

**DÉJÀ VU ALL OVER AGAIN?
COLLECTIVE BARGAINING AND NAFTA:
CAN MEXICAN AND UNITED STATES NATIONAL UNIONS FOSTER
GROWTH UNDER THE NAALC?**

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I. INTRODUCTION

This Note compares the labor rights provisions of the Mexican Constitution of 1917 (as codified in the Mexican federal labor laws) to models of federal labor law standards in the United States. This Note points out the ways in which each country's national union objectives differed as each respective union leadership rose to power, but it acknowledges that Mexican and American unions share the common objective of preserving power. The sources of power differ, however; Mexican labor unions seek to maintain the power of state-chartered unions, while American labor unions struggle to preserve the power base they obtained during World War II.¹ History demonstrates that poor strategic decisions in both countries may have led to detrimental outcomes for unions. Ultimately, this Note concludes that contemporary Mexican and U.S. labor unions may lack sufficient autonomous power to increase their memberships in the NAFTA context, but by coordinating their efforts with other organizations they can assure that the status of Mexican workers as well as the vitality of U.S. unions will continue to be an issue of public discussion.

With respect to Mexican labor unions, the following analyses address employee legal rights issues that can impede union organizing efforts. Especially relevant to the discussion is the role of the recently deposed Partido Revolucionario Institucional (Institutional Revolutionary Party, PRI)² in relation to the Presidential election of Vicente Fox of the Partido Acción Nacional (National Action Party, PAN) and other significant party victories in the 2000 Mexican elections.³ The PRI, which was the dominant political party for seventy years, established a patronage system that perpetuates shared power between the Mexican federal government and state sanctioned unions over the Mexican worker.⁴ The question now becomes whether PAN will endorse this policy

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1. See Frederick Englehart, *Withered Giants: Mexican and U.S. Organized Labor and the North American Agreement on Labor Cooperation*, 29 CASE W. RES. J. INT'L. L. 321, 329 & 340 (1997).

2. See *id.* at 340-42.

3. See *id.* at 344-45.

4. See *id.* at 347.

approach or change the laws to allow a more competitive approach to union representation of workers. The following sections evaluate the patronage system generally and the specific complications it presents in terms of establishing new labor organizations.

Finally, this Note considers how the unions' focus in both countries has had to shift from confrontation and adversarial positioning to compromise and cooperation with non-labor social movements to remedy waning power bases and to pursue Party compliance with the implementation requirements of the North American Agreement on Labor Cooperation (NAALC).⁵ This part of the discussion compares initial and more recent submissions to the National Administrative Office (NAO) and illustrates that unions are becoming more adept at arguing the language of trade agreements.⁶ However, the question remains whether the AFL-CIO and nascent Mexican unions can form cooperative cross-border corporate entities, subject to Mexican law, to pursue common goals.⁷

II. COMPARISON OF SOURCES OF LABOR LAW

A. Mexico's Civil Law System and Its Influence on Labor Law

The current Mexican system of law has evolved from several constitutions – though the latest has survived more than ninety years – since the Mexican Revolution at the turn of the century.⁸ The Constitution of 1917 contains over 130 articles and, unlike its American counterpart, enumerates 80 distinct rights in the first 29 articles.⁹ Article 123 of the Constitution of 1917 includes several provisions regarding the protection and dignity of labor, and Mexican Federal Labor Law now codifies many of these provisions.¹⁰ Article 123

5. *See id.*

6. The treaty organization itself had to become familiar with the procedural and political parameters of the NAALC language at the same time unions were continuing to use conventional (but inapplicable) NLRB language to gain the advantage in agreements. Over time, both NAOs and unions became more proficient at interpreting and using NAALC language in their agreements, and early NAFTA union submissions reflect that traditional labor bargaining language was not suited for trade agreement submissions.

7. The AFL-CIO and affiliated Canadian national unions already operate in such a manner. The United Auto Workers and the United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industries provide examples. Both AFL-CIO affiliates have Canadian and United States divisions that bargain independently of one another, but enjoy the fruits of association with similar organizations.

8. WILLIAM D. SIGNET, MEXICAN LAW LIBRARY COMMERCIAL IX (1997), available at 1997 WL 685237.

9. *Id.* at XIV. The Constitution of 1917 also contains over 200 amendments.

10. *Id.* at XV. *See generally* MEX. CONST. tit. VI, art. 123 (1917), English version available at <http://www.ilstu.edu/class/hist263/docs/1917const.html>. This section of the 1917 Constitution dedicates twenty-seven subsections to define social and working

establishes the eight hour work day,¹¹ the six day maximum work week,¹² restricts the labor of minors,¹³ and addresses many other privileges and obligations that evolved primarily through statutory reform in the United States.¹⁴

The Constitution of 1917 strives to protect Mexican social rights by "exhort[ing] the state to assume a primary role in providing free and universal primary and secondary education," free from fanaticism and prejudices.¹⁵ The Mexican federal government has specific ownership of all lands and waters, and a foreign interest may obtain rights only after agreeing to be subject to the Mexican government and its laws as a Mexican citizen.¹⁶ A unique by-product of the provisions in Articles 103 and 107 of the Constitution is federal court empowerment to decide controversies arising from laws or administrative acts that infringe upon individual liberties.¹⁷ These "*amparo*" judicial powers are a combination of equitable remedies that are similar to writs of habeas corpus, mandamus and judicial appeal.¹⁸ *Amparo* grants standing to Mexican citizens in many areas of law where U.S. citizens may either lack standing or fail to show they are a party to the case or controversy pursuant to the common law application of Article III of the Constitution.¹⁹ The practical effect of recourse under *amparo* is beyond the scope of this Note, but it is important to recognize that Mexican unions have exercised *amparo* rights to challenge the status quo in collective bargaining situations.²⁰

Mexico has a federal government with executive, legislative and judicial divisions, and each branch possesses both enumerated and implicit powers.²¹ The

conditions in Mexican industry, and another fourteen subsections defining the relationship between unions and the federal government, and establishing many specific worker rights, including minimum annual vacation time.

11. MEX. CONST., *supra* note 10, art 123 (A)(I).

12. *See id.* art. 123 (A)(IV).

13. *See id.* art. 123 (A)(III).

14. *See generally* National Labor Relations Act, 29 U.S.C. §§ 151-168 (1935); Fair Labor Standards Act, (FLSA) 29 U.S.C. §§ 209-219 (1939); Title VII of the 1964 Civil Rights Act, (Title VII) 42 U.S.C. § 2000(e) (1964); Age Discrimination in Employment Act (ADEA) 29 U.S.C. § 621-634 (1990); Americans with Disabilities Act, 42 U.S.C. §§ 12101-12113 (1967); *See also* MEX. CONST., *supra* note 10, arts. 103 & 107.

15. SIGNET, *supra* note 8, at XIV.

16. *See id.* at XV.

17. *See id.* at XV. Individuals opposed to and harmed by official acts, arrest, and deportation can assert *amparo*. Individuals can levy *amparo* against legislative acts, regulations or decrees. Final judicial decisions are subject to *amparo* challenges when no legal recourse exists. Administrative acts or omissions, whether federal or local, are subject to *amparo* proceedings as well. A court may enjoin further acts against the aggrieved party at any time during the proceeding. *Id.*

18. *Id.*

19. *Id.*

20. *See* § VI (B) *infra*, Recent NAALC Activity.

21. SIGNET, *supra* note 8, at XVI-XVII.

public administration of laws occurs through the coordination of multiple chartered agencies. The separation of powers in Mexico, while parallel to that in the United States, has resulted in executive branch dominance.²² This dominance is attributable to Mexico's civil law system, which allows the executive branch to promulgate judicial regulations. The attenuated development and application of common law decisions in Mexico also contributes to the Executive's comparatively greater judicial power. Thus, case law jurisprudence comprises "one of the most significant differences between the Mexican and U.S. legal system."²³ To establish judicial precedent with the precedential authority that exists in the U.S. court system following a Supreme Court decision, the Mexican Supreme Court of Justice or the collegial circuit courts must reach the same judicial conclusion in five consecutive opinions; a contravening opinion in any case jeopardizes precedent.²⁴ Although jurisprudential development can occur through the Mexican federal tax court and the administrative law court in the federal district,²⁵ the arduous development of common law creates a system whereby the executive branch is in a better position to promulgate laws and regulations, and is thus more powerful than the judicial branch.

The U.S. legal system is a more unitary system, and the judicial branch adjudicates issues without regard to any specialized basis.²⁶ In Mexico, however, courts are more specialized and "sharp divisions still exist among several branches of jurisprudence, the primary ones being civil, commercial, criminal, administrative, and labor matters . . ."²⁷ The result is a non-unified legal system. For example, the Mexican legal system might confer jurisdiction upon federal courts to hear commercial cases but specify that other courts have authority only over other particular claims.²⁸ "[R]egistration requirements and the public registry in which such requirements are inscribed may depend upon whether the actor or the subject matter of the transaction is accorded a civil or commercial character."²⁹

Another difference between the American common law and the Mexican civil law systems relates to how officials interpret the laws. When undertaking a

22. *See id.* at XVIII.

23. *Id.* at XXVIII.

24. *See id.*

25. *See id.*

26. *See* U.S. CONST. art. III, §§ 1 & 2. United States judicial power resides in the Supreme Court and Congress has constitutional authority to establish inferior federal courts as it sees fit. Congress also has the authority to designate the jurisdiction of the federal courts. Federal tax and patent courts represent examples of lower courts upon which Congress has conferred specialized jurisdictional authority.

27. *SIGNET*, *supra* note 8, at XXX.

28. *See id.* at XXXI. Mexican courts continue to distinguish between civil, commercial, labor and administrative claims. Conversely, although the American judicial system is divided into civil and criminal divisions and each division includes several subdivisions and specialized courts, American courts generally have jurisdiction to hear multiple and diverse claims. *See also* U.S. CONST. art. III § 2.

