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THE FIRST NAFTA LABOR CASES: A NEW INTERNATIONAL LABOR RIGHTS REGIME TAKES SHAPE

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I. INTRODUCTION

The North American Agreement on Labor Cooperation (NAALC)[1] created a new forum for worker rights advocacy in the expanding global economy. When this labor side accord to the North American Free Trade Agreement (NAFTA) took effect January 1, 1994, trade unions in the United States, which had strongly opposed NAFTA, wasted little time putting it to the test. Two of them, the International Brotherhood of Teamsters (IBT) and the United Electrical, Radio and Machine Workers of America (UE), filed complaints with the United States National Administrative Office (NAO). Their submissions alleged labor rights violations against workers in the Mexican *maquiladora* region by two large U.S.-based multinational companies.

The NAO is the new agency created by the United States Department of Labor to review and report on public communications concerning labor law matters under the NAFTA labor side agreement.[2] Each NAFTA country established its *own* NAO to treat labor law matters in *another* NAFTA country. As a national entity that takes up labor rights issues outside the national territory, the NAO is a unique institution. It has no counterpart under the NAFTA environmental side agreement, nor under any other labor rights regime in Europe or elsewhere. As such, the first controversies brought to it under the NAALC bear close examination, both for indications as to how future cases will be handled as NAFTA and its side agreements evolve, and for comparison to other forums where international labor rights advocacy is undertaken.

Prediction of future events and a full comparative study are beyond the scope of this paper. The purpose here is to describe in some detail the NAO's processing of the first NAFTA labor rights cases. However, it is useful to first situate this new arena for labor rights advocacy in the broader landscape of labor rights regimes, especially with respect to their enforcement mechanisms.[3]

The most established and best-known forum for labor rights treatment is the International Labor Organization (ILO), a United Nations-related

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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. *See* Jorge F. Pérez-López, *The Institutional Framework of the North American Agreement on Labor Cooperation*, 3 U.S.-MEX. L.J. 133 (1995).

3. For a more thorough discussion of the variety of arenas where international labor rights are treated, see Lance Compa, *Labor Rights and Labor Standards in International Trade*, 25 J.L. & POL'Y INT'L BUS. 165-91 (1993).

body that fashions labor rights and labor standards adopted by government, business and labor delegates to its annual conference.[4] Since its founding in 1919, over 175 conventions and a similar number of recommendations have been adopted by the ILO.[5] The ILO has various procedures for handling complaints against member States, and different standing or *ad hoc* committees to conduct inquiries and issue reports on such complaints.[6] However, the ILO has no sanctioning power or other means of enforcing its standards. It must rely on behind-the-scenes dialogue, embarrassing publicity or other forms of moral force to persuade labor rights violators to change their conduct.[7]

The Organization for Economic Cooperation and Development (OECD) is another multilateral forum where labor rights issues can be raised. This coordinating body for the developed economies of Europe and North America (including Mexico, which joined the OECD in 1993), along with Japan, Australia and New Zealand, issued *Guidelines for Multinational Corporations* in 1976.[8] Under the *Guidelines*, complaints alleging labor rights violations by multinational companies operating in member countries can be brought before OECD committees that review application of the guidelines.

As with the ILO, no form of sanction may ensue under the OECD guidelines. Although trade unions complain of weakness in the guidelines, several stubborn labor-management disputes have been resolved in the course of OECD case processing.[9] The key here, as with the ILO, lies in the availability of an international forum for labor rights advocacy that entails an obligation to answer complaints and explain labor relations actions and policies. Even without potential sanctions at the end of the day, this creates an accountability that might otherwise be lacking.

While they do not provide for sanctions in the hard sense (imprisonment, fines or other financial penalties, or punitive trade measures such as increased tariffs or import bans), labor rights directives of the European Union[10] and labor rights guarantees under European human rights

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4. For a concise history of the ILO, see DAVID A. MORSE, THE ORIGIN AND EVOLUTION OF THE ILO AND ITS ROLE IN THE WORLD COMMUNITY (1969). For a more recent analysis of ILO activities, see ECONOMIC POLICY COUNCIL, UNITED NATIONS ASSOCIATION OF THE UNITED STATES OF AMERICA, THE INTERNATIONAL LABOR ORGANIZATION AND THE GLOBAL ECONOMY: NEW OPTIONS FOR THE UNITED STATES IN THE 1990s (1991).

5. *See* ILO, INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS, 1919-1991 (1992).

6. The ILO's complaint-handling mechanism is complex. For a description, see Lee Swepston, *Human Rights Complaint Procedures of the International Labor Organization, in* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 99-116 (Hurst Hannum ed., 2d ed. 1992).

7. For a discussion of the ILO's "moral suasion" as a means of enforcement, see Virginia A. Leary, *Lessons from the Experience of the International Labour Organization, in* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 580 (Philip Alston ed., 1992).

8. *See* OECD, DECLARATION ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES (rev. 1979).

9. For an account of labor dispute resolution under the OECD and ILO guidelines, see DUNCAN C. CAMPBELL & RICHARD L. ROWAN, MULTINATIONAL ENTERPRISES AND THE OECD INDUSTRIAL RELATIONS GUIDELINES (1983) [hereinafter CAMPBELL & ROWAN].

10. *See* Maastricht Treaty on European Union, Protocol and Agreement on Social Policy, 31 I.L.M. 247, 357 (Feb. 7, 1992).

instruments[11] have been treated by signatory countries as obligatory.[12] Indeed, national laws have been changed—sometimes with great reluctance—after the European Court of Justice or the European Court of Human Rights found a country in violation of labor rights norms.[13]

Trade sanctions *do* exist in unilateral labor rights regimes established by the United States under several of its trade laws. Labor rights amendments have been added to statutes governing the Generalized System of Preferences (GSP) in 1984,[14] the Overseas Private Investment Corporation in 1985,[15] the Caribbean Basin Initiative in 1986,[16] Section 301 of the Trade Act of 1988,[17] and Agency for International Development (AID) funding for economic development grants overseas.[18] In each case, a suspension or elimination of benefits or beneficiary status conferred by these programs can be applied against countries found to consistently violate internationally recognized worker rights.[19]

The GSP labor rights regime administered by the United States Trade Representative (USTR) has the most detailed mechanism for handling complaints, with some features similar to those of the U.S. NAO. It includes an annual petitioning cycle, standards for accepting petitions for

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11. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5.

12. For a description of European human rights regimes, see P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2d ed. 1990).

13. *See, e.g., European Community Cannot Ban Night Work for Women, Court Rules*, 9 EMPLOYEE REL. WKLY. (BNA) 856 (Aug. 5, 1991) (requiring France to revise a prohibition on women working night shifts); Robert Rice & David Goodhart, *Britain Ruled in Breach of EU Employment Laws*, FIN. TIMES (London), June 9, 1994, at 1. For an extended treatment of European labor standards, see ROGER BLANPAIN, LABOUR LAW AND INDUSTRIAL RELATIONS OF THE EUROPEAN COMMUNITY (1991).

14. 19 U.S.C. §§ 2461-2466 (1988). The GSP program permits a developing country to export goods to the United States on a preferential, duty-free basis as long as they meet the conditions for eligibility in the program.

15. 22 U.S.C.A. §§ 2191-2200 (1988). OPIC insures the overseas investments of U.S. corporations against losses due to war, revolution, expropriation or other factors related to political turmoil, as long as the country receiving the investment meets conditions for eligibility under OPIC insurance.

16. 19 U.S.C. §§ 2701-2706 (1988). A 1990 labor rights amendment to what is now called the Caribbean Basin Economic Recovery Act (CBERA), Pub. L. No. 100-418, 102 Stat. 1159 (1989) (current version at 19 U.S.C.A. §2702 (West Supp. 1994)), expanded the worker rights clause to comport with GSP and OPIC formulations. CBERA grants duty-free status to exports into the United States from Caribbean basin countries on a more extensive basis than under GSP provisions.

