

# CANADA/MEXICO/UNITED STATES

## TRADING AWAY RIGHTS The Unfulfilled Promise of NAFTA’s Labor Side Agreement

ACKNOWLEDGMENTS.....	iii
TERMS AND ACRONYMS .....	iv
NAALC Objectives and Obligations.....	vii
NAALC LABOR RIGHTS PRINCIPLES.....	viii
I. SUMMARY .....	1
Structural Weaknesses.....	2
Timid Use of the NAALC by the Parties .....	3
Key Facets of NAO and Labor Ministry Work on Cases.....	3
Utilizing the NAALC’s Potential.....	4
II. FINDINGS AND RECOMMENDATIONS.....	5
General Findings and Recommendations.....	5
To Make the Existing NAALC More Effective.....	5
To Restructure the NAALC.....	6
On Linking Labor Rights and Trade.....	6
Findings and Recommendations Related to the NAALC Signatories.....	6
Government of the United States.....	6
Government of Mexico.....	7
Government of Canada.....	8
III. LABOR RIGHTS AND TRADE .....	9
Sources of International Labor Law .....	9
Links between Labor Rights and Trade.....	10
Toward Enforceable Labor Rights Protections .....	10
The United States-Jordan Free Trade Agreement .....	10
Trade and Labor Rights in the Americas.....	12
IV. THE NAFTA LABOR SIDE ACCORD.....	14
Background .....	14
NAALC Objectives, Obligations, and Principles.....	16
The Accord’s Institutions .....	17
Criticism of the NAALC’s Structure.....	18
Three-Tier System, Focus on Disputes, Time Lapse.....	18
Table: Remedial Possibilities For Non-Compliance with the NAALC.....	20
Failure to Define Case Processes.....	21
Failure to Define the Reach of the NAALC’s Obligations.....	21
Differences in Interpreting and Using the NAALC.....	22

V. NAALC CASE SUMMARIES .....	24
NAALC Case Statistics .....	24
Cases Filed in the United States .....	24
Cases Filed in Mexico .....	29
Cases Filed in Canada .....	31
VI. THE RESULTS OF NAFTA LABOR RIGHTS CASES .....	32
Evaluating the Accord .....	32
NAALC Labor Rights Objectives, Principles, and Obligations .....	32
Article 1: The NAALC's Objectives .....	33
Article 2: Promoting "High Labor Standards" .....	34
Article 3: Government Enforcement Action .....	36
Freedom of Association and Protection of the Right to Organize .....	37
<i>Complaints against Mexico</i> .....	37
<i>Complaints against the United States</i> .....	40
Right to Bargain Collectively .....	41
Right to Strike .....	44
Prohibition of Forced Labor .....	45
Compensation in Cases of Occupational Injuries and Illnesses .....	45
Protection of Migrant Labor .....	45
Elimination of Employment Discrimination .....	46
Equal Pay for Women and Men .....	47
Labor Protections for Children and Young Persons .....	47
Minimum Employment Standards .....	48
Prevention of Occupational Injuries and Illnesses .....	49
<i>Complaints against the United States</i> .....	50
<i>Complaints against Mexico</i> .....	50
Article 4: Access to Labor Tribunals .....	52
Article 5: Fairness of Labor Tribunals .....	53
<i>Complaints against Mexico</i> .....	53
<i>Complaints against the United States</i> .....	55
Article 6: Publication of Laws and Regulations Related to the NAALC .....	55
Article 7: Promoting Public Awareness of National Labor Law .....	55
APPENDIX I: U.S.-MEXICO MINISTERIAL AGREEMENTS .....	56

## ACKNOWLEDGEMENTS

Joel Solomon, research director for the Americas Division of Human Rights Watch (currently on leave from the organization), wrote this report. Joanne Mariner and José Miguel Vivanco, the division's deputy director and executive director, edited it. Human Rights Watch Program Director Malcolm Smart and Senior Legal Advisor James Ross also edited the report.

Human Rights Watch is grateful for the continuing support of the General Service Foundation. The foundation's generous support allowed us to undertake this report as part of a project on labor rights and trade. The author would also like to thank Lance Compa, labor rights consultant to Human Rights Watch, and Carol Pier, researcher with the Americas Division, for their comments.

## TERMS AND ACRONYMS

Arbitral Panel	An arbitral panel is set up to resolve disagreements about the enforcement of certain labor law subject areas by one of the parties: labor protections for children and young persons; minimum employment standards, including minimum wage; and prevention of occupational injuries and illnesses. If the government against which the complaint was lodged fails to implement the action plan devised by the panel, fines backed by trade sanctions can result. Such a panel can only be established if the state parties do not reach agreement based on the recommendations of an Evaluation Committee of Experts.
Commission for Labor Cooperation (CLC)	The CLC is the international entity responsible for administering the NAALC, made up of a Council of Ministers and a Secretariat.
Council of Ministers	Composed of the labor ministers of the NAALC signatory countries, the council is the governing body of the NAALC, responsible for overseeing the implementation and interpretation of the agreement and directing the work of the Secretariat. The Council plays a central role in cases that involve an Evaluation Committee of Experts or requests for arbitration or sanctions.
Evaluation Committee of Experts (ECE)	An ECE consists of a panel of independent experts convened to study, draw conclusions about, and make recommendations on a pattern of practice related to enforcement of labor laws in the following issue areas: prohibition of forced labor; compensation in cases of occupational injuries and illnesses; protection of migrant labor; elimination of employment discrimination; equal pay for men and women; labor protections for children and young persons; minimum employment standards, including minimum wage; and prevention of occupational injuries and illnesses. An ECE can be convoked by any of the parties to the NAALC if a labor matter related to one of these labor principles has not been resolved through ministerial consultations. An ECE's report will lead to consultations by the state parties; if consultations do not lead to consensual resolution, an arbitral panel may be set up, but only to address issues related to the latter three issue areas mentioned above.
Free Trade Area of the Americas (FTAA)	A free trade area currently being negotiated for the Western Hemisphere that is scheduled to begin in 2005.
Ministerial Agreement	An agreement between labor ministries to adopt activities to address problems related to a signatory's fulfillment of NAALC obligations. This term has been developed through practice; it is not an official term created by the NAALC.

Ministerial Consultations	Discussions between two or more labor ministries to determine how to address issues related to compliance with NAALC obligations. In practice, consultations have always taken place at the request of an NAO, but ministries can also initiate consultations on their own.
National Administrative Office (NAO)	Each of the state parties established an NAO, an office within the labor department of a NAALC signatory country that is responsible for the development or receipt of complaints about alleged violations of the NAALC, and the review of such complaints. The NAOs also promote cooperative activities between signatories and exchange information on labor law and adjudication.
North American Agreement on Labor Cooperation (NAALC)	The labor side agreement of the North American Free Trade Agreement.
North American Free Trade Agreement (NAFTA)	NAFTA is the agreement that created the free trade area between Canada, Mexico, and the United States that came into force in January 1994.
Pattern of Practice of Non-enforcement	In order for an Evaluation Committee of Experts to be formed, the country complained of must have engaged in a “pattern of practice” of non-enforcement of the labor principle at issue. This means a “course of action or inaction beginning after the date of entry into force of the Agreement, and does not include a single instance or case.”
Persistent Pattern of Non-enforcement	In order for an arbitral panel to be convened, the country complained of must have engaged in a “persistent pattern” of non-enforcement of the labor principles at issue. This refers to a “sustained or recurring pattern of practice.”
Secretariat	The Secretariat assists and supports the Council of Ministers, preparing reports and studies on issues of relevance and, with the NAOs, organizing cooperative activities between the parties.
Sanctions	Sanctions may be applied against a government that fails to implement the action plan of an arbitral panel. The financial penalty cannot exceed .007 percent of the total trade in goods between the parties. If that government fails to pay the penalty, the complaining government can suspend NAFTA benefits in an amount no greater than that sufficient to collect the monetary penalty. (Canada has ensured that it will not be the subject of trade sanctions, by guaranteeing payment of fines through enforcement in its courts.)

Trade-related

In order for an Evaluation Committee of Experts to be formed, the non-enforcement of the labor principles at issue must have taken place in a matter that is “trade-related.” This means that the matter must relate to “a situation involving workplaces, firms, companies or sectors that produce goods or provide services traded between the territories of the Parties; or that compete, in the territory of the Party whose labor law was the subject of ministerial consultations. . . , with goods or services produced or provided by persons of another Party.”

## NAALC Objectives and Obligations<sup>1</sup>

Article 1: The objectives of this Agreement are to improve working conditions and living standards in each Party's territory; promote, to the maximum extent possible, the [NAALC Labor Principles]; encourage publication and exchange of information. . . to enhance mutually beneficial understanding of the laws and institutions governing labor in each Party's territory; promote compliance with, and effective enforcement by each Party of, its labor law; and, foster transparency in the administration of labor law. (Partial list)

Article 2: Affirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.

Article 3(1)(a-g): Each Party shall promote compliance with and effectively enforce its labor law through appropriate government action, subject to Article 42 [which prohibits one party from enforcing labor law in the territory of another], such as: appointing and training inspectors; monitoring compliance and investigating suspected violations, including through on-site inspections; seeking assurances of voluntary compliance; requiring record keeping and reporting; encouraging the establishment of worker-management committees to address labor regulation of the workplace; providing or encouraging mediation, conciliation and arbitration services; or initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor law.

Article 4(1): Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for enforcement of the Party's labor law.

Article 5(1)(a and d) and 5(4): Each Party shall ensure that its administrative, quasi-judicial, judicial and labor tribunal proceedings for the enforcement of its labor law are fair, equitable and transparent and, to this end, each Party shall provide that: such proceedings comply with due process of law; and such proceedings are not unnecessarily complicated and do not entail unreasonable charges or time limits or unwarranted delays. Each Party shall ensure that tribunals that conduct or review such proceedings are impartial and independent and do not have any substantial interest in the outcome of the matter.

Article 6: Each Party shall ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available.

Article 7: Each Party shall promote public awareness of its labor law.

---

<sup>1</sup> North American Agreement on Labor Cooperation (NAALC), September 13, 1993.

## NAALC LABOR RIGHTS PRINCIPLES<sup>2</sup>

The NAALC divides its eleven labor rights norms into three tiers, with each successive level allowing for additional action by the parties to address problems with the enforcement of labor law in those eleven subject areas. At all three levels, the parties can engage in government-to-government talks and agree to programs to address the non-enforcement problems under discussion. If such a program does not lead to the resolution of the problem, and the labor rights norm falls into the second or first tier, a state party can call for the creation of an Evaluation Committee of Experts (ECE), made up of outside experts who will issue non-binding recommendations for resolution of the problem. A first-tier labor rights problem, if unresolved based on the ECE recommendations, can lead to the creation of an arbitral panel and sanctions.

### **First (highest) tier (Evaluation Committee of Experts and arbitral panel, leading to sanctions)**

Labor protections for children and young persons  
Minimum employment standards, including minimum wage  
Prevention of occupational injuries and illnesses

### **Second tier (Can go to an Evaluation Committee of Experts)**

Prohibition of forced labor  
Compensation in cases of occupational injuries and illnesses  
Protection of migrant labor  
Elimination of employment discrimination  
Equal pay for men and women

### **Third (lowest) tier (No independent review procedures)**

Freedom of association and the right to organize  
The right to bargain collectively  
The right to strike

---

<sup>2</sup> NAALC, Annex I.



## I. SUMMARY

In 1993, the United States, Mexico, and Canada adopted a labor side accord to the North American Free Trade Agreement (NAFTA), pledging to work toward broad improvements in the situation of labor rights in their respective countries. Seven years after the agreement entered into force, however, the record shows that the three countries have failed to live up to this commitment. While the accord, known formally as the North American Agreement on Labor Cooperation (NAALC), has suffered from structural defects from the outset, it nevertheless holds far greater potential to promote workers' rights and high labor standards than its limited use by the signatory states would suggest. Instead of exploiting this potential, the NAFTA countries have ensured the accord's ineffectiveness in protecting workers' rights.

As part of our work to promote labor rights, Human Rights Watch has actively utilized and tested the NAALC mechanisms, and in the past few years has filed two petitions alleging violations of the NAALC's terms. At present, given the increasing international debate regarding how—or whether—to link labor rights provisions to trade agreements, it is a particularly appropriate moment to assess the NAALC experience and the lessons that flow from it. This report aims to evaluate the accord, and so to contribute to the wider debate from a non-partisan perspective. Human Rights Watch takes no position on trade per se, and took no position on NAFTA, but we are committed to helping identify, enhance, and implement the most effective measures possible for promoting labor rights. With this in mind, in addition to critiquing the NAALC's provisions and assessing its operation, we include recommendations on how the three NAFTA governments could better utilize the NAALC in its present form, and how the accord could be strengthened to more effectively safeguard labor rights.

The NAALC, for all its deficiencies in practice, remains the most ambitious link between labor rights and trade ever implemented. It broke new ground by creating labor-related obligations and establishing sanctions for failure to fulfill them in certain cases. Under the accord, the signatories must ensure that labor laws and regulations provide for “high labor standards;” they must strive to improve those standards; and they must ensure access to “fair, equitable, and transparent” mechanisms for enforcing their labor law. The accord obligates the parties to effectively enforce their own labor law in eleven key subject areas, and stipulates that a “pattern of practice” of non-compliance (more than one incident) in certain subject areas could lead to the appointment of an outside panel of experts to recommend measures to resolve the problem. A “persistent pattern” of non-enforcement (a sustained or recurring pattern of practice) could lead to the convocation of an arbitral panel and the imposition of sanctions.

As initially conceived and negotiated, NAFTA included no provisions to protect labor rights in its text or through a side agreement. During the 1992 presidential campaign, however, then-candidate Bill Clinton strongly criticized NAFTA, which had been signed by the incumbent, President George Bush, arguing that it did “nothing to reaffirm our right to insist that the Mexicans follow their own labor standards, now frequently violated.” Clinton sought to assuage concern within a key Democratic Party constituency—labor unions—that U.S.-based companies would move to Mexico to take advantage of lax enforcement of labor laws there.

The NAALC that was finally negotiated by Canada, Mexico, and the United States sidestepped thorny international political issues by avoiding any suggestion that it was intended to harmonize labor standards in the three countries, and by ruling out the establishment of multinational judicial processes or appeals procedures. Rather, it aims to promote broad improvements in the labor rights situation in the signatory countries, and it relies on political engagement between the parties as the means to address its violations. Nongovernmental organizations and individuals also play a part by signaling to the governments involved when the obligations established by the accord have not been met.

The NAALC does not incorporate international labor rights norms; instead, it calls on the signatories to enforce their domestic labor standards effectively while working cooperatively with the International Labor

Organization (ILO). Interestingly, the labor principles subject to NAALC consideration include a wider range of issues than the ILO's core standards, including protections for migrant workers and workers' compensation.

The NAALC does not purport to resolve labor rights problems in specific cases. A worker unjustly fired for organizing a union in the United States, for example, could not expect a case filed under the NAALC to lead to job reinstatement. Fixing problems with the enforcement of laws designed to protect freedom of association, however, would fall squarely within the accord's obligations. Similarly, a Mexican worker victimized by an unfair labor tribunal could not expect a NAALC-based process to correct the legal deficiencies suffered in the case heard domestically, but could legitimately expect the pact to contribute to a general improvement in Mexico's labor tribunals.

Even with these limitations, the NAALC has the potential to be a much more effective mechanism for promoting labor rights than it has been, in practice, to date. For example, if they had the necessary political will, the signatories could use the NAALC's framework to identify longstanding weaknesses in labor rights protections and develop comprehensive plans to remedy them. They could contribute to the development of labor law policy in their respective countries by promoting higher standards. And they could contribute to the wider international debate about how to link labor rights and trade.

### **Structural Weaknesses**

An important structural weakness of the NAALC is its lack of an independent oversight body. In fact, such a body was proposed in an early draft of the agreement, but the signatories eventually decided to establish only weak bilateral and trilateral mechanisms as a basis for enforcement. Thus, for example, if the United States violates one of its NAALC obligations, Mexico or Canada can either separately or jointly push for a remedy. In practice, however, as was entirely predictable from the outset, in deciding whether to do so they are likely to also take account of other issues relevant to their bilateral relations with the United States, such as immigration, narcotics control, and the promotion of trade. So it is scarcely surprising that the NAALC's potential as a means for promoting respect for, and improvements in, labor rights has been dramatically underused.

The NAALC signatories have taken advantage of the accord's silence on how to deal with allegations of non-compliance with its obligations. National Administrative Offices (NAOs), which were created in each signatory country to address instances of non-compliance, have complete discretion to determine which complaints to accept and how to investigate and report on them. Similarly, the accord sets out no standards regarding how labor ministries in the three signatory states should design programs to address instances of non-compliance with NAALC obligations. As a result, the governments have sometimes ignored issues raised by petitioners, reported on issues but then failed to include them in government-to-government talks, or included them in bilateral discussions but established no mechanism for remedying the problems identified.

The accord permits the establishment of an outside panel of experts known as an Evaluation Committee of Experts (ECE) and an arbitral panel to address non-compliance with the obligation to enforce certain NAALC labor principles. However, it is vague on what to do when the accord's other obligations are not met. The obligation to have high labor standards, to strive to improve those standards, and to provide access to fair labor tribunals cannot by themselves be brought before such bodies. This constitutes a serious problem, because these obligations are fundamental to the ability of any government to enforce its labor law. In addition, the failure of a signatory government to enforce laws related to three fundamental labor rights—freedom of association and the right to organize, the right to bargain collectively, and the right to strike—cannot be brought before an expert committee or sanctions panel at all.

### **Timid Use of the NAALC by the Parties**

To date, the NAALC parties have handled a total of twenty-three cases in which nongovernmental organizations (NGOs) have alleged that one of the governments failed to fulfill its obligations under the accord. Chapter IV of this report presents a detailed review of the pact's structure, including its major structural and usage-related weaknesses. Chapter V presents summaries of each case filed under the accord, and Chapter VI reviews the impact of each case, examining them on a right-by-right and obligation-by-obligation basis, demonstrating the ways in which the parties have under-utilized the NAALC.

#### **Key Facets of NAO and Labor Ministry Work on Cases**

- 1) Case initiation
- 2) Information-gathering
- 3) Reporting
- 4) Findings
- 5) Recommendations
- 6) Ministerial consultation
- 7) Ministerial agreement
- 8) Follow-up

Source: Human Rights Watch

Through the course of handling cases, the NAOs and labor ministries have at least eight opportunities to stake out positions on labor rights, using the NAALC as a guide. Signatories interested in taking advantage of the NAALC to promote labor rights would take consistently strong measures at each stage. Their ability to do so, in fact, is one key way in which the NAALC provides important opportunities to promote labor rights. To date, however, the signatories have failed to use these opportunities to their fullest extent, or they have taken inconsistent measures as they move from one stage to the next.

The NAOs can initiate or accept cases for review, seeking to take on new issues that will use the NAALC to its fullest. The NAO can cast a wide net in search of information, seeking input from labor unions, businesses, nongovernmental organizations, governments, consultants, and other sources. Based on the information it gathers, the NAO then has an opportunity to synthesize the information gathered. Its findings can provide insight into problems uncovered, explicitly linking them to a state's obligations under the NAALC and building a case-based interpretation of the reach of those obligations.

An NAO's recommendations offer an opportunity for the reviewing government to set out goals for resolving the problems identified. Based on the recommendations, the labor ministry in which the NAO works can engage with one or both counterparts to resolve the problems through talks between labor ministries: these are known as ministerial consultations. Although the NAALC does not expressly call for governments to sign a ministerial agreement as a way of addressing a problem, the general practice has been that ministerial consultations will lead to such an agreement, and that this agreement then establishes a plan for resolving the labor issues at stake. Follow-up on such agreements provides an opportunity to ensure that the work plan was implemented effectively and that the problems have been resolved.

Rather than use their discretion to seek cases, insist on detailed reporting, and design programs to resolve problems, the NAOs and labor ministries have tended to timidity in their work. Five serious problems have resulted: important issues that have come to light through cases have gone unaddressed by the governments; petitioners' concerns have been ignored; some case reports have been devoid of findings of fact; interpretation of the NAALC's obligations has been minimal; and agreements between governments to address concerns arising in NAALC cases have, by design, provided little or no possibility of resolving the problems identified by petitioners.

The failure to define the NAALC's obligations has led in some cases to unfounded interpretations that severely limit the accord. The most common spurious argument is that only the enforcement of labor law, not the violation of other NAALC obligations, can be the subject of an NAO review or agreement between labor ministries to develop corrective activities. In fact, all aspects of the NAALC are subject to review and corrective activities. However, the signatories have created no opportunity for debating such interpretations or resolving

differences about such matters—even though the accord provides that the Council of Ministers, which serves as the accord’s governing body, “shall address questions and differences” regarding interpretations of the accord. Given the lack of accountability under the NAALC, strong political pressure for the signatories to adopt the weakest possible interpretation of the accord has not been countered.

The NAALC includes no formal appeals process, so petitioners faced with incomplete actions by the signatories have only one recourse: plead for reconsideration.

### **Utilizing the NAALC’s Potential**

This reports makes two types of findings and recommendations. The first relates to general ways in which the NAALC could be made more effective, both with its current structure and with reforms that would improve it. The second focuses on the way Canada, Mexico, and the United States have used the accord. The following chapter lays out a full range of recommendations.

Perhaps the single most important thing the signatories could do to use the existing NAALC more effectively is to overcome their timid use of it. The timidity problem shows up in the reporting done by the NAOs and the ways in which they lay out their findings and recommendations. Even if these are strong, the labor ministries that take up consultations based on NAO reports often stop far short of designing agreements to resolve the problems identified.

If the NAALC is to be amended and strengthened, as Human Rights Watch believes it should be, the parties should ensure that the full range of NAALC labor principles and obligations can be the subject of remedial action backed by the possibility of sanctions. Of course, doing so would have little impact without the development and application of demanding trilateral standards to ensure that the parties do not arbitrarily handle cases.

## II. FINDINGS AND RECOMMENDATIONS

### General Findings and Recommendations

#### **To Make the Existing NAALC More Effective**

- 1) The NAOs and labor ministries have used their authority under the NAALC timidly; they have not effectively addressed or pursued solutions to issues identified by petitioners using the accord.

*Recommendation: In their case reports, the NAOs should address each and every issue raised by petitioners, expressly accepting or rejecting their contentions with detailed analyses. The NAOs should include explicit topics for resolution in their recommendations for ministerial consultations, and the labor ministries should carefully address each issue with programs designed to resolve the problems identified.*

- 2) The NAALC's potential to serve as a mechanism for the parties to promote broad improvement in the labor rights situation in their respective countries remains unfulfilled.

*Recommendation: The NAOs should seek opportunities to address broad patterns of problems with compliance with NAALC obligations. Further, they should undertake consultations on non-compliance issues without waiting for outside petitions. The parties should make greater use of Evaluation Committees of Experts.*

- 3) The failure to define the NAALC's obligations has led to unfounded interpretations that severely limit the accord; no opportunity has been provided for regular debate about questioned or contradictory interpretations of the accord or for the resolution of such matters.

*Recommendation: The Council of Ministers should actively review interpretations of the NAALC and, in conjunction with the Secretariat, promote public debate on contrary points of view.*

- 4) With few exceptions, the parties have avoided taking actions that would use cases to establish an authoritative interpretation of the NAALC's obligations. Debate about the reach of the NAALC's obligations is a necessary starting point for understanding how governments fail to uphold those obligations.

*Recommendation: The NAOs and Secretariat should take every opportunity to frame their reporting and discussions in terms of the NAALC's obligations, not merely repeating them but pushing to interpret them.*

- 5) The parties have avoided reporting fully on cases submitted and establishing effective follow-up measures.

*Recommendation: The NAALC's Council of Ministers should establish clear and transparent minimum standards for accepting cases and issuing reports, and the NAOs should adopt them. NAO case reports should be required to directly address all claims made by petitioners and to include findings regarding those claims, but they should also allow the NAOs to address issues not directly raised by petitioners. Ministerial agreements, which lay out corrective activities, should address the full breadth of concerns of the NAOs. The Secretariat should publish an annual review of how well NAO reports and activities address petitioners' claims and of the impact of ministerial agreements.*

### **To Restructure the NAALC**

- 6) In practice, the lack of an independent body to oversee the functioning of the NAALC has limited the accord, because the signatories have been unwilling to expend the political will necessary to enforce the accord through bilateral or trilateral channels. Existing mechanisms, such as Evaluation Committees of Experts, have yet to be convened.