29. *SIGNET*, *supra* note 8, at XXXI.

legal analysis, an American attorney is likely to use both statutory interpretation and case law when formulating her arguments.³⁰ On the other hand, a Mexican lawyer will rely solely on statutory language and the conventional interpretations in the Mexican legal community.³¹ These interpretations and understandings develop through formal commentaries and informal intercollegial discussions where legal professionals exchange information and experience in an "ethos of cooperation and consensus."³² An attorney in the United States could not render an opinion on a statute until thoroughly reviewing the case precedents regarding statutory interpretation.³³

Finally, the notary public plays a critical role in the Mexican legal system. This quasi-public official is educated in the law and provides mandatory legal services to the general public and private parties who require such services to legitimize their undertakings.³⁴ The imprimatur of a notary official creates a presumption that documents are legitimate and valid, and this presumption of validity can also extend to transactional facts and occurrences.³⁵ While the notary often provides requisite legal services and tenders legal advice to the parties who appear before him, the notary does not have clients *per se*.³⁶

Understanding Mexican legal customs and practices is critical for the American attorney who may be working within the confines of a very different set of problems. American corporations that are relocating to or starting up in Mexico should have a similar understanding since the corporation may be significantly dependent upon Mexican legal representation to navigate through and comply with legal requirements.³⁷ Not surprisingly, it is equally important that American labor union representatives are cognizant of the particularities in Mexican law; otherwise, American unions that seek to collaborate or form associations with Mexican national labor unions are likely to face considerable obstacles. Notably, as strikingly different as the Mexican and U.S. judicial systems are, parallels exist in the labor jurisdictions, where both countries designate special boards to hear employment disputes.³⁸

30. *See id.* at XXX.

31. *Id.*

32. *Id.*

33. *See id.*

34. *See id.* at XXXIII.

35. SIGNET, *supra* note 8, at XXXIII.

36. *See id.*

37. *See* Christine Larson, *Legal Maze: Though Mexico has Streamlined a Few of its Bureaucratic Headaches, U.S. Companies Often Still Need a Mexican Legal Team to Lead Them Through the Intricacies of the System*, BUS. MEXICO, May 1, 1999 (American Chamber of Commerce of Mexico).

38. *See* SIGNET, *supra* note 8, at XXXI. Employment disputes of first instance are usually delegated to special Labor and Conciliation Boards (*Juntas de Conciliación y Arbitraje*); *see also* NLRA, *supra* note 14. In the United States, the National Labor Relations Board has the authority to settle representation disputes and prosecute violations of the unfair labor practices provisions of the Act.

B. The United States and the Foundation of Labor Law

The U.S. Constitution does not speak as directly to the honor and dignity of labor. Instead, constitutional concepts implicitly incorporate workers' rights into concepts such as the freedom of assembly and association³⁹ and the right to contract.⁴⁰ Collective bargaining has also contributed to the development of workers' rights, and many of the advances in U.S. labor law resulted from Congressional responses to particular political situations.⁴¹

The National Labor Relations Act (NLRA) became law in 1935 and created the second National Labor Relations Board (NLRB).⁴² The Act recognized the right of American workers to freely associate and identified the formation of labor organizations as a national policy objective.⁴³ The Fair Labor Standards Act of 1938 added definitions of child labor and established the forty-hour work week as the baseline wage period.⁴⁴ Then, in 1964, Congress enacted Title VII of the Civil Rights Act that prohibited employers from discriminating based on race, sex, national origin, religion, or color.⁴⁵ The Age Discrimination in Employment Act of 1967 created a legally protected class for workers who are forty years old and older to shield against age discrimination.⁴⁶ The most recent Congressional legislation to promote employee rights was the Americans with Disabilities Act of 1990, which prevents employers from discriminating against qualified applicants because of a disability.⁴⁷ Subsequent U.S. Supreme Court opinions have modified the understanding of each of these Congressional acts. However, the Mexican Supreme Court of Justice cannot influence interpretation or administration of statutory law as efficiently.⁴⁸

One can thus make several notable comparisons between the ways labor laws developed in Mexico and the United States. First, Mexico formally

39. U.S. CONST. amend. I.

40. *Id.* art. I, § 10.

41. See *Lochner v. U.S.*, 198 U.S. 45 (1905). In *Lochner*, the Supreme Court reasoned that the individual right to contract outweighed a state's right to regulate economic labor conditions, unless the regulation related to an appropriate state goal. Subsequent development in jurisprudence has rejected this doctrine as it applies to economic regulation of labor. Additionally, the National Labor Relations Act recognizes the right of individual employees to associate and pursue contractual obligations from employers.

42. See NLRA, *supra* note 14. The first NLRB was established under a joint resolution of Congress approved June 19, 1934, 48 Stat. 1183 (1934).

43. See *id.*

44. See FLSA, *supra* note 14.

45. See Title VII, *supra* note 14.

46. See ADEA, *supra* note 14.

47. See ADA, *supra* note 14.

48. See SIGNET, *supra* note 8, at XXVIII.

constitutionalized laws relating to the dignity of labor in 1917. The United States never explicitly incorporated such laws into its constitution, and congressional creation of enumerated employee rights lagged behind comparable Mexican constitutional laws by eighteen to twenty-one years. Second, judicial review had a considerable influence on Congressional labor legislation in the United States, and therefore played a greater role in U.S. labor law than in Mexican labor law. Third, since judicial opinions have accompanied and interpreted congressionally enacted labor laws, judicial reviews have clarified the scope of law enforcement for U.S. administrative agencies. Given the prescribed regimen for establishing Mexican jurisprudence, it comes as no surprise that judicial review in the United States has proven a more expedient and effective means of developing the law.

III. THE UNIONS' RISE TO POWER

A. The Ascent to Power of Mexican Labor Unions and the Hegemonic State Control

Organized labor in Mexico finds life in Title VI, Article 123 of the Mexican Constitution of 1917.⁴⁹ Mexican federal labor law arises out of the constitution and is national in scope.⁵⁰ These labor laws address both individual⁵¹ and collective rights,⁵² employment relationships and employer and employee obligations,⁵³ working conditions and standards,⁵⁴ strikes,⁵⁵ and employment procedures.

Like unions in the United States, the politics of war have influenced the growth and decline of union power in Mexico. The 1910-1920 Mexican Revolution saw the rise to power of the confederated labor organizations known as Casa Del Obrero Mundial (House of the World Worker, CASA). This group of organizations ascended to power with Mexican President Carranza and maintained it throughout the administrations of his successors, Obregon and Calles,⁵⁶ but failed when it called a general strike as part of the power struggles during the Revolution. A more cooperative labor organization, the Confederacion Regional Obrera Mexicana (Regional Confederation of Mexican Workers, CROM) replaced CASA.⁵⁷

49. See MEX. CONST., *supra* note 10, art. 123.

50. See Englehart, *supra* note 1; see also Ley Federal Del Trabajo (The Federal Labor Law) (1970), available at 1997 WL 686862 [hereinafter FLL].

51. See FLL, *supra* note 50, tit. ii.

52. See *id.* tit. vii.

53. See *id.* tit. vi.

54. See *id.* tit. iii.

55. See *id.* tit. viii.

56. See Englehart, *supra* note 1, at 341.

57. See *id.* citing GEORGE W. GRAYSON, THE MEXICAN LABOR MACHINE 6-8 (The

CROM also thrived under Presidents Obregon and Calles and worked against other labor organizations, including CASA, to support the government.⁵⁸ CROM faded in the late 1920s, and one of the leaders from that organization, Vicente Toledano, established a new organization that eventually became the Confederacion de Trabajadores de Mexico (Confederation of Mexican Workers, or CTM). The CTM is the largest of the three political factions that comprise the PRI union patronage.⁵⁹ However, "[T]his proximity to the ruling party has produced an organized labor movement without an ideology of its own."⁶⁰

B. The Extent of Corruption in Mexican Labor Unions

Critics of Mexican organized labor and its close association with the PRI since the 1930s condemn its corrupt political culture.⁶¹ Observers assert that officials fail to investigate alleged labor law infractions and ignore the functionality of the enforcement system.⁶² However, not all commentators conclude that the legal aspects of Mexico's political and labor system are non-functioning and corrupt. If the critics acknowledge that Mexican labor history is "one of class struggle, built on exploitation, the repression of workers' coalitions and labor strikes,"⁶³ they also acknowledge that the constitutional response is a "far reaching and historic effort to define the social rights of Mexico's workers."⁶⁴

The PRI constructed a system that not only assured its own welfare, but that also influenced judicial composition. Although the Mexican judicial system is not overly manipulative, judicial patronage is a by-product of the PRI's sixty-

Center for Strategic Studies, Washington, D.C., ed., 1989)); Rodney D. Anderson, *Mexico, in LATIN AMERICAN LABOR ORGANIZATIONS* 511, 517 (Gerald Michael Greenfield & Sheldon L. Maram eds., 1987).

58. See Anderson, *supra* note 57, at 518.

59. See Englehart, *supra* note 1, at 341 referring to FREDERIC MEYERS, *MEXICAN INDUSTRIAL RELATIONS FROM THE PERSPECTIVE OF THE LABOR COURTS* 14-15 (Institute of Industrial Relations Monograph Series Vol. 24, 1979).

60. Englehart, *supra* note 1, referring to DAN LA BOTZ, *MASK OF DEMOCRACY: LABOR SUPPRESSION IN MEXICO TODAY*, 39 (1992).

61. See generally LA BOTZ, *supra* note 50.

62. Michael Joseph McGuinness, *The Politics of Labor Regulation in North America: A Reconsideration of Labor Law Enforcement in Mexico*, 21 U. P. INT'L ECON. L. 1 (Spring 2000) [hereinafter McGuinness, *The Politics of Labor*].

63. Michael Joseph McGuinness, *The Landscape of Labor Law Enforcement in North America: An Examination of Mexico's Labor Regulatory Policy and Practice*, 29 LAW & POL'Y INT'L BUS. 365, 370 (Spring 1998) [hereinafter McGuinness, *The Landscape of Labor*]; Boris Kozolchyk, *The Spirit of Mexico's "New" Labor Law*, in LABOR LAW ENFORCEMENT IN MEXICO AND THE ROLE OF THE FEDERAL AND STATE CONCILIATION AND ARBITRATION BOARDS 1 (1994) (report submitted to the U.S. NAO, U.S. Dept. of Labor).

