

Université de Montréal

**The Functioning
of the
North American Agreement on Labor Cooperation**

par

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EXECUTIVE SUMMARY

The current trend towards globalization is leading to the opening of borders and an increased flow of goods between countries. Because labour is substantially cheaper in poorer countries, production costs are significantly lower than in more industrialized nations, allowing foreign-produced products to be sold at a lower price than those produced domestically. As domestic markets face an increased competition from the influx of cheaper, foreign-produced goods, the danger of *social dumping* becomes evident. In an attempt to minimize production costs, companies may decrease work conditions and governments may tend to lower the level of social protection (programs such as unemployment insurance, welfare, etc.) in the society as a whole. Consequently, we must ask ourselves what can be done to minimize the risks of social dumping.

With regards to social protection in the context of globalization, certain options are available. First, there is the *laissez-faire* attitude of the neo-liberals, who claim that governments should not interfere with the natural forces of the markets. Second, there is the example of the European Union (EU), which creates political and judicial institutions as well as a social charter at the supranational level. Third, the system of international labour standards established by the International Labour Organization (ILO) creates a set of labour Conventions that member countries may voluntarily ratify. Each of these three alternatives is discussed in this paper. As a final option, a social agreement (also called a social clause) may be attached to a specific international trade treaty. This is the chosen alternative in North America and the focus of our paper.

When the North American Free Trade Agreement came into effect in January 1994, a side agreement on labour rights protection, the North American Agreement on Labor Cooperation (NAALC) also took effect. The objectives of the side accord are : (1) to improve work conditions and living standards on NAFTA territory, (2) to promote the eleven labour principles set out in the NAALC, (3) to encourage cooperation between the three countries, (4) to publish and exchange labour information, (5) to organize cooperative activities, (6) to promote compliance with national labour legislation, and (7)

to foster transparency in labour law administration. The present paper is a descriptive case study of the functioning of the NAALC. In order to complete our study, we visited and conducted interviews at the various institutions created under the NAALC – each of the National Administrative Offices (NAOs) in Washington DC, Mexico City and Ottawa, as well as the Secretariat in Dallas. Our study focuses on the two main functions of the NAALC's institutions : the organization of cooperative activities (conferences, etc.) around the eleven labour principles outlined in the NAALC, and the review of public submissions regarding cases of alleged violations of national labour legislation.

The side accord has been severely criticized by labour representatives for various reasons. These groups criticize the fact that the Accord does not create a supranational labour legislation, its complaints procedures are lengthy, it is not harsh enough, and the violation of only three of the eleven labour principles can go all the way to economic sanctions. For these reasons, according to labour representatives, the NAALC is incapable of protecting workers' rights and minimizing the risks of social dumping. Through our analysis of the NAOs' handling of the public submissions received to date and their organization of cooperative activities, we conclude that the institutions are well on their way to attaining the Accord's objectives. Labour groups will continue to criticize the NAALC, however, as they call for the institutions to be granted the power to order companies to reinstate dismissed workers and pay penalties. The three governments, on the other hand, never intended for the NAALC's institutions to replace regular domestic channels. By the review of public submissions, the organization of cooperative activities, and the completion of studies on labour issues in the three countries, most of the NAALC's objectives are already being attained, especially those of transparency in labour law administration and the dissemination of information. The objective of improving working conditions and living standards, however, seems to be attainable only in the longer term. By working towards the other more short-term objectives, work conditions and living standards can eventually be improved, as workers will become more knowledgeable of their rights. It is perhaps important to clarify that this is a long-term objective, as the fact that it is listed first in the text of the Accord may be causing labour representatives to focus on this point, thus sparking their criticism of the NAALC.

RÉSUMÉ

Le 1^{er} janvier 1994, l'Accord de libre-échange nord-américain (l'ALÉNA)^a est entré en vigueur entre les États-Unis, le Canada et le Mexique. Au même moment, un accord parallèle (aussi appelé une clause sociale), l'Accord nord-américain de coopération dans le domaine du travail (l'ANACT)^b a été mis en place. Les objectifs de cet accord parallèle incluent : (1) l'amélioration des conditions de travail et du niveau de vie dans les trois pays; (2) le respect des onze principes relatifs au travail énoncés dans le texte de l'Accord; (3) l'encouragement de la coopération pour améliorer les niveaux de productivité et de qualité; (4) la publication et l'échange d'informations afin de contribuer à une meilleure compréhension des lois et institutions régissant le travail; (5) l'organisation des activités coopératives en matière de travail; (6) la promotion de l'observation et de l'application des lois nationales du travail, et (7) favoriser la transparence dans l'application de la législation nationale du travail.

Certaines institutions ont été créées dans les trois pays dans le but de surveiller et d'administrer la mise en œuvre de l'ANACT. La Commission de coopération dans le domaine du travail est composée d'un Conseil ministériel et d'un Secrétariat. Le Conseil ministériel est constitué des ministres du Travail de chacun des trois pays. Les employés du Secrétariat, situés à Dallas, Texas, représentent les trois nationalités de l'ALÉNA. De plus, chaque pays a établi un Bureau Administratif National (BAN)^c, dont les responsabilités principales incluent la révision des plaintes du public quant au non-respect de la législation nationale du travail et l'organisation des activités coopératives (séminaires, conférences, etc.). La présente étude porte sur le fonctionnement de l'Accord parallèle. Ce projet est principalement une étude de cas descriptive. Nous voulions documenter le fonctionnement de l'ANACT et, pour ce faire, nous avons visité les bureaux du Secrétariat ainsi que les trois BAN. Durant ces visites, nous avons complété des entrevues avec les employés de toutes les institutions de l'ANACT.

^a En anglais, North American Free Trade Agreement (NAFTA).

^b En anglais, North American Agreement on Labor Cooperation (NAALC).

^c En anglais, National Administrative Office (NAO).

Dans le contexte actuel de mondialisation, plusieurs observateurs soutiennent qu'il existe un danger d'une détérioration des conditions de travail en raison de la concurrence accrue des pays en voie de développement (les pays pauvres). Dans ces pays, le coût du travail est moindre que dans les pays industrialisés (les pays riches). De ce fait, les coûts de production y sont beaucoup moins élevés. Les gouvernements et les entreprises des pays riches, dans le but de minimiser leurs coûts de production face à cette concurrence internationale, peuvent choisir de diminuer les normes de protection sociale et les conditions de travail. Par exemple, dans les pays riches, les coûts de production sont plus élevés en raison des normes de travail minimums qui incluent les avantages sociaux, le salaire minimum, les congés de maternité, les règlements quant à la santé et sécurité au travail, etc. De plus, les programmes de protection sociale tels que l'assurance chômage, le bien-être social, l'assurance santé, etc. contribuent eux aussi à augmenter les coûts de production. Dans les pays pauvres, où la plupart de ces programmes de protection sociale n'existent pas et où les conditions de travail ne sont pas au même niveau que celles des pays riches, les coûts de production sont beaucoup moins élevés. L'ouverture des frontières permet aux entreprises d'aller là où le travail est le moins cher. Conséquemment, il y aurait un risque élevé que les entreprises des pays industrialisés transfèrent la production de leurs biens aux pays pauvres et que les gouvernements diminuent le niveau de protection sociale dans le but de baisser les coûts de production et demeurer concurrentiels dans le contexte de mondialisation. Nous parlons ici d'un *nivellement vers le bas* de la protection sociale.

Cette conséquence importante de la mondialisation est illustrée par le concept du *dumping social*. Le dumping social vient du concept économique de *dumping*. Les traités de commerce international interdisent les pratiques déloyales de commerce. Pour que le commerce international soit juste et équitable ('fair trade'), le prix d'un produit vendu à l'étranger doit tenir compte de tous les coûts de sa production. Lorsque le produit est vendu à un prix inférieur à ses coûts de production (dans le but de conquérir les marchés internationaux), le commerce international est déloyal. Les entreprises se permettent alors de vendre leurs produits à un prix inférieur aux coûts de production soit

en acceptant des pertes de revenus, soit en acceptant des subventions gouvernementales. Dans le cas du dumping *social*, encore une fois le produit est vendu à un prix inférieur aux coûts de production. Toutefois, au lieu que ce soit l'entreprise qui paye la différence entre le prix de vente et les coûts de production, ce sont les employés et la société en générale qui 'payent'...en travaillant dans des conditions inacceptables et dans un contexte où la protection sociale est quasi-inexistante.

Que peut-on faire pour éviter une situation de dumping social et un nivellement vers le bas de la protection sociale dans un contexte de mondialisation ? Nous avons regardé quatre alternatives pour assurer la protection des travailleurs dans un monde sans frontières. Premièrement, selon la perspective néo-libérale de 'laisser-faire', les gouvernements ne doivent rien faire pour influencer les forces naturelles des marchés internationaux. Toutefois, notre étude nous montre que les risques de dumping social sont élevés sans l'intervention du gouvernement. Deuxièmement, contrairement à la situation en Amérique du Nord, l'Union européenne (UE) a choisi d'établir des institutions politiques et judiciaires au niveau supranational. Ces institutions ont le pouvoir d'établir des normes et des politiques communes à tous les pays membres de l'Union. Cependant, la comparaison entre l'Europe et l'Amérique du Nord est limitée : Tandis que le territoire de l'ALÉNA est un exemple d'intégration uniquement économique, l'Europe en est un d'intégration économique, politique et judiciaire. De plus, le danger du dumping social est moins élevé en Europe, car l'écart entre les pays riches et les pays pauvres n'est pas aussi évident qu'en Amérique du Nord (la différence entre les États-Unis et le Mexique, par exemple). Troisièmement, il existe le système des normes internationales du travail établi par l'Organisation internationale du travail (OIT)^d. Toutefois, le pouvoir de cette organisation est limité puisque les pays membres de l'OIT ne sont pas obligés de ratifier ses Conventions, mais le font sur une base volontaire. De plus, la possibilité de sanctions économiques dans le cas de non-respect des Conventions n'existe pas. L'Organisation tente de n'utiliser que la pression morale pour influencer les pays à respecter ses Conventions.

^d En anglais, International Labour Organization (ILO).

La dernière alternative pour assurer la protection sociale dans le contexte de mondialisation est celle d'une clause sociale liée à un accord de commerce international. Une clause sociale établit les mécanismes et les normes de protection sociale sur un territoire défini par un traité de commerce international. L'ANACT est un exemple d'une telle clause. Malgré le fait que cette clause sociale établisse onze principes relatifs au travail, aucune législation commune aux trois pays n'est créée par l'Accord. Selon l'ANACT, les pays ne sont tenus qu'à respecter leur propre législation nationale du travail. L'Accord a été sévèrement critiqué sur ce point par les groupes représentant les travailleurs, surtout aux États-Unis. Ces groupes, qui ont mené une lutte contre le libre-échange depuis le début des négociations, ont également critiqué la clause sociale sur plusieurs autres points, en disant que cet accord ne serait jamais capable d'améliorer les conditions de travail sur le territoire de l'ALÉNA ni d'éviter le dumping social. Selon ces groupes, les procédures de plainte dans les cas de non-respect de la législation du travail sont trop longues et compliquées; l'Accord n'est pas assez sévère car il a été établi sous un esprit de coopération entre les trois pays, ce qui rend la possibilité de sanctions peu probable; même dans le rare cas de sanctions économiques, les montants de ces sanctions sont minimes, et il n'y a que trois des onze principes qui peuvent aller à l'étape de sanctions économiques. Ces trois principes sont le salaire minimum, le travail des enfants et la santé et sécurité au travail (SST). En fait, les procédures de plainte de l'Accord peuvent être divisées en trois groupes. Le premier groupe (les principes de relations industrielles) ne peut aller qu'à l'étape des consultations ministérielles. Le deuxième groupe de principes (les normes techniques du travail) peut aller à la prochaine étape, celle d'un Comité évaluatif d'experts. Finalement, il n'y a que les trois principes déjà mentionnés qui peuvent aller à l'étape finale des sanctions économiques.

Nous avons analysé le fonctionnement de l'Accord par rapport aux deux fonctions les plus importantes des institutions, soit l'organisation des activités coopératives et la revue des communications du public (les plaintes) concernant le non-respect de la législation nationale du travail. Depuis l'entrée en vigueur de l'ANACT, les BAN organisent des activités de coopération (séminaires, conférences, etc.) qui portent sur les onze principes relatifs au travail. Chacun des trois pays est invité à y envoyer des participants

représentant les trois acteurs sociaux (le gouvernement, les employeurs et les travailleurs). Jusqu'à présent, les trois pays ont tenu un nombre relativement égal de ces activités. Toutefois, les commentaires reçus de nos interlocuteurs (les personnes interviewées aux BAN et au Secrétariat) mettent en évidence une perception d'inégalité quant à l'effort consacré à l'organisation des activités : selon nos interlocuteurs, le Mexique ne met pas assez d'effort dans l'organisation des activités coopératives. De plus, le Mexique a été critiqué sur deux autres points – (1) les représentants des travailleurs mexicains ne sont jamais invités à présenter des discours durant les conférences et (2) certains ont l'impression que le gouvernement mexicain exerce une forme de censure quant aux sujets qui peuvent être traités lors des activités de coopération.

En ce qui a trait aux plaintes reçues par les BAN, au moment de la rédaction de cet ouvrage, huit cas ont été acceptés par les bureaux. Sept des huit cas ont été reçus par le bureau américain, tandis qu'un seul a été soumis au BAN mexicain. Le Canada, puisque les provinces n'avaient pas encore ratifié l'Accord, ne pouvait pas, jusqu'à très récemment, participer au processus de plainte. Sept des huit plaintes soumises aux bureaux concernent le non-respect des principes de 'relations industrielles', plus spécifiquement la liberté d'association et la protection du droit d'association. Dans chacun de ces cas, la compagnie ou les tribunaux mexicains ont tenté de bloquer la formation d'un syndicat indépendant, et les travailleurs voulant organiser le syndicat ont été congédiés. Tous ces cas sauf un concernent des événements qui ont eu lieu au Mexique, tandis qu'un seul cas porte sur des événements survenus aux États-Unis. Finalement, une des plus récentes plaintes acceptées par un des BAN porte sur la discrimination contre les femmes enceintes dans les *maquiladoras* du Mexique.

Selon l'ANACT, les plaintes concernant la violation des principes de relations industrielles ne peuvent pas aller plus loin que les consultations ministérielles. Autrement dit, le non-respect de ces principes n'est pas assujéti aux sanctions économiques. Dans la plupart des cas, les consultations ministérielles ont été recommandées par le BAN. Les résultats de ces consultations sont le plus souvent la

réalisation d'une étude et la tenue de conférences portant sur les problèmes soulevés dans la plainte. Les organisations représentant les travailleurs critiquent ces procédures en disant que les institutions de l'Accord devraient avoir le pouvoir d'ordonner la réintégration des travailleurs congédiés et de forcer les entreprises impliquées à payer des pénalités. Ce genre d'actions, toutefois, est laissé aux procédures domestiques existantes.

Pour ce qui est des critiques affirmant que les procédures de plainte sont longues et compliquées, que l'Accord n'est pas assez sévère, et que les sanctions économiques sont peu probables, il est important de noter que l'esprit de coopération sous lequel l'ANACT a été établi est à la base de toutes les procédures mises en place. En effet, il est fort probable que les trois pays n'auraient pas accepté de ratifier un accord comprenant une haute probabilité de sévères sanctions. Un accord coopératif ratifié n'est-il pas mieux qu'un accord sévère que personne n'aurait signé?

Malgré les nombreuses critiques de l'Accord de la part des représentants des travailleurs, l'ANACT semble pouvoir atteindre ses objectifs. Toutefois, dans le but d'être plus explicite et éviter les critiques, les objectifs de l'ANACT devraient peut-être être divisés selon le fait que leur atteinte relève du court ou du long terme. Par exemple, les objectifs d'encourager la coopération entre les pays, de favoriser la publication et l'échange d'informations, de favoriser la transparence dans l'application de la législation du travail, et d'élaborer des activités de coopération sont entrepris depuis l'entrée en force de l'Accord. Cependant, l'objectif d'améliorer les conditions de travail et le niveau de vie sur le territoire de l'ALÉNA ne peut être atteint qu'à plus long terme. Il est possible que le fait que cet objectif soit le premier mentionné dans la liste d'objectifs du texte de l'ANACT crée des attentes parmi les représentants des travailleurs, qui mettent l'accent sur celui-ci comme objectif immédiat et primordial de l'Accord. En travaillant vers l'atteinte des objectifs à plus court terme, tel que la transparence dans l'application de la législation, les pays atteindront éventuellement l'objectif de l'amélioration des conditions de travail et du niveau de vie.

La transparence dans l'application de la loi du travail exerce une pression morale sur les gouvernements des trois pays. Cette transparence, ainsi que l'échange d'informations entre les parties, augmente les connaissances du public concernant leurs droits. Conséquemment, l'impact de l'ANACT sera de plus en plus évident avec le temps, lorsqu'il y aura davantage d'activités de coopération et de revue des plaintes.

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INTRODUCTION

In recent years, the elimination of trade barriers between nations and the establishment of regional accords offering specific trade privileges to member countries are trends which have been rapidly growing in importance all over the world. Supranational accords such as NAFTA and GATT (General Agreement on Tariffs and Trade), and supranational organizations like GATT's successor, the World Trade Organization (WTO), as well as the European Union, ASEAN, Mercosur and others have all allowed national businesses to tap foreign markets to an unprecedented degree. This tendency towards globalization means that foreign products are now readily available on domestic markets at significantly lower prices than in the past. Moreover, along with the development of these new markets, the number of companies opening offices and factories on foreign soil is steadily increasing. Furthermore, those companies opening production facilities in countries where labour costs are substantially less than those at home, are able to sell their products at lower prices. In many cases, companies in richer, industrialized countries are choosing to establish production in poorer, developing countries, where the difference in labour costs can be enormous.

The financial advantages for companies in these situations are not without disadvantages for the remainder of enterprises that do not yet compete on foreign markets. In fact, these domestic companies must cut production costs at home in order to remain competitive in the face of cheaper, foreign-made products. In order to do this, these companies may sell their products at a price which is lower than the actual production cost, and attempt to make up for the low price by cutting elsewhere. Since labour costs are one of the main components of production costs (approximately two thirds of total production costs)¹, one obvious way to decrease expenditures is to lower the standards of work conditions currently offered to employees. Workers accustomed to certain levels of income, benefits and job security are soon seeing some or all of these privileges reduced or even

¹ STANFORD, J., C. ELWELL and S. SINCLAIR, *Social Dumping Under North American Free Trade*, Canadian Centre for Policy Alternatives, October 1993, p. 5.

completely revoked, as their employers struggle to compete with an influx of lower-cost foreign products. In some cases, basic worker rights such as the right to organize, the right to collective bargaining and the right to strike are not being respected, as these rights often signify higher labour costs for employers.

The lowering of work conditions is but one consequence of increased international competition. As employers attempt to bring down production costs, the negative impact of globalization on workers at home² may also be felt by the society as a whole. As we will explain in more detail in Section 1.2 on social dumping, the attempts by companies to lower their production costs may cause the general public in the producing region to bare an unfair share of the impact of cost-cutting. Environmental pollution and workplace accidents are examples of the effects on the general population. In the case where companies ignore pollution control legislation or occupational safety and health measures in an attempt to cut production costs, the society in the producing region has to bear the consequences such as increased pollution or medicare costs. These phenomena will be discussed in further detail later on in this paper. The tendency towards a lowering of work conditions in the face of international competition, known as ‘social dumping’ or the ‘race to the bottom’, is causing unions and other workers’ rights groups to call for the establishment of international labour laws and standards in order to ensure the protection of workers’ rights in a globalized economy.

Social dumping in countries with high labour costs is not the only option available to domestic enterprises confronting increased international competition. These companies may decide that the lowering of work conditions is not sufficient to cut costs, and that a better solution would be to simply close down their facilities and transfer production to countries with cheaper labour. Very often, production is transferred to a developing country whose ‘cheap labour’ is due in part to the fact that work conditions are minimal

² When we refer to workers ‘at home’, we are referring to workers in those companies (in Canada or in other industrialized countries like Canada), that are finding themselves facing increased competition from cheaper, foreign-made products.

and the formation of workers' unions is discouraged. We see, therefore, that the risk of social dumping is only one consequence of increased globalization. Job losses resulting from the transfer of production to countries with low labour costs may also occur.

The above aspects of the impact of globalization are summarized by Langille.³ According to this author, the "*phenomena which are directly related to the new internationalization of the economy are : (1) the relocation of domestic firms, in search of regulatory advantage, to other jurisdictions; (2) domestic firms threatening relocation in their bargaining with local employees and trade unions, demanding lower negotiated standards (concessions); (3) domestic firms threatening relocation in the political process resulting in an alteration in regulatory standards or a resistance to higher standards; (4) firms engaging in jurisdiction shopping for (...) subsidies with resulting subsidy contests by jurisdictions.*"

The particular situation in North America is no different. The North American Free Trade Agreement (NAFTA) has been in effect since January 1994, linking Canada, Mexico and the United States. This essentially commercial accord calls for the elimination of trade barriers over a 10 to 15 year period. Although this accord does not cover the social aspect of free trade, a side accord, the North American Agreement on Labor Cooperation (NAALC), came into effect on the same day for this purpose. The NAALC has three main functions. The side accord (1) presents specific labour principles to be respected by the three NAFTA countries, (2) outlines the establishment of certain institutions (e.g. a National Administrative Office in each country, a Secretariat, etc.) to oversee each country's respect of its labour laws, and (3) details the procedures to follow when labour principles are not respected by any one of the three parties. According to the side agreement, each country is obliged to respect its own labour laws, as common labour laws governing all three countries have not been created. In certain cases, sanctions against a member country that does not follow the required labour principles listed in the

³ LANGILLE, B., *General Reflections on the Relationship of Trade and Labour (or: Fair Trade is Free Trade's Destiny)*, Faculty of Law, University of Toronto, September 1994, pp. 7-8.

Accord are specified. Although there are a total of eleven principles set out in the NAALC, it is important to note that economic sanctions are currently only possible in the areas of child labour, minimum wage and occupational safety and health. The main purpose of the NAALC is to minimize social dumping by ensuring that workers' fundamental rights are protected on NAFTA territory.

The establishment of a side accord is just one way of attempting to protect workers' rights and limit social dumping in North America. Other possibilities may include : (1) forming a system of institutions for political and legal integration, as is the case in the European Union; (2) applying, with sanctions, the system of international labour standards established by the International Labour Organization (ILO) to the NAFTA countries, or (3) adopting a *laissez-faire* attitude, allowing each country to decide on its own labour standards and sanctions (a more liberal point of view). Of course, each of these four options has its advantages and drawbacks. In North America, the three governments involved opted for the side accord (equivalent to a 'social clause'), assuming it would be an effective way to ensure the protection of workers' fundamental rights. In the present study, we propose an in-depth analysis of this side accord, including a discussion of how it works and its achievements.

Why is a such a study of the NAALC important now? With the current situation of the North American labour market (high unemployment, low job security, company closures, and the apparent loss of negotiation power by employee unions)⁴, an analysis of the functioning of the NAALC is essential in order to verify that workers' rights are being properly protected in such a volatile labour environment. Also, eight cases of alleged non-respect of workers' rights have been reported since the NAALC came into effect in 1994, making this an opportune time to analyze the functioning of the side accord. In fact, a complete documentation of the functioning of the NAALC at this moment, almost four years after it came into effect, may enable future studies to evaluate its efficiency or

⁴ For a detailed analysis of the situation of the Canadian economy, see *Challenging 'Free Trade' in Canada: The Real Story*, Canadian Centre for Policy Alternatives, August 1996.

effectiveness before too much time passes and too many cases are reported. Such an analysis can highlight possible weaknesses in the current system and form a solid base on which future research may rely when suggesting any modifications to the institutions and procedures in place. Canada's recently-concluded free trade deal with Chile, as well as its desire to promote similar agreements with other countries, also confirm the strong need for an analysis of the side accord. In the future, a social clause such as the NAALC may even be incorporated into a free trade deal before its final draft is adopted.

Finally, much doubt has been raised as to the ability of the side accord to actually minimize social dumping and protect workers' rights.⁵ More specifically, the NAALC has been criticized for having 'no teeth' (not harsh enough because of the limited possibility of economic sanctions), not having a wide enough application (sanctions are only possible in the areas of child labour, minimum wage and occupational safety and health) and the absence of supranational labour laws.⁶ Furthermore, Moreau and Trudeau add to this list of criticisms the fact that there must be a direct link between the violation of a particular labour standard and the trade of a certain product.⁷ In other words, if a product is intended for domestic consumption and not for export, the penalties and procedures listed in the NAALC are not applicable, regardless of any existing non-respect of labour standards. Lastly, these authors stipulate that the sanctions proposed by the NAALC may help to ensure the protection of workers' rights in the formal sector, but will not be able to regulate the informal sector⁸, which is a large part of the Mexican economy. In light of these criticisms, a study of the accomplishments of the side accord, almost four years after its entry into force, becomes all the more interesting.

⁵ See for example, **SARDIN, J.P.**, *La loyauté dans les échanges internationaux: le débat sur l'harmonisation des normes de travail*; **MOREAU, M.A. et G. TRUDEAU**, *L'opportunité de recours à une sanction économique en matière sociale (ou la nouvelle histoire de la carotte et du bâton)*; **STAELENS, P.**, *La clause sociale: Position des pays en voie de développement et du Mexique dans le cadre de l'ALÉNA*; **VERGE, P.**, *Le travail à la mesure du commerce international et de la diplomatie: l'ANACT*; and **SERVAIS, J.M.**, *Les aspects sociaux de la libéralisation du commerce international ou la clause sociale revisitée*; all in the *Bulletin de droit comparé du travail et de la sécurité sociale*, Université Montesquieu-Bordeaux IV, 1996.

⁶ **VERGE, P.**, *op. cit.* note 5, pp. 78-80.

⁷ **MOREAU et TRUDEAU**, *op. cit.* note 5, p. 46.

⁸ *Id.*, p. 55.

On the following pages, we explain in detail the procedures and outcomes of our study of the functioning of the NAALC. The study is divided into two parts, with two chapters in each part. Part I overviews the theoretical background of the social dimension of North American integration, while Part II investigates the actual functioning of this social dimension. The first chapter consists of a complete **review of the existing literature** covering the major concepts related to our research topic. This chapter includes a detailed discussion of the possible options available to protect the rights of workers on the global marketplace. We will be looking at two major international bodies, the European Union (EU) and the ILO. Our discussion of the EU serves to facilitate an understanding of the North American side accord, while our consideration of the ILO's labour standards highlights an important alternative to the NAALC which is, at least in theory, already in effect on NAFTA territory.

The second chapter provides an outline of the **theoretical framework** that forms the basis of our study. In this section, we describe the specific context with which we are dealing in North America, namely that of the North American Free Trade Agreement. We also briefly present the NAALC, so as to familiarize the reader with the object of our attention in this study. The final part of this chapter looks at the eleven labour principles outlined in the text of the side accord, as we consider these principles to be the 'fundamental rights' of workers for the purposes of our study. These three elements are the framework within which we build our analysis of the side accord.

The third chapter in this paper outlines the **methodology** followed in the completion of our project. Here, we describe the details of all procedures used to study the functioning of the side accord, such as the review of the literature and use of secondary data, as well as the conferences attended as part of our research. We also discuss in detail how our site visits were completed and what type of information we obtained from them. Site visits consisted of interviews with members of the National Administrative Offices (NAOs) of the three countries and of the Secretariat, as well as a review of any documentation

available at each office. The purpose of the interviews was to gather information and opinions on the functioning of the institutions and procedures created under the side accord. It is important that we clarify from the start that this project is a detailed, descriptive case study of the functioning of the side accord and not an empirical measure of its efficiency or effectiveness.

In the fourth and final chapter of this paper, we provide an in-depth **analysis of the functioning of the NAALC** (including a discussion of the handling of the eight cases reported to date). In this chapter, we first examine the rules, procedures and sanctions as set out by the text of the side accord. We then describe the functioning of the institutions and procedures to date, based on our detailed review of the literature and secondary data and on the information gathered during our visits to the NAOs and the Secretariat. Finally, we discuss the results of our study by way of an analysis of what the side accord set out to achieve, versus its actual accomplishments since its implementation. As a **conclusion** to our study, the last section of this paper first offers a résumé of our research topic, procedures and results, and then highlights some important implications of our findings. In this last section, we also present our personal opinions on the functioning of the NAALC. Before we go on to our study of the side accord, let us first explain the question we set out to answer.

THE RESEARCH TOPIC

Given its recent date of entry into force (January 1st, 1994), a concrete analysis of the institutions and procedures of the NAALC at this time is imperative in order to document the workings of the side accord in the early stages of its implementation. The main purpose of our study is to describe how the NAALC has been functioning since its entry into force. As such, the research question we attempt to answer is the following :

« What is the functioning of the institutions and procedures created under the North American Agreement on Labor Cooperation (NAALC) with regards to the protection of the fundamental rights of workers in the context of the North American Free Trade Agreement (NAFTA)? »

As previously mentioned, our project is essentially a descriptive case study of an existing phenomenon, namely the side accord to the North American Free Trade Agreement. The study is basically a gathering of pertinent information on the functioning of the NAALC in a comprehensive and organized manner. This analysis is imperative to any future studies of the side accord, as an evaluation of the institutions and procedures in place would be impossible without the initial documentation of their functioning. The urgency of our research project is manifested by two factors. First, the increasing importance of globalization in general, as is evident in North America by the recent signing of a free trade accord between Canada and Chile (and perhaps, in the near future, Argentina), leads us to believe that social dumping will soon become a more prominent risk.⁹

A second important factor influencing the need to study the functioning of the side accord is the current instability of jobs on the North American labour market. Instability on the

⁹ Interestingly, in May of 1995, the Clinton Administration declared itself willing to study the possibility of a Trans-Atlantic free trade accord (TAFTA). This proposition was advanced by members of the Canadian, British and German governments. Although not more than an abstract idea for the moment, the eventuality of such an accord is not unrealistic, given the current trend towards increased globalization. For more information on this subject, see *L'État du Monde, Annuaire économique et géopolitique mondial*, édition 1996, Éditions La Découverte/Boréal, Montréal, 1995, pp. 32-38.

job markets is thought to be caused in part by globalization, as companies look for increased flexibility in the face of international competition. In their search for flexibility, many organizations will opt for atypical job structures (for example, part-time or contractual work) as opposed to regular full-time employment. An increase in the number of precarious jobs is a sign of greater instability on the job market.

Instability on the North American labour market is manifested in several ways. For example, according to a study by the Secretariat of the Commission for Labor Cooperation, although most employed North Americans still have one full-time job, « *the relative size of this group is declining as various forms of non-standard work, including part-time workers, own-account self-employment, temporary or contract workers, and multiple job holders, become more prevalent in all three countries.* »¹⁰ Furthermore, the results of this same study show that real average weekly earnings in 1995 were below 1984 levels (meaning that earnings have not kept pace with inflation in North America), and that a disproportionate number of women and young people fall into the category of part-time work.¹¹ Finally, the study mentions that *involuntary* part-time work has been increasing over the past few years in Canada and Mexico, although it has decreased in the United States.¹²

In Canada, recent and proposed cuts in social programs such as Medicare, unemployment insurance (now called 'employment insurance') and welfare all result in workers' increasing needs for financial security. More than ever, employees need to feel that they can count on a steady income. This sense of security, however, is not likely to exist when jobs are unstable. As the results of the Secretariat's study demonstrate, regular full-time job may be becoming a thing of the past. The need for increased flexibility for companies, prompted by heightened globalization, may be leading to increased instability for workers. Because of this decrease in job security, a properly functioning structure to protect employees' rights in a globalized environment is not a luxury, but a necessity.

¹⁰ Commission for Labor Cooperation, *Labor in NAFTA Countries*, Vol. 1, N°2, August 1996, p. 2.

¹¹ *Id.*, p. 2, 7.

¹² *Id.*, p. 8.

Besides the increased importance of globalization and the instability of jobs on the North American labour markets as described above, a third reason for studying the functioning of the NAALC is the fact that the side accord is the first example of a social clause directly tied to a treaty on economic integration or international trade. The study of the functioning of this side accord becomes all the more important given that the NAALC is likely to serve as a model or a precedent in the negotiation of future international trade treaties and social clauses. Such has already been the case in Canada's recent negotiations with Chile.

In order to eventually evaluate the efficiency or effectiveness of the side accord, a thorough, descriptive case study is primordial. In the current study, not only have we completed a description of the institutions and procedures of the NAALC, but in order for our analysis to be as realistic as possible, we have also looked at existing alternatives. Firstly, we discuss the structures of the European Union, which provide us with an interesting point of reference for our study of the NAALC. Integration in Europe has been taken to a much further degree than in North America, as it is not only economic, but political and legal as well. We briefly look at the situation of social dumping in Europe, as we may have a lot to learn from their experience. We emphasize the fact that the purpose of our discussion of the European Union is not to incite us to choose the 'better' of the two systems. In fact, we are not attempting to *compare* the North American context with that of Europe (a process which is, in itself, an evaluation). We wish simply to provide a brief description of the European context to facilitate our understanding of the North American situation. A description of the mechanisms that already exists in Europe will enhance our understanding of certain aspects of the North American context.

A second important element in our study is an analysis of the system of international labour standards established by the ILO. While the EU example serves to enhance our understanding of the North American situation, what occurs in Europe remains a completely separate issue which does not (and should not) directly affect the NAFTA countries. The ILO's international labour standards, however, apply to Mexico, the

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United States and Canada, as all three NAFTA countries have ratified certain conventions of this international body. It is logical, therefore, to assume that these labour standards can (and should) be applied to the NAFTA context. As such, an examination of the procedures of complaint and the possible sanctions allowed by the ILO is in order. Since these standards are technically in effect on NAFTA territory, we look at their ratification, application and possible sanctioning by the three countries. This information enables us to formulate an opinion as to whether or not the side accord to NAFTA is a more appropriate alternative to protect the fundamental rights of workers. The discussions of the European Union and of the ILO are important aspects of our project and contribute significant information to lend credibility to our analysis of the functioning of the NAALC.

It is important to emphasize the fact that the main goal of this research project is to gather and organize pertinent information as to the *functioning* of the side accord. A judgment of the *efficiency* or *effectiveness* of its functioning is not entailed by our study. We note, however, that a study of the efficiency or effectiveness of its functioning would be a logical subject for subsequent research projects. In order for an exact and realistic measure of efficiency to be obtained, detailed information and reactions would be required not only from government offices (as is the case with the present study), but from unions and employers as well. This type of measure of the efficiency of the NAALC is not the focus of our project, as our ultimate goal is simply to describe the *functioning* of the NAALC. Although we understand the limits that this type of analysis may have, we insist upon the nature of our project as being a descriptive study of an existing phenomenon. We do not develop a hypothesis to test the impact that specific variables (such as sanctions or common labour laws) may have on the efficiency of a side accord, nor do we attempt to empirically compare the difference between the efficiency of other methods of protection of workers' rights (i.e. the European Union example or the system of the ILO) and that of the side accord. Our intention from the onset of this project was to conduct an exploratory study in order to document the phenomenon of the functioning of the side accord. In this respect, information uncovered during our project may highlight important elements that can become the focus of future studies.

Our study draws the line at the description of the functioning of the NAALC. We do not take our analysis to the next step by evaluating the effectiveness of the side accord. In fact, in order to evaluate the functioning of the social clause, we would have had to establish a list of criteria against which the NAALC could be judged. This was never the objective of our research. We believe, however, that by providing a detailed and organized descriptive study, this research is facilitating the evaluative process in the future. The pertinence, therefore, of a study such as ours, which documents the functioning of the NAALC, is that it can provide information essential to any future evaluation of the ability of the side accord to accomplish what it set out to do.

CHAPTER 1. REVIEW OF THE LITERATURE

Before we can begin the discussion and analysis of our research subject, we must provide detailed explanations of the important concepts that constantly recur throughout our study. In this first chapter, we offer descriptions of some of the key concepts associated with our topic. We begin our review by elaborating on (1) globalization, (2) social dumping, (3) workers' fundamental rights, and (4) the link between international trade and social protection. Full comprehension of these concepts is considered primordial to the understanding of our analysis of the NAALC. Without a firm grasp on these underlying issues, it would be difficult to judge the nature of our discussion of the functioning of the side accord.

After looking at these concepts, in the last section of this chapter, we offer explanations of some of the different structures put in place to ensure social protection in a globalized economy. As we mentioned in the introduction to this paper, the alternatives for social protection include : (1) adopting a *laissez-faire* attitude, leaving each country free to decide on its own labour standards and sanctions (the liberal point of view); (2) the example of the European Union, where, along with economic integration, a system of institutions for political and legal integration was formed; (3) applying the system of international labour standards established by the International Labour Organization (ILO) to the NAFTA countries; and (4) the adoption of a social clause tied to an international trade agreement. Let us begin with a discussion of the key concepts related to our subject.

1.1 Globalization

A solid understanding of the concept of globalization is essential to our analysis of the side accord. Our review of the literature on this subject has led us to two texts in particular that can offer us a clear explanation of globalization. These recent articles provide us with

a solid basis of understanding of this concept. First, Giles¹³ provides us with a detailed definition of globalization. The author breaks down the concept into three basic elements: the globalization of markets, the globalization of production, and the globalization of the State. He then discusses some important impacts of globalization on national corporations as well as on State and other national-level institutions. Second, Wade¹⁴ discusses the actual degree of globalization in the world today. While he is not in disagreement with Giles' explanation of the concept per se, the author does claim that the image we have of the extent of globalization may be exaggerated. The two articles are quite complementary. Whereas Giles offers us an elaborate yet easily understood definition of a complex subject, Wade enters into the specifics of the degree of globalization. We require Giles' article to make sense out of Wade's arguments, and we need Wade's arguments to qualify the importance of the concept defined by Giles.

For the purposes of our case study, let us begin our discussion of globalization with a review of the elaborate definition of this concept provided by Giles. According to this author, it is important to distinguish three types of globalization. First, the **globalization of markets** is the increased integration of national markets into a larger, global market so that goods, services, information, labour and capital can circulate freely across national borders. A measure of the degree of globalization of markets is the increase in international trade and in the mobility of capital such as higher volumes of direct foreign investment. For example, in the past twenty years, world trade has increased from \$200 billion US to over four trillion US dollars and international direct investment has expanded from \$211 billion to \$1.8 trillion.¹⁵ International agreements specifying the removal of trade barriers have been a prime factor in the increase of market globalization. NAFTA, GATT/WTO and the European Union are perfect examples of the reduction of barriers to

¹³ GILES, A., *Globalization and Industrial Relations*, in The Globalization of the Economy and the Worker - Selected Papers from the XXXIInd Annual CIRA Conference, Université de Laval, 1996, pp. 3-18.

¹⁴ WADE, R., *Globalization and Its Limits: Reports of the Death of the National Economy are Greatly Exaggerated*, 1996, pp. 60-88.

¹⁵ CZINKOTA, M., I. RONKAINEN and M. MOFFETT, International Business, Third Edition, Dryden Press, Fort Worth, 1994, p. 18.

trade and the reorganization of markets from a national to an international or regional level.

The second type of globalization discussed by Giles is the **globalization of production**. As explained by Stewart, multinational manufacturing companies “*seeking to cut costs (...) have divided their operations into separate units: raw materials, processing, manufacture of components, assembly and distribution. On the basis of worldwide searches they have sought to situate units in locations that will yield the lowest total production costs. Nations are struggling to attract investment operations that will add value to their economies and strengthen their position in international trade.*”¹⁶ In other words, in these cases, the production process of a company may be spread out over several countries. Each step in the production process, such as research and development, product design, assembly, distribution, etc. may be undertaken in a different country. This process may be entirely handled by one specific company or by various business partners. In fact, the growing number of multinational organizations and of strategic alliances such as partnerships and joint ventures is a good measure of the extent of production globalization.

The third and final type of globalization presented by Giles is the **globalization of the State**. In this case, the political framework governing the economy is restructured from a national to an international level. National institutions that traditionally regulated public policies and procedures can become inappropriate in a global economy and socio-economic regulation at the international or regional level may be more suitable. Some examples of supranational institutions are the World Bank or the WTO at the global level, or the institutions of NAFTA and of the European Union at the regional level.

In his article, Giles also mentions some important effects of globalization.¹⁷ First, the globalization of markets, with the resulting influx of foreign products at low prices, may

¹⁶ STEWARD, *Environmental Regulation and International Competitiveness* (1993) 102 Yale L.J. 2039, p. 2042.

¹⁷ GILES, *op. cit.* note 13, pp. 5-8.

decrease the competitiveness of organizations in countries where the costs of labour are high. This, in turn, can lead to social dumping, as these countries attempt to lower their costs. Second, the globalization of production can **reduce the autonomy of State and employee institutions** at the national level. For example, as the production process shifts onto the international scene, procedures become more homogeneous and particularities at the national level are discarded. In fact, certain authors even stipulate that “*Globalization is a business initiative based on the belief that the world is becoming more homogeneous.*”¹⁸ As more and more companies are managed from a global perspective, national management styles or union demands are increasingly erased.

As a third important effect, the globalization of State can result in a **concentration of power at the global level**, at the expense of national unions. According to Giles, the ‘global elite’ which controls the power in a globalized economy consists largely of multinational enterprises with a neo-liberal perspective of trade markets. As power shifts into the hands of the elite, « *...labour is excluded from virtually all of the decision-making mechanisms and key institutions that govern the system. (...) Thus, the policy options favoured by labour movements are not even given a hearing at the international level. (...) The obsession with free-trade, controlling inflation through monetary policy, and the deregulation of labour markets has contributed to the overall decline in trade union strength and negotiating power.* »¹⁹

Giles’ description of globalization enables us to fully understand what is meant by this term. From his explanations, we see that globalization occurs at three different levels: on the markets, in production and in State institutions. What we must now discuss is the actual degree of globalization that exists today. For this, Wade offers some arguments which, in his opinion, demonstrate that the true extent of globalization may be less than we think.

¹⁸ CZINKOTA, RONKAINEN and MOFFETT, Op. Cit. note 15, p.456.

¹⁹ GILES, op. cit. note 13, p. 8.

Whereas Giles discusses globalization along the lines of markets, production and State, Wade divides this concept according to (1) trade, (2) foreign direct investment (FDI), (3) finance capital, and (4) technology production. There is significant similarity in the explanations of these two authors. When Giles discusses the globalization of markets, he refers to international trade and foreign investment. For Wade, this is trade, FDI and finance capital all in one. Giles' explanation of the globalization of production is rendered more specific with Wade, as this author emphasizes the production of technology (in other words, research and development), and not simply the production of any good. Finally, whereas Giles discusses the globalization of the State as a particular element of this concept, Wade refers to the importance of national institutions as an underlying theme throughout his article. According to Wade, the actual degree of globalization can be measured by studying the four elements along which he has divided his article. Let us look now at the extent of globalization as seen by this author.

Wade does not disagree with the numerous authors who talk about globalization in the world today. In fact, he readily admits that there is a tendency towards the globalization of the economy :

“At the micro level, a higher proportion of firms now have operations in many more countries than before; a higher percentage of total value added is produced by firms outside their home country; and any one firm faces more foreign-based competitors (...). At the macro level, national economies are much more integrated through trade and foreign direct investment (...). National borders are consequently more permeable (...), international competition has therefore become more intense (...) and the ‘global’ dimension of national economic policymaking has become more important.”²⁰

Although he believes that there is a tendency towards globalization, Wade warns that all the attention that this concept is receiving must be taken with a grain of salt. The author states that those who claim that the regulation of the economy by national-level

²⁰ WADE, *loc. cit.* note 14, p. 62.

institutions is a thing of the past are clearly out in left field, as the actual degree of globalization is much less significant than we may think.²¹ Wade offers several arguments to make his point.

First, as far as international trade is concerned, it must be measured as a percentage of GDP. According to the author, the share of trade in GDP is quite minimal in most countries. In fact, more than 90% of the economies of the US, Japan, the EU, Asia and Latin America are based on production for the domestic market and 90% of their consumption is produced at home. Furthermore, among OECD countries, the overall GDP is becoming less and less rooted in manufacturing and increasingly rooted in the service industry. Since services are far less trade-intensive than manufacturing, *“we should not assume that trade integration will go on increasing as the world economy grows faster, because faster growth will accelerate the shift from manufacturing to services.”*²² Moreover, Wade points out that a huge proportion of world trade (84% in 1989) is concentrated among developed market economies, and not developing or newly industrialized countries. This shows that the present trend of globalization is not truly ‘global’ but rather limited to certain privileged nations. Finally, Wade stipulates that although there is a tendency towards the reduction or elimination of tariffs, *“national borders continue to be control points where governments can affect the quantity and price of cross-border merchandise transactions, nowadays less through tariffs than through a whole panoply of nontariff barriers”*²³ such as quotas, ‘voluntary’ trade restraints and managed trade.

Second, foreign direct investment is also less significant than we may believe, even though there has been a tendency towards less restrictive laws governing FDI, both in industrialized and developing countries. In fact, for most major industrialized countries, outgoing and incoming FDI is ‘quite small’ (usually between 5 and 15 percent) relative to net domestic business investment. In other words, *“domestic investment by domestic*

²¹ *Id.*, p. 62, 85, 88.

²² *Id.*, p. 66.

²³ *Id.*, p. 70.

capital easily dominates both direct investment overseas and foreign investment at home."²⁴ Moreover, despite the fact that developing countries' share in the world flow of FDI has been increasing, two-thirds of total world FDI have been into the US and the European Union. Once again, these statistics show that globalization is not truly of a 'global' nature. As far as the world's leading economy is concerned, US capital invested internationally represents less than seven percent of that country's GDP. Indeed, the ratio of foreign to domestic assets in the US has actually decreased since the 1980's. As all these numbers demonstrate, FDI does not represent a significant amount of most industrialized countries' total investments. Domestic investment still is of far greater importance.

Third, with respect to **finance capital**, Wade recognizes that there has been an increased integration in financial assets such as currencies, government bonds and futures since the 1980's, and that governmental barriers to outgoing finance capital have been virtually eliminated. However, in spite of this increased integration, the actual number of financial products sold on world markets is rather low. A concrete sign of truly global financial markets would be a significant international stock market, yet this is not the current situation :

*"Stock markets are far from being fully integrated, because few companies have a sufficiently global reputation for trading in their stock to be active outside the home market. Financial regulations, tax systems, accounting practices, and corporate ownership rules are all mainly national (...). The mobility of capital is much higher within a country than between countries; national borders tend to segment even financial markets."*²⁵

So, as far as finance capital is concerned, once again we see that the image we have of globalization may not be quite accurate. The fact that the stock market, tax and

²⁴ *Id.*

²⁵ *Id.*, p. 73-74.

accounting systems are still maintained on a national level is proof that globalization has not reached the extent that we may imagine.

The fourth and last element of globalization according to Wade is **technology production**. Whereas Giles spoke of the globalization of production in general, Wade refers only to production in terms of technology (research and development). The author fully agrees that a growing number of companies are internationalizing their production process. However he claims that this internationalization is limited to the 'most routinized assembly operations'. Therefore, although there is evidence of an increasing number of multinational corporations (MNCs), this only signifies that simple portions of the production process are completed on foreign soil. An international production process for goods does not mean that there is true globalization of the most important aspects of enterprises. Indeed, Wade states that :

*"Most MNCs hold most of their assets and employees in their home country. (...) Therefore, most MNCs are quite susceptible to pressure and persuasion from the home country government than from any other. (...) In most cases, a large majority of shares are held by individuals and legal entities in the home nation. (...) Similarly, top management and governance rest in home country hands."*²⁶

In terms of production, it is not the production of goods in various countries that should be used to measure globalization, but the degree of internationalization of research and development (R&D). According to the author, we must look at where R&D is concentrated, as this is where the strategic decision making and innovation of the corporation are found. In actuality, most MNCs do the majority of their R&D in their home country. For example, in recent years, American MNCs accomplished over 90% of R&D activities at home. The figure is 98% for Japanese MNCs.²⁷ As we can see from these numbers, the 'brains' of MNCs remain in the home country, regardless of where production of the goods is completed. As such, using the production process as an

²⁶ *Id.*, p. 79.

²⁷ *Id.*

indication of globalization gives an inaccurate and probably exaggerated measure of this phenomenon.

In summary, the articles by Giles and Wade that are outlined above offer us a clear and detailed vision of globalization. The elaborate definition of this concept provided by Giles allows us to fully understand all aspects of globalization. Wade's article gives us numerous data to qualify the concept in real terms. The article acts as a reality check that enables us to keep our feet on the ground whenever we discuss the importance of globalization. We can conclude from this discussion that the image we have of the concept of globalization may be exaggerated. As Wade states, "*using two eyes rather than one we find evidence that the world economy is less internationalized, less integrated [than we may think].*"²⁸

1.2 Social Dumping

One of the most talked about consequences of free trade is the phenomenon of social dumping (also known as the 'race to the bottom'). Moreover, social dumping is one of the most widely noted justifications for the need for a social dimension in free trade agreements.²⁹ A solid understanding of this concept is essential to our research project. In order to fully comprehend *social* dumping, it is necessary to begin with an explanation of the economic concept of *dumping* itself, for it is from this latter concept that the former came to be understood. In 1993, the Canadian Centre for Policy Alternatives published a detailed report defining the concept of social dumping.³⁰ This report, along with others on the same subject, enabled us to develop the following explanations of dumping and social dumping.

²⁸ *Id.*, p. 66.

²⁹ ADAMS, R. and L. TURNER, *The Social Dimension of Freer Trade*, in Regional Integration and Industrial Relations in North America, M.L. Cook and H.C. Katz (ed.), Institute of Collective Bargaining, Cornell University, New York, 1994, p. 82.

³⁰ STANFORD, ELWELL and SINCLAIR, *loc. cit.* note 1, 66 pp.

1.2.1 Dumping

Most international trade treaties contain specifications pertaining to the prevention of unfair foreign trade practices. In essence, the principle of fair trade holds that « *the price of a commodity sold on international markets should accurately reflect the sum of the costs involved in its production.* »³¹ Laws and regulations established to identify, measure and take action against the violation of fair trade principles are known as ‘contingent protection’ measures. Protection measures often take the form of tariffs or duties, which are applied against those specific trade flows that are considered to be unfair. The goal of contingent protection measures is, according to the Canadian Centre for Policy Alternatives (CCPA), « *to offset the price advantage that the imported good gains as a result of the offending trade practice; this is usually accomplished through a special tariff or duty whose level is determined after attempting to measure the exact economic benefit of the allegedly unfair trade practice.* »³²

Two particular trade practices which can often have the same effects as contingent protection measures are dumping and subsidization. Dumping is the practice of selling a product on foreign markets at a price lower than what it costs to produce the product.³³ In this case, the product is ‘dumped’ on the foreign market at a price that does not reflect the true costs to the producer. The difference between the higher production cost of the product and its lower selling price on the foreign market is borne by the producer in the form of lost revenues. The reason why a producer is able to sell its product below production costs on foreign markets is that the majority of overhead costs (installations, machinery, etc.) are already amortized by domestic sales. As such, the product is sold internationally at a price which only represents a part of the total production costs (i.e. no overhead costs are considered).³⁴ The logic behind a producer’s decision to sell a product below its production cost, thereby losing potential revenue with each sale, is considered to

³¹ *Id.*, p. 2.

³² *Id.*

³³ BAUMOL, W.G., A.S. BLINDER et W.M. CARTH, L'économie - principes et politiques, Éditions Études Vivantes, 1986, p. 469.

be an 'anti-competitive' or a 'predatory' pricing strategy. In this case, the producer's objective is « *to drive its competitors out of business (allowing the surviving firm to increase prices dramatically at a later date) or else to discriminate between the prices charged in different markets (so that lower prices are charged in more competitive foreign markets, while more profitable prices are charged in a protected home market).* »³⁵

Subsidization is a second trade practice which is considered to be a contingent protection measure. In this case, as in the case of dumping, a firm sells its product on foreign markets at a price lower than its production costs (usually for the same reasons mentioned above). However, instead of the difference between production cost and market price being borne by the producer, this difference is borne by the government in the form of subsidies offered to the firm.³⁶ The reasoning of the government is that the benefits of subsidization (such as job creation due to increased demand and output) far outweigh the cost of the subsidies. According to Langille, "*from a global and abstract point of view, there is no relevant distinction between a tariff on imported goods to protect domestic producers from foreign-produced competing goods (...), and a subsidy to domestic producers which achieves the same result (...). Subsidies are just as effective a 'barrier' to trade as tariffs are.*"³⁷ Following this line of reasoning, if the reduction of tariffs is an inherent element to the concept of free trade, one must question the existence of subsidies in a true 'free trade' environment. In fact, Adams³⁸ contends that the elimination of such subsidies is an important objective of free trade agreements.

In both the above examples, products are sold on foreign markets at prices that are lower than production costs. In the case of dumping, lost revenues are borne by the producer and in the case of subsidization, the costs are incurred by the government. Whether it be a result of dumping or of subsidization, producers have the advantage of selling their

³⁴ *Id.*

³⁵ STANFORD, EWELL and SINCLAIR, *loc. cit.* note 1, p. 2.

³⁶ *Id.*, p. 3.

³⁷ LANGILLE, *loc. cit.* note 3, p. 5.

products at artificially low prices. Prices are considered to be artificially low, as they do not reflect true costs, and either the company itself (by accepting lost revenues) or the government (by offering subsidies) must make up for the difference. The concept of *social dumping* takes this reasoning one step further, as it is *workers or the society as a whole* that must pay the price.

1.2.2 *Social dumping*

Social dumping, like dumping itself, may be considered a type of unfair trade practice. Once again, a product is sold on foreign markets at a price lower than its true cost. In this case, however, the difference between the actual production cost and the market selling price is borne by the employees of the firm or by the public in the producing region. According to the CCPA, "*instead of directly absorbing a loss on each unit or covering that loss through transfers from the government, a producing firm is able to discount its prices below true costs by somehow forcing its own employees and/or the surrounding residents to bear an undue share of those costs.*"³⁹ Three specific examples of the costs borne by employees or by the general public will help us to clarify the notion of social dumping.

First, **environmental pollution** is a side effect of the production process of most goods. The negative effects of pollution are considered to be a part of production costs, as companies in many industrialized countries are required to put measures in place to control pollution and often must pay fines or other penalties for polluting. In countries where pollution control measures do not exist or are not enforced, or where companies are not held directly responsible for polluting, production costs are significantly lowered, as no particular pollution-control measures must be adopted in the production process. In this case, products can be sold at lower prices on foreign markets, but the population of the

³⁸ ADAMS and TURNER, *op. cit.* note 29, p. 83.

³⁹ STANFORD, EWELL and SINCLAIR, *loc. cit.* note 1, p. 4.

producing country must suffer the consequences. Environmental pollution is therefore considered to be a form of social dumping.⁴⁰

A second example of costs borne by employees or by the public is the **risk of injury in the workplace**. When a firm is not required to follow certain standards of occupational safety and health (OSH) in its production process, due to either the non-enforcement or non-existence of legislation, its employees must suffer the consequences. Workplace accidents and illnesses resulting from nonexistent safety standards are the price the employees pay, while the company is able to lower its production costs either by not taking adequate safety precautions or by not being held financially responsible for these accidents.⁴¹ On the other hand, those firms in countries where safety precautions are obligatory, are required to include these measures in the calculation of their production costs. As such, « *an absence of workplace health legislation can thus be seen as a form of social dumping, in which the employees of a firm involuntarily subsidize production for export markets.* »⁴² We must stress that the non-enforcement of any existing legislation has the same impact as the absence of such legislation.