*Recommendation: The parties should create an independent oversight agency responsible for reviewing allegations of non-compliance and engaging the governments to take remedial action.*

- 7) The accord provides little guidance for addressing obligations that are not among the NAALC labor principles that can be reviewed by an ECE or arbitral panel. Further, the failure of a party to enforce labor laws related to three fundamental labor rights—freedom of association and the right to organize, the right to bargain collectively, and the right to strike—cannot be brought before an ECE at all.

*Recommendation: The signatories should amend the NAALC such that the full range of NAALC obligations can be considered by ECEs or arbitral panels, including the obligation to enforce laws governing all eleven labor principles as well as the obligations to have high labor standards, to strive to improve those standards, to provide access to labor tribunals, and to ensure that labor tribunals are fair.*

- 8) Long delays and cumbersome processes create a disincentive to bringing a case before the NAALC system. It could take years for a case to work its way through the NAALC system. Although it is crucial to allot sufficient time to gather relevant information and evidence, many processes could be streamlined. For instance, no deadline exists for the parties to conclude ministerial consultations. Of course, the delay would be less important if petitioners had a reasonable expectation that the time invested would result in detailed, effective outcomes.

*Recommendation: The signatories should agree to establish streamlined timelines for handling cases and impose a reasonable deadline to conclude ministerial consultations.*

### **On Linking Labor Rights and Trade**

- 9) Linking labor rights to trade agreements is crucial to the promotion of labor rights. Not only is it an important way for countries to uphold international labor law, but it establishes a bulwark against using poor labor standards to gain an advantage in trade.

*Recommendation: A NAALC-like accord, or one drawing on the NAALC and other such agreements, such as the recently concluded U.S.-Jordan free trade agreement, should be included as an integral element of the Free Trade Area of the Americas (FTAA). Formal debate on linking labor rights and trade should take place in the context of talks designed to establish the FTAA.*

## **Findings and Recommendations Related to the NAALC Signatories**

### **Government of the United States**

- 10) The U.S. NAO has been uneven in its handling of NAALC non-compliance issues. At times, the agency has demonstrated excellent information-gathering initiatives, and some of its case reports have been coherent and strong. Other reports have been evasive and incomplete, ignoring key issues raised by petitioners and failing to address NAALC obligations of relevance. Laudable creativity in deciding which issues to review has been undermined by an aversion to taking on tough topics.

*Recommendation: The U.S. NAO should seek to replicate and enhance its best practices with respect to information gathering and reporting on issues related to non-compliance with NAALC obligations. In its*

case reports, the agency should clearly address all aspects of the petitions it receives; its recommendations for ministerial consultations should include details regarding the issues to be resolved, so that the success or failure of the ministerial agreements can be assessed in light of the problems documented in the first place.

- 11) Ministerial consultations have failed to resolve the problem of forced pregnancy testing in Mexican export-processing factories (*maquiladoras*), an issue raised in a petition from 1997. U.S. officials, including former Labor Secretary Alexis Herman, have asserted that Mexican authorities have stated that pre- and post-hire pregnancy and other gender discrimination violate Mexican law, yet the practices continue. This indicates the need to establish an Evaluation Committee of Experts to address the topic and issue recommendations for resolution.

*Recommendation: The United States should call for the formation of an Evaluation Committee of Experts to deal with issues related to forced pregnancy testing. The ECE should include an examination of the effectiveness of the steps taken by authorities to end pregnancy-based sex discrimination in Mexico, making recommendations for effective change. In addition, the ECE should study and issue recommendations on a host of issues raised in the complaint about forced pregnancy testing, including the degree to which Mexico has high labor standards in the area of discrimination, problems with access to labor tribunals, and questions about the fairness of labor tribunals in discrimination cases.*

- 12) The government of the United States has exaggerated the impact of the NAALC. In a 1997 report, for instance, the Clinton Administration assigned credit to the accord for Mexico's official recognition of a union previously denied accreditation and for secret balloting at two companies where secret voting had been previously denied. Although these events did occur, the U.S. NAO had failed to criticize the practices in its reports on the various labor rights violations preventing union recognition and secret balloting. The positive results were completely secondary to the work of the agency.

*Recommendation: The United States government should more carefully assess the results of the NAALC and report more straight-forwardly on the impact of its own work. If it desires to promote the types of positive changes that it ascribes to the NAALC, the Administration should develop policy and publish NAO reports that directly seek such outcomes.*

### **Government of Mexico**

- 13) The Mexican NAO has, in most cases, failed in its reports to provide more than a repetition of allegations and recitation of the NAALC's provisions. The Mexican authorities' views on the NAALC's obligations are therefore unclear, as is the basis for the ministerial consultations it has sought.

*Recommendation: The Mexican NAO should provide detailed findings in its case reports and relate them to the NAALC's obligations. The content of ministerial agreements should be tailored to address violations that the Mexican NAO uncovers.*

- 14) In the Washington State apples case, which was submitted to the Mexican NAO in 1998, ministerial consultations have failed to resolve the serious problems highlighted by petitioners, including the U.S. government's failure to enforce health and safety laws. As a result, an ECE should be formed to investigate and make recommendations on the issues raised by petitioners.

*Recommendation: The Mexican NAO should call for the creation of an ECE to address the issues raised and documented by petitioners but left unresolved by ministerial consultations on the case.*

**Government of Canada**

- 15) The Canadian NAO has processed only three cases, but in the one case it has reported on, it went further than its U.S. or Mexican counterparts in fully examining the issues raised by petitioners and recommending in detail the types of issues that should be addressed through ministerial consultations.

*Recommendation: The Canadian NAO should continue to use case reporting to interpret the NAALC. The Canadian NAO should insist that the pending government-to-government agreement in the case in question—related to an auto parts manufacturer that used to be owned by Echlin—be designed to promote effective compliance with the NAALC’s obligations.*



### III. LABOR RIGHTS AND TRADE

#### Sources of International Labor Law

The International Labor Organization (ILO), a specialized agency of the United Nations, is the main worldwide vehicle for developing and promoting labor standards. It has promulgated more than 180 labor rights conventions. At least three reasons—both moral and practical—led to the creation of the ILO in 1919. Concern existed about the poor conditions of people at work, but the founders of the labor organization also worried that unless those conditions were improved, social unrest would be likely to follow. At the same time, the impact on trade of unfair labor practices was a matter of deep preoccupation.<sup>3</sup> Concern that lower wages and labor standards in one country will adversely affect workers in another—known as “social dumping”—remains today.<sup>4</sup>

Based on consensus about basic workers’ rights, the ILO has identified eight core conventions: Freedom of Association and Protection of the Right to Organize, 1948 (Convention No. 87); Right to Organize and Collective Bargaining Convention, 1949 (Convention No. 98); Forced Labor, 1930 (Convention No. 29); Abolition of Forced Labor Convention, 1957 (Convention No. 105); Discrimination (Employment and Occupation), 1958 (Convention No. 111); Equal Remuneration, 1951 (Convention No. 100); Minimum Age, 1973 (Convention No. 138); and Worst Forms of Child Labor, 1999 (Convention No. 182).

Although not all countries have ratified these conventions, in 1998 the ILO established the Declaration of Fundamental Principles and Rights at Work, which focuses on the rights enshrined in the core conventions. It holds, “All Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labor; (c) the effective abolition of child labor; and (d) the elimination of discrimination in respect of employment and occupation.”<sup>5</sup>

Other sources of international labor-related law include the International Covenant on Civil and Political Rights (ICCPR), which states: “Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.”<sup>6</sup> All three NAFTA countries are parties to the ICCPR. Canada and Mexico are also parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR), encompassing the right to the enjoyment of just and favorable conditions of work, the right to form and join trade unions, and the right to strike.<sup>7</sup> The American Convention on Human Rights, ratified by Canada and Mexico, also enshrines the right to free association.<sup>8</sup> In addition, Mexico and Canada have ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which prohibits employment-related discrimination.<sup>9</sup> The United States has signed but not ratified the ICESCR, American Convention, and CEDAW, binding it to do nothing in contravention of their terms.

---

<sup>3</sup> See, for example, Eddy Lee, “Globalization and Labour Standards: A Review of Issues,” *International Labour Review*, Vol. 136, No. 2, 1997. Available on the Internet at [www.ilo.org/public/english/support/publ/revue/articles/lee97-2.htm](http://www.ilo.org/public/english/support/publ/revue/articles/lee97-2.htm).

<sup>4</sup> See, for example, Stephen S. Golub, “Are International Labor Standards Needed to Prevent Social Dumping?” *Finance and Development*, December 1997, pp. 20-23, and Robert T. Stranks, “The New Jerusalem: Globalization, Trade Liberalization, and Some Implications for Canadian Labour Policy,” Department of Foreign Affairs and International Trade, Government of Canada, February 1994.

<sup>5</sup> ILO Declaration on Fundamental Principles and Rights at Work, adopted by the International Labour Conference, Geneva, June 18, 1998.

<sup>6</sup> International Covenant on Civil and Political Rights, Article 22.

<sup>7</sup> International Covenant on Economic, Social and Cultural Rights, Articles 7 and 8.

<sup>8</sup> American Convention on Human Rights, Article 16(1).

<sup>9</sup> Convention on the Elimination of All Forms of Discrimination against Women, Article 11.

## **Links between Labor Rights and Trade**

The NAALC was not the first attempt to address labor rights in the context of trade. As long ago as 1919, for example, the covenant establishing the League of Nations enjoined that body's member states to ensure "fair and humane conditions of labor" both domestically and "in all countries to which their commercial and industrial relations extend."<sup>10</sup> In such general terms, the ill-fated League's member states undertook to engage their trading partners in efforts to secure labor rights.

After the demise of the League of Nations, the issue of labor rights and trade was taken up again as countries negotiated a charter for what was to be the International Trade Organization (ITO). Article 7 of the charter read, "The Members recognize that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and agreements. They recognize that all countries have a common interest in the achievement and maintenance of fair labor standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit."<sup>11</sup> The organization never got off the ground, but the idea enshrined in Article 7 lived on in the General Agreement on Tariffs and Trade (GATT), established in 1947 to develop and enforce international trade rules. The parties to the GATT were required to observe the labor rights principles enunciated in the charter of the failed ITO. Nonetheless, neither the ITO nor the GATT established a mechanism to enforce labor standards.

## **Toward Enforceable Labor Rights Protections**

No compulsory enforcement mechanism exists to ensure that countries respect the labor standards included in ILO conventions. The World Trade Organization (WTO), successor to the GATT since 1995, did not establish any direct linkages between trade and labor rights. In December 1996, for example, at ministerial discussions in Singapore, the WTO rejected any direct involvement in labor rights issues, and reiterated that the ILO was the appropriate venue for dealing with labor rights.<sup>12</sup> More recently, however, the Seattle ministerial meeting of the WTO in 1999 saw strong public discord about the role of labor rights in trade agreements.

Other international trade organizations, and several international commodity agreements, also address labor standards.<sup>13</sup> The Organization for Economic Cooperation and Development (OECD) has a mechanism for receiving complaints of labor rights violations committed by multinational corporations, but lacks sanctions capabilities.<sup>14</sup>

### **The United States-Jordan Free Trade Agreement**

On October 24, 2000, the United States and Jordan signed an agreement to establish a free trade area that contains labor rights provisions as a core part of the accord. In several key ways, the agreement breaks new ground in linking labor rights and trade, although application of its labor provisions will still depend on the political will of officials from the signatory governments. At this writing, the U.S. Congress had yet to vote on the agreement.

---

<sup>10</sup> Philip Alston, "International Trade as an Instrument of Positive Human Rights Policy," *Human Rights Quarterly*, Vol. 4, No. 2, Spring 1982, p. 171.

<sup>11</sup> Cited in *ibid.*, p. 172.

<sup>12</sup> World Trade Organization, "Singapore Ministerial Declaration," December 13, 1996. The declaration holds, "We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them."

<sup>13</sup> International Confederation of Free Trade Unions, "Building Workers' Human Rights into the Global Trading System," 1999, p. 61. These include the International Sugar Agreement, Tin Agreement of 1981, Cocoa Agreement of 1986, and International Rubber Agreement of 1987.

<sup>14</sup> Lance Compa, "The First NAFTA Labor Cases: A New International Labor Rights Regime Takes Shape," *U.S.-Mexico Labor Law Journal*, 1995, p. 160.

In comparing the potential for effectiveness between the NAALC and the U.S.-Jordan agreement, it is important to consider their differences with respect to the type of remedies they establish and when those remedies become available. The NAALC establishes a low threshold for governments to engage in non-binding remedial work on its full range of labor principles, but creates a high threshold for sanctions-producing work on a more limited range of labor law issues. In contrast, the U.S.-Jordan agreement establishes a high threshold for countries to begin to work on cases, but skips the non-binding remedial activities altogether by moving directly to case reviews that could lead to sanctions for non-enforcement of the full range of labor principles that it covers.

The labor laws subject to the U.S.-Jordan agreement are referenced to core international labor laws, and draw on bilateral U.S. trade law. The agreement notes that each signatory will “strive to ensure” that its domestic labor laws reflect the ILO’s Declaration of Fundamental Principles and Rights at Work and will endeavor to improve its domestic standards. However, it does not require the signatories to ensure that they meet these goals.

The effective enforcement of each party’s domestic laws will be reviewed to determine compliance with the U.S.-Jordan accord, and sustained or recurring non-enforcement of those laws could lead to sanctions.<sup>15</sup> The agreement does not specify the types of actions the parties can take in response to violations of the accord. Rather, it establishes that if a dispute is not settled amicably, “the affected Party shall be entitled to take any appropriate and commensurate measure.”<sup>16</sup> The pact covers freedom of association and the right to organize, the right to bargain collectively, the prohibition on the use of any form of forced or compulsory labor, a minimum age for the employment of children, and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.<sup>17</sup> The parties to the NAALC promise to effectively enforce a greater number of labor laws, but it permits sanctions only for a persistent pattern of non-enforcement of laws related to child labor, minimum employment standards, and occupational safety and health.

Structurally, the U.S.-Jordan pact overcame some of the limitations of the NAALC. The signatories integrate its labor stipulations into the body of the accord, providing them with as much force as the pact’s provisions on trade and intellectual property rights.<sup>18</sup> In addition, the accord does not divide its labor principles into tiers, with certain levels permitting stronger mechanisms to promote resolution of violations than others, as does the NAALC. Finally, where defined, the time periods for action under the dispute settlement mechanisms are shorter than they are for the NAALC, although no time frame is given for the naming of members of a dispute settlement panel under the U.S.-Jordan accord.<sup>19</sup>

The U.S.-Jordan agreement sets a high standard for a case to be opened for review. It holds that “A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction,” but then limits this provision by noting that a failure to effectively enforce labor law will only be of concern if it takes place “in a manner affecting trade between the Parties.”<sup>20</sup> Trade between the two countries is minimal,

---

<sup>15</sup> Agreement between the United States of American and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, October 24, 2000, Articles 4 and 6(4)(a-e). The agreement states, “A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties.”

<sup>16</sup> *Ibid.*, Article 17(2)(b).

<sup>17</sup> *Ibid.*, Article 6(6).

<sup>18</sup> *Ibid.*, Article 6.

<sup>19</sup> If the Parties fail to resolve a dispute through bilateral consultations within sixty days, the issue will go to the Joint Committee, a committee comprising Jordan’s labor minister and the U.S. trade representative. If they fail to reach a resolution in 90 days, the matter will go to a dispute settlement panel, which will be composed of one representative named by each Party and a chair named by those two representatives. There is no deadline for the naming of the members of dispute settlement panels. The panel’s non-binding report will be sent to the Joint Committee, which will endeavor again to resolve the dispute taking into consideration the report’s recommendations. If no resolution is reached, the affected party will be able to take an “appropriate and commensurate measure.” *Ibid.*, Article 17.

<sup>20</sup> *Ibid.*

totaling U.S. \$300 million in 1999, with only \$30 million in imports to the United States from Jordan.<sup>21</sup>

The NAALC also contains wording linking remedial action to trade, but it does not erect barriers to initial efforts to promote compliance with the accord's obligations. It does, however, limit the formation of an Evaluation Committee of Experts—a step beyond the initial review and activities designed to address violations of the NAALC's obligations—to matters that are “trade-related,” a reference to goods or services that are traded between signatories or that compete with goods or services produced in a signatory country.<sup>22</sup> Work by the NAOs and between labor ministries designed to address violations of the NAALC's obligations need not be related to trade at all; rather, the issue to be addressed must be related to “any matter within the scope of the [NAALC].”<sup>23</sup>

Like the NAALC, the U.S.-Jordan accord limits the scope of its labor protections by excluding from concern any “course of action or inaction” leading to a failure to effectively enforce labor laws that results from the exercise of investigation-related, regulatory, or prosecutorial discretion, or “results from a *bona fide* decision regarding the allocation of resources.”<sup>24</sup>

The U.S.-Jordan agreement holds that the governments will consider public views in the implementation of the accord. The implementing regulations for the U.S.-Jordan agreement could further clarify the role of nongovernmental groups in the presentation of complaints and receipt and processing of information, but they had yet to be released at this writing. However, a memorandum of understanding between the parties further defines the role of nongovernmental groups with respect to transparency in the agreement's dispute settlement procedures. It states, for example, that Jordan and the United States “shall solicit and consider the views of members of their respective publics in order to draw upon a broad range of perspectives,” and that the parties “shall accept and consider *amicus curiae* submissions by individuals, legal persons, and nongovernmental organizations with an interest in the outcome of the dispute.”<sup>25</sup>

### **Trade and Labor Rights in the Americas**

More than two-dozen bilateral or multilateral trade-related agreements exist in the Western Hemisphere. Several have linked trade and labor rights to varying degrees, including the 1991 agreement creating the Common Market of the South (Mercado Común del Sur, Mercosur), the 1997 Canada-Chile Free Trade Agreement (CCFTA), and the 1997 Charter of Civil Society of the Caribbean Community (CARICOM).<sup>26</sup>

The treaty establishing Mercosur, the southern Latin American customs union comprising Argentina, Brazil, Paraguay, and Uruguay, did not directly address labor rights issues. In 1994, the Mercosur countries rejected the inclusion of a social charter, after failing to come to agreement on its provisions.<sup>27</sup> However, under the auspices of the accord, several working groups were established to address labor-related issues, and an Economic and Social Consultative Forum was created in 1994 and became operational in 1996.<sup>28</sup> It provided a context for NGOs, business, and labor interests to discuss issues including labor rights, but its recommendations

---

<sup>21</sup> U.S. Census Bureau, U.S. Trade Balances by Country, available on the Internet at <http://www.census.gov/foreign-trade/balance/c5110.html>.

<sup>22</sup> NAALC, Article 49.

<sup>23</sup> *Ibid.*, Article 22(1).

<sup>24</sup> Agreement between the United States of America and the Hashemite Kingdom of Jordan, Article 6(4)(b).

<sup>25</sup> “Memorandum of Understanding on Transparency in Dispute Settlement Under the Agreement between the United States and Jordan on the Establishment of a Free Trade Area,” October 24, 2000.

<sup>26</sup> For a detailed discussion of these systems, see International Labor Rights Fund, “Developing Effective Mechanisms for Implementing Labor Rights in the Global Economy,” August 1998, discussion draft, available on the Internet at [www.laborrights.org/ilrf.html](http://www.laborrights.org/ilrf.html).

<sup>27</sup> Lance Compa, “Works in Progress: Constructing the Social Dimension of Trade in the Americas,” paper delivered at the U.S.-E.U. Seminar on the Social Dimension of Economic Integration, Washington, DC, October 14-15, 1999, p. 17.

<sup>28</sup> *Ibid.*, pp. 19-20.

had no binding authority on the Mercosur countries, which did not have official representation in the group.<sup>29</sup>

In 1998, however, the presidents of the four Mercosur countries issued the Social-Labor Declaration, which led to the creation of the Social-Labor Commission. The declaration discusses core labor standards and other labor issues, including migrant workers' rights, and obligates the signatories to respect the enunciated labor standards and enforce their own labor laws.<sup>30</sup> It contains no enforcement mechanism, however. The commission comprises government, labor, and business representatives, and includes among its faculties the ability to make recommendations and to report on issues related to the fulfillment of the declaration.

Only the NAALC and the Canada-Chile agreement contain express labor rights standards linked to actionable mechanisms. In most respects, the two agreements are the same. The biggest difference between the two agreements rests with the role of sanctions. Permitted in certain circumstances in the NAALC, sanctions are not a part of the CCFTA.<sup>31</sup> A further difference relates to the CCFTA's detailed procedure for using the findings of arbitration panels in domestic courts.<sup>32</sup> Such provisions are absent from the NAALC. No complaints have been filed under the CCFTA.

The Caribbean Community and Common Market (CARICOM), established in 1973, developed a Charter of Civil Society in 1997. The charter recognizes basic workers' rights and lays out government responsibilities with respect to those rights.<sup>33</sup> The charter establishes a mechanism for lodging complaints about violations of its content, but the strongest action that can be taken in response to a complaint amounts to a recommendation. The charter broke new ground, however, in permitting complaints against more than just governments. In addition, "social partners"—defined as "the Government of a State, Associations of Employers, Workers Organisations and such Non-Governmental Organisations as the State may recognize"—can be the subject of complaints.<sup>34</sup> No complaints have been filed under the Charter of Civil Society.

---

<sup>29</sup> Ibid.

<sup>30</sup> Ibid., p. 21.

<sup>31</sup> Agreement on Labour Cooperation between the Government of Canada and the Government of the Republic of Chile, Article 35(4)(b).

<sup>32</sup> Ibid., Article 37.

<sup>33</sup> Charter of Civil Society for the Caribbean Community, Article 19.

<sup>34</sup> Ibid., Article 1.

#### IV. THE NAFTA LABOR SIDE ACCORD

##### Background

As initially conceived and negotiated, NAFTA included no provisions for labor rights. In 1991, President George Bush told the United States Congress:

Mexico's labor standards are comparable to those in the United States, Europe and other industrialized countries. The Mexican Constitution of 1917, as implemented through various pieces of legislation, provides a comprehensive set of rights and standards for workers in all sectors of Mexico. What have been lacking are budgetary resources to permit effective enforcement of the constitution and legislative measures.<sup>35</sup>

As Bush pointed out, Mexican law protects a broad array of labor rights. In practice, however, these are not enforced and are routinely flouted by employers in Mexico. Similarly, as a recent Human Rights Watch report shows, problems of weak enforcement of labor law protections for workers' rights are also evident in the United States.<sup>36</sup>

According to the Bush Administration, the trade agreement would itself generate the economic resources necessary to enable the Mexican government to overcome the technical problem of funding enforcement of the country's labor laws. Yet, in 1991 politics in the United States forced the labor rights issue to the top of the debate on trade. The Bush Administration needed a renewal of fast-track negotiating authority to move forward with the NAFTA trade talks. Such authority would enable the president to negotiate a trade accord that would be submitted to Congress for a straight yes-or-no vote, thereby avoiding a situation in which the president would be required to renegotiate with trading partners those parts of an agreement that Congress wished to change.

Senators and representatives in the U.S. Congress took the opportunity provided by the fast track debate to raise concern about the impact on the United States of inadequate labor standards in Mexico.<sup>37</sup> In response, the administration assured them that any trade agreement with Mexico would include "new initiatives to expand U.S.-Mexico labor cooperation," including labor standards.<sup>38</sup> Although it was initially unclear what such initiatives would comprise, the Bush Administration subsequently proposed to establish a commission to discuss labor issues arising between Mexico and the United States.<sup>39</sup>

President Bush signed NAFTA in December 1992, but sending it to the Senate for ratification would be up to the next president. Facing stiff questions from labor unions—a core Democratic Party constituency—candidate Bill Clinton declared that he would support NAFTA if it included side agreements on labor rights and the environment.

In a much-cited speech in 1992, just before the presidential election, Clinton stated that NAFTA, as negotiated, did "nothing to reaffirm our right to insist that the Mexicans follow their own labor standards, now

---

<sup>35</sup> Cited in Jerome Levinson, "Unrequited Toil: Denial of Labor Rights in Mexico and Implications for NAFTA," World Policy Institute, April 1993, p. 2.

<sup>36</sup> See, for example, Human Rights Watch, *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards* (New York: Human Rights Watch, 2000). Regarding Mexico, see, for example, Graciela Bensúsán, *El Modelo Mexicano de Regulación Laboral* (Mexico City, Plaza y Valdés, 2000).