64. McGuinness, *The Landscape of Labor*, *supra* note 63, at 370; see also MEX. CONST., *supra* note 10, art. 123.

year monopoly on political power, and thus contributes to Mexico's systemic political corruption.⁶⁵ The PRI chain of Presidents Salinas and Zedillo in the 1980s and 1990s diminished the powerful PRI-CTM alliance with economic policies that weakened the association between the two entities.⁶⁶

The composition of Conciliation and Arbitration Boards (CABs) illustrates this point.⁶⁷ Each CAB by law consists of both labor and management representatives and one government official.⁶⁸ Historical allegations assert that most of the labor appointments are gifts of political patronage from CTM,⁶⁹ which possesses undeniable political stature as the primary PRI labor organization and exerts considerable influence over the CABs.⁷⁰ CABs tend to view unions unaffiliated with CTM as either apolitical and non-threatening or leftist and destabilizing, and CAB decisions typically do not favor the more radical unions.⁷¹ "The U.S. Embassy reports that while charges of corruption, strong-arm tactics, sweetheart deals, and the active frustration of true union organizing efforts have some validity, they are not the predominant pattern."⁷²

Starting in 1995, however, the National Action Party (PAN) began winning critical municipal and regional elections.⁷³ These smaller-scale victories arguably paved the way to PAN candidate Vicente Fox's victory in the 2000 Mexican Presidential elections. The ways in which Fox's administration affects Mexican organized labor and responds to a staggering decrease in earned wages remain uncertain.

65. See Englehart, *supra* note 1, at 344. The pool of candidates from which judicial appointees are chosen consists of those people the PRI endorses or considers reliable.

66. See *id.* at 347. Efficiency measures on the state-run railroad (Ferroviales) and oil company (Pemex) resulted in massive layoffs; adoption of plant-by-plant collective bargaining measures reduced the power CTM had enjoyed in the industry-wide method; institution of inflation fighting measures and an internal political realignment of PRI cost CTM political capital within PRI.

67. See Englehart, *supra* note 1, at 343.

68. MEX. CONST., *supra* note 10, tit. vi, art. 123(A)(XX) ("The differences or conflicts between capital or labor will be subject to the decision of a Board of Conciliation and Arbitration, formed by an equal number of representatives of the workers and the employers, and one of the government.")

69. See Englehart, *supra* note 1, at 343.

70. *Id.*

71. See *id.*

72. See Englehart, *supra* note 1, at 344 citing BUREAU INT'L LAB. AFF., U.S. DEP'T. LAB. FLT 95-15, FOREIGN LABOR TRENDS, 1994-95; MEXICO 15 (1995); see also Englehart, *supra* note 1, at 344.

73. See Englehart, *supra* note 1, at 345.

C. The Importance of World War II: The Rise Before the Fall of the Labor Movement in the United States

World War II presented the unexpected impetus for union leaders to develop a political stronghold and to form a credible national labor movement;⁷⁴ a nation at war has higher priorities than resisting workers' demands in the workplace. President Roosevelt established the National War Labor Board (NWLB) on January 12, 1942 and granted it jurisdiction to ensure wartime industrial output.⁷⁵ The NWLB's contributions to the labor movement during the War included making certain that recalcitrant employers complied with labor agreements, augmenting employee fringe benefits, and increasing union membership from 13.2% in 1935 to 35.5% in 1945.⁷⁶

The union shop, a cornerstone of union jobsite control, enjoyed significant reinforcement.⁷⁷ However, union activities dating back to World War I continued to influence the public perception of unions. Because no-strike pledges provided little protection against union work stoppages during that era, public sentiment in the 1930s and 1940s was adverse to strikes.⁷⁸ The same thing happened in World War II. Despite no-strike and no-lockout provisions, workers again began to strike against key sectors of the economy that employed large numbers of people.⁷⁹ Consequently, the 1946 political elections turned the tide against labor unions and ultimately produced the Taft-Hartley Act of 1947, which effectively limited the reach of labor laws that had expanded with the passage of the NLRA and the government's broad interpretation of collective rights.⁸⁰ The Act directly challenged union power by granting workers the right to refrain from participating in union activity,⁸¹ making the closed shop illegal,⁸² instituting a

74. See David Brody, *Thinking About Industrial Unionism*, in *WORKERS IN INDUSTRIAL AMERICA: ESSAYS ON THE 20TH CENTURY STRUGGLE*, 120 – 28, (2nd ed. 1993) [hereinafter Brody, *Thinking*].

75. See Englehart, *supra* note 1, at 329 n.46. See also Exec. Order No. 9017, 3 C.F.R. 1075 (1938-1943), reprinted in 2 U.S. DEP'T. LAB., *TERMINATION REPORT OF THE NATIONAL WAR LABOR BOARD* 49 (1949). The WLB expired on December 31, 1945 having disposed of 208,900 industrial disputes that involved more than 12.5 million workers.

76. See Englehart, *supra* note 1, at 329; see also Brody, *Thinking*, *supra* note 74, at 121.

77. See Brody, *Thinking*, *supra* note 74, at 120-28.

78. See *id.* at 332; see also Exec. Order No. 9017, 3 C.F.R. 1075 (1938-1943), reprinted in 2 U.S. DEP'T. LAB., *TERMINATION REPORT OF THE NATIONAL WAR LABOR BOARD* 49 (1949) at 10. In 1942, 2,968 work stoppages greater than ten days in duration idled 840,000 workers; in 1943, 3,752 work stoppages averaging five days idled 1,981,000 workers. See also *Postwar Work Stoppages Caused by Labor Management Disputes*, 63 MONTHLY LAB. REV. 718, 720 (1946).

79. See Englehart, *supra* note 1, at 331.

80. See Labor Management Relations Act, Pub. L. No. 80-101, 61 Stat. 136 (codified at 29 U.S.C. §§ 141-187 (1988)).

81. See *id.* § 157.

complex process for union representation elections,⁸³ and introducing several new “unfair labor practices” that included sanctions for union non-compliance.⁸⁴

By 1946, union organizations had also become vulnerable to criminal infiltration; officials found a “clear and historical partnership between organized crime and organized labor.”⁸⁵ The passage of the Hobbes Act during that same year⁸⁶ resulted from the conclusion that efforts to “clean up” labor had failed and marked the beginning of a thirty-year scrutinization of labor.⁸⁷ For instance:

The corrosive effects of the reflexive use of the strike, the tolerance of criminal infiltration, philosophical decisions by leaders [that led to sluggish progressive unionism], the conversion of high office to personal sinecure, could have been mitigated by responsible, forward-looking leadership . . . [but unionism’s] shortsighted use of . . . power [when it had it] furnishes the theme for its decline. Now, perhaps fatally weakened by declining membership, union leadership can no longer afford to act reflexively, but must reassess its responses and tactics with a view to the long term that includes a searching evaluation of the tools at hand. NAALC is one tool that should be used more.⁸⁸

In the decades before and after World War II, American labor leaders chose a philosophy that eschewed political involvement and focused on the immediate needs of better wages and working conditions.⁸⁹ In a strategic effort to impede union organization, companies began applying a philosophy of “welfare capitalism” to provide benefits and recognize a moral obligation to their employees.⁹⁰

82. *See id.* § 158(a)(3).

83. *See id.* § 159.

84. *See id.* § 158(b).

85. *Id.*

86. *See* Pub. L. No. 79-258 (1946), reprinted in 1946 U.S. Code Cong. Serv. 1360.

87. *See* Englehart, *supra* note 1, at 334-35.

88. *Id.* at 339.

89. *See* Brody, *Thinking*, *supra* note 74, at 37.

90. *See* Brody, *The Rise and Decline of Welfare Capitalism*, 47-78, in *WORKERS IN INDUSTRIAL AMERICA: ESSAYS ON THE 20TH CENTURY STRUGGLE*, 120-28, (2nd ed. 1993) [hereinafter Brody, *Rise and Decline*]. Brody holds that the promise of welfare capitalism, the practice of companies respecting their employees and the dignity of their work, collapsed under its inability to fund all the benefits participating companies put in place as the depression put more demands on them to provide for all workers in the face of declining demand and production. Companies often structured their work sharing programs in which all employees stayed on the job, but the total weekly hours for which a worker received pay was so paltry the wages were far below subsistence needs. Ultimately, the Great Depression induced the failure of this type of corporate *noblesse oblige* and set

Welfare capitalism, based on the theory that companies owe employees their fair share of corporate profits, ultimately benefited only union members – not the general working class – and doomed class struggle unionism.⁹¹ Therefore, class struggle unionism resulted when alienated workers joined together to pursue a larger share of the wealth they helped to produce. Some authors suggest that welfare capitalism compromised the progressive tendencies of unionism with respect to women and people of color in the labor force, and rendered unions unable to respond to the shift from manufacturing to service and technology.⁹² These commentators hypothesize that, by catering only to existing members who tended to be white males, unions missed important opportunities to recruit new members from a more diverse labor market.⁹³ These entrenched power structures have hobbled unions and have produced only six AFL-CIO presidents since 1886, while Britain has had six monarchs, and the Vatican has had nine Popes.⁹⁴

IV. THE MEXICAN CONSTITUTION AND THE FEDERAL LABOR LAW

A. The Federal Labor Acts of 1931 and 1990

The Federal Labor Act of 1990 is the latest incarnation of the Federal Labor Act of 1931, which codifies the constitutional basis for Mexican labor law.⁹⁵ The Act renews constitutional mandates, and reiterates federal standards that regulate employment relations, general work conditions and conditions for special classes such as women and minors, special industries, employee organizations, workplace safety, compensation, and the state's enforcement role.⁹⁶ The Act reaffirms that Mexican employers are responsible for a safe workplace and expands the scope of protection for workers, including pregnant women and minors.⁹⁷

State and local officials have authority to enforce most federal Mexican labor laws. However, Article 123 specifies that the federal government retain sole enforcement authority over certain laws. These laws tend to affect national

the stage for post-depression support for collective bargaining.

91. *Id.* at 37; see also *Postwar Work Stoppages Caused by Labor Management Disputes*, *supra* note 78.

92. See Englehart, *supra* note 1, at 351, referring to Industrial Union Department, AFL-CIO, *Needed: A Constructive Foreign Trade Policy* 103-05 (1971) (noting predictions by the U.S. Department of Labor that the service sector of the economy will grow at an increased rate eclipsing the manufacturing sector).

93. *Id.* at 338

94. *Id.* at 337-38.