17. 19 U.S.C. §§ 2411-2419 (1988). Section 301 defines various unfair trade practices, now including worker rights violations, making a country that trades with the United States liable to retaliatory action.

18. Foreign Assistance Act of 1961, 22 U.S.C.A. §§ 2151-2376 (West Supp. IV 1992).

19. *See* Jorge Pérez-López, *Conditioning Trade on Foreign Labor Law: The U.S. Approach*, 9 COMP. LAB. L.J. 253 (1988). For a criticism of the United States approach to international labor rights as reflected in these statutes, see Philip Alston, *Labor Rights Provisions in U.S. Trade Law: "Aggressive Unilateralism"?*, 15 HUM. RTS. Q. 1 (1993); Theresa Amato, *Labor Rights Conditionality: United States Trade Legislation and the International Trade Order*, 65 N.Y.U. L. REV. 79 (1990); Harlan Mandel, *In Pursuit of the Missing Link: International Worker Rights and International Trade?*, 27 COLUM. J. TRANSNAT'L L. 443 (1989). For a defense of such clauses, see JOHN CAVANAGH ET AL., TRADE'S HIDDEN COSTS: WORKER RIGHTS IN A CHANGING WORLD ECONOMY (1988); Terry Collingsworth, *American Labor Policy and the International Economy: Clarifying Policies and Interests*, 31 B.C. L. REV. 31 (1989).

review, and a review process with public hearings and filings of written briefs and responses.[20] Several countries have been removed or suspended from preferential trade treatment under the GSP program because of labor rights violations.[21] Some have had GSP benefits restored after reforming their labor laws or labor law enforcement to comport with international standards.[22]

II. CREATING THE LABOR SIDE AGREEMENT AND THE NAO

A. Background to the NAALC

The NAFTA labor and environmental side agreements had their genesis in the 1992 presidential campaign of Bill Clinton.[23] Seeking to balance the market-opening concerns of his economic advisors with the social concerns of labor and environmental supporters, Clinton pledged to go forward with NAFTA on the condition that parallel accords on labor rights and environmental protection be negotiated with Mexico and Canada.[24] United States unions saw the labor side agreement as insufficient to protect workers and continued their fierce opposition to NAFTA.[25] For their part, environmental forces divided between those who viewed that side agreement as acceptable and those who argued that it fell short of necessary protective measures.[26]

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20. *See* Regulations of the USTR Pertaining to Eligibility of Articles and Countries for the Generalized System of Preference Program, 15 C.F.R. §§ 2007.0 to 2007.8 (1994).

21. *See* International Trade—Assessment of the Generalized System of Preferences, USGAO Pub. GAO/GGD—95-9, at 107-08 (Nov. 1994); Compa, *supra* note 3, at 182 n.91.

22. GSP labor rights case files are available for public inspection at the Office of the United States Trade Representative, Washington, D.C. For an inconclusive judicial review of the GSP labor rights enforcement program, see Int'l Labor Rights Educ. and Research Fund et al. v. Bush et al., 954 F.2d 745 (D.C. Cir. 1992) (divided court sustained motion to dismiss on jurisdiction, standing and justiciability grounds).

23. *See* Robert E. Herzstein, *The Labor Cooperation Agreement Among Mexico, Canada and the United States; Its Negotiation and Prospects*, 3 U.S.-MEX. L.J. 121 (1995) [hereinafter Herzstein].

24. *See* Governor Bill Clinton, Expanding Trade and Creating American Jobs, Address at Raleigh, North Carolina (Oct. 4, 1992).

25. For accounts of labor's organizing effort against NAFTA, see Peter T. Kilborn, *Unions Gird for War Over Trade Pact*, N.Y. TIMES, Oct. 4, 1993, at A14; Thomas K. Friedman, *Adamant Unions Zero In On Clinton*, N.Y. TIMES, Nov. 10, 1993, at B10. Labor advocates' criticism of the labor side agreement focused on two important features: 1) the absence of common labor rights and labor standards or any plan for gradual "harmonization" among NAFTA parties—instead, the agreement obligates each party to effectively enforce its *own* labor laws; and 2) the dividing of eleven defined "labor law matters" into different levels of treatment wherein three fundamental rights, from labor's standpoint—the right of association, the right to organize and bargain, and the right to strike—are subject only to review and consultation; eight remaining "technical labor standards"—regarding forced labor, child labor, minimum wage and hour standards, employment discrimination, equal pay for men and women, job health and safety, workers' compensation for occupational injuries and illnesses and protection of migrant workers—are subject to evaluation and recommendations by an Evaluation Committee of Experts (ECE); and of those eight only three—child labor, health and safety, and minimum wage and hour standards—can go forward to dispute resolution and possible sanctions. *See* Herzstein, *supra* note 23.

26. For the most part, those environmental NGO's that depend on large corporate grants for their primary funding sources supported NAFTA. Those with a grass roots base of individual donors opposed it. *See* Keith Schneider, *Environment Groups Are Split on Support for Free-Trade Pact*, N.Y. TIMES, Sept. 16, 1993, at A1.

This paper does not judge the validity of such criticisms of the NAFTA side agreements. Like any negotiated instrument, they reflect compromise among competing interests. When the negotiators speak for three sovereign nations, each with their own swirling, often clashing business, labor, environmental and political currents, the results are even more complex and nuanced. The surer present course for making sound judgments about the labor side agreement is to let experience under it take shape.

The North American Agreement on Labor Cooperation has certain hybrid characteristics. It stresses cooperation and consultation, as the title suggests and as various articles repeat. An agenda of sixteen subject areas is set forth for cooperative activities, with plans for conferences, research projects, technical assistance and other methods of cooperation.[27] At the same time, however, the Agreement contains a quasi-judicial contentious procedure that can lead to fines or suspension of NAFTA trade benefits for persistent violations of certain defined labor rights and labor standards.[28] Thus, cooperation and contention co-exist in the NAFTA labor side agreement. It remains to be seen how this inherent tension will play itself out in practice.

B. The National Administrative Office

The NAO of each NAFTA party provides the first level of treatment of labor rights issues under the labor side accord. A critical function of each is to review labor law matters in one or both of the other NAFTA parties—not domestic matters. In this sense, the thrust of the NAO's function runs counter to the otherwise firm preservation of sovereignty under the labor side accord. The Agreement recognizes "the right of each Party to establish its own domestic labor standards"[29] and insists that "[n]othing in this Agreement shall be construed to empower a Party's authorities to undertake labor law enforcement activities in the territory of another Party."[30] Nonetheless, empowering the authorities of a Party to *review* "labor law matters arising in the territory of another Party"[31] putatively breaches sovereignty in the strictest sense. It subjects domestic law and administration to judgments, including critical judgments, by a foreign entity.[32]

C. The U.S. NAO's Procedural Guidelines

United States employer and labor organizations first battled over the procedural guidelines for NAO reviews. The labor side agreement permits each country's NAO to conduct its reviews "in accordance with domestic

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27. NAALC, *supra* note 1, art. 11.
28. *Id.* arts. 27-41.
29. *Id.* art. 2.
30. *Id.* art. 42.
31. *Id.* art. 16(3).
32. For a broader discussion of the sovereignty issue, see Lance Compa, *Enforcing Worker Rights Under the NAFTA Labor Side Accord*, 88 AM. SOC'Y INT'L L. PROC. 535 (1994).