As a third example of the costs to employees or to the society, we must consider the **socio-economic and labour market institutions** that influence wages and collective bargaining.⁴³ Labour costs weigh heavily in the calculation of total production cost, and factors such as minimum wage legislation, unions and the right to collective bargaining, as well as taxation and social safety nets (for example, unemployment insurance) all influence the cost of labour. Producers in countries where these types of labour policies are in place will inevitably have higher labour costs than those in countries where minimum wage

⁴⁰ Although environmental pollution is not an issue for the purposes of the present research project, it is interesting to note that, just as the NAALC was established to protect workers' rights, another side accord to NAFTA was established at the same time with the goal of protecting the environment.

⁴¹ It is actually not only the employees who pay the price, for when a company is not held financially responsible for workplace accidents, the society at large also pays, in the form of taxes for medical services.

⁴² STANFORD, EWELL and SINCLAIR, *loc. cit.* note 1, p. 5.

⁴³ *Id.*

legislation, unions and social safety nets are nonexistent.⁴⁴ In this respect, an absence of labour policies and social programs (i.e. governmental non-action) can be considered a form of social dumping. For example, on one hand, if a government chooses to use tax revenues to fund maternity leaves, foreign producers may consider this a form of subsidy (as the company itself does not have to finance this leave). On the other hand, “*the failure of the government to impose the maternity leave (...) requirement in the first place, (...) may just as well be viewed as a subsidy from the point of view of competing producers in other jurisdictions who are bound by such costly requirements.*”⁴⁵ In this respect, the fact that the government does not oblige firms to offer maternity leaves will result in a lowering of social protection (social dumping).

These three examples of costs borne by employees and/or by society help to illustrate the concept of social dumping. As we can see, the financial advantages to companies in countries where adequate labour legislation is not established (or not enforced) are substantial, as their production costs can be significantly lowered. In the context of increased international trade, any opportunity to decrease costs is welcomed, justified by the need to remain competitive and survive on the global market. In this situation, costs are borne by the employees or by the society at large in the producing country, in the form of inadequate social protection. Intensified international competition increases the possibility of social dumping. In fact, Moreau and Trudeau⁴⁶ stipulate that the greater the extent of economic and commercial integration, and the greater the difference in levels of social protection, the stronger the chances of social dumping. Hence the importance of concrete measures to minimize the risks of social dumping.

⁴⁴ *Id.*

⁴⁵ LANGILLE, *loc. cit.* note 3, p. 5.

⁴⁶ MOREAU, M.A. and G. TRUDEAU, *Les modes de réglementation sociale à l'heure de l'ouverture des frontières: quelques réflexions autour des modèles européen et nord-américain*, Les Cahiers de Droit, Vol. 33, n° 2, juin 1992, p. 354.

1.3 Workers' Fundamental Rights

With time, just about any privilege we are used to receiving can begin to be perceived as a 'right'. If your children have always had two 'free' visits a year to the dentist, the State's decision to stop funding this privilege will be considered an infringement on your children's 'right' to free dental care. When those less fortunate people in society have been receiving financial help in times of need in the form of welfare, cuts in this program are perceived as the government's revocation of their 'right' to financial aid from the State. If an individual has always had his life insurance paid for by the company he works for, the day management decides to stop contributing to his insurance plan, he will no doubt feel that the company has revoked his 'right' to this free benefit. Are your two coffee breaks per day your 'right'? How about your annual salary increase, your union membership, or your option to strike when unhappy with your work conditions? The question of which work conditions are 'rights' and which are merely privileges is not a simple one. Of course, the State clarifies this question to some extent when it adopts legislation pertaining to some of these issues. For example, when the law states that workers may select a union to represent them, this privilege clearly becomes a 'right', at least in the legal order.

The issue of workers' rights is put into evidence in the current environment of increased international trade. As we mentioned earlier in this paper, the problem of social dumping highlights the need to protect the rights of workers in the context of globalization. Since the concept of workers' rights can be quite complicated, as the preceding paragraph illustrates, and can vary from country to country, the debate on social protection in the face of globalization is usually limited to 'fundamental' rights. In other words, the concern is for the protection of those rights to which all persons in all countries are entitled to at all times.

According to the International Labour Organization, "*there are some basic workers' rights that should be unconditionally recognized, irrespective of a country's level of*

development or its values and preferences."⁴⁷ These fundamental rights include the prohibition of forced labour (and child labour), freedom of association and the right to engage in collective bargaining, and equality of treatment (referring to equal remuneration).⁴⁸ These rights, often called 'core labour standards' are considered by the ILO to be of utmost importance from a humanitarian viewpoint. Although there is no formal consensus around the globe on the question of core labour standards, many countries are in agreement that the debate over international trade and labour standards should focus on a subset of 'basic' or 'fundamental' rights.⁴⁹ The idea of referring to 'internationally recognized workers' rights' in the context of international trade was first put forward at the Uruguay Round of Multilateral Trade Negotiations of the GATT (General Agreement on Tariffs and Trade) in Marrakech in April of 1994. Despite the fact that this proposition was not widely accepted at the time, a general agreement on these fundamental rights was attained at the World Social Summit in Copenhagen in March 1995.⁵⁰ More recently, discussions in the ILO have led to unanimous recognition of a limited category of 'basic' rights that cannot be made conditional upon a country's level of development or preferences.⁵¹

Certain Conventions of the ILO have received wide recognition from the international community, demonstrated by the large number of ratifications by member countries, and thus form the basis of what are now considered to be 'basic rights', 'fundamental rights' or 'core labour standards'.⁵² The following list briefly describes these Conventions⁵³ :

⁴⁷ **International Labour Organization** (hereafter ILO), *The Social Dimension of the Liberalization of International Trade*, Contribution to the G7 Employment Conference submitted by the Director-General of the ILO, Lille, April 1-2, 1996, p. 2.

⁴⁸ *Id.*

⁴⁹ **Organization for Economic Cooperation and Development (OECD)**, *Trade, Employment and Labour Standards - A Study of Core Workers' Rights and International Trade*, May 14th, 1996, p. 6.

⁵⁰ *Id.*

⁵¹ **ILO**, *supra* note 47.

⁵² **SERVAIS**, *op. cit.* note 5, pp. 219-220.

⁵³ This list is taken integrally from *Human Rights in the Working World*, **International Labour Organization**, at the ILO web site, last updated October 24, 1996.

Convention 29 : *Forced Labour*

Requires the suppression of forced or compulsory labour in all its forms. Certain exceptions are permitted, such as military service, convict labour properly supervised, emergencies such as wars, fires, earthquakes, etc.

Convention 87 : *Freedom of Association and Protection of the Right to Organize*

Establishes the right of all workers and employers to form and join organizations of their own choosing without prior authorization, and lays down a series of guarantees for the free functioning of organizations without interference by the public authorities.

Convention 98 : *Right to Organize and Collective Bargaining*

Provides for protection against anti-union discrimination, for protection of workers' and employers' organizations against acts of interference by each other, and for measures to promote collective bargaining.

Convention 100 : *Equal Remuneration*

Calls for equal pay for men and women for work of equal value.

Convention 105 : *Abolition of Forced Labour*

Prohibits the use of any form of forced or compulsory labour as a means of political coercion or education, punishment for the expression of political or ideological views, workforce mobilization, labour discipline, punishment for participation in strikes, or discrimination.

Convention 111 : *Discrimination (Employment and Occupation)*

Calls for a national policy to eliminate discrimination in access to employment, training and working conditions, on grounds of race, colour, sex, religion, political opinion, national extraction or social origin and to promote equality of opportunity and treatment.

Convention 138 : *Minimum Age*

Aims at the abolition of child labour, stipulating that the minimum age for admission to employment shall not be less than the age of completion of compulsory schooling.

The ratification of these core labour standards by all ILO members is a goal that was set at the annual Conference in 1994, on the occasion of the Organization's 75th anniversary.⁵⁴ It is interesting to note that these fundamental workers' rights are also considered by the ILO to be important, basic human rights. In other words, these are individual and collective rights that are already recognized, by the Universal Declaration of Human Rights, as being 'inherent in human dignity'.⁵⁵ With regards to basic human rights, the ILO adds two more Conventions to the above list :

Convention 122 : *Employment Policy*

Calls for pursuit of a national policy aimed at promoting full, productive and freely chosen employment.

Convention 169 : *Indigenous and Tribal Peoples*

Provides for basic protection of these groups to maintain their own ways of life without being forced into assimilation.

Recognition of the first seven Conventions in the above list as fundamental workers' rights has been acknowledged by certain international bodies or agreements outside of the ILO. In fact, most of these seven Conventions have been referred to by the Organization for Economic Cooperation and Development (OECD) and the European Union as fundamental (see Annex 1). For its part, the OECD has suggested that core labour standards should include (1) freedom of association and collective bargaining, (2) the elimination of exploitative forms of child labour, (3) prohibition of forced labour, and (4) non-discrimination in employment.⁵⁶ Furthermore, like the ILO, this international organization stipulates that these standards have all the characteristics of basic human rights.⁵⁷ It is interesting to note that the OECD does not make reference to equal pay for men and women (Convention 100). Fundamental rights in the EU are referred to in the various treaties governing the member States.⁵⁸ In addition to the treaties, Servais⁵⁹

⁵⁴ ILO, *ILO Focus*, Vol. 9 n° 2, Summer 1996, p. 7.

⁵⁵ ILO, *supra* note 47, p. 2-3.

⁵⁶ OECD, *supra* note 49, p. 6.

⁵⁷ *Id.*, p. 8.

⁵⁸ We will discuss the EU and its social protection in detail later on in this chapter.

⁵⁹ SERVAIS, *op. cit.* note 5, p. 216.

explains that the EU makes reference to the above mentioned ILO Conventions in its Règlement n° 3281/94. According to this author, beginning in January 1998, EU countries may benefit from special privileges if they are able to prove that they have adopted and effectively apply Conventions 87, 98 and 138. Also, EU privileges may be revoked in situations that go against Conventions 29 and 105.⁶⁰ We will elaborate on the NAFTA side accord's reference to core labour standards later on in this paper.

In addition to information concerning the OECD and the EU, Annex 1 also contains a listing of the ILO's core labour standards that have been ratified by each of the NAFTA countries. As we can see, both Canada and Mexico have ratified the majority of these standards. On the contrary, the United States have ratified only Convention 105 pertaining to the abolition of forced labour. This does not mean, however, that the US does not promote core labour standards. In fact, Compa⁶¹ explains that in its Generalized System of Preferences (GSP) legislation, the US makes specific reference to the following 'internationally recognized workers' rights': (1) freedom of association, (2) the right to organize and collective bargaining, (3) prohibition of forced labour, (4) restrictions on child labour, and (5) minimum work conditions such as minimum wage, a limited number of work hours and organizational safety and health.

In summary, this discussion of workers' fundamental rights demonstrates that there seems to be quite widespread agreement on the types of rights that all persons should be entitled to regardless of the level of development of their home country. In the opinion of the ILO, these rights are also considered to be basic human rights. In the current context of increased international trade, these fundamental rights must be protected.

⁶⁰ *Id.*, p. 216-217.

⁶¹ COMPA, L., *L'unilatéralisme et le multilatéralisme dans la politique américaine des droits du travail dans l'hémisphère: une comparaison entre le GSP et l'ALÉNA*, in the Bulletin de droit comparé du travail et de la sécurité sociale, *op. cit.* note 5, p. 88.

1.4 The Link Between International Trade and Social Protection

In recent years, there has been much debate on the need to protect the fundamental rights of workers in the face of increased international competition. The central question in these discussions is whether or not social protection should be directly tied to an international trade treaty. In other words, should there be a social element to international trade agreements, whereby the non-respect of workers' rights can lead to economic sanctions? As we will see in this section, there seems to be a widespread agreement as to the existence of a link between trade and social protection. The appropriate means to ensure social protection, however, is still subject to debate, as is the question of to whom this responsibility should go. We must first understand the link between trade and social protection before we can discuss the need to include a social dimension in international trade agreements.

With the existence of supranational entities such as the ILO, certain core labour standards have been identified and the Conventions concerning these matters have been ratified by a great number of countries around the world.⁶² As we mentioned previously, even bodies such as the OECD recognize the importance of these basic rights. Moreover, most countries have their own sets of labour laws in place, whether or not they are part of any international trade treaty, which offer the protection of fundamental rights to their citizens. With these different forms of protection already in place, what then is purpose of offering a specific protection of rights with the conclusion of an international trade treaty? The purpose is to concretize the link between international trade and social protection. Our earlier discussions of the concepts of globalization and social dumping shed some light on the possibilities of a lowering of work conditions in the face of increased international competition. The reasoning behind this is that employers are tempted to decrease labour costs in order to remain competitive on the global marketplace. The same logic applies to States that could be tempted to 'deregulate' labour in an attempt to attract foreign investment. Currently, the system of ILO Conventions, as well as any existing domestic

⁶² See Section 1.3 on workers' fundamental rights.

labour laws, are not tied to international trade in any way. In other words, there are no trade sanctions possible in the event of a violation of workers' rights. However, the labour market is changing, with the ever-increasing number of international trade agreements, and so too must the forms of protection of workers' rights in the new global economy. The risk of social dumping is an example of the need to directly link social protection with international trade agreements. The ILO explains this link in the following way :

“There is a growing awareness that trade liberalization must go hand in hand with social progress. Otherwise, tensions will arise which sooner or later will lead to protectionist reactions. (...) The interdependence arising out of the globalization of the economy places the States concerned (...) under the obligation of promoting social progress parallel to the economic progress resulting from trade liberalization.”⁶³

To put this more clearly, in the opinion of the ILO, because there is a certain economic progress that results from international trade, there should also be a corresponding social progress. If countries are to reap the benefits of international trade, so too should their citizens. Because international trade entails both economic and social consequences, these two elements are inseparable. The link between trade and social protection is, therefore, undeniable.

According to May Morpaw, director of the Canadian National Administrative Office of the NAALC, the existence of such a link is obvious.⁶⁴ Morpaw stipulates that, although there is no consensus on this subject in Canada or internationally, there is a clear overlap between social and economic aspects on the labour market.⁶⁵ Moreau and Trudeau⁶⁶ maintain a similar opinion. The authors insist that the violation of social protection standards is a form of social dumping (see the third example in Section 1.2.2 above).

⁶³ ILO, *supra* note 47, p. 4.

⁶⁴ MORPAW, M., *Accord nord-américain de coopération dans le domaine du travail : points importants, mise en oeuvre et portée*, discours de clôture du Colloque 1995 de l'Association canadienne des relations industrielles, Montréal, mai 1995, p. 16.

⁶⁵ *Id.*

They defend this idea by explaining that the non-respect of workers' rights can cause international competition to be unfair in the same way that imposing tariffs on foreign products can be considered unfair. Since trade becomes unfair with social dumping, the link between labour standards and the maintenance of a fair free trade deal is confirmed.⁶⁷ In other words, one way to ensure that international competition remains fair in the context of a free trade treaty is to ensure the protection of labour standards. In a more recent article, Moreau and Trudeau reiterate their argument of the link between trade and social protection. The authors claim that "*faute de contrepoids, il est clair qu'il existe un lien entre l'augmentation de la compétitivité et l'absence, la baisse ou la non-application des normes sociales.*"⁶⁸ In yet another article, these same authors explain that economic sanctions (along with moral pressure and negative publicity) are the only type of sanction that one country can impose on another, thereby confirming the obvious need to link international trade and social protection.⁶⁹

Although numerous parties are now in agreement that there is a definite link between international trade and social protection, consensus as to the appropriate *body* and the appropriate *instrument* to protect workers' rights is far from being attained. With regards to which international body should handle the issue of social protection and trade, the two most often mentioned organizations are the ILO and the World Trade Organization (WTO).⁷⁰ On the one hand, there is the belief that the question of social protection should be the responsibility of the ILO through the promotion of its core labour standards. The belief is that because the ILO specializes in labour issues, it is best apt to handle the issue of workers' rights. Proponents of this point of view claim that an international body whose function is the regulation of *commerce* is not an appropriate forum to handle labour rights issues. From this perspective, international trade and labour rights are issues that

⁶⁶ MOREAU, et TRUDEAU, *loc. cit.* note 46, pp. 396-397.

⁶⁷ *Id.*, p. 397.

⁶⁸ MOREAU et TRUDEAU, *La clause sociale dans l'accord de libre-échange nord-américain*, Revue Internationale de Droit Économique, vol.3, 1995, p. 398.

⁶⁹ MOREAU et TRUDEAU, *op. cit.* note 5, pp. 52-55.

⁷⁰ Created in January 1995, the WTO is the successor of the GATT. For more information, see *Ce qui va changer avec l'OMC*, L'État du Monde - Annuaire économique et géopolitique mondial, édition 1996, Éd. La Découverte/Boréal, p. 48-50.

should be tackled separately. On the other hand, there are those who argue that the WTO should take on the responsibility of social protection in a globalized environment as it is the major international body regulating international trade and related issues. Because trade and social protection are inseparable, the WTO must incorporate a social dimension into its international trade policies. The following look at some of the comments from WTO members at the WTO Ministerial Conference in Singapore in 1996⁷¹ offers an interesting summary of the difficulty in reaching a consensus in this debate :

“There is a perception that somehow increasing trade flows may be harmful - that it leads to job losses, not job creation. While the ILO is the primary forum for dealing with core labour standards, we, at the WTO, need to respond to these concerns by showing that increased adherence to a rules-based system, together with further trade liberalization, leads to greater economic growth which benefits us all.”

Statement by the Honourable
Arthur Eggleton, Minister for
International Trade (CANADA)

“(...) the WTO should, in cooperation with the ILO, examine in greater detail the important nexus between trade and labour standards. We believe strongly that increased trade and the economic growth that it brings should also engender greater respect for the basic human rights that are the focus of our core labour standards proposal. We are not proposing an agreement on minimum wages, changes that could take away the comparative advantage of low-wage producers, or the use of protectionist measures to enforce labour standards. We are proposing that the concerns of working people - people who fear that trade liberalization will lead to distortion - be addressed in a modest work programme in the WTO. (...) support for the WTO will surely erode if we cannot address the concerns of working people and demonstrate that trade is a path to tangible prosperity.”

The Hon. Charlene Barshefsky,
Acting U.S. Trade Representative
(UNITED STATES)

⁷¹ All quotes are taken from the original speeches presented at the WTO Ministerial Conference in Singapore, December 9-13, 1996., taken from the WTO's web site on the Internet.

“On the issue of labour standards, Mexico is convinced that the only appropriate forum to deal with this issue is the ILO which has the benefit of the accumulated experience of decades of participation by workers’ and employers’ associations. That is where we must work to ensure that countries that have not yet done so ratify the outstanding conventions. The best way that the WTO can help to raise people’s living standards around the world is by promoting economic development through increased trade. Raising the issue of labour in the WTO could provide an excuse for using trade measures for protectional purposes.”

**Dr. Herminio Blanco Mendoza,
Minister of Foreign Trade and
Industrial Development
(MEXICO)**

“(…) concerns about (…) labour standards and other apparently domestic political issues are now the legitimate concern of the WTO because they are concerns of our constituents. Only when the WTO is seen to meet the aspirations of our constituents can we be sure of keeping the way open for continued trade liberalization.”

**Sir Leon Brittan, Vice President of
the European Commission**

As we can see by these statements, there does not seem to be outright denial of the existence of a link between trade and rights. However, there is much debate as to which is the appropriate body to tackle the issue of social protection. One argument is that social protection should be the responsibility of the ILO, an organism established specifically for this purpose, but not having any sanctioning power. According to this point of view, the WTO’s sole purpose is the regulation of international trade and it should not get involved with social issues. The flipside to this coin is the argument that the fact that the WTO regulates international trade is exactly the reason why it should handle the issue of social protection. Trade and social protection are considered to be inseparable issues and therefore must be handled together. In this case, the ILO is not seen as the most appropriate body to handle social protection in the context of international trade, as it does not link these two elements. In fact, in the opinion of Moreau and Trudeau⁷², the ILO

⁷² MOREAU and TRUDEAU, *op. cit.* note 5, p. 44.

does not create a direct link between international trade and social protection, as is evidenced by the absence of economic sanctions attached to its Conventions.⁷³

In summary, our discussion on social dumping showed us that increased international trade can have a definite impact on the rights of workers. For this reason, the existence of a link between trade and social protection is undeniable, and there seems to be a wide acceptance of the fact that this link exists. There is still much debate, however, as to whom should take on the responsibility of ensuring social protection in the context of international trade. The ILO sums up its point of view as follows :

“The absence of an explicit social dimension in the current trade system does not mean that this dimension does not already exist for the partners in this system. The member States of the WTO are members of the ILO and cannot act in one organization inconsistently with the obligations they have assumed in the other. Membership of both organizations necessarily leads to an overlap, rather than a juxtaposition of their obligations. It is not necessary to revise the charter of either organization in order to give greater depth and more concrete implications to this dimension. The ILO, which throughout its history has displayed institutional inventiveness, affords effective means of action within its constitutional framework, provided there is the will to act.”⁷⁴

What the debate regarding trade and social protection all boils down to is the need to incorporate a social dimension into a specific trade treaty. As the point of view of the OECD indicates, this is the path to follow :

“Compared with unilateral measures, making the respect of core labour standards part of regional trade agreements, as in the case of the NAFTA side agreement on labour cooperation, has the advantage that all concerned parties must agree to a pre-established set of norms and a

⁷³ The rules, procedures and possible sanctions of the ILO will be discussed later on in this section.

⁷⁴ ILO, *supra* note 47, p.5.

well-defined dispute settlement mechanism. (...) It is [however] far too early to assess the effectiveness of this particular mechanism.”⁷⁵

Since countries are able to benefit from a certain economic progress because of international trade, shouldn't their citizens benefit from enhanced social standards? If there is such a direct link between trade and social protection, shouldn't the non-respect of workers' rights entail trade sanctions? If we follow the argument of the increased risks of social dumping, then it goes without saying that some type of instrument to ensure social protection is essential. In the following section, we take a look at the different ways that the issue of social protection in the globalized environment is being handled.

1.5 Alternatives for Social Protection

Now that we have reviewed the literature on the most important issues that underlie our study of the functioning of the NAALC, we must look at the main alternatives that are currently being used in an attempt to protect the rights of workers in the context of globalization. Before we discuss these alternatives, however, it is important to understand why countries are tending towards international trade in the first place. In this final section of the present chapter, we first take a brief look at the economic theory behind international trade, and then discuss the various alternatives for social protection in a globalized context.

Economists offer some interesting theories as to why countries are leaning towards international trade. A simple and straightforward overview of these theories at this point is sufficient for the purposes of our study. From an economic point of view, it is to a nation's advantage to increase its trade with foreign markets. According to Baumol⁷⁶, there are three main reasons why a country decides to procure goods through international trade rather than developing an economy that is completely self-sufficient (i.e. produces all

⁷⁵ OECD, *supra* note 49, p. 17.

⁷⁶ BAUMOL, BLINDER and CARTH, *op. cit.* note 33, pp. 451-452.

the goods it needs itself). First, because natural resources are not equally distributed around the world, a nation must buy the resources it doesn't have from other countries. For example, countries in the Middle East are rich in oil, but they do not have many forests. The situation is the reverse in Canada. Each region can therefore trade the resource it has to obtain that which it does not have. Second, because of factors such as climate and the qualifications of the workforce, the production of certain goods may be more easily produced in one country compared to another. This explains why Canada chooses to import bananas rather than attempting (most likely in vain) to produce them itself. Also, because of the high number of agriculturalists in New Zealand and electronics specialists in Japan, it is more advantageous for the first to specialize in agriculture and the second in electronics, and for each to import what they do not produce. Third, for reasons of economies of scale, it is more advantageous for a country to focus its resources (capital and labour) on the production of certain goods for which it is a more efficient producer, than to try and produce all the goods that its population may need. Specialization allows for the production of larger quantities of a particular good, thereby increasing efficiency.⁷⁷

Another explanation for international trade is provided by Adam Smith's theory of absolute advantage. Accordingly, a country has an absolute advantage over another, in the production of a certain good, if it can produce the good with less production resources (capital and labour) than the other country.⁷⁸ For example, if it takes 4 hours to produce a metre of cotton in Canada, but only two hours to do so in India (with the same amount of resources), India is said to have an absolute advantage over Canada in the production of cotton. Finally, along these same lines, if Canada imports cotton from India instead of producing it itself, it can consecrate its resources to the production of other goods. Canada can thereby become more efficient in the specialization of its production of those other goods.

⁷⁷ *Id.*, p. 451.

⁷⁸ CZINKOTA, RONKAINEN and MOFFETT, *op. cit.* note 15, p. 22.

This brief explanation of the economic theories related to international trade shows us that countries have many reasons to be inclined to trade with foreign markets. In previous sections, we looked at the impact that globalization can have on workers' rights and social protection. Now that we have a basic understanding of why countries lean towards international trade, let us look at four ways to handle the issue of social protection in a situation of increased globalization. These options include the following :

(1) adopting a *laissez-faire* attitude, leaving each country free to decide on its own labour standards and sanctions (the liberal point of view) - In this situation, the question is whether or not 'natural' market forces will lead to or minimize social dumping. Will the status quo be maintained or will there be a tendency towards a lowering of work conditions if no concrete action is taken to protect workers' rights? We look at this issue in an attempt to understand the need to adopt formal policies for social protection in the face of increased international competition.

(2) the example of the European Union, where, along with economic integration, a system of institutions for political and legal integration was formed - The EU's Social Charter is in fitting with Europe's unique situation. We discuss the EU's manner of social protection in order to facilitate our understanding of the North American social clause. This discussion is not meant to serve as a basis for judging which of the two is the 'better' alternative, but simply to familiarize us with another existing attempt to ensure social protection in a globalized economy.

(3) applying the system of international labour standards established by the International Labour Organization (ILO) to the NAFTA countries - As previously stated, the ILO's international labour standards apply to Mexico, the United States and Canada, as all three NAFTA countries have ratified certain of its Conventions. To begin our discussion of this international body, we take a look at the list of specific ILO Conventions ratified by each NAFTA country. Then, we look at how these labour standards apply to the NAFTA context and examine the procedures of complaint and the

possible sanctions under the ILO. Our discussion of the ILO will allow us to form an opinion as to whether or not the side accord to NAFTA is a more appropriate way of ensuring social protection than relying on the ILO's system of international labour standards.

(4) the adoption of a social clause tied to an international trade agreement - The adoption of a side agreement concerning the protection of fundamental rights is the chosen method in North America. As opposed to the above attempts at social protection, the social clause is the only alternative directly linked to a particular international trade agreement. As we know, the NAALC and NAFTA came into effect simultaneously. The side accord stipulates that a NAFTA country may only be subject to sanctions, in a case of non-respect of its labour laws, if the non-respect occurs in the production of goods destined for trade with one of the other two member countries according to the terms of the free-trade agreement.⁷⁹ This stipulation creates a solid and direct link between social protection and international trade among the three nations. Obviously, the three governments opted for a side accord with the belief that it would be an effective way to ensure the protection of workers' fundamental rights. Our description of the functioning of the NAALC will help to clarify the actual situation. Let us now discuss each of these four options in more detail.

1.5.1 Laisser-faire

The simplest and most obvious way to react to a situation of increased globalization is to do nothing in the way of social protection measures. This is the viewpoint of the neo-liberals, who are of the belief that the natural forces of the markets must prevail and governments must not interfere with the workings of markets in any way. The liberal viewpoint supports the economic theory of the 'invisible hand'. According to this theory, if all individuals act in their own best interest, the overall result will be in the best interest

⁷⁹ **North American Agreement on Labor Cooperation** (hereafter NAALC), between the Canadian, American and Mexican governments, Final Draft, Sept. 1993, Articles 23(3a) and 29(1a).

of the general society.⁸⁰ In other words, if each individual searches to satisfy his own personal interests, an 'invisible hand' (the natural forces of the markets) works towards bringing all these interests together for the good of the society as a whole. In this case, all each person has to do is look out for his own well-being and the well-being of society will follow naturally.

This same theory can be taken to an international level. Accordingly, if each party (country) acts in its own best interest then all parties will benefit, and this outcome will evolve naturally, without government interference. Governments do not have to create institutions or mechanisms to artificially control the outcomes of globalization, as the natural forces of the markets are the logical and best way to let the situation evolve. The question is, if such an attitude of *laissez-faire* is adopted in the context of international trade, will the employees of all countries benefit? More plainly, if the governments involved do nothing to protect the rights of workers, and each country is allowed to simply look out for its own best interest in the context of globalization, will the result be an improved situation for all workers or will there be a deterioration in social protection, as the advocates of social dumping theory stipulate? The story of 'The Prisoner's Dilemma' helps to illustrate this situation (see Annex 2).

The Prisoner's Dilemma story may be interpreted as that of two countries trading with each other. Whereas the outcome each prisoner is searching for is the lowest jail term possible, the outcome each country looks for in international trade is the improvement of its economic and, consequently, social situation. In such a case, each nation looks to attract foreign investment as a way to improve its own outcome. One way of attracting this investment is by providing a low-cost environment for foreign companies. In this line of reasoning, a lowering of work conditions will attract foreign companies seeking to invest where production costs are low (cheap labour). If each country acts in its own best interest (i.e. looks to attract the most foreign investment possible), it will lower the

⁸⁰ LEGOFF, J.P., Économie managériale: marchés, soutien à la décision, concurrence, Sainte-Foy, Presse de l'Université du Québec, 1993, pp.101-102.

conditions of its workers. Like the decision-making process in the Prisoner's Dilemma, the decision to look out for one's own best interest is a logical, rational one. Because each country is tempted to lower the rights of its workers, thereby attracting foreign investors, there is a general deterioration of work conditions in all countries. According to this theory, if no concrete action to protect workers' rights is taken by governments in the context of international trade, social dumping will be inevitable. Each trading partner, in an effort to maximize its own outcomes, will lower the social protection it offers to its citizens. That each country looks to improve its own situation is perfectly logical. It will, however, lead to a general tendency towards a decline in the levels of social protection (a race to the bottom).⁸¹

The story of the Prisoner's Dilemma offers us an interesting illustration of the reasoning that each country will adopt in the context of international trade. As we can see by this discussion, if each nation acts in its own best interest, and it is perfectly logical to assume it will, then there will likely be a deterioration of social protection unless governments take concrete measures to protect workers' rights. From this standpoint, social dumping is inevitable without government intervention. The *laissez-faire* attitude is not, therefore, the best alternative to ensure social protection in the context of globalization.

1.5.2 The Example of the European Union

While the NAALC is clearly the first (and only) example of a social clause directly tied to a free trade deal, there is one other regional model of the social dimension of internationalization that it is important to discuss at this point. The European Union is, at the moment, the closest existing example of economic integration, including a concrete social dimension, between independent industrialized countries. For this reason, any discussion of the functioning of North America's social clause would be incomplete without a look at the alternative used by Europe. It would be difficult to speak of the

⁸¹ For a more detailed explanation of the 'race to the bottom' in the context of international trade, see **LANGILLE, B.**, *A Day at the Races: A Reply to Professor Revesz on the Race to the Bottom*, Faculty of Law, University of Toronto, June, 1994, pp. 7-8.

functioning of the NAALC without discussing what has already been established elsewhere.

The purpose of our discussion of the European situation is not to evaluate which of the two systems is more effective. Indeed, a thorough comparison between the European situation and that of North America can easily be the subject of numerous theses. We are well aware of the extensive scale of such a study and do not intend to undertake an evaluative comparison of the two continents. This is not the *raison d'être* of our research project. We include this section in our study in order to provide the reader with a complete overview of the various attempts made to minimize social dumping and protect the fundamental rights of workers. A basic understanding of Europe's effort to guarantee a certain level of social protection in the face of globalization will help to fully comprehend the mechanisms of the NAALC. This discussion of the EU may also provide an introductory base for future comparison studies of the two continents and their respective attempts at social protection.

In this section, we look at the situation of integration in Europe. Whereas North America is an example of economic integration, Europe is one of economic, legal and political integration. This is a fundamental distinction between the two continents and must be understood from the start. This difference limits the extent of any comparison between the two regions, despite the fact that they are both examples of an elimination of barriers and a liberalization of trade across a specific territory. In order to explain the integration of the EU, we briefly look at the institutions created and the various treaties signed on the territory. We then elaborate on the specific mechanisms governing the social dimension of internationalization in Europe, especially the European Social Charter and the Social Agreement included in the Maastricht Treaty. A description of these mechanisms will help to clarify the EU's handling of the social dimension of international trade, providing us with complete information on the different existing alternatives for social protection. Let us begin with a brief mention of some essential differences between the EU and North America, so that we may put ourselves in context with the European situation. Then we

will discuss the history of the European Union and the treaties which contributed to its formation.

There are two important differences to point out between the integration evident in Europe and that of North America. First, political and judiciary structures such as the European Parliament, the European Commission, the European Council, and the European Court of Justice have been created at the supranational level under the Union.⁸² These supranational institutions are far more necessary in Europe than in North America due to the increased degree of integration on that continent. The supranational institutions have jurisdiction over all member countries. The structures which have been created are described as follows⁸³ :

1. **European Parliament** - Since 1979, its 518 members have been elected every five years by the citizens of the member States. The Parliament has passed important initiatives concerning foreign policy, human rights, social welfare and ecological protection, and has become the central forum for continental discussions on social and economic policy. The Parliament considers proposals from the European Commission and has the ultimate right to dismiss the Commission. The Parliament more recently has increased control over the EU's budget.
2. **European Commission** - The Commission is the policy planning and executive body of the EU. Its 17 members (Commissioners) are representatives from all member States and are appointed for four-year terms. The Commission acts to ensure respect of EU laws and Treaties by all member States, and draws up proposals for policy and legislation for approval by the Council.
3. **European Council of Ministers** - It is comprised of one government minister from each member State. The Ministers make the final decisions on laws to be applied throughout the EU, based on proposals from the Commission. The Council also meets two or three times a year to discuss the major issues confronting the EU.

⁸² SANGER, M., *Free Trade and Workers' Rights: The European Social Charter*, Canadian Centre for Policy Alternatives, May 1991, pp. 3-4.

⁸³ Taken from *The European Community*, in the NATO Handbook at the NATO web site on the Internet, pp. 1-2, and DIXON, B., *Summary of the Maastricht Treaty*, at the web site of the Democratic Socialists of America on the Internet, p. 1.

4. European Court of Justice - The Court is made up of one judge from each member State, and passes judgment on disputes arising from the application and interpretation of EU law. The Court has the power to overturn any decisions by national tribunals which are deemed to be contrary to the EU Treaties. The judgments of the Court are binding on the Commission, national governments, firms and individuals.

As we can see by this list, the EU has an intricate system of institutions at the supranational level. In the case of North America, each nation retains its entire sovereignty under NAFTA and no political or judiciary structures, with the exception of those created by the side accord, have been created at the supranational level. This important difference illustrates that there has been, to some extent, a transfer of authority to the supranational (regional) level in Europe, while it remains at the national level in North America.

A second difference between European and North American integration is the spread between the economies of the various countries. Not only does the Canada-US Free Trade Agreement connect us to an economy which is ten times the size of ours, but the US is clearly the dominant player in NAFTA, with more than double the population and economic strength of its two partners put together.⁸⁴ In Europe, there is a more balanced situation between member countries. There are presently fifteen nations in the European Union, spread quite evenly between large, medium and small economies. Although there are some countries with strong economic power and industrial development (Germany, Italy, Great Britain and France, for example), no one country dominates the European Union to the same extent that the United States dominates North America.⁸⁵ In theory, therefore, the risks of social dumping are evident in Europe, as the range of economic situations between nations (Portugal and Germany, for example) may be quite large in some cases. However, because the difference between rich and poor countries is not nearly as great as that between the US and Mexico for example, and because of the creation of political and judiciary structures at the supranational level, the risks of social

⁸⁴ SANGER, *loc. cit.* note 82, p. 1.

⁸⁵ *Id.*

dumping may be more limited. A final difference worth noting is that the free circulation of workers is permitted throughout the EU, while it is not at all the case in North America.

Now that we have briefly discussed the institutions of the EU and noted the major differences between Europe and North America, let us take a look at how the EU came to be.

History and Treaties :

The first version of the European Union was the **European Coal and Steel Community (ECSC)**. The initial proposal was tabled by France in May of 1950 and the treaty establishing the ECSC was officially signed in April 1951 by six countries : France, Germany, Italy, the Netherlands, Belgium and Luxembourg.⁸⁶ In March of 1957, upon the signing of the European Economic Community Treaty (better known as the **Treaty of Rome**), the ECSC became the European Economic Community (EEC), popularly referred to as the European Common Market. The Treaty of Rome is Europe's form of government and its constitutional law.⁸⁷ It sets up institutions and mechanisms for decision-making which allow for the expression of both national and Community interests.⁸⁸ The Treaty was signed by the six founding nations of the ECSC, who were joined by Denmark, Ireland and the United Kingdom (UK) in 1973, Greece in 1981, and Spain and Portugal in 1986, bringing the total number of member countries to twelve.⁸⁹

One important aspect of the Treaty of Rome is that it allows for the free circulation not only of services and capital, but also of workers within the EEC.⁹⁰ With regards to social aspects however, the Treaty contains few social policy provisions. In the opinion of Sanger, the most important of the social provisions found in the Treaty "*concerns the*

⁸⁶ **DIXON**, *supra* note 83.

⁸⁷ *The Growth of the EU*, at the EU Guide website on the Internet, 1996, p. 2.

⁸⁸ **FONTAINE, P.**, *Seven Key Days in the Making of Europe*, at the Europa web site of the European Union, 1996, p. 2.

⁸⁹ *The European Community*, at the web site of the North Atlantic Treaty Organization (NATO) on the Internet, August 1995, p. 1.

⁹⁰ **STONE, K.**, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, Michigan Journal of International Law, Vol. 16, 1995, p. 1000.

equal treatment of men and women, which is one of the few areas in which effective social measures have been introduced."⁹¹ Moreau and Trudeau also question the strength of the social element of the Treaty of Rome at the supranational level. The authors stipulate that :

*"Malgré une préoccupation affirmée de la dimension sociale de la CEE (...), il n'en demeure pas moins que les instances communautaires n'obtiennent que très peu de compétences en cette matière. La construction de l'Europe sociale, fondée sur le principe de la subsidiarité, suppose le respect des diversités nationales, et donc des politiques nationales des pays de la CEE."*⁹²

In other words, because the Treaty of Rome affirms the respect of each country's policies and jurisdiction, social matters included in the Treaty do not have much pull at the level of the Community. Moreover, regarding the social status of workers and labour relations, Moreau and Trudeau explain that the Treaty of Rome favours the harmonization of the legal systems of member countries as opposed to the setting of uniform rules. In fact, according to these authors, the applicable legislation in these matters is, for the most part, the national laws of the member nations and not a supranational legislation.⁹³

The next important moment in the history of the European Union was the entry into force of the **Single European Act**. The Single European Act was signed in February of 1986, and came into effect in 1987. One of its most important elements is that it formally establishes the internal market. Pascal Fontaine of the Institut d'Études Politiques in Paris states :

"the Single Act links the objective of the great internal market closely to another, equally vital target: the achievement of economic and social cohesion. (...) It takes into account the social dimension of the internal market: in the view of those who govern the Union, the proper functioning of the internal market and healthy competition between

⁹¹ SANGER, *loc. cit.* note 82, p. 3.

⁹² MOREAU, and TRUDEAU, *loc. cit.* note 46, pp. 365-366.

⁹³ *Id.*, p. 368.

businesses are inseparable from the ongoing objective of improving the living and working conditions of Europe's citizens.”⁹⁴

An important aspect of the Act is that, in certain areas, it reduces the requirement for unanimity in EU legislation to one of a qualified majority. More precisely, “*all legislation concerning the creation of the single market is decided in the European Council by a system of qualified majority voting, in which votes are weighted according to the size of the nation.*”⁹⁵ Issues regarding work conditions, however, still entailed a requirement for unanimous approval.⁹⁶

In late 1988, French socialist Jacques Delors, president of the European Commission, campaigned for the development of a package of social welfare guarantees to be adopted within the Common Market. In December 1989, the Community Charter of Fundamental Social Rights of Workers (commonly called the **Social Charter**) was signed by eleven out of the twelve member States of the European Community, with Britain's Margaret Thatcher casting the only dissenting vote.⁹⁷ The Social Charter's influence was seriously limited by Britain's refusal to sign on. According to Stone, because the UK refused to sign the Charter,

“the eleven States that ratified the Social Charter have treated it as a mandate for the European Commission to formulate Directives for the protection of labor and the promotion of collective bargaining.”⁹⁸ Stone goes on to explain that “*An EU Directive is a regulation enacted by the EU Council which the member States must then enact into their domestic legislation. (...) Usually the directive sets minimum standards in a particular area which the member States must then ‘transpose’ in ways that are consistent with their own distinct labor law system. (...) EU Directives have force only to the extent that they are implemented by the member States.*”⁹⁹

⁹⁴ FONTAINE, *supra* note 88, p. 4.

⁹⁵ SANGER, *loc. cit.* note 82, p. 4.

⁹⁶ *Id.*, p. 7.

⁹⁷ *Europe Without Frontiers: The Social Dimension of the Internal Market*, at the Europa web site of the European Union, 1996, #1101.

⁹⁸ STONE, *loc. cit.* note 90, p. 1001.

⁹⁹ *Id.*, pp. 1001, 1003.

In other words, the Social Charter does not legally bind the member States to the work conditions it sets out. It is a declaration of the essential elements for European social policy but has no direct legal effect.¹⁰⁰ Moreover, it leaves implementation up to each member. In a document prepared by the European Commission, it is explained that “*The Social Charter as such merely states and notes the rights on which the Heads of State or Government have reached agreement. It does not in any way change the existing legal situation. In the field of social affairs, the responsibility for guaranteeing and implementing these rights is shared by the Member States of the European Community.*”¹⁰¹ We will discuss the Social Charter in more detail later in this section.

The next remarkable event in the history of the European Community was the signing of the Treaty on European Union, in Maastricht in February of 1992. The Treaty, more commonly known as the Treaty of Maastricht, came into force on November 1st, 1993. It was at this time that the European Community began to be commonly referred to as the European Union. The Treaty of Maastricht brought some major amendments to the Treaty of Rome and the Single European Act. What the world will probably remember the most about the Treaty of Maastricht is the decision to create a monetary union, with the creation of a single currency, the eurodollar, by January 1999.¹⁰² Among the objectives listed in Title I of the Treaty, is the goal “*to promote economic and social progress (...) through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency*” and to “*strengthen the protection of the rights and interests of the nationals of its Member States (...)*”¹⁰³ Also in this section of the Treaty, it is maintained that “*The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4*

¹⁰⁰ **ELWELL, C.**, Human Rights, Labour Standards and the New WTO: Opportunities for a Linkage, International Centre for Human Rights and Democratic Development, 1995, p. 12.

¹⁰¹ *Europe Without Frontiers: The Social Dimension of the Internal Market*, *supra* note 97.

¹⁰² **FONTAINE**, *supra* note 88, p. 4.

¹⁰³ Treaty of Maastricht, Title I, Common Provisions, Article B.

*November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of the Community law.”*¹⁰⁴

With regards to social matters, eleven of the twelve member countries of the EU agreed to modify the dispositions of the Treaty of Rome and the Single European Act at the Maastricht meetings in 1992.¹⁰⁵ Once again, just as it had opposed the Social Charter, the United Kingdom refused to sign the Treaty. The changes, which were based on the provisions of the previous Social Charter and agreed upon by the other eleven countries, give an increased jurisdiction in social matters to the supranational level. However, because of continued opposition from the UK, the modifications regarding social issues were not included as an integral part of the Treaty of Maastricht, but rather as a separate agreement (the Agreement on Social Policy) annexed to the Treaty.¹⁰⁶ Stone explains that “*the eleven member States were authorized by the ‘Protocol on Social Policy’ [attached to the Treaty of Maastricht] to utilize the mechanisms of the EEC for the purposes of implementing that Agreement. (...) the Social Policy proposals which the UK government is unwilling to accept may be agreed upon among the other member States and become binding on all except the UK.*”¹⁰⁷

Finally, a major change in the European Union came in 1995, when three more countries, Austria, Sweden and Finland were admitted. The popularity of the EU seems to be constantly growing. In fact, according to Fontaine, ten more countries have applied to join the Union in recent years (from Central Europe, the Balkans, the Mediterranean and the Baltic area).¹⁰⁸ Now that we have a general understanding of the history of the EU and the various Treaties that govern its members, let us look a little more closely at the legislation regarding social matters.

¹⁰⁴ *Treaty of Maastricht*, Title I, Common Provisions, Article F (2).

¹⁰⁵ MOREAU and TRUDEAU, *loc. cit.* note 46, p. 381.

¹⁰⁶ *Id.*

¹⁰⁷ STONE, *loc. cit.* note 90, pp. 1002-1003.

¹⁰⁸ FONTAINE, *supra* note 88, pp. 1, 3.

Social Protection in the EU :

As we have seen from the above overview of the history and Treaties of the EU, reference to social matters can be found in the various Treaties governing the continent since the Treaty of Rome with its mention of equal treatment for men and women. The most comprehensive references to social protection, however, came from the Social Charter, and later from the Agreement on Social Policy in the Treaty of Maastricht. Reference to social matters can also be found in Title VIII of the Treaty of Rome, as amended by the Treaty of Maastricht. Let us look more closely at these three sources of social protection.

The Community Charter of Fundamental Social Rights of Workers (the Social Charter) of 1989 provided a list of twelve rights to be respected by member States. These rights are as follows¹⁰⁹ :

1. **Freedom of Movement** (workers may move freely throughout the EU)
2. **Employment and Remuneration** (free choice of occupation; free access to public placement services and the right to fair remuneration)
3. **Improvement of Living and Working Conditions** (the completion of the internal market must lead to improvement in living and working conditions)
4. **Social Protection** (the right to adequate social protection and social security benefits)
5. **Freedom of Association and Collective Bargaining**
6. **Vocational Training** (access to continuing and permanent training systems as well as retraining)
7. **Equal Treatment for Men and Women** (in employment, remuneration, work conditions, social protection, education, vocational training and career development)
8. **Information, Consultation and Participation of Workers** (with regards to technological changes, restructuring, mergers, collective redundancy; in companies having establishments in two or more member States)

¹⁰⁹ Community Charter of Fundamental Social Rights of Workers, Title I, December 1989.

9. **Health Protection and Safety at the Workplace**
10. **Protection of Children and Adolescents** (minimum employment age must not be lower than the minimum school-leaving age)
11. **Elderly Persons** (access to resources affording a decent standard of living upon retirement)
12. **Disabled Persons** (additional measures to improve their social and professional integration, such as training, ergonomics, transportation, etc.)

As was mentioned previously, the influence of the Social Charter was seriously limited by the fact that the UK did not sign on. Because of this, the Charter does not represent binding law to which the member States must adhere. It merely notes the rights on which the member States have reached agreement, and leaves implementation up to each country. The Social Charter was given more 'force' by the modifications brought on by the Treaty of Maastricht¹¹⁰, as its provisions were annexed to the Treaty in the Agreement on Social Policy.

The Agreement on Social Policy in the Maastricht Protocol, also referred to as the Social Agreement, made several changes in the way in which labour Directives are implemented. Most importantly, the Agreement states that labour Directives *may* be implemented through collective bargaining agreements, legislation and administrative regulation, depending on the wishes of the individual country.¹¹¹ Another point to note is that the Maastricht Protocol specifies certain issues which may be legislated upon by way of a majority vote, as opposed to unanimity which was the previous requirement on these issues. Under the Agreement on Social Policy¹¹², the issues subject to a **qualified majority** vote are : (1) improvement of the work environment to protect workers' health and safety, (2) working conditions, (3) information and consultation of workers, (4) equality between men and women, and (5) integration of persons excluded from the labour market. Issues requiring **unanimity** are : (1) social security and social protection of workers, (2) protection of workers when the employment contract is terminated, (3)

¹¹⁰ MOREAU and TRUDEAU, *loc. cit.* note 46, p. 381.

¹¹¹ STONE, *loc. cit.* note 90, p. 1003.

representation and collective defense of workers and employers, (4) conditions of employment for third-country nationals in the EU, and (5) financial contributions for promotion of employment and job creation. Stone notes that “*the Social Agreement makes it clear that most collective labor rights are excluded from majority voting. (...)the provisions (...) shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs. To date, the EU has not attempted to legislate or harmonize in the field of collective bargaining law.*”¹¹³

The Treaty of Rome, which is the EU’s form of constitutional law, provides the final important source of social protection legislation. The Treaty of Rome, as amended by the Treaty of Maastricht, contains its social provisions in Articles 117 to 127 of Title VIII. A summary of the contents these Articles is found in Annex 3 of this study. Finally, one of the more recent developments in the way of social protection was the formation of the *Comité des Sages* (CDS), which was set up from October 1995 to February 1996 under the European Commission’s social action program. The focus of the CDS was to examine the role of the initial Social Charter, and of the issue of fundamental rights in general, in the light of a revision of the EU Treaties.¹¹⁴ The final report of the CDS was presented in Brussels at the first European Social Policy Forum in March 1996. The CDS’s main recommendation was a call for immediate steps to integrate eight ‘minimum core fundamental rights’ into the Treaty on European Union (Treaty of Maastricht)¹¹⁵ :

1. equality for all before the law
2. a ban on any form of discrimination
3. equality between men and women
4. freedom of movement within the EU
5. right to choose one’s occupation or profession and educational system
6. right of association
7. right to defend one’s rights
8. right of collective bargaining and action

¹¹² Agreement on Social Policy, Maastricht Protocol, Article 2, paragraphs 1-3.

¹¹³ STONE, *loc. cit.* note 90, p. 1003.

¹¹⁴ *For a Europe of Civic and Social Rights*, Eur-OP News, at the web site of the EU Office of Publications on the Internet, 1996.

¹¹⁵ *Id.*

According to the CDS, in the long term, these fundamental rights should be adopted as a comprehensive Bill of Rights which would be incorporated into a future EU Treaty. Lastly, the CDS called for innovation in the social field in order to be able to adapt to the future demands of increased globalization and demographic developments.¹¹⁶

Recent developments in the European Union may once again change the nature of social policy on that continent. At the Intergovernmental Conference in June 1997, a new treaty on European Union was negotiated. The new **Treaty of Amsterdam** amends certain provisions of the Treaty of Rome and of the Treaty of Maastricht. The three main reforms in the area of social policy are : (1) the introduction of a chapter on employment, (2) a new non-discrimination clause, and (3) the incorporation of the social policy into the main body of the Treaty. Another element of the Treaty of Amsterdam is the fact that it extends the number of areas subject to adoption by qualified majority vote as opposed to unanimity. The Treaty does not include, however, any extensions of qualified majority voting in the area of social policy.¹¹⁷

With regards to employment policy, it is important to note that the new treaty places no binding obligations on individual member countries. In fact, the employment chapter stipulates that its measures shall not include harmonization of the laws and regulations of the member States, which highlights the fact that "*this is a matter to be regulated at the member State, and not the Community, level. (...) [The chapter answers] the need to assuage the fear that the Community would be given real powers to determine employment policy in member States, something which was unacceptable to a great many delegations.*"¹¹⁸

¹¹⁶ *Working on European Social Policy: A Report on the Forum*, at the Europa web site of the EU, 1996.

¹¹⁷ *Social Policy Under the Treaty of Amsterdam*, EIRR 283, August 1997, p. 18.

¹¹⁸ *Id.*, p. 15.

Most importantly, the Treaty of Amsterdam incorporates social provisions into the main body of the text. As mentioned earlier, because the UK opposed the social provisions of the Treaty of Maastricht, the social policy amendments were not included as an integral part of the Treaty, but rather as a separate agreement (the Agreement on Social Policy) annexed to the Treaty. Since the Labour Party came into power in May 1997, the UK has expressed a willingness to accept these social provisions,¹¹⁹ thereby enabling social policy to become an integral part of the Treaty of Amsterdam.

The text of the Treaty of Amsterdam should be finalized in the next few months. Once this is done, it will then be subject to ratification by all member States of the EU before it can be put into force.¹²⁰ The fact that social policy is now incorporated into the main body of the Treaty is an important step for the Union, as all members will be subject to its provisions, without exception.

In summary, we can see that the European Union has taken the issue of social protection in the context of increased globalization quite seriously. Its various Treaties provide elaborate guidelines and regulations for the protection of workers' rights. For the moment, these references to social protection vary in their degree of influence and application, as the UK has not ratified the Social Charter or the Maastricht Protocol. However, it is assumed that all member States will ratify the new Treaty of Amsterdam, which should bring consistency to the application of social policy in Europe. It is obvious that the European Union provides us with an interesting example on which to base our discussion of the functioning of the North American side agreement on labour standards. However, we must keep in mind the limits of any comparison between the two continents, since the degree of integration in Europe, as previously mentioned, far exceeds that of North America.

¹¹⁹ *Id.*, p. 16.

¹²⁰ *Id.*, p. 14.

1.5.3 *The International Labour Organization*

The International Labour Organization is central to the concepts of fundamental rights and social protection in the context of international trade, and thus, is central to the present study. Because each of the NAFTA countries has ratified certain of the ILO's labour standards (see Annex 4 for a complete list of the Conventions ratified by the three countries), it is important that the role of the ILO and its Conventions on NAFTA territory be fully understood. Briefly, even before the signing of NAFTA and its labour side agreement, Canada, Mexico and the United States recognized the importance of the ILO's Conventions and manifested their support for these international labour standards by ratifying a certain number of them. Now that the NAALC is in effect on NAFTA territory, it seems as though there are two systems of social protection in place, and, in fact, there are. It is imperative that we understand the difference between the protection of workers' rights offered by the side accord and that offered by the ILO. In this section, we look at the ILO's institutions, procedures of supervision and possible sanctions, if any. This will enable us to better comprehend the role of each of these systems of social protection, clarify any ambiguity as to how the protection of workers' rights is being handled, and put into perspective the need for a social clause in the NAFTA context.

To begin, a brief look at the history of the ILO will enable us to understand the context from which this organization takes its origins. The ILO came into existence after World War I, with the Treaty of Versailles in 1919. At that time, two fundamental goals of the Organization were established : (1) to improve the conditions of workers by promoting a humanistic and reformist alternative to the ideology of class struggle, and (2) to make competition between countries more equitable by bringing working conditions in each country closer together.¹²¹ After World War II in 1944, the Organization adopted the Declaration of Philadelphia, which redefined its aims and purposes. The Declaration encompasses the following four principles:

¹²¹ HAGEN, K., *The Relationship Between ILO Labour Standards and Free Trade Agreements in a Global Economy*, The American Bar Association, London, April 26, 1996, pp. 9-10.