<sup>37</sup> Robert E. Herzstein, "The Labor Cooperation Agreement Among Mexico, Canada, and the United States: Its Negotiation and Prospects," *United States-Mexico Law Journal*, Vol. 3, The University of New Mexico School of Law, pp. 122-123.

<sup>38</sup> *Ibid.*, p. 123.

<sup>39</sup> *Ibid.*, p. 124.

frequently violated.” After Clinton’s speech, President Carlos Salinas of Mexico expressed his willingness to address concerns beyond the specific trade issues dealt with in the main accord.<sup>40</sup>

Negotiations for the labor side agreement began soon after Clinton took office. Clinton Administration officials suggested that the labor side accord would actually be used by the United States to promote change in Mexican labor practices. For example, Principal Deputy Assistant Secretary of State for Human Rights and Humanitarian Affairs Nancy Ely-Raphel told the Committee on Small Business of the House of Representatives that “if NAFTA is passed, we will have a great deal more leverage with the Government of Mexico than we have presently, because they will have committed themselves to enforcing their labor laws, doing all the kinds of things that they are not now legally obligated to us to do.”<sup>41</sup>

The agreement intentionally stopped short of creating supra-national labor law enforcement mechanisms, and it did not pretend to establish international labor standards or harmonize standards across borders. An initial U.S. draft side agreement proposed the creation of a multilateral commission with enforcement responsibility, but this was later dropped in the face of Mexican and Canadian opposition.<sup>42</sup> In the end, the NAALC established the objective and obligation to “promote compliance with, and effective enforcement by each Party of, its labor law.”<sup>43</sup>

The three signatory states are entitled to amend the agreement if they all agree to the proposed change or addition, and if each state approves the change through its own appropriate legal mechanisms.<sup>44</sup>

The three signatory states formally reviewed the NAALC beginning in 1997, in furtherance of the accord’s call for a review of its “operation and effectiveness in light of experience.”<sup>45</sup> The findings of the review, which was overseen by the three states’ labor ministers in their capacity as the NAALC Council of Ministers, were released in March 1999. These drew on comments solicited from the public as well as insights from government officials and the National Advisory Panels established in the three countries, each composed of members of the public chosen by their respective governments to advise on the implementation of the agreement. The findings of this process, as well as the individual analyses conducted by the Canadian, Mexican, and U.S. advisory panels, are incorporated into the analysis in this report.

In 1997 and 1999, the Executive Office of the President of the United States published a report on the effectiveness of the results of the NAALC. These, too, are incorporated into the findings of this report.<sup>46</sup>

---

<sup>40</sup> Minnesota Advocates for Human Rights, “No Double Standards in International Law,” December 1992, p. 9.

<sup>41</sup> House of Representatives, “Hearing before the Committee on Small Business, June 29 and September 30, 1993,” Serial No. 103-29, U.S. Government Printing Office, p. 51.

<sup>42</sup> Laura Okin Pomery, “The Labor Side Agreement Under the NAFTA: Analysis of Its Failure to Include Strong Enforcement Provisions and Recommendations for Future Labor Agreements Negotiated with Developing Countries,” 29 *Go. Wash. J. Int’l L. & Econ.*, 1996, p. 221. See also Jerome Levinson, “Nafta’s Labor Side Agreement: Lessons from the First Three Years,” Institute for Policy Studies and International Labor Rights Fund, November 21, 1996, p. 11.

<sup>43</sup> NAALC, Article 1(f).

<sup>44</sup> *Ibid.*, Article 52.

<sup>45</sup> *Ibid.*, Article 10(1).

<sup>46</sup> Executive Office of the President, Office of the U.S. Trade Representative, “Study on the Operation and Effects of the North American Free Trade Agreement,” July 1997. Executive Office of the President, Office of the U.S. Trade Representative, “NAFTA Works for America,” July 1999.

## NAALC Objectives, Obligations, and Principles

The NAALC establishes objectives, obligations, and principles for the parties to the accord. The objectives introduce the overall goals of the accord, including the improvement of working conditions and living standards and the encouragement of an exchange of information related to labor laws and institutions in the three states that are party to the agreement.

The obligations move beyond a mere statement of intent by establishing a series of requirements. Some of these are broad in nature, such as the obligation to have “high labor standards,” while others are much more specific, such as the requirement that each state party ensure access to “administrative, quasi-judicial, judicial or labor tribunals for the enforcement of [its domestic] labor law.”<sup>47</sup> Another obligation requires that such tribunals be “fair, equitable and transparent.”<sup>48</sup> The obligation that the parties effectively enforce their own labor law stands out, because its violation could, under certain circumstances, as explained below, trigger NAALC mechanisms including an arbitral panel.<sup>49</sup> A party’s effective enforcement of its labor laws is reviewed in the context of government enforcement priorities; if a party can demonstrate that its failure to enforce a law stemmed from the legitimate pursuit of higher priorities, it will not be held in violation of the accord.<sup>50</sup> According to other NAALC obligations, the three state parties must make public any regulations, procedures, and administrative rulings related to the accord, and must promote awareness of their domestic labor laws.<sup>51</sup>

The parties have taken seriously the accord’s call for them to promote cooperative activities.<sup>52</sup> According to the U.S. NAO, more than fifty activities have taken place in furtherance of this element of the accord, including training on sampling and analysis of airborne contaminants, hazard recognition for industrial hygienists, protecting children at work, and on best practices with respect to migrant workers.<sup>53</sup> These activities, however, are not reviewed in detail in this report, except where they relate to specific petitions filed under the NAALC, because they generally do not address directly the labor rights violations that are the subject of petitioners’ complaints.

The NAALC also establishes eleven labor rights norms, which it refers to as principles. These are divided into three levels, with each successive level subject to additional action by the state parties to address a violation. The most basic level, which allows for the least intervention, includes freedom of association and the right to organize, the right to bargain collectively, and the right to strike. The second level includes prohibition of forced labor, compensation in cases of occupational injuries and illnesses, protection of migrant labor, elimination of employment discrimination, and equal pay for men and women. The highest level includes labor protections for children and young persons, minimum employment standards like minimum wage, and prevention of occupational injuries and illnesses.

At all three levels, where enforcement of the relevant rights is in question, the accord provides a basis for the state parties to engage in government-to-government talks and to establish consensual work programs to address the problem. But if such a program does not resolve the problem, and the labor rights norm in question falls into either the second or highest tier, a state party can call for the establishment of an Evaluation Committee

---

<sup>47</sup> NAALC, Articles 2 and 4(1).

<sup>48</sup> *Ibid.*, Article 5(1).

<sup>49</sup> *Ibid.*, Article 3(1).

<sup>50</sup> *Ibid.*, Article 49. “A Party has not failed to ‘effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards’ or comply with Article 3(1) in a particular case where the action or inaction by agencies or officials of that Party: reflects a reasonable exercise of the agency's or the official's discretion with respect to investigatory, prosecutorial, regulatory or compliance matters; or results from bona fide decisions to allocate resources to enforcement in respect of other labor matters determined to have higher priorities.”

<sup>51</sup> *Ibid.*, Articles 6(1) and 7.

<sup>52</sup> *Ibid.*, Articles 1 and 11.

<sup>53</sup> U.S. NAO, “Cooperative Activities,” December 2000, available on the Internet at <http://www2.dol.gov/dol/ilab/public/programs/nao/coopact.htm>.



of Experts (ECE). An ECE, composed of outside experts, may then issue non-binding recommendations for resolution of the problem. Beyond this, if the ECE recommendations still do not resolve the problem and the labor rights norm in question is one within the highest tier, the accord provides for the appointment of an arbitral panel and, ultimately, the imposition of sanctions on the offending state party.

### **The Accord's Institutions**

The NAALC creates several bodies to administer the accord. It is overseen by the Commission for Labor Cooperation, comprising a Council of Ministers and a Secretariat. The Council, which must meet at least once a year, functions as the governing body. The Secretariat, which is permanently convened in Washington, D.C., serves as executor of actions, such as promoting cooperative activities and preparing special studies. The Secretariat's executive director is appointed by the Council for a three-year term, and comes from one of the three state parties on a rotating basis.

As required by the NAALC, each of the three state parties also created a National Administrative Office (NAO) within their respective labor ministries.<sup>54</sup> These NAOs, staffed by government officials, act as the main bridge between the three states for addressing issues arising under the NAALC. Thus, the three NAOs exchange information on labor law and adjudication, receive complaints from petitioners about alleged NAALC violations, initiate investigations on their own or following complaints, publish reports on their findings, and develop and implement cooperative activities.

The basic level of government-to-government interaction based on the NAALC takes place through the NAOs. However, the NAALC establishes no standards for which cases to accept or reject, how to follow up on issues raised by petitioners, or what constitutes appropriate action for ministers to take to address a labor rights issue. By setting their sights low, therefore, the governments effectively enabled themselves to short-circuit even the few remedial possibilities that exist. At the same time, they avoided establishing a structure that would lead to the development of a body of information about patterns of labor-related problems in the three countries and that would assist potential petitioners to understand how best to use the NAALC.

The next level of official communication beyond the NAOs takes place between the three countries' labor ministers. Thus, if one state decides that high-level intervention is required to address a problem arising under the accord, that country's labor minister can call for formal consultations with one or both counterpart ministers in the other states. Such ministerial consultations can be called to address any issue relevant to the NAALC. In practice, to date, all such ministerial consultations have resulted in signed ministerial agreements concerning the issues in question, although the NAALC does not formally require this.

The NAALC establishes four options for addressing issues relating to the NAALC's obligations and labor principles:

- 1) *Consultations between NAOs.* This process allows one country's NAO to obtain case-specific information or details of labor law and institutions in another signatory country. An NAO may exercise this authority in response to a complaint or on its own initiative.
- 2) *Ministerial consultations.* Any NAO can recommend that minister-to-minister discussions take place "regarding any matter within the scope of [the NAALC]." This authority can be exercised in response to a specific case or on the initiative of an NAO. A minister to whom an NAO issues a recommendation has discretion to request consultations with a counterpart,

---

<sup>54</sup> When Canada broadened the scope of its hemispheric trade program in the late 1990s, as evidenced by the free trade agreement it signed with Chile in 1997, its NAO was renamed the Office for Inter-American Labour Cooperation. This report uses the term NAO to refer to the NAALC administrative agency in the labor ministry of all three signatory countries.

although in practice all such recommendations have been followed by a formal request for consultations. Ministers could also request consultations without first receiving an NAO recommendation to do so, although this has not occurred in practice.

- 3) *Evaluations.* If issues related to the second and highest tiers of the NAALC's labor principles are not resolved through ministerial consultations, the accord provides that a state may request that an Evaluation Committee of Experts (ECE) be formed, with a separate ECE being convened for each specific dispute. Such ECEs are to be composed of experts in "labor matters or other appropriate disciplines" from outside the NAALC machinery, who, in a "non-adversarial manner," are to analyze "patterns of practice" by each state party in enforcing their labor law, and to present non-binding recommendations for resolving the issue in question. ECEs, whose members need not be nationals of the signatory countries,<sup>55</sup> normally are to consist of a chairperson and two other members chosen by consensus by the Council of Ministers.<sup>56</sup> For an ECE to be formed, however, the matter at issue must be trade-related and covered by mutually recognized labor laws.<sup>57</sup> Members of the public are permitted to make written submissions to the ECE.<sup>58</sup> To date, no ECE has been formed.
- 4) *Arbitration and penalties.* On issues unresolved by the ECE that are related to the first tier of the NAALC's labor principles, the labor ministers of the signatory countries can convene an arbitral panel. The panel will issue a report on whether there has been a consistent pattern of failure by the government concerned to effectively enforce the law in question. In the event that the panel determines that such a pattern exists, it will make recommendations. "Normally," according to the NAALC, the recommendation will be that "the Party complained against adopt and implement an action plan sufficient to remedy the pattern of non-enforcement."<sup>59</sup> If the government fails to implement the action plan, a financial penalty not to exceed .007 percent of the value of the total trade in goods between the parties can be assessed against the offending government.<sup>60</sup> In case of a failure to pay the penalty, the complaining government can suspend NAFTA benefits in an amount no greater than that sufficient to collect the monetary penalty.<sup>61</sup>

## Criticism of the NAALC's Structure

### Three-Tier System, Focus on Disputes, Time Lapse

Some observers, including labor unions, have criticized the division of labor rights into tiers because it deprives collective rights protections of any enforceability. According to Morton Bahr, president of the Communication Workers of America, "The fundamental rights of workers include, as the NAALC recognizes, the right to freedom of association and protection of the right to organize," but "because the NAALC relegates protection of these rights to the third tier of its enforcement structure, there is no effective remedy for workers

---

<sup>55</sup> Commission for Labor Cooperation, "Rules of Procedure for Evaluation Committees of Experts of the North American Agreement on Labor Cooperation," no date, paras. 18-21.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid., Article 23(1)(2).

<sup>58</sup> Ibid., para. 35.

<sup>59</sup> NAALC, Article 36(2).

<sup>60</sup> According to U.S. census data, the total trade in goods between the United States and Mexico in 1999 reached \$196,629.5 million. This would permit a maximum fine of \$13.76 million. Census data is available at [www.census.gov/foreign-trade/balance/c2010.html](http://www.census.gov/foreign-trade/balance/c2010.html).

<sup>61</sup> Canada has ensured that it will not be the subject of trade sanctions by guaranteeing payment of fines through enforcement in its courts. See NAALC, Annex 41A.

whose rights are violated.”<sup>62</sup> The official justification for the exclusion of collective rights from any remedial action was that their inclusion could prejudice on-going labor relations disputes.

The division of labor rights into three tiers necessarily limits the NAALC’s potential effectiveness by seriously weakening the remedies available. A strengthened accord, therefore, should open the full range of labor principles, including those currently consigned to the lowest tier, to the full range of mechanisms available to remedy non-compliance.

A similar restriction exists with respect to the NAALC’s obligations. Only non-compliance with article 3—the obligation to effectively enforce domestic labor law—can lead to the establishment of an ECE, although there is nothing to prevent an ECE from analyzing a state’s non-compliance with other NAALC obligations in order to assess the full implications of an article 3 violation. Again, if the NAALC were to be amended and strengthened, it should permit an ECE to be formed to address and remedy non-compliance with any NAALC obligation.

Some members of the business community have argued that the NAOs have focused too much on dispute resolution. For example, according to the U.S. Council for International Business (USCIB), an organization that represents the interests of U.S. businesses, “implementation of the NAALC has unduly emphasized the compliance and effective enforcement of labor law obligations of the NAALC over positive cooperative activities. As a consequence, it sets the wrong tone and focus.”<sup>63</sup>

Cooperative activities are indeed important, but the exclusion of case-related activities would eliminate one key role of the NAALC. To focus on the obligations created under the pact falls squarely within the bounds of legitimate and much-needed NAALC-related activity.

Other criticism has focused on the amount of time it takes to complete the NAALC complaint process. In effect, it can take years to progress from filing a complaint to obtaining a ministerial agreement. For example, although the Echlin case was filed with the Canadian NAO on April 6, 1998, the Mexican and Canadian governments had still to reach an agreement almost three years later. As Thea Lee of the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) rightly points out, “Even in the areas subject to dispute settlement, the consultation and dispute resolution procedures are so lengthy and tortuous as to discourage complaints and petitions.”<sup>64</sup>

The NAALC’s Council of Ministers, however, unsurprisingly takes a more sympathetic view of the NAALC’s “long and cumbersome” processes:

These processes do not adjudicate or enforce the rights of individuals in specific circumstances or particular cases. These NAALC procedures involve sovereign governments in the discussion, investigation and resolution of major governmental responsibilities and may have broad implications for administrative and judicial process or for policy and the interpretation of legislation. The procedures must move at a deliberate pace with full opportunity for consultation to ensure complete understanding of matters which are by nature middle to long term.<sup>65</sup>

---

<sup>62</sup> Morton Bahr, president, Communication Workers of America, comments reproduced in Commission for Labor Cooperation, “Review of the North American Agreement on Labor Cooperation,” March 1999. Available at [www.naalc.org/english/publications/review\\_annex5\\_us.htm](http://www.naalc.org/english/publications/review_annex5_us.htm).

<sup>63</sup> Abraham Katz, United States Council for International Business, comments reproduced in “Review of the North American Agreement on Labor Cooperation.”

<sup>64</sup> Thea Lee, AFL-CIO, comments reproduced in “Review of the North American Agreement on Labor Cooperation.”

<sup>65</sup> Commission for Labor Cooperation, “Review of the North American Agreement on Labor Cooperation,” p. 9.

<b>Table: Remedial Possibilities For Non-Compliance with the NAALC</b>  Source: Human Rights Watch	Remedial Option		
Obligation and Labor Rights Principle	Government-to-government talks and consensual work programs to address non-compliance	Outside committee of experts to make non-binding recommendations	Arbitral panel to consider sanctions
Obligation—Article 2: High labor standards and improvement of standards	X		
Obligation—Article 3: Effectively enforce domestic labor law	X	X (In combination with principle below)	X (In combination with principle below)
Obligation—Article 4: Access to labor tribunals	X		
Obligation—Article 5: Fair labor tribunals	X		
Obligation—Article 6: Publicize NAALC rulings	X		
Obligation—Article 7: Publicize domestic labor laws	X		
Labor Principle: Freedom of association and the right to organize	X		
Labor Principle: Right to bargain collectively	X		
Labor Principle: Right to strike	X		
Labor Principle: Prohibition of forced labor	X	X	
Labor Principle: Compensation in cases of occupational injuries and illnesses	X	X	
Labor Principle: Protection of migrant labor	X	X	
Labor Principle: Elimination of employment discrimination	X	X	
Labor Principle: Equal pay for men and women	X	X	
Labor Principle: Labor protections for children and young persons	X	X	X
Labor Principle: Minimum employment standards	X	X	X
Labor Principle: Prevention of occupational injuries and illnesses	X	X	X

Clearly, the NAOs and labor ministers must have sufficient time to carefully examine and assess complaints, and identify and agree to appropriate remedies, but Human Rights Watch believes that the current system could and should be streamlined. For instance, a reasonable deadline should be established for governments to agree to ministerial consultations. Currently, no such deadline exists. However, the greatest problem is not so much the length of time that the process takes but the fact that, despite the long duration, complaints brought under the NAALC have consistently resulted in weak outcomes. This fatal combination creates an even stronger disincentive to participate in the process by demonstrating that years of effort and expense are likely to come to naught.

#### **Failure to Define Case Processes**

The NAALC is substantially weakened by the NAOs' discretion to accept or reject complaints and by the lack of content-related standards on how they should address petitioners' concerns. Thus, if the report of an NAO fails adequately or at all to address issues raised by petitioners, or if the NAO's findings and recommendations do not follow from the material analyzed, no formal process exists through which petitioners can have the NAO decision reconsidered. All that petitioners can do in such circumstances is request that the NAO reconsider, but the NAO can refuse to do this without providing any explanation. Consequently, NAOs can ignore petitioners' claims altogether, investigate their claims but fail to report on them, or report on them but fail to recommend that they be made the subject of ministerial consultations.

Similarly, labor ministers engaged in government-to-government talks are not bound by any standards regarding how to address the problems uncovered during NAO case reviews. The work plans they develop ostensibly to remedy these problems may address valid issues raised by petitioners but do so only selectively, or they may fully address petitioners' concerns but fail to lead to government activities designed to remedy labor rights problems.

Even without changing the structure of the NAALC, the Council of Ministers could and should develop guidelines to ensure that the NAOs and labor ministries fully investigate and effectively address problems that are identified by petitioners or brought to light directly by the NAOs.

#### **Failure to Define the Reach of the NAALC's Obligations**

Enforcement of the NAALC is hindered by the lack of specificity of the accord's obligations. First, although the NAALC establishes a process for addressing non-compliance with the obligation to enforce labor law, it is silent on what to do when the accord's other obligations are not met. Second, the accord does not set standards for interpreting several important areas of obligations, including the requirement that signatories strive to improve their labor standards.

Neither problem is insurmountable. Indeed, in order to ensure that the obligations are met, the NAOs should be working actively to overcome the NAALC's weaknesses in these areas. The Council of Ministers, which is formally responsible for interpreting the NAALC, should also take the lead in overcoming this problem.<sup>66</sup> Through the review of cases and other activities designed to address NAALC obligations, these implementing structures of the NAALC should be working to develop a collective understanding of the meaning of the NAALC's obligations. Even though the accord itself fails to establish adequate remedial mechanisms to resolve problems, the NAOs and other NAALC structures should seek ways to ensure that states comply with the requirements of the accord.

---

<sup>66</sup> Among the Council of Minister's functions is to "address questions and differences that may arise between the Parties regarding the interpretation or application of this Agreement." NAALC, Article 10(1)(g).

Unfortunately, the parties have, for the most part, avoided taking any action that would establish through case histories an authoritative interpretation of these key aspects of the accord. The failure to imbue NAOs with clear authority to ensure that violations of the NAALC's obligations are clarified and remedied has also led to calls for the NAOs to avoid any work on enforcement. The Mexican National Advisory Committee, convened by the government and consisting of business and labor leaders, argued in 1997, for instance, "The NAOs do not possess jurisdictional characteristics and should therefore be limited to facilitating contact, cooperation and mutual support between the signatory countries of the Agreement."<sup>67</sup>

Similarly, in 1998, the Mexican government argued strongly that the U.S. NAO should not take up a particular case on the grounds that the NAALC only "commits each Party to promote the enforcement of its own labor legislation, and the other Parties to respect it." The Association of Flight Attendants of the United States had filed the case in question on behalf of Mexican airline workers after the Mexican government intervened in a 1998 strike by AeroMéxico flight attendants and issued an executive order to take over the airline and end the strike. The Mexican government argued national security concerns to justify its actions. According to the Mexican Labor Ministry, the NAALC does not permit other state parties to the accord to question "a sovereign decision of the Mexican Government."<sup>68</sup> This, Human Rights Watch believes, was incorrect, because the NAALC permits, at a minimum, ministerial consultations on any issue relevant to the accord.<sup>69</sup> In the event, however, the U.S. NAO neither accepted the case for review nor justified its refusal in any detail.

Problems have also emerged concerning the NAALC's relationship to domestic laws. The NAALC requires the state parties to enforce their own labor laws and affirms the right of each to adopt its own labor standards and modify its own laws. Yet, it does not exclude the content of those standards and laws from review under the NAALC. Article 2, for instance, requires that the state parties promote "high labor standards."<sup>70</sup> In addition to allowing ministerial consultations on any matter within the scope of the accord, the NAALC also gives the NAOs authority to receive and review petitions "on labor law matters arising in the territory of another Party."<sup>71</sup>

These provisions place the content of each state's domestic labor laws squarely within the purview of the accord, even as they avoid establishing cross-border standards for content. The Mexican NAO has argued, however, that changes in domestic laws cannot be considered under the NAALC, as when it asserted in reporting on the DeCoster Egg Farm complaint brought against the United States: "The commitments assumed under the NAALC do not call for establishment of common standards on labor matters, *changes in the domestic laws*, or supranational mechanisms."<sup>72</sup> Petitioners in this case complained that the U.S. was failing to uphold NAALC standards relating to the protection of migrant workers, minimum employment standards, elimination of employment discrimination, prevention of occupational injuries and illnesses, and compensation in cases of occupational injuries and illnesses at an egg farm in Maine.

### **Differences in Interpreting and Using the NAALC**

Despite the fact that the signatories have not actively sought to define the reach of the NAALC, the record to date shows that the three state parties have adopted somewhat different approaches toward the agreement. Only the Canadian NAO has sought to interpret the meaning of the NAALC's obligations: for example, it proposed that

---

<sup>67</sup> Commission for Labor Cooperation, "Review of the North American Agreement on Labor Cooperation."

<sup>68</sup> Letter from Claudia Franco Hijuelos, general coordinator of the Ministry of Labor, to Andrew Samet, Deputy Undersecretary for International Labor Affairs at the U.S. Department of Labor, September 3, 1998. This letter was obtained by the Association of Flight Attendants (AFA) through a Freedom of Information Act request. The AFA requested the document after the U.S. NAO decided not to review a case against the Mexican government that it had submitted.

<sup>69</sup> NAALC, Article 22(1).

<sup>70</sup> *Ibid.*, Article 2.

<sup>71</sup> *Ibid.*, Article 16(3).

<sup>72</sup> Mexican NAO, "Report of Review, MEX Public Communication 9803," December 1999, p. 5. Italics added.

labor tribunals, when deciding between different options for structuring union elections, should take account of the NAALC's obligation to establish high labor standards.

