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NAFTA's Labor Side Accord: A Three-Year Accounting

Abstract

[Excerpt] Any number of idealized "social charters" with universal standards and swift, powerful enforcement powers could be drafted by critics of the labor side agreement. But the NAALC was negotiated by sovereign governments with clashing business, labor, and political concerns. The result is a hybrid agreement, one that preserves sovereignty but creates mutual obligations and combines broad cooperation and consultation programs alongside contentious review, evaluation, and dispute resolution mechanisms. Most of all, the NAALC promotes engagement on labor rights and labor standards in an experiment not tested in any other international forum.

Keywords

North American Free Trade Agreement, NAFTA, North American Agreement on Labor Cooperation, NAALC, United States, Canada, Mexico, labor rights, workers

Disciplines

Human Rights Law | International and Comparative Labor Relations

Comments

Suggested Citation

Compa, L. (1997). NAFTA's labor side accord: A three-year accounting [Electronic version]. *NAFTA, Law and Business Review of the Americas*, 3(3), 6-23.

Retrieved [insert date], from Cornell University, School of Industrial and Labor Relations site:

<http://digitalcommons.ilr.cornell.edu/articles/343/>

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NAFTA's Labor Side Accord: A Three-Year Accounting

*Lance Compa**

The North American Agreement on Labor Cooperation (NAALC)¹ emerged from a promise Bill Clinton made during the 1992 presidential campaign against George Bush. During 1990-1992 President Bush negotiated the North American Free Trade Agreement² NAFTA with President Carlos Salinas of Mexico and Prime Minister Brian Mulroney of Canada. In August, 1992, the three leaders announced agreement on NAFTA just as the U.S. presidential race was heating up.

Labor, environmental, and human rights organizations pressured candidate Clinton to repudiate NAFTA in his campaign for the presidency. NAFTA critics charged that the agreement reflected a neoliberal agenda favoring multinational corporations and investors at the expense of workers and the environment.³ In response, Clinton opted to support NAFTA if "side agreements" dealing with labor and environmental matters became part of the package presented to Congress for approval.⁴ After taking office in January, 1993, the new Clinton Administration proceeded to negotiate the side deals with Mexico and Canada. In August, 1993, agreements were reached on the NAALC and a companion environmental accord, the North American Agreement on Environmental Cooperation (NAAEC). In November, 1993, the U.S. Congress approved NAFTA and the two side agreements. The three accords took effect January 1, 1994.

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1. North American Agreement on Labor Cooperation, Sept. 14, 1993, U.S. Can.-Mex., 32 I.L.M. 1499 [hereinafter NAALC].
 2. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 605.
 3. See Ian Robinson, *North American Trade As If Democracy Mattered: What's Wrong With NAFTA and What Are the Alternatives*, INTERNATIONAL LABOR RIGHTS FUND (1993); Peter T. Kilborn, *Unions Gird for War Over Trade Pact*, N.Y. TIMES, Oct. 4, 1993, at A14; Keith Schneider, *Environment Groups Are Split on Support for Free-Trade Pact*, N.Y. TIMES, Sept. 16, 1993, at A1.
 4. Clinton's position was spelled out in a major campaign speech advertised as his definitive campaign statement on trade policy. See Governor Bill Clinton, *Expanding Trade and Creating American Jobs*, Address at North Carolina State University, Raleigh, North Carolina (1992).
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I. Structure and Functioning.

To understand the NAALC one must see what it is *not*.

First, the NAALC is not an agreement that sets forth new standards to which countries must conform by harmonizing their laws or their standards and regulations. Instead, the NAALC stresses sovereignty in each country's internal labor affairs, recognizing "the right of each Party to establish its own domestic labor standards."⁵ Second, the NAALC does not create a new labor rights enforcement agency to supplant the domestic authorities of each country. NAALC negotiators took pains to declare that "nothing in this Agreement shall be construed to empower a Party's authorities to undertake law enforcement activities in the territory of another Party."⁶ Third, the NAALC does not create a supranational tribunal to receive evidence in order to decide the guilt or innocence of employers involved in labor disputes or to order remedies against violators. Domestic authorities retain this power. Instead, the NAALC countries created a system for mutual review of labor matters and labor law enforcement in defined areas of labor law. These reviews are conducted first by each other, and then, depending on the subject area, by independent, non-governmental evaluation committees or arbitral panels.

The core obligation assumed by each of the NAALC parties is to "effectively enforce its labor law."⁷ This notion of "effective enforcement" of domestic labor law is the heart of the NAALC. While the countries have not yielded sovereignty with respect to the content of their laws or the authorities and procedures for enforcing them, they have transcended traditional notions of sovereignty by opening themselves to critical international and independent reviews, evaluations, and even arbitrations over their performance in enforcing their labor laws. In three key areas -- minimum wage, child labor, and occupational safety and health -- the countries created a prospect of fines or loss of NAFTA trade benefits for a persistent pattern of failure to effectively enforce domestic law.

The significance of this acquiescence to outside scrutiny should not be deprecated. Countries traditionally shield domestic sovereignty over labor law and labor-management relations. Indeed, labor law usually reflects a balance of forces resulting from decades of social struggle. The hybrid approach taken by the NAALC countries -- preserving sovereignty over the levels of labor laws and standards, but submitting to reviews by each other by independent, non-governmental bodies -- extends as far as countries can advance in fashioning the first labor accord connected to an international trade agreement. This is especially true where the United States dominates the economic relationship among the three NAFTA countries, where both Mexico and Canada see their own labor laws as more protective of workers than those of the United States and where smaller countries resist any move toward harmonization that would be influenced by the gravitational pull of U.S. economic power. A fear already exists among labor rights advocates in Mexico and Canada that the U.S. deregulatory model of labor relations is advancing in their countries.⁸

5. NAALC, *supra* note 1, art. 2.

6. *Id.* art. 42.

7. *Id.* art. 3(1).

8. See Manuel Fuentes Muñiz, *The NAFTA Labor Accord in Mexico and Its Repercussions for Workers*, 10 CONN. J. INT'L. 379-401 (1995).