- Labour is not a commodity.
- Freedom of expression and of association are essential to sustained progress.
- Poverty anywhere constitutes a danger to prosperity everywhere.
- All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.¹²²

In 1946, the ILO became the first specialized agency associated with the United Nations.¹²³ On its 50th anniversary in 1969, the ILO was awarded the Nobel Peace Prize. Today, this international body is comprised of 173 member States, with a total of over 6200 ratifications of its 176 Labour Conventions.¹²⁴

Institutions of the ILO :

The ILO is quite unique among world organizations in that it has adopted a tripartite structure, uniting representatives of governments, employers and workers from around the world, with the purpose of recommending minimal international labour standards and formulating international labour conventions.¹²⁵ Each member State is represented by two government delegates, one employer delegate and one worker delegate. In this context, employers' and workers' representatives, considered to be the 'social partners' of the economy, have an equal voice with government representatives in shaping the policies and programs of the ILO.¹²⁶ Member countries of the ILO meet annually at the **International Labour Conference** in Geneva. The Conference is an international forum for discussion of the world's labour and social issues. At the Conference, the minimum international

¹²² **International Labour Organization**, Information Leaflet, at the ILO web site on the Internet, last updated on September 12, 1996.

¹²³ L'État du Monde, Annuaire économique et géopolitique mondial, *op. cit.* note 70, p. 655.

¹²⁴ **ILO**, *Human Rights in the Working World*, at the ILO web site on the Internet, last updated on March 16, 1996.

¹²⁵ L'État du Monde, *op. cit.* note 70.

¹²⁶ **ILO**, *Promoting Workers' Rights and Interests*, ILO Fact Sheet, February 1994.

labour standards and policies of the ILO are established. The Conference also approves the budget of the ILO and elects the Governing Body.¹²⁷

The executive council of the ILO is called the **Governing Body**. The Governing Body meets three times yearly in Geneva and is the mechanism through which the policies of the ILO are decided upon. It establishes the program of the Organization and elects the Director-General. The Governing Body also establishes the budget of the ILO, which is then submitted to the Conference for approval and adoption.¹²⁸ The Body is composed of 28 government members, 14 employer representatives and 14 worker representatives. Out of the 28 government seats, ten are permanently held by those countries of predominant industrial importance. The rest are elected at the Conference every three years, from a distribution of other member States.¹²⁹ Employer and worker representatives each elect their own representatives.

The **International Labour Office** in Geneva is lead by the Director-General (who is elected for a 5-year renewable term)¹³⁰ and is the secretariat, operational headquarters, research centre and publishing house of the ILO. The Office publishes a wide range of studies and reports on labour-related issues. Administrative functions are designated to regional and branch offices in over 40 countries around the world.¹³¹

The **Committee on Freedom of Association**, a tripartite structure, is a special committee which was established in 1951 to examine complaints made by international trade union organizations regarding freedom of association and the right to organize. A situation of violation of either of these two principles may be brought before this Committee by any national-level employer or worker association in a member State. To date, however,

¹²⁷ **ILO**, *Structure of the ILO*, ILO Fact Sheet, February 1994.

¹²⁸ *Id.*

¹²⁹ **ILO Constitution**, Article 7, paragraphs 1 and 2.

¹³⁰ The current Director-General of the ILO is Michel Hansenne, a Belge. He was first elected in 1989 and re-elected for a second term in 1993. For more information, see *The History of the ILO*, International Labour Organization Fact Sheet, February 1994, 3 pp.

¹³¹ **ILO**, *supra* note 127.

almost all cases are put forward by trade unions.¹³² In some cases, if the government of the country agrees, a **Fact Finding and Conciliation Commission** may be sent to the country to analyze the situation.¹³³ The Committee can investigate a complaint regarding an ILO member, even if that country has not ratified Conventions # 87 or # 98, “*because there is a constitutional obligation to protect this right - a key principle of the ILO Constitution.*”¹³⁴ Also, the right of freedom of association is one of the four main principles of the Declaration of Philadelphia (see above).

The international labour standards of the ILO take on two different forms: Conventions and Recommendations. Conventions create a binding obligation once ratified by a country.¹³⁵ ILO member States are obliged to submit Conventions to their governments, but they are free to decide whether or not to ratify them. Although Conventions are legally binding upon ratification, it is important to note that “*the system is premised on applying the basic standard through domestic law, domestic policy and domestic application. The ILO plays an important supervisory role, but the process is based on domestic application.*”¹³⁶ On the other hand, Recommendations are not subject to ratification and therefore do not entail the same legal constraints as do the Conventions.¹³⁷ Instead, the main objective of Recommendations is “*to stimulate and guide national programs in the given areas.*”¹³⁸ In other words, the ILO’s Recommendations set standards that serve to guide the development of national policy, legislation and practice.¹³⁹ Finally, the main functions of the ILO include :

- the formulation of international policies and programmes to promote basic human rights, improve working and living conditions and enhance employment opportunities;

¹³² ILO, *The ILO and employers*, ILO Fact Sheet, February 1994.

¹³³ ILO, *supra* note 126.

¹³⁴ ILO, *ILO: 75 Years of Making a Difference in the World of Work*, Washington, 1994, p. 2.

¹³⁵ ILO, *International Labour Standards*, ILO web site, last updated on March 7, 1996.

¹³⁶ HAGEN, *loc. cit.* note 121, p. 10.

¹³⁷ ILO, *supra* note 135.

¹³⁸ *Id.*

¹³⁹ International Labour Office, *Handbook of Procedures Relating to International Labour Conventions and Recommendations*, Geneva, 1995, p. 3.

- the creation of international standards to serve as guidelines for national authorities in putting these policies into action;
- an extensive programme of international technical cooperation formulated and implemented in an active partnership with constituents, to help countries in making these policies effective in practice;
- training, education, research and publishing activities to help advance all these efforts.¹⁴⁰

One of the most important characteristics of the structures and procedures of the ILO is that there are no economic sanctions or penalties tied to non-compliance with the Organization's Conventions, and this, whether or not the country involved has ratified a given Convention. Although a detailed procedure of supervision is in place, the bottom line is that a member country cannot be financially penalized for its non-respect of ILO Conventions. The reason behind this seemingly lax situation is found in the role that the ILO has set out for itself. The role of the Organization is limited to presenting a moral pressure to countries so that they first ratify a Convention and then adopt it into national legislation. In this context, member States feel a moral obligation to comply with the standards set by the ILO.¹⁴¹ The ILO does not wish to take on the responsibility of punishment, as this was not the intended *raison d'être* of the Organization. In fact, Katherine Hagen, Deputy Director-General of ILO, describes the Organization and its role in the following way :

*"[The ILO's system is] essentially voluntary. Member States have the right to decide, through their constitutional processes, whether or not to ratify Conventions. It is up to them to determine whether they accept formal obligations. Once accepted, the ILO's supervisory machinery can and does press them to take corrective action where needed, but the ILO does not have, and does not seek to have, any coercive powers. It relies on moral effect, on the force of public opinion, on pressure from other governments and the social partners to secure compliance."*¹⁴²

¹⁴⁰ ILO, *The ILO: What it does*, at the ILO web site, last updated September 12, 1996.

¹⁴¹ As explained during interviews held at the Mexico City ILO Office.

¹⁴² HAGEN, *loc. cit.* note 121, p. 10.

The 'voluntarist' nature of the system of the ILO was highlighted by Hartwell when she stated that "(...) *when countries fail for whatever reason to translate economic development into social development, the ILO's role should not be primarily about sanctions. It should be about encouragement, support and assistance.*"¹⁴³ The ILO, therefore, clearly does not wish to take on the responsibility of punishment in cases of non-compliance with its Conventions. As a matter of fact, Sardin explains that even the *possibility* of sanctions may be enough to discourage a country from ratifying a Convention, or even from becoming a member of the ILO.¹⁴⁴ As such, the Organization chooses to limit its role to that of a model on which countries should base their domestic laws and systems of social protection for workers. Its primary responsibility is to offer technical assistance and guidance to the member States. The Organization has developed, however, a system of supervisory mechanisms which serves as a 'conscience' for member States. Let us now take a brief look at this system of supervision.

Supervisory Procedures of the ILO :

Article 19, paragraph 5 of the ILO Constitution delineates the following procedures : When a new Convention is communicated to the ILO's member States, each member has up to a maximum of 18 months from the closing of the annual Conference to bring the Convention before the appropriate authorities of his country "*for enactment of legislation or other action.*" If the member obtains consent from his authorities, he notifies the ILO of the formal ratification of the Convention, and "*will take such action as may be necessary to make effective the provisions of such Convention.*" However, in the case where a member State does not consent to ratification, "*no further obligation shall rest upon the member.*"¹⁴⁵ We see from this explanation of the procedures, that the member States are under no obligation to ratify Conventions, although they may feel a certain 'moral pressure' to do so.

¹⁴³ HARTWELL, C., Chairperson of the Working Party on the Social Dimensions of the Liberalization of International Trade, Summary presented to the Working Party, Geneva, March-April 1995, p. 2.

¹⁴⁴ SARDIN, *op. cit.* note 5, p. 25.

¹⁴⁵ ILO Constitution, Article 19, paragraph 5(b) to (e).

The normal procedures of supervision are such that ratified Conventions are subject to constant monitoring by the ILO. Moreover, member States agree to present regular reports to the International Labour Office detailing the measures taken to apply, in law and in practice, the ratified Conventions.¹⁴⁶ In the event of a worker or an employer association bringing a case of non-compliance with a ratified Convention to the attention of the International Labour Office, Article 24 states that “ (...) *the Governing Body may communicate this (...) to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit.*”¹⁴⁷ The general procedures go on to explain that the country against which the complaint was made has a certain period of time in which it must respond in writing to the ILO as to the corrective measures adopted. The Organization may order a Commission of Inquiry to study the situation and produce a report of its recommendations. The ILO also has the right to publish the complaint, the country’s response, if any, the Commission’s reports, as well as all developments in the case.¹⁴⁸ Publication of a country’s action or non-action to comply with a Convention is intended to put the aforementioned ‘moral pressure’ onto its government and thereby obtain the desired compliance.

Finally, if a member country does not follow the recommendations of the Commission of Inquiry, “*the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.*”¹⁴⁹ This is the point where, if they existed, economic sanctions would be imposed. However, judging by the only sanctions that exist within the ILO, those for member States with unpaid dues, this ‘action as it may deem wise’ is not likely to be very harsh. As an example, a country who has unpaid dues for a period exceeding two years, *may* lose its right to vote at the Conference. Yet, in many cases, arrangements are made with the country so that it may make regular

¹⁴⁶ ILO, *supra* note 135.

¹⁴⁷ ILO Constitution, Article 24.

¹⁴⁸ *Id.*, Articles 25 to 28.

¹⁴⁹ *Id.*, Article 33.

payments over a certain number of years.¹⁵⁰ In any case, one must question the severity of the loss of the right to vote at the Conference.

The ILO's position of non-coercion and its limit to exerting a 'moral pressure' on its members has, not surprisingly, lead to numerous criticisms of its ability to promote workers' rights around the globe.¹⁵¹ Vogel¹⁵² insists that the capacity of the ILO to ensure the respect of workers' fundamental rights is limited, while Compa¹⁵³ speaks of "*la mobilisation de la honte*" as being the ILO's sole means of making countries respect its Conventions. In the opinion of Servais¹⁵⁴, criticisms of the ILO's system boil down to two factors : (1) nothing obliges a country to ratify an ILO Convention, and (2) no sanctions are possible in the procedures of the ILO for cases of violation of workers' rights. This author emphasizes the importance of sanctions in international law.

What then is the role of the ILO on NAFTA territory, now that the NAALC is in place? From this discussion, we can see that the Organization limits its role to example-setting and moral pressure. As we said earlier, the three countries had ratified certain Conventions before the side accord even existed. Was the ILO's system sufficient in North America? The Organization's system of international labour standards provided an already-established set of guidelines for the NAFTA countries to adhere to, and thus is in itself an alternative to the NAALC. Was there a need for additional protection in the form of a social clause to NAFTA? What has the NAALC added, if anything, to improve the protection of workers' rights? How do the systems of these two entities work together? These are some of the questions we will attempt to answer in the chapter on the analysis

¹⁵⁰ Information and explanations obtained during interviews at the Mexico City ILO office.

¹⁵¹ See, for example, HAGEN, *loc. cit.* note 121, pp. 10-11; SERVAIS, *Les aspects sociaux de la libéralisation du commerce international ou la clause sociale revisitée*, VOGEL, L., *Le débat sur les clauses sociales et l'Union Européenne*, and COMPA, L., *L'unilatéralisme et le multilatéralisme dans la politique américaine des droits du travail dans l'hémisphère: une comparaison entre le GSP et l'ALÉNA*, all in the *Bulletin de Droit Comparé et de la Sécurité Sociale*, *op. cit.* note 5.

¹⁵² VOGEL, *Bulletin de Droit Comparé et de la Sécurité Sociale*, *op. cit.* note 5, p. 161.

¹⁵³ COMPA, *op. cit.* note 5, p. 92.

¹⁵⁴ SERVAIS, *op. cit.* note 5, p.218.

of the NAALC. Before we do that, however, let us examine more closely the general concept of a social clause.

1.5.4 Social clauses

Because the ILO is the only international-level system in place to promote the protection of workers' rights, and because this system does not offer any form of economic sanctions, specific regions may opt for a heightened protection in the form of a social clause. A social clause (or side accord) is linked directly to a regional free trade deal and contains provisions for specific economic sanctions in the case of non-respect of workers' rights. Moreau defines a social clause as "*the insertion in an international trade treaty, either bilateral, multilateral or global, of a disposition outlining economic sanctions in cases of violation of those labour standards deemed essential in the treaty.*"¹⁵⁵ The idea of a social clause in trade agreements has sparked quite a debate between developing countries and richer, industrialized countries as to the true impact that this type of mechanism may have. Numerous criticisms of the social clause have arisen out of this debate.¹⁵⁶

On the one hand, advocates of a social clause, more often than not industrialized countries, contend that their motivations for the inclusion of such a clause are purely ethical - the objectives being the improvement of work conditions and the avoidance of the detrimental effects of social dumping.¹⁵⁷ Moreover, from this point of view, a social clause is seen as a way of stopping companies from transferring their production from richer countries to developing ones (thereby avoiding significant job losses in

¹⁵⁵ MOREAU, M.A., *La clause sociale dans les traités internationaux: Bilan et perspectives*, Maison des sciences sociales Ange-Guepin, Nantes, Conférence du 20 mars 1995, p. 2 (this author's translation).

¹⁵⁶ For an interesting and thorough overview of the arguments on both sides of this debate, see the following authors: HAGEN, *loc. cit.* note 121, 15 pp.; ROBINSON, I., *The NAFTA Labour Accord in Canada: Experience, Prospects and Alternatives*, *Connecticut Journal of International Law*, Vol. 10, n°2, Spring 1995, pp. 475-531; MOREAU, and TRUDEAU, *loc. cit.* note 68, pp. 393-406; STAELENS, *La Clause Sociale: Position des Pays en Voie de Développement et du Mexique dan le cadre de l'ALÉNA*, KOTRANE, H., *La clause sociale, vue d'en bas*, SARDIN, *La Loyauté dans les échanges internationaux: le débat sur l'harmonisation des normes du travail*, and SERVAIS, *Les aspects sociaux de la libéralisation du commerce international ou la clause sociale revisitée*, all in the *Bulletin de Droit Comparé et de la Sécurité Sociale*, *op. cit.* note 5.

industrialized countries).¹⁵⁸ On the other hand, developing countries argue that the true reason behind the industrialized countries' push for a social clause is that they want to protect their markets from the increased competition of 'cheap labour' countries. In other words, the social clause is nothing more than a form of **protectionism**.¹⁵⁹ In this scenario, industrialized countries are attempting to protect themselves from possible job losses (not to mention losses in market share and profits) by calling for an improvement of work conditions in developing countries.¹⁶⁰ According to Robinson, as long as the perception of protectionism exists, poorer countries will resist the idea of a social clause and "*growing conflict over the issue will weaken multilateral approaches to trade that depend upon consensus.*"¹⁶¹

Besides the argument that a side accord to an international trade agreement is simply disguised protectionism, other criticisms of the social clause have been heard. One problem often referred to is that of the developing countries' loss of their **comparative advantage**. By this reasoning, the low salaries and work conditions of developing countries constitute a comparative advantage for these nations and not a form of social dumping or unfair competition.¹⁶² Faced with a social clause, developing countries are refused access to the markets of industrialized countries, as they are unable to attain the levels of work conditions called for by their richer counterparts.¹⁶³

Related to this contention is the notion that a social clause may **block the development process** of poorer countries. While international trade is supposed to encourage economic development and, as a result, social progress, the presence of a social clause risks having the opposite effect. In other words, a side accord can provoke social distortion and encourage a two-tiered development: a slow one for poor countries and an accelerated

¹⁵⁷ SARDIN, *op. cit.* note 5, p.33.

¹⁵⁸ STAELENS, *op. cit.* note 5, p. 57.

¹⁵⁹ ROY, M.P., *L'Organisation mondiale du commerce*, Revue de Recherches Juridictionnelles, 1995-3, p. 798.

¹⁶⁰ SARDIN, *op. cit.* note 5, p. 34.

¹⁶¹ ROBINSON, *loc. cit.* note 156, p. 498.

¹⁶² STAELENS, *op. cit.* note 5, p. 60.

¹⁶³ KOTRANE, *op. cit.* note 5, p. 135.

development for industrialized nations.¹⁶⁴ Robinson explains the blockage of development in the following way:

*“Requiring less developed countries (LCD’s) to adopt minimum international criteria set out in the social charter would raise labour costs and increase market ‘rigidities’ in these countries. Higher labour costs would mean lower foreign investment and slower economic growth. Labour market rigidities would further reduce growth rates. Thus, LCD growth would be slowed.”*¹⁶⁵

A final argument against social clauses in international trade agreements is that of interference in domestic politics and the notion of **national sovereignty**.¹⁶⁶ Proponents of this view claim that imposing international labour rights and standards on other countries undermines their inherent right to decide on their own internal policies and legislation.¹⁶⁷

In his article, Sardin explains that developing countries justify their arguments against a social clause by basing them on three concrete observations.¹⁶⁸ First, the choice of specific standards which are to figure in the side accord shows a bias against developing nations. For example, child labour is much more widespread in poorer countries than it is in industrialized nations. As such, the impact of a clause prohibiting child labour is much more severe for developing countries. As an example of this, Krueger¹⁶⁹ states that *“if child labor is used extensively in the textile industry in less-developed nations, then textile companies in developed nations would benefit from an international ban on child labor. The textile industry in developed nations will have an incentive to lobby for such policies.”* Second, the United States’ recent policy regarding China was a blatant display of how dominant countries can manipulate international agreements in their favour. When President Clinton first took position in the White house, he repeatedly contended that

¹⁶⁴ STAELENS, *op. cit.* note 5, p. 60.

¹⁶⁵ ROBINSON, *loc. cit.* note 156, p. 498.

¹⁶⁶ STAELENS, *op. cit.* note 5, p. 60.

¹⁶⁷ ROBINSON, *loc. cit.* note 156, p. 498.

¹⁶⁸ SARDIN, *op. cit.* note 5, pp. 34-35.

China would no longer benefit from 'most favoured nation' status if that country was not making significant progress in the areas of human rights within one year. However, at the end of this period, China continued to enjoy this status even without any improvements in human rights conditions. This was seen as a political move from the Clinton Administration in the hopes of maintaining support from American export industries.

The third observation on which developing countries base their arguments against a social clause is the constant call made by industrialized nations for the implementation of antidumping mechanisms in trade agreements.¹⁷⁰ In other words, industrialized countries are emphasizing the need for sanctions against nations that do not respect workers' rights. These sanctions would most likely hit hardest among developing countries, and the noise from industrialized nations about the need for sanctions is nothing more than a form of protectionism.

All the above issues point to the potential weaknesses of a social clause. The arguments from developing countries raise some interesting questions as to the true impact that a social clause may have on the protection of workers' rights. In the analysis section of this project, we will discuss the functioning of a specific social clause, the NAALC, according to these criticisms. This exercise will enable us to formulate opinions of the side accord which will be discussed at the end of our study.

¹⁶⁹ KRUEGER, A., *Observations on International Labor Standards and Trade*, Woodrow Wilson School, Princeton University, Paper prepared for the World Bank Annual Conference on Development Economics, April 1996, p. 4.

¹⁷⁰ SARDIN, *op. cit.* note 5, p. 35.

CHAPTER 2. OPERATIONAL FRAMEWORK

In the previous chapter, we completed a review of the literature concerning some essential concepts related to our research topic. We also discussed the existing alternatives available to offer workers an acceptable level of social protection in the face of increased international trade. These options include the notion of *laissez-faire*, the example of the EU, the ILO's system of international labour standards, and a social clause tied to a trade agreement. The descriptions of these concepts will enable us to better comprehend the particular context of the side accord in North America. In the present chapter, we continue on with the theoretical basis of our study in order to provide an operational framework for our specific topic.

The explanations given here comprise the framework of our study. In other words, the general concepts we described in the previous chapter are narrowed down to their specific significance in North America. As such, the descriptions offered in this chapter are considered to provide the operational framework from within which we formulate our discussion of the functioning of the NAALC. For example, while we offered an overview of the general concept of globalization in the previous chapter, we now describe the particular regional context of the North American Free Trade Agreement. Also, the general explanation, in the previous chapter, of social clauses and other alternatives for social protection leads us to a more specific elaboration of the NAALC in this section. Finally, in the previous chapter, we offered an overview of the important literature on the subject of fundamental rights. In the present chapter, we explain our particular use, in this study, of the notion of fundamental rights. Our usage, for the purposes of the present study, may or may not be similar to the general notions of this concept which were described during the overview in the previous chapter.

Before undertaking our analysis of the NAALC, a detailed explanation of three major concepts pertinent to our subject is essential in order to clarify the elements on which we will base our findings, arguments and conclusions. The following descriptions of NAFTA, the NAALC, and workers' fundamental rights will become the ground on which we will

build our study of the functioning of the side accord. Once we have a general understanding of the free trade situation in North America, the specific instrument chosen to promote the protection of workers' rights, and the particular rights considered to be fundamental in this context, we will be able to move on to our discussion of the functioning of the social clause.

2.1 NAFTA

In January of 1989, the bilateral Free Trade Agreement (FTA) between Canada and the United States came into effect. This trade agreement linked Canada to an economy ten times its size.¹⁷¹ The purpose of the accord was to ensure the free circulation of goods between the two countries. The gradual elimination of tariffs is to happen over a ten-year period, reaching completion in 1998.¹⁷² Later, on January 1st, 1994, the entry into force of the North American Free Trade Agreement saw the free trade zone extended to Mexico (see Annex 5 for a brief comparison of some interesting statistics on the three NAFTA countries). NAFTA added a highly populated yet underdeveloped country to the free trade zone. In this current free trade situation, the US is by far the dominant power, as it boasts more than double the population and economic strength of Canada and Mexico combined.¹⁷³ The accord, signed by the governments of the United States, Mexico and Canada, foresees the elimination of trade barriers over a 10 to 15 year period, depending on the specific product or sector. Although the accord calls for tariff-free circulation of goods, services, and, to a certain extent, investments, no provisions are made to allow the free circulation of workers.¹⁷⁴

¹⁷¹ SANGER, *loc. cit.* note 82, p. 1.

¹⁷² LEMIEUX, D., *La mise en oeuvre de l'Accord de libre-échange entre le Canada et les États-Unis en droit interne: 1988-1991*, Les Cahiers de Droit, vol. 33, n° 2, juin 1992, p. 386.

¹⁷³ SANGER, *loc. cit.* note 82, p. 1.

¹⁷⁴ MOREAU, and TRUDEAU, *loc. cit.* note 68, p. 394.

According to Trudeau and Vallée¹⁷⁵, the economic integration between the US and Canada, as well as that between the US and Mexico, is not the result of the signing of NAFTA. In fact, the authors argue that the free trade accord only formalized an already-established, integrated relationship. Well before the signing of NAFTA, the three countries maintained an economically dependent relationship. For example, even before the implementation of the FTA in 1989, over 70% of Canadian exports went to the United States and approximately 65% of imports came from the US. Furthermore, almost three quarters of the trade between these two countries was already duty-free.¹⁷⁶

A similar relationship existed between the United States and Mexico. Before the conclusion of NAFTA, 75% of Mexican exports headed directly towards the US. In fact, according to a recent study by the North American Integration and Development Center at UCLA, there has been a dramatic growth in imports and exports between Mexico and the United States over the past ten years, and this “*has not significantly changed since the implementation of NAFTA.*”¹⁷⁷ According to Trudeau and Vallée, in 1994, Mexico was the third most important trading partner of the US, after Canada and Japan.¹⁷⁸ Finally, the economic relationship between Mexico and Canada was not necessarily one of major importance. In 1987, Mexico received only 0,4% of Canadian exports, putting it in 17th place among Canada’s trading partners.¹⁷⁹ However, Canadian trade with Mexico grew by over 20% in the first year of NAFTA.¹⁸⁰ Trudeau and Vallée mention another interesting characteristic of the trade relationship between the three NAFTA countries. The authors point out that, in 1971, 16% of Mexican and Canadian exports to the US

¹⁷⁵ TRUDEAU, G. and G. VALLÉE, *Economic Integration and Labour Law Policy in Canada*, in *Regional Integration and Industrial Relations in North America*, M.L. Cook and H.C. Katz (ed.), Cornell University, New York, 1994, p. 66.

¹⁷⁶ *Id.*, p. 67.

¹⁷⁷ HINOJOSA-OJEDA, R. et al., *North American Integration Three Years After NAFTA: A Framework for Tracking, Modeling and Internet Accessing the National and Regional Labor Market Impacts*, North American Integration and Development Center, School of Public Policy and Social Research, UCLA, December 1996, p. 3.

¹⁷⁸ TRUDEAU and VALLÉE, *op. cit.* note 175, p. 67.

¹⁷⁹ *Id.*

¹⁸⁰ DILLON, J., *Challenging Free Trade in Canada: The Real Story*, Canadian Centre for Policy Alternatives, August 1996, p. 6.

were of similar products, and that this 'similarity index' reached 43% in 1990.¹⁸¹ These numbers lead us to believe that the United States may be able to choose between Canada and Mexico for a certain amount of their imports.¹⁸²

The relationship between the three NAFTA countries is one characterized by the dependence of Canada and Mexico on the United States, at least in terms of the exports and imports of the first two countries with the US. The Commission for Labor Cooperation recently published the results of a preliminary report on the situation of North American labour markets which clearly illustrates this relationship.¹⁸³ The trade relationship between Canada, Mexico and the US in 1994, as described in the Commission's study, is illustrated in Annex 6. As we can see from these charts, both Canadian and Mexican trade rely heavily on the United States. The charts show that, in 1994, 75% of Canada's total exports and 85% of Mexico's exports went to the US. Meanwhile, in that same year, 60% of Canadian imports and 69% of Mexican imports came from the United States. On the other hand, the US is far less dependent on these two countries as far as its trade is concerned. In fact, almost three quarters of American imports and exports, 72% and 70% respectively, come from outside the NAFTA territory.¹⁸⁴ It is important to understand this economic relationship between the three NAFTA countries before being able to discuss the possible effects of the free trade accord.

Right from the start of negotiations, trade unions in Canada and the United States were not in favor of NAFTA for numerous reasons. First, these groups claimed that there was too large a gap between the levels of development of their two countries, and that of Mexico. Indeed, before the accord came into effect, Bradsher stipulated that "*economic studies have consistently predicted that the pact would have the greatest effect on Mexico because its economy is only one-twentieth of the size of the United States' economy, and*

¹⁸¹ TRUDEAU and VALLÉE, *op. cit.* note 175, p. 67.

¹⁸² An exact interpretation of these statistics requires an understanding of the components of the 'similarity index'. For further information on this subject, see the Economic Council of Canada, *Le libre-échange*, n° 9, p. 14, as cited by Trudeau and Vallée, *op. cit.* note 175.

¹⁸³ For an overview of the results of the preliminary labour market study, see *Labor in NAFTA Countries*, Bulletin of the Commission for Labor Cooperation, Vol. 1, n° 2, August 1996.

*because Mexico already relies heavily on trade with the United States.*¹⁸⁵ Before its implementation, employee representatives predicted that NAFTA would have severe consequences such as company closures and job losses in Canada and the US, transfers of production to Mexico, a lowering of work conditions and a decrease in the rate of unionization.¹⁸⁶ Moreover, the low minimum wage in Mexico was, and still is, often cited as a concrete reason why companies in the US and Canada will likely transfer production down south. The difference in wages between the first two countries and Mexico is truly significant. In April 1995, minimum wage in Mexico ranged from 24 to 30 pesos per day (depending on the State and the region)¹⁸⁷, which was equivalent to \$5 to \$6 Canadian per day! At that rate, a US or Canadian company in Mexico could afford to pay its workers far more than required by law and still maintain substantially lower production costs than if it were to produce at home.

Second, adding to the opposition to the free trade deal, a highly publicized report by the International Trade Commission concluded that, in the US, NAFTA would cause a five percent drop in employment in the automotive and apparel industries and a drop of up to 15 percent in some other industries. The report attributed these job losses to increased competition from Mexican imports and the construction of new factories in that country.¹⁸⁸ Today, employee representatives still maintain that NAFTA is not as beneficial as politicians would like us to believe. The following excerpt from a newsletter of the Canadian Labour Congress summarizes these feelings :

“NAFTA coincides with soaring trade deficits in the US, almost two million unemployed Mexicans, and a serious threat to Canada’s social safety net as we ‘harmonize’ our social policy with that of our trading partners. NAFTA is named as the culprit for worsening environmental conditions along the already highly-polluted US-Mexican border and

¹⁸⁴ Commission for Labor Cooperation, *Labor in NAFTA Countries*, Vol. 1, no 2, August 1996, p. 4.

¹⁸⁵ BRADSHER, K., *Study Says Trade Pact Will Aid US Economy*, New York Times, February 3, 1993, p. C1, C14.

¹⁸⁶ MOREAU and TRUDEAU, *loc. cit.* note 68, p. 394.

¹⁸⁷ Comisión nacional de los salarios mínimos et Ley federal de trabajo, Capítulo VI, artículos 90-97.

¹⁸⁸ International Trade Commission, February 1993, as explained in CZINKOTA et al., *op. cit.* note 15, p. 21.

NAFTA has not relieved Canadian exporters from harassment by protectionist US trade remedies such as anti-dumping and countervailing duties."¹⁸⁹

This negative perception of the free trade deal reported by the Canadian Labour Congress was echoed in a more recent report by Dillon. The author stipulates :

*"Since the Free Trade Agreement (FTA) with the United States was initiated in 1989, Canada has experienced the worst period of its economic and social history since the Great Depression. The restructuring of our economy that commenced under the FTA has continued since Mexico joined to form NAFTA in 1994. Pressures to level the playing field for corporate investors are weakening our social programs. (...) We cannot blame NAFTA for all of the adversity (...). However, many of our problems are linked to neo-liberal economic policies which embrace enhanced competition, free trade and continental integration. (...) The central conclusion is that the Canadian economy has not performed well for workers in the post-FTA period. (...) The real story is that intensified competitive pressures have driven employers to raise productivity and to hold the line on, or to reduce, wages in order to become more cost-competitive (...)."*¹⁹⁰

Finally, the fear of a lowering of work conditions in order to cut production costs (i.e. social dumping) was, and still is, omnipotent. This was one of the main reasons for the opposition towards NAFTA during its initial negotiation stages. In 1991, then US President George Bush reported that the US and Mexican Secretaries of Labour were prepared to sign a 'Memorandum of Understanding' regarding cooperation on certain concerns of workers (for example, health and safety, labour standards and labour conflict measures).¹⁹¹ This was by no means a binding agreement, but rather a program arranged between the two countries and to which Canada was not included. Judging by the continued opposition to NAFTA by American labour, the Memorandum of Understanding

¹⁸⁹ **Canadian Labour Congress**, *The Morning NAFTA - Labour's Voice on Economic Integration*, Issue n° 4, February 1996, p. 1.

¹⁹⁰ **DILLON**, *loc. cit.* note 180, p. 1, 9-10.

¹⁹¹ **HERZSTEIN, R.**, *The Labor Cooperation Agreement Among Mexico, Canada and the United States: It's Negotiation and Prospects*, US-Mexico Law Journal, Vol. 3, Symposium 1995, p. 123.

was clearly not sufficient. Responding to the cries from the labour movement, during his election campaign, Bill Clinton claimed that *“NAFTA would be bad for the United States if implemented as Bush had planned, but good for the country if implemented with (...) supplemental agreements.”*¹⁹²

This was the first step towards incorporating a social clause into the free trade deal. The protection of workers' rights and the risk of social dumping are still considered to be serious issues. However, despite these fears, the final NAFTA text does not contain any references to the social effects of free trade other than in its preamble.¹⁹³ In this opening to the text, the three countries state their resolve to *“create new employment opportunities and improve working conditions and living standards in their respective territories, and protect, enhance and enforce basic workers' rights.”*¹⁹⁴ The NAALC was adopted to take care of the details of the protection of workers' rights, in the NAFTA context, as a result of all the calls for a social dimension to the free trade deal.

2.2 The North American Agreement on Labor Cooperation

We present here a theoretical overview of the North American Agreement on Labor Cooperation (NAALC). The text of the NAALC is reproduced in its integrity in Annex 7. In this section, we do not discuss the functioning of the social clause, but simply offer a general explanation of the NAALC. The intention of this section is to give the reader the basic theoretical knowledge of the NAALC so that he may better follow our analysis later in this paper. Although we may pass briefly over some elements of the NAALC at this time, we will be discussing the side accord in much more depth in the analysis chapter of this project.

¹⁹² *Id.*, pp. 124-125.

¹⁹³ MOREAU and TRUDEAU, *loc. cit.* note 68, p. 394.

¹⁹⁴ NAALC, *supra* note 79, Preamble.

The NAALC is a side accord to NAFTA covering the social dimension of the free trade deal.¹⁹⁵ The idea of a side accord protecting the basic rights of workers was originally put forth by the United States in an attempt to calm the opponents of NAFTA. One such opponent was the AFL-CIO, who proclaimed that the free trade accord would have severe social and economic consequences due to unfair trade practices by companies which would not respect Mexican labour standards or legislation.¹⁹⁶ The side accord and NAFTA came into effect simultaneously on January 1st, 1994. As we mentioned in the introduction to this paper, the NAALC has three main functions : First, the side accord presents eleven specific labour principles to be respected by the three NAFTA countries (see the complete list following in Section 2.3 of this paper), and outlines certain procedures detailing the organization of cooperative activities to promote these principles. Second, it outlines the establishment of certain institutions to oversee the application of the labour principles. Finally, the NAALC details the procedures to follow in the case of a complaint that a member country is not respecting its labour laws.¹⁹⁷ The first part of the social clause lists its main objectives. These objectives include :

- the improvement of working conditions and living standards;
- the promotion of the eleven labor principles (see listing in Section 2.3);
- the encouragement of innovation, increasing productivity and quality;
- the encouragement of research and the exchange of information in order to enhance the understanding of labor laws and institutions of each country;
- the pursuit of cooperative labor-related activities;
- the promotion of compliance with, and effective enforcement by each Party of, its labor law;
- the fostering of transparency in the administration of labor law.¹⁹⁸

¹⁹⁵ The side accord is also called a 'parallel accord', a 'side agreement' or a 'social clause'.

¹⁹⁶ MASCHINO, D., *L'Accord nord-américain de coopération dans le domaine du travail et l'ALÉNA, Marché du travail*, march 1995, p. 6.

¹⁹⁷ *Id.*, p. 7.

¹⁹⁸ NAALC, *supra* note 79, Part I, Article 1, paragraphs (a) - (g).

An important characteristic of the side accord is its maintenance of the sovereignty of each member country. In fact, both the preamble and Article 2 of the NAALC make reference to this factor. While the preamble states that the three governments affirm “*their continuing respect for each Party's constitution and law*”, Article 2 stipulates that they recognize “*...the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations...*”.¹⁹⁹ In order to respect the sovereignty of each member country, the NAALC does not create supranational labour laws, but simply requires all members to respect and enforce their own labour legislation.

Under the NAALC, certain institutions must be established on the territory of the North American Free Trade Accord in order to oversee the application by each country of its own labour laws and to organize cooperative activities between the three countries. These institutions include the following²⁰⁰ :

- (a) *Commission for Labor Cooperation (CLC)* - The CLC is comprised of a Ministerial Council and a Secretariat, and is assisted by the National Administrative Office of each member country.
- (b) *Ministerial Council* - The Council comprises the labour ministers (or their designees) of each of the three member countries. It convenes at least once a year or at the special request of any Party. The Council is the governing body of the Commission for Labor Cooperation, overseeing the implementation of the NAALC and directing the work of the Secretariat. The Council approves the annual plan of activities, the budget and any publications of the CLC. It addresses any differences that may arise between the three countries. The Council has the power to consider ‘any other matter within the scope of the Agreement’.²⁰¹ It also has the responsibility of reviewing the operation and effectiveness of the NAALC within four years after its implementation. Finally, all

¹⁹⁹ *Id.*, Preamble and Part II, Article 2.

²⁰⁰ *Id.*, Part III, Articles 8 to 16.

²⁰¹ *Id.*, Article 10, paragraph 2.

decisions and recommendations of the Council must be taken by consensus, unless the Council decides otherwise.²⁰²

(c) *Secretariat* - The Secretariat, located in Dallas, Texas, is headed by an Executive Director who is chosen by the Ministerial Council for a three-year term. It is comprised of a total of 15 persons from the three NAFTA countries, who are appointed by the Executive Director (and approved by the Ministerial Council). The Secretariat assists the Council in its functions and periodically publishes reports on labour law, labour market conditions and human resource development issues on the NAFTA territory. Where it does not have the particular expertise necessary to complete a study, the Secretariat may engage independent experts on the matter. An important aspect of the Secretariat is its trilateral makeup, intended to reflect its neutral position and its independence from the influence of any one government.²⁰³

(d) *National Administrative Offices (NAOs)* - Each member country is obliged to establish its own NAO (also referred to in this paper as an 'Office') at the federal government level. The three NAOs are currently located in Washington DC, Mexico City and Ottawa. The NAO is a point of contact for its own governmental agencies, the general public of the country, the NAO of another Party, and the Secretariat. The main responsibilities of the NAOs are twofold : First, these Offices must organize 'cooperative activities' (seminars, conferences, etc.) pertaining to the promotion of the eleven labour principles. Second, the NAOs must review communications from the public regarding the alleged violation of a country's obligations under the side accord. In this paper, we will be discussing the functioning of the NAALC with regards to these two areas.

Each NAO is required to periodically publish a list of public communications pertaining to labour law matters on the territory of either of the other Parties. It must review these cases as appropriate, in accordance with domestic procedures.²⁰⁴ An NAO may receive

²⁰² *Id.*, Article 9, paragraph 6.

²⁰³ *Id.*, Article 12, paragraph 5.

²⁰⁴ *Id.*, Article 16, paragraph 3.

complaints from within its own country concerning cases of alleged non-respect of labour law in either of the other two countries. It cannot receive complaints of similar occurrences in its own country, as these issues are the responsibility of the regular national structures. Each NAO may convene two committees: (1) a **National Advisory Committee**, comprised of members of the public (including representatives of labour or business organizations), to advise it on the implementation and elaboration of the side accord, and (2) a **Governmental Committee**, comprising members of the federal and state or provincial governments. The purpose of these committees is to advise the Party on the implementation and elaboration of the NAALC.²⁰⁵

It is important to note the special situation of Canada in the context of labour law. In the US and Mexico, labour law is primarily under the jurisdiction of the federal government. On the other hand, in Canada, labour law is primarily under the jurisdiction of the provinces.²⁰⁶ As such, approximately 90% of workers are subject exclusively to provincial legislation with regards to labour issues.²⁰⁷ Each province has its own labour laws and its own system of application of these laws. Consequently, in order for the terms of the side accord to apply to a particular province, that province must officially adhere to the NAALC. For this reason, when the NAALC came into force in 1994, only the federal government was actually bound by the agreement. What this means is that only those 10% of workers who fall under federal jurisdiction were covered by the terms of the side accord. In 1995, Alberta became the first province to sign on to the side agreement.²⁰⁸ In January and February of 1997, Manitoba and Québec followed Alberta's lead.

Regardless of the fact that labour law in Canada is primarily under provincial jurisdiction, only the federal government could have signed the NAALC anyway. The reason for this is that only the federal government is recognized at the international level and has the competence to sign an international agreement. This is why under the Canadian structure,

²⁰⁵ *Id.*, Articles 17 and 18.

²⁰⁶ ROBINSON, *loc. cit.* note 156, p. 476.

²⁰⁷ MORPAW, *supra*, note 64, p. 14.

²⁰⁸ *Id.*

once the side accord was ratified at the federal level, an additional agreement had to be put in place between the federal government and the provinces. Federal-provincial negotiations in Canada led to the establishment of an **intergovernmental accord** which defines the participation of the provinces with respect to the NAALC.²⁰⁹ This accord will be discussed further on in this paper, in our overview of the specifics of each country's National Administrative Office.

Certain provisions had to be included in the side accord in order to clarify the unique situation of Canada. For example, unless it pertains to an area under federal jurisdiction, at least 35% of the Canadian labour force (or 55% if the matter concerns a specific industry or sector) must be subject to either the federal labour law or that of those provinces which have signed on to the NAALC, in order for Canada to be able to review a complaint concerning one of the other two Parties, or to be the subject of a submission.²¹⁰ Finally, according to the text of the NAALC, Canada has agreed to do its utmost to convince each of the provinces to adhere to the side accord.²¹¹ To date, only the three aforementioned provinces have ratified the agreement.

Apart from a study of the institutions established under the NAALC, an important element in our research project is the analysis of the procedures of complaint and the possible sanctions in the case of a country's alleged non-respect of its labour laws. One important characteristic of the NAALC which underlies its system of complaint and sanctions is the fact that the side accord is based on cooperation among the Parties. In fact, the NAALC stipulates that "*The Parties shall at all times endeavor to agree on the interpretation and application of this Agreement, and shall make every attempt through cooperation and consultations to resolve any matter that might affect its operation.*"²¹² Taking into account the spirit of cooperation on which the NAALC is founded, it is understandable that economic sanctions are a last resort in the case of the non-respect of a country's

²⁰⁹ MASCHINO, *loc. cit.* note 196, p. 9.

²¹⁰ NAALC, *supra* note 79, Annex 46, paragraphs 4(b) and 4(c).

²¹¹ *Id.*, Annex 46, paragraph 7.

²¹² *Id.*, Article 20.

labour laws. In fact, despite the eleven labour principles upheld by the NAALC, economic sanctions are limited to only three areas: occupational safety and health, child labour, and minimum wage.²¹³

Regarding matters which may be treated by the institutions of the NAALC, the text of the side accord has what may be qualified as a three-tiered structure. The first level is that of **cooperative consultations** (either between NAOs or at the ministerial level), where any matter within the scope of the side accord may be reviewed (i.e. any issue pertaining to any of the eleven labour principles). The second level is that of **evaluation** by a committee of experts. Only issues related to labour principles 4 through 11 (excluding the first three principles on what are known as 'industrial relations' issues) may reach this level. Finally, at the third level, that of **dispute resolution** (which involves arbitral panels and economic sanctions), only matters related to occupational safety and health, child labour, and minimum wage may be treated. The sections of the NAALC which outline these procedures are Part IV, on cooperative consultations and evaluations, and Part V on the resolution of disputes. Let us look more closely at these mechanisms.

(a) **consultations between NAOs** - When an NAO receives a public submission regarding alleged violation of the NAALC's labour principles on the territory of one of the other member countries, the Office may request from the other NAO a description of its laws and their administration, proposed changes to these laws, and an explanation of the government's enforcement of its laws. This review of the other country's labour legislation may be initiated by an NAO with or without the submission of a complaint from the public. The requested NAO is required to comply with the demands of its counterpart. At all times, the third country's NAO may be informed on and included in these procedures. Matters which can be the subject of consultations at the NAO level include any issue pertaining to labour law, its administration or labour market conditions.²¹⁴ In

²¹³ *Id.*, Annex 39, paragraph 2.

²¹⁴ *Id.*, Article 21, paragraph 1.

other words, any matter related to the eleven labour principles may be reviewed by the NAOs.

(b) **Ministerial Consultations** - An NAO may request ministerial consultations (consultations between the three labour ministers) regarding “*any matter within the scope of this Agreement*”.²¹⁵ Once again, this means that an issue pertaining to any one of the eleven labour principles may be subject to consultations at the ministerial level. It is important to note that the three countries are required to “*make every attempt to resolve the matter through consultations (...), including through the exchange of sufficient publicly available information to enable a full examination of the matter.*”²¹⁶ According to this article, the countries must try to resolve issues at the cooperative level, thereby avoiding the need to go beyond ministerial consultations.

(c) **Evaluation Committee of Experts (ECE)** - If a matter has not been resolved after ministerial consultations, any one Party may request the establishment of an ECE. Specific criteria have been established by the side accord so that, unlike cooperative consultations, which may treat any labour law issue, only certain issues may reach the level of an ECE. First, an ECE may only be convened for matters that are **directly trade-related** (involving companies whose goods or services are traded with the other Party, or compete with those of another Party) and are covered by **mutually recognized labour laws** (i.e. the two countries involved both have laws in place concerning the issue at hand).²¹⁷ Second, only matters pertaining to occupational safety and health or other **technical labour standards** may be treated by an ECE. A ‘technical labour standard’ is defined as a law or regulation related to labour principles 4 through 11 as listed in the side accord.²¹⁸ This signifies that issues pertaining to freedom of association and the right to organize, collective bargaining, and the right to strike (the first three labour principles, commonly referred to as industrial relations matters), may not go before an ECE. Third, an ECE may only treat matters

²¹⁵ *Id.*, Article 22, paragraph 1.

²¹⁶ *Id.*, Article 22, paragraph 3.

²¹⁷ *Id.*, Article 23, paragraph 3. Please note that definitions of terms used in this section of our paper are found in Article 49 of the NAALC.

which demonstrate a **pattern of practice** by a Party in the enforcement of its laws regarding these labour principles.²¹⁹ In other words, an ECE will not be convened for one-time cases of violation of labour laws, but only if the matter is a recurring issue.

An ECE is made up of three members who are chosen from a list provided by the NAOs. The Council of Ministers selects the chair from a list of experts developed in consultation with the ILO. Members of an ECE must be independent of any member country or the Secretariat.²²⁰ The role of the ECE is to “*analyze, in the light of the objectives of the NAALC and in a non-adversarial manner, patterns of practice by each Party in the enforcement of its occupational safety and health or other technical labor standards (...)*.”²²¹ Finally, the ECE submits a report of its recommendations to the Ministerial Council. All Parties involved in the case must submit to the Secretariat their respective responses to the ECE’s recommendations.²²²

(d) **Arbitral Panel** - If further consultations between the Parties regarding the final report from an ECE still do not resolve the issue, the Ministerial Council may convene an arbitral panel, but only in matters pertaining to occupational safety and health, child labour or the minimum wage technical labour standard (as opposed to *all* the ‘technical labour standards’, as in the case of ECEs). Contrary to the formation of an ECE, where a request is needed from only one Party, a two-thirds vote by the Ministers is needed to convene an Arbitral Panel.²²³ As in the case of an ECE, a panel may only be convened if the issue is **trade-related**, covered by **mutually recognized labour laws**, and if it demonstrates a **persistent pattern of failure** by a Party to enforce its laws in the areas of occupational safety and health, child labour or minimum wage. The Council establishes, by consensus, a roster of individuals who are qualified to serve as panelists.²²⁴ These individuals are appointed for a three year term. An arbitral panel consists of five members, as opposed to

²¹⁸ *Id.*, Article 49.

²¹⁹ *Id.*, Article 23, paragraph 2.

²²⁰ *Id.*, Article 24, paragraph 1.

²²¹ *Id.*, Article 23, paragraph 2.

²²² *Id.*, Part IV, Articles 20 to 26.

²²³ *Id.*, Article 29, paragraph 1.

the three-member ECE. The parties involved in the initial submission are entitled to at least one hearing before the arbitral panel.²²⁵ According to the NAALC, the mandate of an arbitral panel is as follows :

*“To examine, in light of the relevant provisions of the Agreement (...), whether there has been a persistent pattern of failure by the Party complained against to effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards, and to make findings, determinations and recommendations in accordance with Article 36(2).”*²²⁶

Article 36(2) of the side accord goes on to explain that if the findings of the arbitral panel confirm that labour laws in the above areas were not effectively enforced, its recommendations “normally shall be that the Party complained against adopt and implement an action plan sufficient to remedy the pattern of non-enforcement.” The arbitral panel then submits a report of its recommendations to the Parties and the Council. The disputing Parties may agree on a mutually satisfactory action plan which conforms with the recommendations of the panel.²²⁷ If there is no agreement between the disputing Parties, the panel reconvenes and may impose a ‘monetary enforcement assessment’ (i.e. economic sanctions).²²⁸ The text of the NAALC establishes the amounts of monetary enforcement assessments as follows :

*“For the first year after the date of entry into force of this Agreement, any monetary enforcement shall be no greater than 20 million dollars (US) or its equivalent in the currency of the Party complained against. Thereafter, any monetary enforcement assessment shall be no greater than .007 percent of total trade in goods between the Parties during the most recent year for which data are available.”*²²⁹

²²⁴ *Id.*, Article 30, paragraph 1.

²²⁵ *Id.*, Article 33, paragraph 1.

²²⁶ *Id.*, Article 33, paragraph 3.

²²⁷ *Id.*, Article 38.

²²⁸ *Id.*, Article 39, paragraph 4(b).

²²⁹ *Id.*, Annex 39, paragraph 1.

It is important to note that before there is any possibility of economic sanctions being laid against a member country, a whole series of procedures must be followed in an attempt to resolve matters through cooperation between the countries. The procedures discussed above allow for many long delays as a case moves through the system from cooperative consultation to dispute resolution. At every step in the process, the institutions are allowed long periods of time to complete all the required studies, reviews, discussions, etc., so that for a case to finally end up at a 'monetary enforcement assessment', years will have passed.

Besides the establishing procedures to follow in cases of possible violation of obligations under the side accord, the institutions of the NAALC are required to develop and conduct **cooperative activities** to promote the eleven labour principles.²³⁰ According to the text of the NAALC, these activities may include :

- (1) seminars, training sessions, working groups and conferences;
- (2) joint research projects, including sectorial studies;
- (3) technical assistance; and
- (4) such other means as the Parties may agree.²³¹

Each year, the three NAOs develop a plan of cooperative activities to be organized in each country. The specific topics of these cooperative activities are related to the labour principles set out in the side accord. The activities conducted to date by the three countries will be discussed in detail later in this paper.

In summary, we have briefly discussed here the objectives, institutions, procedures of consultation, evaluation and dispute resolution, and the promotion of cooperative activities established under the NAALC. An understanding of the above institutions and procedures will enable us to better comprehend the functioning of the side accord.

²³⁰ *Id.*, Article 11.

²³¹ *Id.*, Article 11.

2.3 Workers' Fundamental Rights (the 11 labour principles of the NAALC)

We initially discussed the general concept of fundamental rights in the previous chapter during our review of the literature. In that section, we mentioned that, in the debate on the social dimension of international trade, there is some widespread agreement that the focus should be on a limited set of fundamental rights. The ILO describes these 'core labour standards' as those to which all persons are entitled, regardless of their country's level of development or values.²³² The particular labour rights considered to be fundamental are also seen as basic human rights. The fundamental rights put forth by the ILO have been adopted in various forms by many countries and international bodies (refer to table in Annex 1).

The Preamble of the NAALC refers to the three countries' resolve, in the North American Free Trade Agreement, to "*protect, enhance and enforce basic workers' rights*".²³³ What are the particular basic rights to which the side accord is referring? As we observed in Section 1.3 on workers' fundamental rights, although there is a certain agreement on basic rights, there are still some differences in the specifics of this notion. Because of the variations of the ILO's list of core labour standards adopted by different bodies or countries, we must clarify which rights are considered basic or fundamental in the context of the NAALC.

We mentioned earlier that the side accord lists eleven specific labour principles to be respected by the three NAFTA countries. In fact, promotion of these eleven labour principles is one of the main objectives that the side accord sets for itself.²³⁴ These principles are as follows :

- 1) Freedom of association and protection of the right to organize
- 2) The right to bargain collectively

²³² ILO, *supra* note 47, p. 2.

²³³ NAALC, *supra* note 79, Preamble.

²³⁴ *Id.*, Article 1(b).

- 3) The right to strike
- 4) Prohibition of forced labor
- 5) Labor protections for children and young persons (considering factors such as the physical, mental and moral development of young persons, including schooling and safety requirements)
- 6) Minimum employment standards (such as minimum wage and overtime pay)
- 7) Elimination of employment discrimination
- 8) Equal pay for men and women
- 9) Prevention of occupational injuries and illnesses
- 10) Compensation in cases of occupational injuries and illnesses
- 11) Protection of migrant workers (migrant workers in a Party's territory are entitled to the same protection of work conditions as that Party's nationals).²³⁵

Annex 1 of the NAALC explains the function of these eleven labour principles by stating that they “*are guiding principles that the Parties are committed to promote, subject to each Party's domestic law, but do not establish common minimum standards for their domestic law. They indicate broad areas of concern where the Parties have developed, each in its own way, laws, regulations, procedures and practices that protect the rights and interests of their respective workforces.*”²³⁶ In other words, the three countries have agreed to devote special attention to the promotion of these particular principles, but are under no obligation to adopt them into their domestic laws.

In Annex 1 of this paper, we provide a comparison of the eleven labour principles of the NAALC and the ILO's core labour standards. Although the wording of the side accord's principles may differ from that of the ILO, the areas covered are, in essence, the same. Because all areas covered by the ILO's seven core labour standards are repeated in the NAALC's eleven principles, it is evident that the side accord derived its list from that of the ILO. However, while there is a similarity, the NAALC goes beyond the core

²³⁵ *Id.*, Annex 1.

²³⁶ *Id.*

standards of the ILO and adds minimum employment standards, the prevention of occupational injuries and illnesses, compensation for occupational injuries and illnesses, and the protection of migrant workers to its list of fundamental rights.²³⁷ When we look at the three NAFTA countries on an individual basis, we note that not one of them has ratified all seven of the ILO's core labour standards, although they all have manifested their desire to promote these rights by signing the NAALC. As such, for the purposes of our project, we consider fundamental workers' rights to be the eleven labour principles listed in the NAALC. For this reason, whenever we discuss either the general need to protect workers' fundamental rights, or the ability of the NAALC to protect these rights, we are referring to those principles listed in the side accord, and not the core labour standards ratified by each country on an individual basis.

²³⁷ HAGEN, *loc. cit.* note 121, p. 13.