The Mexican NAO, by contrast, appears to have adopted the position that it should generally avoid any interpretation of the NAALC and limit its reporting on individual complaints to simply repeating the information it has received from petitioners, without issuing any findings or conclusions.

The U.S. NAO, meanwhile, appears to have adopted a midway position between that of Canada and Mexico. It has not sought to interpret the NAALC's obligations, but it has often provided important and detailed analyses of individual complaints and contributed to wider understanding of labor rights problems in Mexico.

The lack of defined standards for accepting or rejecting cases has led to a wide variety of practice by NAOs. The U.S. NAO, for instance, has sometimes used its latitude to the benefit of petitioners by including broad topics for review. On the other hand, it has not always addressed those same issues in its final reports, and has rejected some cases for review on the vague grounds that they would not further the objectives of the NAALC. Indeed, two cases that the U.S. NAO rejected for review—relating to the national security rationale cited by the Mexican government for its intervention in a strike in Mexico and the exclusion of rural postal workers from the safeguards provided under federal labor legislation in Canada—could surely have added to important discussions of the NAALC.

As part of a four-year review of the NAALC begun in 1997, each country's national NAALC advisory panel reviewed the status of the accord, and interested parties and groups were invited to comment on the agreement. This exposed important differences between Mexico, on the one side, and Canada and the United States on the other. The Mexican council argued that the NAALC should highlight cooperative programs, while the others proposed that the NAOs should more actively seek cases in order to promote change. Unsurprisingly, significant differences emerged also between the attitudes of business groups and labor unions, with the former calling for the NAALC to focus on cooperative initiatives and for NAOs to require that all local remedies be exhausted before accepting complaints, and the latter criticizing the lack of results obtained through NAALC cases.

However, three years after this debate, little has changed. The governments themselves have not publicly discussed, clarified, or challenged each other's positions related to the NAALC, with the result that the NAALC's potential as a means to effect broad improvements in the labor rights situation in the signatory countries has remained severely under-utilized.

## V. NAALC CASE SUMMARIES

<b>NAALC Case Statistics</b>	
Total cases filed by nongovernmental and business groups	23
Duplicate filings	2
Cases initiated by the signatories	0
Cases rejected by NAOs	4
Cases withdrawn by petitioners	3
Cases closed for lack of follow-up from submitters	1
Cases filed in Canada	3
Cases filed in Mexico	5
Cases filed in the United States	15
Cases against Canada	2
Cases against Mexico	14
Cases against the United States	7
Case reports issued	12
Ministerial consultations requested (and convened)	11
Ministerial consultations pending	2
Ministerial agreements signed (covering 9 cases)	6
Source: Human Rights Watch	

### Cases Filed in the United States

1 and 2) *Honeywell and General Electric Case* (U.S. NAO Case Nos. 940001 and 940002)

Initially filed separately in February 1994, these cases were eventually reviewed together by the U.S. NAO, because the petitioners in both accused Mexico of permitting factories in Chihuahua State to fire workers who tried to organize unions, in violation of the NAALC's obligation to effectively enforce freedom of association law. The International Brotherhood of Teamsters (IBT) filed the Honeywell case, and the United Electrical, Radio and Machine Workers of America (UE) filed the petition on General Electric. The U.S. NAO held hearings and published a report on the case in October 1994. It decided not to recommend ministerial consultations with Mexico (see Appendix I).

3) *Sony Case* (U.S. NAO Case No. 940003)

The International Labor Rights Fund, Coalition for Justice in the Maquiladoras, American Friends Service Committee, and National Association of Democratic Lawyers (Asociación Nacional de Abogados Democráticos, ANAD) filed this case in August 1994, alleging that Mexico had violated the NAALC's obligation to effectively enforce laws related to freedom of association and the right to organize, collective bargaining, and minimum work hours for a single day. According to the petitioners, from the early 1990s workers were required to work overtime, were fired for trying to organize a union at the factory, and suffered at the hands of authorities who failed to organize fair union elections. They also alleged that Mexican labor tribunals had acted unfairly against the workers by improperly handling their request for union registration.

The U.S. NAO accepted the freedom of association and collective bargaining issues for review, but declined to investigate the allegations related to violations of Mexican law related to working hours. It held hearings and published a case report in April 1995 that recommended ministerial consultations on the issue of union registration. As a result of ministerial consultations that concluded with an agreement in June 1995, the Mexican government organized three conferences on union registration and produced a study on the topic by Mexican experts.



4) *Second General Electric Case* (U.S. NAO Case No. 940004)

This case alleged Mexican non-compliance with laws related to freedom of association and the right to organize in a General Electric plant. However, in early 1995, the petitioners withdrew the case because of their dissatisfaction with the U.S. NAO's handling of cases 940001 and 940002.

5) *Fishing Ministry Case* (U.S. NAO Case No. 9601)

In June 1996, Human Rights Watch, the International Labor Rights Fund, and Mexico's National Association of Democratic Lawyers submitted this case, arguing that Mexico was violating the NAALC by failing to enforce freedom of association laws and by not ensuring that federal labor tribunals met the accord's article 5 standard for fairness. The petition argued that ILO Convention No. 87, related to freedom of association, should be considered part of Mexico's domestic freedom of association law and included among the norms reviewed for compliance with the NAALC, because the Mexican legal system considered ratified treaties to be part of domestic law.

Workers within the country's Ministry of Fishing, which later became the Ministry of Environment, Natural Resources and Fishing (Secretaría del Medio Ambiente, Recursos Naturales y Pesca, SEMARNAP), were blocked from organizing a union to be called the Democratic Union of SEMARNAP. This occurred both because Mexican law prohibits the formation of more than one union within government ministries and because, when the workers won the technical right to form their union, officials failed to honor that right. For much of the time that the legal battle over formal recognition went on, a union that supported the long-ruling Institutional Revolutionary Party (Partido Revolucionario Institucional, PRI) existed within the ministry. As a result, the courts prohibited the workers from forming the Democratic Union of SEMARNAP, deeming it an unlawful "second union."

The petition also argued that Mexico's tri-partite Federal Conciliation and Arbitration Tribunal, which deals exclusively with federal government employees, was biased against the workers because of the way the tribunal's members are appointed. Mexican law establishes that only one federation of government employee unions can exist, and gives that federation the power to name the "workers'" representative to the tribunal. The federation supported the ruling PRI and fought strongly against the Democratic Union of SEMARNAP, creating a conflict of interest between the workers' representative on the tribunal and the Democratic Union of SEMARNAP.

The U.S. NAO held a hearing in December 1996 and published its report in July 1997. It recommended ministerial consultations on the very limited topic of the status of international labor law within Mexico (see Appendix I). As a result, a conference was held in Baltimore on this issue in 1997.

6) *Maxiswitch* (U.S. NAO Case No. 9602)

Filed in October 1996 by the Communication Workers of America (CWA), the Mexican telephone workers' union, and the Mexican federation of unions in the goods and services industry, this petition argued that the Mexican government failed to uphold NAALC principles related to freedom of association and the right to organize in the Maxiswitch electronics plant in Sonora State.<sup>73</sup> Petitioners alleged that a protection contract—one drawn up between the company and a pro-company union, without input from workers—blocked an independent union from organizing at the facility, which is owned by the Taiwanese Silitek Corporation. Other problems included threats against workers trying to organize. Petitioners also argued that the labor tribunal that heard the case was biased against the independent union, in violation of NAALC article 5.

The U.S. NAO scheduled a hearing on the case, but when Mexican authorities promised to take action to permit a fair organizing campaign, petitioners withdrew the case.

---

<sup>73</sup> The Mexican petitioners were the Sindicato de Telefonistas de la República Mexicana (STRM) and the Federación de Sindicatos de Bienes y Servicios (FESEBS).

7) *Pregnancy Testing Case* (U.S. NAO Case No. 9701)

Submitted in May 1997 by Human Rights Watch, the International Labor Rights Fund, and Mexico's National Association of Democratic Lawyers, this case accused the Mexican government of failing to uphold NAALC anti-discrimination principles by permitting widespread pregnancy-based discrimination in export-processing (maquiladoras) factories in northern Mexico. The petitioners submitted detailed documentation demonstrating that women were routinely required to undergo pregnancy tests as a condition of employment, so that employers could screen out women who would require maternity benefits if hired. Some women who became pregnant after being hired were also pressured to quit their jobs. Petitioners also accused the government of failing to meet the NAALC's article 4 requirement that victims of labor rights violations have access to tribunals; under the Mexican government's interpretation of the law, only people with an established work relationship can seek redress from labor tribunals, so a woman who is not hired because she is pregnant has no such opportunity for redress.

After holding a public hearing in November 1997, the U.S. NAO published a report on the topic in January 1998. The report criticized the practice of pressuring pregnant women to quit their jobs, but stopped short of condemning the practice of pre-hire pregnancy testing. The NAO recommended ministerial consultations "for the purpose of ascertaining the extent of the protections against pregnancy-based gender discrimination afforded by Mexico's laws and their effective enforcement by the appropriate institutions"<sup>74</sup> (see Appendix I). As a result of the consultations, several conferences were held—in Mexico and the United States—to address issues related to women's rights at work.

8) *Han Young Case* (U.S. NAO Case No. 9702)

Several organizations filed this case in February 1998, alleging that Mexico failed to uphold NAALC principles related to freedom of association and the right to organize, the right to bargain collectively, and occupational health and safety.<sup>75</sup> In 1997, workers at the Baja California State plant of Han Young, which produces chassis and platforms for tractor-trailer trucks for Hyundai, began to organize a union. They accused the existing union, affiliated with the Revolutionary Confederation of Workers and Peasants (Confederación Revolucionaria de Obreros y Campesinos, CROC), of being nothing more than a front for management. "As of April 1997, the CROC had never held a meeting with workers, never shown workers a copy of their contract with Han Young, and did not make its existence as a contractual representative known to the workers," petitioners argued.<sup>76</sup>

According to the complaint, workers were forced to work in a polluted environment and suffered pay irregularities. In addition, their attempt to organize independently of the CROC was met with actions including the firing of workers leading the organizing drive. Finally, the labor tribunal unfairly supported the CROC, in violation of NAALC article 5.

The U.S. NAO held a public hearing in February 1998, and issued two reports, one on freedom of association and the right to organize (April 1998) and the other on the occupational safety issues (August 1998). An agreement on ministerial consultations was reached in May 2000 (see Appendix I). It called for the Mexican government to promote the circulation of information on collective contracts, although no reference was made to how this would be done or the goals to be met. Continued government-to-government talks were also to take place to discuss methods of improving health and safety.

---

<sup>74</sup> U.S. NAO, "Public Report of Review of NAO Submission No. 9701," January 12, 1998.

<sup>75</sup> The petitioners were the International Labor Rights Fund, Support Committee for Maquiladora Workers, National Association of Democratic Lawyers (Mexico), Union of Metal, Steel, Iron and Allied Workers (Mexico), Maquiladora Health and Safety Support Network, Worksafe! Southern California, United Steelworkers of America, United Auto Workers, and Canadian Auto Workers.

<sup>76</sup> International Labor Rights Fund, et al., "The Case of Han Young de Mexico, S.A.," October 28, 1997, p. 7.

9) *Echlin Case* (U.S. NAO Case No. 9703)

In December 1997, petitioners led by the UE filed this case, alleging Mexican violations of NAALC principles related to freedom of association and the right to organize, the right to bargain collectively, and prevention of occupational injuries and illness. They also accused Mexico of violating the NAALC's obligation related to fair labor tribunals.<sup>77</sup>

The alleged buses took place in an auto parts factory then owned by the U.S.-based Echlin company. In 1996, workers in the factory in Ciudad de los Reyes, Mexico State, began to organize a union independent of the PRI. Petitioners alleged, and the U.S. NAO confirmed, that the workers faced threats of physical attack and dismissal, and that thugs intimidated workers during union voting. For instance, the workers were required to cast public votes while being intimidated by pro-PRI union officials. Authorities turned a blind eye toward these abuses, and labor tribunals facilitated and approved the outcome of such tainted processes. In addition, the petition charged that government officials failed to enforce health and safety laws at the plant, largely due to what was described as a seriously flawed inspection system. A substantially similar case was filed at the same time in Canada (Canadian NAO Case No. 98-1).

The U.S. NAO held a public hearing on the case in March 1998 and published a report four months later. In May 2000, Mexico and the United States arrived at a ministerial agreement (see Appendix I). This called for several public seminars to be held, and noted that the U.S. and Mexican governments would jointly discuss health and safety techniques. Its action plan also included overall goals for the Mexican government to pursue, without detailing how these were to be achieved: "The Mexican Department of Labor and Social Welfare will continue promoting the registry of collective bargaining contracts in conformity with established labor legislation. At the same time, efforts will be made to promote that workers be provided information pertaining to collective bargaining agreements existing in their place of employment and to promote the use of eligible voter lists and secret ballot elections in disputes over the right to hold the collective bargaining contract."

10) *AeroMéxico Case* (U.S. NAO Case No. 9801)

Filed in August 1998 by the Association of Flight Attendants (AFA) in the United States, this case accused the Mexican government of violating NAALC standards related to the right to strike by forcing striking flight attendants at AeroMéxico to go back to work in 1988. Justifying their actions on national security grounds, the Mexican government intervened by executive order to take over the airline and end the strike.

The U.S. NAO declined to hear the case, arguing that the takeover was carried out according to Mexican law. Without any supporting argumentation, the U.S. NAO determined that hearing the case would not further the interests of the NAALC.

11) *Tomatoes Case* (U.S. NAO Case No. 9802)

The U.S. NAO opened this case, which alleged that Mexico failed to enforce NAALC principles related to child labor on tomato farms, after the U.S. Department of Labor forwarded details that had been submitted to the secretary of labor in 1997 by the Florida Tomato Exchange, an industry group. The Exchange had sent the information to the secretary after the Department of Labor and Department of Agriculture announced an investigation into child labor practices in agriculture in the United States. Such an investigation was acceptable, according to the Exchange, as long as a similar investigation took place in Mexico, which produces much of the winter tomato crop consumed in the United States.<sup>78</sup> "Given the fact that such illegal practices create an unfair

---

<sup>77</sup> The petitioners included some thirty organizations from Canada, Mexico, and the United States.

<sup>78</sup> Human Rights Watch telephone interview with John Himmelberg, lawyer for the Florida Tomato Exchange, January 4, 2001.

advantage against the growers and their employees in the United States,” the Exchange argued, “we do not understand the reasons for such inaction by the Departments of Labor and Agriculture.”<sup>79</sup>

Rather than conduct an investigation into the Mexican tomato industry, the U.S. Department of Labor forwarded the documentation to the U.S. NAO. The Florida Tomato Exchange had no interest in pursuing an NAO case, however, because it doubted that the outcome would be effective.<sup>80</sup> The U.S. NAO closed the case when it did not receive further information from the Exchange.

12) *McDonald’s Case* (U.S. NAO Case No. 9803)

In the first case accusing the Canadian government of failing to enforce NAALC principles, the International Brotherhood of Teamsters and other petitioners alleged that McDonald’s closed a restaurant in Quebec in 1998 rather than permit a union to be certified there.<sup>81</sup> Filed in October 1998, the case was accepted for review by the U.S. NAO but withdrawn by the petitioners after the Canadian government agreed to undertake a study of anti-union plant closures as part of an overall review of the Canadian Labor Code.

13) *Canada Post Case* (U.S. NAO Case No. 9804)

The twenty-one petitioners in this case accused the Canadian government of failing to uphold NAALC principles related to free association, collective bargaining, and health and safety. The case, filed in December 1998, alleged that legislation in Canada—the Canada Post Corporation Act—defined rural letter carriers as independent contractors, not employees of the postal service, so that rural letter carriers lost the right to organize and bargain collectively. In February 1999, the U.S. NAO declined to review the case.

14) *TAESA Case* (U.S. NAO Case No. 9901)

The Association of Flight Attendants, based in Washington, D.C., filed this case in November 1999, accusing the government of Mexico of failing to uphold NAALC standards related to freedom of association, collective bargaining, minimum employment standards, and occupational safety and health. According to the complaint, flight attendants at Mexico’s Executive Air Transport, Inc. (TAESA) tried to join the Association of Flight Attendants of Mexico (ASSA) in 1997, but found that the union election process inhibited them from organizing and bargaining collectively. Petitioners said flight attendants who supported the organizing effort were fired, and minimum work standards were violated because flight attendants were given inadequate safety training and required to fly more hours than safe. Another issue of concern related to the ability of flight attendants to seek a collective bargaining contract on their own when an airline-wide contract already existed.

The U.S. NAO held a public hearing in March 2000 and issued a case report in July 2000. The report recommended ministerial consultations on the case, without specifying exactly which issues should be included; at this writing it was too soon to know if consultations would take place or, if they did, what result they would produce.

*Auto Trim/Custom Trim/Breed Case* (U.S. NAO Case No. 0001)

In June 2000, more than two-dozen organizations filed this case, accusing the Mexican government of failing to enforce health and safety standards at two export-processing factories in Tamaulipas State. Auto Trim and Custom Trim/Breed sew leather covers on steering wheels and gearshifts in the cities of Matamoros and Valle Hermoso, respectively. “Many workers suffer from illnesses and injuries related to exposure to toxic substances

---

<sup>79</sup> Letter from John Himmelberg, an attorney writing on behalf of the Exchange, to Alexis Herman, secretary of labor, July 29, 1998.

<sup>80</sup> Human Rights Watch telephone interview with John Himmelberg.

<sup>81</sup> The other petitioners were the Teamsters of Canada, the Quebec Federation of Labor, Teamsters Local 973, and the International Labor Rights Fund.

and muscular-skeletal disorders caused by poor ergonomics,” according to the petition.<sup>82</sup> Mexican government agencies responsible for enforcing health and safety laws had failed to do so, according to the petitioners.

The U.S. NAO accepted the case for review and held a public hearing in December 2000. Although the agency’s deadline for publishing its report on the case fell on February 27, 2001, the U.S. NAO decided to postpone its release in order to incorporate information sent at the last minute by the Mexican government.

### **Cases Filed in Mexico**

#### **16) *Sprint Case* (Mexican NAO Case No. 9501)**

Filed in February 1995, this case accused the government of the United States of failing to promote NAALC principles related to freedom of association and the right to organize. It arose in the context of an organizing campaign by the Communication Workers of America (CWA), which was trying to establish a union at a Sprint Spanish-language telemarketing facility in California. Sprint’s closure of the facility led to the accusation that it had done so to prevent the union from consolidating. Although the National Labor Relations Board (NLRB), which enforces U.S. labor law by investigating and remedying violations, ruled in favor of the workers, an appeals court overturned the ruling.<sup>83</sup>

The Mexican NAO issued a public report in May 1995 that recommended ministerial consultations. “The Mexican NAO is concerned about the effectiveness of certain measures intended to guarantee” freedom of association and the right to organize in the United States, it wrote.<sup>84</sup> As a condition of the February 1996 agreement reached through ministerial consultations, the United States organized a public forum in San Francisco at which people could express their views on sudden plant closures and their effect on freedom of association (see Appendix I). The NAALC Secretariat also conducted a study on this issue.

#### **17) *Solec Case* (Mexican NAO Case No. 9801)**

Petitioners submitted this case in April 1998, arguing that the government of the United States failed to uphold its labor law related to freedom of association and the right to organize, the right to bargain collectively, minimum wage and employment standards, and the prevention of occupational injuries and illness at the California-based Solec, which manufactures solar panels. Petitioners alleged, for example, that company officials fired workers who sought pay increases. Official inspections carried out to ensure company compliance with health standards were not exhaustive, according to the complaint, thereby violating safety standards. Petitioners also accused the United States of violating NAALC article 5 by maintaining unfair labor tribunals.

In its August 1999 report on the case, the Mexican NAO called for ministerial consultations. In May 2000 the Mexican and United States governments agreed to a program based on those consultations. Under the ministerial agreement, the United States was to organize a government-to-government meeting to discuss the application of U.S. law focusing on the issues raised in this petition and Mexican NAO Case Nos. 9802 and 9803 (see Appendix I). The United States agreed also to conduct public forums and outreach sessions, including in the states of Maine and Washington, with migrant workers, community groups, and government officials.

---

<sup>82</sup> Current and former Workers at Auto Trim and Custom Trim/Breed Mexicana, et al., “Submission to the U.S. National Administrative Office under the North American Agreement on Labor Cooperation,” June 30, 2000, p. 1.

<sup>83</sup> See National Labor Relations Board, Case 20-CA-26203, August 30, 1995, and U.S. NAO, “Status of Submissions,” May 19, 2000, available on the Internet at [www2.dol.gov/dol/ilab/public/programs/nao/status.htm](http://www2.dol.gov/dol/ilab/public/programs/nao/status.htm).

<sup>84</sup> Mexican NAO, “Report on Review of Public Submission 9501/NAO MEX” (U.S. NAO Staff Translation), May 31, 1995, p. 11.

18) *Washington State Apples Case* (Mexican NAO Case No. 9802)

Petitioners filed this case with the Mexican NAO in May 1998.<sup>85</sup> One of the broadest cases ever filed under the NAALC, it focused on labor problems in the Washington State apple industry. The petitioners alleged that the United States government failed to enforce the rights to organize and bargain collectively, minimum labor standards, non-discrimination in employment, job safety and health, workers' compensation, and migrant worker protections.

Petitioners documented problems including illegal threats of firings and plant closings, bribes, and pressuring workers to wear anti-union buttons. Regarding the treatment of migrants, the petitioners argued that many provisions of U.S. labor law fail to extend the same legal protections to migrants as to nationals, including in workers' compensation laws. They argued that only half of all migrant workers are even covered by minimum wage standards, and that workers often receive below-poverty wages in the sector.

In addition to labor law enforcement violations, petitioners accused the United States of breaching NAALC article 2, concerning high labor standards, by excluding agricultural workers from some labor law protections or affording them inferior protection, and by maintaining health and safety laws that failed to establish necessary safeguards. They contended that the United States had not only failed to make essential improvements in its laws related to workers' rights, but had further weakened those laws. The complaint also pointed to structural problems affecting the National Labor Relations Board (NLRB) as a violation of the NAALC article 5 requirement that the state parties provide fair institutions for administering labor law.

The Mexican NAO issued a report in August 1999, calling for ministerial consultations on the enforcement issues raised by petitioners. The ministerial agreement, reached in May 2000, included planned outreach sessions at which these issues were to be discussed with migrant workers as well as a public forum for workers, unions, employers, and government officials (Appendix I).

19) *DeCoster Egg Farm Case* (U.S. NAO Case No. 9803)

Petitioners filed this case in August 1998, alleging that at the DeCoster egg farm in Maine, the United States failed to uphold NAALC standards related to the protection of migrant workers, minimum employment standards, elimination of employment discrimination, protection of occupational injuries and illnesses, and compensation in cases of occupational injuries and illnesses. Petitioners accused the United States of failing to take appropriate measures to deal with problems, including false pretexts for hiring and to end discrimination against Mexican workers. The case also accused the United States of failing to ensure access to labor tribunals and guarantee the fairness of such tribunals, and of failing to distribute information about its labor laws.

The Mexican NAO published a report on the case in December 1999. In May 2000, the Mexican and United States governments agreed on a program based on ministerial consultations (see Appendix I). It included planned outreach sessions at which these issues would be discussed with migrant workers as well as a public forum for workers, unions, employers, and government officials.

20) *Department of Labor Case* (Mexican NAO Case No. 9804)

Petitioners in this case, led by the Yale Law School Workers' Rights Project, took issue with a memorandum of understanding agreed to by the U.S. Department of Labor (DOL) and the Immigration and Naturalization Service (INS) in 1992. Filed in September 1998, the case accused the United States government of failing to enforce minimum employment standards and statutes designed to protect migrant workers.

---

<sup>85</sup> The petitioners, from Mexico, were the Union of Workers in the Metal, Steel, Related Iron and Similar Industries (STIMAHCS), the Authentic Labor Front (FAT); the National Workers' Union (UNT); and the Democratic Workers' Front.

The memorandum of understanding (MOU) permitted Department of Labor inspectors who received complaints about minimum wage and overtime violations under the Fair Labor Standards Act to determine the legal status of the immigrants who made the complaints. This subjected complainants to the possibility of deportation for having sought to have their labor rights enforced.

After the petition was filed, the U.S. government agencies involved drew up a new MOU in which the Department of Labor pledged not to share with the INS information about the immigration status of persons who file complaints relating to unpaid minimum wages or overtime. Information on immigration status obtained by the Department of Labor through its own inspections, however, could still be given to the INS, according to the new MOU. The case was filed simultaneously in Canada (Canadian NAO Case No. 98-2).