A. THE LABOR PRINCIPLES OF THE NAALC.

NAALC Annex 1 states that the United States, Mexico, and Canada "are committed to promote" the following labor principles while it emphasizes that the Parties "do not establish common minimum standards for their domestic law":⁹

- 1) Freedom of association and protection of the right to organize
- 2) The right to bargain collectively
- 3) The right to strike
- 4) Prohibition of forced labor
- 5) Labor protections for children and young persons
- 6) Minimum employment standards
- 7) Elimination of employment discrimination
- 8) Equal pay for women and men
- 9) Prevention of occupational injuries and illnesses
- 10) Compensation in cases of occupational injuries and illnesses
- 11) Protection of migrant workers

B. COUNTRIES' OBLIGATIONS UNDER THE NAALC.

In Part Two of the NAALC, the three countries adopted six obligations in important areas of labor law and labor law enforcement.¹⁰ First, article 2 provides the levels of protection. It states that "[e]ach 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."¹¹ Second, article 3 describes government enforcement action by providing that "[e]ach Party shall promote compliance with and effectively enforce its labor law through appropriate government action."¹² Third, article 4 relates to private action in which "[e]ach Party shall ensure that persons with a legally recognized interest under its laws . . . have appropriate access to administrative . . . judicial or labor tribunals for the enforcement of the Party's labor law."¹³ Fourth, article 5 establishes procedural guarantees by stating that "[e]ach Party shall ensure that its . . . proceedings for the enforcement of its labor law are fair, equitable and transparent."¹⁴ Fifth, article 6 ensures publication of laws by stipulating that "[e]ach Party shall ensure that its laws regulations are publicly available and that proposed changes are published in advance and open to public comment."¹⁵ Sixth, article 7 discusses public information and awareness. The article states that "[e]ach Party shall promote public awareness of its labor law."¹⁶

9. NAALC, *supra* note 1, at Annex 1. The full clause reads: "The following are guiding principles that the Parties are committed to promote, subject to each Party's domestic law, but do not establish common minimum standards for their domestic law. They indicate broad areas of concern where the Parties have developed, each in its own way, laws, regulations, procedures and practices that protect the rights and interests of their respective workforces."

10. *Id.* arts. 2-7.

11. *Id.* art. 2.

12. *Id.* art. 3.

13. *Id.* art. 4.

14. *Id.* art. 5.

15. *Id.* art. 6.

16. *Id.* art. 7.

C. STRUCTURE OF THE COMMISSION FOR LABOR COOPERATION.

1. *The Commission.*

A cabinet-level Ministerial Council and a permanent staff Secretariat make up the Commission for Labor Cooperation.¹⁷ The Council includes the Secretary (in the United States and Mexico) and the Minister (in Canada) of Labor of the three NAFTA countries. Acting as a single entity, the Council oversees the implementation of the NAALC and supervises the activities of the Secretariat.¹⁸ The Council also promotes trilateral cooperative activities on a broad range of issues in the areas of labor law, labor standards, labor relations, and labor markets.¹⁹

The Commission's Secretariat, based in Dallas, Texas, began its operations in September, 1995.²⁰ The Secretariat's fifteen member staff includes labor lawyers, economists, and other professionals experienced in labor affairs in their respective countries. They work in Spanish, French, and English. A senior Canadian labor ministry official, who negotiated the NAALC on behalf of the Canadian government, was named the first Executive Director of the Secretariat. He is joined in Secretariat management by a senior U.S. director for labor law and economic research and a senior Mexican director for cooperation and evaluations.²¹

The Executive Director and the international staff members are appointed for 3-year terms, subject to one renewal. Directorships rotated among nationals of the three countries. All directors and staff are international civil servants who may not take instructions from any government.²²

The NAALC Labor Secretariat has two principal functions. First, it produces comparative reports on labor laws and labor markets of the three countries, including special reports at the request of the Council. Second, the Secretariat serves as the general administrative arm of the Commission by providing staff support to the Council and to any Evaluation Committees of Experts or Arbitral Panels established under the Agreement.²³

2. *National Administrative Offices (NAOs).*

The NAALC also requires each government to maintain a National Administrative Office (NAO) within the Labor Department of each country.²⁴ The NAOs serve as points of contact and sources of information among themselves and other government agencies, with the Dallas-based Secretariat, and with the public.²⁵ The NAOs also receive com-

17. *Id.* art. 8.

18. *Id.* art. 10.

19. *Id.* art. 11.

20. See Jeffrey Hoffman, *Setting Up Shop: NAFTA labor secretariat opens intergovernmental office in Dallas*, THE DALLAS MORNING NEWS, Oct. 9, 1995, at 1D.

21. See COMMISSION FOR LABOR COOPERATION, ANNUAL REPORT (1996).

22. *Id.* art. 12(5).

23. *Id.* arts. 13-14.

24. *Id.* art. 15.

25. *Id.* art. 16.

plaints under the Agreement regarding labor law issues arising in another NAFTA country.²⁶ This last feature is unusual but important; aggrieved workers, unions, or their allies must file their complaints with the NAO in another country, not their own, to initiate the review process. However, each NAO establishes its own domestic procedures for reviewing complaints for example, in the United States, procedures include public hearings²⁷ while the Mexican NAO review process does not contemplate public hearings.²⁸

For matters involving any of the eleven labor principles, an NAO may recommend ministerial consultations at the Council level as part of its "report of review" in the matter. These consultations can be bi-lateral, between the country whose NAO issued the report and the country where alleged violations of workers' rights occurred, or they can be tri-lateral, inviting the cabinet minister of the third country to participate in the consultation.²⁹

3. *Evaluation Committees of Experts (ECEs).*

Following consultations in any matter, except one involving labor principles 1, 2 or 3, any Party may request that an independent Evaluation Committee of Experts (ECE) be established. The ECE must be formed upon such a request. However, a Party need not have made a prior complaint or obtained a NAO report in order to request ministerial consultations or the establishment of an ECE. Any minister may request consultation on any matter without a complaint having been filed and may initiate an ECE if the matter is susceptible to evaluation. However, in doing so, the requesting party opens its own record of labor law enforcement in the same subject matter to scrutiny by the ECE.³⁰

The ECEs may evaluate the record of both the country that is the object of the request and the country making the request in one or more of the following "technical labor standards,"³¹ depending on the scope of the request:

- 1) Prohibition of forced labor
- 2) Labor protections for children and young persons
- 3) Minimum employment standards
- 4) Elimination of employment discrimination
- 5) Equal pay for women and men
- 6) Prevention of occupational injuries and illnesses
- 7) Compensation in cases of occupational injuries and illnesses
- 8) Protection of migrant workers

4. *Arbitral Panels for Dispute Resolution*

After an ECE report, if a country believes a persistent pattern of failure still exists by another country in effectively enforcing its occupational safety and health, child labor, or

26. *Id.* art. 16. Complaints are also called "public communications" or "submissions" in NAALC parlance.