CHAPTER 3. METHODOLOGY

Now that we have explained in detail our research topic, reviewed the literature on the essential concepts related to our subject, and specified the theoretical framework which forms the basis of our analysis of the NAALC, we must discuss the methodology used during our study. In other words, since we have completed our discussion of *what* we are studying, we must now endeavor to explain *how* we studied it. It is imperative to fully understand the methodology used throughout our project before we can begin our discussion of the functioning of the NAALC. Without a prior understanding of the procedures followed, it would be difficult to thoroughly comprehend how we arrive at certain conclusions regarding the functioning of the side accord. For this reason, the present chapter discusses in depth how we came about gathering information for the theoretical and practical parts of our research.

This chapter is divided into four sections according to the various elements of our methodology. Procedures explained include (1) the review of the literature and use of secondary data, (2) attendance at conferences and meetings, and (3) direct and indirect observation at the Secretariat and the three National Administrative Offices. The fourth and final part of this chapter contains a detailed description of each of the site visits we conducted. Our visits consisted of the study of all pertinent documentation, direct observation of the procedures and functioning of the institutions, as well as indirect observation in the form of interviews with key persons at each office. This step in our methodology (i.e. the site visits) was considered to be of utmost importance, as it allowed us to gather and organize essential information from several key players who influence the functioning of the institutions of the NAALC. All these procedures are explained in detail below.

3.1 Review of the Literature and Use of Secondary Data

The difference between a review of the literature and the use of secondary data may often cause much confusion among researchers and students alike. For this reason, we discuss the two in a single section, highlighting the way these procedures were used by us in our specific study. However, it may be that other studies do not use these procedures in the same manner explained here. It is important to note that our explanation differentiates the two procedures in a way that best suits the requirements of our study.

For the purposes of our study, the main difference between a review of the literature and the use of secondary data is that the former is comprised of texts that form the theoretical base of our study, whilst the latter comprises those texts, accumulated in the field, that are incorporated into our analysis. In fact, we consider our **review of the literature** to include all texts we read *before* we began our own research in the field, in order to build up our theoretical knowledge of our subject. We can qualify this literature as being all that was known about our subject at the moment we began our project. The literature we used at this stage of our study can be considered scientific literature (doctrine) written by academics and other specialists in the areas of free trade, NAFTA, the NAALC, the European Union and the ILO. The texts that were included in our literature review are mostly theoretical and explain the *facts* about the specific elements of our study in a general manner. It is from these texts that we were able to build our theoretical base, in other words, the concepts and defining framework described in the first part of the present chapter (for example, the explanations of globalization, NAFTA, social dumping, etc.). Also, the texts used to describe the EU and the ILO (Chapter 1) can be considered as part of the literature review that was conducted *before* we went into the field to do our own research. Furthermore, articles on the EU and the ILO contained mainly technical information.

This theoretical information on our subject was attained from a review of several articles by specialists in the fields of labour law, economics and free trade (more specifically, the

integration occurring in Europe and in North America). As mentioned previously, the use of data obtained from the ILO and the European Union is critical to the credibility of our project. Most of this information was obtained from the web sites of these two bodies on the Internet. The Internet has proven to be an interesting and highly important source of data on this subject, as it provided not only an information base but also a contact to communicate directly with persons inside these two entities. The publishings and studies by the three NAOs and the Secretariat have been invaluable sources of information. Studies by the Canadian Centre for Policy Alternatives, the Canadian Labour Congress and Statistics Canada were also essential to the gathering of theoretical data for our project. As such, all these information sources, and many others, formed the literature review for our study.

The **secondary data** used in the completion of our project refers to the articles and texts we collected during our site visits and also to any texts containing critiques of the structures and procedures that are the focus of our study. In this case, the texts are not necessarily a simple *statement of facts* or *description* of the mechanisms we are interested in, but *opinions* and *critiques* as well. Any reports written by members of the NAOs or the Secretariat, or by labour leaders or workers involved in the eight submissions received by the NAALC institutions, are added to those written by academics and are considered to be secondary data. Whereas the texts comprising the literature review are highly theoretical, articles qualified as secondary data may go further than descriptions, to include more *practical* looks at the reality of the functioning of the structures in place. Secondary data also includes summaries of speeches given at conferences and any other documentation that can be incorporated into our own analysis of the functioning of the NAALC. As opposed to the general nature of the texts that form our review of the literature, secondary data may respond to a particular question or criticism of a specific element of our study. For example, any text discussing the handling of a particular submission by the NAOs, or a document summarizing a meeting held by the Offices, the Secretariat or the Ministerial Council is considered to be secondary data. These types of texts report more on the *functioning* of the NAALC institutions than on the *theory* behind the side accord, and

therefore contribute significant information which is directly incorporated into our own analysis.

Our site visits to the NAOs and to the Secretariat, as well as our participation in numerous conferences, allowed us to amass a considerable amount of secondary data. Included in this documentation are several critiques of the NAALC by labour advocates, various reports done by the staff of the NAALC institutions, regular updates on NAO activities, the texts of the actual submissions and all submission updates, minutes of meetings held by the Offices or the Ministerial Council, summaries of speeches presented by academics or labour representatives at conferences related to our research topic, as well as texts containing the opinions of academics as to the functioning of the side accord. The use of this secondary data enables us to conduct our analysis of the functioning of the NAALC and to formulate our own opinion of this subject.

3.2 Conferences

Conferences and meetings on the subjects of economic integration, the NAALC and the European Union greatly enhanced our theoretical knowledge of the research subject and offered us up-to-date information on the activities of the NAALC institutions as well as on the opinions of labour activists, NAALC staff and academics alike. As such, information obtained from conferences not only formed part of our review of the literature, but also offered numerous sources of secondary data. For example, conferences on the European Union provided mainly technical information on legal structures, which was included in our review of the literature. On the other hand, the conference on the functioning of the side accord offered several expert opinions regarding the success of the NAALC in handling certain submissions. These opinions are considered to be secondary data. All conferences proved to be an essential part of our project, not only for the information obtained, but also because they permitted us to establish contacts with key persons in the

fields of economic integration, labour law and the side accord. Conferences attended include :

- (1) Tripartite Conference on *Industrial Relations for the 21st Century* (Canada - US - Mexico); held in Montréal, Québec
 - March 18, 19 and 20, 1996
- (2) Conference on the NAALC (at the École de Relations Industrielles, Université de Montréal), with Dalil Maschino, Senior Economist at the Secretariat and Dr. Leoncio Lara, Senior Legal Council at the Secretariat
 - March 21, 1996
- (3) *L'intégration économique en Europe*, (École de Relations Industrielles and the Département des Sciences Politiques, Université de Montréal), with Marie-Ange Moreau, Professor at the Institut de Droit des Affaires, Université d'Aix-Marseille III
 - April 15, 1996
- (4) *L'évolution du droit social communautaire en Europe depuis Maastricht*, (organized by the *Chaire Jean Monnet* of the Université de Montréal, and held at the offices of the Stikeman-Elliott law firm), with Marie-Ange Moreau
 - April 17, 1996
- (5) Meeting with Marie-Ange Moreau regarding the aspects of the European Union essential to the completion of our research project
 - April 18, 1996
- (6) *La sécurité d'emploi et l'intégration économique en Europe*, (doctoral seminar at the École de Relations Industrielles, Université de Montréal), with Marie-Ange Moreau
 - April 19, 1996
- (7) *Le droit du travail mexicain*, (Université du Québec à Montréal), with May Morpaw, Director of the Canadian NAO, Dr. Leoncio Lara, and Carlos de Buen Unna, Professor at the Universidad Iberoamericana and the Universidad Panamericana, Mexico
 - November 8, 1996
- (8) *The North American Agreement on Labor Cooperation : Linking Labor Standards and Rights to Trade Agreements*, (Washington College of Law, American University and the US NAO), with academics, NAO and Secretariat staff, and labour activists, at Washington, DC
 - November 12, 1996

- (9) *NAFTA and its Impact on Labor and Immigration*, (École de Relations Industrielles, Université de Montréal), with Raul Hinojosa-Ojeda, School of Public Policy and Social Research, UCLA, and Research Director, North American Integration and Development Center
 - March 21, 1997
- (10) Tripartite Conference on *Protecting Working Children in North America: A Shared Responsibility*, (Canada - US - Mexico); held in Ottawa, Ontario
 - October 15 and 16, 1997

Our attendance at the above mentioned conferences was mainly as an observer, taking notes on what was presented by the invited speakers. We also collected any documentation distributed during the conferences, including summaries of speeches, pamphlets and other more technical documents. Furthermore, conference attendance gave us the opportunity to converse with other attendees, as well as with the speakers and staff members of the NAALC institutes. From this, we were able to gather additional information on our research subject, especially regarding the opinions of certain participants directly involved in the NAALC or otherwise interested in its functioning.

3.3 Interviews and Site Visits (Indirect and Direct Observation)

In November and December of 1996, we completed the field research part of our project. Once the major portion of our review of the literature (the necessary theoretical background) was completed, we conducted visits to all three National Administrative Offices and the Secretariat, as well as to the Washington DC and Mexico City offices of the International Labour Organization. Although visits to the ILO offices were not part of our initial research plans, we seized the opportunity to conduct meetings at these offices since we were in those same cities for our NAO visits. We also added on an interview with the ex-Secretary of the Mexican NAO, who is currently working in the Mexican Embassy in Ottawa. This meeting was considered to be important because, at the time of our study, no replacement had yet been nominated to the position.

During our stays at each of the NAOs and at the Secretariat, our time was divided between the conducting of interviews (indirect observation) and the direct observation of what was going on around us in terms of meetings between staff members, conversations among staff outside of the 'official' interview context, and general observations of workflow habits and routines. The remainder of our time was spent reviewing any secondary data available on site. In this section, we explain the details of our site visits. However, before we go any further, it is important to differentiate the two types of observation (indirect and direct) used during our stays at the NAOs and the Secretariat.

Quivy and Van Campenhoudt²³⁸ explain **indirect observation** as follows : “...le chercheur s'adresse au sujet pour obtenir l'information recherchée. En répondant aux questions, le sujet intervient dans la production de l'information. Celle-ci n'est pas prélevée directement et est donc moins objective ...l'instrument d'observation est soit un questionnaire soit un guide d'interview.” From this explanation, we see that the information we collected from our interlocutors during the interviews we conducted is considered to be indirect. In other words, we did not gather the information directly, based on our own observations, but from someone else, based on their observations. The answers they gave to our interview questions reflect their perceptions and their understanding of the subject at hand, not our own.

The same authors describe **direct observation** in this way : “le chercheur procède directement lui-même au recueil des informations, sans s'adresser aux sujets concernés...Les sujets observés n'interviennent pas dans la production de l'information recherchée. Celle-ci est manifeste et prélevée directement sur eux par l'observateur.”²³⁹ In line with this definition, whenever we were observing or listening to conversations pertaining to our subject between NAO or Secretariat staff, or whenever we witnessed the workflow at any of the Offices, we were involved in the direct observation of the functioning of the NAALC. Also, the information we were privy to during lunches,

²³⁸ QUIVY, R. and L. VAN CAMPENHOUDT, Manuel de recherche en sciences sociales, Éditions Dunod, Paris, 1995, pp. 164-165.

²³⁹ *Id.*

dinners, etc. with NAALC staff, as well as the general observations made by us while we spent time at the Offices, are considered to be direct observation. The information gathered and noted directly by us is a reflection of our own perceptions and understanding of the functioning of the NAALC as we witnessed while we were on site.

The primary objective of our conducting site visits at the three National Administrative Offices and the Secretariat was twofold : to gather information through both direct and indirect observation. First, as previously mentioned, being on site allowed for the **direct observation** of the workflow of each office. This way, we were able to form our own impressions of how things were being done and we got a first-hand look at the NAALC in action. Procedures were far more easily understood by witnessing them directly than they would have been had we simply read about them or asked others' opinions. Also, on site, we were able to establish and develop a certain rapport with NAALC staff. This rapport was essential to our project in that spending time with staff encouraged them to elaborate and explain more than they normally would have in a formal interview. It also gave them the opportunity to offer us additional information as it arose, and to discuss more casually certain issues that were not necessarily the subject of interview questions. The few days spent at each office also offered several opportunities to meet with staff in a more unofficial context, such as over lunches and dinners. These situations were ideal to gather supplementary information that may have been overlooked during interviews. As a result of the time spent on site, a significant part of the information gathered during our visits was collected through direct observation, outside of the formal interview setting.

Second, **interviews (indirect observation)** with persons in key positions at the NAOs and the Secretariat enabled us to gather opinions and information on the functioning of these institutions and on the achievements to date under the NAALC. The people who work in each of these offices have invaluable, first-hand experience with the types of requests and complaints that are received and the procedures followed to resolve specific issues. Furthermore, they have a vast knowledge of the workflow and the stages involved in the handling of the eight complaints received to date by the NAOs. These persons are key

players in the functioning of the systems established under the NAALC. They are the decision-makers whenever issues arise regarding labour rights in the three NAFTA countries, and their decisions affect the functioning of the system as a whole. For instance, the decision of the US NAO to hold public hearings in San Francisco into submission #9501 (Sprint) in February of 1996²⁴⁰ can have a strong impact on the outcome of this case as well as on the occurrence of similar cases in the future. The NAALC staff members have learned, from each past decision they have made, what will work in the resolution of future issues and what will not. Their experience guides their actions with each new issue that arises. They are able to identify the strong and weak points of the NAALC. This type of knowledge would have been impossible to obtain simply by reading the available literature pertaining to the side accord. As such, the information gathered by interviewing NAALC staff proved to be invaluable to our study.

Now that we have defined the types of observation used during our visits and explained the kinds of information we set out to attain, we must discuss the interviewing style that was adopted for all the interviews we conducted and explain with whom interviews were deemed important. We then will proceed with a detailed description of each of the site visits.

3.3.1 Interview style

In order to obtain as much information as possible on our research subject, we conducted open, unstructured interviews at the NAOs and the Secretariat, as well as at the Mexican ILO office. The main reason for conducting this type of interview was to allow our interlocutor to freely express his opinions on the issues at hand. We did not wish to restrict the flow of information by adhering to pre-determined questions or to a pre-determined structure. An open interviewing style allowed us to adjust our questioning

²⁴⁰ US National Administrative Office, North American Agreement on Labor Cooperation, Avis concernant une tribune publique sur la plainte #9501, Bureau des affaires internationales du travail, January 22, 1996. The procedures followed in this case and other reported cases will be discussed in detail in Chapter 4.

according to any important information brought up by the interviewee that we may not have foreseen. This technique gave us the flexibility required to add any last-minute details or themes to our research subject. With a semi-directive interviewing style, we were able to guide the interview simply by presenting the pertinent sub-topics and allowing the interviewee to elaborate freely on the subject.

With this in mind, we prepared a general questionnaire divided according to the sub-topics related to our research subject (see Annex 8). It is important to note that the specific wording of the written questions was not always how these questions were presented to the interviewee, nor does the questionnaire represent the exact order in which questions were asked. As much as possible, questions were presented in an open-ended fashion, and interviewees were asked to elaborate whenever necessary. Furthermore, questions were not limited to those included in the questionnaire, nor were all these questions presented to each interviewee. As a matter of fact, in most interviews, entire sections of questions were omitted in order to allow sufficient time to pursue the areas more related to the interviewee's expertise, responsibilities or experience. For example, when interviewing a staff member whose major responsibility is the coordination of cooperative activities, we focused on these questions and completely left out questions pertaining to, say, the EU or the ILO. On the other hand, when interviewing someone who has a vast knowledge of the functioning of the European system, we pursued this particular line of questioning.

Interestingly, we are able to say that in every interview we learned something new, as each interlocutor was able to enlighten us on the specific area of his or her responsibility. Also, although each interview may have concentrated on a different line of questioning, which varied according to the interlocutor's job function, many groups of questions were common to all interviews. This effort was made in order to ensure the compilation of a sufficient amount of information and opinions on certain important subjects. For example, all interviewees were asked their opinions on matters such as the need for economic sanctions, the possibility of harmonizing labour standards, the justification of existing critiques of the side accord, the progress made by the institutions to date, and the ability of

the NAALC to accomplish the objectives set out in its text. In addition, all interlocutors were asked their opinions on the relationship among the NAOs and between the NAOs and the Secretariat. As such, each interview contained a line of questioning common to all other interviews, plus a set of questions specific to that particular interview. Finally, it must be mentioned that, in all interviews, we encouraged our interviewees to express their opinions and not to limit themselves to the statement of known facts.

Another important point to mention regarding our interviewing style is the way in which we recorded the information collected. At the start of each interview, we explained the purpose of the meeting, the type information we were interested in gathering, how the interview would be structured, approximately how long it would last, etc. Each interlocutor was then told that we would be recording the interview on audio cassettes. It was clearly explained that this recording was solely to enable us to retain as much information as possible from the interview, and to permit us to listen to what was being said without worrying about writing every word on paper. We also mentioned that the taking of notes is often distracting to both the interviewer and the interviewee, and that the audio cassette would enable us to minimize the amount of writing we would have to do during the meeting.

Each person was assured that the cassettes would not be used to identify our interlocutor or to quote him in a way that he may not wish to be cited. Even though this was affirmed from the onset, each interlocutor was told that we would turn off the cassette recorder whenever he indicated that he was uncomfortable having his words taped. This option was offered to each interviewee in order to ensure that the information we were receiving was as unrestricted and exact as possible. We in no way wanted the presence of an audio cassette to limit the information that was being shared with us. Interestingly, the request to stop the recording was made on several occasions.

In addition to the audio cassette, we were also taking handwritten notes during the interviews. These notes were mainly brief annotations of key words, meant to highlight important issues when reviewing the meeting at a later time. Note-taking was kept to a minimum in all interviews, as it is a technique that may distract the interlocutor and cause the interviewer to miss potentially important information. We also kept in mind that the taking of notes often leads the interlocutor to elaborate on an issue when we are writing, assuming that it is important, and pass briefly over a subject if we are not taking note of it, thinking that it is of lesser importance.²⁴¹ Since we were minimizing the taking of notes during the interview, we made sure to write more elaborate summaries as soon as possible after the interview, to ensure that essential information was recorded and not forgotten. While we called the notes we took during an interview our 'official' notes, the detailed résumés we wrote after an interview were considered our 'unofficial' notes. Besides the more technical information that was given in the interview, these summaries also included our perceptions of the interlocutor's reactions, willingness to discuss certain issues, level of comfort with the tape recorder, knowledge of a particular subject, etc. This triple-recording of the interviews we conducted (i.e. official notes, unofficial notes and audio cassettes) ensures that our analysis of the data is based on exact data.

In terms of the language in which interviews were conducted, it is important to note that all interviewees were given the opportunity to express themselves in their own preferred language. Our ability to communicate in all three of the official NAFTA languages (English, French and Spanish) permitted the interlocutor to choose to respond in the language he was most comfortable with. This factor enabled all interviewees to give more elaborate explanations and thus facilitated the accumulation of data. The fact that our interlocutors were free to speak in their preferred language meant that responses were less restricted or limited by language difficulties and, as a result, the interviewee felt more at ease during the meeting. This also reduced the possibility that an interlocutor may unknowingly give inaccurate information due to his inability to explain himself sufficiently

²⁴¹ GORDEN, R.L., Interviewing - Strategy, Techniques and Tactics, Dorsey Press, Illinois, 1969, p. 177.

in a second (or third) language. A final detail to specify regarding our interviewing style is that, unless otherwise stated, all meetings had a duration of one to one-and-a-half hours.

3.3.2 Interviewees

Although it would appear ideal to conduct interviews with *all* those persons working within the institutions of the NAALC, this is not a realistic situation (nor would it be the most efficient way to gather the necessary information for our study). In fact, if we had proceeded in this way, we most likely would have found that information became repetitive or at least that it significantly overlapped with previously gathered data. Actually, this repetitiveness was already becoming evident with the number of interviews we conducted, which we saw as a positive sign demonstrating that we were reaching a saturation point with regards to the information we were looking for.²⁴²

During our site visits, we were sure to meet with all persons with whom interviews were deemed *essential* to the successful completion of our research project. Interviews with the directors (or ‘secretaries’) of the Canadian, Mexican and American NAOs and with the executive director of the Secretariat were imperative to our project, as these persons are the key decision-makers on all issues that may arise.²⁴³ For the NAOs, we needed to collect information on the two primary functions of these offices, namely cooperative activities and the handling of complaints (‘submissions’). As such, interviews with any persons involved in the planning of cooperative activities were essential, as were meetings with those individuals handling the six complaints of alleged non-respect of labour laws received to date. For the Secretariat, besides the executive director, interviews with the

²⁴² We were often finding, throughout the course of our visits, that many interviewees were of a similar opinion regarding matters such as the harmonization of standards, the ability of the NAALC to reach its objectives, etc. Although we were continuing to collect information specific to each job function, this type of information was not always relevant to the purposes of our study. It is for this reason that we stipulate that further interviews were not necessary. It is quite likely that we would have accumulated more job-specific data, while other more pertinent information would have become redundant. We will be discussing the information gathered from the interviews in more detail later on in this paper.

²⁴³ As we previously mentioned, there was no replacement Secretary at the Mexican NAO at the time of our study. However, we were fortunate enough to be able to interview not only the General Coordinator for International Affairs (of which the NAO is a part), but also the ex-Secretary of the Mexican office.

two other director positions (Finance/Administration and Labour Law/Economics Research) were considered to be imperative.

Although these were the interviews we had set out to conduct, we in no way limited ourselves to these persons. In fact, before beginning our site visits, copies of the proposal of the current study were sent to the Secretaries of the three NAOs and to a contact person at the Secretariat in Dallas. This way, each NAALC institution was aware of the focus of our study, the type of information we would be looking for, and the general questions we would be asking during interviews. This enabled the Secretary to offer suggestions as to those persons with whom interviews should be conducted. Furthermore, once on site, interviews with any other individuals able to contribute pertinent information were encouraged and welcomed.

3.4 Description of visits

When developing a calendar of visits to each office, we had to take into account the availability of those persons we wished to interview. Indeed, the calendar we proposed for the completion of our research project was influenced to a great extent by the availability of key persons at the NAOs and the Secretariat. Our initial goal was to complete all site visits before the Holiday season in December 1996, a goal which we were successful in attaining. In our opinion, the ideal situation for the conducting of site visits would have been the following : First, a visit to the Canadian NAO would start us off on possible themes to discuss while out of the country on other visits. Staff at this Office could offer suggestions on the type of information to collect while visiting other offices. The purpose of this would be to ensure that we covered all important areas while away. By doing so, we would decrease the chances of an essential piece of information being overlooked during a visit (as it would be impossible to return to an out-of-country office). After a brief initial visit at the Canadian Office, the next trip would be to the Secretariat in Dallas. It would be advantageous to visit the Secretariat before visiting the US and

Mexican NAOs. This way, the Secretariat could guide us on important matters to be analyzed during our visits to the national offices. The order in which we should visit the US and Mexican Offices could vary according to the availability of their staff. Finally, should any essential information come up during the following visits, it would be important to revisit the Canadian NAO upon our return.

In reality, for numerous practical reasons, the ideal situation we have just described was not how the visits were conducted. In fact, the order of site visits was decided upon based entirely on the availability of staff members, and was as follows : We began with a visit to the US NAO in Washington DC. Our stay in Washington began with our attendance at a conference on the NAALC at the Washington College of Law (refer to the list in Section 3.2 above). We then spent two days at the offices of the US NAO, where we conducted interviews and reviewed available documentation. Following the NAO visit, a meeting was arranged at the Washington ILO office, where an afternoon was spent reviewing pertinent literature.

After Washington, we visited the offices of the Secretariat in Dallas, Texas. We spent four days at the Secretariat, conducting various interviews and gathering important documents. From Dallas, we headed to Mexico, where one day was spent interviewing the staff of the Mexican NAO. No time was spent reviewing documentation at the Mexican NAO, for reasons which we will explain later on in this section. While in Mexico, we also visited the regional ILO office, where we conducted one interview and collected some important literature. Upon our return to Canada, we visited the Canadian NAO in Ottawa, where two interviews were conducted. As in Mexico, no time was spent examining documentation at the Canadian NAO. Reasons for this will be explained later. After the visit to the Canadian NAO, our last interview was with the ex-Secretary of the Mexican NAO, who is currently working at the Mexican embassy in Ottawa. This visit completed the field research portion of our project. In the following paragraphs, we describe each visit in further detail.

3.4.1 The US NAO, Washington DC

Our visit of the US NAO in Washington DC consisted of three formal interviews and a lengthy review of all available documents. The NAO has a documentation room that is open to the public, which contains copies of all types of literature directly or indirectly related to the side accord. Articles found here include publications and reports completed by the US NAO itself or by another NAALC institution; any documents regarding the submissions received to date; studies conducted by a NAALC body or by related institutions; economic and labour market statistics; legal information for the three NAFTA countries, and a wealth of other informative documents regarding labour- and trade-related issues. To review all the documentation contained in this library would require a much longer period of time than we had available to us. Any time available before or after an interview was spent in the documentation room, where we were able to amass a significant amount of information for our project. It is important to note that during the time spent in the library we were also able to obtain much information on policies and procedures, as well as on the developments of each submission, from the person in charge of the administration of this room. We do not consider these discussions to be a formal interview, however a considerable amount of up-to-date information was gathered in this way.

Besides the review of articles and reports in the documentation room, three interviews were conducted at the US NAO. The first meeting held was with the Secretary of the Office. At the end of the interview, the Secretary was able to reconfirm to us which persons would best be able to give us the information we were looking for. Based on the division of responsibilities at the US NAO, interviews were conducted with the Regulatory Specialist and the Cooperative Programs Specialist. The position of Regulatory Specialist is responsible for all aspects of the submissions received by the NAOs, while the Cooperative Programs Specialist handles all stages of cooperative activities, from the planning of an event to its follow-up. These two interviews were considered sufficient to provide us with a detailed overview of how the US Office handles the two main functions

attributed to the NAOs. As we will see later on in this paper, the division of responsibilities within the NAOs varies from country to country. For this reason, the titles of our interlocutors are different at each location.

3.4.2 The Washington ILO office

Before leaving for Washington, a contact was established with the Information Officer at the Washington ILO office, and a general explanation of our project was given. Arrangements were made to visit the ILO office while we were in Washington. Our visit included a brief meeting with the Information Officer, in which we were given copies of any pertinent documentation related to our research topic. We also had the opportunity to spend some time reviewing certain ILO reports. As we mentioned earlier on, the ILO visit was not part of our initial proposal for this project. However, this visit was convenient since we were in Washington, and any information gathered at the ILO office was considered to be an additional benefit for our study.

3.4.3 The Secretariat, Dallas, Texas

Our next site visit was to the offices of the Secretariat at Dallas. Four full days were spent conducting interviews and reviewing documentation. As was the case at the Washington NAO, the Secretariat has a reading room containing a wide variety of labour-related, economic and legal information, as well as copies of all NAALC publications and the minutes of the Ministerial Council meetings. In addition, an interesting selection of academic literature is also available. During our stay, any time not spent in interviews was spent in the documentation room.

Five formal interviews were conducted at the Secretariat, with persons holding the following positions :

- (1) Executive Director
- (2) Director, Labor Law and Economics Research
- (3) Senior Legal Counsel

- (4) Senior Economist
- (5) Manager of Operations

As we previously mentioned, one of the interviews that we had initially intended on conducting at the Secretariat was with the Director of Finance and Administration. However, the person holding this position had recently left the Secretariat and no replacement had been named at the time of our visit. Despite this fact, since the individuals in the five positions we interviewed represented a wide variety of responsibilities at the Secretariat, we were able to obtain an excellent overview of its functioning.

3.4.4 The Mexican NAO, Mexico City

Our stay at the Mexican NAO was the shortest of all our visits to NAALC institutions. Three interviews were carried out consecutively, in one half-day visit of the Office. Persons interviewed were the General Coordinator for International Affairs, the Director for Political Affairs and the Director for Labour Cooperation. The structure of the Mexican NAO is quite different from that of its sister offices, and merits a particular mention at this point (refer to the organizational chart in Annex 9). The NAO is one of two branches of the General Coordination for International Affairs (GCIA) at the *Secretaría del Trabajo y Previsión Social*, the other branch being the General Direction for International Labour Affairs. Although the NAO consists of just two full-time professional positions, employees of the other branch of the GCIA are regularly and quite heavily involved in the affairs of the NAO. In fact, only one of the three interviews we conducted was with a full-time NAO employee - the Director for Labour Cooperation.

The General Coordinator of International Affairs is the head of the GCIA as a whole, and the NAO is one of his two main areas of responsibility. Our interview with this person was essential, as the Secretary of the Mexican NAO had left the position and a replacement had yet to be named at the time of our visit. As we stated earlier, we were

eventually able to arrange a meeting with this individual, who is currently working at the Mexican Embassy in Ottawa. It is unfortunate that we were only able to interview one of the two full-time NAO employees. This is explained by the fact that the second person was out of the country for a meeting with the Canadian and US NAOs. Furthermore, a meeting with the NAO Secretary's equivalent in the other branch of the GCIA would have enhanced our visit, but this individual was away from the office at the time. As we can see by this brief description, the Mexican NAO's structure is quite complicated. We will be discussing this factor in more detail in the analysis section of this paper.

The complicated structure of the GCIA is perhaps one factor that explains our short visit of the Mexican NAO. A second reason for this may be the small number of full-time NAO positions and the number of absent employees. In fact, the three interviews we conducted made up the entire group of available persons handling NAALC-related issues. A final element influencing the short length of time spent at the NAO is the fact that the Mexican Office has no public documentation room or library. For this reason, unlike our visits of the US NAO or the Secretariat, we could not spend any time reviewing documentation on site. In any event, the number of publications or reports done by the Mexican NAO is far less than that of its US counterpart, which may explain the absence of a need for a reading room. Despite this fact, we were still able to obtain copies of existing documents at the Office.

3.4.5 The Mexico City ILO Office

As was the case in Washington, the visit of the Mexican ILO office was arranged only once our trip to Mexico was confirmed with the NAO. Although the Mexican ILO visit was initially considered to be supplementary to our field research, this meeting was in fact extremely informative. One formal interview and other less formal meetings were conducted with the Specialist for Socio-Laboural Issues. The main subject of these meeting was the ILO's policies and procedures regarding the supervision and enforcement of the institution's international labour standards. The information gathered at the

Mexican ILO office is invaluable to our discussion of using the ILO's labour standards on NAFTA territory as an alternative to the side accord. The other interesting type of information obtained at the ILO office is regarding the relationship it has with the Mexican NAO in terms of the sharing or exchange of data. This will be discussed in more detail later on in this paper.

3.4.6 The Canadian NAO, Ottawa

Our visit to the Canadian NAO was brief but very informative. Two formal interviews were conducted on two separate days. These meetings were with the Director of the NAO (the equivalent of the Secretary at the US or Mexican Offices) and with a Senior Policy and Program Officer (one of three positions with the same title). Although only two interviews were conducted at the Canadian Office (compared to three at the US and Mexican NAOs), the information accumulated there was more than adequate for our needs. The reasons for this may be that (1) the interview with the Director lasted over two and a half hours, significantly longer than any other interview we conducted throughout our fieldwork, and (2) we have had several occasions in the past to meet persons working at the Canadian NAO. As such, our visit to this Office was not the first opportunity we have had to collect information related to our research subject.

As we will see in our analysis of the NAALC, the situation of Canada with regards to receiving or being the subject of a submission is quite different from that of its two counterparts. The main reason for this particularity is that the Canadian political structure gives the provinces jurisdiction over most labour law issues.²⁴⁴ In fact, labour laws tend to vary somewhat from province to province. As a result of this structure, the Canadian NAO has had to specify the terms of federal-provincial relations and procedures with respect to NAALC-related issues. Needless to say, it was imperative that we obtain information regarding this federal-provincial situation during our visit to the Canadian

²⁴⁴ MORPAW, *supra* note 64, p. 14.

NAO. Our meeting with the Senior Policy and Program Officer served this purpose and an important amount of data was collected.

Finally, there is no 'official' public reading room or library at the Canadian NAO. However, the Office has a significant amount of documentation available to the public, and a request may be made to review files on hand at the NAO. In any event, since the Canadian NAO was the last of the NAALC institutions we visited, we no longer had a need to collect much documentation on site. Copies of specific documents we required were obtained during the interviews.

3.4.7 The Mexican Embassy, Ottawa

As a final element to our fieldwork, a meeting was arranged with the ex-Secretary of the Mexican NAO, who is currently working at the Mexican Embassy in Ottawa. This interview was not part of our original proposal, but became an essential element in our methodology since no replacement Secretary was in place at the Mexican NAO. The importance of this interview is also reflected in the fact that our interlocutor was the first and only person to hold the Secretary's position and therefore was able to contribute a significant amount of valuable information. Furthermore, the conducting of this interview also lends consistency to our procedures, in that we were able to obtain the opinions of the highest person of authority in each NAALC institution's hierarchy.

In sum, a total of fifteen formal interviews were conducted throughout our field research. All interviews lasted one to one-and-a-half hours, with the exception of that with the Director of the Canadian NAO, which was significantly longer. In all cases, except that of the Mexican ILO, the interviews were recorded on audio tape. In several cases, however, the interlocutor requested that the tape be shut off when discussing issues that may be considered sensitive. This option was offered to all interviewees to minimize the chances of limiting the type of information to which we would be given access. Whenever possible, all available documentation was reviewed. In addition to interviews, the

overwhelming amount of pertinent documents, as well as the numerous contacts with NAALC staff outside of the formal interview setting, greatly contributed to the volume of data gathered during our fieldwork. Since we now have completed our description of all aspects of our methodology, it is time to move on to our analysis of the information we accumulated through our research.

CHAPTER 4. ANALYSIS OF THE NAALC

In the first part of this paper, we conducted a complete review of the literature on concepts related to our research topic. We also discussed the theoretical framework on which our study is based. The literature review and the look at our theoretical framework were necessary in order to put the reader into context, to provide him or her with a solid understanding of the focus of our interest. Now that we have built a solid theoretical base for the study of the NAALC, let us move on to the analysis of its functioning. We now have a firm grasp on the theory and we attempt, in this chapter, to use this knowledge in our analysis of how the side accord is working in 'real life'. This chapter is divided into four sections. First, we provide a look at the various structures created by the side accord (the Secretariat and the NAOs). We discuss the role these institutions have taken on, the division of responsibilities within each institution, the elements specific to each NAO, and the balance between the different Offices. Second, we outline the cooperative activities organized by the institutions to date, the themes along which these activities have been planned, and the balance between the NAOs with regards to the planning and/or hosting of activities. Third, the eight public submissions reviewed to date by the NAOs are analyzed in terms of the handling of each case by the Offices. Finally, we consider the most often heard criticisms of the NAALC and offer some arguments for or against these remarks.

4.1 Structures

The side accord calls for the establishment of certain institutions on the territory of the North American Free Trade Agreement. Part III (Articles 8 to 19) of the NAALC outlines the establishment of the Commission for Labor Cooperation (CLC, consisting of the Council of Ministers and the Secretariat) and three National Administrative Offices (NAOs). A brief definition of each of these institutions was given in Section 2.2 of this paper. In the present section, we discuss the role that each institution plays in the overall structure. We look at the Secretariat and each NAO in terms of the division of

responsibilities at each Office as well as the sharing of tasks among the institutions. With regards to the NAOs, we discuss some of the important differences evident in the way they function, differences that may or may not be due to the culture of the individual country in which an Office is located. Also, we consider some of the challenges facing each NAO as it works towards the accomplishment of the NAALC's objectives. As for the Council of Ministers, we will not discuss this structure in further detail, as a permanent structure with ongoing responsibilities is not set up (nor will it be). Suffice it to say that, to date, the three Labour Ministers or their designees have been meeting more or less once a year to discuss various elements of the functioning of the side accord.²⁴⁵ The Ministers have also concurred in the context of public submissions, when an NAO has requested ministerial consultations on a specific case. Although the basics of the mandate, responsibilities and procedures of the Secretariat and the NAOs are found in the text of the side accord, much of the information brought out in this section was derived from our site visits and interviews.

4.1.1 The Secretariat

Articles 12 to 14 of the NAALC pertain to the setup and responsibilities of the Secretariat. The Secretariat, unlike the country-specific NAOs, is made up of members of all three NAFTA countries in equal numbers. This trilateral makeup is intended to reflect the neutrality of the Secretariat. In fact, with regards to the neutral nature of the Secretariat, the side accord specifies the following :

“In the performance of their duties, the Executive Director and the staff shall not seek or receive instructions from any government or any other authority external to the Council. Each Party shall respect the international character

²⁴⁵ Information obtained from the offices of the Secretariat. Meetings thus far include the following: Meetings of the Ministerial Council - March 21, 1994 (Washington DC), April 28, 1995 (Ottawa), May 15, 1996 (Mexico City), and September 18, 1997; Meetings of Council Designees - February 24-25, 1995 (Mexico City), March 8, 1995 (Dallas), April 19, 1995 (Toronto), July 26, 1995 (Mexico City), September 26-27, 1995 (Dallas), January 23-25, 1996 (Dallas), April 11-12, 1996 (Dallas), and December 5, 1996 (Dallas). For a review of the topics discussed in each of these meetings, see the 1995 Annual Report of the Commission for Labor Cooperation, pp. 6-8 and the 1996 Annual Report pp. 3-4.

of the responsibilities of the Executive Director and the staff and shall not seek to influence them in the discharge of their responsibilities.”²⁴⁶

As this article states, the Secretariat is considered to be an international structure, equally representing the three member countries. It is not to be influenced by any one of the three countries and must take its orders only from the Council of Ministers, where the three Ministers have equal status and must make decisions by consensus.²⁴⁷ Although located in the United States (Dallas, Texas), the Secretariat is not an arm of the US government, nor of any other federal government. The nationalities of its staff clearly reflect the international nature of the Secretariat, as Mexicans, Canadians and Americans work together at the Dallas offices.²⁴⁸

The Secretariat is headed by an Executive Director, named by the Council of Ministers, who then selects the rest of the staff (with the approval of the Council). All staff of the Secretariat, including the Executive Director, are appointed for three-year terms, with the option for renewal for one additional term. The first Executive Director of the Secretariat is a Canadian, and the position will continue to rotate between nationals of each country.²⁴⁹ As we approach the end of the first three-year term, it will be interesting to see how many, if any, staff will remain in position for a second term. At time of writing, when questioned in interviews, most staff were undecided about staying on for a second term. Although the side accord fixes the initial number of positions at fifteen²⁵⁰, only 12

²⁴⁶ *NAALC*, *supra* note 79, Article 12, paragraph 5.

²⁴⁷ *Id.*, Article 8, paragraph 6.

²⁴⁸ The Secretariat officially opened in Dallas on September 27, 1995.

²⁴⁹ The whole situation of deciding from which country the Executive Director would come was somewhat of a game of politics between the three countries. As the three nations desired to maintain a balance of power in the context of NAFTA, the leaderships and locations of the Labor Commission and the Environmental Commission (established under the two NAFTA side accords), as well as of the soon-to-be inaugurated Free Trade Commission, were spread evenly among the countries. As such, a Canadian heads the Labor Secretariat in Dallas, a Mexican heads the Environmental Secretariat in Montréal, and an American will be heading the Free Trade Commission in Mexico City (to be officially opened in late 1997). Interestingly, the Mexican head of the Environmental Secretariat is nearing the end of his 3-year term, and has just accepted to sign on for a second term. This information was obtained from interviews at the Labor Secretariat in Dallas and from sources at the Environmental Secretariat in Montréal.

²⁵⁰ *NAALC*, *supra* note 79, Article 12, paragraph 3.

positions were created for the first term of the Secretariat's functioning. The positions currently active at the Secretariat are as follows :

- 1 - Executive Director (Canada)
- 2 - Director, Labor Law and Economics Research (USA)
- 3 - Director, Finance and Administration (Mexico)²⁵¹
- 4 - Senior Legal Counsel (Mexico)
- 5 - Senior Economist (Canada)
- 6 - Senior Economist (Mexico)
- 7 - International Labor Advisor (USA)
- 8 - International Labor Advisor (Canada)
- 9 - International Cooperative Activities Coordinator (Mexico)
- 10 - Manager of Operations (USA)
- 11 - Financial Officer (USA)
- 12 - Research Documentation Coordinator (Canada)

It is important to note that the NAOs do not report to the Secretariat as in a hierarchical structure. Rather, the Secretariat and the three NAOs work together as an *“interconnected network of consultation and cooperation in the furtherance of the NAALC objectives.”*²⁵² The NAALC creates institutions both at the national level (NAOs) and at the international level (Secretariat), but neither of these is considered to be the superior of the other. Although decisions made either at the Secretariat or the NAO level do not have to be approved by the other level, staff in all institutions affirmed that there is an ongoing communication of ideas and decisions between the Secretariat and the Offices. Each institution notifies the others of its decisions, procedures, etc.

The Secretariat has two main functions : information and administration. First, this institution has the responsibility to provide information to the public on labour-related issues. Article 14 pertains to the various reports and studies to be completed by the

²⁵¹ The position of Director, Finance and Administration was vacant at the time of our visit, as the occupant had recently left the Secretariat. Because the occupant of this position was from Mexico, the replacement must also be a Mexican, in order to maintain the balance in the number of staff from each country. No candidate had been named at time of writing.

²⁵² Commission for Labor Cooperation, Annual Report, 1995, p. 2.

Secretariat. According to this article, the Secretariat must periodically publish reports on labour law, labour market conditions and human resource development issues on the NAFTA territory. Where it does not have the particular expertise necessary to complete a study, the Secretariat may engage independent experts on the matter.²⁵³ In short, the Secretariat was qualified during our visits as being the 'think tank' of the NAALC's institutions. The second function of the Secretariat is administrative. Article 13 outlines the various administrative functions of the Secretariat, such as the assistance to the Council in its functions, the development of the annual plan of activities and the preparation of the Commission's budget.²⁵⁴

The Secretariat has undertaken some interesting studies since its official opening in September 1995. To date, three studies are either completed or nearly completed, and should be available in the near future : (1) a Comparative Labor Law Study, (2) a Comparative Labor Market Study, and (3) a Standard and Advanced Practices Study. The objective of the Labor Law Study is to produce a description of the labour laws in each of the three countries. This study is to be organized according to the eleven labour principles, with reference to the six objectives of the side accord.²⁵⁵ The intention of the Secretariat is to make available a document that compares and contrasts the labour law systems of the three countries. Work on this project began in late 1995 and the published document is expected out some time in 1997.

The second project of the Secretariat, the Labor Market Study, also began in late 1995. This study compares some important labour market themes and indicators on the NAFTA territory. An interesting aspect of this report is that it contains certain statistics which are not common to many economic studies, such as underemployment, non-standard work, the informal sector, low wage/low skill versus high wage/high skill job distribution,

²⁵³ NAALC, *supra* note 79, Article 14, paragraph 2(b).

²⁵⁴ With regards to the budget of the Secretariat, Article 47 of the NAALC states that each of the member countries must contribute equal amounts to the annual budget of the Commission for Labor Cooperation.

²⁵⁵ Web site of the Secretariat on the Internet.

working time arrangements, etc.²⁵⁶ The objective of this study is to develop a data bank which can be referred to on a regular basis for information on the state of the North American labour market.²⁵⁷ A preliminary study of this project was made available in May 1996.

The third study initiated by the Secretariat pertains to standard and advanced labour practices in the garment industry. The study looks at companies located on NAFTA territory which are engaged in trade in North America. The report plans to discuss the differences between companies with advanced versus standard practices in areas such as employee consultation, methods of communication, worker training, and work groups. The objective of this study is to “*present advanced labor practices of successful firms (...) in North America (...), to demonstrate that competitiveness and good labor practices can go together, and to promote knowledge of best practices that are in use.*”²⁵⁸ The study will compare these ‘advanced’ practices with the ‘standard’ labour practices which prevail in the garment industry. Staff of the Secretariat have established contacts in companies located in all three countries and certain site visits have been conducted, however work on this project is not yet completed. The Secretariat plans to make this study available some time in late 1997.

Besides these three studies, the Secretariat undertook a fourth project, which is actually the first special study carried out at the request of the Council of Ministers. As a result of ministerial consultations conducted in the review of the Sprint public submission²⁵⁹, the Secretariat has recently completed a study of the effects that sudden plant closures may have on the right to freedom of association.²⁶⁰ This study comes at a time when company closures are much more frequent than in the past, and looks at incidences of plant closings

²⁵⁶ Commission for Labor Cooperation, Annual Report, 1995, p. 13.

²⁵⁷ Web site of the Secretariat on the Internet.

²⁵⁸ Id.

²⁵⁹ This submission concerns the sudden closing of a Sprint plant in San Francisco and the resulting layoffs of over 200 workers. We will be discussing this case later on in the section on public submissions.

²⁶⁰ Plant Closings and Labor Rights - The Effects of Sudden Plant Closings on Freedom of Association and the Right to Organize in Canada, Mexico and the United States, Commission for Labor Cooperation, Bernan Associates, 1997, 240 pp.

as a means to avoid unionization. The project examines each country's official records concerning the enforcement of labour laws on this subject.²⁶¹ Also analyzed is each country's legislation specific to this issue. The Secretariat hopes that this study will bring to light any evident trends on NAFTA territory with regards to plant closures as a union avoidance measure. This issue is considered to be important in the current context of economic difficulties that companies are facing. The published project was made available in 1997.

Publication issues and other administrative tasks delayed the availability of these studies far beyond the dates that were initially set as objectives. According to interviews conducted at the offices of the Secretariat, each of these projects has required a considerable amount of time and effort on the part of Secretariat staff. As staff members immerse themselves in the development of these types of studies, it becomes more and more evident that the resources of the Secretariat are not sufficient to undertake projects that require such great amounts of research and data collection. For this reason, whereas these four projects were completed for the most part by Secretariat staff, future studies will have to rely more heavily on contracting out major parts of the research, especially regarding the collection of data.²⁶²

Secretariat staff has already been working on establishing contacts in each of the three countries for the purpose of contracting out elements of its data collection. Contacts in each country are necessary in order to compile country-specific data for each study, as it is the intention of the Secretariat to always include information on all three countries in any study it conducts. This is evident, for example, in the study on sudden plant closings. The request by the Council of Ministers resulted from issues arising in the US, but the study will cover the handling of this issue by all three countries. The Secretariat always attempts

²⁶¹ Records from Canada's federal and provincial labour boards, the US's National Labour Relations Board, and Mexico's Conciliation and Arbitration Boards are analyzed for this project.

²⁶² The need to increasingly contract out parts of future studies by the Secretariat is an issue that was raised during several of the interviews conducted at the Dallas offices.

to cover each country's labour laws and administration in order to ensure that there is a learning in each country about how its trading partners handle similar issues.

In addition to the four studies conducted thus far, the Secretariat recently organized its first major seminar since its establishment. On February 28 and March 1, 1997, the Secretariat held the first North American Seminar on Incomes and Productivity. The seminar was held in Dallas and attended by representatives from academia, government and the private sector of each NAFTA country. The conference focused on the link between incomes and productivity, with the central theme being that as productivity increases, so too should incomes. The intention of the Secretariat is to offer a very broad look at this subject in this first meeting, and then build on the issues raised at this seminar during future conferences.²⁶³ Because of the recent date of this seminar, no documentation pertaining to the issues raised had been made available at the time of writing of the present paper.

As can be seen by this overview of the studies and seminars conducted by the Secretariat, it is obviously too soon to be able to measure the precise impact that these events may have on the general public or, more particularly, on labour and labour legislation. The Secretariat's studies have only recently been made available to the public, and no follow-up information on the Incomes and Productivity seminar has yet been issued. Without the reports themselves or any follow-up information on the seminar, the accomplishments of the Secretariat cannot be evaluated. Public reaction to the Secretariat's projects cannot yet be measured, nor can the degree of learning of the three governments. One thing is certain though, studies and conferences such as those already organized by the Secretariat can definitely increase the knowledge of government, employers and workers in each country. Not only do these studies provide information on a particular country's legislation and administration of labour law and labour market issues, they also allow each country to learn of alternative ways to handle these issues. This way, all three countries

²⁶³ *Labor in NAFTA Countries*, Bulletin of the Commission for Labor Cooperation, Vol. 1, n° 3, October 1996, p. 3.

can benefit from the disseminated information, by learning what works and what doesn't in labour law and administration issues. Since the spreading of information is a major objective of the NAALC²⁶⁴, and one of the main functions of the Secretariat in particular, it is evident that the completion of studies and conferences is a major step towards the accomplishment of goals of the side accord. The next logical step, of course, is a wide circulation of the published reports. Only then will the true impact of the studies be clear.

One final element to note about the Secretariat is that it maintains a documentation room on premises, containing academic literature on labour-related issues, legislative and economic information on the three NAFTA countries, as well as documents pertaining to the treatment of public submissions and the organization of cooperative activities. At the time of our visit, this library was not yet fully organized and staff were in the process of developing a classification and recording system for the documents it contained. The Secretariat was also in the process of developing its own web site on the Internet, so that the general public can have quick, easy access to a variety of information on the NAALC and its institutions. This web site is functioning at the moment, but with a limited amount of available information. As is the case with its seminars and studies, the Secretariat's library and web site are also a means of attaining the NAALC's objectives of the dissemination of information and the fostering of transparency in labour administration issues.

In addition to the Secretariat, the side accord calls for the establishment of three national-level offices. Paragraphs 15 and 16 of the NAALC cover the structure and functions of the NAOs. The major responsibility of the NAOs is twofold : the review of public submissions regarding alleged violations of labour law, and the organization of cooperative activities. The review of labour law issues by an NAO does not necessarily have to be requested in a public submission. An NAO may initiate a review itself. In reality, however, all reviews completed by the NAOs thus far have been rooted in public submissions. As opposed to the neutral, international nature of the Secretariat, the NAOs

²⁶⁴ NAALC, *supra* note 79, Article 1.

are directly linked to the federal government of the country in which they are situated.²⁶⁵ Furthermore, whereas the Secretariat gets its funding from all three nations, each country is responsible for the operation and costs of its own Office. Because the setup and administration of each NAO is the responsibility of its federal government, there are significant differences in the way each Office is run. Our visits of each NAO offered us an interesting view of how the Offices vary in their functioning.

4.1.2 The US NAO :

The US NAO in Washington DC is part of the Bureau of International Labor Affairs at the US Department of Labor. The Office is the biggest, and dare we say busiest, of the three NAOs. We hesitate somewhat to declare this Office the busiest, as each NAO has its own viewpoint on this matter and offers in argument the particularities of its own situation. The fact of the matter is that the US NAO is perceived by many in the field to be 'where the action is', or at least has been, since the establishment of the Offices, mainly because all but one of the public communications to date have been submitted to this Office. The NAO consists of eight staff at the present time (including one support staff - receptionist - position), although some of these persons indicated during our visit that the official number of positions authorized by the US government was actually as high as thirteen. The positions at the US NAO are as follows :

- 1) Secretary
- 2) Deputy Secretary
- 3) Regulatory Specialist (i.e. public submissions)
- 4) Cooperative Programs Specialist
- 5) Information Officer
- 6) Confidential Assistant (to the Secretary)
- 7) Program Assistant
- 8) Receptionist

²⁶⁵ *Id.*, Article 15, paragraph 1.

One interesting feature of the division of responsibilities at this Office is that there is one position for each of the two main functions of the NAOs, namely cooperative activities and public submissions. As we will see, this separation of responsibilities between cooperative activities and public communications is not so clearly defined at the Mexican or Canadian Offices. At the US NAO, the Regulatory Specialist handles all aspects of public submissions process, whereas the Cooperative Programs Specialist handles anything related to cooperative activities. The responsibilities of these two positions rarely overlap. Each person thereby becomes a specialist in his or her own area, but does not follow closely the tasks of the other. The obvious potential problem with this setup is that there is only one person who knows the details of what is going on in each area. When the Regulatory Specialist is unavailable or absent, no other person is able to say for sure where exactly the Office is in the treatment of a particular submission. The same reasoning goes for the handling of cooperative activities. On the other hand, the fact that the same person deals with every new issue that arises (either in submissions or activities) lends a certain stability to how each situation is approached. The NAO's treatment of each new event can also benefit from the individual's learning process, as he is able to build on his acquired knowledge in the handling of past cases or activities.

Another interesting characteristic of the US NAO is that there is an elaborate information library on the premises which is accessible to the public. This public documentation room contains a wide variety of reports on the three countries' labour laws and other labour-related topics, labour market statistics, as well as all public documents related to the submissions received and the cooperative activities organized by the US NAO itself or by Mexican or Canadian counterparts. There is also a CD ROM in the documentation room where the public can have access to the texts of the various labour laws of the NAFTA countries. Moreover, the US NAO handles numerous requests for information which are received by mail, and promptly sends out any documentation by post. Furthermore, the US Office has set up an impressive fax-on-demand system, where the general public can call the NAO and have any document recorded in the Office's listings faxed immediately to them. This system has required a significant amount of organization on the part of NAO

employees to classify and register every document on file and to answer public requests for information. The public information system at the US NAO has thus far been quite busy.²⁶⁶ Obviously, for such a public information system to function smoothly, the US NAO has had to assign one full-time employee, the Information Officer, just to its management and administration. This type of position does not exist at the other two NAOs, which do not operate such a public information system.

Because eight out of the nine public communications received to date were submitted to the US NAO, the Office obviously has had to put much effort into the handling of these complaints, more so than the other two NAOs. Nevertheless, all staff interviewed insisted that time and energy are divided equally between public submissions and cooperative activities. Furthermore, interviewees also noted the need to maintain this balance between submissions and activities, as both are equally important functions of the side accord. This was the same opinion obtained at all NAOs and at the Secretariat. However, the fact that most of the submissions have been handled by the US NAO makes it that much more important for this Office not to neglect cooperative activities. In this respect, that one position at the US NAO continues to handle exclusively cooperative activities²⁶⁷ may well serve to ensure that the organization of these activities is not put aside to allow efforts to be concentrated solely on submissions. Interestingly though, the comment was often made that there was a significant need for more staff. When questioned about where this need was the strongest, the handling of submissions was the area mentioned.

According to the NAALC, each Party “*may convene a national advisory committee, comprising members of its public, including representatives of its labor and business organizations and other persons, to advise it on the implementation and further elaboration of this Agreement.*”²⁶⁸ In accordance with this article, the US NAO has established a National Advisory Committee (NAC) consisting of twelve members from

²⁶⁶ In the four months from August to December 1996 for example, the fax-on-demand alone had received 493 calls (at the time of our visit).

²⁶⁷ We will discuss each NAO’s organization of cooperative activities more specifically in the following section of this chapter.

labour, business and academia. Committee members are from all across the country and meet formally upon the request of the Secretary of the US NAO. Although the Chair of the NAC could call meetings at her own initiative, because the Committee is funded by the NAO, formal meetings of the Committee outside of a specific request by the Secretary are not likely.²⁶⁹ At the time of our visit, the NAC had met twice and a third meeting was scheduled to take place the following month.

In the opinion of the Secretary of the NAO, the NAC plays a very important advisory role in the actions and decisions of the US Office. The Chair of the Committee is in regular contact with the NAO Secretary and coordinates the communication of information to and from other NAC members. The US NAO's advisory committee is well established, with a set Charter and bylaws governing its functions. Consulting with its Committee permits the NAO to consider the opinions of labour, business and academia in its decision-making. In this way, representatives of the various sectors of society have the opportunity to influence the decisions made by the NAO.