### **Cases Filed in Canada**

#### **21) *Echlin Case* (Canadian NAO Case No. 98-1)**

In April 1998, petitioners filed a case in Canada accusing the Mexican government of violating multiple NAALC obligations and failing to enforce several labor principles at the Ciudad de los Reyes, Mexico State, auto parts factory owned at the time by Echlin. The case was substantially similar to the one filed with the U.S. NAO in December 1997 (For case details, see U.S. NAO Case No. 9703, above at listing 9). One difference between the case filed in Canada and the one submitted in the United States was that the former included the allegation that Mexico had violated article 2 of the NAALC, regarding “high labor standards,” while this charge was not made in the case filed before the U.S. NAO.

In September 1998, the Canadian NAO held a public meeting on the case, following multiple communications with the petitioners, Mexican government, and representatives of Dana, which had purchased the plant from Echlin after the petition was filed. The Canadian NAO published two reports on the case. The first focused on the freedom of association, collective bargaining, and labor tribunal issues raised by petitioners (December 1998). The second dealt with health and safety issues (March 1999). At this writing, the Mexican and Canadian governments had yet to conclude ministerial consultations.

#### **22) *Department of Labor Case* (Canadian NAO Case No. 98-2)**

This case, related to an MOU between the U.S. Department of Labor and Immigration and Naturalization Service, was filed simultaneously in Mexico and Canada. (For a description of the case, see Mexican NAO Case No. 9804, listed above as entry No. 20.)

#### **23) *EFCO Case* (Canadian NAO Case No. 99-1)**

The Labor Policy Association, an organization that represents human resource officers in the private sector in the United States, and EFCO, which manufactures windows, doors, and walls, filed this petition in April 1999. They accused the U.S. government of failing to enforce NAALC’s article 3 requirement that the signatories promote compliance with their labor law by, among other things, “encouraging the establishment of worker-management committees to address labor regulation in the workplace.” The U.S. National Labor Relations Act prohibits employer domination of labor organizations, and the National Labor Relations Board had ruled that management-worker groups at EFCO were sponsored and dominated by management, not workers.<sup>86</sup> In June 1999, the Canadian NAO opted not to review the case, arguing that the petition had not established that the United States had violated the NAALC. The Canadian NAO did not grant the petitioners’ request for reconsideration.

---

<sup>86</sup> For further information, see Lance Compa, “NAFTA’s Social Dimension: The North American Agreement on Labor Cooperation,” working paper for the Labor Law and Labor Relations Program of the International Labor Office, Geneva, October 1999, p. 30.

## VI. THE RESULTS OF NAFTA LABOR RIGHTS CASES

### **Evaluating the Accord**

This report applies two overall measures to evaluate the NAALC. First and foremost, it gauges the extent to which the state parties have identified and corrected non-compliance with the range of NAALC obligations. This, after all, constitutes the NAALC's central promise, both political and statutory. Although the side agreement does not require outside complaints to spur governmental action on non-compliance with NAALC obligations, to date no country has independently initiated consultations regarding possible violations of the NAALC. Therefore, this report relies on the content and outcome of cases filed by nongovernmental groups that allege non-compliance with one or more of the accord's obligations. It analyzes the twenty-three complaints filed using the NAALC, the reports and other documentation produced by the governments, and the content of programs designed to address the complaints.

Of the twenty-three cases filed using the NAALC, fourteen alleged violations in Mexico, seven referred to alleged violations in the United States, and two concerned Canada. The cases raised two types of questions regarding the parties' respect for the side agreement. The first relates to alleged violations of one or more of the NAALC's eleven labor principles. The second has to do with alleged violations of one or more of the accord's seven labor rights objectives and obligations. This chapter presents information in an obligation-by-obligation format, including a principle-by-principle analysis within the section on the requirement that the parties effectively enforce their own labor law.

Together, the three NAOs have issued a total of twelve case reports, recommending ministerial consultations—that is, government-to-government talks—in all but one instance. As a result of such consultations, Mexico and the United States have adopted six ministerial agreements covering nine separate cases; four of those cases were against the United States, and five against Mexico. Canada is currently negotiating an agreement with Mexico.

A second measure used here to evaluate the NAALC relates to how the signatories have addressed the linkage between trade and labor rights. That is, this report reviews the extent to which the parties have attempted to understand and interpret the NAALC's obligations. The accord does not expressly require that the parties do this, but given the vague nature of the obligations, the signatories necessarily must do so in order to understand the nature of the obligations they undertook by signing the accord.

This report does not seek to evaluate the cooperative activities undertaken under the auspices of the accord, except to the extent that they resulted directly from a NAALC case. These are said to have been plentiful and productive, and to be a positive result of the NAALC. However, while improved technical expertise and the promotion of greater understanding of labor issues between Canada, Mexico, and the United States are important, they are no substitute for policies designed to improve labor rights conditions. In a similar vein, this report does not focus on the secondary benefits of NAALC cases, such as increased cross-border linkages and cooperation between labor unions and human rights groups, and the way specific cases have led to politically motivated results outside the framework of the NAALC. After all, the NAALC was not crafted to provide such benefits, and even some of the most widely cited secondary benefits have proven, upon detailed review, to have been far less important than suggested.

### **NAALC Labor Rights Objectives, Principles, and Obligations**

As discussed in detail in the following sections, every case submitted to an NAO has included the allegation that the government in question has failed to enforce its labor law with respect to one of the eleven labor principles enunciated in the accord. Little has been done, though, to overcome structural problems found in enforcement mechanisms, even when serious questions have been raised through the NAO submission process. Concerns about enforcement mechanisms and the effectiveness of enforcement actions have been addressed



through the NAO consultative process in a variety of ways, mostly focusing on training and exchange of information, but they have not addressed the broader structural problems affecting enforcement.

Compared to enforcement concerns, fewer allegations have been lodged related to other NAALC obligations. Nonetheless, serious questions have been raised about access to, and the fairness of, labor tribunals in Mexico and the United States. Little has been done to address these concerns, however, beyond holding seminars to discuss the problem. This key to labor law enforcement—access to impartial tribunals—has received scant attention and no remedial action under the NAALC.

For the NAALC case mechanisms to be effective in improving the labor rights situation in the three countries, NAOs and labor ministries would need to take consistently strong action as cases move through their key stages: initiation and acceptance of cases; gathering information related to complaints; reporting on the issues raised; detailing the findings; announcement of recommendations; the content of ministerial consultations; development of ministerial agreements; and follow-up, including taking steps to ensure that ministerial agreements are carried out and, if they are not, adopting measures such as the establishment of Evaluation Committees of Experts to address the problems unresolved through ministerial consultations.

Even strong reporting can be inadequate in promoting positive change in the labor rights situation in the state parties if at any of the subsequent stages the relevant authorities take weaker actions. Similarly, without detailed explanations of the reasoning behind the parties' actions and findings in specific cases, the NAALC's obligations will remain vague, and the link between labor rights and trade—the key to understanding how well the parties have fulfilled their obligations under the accord—will remain unclear.

As the following article-by-article analysis makes clear, the three state parties have largely failed to avoid these pitfalls.

#### **Article 1: The NAALC's Objectives**

*The objectives of this Agreement are to improve working conditions and living standards in each Party's territory; promote, to the maximum extent possible, the [NAALC Labor Principles]; encourage publication and exchange of information. . . to enhance mutually beneficial understanding of the laws and institutions governing labor in each Party's territory; promote compliance with, and effective enforcement by each Party of, its labor law; and, foster transparency in the administration of labor law. (Partial list)*

The policy makers who use the NAALC should take its objectives, separate from its obligations, as an aid to interpreting ambiguous provisions of the accord, and as general guidelines for decision-making. The U.S. NAO, for instance, has explicitly cited the objectives as a rationale for deciding to proceed with or declining to review cases. In this context, it has justified its actions based on what it believes would or would not "further the objectives of the NAALC."<sup>87</sup> Defining the meaning of the NAALC's objectives, therefore, is an important way to clarify the decision-making processes based on them. In addition, for the parties to measure their success or failure in achieving the important goals set out in the objectives, they must actively work to understand how action or inaction on the part of the state parties affects these objectives.

Unfortunately, even when the NAALC's objectives have been reviewed by the NAOs in the context of specific cases, or used to justify decision-making, the NAOs have failed to interpret them.

---

<sup>87</sup> See, for example, U.S. NAO, "Public Report of Review of NAO Submission No. 9702-Part II: Safety and Health Addendum," August 11, 1998, p. 43, and U.S. NAO, "Public Report of Review of NAO Submission No. 9701," p. 46.

Five cases have raised questions regarding a signatory's failure to take steps in line with the accord's objectives. Two of the cases, both related to the same alleged violations in the Echlin auto parts plant in Mexico, were ultimately reviewed by the U.S. and Canadian NAOs. Of the other three cases, two were not accepted for review and the third was too recently filed at this writing to allow an analysis of its handling.<sup>88</sup> The U.S. and Canadian NAOs reviewed the Echlin cases separately, but both found serious problems with Mexican enforcement of freedom of association law and raised questions about the fairness of the labor tribunals.<sup>89</sup> However, neither agency explained how the specific problems it had documented had hindered the accord's objectives, or how ministerial consultations would advance them.

### **Article 2: Promoting "High Labor Standards"**

*Affirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.*

Petitioners in four complaints, only two of which have ultimately been reviewed by an NAO, have cited the obligation of state parties under the NAALC to have high labor standards, and to improve those standards. The issue was addressed in detail by petitioners in the Washington State apples case, filed with the Mexican NAO in August 1999, and in the Echlin case filed with the Canadian NAO (although the Echlin case was also filed with the U.S. NAO, the version presented in the United States did not raise Article 2 issues).<sup>90</sup>

The requirement that the signatories maintain high labor standards can be understood as a general duty clause parallel to such provisions of U.S. and international law.<sup>91</sup> It is important for the parties to use this article to define the reach of the NAALC. Although the NAALC's eleven labor principles serve to provide a broad definition of what "high" labor standards should consist of, they are too general to incorporate each specific law and situation that could exist in the three countries covered by the agreement.

General obligations are intentionally broad and vague, requiring the parties to the agreement to work actively to define their reach if they are to be fulfilled. In analogous situations in which general obligations are created in domestic or international law, formal attempts have been made to interpret specific conditions in light of those general obligations.<sup>92</sup> Such an effort within the framework of the NAALC would also help further the discussion on linking labor rights and trade. Doing so would not require the standardization of domestic

---

<sup>88</sup> The cases not accepted for review were the Canadian Post Case (U.S. NAO Case No. 9804) and the EFCO case (Canadian NAO Case No. 99-1). The Auto Trim case (U.S. NAO Case No. 0001) was filed in June 2000; at this writing, the U.S. NAO had yet to publish its report on the case.

<sup>89</sup> Canadian NAO, "Review of Public Communication CAN 98-1 (Part I)," December 11, 1998, p. 2. U.S. NAO, "Public Report of Review of NAO Submission No. 9703," July 31, 1998 (revised August 21, 1998), p. 12.

<sup>90</sup> Regarding the two cases that were rejected, the U.S. NAO did not accept Case No. 9804, related to a Canadian law that provides fewer labor rights guarantees for rural mail carriers than it does for urban carriers. The Canadian government rejected Canadian NAO Case No. 99-1, regarding what the petitioners deemed unduly restrictive provisions of U.S. labor law related to the National Labor Relations Act's prohibition of employer domination of labor organizations.

<sup>91</sup> In U.S. domestic labor legislation, for instance, Section 8(a)(1) of the National Labor Relations Act (NLRA) establishes a general duty for employers to refrain from "interference, restraint and coercion." Internationally, Article 2 of the International Covenant on Civil and Political Rights (ICCPR) holds that the Parties undertake "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant." The American Convention on Human Rights (ACHR), at Article 1, establishes a similar general obligation.

<sup>92</sup> With respect to the NLRA, the National Labor Relations Board and appeals courts have done so. The ICCPR's Article 2 has been interpreted by the United Nations Human Rights Committee. ACHR Article 1 has been reviewed and interpreted by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

legislation. Rather, the state parties should grapple with how this NAALC obligation can be factored into the establishment of domestic standards.

Further, the NAALC's requirement that the state parties strive to improve their labor law standards implies, at a minimum, that labor standards in the three countries are not to remain static. Yet, how to define what constitutes inadequate action to improve the content of labor laws remains an open question, and the only way to determine whether the parties are fulfilling this obligation is to interpret this portion of the NAALC.

In practice, the NAOs have interpreted article 2 differently. Mexico has rejected the implication that this article requires the parties actively to improve labor standards where they are not "high," while the Canadian NAO has said that article 2 should be used as a measure of how labor standards are devised. The U.S. NAO ignored the issue in the only case it received in which the article was cited.

In the Washington State apples case, petitioners contended that the United States does not have high labor standards in an array of areas. They argued that it lacks standards altogether for a majority of hazardous chemical products; lacks ergonomic standards; and fails to establish standards relating to the right to information and medical supervision.<sup>93</sup> They further alleged violations of this obligation with respect to the protection of migrant workers, arguing that U.S. law provides lesser protections for migrants than it does for non-migrants, and that agricultural workers are excluded from many labor protections under U.S. labor law.<sup>94</sup>

The Washington State apples case also laid the groundwork to test the meaning of the article 2 requirement that the state parties "continue to strive to improve" their labor standards. "There has been no essential improvement in the law's protection of the rights of workers to organize since the [National Labor Relations Act] was adopted in 1935," according to petitioners. "Almost all important changes to the law, beginning with the Taft-Hartley Act of 1947, have increased the power of employers to prevent the union organization of workers."<sup>95</sup>

Unfortunately, in its August 1999 case report, the Mexican NAO limited itself to repeating the allegations of the petitioners and to listing the provisions of the NAALC that were said to have been violated. It provided no findings or conclusions of its own. The Mexican NAO went on to recommend ministerial consultations in order to obtain further information on steps taken by the United States to enforce the rights of workers in the agricultural sector, but it did not seek consultations on article 2. Taking advantage of the lack of standards for NAO reporting, it did not expressly state why it left article 2 out of its recommendation despite so much detailed information provided by the petitioners.

The Canadian NAO took a strikingly different approach to article 2. Faced with information regarding unfair practices for union voting in the Echlin case, in its report on the case the Canadian NAO said that Mexican tribunals should interpret their own laws with article 2 in mind. The Canadian NAO suggested that secret ballots for unionization votes provided greater protection for workers' rights, but stopped short of saying that such ballots were required for Mexico to fulfill its obligations under article 2. However, the Canadian NAO noted that if alternatives to secret ballots were used by Mexican labor tribunals, "the onus is on the [tribunal] to show that they are equally effective in protecting the accuracy and integrity of the [vote] and that they meet the obligations stemming from Article 2 of the NAALC."<sup>96</sup> This type of reasoning is essential to give meaning to the NAALC.

---

<sup>93</sup> STIMAHCS, et al, "Violations of NAALC Labor Principles and Obligations in the Washington State Apple Industry," May 27, 1997, pp. 16-17. Several years after the case was filed, the Clinton Administration issued ergonomics standards; at this writing, the House of Representatives and Senate had passed, and President George W. Bush pledged to sign legislation scuttling the standards.

<sup>94</sup> Ibid., pp. 23-26.

<sup>95</sup> Ibid., p. 11.

<sup>96</sup> Canadian NAO, "Review of Public Communication CAN 98-1 (Part I)," p. 37.

Only one petition submitted to the U.S. NAO raised an article 2 issue. In that case—the Canadian Post case—petitioners argued that a federal law improperly restricted the rights of rural letter carriers by prohibiting them from organizing. Demonstrating how the lack of standards regarding when to accept cases can lead to arbitrary decision-making, the U.S. NAO rejected the case on the grounds that it “does not raise questions regarding the application or enforcement of the law.”<sup>97</sup> Nowhere in existing NAALC or U.S. NAO guidelines is such a standard laid out. In fact, the NAOs can accept for review any case related to “labor law matters” in a signatory country.<sup>98</sup>

### **Article 3: Government Enforcement Action**

*Each Party shall promote compliance with and effectively enforce its labor law through appropriate government action, subject to Article 42 [which prohibits one party from enforcing labor law in the territory of another].*

The NAALC requirement that each party effectively enforce its own labor law has been cited in every petition filed under the accord. The U.S. NAO has issued eight reports covering this issue, while the Mexican NAO has addressed it in four case publications. The Canadian NAO handled this issue in the single two-part report it released on the Echlin case.

This obligation is key under the accord, because a party’s pattern of practice of failure to live up to it could lead in certain circumstances to the creation of an Evaluation Committee of Experts. A persistent pattern of non-enforcement could lead to the creation of an arbitral panel to consider sanctions in some labor law issue areas. Even without the formation of these NAALC bodies, the accord could be used by the parties to resolve problems related to the enforcement of the full range of labor principles recognized by the accord. If the parties were to interpret the NAALC with an eye toward ensuring that problems with enforcement are remedied, strong cases should lead to findings of non-compliance, and ministerial consultations should lead to agreements that resolve the problems identified. At the same time, the reasoning contained in NAO reports should contribute to an understanding of the NAALC’s obligation to enforce labor laws.

Cases submitted under the NAALC have received a wide variety of responses from the NAOs. The U.S. NAO has occasionally failed in its reports to address difficult enforcement issues, while at other times its strong findings related to enforcement have been followed by weak ministerial agreements. The Mexican NAO has refused in all but its first case to do more than repeat the enforcement-related allegations made by petitioners. Its failure to draw conclusions or link its requests for ministerial consultations with specific goals for improving enforcement problems has weakened the NAALC in practice.

The Mexican NAO has suggested, in fact, that the NAOs are not empowered to conduct in-depth analyses of the failure to enforce labor law. This, it has asserted, is the purview of an Evaluation Committee of Experts. This interpretation short-circuits the NAALC, because lowest-tier labor rights—freedom of association, the right to bargain collectively, and the right to strike—cannot be considered by an ECE and, therefore, could never be analyzed in depth if the Mexican NAO were correct in its interpretation. Further, a party can only request the appointment of an ECE after ministerial consultations fail. For ministerial consultations to reach such an impasse, however, the complaining government, not an ECE, would have had to have done an in depth analysis of an enforcement issue.

---

<sup>97</sup> Letter from Irasema Garza, secretary, U.S. NAO, to Larry Fedechko, president, Organization of Rural Route Mail Carriers, February 1, 1999.

<sup>98</sup> NAALC, Article 16(3).

Canada's single case report was strong in criticizing labor law enforcement in Mexico; at this writing, the two governments have not concluded ministerial consultations.

### **Freedom of Association and Protection of the Right to Organize**

*The right of workers exercised freely and without impediment to establish and join organizations of their own choosing to further and defend their interests.*<sup>99</sup>

By far, more NAALC cases have included allegations of violations of the right to freedom of association and the right to organize than any other labor principle recognized by the accord: fifteen out of twenty-three. In the NAALC context, ten cases have been aired in which Mexico has been accused of failing to effectively enforce its laws protecting freedom of association and the right to organize. Three cases have alleged U.S. failure to enforce this provision of the NAALC, and two accused Canada of non-enforcement.

Freedom of association rights are crucial to the protection of other labor rights, because they underpin workers' rights to defend their employment-related interests. A large body of international jurisprudence exists in this subject area.<sup>100</sup> The importance of this right has contributed to criticism that its violation under the NAALC cannot lead to any enforceable remedy.

### ***Complaints against Mexico***

The U.S. NAO has heard nine of the ten cases against Mexico. Overall, the agency has demonstrated an openness toward the detailed investigation of cases, seeking and receiving information on complaints from an array of sources from within and outside of governments. However, this openness has not been matched by consistent strength in reporting, issuing findings, and making recommendations. Further, ministerial consultations and the agreements that have stemmed from them, and follow-up to these important steps, have tended to be inconsistent. As a result, strong actions taken during one phase, when they have occurred, have been rendered far less important by subsequent weak actions.

The failure of ministerial consultations to follow up on good U.S. NAO information gathering with solid work programs to ameliorate problems was clear in the Sony case, for instance. The U.S. NAO called for ministerial consultations on the case, "Given that serious questions are raised herein concerning the workers' ability to obtain recognition of an independent union through the registration process with the local [labor tribunal] . . . ."<sup>101</sup> This finding came in response to information documenting company intimidation of union members, including the dismissal or demotion of union activists. Further, according to information provided by petitioners, the labor tribunal condoned unfair voting to the detriment of the workers.

The ministerial agreement, however, called for several conferences to be held at which representatives of Canada, Mexico, and the United States would exchange views on union registration systems in their own countries. In a report on those meetings, the U.S. NAO concluded that the mechanisms in Mexico designed to enforce labor law related to union registration demonstrated "weaknesses and inconsistencies."<sup>102</sup> Nonetheless, nothing was ever done to address those weaknesses and inconsistencies.

---

<sup>99</sup> The italicized descriptions of the NAALC labor principles in this chapter are drawn from the NAALC's own definitions. NAALC, Annex 1.

<sup>100</sup> The ILO maintains a freedom of association committee, which is the authoritative source for interpreting ILO Convention 87 on Freedom of Association and the Right to Organize, and has published tomes on the committee's findings. See, for example, International Labor Office, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (Geneva: International Labor Office, 1996).

<sup>101</sup> U.S. NAO, "Public Report of Review, NAO Submission No. 940003," April 11, 1995, p. 32.

<sup>102</sup> U.S. NAO, "Report on Ministerial Consultations on NAO Submission No. 940003," June 7, 1996, p. 14.

In the Sony case, though, the U.S. NAO rightly pointed to a set of important but limited secondary achievements resulting from the process: “The dialogue which is taking place on this sensitive labor issue is a positive development. The knowledge which has been gained by each government and disseminated to the public is a critical stepping stone towards understanding the ways in which labor law enforcement can be improved in each country.”<sup>103</sup>

In the Fishing Ministry case, the U.S. NAO also gathered detailed information from petitioners and the Mexican government regarding the allegation that Mexican law violated freedom of association standards by limiting to one the number of unions that can exist in any government ministry. In accepting this issue for review, the U.S. NAO showed admirable breadth of criteria, given that the Industrial Relations Committee of the International Council for International Business argued that the NAALC presupposed the validity of domestic laws and that the U.S. NAO should not consider issues that challenged the content of domestic standards.<sup>104</sup>

The petition also argued that Mexico was in violation of ILO freedom of association standards, and that because such standards were considered part of Mexico’s domestic law, the ILO standards should be considered by the U.S. NAO as part of the domestic labor law violated by the country under the terms of the NAALC. Finally, petitioners argued that authorities failed to enforce the freedom of association rights of the workers who tried to form the union, showing that workers who did so were denied permission to organize while a pro-government union was permitted to do so, or were threatened with retaliation for their union work. Even when the workers finally won in court the right to form a union, they were not permitted to function as a formal union.

The U.S. NAO’s report on the case, however, contained no analysis of the petitioners’ allegations that union members were unable to organize or enjoy the rights they eventually won in court. Further, it did not address the claim that the government’s failure to recognize the court victory constituted the failure to effectively enforce freedom of association law. Instead, the U.S. NAO focused on the fact that the union had had access to courts and eventually won the right to register as a union, as if the formal processes were tantamount to effective enforcement. The U.S. NAO rejected a request by petitioners to review the case again.

With respect to the argument that ILO standards should be considered part of Mexico’s domestic labor law, the U.S. NAO said it found contrary opinions in Mexico on the topic. On this issue alone the U.S. NAO called for ministerial consultations, which led to a conference on the relationship between international and domestic labor law in Baltimore, Maryland.<sup>105</sup> At this, only government-appointed speakers were invited to present their views, and no commitment to act upon any information given or received at the conference was undertaken. Even to the extent that the U.S. NAO could have made progress in clarifying the NAALC’s reach by pushing for consensus or debate on the issue of international standards as domestic law, through its weak ministerial agreement, it failed to do so.

Interestingly, this case led the Clinton Administration to claim that the NAALC had led to positive freedom of association results. “[The] submission process has led to concrete results in several cases,” the Administration asserted in a 1997 study on NAFTA, “particularly with respect to ensuring freedom of association.”<sup>106</sup> The Administration made a similar claim in 1999.<sup>107</sup> The Administration had in mind the fact that the union won the legal right to form as a second union within the Mexican government ministry. “This union’s predicament had been reviewed and reported on previously by the U.S. NAO. This decision and the Supreme

---

<sup>103</sup> Ibid., p 7.