27. *See* Revised Notice of Establishment of United States National Administrative Office, 59 Fed. Reg. 16,660-62 (1994).

28. *See* Mexico Secretariat of Labor and Social Welfare, *What Is the Mexican National Administrative Office?* (1996).

29. NAALC, *supra* note 1, art. 22.

30. *Id.* art. 23.

31. *Id.* art. 23(2).

minimum wage technical labor standards, it may request the establishment of an independent Arbitral Panel.³² After considering the matter, the Arbitral Panel may issue a ruling on which the parties may agree to an "action plan."³³ If the action plan is not implemented, the Panel may impose a monetary enforcement assessment against the offending government.³⁴ The fine would be used to improve labor law enforcement in the Party complained against.³⁵ If the fine is not paid, trade sanctions may be applied.³⁶

D. STAGES OF TREATMENT AND SCOPE OF REVIEW.

1. *NAO Review and Ministerial Consultations.*

Subtle but important distinctions emerge in the scope of review in the various stages of treatment of labor matters under the NAALC and in the ability to trigger the next stage of treatment. The scope of initial review by an NAO and ministerial consultations is extremely wide. For NAO review, the scope includes "labor law matters arising in the territory of another Party" while ministerial consultations review covers "any matter within the scope of this Agreement".³⁷ The matter need not be related to NAFTA or to trade. Furthermore, failure to effectively enforce domestic law is not a necessary element for NAO review.

NAO review also does not contain any "standing" requirement to file a complaint. Any citizen or organization of any country, alone or in coalition, may file a complaint with an NAO. The complaining party need not demonstrate harm or interest in the matter in order to have standing. The NAO must respond to the complaint either by accepting the complaint for review or, if it does not accept the complaint for review, by explaining in writing to the complainant the reasons for non-acceptance.³⁸

Beyond NAO review, however, the process becomes government-driven. Only the NAO may recommend ministerial consultations and only a minister can accept the recommendation and request consultations. Furthermore, one minister may initiate the formation of an ECE³⁹ while two ministers are necessary to initiate the formation of an arbitral panel.⁴⁰ In this context, lobbying skills and political pressure are needed for the private parties to push their complaints forward through the process.

2. *ECE.*

Two new elements are needed for complaints to move to review by an ECE. First, the matter must be "trade-related," involving companies engaged in NAFTA trade or competing with traded goods or service from a NAFTA partner. Second, the matter must be cov-

32. *Id.* art. 27.

33. *Id.* art. 38.

34. *Id.* art. 39(4)(b); Annex 39.

35. *See id.* Annex 39(3).

36. *Id.* art. 41.

37. *Id.* arts. 16(3) 22.

38. *See supra* notes 22, 23 (The Canadian NAO is still formulating its guidelines).

39. NAALC, *supra* note 1, art. 23.

40. *Id.* art. 29(1).

ered by “mutually recognized labor laws” meaning both countries have laws on the matter.⁴¹ For example, a U.S. or Canadian request for ECE review on a matter involving Mexico’s law, which requires profit-sharing by all firms, might fail because no such law exists in the United States or Canada.

The scope of an ECE’s evaluation is narrower than that of an NAO review or ministerial consultation. Assuming that the matters are trade-related and covered by mutually recognized labor law, the NAALC specifies that the Committee “shall analyze, in the light of the objectives of this Agreement and in a non-adversarial manner, patterns of practice by each Party in the enforcement of its . . . technical labor standards [Labor Principles 4-11].”⁴² This introduces three additional factors:

- 1) The exclusion of Labor Principles 1, 2 and 3 from ECE treatment
- 2) The need to examine “patterns of practice” rather than “labor law matters” or “any matter”
- 3) The need to examine “enforcement” rather than “labor law matters” or “any matter”

3. *Dispute Resolution*

Dispute resolution by an arbitral panel entails the same requirements for trade-relatedness and mutually recognized labor laws. However, the NAALC contains an important new formulation of the scope of treatment by an arbitral panel: the “alleged persistent pattern of failure to effectively enforce occupational safety and health, child labor or minimum wage technical labor standards.”⁴³ This new formulation makes only 3 labor principles susceptible to dispute resolution. It also introduces the concept of a “persistent pattern of failure to effectively enforce . . . labor standards.” Issues characterized simply as “labor law matters” or “any matter” for NAO reviews and ministerial consultations, or “patterns of practice” and “enforcement” for ECE evaluation, face new, higher hurdles with arbitral review requiring findings of a “persistent pattern” and “failure to enforce” to obtain an arbitral panel ruling in favor of workers’ rights.

II. Experience Under the NAALC: The First Three Years.

The first three years of experience under the NAALC were marked by an extensive program of cooperative activities, the first research reports by the Secretariat and its first international seminar, and the first complaints treated under the review and consultation process.

A. COOPERATIVE ACTIVITIES.

Cooperative activities included meetings and workshops among labor officials of the countries, exchanges of professional and technical delegations, and public seminars and conferences. They covered the following areas:

41. *Id.* art. 23(3).

42. *Id.* art. 23(2).

43. *Id.* art. 29(1).

- 1) Occupational safety and health matters, including particular attention to the construction, chemical and electronics industries
- 2) Employment and job training
- 3) Women in the workplace
- 4) Non-standard work (temporary, part-time, independent contracting, home work etc.)
- 5) Freedom of association and the right to organize
- 6) Child labor
- 7) Income security (unemployment insurance, pensions, workers' compensation etc.)⁴⁴

B. SECRETARIAT RESEARCH.

In December, 1996, the Secretariat published a 40-page *Preliminary Labor Law Report* covering important elements of Labor Principles 1, 2, and 3 in the three NAALC countries.⁴⁵ This preliminary report anticipates a larger-scale *Comparative Labor Law Report* whose Volume I, to be published in 1997, analyzes the countries' labor and industrial relations laws in light of the six obligations of the NAALC. Later volumes will treat other Labor Principles.