95. See McGuinness, *The Landscape of Labor*, *supra* note 63, at 371-72.

96. See *id.* at 372.

97. See *id.* at 372.

commerce or interests and include sectors such as federally run businesses, petroleum companies, railroads, and regulatory agencies such as employee safety, training, and education.⁹⁸

The 1990 Federal Labor Act includes directives for the Ministry of Labor to create an administrative entity that conducts federal labor inspections and reports the results to the sanctioning arm of the Ministry. Currently, the Ministry of Labor and Social Welfare (Secretaría del Trabajo y Previsión Social, or STPS) is responsible for this regulatory oversight.⁹⁹ The Ministry of Labor and Social Welfare derives its enforcement power from the 1976 *Organica de la Administración Pública Federal* (Federal Public Administration Act). This Act sets forth the Ministry of Labor's primary responsibilities and grants the Ministry investigatory powers¹⁰⁰ to ensure employers' compliance with labor standards.¹⁰¹

B. Workplace Inspections

The Ministry has instituted a bureaucracy that performs four types of inspections: initial, periodic, verification, and extraordinary.¹⁰² Initial, periodic, and extraordinary inspections enforce labor laws regarding general work conditions, workplace safety and health, and steam generators/pressure vessels.¹⁰³ As of 1998, the Mexican Labor Inspector Corps consisted of 276 inspectors who had performed 48,711 inspections.¹⁰⁴ Inspectors tend to be young, well educated and come from lower middle-class families.¹⁰⁵ They receive training in labor inspection as part of their careers as inspectors.¹⁰⁶ The Ministry supervises inspectors through a reporting mechanism that includes investigations of inspector activities, periodic audits, and internal supervisory inspections.¹⁰⁷ However, the programs' accomplishments often are not on par with the goals and objectives stated in Mexican law.

Inspections are to occur biennially, but they can take place more

98. MEX. CONST. 1917, *supra* note 10, art. 123(A)(XXXI).

99. See McGuinness, *The Landscape of Labor*, *supra* note 63, at 377; see also FLL, *supra* note 50, arts. 541, 542, 544, 547, 548, 2003.

100. See McGuinness, *The Landscape of Labor*, *supra* note 63, at 375. Ley Organica de la Administración Pública Federal, art. 40 (1976) charges the Ministry with enforcing existing labor standards, developing new labor standards, establishing inspection programs, collaborating with Safety and Health Commissions, sanctioning employers who violate labor standards, publishing and disseminating of labor standards.

101. *See id.* at 375.

102. *Id.* at 379.

103. *See id.* at 380.

104. *See id.* at 381-82.

105. *See id.* at 382.

106. See McGuinness, *The Landscape of Labor*, *supra* note 63, at 383.

107. *See id.* at 385.

frequently.¹⁰⁸ In any given year, the average manufacturing operation is subject to four federal labor inspections.¹⁰⁹ Inspections occur according to protocols, and inspectors report on workplace conditions and documentation related to compliance and offer suggestions for the improvement of workplace health and safety.¹¹⁰ Inspectors begin their work in the office and then move to the field, where company and labor representatives, and health and safety commissioners accompany them during the workplace investigations.¹¹¹ When the inspector tours an industrial factory or worksite, he may interview workers and review documents.¹¹² At the end of the inspection, the inspector prepares a report that the employer and worker representative review and comment upon.¹¹³

C. Shortcomings in Enforcement

The Mexican system is smoother on paper than is its implementation. Employers who resist inspection are usually incompetent, outraged, or corrupt.¹¹⁴ Inspectors may also exercise their authority in an officious and intransigent, incompetent or corrupt manner.¹¹⁵ Workers are often afraid that their disinterested employer or entrenched union representative will perceive as threatening or disruptive any declarations against employers or exhortations that unions should rise above their own indifference to employee welfare.¹¹⁶ Further, support for the labor inspection programs at the local health and safety commission level is spotty.¹¹⁷ Many commissioners regard the commissions themselves as existing in name only to cosmetically satisfy minimum administrative requirements under federal labor law.¹¹⁸ Generally, "federal labor inspection in Mexico suffers from the lack of financial, technical, and human resources common in developing countries."¹¹⁹

Nonetheless, some commentators still believe that "despite its flaws, this regulatory structure deserves more esteem than it receives."¹²⁰ These commentators might assert that by merely being in place, the legal structure and enforcement mechanisms provide benefits that far outweigh the disadvantages of

108. *See id.*

109. *See id.*

110. *See id.* at 384-85.

111. *See id.* at 390-91.

112. McGuinness, *The Landscape of Labor*, *supra* note 63, at 391-98.

113. *See id.* at 400.

114. *See id.* at 402.

115. *See id.* at 403.

116. *See id.* at 404-05.

117. *See id.* at 406-07.

118. *See* McGuinness, *The Landscape of Labor*, *supra* note 63, at 407.

119. *Id.* at 410.

120. *Id.* at 411.

industrial intransigency and inspector corruption.¹²¹ These same facts, however, lead other commentators to conclude that corruption has rendered labor law enforcement in Mexico a paper tiger.¹²²

D. Comparison to Labor Law Enforcement in the United States

Facially, the American and Mexican labor law enforcement systems are substantially alike, insofar as both systems are dependent upon federal agencies for the oversight of national standards and the delegation of inspection responsibilities.¹²³ Mexico's Constitution delineates more clearly between federal and state or local jurisdictional authority.¹²⁴ In the United States, many jurisdictional divisions between the federal and state or local governments are largely dependent upon common law interpretations of the scope of the commerce clause. Less clearly defined jurisdictional spheres have affected the evolution of American labor law and the role of administrative agencies.

For example, federal and state OSHAs often have overlapping jurisdictional authority; as a result, both offices are responsible for inspecting worksites and enforcing agency regulations. American agencies have more enforcement responsibilities, largely because the American public believes in the legitimacy of bureaucracies such as OSHA, the NLRB and the EEOC, while, in contrast, the Mexican public believes political patronage, corruption, or apathy encumber comparable agencies in that country.¹²⁵ Nonetheless, some commentators insist that the Mexican government is making progress. These individuals argue that a focus on corruption detracts attention from the Mexican government's attempts to strengthen the credibility of its labor law enforcement agencies and officers.¹²⁶

121. See McGuinness, *The Landscape of Labor*, *supra* note 63 at 411. McGuinness admits that "the picture of Mexico's labor regulatory structure that emerges from [his] review is not one of a perfectly-functioning system." The system is subject to financial, technical and human resource deficiencies common to developing countries, but that the failings of Mexico's labor law enforcement mechanism are far less extensive than the NAFTA opponents indicate. "The workplace regulatory system essentially works . . . [a]nd despite its flaws, . . . deserves more esteem than it receives."

122. See generally Englehart, *supra* note 1.

123. The Occupation Safety and Health Administration in the United States and the General Division of Federal Labor Inspection in Mexico are comparable examples.

124. MEX. CONST. 1917, *supra* note 10, art. 23 (xxxi)

125. See Englehart, *supra* note 1, at 342-44.

126. See McGuinness, *The Landscape of Labor*, *supra* note 63.

V. NAALC AS A TOOL FOR PRIVATE PARTY COLLECTIVE BARGAINING

As Parties to NAFTA and to the NAALC, Canada, Mexico, and the United States have established objectives, levels of protection, provisions for government enforcement action, provisions for private action, and procedural guarantees concerning enforcement of their respective labor laws.¹²⁷ A brief structural description of NAALC components is helpful in understanding where the NAALC fits into the NAFTA scheme. The NAALC establishes a Commission for Labor Cooperation, under which all other components of the agreement organize.¹²⁸

Two distinct agreement components operate under the Commission's auspices. The first, the ministerial Council (Council), is comprised of the labor ministers of the Party nations or a designee.¹²⁹ The Council's function in relation to NAALC is roughly parallel to the function of the Department of Labor in relation to the United States, in that it administers the treaty as it develops. The Council publishes reports and studies, facilitates Party consultations, and collects and publishes data on enforcement, labor standards, and labor market indicators.¹³⁰ Each Party maintains three organizations under the oversight of the ministerial Council: a National Advisory Office (NAO),¹³¹ a National Advisory Committee (NAC),¹³² and Governmental Committees.¹³³ The purpose of the NAC and Governmental Committee is to inform and advise its respective NAO of issues related to the "implementation and elaboration" of the NAALC.¹³⁴ The NAC is composed of members of the public, including labor and business representatives.¹³⁵ The Governmental Committee is composed of federal, state, or provincial governmental representatives.¹³⁶

The second component, the Secretariat, takes direction from the ministerial Council, and executes the provisions of the agreement for which it is responsible under the direction of the Executive Director, a position rotated

127. See NAFTA Supplemental Agreement, North American Agreement on Labor Cooperation Between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States, Final Draft, Sept. 13, 1993, arts. 1-5 [hereinafter NAALC], available at <http://www.dol.gov/dol/ilab/public/media/reports/nao/naalctoc.htm> (last visited Mar. 15, 2002).

128. *Id.* art. 8.

129. *Id.* art. 9.

130. *Id.* art. 10.

131. *Id.* art. 15.

132. *Id.* art. 17.

133. NAALC, *supra* note 127, art. 18.

134. *Id.* arts 17, 18.

135. *Id.* art. 17.

136. *Id.* art. 18.

among the Parties.¹³⁷ The Executive Director and staff assist the Council as it performs its duties under the NAALC by planning the annual budget, reporting on its own activities, and publishing a list of actions taken under Part Four of the NAALC.¹³⁸ Part Four addresses cooperative consultations that NAOs conduct, and evaluations that the Expert Committee on Evaluations (ECE) conducts. Consultations take place between NAOs at the ministerial level and, failing resolution of an issue, the ECE is convened at the request of a Party.

In coordination between the Council and the Secretariat, each Party's NAO is the functional point of contact for government agencies, other NAOs, and the Secretariat itself. Each NAO, upon request, provides to the Secretariat background reports on each Party's labor law, procedures, statistics relating to implementation and enforcement of labor law, labor market conditions, and on any other matter the Council may request of the Secretariat.¹³⁹

All of the preceding activity occurs at the treaty level, among the Parties to NAFTA. No private right of action exists at this level.¹⁴⁰ The resolution of disputes is addressed in Part Five of the NAALC, which establishes procedures, and provides an exclusive right of remedy for the Parties. Recall, however, that each Party is required to ensure that persons with a legally recognized interest under its laws have appropriate access to its administrative, quasi-judicial, judicial, or labor tribunals for the enforcement of the Party's labor laws.¹⁴¹ Therefore, a union or company does have the right to redress grievances through filing a submission to the NAO for review. From that point, the union or company has to establish, and the NAALC protocols must accept, that the United States, as a Party to NAFTA, has sufficient cause under the NAALC to proceed under its provisions.