<sup>104</sup> U.S. NAO, “Public Report of Review, NAO Submission 9601,” January 27, 1997, p. 13.

<sup>105</sup> After determining that the conference would offer no opportunity to resolve the issues described in the submission, Human Rights Watch, a petitioner in the case, did not attend the conference.

<sup>106</sup> Office of the U.S. Trade Representative, “Study on the Operation and Effects,” p. 95.

<sup>107</sup> Office of the U.S. Trade Representative, “NAFTA Works for America,” p. 19.

Court decision [permitting more than one union to organize in a ministry] signaled a departure from a significant restriction on the ability to organize in the public sector, existing since 1960.”<sup>108</sup>

The U.S. government correctly pointed out that a fundamental victory for freedom of association took place when the Mexican Supreme Court ruled that Mexican labor law violated freedom of association standards by limiting to one the number of unions that could exist in any government ministry.<sup>109</sup> Claiming credit for it through the NAALC, however, far overstates the role played by the U.S. NAO, particularly since the United States did not so much as criticize the law or seek to engage the Mexican government to amend it.

Some benefit to the union did occur, however. “We didn’t derive direct benefit from the case,” according to Roberto Tooms, the secretary general of the union at the time the case was before the U.S. NAO. “The benefit was political. It helped push the labor tribunals to give us favorable responses, and it showed the workers that it was not useless to continue fighting.”<sup>110</sup> Further, the legal road blazed by the union—establishing the precedent that more than one union can exist in a ministry—has been followed by workers in other government sectors, including the air traffic controllers and workers in the agency that handles tax revenues.

Unlike its findings in the Fishing Ministry case, the U.S. NAO identified serious freedom of association problems in the Han Young and Echlin cases. In the former, the NAO found, “The workers in question have expressed their union preference through two representation elections, strikes, and fasts, and in the face of determined opposition from the company, including intimidation, threats, and dismissals.” The U.S. NAO went on to note the link between labor tribunals and freedom of association: “The placement, by the Tijuana CAB, of obstacles to the ability of workers to exercise their right to freedom of association, through the application of inconsistent and imprecise criteria and standards for union registration and for determining union representation, is not consistent with Mexico’s obligation to effectively enforce its labor laws on freedom of association in accordance with Article 3 of the NAALC.”<sup>111</sup>

In the Echlin case, the U.S. NAO determined:

a group of workers who attempted to exercise their right to freedom of association were subjected to retaliation by their employer and the established union in the workplace, including threats of physical harm and dismissal. They were required to vote for union representation in an atmosphere of fear and intimidation and to cast open ballots in the presence of representatives of the contending unions, including the one threatening reprisals and dismissals; the representative of a management that had clearly expressed its union preferences and had already retaliated against workers for their union activities; and before a large number of aggressively active and boisterous individuals who were not employees but were allowed in by the company.<sup>112</sup>

In both cases, the U.S. NAO recommended ministerial consultations, and an agreement was signed with Mexico in May 2000 (see Appendix I). With respect to the freedom of association issues raised in the cases, the

---

<sup>108</sup> Ibid.

<sup>109</sup> As important as this advance was, however, it was limited by the fact that Mexican appeals court decisions are valid only for the case in which the decision was made; it did not create binding precedent for other unions. It was further limited by the fact that Mexican labor law does not define the rights of second unions in government ministries, since such unions had always been prohibited. This gap in the law is what allowed SEMARNAP to refuse to honor the registration obtained by the union.

<sup>110</sup> Human Rights Watch telephone interview with Roberto Tooms, former secretary general of SIDT-SEMARNAP, July 21, 2000.

<sup>111</sup> U.S. NAO, “Public Report of Review of NAO Submission No. 9702,” April 28, 1998, available on the Internet at <http://www2.dol.gov/dol/ilab/public/media/reports/nao/pubrep9702.htm#vi>.

<sup>112</sup> U.S. NAO, “Public Report of Review of NAO Submission No. 9703,” pp. 69-70.

Mexican government committed itself to “promote the use of eligible voter lists and secret ballot elections in disputes over the right to hold the collective bargaining contract,” and agreed to hold a public seminar in Tijuana on freedom of association issues. The link between labor tribunals and freedom of association uncovered in the Han Young case would be addressed through a public seminar in Mexico at which labor tribunal law and practice would be discussed by representatives of the three state parties to the NAALC.

The Han Young union’s lawyer dismissed the practical state-level impact of the government’s promise to promote secret ballots. “Here, we still vote by voice in front of everyone,” he told Human Rights Watch.<sup>113</sup> The public seminar in Tijuana, held in June 2000, was the scene of a violent scuffle between members of contending unions from the Han Young plant. The session on labor tribunals had not been held at this writing, but the mere discussion of law and practice held little hope of leading to resolution of the problems identified by the U.S. NAO.

### ***Complaints against the United States***

Three freedom of association cases have been filed in Mexico, alleging violations of that right in the United States. The first, filed in February 1995, related to the closure by Sprint of a San Francisco-based subsidiary of the corporation. In its May 1995 report on the case, the Mexican NAO expressed concern about the “effectiveness of certain measures intended to guaranty” freedom of association and the right of workers to organize in the United States, and recommended ministerial consultations.<sup>114</sup>

Based on the report, the Mexicans sought ministerial consultations, but the content of the resulting ministerial agreement was weak (see Appendix I). The U.S. Secretary of Labor agreed to keep his Mexican counterpart informed on the legal proceedings in the United States about the plant’s closure, and the NAALC Secretariat would be instructed to study the effects of sudden plant closings on the principle of freedom of association and the right of workers to organize in the three NAALC countries. In addition, the U.S. Department of Labor would hold a public forum in San Francisco at which any interested party could publicly express an opinion on that subject.<sup>115</sup>

The petitioners in the case found the Secretariat’s report on plant closings far from helpful: “The report failed to address even the most basic issues regarding plant closings and worker’s rights. In fact, the [Sprint] case was not even mentioned among the examples cited in the report. The report was essentially a summary of existing labor law, an overly rosy view of how that law is administered, especially in the U.S., and recommendations that address bureaucratic issues, not the real needs of workers.”<sup>116</sup>

In the Solec case, petitioners accused the company of using tactics such as threats of firing union activists to counter an organizing effort, and alleged failure by the United States to uphold its freedom of association law because it did not stop this. The ministerial agreement between the Mexican and U.S. governments did not address the problems in the Solec case. The failure of the Mexican NAO to explain its reasoning, or to include findings and conclusions, made it impossible to know whether the ministerial agreement’s weakness stemmed from a belief that the allegations were without merit, or if it indicated that the state parties simply did not wish to address the problems highlighted by the petitioners.

---

<sup>113</sup> Human Rights Watch telephone interview with José Angel Peñaflor, January 3, 2001.

<sup>114</sup> Mexican NAO, “Report on Review of Public Submission 9501/NAOMEX.”

<sup>115</sup> U.S. NAO, “Agreement Reached by the U.S. and Mexico. Ministerial Consultations--Submission 9501 (Sprint Case) Agreements on Implementation,” December 15, 1995. The agreement was not formally signed until February 13, 1996.

<sup>116</sup> Morton Bahr, comments reproduced in Commission for Labor Cooperation, “Review of the North American Agreement on Labor Cooperation.”



In the Washington State apples case, petitioners alleged problems including illegal threats of firing and plant closings, bribes, and pressuring workers to wear anti-union buttons.<sup>117</sup> The apples case also raised important questions regarding enforcement of the right to freedom of association, because it carefully reviewed violations of this right in the context of U.S. laws and enforcement mechanisms. The case argued that NLRB budget cuts hampered the work of the enforcement agency, while unnecessary complications and unjustified delays effectively nullified the freedom of association protections that exist for agricultural workers: “From the beginning, employers know that if workers win the case in the end, the remedies and settlements are almost insignificant.”<sup>118</sup>

The Mexican NAO should have used this opportunity to explore the complex relationship between law, enforcement, and enjoyment of labor rights. Such was not the result, however. The Mexican NAO passed no opinion on the allegations made by petitioners, and, with respect to freedom of association, the ministerial agreement focused only on holding outreach sessions with migrant workers.

### **Right to Bargain Collectively**

*The protection of the right of organized workers to freely engage in collective bargaining on matters concerning the terms and conditions of employment.*

While the NAALC has led to substantial detail and analysis related to freedom of association, the right to bargain collectively has led to only cursory evaluation under the accord. Six NAALC cases have been filed alleging violations of the right to bargain collectively: two accused the United States of failing to enforce its laws on the subject, three focused on Mexico, and one related to Canada.

The issue in Mexico is important, because of the prevalence of “protection contracts,” whereby a pro-company union signs a contract with employers without the input or knowledge of workers. Attempts to organize or bargain collectively are often frustrated when workers find out that a contract about which they knew nothing already exists. In a report issued in the Executive Air Transport (TAESA) case in 2000, the U.S. NAO recognized that the problem of unrepresentative collective bargaining agreements “is even more significant given the historical practice in Mexico of collective bargaining agreements being signed with employers at the inception of the company and routinely renewed.”<sup>119</sup>

An unrepresentative bargaining agreement was precisely the issue in the Han Young case. Workers who tried to organize at the auto parts factory in 1997 had to fight against a pro-management union that had never represented them in the past. “As of April 1997,” the petitioners wrote, “the [existing union] had never held a meeting with workers, never shown workers a copy of the contract with Han Young, and did not make its existence as contractual representative known to the workers.”<sup>120</sup> The workers eventually obtained the collective bargaining contract, but doing so was far more difficult than it should have been under the law. As the U.S. NAO found, “This review indicates that a group of 120 workers at Han Young obtained union representation only after extensive litigation, intervention by the Mexican Federal labor authorities, two representation elections which they won, international public attention, and extensive media coverage.”<sup>121</sup>

---

<sup>117</sup> STIMAHCS, et al., “Violations of the NALCA Labor Principles and Obligations in the Washington State Apple Industry,” pp. 10-11.

<sup>118</sup> Ibid., pp. 11-12.

<sup>119</sup> U.S. NAO, “Public Report of Review of NAO Submission No. 9901,” July 7, 2000, p. 72.

<sup>120</sup> International Labor Rights Fund, et al., “The Case of Han Young,” p. 7.

<sup>121</sup> U.S. NAO, “Public Report of Review of NAO Submission No. 9702.”

Despite these victories, the workers remain unable to exercise their collective bargaining rights. When the factory refused to honor the contract, the workers went on strike. Then, in February 1999, the factory was sold and the striking workers replaced, according to the union's legal representative.<sup>122</sup>

The U.S. NAO recommended ministerial consultations to discuss this and other issues with the Mexican government. The outcome of the consultations, concluded in May 2000, included a potentially important commitment from the Mexican Department of Labor to promote collective bargaining rights. The agreement, reproduced in Appendix I, stated that the department "will continue promoting the registry of collective bargaining contracts in conformity with established labor legislation. At the same time, efforts will be made to promote that workers be provided information pertaining to collective bargaining agreements existing in their place of employment and to promote the use of eligible voter lists and secret ballot elections in disputes over the right to hold the collective bargaining contract."

This potentially important outcome has been hampered by a lack of follow-up at the local level. None of the collective bargaining activities promised under the agreement have been carried out on a local state level, according to the Han Young union's lawyer.<sup>123</sup> Although some federal initiatives are said to be in progress, most businesses are under the jurisdiction of local state labor tribunals; therefore, their workers would not benefit from federal action.<sup>124</sup>

In the TAESA case, the U.S. NAO did not ultimately determine that any collective bargaining violations had taken place in Mexico. Petitioners had noted that flight attendants at TAESA wanted the Association of Flight Attendants of Mexico (ASSA) to represent their specific interests related to safety, inadequate training, low wages, and problems related to non-payment of financial obligations including overtime. However, an airline-wide collective bargaining contract already existed.

The U.S. NAO determined that Mexican labor law does not specify exactly how craft unions can be formed when a company-wide agreement already exists. Nonetheless, the U.S. NAO did suggest that existing Mexican law and its interpretation may not meet the NAALC's standards related to collective bargaining: "Further information would be helpful in determining how the precedent applied in this case is consistent with the [Federal Labor Law] provisions recognizing craft union rights and how Mexican law provides for a craft union to seek representation of workers in its craft where a company-wide collective labor agreement already exists."<sup>125</sup> The most that could come from this provision of the ministerial agreement would be information, as the Mexican government did not agree to take any action to remedy any problems related to collective bargaining.

Two cases lodged in Mexico raised collective bargaining issues in the United States—the cases of Solec and the Washington State apple industry. In the former, workers at the Carson, California, plant argued that their ability to bargain collectively was irreparably harmed by slipshod NLRB actions—including unjustified delays in overseeing a union election and ballot count—that allowed the company the time to engage in abusive anti-union tactics.<sup>126</sup> The petition accused the NLRB of being bought off by the company.

The Mexican NAO's report on the case did not address the issue of collective bargaining, but it did ask that this issue be included in ministerial consultations. The ministerial agreement signed on May 18, 2000, called for the U.S. government to provide additional information to Mexican authorities on issues related to collective

---

<sup>122</sup> Human Rights Watch telephone interview with José Angel Peñaflor.

<sup>123</sup> Ibid.

<sup>124</sup> For further information on this aspect of Mexican labor law, see Commission for Labor Cooperation, *Labor Relations Law in North America* (Washington, D.C.: Commission for Labor Cooperation, 2000), pp. 98-100.

<sup>125</sup> U.S. NAO, "Public Report of Review of NAO Submission No. 9901," p. 72.

<sup>126</sup> Oil, Chemical and Atomic Workers International Union, Local 1-675, et al., "Comunicación Pública a la Oficina Administrativa Nacional," April 9, 1998, p. 10.

bargaining, but the public initiatives planned in the agreement all focused on migrant workers, in response to other cases filed against the United States. In the end, this complaint led to no substantive programming on the issue of collective bargaining in the context of Solec—partly because the Mexican NAO did not address the issue in its report, and partly because the governments did not address it in their agreement in any way beyond providing information from one government to the other.

In the apples case, the petitioners argued, “Rather than accepting the will of the majority to join the union and be predisposed to negotiate labor conditions with the union, the companies engaged in a campaign of threats, intimidation, coercion and discrimination to overrule the majority obtained by the union, and to subvert the workers’ rights to freely associate, organize and engage in collective bargaining.”<sup>127</sup> Petitioners identified structural problems with enforcement mechanisms in the United States that permitted such problems to continue.

The Mexican NAO report on the case limited itself to repeating the allegations of the petitioners and listing the NAALC principles that may have been violated. Nonetheless, the Mexican NAO sought ministerial consultations on issues raised by the petitioners, including collective bargaining, and recommended that collective bargaining be included in the ministerial consultations. The ministerial agreement, signed in May 2000, included multiple opportunities for educating migrant workers about their rights but nothing designed to address the structural problems with enforcement of labor laws identified by the petitioners.

Two petitions alleging violations of the right to bargain collectively have been rejected under the NAALC. The first, filed in the United States in 1998, accused the Canadian government of violating this right when the Canadian Parliament amended the Canadian Post Corporation Act in 1985 to define rural letter carriers as independent contractors, thereby excluding them from the act’s protection of freedom of association and the right to bargain collectively.<sup>128</sup> The U.S. NAO did not provide detailed reasoning for rejecting the petition.

The Canadian government refused to hear a collective bargaining case lodged against the United States in 1999.<sup>129</sup> Petitioners argued in their April 1999 brief that the United States had violated its obligation under article 3 to encourage labor-management cooperation.<sup>130</sup> The Canadian NAO received information on the case from the U.S. NAO and the AFL-CIO, then determined that the information at its disposal did “not indicate a failure to comply with the obligations of the Agreement.”<sup>131</sup> Lacking any formal appeals procedure, the Canadian NAO did not accept the petitioners’ request for reconsideration.

It is impossible to apply substantive standards to the Canadian NAO’s refusal to review the case, because no such standards exist. Petitioners, however, raised an interesting point about the scope of the NAALC’s reach into issues related to employee-management relations. The preamble to the accord notes that the signatories resolved to strengthen labor-management relations through greater dialogue and to encourage workers and

---

<sup>127</sup> STIMAHCS, et al., “Violations of NAALC Labor Principles and Obligations in the Washington State Apple Industry,” p. 6.

<sup>128</sup> Organization of Rural Route Mail Couriers, et al., “Public Communication on Labor Law Matter Arising in Canada,” December 2, 1998, pp. 5-6.

<sup>129</sup> Labor Policy Association and EFCO Corporation, “Public Communication/Submission on Labor Law Matters Arising in the United States Before the Canadian National Administrative Office Under the North American Agreement on Labor Cooperation,” April 14, 1999. In June 1999 the Canadian NAO declined to review the case.

<sup>130</sup> Article 3 of the NAALC requires the signatories to promote compliance with their labor law by, among other things, “encouraging the establishment of worker-management committees to address labor regulation in the workplace.” The U.S. National Labor Relations Act prohibits employer domination of labor organizations, and the National Labor Relations Board had ruled that management-worker groups at EFCO were sponsored and dominated by management, not workers. See Lance Compa, “NAFTA’s Social Dimension,” p. 30.

<sup>131</sup> Letter from Daniel Yager, Senior Vice-President and General Counsel of LPA, to May Morpaw, Director of the Office of Inter-American Labour Cooperation of Canada, June 15, 1999.

employers to work together in maintaining “a progressive, fair, safe and healthy working environment.”<sup>132</sup> Petitioners had raised concern about NLRB rulings penalizing a company for fostering worker-management committees on the grounds that management dominated the committees. The NAALC permits a review of any issue relevant to the accord, whether or not a violation of NAALC obligations took place; the Canadian NAO thereby missed an opportunity to explore new territory.

### **Right to Strike**

*The protection of the right of workers to strike in order to defend their collective interests.*

Only one case has alleged violation of the right to strike, and it was not accepted for review by the U.S. NAO. In the case, the Association of Flight Attendants (AFA) of the United States filed the case on behalf of Mexican counterparts. When flight attendants at AeroMéxico went on strike in 1998, the Mexican government intervened by executive order to take over the airline and end the strike. Authorities argued national security concerns in taking their action.

The U.S. NAO declined to hear the case, arguing that the takeover was carried out according to Mexican law and that, “Further, subsequent to the issuance of the executive order, the flight attendants returned to work and negotiated an agreement with the company settling the strike.”<sup>133</sup> Without any further analysis, the U.S. NAO determined that hearing the case would not further the interests of the NAALC and would not, therefore, be the subject of review.

In responding to the NAO, the Association of Flight Attendants alleged that the agreement to end the strike was negotiated under duress and after the workers had been forced to give up their right to strike.<sup>134</sup> “We never questioned the validity of President Zedillo’s executive order under any of the various instruments available to the president,” the AFA complained. “What we asked the NAO to review was whether in the exercise of such undeniable constitutional powers, the President of Mexico caused injury to Mexican labor laws; internationally-accepted labor standards and conventions that protect the Mexican workers’ right to strike.”

In response to the AFA, the U.S. NAO said that it had sought information from the Mexican government and U.S. embassy, and worked with the office of the U.S. Solicitor General to “assure that relevant legal issues were appropriately considered.”<sup>135</sup> Information from the AFA and its Mexican counterparts was not sought after the petition was filed, although the U.S. NAO pointed out that it had been in contact with representatives of both prior to the submission of the complaint.<sup>136</sup> Finally, the U.S. NAO reminded the AFA that the secretary of the NAO has discretion whether to accept or decline a submission and that no appeals process exists.

The U.S. NAO did promise in its original rejection of the case that it would “undertake a research project to evaluate how the three NAALC countries reconcile the issue of the right to strike with national interests of safety, security, and general welfare.”<sup>137</sup> The fact that the U.S. NAO would consider the subject worthy of a special report belies the argument that nothing was to be gained from taking this issue on for NAO review. In any case, at this writing, no special report had been published.

---

<sup>132</sup> NAALC, Preamble.

<sup>133</sup> Letter from Irasema Garza, secretary of the NAO, to Patricia Friend, International President of the Association of Flight Attendants, October 19, 1998.

<sup>134</sup> Letter from Patricia Friend to Irasema Garza, November 9, 1998.

<sup>135</sup> Letter from Irasema Garza to Patricia Friend, December 21, 1998.

<sup>136</sup> Ibid.

<sup>137</sup> U.S. NAO, “Status of Submissions,” May 19, 2000. Available on the Internet at [www2.dol.gov/dol/ilabpublic/programs/nao/status.htm](http://www2.dol.gov/dol/ilabpublic/programs/nao/status.htm).

### **Prohibition of Forced Labor**

*The prohibition and suppression of all forms of forced or compulsory labor, except for types of compulsory work generally considered acceptable by the Parties, such as compulsory military service, certain civic obligations, prison labor not for private purposes and work exacted in cases of emergency.*

No cases have been filed using this article.

### **Compensation in Cases of Occupational Injuries and Illnesses**

*The establishment of a system providing benefits and compensation to workers or their dependents in cases of occupational injuries, accidents or fatalities arising out of, linked with or occurring in the course of employment.*

Three NAALC complaints have explored this principle: the Washington State apples and DeCoster Egg Farm cases, reviewed by the Mexican NAO, and the Canadian Post case, which the U.S. NAO did not accept for review.

In the Washington State apples case, the petitioners alleged, “Government officials in Washington State discourage workers from claiming compensation for pesticide-related illnesses, and reject such claims at a rate higher than that of other claims.”<sup>138</sup> In the DeCoster case, the petitioners made only a passing reference to the problem.

In its reporting, the Mexican NAO subsumed the issue of compensation under the rubric of safety and health, even though that labor principle stands alone within the NAALC. When it asked for ministerial consultations, the Mexican NAO did not raise the issue of workers’ compensation among the matters it wished the consultations to address.<sup>139</sup> Despite these weaknesses in reporting, the ministerial agreement included the topic among those to be addressed in public outreach sessions in Washington State and Maine.

The ministerial agreement, combining consultations on the DeCoster, Washington apples, and Solec cases, provided potentially important opportunities for workers to learn about their rights and express their views, but it contained nothing to address the central concern of the petitioners on the issue of compensation: that employers discourage workers from seeking compensation, and that authorities disproportionately reject compensation claims.

### **Protection of Migrant Labor**

*Providing migrant workers in a Party’s territory with the same legal protection as the Party’s nationals in respect of working conditions.*

The protection of migrant workers has arisen in four cases brought against the United States. Other countries have not been accused of violating this standard in the context of the NAALC.

In the Washington State apples case, petitioners argued: “In many areas U.S. labor law does not provide migrant workers on its territory the same legal protection as to its nationals, with respect to work conditions.”<sup>140</sup> For instance, according to the petition, benefits for non-migrants under workers’ compensation law are better than

---

<sup>138</sup> STIMAHCS, et al., “Violations of NAALC Labor Principles and Obligations in the Washington State Apple Industry,” p. 22.

<sup>139</sup> Mexican NAO, “Review Reports/Public Notice Mex 9802,” (official translation), August 1999, p. 13.

<sup>140</sup> STIMAHCS, et al., “Violations of NAALC Labor Principles and Obligations in the Washington State Apple Industry,” p. 23.

they are for migrants. Other areas where unequal protections exist, they argued, include housing, medical insurance, temporary foreign agricultural workers, and family reunification.<sup>141</sup>

The Mexican NAO report did not take a position on the allegations, and although the agency called for ministerial consultations on the issue of the protection of migrants, the ministerial agreement contained nothing to address the structural problems that the petitioners had identified in U.S. law. Instead, the agreement rested on providing better information to workers about their rights such as they are.

The Mexican NAO sought ministerial consultations to learn about the steps being taken by the United States to ensure that the rights of Mexican migrant agricultural workers are being respected; public education initiatives related to a series of labor rights issues were included in the agreement.

Petitioners in the Yale case, regarding the memorandum of understanding between the Department of Labor and Immigration and Naturalization Service, argued that the United States government failed to enforce statutes to protect migrant workers. According to the petitioners, Department of Labor inspectors who received complaints about minimum wage and overtime violations under the Fair Labor Standards Act had to determine the legal status of immigrants. If the workers were undocumented, their cases were turned over to the INS, which could then commence proceedings to remove them from the country. Therefore, the workers were subjected to deportation as a result of having sought to have their labor rights enforced.<sup>142</sup> The revised MOU, drafted in response to the case filing, prohibits Department of Labor inspectors from providing information to the INS when workers seek to have their rights enforced, but it permits them to do so when they come upon relevant immigration information through other means.