In June, 1997, the Secretariat issued the *North American Labor Markets: A Comparative Profile*, a report covering labor force demographics, changing employment structures and non-standard work patterns, unemployment and underemployment, earnings and productivity, and other key labor market features of the continental economy. Enhanced by nearly one hundred charts and graphs, the report analyzes and presents a decade's worth of data from the three NAALC countries not available in any other source.⁴⁶

A third major study, in preparation by the Secretariat, looks at labor practices in the garment manufacturing industry. Due for publication later in 1997, this report examines how workers, unions, and firms in an important commercial sector are adjusting to new trade patterns in the post-NAFTA years.

The Secretariat also produced a 120-page comparative study titled *Plant Closings and Labor Rights* in response to a special request from the Ministerial Council. The study examines the effects of plant closings and threats of plant closing on workers' right to organize in the United States, Canada, and Mexico. This report was requested as part of a program resulting from ministerial consultations in the Sprint case, described below.⁴⁷

44. See Commission for Labor Cooperation, *supra* note 23 (1995 & 1996).

45. See SECRETARIAT OF THE COMMISSION FOR LABOR COOPERATION, PRELIMINARY REPORT TO THE MINISTERIAL COUNCIL: LABOR AND INDUSTRIAL RELATIONS LAWS IN CANADA, THE UNITED STATES, AND MEXICO (Dec. 1996).

46. See SECRETARIAT OF THE COMMISSION FOR LABOR COOPERATION, NORTH AMERICAN LABOR MARKETS: A COMPARATIVE PROFILE (1997).

47. See SECRETARIAT OF THE COMMISSION FOR LABOR COOPERATION, PLANT CLOSINGS AND LABOR RIGHTS (1997).

C. COMPLAINTS AND CASES.

1. *Honeywell and General Electric.*

In February, 1994, two U.S. unions, the International Brotherhood of Teamsters and the United Electrical Workers, filed complaints with the U.S. NAO alleging discharge of workers for attempting to form unions at the Mexican *maquiladora* facilities of two major multinational corporations. Citing violations of labor principle 1 and the failure of Mexican labor law authorities to adequately protect the right to organize, the unions charged that several workers were discharged for union activity at an electronic control plant of Honeywell Corp. in Chihuahua and at an electric motor plant of the General Electric (G.E.) Co. in Ciudad Juarez, Chihuahua.⁴⁸

The U.S. NAO accepted the complaints for review in April, 1994, and held a public hearing in Washington, D.C. on the matter in September, 1994. Workers from the Honeywell and G.E. factories in Mexico testified at the hearing, along with Mexican labor lawyers and U.S. union representatives. Neither of the companies appeared at the hearing.⁴⁹

The U.S. NAO's Public Report of Review of October 12, 1994, noted that its review "reveals disagreements about the events at the each of the plants," namely whether workers were fired because of union activity or for lawful reasons unrelated to union activity. The NAO, while making no finding on the reasons for the workers' discharge, noted that "the timing of the dismissals appears to coincide with organizing drives by independent unions at both plants." The NAO also cited "other relevant issues" including "difficulties in establishing unions in Mexico, the hurdles faced by independent unions in attaining legal recognition, company blacklisting of union activists . . . and government preference for and support of official unions"⁵⁰ However, the NAO declared itself "not in a position to make a finding that the Government of Mexico failed to enforce the relevant labor laws," noting that the dismissed workers' acceptance of severance pay as indemnization for relinquishing their legal claims was in keeping with Mexican labor law.⁵¹

The NAO report did not recommend ministerial consultations, but rather it called for a series of cooperative activities coordinated by the NAOs of the three NAALC parties regarding freedom of association and protection of the right to organize as a result, in March and September, 1995, trilateral government-to-government workshops were held in Washington, D.C. where experts from each country's labor authorities engaged in discussions regarding union organizing and representation issues, protection against anti union discrimination, procedural guarantees, and union democracy issues.⁵²

48. U.S. NAO, Case Nos. 940001, 940002.

49. See Lance A. Compa, *The First NAFTA Labor Cases: A New International Labor Rights Regime Takes Shape*, 3 U.S. MEXICO L. J. 159-181 (1995).

50. See U.S. NAO, *Public Report of Review, NAO Submission #940001 and NAO Submission #940002* (Bureau of International Labor Affairs, U.S. Dept. of Labor, Oct. 12, 1994), at 28-30.

51. *Id.* at 30-31.

52. Transcripts and papers from these conferences are available from the U.S. National Administrative Office, Bureau of International Labor Affairs, U.S. Department of Labor, Washington, D.C.

As a result of these activities, prompted by the Honeywell and G.E. cases, a trilateral conference on industrial relations in the 21st century was held in Montreal, Quebec in March, 1996. The conference brought together representatives of government, labor, and business, as well as academics and other researchers. The conference included discussions of freedom of association and protection of the right to organize, but extended beyond them to take up issues of new employment structures and the challenge they present to union organizing and representation in years ahead.

2. Sony.

In August, 1994, a coalition of four labor support groups in the United States and Mexico filed a complaint alleging discharge of workers and discrimination against dissident unionists at a Mexican *maquiladora* facility in Nuevo Laredo, Tamaulipas of the Sony Corporation, which manufactures video cassette recorder magnetic tapes.⁵³ The International Labor Rights Fund, the Coalition for Justice in the Maquiladoras, the American Friends Service Committee, and the *Asociación Nacional de Abogados Democráticos* of Mexico cited collusion between management, the incumbent union, and local political leaders in crushing an attempt to elect new leaders and to form a new union at the plant.