procedures."[33] Employer groups urged the U.S. NAO to establish guidelines for cooperative activities only, arguing that the very title of the labor side accord—the "North American Agreement on Labor Cooperation"—precludes any form of review or other contentious procedures except in the most unusual circumstances. Employers also asked the NAO to forbid the naming of any individual corporation in communications to the NAO, and to refuse to take up any matter until all domestic avenues of recourse in administrative agencies or courts were exhausted.[34] Predictably, labor rights advocates took an opposite tack. They called on the NAO to accept all but demonstratively frivolous complaints for review, and to hold field hearings in the United States city closest to events giving rise to a complaint.[35]

The U.S. NAO struck a careful compromise in its final procedural guidelines.[36] It stresses cooperation and consultation with other NAOs as guiding principles in its work.[37] It does not refer to "complaints," but rather "submissions," as the subject of filings by private parties under the side agreement.[38] It sets a fairly low threshold for initiating a review,[39] but requires submitters to show that "appropriate relief" has been sought—not exhausted—under the domestic laws of the other Party.[40] The guidelines also make the NAO review process an exclusive avenue of recourse among international labor rights regimes, barring review if the matter has been brought to the ILO, the OECD or another international body.[41]

The U.S. NAO provides for "prompt" hearings on submissions in most cases,[42] "as may be appropriate to assist the Office to better understand and publicly report on the issues raised."[43] Under the procedural guidelines established by the NAO, within 120 days of the acceptance of a petition for review (subject to an extension of sixty additional days) it "shall issue a public report, which shall include a summary of the proceedings and any findings and recommendations."[44]

At any point, under the terms of the Agreement, the NAO may request consultations with the NAO of another Party in connection with labor law, labor law administration or labor market conditions in the territory

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33. NAALC, *supra* note 1, art. 16(3).

34. *See* Letter from U.S. Council for International Business to U.S. NAO, Comments on Implementation of U.S. National Administrative Office (Feb. 15, 1994) (on file with U.S. NAO).

35. *See* Memorandum from International Labor Rights Education and Research Fund to U.S. NAO, Comments and Suggestions on Procedural Guidelines (Feb. 15, 1994) (unpublished manuscript, on file with U.S. NAO).

36. *See* Revised Notice of Establishment of United States National Administrative Office and Procedural Guidelines, 59 Fed. Reg. 16,660-62 (1994) [hereinafter Procedural Guidelines].

37. *Id.* § D(1).

38. *Id.* § C(4).

39. It permits review unless "statements contained in the submission, even if substantiated, would not constitute a failure of another Party to comply with its obligations . . . ." *Id.* § G(3)(b).

40. *Id.* § G(3)(c).

41. *Id.*

42. *Id.* § H(3).

43. *Id.* § H(1).

44. *Id.* § H(8).

of that Party.[45] Following Article 21 consultations between NAOs, the U.S. NAO may also recommend that the Secretary of Labor request Ministerial Consultations under Article 22, which permits such consultations on "any matter within the scope of this Agreement,"[46] or recommend that the Secretary of Labor request that an Evaluation Committee of Experts be established under Article 23 on one or more of the eight "technical labor standards" susceptible to ECE treatment.[47]

III. THE IBT AND UE SUBMISSIONS TO THE U.S. NAO

A. The Submissions

On February 14, 1994, the International Brotherhood of Teamsters (IBT) and the United Electrical, Radio and Machine Workers of America (UE) filed the first submissions to the U.S. National Administrative Office under the North American Agreement on Labor Cooperation.[48] The cases are similar in their timing and in their allegations, and were processed jointly by the U.S. NAO.

Both labor submissions alleged dismissals of groups of employees in late 1993 because of their attempts to form a union affiliated with the *Frente Auténtico del Trabajo* (Authentic Labor Front, F.A.T.). The F.A.T. is a Mexican labor grouping not tied to the dominant *Confederación de Trabajadores de México* (Mexican Labor Federation, C.T.M.), an arm of the governing Institutional Revolutionary Party. The IBT submission concerned events at a Honeywell factory in Chihuahua; the UE submission involved events at a General Electric plant in Ciudad Juárez.[49] Both submissions were accompanied by sworn affidavits from Mexican workers alleging that they were discharged for union activity.

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45. NAALC, *supra* note 1, art. 21.

46. *Id.* art. 22.

47. *Id.* art. 23. *See supra* text accompanying note 25 for the eight "technical labor standards."

48. Styled as "complaints" by the submitting labor organizations, the Teamsters' submission is Case No. 940001 (on file with U.S. NAO) [hereinafter IBT submission] and the Electrical Workers' submission is Case No. 940002 (on file with U.S. NAO) [hereinafter UE submission] (The IBT represents thousands of Honeywell employees, and the UE thousands of General Electric employees in various locations in the United States; both unions were active in the legislative campaign to defeat NAFTA.).

49. In February 1992, the UE and the F.A.T. announced a "Strategic Organizing Alliance" with a declared purpose of "exploring practical new forms of international labor solidarity in the struggle to improve living and working conditions on both sides of the border." The UE-F.A.T. Strategic Organizing Alliance: Statement of Joint Work, ¶ 1 (Feb. 1992) (on file with U.S. NAO). The UE-F.A.T. Alliance targets the factories of UE-represented companies in the United States that have relocated all or parts of their operations in the Mexican *maquiladora*. Among these are factories making electric motors, wire harnesses, printed circuit boards and other electrical and electronic equipment. The UE-F.A.T. Strategic Organizing Alliance also contained a commitment to "continue joint action strategies to fight against the proposed North American Free Trade Agreement and to fight for a new Continental Development Agreement that benefits the people of the United States, Canada and Mexico, not just the corporations." *Id.* ¶ 6.

Such anti-union discrimination is unlawful under the Mexican Constitution, the Mexican Federal Labor Law, and ILO Convention 87, ratified by Mexico and thus part of its law.[50]

In written communications to the U.S. NAO, Honeywell and General Electric denied that any dismissals were related to union activity. Instead, they insisted that termination of the employees was due to an economic reduction in force or, in some cases, due to employee misconduct.[51] The positions of the submitting unions and the companies are diametrically opposed, and there is no intention in this paper to assess the truth of the allegations. Experienced labor attorneys know well that cases alleging discriminatory discharge are often the most difficult for counsel to litigate and for triers of fact to decide, with complex rules governing shifting burdens of proof in "dual motive" cases and "pretext" cases.[52]

The IBT and UE submissions also contained allegations about health and safety hazards and overtime pay violations as issues that prompted worker efforts to organize. These are subjects that technically are susceptible to every level of treatment under the labor side agreement, including sanctions.[53] However, they were raised by submitters more on the margins than in the center of their cases, and did not figure prominently in further processing of the case. Instead, the NAO's treatment of the cases focused on the alleged discriminatory discharges in relation to the right of association and protection of the right to organize, which are subject only to first-level review and consultation treatment but cannot proceed to second-level evaluation or third-level dispute resolution.

B. Granting Review

The U.S. NAO accepted the IBT and UE submissions for review on April 15, 1994.[54] The United States Council for International Business and the General Electric Company raised several procedural objections to this decision:

1) that the dismissals at issue took place in 1993, before the effective date of the side agreement;

2) that the submissions did not allege a "pattern of practice" of violations under the Agreement;

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50. *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [CONST. - POLITICAL CONSTITUTION OF THE UNITED MEXICAN STATES], art. 123 (10th ed. Delma Edition) (Mex.); *Ley Federal del Trabajo [Federal Labor Law]*, DIARIO OFICIAL DE LA FEDERACIÓN [OFFICIAL GAZETTE OF THE FEDERATION—hereinafter D.O.] art. 133, at 356-58 (Apr. 1, 1970) (Mex.); Convention Concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No. 87) (entered into force July 4, 1950), *reprinted in* ILO CONVENTIONS AND RECOMMENDATIONS, *supra* note 5, at 435.