A. NAALC Procedure

A union in one country may encounter procedural difficulties when it attempts to formulate or pursue a grievance about a foreign government's response to a collective bargaining or collaborative agreement. Under NAALC provisions, the first communication between NAOs should include a description and explanation of each Party's laws, policies, procedures and regulations, as well

137. *Id.* art. 12, cl. 1.

138. *See id.* arts. 20–26. (covering consultations between NAOs, Ministerial Consultations, Evaluation, Rules of Procedure, Draft Evaluation Reports, Final Evaluation Reports).

139. NAALC, *supra* note 127, art. 16, cl. 1, 2.

140. *Id.* art. 43 (“No Party may provide for a right of action under its domestic law against any other Party on the ground that another Party has acted in a manner inconsistent with this Agreement.”).

141. *Id.* art. 4.

as any probable changes.¹⁴² To facilitate a consultative relationship, the provisions implicitly encourage an NAO to inquire about the other Party's particular industry practices or workplace rules. If it becomes apparent that one of the Parties is failing to satisfy NAALC objectives, another Party may request ministerial consultation at the federal agency level, a request to which the NAO, as the designated government contact, is most likely to respond.¹⁴³ Again, neither unions nor any private entity could make such a request.

B. The Ministerial Council

The Ministerial Council has the authority to direct the Secretariat to convene an ECE at the request of any consulting party.¹⁴⁴ The ECEs then evaluate the patterns of practice in industries that are trade-related or subject to international labor laws in order to promote the enforcement of technical labor standards.¹⁴⁵ The subject matter of the reports is limited to a party's occupational safety and health, child labor, or minimum wage issues.¹⁴⁶ ECE functions are analytical and non-adversarial. ECEs are subject to Ministerial rules and regulations and are dependant on the Council for administrative support to perform analyses on the Council's behalf.¹⁴⁷ An ECE is responsible for producing a draft report for the Ministry Council's review¹⁴⁸ and a final evaluative report that requires Council approval.¹⁴⁹ If the Council approves the final report, it may reserve action until the following session, at which time the Council will either release the report or hold it for further review.¹⁵⁰ Thus, ECE reports are subject to the moderating effect of a tripartite review.

C. Arbitral Panels

The next level of review occurs if a Party believes that another has failed to adequately enforce the technical labor standards addressed in an ECE report and requests consultation to discuss this belief.¹⁵¹ This process is also non-adversarial and encourages the development of solutions through consensus.¹⁵² If

142. *See id.* art. 21.

143. *See id.* art. 22.

144. *See id.* art. 23.

145. *See NAALC, supra* note 127, art. 23.

146. *See id.* art. 27(1).

147. *See id.* art. 24.

148. *See id.* art. 25.

149. *See id.* art. 26.

150. *See id.* art. 26(4).

151. *See NAALC, supra* note 127, art. 27(1).

152. *See id.* art. 27(4).

the Parties cannot resolve the issue themselves, the Council meets and assigns working groups to address the issue, implement dispute resolution procedures, or make recommendations that effectuate "a mutually satisfactory resolution of the dispute."¹⁵³ The failure of the consultations to resolve the issues results in the authorization of a Party to request the convening of an Arbitral Panel.¹⁵⁴

Arbitral Panels are comprised of qualified individuals willing to serve and are appointed to rosters by consensus.¹⁵⁵ The panel relies on expert opinions¹⁵⁶ and, unless otherwise agreed, issues its initial report based on the submissions and arguments of the disputing Parties.¹⁵⁷ The initial report determines whether a Party has failed to enforce technical labor standards in its law as the opposing Party alleged,¹⁵⁸ after which the Parties can comment on the initial report.¹⁵⁹ If the panel agrees that a country is neglecting to enforce labor standards, the NAALC authorizes the panel to implement the report or reconvene.¹⁶⁰ The panel then produces a final report that includes separate opinions on matters which panel members disagreed, and provides copies of the report to the Parties.¹⁶¹

The Parties then present the report to the Council for mandatory publication.¹⁶² The goal of the implementation plan is to elicit consensual party participation over a six-month period to arrive at a solution. If the Parties do not agree on a satisfactory solution, the complaining Party can request the panel to assess a monetary sanction against the other Party and the Commission may move to suspend the benefits of that party's NAFTA membership.¹⁶³ Significantly, although NAALC regulations afford the Council the opportunity to review an ECE report and to table it indefinitely if the Council so chooses, the Council lacks this discretion in the case of an Arbitral Panel's report.¹⁶⁴

D. The NAALC Structure is Counterintuitive to Traditional Collective Bargaining Strategies

NAALC policies and procedures are the antithesis of traditional labor approaches. The former is sedate and consensual, and the latter is an adversarial

153. *See id.* art. 28.

154. *See id.* art. 29.

155. *See id.* art. 30.

156. *See id.* art. 35.

157. *See NAALC, supra* note 127, art. 36.

158. *See id.* art. 36(2)(b).

159. *See id.* art. 37.

160. *See id.* art. 39.

161. *See id.*

162. *See id.* art. 37.

163. *See NAALC, supra* note 127, art. 40.

164. *See id.* art. 26(4).

struggle to obtain solidarity and justice in the workplace. Significantly, NAALC procedures ignore union disputes that are unrelated to trade matters or technical labor standards. Moreover, NAALC procedures focus on economic disputes between national rather than private parties. Consequently, Parties cannot use the NAALC dispute mechanisms to resolve any collective bargaining issues that do not pertain to subjects in the NAFTA agreement.¹⁶⁵ Early NAALC disputes highlighted the vast differences in the objectives involved in relatively short-term collective bargaining disputes and the longer term international relations disputes, which focus more on process and continuity in communication.

VI. A COMPARISON OF NAALC SUBMISSIONS

A. The First NAALC Submission: The IBT and UE Versus Honeywell and General Electric

“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. [NAO] under [NAALC].”¹⁶⁶ The IBT and UE brought the claim on behalf of union employees at Honeywell and General Electric to protest the companies’ decision to move production capacity to the Mexican maquiladora.¹⁶⁷ The union submissions were similar in timing and scope, and the American NAO processed them jointly.¹⁶⁸ The submissions were styled in the form of traditional union complaints by the IBT and UE, which had each been active in promoting legislation to defeat NAFTA.¹⁶⁹ The submissions argued and contained affidavits from Mexican workers alleging that Honeywell and GE had illegally dismissed employees who were attempting to form a union affiliated with Frente Auténtico del Trabajo (Authentic Labor Front, or FAT), an

165. *See id.* arts. 11, 38. Article 11 charges the Ministerial Councils with the promotion of cooperative activities regarding occupational health and safety, child labor, conditions for migrant workers, human resource development, labor statistics, work benefits, social programs, productivity, labor-management relations and collective bargaining procedures, employment standards, compensation for work-related injury or illness, legislation regarding unions, collective bargaining and dispute resolution, workplace gender equality, forms of cooperation between labor, management, and government, technical assistance for the development of labor standard, and other such matters as the Parties may agree. In contrast, under art. 38, the Arbitral Panel, as an investigatory entity, acts under narrower constraints and is limited to findings of persistent pattern of failure only in the areas of occupational safety and health, child labor, or minimum wage technical labor standards when considering resolution of disputes.

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

167. *See id.* at 165.

168. *See id.*

169. *See id.*

independent union not affiliated with the dominant PRI/CMT labor organization.¹⁷⁰ They also contained allegations about health and safety hazards and overtime pay, of which only the health and safety issues could proceed beyond review to consultation, dispute resolution and possible sanctions.¹⁷¹ The NAO accepted the submissions for review and initiated the procedures described above. Honeywell and GE filed objections to the submissions, stating they did not allege a pattern of practice of violations, that the dismissals occurred before the agreement was in effect, and that the Mexican employees did not exhaust the remedies available to them under Mexican law.¹⁷² Both the unions and the companies were on new ground. Neither of them had the benefit of researching previous complaints, because no previous actions existed. Each was attempting to invoke a process of review at a governmental level based on collective bargaining experience in collective bargaining obtained from domestic labor disputes dating back to World War II, and built on the U.S. model of labor relations.

1. The Misapplication of NAALC Principles

GE, Honeywell, the UE and the IBT applied causes of action from one level of NAALC authority to other inapplicable levels of authority within that structure. For example, objections about pattern of practice reflected a misunderstanding of when that criterion came into play in the NAALC procedure.¹⁷³ Pattern of practice findings first arise in ECE Evaluations, which are not undertaken until well after the convening of an NAO review, and after NAO and Ministerial consultations regarding a particular situation.¹⁷⁴ Here, the NAO review had just begun receiving public communication on an issue unproven to be concerning a subject matter addressed by the treaty. Any ECE procedure, were it to occur, would be in the distant future. Additionally, the ECE *analyzes* whether patterns of practice exist, while a private party *merely alleges* to the NAO that a particular practice is proscribed.¹⁷⁵ Thus, the NAO is required to provide for the submission of public communications, such as a submission from a private party alleging labor improprieties in another country, whereupon the NAO reviews such submissions regarding that Party-country.¹⁷⁶

170. *See id.*

171. *See NAALC, supra* note 127, art. 27. Consultation at the ministerial level is restricted to occupational safety and health, child labor, or minimum wage technical labor standards.

172. Campa, *supra* note 166, at 166-67.

173. *See id.*

174. *See NAALC, supra* note 127, art. 23, cl. 2; *id.* arts. 21, 22.

175. *See id.*

176. *See id.* art.16(3).

2. Domestic Confrontation Tactics in an International Consensus Oriented Process

The companies' objections to the unions' submissions concerning incidents that occurred before the adoption of the NAFTA agreement failed to recognize the absence of timing language in the NAALC concerning the scope of review an NAO could exercise. The NAALC provides broad scope of authority to an NAO to review "labor law matters arising in the territory of another Party" absent limiting criteria.¹⁷⁷ The companies' objection that the Mexican employees had not exhausted their remedies under Mexican law similarly failed to recognize that rather than exhaust domestic remedies, a party need only seek relief under domestic laws, which several employees undertook to obtain.¹⁷⁸

The last claim in the union submission alleged an individual company's wrongdoing rather than alleging the failure of the Mexican government to effectively enforce certain of its labor laws.¹⁷⁹ This claim was substantive due to the different procedure in the United States, where *unions* file complaints with the National Labor Relations Board (NLRB) against *companies*. In contrast, under the international dispute resolution procedure used in NAFTA, *nations* file complaints regarding *governmental* acts. Thus, by virtue of the character of the parties to the dispute, the union claim that the companies had acted improperly had no merit under the treaty.