In October, 1994, the U.S. NAO accepted the complaint for review and in February, 1995, the NAO conducted a public hearing in San Antonio, Texas, during which Mexican workers, their attorneys, and U.S. supporters spoke. Citing "serious questions" on union registration issues, the U.S. NAO recommended ministerial consultations in a Public Report of Review dated April 11, 1995.⁵⁴ Ensuing consultations resulted in a program of activities including trilateral workshops and public conferences in Mexico and in the United States on union registration and certification, a special study by independent Mexican labor law experts dealing with union registration and its implementation, and a series of meetings by officials of the Mexican Department of Labor and Social Welfare with Sony workers, local labor authorities, and company representatives.

Additionally, seminars on union registration and certification procedures were held with public participation in Mexico City, D.F. and San Antonio, Texas in September and November, 1995, respectively and in Monterrey, Nuevo Leon in February, 1996. In February, 1996, the Mexican NAO published documents related to the seminars, the special study by independent experts, and the meetings called for in the agreement on ministerial consultations. Furthermore, in June, 1996, the U.S. NAO released a report summarizing and analyzing the results of the seminars and other aspects of the program resulting from ministerial consultations in Submission No. 94003.⁵⁵ The U.S. Secretary of Labor directed the NAO to monitor developments in Mexico regarding union registration and to report on the implications of decisions by the Supreme Court of Mexico on constitutional issues involving union registration in the public sector.

53. U.S. NAO Case No. 940003.

54. See U.S. NAO, *Public Report of Review, NAO Submission #940003* (Bureau of International Labor Affairs, U.S. Dept. of Labor, Apr. 11, 1995).

55. See U.S. NAO, *Report on Ministerial Consultations on NAO Submission #940003 Under the North American Agreement on Labor Cooperation* (Bureau of International Labor Affairs, U.S. Dept. of Labor, June 4, 1995).

In December, 1996, the U.S. NAO delivered the follow-up report requested by the Secretary. The follow-up report discussed the current status of Sony workers, initiatives in Mexico to change the labor law, and decisions of the Mexican Supreme Court. The report concluded that "potentially significant development continue to take place in Mexico in a wide range of labor matters, including labor legislation, labor-management relations, labor-government relations, and within labor organizations themselves. The extent of the impact of the developments discussed above, however, remains to be seen."⁵⁶

3. *Sprint.*

The *Sindicato de Telefonistas de la República Mexicana* (STRM) filed a complaint with the NAO of Mexico in February, 1995. The complaint arose after the sudden closing of a Spanish-language telemarketing facility of the Sprint Corporation in San Francisco, California alleged to be motivated by anti-union bias.⁵⁷ The STRM collaborated with its U.S. counterpart, the Communications Workers of America (CWA), which was the union seeking to organize the Sprint facility.⁵⁸

The NAO of Mexico accepted the complaint for review and issued a Report on May 31, 1995. The report concluded that it was "concerned about the effectiveness of certain measures intended to guarantee [freedom of association and the right of workers to organize]" and "possible problems in the effective application of U.S. law," and recommended ministerial consultations in the matter.⁵⁹ Ensuing consultations resulted in an agreement among the labor secretaries of Mexico and the United States and the labor minister of Canada dated February 13, 1996, which called for a three part program. First, a public forum was to be held in San Francisco, California. Second, the Secretariat was to create a special report on the effects of sudden plant closings on the principle of freedom of association and protection of the right to organize in the three countries. Third, the Secretary of Labor of the United States was to provide to the Secretary of Labor of Mexico updates on developments in proceedings under U.S. domestic labor law of the case that prompted the submission and the ministerial consultations.

On February 27, 1996, the public forum called for by the ministers was held in San Francisco with presentations by workers affected by the plant closing, by union representatives from the STRM and the CWA, and by unionists from Germany and Great Britain. Testimony was also offered by a law professor speaking on behalf of Sprint and by academic analysts. In December, 1996, the U.S. National Labor Relations Board (NLRB) ruled that the plant closing by Sprint was motivated by anti-union animus and ordered the employer to rehire affected workers into openings in other divisions of the company and to provide back pay for lost wages. Sprint appealed the NLRB decision and the case is currently pending in the courts.⁶⁰

56. See U.S. NAO, *Follow-Up Report, NAO Submission #940003* (Bureau of International Labor Affairs, U.S. Dept. of Labor, Dec. 4, 1996, at 10).

57. See Case No. 9501. OAN MEX (Mexican National Administrative Office, Department of Labor and Social Welfare, Feb. 9, 1995).

58. *Id.*

59. See NAO of Mexico, *Informe sobre la Revisión de la Comunicación Pública 9501 / OAN MEX* (Mexican National Administrative Office, Department of Labor and Social Welfare, May 31, 1995).

60. See LCF, Inc., d/b/a La Conexion Familiar and Sprint Corporation, 322 N.L.R.B. 137 (1996).

In June, 1997, the Secretariat issued its special report titled *Plant Closings and Labor Rights*.⁶¹ The report reviewed administrative tribunal and court decisions in the United States, Canada, and Mexico dealing with plants closings and threats of plant closing to resist union organizing efforts by workers. The report found that such anti-union tactics are widespread in the United States but less prevalent in the other countries; in Canada, it is less prevalent due to stronger enforcement, and in Mexico, due to differences in the union organizing system, which rarely involves an election "campaign" where threats of closing or decisions to close are made.

4. *Pesca Union.*

In June, 1996, the International Labor Rights Fund, Human Rights Watch/Americas, and the *Asociación Nacional de Abogados Democráticos* filed a complaint with the U.S. NAO on behalf of the *Sindicato Unico de Trabajadores de la Secretaría de Pesca* (SUTSP), a union that had long represented employees of the Mexican fisheries ministry. The union lost its representation rights when the fisheries ministry merged into a new, larger ministry of environment, natural resources, and fisheries.⁶²

The complaint alleged that the new ministry and the labor authorities improperly revoked its union registration and granted recognition and favorable treatment to a rival union. The complaint raised issues concerning the federal labor law requirement prohibiting more than one union in a governmental entity. This was cited by complainants as a violation of ILO Convention 87, which under the Mexican Constitution is part of the country's domestic law. Complainants also charged that the participation in the tripartite *Junta de Conciliación y Arbitraje* of union representatives, who might have a conflict of interest in ruling on disputes with another union, violated the NAALC's requirement for impartial labor tribunals.