In sum, the US NAO seems to be quite well organized and procedures are well in place. In general, all staff met with during our visit expressed their satisfaction with the functioning of the Office and the progress made since its establishment. Of course, the call for more staff heard at the US NAO is not uncommon, not only within the other structures of the NAALC but elsewhere in the private and public sectors as well.²⁷⁰ However, it is obvious that the US NAO has been heavily immersed in the treatment of public submissions, and employees clearly state that the possibility of the NAO itself initiating a review of labour issues (i.e. not waiting for an issue to be raised by a public submission) is rather minimal. At a recent conference, when questioned as to why the NAO has never

²⁶⁸ NAALC, *supra* note 79, Article 17.

²⁶⁹ Information obtained from interviews at the US NAO.

²⁷⁰ Calls for additional staff are not surprising in today's economic environment with its context of downsizing, which seems to be so widespread across all sectors.

initiated a review without waiting for a public submission to do so, the Secretary of the US NAO responded that the Office simply has not had the time.²⁷¹

In any event, the US NAO seems to be doing quite well with the resources it has, as is evidenced in part by its thorough handling of the submissions process. For every case reviewed by the NAO, detailed reports were completed by the Office. For example, in the one case that has gone the furthest in the review process thus far, Sony²⁷², the US NAO not only issued a public report after its review, but also after the ministerial consultations. Moreover, a follow-up report on the Sony submission was completed by the Office approximately 18 months after the ministerial consultations agreement. The documentation completed by the US NAO in the submissions process goes well beyond the requirements outlined in the NAALC.²⁷³ Certain comments made by the Secretary of the US NAO during our interviews reflect the attitude behind the thoroughness of the Office's procedures: "*The US NAO wants to have a serious impact on labour standards and labour rights. The US NAO is very serious; it's not just for show. (...) Even a report on the ministerial consultations for Sony was done by the US NAO, so we've shown how serious we are (...).*" Finally, when asked if the side accord is functioning in the attainment of its objectives, the Secretary replied that, "*at the US Office, it is definitely functioning*".

4.1.3 The Mexican NAO :

As we mentioned in the methodology chapter of this paper, the Mexican NAO in Mexico City is one of two branches of the General Coordination for International Affairs (GCIA) at the *Secretaría del Trabajo y Previsión Social* (STPS, Secretariat of Labour and Social Welfare), the other branch being the General Direction for International Labour Affairs (GDILA). Because its structure is complex and the division of NAALC responsibilities

²⁷¹ At the conference on *The North American Agreement on Labor Cooperation : Linking Labor Standards and Rights to Trade Agreements*, (Washington College of Law, American University and the US NAO), Washington, DC, November 12, 1996.

²⁷² The Sony case will be discussed in detail later in this chapter.

can be confusing, we provide a partial organizational chart of the GCIA in Annex 9. As we can see from this diagram, there are only three professional staff positions at the Mexican NAO : a Secretary, a Director for Labour Cooperation (handling mainly cooperative activities), and a Director for Special Affairs (handling mainly public submissions). There is also one support (administrative) position. Of the three professional positions, one (the position of Secretary of the NAO) had been vacant for several months during our research period and was only filled in February of 1997 (and once again later that same year). At the time of our visit, the previous NAO Secretary (the first one since the Offices had been created) had left the position to work at the Mexican Embassy in Canada. As such, interviews were conducted with this individual in his new position at the Mexican Embassy, and with the head of the GCIA as a whole, who had taken over most decision-making that would normally be the responsibility of the Secretary.

Due to the small number of staff working directly for the NAO, positions in the other branch of the GCIA are inevitably and regularly highly involved in the workings of the NAO. In fact, it was estimated during our visit that the head of the GDILA (the equivalent of the Secretary of the NAO) invested approximately 70% of her time on NAO-related affairs.²⁷⁴ Moreover, one of the interviews we conducted was with the Director for Political Affairs at the GDILA, who claimed that about 90% of her time was spent on NAO issues. For an employee who does not actually work for the NAO, this individual seemed to have quite a firm grip on NAO matters. In fact, it was from this individual that we were able to obtain most of our information on the overall workflow of the Mexican Office!

Throughout the period that the position of Secretary at the NAO was vacant, the General Director of the GCIA, Luis Miguel Díaz, ran the NAO and the Office's two staff members reported directly to him. Interestingly enough, both the General Director himself and the

²⁷³ See procedures outlined in Articles 16(3) and 21 of the NAALC.

²⁷⁴ Interestingly, as an update to our discussion of the Mexican NAO, the head of the GDILA recently replaced Luis Miguel Díaz as General Coordinator of the GCIA.

employees interviewed claimed that the absence of a Secretary had not had much of an impact on the functioning of the NAO, as the General Director was able to handle any issues that would normally go to the Secretary. On the other hand, as at the US NAO, comments were made as to the need for more staff. Although interviewees claimed that the absence of a Secretary had little impact on the functioning of the Office, it seemed as though procedures were not fully established and the responsibilities of each position were unclear. This was most evident in the fact that two employees of the GDILA, whose positions were not intended to handle matters pertaining to the side accord, spent most of their time on NAALC-related issues. Furthermore, although the two NAO staff positions were intended to be divided according to cooperative activities and submissions, the workload often required them to assume a certain jack-of-all-trades function. Also, according to the staff, events such as cooperative activities held in Mexico could be better organized if the NAO had more resources. Without additional human resources, it would be very difficult to better organize the procedures and workflow at the Office. In short, it seems as though the Mexican Office was lacking a proper organizational structure and clearly-defined responsibilities for each position.

The minimal resources at the Mexican NAO was not only made evident by the small number of employees, but also in the facilities available. When compared to the number of publications put out by the US NAO, the documentation of the Mexican NAO was quite limited. This is a probable reason for the lack of a public reading room like the library at the US Office. At the US NAO, when we were not conducting interviews, we were able to spend a significant amount of time reviewing documentation in the library. This time spent on site allowed us to observe the workflow and talk with staff outside of the interview context, and greatly increased the amount of information we were able to gather during our visit. On the other hand, the lack of similar facilities at the Mexican NAO meant that there was no place to spend time reviewing documentation or otherwise observing the functioning of the Office. This also means that the NAO facilities could obviously not be open to the public. Our three interviews were conducted one

immediately following the other and our visit of the NAO was thus completed. The lack of facilities and resources made a longer visit impossible.

Despite the small number of staff at the Mexican NAO and its limited facilities, it is important to note that the Office has established a National Advisory Committee to counsel it on the implementation and elaboration of the side accord. The eight-member Committee comprises four representatives from labour and four from employers, and convenes at the request of the head of the GClA. The NAC has had two formal meetings thus far, but Committee members are in regular contact with the *Secretaría del Trabajo y Previsión Social* (STPS). According to our interviewees, the NAC plays a highly important role in determining the actions of the NAO in its interpretation of the side accord.

With regards to time spent on cooperative activities versus on public submissions, the comments of the Mexican staff were similar to those of the US employees. In fact, interviewees at the Mexican Office claimed that time and energy were equally spent on both of the primary responsibilities of the NAOs. Moreover, as did their counterparts at the US NAO, all persons interviewed affirmed that the two functions *should* receive equal attention. An interesting observation on this balance was noted by the General Coordinator of International Affairs. From his point of view, “*public submissions actually are in themselves a form of cooperative activity, since the goal of the procedure is to help a country in the administration of its labour laws and the respect of workers’ rights*”.²⁷⁵ The General Coordinator went on to explain that Annex 39 of the NAALC reflects the cooperative nature of the submissions procedure in that even in the eventuality of economic sanctions, the amount paid must be put “*into a fund established in the name of the Commission (...) and shall be expended at the direction of the Council to improve or enhance the labor law enforcement in the Party complained against (...)*”.²⁷⁶ According

²⁷⁵ From our interview with the General Coordinator of International Affairs.

²⁷⁶ NAALC, *supra* note 79, Annex 39, paragraph 3.

to the General Coordinator, this annex shows that even sanctions are intended to help the country improve its treatment of workers, which is obviously an act of cooperation.

The cooperative nature of the NAALC in general was often mentioned by the Mexican staff. Whereas interviewees at the US Office emphasized their seriousness in protecting workers' rights and the thoroughness of their procedures, the Mexicans stressed the importance of maintaining good relations with its US and Canadian counterparts in both the organization of cooperative activities and the handling of submissions. In fact, when asked about the functioning of the side accord, the 'cordial relations' established between the countries were often mentioned as proof that the Accord is accomplishing its goals. Good relations between countries, however, seem more important from a political standpoint than from that of the protection of workers' rights. In order to truly ensure that workers' rights are protected, good political relations might just have to be put aside from time to time. Many labour representatives would certainly feel this way. As a matter of fact, staff at the Mexican NAO also raised this point. It was mentioned that the NAALC may be seen as working very well *politically*, but this may not necessarily mean that it is functioning well for workers. One interviewee stated that the NAALC cannot be ideal for political relations and at the same time be ideal for workers' rights.

As much as all interviewees at the US NAO agreed that the NAALC's ability to protect workers' rights is of utmost importance, comments from the Mexican Office tended to vary between the NAALC's being able to foster good relations between countries and its ability to improve workers' rights. On the one hand, Mexican staff recognize the importance of good relations between the NAFTA countries, but on the other hand they readily admit that if they only aim for improving political relations, then workers' rights might not be protected in the best way possible. Obviously, the exact importance of good political relations versus the protection of workers' rights seemed to be somewhat of a debate at the Mexican Office. The different viewpoints of the US and Mexican NAOs is reflected in their handling of public submissions. As we will see in Section 4.3 of this paper, the US regards its handling of the Sony submission as 'harsh', and included its

opinion of the innocence or guilt of the company in its public reports. Furthermore, in the opinion of the US NAO, the Mexican Office did not go 'far enough' in its handling of the Sprint submission.²⁷⁷ The Mexican NAO, however, saw its treatment of the Sprint case as appropriate and commended itself and its US counterpart for the 'cordial relations' maintained throughout the review process.

Finally, when asked about the functioning of the side accord, staff at the Mexican Office mentioned the 'high expectations' of labour regarding the power of the NAALC. Interviewees commented that as long as labour continues to call for reinstatement of workers when a company allegedly dismisses employees for union activity, then it would appear that the side accord is not strong enough. In the opinion of the Mexican NAO's staff, the NAALC is accomplishing what the three governments wanted it to do, not what labour *hoped* it would do. As one interviewee stated, "*the NAALC is not aspirin.*" It is not, and was not meant to be, a quick cure for specific labour relations problems. If labour expects an overnight remedy to its problems, then labour will continue to be disappointed. According to Mexican NAO staff, the NAALC is working slowly but surely towards the objectives set for it by the three governments.

4.1.4 *The Canadian NAO :*

The Canadian NAO, located in Ottawa, is part of the Labour Branch of Human Resources Development Canada (HRDC). The Office presently consists of six positions : the Director (called the 'Secretary' at the US and Mexican NAOs), three Senior Policy and Program Officers, one Project Coordinator (handling the logistics for the organization of cooperative activities and other events and seminars) and one secretary (support position). Interestingly, the original structure of the NAO contained two Policy and Program Officers, and the third position was only recently created. This third position was actually intended to handle issues that would eventually arise from the Canada-Chile accord. However, in the opinion of the Director of the NAO, the more likely scenario is that issues

²⁷⁷ As per information gathered during our site visits.

related to the Canada-Chile accord would be spread between the three Policy and Program Officers.

An important structural difference between the Canadian Office and its two counterparts is the fact that positions are not designed to be mutually exclusive. Whereas the US and Mexican NAOs have designed their structures so that cooperative activities and public submissions are handled by different persons, the Canadian Office has created three Senior Policy and Program Coordinators whose responsibilities greatly overlap. These three positions all have the responsibilities of handling cooperative activities, submissions and federal-provincial relations (which we will explain shortly). According to the Secretary of the Canadian NAO, the intention of creating three virtually identical positions was to ensure that all employees have a well-rounded experience in all aspects of the NAALC.²⁷⁸ This way, 'corporate memory' is maintained should an individual leave the NAO.

Work is divided among the three Senior Policy and Program Coordinators so that each person handles a particular public submission (indirectly, of course, given Canada's unique situation regarding submissions) and a specified type of cooperative activity. For example, with regards to activities, one person presently handles those related to industrial relations issues (freedom of association, collective bargaining, the right to organize), one handles occupational safety and health (OSH) and child labour issues, and the third person deals with women's issues, labour standards and work conditions. With regards to public submissions, cases are rotated among the Policy and Program Coordinators as they are received from either of the other two NAOs. Canada's involvement in the treatment of submissions will be explained later in this section.

²⁷⁸ In actuality, the Canadian NAO was established with two Policy and Program Coordinator positions in mind. The third position was more recently created in order to handle labour issues related to the Canada-Chile bilateral free trade deal. However, the NAO Secretary stated during interviews that this third position was sharing, and would continue to share, the same responsibilities as the two others. This planning on the part of the Secretary is due to the fact that the structure creating positions with overlapping responsibilities had proven to be an efficient way to divide the workload.

A second structural difference between the Canadian NAO and the two others is the fact that there are no lawyers on staff at the Office. At the present time, the two top positions at the US NAO (the Secretary and the Deputy Secretary) are currently held by practicing lawyers. As well, during our research at the Mexican Office, the position of General Coordinator of International Affairs was held by a lawyer. Furthermore, the ex-Secretary of the NAO was also a practicing lawyer. It seems only logical to have lawyers heading institutions which were created to handle labour law issues arising on NAFTA territory. However, the reason why the Canadian Office is not headed by a lawyer is due to Canadian federal government regulations. More specifically, the Canadian governmental structure does not allow for a practicing lawyer to head what is called a 'program' branch of government.²⁷⁹ A separate unit known as 'Legal Services' exists for this reason. When in need of legal expertise or services with regards to NAO affairs, the staff of the Office consult with the legal experts in the Legal Services unit. According to the Director of the Canadian NAO, this structure allows the Office to focus on its various policies and programs, leaving technical legal issues to another department. In the opinion of the NAO Director, this approach functions very well.

Of course, the most obvious and important difference between Canada and the other two countries is Canada's unique position with regards to federal versus provincial jurisdiction on labour law issues. As was mentioned in Section 2.2 on the NAALC, approximately 90% of workers in Canada fall exclusively under provincial labour legislation. For this reason, each province maintains the power to ratify or not the labour side accord. Should a province choose not to sign on to the social clause, workers falling under the jurisdiction of that province are not covered by the terms set out in the NAALC. As such, when the federal government first signed the side agreement, only those workers falling under federal jurisdiction were subject to the terms of the Accord. An 'intergovernmental agreement', which we will discuss shortly, must be signed by any province interested in being officially associated with the NAALC. Alberta was the first province to sign the intergovernmental agreement, thereby ratifying the labour side accord, in 1995. The

²⁷⁹ As explained by the Secretary of the Canadian NAO during interviews.

province was followed more recently by Manitoba and Québec in January and February of 1997.²⁸⁰ Because all provinces had not signed on to the side accord, special conditions were laid out in the text of the NAALC to cover Canada's situation. Annex 46 of the side accord details the extent of Canada's obligations with regards to the submissions process up to and including the convening of an arbitral panel (see the text of the side accord in Annex 7).

The side accord's most important provision concerning Canada is the stipulation that the federal government and those provinces which have ratified the NAALC must account for at least 35% of the country's labour force in order for Canada to be the subject of a public submission or to accept a submission regarding events in another country.²⁸¹ This figure increases to 55% of the national labour force if the matter at hand concerns a specific industry or sector.²⁸² Since the NAALC first came into effect, and up until very recently, Canada could not actively become involved in submissions, as the federal government and Alberta alone did not account for 35% of the Canadian labour force.²⁸³ Now that Manitoba and Québec have officially signed on to the NAALC, approximately 45% of Canada's labour force is now covered by the side accord.²⁸⁴ As a result, as per Annex 46 of the NAALC, Canada can now request ministerial consultations, be the focus of a public submission, and be actively involved in the consultation process.

Although the 'magic' number of 35% of the labour force has been reached and Canada can now be subject to the submission process, in the case of an industry-specific submission Canada would still not be subject to this process until 55% of the labour force is covered by the NAALC. According to the Director of the Canadian NAO, the 35% figure was far more important to attain than the 55% needed for an industry-specific issue. In her opinion, it would take several submissions regarding events in the same industry before it

²⁸⁰ News releases by the Federal government and the Manitoba and Québec provincial governments, dated January 21 and February 10, 1997.

²⁸¹ NAALC, *supra* note 79, Annex 46, paragraph 4(b).

²⁸² *Id.*, Annex 46, paragraph 4(c).

²⁸³ With the recent ratification of the side accord by Manitoba and Québec, the magic number of 35% has now been attained.

could be established that a particular labour law matter is the problem of a specific industry. Many years may pass before this has a chance of happening, but Canada being at least subject to the same conditions as its trading partners is a definite must in order for the NAALC to have as wide a coverage as possible and protect as many workers as possible on the NAFTA territory.

In order to officially ratify the side accord, interested Canadian provinces must sign the Canadian Intergovernmental Agreement Regarding the North American Agreement on Labour Cooperation (hereafter, the 'CIA', see Annex 12 for a copy of the agreement). This document, signed by the federal government and any provincial governments that wish to be associated with the NAALC, recognizes in its Preamble that "*partnership and cooperation between federal, provincial and territorial governments are essential in order to achieve the goals of the NAALC.*"²⁸⁵ The objectives of the CIA, provided in Article 1 of the agreement, are as follows :

- a) to ensure cooperation with regard to labour matters through the effective and efficient implementation of the NAALC;
- b) to allow for full participation of the provincial and territorial governments, with the federal government, in the implementation, management and further elaboration of the NAALC; and
- c) to define specific roles regarding the NAALC.

The CIA is the mechanism by which Canada's unique situation under the NAALC is laid out. Article 2 specifies that only those governments which are signatory to the CIA "*shall enjoy the rights of the NAALC and shall be bound by its obligations (...).*"²⁸⁶ In other words, those provinces or territories that have not signed the CIA are not required to adhere to the conditions established by the side accord, nor can they be the subject of public submissions or any steps of the dispute settlement process.

²⁸⁴ Commission for Labor Cooperation, *Labor in NAFTA Countries*, Vol. 2, No 1, June 1997, p. 8.

²⁸⁵ *Canadian Intergovernmental Agreement Regarding the North American Agreement on Labour Cooperation*, May 1995.

²⁸⁶ *Id.*, Article 2.

In order to develop and manage Canada's involvement in the side accord, and to establish the country's position with regards to NAALC-related issues, the Canadian NAO established a Governmental Committee (GC) as per the stipulations of Article 18 of the NAALC. Article 3 of the CIA details the roles and functions of this committee. The GC comprises one representative from each signatory government (the provincial labour minister or his designee). The federal labour minister and a minister from one of the other signatory governments co-chair the committee. The decision-making process of the GC is based on consensus. To involve the provinces in the goings-on of the side accord, and to encourage the sharing of information with all provincial governments (regardless of whether or not they are signatory to the CIA), representatives of those provincial or territorial governments that have not signed the CIA may still participate in the meetings of the governmental committee. Although these governments will be able to voice their opinions on the matters at hand, they will not be included in the determination of consensus when it comes to decision-making.²⁸⁷

The sharing of information between the federal and provincial governments is a main function of the governmental committee. This task in itself creates a large volume of work for the Canadian NAO. The CIA specifies that all documents relating to the NAALC, especially those concerning Canadian activities, must be promptly provided to all provincial and territorial governments.²⁸⁸ Because any documentation from the federal government (of which the NAO is a part) must be in both official languages, the NAO must ensure that all documents received from the other two countries are available in English and French before they can be distributed to the various governments. Translation therefore becomes a major responsibility of the NAO, as staff members provide summaries of documents such as public submissions for the provincial governments. Federal-provincial communications was often cited by staff as being an important responsibility, unique to the Canadian NAO, which took up much of the staff's time. Staff commented that this was one function on which the Canadian NAO could not be compared to its two

²⁸⁷ *Id.*, Article 3(6).

²⁸⁸ *Id.*, Article 5(2).

partners. In this respect, interviewees tended to state that the Canadian Office may be 'more consultative' than its two counterparts.

With regards to the availability of information to the public, the Canadian Office, like its US counterpart, has its version of the US public documentation room. In Canada's case, however, this 'library' is not an integral part of the NAO. Conveniently for the NAO, a federal government library (a reference/resource centre) is located just across the hall from the Office. The NAO's support staff position has the responsibility of organizing and maintaining the Office's documentation. The NAO has a catalogued collection of documents, available to the public, which is kept in the government's library. A list of documents in the collection is available from the NAO. Contrary to the high volume of visitors to the US documentation room and the numerous requests for information received by fax, mail or phone by the US Office, Canadian NAO staff stated that they do not receive 'very many' requests for information. Most requests are from students.

In terms of the time spent on cooperative activities and submissions, staff at the Canadian Office stated that time and effort are equally spread between these two main NAO responsibilities. Although until very recently the Canadian NAO was not directly involved in the handling of submissions, due to the fact that the required 35% of the workforce had not been reached, the Office still participated in all aspects of the submissions process. The Director of the Canadian NAO explained that "*Canada has never sat out on any submission, mainly because it would not be too forward-looking to let Mexico and the US develop patterns of working together on these issues.*"²⁸⁹ In other words, the reason that the Canadian NAO keeps itself highly informed and involved in the submission process is to avoid being a latecomer in an already-established relationship between the US and Mexico. According to the Director, because Canada could eventually receive or be the subject of a public submission, especially now that the provinces signatory to the CIA represent over 35% of the total labour force, it was always important for its NAO to be involved in the submissions process. Canadian delegations were sent to all public hearings.

²⁸⁹ From our interviews at the Canadian NAO.

Although Canadian representatives did not discuss the specific content or substance of a particular submission, they did discuss how the type of labour issue at hand is dealt with in Canada. In the opinion of the NAO Director, even though the country could not be directly involved in the submissions process at the start, Canada did not want the other two countries “to develop a history between them on how to handle submissions. It is better if Canada is present and tries to influence and shape (the process) from the beginning.”²⁹⁰

As we mentioned in our discussions of the US and Mexican NAOs, those two Offices have established their respective National Advisory Committees (NACs) as per Article 17 of the NAALC. In Canada, an ad-hoc committee had been put in place and was acting as the NAC at the time of our visit. Because the Canadian NAO had numerous issues that needed to be resolved regarding the permanent structure of the NAC (e.g. the balance of east-west and French-English representation), a business and labour advisory committee was put together in an ad-hoc fashion until the composition of the formal NAC could be decided upon. This ad-hoc committee is considered by NAO staff to be the precursor of the eventual National Advisory Committee. The ad-hoc committee is very informally structured in terms of its mandate, schedule of meetings, etc. Members were invited to sit on the committee and the actual number of people regularly attending “tends to fluctuate between 8 and 12, depending on how hot the issue at hand is at the moment”.²⁹¹ Members of the committee include representatives from the country’s key employee unions and employer associations.

To date, the ad-hoc committee has been meeting every six to eight weeks. Although it does not have a formal mandate, the group was often consulted with regarding negotiations for the Canada-Chile labour agreement. Besides these negotiations, the committee has also discussed issues related to the public submissions received by the US and Mexican NAOs. These were not in-depth discussions of the details of a particular

²⁹⁰ *Id.*

²⁹¹ *Id.*

submission, however, but rather general discussions of how the issue may be handled if it were to occur in Canada. Lastly, the ad-hoc committee has also been asked to provide proposals for cooperative activities, which members have duly been providing whenever asked.

Finally, when asked whether the side accord is accomplishing the objectives set out in its text, staff of the Canadian NAO are convinced that the Accord is well on its way and heading in the right direction. According to our interviewees, the bad publicity which a corporation or government faces when national labour laws are not respected may be enough to improve the respect of labour legislation on NAFTA territory. As the Director of the Canadian Office puts it, "*A bad public image and a negative spotlight turned on you is the same as, if not more effective than, economic sanctions that only a few experts would ever know about anyway.*"²⁹²

4.1.5 General Observations on the NAOs :

Our visits of the three NAOs provided us with a unique opportunity to observe similarities and differences between the functioning of each Office. The most striking differences between the NAOs were no doubt related to each Office's budgetary constraints. Budgets seemed to have an impact on three areas in particular : (a) the organization of cooperative activities or participation in other seminars/conferences, (b) the number/quality of publishings, and (c) the facilities and services of the NAO. All three of these factors consequently impact the dissemination of information to the public.

The organization of cooperative activities :

With regards to the organization of cooperative activities, the comment was made at both the US and the Canadian Offices that these two put much time and energy into the organization of activities - more so than their Mexican counterpart. This observation does not concern the number of activities hosted, but rather the coordination of the various

²⁹² *Id.*

aspects of the planning of an event so that the activity is well structured and organized. As far as the US Office is concerned, not only is this evident in the cooperative activities it organizes, but also in the numerous other seminars or conferences in which it participates. The US NAO makes its presence known within the US by participating in activities held by other organizations or associations. For example, staff of the Office often are invited as guest speakers at conferences organized by local colleges and universities. Although the Mexican and Canadian NAOs also participate in events outside the realm of cooperative activities among the three countries, this seemed to be much more evident at the US NAO. The presence of NAO staff at various seminars and conferences helps to familiarize the public with the NAO and the NAALC, thereby working towards the objective of information dissemination.

A last point to mention regarding cooperative and other activities is the fact that when an activity is organized by one of the three countries, the other two countries are always invited to send representatives. An NAO's ability to send delegations to participate is obviously linked to its budget. During our interviews it was often mentioned that the respective budgets of Canada and the US were sufficient to permit them to send delegations to the activities of its counterparts whenever they chose to do so. At the Mexican NAO, it was pointed out that they were not always financially able to send delegations to the activities of the other two countries.

The number/quality of publishings :

It was quite obvious through our site visits that the US NAO spent a significant amount of money on the publishing of various documents on labour-related issues. The Office had a wide selection of pamphlets, booklets, reports, etc. that it had produced, either alone or in conjunction with other areas of the US Department of Labor or organizations such as the Occupational Safety and Health Administration. By putting out such a wide selection of literature on labour-related issues, the US NAO increases public knowledge not only of the Office's existence, but also of labour issues in general. One of the main objectives of the NAALC being the dissemination of information, we can see that the US Office is well

on its way in this respect, both with its presence at conferences and with its many publications. As for the Canadian and Mexican NAOs, documents published by these two Offices was not nearly as numerous as that of the US Office. The Mexican NAO had by far the fewest publications.

The facilities and services of the NAO :

The third area impacted by the Offices' respective budgets was their facilities and services. Once again, the US NAO seemed to be able to offer the most elaborate services to the public, especially with regards to the dissemination of information. As we previously mentioned, the publishings of the various Offices help not only to familiarize the public with the NAO, but also to increase knowledge of labour-related issues and of the side accord itself. The US Office's elaborate fax-on-demand, CD ROM and documentation room were all facilities and services put in place to serve the public. With a full-time information officer to answer public requests for information, the US NAO was definitely the best model of information dissemination to the public. Of course, these services are costly and not all Offices can offer them to the same extent as the US NAO. The Canadian and Mexican Offices will also send out documentation upon request, but judging by the number of requests for information received by the US NAO, it is obvious that the Office has made itself known to a greater degree than its two counterparts. While the Canadian Office is able to use the government's resource centre should an individual want to review documentation at the NAO, the Mexican NAO had absolutely no facilities that could be open to the public. When asked if there was any intention to set up a public reading room at the Mexican Office, one interviewee clearly stated that they "*just don't have the space or the facilities to do so.*"²⁹³

The budgetary constraints of the NAOs are not the only factor influencing the dissemination of information. Even with an ideal amount of information available from the NAOs, the effectiveness of this dissemination will be impacted by the country's economic situation and the education level of the general public. Canada and the US are most

²⁹³ *Id.*

certainly on fairly equal ground in this respect, and this point was not even mentioned during our visits of these two Offices. However, the situation in Mexico is quite different. The point of the country's economic situation and average education level was stressed during interviews at the Mexican NAO. It was mentioned during our visit, for example, that an NAO web site to disseminate information is of little use to the Mexican public, since very few people have access to computers. Furthermore, the impression of the staff was that the majority of workers hardly know of the existence of the NAO, let alone its role in the protection of workers' rights. As a result, most workers won't follow the progress of a particular public submission, nor would they be aware of a final decision being made in a case. NAO staff argued that Mexican workers' and unions' minimal knowledge of the NAALC and its institutions was evident in the fact that only one case thus far was brought to the attention of the Mexican NAO regarding events in the US (Sprint - the case will be discussed further on in this paper). When asked how the Mexican NAO could better educate the public, the response was that the Office must continue to send information pamphlets on the NAO out to unions and continue to organize cooperative activities. Even with this, however, staff expressed concern that there may be a certain lack of interest on the part of Mexican workers in general to learn about the side accord and its institutions.

Another interesting observation made during our site visits is regarding the NAOs' relationship with the Secretariat. The Canadian NAO was the only one to mention the time consecrated to supporting the Secretariat's initiatives and responding to its requests. In fact, the Canadian Director explained that 10 to 15% of the staff's time was spent on the NAO's relationship with Dallas. From our interviews at the Canadian Office, it seemed evident that the belief there was that staff members spend more time on supporting the Secretariat in its initiatives and requests than do their counterparts at the US and Mexican NAOs. Staff gave numerous examples of their Office's involvement with the Secretariat. In particular, it was explained that the Secretariat always sends draft copies of its studies to the three NAOs to ask for feedback and for the Offices to check the factual accuracy of the information. The Canadian Office takes this role quite seriously. Not only

do the NAO staff members review every research project or study that Dallas prepares, but draft copies are also sent to members of the ad-hoc committee and to the provinces for feedback and comments on the accuracy of the documents. This is an example of the Canadian Office's consultative nature, which, as mentioned earlier, staff claim is stronger than that of its counterparts.

As a specific example of the Canadian NAO's support to the Secretariat, staff mentioned the establishment of the rules of procedure for an eventual Evaluation Committee of Experts (ECE) as per Article 23 of the NAALC. As one of the recent duties of the NAOs, the Council of Ministers requested each Office to draft their version of the rules of procedure for discussion among the institutions. According to the Canadian Office, they were the only NAO to do so. The Director of the Canadian Office, along with the Legal Services department of the federal government, drafted a detailed set of rules for ECEs. Because the other two Offices had not prepared their own versions of these procedures, they were given copies of the Canadian draft, which was eventually modified with feedback from the US and Mexico and adopted by the institutions. The Canadians use this as an example of the seriousness with which they undertake services requested of them by the Secretariat.

A final observation on the three NAOs concerns their opinions as to whether the NAALC is truly functioning in the attainment of its objectives. All three Offices were in agreement that the side accord is slowly accomplishing what it set out to do - mainly the objectives of information dissemination, cooperative activities, the promotion of compliance with national labour laws and the fostering of transparency in labour law administration. Out of all the NAALC's objectives, information dissemination and transparency in the administration of labour laws were the most often cited as evidence that the side accord is capable of reaching its goals.

4.2 Cooperative Activities

According to the NAALC, the Secretariat and the NAOs have two main functions. The first of these two major responsibilities is the organization of what are known as cooperative activities, while the second is the handling of public submissions. In this section, we look at the cooperative activities organized by the institutions to date, the themes of the various activities, and the balance between the NAOs with regards to the planning and/or hosting of activities.

Although it is the responsibility of the Secretariat to develop the annual plan and budget for proposed cooperative activities²⁹⁴, according to Articles 10 and 11 of the side accord, the ultimate responsibility for these activities lies with the Council of labour ministers. In fact, it is the responsibility of the Council to establish the priorities for cooperative activities and approve the annual plan and budget submitted by the Secretariat.²⁹⁵ Article 11 lists the various fields of interest around which cooperative activities must be organized as follows²⁹⁶ :

- occupational safety and health
- child labour
- migrant workers
- human resource development
- labour statistics
- work benefits
- social programs for workers and their families
- productivity improvement
- labour-management relations and collective bargaining
- employment standards
- compensation for work-related injury or illness
- legislation regarding the formation and operation of unions, collective bargaining and the resolution of labour disputes

²⁹⁴ NAALC, supra note 79, Article 13(2).

²⁹⁵ *Id.*, Article 10(1).

²⁹⁶ *Id.*, Article 11(1).

- equality of men and women in the workplace
- forms of cooperation among workers, management and government
- the provision of technical assistance for the development of a Party's labour standards
- such other matters as the Parties may agree

Paragraph 2 of the same article lists the types of activities that may be organized around these themes. Accordingly, cooperative activities may consist of seminars, training sessions, working groups, conferences, joint research projects, sectoral studies, technical assistance and any other means that the Parties deem appropriate.²⁹⁷ Finally, Article 11 goes on to state that the countries must carry out cooperative activities “*with due regard for the economic, social, cultural and legislative differences between them.*”²⁹⁸

Each year since the NAALC was established in 1994, a variety of activities have been organized by the three countries. Activities vary in subject and location, with each country hosting a selection of seminars and conferences every year. Each activity is open to participants from all three countries, with representatives from labour, government, employers and academia invited.

The tables in Annex 11 of this paper list all cooperative activities held since 1995, the calendar year after the creation of the NAALC and its institutions. Activities organized in 1994 are not included in the list, as the NAOs and the Secretariat were not fully established and operating at that time. Although numerous labour-related activities were held in the three NAFTA countries in 1994, many were not expressly organized by the NAALC institutions. A booklet put together by the US NAO in April of 1995²⁹⁹ lists labour-related activities held on NAFTA territory in 1994. Despite the fact that this booklet describes these activities as part of the ‘Cooperative Work Program’ of the NAALC, we believe this may be somewhat misleading. In fact, the booklet itself explains

²⁹⁷ *Id.*, Article 11(2).

²⁹⁸ *Id.*, Article 11(3).

²⁹⁹ US Department of Labor, Highlights of the 1994 Cooperative Work Program, April 1995.

that many of the activities listed therein were actually organized under bilateral 'Memorandums of Understanding' between the NAFTA countries.

In May 1991, the United States and Mexico signed a Memorandum of Understanding (MOU) outlining their agreement and cooperation in the enforcement of child labour and occupational safety and health standards. The MOU states that the two countries must organize cooperative activities to facilitate the exchange of information on various labour-related areas. One year later, in May 1992, Canada and Mexico signed a similar bilateral MOU calling for similar cooperative activities between the two countries.³⁰⁰ As the US NAO's booklet explains, when the three NAFTA countries were ratifying the NAALC in September 1993, they agreed to "*include (...) MOU activities in the NAALC work program, which would encompass bilateral and trilateral projects.*"³⁰¹

The US NAO's booklet does not distinguish between activities organized by the side accord's institutions and those which were already planned to take place under the MOUs or organized by institutions other than those of the NAALC. Because the cooperative activities listed in the booklet are so numerous, and because the institutions of the NAALC were not all up and running in 1994, we find it difficult to include this list of activities as part of our discussion of the NAALC's cooperative activities program. Since we are studying the functioning of the side accord, and not that of the MOUs, we do not think it appropriate to discuss the activities held in 1994. Not only are we not able to identify activities expressly organized by the NAALC's institutions, the sheer number of activities listed for 1994 is largely disproportionate in comparison to the number organized in following years.

Although we clearly cannot give credit to the NAALC's institutions for the activities held in 1994, the US NAO's booklet contains a long list of activities held as part of the

³⁰⁰ *Id.*, p.2.

³⁰¹ *Id.*

NAALC's cooperative work program. The activities held highlighted the following four areas³⁰² :

- 1) **Occupational Safety and Health** - The 16 various training sessions, presentations, seminars, workshops and conferences are too numerous to list in this paper. Suffice it to say here that, interestingly, although 12 out of the 16 events were held in Mexico, all activities were quite equally organized by the three countries.
- 2) **Employment and Job Training** - One seminar on "*Microenterprises and the Informal Sector*" was held in Mexico City.
- 3) **Productivity and Quality** - One trinational workshop on "*Productivity Trends and Indicators*" was hosted by Mexico.
- 4) **Labour Law / Worker Rights** - One four-day series of workshops on "*Labor Law and Practice*" was held in California. Also, one "*Conference on Labor Law and Industrial Relations*" was held in Washington DC.

The US NAO's booklet is the only document available which provides a summary of cooperative activities held in 1994. In 1995 and 1996, the Secretariat issued annual reports, which included listings of the NAALC's cooperative activities. Because the side accord's institutions were up and running at that time, it is far more logical to associate these activities with the NAALC. Furthermore, although the activities held in following years covered the same central themes as in 1994, as can be seen by the tables in Annex 11, activities held in 1995 and later were far fewer than the twenty activities claimed for the first year of the NAALC's existence. As the table indicates, 6 to 7 cooperative activities per year from 1995 to 1997 inclusively is about the norm. Interestingly, the list of planned activities for 1998 shows a total of 10 conferences or seminars. Although this list is only a forecast of future activities, it seems possible that now that the institutions are fully functioning and no longer in their start up phase, they may be able to support a heavier load of cooperative activities.

³⁰² *Id.*, pp.3-8.

General Themes :

An interesting point to make regarding the division of activities along the central themes is that the majority of cooperative activities held thus far have been in the area of occupational safety and health (OSH). Even excluding the activities organized in 1994, when 16 out of the 20 activities held were OSH-related, since the NAALC institutions became fully functional in 1995 most of the activities they have organized have been along the lines of occupational safety and health. The proposed list for 1998 shows the same tendency, with half the cooperative activities being OSH-related while the other half is a combination of the themes of employment and job training; labour law and worker rights; and productivity and quality. There does not seem to be any concrete reason as to why there has been a preponderance of OSH-related activities, or why some of the 16 themes listed at the beginning of this section have yet to be touched on. The reason for this may be none other than the fact that the types of activities organized simply reflect the wants and needs of the three countries.

Hosting :

In terms of the hosting of events, as per our interviews, the country who proposes a particular subject is usually the one to host it. In some cases, a specific subject is thought to be most beneficial to the workers of a particular country. In that case, regardless of which country developed the idea, the activity may be held in a country other than the primary organizer of the event. For example, in 1995, the Canadian Centre for Occupational Health and Safety organized a familiarization seminar which was held in Mexico City. The Centre has an elaborate selection of information services, electronic and otherwise, on health and safety in the workplace. The goal of the seminar was to highlight these services and the expertise of the Centre to workers outside of Canada. It was thought that holding the seminar in Mexico would allow more Mexicans to attend than if it were held in Canada.

Proposed topics :

We mentioned earlier that it is the responsibility of the Secretariat to develop the annual plan for cooperative activities. In actuality, each NAO devises its own list of suggestions for future activities. As it was explained to us during our site visits, once each NAO prepares its list of suggested activities, staff members from the three Offices meet to agree upon the final list of activities for the upcoming year. Both the US and the Canadian Offices stated that their respective advisory committees are approached for proposals on future cooperative activities. Staff at the NAO review the proposals and then take the list from the advisory committee forward for discussion with the other Offices. In Mexico, however, the situation is different. Along the way, certain subjects tend to fall to the wayside, as the list of proposals is edited before it is approved. As such, the proposals brought to discussion with the US and Canadian Offices may not be a complete list of what was originally thought of as important. For example, one must wonder why subjects such as Mexico's informal sector, recommendations for labour law reform, or the structure and functioning of Mexico's labour tribunals have never been put forth as proposals for cooperative activities. At least one author has hinted that there may be a degree of censoring going on : Herzenberg suggests that "*persistent external pressure might give the Secretariat and civil servants within each labor ministry the space to conduct more valuable and less censored intergovernmental cooperative programs and special studies.*"³⁰³

Another issue with regards to proposed topics for cooperative activities is that, as much as possible, the countries try to develop a final plan that includes subjects which are of interest to all three nations. The example given to us during our visits was the issue of migrant workers (usually Mexican workers who cross the border into the United States to find work). Although this topic was proposed as a subject for cooperative activities, Canada objected to the proposal. From the Canadian point of view, the NAO did not

³⁰³ HERZENBERG, S., *Using NAFTA's Labor Agreement to Move Toward the High Road*, Keystone Research Center, Pennsylvania, paper submitted at the Symposium on International Labor Rights and Standards After NAFTA, May 2-3, 1996, p. 14.

want to put time and energy into a cooperative activity on migrant workers, as the issue is only of concern to the US and Mexico.

Participation :

An important point to mention with regards to cooperative activities is the participation of delegations from the three countries at all conferences and seminars. As was previously mentioned, representatives from labour, employers, government and academia from each country are invited to attend cooperative activities. While budgetary constraints may be one reason why a country does not send representatives to attend a specific activity held in one of the other nations, the interest in the subject no doubt plays an important role as well. If, however, the final list of activities is agreed upon by the three countries, then it can only be assumed that the activities are of interest to all parties. The point was made during some of our interviews though, that Canada and the US have often questioned the qualifications or credibility of Mexican speakers at cooperative activities. The perception is that these two countries tend to 'look down' on Mexican presenters and therefore often show minimal interest in sending delegations to conferences organized by Mexico.³⁰⁴ On the other hand, we should not forget that, as we stated earlier, the US and Canada believe they put more time and effort into the organization of cooperative activities. It is possible, therefore, that it is not the credibility of Mexican speakers that affects the interest of the US and Canada in their partner's activities, but the perceived lack of organization on the part of Mexico.

A second interesting issue was raised during our interviews with regards to the participation of delegations in the various cooperative activities. The point was made that Mexico does not have representatives from labour speaking at cooperative activities, as do the US and Canada. As per opinions expressed during our visits, this is seen by the other two countries as a sign that the Mexican government is not completely comfortable with the idea of inviting labour representatives to speak publicly at conferences attended by delegations from the US and Canada. Interestingly, when we asked about labour's

³⁰⁴ Based on interviews during our site visits.

participation in cooperative activities, the response received from the Mexican Office was simply that “*the CTM always sends representatives to all activities.*”³⁰⁵ We were unable to get clarification on the issue of labour representatives actually *speaking* at conferences.

Finally, one last point to discuss regarding cooperative activities is the perceived impact that they may have on the attainment of the NAALC’s objectives. At all three NAOs, staff were unanimous in saying that cooperative activities are a manifestation of the ‘sunshine function’ of the side accord. In other words, transparency in the administration of labour law is aided by the organization of cooperative activities. All NAO staff stressed the importance of holding seminars and conferences on labour-related issues in order to increase workers’ knowledge of their rights. It is probably still too soon to evaluate any direct impact these activities may have on workers’ rights, but it is obvious that they are a sure way to disseminate information among the three countries.

4.3 Public Submissions

The second of the two main functions of the institutions of the NAALC is the handling of complaints received from the public concerning alleged violations of a country’s labour laws. These complaints are referred to as ‘public communications’ or ‘public submissions’ in the vocabulary of the side accord and its institutions, as these terms better reflect the spirit of cooperation under which the NAALC was established. For the purposes of the present project, we will use the terms *submission*, *communication*, *case* and/or *complaint* interchangeably.³⁰⁶ In this section, we look at the submission process as manifested by the handling of the public communications received to date. First, we discuss the procedures for accepting or rejecting a case for review by the NAO. Second, we analyze the how each of the submissions received was handled by the NAOs, and finally, we look at the effects that the outcomes of these cases may have on the handling of future cases. It is

³⁰⁵ The CTM is the Mexican labour organization known for its obvious links to the ruling PRI party.

³⁰⁶ Unlike the institutions of the NAALC, we do use, from time to time, the term ‘complaint’. In our opinion, we are simply calling a spade a spade.

important to note that it is not our intention to enter into the details of the allegations or of the concerned company's arguments, but rather to discuss how the cases were handled by the institutions of the NAALC. For our purposes, a basic outline of the submissions is enough to enable us to discuss the procedures followed by the NAOs. We provide an outline of each submission in Annex 10 of this paper. For more detailed information on the cases themselves, we refer the reader to the actual submissions which are on file at the NAOs as at the dates mentioned in Annex 10, and to the public reports put out by the respective NAO. Let us begin now with a look at how a public communication is accepted for review.

4.3.1 Accepting a submission for review

According to the social clause, each NAO has the responsibility to receive and review public communications, from its own nationals, on labour law matters arising in the territory of one of the other two countries.³⁰⁷ An NAO may not receive submissions for matters arising in its own territory, as these issues must be dealt with through the usual domestic channels. The acceptance of a public communication for review by an NAO is the first step in the procedures to investigate and/or resolve labour matters arising on NAFTA territory. These procedures may go from consultations between NAOs to Ministerial Consultations, an Evaluative Committee of Experts (ECE), Arbitral Panels and even economic sanctions, depending on the specific issue at hand. However, it is important to note that the NAOs do not require a submission from the public in order to begin an investigation of a particular labour issue. In fact, Article 21 of the side accord stipulates that "*A NAO may request consultations (...) with another NAO in relation to the other Party's labor law, its administration, or labor market conditions in its territory.*"³⁰⁸ In other words, an NAO may initiate an investigation into a particular labour law issue in another country whether or not the matter is the focus of a public submission. To date, however, this has not occurred.

³⁰⁷ NAALC, *supra* note 79, Article 16(3).

³⁰⁸ *Id.*, Article 21.

All investigations into labour law matters thus far have resulted from issues raised by public submissions. In this sense, this aspect of the system has been rather reactive as opposed to proactive. In the opinion of several NAALC employees³⁰⁹ interviewed during the course of our research, the reason why the NAOs have not yet taken the initiative themselves to investigate labour issues is due mainly to workload - because the institutions are relatively newly established and many staff members are still new to their positions, many procedures have not yet been smoothed out. Also, submissions from the public have been flowing in quite steadily. As a result, NAO staff members have had little time to initiate investigations into labour law issues themselves. The opportunities to investigate these issues have nonetheless arisen on a regular basis from the submissions received to date. It is assumed that a 'quiet period' in the area of public communications may provide an opportunity for NAOs to proactively investigate labour law issues.

In terms of the criteria used to decide whether or not a particular submission is to be accepted for review by an NAO, the text of the side accord is rather vague. At this first level in the procedures set out in the NAALC, the NAOs shall receive labour law matters "*as appropriate*".³¹⁰ In fact, up to the level of ministerial consultations, the institutions may study "*any matter within the scope of this agreement*".³¹¹ As we mentioned earlier, the NAALC is not meant to replace domestic procedures with regards to individual cases of violation of labour laws. A main objective of the side accord is to ensure that each government respects and enforces its own labour legislation.³¹² In other words, the institutions of the NAALC are not intended to investigate individual cases of violation of the national labour law, but only those in which the government of the country involved has allegedly failed to enforce its labour laws. At the level of NAO consultations, any matter regarding the government's non-enforcement of any of the eleven labour principles

³⁰⁹ We use the term 'NAALC employees' to refer to any staff members of the institutions established by the side accord (i.e. the three NAOs and the Secretariat).

³¹⁰ *NAALC*, *supra* note 79, Article 16(3).

³¹¹ *Id.*, Article 22.

³¹² *Id.*, Article 1(f).

of the NAALC may be acceptable to begin the review process.³¹³ As the submission moves through the procedures, however, the types of issues that can be dealt with by the institutions become more limited.

At the NAO level, how does an Office decide whether or not to accept a public communication for review? How is it seen to that the decision is not arbitrary? In order to ensure that the acceptance or rejection of a submission is as fair as possible, the Offices have each developed a set of guidelines to enable them to make this decision in an objective manner. It should be noted that the establishment of these guidelines is not a concrete responsibility derived from the text of the side accord. Both the Mexican and the US NAOs developed their current sets of procedures to follow with regards to the acceptance of public communications in February of 1995. On the other hand, the Canadian NAO only more recently (September 1996) developed its guidelines for submissions, which had yet to be finalized at the time of writing of this paper. The establishment of these procedures was not considered urgent for the Canadian Office, as Canada has only recently become subject to the submissions process.³¹⁴

Whereas the Canadian and the US guidelines are quite similar, those of Mexico are considerably less explicit. In essence, the first two countries use the following guidelines when deciding whether or not to accept a case for review³¹⁵ :

³¹³ When we discuss the 'review process', we refer to any and all procedures undertaken by a particular NAO from the time a submission is received up to the Office's decision on whether or not to recommend ministerial consultations (i.e. the next step in the handling of submissions). These procedures may include any consultations with the other NAOs, studies ordered by the investigating Office, information or statements gathered by the Parties involved in the complaint, the holding of a public hearing, etc.

³¹⁴ As per interviews conducted at the Canadian NAO.

³¹⁵ Information compiled from the following sources - For the United States: *Guide to the North American Agreement on Labor Cooperation*, US NAO, US Department of Labor, Washington DC, February 1995, pp. 5-6; for Canada: *Canadian NAO Guidelines for Public Communications Under Articles 16.3 and 21 of the NAALC*, September 27, 1996 (not finalized).

- (1) Do the matters in question constitute a failure of the other Party to meet its obligations under Part II of the NAALC?
- (2) Does the submission raise issues relevant to labour law matters in the other Party's territory?
- (3) Will the case contribute to advancing the objectives of the NAALC?
- (4) Is the submission substantially different from previous cases? Does it include significant new information not available in previous submissions?
- (5) Does the communication clearly identify the submitter, including all coordinates for contact? Is it signed and dated?
- (6) Does the submission clearly state the nature of the request (i.e. does it specify the matters the NAO should investigate)?
- (7) Do the reported issues appear to indicate non-enforcement of labour law by the other Party?³¹⁶
- (8) Has relief already been sought under the other Party's domestic laws? Is the case pending before an international tribunal?

In addition to the above guidelines, which are common to both Canada and the US, Canada asks that any confidential information be identified in the submission, while the US adds that the case must identify whether there has been any harm to the submitter (and to what extent).³¹⁷ Furthermore, the Canadian NAO, due to the fact that not all provinces have signed on to the Agreement, explains that "*Except for a matter that would fall under federal jurisdiction if it were to arise in Canada, the other Parties are not required to respond to a public communication unless a minimum of 35% of Canada's labour force is covered by the NAALC and, if the matter concerns a specific industry or sector, at least 55% of the workers involved are employed in the provinces for which Canada is bound under the NAALC.*"³¹⁸ As per this statement, until recently, the Canadian NAO could have received a communication regarding labour law issues in another country, but the other country was under no obligation to respond to Canada's inquiry (except under certain

³¹⁶ While the Canadian guidelines mention 'non-enforcement' of labour law, the US guidelines require a 'pattern' of non-enforcement.

³¹⁷ See *supra* note 315.

³¹⁸ See Canadian NAO Guidelines, *supra* note 315.

circumstances). Finally, the guidelines established by the Mexican NAO are significantly less detailed. The Mexican Office states that public communications shall³¹⁹ :

- (a) be forwarded to the NAO's address in Mexico City
- (b) be written in Spanish
- (c) identify the petitioner, including address and telephone number
- (d) identify any confidential information
- (e) itemize the labour law matters arising in the other Party's territory

As is evident in this listing, the Mexican criteria which are similar to those of its two trading partners concern the identification of the petitioner, of any confidential information, and of the specific labour law issues in the case. Beyond these three points, the Mexican NAO does not require that a public communication refer to points 1, 3, 4, 6, 7 and 8 in the Canadian / US listing. The fact that the Mexican guidelines leave considerable room for individual interpretation of the eligibility of a submission for review may lead to a discrepancy between the types of cases accepted in Mexico versus those accepted in the US or, eventually, in Canada. A uniform set of guidelines, adopted by all three countries, may serve to minimize the chances of a case being refused by one country while an essentially similar case is accepted elsewhere. This would provide an image of improved consistency within the system, which in turn may contribute to an enhanced credibility of the side accord.

4.3.2 Cases Reviewed to Date

Now that we have seen that one of the main responsibilities of the NAOs is the receipt and review of public communications, and have briefly discussed how each Office comes about deciding whether or not to review a particular submission, let us look at the specific communications accepted to date for review by the NAOs. Since the establishment of the NAALC's institutions, a total of nine public communications were received by the NAOs.

³¹⁹ *Rules of Procedure of the Mexican NAO Concerning Public Communications Under Article 16(3) of*

Out of these nine, one was withdrawn by the submitters in its early stages, before the review process was completed by the NAO.³²⁰ For this reason, we will not discuss the details of this particular case in the present paper. Although one other submission was also withdrawn before the completion of the review process, the reasons behind the last-minute withdrawal are quite interesting and therefore merit discussion.³²¹ In this section, we look at the processes followed and the decisions made by the NAOs regarding the eight remaining submissions which were all accepted for review by the respective NAOs. Of these eight communications, seven were filed with the US NAO concerning events which took place in Mexico, whereas one was filed with the Mexican NAO regarding events in the US. To date, the Canadian NAO has neither received nor been the subject of any public submissions. A breakdown of the important elements of each of the eight reviewed cases is found in Annex 10 of this paper.

1. *Honeywell (940001)* and 2. *General Electric (940002)* :

The first two cases received by the institutions of the NAALC concern similar events at two different plants in the *maquiladora*³²² region of Mexico. On February 14, 1994, two separate complaints were filed with the US NAO by two different workers' rights organizations regarding the alleged violation of workers' rights at a Honeywell plant and at a GE plant. Both public communications stated that a number of workers were fired by their respective companies allegedly for trying to bring in an independent union affiliated with the *Frente Auténtico del Trabajo* (FAT). The FAT is a Mexican labour organization that does not maintain ties with the dominant *Confederación de Trabajadores de Mexico*

the NAALC; Mexican NAO, February 1995 (unofficial translation).

³²⁰ Submission 940004 was filed with the US NAO by the United Electrical, Radio and Machine Workers (UE) against a GE subsidiary in Mexico. The UE withdrew the submission prior to the completion of the review process by the US NAO.

³²¹ Submission 9602 (Maxi-Switch) was accepted for review by the US NAO, however the case was withdrawn by the petitioners only three days before the public hearing was to take place.

³²² Maquiladoras, as defined by Levinson, "are plants generally located in Mexico along the border with the US, which transform US products into more advanced stages, and then, under favorable customs arrangements, send the more advanced products back to the US. The great majority of the maquiladora plants are owned by US corporations." From LEVINSON, J., *NAFTA's Labor Side Agreement: Lessons From the First Three Years*, Institute for Policy Studies and the International Labor Rights Fund, Washington DC, November 21, 1996, p. 1.

(CTM), a group which is directly linked to the governing *Partido Revolucionario Institucional* (PRI).³²³ In both cases, the companies claimed that the dismissals were due to other, legitimate reasons (downsizing, workplace rule violations, or performance problems). Both submissions state that the vast majority of dismissed workers signed resignation forms enabling them to collect severance packages, while at the same time waiving their ability to file claims against the employer protesting their dismissal.³²⁴ Because of the timing and similarity of these submissions, the two were treated together by the NAOs.