Fortuitously, the claim against General Electric and Honeywell gained life through a happenstance reference to governmental shortcomings in enforcing its laws. The unions' claim that Mexico was not enforcing its laws was more or less rescued by the implications of other NAFTA considerations including the NAALC provisions that each party "shall ensure that its labor laws and regulations provide for high labor standards,"¹⁸⁰ and "promote compliance with . . . its labor law,"¹⁸¹ and that "commit[ment] to promote . . . the freedom of association and protection of the right to organize."¹⁸² "Each of these formulations goes beyond the enforcement issue per se," and it is likely, in wake of the bitter fight over NAFTA, that political winds and the possibility of

177. See *id.* art. 16(3) (requiring, in accordance with the domestic procedures of the particular Party, but with no time restriction, each NAO to provide for the submission, receipt, and periodic publication of public communications on labor law matters arising in another country); Campa, *supra* note 160, at 167.

178. See NAALC, *supra* note 127, art. 16(3); see also Campa, *supra* note 166, at 167.

179. See Campa, *supra* note 166, at 166-167.

180. See Campa, *supra* note 166, at 168; see also NAALC, *supra* note 127, art. 2.

181. See Campa, *supra* note 166, at 168; see also NAALC, *supra* note 127, art. 3(1); see also NAALC *supra* note 127, art. 1(f).

182. See Campa, *supra* note 166, at 168; see also NAALC, *supra* note 127, Annex 1 (Labor Principles).

organized union boycotts of the treaty influenced the NAO.¹⁸³ The difference in scope between what issues an NAO can review and what an ECE may report on is significant, and the employer objection to the breadth of the submissions was closer in concept to the guidelines for the ECEs rather than the NAOs. In this first NAALC submission, both the companies and the unions used arguments that did not fit well within the procedures established in the NAALC. Both the companies and the unions expected a resolution paralleling the traditional win-lose decisions that they had come to expect after years of administrative litigation in the United States system of labor law administration under the NLRB.

3. The NAO Public Hearings and Findings

Instead, the NAO, in a consensus oriented approach, continued the dialogue with the unions and companies, requesting and receiving information from the Mexican NAO, commissioning studies of Mexican labor law and its administration, and announcing the public hearing for August 31, 1994 in Washington, D.C.¹⁸⁴ The NAO ultimately issued its public report amid press reports that its conclusions marked a victory for the corporations.¹⁸⁵ In the short run, the NAO decision did seem like a corporate victory because there was no resolution of the issue. The NAO found itself in no position to publish a finding that Mexico failed to enforce its relevant labor laws, and therefore recommended the establishment of a series of cooperative programs to involve the business and labor communities in the three NAFTA countries and educate the public about the labor side agreement.¹⁸⁶ The NAO could have recommended Ministerial Consultations.¹⁸⁷ Considering the untried state of the NAALC process, the NAO likely properly approached the cases "bold-on-process" and "cautious-on-outcome."¹⁸⁸ In contrast, the approaches of the U.S. press and the IBT were the opposite, and when the outcome fell short of the union's objective, it was natural to perceive the result as a setback or even a defeat. Expectations were high, and although the NAALC describes the function of the NAO, its effect would not be felt immediately. The private parties sought to use the NAO as an adjudicative body, but the NAO sought to educate the public and consult with the Mexican NAO rather than to find non-compliance with the principles of NAALC labor rights through Mexico's enforcement of its own labor law.¹⁸⁹

183. See Campa, *supra* note 166, at 168-69.

184. See *id.* at 169.

185. See *id.* at 177.

186. See *id.*

187. See NAALC, *supra* note 127, art. 22.

188. See Campa, *supra* note 166, at 178.

189. See *id.* at 179.

4. What the NAO Public Hearing Accomplished

The major point of note inherent in the first case is that labor practices of U.S. corporations in Mexico, previously in the "private domain of employers and reviewed by anonymous bureaucrats in obscure proceedings, are now subjected to formal public governmental review with the trappings, if not the substance, of an adjudicatory process."¹⁹⁰ The first case in one sense satisfied no one, and proved that it would take time to establish a record of cases to build the credibility needed by the NAO among the various other Labor Department Agencies to have weight in influencing U.S. trade and labor policies. In another sense, the nascent process at least demonstrated that private parties could now access a procedure for redress by virtue of the public communication obligation the NAO carries, even if no clear winner emerged here.

B. Recent NAALC Activity: AFA-ASSA v. TAESA Airlines

1. An Allegation of Unfair Labor Practices and Lack of Law Enforcement

On November 10, 1999, the Association of Flight Attendants (AFA), a United States labor organization, and the Association of Flight Attendants of Mexico (ASSA) filed a submission under the auspices of the NAALC. The U.S. NAO accepted it for review in January 2000 and completed the review by March 23, 2000.¹⁹¹ Executive Air Transport (TAESA) was a privately owned airline carrier in Mexico with service to the United States and Canada with a history of financial and air safety difficulties.¹⁹² The unions contended that the TAESA flight attendants wanted a craft union to represent them and address issues regarding safety and health hazards aboard TAESA aircraft, inadequate training, low wages, and the non-payment of overtime or payroll taxes.¹⁹³ Under the

190. *Id.* at 180.

191. *See* Public Report of Review of NAO Submission No. 9901, U.S. National Administrative Office, Bureau of International Labor Affairs, U.S. Department of Labor, July 7, 2000, available at <http://www.dol.gov/dol/ilab/public/programs/nao/submiss.htm>. (last visited Mar. 15, 2002) [hereinafter, NAO Report 9901].

192. *See id.* § 2.1 Case Summary, citing Brendan M. Case, *Mexico's 3rd Largest Airline Out of Business*, THE DALLAS MORNING NEWS, Feb. 22, 2000. On November 9, 1999, a TAESA aircraft crashed in Uruapan Mexico, killing five crew members and thirteen passengers. The Mexican government responded, investigated, discovered problems in maintenance, operation, training, and administration, and suspended the airlines operations until it met certain conditions. TAESA was unable to fulfill the financial requirements necessary to meet the requirements, and filed for bankruptcy.) *Id.*

193. *See id.* § 5.3 Analysis. *See also id.* Table 1, Financial Attachments Against TAESA.

NAALC, the NAO can address cooperative labor activities, including occupational safety and health, work benefits, and labor legislation.¹⁹⁴ However, a union agreement was already in place between TAESA and the National Union of Air Transport Workers of Mexico (SNTETA), the union closely associated with the ruling PRI government.¹⁹⁵ Under Mexican labor law, recognition of a competitor union's right to seek representation of workers already covered by a bargaining agreement is difficult to obtain, and unions seeking to oust unions already representing workers who are dissatisfied with their existing representation face an organizing task with long odds of success.¹⁹⁶ AFA and ASSA engaged in several appearances and decisions before the Conciliation and Arbitration Board (CAB), the functional equivalent of a regional branch of the NLRB in the United States Department of Labor. CABs conduct the procedural business of determining the treatment and outcomes of labor disputes at the local level. The unions asserted the CAB rulings were not fair, equitable, or transparent, and further claimed that the CAB aided TAESA in obstructing the rights of the flight attendants.¹⁹⁷ During the representation election, AFA and ASSA alleged that SNTETA and TAESA management subjected the new union's supporters to intense intimidation and threats, including armed guards and attack dogs on the premises under a voting procedure that required ASSA supporters to vote orally in the presence of the opposing union and management.

194. NAALC, *supra* note 127, art. 11, § 1(a)-1(p). Article 11 addresses the areas noted, however, it does not per se address the adequacy of wages or other contractual components of a collective bargaining agreement.

195. See NAO 9901 Report, *supra* note 191, Summary of Submission.

196. See FLL, *supra* note 50, tit. vii, ch. iii, arts. 386-403. The FLL sets out the parameters under which labor agreements are recognized. Minority representation unions, as defined under art. 388 III, find themselves pitted against entrenched unions that are usually aligned with the ruling PRI, and forced into representation by the majority union. This occurs often when a craft union attempts to represent occupational workers who belong to an industrial union. To succeed, the craft union must establish a representation base that exceeds that of the industrial union. See also Englehart, *supra* note 1, at 343 (discussing official contracts, union retrenchment, and the relationship between the governing party and the established union). This results in entrenchment because there is no specific provision that speaks to an independent union's challenge of an existing union's legitimacy during periods of contract renewal. See also FLL 388 (there is no window for a union to challenge the incumbent when its contract comes to term).

197. See NAO Report 9901, *supra* note 191, § 2 Summary of Submission. ASSA lost the election amid a flurry of protests over the conduct of the election. The airline fired ASSA supporters from their jobs. After several decisions, appeals, and dismissals, ASSA, as of July 7, 2000, had successfully challenged the CAB decision that favored the established union in the election on procedural grounds. As of that date, the case was once again before the CAB for re-hearing as a result of lengthy legal wrangling in Mexico. However, much of the controversy is now mooted by the ultimate bankruptcy of TAESA

2. NAO Findings and Analysis

The NAO found, among other things, that the CAB decision to prohibit a breach of the existing contract comported with the applicable Mexican federal labor law, although irregularities had cast doubt upon the fairness of the election.¹⁹⁸ The fact that the airlines fired the ASSA supporters so soon after the elections led the NAO to believe that the terminations were retaliatory.¹⁹⁹ Individual workers had filed complaints with the CAB,²⁰⁰ consequently the NAO recommended Ministerial Consultations regarding the AFA submission.²⁰¹

According to the AFA submission, TAESA terminated pro-ASSA flight attendants in direct retaliation for their pro-ASSA stance, after which the same CAB, which established the representation base in such a way as to defeat ASSA, then reviewed whether TAESA treated these employees in a retaliatory manner.²⁰²

C. The Early Submission by the IBT Compared to the ASSA Submission

1. Evolutions in the Submission Process

The NAO TAESA recommendation sweeps more broadly than did the 1994 Honeywell/General Electric decision. There, the NAO did not recommend ministerial consultations and was hesitant to imply that the Mexican government was not enforcing labor laws. Neither situation produced a decision the union desired, at least with respect to arbitration or bargaining. Given the historical foundations of U.S. union power, it is plausible that the unions formed their expectations according to what would happen in a NLRB proceeding. In a NLRB action, the Board could enjoin transgressing unions or companies from further unfair labor practices and require a posting to that effect to stipulate that

198. *See id.*

199. *See id.*

200. *See id.* The NAO inquired about the safety issues and the overtime wages AFA and ASSA raised, in part because the Mexican government provided spotty information about these issues. *See id.* § 17 Findings.