The U.S. NAO accepted the petition for review in August, 1996. It held a public hearing in Washington, D.C. in December, 1996, with statements by representatives of the submitting organizations, by union representatives and counsel from the contending union organizations, by interested public citizens, and by a representative of the Mexican Department of Labor and Social Welfare. As part of its review, the U.S. NAO also commissioned special studies on labor law enforcement in the federal sector.

On January 27, 1997, the U.S. NAO issued a Public Report of Review that recommended ministerial consultations on relevant legal doctrines in Mexico, including the effects on Mexican labor law of constitutional provisions assuring freedom of association, "for the purpose of examining the relationship between and the effect of international treaties, such as ILO Convention 87, and constitutional provisions on freedom of association on the national labor laws of Mexico."⁶³

61. See *supra* note 40.

62. See U.S. NAO, Case No. 9601.

63. See U.S. NAO, *Public Report of Review, NAO Submission #9601* (Bureau of International Labor Affairs, U.S. Dept. of Labor, Jan. 27, 1997).

5. *Maxi-Switch.*

In a mirror image of the Sprint case, CWA filed a complaint with the U.S. NAO in October, 1996, together with the STRM and its union federation.⁶⁴ The complaint alleged that workers' attempt to organize a union affiliated with the STRM at the Maxi-Switch facility in Cananea, Sonora was thwarted by a collusive "contract of protection" between the company and another union affiliated with the dominant union federation. Maxi-Switch, a computer keyboard manufacturer, is a subsidiary of the Silitek corporation of Taipei, Taiwan. The complaint argued that the contract was made without employees' knowledge or consent and that the local *Junta de Conciliación y Arbitraje* improperly denied registration to the STRM group.⁶⁵

In December, 1996, the U.S. NAO accepted the submission for review and scheduled a public hearing in the matter in Tucson, Arizona on April 18, 1997. Testimony was to be received from Maxi-Switch workers and from representatives of the CWA and the STRM. However, on April 15, 1997, the CWA withdrew the submission at the request of the STRM because the labor authorities in Mexico took steps to resolve the matter to the satisfaction of the STRM, including granting registration to the STRM-affiliated union. The public hearing was canceled.⁶⁶ Following these events, the "Forista" movement of independent unions in Mexico announced a plan to launch large-scale organizing drives in the *maquiladora* manufacturing areas. As one leader said, "we have initiated the fight against 'protection contracts' and 'white unions' in the *maquiladora*."⁶⁷

6. *Pregnancy Discrimination in the Maquiladora.*

Two U.S.-based human rights groups and an association of Mexican attorneys filed a complaint with the NAO of the United States on May 15, 1997, alleging "a pattern of widespread, state-tolerated sex discrimination against prospective and actual female workers in the *maquiladora* sector along the Mexico-U.S. border."⁶⁸ The complaint involved an alleged common practice of requiring pregnancy testing of all female job applicants and denying employment to those whose test results are positive, and of pressuring employees who become pregnant while working to leave their jobs, all to avoid the legal requirement of three months' fully-paid maternity leave for workers who give birth.

The submitters argued that the practice by employers and the failure of the labor authorities to combat it—sometimes by omission, sometimes by overt support for the employers' discriminatory policy—violates Mexico's obligations under the NAALC. The complaint sought a U.S. NAO review, public hearings in cities along the Mexico-U.S. border, and the formation of an Evaluation Committee of Experts to report on employment

64. See U.S. NAO, Case. No. 9602.

65. *Id.*

66. See Pamelah M. Prah, *CWA Drops NAFTA Charge After Mexico Recognizes Workers' Independent Union*, BUREAU OF NATIONAL AFFAIRS DAILY LABOR REPORT, Apr. 17, 1997, at A7.

67. See John Nagel, *Mexican Labor Group Calls for Action Following Victory in Maxi-Switch Campaign*, BUREAU OF NATIONAL AFFAIRS DAILY LABOR REPORT, Apr. 28, 1997, at A4.

68. See U.S. NAO Case No. 9701, "Submission Concerning Pregnancy-Based Sex Discrimination in Mexico's *Maquiladora* Sector," at 4 (filed by Human Rights Watch/Americas, International Labor Rights Fund, and Asociacion Nacional de Abogados Democraticos).

practices related to pregnancy in the three NAALC countries.⁶⁹ At this writing, the U.S. NAO is considering whether to accept the case for review.

D. ANALYSIS.

Analyzing NAFTA's labor side agreement is a 2-track exercise. One track follows the experience within the institutional framework of the NAALC. A second track follows actions outside this framework in the form of cross border organizing and related efforts by unions, human rights organizations and related advocacy groups.

1. *Track I: Using the NAALC.*

Experience within the structures created by the NAALC reflects unrealized potential. Only six cases were filed under the NAALC in its first three years of operation.⁷⁰ All of them involved the first eleven principles on union organizing matters, and they stopped at the first level of review, NAO review and optional ministerial consultations.

Critics assailed the NAALC for failing to achieve reinstatement of dismissed workers or recognition of independent unions.⁷¹ However, such criticism misapprehends the power of the NAALC for it cannot substitute for domestic labor law. None of the three countries were prepared to have a new supranational body dictate remedies to its domestic authorities. Instead, the NAALC creates a new setting for international scrutiny of labor law matters in hopes that over time, the "sunlight" effect of such scrutiny can change the climate of respect for workers' rights.⁷²

The NAALC cases have had some concrete results as well as some that can only be conjectured. In the *GE* and *Honeywell* cases, some workers were reinstated, and those companies, along with others in the region, have instructed their managers to avoid putting them in a position of having new complaints filed against them -- that is, to not fire workers for organizing. At least some companies appear to be more cautious in targeting workers for dismissal.⁷³ In the *Sony* case, independent trade union advocates acknowledged that the public conferences and events surrounding the ministerial consultation program gave them an international audience that sustained their organizing effort.⁷⁴

Similarly, Sprint workers have maintained their union organization, fueled in part by knowing that, in addition to their domestic labor board case, they have international support and an international organization reporting on plant closings and union organizing in the three countries.⁷⁵ In the *Maxi-Switch* case, the NAALC filing and the prospect of

69. *Id.* at 37-39.