Despite protests from GE and the United States Council for International Business, the US NAO decided to accept the two complaints for review. These organizations claimed that the NAO should reject the submissions for procedural reasons, namely³²⁵ : (1) the complaints did not concern a pattern of non-enforcement of labour law, (2) the submitters did not exhaust domestic remedies, and (3) the events took place before the NAALC came into effect (in both cases, November 1993). As a response to these arguments, Lance Compa, Director for Labor Law and Economics Research at the Secretariat at the time, explains that “*the ‘pattern of practice’ criterion, with its post-January 1, 1994 requirement, does not come into play under the labor side agreement’s terms until an ECE is formed - after the NAO has completed a review.*”³²⁶ What is interesting about the ‘pattern of practice’ issue is that, although the text of the NAALC does not specify this criterion, the US NAO’s procedural guidelines for accepting a submission for review have, since February 1995, required a “*pattern of non-enforcement of labor law*”.³²⁷ As such, if the same cases were to be presented today, the ‘pattern of practice’ issue may lead the

³²³ COMPA, L., *The First NAFTA Labor Cases: A New International Labor Rights Regime Takes Shape*, *United States-Mexico Law Journal*, Vol. 3, Symposium 1995, p. 165.

³²⁴ According to a study conducted by the Secretariat, accepting severance packages is quite common in Mexico, as there is no unemployment insurance system in that country. The study states that “the immediate provision of severance pay, in the highest possible amount, becomes of paramount interest to workers, both in individual discharge cases and in plant closings.” See *Plant Closings and Labor Rights*, Commission for Labor Cooperation, Bernan Press, 1997, p. 84.

³²⁵ ADAMS, R.J. and P. SINGH, *Worker Rights Under NAFTA: Experience With the North American Agreement on Labor Cooperation*, Michael G. DeGroote School of Business, McMaster University, working paper #417, October 1996, p. 12.

³²⁶ COMPA, *loc. cit.* note 323, p. 167.

³²⁷ *Guide to the North American Agreement on Labor Cooperation*, US NAO, *supra* note 315, p. 5.

NAO to reject the submission for review. As for the protest regarding exhaustion of domestic remedies, Compa explains that the US NAO's procedural guidelines which existed at the time did not require 'exhaustion' of domestic remedies, but simply that relief had been 'sought' under domestic laws.³²⁸ This stipulation remains so under the US guidelines dated February 1995. In the Honeywell and GE submissions, dismissed employees did seek (and receive) severance pay under the Mexican legal system, and some workers even sought reinstatement.

Although the texts of these submissions refer to the non-enforcement by the Mexican government of its labour laws (namely freedom of association and the right to organize)³²⁹, it is evident that these cases referred more to the unfair labour practices of particular employers.³³⁰ As we mentioned earlier, resolving complaints against individual companies is not the role of the NAALC's institutions. In this respect, had the US NAO decided to narrowly interpret the side accord, it may have chosen not to accept these cases for review. However, the language of the NAALC does not simply mention government 'enforcement' of labour law. Articles 2 and 3 of the side accord state that "*each Party shall ensure that its labor laws and regulations provide for high labor standards*" and that "*each Party shall promote compliance with (...) its labor law (...)*."³³¹ According to Compa, this wording "*goes beyond the enforcement issue per se.*"³³² Following this reasoning, the US NAO obviously chose a wider interpretation of the side accord in order to accept the communications for review. Compa explains the Office's decision to accept these submissions as follows :

"(...) it is impossible to divorce a technical reading of a legal instrument from a 'reading' of the political winds in the wake of the bitter fight over NAFTA. United States unions had been vociferous in their opposition to NAFTA and in their criticism of the labor side agreement. Had the NAO rejected these submissions on a technicality, new blasts of criticism from organized labor and its allies in Congress, congressional

³²⁸ COMPA, *loc. cit.* note 323, p. 167.

³²⁹ See the actual submissions, in particular the UE submission regarding General Electric, for their points of view regarding the failure of the Mexican government to enforce its laws.

³³⁰ See COMPA, *loc. cit.* note 323, pp. 167-168 for a detailed explanation of this issue.

³³¹ NAALC, *supra* note 79, Articles 2 and 3.

³³² COMPA, *loc. cit.* note 323, p. 168.

*hearings, perhaps even a union 'boycott' of the side accord, would likely have ensued (...). In this instance, the NAO did not have to make an overtly political decision to grant review in the face of contrary language in the Agreement. The language itself justified acceptance and review of the unions' submissions."*³³³

Compa mentions that the US NAO did not have to make an *overtly* political decision in order to accept these submissions. However, it seems clear that the NAO's decision to review the cases had political considerations. The newly established institutions of the NAALC simply could not afford to reject the first cases submitted by labour organizations. The blow to the public's image of the side accord would have been devastating. The handling of the first public communications regarding violations of workers' rights would be seen as an example of the protection that would be afforded to workers under NAFTA. Because of this example-setting factor, the US NAO really had no choice but to accept the submissions. However, when the NAO eventually decided not to recommend ministerial consultations, the same example-setting factor also came into play, leaving labour organizations feeling cheated. These organizations did not hesitate to express their disappointment at the outcomes of the first NAALC submissions.³³⁴

The US NAO organized public hearings³³⁵ into these two cases, which were held in Washington on September 12th, 1994. The two companies involved did not testify at the

³³³ *Id.*, p. 169.

³³⁴ See summaries of labour's reactions in: **COMPA**, *loc. cit.* note 323, p. 176-177; **Daily Labor Reporter**, *Electrical Workers Drops Petition - Lambasts NAO for White Wash Probe*, February 2, 1995; **SOUTHARD-MURPHY, B.**, *NAFTA's North American Agreement on Labor Cooperation: The Present and the Future*, p. 417, and **BIERMAN, L.** and **R. GELY**, *The North American Agreement on Labor Cooperation: A New Frontier in North American Labor Relations*, p. 557, both in the Connecticut Journal of International Law, Vol. 10, 1995.

³³⁵ The holding of public hearings into the submissions received by the NAOs is not stipulated in the text of the NAALC. Why then did the US NAO choose to hold these hearings? According to discussions with NAALC staff members, the holding of public hearings is quite common in various sections of the US government. In the opinions of these staff members, since public hearings can be considered 'common practice' in the US, it is not unusual to hold public hearings in the submissions process of the NAALC. It was explained that pressure from the US labour movement to create a strong tool for the protection of workers' rights in the context of NAFTA may have influenced US negotiators' attitudes. Although the Mexicans were against the idea of public hearings being included in the NAALC's official procedures, the US NAO decided that it would add this option to its general guidelines for the handling of public submissions. This information was received by at least two NAO staff members, but we were unable to back these explanations with any documentation.

hearing but chose to file written statements instead. Moreover, the Mexican NAO chose not to send any representatives to the hearing. Statements and arguments were presented by representatives of the unions which submitted the complaints, one former employee from each of the two companies involved, Mexican labour attorneys and a Canadian labour law expert.³³⁶ In the report issued by the US NAO after the hearings, the Office chose not to recommend ministerial consultations, the next step in the review process. The reasoning behind this decision is explained in the report as follows :

“The NAO review has not been aimed primarily at determining whether or not the two companies (...) may have acted in violation of Mexican labor law. Moreover, the NAO is not an appellate body, nor is it a substitute for pursuing domestic remedies. (...) it is very difficult to ascertain whether there has been a violation of freedom of association when severance is preferred over a review of the case by a CAB [Conciliation and Arbitration Board]. However, the NAO notes that the timing of the dismissals appears to coincide with organizing drives by independent unions at both plants. (...) Since workers (...) accepted severance, thereby preempting Mexican authorities from establishing whether the dismissals were for cause or in retribution for union organizing, the NAO is not in a position to make a finding that the Government of Mexico failed to enforce the relevant labor laws. (...) However, the NAO shares the submitters’ concerns about the vital importance of freedom of association and the right to organize and the implications for workers of the failure of governments to protect such rights.”³³⁷

Since the objective of the NAO is to establish whether or not the government enforced its laws, and the Office was not able to conclude on this point, the review process in these two cases ended at this point. The NAO did, however, make recommendations for seminars on freedom of association and programs to provide information to the public on the side accord and its procedures. As was expected, reactions to this decision varied drastically, with the companies’ management claiming that the decision proved their actions were legitimate, while the unions criticized the NAALC for being toothless and ineffective.³³⁸ In actuality, the US NAO’s decision did not side with either party. It did

³³⁶ Public Report of Review, NAO Submissions # 940001 and #940002, US NAO, October 12, 1994.

³³⁷ *Id.*, pp. 28-32.

³³⁸ SOUTHARD-MURPHY, *loc. cit.* note 334, p. 416-417.

not proclaim the companies' innocence, nor did it state that the workers were indeed fired for union organizing activity. The NAO merely emphasized the fact that it could not conclude on its primary objective, namely to verify whether or not the Mexican government enforced its laws. Furthermore, the public hearing procedure was not intended to put the companies involved on trial. The goal was to gather information regarding the government's actions in these cases.³³⁹ If the labour movement hoped for a trial situation where the company would be found guilty and be penalized, and the workers would be rewarded their due, it is no wonder that these organizations were so disappointed with the outcome of the hearings.

Finally, although the review of the first two NAALC cases did not lead to ministerial consultations, the procedures followed did have some positive outcomes. In fact, according to Compa, "*the publicity surrounding the cases prompted reinstatement of several workers, and widespread instructions from US firms' headquarters to their Mexican subsidiaries to comply carefully with Mexican labor laws. Later, GE agreed to a secret-ballot vote for union representation, the first of its kind in Mexico (the union lost the election).*"³⁴⁰ So, as we can see, despite the negative impression unions had of the results of these cases, the outcomes may have affected certain aspects of the right to organize and freedom of association in Mexico.

3. Sony (940003) :

Six months after the filing of the first two public communications, the US NAO received another submission, this time regarding events at a Sony subsidiary in the maquiladora region. Once again, the submission accused the company of firing workers for attempting to bring in an independent union (i.e. one not affiliated with the CTM). And, like the previous cases, the company claimed it was justified in dismissing the employees, as the dismissals were due to work rule violations and not union activity. Furthermore, like the

³³⁹ COMPA, *loc. cit.* note 323, p. 177.

³⁴⁰ COMPA, L., *Another Look at the NAFTA Labor Accord*, Fall 1996, p. 7 (draft copy).

employees of Honeywell and GE, most of the workers accepted severance packages, waiving their right to file a complaint against their former employer.

Despite its many similarities to the two previous submissions, the Sony case differs from the first cases in one important aspect: the degree to which allegations target the government's violation of its obligation to protect the right to organize and freedom of association. In this case, in addition to allegations that the company did not respect workers' rights, the Mexican government is accused of attempting to block the registration of the independent union. More specifically, the local Conciliation and Arbitration Board (CAB) allegedly favoured the CTM (the union closely linked to the Mexican government), by denying registration of the independent union for minor technical reasons (such as the fact that the petition was not filed in two copies) and because another union (CTM) already existed at the plant. The submission claims that the CAB is not impartial and that the composition of the board assures the rejection of any union not affiliated with the CTM.³⁴¹ Jerome Levinson, the lead lawyer representing the dismissed Sony workers, explains the biased nature of the CABs as follows :

“Registration [with the local CAB] is supposed to be an administrative act which follows automatically if the union meets certain objective criteria (number of members, etc.) but a determined CAB can almost always find some technical ground on which to deny the petition for registration. The composition of the CABs assures a direct interest in denying registration to a union not affiliated with the CTM. The government assures that the labor membership of the CABs consist only of members of CTM-affiliated unions; the CTM affiliated unions emphasize conformity with the government's economic policy rather than industrial conflict on behalf of higher wages and benefits for union members and are therefore preferred by employers.”³⁴²

A consultant hired by the US NAO as a specialist on Mexican labour law confirms Levinson's opinion of the CABs: “(...) *the workers' representative [on the CAB] actually represents the majority union [CTM]. So the union representatives on the board have a*

³⁴¹ The CABs are made up of equal numbers of employer and labour representatives, and one government member.

*competing interest with the independent unions seeking registration, and therefore at least one board member is not truly impartial (...).*³⁴³ Furthermore, a report by two specialists on Mexican labour law, which was completed for the US NAO in relation to the Honeywell and GE cases, stipulates that :

*“According to Mexican law there are no such thing (sic) as official unions. All registered workers’ syndicates have the same rights and obligations and therefore should be considered independent unions. In reality the main force behind the government’s party is the CTM. (...) official unions (meaning the CTM) in practice have received a privileged treatment from the CABs and other labor authorities (...). the CTM has traditionally behaved as an extremely docile labor force vis a vis the government. (...) in any conflict with the CTM (...), if legally possible, the CABs would favor this last union.”*³⁴⁴

These statements seem to highlight the seriousness of the Sony submission’s allegations regarding the Mexican government’s (CAB’s) non-enforcement of its laws on the right to organize and freedom of association. Furthermore, the submission raises doubts as to the Mexican government’s respect of its obligations under the NAALC, in particular, Article 5, which stipulates that each country must ensure that *“its administrative, quasi-judicial, judicial and labor tribunal proceedings for the enforcement of its labor law are fair, equitable and transparent”*, and that *“tribunals that conduct or review such proceedings are impartial and independent and do not have any substantial interest in the outcome of the matter.”*³⁴⁵ In this respect, the Sony submission differs significantly from the Honeywell and GE cases.

The US NAO decided to accept the Sony submission for review, but emphasized that its focus was on the government of Mexico’s enforcement of its labour law, and not the

³⁴² LEVINSON, *loc. cit.* note 322, p. 8.

³⁴³ DE BUEN LOZANO, N., Executive Summary of the Second Seminar on Union Registration and Certification Procedures, San Antonio, Texas, November 8-9, 1995.

³⁴⁴ CURTIS, P.A. and A. GUTIERREZ KIRCHNER, *Questions on Labor Law Enforcement in Mexico and the Role of the Federal and State Conciliation and Arbitration Boards*, report prepared for the US NAO, August 8, 1994, p. 34.

³⁴⁵ NAALC, *supra* note 79, Article 5, paragraphs 1 and 4.

conduct of the individual company.³⁴⁶ Public hearings into the case were organized by the US NAO and held in February 1995. During the review process, information was gathered from the submitters, the company, affected workers, and the Mexican NAO. The US NAO also commissioned a research report by a Mexican labour law specialist on the issues raised in the submission. In its public report dated April 11, 1995, the NAO stated that :

*“Given that serious questions are raised herein concerning the workers’ ability to obtain recognition of an independent union through the registration process with the local CAB (...), the NAO recommends that ministerial consultations are appropriate to further address the operation of the union registration process.”*³⁴⁷

It is evident here that the focus on the government’s enforcement of its labour laws was far more obvious in the Sony case than it was in the previous public submissions. As a result, this submission became the first to go on to the level of ministerial consultations.

It is important to note that the US NAO referred back to its studies of the Honeywell and GE cases during the Sony review. In fact, the NAO *“examined relevant materials from its review of Submissions #940001 and #940002, including the consultant’s reports on Mexican labor law generated for those reviews.”*³⁴⁸ Also, in its analysis of the Sony submission, the Office states that it *“cannot ignore the similarities of these accounts and of those reviewed by the NAO in the first two submissions filed before it.”*³⁴⁹ The fact that the NAO referred to the previous cases during the review process allows for a certain continuity and evolution in the handling of submissions. It permits a certain learning in the review process. For example, even the simple fact that the public hearing was conducted in San Antonio, Texas (a two-hour drive from the location of the Sony plant), made a significant difference in this case, by enabling more workers to attend. In the previous submissions, hearings were held in Washington DC, limiting the number of workers able to participate. A further element retained from the previous reviews is the reference to the

³⁴⁶ Public Report of Review, NAO Submission # 940003, US NAO, April 11, 1995, p. 10.

³⁴⁷ *Id.*, p. 32.

³⁴⁸ *Id.*, pp. 9-10.

workers' actions. In its public report, the US NAO mentions the similarity between the actions of Sony workers and those of the Honeywell and GE employees, in that in both cases the workers accepted severance packages, thereby waiving their right to file claims against the employer protesting their dismissal.³⁵⁰

Another interesting aspect of the Sony review is that, although the NAO stated from the start that its focus was the government's enforcement of the law and not the company's behaviour, the Office very clearly stated in its public report that "*it appears plausible that the workers' discharges occurred for the causes alleged, namely for participation in union organizing activities.*"³⁵¹ By this statement, the NAO is insinuating that the company is not completely innocent in this matter. Even though this was not the focus of the Office's review, the NAO clearly decided to give its opinion on the innocence of the company. Finally, the US NAO's decision to recommend ministerial consultations in the Sony case was clearly based on the government's violation of its obligations under the NAALC and not on the company's treatment of its workers. As such, the decision not to recommend ministerial consultations in the previous cases is better understood once it is compared to the reasoning behind the decision in the Sony case.

On June 7, 1996, the US NAO issued a public report on the ministerial consultations. The activities negotiated as part of the Ministerial Consultations Implementation Agreement were : (1) a joint work program consisting of three trilateral public seminars on union registration and certification, (2) a study, by independent experts on Mexican labour law, of Mexico's labour law dealing with union registration and its implementation, and (3) a series of meetings between officials from the Mexican Department of Labor and Social Welfare, Sony workers and management, and union representatives.³⁵² In the report issued by the US NAO after the ministerial consultations, the Office heralds the success of the process :

³⁴⁹ *Id.*, p. 26.

³⁵⁰ *Id.*

³⁵¹ *Id.*, p. 27.

³⁵² Report on Ministerial Consultations on NAO Submission # 940003, US NAO, June 7, 1996, pp. 3-6.

“This first test of ministerial consultations under the NAALC has demonstrated that this can be a useful method of cooperatively exploring serious labor issues and concerns, and ensuring consideration of whether each country is in compliance with its obligations under the NAALC. As a result of ministerial consultations, this matter has been appropriately examined and information has been developed and disseminated (...). The dialogue which is taking place in this sensitive labor issue is a positive development. (...) Through this transparent public review and reporting, each country has shed new light on the areas of concern in its labor laws, and begun to more openly evaluate and publicly disclose concerns about the efficacy of its labor law enforcement mechanisms.”³⁵³

The report on the ministerial consultations goes on to claim that :

“Perhaps the greatest achievement of these ministerial consultations was that the public was afforded the opportunity to observe and participate in this dialogue, and to question their own governments about the ways in which they might improve enforcement of their own labor laws. The US NAO is satisfied that the implementation of this ministerial consultations agreement has promoted transparency in the administration of labor law in the NAFTA countries, and provided for an unprecedented open and public dialogue between government, workers and employers (...).”³⁵⁴

What we can gather from the conclusions of this report is that the institutions of the NAALC consider that ministerial consultations is a process which can allow the three countries to meet the objectives set out in the text of the side accord. In terms of the objectives of an exchange of information, the promotion of understanding of labour laws, and the transparency of labour law administration, the ministerial consultations conducted in the Sony case were successful. The objective of transparency is commonly referred to by Secretariat and NAO staff as the ‘sunshine function’ of the side accord. The sunshine function is, according to information gathered from our interviews, a crucial element in the attainment of the NAALC’s objectives. Since the review of the Sony case allowed for the dissemination of much information on the functioning of the union registration process, the NAO declared the process a success. Labour, of course, was not so quick to agree with the success proclaimed by the NAALC’s institutions. A request to reopen ministerial

³⁵³ *Id.*, pp. 6-7.

³⁵⁴ *Id.*, p. 7.

consultations in the Sony case was submitted by the parties involved. The NAO rejected this request, stating that the objectives of ministerial consultations (i.e. a complete examination of the issues) were accomplished, and that no additional benefit could be achieved by reopening these consultations.³⁵⁵ Levinson explains labour's disappointment with the outcome of the Sony submission :

*“No sanctions could be taken against [Sony]; no workers were reinstated. The Mexican government (...) could not be sanctioned for failing to assure workers at [Sony] their constitutional right of free association. The CABS continue to exist with their current composition and acknowledged conflict of interest. Nothing changed as a consequence of the NAALC. (...) Seminars cannot substitute for action. And, despite the courageous and candid reports of the US NAO, there is no effective action under the NAALC that can be taken on behalf of the (...) dissident workers.”*³⁵⁶

This statement by Levinson reflects a completely different set of expectations of the NAALC's capabilities. As we know from the original submission, the submitters were claiming the reinstatement of workers, and anything less than reinstatement would be considered a failure by labour advocates. On the other hand, the institutions of the NAALC never claimed to have the power to force an organization to reinstate workers. In fact, the side accord leaves this type of power entirely to domestic channels. Article 42 of the NAALC clearly indicates that *“Nothing in this Agreement shall be construed to empower a Party's authorities to undertake labor law enforcement activities in the territory of another Party.”*³⁵⁷ If labour continues to expect such things as reinstatement of workers in situations presented before the institutions of the NAALC, it will continue to be disappointed with the outcomes of their submissions. However, if the expectations are the exchange of information, the promotion of understanding and the transparency of labour laws, the parties involved would be more than satisfied. The procedures followed in the Sony submission allowed for the exposure of certain elements in Mexico's union registration process which violate the rights of workers. Moreover, the reports produced by the US NAO in relation to the Sony case demonstrate that the Office is ready to

³⁵⁵ *Id.*, p. 14.

³⁵⁶ LEVINSON, *loc. cit.* note 322, pp. 20-21.

³⁵⁷ NAALC, *supra* note 79, Article 42.

criticize when necessary. The conclusion to the report on ministerial consultations illustrates this fact :

“The US NAO is hopeful that the STPS [the Mexican Labour Secretariat], will give serious consideration to the sound observations and recommendations of its own experts in this area. Likewise, it is hoped that the Mexican government will undertake a serious review of the implementation of its laws regarding union registration, and take whatever steps are warranted to strengthen the enforcement mechanisms and the equitable application of the law. The US NAO will continue to work closely with the Mexican NAO towards the attainment of this objective.”³⁵⁸

This report on the ministerial consultations is perceived by the staff of the US NAO to be quite harsh.³⁵⁹ It can be seen as a very diplomatic reprimand by the US NAO to the Mexican government, worded in a ‘politically correct’ fashion. However, labour does not yet seem to be satisfied. At a recent conference in Washington DC on the functioning of the side accord, Levinson questioned the Secretary of the US NAO as to the possibility of renegotiating the NAALC so as to allow sanctions in the event that a government does not provide independent labour tribunals. As was to be expected, the Secretary’s response was negative. Moreover, the Secretary insisted upon the fact that there has been significant progress to date as a result of the public reviews.³⁶⁰ We can see from this exchange that the high expectations of labour in this situation have not changed, nor has the NAALC staff’s belief that the side accord’s procedures are achieving the objectives they set out to attain. This difference of opinion seems to be rooted in each party’s expectations of the side accord.

Although the submitters’ request to reopen ministerial consultations was denied, the US Secretary of Labour directed the NAO to conduct a follow-up review of the matters raised in the Sony submission. The review was completed and a report issued on December 4, 1996. The focus of the follow-up was on the current situation of the dismissed Sony

³⁵⁸ Report on Ministerial Consultations on NAO Submission # 940003, *supra* note 352, p. 14.

³⁵⁹ As per interviews conducted at the US NAO during our research.

³⁶⁰ Noted at the Conference on *The North American Agreement on Labor Cooperation : Linking Labor Standards and Rights to Trade Agreements*, at the Washington College of Law, American University, November 12, 1996.

workers and on the initiatives of the Mexican government to change its labour laws relating to the union registration process.³⁶¹ Regarding the status of the dismissed workers, the US NAO's report states that all of these persons remain unemployed. Furthermore, there is a belief that these workers are now blacklisted in the maquiladora region, and therefore unable to find other employment.³⁶² The fact that the affected employees are still without work is the reason behind the submitters' constant criticisms of the NAALC's effectiveness.

As for government initiatives to change the labour laws, certain recently-proposed modifications, as well as two Supreme Court decisions, may address the issues raised in the Sony submission. The submitters targeted the biased nature of the CABs, evident in the Board's reasons for denying registration of the union (i.e. the existence of another union and minor technical reasons). The US NAO's follow-up report details the developments in Mexico's labour laws related to these issues. According to the report, the principal opposition party in Mexico recently submitted a bill proposing changes to the *Ley Federal de Trabajo* (LFT, the Federal Labour Law). These changes, if accepted, would remove the discretionary authority of CABs in the union registration process and clarify the nature of the procedure as a formality. Moreover, the changes would end the current practice of tripartite appointments (labour, management and government) to these tribunals. This modification has the potential to minimize the biased nature of the CABs as mentioned in the Sony submission.³⁶³ The opposition party's proposed changes are pending decision by a Senate Committee.

In addition to these proposed modifications to the LFT, the follow-up report mentions two Supreme Court decisions (May 1996)³⁶⁴ which declared unconstitutional two state statutes which prohibit the formation of more than one union in the workplace. Legally, these

³⁶¹ Follow-up Report - NAO Submission # 940003, US NAO, December 4, 1996, p. 3.

³⁶² *Id.*, p. 4.

³⁶³ *Id.*

³⁶⁴ *Amparo* Decision 337/94, Union of Academic Personnel of the University of Guadalajara, and *Amparo* Decision 338/95, Solidarity Union of Employees of the State of Oaxaca and Decentralized Agencies. The

decisions are only binding on the parties involved. However, lower courts in Mexico do have a tendency to follow high court decisions, which would increase the impact of these decisions.³⁶⁵ Finally, the report discusses the *Nueva Cultura Laboral* (NCL, New Labour Culture) in Mexico. In August 1996, the Mexican government, labour and management representatives signed an agreement detailing efforts on the part of all parties to improve labour-management cooperation. The document specifically addresses the issues of union democracy and the impartiality of labour tribunals, the two matters raised in the Sony submission.³⁶⁶

It would be unwise to immediately claim that the NAALC and its institutions have allowed for the recent proposed changes in Mexico's labour laws, in the Supreme Court decisions, or in the NCL principles. These are quite obviously developments which are rooted in the evolution of Mexico's own culture and society. However, the more people are aware of their rights, the more likely they are to demand changes in procedures which violate these rights. The publicity surrounding cases such as Sony and the others brought before the NAOs, and the dissemination of information which results from NAO reviews, may help to increase this awareness.

4. *Sprint (9501)* :

In February of 1995, the first public communication regarding events in the United States was received by the Mexican NAO. The submission concerned the sudden closure of a Sprint subsidiary in San Francisco and the resulting layoffs of 235 telephone workers. The plant was closed only eight days before a union vote was to be held. The submitter (STRM, a union in Mexico), alleged that the plant was closed in order to avoid unionization, citing numerous examples of threats and intimidation by management.

amparo lawsuit is the mechanism by which the constitutionality of an act of government may be challenged.

³⁶⁵ Follow-up Report, *supra* note 361, p. 9.

³⁶⁶ *Id.*, p. 5.

Among its many demands, the STRM requested that all workers be reinstated.³⁶⁷ The company argued that the closure was due to economic problems and denied all allegations by workers that management used intimidation and threats to dissuade employees from organizing. Besides the specific allegations against the company, the complaint also claimed that US law enforcement has been inadequate in such matters, and criticized the slow reviews of such cases by the NLRB (National Labor Relations Board, the domestic channel for such issues) and the insignificant fines available under US law.

The Mexican NAO accepted the Sprint submission for review. In its public report dated May 31, 1995, the NAO states that the focus of the review was on the US legislation related to freedom of association, the right to organize, union representation procedures and collective bargaining.³⁶⁸ According to the report, the review conducted by the Mexican NAO consisted of the following measures :

- (1) consultations with the US NAO regarding US labour legislation
- (2) an internal study conducted by the Mexican NAO on US legislation
- (3) meetings between the Mexican Directorates of Legal Affairs, International Labour Affairs, and the Secretariat of Labour and Social Welfare in order to evaluate the information related to the review
- (4) attendance by NAO staff at a trilateral government conference on freedom of association and the right to organize (Washington, March 27-28, 1995)
- (5) meetings between staff of the Mexican NAO and Sprint's lawyers
- (6) meetings between the NAO and its National Consultative Committee regarding the issues raised in the Sprint submission

The report itself consists mainly of a general summary of US legislation related to the issues of freedom of association and the right to organize, with a brief conclusion and

³⁶⁷ Complaint Against Sprint Filed by Mexican Telephone Workers Union (translation by the Communications Workers of America), Bureau of National Affairs, Washington DC, DLR, October 2, 1995, p. E-7.

³⁶⁸ Report on Review of Public Submission # 9501, Mexican NAO, May 31, 1995, p. 2.

statement of the NAO's recommendations. Nowhere in the report are the specific allegations against the company ever discussed or even referred to. This is not surprising, as the report was issued before any public hearings into the matter took place. As a conclusion to the public report, the Mexican NAO states :

“The review by the NAO of Mexico consisted in obtaining and analyzing information on US labor legislation and its application. The description of the laws (...) furthered the understanding of the functioning of the US labor system, consistent with the objectives of the NAALC. After studying matters related to US labor legislation related to Public Submission 9501, particularly (...) freedom of association and the right of workers to organize, the NAO of Mexico is concerned about the effectiveness of certain measures intended to guarantee these fundamental labor principles. (...) The law that governs freedom of association and the right to organize is based on the premise that it is necessary to guarantee these fundamental rights of workers so as not to affect trade. The interrelation which exists between open trade and its direct influence on the life of workers has been expressly recognized [in the Preamble of the NAALC].³⁶⁹ Consequently, there should be further study on the impact that actions motivated by commercial realities have on labor matters (...).

In view of the above, the NAO of Mexico emphasized in its analysis the possible problems in the effective application of US law, which could arise when an employer refuses to negotiate collectively (...) or where the employer refuses to permit that an election takes place. Specifically, the NAO (...) was unable to assess with complete certitude the effects on the rights of workers when an employer suddenly closes the place of work.”³⁷⁰

The report goes on to recommend the completion of a study on the effects of sudden plant closures on the rights of workers and the holding of ministerial consultations. In contrast to the public reports issued by the US NAO for the Honeywell, GE and Sony submissions, the Sprint report does not mention any specific violation on the part of the government of its obligation to respect its labour laws. In explaining its decision to accept the Sprint submission for review, the Mexican NAO refers to Article 1 of the NAALC, which lists the objectives of the Accord (see Section 2.2 of this paper), and Annex 1 of the Accord,

³⁶⁹ It must be noted that 65% of the Sprint plant's revenues was derived from telephone traffic between Mexico and the US (see the letter to the US NAO from the Communications Workers of America, dated September 8, 1995).

which lists the eleven labour principles, including freedom of association and the right to organize (see Section 2.3 of this paper).³⁷¹ Also, the report states that the decision to accept the submission is in conformity with the list of guidelines prepared by the Mexican NAO (see Section 4.3.1 above).

The references to the objectives and to the eleven labour principles of the NAALC as reasons for accepting the submission for review are rather general, especially given the fact that the report does not discuss the specific events which occurred at the Sprint subsidiary, and that no public hearing was held prior to the publication of the report. Compared to the public reports completed by the US NAO, which discussed the government's specific actions to enforce its labour laws in each case, the report by the Mexican NAO falls short in its ability to clearly identify the reasons for its review and for its recommendation of ministerial consultations. In fact, as the last citation above indicates, the Office concluded that it *was unable to assess with complete certitude the effects on the rights of workers when an employer suddenly closes the place of work*. In this statement, the Mexican NAO claims that it is unsure whether or not sudden plant closures affect workers' rights. It seems as though the Office is recommending ministerial consultations without having identified the actual issues at hand. Perhaps the holding of public hearings *before* issuing its report would have helped the NAO in identifying the specific focus of its review.

The issues raised in the Sprint submission were also heard before an Administrative Law Judge (ALJ), under the US's normal domestic procedures. The judge's decision was rendered on August 30, 1995, three months after the publishing of the Mexican NAO's report.³⁷² In his ruling, the judge confirmed that Sprint engaged in over 50 different violations of labour law during the union organizing drive and that the plant closing was partially motivated by anti-union considerations. However, despite these violations of labour rights, the ALJ found that Sprint did indeed have valid economic reasons for

³⁷⁰ Report on Review of Public Submission # 9501, *supra* note 368, pp. 11-12.

³⁷¹ *Id.*, p. 9.

closing its plant. The remedy decided upon in the ruling was that Sprint “*be required to cease and desist therefrom and from (...) interfering with, restraining or coercing its employees in the exercise of their rights (...)*.”³⁷³ In particular, the ruling orders that the company cease all forms of threats, interrogation of employees regarding their union activities, surveillance of workers’ union activities, etc.³⁷⁴ An appeal of this ruling was filed with the National Labor Relations Board (NLRB). The ALJ decision was overruled by the NLRB in December 1996, who found that the closing was unlawful discrimination for anti-union reasons. Sprint was ordered to rehire affected workers into positions elsewhere in the company.³⁷⁵ The NLRB’s decision has been appealed to the federal appeals court.

Ministerial consultations were held in December 1995 and the agreement reached by the ministers was signed on February 13, 1996. The agreements on implementation stipulate that : (1) the US must keep the Mexican Secretary of Labour up to date on the progress of the appeal under US domestic channels, (2) the Secretariat in Dallas must conduct a study of the effects of sudden plant closures on freedom of association and the right to organize³⁷⁶, and (3) the US NAO must organize a public forum in San Francisco to allow the parties an opportunity to express their concerns on the effects of sudden plant closings on workers’ rights.³⁷⁷ This public hearing into the Sprint submission was held on February 27, 1996, just two weeks after the ministerial consultations agreement was issued.

Unlike the procedures followed by the US NAO in the previous cases, the Mexican Office did not complete a report on the ministerial consultations, but rather issued a brief summary (calendar) of the events which took place during the Sprint review. This summary is simply a chronological listing of the procedures followed in the Sprint case and

³⁷² LCF, Inc. d/b/a La Conexion Familiar and Sprint Corporation and Communications Workers of America, AFL-CIO, District Nine, Case 20-CA-26203, before the National Labor Relations Board, San Francisco Branch Office, August 30, 1995.

³⁷³ *Id.*, p. 34.

³⁷⁴ *Id.*, pp. 34-35.

³⁷⁵ Plant Closings and Labor Rights, *op. cit.* note 260.

³⁷⁶ At time of writing, the study has just recently been made available to the public.

³⁷⁷ Ministerial Consultations, Submission #9501 - Agreements on Implementation, February 13, 1996.

does not discuss the public forum in San Francisco.³⁷⁸ Moreover, no report was completed by the Mexican NAO after the public forum. Newspaper accounts of the hearing claim that the session :

*“...became a forum for criticizing enforcement of US labor laws (...). [The hearing] served essentially as a platform for labor groups to call attention to abuses of workers’ rights and companies’ efforts to avoid unionization. (...) the shortcomings of labor protections in the United States (...) were graphically and emotionally illustrated as speakers described the Sprint case.”*³⁷⁹

In the previous cases submitted to the US Office, public reports were completed *after* the public forum and contained a summary of the issues brought up at the hearing. This way, the NAO could consider information gathered at the hearing when making its recommendations in the case. Also, in the Sony case, the US NAO put out a report on the ministerial consultations after these consultations were completed. In the Sprint case, the public report issued by the Mexican NAO was completed in May 1995, yet the public forum was only held in February 1996. In this case, it was too late for the information obtained at the hearing to influence the NAO’s recommendations in the case. Also, no report on the ministerial consultations was issued by the Mexican Office. At the time of the public hearings, the outcomes of the ministerial consultations had already been decided upon. Moreover, even though the actions of the individual company are not the focus of the NAALC’s institutions, the US NAO did not hesitate to include in its past reports an opinion as to the truth of the allegations concerning the companies’ treatment of their workers. The Mexican NAO, on the other hand, made no mention whatsoever of Sprint’s treatment of its employees. We can assume that any bad publicity regarding the submissions may put pressure on the company to correct the way it treats its workers, especially if doubts are raised by the NAOs as to the company’s guilt in the matter. However, since the Mexican NAO chose not to make any mention of the company’s behaviour in any of its reports, the impact of the Sprint review may not be as strong as that of the previous cases, especially that of the Sony review.

³⁷⁸ *Consultas Ministeriales Relacionadas Con el Caso Sprint*, Mexican NAO, March 1996, 2pp.

Because the Sprint submission was the first one concerning events in the United States, and because all the previous cases highlighted the Mexican government's non-respect of the NAALC's labour principles, the handling of this case by the Mexican NAO was of great interest to the US Office. As per information gathered during our research interviews, the US NAO was curious to see how severe the Mexican Office would be in its review of the Sprint submission. The US staff believed that the Mexican NAO may see this submission as Mexico's chance to show that the abuse of workers' rights does not only take place in their country, but in the US as well. After being the focus of all the previous submissions, would Mexico be more severe in its review of events in the US? During our visit of the US NAO, the staff commented that they were surprised that the Mexican Office had not been more harsh in its handling of the Sprint submission, that the NAO did not highly publicize the case or use the opportunity to pass judgment on a company's treatment of its workers in the US. The US NAO considered the reports completed by the Mexican Office to be much less severe and judgmental than they could have been.

When these comments were brought to the attention of the Mexican NAO during our interviews, the staff claimed that their review of the Sprint submission satisfactorily served the purposes of the NAALC. The objective of the Sprint review was to gather and share information about US legislation regarding the right to organize and freedom of association, and this had been accomplished. The Mexican NAO qualified the relationship with the US Office throughout the review process as "very cordial" and was pleased that the NAALC's objectives of information and transparency were attained in this case.³⁸⁰ As far as the Mexican NAO was concerned, the Sprint review was successfully and appropriately completed, and all three countries have increased their knowledge of each other's legislation regarding the right to organize and freedom of association. The

³⁷⁹ TIRSCHWELL, P., *NAFTA Case Highlights Charges of US Workers' Rights Abuses*, Journal of Commerce, February 29, 1996.

³⁸⁰ Based on information gathered during interviews at the Mexican NAO.

Mexican NAO believes that there had been no reason to be more severe in its review of the Sprint submission.³⁸¹

5. *Secretaría de Pesca (9601)* :

The next public communication brought before the NAALC's institutions was submitted to the US NAO by one Mexican and two US labour and human rights organizations, on June 13, 1996. The case involves the deregistration of the existing union, SUTSP³⁸², at the *Secretaría de Pesca* (Ministry of Fishing, hereafter 'Pesca Ministry') when the Ministry was merged with another to form the new Ministry of the Environment, Natural Resources and Fishing (SEMARNAP).³⁸³ A new union was created to represent the workers of the new Ministry. According to the submission, the replacement union is affiliated to the FSTSE³⁸⁴ federation, which is linked to the ruling PRI government party. Although the SUTSP union is also affiliated to the FSTSE, it is claimed that SUTSP never received adequate support by the federation as had the replacement union.

The SUTSP union went before Mexico's Federal Conciliation and Arbitration Tribunal (FCAT), the equivalent of the CABs but for federal employees, to request recognition at the new SEMARNAP Ministry. This request was rejected by the FCAT, which stated that the replacement union was already in place at SEMARNAP. According to Mexican law, only one union may represent workers at a federal government entity. The petitioners contest two points related to the FCATs and the limit of one union in federal entities. First, the submission alleges that there is an inherent conflict of interest in the structure of the FCATs, in that one of the three members of each chamber is named by the FSTSE

³⁸¹ The opinion of Canada in the Sprint case may be considered more neutral. According to our interviews at the Canadian NAO, Mexico 'did a respectable job' in its handling of the Sprint case. The Mexican NAO was on a learning curve, as this submission was its first, but the US already had experience in these types of cases, and became more organized and focussed with each new submission.

³⁸² SUTSP : *Sindicato Unico de Trabajadores de la Secretaría de Pesca.*

³⁸³ SEMARNAP : *Secretaría del Medio Ambiente, Recursos Naturales y Pesca.*

³⁸⁴ FSTSE : *Federación de Sindicatos de Trabajadores al Servicio del Estado.*

union. Second, the submission claims that the law which permits only one union in a particular federal entity violates the right to organize and freedom of association.³⁸⁵

As was the case with the Honeywell and GE submissions, the United States Council for International Business (USCIB) protested the US NAO's involvement in this case, stating that the issues in the submission are beyond the scope of the NAALC. The USCIB claims that the NAOs have no authority to review or request changes in existing Mexican labour laws, but merely to ensure the government's enforcement of its laws. The organization states that all laws were followed in this case and therefore the NAO has no place in this matter.³⁸⁶ As we saw in the US NAO's handling of the Sony case, however, the Office used a much wider interpretation of the NAALC so as to go beyond the simple issue of the *enforcement* of labour laws. This is once again the case in its study of the Pesca submission.

Much more surprising than the protests from the USCIB, however, is a report from the Mexican NAO to its US counterpart stating that "*the submission should be thrown out because (...) the requests presented in the public submission do not have a legal basis.*"³⁸⁷ This nine-page document submitted to the US Office lists several reasons why, in the opinion of the Mexican NAO, the Pesca submission should not be accepted for review. First, the document states that the objectives listed in Article 1 of the NAALC (see list in Section 2.2 of this paper) do not cover participation in conflicts between unions, nor do they permit the NAOs to be the means by which changes in labour law can be introduced.³⁸⁸ According to the Mexican Office, this submission is a case of inter-union conflict between the SUTSP and the replacement union. Second, the Mexican NAO affirms that the matter "*has followed a legal course in Mexico*", and goes on to detail all

³⁸⁵ The intricacies of this case are quite complicated. The summary here highlights the two main points in the Pesca submission. For a more elaborate explanation of the events and allegations in this case, see the original public communication submitted by Human Rights Watch/Americas, International Labor Rights Fund and Asociación Nacional de Abogados Democráticos, on file at the NAOs as at June 13, 1996.

³⁸⁶ Letter to the Secretary of the US NAO from the US Council for International Business, September 18, 1996.

³⁸⁷ Report by the Mexican NAO Concerning Public Submission # 9601, July 11, 1996, pp. 8-9.

³⁸⁸ *Id.*, p. 1.

the procedures followed in the union deregistration and registration process before the FCAT and other Mexican labour tribunals.³⁸⁹ Since all Mexican laws were followed throughout the procedures, the Mexican NAO declares that the US NAO should not become involved in this case.

According to the Mexican Office, the third reason why the US NAO should reject the submission is that *“this matter has been followed by the Committee on Freedom of Association of the ILO and the Mexican government has responded on this matter in accord with the procedures set forth by this Organization.”*³⁹⁰ In fact, prior to the NAO submission, the SUTSP union had filed a complaint before the ILO regarding the same issues later presented to the NAO in the Pesca case. The complaint to the ILO stated that these issues represent a violation of ILO Convention 87 (freedom of association and the right to organize), which Mexico has ratified. In November 1995, the ILO’s Committee on Freedom of Association recommended to the Mexican government that (1) it takes the necessary steps so that independent unions are not blocked from organizing in federal entities, and (2) the SUTSP be allowed to obtain legal status and carry out union activities.³⁹¹ As the case evolved, the SUTSP was finally granted re-registration and the FCAT canceled the registration of the replacement union. For this reason, the Mexican NAO claims that its government heeded the recommendations of the ILO, and therefore there is no call to pursue this matter before the US NAO.³⁹² The Mexican NAO’s document goes on to state that :

“...the procedures for administering labor law are being applied by the relevant authorities (...). Within the framework of the legislation currently in force, the government of Mexico has promoted observance and adequate enforcement of its labor legislation as foreseen in Article 3.1 of the NAALC.

³⁸⁹ *Id.*, pp. 1-4.

³⁹⁰ *Id.*, p. 4.

³⁹¹ **International Labour Office**, 300th Report of the Committee on Freedom of Association, Case N° 1844, November 1995, paragraphs 215-244.

³⁹² According to the submission, however, the FCAT seriously limited the official recognition of SUTSP. Even though it had been re-registered, the union could not engage SEMARNAP on union business. Furthermore, although SUTSP had received recognition and the replacement union had been deregistered, the new Ministry allegedly continued to deal with the replacement union.

(...) The public submission does not demonstrate that there is a premeditated purpose to carry out arbitrary decisions in the application of the system of registration. The authorities of the FCAT have issued decisions based and motivated on good faith. (...) Mexico is fulfilling its obligation to promote the observance and effective enforcement of its labor law.”³⁹³

In spite of the vivid protests from its Mexican counterpart, the US NAO decided to accept the Pesca submission for review. In its notice of acceptance, the US Office affirms that the case furthers the objectives of the NAALC as per the NAO’s guidelines (see Section 4.3.1 above). It also states that the objective of the study is to verify the Mexican government’s compliance with Articles 3 and 5 of the NAALC concerning the effective enforcement of labour laws and fair, impartial tribunals.³⁹⁴ This reference to the government’s obligation to provide fair and unbiased tribunals (Article 5) is the same issue that was raised in the Sony submission with regards to the CABs. Once again, it is alleged that the tribunals are biased, as one of their members is affiliated with a union linked to the PRI. This is, according to both the Sony and Pesca submissions, a blatant conflict of interest in cases regarding the recognition of independent unions. Interestingly, the report from the Mexican NAO states that :

“the mechanism of judicial review of decisions rendered by the FCAT offers an efficient way (sic), guaranteeing in this manner adequate access to the courts in accord with the stipulations of Article 4 of the NAALC, and the proper legal procedure foreseen in Article 5, paragraphs 1,2,3,4 and 5 of the same.”³⁹⁵

As we can see here, there is definitely a difference in the points of view of the two NAOs involved in this submission. On the one hand, the Mexican NAO cites the government’s respect of Article 5 as a reason why the US Office should reject the review of the Pesca case. On the other hand, the possible violation of the same Article 5 by the Mexican government is the reason why the US NAO chose to accept the case for review. While the Mexican NAO states that structure and composition of the FCAT is a matter which is

³⁹³ Report by Mexican NAO on Public Submission # 9601, *supra* note 387, p. 7.

³⁹⁴ Notice of Determination Regarding Review of Submission # 9601, US NAO, July 29, 1996.

³⁹⁵ Report by Mexican NAO on Public Submission # 9601, *supra* note 387, p. 8.

beyond the jurisdiction of the NAALC,³⁹⁶ the US NAO seems to see this as a flawed structure which may be a cause of violations of workers' rights. Consequently, the composition of Mexico's labour tribunals is seen by the US Office as falling directly within the scope of the side accord.

During the review process, the US NAO collected information from numerous sources, including the submitters, the Mexican NAO, representatives of the unions involved, and experts on Mexican labour law. The US Office organized public hearings into the Pesca Ministry submission, which were held in Washington DC on December 3, 1996, and issued its public report on January 27, 1997. Among the many speakers at the public hearing, six persons spoke on behalf of the submitters and one person spoke on behalf of the replacement union at the new Ministry. An interesting fact to note is that Dr. Luis Miguel Díaz, General Coordinator for International Affairs at the GCIA at the time (of which the Mexican NAO is a branch, see Section 3.4.4 of this paper), spoke on behalf of the Mexican Government. Dr. Díaz reiterated the position described in the Mexican NAO's report of July 11, 1996, stating that the Mexican government had enforced its labour laws and therefore was not in violation of its obligations under the NAALC.³⁹⁷ This is the first time that the different NAOs openly disagree with the decision to accept a submission for review. One must wonder what impact this publicly-expressed difference of opinion may have on the image of the NAALC's institutions, especially given the spirit of cooperation under which the procedures of the side accord were established and are to take place.

In its public report, the US NAO makes reference to the same two decisions of the Mexican Supreme Court (May 1996) which were referred to in the Sony case (see the discussion of the Sony submission above). Let us recall that these rulings found that two state statutes which prohibited employees from forming more than one union per workplace were unconstitutional. The public report also refers to the ILO Freedom of Association Committee's findings and recommendations concerning the issues raised in

³⁹⁶ *Id.*

³⁹⁷ Public Report of Review, NAO Submission # 9601, US NAO, January 27, 1997, p. 13.

this case. The NAO raises important questions concerning the legal status of ILO Convention 87 (freedom of association and the right to organize) in comparison to the contents of national laws. This ambiguity of international treaties versus national legislation is important to clarify, as the ratification of this Convention by Mexico was the grounds for SUTSP's complaint before the Freedom of Association Committee. With regards to the Supreme Court decisions and to the legal standing of ILO Convention 87 under the Mexican Constitution, the US NAO states that these matters "*raise questions not subject to a clear interpretation by the NAO. Consequently, further consultations could contribute to a better understanding of the legal doctrines at issue.*"³⁹⁸

Concerning the allegation of the biased behaviour of the FCAT, the review found that both the SUTSP union and the replacement union were affiliated to the FSTSE. Consequently, it would be difficult to claim that because one FCAT member is named by the FSTSE federation, the tribunal acted unfairly towards the replacement union. On this point, the submitters state that even though SUTSP was also affiliated to the FSTSE, the replacement union "*had the institutional support of the federation and the Ministry and that SUTSP had never been properly supported by the federation.*"³⁹⁹ After a full examination of the facts related to the FCAT's actions in this submission, the US NAO concluded that :

*"...in the instant submission, both of the contending unions were affiliated to the FSTSE. Moreover, there is a procedure in place to address allegations of conflict of interest, and this procedure was used. (...) Given these circumstances, it does not appear that the final outcome of the union representation case was affected by the composition of the FCAT."*⁴⁰⁰

Surprisingly, the US NAO concluded its report by recommending ministerial consultations in the Pesca Ministry submission "*for the purpose of examining the relationship between and the effect of international treaties, such as ILO Convention 87, and constitutional*

³⁹⁸ *Id.*, p. 32.

³⁹⁹ *Id.*, p. 21.

⁴⁰⁰ *Id.*, p. 32.

provisions on freedom of association on the national labor laws of Mexico."⁴⁰¹ No mention of the need to study the structure of the Mexican tribunals was made. As a result of ministerial consultations, the Agreement on Ministerial Consultations, signed by the three labour ministers on September 3, 1997, makes the recommendation that a conference be organized to study "*the relationship between international treaties and constitutional provisions (...).*"⁴⁰² This conference was held just recently, on December 4, 1997, in Baltimore. No results are available at the time of writing.

The difference of opinion between the Mexican and US NAOs regarding the scope of the side accord in this submission has led to some interesting occurrences during the review of this case. On the one hand, the Mexican NAO openly defended its government when the government's behaviour was the subject of a complaint to the US NAO. The Mexicans even went so far as to publicly protest the review at the hearing held by the US Office, by stating that the government acted in compliance with its obligations under the side accord. On the other hand, the US NAO dared to ignore the protests from its counterpart and went ahead with the review process. The outcome of the US NAO's review showed both its independence from influence or pressure by the Mexican Office (by going ahead and recommending ministerial consultations even when the Mexican NAO believed that the issues went beyond the scope of the NAALC), while at the same time offering a show of respect for the Mexican NAO's arguments (by stating technical legal matters, and not the possible conflict of interest of the FCATs, as the reason for its recommendation). This type of decision, however, does raise certain questions as to the adequacy of a resolution that does not touch on the main issue raised by the submission. In other words, does this decision render futile the review process, seeing that the impartiality of the FCATs as mentioned in the case does not even figure in the final recommendations of the US NAO or the ministerial consultations?

⁴⁰¹ *Id.*, p. 33.

⁴⁰² US NAO, *Agreement on Ministerial Consultations - Submission 9601*, September 3, 1997.

This final decision of the US NAO is a good middle ground for the first case where there has been a difference of opinion between the NAOs. Its recommendation of ministerial consultations did not point fingers at the Mexican government, which may have touched off a more serious conflict between the two NAOs, but rather affirmed that consultations were necessary to analyze the effects of international treaties and constitutional provisions on Mexico's national labour laws. This reasoning should appease the Mexican NAO, who all along argued that the government was not violating its obligations under the NAALC. A more neutral point such as the effects of international treaties and the Constitution on national laws does not blame the Mexican government for violating the provisions of the side accord. Although this may not be the best decision in terms of getting to the true heart of the matter in this case, it certainly seems to be 'politically correct' in the context of cooperation that the NAALC sets out. Labour, of course, would definitely not be satisfied if the Accord's ability to protect workers' rights was always hindered by politics. With the spirit of cooperation under which the NAALC was established, however, the US NAO could not suddenly strike out against its neighbour.

6. *Maxi-Switch (9602)* :

The next case to be presented to the NAOs is that of Maxi-Switch, a plant in the maquiladora regions of Mexico. The case was submitted to the US NAO on October 11, 1996, by the Communications Workers of America (CWA), the same union that had collaborated with the Mexican union in the Sprint case, as well as two Mexican labour organizations, the STRM and the FESEBS.⁴⁰³ In this submission, as in all the previous cases, the focus is on the fundamental rights of freedom of association and the right to organize.

During the organization campaign, the company allegedly used threats and intimidation to block the unionization of its workers. The company also fired some of the officials of the

⁴⁰³ The Case of Maxi-Switch, Inc. in Cananea, Mexico, Submitted to the US NAO by the Communications Workers of America (CWA), the *Sindicato de Telefonistas de la República Mexicana* (STRM) and the *Federación de Sindicatos de Empresas de Bienes y Servicios* (FESEBS), October 11, 1996.

newly-formed union. The submission alleges that when workers at the Maxi-Switch plant sought organization, the company and the state government claimed that they were already represented by another union. For this reason, the local CAB refused registration of the new union. The workers, however, insist that they were not aware of the existence of any other union in the company. The submitters affirm that the workers had no knowledge of the identity, the bylaws or the content of the collective agreement of the supposedly-existing union. The company allegedly signed a contract with a 'phantom union' in an attempt to avoid having to deal with the union that the workers were organizing themselves.⁴⁰⁴

The submission goes on to say that the phantom union was only registered shortly after workers began their organization campaign. The registration of the phantom union shows that it is affiliated to the CTM, the union linked to the governing PRI. Also, according to the submission, both the chairman and the labour representative of the CAB (the tribunal that denied registration to the newly-formed union), are members of the CTM.⁴⁰⁵ The submitters claim that this represents a conflict of interest on the part of the CAB, in that two of its members are biased against any union not affiliated with the CTM. This is a violation of the government's obligation to provide fair, impartial labour tribunals under Article 5 of the NAALC, the same allegation as in previous cases. The submitters also claim that the Mexican government is not respecting its obligation, under Article 3 of the side accord, to promote compliance and effectively enforce its labour laws.⁴⁰⁶

The US NAO decided to accept the Maxi-Switch submission for review. In a document released by the Office, the NAO confirmed that the objective of its review was :

“to gather information (...) on the Government of Mexico's promotion of compliance with, and effective enforcement of, its labor law through appropriate government action, as set out in Article 3 of the NAALC, and on the steps the Government of Mexico has taken to ensure that its administrative, quasi-judicial and labor tribunal proceedings for the

⁴⁰⁴ *Id.*, p. 5.

⁴⁰⁵ *Id.*, p. 6.

⁴⁰⁶ *Id.*, p. 13.

enforcement of its labor law are fair, equitable and transparent, in accordance with Article 5 of the NAALC."⁴⁰⁷

In March 1997, the US NAO announced that the public hearing on the Maxi-Switch submission was to take place on April 18, 1997, in Tucson, Arizona.⁴⁰⁸ However, last-minute developments in this case led to the cancellation of the hearing. Through discussions with NAO staff, we learned that the submitters of the Maxi-Switch case withdrew their submission only three days before the public hearing of April 18, 1997 was scheduled to take place in Arizona. Although available information is limited at time of writing, it appears that the main reason for the submitters' withdrawal of their complaint is the fact that the Mexican government finally recognized the independent union's formation at Maxi-Switch. According to the US Bureau of National Affairs (BNA), the newly appointed Secretary of the Mexican NAO at the time, Jorge Castanon Lara, confirmed that "*the local labor tribunal that originally rejected the Maxi-Switch union's registration efforts was ultimately responsible for granting recognition to the independent union.*"⁴⁰⁹ Because the non-recognition of the independent union was the issue at the heart of the submission, once the union was recognized, there was no longer a need for a public hearing or further review by the US NAO.