51. *See* Letter from Honeywell and attached Comments on NAO Submission #940001 (Aug. 31, 1994); Letter from General Electric and attached Submission #940002—Position Statement of the General Electric Company (Aug. 17, 1994) (on file with U.S. NAO).

52. *See, e.g.*, N.R.L.B. v. Wright Line, 251 N.L.R.B. 1083 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

53. *See supra* text accompanying note 25.

54. Determination to Accept Submission #940001 for Review, 59 Fed. Reg. 18,832-33 (1994); Determination to Accept Submission #940002 for Review, 59 Fed. Reg. 18,833-34 (1994).

3) that the complaining unions or affected workers had not invoked (per General Electric) or exhausted (per C.I.B.) domestic remedies in Mexico;

4) that the submissions focused on alleged wrongdoing by individual companies rather than on a failure by Mexico to effectively enforce its labor laws.[55]

A careful reading of the NAALC and the NAO's procedural guidelines supports the NAO's action. The Agreement defines "pattern of practice" as "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."[56] If the allegation of a "pattern of practice" were required for an NAO review, such review would clearly be precluded under this definition. However, the "pattern of practice" criterion, with its post-January 1, 1994 requirement, does not come into play under the labor side agreement's terms until an Evaluation Committee of Experts (ECE) is formed—*after* the NAO has completed a review.[57] In contrast, the NAALC provides for a broad scope of NAO review, namely "labor law matters arising in the territory of another Party,"[58] with no other limiting criteria as to timeliness or "pattern."

The employers simply erred in raising the domestic remedy objection. First, most of the dismissed employees sought and received severance pay in proceedings under the Mexican labor law system, and some of them declined severance pay and *did* seek reinstatement under Mexican law. Second, the NAO guidelines explicitly do not require exhaustion of domestic remedies, but only that relief has been "sought" under domestic laws.[59]

The issue of enforcement by Mexican authorities, distinct from alleged unfair labor practices by individual employers, posed a thornier problem for submitting unions and for the U.S. NAO. A core obligation assumed by the Parties to the NAALC is to "effectively enforce its labor law."[60] The NAOs are not intended to operate as a surrogate National Labor Relations Board, issuing complaints and conducting trials on charges of unfair labor practices by respondent employers or labor organizations.[61] Although both unions' submissions raised issues of enforcement—mainly arguing the futility of recourse to Mexican labor law administrators[62]—

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55. *See* Letter from the U.S. Council for International Business, (Aug. 31, 1994) (on file with U.S. NAO); Letter from General Electric (Apr. 5, 1994) (on file with U.S. NAO). For its part, Honeywell did not interpose procedural objections. It filed a position paper that went to the merits of the case, defending its actions at the Chihuahua factory that gave rise to the union submission. *See supra* note 51.

56. NAALC, *supra* note 1, art. 49.

57. *Id.* art. 23.

58. *Id.* art. 16.

59. *See* Procedural Guidelines, *supra* note 36, § G(3)(c).

60. NAALC, *supra* note 1, art. 3(1).

61. *See* National Labor Relations Act, 29 U.S.C. §§ 151-169, 3-6 (1988).

62. The UE submission alleges that the failure of the Mexican authorities to enforce its labor laws is established by a number of sources, and goes on to describe the sources in some detail. UE submission, *supra* note 48. The Teamster submission discusses the then-pending complaint of

their content was closer in substance to an unfair labor practice complaint against the employers.

In part, the unions' focus on alleged corporate wrongdoing was due to inexperience with the NAO and the labor side agreement. In the United States, union experience in invoking legal processes is largely one of filing complaints against companies.[63] It is only natural that here, with no guidelines in place and no prior cases for guidance, the unions would rely on formulations with which they are most comfortable. Besides that, though, the unions did not want to let the employers "off the hook" for what they saw as moves to crush union organizing. Perhaps, the unions reasoned, companies might become more cautious in their treatment of union activists if they realize that the labor side agreement creates a forum where adverse publicity about working conditions in Mexico could affect the United States corporate image.[64]

The unions' most solid ground for the viability of their submissions lies in the labor side agreement itself. "Enforcement" is not the beginning and end of obligations assumed by the Parties. The NAALC provides that "each Party shall ensure that its labor laws and regulations provide for high labor standards,"[65] that "[e]ach Party shall promote compliance with . . . its labor law,"[66] and that "the Parties are committed to promote . . . [f]reedom of association and protection of the right to organize."[67] Each of these formulations goes beyond the enforcement issue per se.

The broad scope of NAO review, "labor law matters," does not restrict review to enforcement issues. Likewise, the NAO's procedural guidelines reflect this broad scope, permitting review of submissions "on labor law matters arising in the territory of another Party,"[68] without specifying enforcement as the relevant "matter." Similarly, Ministerial Consultations which would follow an NAO review are held "regarding any matter within the scope of this Agreement."[69] As with the "pattern of practice" criterion, "enforcement" first appears as a mandatory criterion for action under the NAALC in Article 23 establishing the scope of an ECE

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one of the dismissed employees before the Mexican labor board, pointing out that such labor boards have a reputation for refusing to reinstate workers when fired for supporting an independent union. IBT submission, *supra* note 48. The submission goes on to request relief specifically aimed at enforcement by Mexican authorities.

63. U.S. unions rarely use ILO or OECD procedures, compared to their European counterparts. *See* CAMPBELL & ROWAN, *supra* note 9.

64. As one union official stated, "You [the NAO] have the ability to create [substantial] headaches for corporations and government bodies that disregard labor rights, to focus the spotlight of public attention and condemnation on their behavior, and to give pause to those who contemplate embarking on that path." *See* Statement from Amy R. Newell to U.S. NAO, "Violations of Worker Rights by General Electric Company and Failure of the Mexican Government to Effectively Enforce Laws Protecting Labor Rights," at 3 (Sept. 12, 1994) (on file with U.S. NAO).

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

66. *Id.* art. 3(1). *See also id.* art. 1(f).

67. *Id.* annex 1 (Labor Principles). In addition, Article 1 specifies that the objective of the NAALC is to "promote, to the maximum extent possible, the labor principles set out in Annex 1." *Id.* art. 1(b).

68. Procedural Guidelines, *supra* note 36, § C(4).

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

evaluation.[70] Enforcement as such does not appear to limit the scope of an NAO review or subsequent consultations.

Had it chosen to adopt a narrow procedural approach to the unions' submissions, the U.S. NAO might have sustained a stricter reading of the labor side agreement and rejected review on timeliness and "pattern" grounds, or over the "enforcement" question, notwithstanding the broader language of the Agreement. However, it is impossible to divorce a technical reading of a legal instrument from a "reading" of the political winds in the wake of the bitter fight over NAFTA. United States unions had been vociferous in their opposition to NAFTA and in their criticism of the labor side agreement. Had the NAO rejected these submissions on a technicality, new blasts of criticism from organized labor and its allies in Congress, congressional hearings, perhaps even a union "boycott" of the side accord, would likely have ensued—especially where, as here, a careful, technical reading of the NAALC would *not* result in barring review. In this instance, the NAO did not have to make an overtly political decision to grant review in the face of contrary language in the Agreement. The language itself justified acceptance and review of the unions' submissions.