70. *Id.*

71. See Jerome I. Levinson, *NAFTA's Labor Agreement: Lessons From the First Three Years*, INSTITUTE FOR POLICY STUDIES AND THE INTERNATIONAL LABOR RIGHTS FUND, Nov. 12, 1996, at 3 (calling the NAALC "a fatally flawed agreement.").

72. *Id.*

73. See Dora Delgado, *NAOs Deterring Would-Be Violators of Labor Laws, Mexican Official Says*, in BUREAU OF NATIONAL AFFAIRS DAILY LABOR REPORT, Oct. 25, 1995, at A13.

74. See Dora Delgado, *Jury Should Remain Out on Power of Labor Side Accord, Officials Say*, in BUREAU OF NATIONAL AFFAIRS DAILY LABOR REPORT, Mar. 4, 1996, at C1.

75. See *U.S. Union Hails NAFTA Labor Ministers Agreement in Sprint Case*, INSIDE NAFTA, Dec. 27, 1995, at 10.

public hearings and potential ministerial consultations clearly contributed to the resolution of the matter to the satisfaction of the unions involved.⁷⁶ Even the prospect of a NAALC case can have effects. In Canada, the province of Alberta withdrew a plan to privatize labor standards enforcement after trade unions announced they would file a complaint under the NAALC with the NAOs of the United States and Mexico.⁷⁷

Labor board and court decisions have also taken favorable turns in NAALC-related cases. In the *Pesca* case, the independent union had its registration restored by court order and it still enjoys *personalidad juridica*.⁷⁸ In the Sprint case, the U.S. NLRB reversed the administrative judge, who heard the evidence, and ruled in Sprint's favor on the plant closing issue. The NLRB ruled that the company closed the plant because of anti-union motivation, not for economic reasons, and ordered that the workers be rehired. It would be too much to claim a cause-and-effect relationship between the NAALC and these decisions, but the new international accountability demanded by the NAALC was certainly part of the context.⁷⁹

Only one case involving any of the other 10 Principles has been initiated, and it is too soon at this writing to know whether it has been accepted for review. Further the NAALC Evaluation procedure has not been invoked, nor has the Arbitration mechanism been put to the test. In sum, one subject matter -- organizing -- has been treated at the stage one Review level, when the potential exists for three subjects --organizing, bargaining and striking -- to get such first-level treatment. Five other subjects -- forced labor, equal pay, non-discrimination, workers' compensation and migrant labor -- can get two levels of treatment, Review and Evaluation. Three more -- child labor, minimum wages and safety and health -- can get all three levels of treatment: Review, Evaluation and Arbitration. Experience with just one of a possible twenty-two combinations of subject and treatment cannot be a basis for conclusions about the NAALC's worth.

The potential use of an ECE is especially interesting. Eight topics are susceptible to an ECE under the NAALC. The ECE procedure is deliberately non accusatory. It can be initiated by one government alone, as long as that government is willing to open up its own enforcement record in the subject matter being evaluated. But government officials do not undertake the evaluation. Rather, an independent panel of experts from the three countries undertake their own comparative analysis, reports, and recommendations.

The NAALC's ECE mechanism could be a powerful tool for promoting effective labor law enforcement. Interested unions, employers, or other groups could call to their government's attention problems that might lend themselves to a ministerial request for an ECE. Collaborating across borders, such groups could encourage all the governments to undertake an ECE in a recognized area of common concern. Beyond that, they could ask for cases implicating child labor, minimum wage, or occupational safety and health issues to advance beyond Evaluation to the Dispute Resolution level of treatment, if two govern-

76. See Prah, *supra* note 57.

77. See *Province's Halt of Privatization Plan Ends Looming NAFTA Complaint*, INSIDE NAFTA, Dec. 25, 1996, at 14; Allan Chambers, *Privatization of labor rules raises fears: Law may face NAFTA challenge*, EDMONTON JOURNAL, Sept. 6, 1996, at 1.

78. See U.S. NAO, *supra* note 55.

79. The Sprint Corp. has appealed the NLRB's decision to the federal courts of appeals.

ments agree to carry such cases forward. However, only one case susceptible to ECE treatment has been brought.⁸⁰

2. *Track II: Cross-Border Organizing.*

A key outgrowth of the NAFTA labor side accord is an unprecedented increase in exchange, communication, and collaboration among labor rights advocates and labor researchers at the trinational level. Under the NAALC's unusual cross-cutting procedures, complaints involving practices in one country must be initiated in or by another country. Thus, trade unionists and their allies are compelled to collaborate across North American borders to use the NAALC.

Even before NAFTA, the United Electrical Workers union (UE) and the Mexican *Frente Autentico de Trabajo* (FAT) fashioned a strategic organizing alliance.⁸¹ The Teamsters union and the FAT undertook similar efforts without the formality of a written agreement. Furthermore, the Communications Workers of America (CWA) developed close ties with the *Sindicato de Telefonistas de la Republica Mexicana* (STRM), the national telephone workers union of Mexico.⁸² The ILGWU and ACTWU, now joined in the new union UNITE, have carried out joint programs with unions in Mexico and Canada. In one "twin plant" setting with unionized shops in Eagle Pass, Texas and Piedras Negras, Coahuila, for example, the UNITE local collaborated with its Mexican counterpart to achieve key contract gains in both factories. On a broader scale, the Texas state AFL-CIO has formed a Border Solidarity Committee to work with Mexican unions in the border region.

The UE and Teamsters filed the first NAFTA labor cases with the U.S. NAO on behalf of Mexican workers involved in FAT organizing efforts. The Sony case was filed by a coalition of four groups: the Washington-based International Labor Rights Fund, the Texas-based Coalition for Justice in the Maquiladoras, and American Friends Service Committee Maquiladora Project, along with the Mexican National Association of Democratic Lawyers.