Immediate reactions to the news of the submission's withdrawal, as reported by the BNA⁴¹⁰, hailed the positive impact that the NAALC had in the resolution of this case. In fact, the BNA reports the following reactions to the cancellation of the Maxi-Switch submission⁴¹¹: First, the Secretary of the Mexican NAO is cited as saying "*I feel that the entire process of gathering information, which was carried out since the public complaint, has had a positive effect on the registration within the parameters of the North American Agreement on Labor Cooperation.*" Interestingly, reactions from labour representatives seem to echo the Secretary's sentiments. A spokesman for the Union of

⁴⁰⁷ Notice of Hearing, Submission # 9602, US NAO, March 13, 1997, pp. 3-4.

⁴⁰⁸ *Id.*, p. 2.

⁴⁰⁹ *NAFTA Complaint Adds to Recognition of Mexican Union, According to Experts*, Daily Labor Report, US Bureau of National Affairs, Washington DC, April 23, 1997.

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

Telephone Workers of Mexico attributed the recognition of the union to the public scrutiny surrounding the public submission, stating that “*the public complaint put a lot of pressure on authorities to register the union.*” Finally, a statement by a representative of Mexico Flight Attendants’ Union affirmed that “*the Communications Workers of America action has had an echo in our country in the form of the recognition of the independent movement. We are talking about an important precedent (...).*”

Although these reactions may seem somewhat quick to praise the influence of the side accord in this matter, it is difficult not to attribute at least some credit to the publicity brought about by the US NAO's review of the Maxi-Switch case. The dissemination of information and the negative publicity surrounding the submission are arguably important factors affecting the Mexican government's last-minute decision to officially recognize the independent union. Even though there may be a certain tendency to 'jump the gun' by concluding that the government gave in to pressure from the public submission procedures, analyzing the government's action without considering the influence of the NAO's procedures may be just as misleading. An obviously positive observation of the outcome of this case, despite the fact that its review was cancelled, is the fact that representatives of both the NAALC and labour have similar opinions of the role that the side accord played in this matter.

7. *Pregnancy-based Discrimination (9701) :*

In May of 1997, the US NAO received a public submission which is truly a unique case in comparison to all the other complaints received by the NAOs. Unlike all the other submissions received to date, this case does not concern events at one particular company, but rather a widespread behaviour which allegedly occurs in the maquiladora regions in general. Also, whereas all other submissions to date concern the industrial relations rights of freedom of association and the right to organize, this case is one of alleged discrimination.

A case of alleged pregnancy-based discrimination in the maquiladora regions was submitted by Human Rights Watch and the International Labor Rights Fund of the US, and the Asociación Nacional de Abogados Democráticos of Mexico. These are the same organizations involved in the Sony and Pesca submissions. According to the submission, the Human Rights Watch/Women's Project completed a three-week mission in Mexico in March 1995, in order to investigate allegations of widespread sex discrimination against women in the maquiladoras. The investigation included interviews of over 50 women from more than 40 maquiladoras across three states in Mexico. The public submission alleges that women applicants are tested during the hiring process to determine whether or not they are pregnant, and that employers refuse to hire pregnant women in order to avoid paying compulsory maternity benefits. Furthermore, it is alleged that women who become pregnant after hire are subject to abusive conditions and mistreatment. Supervisors apparently reassign pregnant women to physically harder work and deny basic privileges such as being able to sit while working. As per information from the Canadian NAO, women in the maquiladora regions are signed on to 28-day work contracts, and in order for their contracts to be renewed, they must submit to pregnancy testing every 28 days. According to a summary of the submission obtained from the Canadian NAO,

*“...these practices are widespread and known to the Mexican government. The petitioners indicate that they tried but failed to obtain clarification from the Mexican government on its interpretation of applicable labour law. The petitioners submit that effective relief is not available through labour inspectors, CAB mechanisms or the offices of the Labour Rights Ombudsman. In fact, some CABs defend pregnancy-based discrimination as legitimate. (...) The petitioners further submit that the government of Mexico discourages the use of CAB mechanisms for the resolution of pre-hire discrimination cases and takes no serious action to end obligatory pregnancy testing.”*⁴¹²

The submitters call for a public hearing into this case. They request that the US NAO engage with the Mexican government in the hopes of ending pregnancy-based discriminatory practices. The US NAO accepted this submission for review on July 14,

1997. Its acceptance is based on the Mexican government's failure to meet its obligations under the following NAALC articles : Article 3(1) regarding the promotion of compliance and the effective enforcement of labour laws related to, in this case, sex discrimination and equality of men and women workers; Article 4(1) on the obligation to ensure access to tribunals for the enforcement of labour law, and Article 4(2) on the obligation to ensure that persons have recourse to procedures by which their rights can be enforced.⁴¹³

The public hearing into this submission was held in Brownsville, Texas, on November 19, 1997. At the time of writing, no information on the results of the hearing has yet been made available. The handling of this public communication will be of great interest to labour organizations and the three governments alike. This is the first case that concerns labour principles other than freedom of association and the right to organize. All other cases, due to the fact that they concern industrial relations principles, are limited to the level of ministerial consultations. This case, because it relates to sex discrimination, can potentially go to the level of an Evaluation Committee of Experts. The ECE procedures have not yet been tested and, as such, all parties involved will certainly scrutinize the handling of this submission. The case may present the first opportunity to evaluate the effectiveness of ECE procedures, should it end up going to that stage. Of course, one can argue that the best result would be that the NAOs are able to resolve the case, to the satisfaction of all involved, before needing to go to the ECE level.

8. *Han Young (9702)* :

The most recent case to be received by the NAOs concerns events at the Han Young maquiladora in Tijuana, Mexico. Han Young is a subsidiary of Hyundai Precision America. The public communication was submitted to the US NAO on October 30, 1997, by the Support Committee for Maquiladora Workers (US), the International Labor Rights Fund (US), the Asociación Nacional de Abogados Democráticos (Mexico), and the

⁴¹² Canadian NAO, *Summary of US Submission 9701 - Pregnancy-based Sex Discrimination*, 1997, p. 2.

⁴¹³ *Id.*, p. 3.

Sindicato de Trabajadores de la Industria Metalica, Acero, Hierro, Conexos y Similares - STIMAHCS (Mexico). Once again, as in all other cases with the exception of the discrimination submission, the submission concerns the alleged violation of the right to organize and freedom of association.

The submission alleges that Han Young has had a contract for several years with the Union de Trabajadores de Oficios Varios (CROC), which is affiliated with the ruling PRI party. Since its existence at the company, the CROC has never held meetings or otherwise made its presence known to workers. Apparently, when workers began union organization activities with an independent union, they were subjected to harassment and intimidation by the company and four union supporters were fired. Elections were held between the existing CROC and the new union, STIMAHCS, on October 6, 1997. Although the submitters claim that the STIMAHCS actually won the election, on November 10, 1997 (after the case was submitted to the US NAO), the CAB denied certification of the independent union. The CAB claims that the certification vote did not constitute sufficient proof that the majority of workers support the independent union, that STIMAHCS cannot represent auto workers as it is a union of steel, metal and iron workers, and that STIMAHCS is not a registered union.⁴¹⁴

Similarly to previous cases, the submitters of this public communication claim that the Mexican government is in violation of Articles 3 and 5 of the NAALC. These articles concern the government's obligation to promote compliance with and effectively enforce its labour laws, and to ensure that tribunals are fair, equitable and transparent. The submission also claims violation of Article 123 of the Mexican Constitution (on freedom of association) and ILO Convention 87 (on the right to organize and bargain collectively).⁴¹⁵ The petitioners request that the US NAO hold public hearings into the case and ensure that Mexico secures the company's compliance with Mexican and international law, including the reinstatement of dismissed workers and certification of the

⁴¹⁴ Canadian NAO, *Summary of US Submission 9702 - Han Young Maquiladora, 1997*, p. 3.

⁴¹⁵ US NAO, *Notice of Determination Regarding Review of Submission 9702*, November 17, 1997, pp. 3-4.

independent union. The submission was accepted for review by the US NAO on November 17, 1997. No date has yet been scheduled for a public hearing into this submission.

This case, although only in its early stages, once again brings up the same issues of freedom of association and the right to organize as in the previous cases. The issues highlighted in this submission are the same as those in the Sony case, where doubts were raised as to the impartiality of the Mexican CABs. Let us recall Jerome Levinson's statement regarding the outcome of the Sony review : "*The CABs still exist with their (...) acknowledged conflict of interest. (...) Seminars cannot substitute for action. And, despite the courageous and candid reports of the US NAO, there is no effective action under the NAALC that can be taken on behalf of the (...) dissident workers.*" (see the section on the Sony complaint). It will be interesting to see the final outcome of the Han Young submission. What can the US NAO do *more* than it did in its treatment of the Sony case? In that case, public hearings and ministerial consultations were held, and the recommendations of the consultations were implemented. Even a follow-up report was completed a year and a half after the ministerial consultations agreement was announced. For what that was worth, the submitters still proclaimed their utter dissatisfaction with the outcomes, as workers were not reinstated by Sony. According to the text of the NAALC, so-called industrial relations matters (freedom of association, the right to organize and collective bargaining) cannot go beyond the level of ministerial consultations, so what more can be expected?

The US NAO did whatever it could within the limits of the NAALC for the Sony submission. If it does the same for the Han Young case, labour will still be unhappy. Levinson called for the reopening of the side accord to allow for economic sanctions in situations similar to those of the Sony and Maxi-Switch submissions. The Secretary of the US NAO declared that the reopening of the NAALC is not an option at the present time. Now that another case citing Articles 3 and 5 of the NAALC has been accepted for review, can we expect the outcomes to be any different? Levinson stated that seminars

cannot substitute for action. Besides studies and conferences, what else can ministerial consultations recommend? As long as the three governments agree that the procedures of the NAALC are not to replace domestic procedures, the NAOs cannot order individual companies to act in a certain way, nor can they force a government to change its laws or its enforcement of those laws. What the NAALC can achieve, though, is a progressive change, initiated internally but rooted in the moral pressure and publicity resulting from the review of submissions. Rooted also in workers' increased awareness of their rights, which results from seminars, conferences and studies, and from the general dissemination of information (the 'sunshine function'), one of the main objectives of the side accord.

What will be the impact on the Mexican government of another round of bad publicity about inherently biased CABs? The proposed changes in Mexican labour laws, the recent Supreme Court decisions, and the Nueva Cultura Laboral - these are all developments initiated internally, perhaps resulting from a certain introspection on the part of the Mexican government. But can the learning process resulting from the review of public submissions not help these changes along? The NAALC was never intended to bring about drastic change overnight, even though labour seems to be calling for serious and fast action. The reviews handled by the NAOs to date have already helped to publicize certain labour issues and educate workers on their rights. The review process established by the side accord has already sparked a collaboration between US and Mexican unions that may not have existed otherwise. This can only help to bring labour issues to the forefront as the three countries develop their free-trade relationship.

In sum, this section has given us a detailed overview of the cases handled by the NAOs to date. As we saw in the previous section on cooperative activities, the creation of the NAALC and its institutions has led to increased communications and consultation between the three NAFTA countries. Regardless of the immediate results of a specific event, be it a tripartite seminar or the analysis of a public submission, the long term effects of such consultation and communication can only serve to increase the awareness of workers in all three countries of their rights. Furthermore, the more a government learns about its

partners' observance of their respective labour laws, the more we can expect that the governments will attempt to adhere to their laws, conscious of being under the watchful eyes of their neighbours.

4.4 Criticisms of the NAALC

As we had mentioned at the start of this paper, the NAALC has been criticized for several reasons by a variety of sources including trade unions and other labour rights associations and advocates.⁴¹⁶ Among the many criticisms of the side accord, the following seem to be the most serious and widespread⁴¹⁷ :

- There is no supranational legislation nor any intent to harmonize the three countries' laws (each country only has to enforce its own laws).
- The complaints procedures are extremely lengthy, bureaucratic and complicated.
- The Accord does not have enough 'teeth' (the spirit of cooperation is foremost, making the possibility of sanctions highly unlikely; consequently, the NAALC cannot prevent social dumping or have a significant impact on workers' rights).
- The side accord is too narrow (only 3 areas can go all the way to economic sanctions: child labour, minimum wage and occupational safety and health).

In this section, we will discuss each of these criticisms and offer some arguments for or against these remarks. We also briefly refer back to the contexts of the European Union and the International Labour Organization, two entities that we analyzed early on in this paper to aid our understanding of the North American situation. We base our discussion not only on our review of the literature but also on our interviews with staff members of the NAOs and the Secretariat.

⁴¹⁶ Refer to *supra* note 334.

⁴¹⁷ **COMPA**, *loc. cit.* note 340, pp. 1-3. Compa divides the criticisms against the side accord into three main problems: (1) the Accord does not create common labour norms, (2) the bureaucracy and the

4.4.1 *No supranational legislation or intent to harmonize laws*

One of the most often heard criticisms of the NAALC is that it does not create any common legislation at the supranational level. In other words, no set of labour laws is established for all three NAFTA countries to abide by - they are each only obligated to respect their own legislation. In this regard, Moreau and Trudeau state that “...*la faiblesse de la clause de l’ALÉNA est de ne fixer la ‘barre de la loyauté’ (...) ni sur une harmonisation des normes, comme cela est fait dans l’Union européenne, ni sur une obligation de garantie d’un niveau de protection, comme dans les conventions de l’OIT (...).*”⁴¹⁸ These authors clearly see the lack of intent to harmonize labour legislation as an inherent weakness of the NAALC. Verge explains the need for supranational legislation as follows :

*“La protection et l’avancement des droits et intérêts des salariés (...) doivent tenir compte de l’élargissement de l’espace économique; les fonctions caractéristiques du droit, des institutions et des politiques du travail sont appelées, comme l’illustre l’expérience européenne, à suivre le déplacement de ces frontières économiques. (...) Ceci dit, l’ANACT reste marqué négativement par l’absence de toute portée supranationale véritable. Pour ce qui est du fond, il ne formule pas de normes ou de standards servant à définir un contenu minimal d’un droit du travail auquel devrait se confronter le droit national de l’un ou l’autre des pays en cause.”*⁴¹⁹

In these authors’ opinions, the European Union has the right idea. Labour legislation must be modified in accordance with the new economic space. When the economic borders between countries are removed, legislation must change to encompass all countries on the new territory. The side accord clearly states that each country retains the right “*to establish its own domestic standards and to adopt or modify accordingly its labor laws and regulations (...).*” The only condition is that “*each Party shall ensure that its labor*

‘procedural maze’ built into the Accord, and (3) the three categories or tiers into which the eleven labour principles are divided.

⁴¹⁸ MOREAU and TRUDEAU, *loc. cit.* note 68, p. 399.

⁴¹⁹ VERGE, *op. cit.* note 5, p. 79.

laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces."⁴²⁰ Following the logic of this article, a country would be fully within its rights should it choose to modify its labour legislation in order to decrease the degree of social protection offered to workers.

There is another side to the criticism that the NAALC does not create a supranational legislation or intend to harmonize the labour laws of the three countries. In fact, Adams and Singh go so far as to state that the Accord *does* establish a common set of minimum standards, at least in principle.⁴²¹ In the opinion of these authors, the Accord's eleven labour principles are in essence a set of common labour standards (whether they are officially qualified as such or not) to which the three countries are expected to adhere. Although Annex 1 of the NAALC stipulates that the labour principles do not establish common minimum standards, they are at the very least guiding principles that the three countries are committed to promote. These principles indicate broad areas of concern already reflected in each country's own laws, regulations, procedures and practices. Moreover, according to Adams and Singh, it can even be argued that not only does the NAALC create common labour principles, but these principles cover a wider range of areas than what are usually considered to be core labour standards.⁴²²

Compa defends the reasoning behind the three countries' decision not to develop a common labour legislation by explaining that the sovereignty of each country must be respected. This author argues that the peculiarities in each country's labour legislation are the result of specific events in its history :

"These differences [in each country's legislation] did not just casually happen. They result from entire national histories replete with anti-colonial wars, civil wars, constitutional crises, regional conflicts and class struggles. With three ministers of labor sitting down to negotiate

⁴²⁰ NAALC, *supra* note 79, Article 2.

⁴²¹ ADAMS, R., and P. SINGH, *Worker Rights Under NAFTA: Experience With the North American Agreement on Labor Cooperation*, DeGroote School of Business, McMaster University, May 1996, p. 6.

⁴²² *Id.*

*the first labor agreement connected to a trade pact, it is unrealistic to expect them to undo those laws and defer to a supranational power.*⁴²³

It should also be noted that the creation of a supranational legislation may not have equal consequences for all parties. In fact, Staelens affirms that “[déplacer] *les droits et pouvoirs des niveaux locaux et nationaux vers une institution internationale (...) risque de donner un traitement favorable aux parties les plus puissantes.*”⁴²⁴ In other words, although labour calls for a supranational legislation in order to have all three countries abide by the same laws, it must be taken into consideration that, in the establishment of this legislation, the US likely would have more negotiating power. As a result, the eventual common legislation may represent more the demands of the US than those of Mexico, for example.

The approach taken in the NAALC to ensure each country’s sovereignty is a far more realistic option than the creation of a specific supranational labour legislation. By establishing the eleven labour principles, the side accord ensures, to some extent, a commitment and an ‘obligation’ on the part of each government to respect certain labour standards. At the same time, the NAALC maintains each country’s sovereignty - an important feature in convincing the countries to sign the agreement in the first place. The idea of maintaining national sovereignty while also setting international principles is behind the reasoning of John McKennirey, executive director of the Secretariat at Dallas, when he explains that the NAALC is “*an international commitment to support and promote domestic law.*”⁴²⁵

Although the NAFTA members did not give up their right to develop and control their own labour legislation, they did open themselves up to being judged by their neighbours on their respect of the eleven labour principles that they agreed to promote. The fact that

⁴²³ COMPA, *loc. cit.* note 340, p. 5.

⁴²⁴ STAELENS, P., *Droit du travail, intégration économique et ‘clause sociale’ à la lumière de l’expérience nord-américaine*, Doctoral thesis, Université Jean Monnet de Saint Étienne, France, January 1997, p. 391.

each country did agree to allow its neighbours to judge its respect of national labour laws is, according to Compa, “*an extraordinary degree of candor in international relations, in contrast to traditional sovereignty rules. It should not be scorned because it fails to achieve a supposed ideal of international fair labor standards (...)*.”⁴²⁵ Finally, this scrutiny may be enough to make the countries adhere to the contents of the labour principles, without the need for a supranational legislation. Although each country maintains the power to modify its own laws, it would be rather difficult for a country to make a change that goes against one or more of the eleven labour principles, without labour rights activists in the three countries, not just on its own territory, crying foul play.

In all our interviews with staff of the NAOs and the Secretariat, we asked for opinions on the issue of harmonization of laws and the establishment of supranational legislation. Interviewees were unanimous in advising against this option. All were convinced that the assurance of maintaining sovereignty was needed in order to obtain the buy-in from the countries in the first place. Many respondents stated that it would have been virtually impossible to get the countries to relinquish their sovereignty, which would have hindered the ratification of the side accord right from the outset of negotiations. It is important to highlight that all interviewees clearly stated that the harmonization of labour legislation was never even an issue in the development of the side accord. The creation of a supranational labour law was not the intention of the governments involved. It was clear to all three governments, however, that labour definitely wanted a supranational legislation. According to some interviewees, labour representatives saw the harmonization of legislation not only as a way to improve overall working conditions in Mexico, but also to limit anti-union actions from employers in the US. Almost all interviewees stated that one of the main reasons why labour advocates continue to criticize the side accord is because they did not get the supranational legislation they were hoping for. This was not a realistic expectation on the part of labour, as the governments never even meant to bring the issue of harmonization to the table. Criticizing the NAALC for not creating

⁴²⁵ Statement made at the conference on *The NAALC - Linking Labor Standards and Rights to Trade Agreements*; Washington College of Law, American University, November 12, 1996.

⁴²⁶ *COMPA*, *loc. cit.* note 340, p. 6.

supranational legislation is not entirely justified. In the words of the executive director of the Secretariat, “*Labour was profoundly upset because they wanted supranational standards but didn’t get them. This would only be a true criticism if [the three governments] had wanted supranational standards.*”⁴²⁷ Is it not better to have an accord that focuses on the enforcement of existing national laws than no accord at all? It is not likely that the countries would have ratified an accord imposing a supranational legislation.

4.4.2 Complaints procedures are lengthy, bureaucratic and complicated

A second criticism of the side accord relates to the long, complicated complaints procedures that have been put in place by the NAALC. At each step, beginning with a public submission to an NAO and right through to economic sanctions being imposed, the institutions have a substantive amount of time in which to review the matter at hand, request a study of related issues in each country, analyze the facts, make a decision, write a report on the decision and, finally, implement the decision. The country that allegedly violated its labour law also has a significant amount of time to correct the situation. Diamond observes that :

*“...to get to the final step in the NAALC over a dispute regarding a technical labor standard can take as many as 1320 days - nearly four years. (...) A complaint must wind its way through consultations between national representatives (NAOs) to ministerial consultations, through an evaluation by a committee of experts, to a draft and final evaluation report, to party-to-party consultation, to an arbitration panel, through an initial and final report by the arbitration panel, to an implementation of the final report, to the possible reconvening of the panel, to a second possible reconvening of the panel, to the imposition of a ‘monetary enforcement assessment’, to the possible reconvening of the arbitration panel, to a final report to the parties in dispute.”*⁴²⁸

⁴²⁷ Comments from our interviews.

⁴²⁸ **DIAMOND, S.**, *Labor Rights in the Global Economy: A Case Study of the North American Free Trade Agreement*, in Human Rights, Labor Rights and International Trade, L. Compa and S. Diamond (ed.), University of Pennsylvania Press, 1996, p. 217.

As this paragraph illustrates, the entire process may seem to take an eternity. At any given step in the procedure, it may be tempting for the plaintiff to just give up. Furthermore, as is the case for any issue getting media attention, although public interest may be significant when the situation is first brought to light, as time goes by the number of interested parties may tend to dwindle. As a result, the final decision in a particular case may be known only to the few parties that were actually able to follow the issue through to its end.

Although the myriad of complex procedures spelled out by the NAALC is not unlike the complexity of any other international agreement, it is important to realize that there is 'method' to this madness. The complicated procedures set out by the side accord were established for a reason. Jorge Perez-Lopez of the US Bureau of International Labor Affairs explains :

*“The main objective of the NAALC is to improve working conditions and living standards in the US, Mexico and Canada (...). The preferred approach of the Agreement to reach this objective is through cooperation - exchanges of information, technical assistance, and consultations. (...) Penalties - either monetary fines or trade sanctions - are clearly mechanisms of last resort, expected to be used on the rarest of occasions and only after an extended process of consultations.”*⁴²⁹

As Perez-Lopez suggests, the long, drawn-out complaints procedures may simply be intended to discourage parties from using this avenue to resolve issues that may arise. As reported by Ingrid Negrete, one of the Mexican negotiators for the NAALC, *“assured Mexican entrepreneurs that the lengthy and complex process required by the labor (and environmental) side agreements makes it very improbable that the stage of sanctions could be reached.”*⁴³⁰ Imposing penalties or sanctions on a neighbour is considered to be a drastic measure, one that is discouraged by the spirit of cooperation under which the NAALC was created. Whereas critics of the side accord point to the bureaucracy of the

⁴²⁹ **PEREZ-LOPEZ, J.**, *The Promotion of International Labor Standards and NAFTA: Retrospect and Prospects*, in the Connecticut Journal of International Law, Vol. 10, Spring 1995, p. 450.

⁴³⁰ **NEGRETE, I.**, *Mexico Official Defends NAFTA Dispute Process*, Journal of Commerce, August 10, 1993, p. A3.

complaints procedures as a weakness that discourages the filing of public submissions, proponents of the NAALC can only be content with the fact that these complex procedures are fulfilling exactly what they were intended to do.

Comments from our interviewees with regards to the bureaucracy of the NAALC's procedures generally confirmed the view that the complicated procedures established by the side accord are no different than what can be found in any international agreement on any subject. Interviewees were also in agreement that these procedures were never meant to be simple, that they are meant to be used as a last resort, and that they are secondary to the spirit of cooperation under which the NAALC was established.

4.4.3 The side accord does not have enough 'teeth'

The spirit of cooperation mentioned above is at the root of the criticism that the NAALC does not have enough 'teeth'. Labour activists have outspokenly characterized the Accord as "*toothless and ineffective as a means to protect workers rights.*"⁴³¹ What is meant by this statement is that the side accord is simply not harsh enough. This criticism refers to labour's complaints that (a) the chances that economic sanctions will be imposed are very remote, (b) even if economic sanctions were ordered, they could not be stiff enough, and (c) the institutions of the NAALC do not have the necessary power to order a company to reinstate workers and pay penalties.

First, the slim chances that economic sanctions ('monetary enforcement assessments' in the language of the NAALC) will be imposed are due to the fact that the side accord seriously limits the types of cases in which this is an option. In the dispute resolution procedures outlined in the NAALC, only an arbitral panel can order the payment of a monetary enforcement assessment, and only in the case of a 'persistent pattern of failure' by a country to effectively enforce its laws pertaining to (1) occupational safety and health, (2) child labour or (3) minimum wage. Furthermore, this persistent pattern of failure must

⁴³¹ SOUTHARD-MURPHY, *loc. cit.* note 334, p. 417.

involve an area that is trade-related *and* covered by mutually recognized labour laws.⁴³² These conditions very obviously restrict the number of cases in which economic sanctions can be imposed.

Second, even in the rare case where the payment of economic sanctions is ordered, these sanctions are perceived by labour representatives as not being tough enough. Critics of the side accord mock the fact that the side accord “*allows the money to go back to the offending country anyway*”.⁴³³ This criticism refers to Annex 39 of the NAALC, which stipulates that :

*“All monetary enforcement assessments shall be paid in the currency of the Party complained against into a fund established in the name of the Commission by the Council and shall be expended at the direction of the Council to improve or enhance the labor law enforcement in the Party complained against, consistent with its law.”*⁴³⁴

In other words, even in the remote case where a country is condemned to pay a fine, the money is deposited into a fund and, at the direction of the Council of ministers, will be spent on improving labour law enforcement in the same country that paid the fine in the first place. This, as the critics state, is not exactly tough enough to push a nation to abide by its laws, because the money does not leave the country.

Third, the effectiveness of the NAALC is questioned with respect to the minimal power granted to its institutions. The side accord is criticized for not enabling the NAOs or the Secretariat to impose sanctions on the individual company involved in a case or order the company to reinstate workers. As we have seen in our discussion of the public submissions reviewed to date, actions taken have included ministerial consultations, public hearings and recommended studies and seminars. Even in the Sony case, where the US NAO truly tested the limits of how far it could go with the allowed procedures of the

⁴³² NAALC, *supra* note 79, Article 29, paragraph 1. See Section 2.2 of this paper for more details.

⁴³³ Comments at recent conference attended during our research.

⁴³⁴ NAALC, *supra* note 79, Annex 39, paragraph 3.

NAALC, labour representatives continued to claim that the Accord had no significant effect on workers' rights as it was not able to force the company to reinstate workers. Let us not forget that the lead lawyer for the workers, Jerome Levinson, insisted that seminars cannot replace concrete action.⁴³⁵ Along these same lines, the Canadian Labour Congress contends that “*the actions of Sony in Mexico and Sprint in the US (...) demonstrate that the NAFTA side agreement creates talk shops, but does not protect jobs or improve working conditions (...)*.”⁴³⁶

For the three reasons mentioned above, critics of the NAALC claim that it is just not harsh enough to bring about an improvement in work conditions. The possibility of sanctions being imposed on a country that does not respect its labour laws is very slim, and even if they are imposed, the money stays within the country. Moreover, offending companies cannot be penalized or ordered to reinstate workers. With such lax penalties, according to critics of the Accord, what do offending countries (or companies) have to fear?

In response to this criticism, many advocates of the NAALC are of the opinion that making the Accord more harsh will not necessarily improve work conditions. As Adams and Singh put it, “*strong enforcement procedures do not necessarily lead to strict compliance.*”⁴³⁷ Moreau and Trudeau confirm this statement : “*Il est clair, d'ailleurs, que la sanction indemnitaire est particulièrement mal adaptée à la réparation de la violation de droits fondamentaux.*”⁴³⁸ These authors explain that economic sanctions can have a goal other than the reparation of a specific past violation of workers' rights. Instead, they say, “*la sanction économique peut avoir une raison d'être différente: créer une menace suffisamment dissuasive, parce que sont en cause les intérêts du libre-échange, pour que les droits essentiels des travailleurs soient garantis; soit, (...) une nouvelle histoire de carotte et de bâton.*”⁴³⁹ From this point of view, the threat of sanctions alone is enough to

⁴³⁵ See our discussion of the Sony case in Section 4.3 of this paper.

⁴³⁶ **Canadian Labour Congress**, *The Morning NAFTA - Labour's Voice on Economic Integration*, Issue N° 5, May 1996, p. 4.

⁴³⁷ **ADAMS** and **SINGH**, *loc. cit.* note 421, p. 25

⁴³⁸ **MOREAU** and **TRUDEAU**, *op. cit.* note 5, p. 48.

⁴³⁹ *Id.*, p. 47.

incite the governments to enforce their respective labour laws. The fact that the side accord already contains the possibility of sanctions is sufficient. Making these sanctions tougher will not necessarily increase the likelihood of compliance. In any event, according to Betty Southard-Murphy, the side accord does have teeth - it is just that the teeth are not in the form of economic sanctions, but rather in the form of the monitoring by their neighbours of each country's compliance with their obligations under the NAALC.⁴⁴⁰ The public scrutiny that an offending country has to face is enough to persuade its government to abide by its labour laws.

All our interviewees were adamantly against the idea of making the NAALC harsher (either by increasing the dollar amount of existing sanctions or by increasing the variety of areas subject to sanctions) in order to increase compliance with national labour laws : In the opinion of the Secretariat's executive director, the 'sunshine function' of the Accord (i.e. its objective of transparency in the administration of labour legislation) is an effective and non-coercive way of having an impact on the respect of workers' rights in the three countries. Interviewees were not at a loss for analogies to illustrate the issue of increased sanctions. Luiz Miguel Diaz, General Coordinator for International Affairs in Mexico at the time of our visit, explained that increasing the possibility of sanctions in the NAALC is not the solution because "*spanking a child will not guarantee that he will obey.*" May Morpaw, Director of the Canadian NAO, affirmed that the spirit of cooperation is the right way to bring about respect of national laws, because "*you can catch more flies with honey than with vinegar.*"

As Adams and Singh explain, "*the dominant theme of the accord is cooperation rather than adversarialism.*"⁴⁴¹ This spirit of cooperation is therefore of utmost importance in the establishment of procedures to protect workers' rights. Because cooperation is inherent in the Accord itself, cooperative activities are seen as the preferred way to ensure the protection of workers' rights. By sharing information on workers' rights through

⁴⁴⁰ SOUTHARD-MURPHY, *loc. cit.* note 334, p. 408.

⁴⁴¹ ADAMS and SINGH, *loc. cit.* note 421, p. 7.

conferences and workshops, workers become more aware of their rights. With more knowledgeable workers, companies are more likely to abide by the law. This is why transparency is seen as an effective (and non-coercive) way to ensure that workers' rights are respected.

Obviously, with cooperation as a priority, sanctions are not seen as an appropriate means to ensure respect of labour legislation. All interviewees emphasized the fact that the sunshine function of the Accord is an effective and appropriate way to promote workers' rights. Morpaw's statement mentioned earlier in this chapter explains the importance of the sunshine function : *"A bad public image and a negative spotlight turned on you is the same as, if not more effective than, economic sanctions that only a few experts would ever know about anyway."*⁴⁴² An issue in the public eye can reach all classes of society, whether normally interested in the specific type of issue at hand or not. Thus, the impact of the public submission process can be quite strong, with negative media attention attacking the reputation of the company and the government involved. If the non-respect of national labour laws was subject to economic sanctions alone, the likelihood would be that only those individuals, politicians or companies directly involved in the case would ever be aware of the payment of sanctions. As such, the risk of negative exposure would be minimal.

The comments of Irasema Garza, Secretary of the US NAO, sum up quite adequately the opinions of most NAO and Secretariat staff with regards to the criticism that the NAALC does not have enough teeth. According to Garza, this criticism is not founded because the agreement has not yet been tested beyond the level of ministerial consultations. In her opinion, it is unfair to criticize the mechanisms that the side accord establishes if these mechanisms have not even been tested yet.⁴⁴³ Without first testing these procedures, by studying a case that goes all the way through the complaints procedures, how can labour know that the Accord is not harsh enough? So far, the cases presented have only gone to

⁴⁴² From our interviews at the Canadian NAO.

⁴⁴³ Comments at a seminar attended during our research.

the stage of ministerial consultations. Only after a case goes to an Evaluation Committee of Experts, an arbitral panel, and the imposition of a monetary enforcement assessment, will labour (or anyone else for that matter) be in a position to judge the harshness of the NAALC.

Of course, we must not forget the comment that was referred to earlier in our paper. At a recent conference, the Secretary of the US NAO explained that the reason why no issue has gone beyond ministerial consultations is that the public submissions received so far related to topics that do not allow the procedures to go beyond that step. It was pointed out at the time that an NAO can initiate the process without waiting for a public submission to do so. A review initiated by the NAO could be an opportunity to evaluate the harshness of all the complaints procedures, beyond the stage of ministerial consultations. The institutions do not have to wait for labour to submit an appropriate case. However, as the Secretary explained, the chances are slim that the NAO would have the resources and the time to initiate an action on its own.

One last point to mention is the comparison of the side agreement to the system of the International Labour Organization, with regards to the criticism that the Accord is not tough enough. Although the NAALC is similar to the ILO in the aspect of exerting 'moral pressure' on countries in order to obtain their compliance with workers' rights, it is important to realize that the side accord goes one serious step further than the ILO. As we recall from Section 1.5.3 of this paper, adherence to the ILO's international labour standards is strictly voluntary. The Organization exerts a moral pressure on countries so that they first ratify a Convention and then adopt it into their national legislation. The ILO does not take on the responsibility of punishment, as this is not its *raison d'être*. In Chapter 1 of this paper, we referred to Hartwell's stipulation that "*(...) when countries fail for whatever reason to translate economic development into social development, the ILO's role should not be primarily about sanctions. It should be about encouragement, support and assistance.*"⁴⁴⁴

⁴⁴⁴ HARTWELL, *supra* note 143, p. 2.

In North America, the three NAFTA countries can also claim that the NAALC's role, like that of the ILO, is not primarily about sanctions. The side accord is primarily about cooperation. However, the important difference between the ILO's system of labour standards and the NAALC is that the side agreement contains the *threat* of economic sanctions. Although the focus is on cooperation and the exertion of moral pressure, the possibility of sanctions does exist. It seems as though the NAALC follows the ILO's model of international labour standards with regards to (a) the labour principles being based on the ILO's core labour standards and (b) the belief that moral pressure can be effective in the protection of workers' rights, yet the NAALC does not stop there. It has been able to improve on the model of the ILO by including the possibility of economic sanctions for violations of labour legislation, a step that the ILO does not take. As such, we can only assume that the NAALC has a chance of being more effective than the ILO in the protection of workers' rights on its territory.

4.4.4 The side accord is too narrow (only 3 areas can go to economic sanctions)

Related to the criticism that the NAALC is not harsh enough is the reproach that it is also too narrow. As we explained in detail in Section 2.2, the eleven labour principles of the side agreement are divided into a three-tiered structure. At the level of ministerial consultations, any matter within the scope of the Agreement can be handled.⁴⁴⁵ The second level or tier, that of the Evaluation Committee of Experts, is reserved for issues related to occupational safety and health or other 'technical labour standards' (i.e. the last eight of the eleven labour principles, excluding the three so-called industrial relations principles).⁴⁴⁶ Arbitral panels and monetary enforcement assessments are at the third tier of the structure ('dispute resolution'), which is reserved only for matters pertaining to occupational safety and health, child labour or minimum wage technical labour standards.⁴⁴⁷ The reason why no case has gone all the way through the procedures established by the side accord is that the cases submitted to date have not regarded the

⁴⁴⁵ *NAALC*, *supra* note 79, Article 22, paragraph 1.

⁴⁴⁶ *Id.*, Article 23, paragraph 1. Article 49 defines 'technical labour standards'.

⁴⁴⁷ *Id.*, Article 27, paragraph 1.

three areas identified by the NAALC as subject to dispute resolution - all have concerned the alleged violation of the right to organize and freedom of association, which are limited to the first tier of the complaints process.

The fact that the eleven labour principles of the NAALC are increasingly eliminated as they progress through the complaints procedures has prompted severe criticism by labour rights advocates. The side accord has been labeled as too narrow, allowing only three areas to be subject to dispute resolution. Compa explains that, "*critics argued that narrowing the funnel as issues move forward only chokes off possibilities for enhancing labor rights in North America.*"⁴⁴⁸ The three areas that can only go to the first level of the process (ministerial consultations) are known as 'industrial relations' issues. These are freedom of association and the right to organize, the right to bargain collectively, and the right to strike. To labour rights groups, these are the most important of the labour principles. The issues at the heart of the cases submitted to the NAOs to date demonstrate the importance of industrial relations issues to labour activists. According to Levinson, "*laws relating to industrial relations [are] the most fundamental of all worker rights*", and the fact that issues relating to these rights cannot proceed to dispute resolution makes the NAALC "*an agreement based upon a hope and a prayer.*"⁴⁴⁹

Of course, an obvious question is the following : If the labour movement so strongly criticizes the NAALC for not having enough teeth, and the response to this criticism has simply been that the Accord has not been tested to its fullest extent, then why does labour keep submitting only industrial relations cases, knowing full well that these cases can't go beyond the stage of ministerial consultations? Why don't labour activists present cases of alleged violations of rights in the three areas that can be subject to arbitral panels? At least if they did, the true effectiveness of the Accord could be determined. The general opinion of staff members at the NAOs and the Secretariat with regards to these questions is the following : Because industrial relations issues are the most fundamental rights for the

⁴⁴⁸ COMPA, *loc. cit.* note 340, p. 3.

⁴⁴⁹ LEVINSON, *loc. cit.* note 322, p. 12.

labour movement (mostly for the US labour movement, which has been the most vocal against the Accord), they continue to submit these particular types of cases. *These* are the types of cases which labour wants to see subjected to economic sanctions; hence the criticism that the NAALC is too narrow. In other words, the fact that cases regarding child labour, occupational safety and health or minimum wage can go all the way to economic sanctions is not a major concern of US labour organizations. What is important to these groups is that any violation of freedom of association and the right to organize, the right to strike, and the right to collective bargaining can be subject to sanctions.

In the opinion of some of our interviewees, even if the violation of all the technical labour standards presently limited to the second tier of the process became subject to economic sanctions, labour organizations would still argue that the NAALC is too narrow. If the three industrial relations rights are blocked from the third tier, labour will never be satisfied. Why are these industrial relations rights so important to labour organizations? Because without these basic rights, the very existence of these groups may be threatened. As long as these fundamental rights are enforced, then labour organizations can worry about other issues. The first priority for US labour groups is to ensure that free trade does not allow the violation of the rights that are essential to their existence. From their point of view, the bleak situation of unions in Mexico and the anti-union behaviour of corporations in the United States has to be exposed, and their way of doing this is by submitting cases of violation of industrial relations rights to the NAOs.

In this context, it seems as though the only way to resolve the issue of the NAALC being too narrow would be to allow industrial relations violations to go all the way through the complaints procedures. No matter what other rights are allowed to go to the final stages of dispute resolution, it is the industrial relations principles that preoccupy labour organizations. As such, the criticism is not so much that there is a three-tier structure to the complaints process, but that violation of the three industrial relations rights cannot be subject to economic sanctions. The fact that industrial relations principles are limited to the first level of the complaints procedures is actually quite similar to the European

situation. As we discussed in detail in Chapter 1 of this paper, the EU's Social Charter also has different levels at which particular labour rights issues are tackled. Compa explains the similarity between the EU and North America as follows :

“(...) a tiered approach to labor issues is not unusual in the international context. The European Union also divides the twelve elements of its Social Charter into three tiers of treatment, much like those of the NAFTA labor pact. To be precise, the same subjects susceptible only to first level review in the North American scheme - rights of association and organizing, collective bargaining (...), and the right to strike - are the three that are specifically excluded by the Maastricht Treaty from any form of Europe-wide legislation. For now, these issues are so central to national identity, history and workplace culture that no society accepts change forced from outside (...).”⁴⁵⁰

The three tiers of workers' rights in the EU to which Compa refers can be explained in the following manner⁴⁵¹ : The first tier concerns rights for which Directives can be adopted by **qualified majority vote**. These are, according to Compa, mostly the non-controversial issues such as health and safety, equal pay and workers' access to information. For the labour rights at the middle tier, Directives must be adopted by **unanimity**. Examples of these principles include workers' compensation and termination of the individual contract of employment. Finally, the third tier of rights **cannot be the subject of Europe-wide Directives**. These are freedom of association, collective bargaining and the right to strike. These three industrial relations rights, the exact same ones as those which are limited to the first tier of the NAALC, cannot be included in continent-wide legislation (Directives).⁴⁵²

⁴⁵⁰ COMPA, *loc. cit.* note 340, p. 7.

⁴⁵¹ Based on an explanation of the similarities of the three-tiered structures of the EU and North America, as presented by Compa at a conference attended at the Washington College of Law during our research.

⁴⁵² See Section 1.5.2 of this paper for a detailed explanation of workers' rights in the EU context.

As we can see from this comparison, the NAALC's often-criticized 'narrow' scope is not unlike the EU's structure. As we have seen, the NAALC is often negatively compared to the EU, however we can now understand that the three industrial relations areas which are not subject to economic sanctions under the side accord are also quite limited in Europe. Many critics of the NAALC praise the EU's model because of its creation of supranational structures. When criticizing the narrowness of the NAALC in favour of the EU, however, these critics should be taking into account the fact that, in both models, industrial relations rights remain under the control of national governments.

In this section, we have looked at the major criticisms of the NAALC. Despite the fact that the side agreement has been severely criticized for not creating supranational legislation, complaints procedures being too bureaucratic, having no teeth and being too narrow in scope, staff at the Secretariat and the NAOs are convinced that the NAALC is working just as planned. Rather than doubting the effectiveness of the side accord in the face of these criticisms, staff members in the three countries are adamant that the Accord was created the way it was with the intention of protecting workers' rights in a cooperative manner. The mechanisms built into the Accord are an effective and appropriate means to protect workers' rights within the spirit of cooperation, not one of coercion.

In summary, this chapter has delved into the details of the functioning of the NAALC. We began our analysis with a look at the structures set up by the Accord, both at the federal government level (the NAOs) and at the supranational level (the Secretariat). We saw that although the Offices were created with the same purpose and have basically the same responsibilities, there are differences in their functioning which make each NAO unique. After looking at the structures set up by the NAALC, we discussed the two main areas of responsibility of the side accord's institutions : the types of cooperative activities organized to date and the eight public submissions filed with the NAOs. Lastly, we considered some of the major criticisms of the side agreement and presented some of the points of view of staff members interviewed at the NAOs and the Secretariat. We briefly

discussed how the side accord compares to the ILO and the European Union with regards to these specific criticisms. The general opinion of our interviewees seems to be that the Accord is functioning quite satisfactorily and is an appropriate *cooperative* mechanism to protect workers' rights in the context of the North American Free Trade Agreement.

CONCLUSION

The North American Agreement on Labor Cooperation is nearing the fourth anniversary of its existence. Article 10 of the side accord calls for the “*review of its operation and effectiveness in the light of experience*” within four years after its date of entry into force.⁴⁵³ In November 1997, the institutions of the NAALC put out a call to the public for comments on the operation and effectiveness of the side agreement. The present study is thus quite timely, offering at an opportune moment a descriptive summary of the functioning of the Accord since its establishment.

The goal we set out at the beginning of this paper was to document the functioning of the side accord. In order to do so, we first laid out the theoretical basis of our study by discussing some of the underlying concepts related to our research topic. We began with an overview of globalization, looking at the trend towards the integration of national markets and the breaking down of barriers to international trade. We then discussed the concept of social dumping and the argument that countries will tend to decrease workers’ rights in the hopes of minimizing production costs in the face of heightened international competition. As each country attempts to remain competitive on the global marketplace, there is the risk of a downward spiral in the level of protection afforded to workers. We presented the notion of fundamental workers’ rights with a look at the specific rights considered by the International Labour Organization to be core labour standards. We saw that these seven rights were also adopted for the most part by other international bodies such as the OECD and the European Union (see Annex 1).

Next, the link between international trade and social protection was discussed, with the major debate being whether or not social protection should be directly tied to an international trade treaty. There is a widespread acknowledgement at the international level of the link between international trade and social protection. This is based on the belief that the economic progress that ensues from international trade should allow for a

⁴⁵³ NAALC, *supra* note 79, Article 10, paragraph 1(a).

corresponding social progress. However, there remains substantial debate as to whether or not a social clause tied to a trade treaty is the appropriate mechanism for protecting workers' rights. There also exists a certain amount of debate as to the appropriate body to promote and/or enforce the protection of workers' rights at the international level. In this respect, many state that the ILO should take on this responsibility through the promotion of its core labour standards. On the other hand, others argue that the responsibility should lie with the World Trade Organization, as it is the major international body regulating international trade.

A thorough analysis of the theoretical aspects surrounding our research topic required us to analyze the existing alternatives for social protection on the global marketplace. We first looked at the neo-liberal *laissez-faire* attitude, for which the belief is that governments should not interfere with the natural forces of the markets. From this point of view, the economic theory of the 'invisible hand' ensures that if all individuals act in their own best interest, the overall result will be in the best interest of society as a whole. At the international level, if each country acts in its own best interest, all parties will benefit. Thus, there is no need for governments to put in place special measures to protect workers' rights in the context of globalization. On the other hand, a look at the Prisoner's Dilemma analogy (Annex 2) showed that if each party looks out for its own best interests, their actions may not be the most advantageous as possible for all parties involved.

Other alternatives for social protection include the example of the European Union and the ILO. We saw that the situation of the EU is quite different from that of North America, which therefore limits the comparison between the two continents. It was explained that the EU is an example not only of economic integration, but also of political and judicial integration. Supranational structures have been created in Europe to reflect this multidimensional integration. As for the ILO's system of international labour standards, it was discussed that the ratification of the ILO's Conventions is purely voluntary. This body does not have, and does not wish to have, the power to force countries to adhere to these Conventions. No sanctions or any other type of penalties exist to punish cases of

non-respect of ratified Conventions. Moral pressure is the only means available to convince countries to respect the ILO's labour standards.

The final alternative for social protection discussed in this paper is the option of a social clause (or 'side accord') tied to a regional free trade treaty. The idea of a side accord linked to a trade agreement has created a conflict between industrialized and developing countries. On the one hand, industrialized countries argue that the reasons for a social clause are purely ethical, namely the improvement of work conditions and the minimizing of social dumping. On the other hand, developing countries contend that the social clause in trade agreements is none other than a form of protectionism. From their point of view, the real reason why richer nations argue for a social clause is to protect themselves from increased competition from 'cheap labour' countries. It is not work conditions that industrialized countries are preoccupied with, but the fear of decreased profits and market shares as capital moves to poorer countries.

After discussing the various alternatives available for social protection on the global marketplace, we outlined the operational framework surrounding our research topic. This framework was needed in order to set the context in which we were studying the functioning of the side accord. We first explained the economic situation in North America, looking at the relationship between the US, Mexico and Canada, and providing a general overview of the conditions set by the North American Free Trade Agreement. We then discussed the NAALC itself, reviewing the contents of its numerous articles with regards to the institutions it creates and the mechanisms it establishes for the protection of workers' rights. In particular, we discussed the mandates and responsibilities of the Secretariat and the NAOs, and the procedures to be followed in cases of non-enforcement of national labour legislation. Finally, we reviewed the eleven labour principles established by the NAALC. These principles are to be the focus of cooperative activities organized by the three countries and their violation is subject to investigation by the public submission process.

Once the theoretical background of our research topic was laid out, we explained the methodology used to complete our study of the NAALC, which included a literature review, attendance at conferences related to our subject, as well as interviews conducted at the NAOs and at the Secretariat. This finally brought us to our analysis of the functioning of the side accord. We began our analysis with a detailed look at the institutions created by the NAALC. We discussed the structure of each NAO and of the Secretariat, based on information gathered during our site visits and interviews. This discussion allowed us to note that although the Offices have the same mandate and responsibilities, each one is unique in its own way. For example, the US Office has been quite busy establishing its steps for the handling of public submissions, having received all but one of the complaints to date. The Mexican Office has had a difficult time getting organized due to its significantly lower number of staff members than its counterparts, thereby requiring some time from government employees outside of the NAO. It also has a problem with a lack of facilities, and is thus unable to provide a reading or documentation room for the public. Finally, the Canadian Office has put significant time and effort into developing its relations with the provincial governments and establishing procedures for federal-provincial communications. Getting all the provinces to sign on to the NAALC has been and will continue to be a focus of the Canadian NAO. With regards to the Secretariat, its challenge has been to efficiently use its resources to conduct the studies which are a major part of its mandate. By experience, staff of the Secretariat have come to the realization that it is difficult for them to consecrate resources to the gathering of data required for their studies. In the future, it is likely that much of the information gathering will be outsourced, as the Secretariat establishes links with outside organizations.

Along with our analysis of the structures themselves, an important part of our study of the functioning of the NAALC was the examination of the major achievements of the past few years, namely the cooperative activities held and the public submissions reviewed to date. Our review of the seminars, conferences and workshops organized by the NAALC's institutions has shown us that the institutions have held numerous events in the three

countries on a wide variety of topics, thereby making some progress towards attaining at least the goal of information dissemination and transparency in labour law administration.

Discussing the handling of public submissions on a case-by-case basis has helped to identify a consistent pattern of actions in the handling of submissions that is becoming firmly established, at least on the part of the US NAO. It has also shown us the similarities in the cases submitted to date. All cases but one have concerned alleged violations of the right to organize and freedom of association (the exception being the case on pregnancy-based discrimination). Moreover, all cases but one have been filed regarding violations occurring in Mexico (the exception being the Sprint case in San Francisco). These cases highlight a pattern whereby US unions are the most vocal and their focus thus far has been on violations of so-called 'industrial relations' rights.

Lastly, no analysis of the side accord would be complete without a look at the major criticisms of the agreement. The Accord has been criticized for not having created a supranational legislation, being too bureaucratic in its complaints procedures, having no 'teeth' and having too narrow a scope. From the points of view of staff at the NAOs and at the Secretariat, the side agreement is working exactly as planned. The desire to maintain national sovereignty and the spirit of cooperation under which the NAALC was developed are the most common arguments given in defense of the Accord. The discussion of the criticisms of the Accord and the arguments presented in its defense conclude our study of the functioning of the NAALC.

Our research, especially the opportunity to visit all NAALC institutions and conduct interviews in the three countries, has given us a unique viewpoint of the side accord. As a result, we are able to make some interesting observations and formulate our own opinions as to the functioning of the Accord. First and foremost is the issue of the various criticisms of the NAALC, for which the general opinion of our interviewees was that the Accord was doing its job as it was set out to do and that the criticisms are not justified. For example, in the opinion of our interviewees, the absence of supranational legislation is

absolutely necessary in order to maintain the sovereignty of each nation. On this point, it seems difficult to ignore this argument. The three countries are so different in histories, cultures and in their economic situations. Attempting to incorporate these three distinct profiles into a common labour legislation could lead to never-ending negotiations that would leave all three countries frustrated. Also, the risk of the strongest economy, the US, overpowering its counterparts during these negotiations and coming out of the process with an obvious advantage is quite high. It is difficult to envision otherwise. Honestly speaking, what are the real chances that Mexico would be able to convince the other two countries to adopt its point of view with regards to the rights of workers? Any supranational legislation would likely reflect the wishes of the United States far more than those of Mexico.

On the points of the bureaucracy of the complaints procedures, the NAALC not having enough teeth and the narrow scope of the Accord, the underlying spirit of cooperation was given in argument to these criticisms. This argument, like that of national sovereignty, seems to hold water. The side accord is primarily a political instrument. It would have been extremely difficult to convince the three countries to voluntarily ratify an international treaty that incorporates stiff penalties for all kinds of labour standards violations. Chances are that if the NAALC contained provisions for high sanctions for the violation of any one of the eleven principles, the countries probably would not have signed on. As is reflected by the numerous public submissions alleging violation of industrial relations standards in Mexico, it seems as though these types of situations are not uncommon in that country. Would Mexico have accepted to sign on to the NAALC if the risks of tough economic sanctions were high? Designing the NAALC as a cooperative instrument to promote the respect of the labour principles seems like a better way to get buy-in from the countries than proposing a coercive instrument.

We often heard the argument that the criticism of the Accord's not being harsh enough to be effective in improving working conditions is too premature, as the procedures beyond the level of ministerial consultations have not yet been tested. So far, all but one of the

cases submitted to the Offices concerned the violation of industrial relations rights which, as we know, is limited to the level of ministerial consultations. One of the most recent submissions, that of the alleged pregnancy-based discrimination, will hopefully allow for the testing of complaints procedures beyond consultations. In fact, this case, while not being subject to arbitral panels or economic sanctions, may be the first time that the Evaluation Committee of Experts procedures are tested. One cannot help but wonder what would have been the outcome if this submission had been presented as a case of violation of the occupational safety and health standard, as this technical labour standard is one of the three that can go all the way to economic sanctions.⁴⁵⁴ Given the fact that the ECE, arbitral panel and economic sanctions procedures have not yet been tested, we must agree that it is not justified to criticize the effectiveness of the Accord at this time.

It is important to recognize that all our interviewees gave the same discourse with regards to the criticisms of the NAALC's functioning. The consistency of the responses we received was quite striking, and the thought did cross our mind on several occasions as to whether or not we were hearing a rehearsed political speech. Could (or would) government workers named to the NAOs and the Secretariat openly criticize the functioning of the side accord? We should not forget that these individuals are in political positions, where diplomacy is of the utmost importance. On the other hand, while interviewees did not criticize the functioning of the NAALC, they were on occasion open to discussing some of the negative aspects of the relations between the NAOs. Let us bear in mind the statements made during our interviews with regards to the Mexican NAO's lax treatment of the Sprint case; the belief that the Mexican Office's cooperative activities are given less effort and are less organized than those of the other two countries; the remarks questioning what the Canadian NAO did with its time since it was not directly involved in the submissions process; etc. An important observation about these comments is that they were usually made after the interviewee turned off the tape recorder. With the protection of anonymity, interviewees seemed to feel more at ease criticizing their counterparts. If

⁴⁵⁴ Remember that there were allegations in this case suggesting that pregnant women were subjected to abusive practices, unreasonable conditions and physically harder work leading to overexertion.

this is the case, wouldn't they have felt more at ease criticizing the NAALC as well? Perhaps then, their conviction that the Accord is achieving its objectives was genuine.