201. *See id.*; *see also* NAALC arts. 22, 23. Ministerial Consultations are the second phase of the NAFTA NAALC procedure. The consultations occur at the federal level of government agency, and if resolution is unsatisfactory, a Party may request the formation of a panel of experts under Article 23, the ECE, which then investigates in an inquisitorial style the "patterns of practice by each Party in the enforcement of its occupational safety and health or other technical labor standards as they apply to the particular matter considered by the Parties under Article 22."

202. U.S. NAO Public Submission 9901, available at <http://www.dol.gov/dol/ilab/public/programs/nao/submissions/htm>. (last visited Mar. 15, 2002).

employers refrain from similar activities in the future.²⁰³ It is predictable that such expectations should arise from this experience. As submissions increase, the NAOs become more familiar with NAFTA procedures, more proficient at negotiating, and more adept at assessing situations. The submitters are gaining acumen as well, if the length of the submissions is any indicator. The General Electric/IBT submission was succinct, concise, and just over 4,500 words in length; the AFA submission was just under 5,000 words. The latest submission on the NAO website is much more expansive; the summary of the petition alone is almost 5,000 words.²⁰⁴ The private parties who initiate claims are becoming more skillful in crafting NAO submissions. Parties are now more likely to utilize strategies that comply with NAALC requirements instead of those that fit their country's particular collective bargaining paradigms.

For example, the AFA submission was more specific and incorporated NAALC language to articulate that TAESA and the Mexican government were failing to enforce Mexican labor laws. In contrast, the IBT submission more closely resembled the style of a NLRB Unfair Labor Practice Complaint.²⁰⁵ The

203. See generally NLRA, *supra* note 44.

204. BUREAU OF INT'L LABOR AFFAIRS / NAO, U.S. DEP'T. OF LABOR, U.S. NAO SUBMISSIONS 94002, 9901, & 2001-01 available at <http://www.dol.gov/dol/ilab/public/programs/nao/submissions.htm> (last visited Mar. 15, 2002).

205. Campa, *supra* note 66, at 165. In his footnote discussing the complaints filed by IBT, NAO submission number 940001 and UE, submission number 9402, Campa describes them as styled as complaints:

[T]he General Electric Company is one of the world's most powerful corporations. Yet, according to documents appended hereto, GE's motor plant in Juarez, Mexico has flagrantly violated the labor and human rights of its employees. As set forth in greater detail herein, the workers at the Juarez motor plant, which is known as Compania Armadora or CASA, have reported that GE management has actively obstructed union organizing efforts in violation of Mexican and international law, and in violation of the principles of freedom of association and protection of the right to organize.

Compare to the AFA-ASSA NAO Submission Number 9907:

[T]he U.S. NAO has jurisdiction in this submission under Article 16(3) of the NAALC authorizing each NAO to provide for the submission and receipt of public communications on labor law matters arising in the territory of another party. The events prompting this submission arose in the territory of Mexico and concern labor law matters as defined in NAALC Article 49; namely freedom of association and protection of the right to organize, the right to bargain collectively, minimum employment standards, and prevention of occupational injuries and illnesses. The U.S. NAO has provided for such submission and receipt of this public communication under its 1994 Procedural Guidelines.

evolution of style has undoubtedly helped direct the U.S. NAO to formulate recommendations and has facilitated descriptions of the problem in NAALC terms instead of in NLRB terms.

2. Some Specifics in the AFA-ASSA Submission

The AFA submission identified a substantial portion of the NAO's jurisdictional authorities.²⁰⁶ The submission took the NAO by the hand and led it through the ascending strata of NAALC authority by using the terms of the agreement as the agreement uses those terms. As a result, the NAO analysis applied almost every area of NAALC to the dispute. The Submission suggests Mexican government action, or lack of it, facilitated the union's defeat:

TAESA management, with the complicity of government labor authorities, struck back with a vengeance against the efforts of flight attendants to obtain ASSA representation. They blocked an election for two years, [and] then held an election rife with fear, fraud and intimidation. Finally, TAESA fired the flight attendants who voted by an overwhelming majority for ASSA.²⁰⁷

The NAO Public Report addressed all seven issues the AFA-ASSA raised, which ranged from the right to participate in collective bargaining to the right to associate freely, and did so in a way that acknowledged NAALC articles, the Mexican Constitution, federal labor laws, and the International Labor Organization (ILO) Convention 87.²⁰⁸ The report addressed other issues in similar detail.²⁰⁹ In short, one could conceptualize the difference between the IBT and AFA-ASSA submissions as a complaint in the first instance and a well-pleaded complaint in the second.

The NAO's analysis noted that the ASSA filed four *amparo* motions

206. See NAO Submission 9901, *supra* note 191, § 1 Jurisdiction. The submission specifically states the jurisdiction of the NAO under NAALC Article 16, the ministerial jurisdiction under Article 22 authorizing the U.S. Secretary of Labor to consult with the Secretary of Labor for Mexico, the Article 23 authority for the Evaluation Committee of Experts, the Article 29 jurisdiction of the Arbitral Panel dispute resolution powers to resolve persistent failures to enforce the technical labor standards of a country. Further the submission stated the trade relatedness of the issue and stated that the "laws of Mexico and the United States address the same general subject matters contained in this submission in a manner that provides enforceable rights, protections or standards." *Id.*

207. See *id.*, Background ¶ 12.

208. See NAO Report 9901, *supra* note 191, § 2.2.1 Freedom of Association

209. See *id.* §§ 2.2.2 & 2.2.3.

before it submitted its complaint to the American NAO, and actually received several favorable judicial rulings.²¹⁰ However, the ASSA failed to convince a judge that it had entered into a contract at the same time the SNTETA was attempting to administer a contract, and that a provision in Mexican Federal Labor Law created a window of opportunity during contract negotiations when a competing union could give notice of its intent to take over representation.²¹¹ The NAO report also details the CAB's sabotage of the representation election, the bias of the CAB, minimum employment standards under NAALC, and ties them in with the Mexican Constitution and the Federal Labor Law, and other federal statutes relating to the charges that TAESA did not pay taxes on the wages it did pay its employees.²¹² The NAO then analyzed the NAALC obligations relative to occupational safety and health issues in the same manner, linking the NAALC obligations to Mexican Federal Labor Law and the Mexican Constitution.²¹³

3. Creating a More Savvy NAO

The NAO found that the CAB decisions in the ASSA case complied with Mexican legal precedent, including the holding that ASSA could not represent all employees of TAESA because it is a craft union. A craft union represents a group of people who are all engaged in the same craft, while an industrial union represents members who engage in different crafts employed in the same industry.²¹⁴ Although the NAO identified certain instances where the Mexican government enforced its payroll tax laws, it also found areas where the evidence was inconclusive as to whether Mexican CABs applied labor laws or conducted the representation election in a fair and impartial manner.²¹⁵ The contrast between the IBT findings and the AFA findings is not so stark if one evaluates it in the context of the submissions themselves. There is a structural parallel between the extent of the respective submission and the depth of the corresponding NAO analysis. The incremental increase in sophistication in the submissions as the parties become accustomed to the provisions of the agreement is the most feasible explanation for the increased level of critique in the public reports. Another contributing factor may relate to the comfort zone the NAO has established with other Department of Labor agencies during its past six years of operation.

210. *See id.* § 4.3.1 Analysis.

211. *See id.*; *see also* NLRA, *supra* note 44, § 9 (relating to the time window before contract expiration that a United States union can contest the representation by the union currently administering the collective bargaining agreement, and enter into the process to collect the evidence necessary to initiate an election for representation).

212. *See* NAO Report 9901 *supra* note 191, § 5 Minimum Employment Standards.

213. *See id.* § 6 Occupational Safety and Health.

214. *See id.* § 7 Findings. *See also* FLL, *supra* note 50, tit. vii, ch. ii, art. 360 §§ 1-5; NLRA, *supra* note 44 (providing for the same distinctions among union types).

215. *See* NAO Report 9901, *supra* note 191, § 7.

VII. A SHIFT IN THE COLLECTIVE BARGAINING PARADIGM

A. The Unions Have Increased Public Awareness But Have Not Extended Their Organizational Reach.

Issues that have arguably not changed significantly are the relationships among unions within the context of the NAALC and among the parties to NAFTA. While unions have experienced a modicum of success, the NAO has accepted only thirteen submissions since the NAALC's inception.²¹⁶ The two submissions considered here have not resulted in stellar fallout for the unions in terms of contracts or arbitration outcomes. However, the procedures have influenced the culture of communication, the climate of analysis, and the level of public awareness of cross-border collective bargaining. Consider: "[T]he labor side accord and the NAO review process provide a new forum where labor rights advocates can press for improved working conditions and call companies and government to account for their practices."²¹⁷

Questions remain: Does this opportunity for expanded union influence over the welfare and benefit of workers come without an accompanying rise in membership? What is the nature of the unions' interest? The public discussion seems to indicate that unions may not benefit directly from their participation in the development of NAFTA protocols. However, the collaborative efforts of independent Mexican unions and the AFL-CIO to organize workers and shape corporate labor practices in Mexico might have a corollary effect of encouraging progress in this area, even if they do not directly liberalize the collective bargaining process in Mexico in such a way as to wrestle enough power from the entrenched unions to break their monopoly over the Mexican worker.