C. The Review Process and Planning the Public Hearing

Having accepted the submissions for review, the U.S. NAO undertook "such further examination of the submission as may be appropriate to assist the Office to better understand and publicly report on the issues raised."[71] It continued a regular dialogue with the submitting unions and with representatives of the corporations involved in the cases. It requested and received information from the NAO of Mexico.[72] It commissioned two extensive studies of Mexican labor law and labor law administration, especially as they relate to freedom of association and the right to organize.[73] Finally, on July 28, 1994, the U.S. NAO announced that a public hearing would be held August 31, 1994 in Washington, D.C. on the submissions and invited "persons wishing to provide information or present their views on matters related to the review" to file statements or request to testify.[74]

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

71. Procedural Guidelines, *supra* note 36, § H(1).

72. In response to the U.S. NAO's request, the NAO of Mexico applied strictly the terms of Article 21 of the labor side agreement on "Consultations between NAO's." It provided "descriptions of its laws, regulations, procedures, policies or practices," but refused the NAO's request for information on the specific allegations of the IBT and UE submissions. NAALC, *supra* note 1, art. 21. *See* Letter from *Oficina Administrativa Nacional de México* to U.S. NAO, (July 5, 1994) (on file with U.S. NAO).

73. *See* REPORT, LABOR LAW ENFORCEMENT IN MEXICO AND THE ROLE OF THE FEDERAL AND STATE CONCILIATION AND ARBITRATION BOARDS, NATIONAL LAW CENTER FOR INTER-AMERICAN FREE TRADE (July 26, 1994); PAUL A. CURTIS, REPORT, QUESTIONS ON LABOR LAW ENFORCEMENT IN MEXICO AND THE ROLE OF THE ARBITRATION AND CONCILIATION BOARDS (Sept. 7, 1994).

74. *See* Notice of Hearing, 59 Fed. Reg. 38,492 (1994). Originally announced for August 31, 1994, the hearing was later postponed until September 12, 1994.

The conditions announced by the NAO for the conduct of the hearing engendered a new controversy with submitting unions. The NAO rejected the unions' request that the hearing take place in El Paso, Texas, the United States city closest to Ciudad Juárez and Chihuahua. It required written statements or briefs ten days in advance of the hearing, limited oral testimony to a ten-minute summary of the written statement, and prohibited any sound or film recording devices at the hearing.[75]

Union representatives argued:

1) that travel expenses to Washington, D.C., as opposed to a field hearing in El Paso, would deny many affected workers the opportunity to testify at the hearing;

2) that requiring a full written statement ten days in advance of the hearing was burdensome and unnecessary, especially for Mexican witnesses in the midst of campaigns for their August 21, 1994 presidential election;

3) that ten minutes were insufficient for witnesses to complete their testimony;

4) that the media prohibition would stifle public awareness of labor rights under the NAALC; and

5) that union representatives should be allowed a greater role in the hearing, including being able to question witnesses.[76] Prompted by union advocates, similar protests were registered by members of Congress.[77]

The unions and their congressional allies may not have sufficiently appreciated a waiver clause included by the NAO in its announcement of the public hearing: "The requirements relating to the submission of written statements or briefs and requests to present oral testimony may be waived by the Secretary of the U.S. National Administrative Office for reasons of equity and the public interest."[78] In the end, the U.S. NAO struck a careful compromise. It adhered to the decision to conduct the hearing in Washington, D.C., as a site "readily accessible to a broad cross-section of interested parties."[79] It maintained the media limitation, pointing out that the print media had complete access to the hearing and that a complete transcript would become part of the public record. It continued to limit union participation to presentation of testimony, not cross examination, on the grounds that "no witness has the right to cross examine any other witness because the hearing is informational rather than adversarial."[80]

Responding to union concerns, the NAO moved the hearing date back two weeks to September 12, 1994, giving the unions and their witnesses more time to prepare. It waived the requirement for complete written

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75. *See id.* (Nature and Conduct of Hearing).

76. *See* Letter from United Electrical, Radio and Machine Workers of America (UE) to U.S. NAO (July 29, 1994) (on file with U.S. NAO).

77. *See* Letter from Rep. Richard A. Gephardt (Aug. 3, 1994) (on file with U.S. NAO).

78. Hearing on Submissions #940001 and #940002, 59 Fed. Reg. 38,493 (1994) (Written Statements of Briefs and Requests to Present Oral Testimony).

79. Letter from NAO to Rep. Gephardt (Aug. 10, 1994) (on file with U.S. NAO).

80. *Id.*

statements ten days in advance of the hearing, accepting instead brief descriptions of anticipated testimony. It accepted the unions' proposal to have presentations by four panels of witnesses rather than individuals, and agreed to blocks of time ranging from forty minutes to two hours for the witness panels to make their presentations at the hearing.[81]

IV. THE FIRST PUBLIC HEARING BY THE U.S. NAO

The U.S. NAO's hearing on the IBT and UE submissions under the NAALC took place on September 12, 1994 in a large conference room at the United States Department of Labor headquarters in Washington, D.C. The only witnesses that appeared were trade union representatives. Officials of Honeywell and General Electric did not testify at the hearing, choosing instead to file written statements.[82] The NAO of Mexico did not participate in the hearing, as it could have under the procedural guidelines of the U.S. NAO.[83] No other persons requested to testify at the hearing.

The Secretary of the U.S. NAO opened the hearing with a statement of purpose and a review of the ground rules for the conduct of the hearing.[84] Panel 1 consisted of the President of the IBT and the General Secretary-Treasurer of the UE.[85] They presented overviews of their experiences with Honeywell, General Electric, and other companies transferring production to Mexico, and of their efforts to develop mutual organizing and bargaining projects with unions in Mexico. They repeated core arguments of United States unions against what they viewed as the pro-employer content of NAFTA, as well as the weaknesses of the labor side agreement.[86] At the same time, the UE officer expressed belief that "the NAO can make the difference, can elevate the question of respect for workers' rights far beyond the level that your actual enforcement power would lead one to expect."[87] These witnesses were not questioned by the U.S. NAO.

Panel 2 consisted of one former employee from the Honeywell plant in Chihuahua and one former employee from the General Electric plant in Juárez, accompanied by a representative of the F.A.T. and by a UE labor attorney.[88] The UE counsel opened this panel's testimony with a

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81. Amended Notice of Hearing on Submissions #940001 and #940002, 59 Fed. Reg. 41,511 (1994).

82. *See supra* note 51.

83. *See* Procedural Guidelines, *supra* note 36, § H(7).

84. Transcript of Public Hearing from U.S. NAO at 4-8 (Sept. 12,1994) (on file with U.S. NAO) [hereinafter Transcript]. NAO Secretary Irasema Garza presided over the hearing, accompanied by staff members of the U.S. Department of Labor's Bureau of International Labor Affairs and Solicitor's Office.

85. *See* Written Statement from Ron Carey and Amy Newell to the U.S. NAO (Sept. 12, 1994) (on file with U.S. NAO).

86. Transcript, *supra* note 84, at 8-20.

87. *Id.* at 17.

88. *See* Written Statement from Fernando Castro, Ofelia Medrano, Benedicto Martínez & Robin Alexander to the U.S. NAO (Sept. 12, 1994) (on file with U.S. NAO).

summary of the factual background alleged in the submissions and introductions of the witnesses to follow.[89] Each of the workers gave accounts of the termination of their own and co-workers' employment, allegedly for their pro-union activities, recounting statements by company managers that their union activity was the reason for their firing.[90]

The NAO hearing officer questioned these witnesses about their efforts to seek redress under Mexican labor law procedures. One acknowledged that while she first contested her dismissal and sought reinstatement through the Mexican *Junta de Conciliación y Arbitraje* (Conciliation and Arbitration Board, CAB), she later, faced with an economic crisis, accepted severance pay and waived reinstatement rights.[91] Another worker testified that his case was still pending before the CAB without a decision, nearly ten months after his dismissal.[92]

The F.A.T. union official described his work attempting to organize at the Honeywell and General Electric plants. He alleged discrimination by the Mexican government against his independent union federation, contrasting it to the favorable treatment received by the government-affiliated C.T.M. federation.[93] He also alleged widespread use of blank forms that workers are required to sign as a condition of employment and that are later presented as signed resignation statements if workers contest their dismissal, and widespread use of a blacklist by *maquiladora* employers.[94] Questioning by the NAO hearing officer again went to attempts by the witness to seek redress through the Mexican labor law system, eliciting an explanation that government officials refused to entertain complaints from an independent union federation and that only individual workers, not the union that is assisting them in organizing, are permitted to seek legal remedies.[95]