#### **Elimination of Employment Discrimination**

*Elimination of employment discrimination on such grounds as race, religion, age, sex or other grounds, subject to certain reasonable exceptions, such as, where applicable, bona fide occupational requirements or qualifications and established practices or rules governing retirement ages, and special measures of protection or assistance for particular groups designed to take into account the effects of discrimination.*

Four cases have focused on employment discrimination, three alleging violations by the United States and one accusing Mexico of failing to enforce its laws on the subject. The first case to raise the issue was filed in 1997 by Human Rights Watch, the International Labor Rights Fund, and Mexico's National Association of Democratic Lawyers. It documented a pattern of pregnancy-based sex discrimination in *maquiladoras*. Female job applicants were required to undergo pregnancy tests as a way for prospective employers to deny jobs to pregnant women, and workers who became pregnant while on the job were pressured to leave. Although the Mexican government argued throughout the NAALC process that pregnancy testing did not violate Mexican law, eventually Mexican authorities publicly stated that such testing in fact did breach domestic standards.<sup>143</sup>

The government has been done to promote the policy shift. Indeed, in public seminars that grew out of the ministerial agreements in the case, Mexican authorities produced documents on women's labor rights without

---

<sup>141</sup> Ibid., pp. 23-26.

<sup>142</sup> This case was filed in 1998 in both Mexico (Mexican NAO Case No. 9804) and Canada (Canadian NAO Case No. 98-2).

<sup>143</sup> Letter from Alexis Herman, secretary of labor, to José Miguel Vivanco, executive director of the Americas Division of Human Rights Watch, May 5, 1999. Letter from Irasema Garza, secretary of the U.S. NAO, to José Miguel Vivanco, August 30, 1999. Describing statements made at a conference in Mexico sponsored as part of the ministerial agreement on the case, Herman wrote, "In particular, the Mexican officials explained the view that employment discrimination, both pre- and post-hire, on the basis of gender and pregnancy are illegal under Mexican law and would not be tolerated."

addressing the issue of pregnancy-based sex discrimination. Further, Mexican officials have used NAALC-related opportunities, such as seminars, to spread misinformation. In one such example, government-produced pamphlets stated that women workers were required to inform their employers of their pregnancy status. In another, the government contended that the labor code allowed for post-hire pregnancy testing of working women when that testing was intended to protect the well-being of the woman worker or her fetus.

Nonetheless, the NAALC case has had secondary benefits. “The NAALC complaint process validated activists and women workers in their own fight to bring attention to this problem and to seek to stop it,” according to LaShawn Jefferson, deputy director of the Women’s Rights Division of Human Rights Watch and the researcher who documented the discrimination. In addition, the case forced the hand of the United States, Jefferson notes, comparing the attitude of officials before and after the case was filed.

Three cases have alleged racial discrimination in the United States: Solec, Washington State apples, and DeCoster Egg Farm. True to the pattern developed by the Mexican NAO, which heard the complaints, public reports on the allegations were limited to repeating the petitioners’ claims and listing the NAALC principles that, if the claims were true, would have been violated. The single ministerial agreement reached covering the three cases provides for multiple public outreach sessions where issues including discrimination were to be discussed. The United States would be able to satisfy the terms of the agreement simply by holding the sessions, regardless of their content. Without understanding how the Mexican NAO viewed the problem to begin with, it is impossible to determine whether the U.S. work program addresses what the Mexican authorities deemed worthy of holding consultations.

#### **Equal Pay for Women and Men**

*Equal wages for women and men by applying the principle of equal pay for equal work in the same establishment.*

No cases have been filed using this article.

#### **Labor Protections for Children and Young Persons**

*The establishment of restrictions on the employment of children and young persons that may vary taking into consideration relevant factors likely to jeopardize the full physical, mental and moral development of young persons, including schooling and safety requirements.*

The only case alleging violations of law related to children was closed by the U.S. NAO for lack of information from the petitioners. The case had been opened by the agency in 1998 after the U.S. labor secretary forwarded a complaint filed by the Florida Tomato Exchange. The Exchange had sought an investigation led by the secretary’s office after the secretary announced that it would be carrying out an investigation into child labor on fruit and vegetable farms in the United States. The Exchange was interested in a Department of Labor investigation similar to the one carried out in the United States, not an NAO case that they feared would have no effect on child labor in Mexico’s tomato industry.<sup>144</sup> The U.S. NAO closed the case when the Florida Tomato Exchange did not respond to requests for further information from the U.S. NAO.

---

<sup>144</sup> Human Rights Watch telephone interview with John Himmelberg.

### **Minimum Employment Standards**

*The establishment of minimum employment standards, such as minimum wages and overtime pay, for wage earners, including those not covered by collective agreements.*

Minimum employment standards have been the subject of eight cases filed under the NAALC. These rights include minimum wages and overtime pay for wage earners, including those not covered by collective bargaining agreements.

The first case to raise these concerns was lodged with the U.S. NAO in 1994. Petitioners accused a General Electric plant in Mexico's Tamaulipas State of failing to pay overtime, among other abuses that included firing workers who tried to organize a union. Although the U.S. NAO's case report notes that this accusation was made, it fails to address it in any way in its findings.<sup>145</sup> The U.S. NAO did not recommend ministerial consultations in the case. A second case alleging violations of this NAALC principle by Mexico was withdrawn by the petitioners in protest over the way the U.S. NAO handled an earlier case involving General Electric and Honeywell; the withdrawn case related to a General Electric subsidiary.

The U.S. NAO again addressed this issue several years later, when it considered violations of NAALC minimum employment standards in the TAESA case. Petitioners argued that the airline had forced flight attendants to work in excess of maximum flying time limits, failed to pay overtime and Sunday and holiday premiums, and neglected to pay payroll taxes needed for workers to receive benefits from the government.<sup>146</sup> Even though the U.S. NAO determined that the petitioners submitted "credible evidence of disturbing neglect by the company" related to overtime, the Mexican NAO did not provide its U.S. counterpart with information that would allow a conclusion to be drawn regarding the government's handling of the issue.<sup>147</sup> The U.S. NAO did not, therefore, reach a conclusion.

Both the Sony and TAESA cases highlight one of the weaknesses of the NAALC: the NAOs can arbitrarily ignore issues brought to their attention. In the Sony case, the U.S. NAO simply neglected to comment on this aspect of the petition. In the TAESA case, Mexico's failure to respond to the U.S. NAO caused the U.S. agency's inability to come to a conclusion on the subject.

In the TAESA case, the U.S. NAO recommended that the U.S. secretary of labor engage in ministerial consultations, but did not specify what issues should be included. At this writing, no agreement had been reached. However, the U.S. NAO noted that it continued to seek information on the minimum employment standards issues raised in the case.<sup>148</sup>

Two cases have been lodged in Mexico that allege violation of this NAALC principle in the United States—the Solec and Washington apples cases. In the Solec case, petitioners argued that U.S. authorities knew about violations of law related to salary and overtime but did nothing about it.<sup>149</sup> Without reaching a finding on the allegation, the Mexican NAO requested ministerial consultations on the issue. As with other aspects of the Solec case, however, only a government-to-government exchange of information on the issue will come from the ministerial agreement.

---

<sup>145</sup> U.S. NAO, "Public Report of Review, NAO Submission No. 940001 and NAO Submission No. 940002," October 12, 1994, p. 6.

<sup>146</sup> Association of Flight Attendants, "Public Communication to the United States National Administrative Office/Executive Air Transport, Inc. (TAESA)," November 10, 1999, pp. 11-12.

<sup>147</sup> U.S. NAO, "Public Report of Review of NAO Submission No. 9901," pp. 74-75.

<sup>148</sup> *Ibid.*, p. 75.

<sup>149</sup> Mexican NAO, "Informe de Revisión, Comunicación Pública Mex 9801," August 1999. Available at [www2.dol.gov/dol/ilab/public/media/reports/nao/mex9801spanish.htm](http://www2.dol.gov/dol/ilab/public/media/reports/nao/mex9801spanish.htm).



In the apples case, petitioners argued that only half of all migrant workers are even covered by minimum wage standards, and that workers often receive below-poverty wages in the sector. The Mexican NAO called for ministerial consultations on the issue. The ministerial agreement included planned outreach sessions at which these issues were to be discussed with migrant workers as well as a public forum for workers, unions, employers, and government officials.

A final case dealing with this issue was submitted simultaneously in Mexico and Canada, dealing with the MOU between the U.S. Department of Labor and the INS. The petitioners argued that the MOU frightened entire communities into failing to inform authorities about violations of minimum labor standards, including minimum wage and overtime.<sup>150</sup>

As stated above, after the petition was filed, the U.S. government agencies involved drew up a new MOU in which the Department of Labor pledged not to share with the INS information about the immigration status of people who file complaints for unpaid minimum wages or overtime. Information on immigration status obtained by the Department of Labor through its own inspections, however, can be given to the INS.<sup>151</sup>

### **Prevention of Occupational Injuries and Illnesses**

*Prescribing and implementing standards to minimize the causes of occupational injuries and illnesses.*

Nine cases have been filed alleging violations of this labor principle, six against Mexico and three against the United States. The importance of these cases rests with the fact that violations of this principle could conceivably lead to sanctions under the NAALC.

Even though serious evidence of non-enforcement of laws related to the prevention of occupational injuries and illnesses has come up in NAALC cases, no case has gone beyond ministerial consultations. The U.S. government has failed to insist that the problems it has identified be resolved. As described below, the U.S. NAO appears to have gone out of its way to avoid concluding that the Mexican government failed to effectively enforce laws on this issue. In one case—related to Han Young—the agency went so far as to conclude that the enforcement was not effective but then determine that the Mexican government had in fact complied with the NAALC.

Petitioners presented the Mexican NAO with strong evidence of non-enforcement in the United States, but the agency failed to do more than simply repeat the allegations made. The ministerial agreements arising from non-enforcement of this labor principle in Mexico and the United States have failed to include programs to resolve the problems identified or complained of by petitioners.

The Canadian NAO has documented serious concerns about the enforcement of health and safety laws in Mexico, based on its review of the Echlin case. It has issued detailed recommendations for ministerial consultations on the case, demonstrating strong actions on every facet of the NAO's work undertaken to date on the issue. The consultations have yet to conclude.

---

<sup>150</sup> Yale Law School, et al., "Petición sobre Asuntos Relativos a Legislación Laboral Surgidos en los Estados Unidos," September 17, 1998, pp. 29-30.

<sup>151</sup> Lance Compa, "NAFTA's Social Dimension," p. 30.

### ***Complaints against the United States***

Accusations against the United States were made in the Solec, Washington State apples, and DeCoster Egg Farm cases. In each one, employers were said to have permitted unsafe conditions. In the apples case, for example, unsafe use of pesticides combined with lack of regulation and failure to enforce existing laws lead to disproportionately high rates of poisoning of migrant workers and disproportionately low rates of penalizing employers, according to the petitioners.<sup>152</sup> The petitioners in the Solec case went further, characterizing the systemic failure to enforce health and safety laws as the result of “complicity” between the U.S. Office of Safety and Health Administration (OSHA) and the company.<sup>153</sup>

Ministerial consultations led to an agreement covering all three cases in May 2000, but its strongest content consisted of holding public forums in Maine and Washington State on the host of issues raised in the petition. Public outreach sessions are certainly useful as a means to help workers obtain the information they need about their rights, which itself is a first step toward insisting that those rights are enforced. However, the problem identified by petitioners in the Washington State apples case, related to bad law and poor implementation of existing law—issues that went completely unaddressed by the agreement. Similarly, the Solec case raised concerns about the effectiveness of the agency responsible for enforcing the law; whether or not the Mexican NAO agreed with the petitioners’ allegations, the issue should have been reviewed in detail.

The ministerial agreement contained no content related to poor enforcement of existing health and safety standards. Despite the centrality of labor law enforcement within the NAALC, the U.S. and Mexican governments signed a ministerial agreement that suggested that better information for victims would resolve the problem. As noted earlier in this report, petitioners described in detail OSHA’s organizational failings. The problem was not that victims did not know their rights, but that OSHA’s administrative, budgetary, and legal limitations made the effective enforcement of those rights difficult. Under such circumstances, the circulation to victims of better information constituted a woefully inadequate response.

Although the ministerial agreement called for public outreach on health and safety through measures such as holding meetings at which such issues could be discussed with workers and information about applicable law disseminated, the agreement only referred to such activities in the context of migrant workers. While clearly a relevant response to part of the problem in the Washington State apples and DeCoster Egg Farm cases, it left the workers of Solec in the dark.

### ***Complaints against Mexico***

The six safety and health cases lodged against Mexico have led to far more information on the alleged abuses than those filed in Mexico, because the public reports by the U.S. and Canadian NAOs contain more detail and official opinions on the subject than those of Mexico.

In the Han Young case, the U.S. NAO found consistent and credible evidence that the workplace was “polluted with toxic airborne contaminants, strewn with electrical cables running through puddles of water, operating with poorly maintained and unsafe machinery, and with numerous other violations and omissions of minimum safety and health standards.”<sup>154</sup> The report went on to note that multiple factory inspections had taken place and fines levied, but there was no evidence that the fines were ever collected. The report concluded that “serious hazards continued unabated at the plant.”<sup>155</sup> It ended with strong questions about the “process for

---

<sup>152</sup> STIMAHCS, et al., “Violations of NAALC Labor Principles and Obligations in the Washington State Apple Industry.”

<sup>153</sup> Oil, Chemical and Atomic Workers International Union, “Comunicación Pública,” p. 5.

<sup>154</sup> U.S. NAO, “Public Report of Review of NAO Submission No. 9702-Part II,” p. 41.

<sup>155</sup> *Ibid.*, p. 42.

conducting inspections and assessing, increasing and collecting financial penalties.”<sup>156</sup> Nonetheless, the ministerial agreement contained no content designed to address, much less remedy, the problem.

In the Echlin case, the U.S. NAO described serious health and safety problems, and then issued a finding that the government had not violated its health and safety law:

With regard to the health and safety issues raised, the information available indicates that the ITAPSA [Echlin] plant may suffer serious health and safety deficiencies that are hazardous to its employees. The fines that were assessed were minimal and the NAO has been unable to ascertain if they have been collected. Also, there are serious questions as to the efficacy of the inspections themselves. However, the information also indicates that the factory has been subjected to ongoing health and safety inspections by the authorities which have noted numerous shortcomings and that corrective action was undertaken on many of these.<sup>157</sup>

The NAO concluded that the Echlin inspections were up to Mexican legal standards but that their efficacy was in doubt. The U.S. NAO ignored the requirement that laws be effectively enforced, accepting instead that the laws be nominally applied.

The ministerial agreement that covered the two cases, reached in May 2000 (see Appendix I) was limited to an exchange of information on safety and health techniques and policies to promote compliance with safety and health laws and regulations. It also included the development of a program to disseminate information on procedures and general information on the Internet.

The Canadian report on the Echlin case also found reason for concern regarding the effective enforcement of laws related to health and safety in Mexico. “Regarding hazardous substances,” the Canadian NAO found, “the information received by the NAO suggests that Mexico may not have met its obligations under Article 3(1)(b) of the NAALC to ensure that: chemicals safety data sheets are readily available to workers; hazardous substances are labeled in Spanish; and workers exposed to hazardous substances are provided with adequate personal protective equipment.”<sup>158</sup>

Although the wording used by the Canadian NAO did not directly accuse Mexico of violating the NAALC, the specificity of the agency’s recommendation for ministerial consultations went a long way toward enabling a ministerial agreement designed to remedy the problems that gave rise to the agency’s concerns in the case. Unlike the recommendations made by the U.S. and Mexican NAOs in the cases they have handled, the Canadian agency made it clear that it wanted to be convinced that the Mexican government effectively enforced its laws. The Canadian NAO included among the issues it sought to address through ministerial consultations: how the requirement to label in Spanish hazardous substances such as asbestos and chemicals is effectively enforced, particularly on imported materials; how labor authorities enforce the requirement that employers disseminate information to workers; and the type of inspections carried out in plants using hazardous substances as well as the efficacy of inspections when advance notice is given.<sup>159</sup>

At this writing, the Canadian and Mexican governments had yet to reach agreement on a plan of action based on the consultations in progress in the case. As far as the case has gone, the Canadian NAO has taken strong steps: case initiation, information-gathering, reporting, and issuance of recommendations. The Canadian NAO’s work on the case to date leaves open the possibility that a ministerial agreement will lead to assurances of

---

<sup>156</sup> Ibid.

<sup>157</sup> U.S. NAO, “Public Report of Review of NAO Submission No. 9703,” p. 71.

<sup>158</sup> Canadian NAO, “Review of Public Communication CAN 98-1 (Part II),” March 12, 1999, p. iii.

<sup>159</sup> Ibid., p. v.

effective enforcement of health and safety laws, or that the failure of the Mexican government to do so will lead to the formation of an Evaluation Committee of Experts.

**Article 4: Access to Labor Tribunals**

*Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for enforcement of the Party's labor law.*

The NAALC requires that signatories ensure access to labor tribunals and that their laws provide for enforcement procedures. Effective enforcement of labor laws cannot take place if victims suffer from limited access to tribunals, because they will be excluded from the mechanisms designed to remedy non-enforcement. This article of the NAALC has been invoked twice against the United States and twice against Mexico.

Petitioners in the DeCoster Egg Farm case against the United States made a general allegation that workers on this farm in Maine did not have access to tribunals in which they could enforce their rights. In response, the Mexican NAO requested detailed information from its U.S. counterpart on access to tribunals. A response from the U.S. NAO provided substantial information on the relevant legal structures, but the Mexican NAO did not ask specifics about the DeCoster Egg Farm, and the U.S. NAO did not volunteer any. The final Mexican NAO report on the case was devoid of findings, interpretation, or analysis. While it is true that the petition itself did not make specific allegations detailing the ways in which article 4 had been violated, the Mexican NAO provided no indication of why it failed to address the issue in its final report, or why the ministerial consultations contained no component related to access to tribunals.

Another case that focused on this article of the NAALC was filed in May 1997, accusing the Mexican government of failing to ensure that certain victims of sex discrimination had access to labor tribunals. The case provided information on pre-hire forced pregnancy testing and post-hire pregnancy-based sex discrimination in *maquiladoras* as a way to screen out pregnant women and thereby avoid paying maternity benefits.<sup>160</sup> “With respect to discrimination in hiring, there is no effective or impartial domestic protection because established tribunals in practice are open only to actual employees, not to applicants,” the petitioners argued.<sup>161</sup> During the U.S. NAO’s information-gathering process, the Mexican NAO confirmed that victims of pre-hire employment discrimination have no access to labor tribunals to remedy the abuse.<sup>162</sup>

With respect to post-hire pregnancy-based sex discrimination, the U.S. NAO agreed that it took place and that it violated Mexican law, but noted theoretically that victims of this type of problem have access to labor tribunals for remedies. The U.S. NAO failed to make recommendations related to the inefficacy of remedies available to victims of post-hire discrimination.<sup>163</sup>

The ministerial agreement on the case, signed in October 1998, provided for holding conferences and outreach sessions on the rights and protections afforded women workers on both sides of the border. The access issue was never resolved, even though the Mexican government confirmed the problem.

---

<sup>160</sup> This case was based on research conducted by the Women’s Rights Division of Human Rights Watch. For further information, see Human Rights Watch, “No Guarantees: Sex Discrimination in Mexico’s Maquiladora Sector,” Vol. 8, No. 6(B), August 1996, and “A Job or Your Rights: Continued Sex Discrimination in Mexico’s Maquiladora Sector,” Vol. 10, No. 1(B), December 1998.

<sup>161</sup> Human Rights Watch, et al, “Submission Concerning Pregnancy-Based Sex Discrimination in Mexico’s Maquiladora Sector,” May 15, 1997, p. 37.

<sup>162</sup> U.S. NAO, “Public Report of Review of NAO Submission No. 9701,” p. 39.

<sup>163</sup> Human Rights Watch, “A Job or Your Rights,” p. 47.

In the Sony case, the U.S. NAO came upon a possible article 4 problem but failed to make a finding on the issue. Related to the lack of remedies when unions violate their own governing instruments, the NAO said, “This raises questions regarding availability of private action and procedural guarantees addressed in Articles 4 and 5 of the NAALC. The U.S. NAO proposes to add this issue to the trilateral exchange program agenda and to focus attention on the questions presented by the workers’ allegations [on freedom of association].”<sup>164</sup>

The Canadian NAO indicated in its report on the Echlin case that workers had been unfairly excluded from labor tribunals, in violation of article 4.<sup>165</sup> At this writing, the Canadian government was still negotiating the content of a ministerial agreement with Mexico.

#### **Article 5: Fairness of Labor Tribunals**

*Each Party shall ensure that its administrative, quasi-judicial, judicial and labor tribunal proceedings for the enforcement of its labor law are fair, equitable and transparent.*

The fairness of labor tribunals goes to the heart of the NAALC’s requirement that the parties enforce their own labor law. As the Canadian NAO has stated, “The effective enforcement of labour legislation rests to a large extent on fair and equitable labour boards and processes.”<sup>166</sup> This makes sense, because without fair tribunals, even the best labor law can be applied in a way that undercuts labor rights.

Twelve NAALC cases have questioned the fairness of tribunals, eight accusing the Mexican government of failing to meet this standard, three accusing the United States, and one accusing Canada. Petitioners have alleged that Mexico’s labor tribunal system suffers from a conflict of interest stemming from the way its members are chosen, and that individual tribunals have acted improperly in specific cases. The Mexican NAO has heard cases arguing that the U.S. labor adjudication system fails the NAALC article 5 requirement that it not be unnecessarily complicated or establish undue delays, and that it works in collusion with management.

Even when the U.S. NAO has confirmed the serious allegations made against the Mexican system, it has failed to take any measure to encourage, much less ensure, that its labor tribunals are fair. For its part, Mexico’s reports have simply failed to address the allegations against the United States. At this writing, Canada and Mexico are engaged in consultations that include article 5 issues.

#### ***Complaints against Mexico***

In two cases, the U.S. NAO found that the structure of Mexico’s labor tribunals could give rise to a conflict of interest because union federations that supported the ruling PRI held the labor-reserved seats on the tribunals. In the case of Executive Air Transport Inc. (TAESA), the U.S. NAO determined that “there is an appearance created that the labor representative of the [Conciliation and Arbitration Board (CAB)] may have an interest in the outcome of the case.”<sup>167</sup>

The Fishing Ministry union case focused on labor tribunals that exist exclusively for employees of the federal government. Petitioners showed that the federation of unions of government employees supported the PRI and vigorously opposed the Democratic Union of SEMARNAP, which espoused independence from the PRI. Yet the federation named the workers’ representatives to the tribunal hearing the case. The U.S. NAO concluded that the make-up of the tribunal could lead to the appearance of conflict of interest in cases in which the federation that names the labor representative was at odds with a union outside the federation.<sup>168</sup> This situation was, in fact, what the Democratic Union faced.

---

<sup>164</sup> U.S. NAO, “Public Report of Review, NAO Submission No. 940003,” p. 29.

<sup>165</sup> Canadian NAO, “Review of Public Communication CAN 98-1 (Part I),” p. 37.

<sup>166</sup> *Ibid.*, p. 35.

<sup>167</sup> U.S. NAO, “Public Report of Review of NAO Submission No. 9901,” p. 41.

<sup>168</sup> U.S. NAO, “Public Report of Review, NAO Submission No. 9601,” January 27, 1997, p. 32. The U.S. NAO took

In both cases, the conclusion of potential conflict of interest should have raised deep concern about the Mexican government's fulfillment of its obligation under article 5 of the NAALC. In both cases, however, the U.S. NAO applied unduly narrow criteria for determining that there was no reason for concern. In the Fishing Ministry union case, for instance, it argued that despite the potential for conflict of interest stemming from the structure of the tribunals, the case itself did not show that a conflict of interest had indeed existed.<sup>169</sup> In so arguing, the U.S. NAO committed two serious errors. First, if the very structure of the tribunals allows for a conflict of interest, then the NAALC fairness criteria cannot be met. In this case, though, the U.S. NAO wrongly applied a case-specific standard where an overall concern for fairness was appropriate.

The second problem related to the U.S. NAO's argument that no conflict of interest existed in the particular case under review. To make this argument, the agency said that no conflict of interest existed because the union was able to win when it appealed outside the labor tribunal system. This argument was irrelevant, since conflict of interest in the labor tribunals can exist whether or not an appeal is available, and winning on appeal, once the case is outside the labor tribunal system and before the regular courts, sheds no light whatsoever on whether bias existed at the labor tribunal level.