Assistance flows both ways, though. For example, the Mexican STRM filed the Sprint complaint on behalf of workers being organized in California by the CWA.⁸³ In 1995, FAT organizers helped the UE win an organizing victory at a large manufacturing plant in Milwaukee, Wisconsin with a high complement of migrant Mexican workers.⁸⁴ Mexican workers, union organizers, and labor lawyers testified in public hearings in the United States on the G.E., Honeywell, and Sony cases. Mexican, U.S., and Canadian labor, democ-

80. For a discussion of the first six cases, see Roy J. Adams & Parbudyal Singh, *Early Experience With NAFTA's Labour Side Accord*, 18 COMP. LAB. L. J. 161, 181 (1997) (concluding that "Each of the three nations has formally committed itself to follow policies that will result in the effective attainment of a robust list of labour rights. It is now up to organized labour and its allies to hold those nations to their word by using the accord to the fullest extent possible,").

81. See the *UE-FAT Strategic Organizing Alliance: Statement of Joint Work* (Feb. 1992), declaring a purpose of "exploring new forms of international labor solidarity in the struggle to improve living and working conditions on both sides of the border." *Id.*

82. See John Cusick, *U.S. and Mexican Telecom Unions Build North American Labor Solidarity*, CWA NEWS, Nov./Dec. 1995, at 10.

83. See Carey Goldberg, *U.S. Labor Making Use of Trade Accord It Fiercely Opposed*, N.Y. TIMES, Feb. 28, 1996, at A1.

84. See Terry Davis, *Cross-Border Organizing Comes Home: UE and FAT in Mexico and Milwaukee*, 23 LAB. RESEARCH REV. 23 (1995).

racy, and human rights advocates spoke out at public forums held by the U.S. and Mexican labor departments on union registration matters as part of the Sony case consultation. U.S. and Mexican unionists were joined by leaders of the Canadian, German, and British telephone workers unions in the public forum inspired by the Sprint case under the NAALC.

All these steps required careful coordination to shape common positions. As those involved begin to know each other better, contacts will proliferate. Currently, trade unionists and union economists, lawyers, and other staffers from the three NAALC countries regularly send delegates to each others' conventions, conferences, and other activities. They are trading bargaining information, translating papers and studies, and finding new ways to link their movements. While it is not only the labor side agreement driving these actions, the NAALC creates a framework for concrete work, including developing strategies, drafting submissions, planning testimony, writing press releases, setting up demonstrations, meeting with government officials, participating in the NAALC's cooperative activities program and events that flow from ministerial consultations, and all the learning about each other's countries and labor movements that goes with them.

Additionally, outside organized labor, a multitude of labor-allied non governmental organizations in the three countries have been conducting a series of trilateral conferences, workshops, research projects, and other bridge-building efforts for the past five years to press for a strengthened social dimension in North American economic integration. However, few of these efforts would have been undertaken outside the NAFTA context, and the NAALC provides concrete opportunity for more joint work.⁸⁵

E. CONCLUSION.

Any number of idealized "social charters" with universal standards and swift, powerful enforcement powers could be drafted by critics of the labor side agreement. But the NAALC was negotiated by sovereign governments with clashing business, labor, and political concerns. The result is a hybrid agreement, one that preserves sovereignty but creates mutual obligations and combines broad cooperation and consultation programs alongside contentious review, evaluation, and dispute resolution mechanisms. Most of all, the NAALC promotes engagement on labor rights and labor standards in an experiment not tested in any other international forum.

85. Key NGO actors in such coalitions include, for the United States: the International Labor Rights Fund (ILRF), the Alliance for Responsible Trade (ART), the Citizens Trade Campaign (CTC), the Development Group for Alternative Policies (D-GAP), the Institute for Policy Studies (IPS), the Coalition for Justice in the Maquiladoras (CJM), the American Friends Service Committee (AFSC), Bread for the World, Mexico-US *Dialogos*, the Institute for Agriculture and Trade Policy (IATP), the Inter-Hemispheric Education Research Center, the Resource Center of the Americas, the Tennessee Industrial Renewal Network (TIRN), and various academic centers; for Mexico: the *Red Mexicana de Accion Frente al Libre Comercio* (RMALC), the research groups *Equipo Pueblo* and FLACSO, the *Asociacion Nacional de Abogados Democraticos, Mujeres Trabajadores Unidas*, and a number of university research centers; for Canada: the Action Canada Network (ACN), the Canadian Center for Policy Alternatives (CCPA), the International Centre for Human Rights and Democratic Development (ICHRDD), the North-South Institute, the Steelworkers Humanity Fund, and the group Common Frontiers.

In principle, a labor rights accord linked to a trade agreement, such as NAFTA, ought to provide for universal standards and eventual harmonization of labor standards -- taking labor out of competition, in the classic formulation. But this is not easy when wide economic disparity exists among the countries negotiating a trade and labor accord, and a single country accounts for 85 percent of the economic activity in the trade area.

In the NAFTA context, a threshold problem of sovereignty concerns all three countries. These are not just concerns of government officials; they are deeply held in all sectors of society, including trade unions and social activist communities. Many Mexican and Canadian labor policy analysts look at the state of U.S. labor law and the U.S. labor movement and recoil at the prospect of homogenized labor laws. They are not about to give up laws created by their own representatives, administered by agencies accountable to their own executive branches, and reviewed by their own judiciary, to a new supranational agency that might be dominated by the overwhelming economic interests of the United States.

The approach taken in the NAALC, emphasizing "effective enforcement" of domestic labor law, is a more practical starting point than attempting to fashion common norms. Any system of law is only as good as its system of enforcement. U.S. experience with a resurgent sweatshop industry in major American cities should give pause to demands that Mexico, or any developing country, "raise" its standards to the levels of industrialized countries before enforcement is strengthened in every country.⁸⁶

Instead of yielding sovereignty over the content of their labor laws and standards, the NAFTA countries shaped the NAALC to open themselves up to trinational scrutiny of their enforcement regimes. Such scrutiny is conducted under the NAALC's Review process, through special studies by the Secretariat, and through Evaluation and Dispute Resolution by independent, non-governmental experts who are free to reach their own conclusions about the effectiveness of countries' labor laws. This is an extraordinary degree of candor in international relations, in contrast to traditional sovereignty rules. It should not be scorned because it fails to achieve a supposed ideal of international fair labor standards and swift, sure punishment powers having massive implications for national sovereignty and domestic legal structures.

86. See William Branigin, *Reaping Abuse for What They Sew; Sweatshops Once Again Commonplace in U.S. Garment Industry*, WASH. POST, Feb. 16, 1997, at A1.