Panel 3 consisted of four Mexican labor attorneys with extensive experience representing workers and unions, much of it on behalf of independent union groupings not connected to the dominant C.T.M. federation.[96] These attorneys went into greater detail on alleged discriminatory treatment of independent unions as a method of government control of the labor movement, the use of pre-signed resignation forms and blacklists, the application of severance pay and waiver of reinstatement as a systematic method of suppressing union organizing, and restrictions on the right to strike, alleging that such practices are especially prevalent in the *maquiladora* sector.[97] Here the U.S. NAO engaged in the most

89. Transcript, *supra* note 84, at 20-27.
90. *Id.* at 27-39.
91. *Id.* at 38-39. The issue of severance pay and waiver of reinstatement as a systematic method of stifling trade union organization became a focus of the hearing. *See id.* at 44-45, 72-74.
92. *Id.* at 33-34.
93. *Id.* at 39-49.
94. *Id.* at 46-50.
95. *Id.* at 49-51.
96. *See* Written Statements from Arturo Alcalde, Jesús Campos Linas, Jorge Fernández Sousa & Gustavo de la Rosa to the U.S. NAO (Sept. 12, 1994) (on file with U.S. NAO).
97. Transcript, *supra* note 84, at 52-76.

extensive questioning, with a wide-ranging interchange that covered the substance of the law, the structure and practice of the CABs and other administrative bodies, as well as the judicial system, and the application of the *cláusula de exclusión* or "closed shop" feature of Mexican labor law.[98]

The final panel consisted of three United States labor attorneys connected with the Teamsters union, and a Canadian labor law expert.[99] The General Counsel of the IBT offered a series of "possible recommendations and agenda for consultation" for the NAO to pursue in its public report. Among seven suggested recommendations was one that would have the corporations reinstate dismissed employees, and one that would have them adopt a "code of conduct" for their *maquiladora* operations. Eight suggested agenda items for NAO-to-NAO or Ministerial Consultations included holding conferences for employer and trade union groups, and developing "plain language" guides to worker rights in the three NAFTA parties.[100] A Teamster associate general counsel asked the NAO to draw an adverse inference against the corporations in making findings for its Public Report, based on their refusal to appear at the hearing and subject themselves to questioning, as workers and union representatives were willing to do.[101]

The final witnesses encountered resistance from the NAO hearing officer when they offered testimony comparing United States and Canadian labor law regarding association and organizing rights. The third witness on this panel, a Chicago-based Teamster attorney, fashioned an argument that because workers' efforts at organizing were prompted by concerns over health and safety issues, the cases should be permitted to advance to ECE and dispute resolution phases rather than be blocked by an "arbitrary separation between associational rights and health and safety issues."[102]

This witness also cited the recent Dunlop Report to show that problems similar in some respects to those described at the hearing, such as discrimination against union activists and delays in legal proceedings, also exist in the United States.[103] The Canadian witness sought to describe "positive" steps taken by the government of Ontario to protect rights of association and organizing. He cited an Ontario law permitting immediate reinstatement of workers while their cases go forward, who are allegedly dismissed for organizing.[104] The relevancy of such comparative

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98. *See id.* at 76-89. The "closed shop" is illegal under U.S. labor law. *See* National Labor Relations Act, *supra* note 61, § 8(a)(3).

99. *See* Written Presentation by Judith A. Scott and Written Statement of Chris Schenk, Ontario Federation of Labor, Possible Recommendations and Agenda for Consultation by the NAO (Sept. 12, 1994) (on file with U.S. NAO) [hereinafter Possible Recommendations]; Oral Statements of Earl Brown, Jr. & Thomas Geoghegan, Transcript, *supra* note 84, at 94-101.

100. *See* Possible Recommendations, *supra* note 99 (on file with U.S. NAO); Transcript, *supra* note 84, at 90-94.

101. *See* Transcript at 94-95.

102. *Id.* at 100-01.

103. *Id.* at 95-98. *See also* U.S. Department of Labor, U.S. Department of Commerce, *Fact Finding Report*, Comm'n on the Future of Worker-Management Relations at 63-92 (May 1994).

104. *See* Transcript, *supra* note 84, at 105-06.

information to a public report on the submissions was challenged by the NAO hearing officer.[105]

The hearing concluded with a brief exchange on the question of "what provision or provisions in the North American Agreement on Labor Cooperation . . . authorized the NAO to make the recommendations you suggest?"[106] Counsel suggested that "your own rules envision recommendations," and pointed to the "range of consultations" in Article 22, namely "any matter within the scope of the agreement."[107] The Secretary of the U.S. NAO closed the hearing with an announcement that persons wishing to submit post-hearing briefs had one week to file.[108]

The two submitting unions and Honeywell each filed a post-hearing brief or statement.[109] These were the only post-hearing filings. The UE brief developed an argument that the use of severance pay as a method of avoiding union organizing, even if technically legal under Mexican law, is violative of ILO Convention 87 on freedom of association and protection of the right to organize.[110] Among other points, the IBT argued that comparative testimony on United States and Canadian experience is relevant to the cases and that NAO resistance to the testimony was "misplaced" because "a responsible request for Consultations . . . should evince a willingness to be self-critical" and that "knowledge of comparative methods of handling similar problems in the three Parties to the NAALC . . . would help ensure that any subsequent Consultations—which the NAO is empowered to request or recommend in connection with these cases—could be carried out on the basis of cooperation and equality."[111] Honeywell pointed out that all controversies had been resolved and no matters involving it were pending before Mexican labor law authorities.[112]

V. FIRST PUBLIC REPORT OF THE UNITED STATES NATIONAL ADMINISTRATIVE OFFICE

On October 12, 1994, the U.S. NAO issued its public report on the IBT and UE submissions.[113] The report first outlined the functions of the NAO, then summarized the submissions of the two unions. It described the conduct of the reviews, stressing that acceptance "was not intended

105. *Id.* at 110.
106. *Id.*
107. *Id.* at 111.
108. *Id.* at 112.
109. *See* Brief for the United Electrical, Radio and Machine Workers of America (UE) (Sept. 16, 1994) (Submission No. 940004) (on file with U.S. NAO) [hereinafter UE Brief]; Post-Hearing Brief for the International Brotherhood of Teamsters, (Sept. 19, 1994) (Submission No. 940002) (on file with U.S. NAO) [hereinafter IBT Brief]; Letter from Honeywell to U.S. NAO (Sept. 19, 1994) (on file with U.S. NAO).
110. UE Brief at 2-3.
111. IBT Brief at 9-10.
112. Letter from Honeywell to U.S. NAO, *supra* note 109, at 1.
113. *See* U.S. National Administrative Office, *Public Report of Review, NAO Submission #940001 and NAO Submission #940002* (Bureau of International Labor Affairs, U.S. Dept. of Labor, Oct. 12, 1994) (on file with U.S. NAO) [hereinafter NAO Report].

to indicate any determination as to the validity or accuracy of the allegations contained in the submissions," and pointing out that the reviews focused on "promotion of compliance with, and effective enforcement of, labor laws that guarantee the right of association and the right to organize freely and prohibit the dismissal of workers because of efforts to exercise those rights."[114]

The report summarized or cited information received from submitting unions and from the Honeywell and General Electric companies, from the NAO of Mexico, from outside experts and from other sources.[115] It devoted several pages to a description of the public hearing and the statements of witnesses there,[116] and described the contents of post-hearing statements by interested parties.[117]