The U.S. NAO has also found problems with individual labor tribunals in Mexico, but failed to insist on remedial action. In a broad finding in the Han Young case, for example, the U.S. NAO determined, "The placement, by the Tijuana CAB, of obstacles to the ability of workers to exercise their right to freedom of association, through the application of inconsistent and imprecise criteria and standards for union registration and for determining union representation, is not consistent with Mexico's obligation to effectively enforce its labor laws on freedom of association in accordance with Article 3 of the NAALC."<sup>170</sup> The U.S. NAO also found that the CAB's actions "appeared inconsistent" with Mexico's obligations to ensure impartial tribunals.<sup>171</sup>

In the Echlin case, the U.S. NAO also found problems with the tribunals: "The conduct of the proceedings by the Federal CAB No. 15 was not always consistent with the Federal Labor Law and the obligation of the Parties to the NAALC to ensure impartial tribunals for the resolution of disputes."<sup>172</sup>

Although the ministerial agreement reached on these two cases addressed the issue of labor tribunals, it did not include components to remedy the problems identified. Instead, it called for a trilateral public seminar to discuss legal, structural, and practical issues related to labor tribunals in the signatory countries.

In the Sony case, the U.S. NAO found "some weaknesses and inconsistencies in the enforcement mechanisms of Mexican labor law with regard to union registration. These form the basis for the arguments made by many in the U.S. (including the submitters in the Sony case) that Mexico's labor tribunals (CABs) are not fair, equitable, impartial and independent when addressing questions of union registration."<sup>173</sup> Despite this finding, the ministerial agreement contained no measures to effectively address the problem. Rather, the Mexican government organized three conferences on union registration and produced a study on the topic by Mexican experts.

---

a narrow view of the possibility of conflict of interest, failing to recognize the possibility for such conflict when one union supports the government and the other is independent of it. Mexican law prescribes that only one federation of federal government employees can exist, so for any union to obtain the benefits that flow from organization, such as health care, it would have to belong to the federation.

<sup>169</sup> U.S. NAO, "Public Report of Review of NAO Submission No. 9901," pp. 41 and 73.

<sup>170</sup> U.S. NAO, "Public Report of Review of NAO Submission No. 9702."

<sup>171</sup> *Ibid.* "The actions of the Tijuana CAB, including the delay in informing the parties of its decision in the case, the rationale of its decision not to certify the first representation election, and irregularities in the conduct of the first representation election, appear inconsistent with Mexico's obligations under Articles 5(1), 5(2)(b) and 5(4) of the NAALC."

<sup>172</sup> U.S. NAO, "Public Report of Review of NAO Submission No. 9703."

<sup>173</sup> U.S. NAO, "Report on Ministerial Consultations on NAO Submission No. 940003," p. 14.

The U.S. NAO provided rare insight into its decision-making process on this issue when it rejected a request by the Sony case petitioners to reopen the case. The agency noted that “the stated objectives of the ministerial consultations were accomplished, i.e. a full examination of the matter.”<sup>174</sup> That is, by choosing to define the goals of ministerial consultations so narrowly—as designed to examine, not remedy problems—the U.S. NAO permitted itself to claim success even though a serious problem came to light regarding article 5 but was not remedied.

Canada’s report on the Echlin case found it “uncertain” that the structure of Mexico’s labor tribunals are such that they meet article 5’s requirement that tribunals be “impartial and independent and do not have any substantial interest in the outcome of the matter.”<sup>175</sup> The report went on to request ministerial consultations on specific issues on this topic, including how article 5 obligations are met given the structure of the tribunals. The consultations continue at this writing.

### ***Complaints against the United States***

In the Solec and Washington State apples cases, petitioners lodged serious complaints about the structure of the U.S. labor adjudication system. As reported above with respect to its impact on freedom of association and the right to bargain collectively, workers at Solec argued that their ability to bargain collectively was irreparably harmed by slipshod NLRB actions—including unjustified delays in overseeing a union election and ballot count—that allowed the company the time to engage in abusive anti-union tactics. The petition also accused the NLRB of being bought off by the company.<sup>176</sup> In the Washington State apples case, petitioners argued that NLRB budget cuts hampered the work of the enforcement agency, while unnecessary complications and unjustified delays effectively nullified the freedom of association protections that exist for agricultural workers. Nonetheless, the Mexican NAO limited itself to repeating the accusations made by petitioners, and the ministerial agreement reached covering the cases did not address the problem.

### **Article 6: Publication of Laws and Regulations Related to the NAALC**

*Each Party shall ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available.*

No cases have been submitted questioning the signatories’ compliance with this article.

### **Article 7: Promoting Public Awareness of National Labor Law**

*Each Party shall promote public awareness of its labor law.*

The United States and Mexico have both been accused once of failing to live up to this provision of the NAALC. In the DeCoster Egg Farm case, the United States responded through ministerial consultations by preparing a plan to advertise labor law related to migrants, including by holding public outreach sessions and producing a trilingual guide to the labor rights of migrants, which it promised to make available to workers, individuals, businesses, and organizations.

The case alleging violations of this obligation by Mexico—the Auto Trim case—was filed in June 2000. At this writing the U.S. NAO had yet to publish its report on the case.

---

<sup>174</sup> Ibid.

<sup>175</sup> Canadian NAO, “Review of Public Communication CAN 98-1 (Part I),” p. 36.

<sup>176</sup> Oil, Chemical and Atomic Workers International Union, “Comunicación Pública,” p. 10.

## APPENDIX I: U.S.-MEXICO MINISTERIAL AGREEMENTS

### 1) Ministerial Agreement on U.S. NAO Case No. 940003 (Sony)—June 26, 1995

The Secretary of Labor of the United States, and the Secretary of Labor and Social Welfare of Mexico, in accord with the provisions of the NAALC, have agreed to carry out consultations regarding labor law dealing with union registration, a subject matter to which both governments lend the greatest importance, and have reached the following agreement:

1. The Secretaries of Labor of the United States and Mexico and the Minister of Labour of Canada will instruct their respective National Administrative Offices (NAOs) to carry out a joint work program to better explain and improve implementation and public understanding of procedures regarding union registration and certification at the federal and state levels in both countries.

The NAOs shall develop a work program within 90 days. The work program could consist of workshops, seminars, meetings, and studies.

Implementation of the work program shall be completed within one year.

2. The Mexican Secretary of Labor and Social Welfare will direct the Mexican NAO to bring together a group of independent experts to conduct a study of labor law dealing with union registration and its implementation. The NAO will invite the local authorities to participate in the study.

The study shall be completed within 180 days.

3. As directed by the Secretary of Labor and Social Welfare, officials of that Department shall:

a) meet with workers at Magnéticos de Mexico, S.A. de C.V., mentioned in the NAO public report on submission 940003 to inform them of remedies available to them under Mexican law regarding union registration;

b) meet with local labor authorities to discuss matters regarding union registration raised by the public report on submission 940003 prepared by the U.S. NAO;

c) meet with representatives of Magnéticos de Mexico, S.A. de C.V., to discuss the public report of submission 940003.

The meetings shall be held within 120 days.

4. The outcome of each of the agreed actions will be promptly made available to the public. The two parties shall decide on the form and timing of the public announcements.

5. All completion dates are effective from the date of agreement.



2) Ministerial Agreement on Mexican NAO Case No. 9501 (Sprint)—February 13, 1996

The Secretary of Labor of the United States, and the Secretary of Labor and Social Welfare of Mexico, in accord with the provisions of the North American Agreement on Labor Cooperation, have agreed to carry out consultations regarding labor law related with the effects of the sudden closing of a plant on the principle of freedom of association and the right of workers to organize. Both governments lend the greatest importance to such issues, and therefore have reached the following agreement:

1. The Secretary of Labor of the United States agrees to continue to keep the Secretary of Labor and Social Welfare of Mexico fully informed of developments related to submission 9501 (Sprint Case) as appeals are considered under the United States legal system. The Department of Labor of the United States will present an appropriate report to the Secretariat of Labor and Social Welfare of Mexico within 120 days of final adjudication of the case by the United States competent authorities.

2. The Secretaries of Labor of the United States and Mexico, after consultations with the Minister of Labor of Canada, will instruct the trinational Labor Secretariat, located in Dallas, Texas, to conduct a study on the effects of the sudden closing of a plant on the principle of freedom of association and right of workers to organize in the three countries.

The study shall be completed within 180 days.

3. The U.S. Department of Labor will organize and conduct a public forum in San Francisco, California, to allow interested parties an opportunity to convey to the public their concerns on the effects of the sudden closing of a plant on the principle of freedom of association and the right of workers to organize. Mexican and Canadian tripartite delegations will be invited to attend.

The forum shall take place within 120 days.

The proceedings of this event shall be recorded by the U.S. Department of Labor.

4. The outcome of each of the agreed actions shall be promptly made available to the public. The Secretary of Labor of the United States and the Secretary of Labor and Social Welfare of Mexico shall decide on the form and timing of the public announcements.

Completion dates are effective from the date of the agreement.

3) Ministerial Agreement on U.S. NAO Case No. 9601 (Fishing Ministry Union)—September 3, 1997

The Secretary of Labor of the United States and the Secretary of Labor and Social Welfare of Mexico, in accordance with the provisions of the North American Agreement on Labor Cooperation (NAALC), agree to undertake consultations regarding the relationship between international treaties and constitutional and legal provisions on freedom of association in Mexico and the United States. With full respect for the national sovereignty of the two countries and in the fullest spirit of cooperation among the Parties to the NAALC, and desiring to build on their existing international commitments, the two governments have reached the following agreement:

1. Pursuant to Article 22 (3) of the NAALC, the National Administrative Offices of the United States and Mexico will exchange sufficient publicly available information to contribute to a better understanding of the labor legislation of each country that is the subject of this consultation.
2. Each National Administrative Office will provide to the other National Administrative Office information on the labor legislation that is the focus of the exchange, in accordance with Paragraph 1.
3. The National Administrative Offices will organize a conference on the relationship between international treaties and constitutional provisions in the United States and Mexico, in accordance with the appended agenda. Canada will be invited to participate.
4. The National Administrative Offices will report the results of the exchange of information and conference to the respective Secretaries of Labor upon completion.

4) Ministerial Agreement on U.S. NAO Case No. 9701 (Pregnancy Testing)—October 21, 1998

The Secretary of Labor of the United States of America and the Secretary of Labor and Social Welfare of Mexico, in accordance with the provisions of the North American Agreement on Labor Cooperation (NAALC), agree to carry out consultations on labor law dealing with women in the work place, in the United States, Canada, and Mexico. With full respect for the sovereignty of the Parties and in the broad spirit of cooperation, the Parties agree to the following:

1. The Secretaries of Labor of the United States and Mexico and the Minister of Labour of Canada will designate officials to meet and confer on the issues raised in Submission No. 9701, including (1) pregnancy discrimination in the work place; (2) the extent of relief for post-hire pregnancy discrimination in Mexico, the United States, and Canada; (3) the legal mechanisms by which laws against discrimination for reason of gender are enforced in the three countries; and (4) an exchange of views among the National Administrative Offices (NAOs) on the U.S. NAO Public Report of Review of Submission No. 9701 on which basis the United States sought ministerial level consultations.
2. Mexico and the United States will each conduct information and outreach sessions at locations close to the U.S.-Mexico border for the purpose of disseminating information to workers, employers, government representatives and non-governmental organizations of both countries on the rights and protections afforded women workers of both countries. The speakers at the seminars will consist of representatives of those government agencies responsible for the enforcement of the relevant laws and other appropriate interested parties.
3. The Secretaries of Labor of the United States and Mexico and the Minister of Labour of Canada will instruct their respective NAOs to plan and conduct a conference, open to the public, at a location accessible to the citizens from the three Parties, on government mechanisms in each country that guarantee the respect and protection of the labor rights of working women and plans to ensure compliance with the laws that protect against employment discrimination. The conference will include the participation of government agencies responsible for enforcement of employment discrimination laws.
4. The Secretariat will complete a public report for the Ministers that reflects the issues considered in the sessions and conference referenced in paragraphs 2 and 3.
5. All of the above actions will be completed within nine months from the date of this agreement.

## JOINT DECLARATION

The Department of Labor of the United States and the Department of Labor and Social Welfare of Mexico, in accordance with the provisions of the North American Agreement on Labor Cooperation (NAALC) and in order to address matters raised by submissions US 9702 and US 9703 before the U.S. National Administrative Office, agreed to carry out ministerial consultations in a spirit of cooperation and complete respect for the sovereignty of each country regarding labor law and practice on the principles of freedom of association and protection of the right to organize, the right to bargain collectively, and prevention of occupational injuries and illnesses.

Acknowledging the commitment of our Governments under the NAALC to ensure the effective enforcement and promotion of our labor laws and regulations;

Recognizing that the NAALC has led to greater levels of cooperation on labor matters between our two countries and pledging to continue and enhance that cooperative spirit;

Understanding that an integral part of the Agreement is a commitment to review public submissions and engage in cooperative consultations on labor matters;

Confirming our support for the assurance of the labor principles, as well as our Governments' obligations under the NAALC;

Underlining our commitment to promote the principle of freedom of association and the right to organize and that these rights can only be assured when workers are able to freely choose their representatives;

Reaffirming our commitment under the NAALC to promote the prevention of occupational injuries and illnesses and to assure that the protection of workers from exposure to hazardous substances is adequate;

Recognizing the need to devote adequate resources for the inspection of workplaces, continued effective and speedy enforcement of safety and health laws, and promotion of and education about safe and healthy workplace practices, as well as to ensure that persons with a legally recognized interest under the law in a particular matter have access to administrative and judicial proceedings for the impartial enforcement of labor laws;

In view of the commitment of the Mexican Department of Labor and Social Welfare to initiatives foreseen in the Program for Employment, Training, and Defense of Labor Rights: 1995-2000, which refers, among other things, to (i) improving the professional level of staff of the Federal Conciliation and Arbitration Board, (ii) setting uniform criteria in the interpretation and application of labor law for labor tribunals, (iii) encouraging the establishment and function of safety and health committees and the provision of appropriate technical assistance to their members, with priority given to micro, small and medium enterprises, and (iv) promoting greater participation of state and municipal officials in safety and health programs; efforts to increase the dissemination of the registry of labor unions in an open manner, including via the Internet, and promote secret ballots and neutral voting places within the framework of labor-management dialogue for the New Labor Culture; and the promotion of occupational safety and health matters and compliance with rules regulating the work of minors and women in the maquiladora industry, as reflected in the Coordination Agreement (Convenio de Concertación) on these matters, signed by the Department of Labor and Social Welfare, the National Council of the Maquiladora and Export Industry, and local associations of the maquiladora industry; and

In conformity with the principles of the NAALC and in efforts to strengthen our commitment under that Agreement to cooperate on labor issues of mutual concern and promote the rights of workers, the U.S. Department of Labor and the Mexican Department of Labor and Social Welfare agree to the following:

## ACTION PLAN

The Mexican Department of Labor and Social Welfare will continue promoting the registry of collective bargaining contracts in conformity with established labor legislation. At the same time, efforts will be made to promote that workers be provided information pertaining to collective bargaining agreements existing in their place of employment and to promote the use of eligible voter lists and secret ballot elections in disputes over the right to hold the collective bargaining contract.

The U.S. Department of Labor and the Mexican Department of Labor and Social Welfare agree to work individually through our Departments and other governmental agencies, and jointly and cooperatively through our respective National Administrative Offices (NAOs) and the Secretariat, to address the specific concerns and the broad labor rights raised by submission US 9702. We agree to cooperate to assure continued respect for freedom of association, which will benefit workers in both of our countries and throughout North America. Similarly, we agree to seek safe and healthy working environments for all workers.

In order to promote the principles of freedom of association and the protection of the right to organize and the right to bargain collectively, a public seminar will be held in Tijuana, Baja California on such themes as freedom of association, the registration of trade unions, mechanisms for gaining and challenging title to the collective bargaining contract, and related procedures, including worker protections during organizing, under the laws and regulations of Mexico. Representatives from federal and local labor authorities will conduct the seminar, which will be designed to encourage participation from the public, including labor organizations, workers, and business.

A trilateral public seminar will be held in the state of Mexico to discuss law and practice governing Labor Boards and their members and officials; their structure and responsibilities; the rules and procedures to assure their impartiality; as well as their role in the processes for gaining the right to a collective bargaining contract. This public seminar will include the participation of officials from relevant federal and state labor boards and authorities, including the Mexican Federal Conciliation and Arbitration Board and the U.S. National Labor Relations Board.

In order to promote the prevention of occupational injuries and illnesses, a government-to-government session will be held for experts from the two countries to exchange information on techniques and policies to promote compliance with safety and health laws and regulations; the processes by which work place inspections are conducted and financial penalties for violations are imposed, escalated, and collected; the use, handling, and marking of hazardous materials; the use of personal protective equipment; and the role of employee/employer safety and health committees.

The U.S. Department of Labor and the Mexican Department of Labor and Social Welfare will collaborate on the contents of a program to disseminate information on procedures and general information on safety and health inspections, including through the use of the Internet.

The U.S. Department of Labor and the Mexican Department of Labor and Social Welfare will continue cooperative consultations and exchange of information at the NAO level on these issues during implementation of this declaration; and, at the end of the prescribed term, review the activities and commitments made pursuant to this Joint Declaration.

The NAOs shall develop a work plan for carrying out the programs called for under this declaration within 90 days. The program called for under this declaration should be completed within 15 months of the date of its signing.

The U.S. Department of Labor and the Mexican Department of Labor and Social Welfare will make available public information shared under the activities conducted pursuant to this Joint Declaration.

6) Ministerial Agreement Mexican NAO Case Nos. 9801 (Solec), 9802 (Washington Apples), and 9803 (DeCoster Egg Farm)—May 18, 2000

## JOINT DECLARATION

The Department of Labor of the United States of America and the Department of Labor and Social Welfare of Mexico, in accordance with the provisions of the North American Agreement on Labor Cooperation (NAALC), and in order to address matters raised by submissions MX 9801, MX 9802, and MX 9803, agreed to carry out ministerial consultations in a spirit of cooperation and complete respect for the sovereignty of each country regarding labor law and practice on the principles of freedom of association and protection of the right to organize, the right to bargain collectively, minimum employment standards, elimination of employment discrimination, prevention of occupational injuries and illnesses, compensation in cases of occupational injuries and illnesses, and protection of migrant workers.

Acknowledging the commitment of our Governments under the NAALC to ensure the effective enforcement and promotion of our labor laws and regulations;

Recognizing that the NAALC has led to greater levels of cooperation on labor matters between our two countries and pledging to continue and enhance that cooperative spirit;

Understanding that an integral part of the Agreement is a commitment to review public submissions and engage in cooperative consultations on labor matters;

Reaffirming our commitment to the Agreement's eleven labor principles;

Recognizing the need to devote adequate resources for the inspection of workplaces, continued effective and speedy enforcement of safety and health laws and regulations, and promotion of and education about safe and healthy work place practices, as well as to ensure that persons with a legally recognized interest under the law in a particular matter have access to administrative and judicial proceedings for the impartial enforcement of labor laws; and

In conformity with the principles of the NAALC and in efforts to strengthen our commitment under that Agreement to cooperate on labor issues of mutual concern and promote the rights of migrant workers, and in order to promote the principles of freedom of association and the protection of the right to organize, the right to bargain collectively, minimum employment standards, elimination of employment discrimination, prevention of occupational injuries and illnesses, compensation in cases of occupational injuries and illnesses, and protection of migrant workers, the U.S. Department of Labor and the Mexican Department of Labor and Social Welfare agree to the following:

## ACTION PLAN

The U.S. Department of Labor and the Mexican Department of Labor and Social Welfare agree to work individually through our Departments and other governmental agencies, and jointly and cooperatively through our respective National Administrative Offices (NAOs), to address the specific concerns and the broad labor rights raised by submissions MX 9801, MX 9802, and MX 9803. We agree to cooperate to assure respect for freedom of association and the protection of the right to organize, which would benefit workers throughout North America. We agree to seek safe and healthy working environments for all workers and the enforcement of minimum employment standards. We agree to work together to eliminate employment discrimination and assure that migrant workers are accorded full protection under the laws.

A follow-up to the conference on agricultural migrant labor in North America will be held. The conference examined the legal, social, and economic issues facing agricultural migrant workers and their families. Participants included representatives of government, labor organizations, business, and non-governmental organizations. As a follow-up to the Conference, officials of the Governments of the United States and Mexico will meet to further exchange information with respect to the role of federal and state agencies in the protection and promotion of the rights of migrant workers in the United States and to explore potential avenues of cooperation regarding the protection of migrant workers. This information exchange will include the participation of labor department officials, Mexican Consular officials who have responsibility of aiding Mexican migrant workers abroad, and representatives of the Office for the Legal Defense of Workers (PROFEDET).

The U.S. Department of Labor will host a government-to-government session in Washington, D.C. to provide Mexican government officials information about the application of U.S. law focusing on the issues raised in submissions MX 9801, MX 9802, and MX 9803. Topics of discussion will include union organizing and bargaining rights, elimination of employment discrimination, minimum conditions of employment, including inspection programs and systems for determining violations of employment conditions for migrant workers, occupational safety and health, including inspection of migrant worker camps and overall working conditions in the agricultural sector, and protection of migrant workers' rights. Participants will include officials from the U.S. Occupational Safety and Health Administration, the U.S. Employment Standards Administration/Wage and Hour Division, the Office of the Solicitor of the Department of Labor, the Equal Employment Opportunity Commission, the National Labor Relations Board and officials from the Mexican Department of Labor and Social Welfare and Mexican consular officials in the United States.

The U.S. Department of Labor will conduct a public forum in the state of Maine where government officials will address migrant agricultural occupational issues and respond to questions of workers, employers, and their representatives. Such a forum will address freedom of association and protection of the right to organize, the right to bargain collectively, minimum employment standards, elimination of employment discrimination, prevention of occupational injuries and illnesses, compensation in cases of occupational injuries and illnesses, and protection of migrant workers, including presentation of compliance information, discussion of employment practices to ensure compliance with applicable U.S. laws and explanation of workers rights, and information on how to file complaints.

The Secretariat will produce a trilingual guide describing law and procedures covering labor rights and protections granted to migrant workers in the United States, Mexico, and Canada. The guide will be made available to workers, individuals, businesses, and organizations.

The U.S. Department of Labor and the Mexican Department of Labor and Social Welfare will continue cooperative consultations and exchange of information at the NAO level on these issues during the implementation of this declaration; and, at the end of the prescribed term, review the activities and commitments made pursuant to this Joint Declaration.

The NAOs shall develop a work plan for carrying out the programs called for under this declaration within 90 days. The program called for under this declaration should be completed within 15 months of the date of its signing.

The U.S. Department of Labor and the Mexican Department of Labor and Social Welfare will make available public information shared under the activities conducted pursuant to this Joint Declaration.



*Human Rights Watch  
Americas Division*

Human Rights Watch is dedicated to protecting the human rights of people around the world.

We stand with victims and activists to bring offenders to justice, to prevent discrimination, to uphold political freedom and to protect people from inhumane conduct in wartime.

We investigate and expose human rights violations and hold abusers accountable.

We challenge governments and those holding power to end abusive practices and respect international human rights law.

We enlist the public and the international community to support the cause of human rights for all.

The staff includes Kenneth Roth, executive director; Michele Alexander, development director; Reed Brody, advocacy director; Carroll Bogert, communications director; Barbara Guglielmo, finance director; Jeri Laber special advisor; Lotte Leicht, Brussels office director; Michael McClintock, deputy program director; Patrick Mingos, publications director; Maria Pignataro Nielsen, human resources director; Jemera Rone, counsel; Malcolm Smart, program director; Wilder Tayler, general counsel; and Joanna Weschler, United Nations representative. Jonathan Fanton is the chair of the board. Robert L. Bernstein is the founding chair.

Its Americas division was established in 1981 to monitor human rights in Latin America and the Caribbean. José Miguel Vivanco is executive director; Joanne Mariner is deputy director; Joel Solomon (on leave) is research director; Sebastian Brett, Robin Kirk and Carol Pier are researchers; Daniel Wilkinson is the Orville Schell Fellow; Tzeitel Waldron Cruz and Elizabeth Hollenback are associates. Stephen L. Kass is chair of the advisory committee; Marina Pinto Kaufman and David E. Nachman are vice chairs.

Web Site Address: <http://www.hrw.org>

Listserv address: To subscribe to the list, send an e-mail message to [majordomo@igc.apc.org](mailto:majordomo@igc.apc.org) with "subscribe hrw-news" in the body of the message (leave the subject line blank).