B. What Does the Future Hold?

Some commentators see NAFTA as a precursor to the Free Trade Area of the Americas (FTAA). If so, NAFTA's enumeration of employee rights probably falls short of those the FTAA must address to successfully integrate trading procedures between the Americas.²¹⁸ In a less distant future, Mexican workers

216. The DOL NAO website lists only thirteen.

217. See Englehart, *supra* note 1, at 179 n.145 (referring to the Telephone Workers Union of Mexico and its submission to the Mexican NAO alleging labor rights violations by Sprint Corporation in connection to the shutdown of a long-distance telephone operations center in California shortly before those workers were to vote on union representation); see also Tim Shorrock, *Mexican Union Steps in to Defend U.S. Workers' Rights*, J. COM., Feb. 13, 1995, at A3.

218. See generally Bobbi-Lee Meloro, Comment, *Balancing the Goals of Free Trade*

may find assistance in establishing their rights in a "nascent cross-border solidarity movement that is emerging as labor's answer to the globalization of capital."²¹⁹ Whether one looks to a hemispherical trade zone or focuses on the price a regional trade agreement exacts from workers, one thing is common to both. The public is discussing the employment conditions foreign employees encounter when working for American corporations in Mexico and other Latin American countries more openly, frequently, and in more influential forums than it did before NAFTA became a reality.

Initially, U.S. unions resisted NAFTA, not because they were concerned about foreign worker welfare, but because they were concerned about their own welfare and feared losing jobs to foreign labor markets.²²⁰ In 1993, rumors of a suppressed Commerce Department report that revealed NAFTA would cost the United States jobs for the rest of the decade fueled organized labor's resistance to its passage.²²¹ The loss of jobs to the Mexican labor markets and the disparity in wages between U.S. and Mexican workers arguably has hurt workers in both countries.²²² This information, and the decline in union

with Workers' Rights in a Hemispheric Economy, 30 U. MIAMI INTER. AM. L. REV. 433 (1998). Meloro asserts that any trade agreement must have provisions for workers' rights in order to address the disparity in wealth thereby perhaps improving economic growth and competition in the Western Hemisphere. *See id.* at 454-60. Although commentators criticize the NAALC as weak, they praise its process of allowing nations to develop their own standards as they arise from the disparate cultures of the Parties, and consider it preferable to pressing a U.S. or Western model of labor relations upon trade agreement parties. *Id.*

219. David Bacon, *Unions Without Borders: A New Kind of Internationalism is Challenging Neo-Liberal Globalism*, 3 THE NATION 272, Jan. 22, 2001, at 20. Bacon stresses the costs in U.S. jobs following the path of least wages and costs as an alienating influence on labor resulting from trade agreements. Both Meloro and Bacon stress that a level economic playing field is necessary for successful trade agreements, and that the disparities among the Americas hinder progress. However, Meloro argues from the functionality of trade agreements, and Bacon from the position that deployment of union solidarity is necessary to resist the tendencies of these agreements to alienate workers. *Id.*; Meloro, *supra* note 218, at 457.

220. *See* Bacon, *supra* note 219.

221. *See The AFL-CIO Finds a Cause; and Just Possibly a Role*, LATIN AMERICAN REGIONAL REPORTS: MEXICO & NAFTA, Oct. 28, 1993, at 4. On the occasion of President Clinton's address to the AFL-CIO convention, Ross Perot had already described the problem alluded to by the unions as the great sucking sound of jobs heading south. The issue of jobs galvanized the unions against such issues as the rumored suppression of a Department of Commerce report predicting job losses through the end of the 1990's resulting from NAFTA, and a Department of Labor report highlighting permanent job losses for some workers in 1992. *See id.* This article suggested in 1993 that a new role for U.S. unions would be to fight NAFTA. *See id.*

222. *See* Bacon, *supra* note 219. Bacon asserts that the United States Department of Labor has certified the loss of more than 500,000 jobs because of NAFTA and that the income of Mexican workers has lost seventy-six percent of its purchasing power.

membership in the United States, make it difficult to envision union support of what appears to be a diminution of their political power. Because NAFTA is a government-to-government agreement, resolving labor problems at a personnel level in favor of particular groups of workers is beyond the scope of the agreement.²²³ This speculation is somewhat accurate, but it may also be true that the private parties who bring complaints and raise issues to the NAO motivate administrative agencies in their own country to address the same issues. However, this process will take time and is unlikely to help individual workers who face termination based on their support of exploited workers who remain employed. Unions argue that Mexican ministries interfere with their rights to form independent unions even though the NAALC-NAO review often determines that Mexican laws prevent independent unions from operating as they do in the United States.²²⁴ For instance, some American unions offer support to Mexican employees in ways that differ from conventional American methods of support.²²⁵ These unions participate in grass-roots coalitions that include unions, churches, and community organizations in Mexico, Canada, and the United States and help Mexican workers fight "an economic policy that uses their low wages to encourage further maquiladora investment."²²⁶

VIII. CONCLUSION

There is a NAFTA box inside which the treaty addresses labor rights issues. The box is the NAALC protocol that addresses labor issues on a governmental scale and often leaves individuals to suffer whatever fate was the result of the labor dispute that was the subject of a particular submission to the NAO in the first place. The process advances at an international relations pace, which is glacial in relation to the pace encountered in contract negotiations. The process encourages analysis of another country's laws without criticizing them. This approach is the antithesis of the traditional labor relations approach to

223. *Id.* (reporting a June 24, 1998 statement by Lewis Karesh, acting secretary of the United States NAO, at a seminar hosted by the Mexican Labor Ministry to address agreements made by Mexico under NAALC in the Han Young submission 9702 in which the NAO recommended ministerial consultations).

224. See NAO Report 9901, *supra* note 191; see also FLL, *supra* note 50, tit. vii, ch. ii, art. 360 §§ 1-5; see also NLRA *supra* note 44, § 9, establishing a window of time before the expiration of a representing union's contract for an independent union to establish that the represented workers may favor an election to determine which union they prefer to represent them. No such provision exists in the Mexican FLL, although a union could lose majority representation and be declared unqualified to administer the contract between the company and the employees. See FLL, *supra* note 50, tit. vii, ch. iv.

225. Conventionally, unions demonstrate support for one another by assisting with organizing efforts to increase union membership.

226. See Bacon, *supra* note 219.

solving labor disputes on the shop floor. One way for unions to effectively operate within the confines of the box is for the unions in the NAFTA countries to build longer-range relationships that transcend individual labor relations campaigns.²²⁷

United States corporations that own maquiladora industries are responsible, in large part, for the closer grass-roots association of cross-border unions.²²⁸ However, Mexican unions worry more about privatization of industries traditionally run by the Mexican government.²²⁹ To many, the worsening conditions of Mexican workers are a direct result of the impact of neoliberal economic reforms, especially the privatization of the state sector of the Mexican economy.²³⁰ AFL-CIO headquarters is seeking a change of strategy by expressing the need to leave the Cold War policy of the AFL-CIO that defended free trade, corporate interests and United States foreign policy and embrace the task of building solidarity.²³¹

227. *Id.* These relationships are alliances that base the union cross-border relationship among rank and file members who visit one another's plants. Bacon sees these alliances, just beginning to take shape, as respecting union autonomy and the decision-making processes in each country, thus undermining the traditional mistrust of U.S. labor in Mexico.

228. *See id.*

229. *See id.*; *see also Go to the Top of the Class; Investment Grade Achieved in all Three Ratings Agencies*, LATIN AMERICAN NEWSLETTERS, Feb. 12, 2002, at 79 (noting that while Fitch, Standard & Poor's, and Moody's raised Mexico's sovereign debt to investment grade, opposition parties are resisting President Fox's attempts to enable private access to Mexico's energy sector, and attacking a recent reduction in electricity rate subsidies as a surreptitious move to privatization); *see also Fox Aims to Open Electrical Sector; But Senate Puts PEMEX Deals with Private Sector on Hold*, *id.*, Jan. 15, 2002, at 30 (noting that President Fox's attempts to open the energy sector to the private sector face an uphill battle, despite his predictions that by failing to open up to the private sector the new investments Mexico needs will take Mexico on an economic path parallel to Brazil's); *see also Electrical Price Rise Causes Uproar: Fox Postpones Measure in Face of Widespread Criticism*, *id.*, Feb. 5, 2002, at 65 (noting that both the PRI and electrical workers' union oppose a subsidy cutting measure that they claim will affect far more than the government estimate of thirty percent of Mexican households), available at LexisNexis:News:Latin American Newsletters.

230. *See id.* "Our government and corporations are using privatization to do away with unions entirely," according to Mercedes Gema Lopez Limon, professor at the University of Baja California in Mexicali. This article asserts that thirty years ago, seventy-five percent of the Mexican workforce was unionized, but less than thirty percent is today. In the state petroleum corporation PEMEX, union membership still approached seventy-five percent, while in the collateral petrochemical industry, now privatized, union membership has fallen to seven percent. *See Bacon*, *supra* note 219.

231. Bacon, *supra* note 219, quoting the then newly elected AFL-CIO secretary treasurer, Rich Trumka, who said,

It's over. We want to be able to confront multinationals as

Practically speaking, that approach may be the only one able to achieve positive results in the struggle for workers' rights in countries whose economies are less developed than the U.S. economy. Free trade agreements aside, each country party to NAFTA, or the yet to be organized FTAA, remains a sovereign nation operating under its own legal system, and is not likely to surrender that singularity. Unions, likely tolerated as much as encouraged in their countries, may operate under laws that as a rule are less well accepted than the corporation laws of those countries.

To think that a U.S. union could act as a multinational corporation would act when it starts up in a foreign country, by registering as a union under that country's law, is a contradictory notion. However, short of that, a well-coordinated solidarity association with nascent Mexican unions and other social organizations would go a long way toward defining the AFL-CIO's role in a way that on its own the union may not succeed in defining. This metamorphosis could evolve – and actually appears to be evolving – much like the first NAALC submissions began defining the NAO role and capacities under the NAALC. The time it has taken the NAO to establish a substantial record of dealing with labor cases may not be fully expired, and the NAO may have more to do to prove the efficacy of the NAALC structure. With this in mind, the national unions of the United States have demonstrated the wisdom to look to the protocols as a starting point to work with emerging unions in Mexico and to keep U.S. organized labor involved in the discussion of international workers' rights as the economic models of trade evolve.

multinationals ourselves now. If a corporation does business in fifteen countries, we'd like to be able to confront them [sic] as labor in fifteen countries. It's not that we need less international involvement, but it should be focused toward building solidarity, helping workers achieve their needs and their goals here at home.