The report went on to review enforcement by the government of Mexico of labor laws relevant to the submissions, again noting that "the issue at hand in the review of the two submissions is whether the Government of Mexico is enforcing its labor laws."[118] It described the procedure and functioning of the state and local Conciliation and Arbitration Boards (CABs) that handled the Honeywell and General Electric matters, noting that except for two cases still pending where a witness complained of delays,[119] no allegations of improprieties on the part of CABs were alleged.[120]

In its key last section on findings and recommendations, the U.S. NAO first repeated its admonition that its review "has not been aimed primarily at determining whether or not the two companies named in the submissions may have acted in violation of Mexican labor law," but rather "to gather as much information as possible to allow the NAO to better understand and publicly report on the Government of Mexico's promotion of compliance with, and effective enforcement of, its labor law . . . ."[121] The NAO noted that the review "reveals disagreements about the events at each of the plants," namely whether workers were fired because of union activity or not, without making any finding as to which version it accepts.[122] However, the NAO did note that "the timing of the dismissals appears to coincide with organizing drives by independent unions at both plants."[123]

In the next passage of the "findings and recommendations" section, the NAO notes that:

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114. *See id.* at 1-7.
115. *Id.* at 9-13, 22; *see also supra* notes 51, 55, 72, 73.
116. *See* NAO Report, *supra* note 113, at 13-20.
117. *Id.* at 20-22; *see also supra* note 109.
118. *See* NAO Report at 21-28.
119. *See* Transcript, *supra* note 84, at 33-34.
120. *See* NAO Report at 26-28. There was testimony at the public hearing, however, alleging that the Labor Secretary of the state of Chihuahua, who supervises the work of the CABs, expressed prejudice against independent union organizing in the *maquiladora* when F.A.T. representatives sought his assistance. *See* Transcript at 49-50, 78.
121. *See* NAO Report at 28.
122. *Id.* at 28-29.
123. *Id.* at 30.

> During the review,a number of other relevant issues regarding enforcement of labor law in Mexico, particularly in the *maquiladora* sector, were brought to the attention of the NAO. They include the difficulties in establishing unions in Mexico, the hurdles faced by independent unions in attaining legal recognition, company black listing of union activists, the use of blank sheets, and government preference for and support of official unions.
>
> Another such issue was the very high percentage of Mexican workers dismissed from their jobs who elect to take severance pay rather than seek reinstatement—which is their right under Mexican labor law.[124]

However, the NAO declared itself to be "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 and the cases of two workers still pending in legal proceedings, were all in keeping with Mexican labor law.[125]

The U.S. NAO recommended a series of cooperative programs regarding rights of association and organizing, such as government-to-government seminars, which would include state and provincial authorities, and "other events that involve the business and labor communities in each of the three countries."[126] It also recommended that each country educate its public about the labor side agreement and its operation.

The NAO ended its report by stating that it "does not recommend ministerial consultations on these matters under Article 22 of the NAALC." It noted that "the information available to the NAO does not establish that the Government of Mexico failed to promote compliance with or enforce specific laws involved."[127]

VI. CONCLUSION

Most press accounts portrayed the NAO Report as a victory for the corporations and the Mexican government. "Reich Supports Mexico On Union Organizing," said the headline in *The New York Times*.[128] *The Washington Post* reported that "The Labor Department rejected complaints by two United States unions that Honeywell and General Electric violated the rights of Mexican workers by firing them for being active in union organizing campaigns."[129] According to *The Wall Street Journal*, "In its findings, the Labor Department said that the Mexican government protected worker rights."[130] Submitting unions reacted with anger to the NAO's final report, terming the process that led to it a "grand fiasco"

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124. *Id.* at 29.
125. *Id.* at 30-31.
126. *See id.* at 31.
127. *Id.* at 32.
128. Allen R. Myerson, *Reich Supports Mexico On Union Organizing*, N.Y. TIMES, Oct. 13, 1994, at C7.
129. Financial Digest, WASH. POST, Oct. 14, 1994, at C1, C2.
130. *See* Asra Q. Nomani, *Unions Angry After Administration Rejects Complaints About Mexico Plants*, WALL ST. J., Oct. 14, 1994, at A2.

and a "false promise," while Honeywell and General Electric officials commended it.[131]

All these reactions—the press's "horse race" approach, the unions' outrage and the companies' contentment—overlook important subtleties in deciding the first cases brought under the NAFTA labor side accord. First, the NAO did not reject the unions' complaints. It found "disagreement about the events,"[132] but noted pointedly that "the timing of the dismissals appears to coincide with organizing drives,"[133] leaving an implication that the workers might well have been fired for organizing. Second, the NAO did not make a positive finding that the government of Mexico protected worker rights. It couched its findings in the negative: that it "is not in a position to make a finding that the Government of Mexico failed to enforce the relevant labor laws,"[134] leaving open the possibility that it did so fail.

Furthermore, the NAO report cited a number of "relevant issues . . . brought to the attention of the NAO" in the course of its review, without characterizing them as being in dispute: difficulties in organizing, obstacles to independent union formation, blacklisting, the use of blank resignation forms, government favoritism toward official unions, and the high incidence of severance pay instead of reinstatement after dismissal.[135] Their formulation as "relevant issues" rather than "allegations" leaves a clear implication that these issues are substantive problems that need to be addressed.

But discerning subtle implications in the NAO Report is no consolation for the bottom line, as far as the unions are concerned. It did not recommend Ministerial Consultations, the single follow-up measure clearly available under the side accord and the NAO procedural guidelines.[136] Instead, it opted for "soft" recommendations such as seminars, conferences and public information and education programs.[137]

Conflicting versions of what actually happened in these first cases created a dilemma for the U.S. NAO. On one hand, an NAO review involves gathering information to prepare a report, not conducting a trial to determine violations of the labor side agreement's terms. On the other hand, the NAO's report must contain findings and recommendations. As noted above, the NAO is hard pressed to make such findings or recommendations without implying that one or the other position of the parties to these cases is to be credited.

The U.S. NAO tilted toward an expansive reading of the labor side accord in accepting the first submissions and holding a public hearing.

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131. *Id.*
132. NAO Report, *supra* note 113, at 28-29.
133. *Id.* at 30.
134. *Id.* at 30-31.
135. *Id.* at 29.
136. Recall that rights of association and organizing may only be a subject of NAO review and Ministerial Consultation. They are not susceptible to an evaluation by an ECE or dispute settlement by an Arbitral Panel. *See supra* note 25.
137. NAO Report, *supra* note 113, at 31-32.

It tilted back toward a narrow reading in deciding the cases when it declined to offer findings on employer conduct and limited its inquiry to "enforcement" matters, without going to "compliance," "ensuring" high labor standards and "promoting" freedom of association and protection of the right to organize, which are also part of the labor side accord.[138] This bold-on-process, cautious-on-outcome approach is probably as much as could be expected from a new government agency in its first case.

The U.S. NAO acted in many respects like the ILO or the OECD when they take up labor rights issues, where sanctions are lacking but the existence of a forum for labor rights advocacy has an effect of its own.[139] Precluded from sanctions by lack of subject matter jurisdiction, the NAO still provided a forum where worker representatives could raise and press for labor rights under terms of a trade agreement. Employers and governments were forced to examine their own conduct and give an accounting of events surrounding the alleged worker rights violations.

Naturally, the companies declared themselves innocent, and the government of Mexico gave the minimum permissible response under the NAALC. But the dynamic launched by the NAO review process had its own effect, independent of the possibility or impossibility of sanctions. Behind the scenes, it forced the companies and the government to review their own actions and to have subordinate officials explain their decisions to superiors.[140] On stage, they had to explain corporate conduct and governmental administration, and to defend themselves in the court of public opinion and political judgment, where the overall worth of NAFTA and the side accords will ultimately be settled.

Union advocates suggested that the NAO decision gives U.S. companies and the Mexican government *carte blanche* to violate worker rights.[141] This may be too dire a conclusion. Obviously, the decision let the companies and the government off the hook to the extent that there were no formal findings of unlawful conduct by employers or of failure to enforce the law by the government, and no recommendation for Ministerial Consultations. But easy access for trade union and worker complainants to a public review and a public hearing on the types of issues raised in the first NAO cases might, on the other hand, make companies more careful in their employment policies where union organizing is underway, and make Mexican labor law authorities more even-handed in their treatment of independent unions and more assertive on behalf of workers discharged for organizing. Only future experience will tell whether the unions' initial pessimistic view will be sustained.

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138. *See* NAALC, *supra* note 1, arts. 1(f), 2, 3(1), 22, 23(2), and annex 1. *See also* Procedural Guidelines, *supra* note 36, § C(4).

139. *See* CAMPBELL & ROWAN, *supra* note 9.

140. General Electric offered reinstatement to several of the dismissed employees in its Mexico plant after an internal review undertaken in response to U.S. union complaints. NAO Report, *supra* note 113, at 11-12, 27.

141. Bureau of National Affairs, *NAO Closes Book on Union NAFTA Charges Against Honeywell and General Electric*, LAB. REL. WK. (BNA), Oct. 19, 1994, at 1009.

This brings the analysis to a discussion of broader policy considerations surrounding the NAO review process. Although the U.S. NAO disclaims any overtly adjudicative function, it is difficult to see how it may avoid such a role altogether. Any report must contain findings and recommendations. It is only natural that any findings and recommendations will require judgments that at least imply compliance or noncompliance with obligations under the labor side agreement.

The question left unanswered after the first cases is whether the NAO will adhere to its narrow, enforcement-only approach in future cases or take a more expansive approach. There is a fundamental problem that the NAO has yet to address: what to do when apparent enforcement of the law has the underlying effect of violating obligations assumed under the labor principles of the NAALC labor rights. In these cases, for example, the NAO declined to look underneath the surface of apparent compliance with Mexican labor law where workers took severance pay instead of seeking reinstatement.[142] While it mentioned them as "relevant issues," the NAO also declined to address charges of legal technicalities being strictly enforced against unions out of favor with the government but loosely applied to government-connected unions, of supposed resignation statements actually deriving from pre-signed blank forms, of blacklisting practices, and of anti-union discrimination by *maquiladora* employers.[143]

The NAALC permits the NAO to go beyond enforcement issues to matters of ensuring high labor standards, promoting compliance with labor law and promoting the labor principles of Annex 1.[144] The underlying issue of whether a severance pay system where workers are forced by economic necessity to accept pay and waive their reinstatement rights operates *de facto* to deny them and their co-workers freedom of association and protection of the right to organize could be addressed in a broader approach to labor law matters, in keeping with the NAALC and the NAO guidelines. Likewise, the NAO could more extensively address the other "relevant issues" raised in this and future reviews. It remains to be seen whether the NAO moves in this direction in future cases or whether it instead stays on the track laid by this first, narrowly-drawn decision.

From the standpoint of trade unions and labor rights advocates eager to see aggressive enforcement of high labor standards, the NAO decision is a disappointment. But labor rights in North America are not going to rise or fall on the outcome of these initial NAO cases. After all, the U.S. NAO cannot organize workers, negotiate collective bargaining agreements, win strikes or elect pro-labor candidates. Working people and their allies have to do that. Meanwhile, the labor side accord and the

142. NAO Report, *supra* note 113, at 30-31.
143. *See id.* at 29.
144. *See* NAALC, *supra* note 1, arts. 1(f), 2, 3(1), 22, 23(2), and annex 1. *See also* Procedural Guidelines, *supra* note 36, § C(4).

NAO review process provide a new forum where labor rights advocates can press for improved working conditions and call companies and governments to account for their practices.[145]

From the standpoint of U.S. corporations with investments in Mexico, and of the government of Mexico and other governments that might in the future accede to NAFTA and the side accords and who want those investments to expand, the first NAO decision should be viewed with caution, not contentment. Whether GE and Honeywell were guilty or innocent in these particular instances, the fact remains that labor practices that have previously been in the private domain of employers and reviewed by anonymous bureaucrats in obscure proceedings, are now subjected to a formal, public governmental review with the trappings, if not the substance, of an adjudicatory process.

Continued review of future submissions alleging corporate misconduct and their public review, especially if the NAO expands its approach to such cases, could cause companies involved in NAFTA trade to modify labor relations policies with regard to union organizing, or at least soften their treatment of individual workers involved in organizing. It could also influence them to turn toward voluntary codes of conduct or some other form of self-regulation as a counter to pressure or criticism from trade unions or governmental bodies. More ominously for advocates of increased North American trade, it could even cause them to begin to weigh the benefits of NAFTA-related tariff reductions against the costs of defending themselves in NAFTA's new labor rights regime. For example, corporations might look to China as a place to invest in the wake of the Clinton Administration's decision to "de-link" human and labor rights considerations from China's trade status.[146]

For the time being, the U.S. NAO is still defining its role and testing its capacities. It could not reasonably be expected to take on the role of an avenging angel in the first cases that came before it. For one thing, the sheer complexity of Mexican labor law and its administration makes definitive judgments difficult. It will take time to develop a foundation of knowledge from which to base more ambitious findings and recommendations.

At this point in the continuing strife over NAFTA and the labor side agreement, hard-edged findings and aggressive recommendations against the corporations or the government of Mexico might have the same destructive impact on the new labor rights regime created by the side accord that an initial refusal to accept the petitions for review, or a

145. The Telephone Workers Union of Mexico has filed a submission to the NAO of Mexico alleging labor rights violations by the Sprint Corporation in connection with the shutdown of a long-distance telephone operations center in California shortly before those workers were to vote on union representation. *See* Tim Shorrock, *Mexican Union Steps In To Defend U.S. Workers' Rights*, J. COM., Feb. 13, 1995, at A3.

146. *See* Thomas L. Friedman, *U.S. Is To Maintain Trade Privileges for China's Goods*, N.Y. TIMES, May 27, 1994, at A1; Douglas Jehl, *U.S. Is To Maintain Trade Privileges for China's Goods*, N.Y. TIMES, May 27, 1994, at A1; Ann Devroy, *Clinton Reverses Course on China; MFN Action Separates Human Rights, Trade*, WASH. POST, May 27, 1994, at A1.

refusal to hold a hearing, would likely have had among trade unionists and their congressional allies. The business community and Mexican government trade and labor policymakers could simply walk away from it, characterizing an aggressive NAO as just a platform for company-bashing and Mexico-bashing.

Just as importantly, the U.S. NAO has to find its place among other U.S. federal agencies dealing with NAFTA issues, such as, for example, other offices within the Labor Department's Bureau of International Labor Affairs, the Office of the United States Trade Representative, the State Department, the Commerce Department, the Agriculture Department, and the White House's foreign and trade policy apparatus. It will take time to establish a substantial record of dealing with labor rights cases and to build substantial credibility in order to have weight in influencing future United States trade and labor rights policies.

The NAO's step forward in accepting these cases and holding a public hearing, followed by its half-step back in declining to make findings of guilt or moving toward Ministerial Consultation, may have been a sound first course of action in a longer-range plan to develop its effectiveness. From the complaining unions' point of view, they were victimized by such a bureaucratic imperative. Similarly, the companies named in these complaints are its beneficiaries. But in the long run, workers and trade unions, as well as employers and governments, will be better served by an NAO that has carefully built up its credibility and effectiveness in the new international labor rights regime established by the NAALC.

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