In our opinion, the NAALC is quite able to meet the objectives set out by the three governments. The fact of the matter is that the NAALC is not able to meet labour's objectives. Let us recall that in most of the submissions where workers were dismissed, labour was calling for the reinstatement of employees. From the beginning, labour was hoping for an instrument that would give the NAALC's institutions the power to order the reinstatement of workers and impose penalties on the offending companies. What labour does not seem to realize is that this type of instrument already exists in the usual domestic channels. We must remember that, in the Sprint case, it was the NLRB that eventually ordered that workers be rehired into other areas of the company, whereas the NAALC institutions could do no more than conduct a study into plant closings. However, the fact that actions against individual companies are left to domestic channels does not seem to satisfy labour. Once again, Levinson's remarks on the outcome of the Sony case still echo:

*"No sanctions could be taken against [Sony]; no workers were reinstated. The Mexican government (...) could not be sanctioned for failing to assure workers at [Sony] their constitutional right of free association. The CABs continue to exist with their current composition and acknowledged conflict of interest. Nothing changed as a consequence of the NAALC. (...) Seminars cannot substitute for action. And, despite the courageous and candid reports of the US NAO, there is no effective action under the NAALC that can be taken on behalf of the (...) dissident workers."*⁴⁵⁵

Considering that this statement in all likelihood reflects labour's expectations of what the NAALC should be able to do, is it any wonder why the side accord is seen as ineffective? Obviously, the very objectives set out in the text are at the root of labour's disappointment

⁴⁵⁵ LEVINSON, *loc. cit.* note 322, pp. 20-21.

with the side agreement. These objectives, let us not forget, are objectives established by three national governments and not by three national labour rights groups. Obviously, if labour rights groups had been the ones setting the objectives for the NAALC, the proposed side accord would have been very different, probably significantly more punishing. To the disappointment of labour groups, they now have to live with an accord that does not meet their expectations. What these groups should realize is that a severe, punishing accord would probably have never been ratified. They are disappointed with the side accord as it is now, but the alternative may very well have been no accord at all. Is a cooperative side accord actually put into effect not better than a harsh side accord that could not be realized?

Judgment of the side accord should be based on the achievement of the actual objectives that have been established, and not on the achievement of non-existent objectives. It is fair to say that the achievement of five of the NAALC's objectives is well under way. All cooperative activities, studies and the handling of public submissions thus far have contributed to the objectives of (1) the promotion of the labour principles, (2) the encouragement of cooperation to increase productivity and quality, (3) the encouragement of publication, the exchange of information and joint studies to increase understanding of labour legislation, (4) the pursuit of labour-related cooperative activities, and (5) the fostering of transparency in labour law administration. We can consider these to be immediate, short-term objectives.

The two other objectives of the side accord, the improvement of working conditions and living standards and the promotion of compliance with labour law, seem to be attainable on a more long-term basis. In reality, the *promotion* of compliance with labour law is very different from compliance itself. In other words, there is a difference between an objective to *promote* compliance and an objective to *obtain* compliance. It can be said that the institutions of the NAALC currently do *promote* compliance with every study, cooperative activity and submission they handle. Actual compliance itself on the part of a government or an individual company may take longer to achieve. Perhaps this distinction is not too

clear, or simply overlooked, by labour groups. If the three governments actually intended the *promotion* of compliance, and not compliance itself, to be their objective, then this should be highlighted in the wording of the NAALC and stressed in communications with the public. However, if compliance itself is the objective, then it should be stated in the NAALC as a long-term or indirect objective. This should also be the case for the objective of improving working conditions and living standards.

} this has to be mentioned

The attainment of these two objectives seems to be dependent on the other five immediate, short-term objectives. Through the promotion of the labour principles, the exchange of information, the fostering of transparency, etc., there will eventually be compliance with labour law as well as an improvement in work conditions and living standards. It is therefore, in our opinion, more appropriate to distinguish short-term and long-term objectives in the text of the NAALC. The fact that the improvement of working conditions and living standards is currently listed as the first of the side accord's seven objectives may be somewhat misleading. It is no wonder that labour focuses on the Accord's foremost objective. If the distinction was made between short-term and long-term objectives, perhaps labour's perception of the NAALC's effectiveness would not be so negative.

It should always be...

The improvement of working conditions and compliance with labour laws are, in our opinion, realistic and attainable goals in the longer term. As one of our interviewees had said, the NAALC is not aspirin, it is not an overnight cure for abuses of workers' rights. Through the sunshine function of the Accord (i.e. the dissemination of information and transparency in labour law administration), workers will become more knowledgeable of their rights and aware of existing abuses. Involvement from trade unions in all three countries will give workers the support they need to go forward and become more vocal in their quest for justice. The negative publicity surrounding the handling of public submissions will dissuade companies and governments from violating workers' rights. The fact that the Mexican government recognized the independent union in the Maxi-Switch

case at the last minute before the public hearing is an example in which the influence of the submissions process cannot be ignored.

To expect immediate compliance with labour legislation and improvement in working conditions is not realistic. The NAALC is an instrument of incremental impact. With the first few seminars and conferences, or with the first public submissions, the impact on public knowledge of workers' rights is minimal. However, as time goes by, more cooperative activities are organized and more public submissions are reviewed. With each event, more workers are touched and public awareness is increased. As additional public submissions are reviewed, the Offices will become more efficient in their procedures. Also, as cases continue to negatively impact the reputations of violators of workers' rights, companies and governments, especially repeat offenders, will have to clean up their act. Perhaps the turnaround in the Maxi-Switch case is a sign of what a negative public image can do. It is possible that the Mexican government recognized the independent union because it did not want another case of bad publicity. Perhaps even the two recent Mexican Supreme Court decisions regarding the law allowing only one union and the Nueva Cultura Laboral in Mexico were somehow brought about, at least in part, by an increased awareness of workers' rights in the general population. As we said earlier in this paper, what the NAALC can achieve is a progressive change, initiated internally but rooted partially in the moral pressure and publicity of the submissions process, and partially in workers' increased awareness of their rights, which results from cooperative activities.

With regards to the impact of the public submissions process over time, it should be noted that the procedures followed thus far in the handling of submissions are due to the individuals in place at the Offices (more particularly the US NAO) and at the level of the Council of Ministers. The influence of the individuals in these positions should not be minimized. The very fact that public hearings seem to have become the norm at the US NAO, and also that ministerial consultations are regularly recommended, are due in large part to the individuals in place at the US Office. One must wonder whether or not public

hearings would have become the norm if the Canadian or Mexican Office had been the first to receive public submissions. It seems quite obvious that the actions of the US Office have greatly determined the path to be followed in the handling of submissions. Furthermore, the role that the labour ministers of each of the three countries have played in the public submissions process should not be ignored. In all cases where ministerial consultations were recommended by the NAO (except the first two – Honeywell and GE), the three ministers decided to hold these consultations.

Of course, it would not be accurate to say that everything is perfect in the current situation. While we accept that certain objectives of the NAALC can only be achieved in the longer term, we acknowledge the fact that progress could be made faster. This is most evident in the case of Mexico.⁴⁵⁶ Whereas all NAOs are part of the respective federal government, in Mexico the proximity of the NAO to the political power may be having a negative effect on the progress that could be made to improve workers' rights. Three examples help to illustrate this possibility. First, we learned during our interviews that certain topics for cooperative activities are removed from the Mexican NAO's list of proposals. It seems as though the Mexican government has been limiting the types of issues that are open to the scrutiny of the other two countries. Second, the Mexican Office's vehement protests of the US NAO's review of the Pesca submission revealed a certain fidelity to the Mexican government over and above the Office's commitment to the objectives of the NAALC. If the Mexican NAO was solely concerned with ensuring the respect of workers' rights, wouldn't there be no reason for it to oppose a review of the Pesca Ministry's actions? Third, the Mexican NAO has not allowed for labour representatives to speak at cooperative activities. Comments made at the other two Offices pertained to the fact that Mexican labour representatives should not only be *invited* to cooperative activities, but invited to *speak*. Of course, it is preferable that these labour representatives come from non-CTM, independent unions (and therefore not linked to the

⁴⁵⁶ The fact that the Mexican NAO is now on its third Secretary in less than four years does not help matters. Whereas the US and Canadian Offices have kept the same Secretaries since their establishment, the position in Mexico was vacant for several months after the first Secretary left. The second Secretary

ruling PRI). Based on these three examples, it seems as though Mexico has the most work to do to reach the NAALC's objectives. Behaviours such as these can block the side accord's working at its fullest potential to achieve its objectives.

A definite positive effect of the side accord is that it allows labour to have a voice at the international level with regards to workers' rights. The involvement of the social actors permits all points of view to be heard regarding events on another Party's territory. As was said in the report on ministerial consultations on the Sony case :

“Perhaps the greatest achievement of these ministerial consultations was that the public was afforded the opportunity to observe and participate in this dialogue, and to question their own governments about the ways in which they might improve enforcement of their own labor laws. The (...) implementation of this ministerial consultations agreement has promoted transparency in the administration of labor law in the NAFTA countries, and provided for an unprecedented open and public dialogue between government, workers and employers (...).”⁴⁵⁷

The public submissions process has already allowed for a collaboration between unions of the three countries, especially those in the US and Mexico, that would probably not exist if it weren't for the NAALC. This collaboration can help to build solidarity among labour organizations across national borders, which can only help to facilitate the promotion and protection of workers' rights on the NAFTA territory. Labour organizations can be more involved than they have been, of course. As the Canadian Labour Congress has stipulated, *“While the NAALC remains weak (...), some labour analysts believe it has some positive value and should be vigorously utilized. Complaints such as the Sprint and Sony cases, they say, can generate political opportunities for workers to exercise their freedom of association with no interference.”⁴⁵⁸* From this statement, it seems as though even labour activists admit that the NAALC has the potential to help improve workers' rights. This call for increased use of the mechanisms of the side accord is echoed by Herzenberg, who seeks to *“persuade unions and other international labor rights advocates to take a fresh*

was only in place for a few months and has recently been replaced by the third. The position is currently held by Rafael Aranda.

⁴⁵⁷ Report on Ministerial Consultations Submission # 940003, *supra* note 352, p. 7.

look at the NAALC and to take advantage of several unused or underutilized instruments in it. These instruments could be used to improve labor rights and raise labor standards (...)."⁴⁵⁹ The unused instruments to which Herzenberg refers may be put into use for the first time if the pregnancy-based discrimination submission moves on to the level of the Evaluation Committee of Experts. Labour is thus encouraged to present more diverse cases to the NAOs for review. At that point, we can say that the Accord will be used to its fullest potential.

All in all, though, the side agreement is moving slowly and steadily in the right direction. We must not forget that this is a first attempt at linking social protection to a trade agreement. It is one step ahead of the existing system of the ILO in that it contains a threat of sanctions, but it is still only an interim type of agreement until the notion of social protection and international trade is seen as an inseparable issue. When and if this ever becomes the case, perhaps social protection will not simply be contained in a parallel agreement to a trade deal, but will be an integral part of the deal itself. The side accord has been criticized on this very fact : *"The NAALC, without a clear legal bridge to NAFTA, is a fatally flawed agreement. Linkage is not enough. (...) An agreement on workers' rights should be an integral part of a trade and investment agreement and not a side agreement (...).*"⁴⁶⁰

The evolution towards social protection becoming an integral part of trade agreements is not obvious. As we saw in Chapter 1 of this paper, there is a significant amount of debate at the international level as to the responsibilities of the WTO and/or the ILO with respect to social protection in the global environment. At least both organizations have acknowledged the existence of this issue and have held fora of debate to discuss the matter. The fact that the ILO has set up a working group to study the issue of social protection in the globalized economy should come as no surprise - workers' rights fall directly under the mandate of the ILO. However, this is not necessarily the case for the

⁴⁵⁸ Canadian Labour Congress, *supra* note 436, p. 5.

⁴⁵⁹ HERZENBERG, *loc. cit.* note 303, p. 3.

⁴⁶⁰ LEVINSON, *loc. cit.* note 322, p. 3.

WTO. As such, the very fact that the WTO has recently focused on the cause of social protection is a big step in itself. Once the international community recognizes that social protection and international trade are one and the same, this will hopefully become part of the mandate of the WTO. Only when this happens can we expect social protection to be incorporated into trade agreements. At that point, we can only hope that countries will not ratify a trade agreement without explicit provisions for social protection inherent in the deal. To get to that point, however, a strong collaboration between the WTO and the ILO is needed.

For now, the NAALC remains a first in the area of social protection in the context of globalization. Much can be learned from the functioning of the Accord. As Otero so clearly states :

“No mechanism comparable to NAALC is now built into [the US’] trade relations with any other country (...). No trading partner of the United States will have its labor practices subject to as much scrutiny as Mexico and Canada. In this respect, NAFTA and NAALC are historic and unprecedented. They represent a model that we may want to build upon as closer hemispheric economic integration proceeds.”⁴⁶¹

The NAALC can definitely be used as a model for including social protection in future trade agreements. For example, the Agreement on Labour Cooperation between Canada and Chile, which was only recently ratified by the two countries, is essentially the same as the NAALC. In this particular example, however, the labour agreement between the two countries was not seen as an opportunity to be creative. Although the agreement may have been more appropriate to the situation between the two nations if it had been designed with their relationship in mind, it was actually intended to be an temporary bilateral agreement until Chile joins NAFTA and the NAALC.⁴⁶² In fact, Article 48 of the

⁴⁶¹ OTERO, J., *The North American Agreement on Labor Cooperation: An Assessment of its First Year's Implementation*, Columbia Journal of Transnational Law, Vol. 33, N°3, 1995, p. 662.

⁴⁶² Based on information gathered during our interviews at the Canadian NAO, Chile's situation is far different than that of Mexico. Although Mexico actually has an elaborate set of labour laws offering a high level of protection to workers, the problem lies in the non-enforcement of these laws. On the other hand, labour legislation and social protection are minimal in Chile. It is not so much the enforcement of

Canada-Chile accord states that "*the Parties shall work toward the early accession of Chile to the North American Agreement on Labor Cooperation.*"⁴⁶³ However, the labour agreement between Canada and Chile was not the only occasion to use what has been learned from the experience with the NAALC. Many countries around the world continue on their path to increasingly open borders as the trend towards complete globalization continues. In North America alone, we can be sure that the NAALC will be referred to on countless occasions as free trade deals with other Central and South American countries are established.

Things are looking good for the future of the NAALC. First, with Manitoba and Québec signing the agreement in early 1997, it will be interesting to how Canada's involvement in the public submissions process develops. The country was not subject to the complaints procedures of the side accord for three of the almost four years it has been in place. Now that all three countries are subject to these procedures, we can only assume that the effects of the Accord will be felt even more strongly on the entire NAFTA territory. Second, with the recent public submission regarding alleged pregnancy-based discrimination, labour organizations and governments together are looking to see how the procedures beyond ministerial consultations will be tested. For the first time, the three countries may get a chance to see the effectiveness of the Evaluation Committee of Experts. Lastly and most importantly, the three countries are in the process of gathering information for the first exhaustive review of the functioning of the Accord. The Secretariat will incorporate the information received from various sources into a report to the Council of Ministers in early 1998, just in time for the four-year review called for in Article 10 of the NAALC. The results of this review are eagerly awaited by governments, labour and employers alike.

labour legislation that is the issue in Chile, but the actual creation of this legislation in the first place. If the legislation does not exist, a side accord calling for the enforcement of legislation is not the appropriate tool in this context.

⁴⁶³ Agreement on Labour Cooperation Between the Government of Canada and the Government of the Republic of Chile, Article 48, February 6, 1997.

It will be interesting to see what changes or recommendations, if any, will be made to the Accord. To date, the NAFTA countries can be content that, being the first accord of its kind, the NAALC seems to have the potential to achieve the objectives set by the three governments and improve workers' rights in a spirit of cooperation.

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ANNEX 1

Table of Core Labour Standards

ANNEX 1 : List of ILO Conventions representing core labour standards as ratified by NAFTA countries and their comparison to labour principles adopted by international structures

#	YEAR ⁵	ILO CONVENTIONS' TITLE	RATIF ⁶					
			OECD ⁷	EU ⁷	NAALC ³	CANADA	MEXICO	U.S.A.
29	1930	Forced Labour (in all its forms)	◆	◆	◆		◆ (1934)	
87	1948	Freedom of Association and Protection of Right to Organize	◆	◆	◆	◆ (1972) ⁷	◆ (1950)	
98	1949	Right to Organize and Collective Bargaining	◆	◆	◆			
100	1951	Equal Remuneration		◆	◆	◆ (1972)	◆ (1952)	
105	1957	Abolition of Forced Labour (as punishment)	◆	◆	◆	◆ (1959)	◆ (1959)	◆ (1991)
111	1958	Discrimination (Employment and Occupation)	◆	◆	◆	◆ (1964)	◆ (1961)	
138	1973	Minimum Age	◆	◆	◆			
122*	1964	Employment Policy		◆			◆ (1966)	
169*	1989	Indigenous and Tribal Peoples						◆ (1990)

* Conventions 122 and 169 are considered by the ILO, along with the seven other Conventions listed here, to be important, basic human rights conventions. They are not, however, considered to be core labour standards. We include them in this table for interest purposes only.

¹ Source of ILO information: **International Labour Organization, Human Rights in the Working World**, at the ILO web site on the Internet, last updated Oct. 24, 1996.

² The OECD states that it adheres to certain principles which are similar to (and based on) the specified ILO Conventions. This does not indicate that this body has indeed ratified these particular ILO Conventions. See *Trade, Employment and Labour Standards - A Study of Core Workers' Rights and International Trade*, OECD, 1996, p. 6.

³ This list represents a compilation of those rights referred to in any of the following: the Treaty of Rome, the European Social Charter, the Social Agreement in the Maastricht Protocol or Règlement no 3281/94. According to the Règlement n° 3281/94 of the European Union, member countries may be entitled to preferential conditions if they adhere to these specific ILO Conventions. For more information, see the section on the EU in the present study and **SERVAIS, J.M., Les aspects sociaux de la libéralisation du commerce international ou la clause sociale revisitée**, Bulletin de Droit Comparé du Travail et de la Sécurité Sociale, Université Montesquieu-Bordeaux IV, 1996, p. 216-217.

⁴ This is a comparison between the specified ILO Conventions and the areas covered by the 11 labour principles included in the NAALC. This does not indicate ratification of these Conventions by the institutions of the NAALC.

⁵ The year the Convention was adopted by the ILO.

⁶ The number of member countries that have ratified the Convention (out of a total of 173 members), as at March 16, 1996.

⁷ All numbers in parentheses indicate the year the specific ILO Convention was ratified by the particular country. Information for each country was obtained from the ILO offices in Washington D.C. and Mexico City, and is accurate as at October 1996.

ANNEX 2

The Prisoner's Dilemma

ANNEX 2 : The Prisoner's Dilemma¹

Two men have committed a serious crime, but there is not enough evidence to convict them. There is sufficient proof, however, to convict them of a lesser crime. A police officer meets with each of the men separately. To each man, he offers the possibility of confessing to the crime. The deal he makes with each man is as follows :

1. If both men admit their guilt, each one will be charged with the serious crime, based on evidence given by his partner. However, they will each serve a sentence of 10 years instead of the maximum of 20 years, because of their demonstrated good behaviour.
2. If neither one of the two confesses, each one will only serve a sentence of 2 years for the lesser crime, as there will be no evidence to convict them of the major crime.
3. If one confesses and the other does not, the one who confesses will be freed and the other will serve the maximum sentence of 20 years.

What should they do? Each man realizes that it is to his own advantage to admit his guilt, regardless of his partner's decision. If the partner confesses, the first man will reduce his sentence from 20 to 10 years by confessing also. If the partner does not confess, the first man will be freed if he confesses instead of serving 2 years for the lesser crime. Since it is to each man's benefit to admit to his crime, both men confess. This is seen as a logical decision based on rational self-interest. Because both men confess, they each serve a sentence of 10 years. However, if neither one had confessed, they would be only serving 2 years each! In this situation, a rational decision on the part of each man seems to have landed them 8 years more than they could have had.

The prisoner's dilemma is an illustration of a situation that demands a strategic decision. The outcome for each party depends on the choice of each party. Each party must choose between **cooperation with his partner** (not confessing anything) and **competition against his partner** (maximizing his own outcome, without concern for the other). In a situation of cooperation, both parties come out winners. However, in a context of competition, where each party thinks only of its own benefit, both end up in a worse situation than might have been.

	I CHOOSE	THE OTHER CHOOSES
A	cooperation (2 years)	cooperation (2 years)
B	cooperation (20 years)	competition (0 years)
C	competition (0 years)	cooperation (20 years)
D	competition (10 years)	competition (10 years)

¹ Adapted from LANGILLE, B., *A Day at the Races: A Reply to Professor Revesz on the Race to the Bottom*, Faculty of Law, University of Toronto, June 1994, p. 4.

ANNEX 3

Treaty of Rome, Title VIII

ANNEX 3 : TREATY OF ROME, TITLE VIII. Social Policy, Education, Vocational Training and Youth; as amended by the Treaty on European Union (summary)¹

CHAPTER 1. SOCIAL PROVISIONS

Article 117

Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained.

They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonization of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action.

Article 118

Without prejudice to the other provisions of this Treaty and in conformity with its general objectives, the Commission shall have the task of promoting close cooperation between Member States in the social field, particularly in matters relating to :

- employment
- labour law and working conditions
- basic and advanced vocational training
- social security
- prevention of occupational accidents and diseases
- occupational hygiene, the right of association, and collective bargaining between employers and workers

To this end, the Commission shall act in close contact with Member States by making studies, delivering opinions and arranging consultations both on problems arising at the national level and on those of concern to international organizations.

Article 118a

1. Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonization of conditions in this area, while maintaining the improvements made.
2. In order to help achieve the objective laid down in the first paragraph, the Council shall adopt, by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules of each of the Member States.
3. The provisions adopted pursuant to this Article shall not prevent any Member State from maintaining or introducing more stringent measures for the protection of working conditions compatible with this Treaty.

¹ Summarized from the Treaty of Rome, taken from the EU Guide web site on the Internet, 1996.

Article 118b

The Commission shall endeavour to develop the dialogue between management and labour at European level which could, if the two sides consider it desirable, lead to relations based on agreement.

Article 119

Each Member State shall, during the first stage, ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

Article 120

Member States shall endeavour to maintain the existing equivalence between paid holiday schemes.

Article 121

The Council may, acting unanimously, assign to the Commission tasks in connection with the implementation of common measures, particularly as regards social security for migrant workers.

Article 122

The Commission shall include a separate chapter on social developments within the Community in its annual report to the European Parliament.

The European Parliament may invite the Commission to draw up reports on any particular problems concerning social conditions.

CHAPTER 2. THE EUROPEAN SOCIAL FUND**Article 123**

In order to improve employment opportunities for workers in the internal market and to contribute thereby to raising the standard of living, a European Social Fund is hereby established. It shall aim to render the employment of workers easier and to increase their geographical and occupational mobility within the Community, and to facilitate their adaptation to industrial changes and to changes in production systems, in particular through vocational training and retraining.

Article 124

The Fund shall be administered by the Commission.

The Commission shall be assisted in this task by a Committee presided over by a member of the Commission and composed of representatives of government, trade unions and employers' organisations.

Article 125

The Council shall adopt implementing decisions relating to the European Social Fund.

CHAPTER 3. EDUCATION, VOCATIONAL TRAINING AND YOUTH

Article 126

1. The Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching.
2. Community action shall be aimed at:
 - developing the European dimension in education
 - encouraging mobility of students and teachers by encouraging the academic recognition of diplomas
 - promoting cooperation between educational establishments
 - developing exchanges of information and experience between Member States
 - encouraging the development of youth exchanges
 - encouraging the development of distance education
3. The Community and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of education.
4. In order to contribute to the achievement of the objectives referred to in this Article, the Council :
 - shall adopt incentive measures, excluding any harmonization of the laws and regulations of the Member States
 - acting by qualified majority on a proposal from the Commission, shall adopt recommendations.

Article 127

1. The Community shall implement a vocational training policy which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organization of vocational training.
2. Community action shall aim to :
 - facilitate adaptation to industrial changes, in particular through vocational training
 - improve initial and continuing vocational training
 - facilitate access to vocational training and encourage mobility of instructors and trainees
 - stimulate cooperation on training between educational or training establishments and firms
 - develop exchanges of information and experience between Member States.
3. The Community and the Member States shall foster cooperation with third countries and the competent international organizations in the sphere of vocational training.
4. The Council shall adopt measures to contribute to the achievement of these objectives, excluding any harmonization of the laws and regulations of Member States.

ANNEX 4

List of ILO Conventions Ratified by NAFTA Countries

ANNEX 4 : ILO Conventions ratified by each of the three NAFTA countries¹

#	TITLE	YEAR ²	MEX	CAN	USA
1	Hours of Work (Industry)	1919		●	
7	Minimum Age (Sea)	1920		●	
8	Unemployment Indemnity (Shipwreck)	1920	●	●	
9	Placing of Seamen	1920	●		
11	Right of Association (Agriculture)	1921	●		
12	Workmen's Compensation (Agriculture)	1921	●		
13	White Lead (Painting)	1921	●		
14	Weekly Rest (Industry)	1921	●	●	
15	Minimum Wage (Trimmers and Stokers)	1921		●	
16	Medical Examination of Young Persons (Sea)	1921	●	●	
17	Workmen's Compensation (Accidents)	1925	●		
19	Equality of Treatment (Accident Compensation)	1925	●		
21	Inspection of Emigrants	1926	●		
22	Seamen's Articles of Agreement	1926	●	●	
23	Repatriation of Seamen	1926	●		
26	Minimum Wage - Fixing Machinery	1928	●	●	
27	Marking of Weight (Vessel Packages)	1929	●	●	
29 *	Forced Labour Convention (in all its forms)	1930	●		
30	Hours of Work (Commerce and Offices)	1930	●		
32	Protection Against Accidents (Dockers)	1932		●	
34	Fee-charging Employment Agencies	1933	●		
42	Workmen's Compensation (Occupational Diseases)	1934	●		
43	Sheet-Glass Works	1934	●		
45	Underground Work (Women)	1935	●		
46	Hours of Work (Coal Mines)	1935	●		
49	Reduction of Hours of Work (Glass-bottle Works)	1935	●		
52	Holidays With Pay	1936	●		
53	Officers' Competency Certificates	1936	●		●
54	Holidays With Pay (Sea)	1936	●		●
55	Shipowners' Liability (Sick and Injured Seamen)	1936	●		●
56	Sickness Insurance (Sea)	1936	●		
57	Hours of Work and Manning (Sea)	1936			●
58	Minimum Age (Sea)	1936	●	●	●
68	Food and Catering (Ships' Crews)	1946		●	
69	Certification of Ships' Cooks	1946		●	
73	Medical Examination (Seafarers)	1946		●	
74	Certification of Able Seamen	1946		●	●
80	Final Articles Revision	1946	●	●	●
87 *	Freedom of Association/Protection of Right to Organize	1948	●	●	
88	Employment Service	1948		●	
90	Night Work of Young Persons (Industry)	1948	●		
95	Protection of Wages	1949	●		
96	Fee-charging Employment Agencies (Revised)	1949	●		
98 *	Right to Organize and Collective Bargaining				
99	Minimum Wage - Fixing Machinery (Agriculture)	1951	●		

		MEX	CAN	USA
100 *	Equal Remuneration	1951	●	●
102	Social Security (Minimum Standards)	1952	●	
105 *	Abolition of Forced Labour (as punishment)	1957	●	●
106	Weekly Rest (Commerce and Offices)	1957	●	
108	Seafarers' Identity Documents	1958	●	
109	Wages, Hours of Work and Manning (Sea)	1958	●	
110	Plantations	1982	●	
111 *	Discrimination (Employment and Occupation)	1958	●	
112	Minimum Age (Fishermen)	1959	●	
115	Radiation Protection	1960	●	
116	Final Articles Revision	1961	●	
118	Equality of Treatment (Social Security)	1962	●	
120	Hygiene (Commerce and Offices)	1964	●	
122	Employment Policy	1964	●	
123	Minimum Age (Underground Work)	1965	●	
124	Medical Examination of Young Persons (Underground Work)	1965	●	
131	Minimum Wage Fixing	1970	●	
134	Prevention of Accidents (Seafarers)	1970	●	
135	Workers' Representatives	1971	●	
138 *	Minimum Age			
140	Paid Educational Leave	1974	●	
141	Rural Workers' Organizations	1975	●	
142	Human Resources Development	1975	●	
144	Tripartite Consultation (International Labour Standards)	1976	●	●
147	Merchant Shipping (Minimum Standards)	1976	●	●
150	Labour Administration	1978	●	●
152	Occupational Safety and Health (Dock Work)	1979	●	
153	Hours of Work and Rest Periods (Road Transport)	1979	●	
155	Occupational Safety and Health	1981	●	
160	Labour Statistics	1985	●	●
161	Occupational Health Services	1985	●	
162	Asbestos	1986	●	
163	Seafarers' Welfare	1987	●	
164	Health Protection and Medical Care (Seafarers)	1987	●	
166	Repatriation of Seafarers (revised)	1987	●	
167	Safety and Health in Construction	1988	●	
169	Indigenous and Tribal Peoples	1989	●	
170	Chemicals	1990	●	
172	Working Conditions (Hotels and Restaurants)	1991	●	
173	Protection of Workers' Claims (Employer Insolvency)	1992	●	
total		70	27	12

* Indicates those ILO Conventions designated as core labour standards (titles are written in bold).

¹ All information was obtained from the Mexico City and Washington DC offices of the ILO and is accurate as at October 1996.

² Indicates the year the Convention was adopted by the ILO.

ANNEX 5

Country Statistics

ANNEX 5 : Country Statistics¹

INDICATOR	CANADA	USA	MEXICO
Population (millions)	29,46	263,25	93,67
Density (persons per km ²)	3,0	28,1	47,6
Inflation rate (%)	0,2	2,7	7,1
Unemployment rate, 1996 (%) ²	9,6	5,4	5,3
GDP per person (US dollars)	20 257	25 572	7 019
% of total world GDP	2,1	25,5	1,46
World rank (GDP per person)	10	2	46
Average annual growth, 1985-1993 (%)	1,7	2,1	2,7
Average number of years of schooling (1992)	12,2	12,4	4,9
Human Development Indicator (world rank) ³	1	8	52

Source : L'État du Monde - Annuaire économique et géopolitique mondial, La Découverte/Boréal, 1996, p. 516, 667-678.

¹ All numbers are for 1994 unless otherwise indicated.

² **International Labour Organization**, as reported in *La Presse, Le monde et son économie*, March 8, 1997.

³ The Human Development Indicator is a complex statistic formulated by the United Nations Development Programme. Three factors are used to compile this indicator : 1- life expectancy at birth; 2- education (represented by the literacy rate among adults and the average number of years of schooling); and 3- GDP per person. For a detailed explanation of calculation of this statistic, see *L'État du Monde*, (supra), p. 667.

ANNEX 6

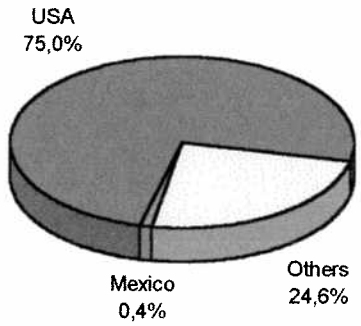
Pie Charts, NAFTA Imports and Exports

ANNEX 6: Exports and Imports Between the Three NAFTA Countries, 1994

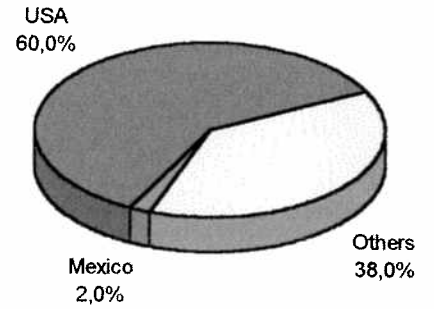
(Source: Commission for Labor Cooperation, Labor in NAFTA Countries, Vol. 1, n° 2, August 1996, p.4.)

EXPORTS

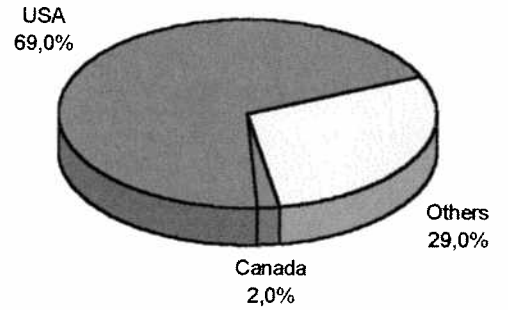
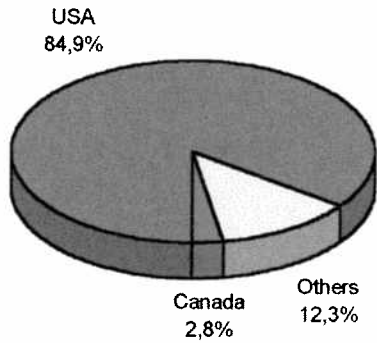
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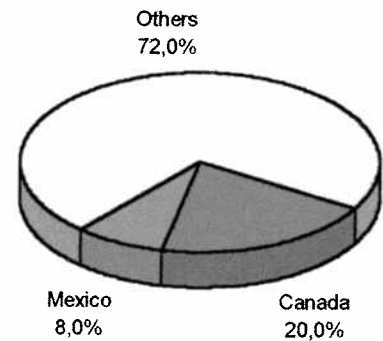
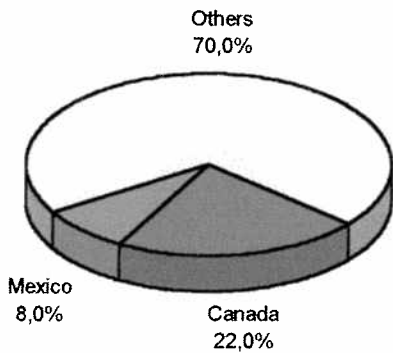
CANADA



MEXICO



USA



ANNEX 7

The NAALC

**NORTH AMERICAN AGREEMENT
ON
LABOR COOPERATION**

BETWEEN

THE GOVERNMENT OF THE UNITED STATES OF AMERICA,

THE GOVERNMENT OF THE UNITED MEXICAN STATES

AND

THE GOVERNMENT OF CANADA

1993

PREAMBLE

The Government of Canada, the Government of the United Mexican States and the Government of the United States of America:

RECALLING their resolve in the North American Free Trade Agreement (NAFTA) to:

- *create* an expanded and secure market for the goods and services produced in their territories,
- *enhance* the competitiveness of their firms in global markets,
- *create* new employment opportunities and improve working conditions and living standards in their respective territories, and
- *protect*, enhance and enforce basic workers' rights;

AFFIRMING their continuing respect for each Party's constitution and law;

DESIRING to build on their respective international commitments and to strengthen their cooperation on labor matters;

RECOGNIZING that their mutual prosperity depends on the promotion of competition based on innovation and rising levels of productivity and quality;

SEEKING to complement the economic opportunities created by the NAFTA with the human resource development, labor-management cooperation and continuous learning that characterize high-productivity economies;

ACKNOWLEDGING that protecting basic workers' rights will encourage firms to adopt high-productivity competitive strategies;

RESOLVED to promote, in accordance with their respective laws, high-skill, high-productivity economic development in North America by:

- *investing* in continuous human resource development, including for entry into the workforce and during periods of unemployment;
- *promoting* employment security and career opportunities for all workers through referral and other employment services;

- *strengthening* labor-management cooperation to promote greater dialogue between worker organizations and employers and to foster creativity and productivity in the workplace;
- *promoting* higher living standards as productivity increases;
- *encouraging* consultation and dialogue between labor, business and government both in each country and in North America;
- *fostering* investment with due regard for the importance of labor laws and principles;
- *encouraging* employers and employees in each country to comply with labor laws and to work together in maintaining a progressive, fair, safe and healthy working environment;

BUILDING on existing institutions and mechanisms in Canada, Mexico and the United States to achieve the preceding economic and social goals; and

CONVINCED of the benefits to be gained from further cooperation between them on labor matters;

HAVE AGREED as follows:

PART ONE

OBJECTIVES

Article 1: Objectives

The objectives of this Agreement are to:

- (a) improve working conditions and living standards in each Party's territory;
- (b) promote, to the maximum extent possible, the labor principles set out in Annex 1;
- (c) encourage cooperation to promote innovation and rising levels of productivity and quality;

- (d) encourage publication and exchange of information, data development and coordination, and joint studies to enhance mutually beneficial understanding of the laws and institutions governing labor in each Party's territory;
- (e) pursue cooperative labor-related activities on the basis of mutual benefit;
- (f) promote compliance with, and effective enforcement by each Party of, its labor law; and
- (g) foster transparency in the administration of labor law.

PART TWO

OBLIGATIONS

Article 2: Levels of Protection

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

Article 3: Government Enforcement Action

1. Each Party shall promote compliance with and effectively enforce its labor law through appropriate government action, subject to Article 42, such as:
 - (a) appointing and training inspectors;
 - (b) monitoring compliance and investigating suspected violations, including through on-site inspections;
 - (c) seeking assurances of voluntary compliance;
 - (d) requiring record keeping and reporting;

- (e) encouraging the establishment of worker-management committees to address labor regulation of the workplace;
- (f) providing or encouraging mediation, conciliation and arbitration services; or
- (g) initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor law.

2. Each Party shall ensure that its competent authorities give due consideration in accordance with its law to any request by an employer, employee or their representatives, or other interested person, for an investigation of an alleged violation of the Party's labor law.

Article 4: Private Action

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

2. Each Party's law shall ensure that such persons may have recourse to, as appropriate, procedures by which rights arising under:

- (a) its labor law, including in respect of occupational safety and health, employment standards, industrial relations and migrant workers, and
- (b) collective agreements,

can be enforced.

Article 5: Procedural Guarantees

1. Each Party shall ensure that its administrative, quasi-judicial, judicial and labor tribunal proceedings for the enforcement of its labor law are fair, equitable and transparent and, to this end, each Party shall provide that:

- (a) such proceedings comply with due process of law;
- (b) any hearings in such proceedings are open to the public, except where the administration of justice otherwise requires;

- (c) the parties to such proceedings are entitled to support or defend their respective positions and to present information or evidence; and
 - (d) such proceedings are not unnecessarily complicated and do not entail unreasonable charges or time limits or unwarranted delays.
2. Each Party shall provide that final decisions on the merits of the case in such proceedings are:
- (a) in writing and preferably state the reasons on which the decisions are based;
 - (b) made available without undue delay to the parties to the proceedings and, consistent with its law, to the public; and
 - (c) based on information or evidence in respect of which the parties were offered the opportunity to be heard.
3. Each Party shall provide, as appropriate, that parties to such proceedings have the right, in accordance with its law, to seek review and, where warranted, correction of final decisions issued in such proceedings.
4. Each Party shall ensure that tribunals that conduct or review such proceedings are impartial and independent and do not have any substantial interest in the outcome of the matter.
5. Each Party shall provide that the parties to administrative, quasi-judicial, judicial or labor tribunal proceedings may seek remedies to ensure the enforcement of their labor rights. Such remedies may include, as appropriate, orders, compliance agreements, fines, penalties, imprisonment, injunctions or emergency workplace closures.
6. Each Party may, as appropriate, adopt or maintain labor defense offices to represent or advise workers or their organizations.
7. Nothing in this Article shall be construed to require a Party to establish, or to prevent a Party from establishing, a judicial system for the enforcement of its labor law distinct from its system for the enforcement of laws in general.
8. For greater certainty, decisions by each Party's administrative, quasi-judicial, judicial or labor tribunals, or pending decisions, as well as related proceedings shall not be subject to revision or reopened under the provisions of this Agreement.

Article 6: Publication

1. Each Party shall ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them.
2. When so established by its law, each Party shall:
 - (a) publish in advance any such measure that it proposes to adopt; and
 - (b) provide interested persons a reasonable opportunity to comment on such proposed measures.

Article 7: Public Information and Awareness

Each Party shall promote public awareness of its labor law, including by:

- (a) ensuring that public information is available related to its labor law and enforcement and compliance procedures; and
- (b) promoting public education regarding its labor law.

PART THREE

COMMISSION FOR LABOR COOPERATION

Article 8: The Commission

1. The Parties hereby establish the Commission for Labor Cooperation.
2. The Commission shall comprise a ministerial Council and a Secretariat. The Commission shall be assisted by the National Administrative Office of each Party.

Section A: The Council

Article 9: Council Structure and Procedures

1. The Council shall comprise labor ministers of the Parties or their designees.
2. The Council shall establish its rules and procedures.
3. The Council shall convene:
 - (a) at least once a year in regular session, and
 - (b) in special session at the request of any Party.

Regular sessions shall be chaired successively by each Party.

4. The Council may hold public sessions to report on appropriate matters.
5. The Council may:
 - (a) establish, and assign responsibilities to, committees, working groups or expert groups; and
 - (b) seek the advice of independent experts.
6. All decisions and recommendations of the Council shall be taken by consensus, except as the Council may otherwise decide or as otherwise provided in this Agreement.

Article 10: Council Functions

1. The Council shall be the governing body of the Commission and shall:
 - (a) oversee the implementation and develop recommendations on the further elaboration of this Agreement and, to this end, the Council shall, within four years after the date of entry into force of this Agreement, review its operation and effectiveness in the light of experience;
 - (b) direct the work and activities of the Secretariat and of any committees or working groups convened by the Council;

- (c) establish priorities for cooperative action and, as appropriate, develop technical assistance programs on the matters set out in Article 11;
- (d) approve the annual plan of activities and budget of the Commission;
- (e) approve for publication, subject to such terms or conditions as it may impose, reports and studies prepared by the Secretariat, independent experts or working groups;
- (f) facilitate Party-to-Party consultations, including through the exchange of information;
- (g) address questions and differences that may arise between the Parties regarding the interpretation or application of this Agreement; and
- (h) promote the collection and publication of comparable data on enforcement, labor standards and labor market indicators.

2. The Council may consider any other matter within the scope of this Agreement and take such other action in the exercise of its functions as the Parties may agree.

Article 11: Cooperative Activities

1. The Council shall promote cooperative activities between the Parties, as appropriate, regarding:

- (a) occupational safety and health;
- (b) child labor;
- (c) migrant workers of the Parties;
- (d) human resource development;
- (e) labor statistics;
- (f) work benefits;
- (g) social programs for workers and their families;

- (h) programs, methodologies and experiences regarding productivity improvement;
- (i) labor-management relations and collective bargaining procedures;
- (j) employment standards and their implementation;
- (k) compensation for work-related injury or illness;
- (l) legislation relating to the formation and operation of unions, collective bargaining and the resolution of labor disputes, and its implementation;
- (m) the equality of women and men in the workplace;
- (n) forms of cooperation among workers, management and government;
- (o) the provision of technical assistance, at the request of a Party, for the development of its labor standards; and
- (p) such other matters as the Parties may agree.

2. In carrying out the activities referred to in paragraph 1, the Parties may, commensurate with the availability of resources in each Party, cooperate through:

- (a) seminars, training sessions, working groups and conferences;
- (b) joint research projects, including sectoral studies;
- (c) technical assistance; and
- (d) such other means as the Parties may agree.

3. The Parties shall carry out the cooperative activities referred to in paragraph 1 with due regard for the economic, social, cultural and legislative differences between them.

Section B: The Secretariat

Article 12: Secretariat Structure and Procedures

1. The Secretariat shall be headed by an Executive Director, who shall be chosen by the Council for a three-year term, which may be renewed by the Council for one additional

three-year term. The position of Executive Director shall rotate consecutively between nationals of each Party. The Council may remove the Executive Director solely for cause.

2. The Executive Director shall appoint and supervise the staff of the Secretariat, regulate their powers and duties and fix their remuneration in accordance with general standards to be established by the Council. The general standards shall provide that:

- (a) staff shall be appointed and retained, and their conditions of employment shall be determined, strictly on the basis of efficiency, competence and integrity;
- (b) in appointing staff, the Executive Director shall take into account lists of candidates prepared by the Parties;
- (c) due regard shall be paid to the importance of recruiting an equitable proportion of the professional staff from among the nationals of each Party; and
- (d) the Executive Director shall inform the Council of all appointments.

3. The number of staff positions shall initially be set at 15 and may be changed thereafter by the Council.

4. The Council may decide, by a two-thirds vote, to reject any appointment that does not meet the general standards. Any such decision shall be made and held in confidence.

5. In the performance of their duties, the Executive Director and the staff shall not seek or receive instructions from any government or any other authority external to the Council. Each Party shall respect the international character of the responsibilities of the Executive Director and the staff and shall not seek to influence them in the discharge of their responsibilities.

6. The Secretariat shall safeguard:

- (a) from disclosure information it receives that could identify an organization or person if the person or organization so requests or the Secretariat otherwise considers it appropriate; and
- (b) from public disclosure any information it receives from any organization or person where the information is designated by that organization or person as confidential or proprietary.

7. The Secretariat shall act under the direction of the Council in accordance with Article 10(1)(b).

Article 13: Secretariat Functions

1. The Secretariat shall assist the Council in exercising its functions and shall provide such other support as the Council may direct.
2. The Executive Director shall submit for the approval of the Council the annual plan of activities and budget for the Commission, including provision for contingencies and proposed cooperative activities.
3. The Secretariat shall report to the Council annually on its activities and expenditures.
4. The Secretariat shall periodically publish a list of matters resolved under Part Four or referred to Evaluation Committees of Experts.

Article 14: Secretariat Reports and Studies

1. The Secretariat shall periodically prepare background reports setting out publicly available information supplied by each Party on:
 - (a) labor law and administrative procedures;
 - (b) trends and administrative strategies related to the implementation and enforcement of labor law;
 - (c) labor market conditions such as employment rates, average wages and labor productivity; and
 - (d) human resource development issues such as training and adjustment programs.
2. The Secretariat shall prepare a study on any matter as the Council may request. The Secretariat shall prepare any such study in accordance with terms of reference established by the Council, and may
 - (a) consider any relevant information;

- (b) where it does not have specific expertise in the matter, engage one or more independent experts of recognized experience; and
 - (c) include proposals on the matter.
3. The Secretariat shall submit a draft of any report or study that it prepares pursuant to paragraph 1 or 2 to the Council. If the Council considers that a report or study is materially inaccurate or otherwise deficient, the Council may remand it to the Secretariat for reconsideration or other disposition.
4. Secretariat reports and studies shall be made public 45 days after their approval by the Council, unless the Council otherwise decides.

Section C: National Administrative Offices

Article 15: National Administrative Office Structure

1. Each Party shall establish a National Administrative Office (NAO) at the federal government level and notify the Secretariat and the other Parties of its location.
2. Each Party shall designate a Secretary for its NAO, who shall be responsible for its administration and management.
3. Each Party shall be responsible for the operation and costs of its NAO.

Article 16: NAO Functions

1. Each NAO shall serve as a point of contact with:
 - (a) governmental agencies of that Party;
 - (b) NAOs of the other Parties; and
 - (c) the Secretariat.
2. Each NAO shall promptly provide publicly available information requested by:
 - (a) the Secretariat for reports under Article 14(1);

- (b) the Secretariat for studies under Article 14(2);
- (c) a NAO of another Party; and
- (d) an ECE.

3. Each NAO shall provide for the submission and receipt, and periodically publish a list, of public communications on labor law matters arising in the territory of another Party. Each NAO shall review such matters, as appropriate, in accordance with domestic procedures.

Section D: National Committees

Article 17: National Advisory Committee

Each Party may convene a national advisory committee, comprising members of its public, including representatives of its labor and business organizations and other persons, to advise it on the implementation and further elaboration of this Agreement.

Article 18: Governmental Committee

Each Party may convene a governmental committee, which may comprise or include representatives of federal and state or provincial governments, to advise it on the implementation and further elaboration of this Agreement.

Section E: Official Languages

Article 19: Official Languages

The official languages of the Commission shall be English, French and Spanish. The Council shall establish rules and procedures regarding interpretation and translation.

PART FOUR

COOPERATIVE CONSULTATIONS AND EVALUATIONS

Article 20: Cooperation

The Parties shall at all times endeavor to agree on the interpretation and application of this Agreement, and shall make every attempt through cooperation and consultations to resolve any matter that might affect its operation.

Section A: Cooperative Consultations

Article 21: Consultations between NAOs

1. A NAO may request consultations, to be conducted in accordance with the procedures set out in paragraph 2, with another NAO in relation to the other Party's labor law, its administration, or labor market conditions in its territory. The requesting NAO shall notify the NAOs of the other Parties and the Secretariat of its request.

2. In such consultations, the requested NAO shall promptly provide such publicly available data or information, including:

- (a) descriptions of its laws, regulations, procedures, policies or practices,
- (b) proposed changes to such procedures, policies or practices, and
- (c) such clarifications and explanations related to such matters,

as may assist the consulting NAOs to better understand and respond to the issues raised.

3. Any other NAO shall be entitled to participate in the consultations on notice to the other NAOs and the Secretariat.

Article 22: Ministerial Consultations

1. Any Party may request in writing consultations with another Party at the ministerial level regarding any matter within the scope of this Agreement. The requesting Party shall provide specific and sufficient information to allow the requested Party to respond.

2. The requesting Party shall promptly notify the other Parties of the request. A third Party that considers it has a substantial interest in the matter shall be entitled to participate in the consultations on notice to the other Parties.

3. The consulting Parties shall make every attempt to resolve the matter through consultations under this Article, including through the exchange of sufficient publicly available information to enable a full examination of the matter.

Section B: Evaluations

Article 23: Evaluation Committee of Experts

1. If a matter has not been resolved after ministerial consultations pursuant to Article 22, any consulting Party may request in writing the establishment of an Evaluation Committee of Experts (ECE). The requesting Party shall deliver the request to the other Parties and to the Secretariat. Subject to paragraphs 3 and 4, the Council shall establish an ECE on delivery of the request.

2. The ECE shall analyze, in the light of the objectives of this Agreement and in a non-adversarial manner, patterns of practice by each Party in the enforcement of its occupational safety and health or other technical labor standards as they apply to the particular matter considered by the Parties under Article 22.

3. No ECE may be convened if a Party obtains a ruling under Annex 23 that the matter:

- (a) is not trade-related; or
- (b) is not covered by mutually recognized labor laws.

4. No ECE may be convened regarding any matter that was previously the subject of an ECE report in the absence of such new information as would warrant a further report.

Article 24: Rules of Procedure

1. The Council shall establish rules of procedure for ECEs, which shall apply unless the Council otherwise decides. The rules of procedure shall provide that:

- (a) an ECE shall normally comprise three members;

- (b) the chair shall be selected by the Council from a roster of experts developed in consultation with the ILO pursuant to Article 45 and, where possible, other members shall be selected from a roster developed by the Parties;
- (c) ECE members shall
 - (i) have expertise or experience in labor matters or other appropriate disciplines,
 - (ii) be chosen strictly on the basis of objectivity, reliability and sound judgment,
 - (iii) be independent of, and not be affiliated with or take instructions from, any Party or the Secretariat, and
 - (iv) comply with a code of conduct to be established by the Council;
- (d) an ECE may invite written submissions from the Parties and the public;
- (e) an ECE may consider, in preparing its report, any information provided by
 - (i) the Secretariat,
 - (ii) the NAO of each Party,
 - (iii) organizations, institutions and persons with relevant expertise, and
 - (iv) the public; and
- (f) each Party shall have a reasonable opportunity to review and comment on information that the ECE receives and to make written submissions to the ECE.

2. The Secretariat and the NAOs shall provide appropriate administrative assistance to an ECE, in accordance with the rules of procedure established by the Council under paragraph 1.

Article 25: Draft Evaluation Reports

1. Within 120 days after it is established, or such other period as the Council may

decide, the ECE shall present a draft report for consideration by the Council, which shall contain:

- (a) a comparative assessment of the matter under consideration;
- (b) its conclusions; and
- (c) where appropriate, practical recommendations that may assist the Parties in respect of the matter.

2. Each Party may submit written views to the ECE on its draft report. The ECE shall take such views into account in preparing its final report.

Article 26: Final Evaluation Reports

1. The ECE shall present a final report to the Council within 60 days after presentation of the draft report, unless the Council otherwise decides.
2. The final report shall be published within 30 days after its presentation to the Council, unless the Council otherwise decides.
3. The Parties shall provide to each other and the Secretariat written responses to the recommendations contained in the ECE report within 90 days of its publication.
4. The final report and such written responses shall be tabled for consideration at the next regular session of the Council. The Council may keep the matter under review.

PART FIVE

RESOLUTION OF DISPUTES

Article 27: Consultations

1. Following presentation to the Council under Article 26(1) of an ECE final report that addresses the enforcement of a Party's occupational safety and health, child labor or minimum wage technical labor standards, any Party may request in writing consultations with any other Party regarding whether there has been a persistent pattern of failure by that other

Party to effectively enforce such standards in respect of the general subject matter addressed in the report.

2. The requesting Party shall deliver the request to the other Parties and to the Secretariat.
3. Unless the Council otherwise provides in its rules and procedures established under Article 9(2), a third Party that considers it has a substantial interest in the matter shall be entitled to participate in the consultations on delivery of written notice to the other Parties and to the Secretariat.
4. The consulting Parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter through consultations under this Article.

Article 28: Initiation of Procedures

1. If the consulting Parties fail to resolve the matter pursuant to Article 27 within 60 days of delivery of a request for consultations, or such other period as the consulting Parties may agree, any such Party may request in writing a special session of the Council.
2. The requesting Party shall state in the request the matter complained of and shall deliver the request to the other Parties and to the Secretariat.
3. Unless it decides otherwise, the Council shall convene within 20 days of delivery of the request and shall endeavor to resolve the dispute promptly.
4. The Council may:
 - (a) call on such technical advisers or create such working groups or expert groups as it deems necessary,
 - (b) have recourse to good offices, conciliation, mediation or such other dispute resolution procedures, or
 - (c) make recommendations,

as may assist the consulting Parties to reach a mutually satisfactory resolution of the dispute. Any such recommendations shall be made public if the Council, by a two-thirds vote, so decides.

5. Where the Council decides that a matter is more properly covered by another agreement or arrangement to which the consulting Parties are party, it shall refer the matter to those Parties for appropriate action in accordance with such other agreement or arrangement.

Article 29: Request for an Arbitral Panel

1. If the matter has not been resolved within 60 days after the Council has convened pursuant to Article 28, the Council shall, on the written request of any consulting Party and by a two-thirds vote, convene an arbitral panel to consider the matter where the alleged persistent pattern of failure by the Party complained against to effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards is:

- (a) trade-related; and
- (b) covered by mutually recognized labor laws.

2. A third Party that considers it has a substantial interest in the matter shall be entitled to join as a complaining Party on delivery of written notice of its intention to participate to the disputing Parties and the Secretariat. The notice shall be delivered at the earliest possible time, and in any event no later than seven days after the date of the vote of the Council to convene a panel.

3. Unless otherwise agreed by the disputing Parties, the panel shall be established and perform its functions in a manner consistent with the provisions of this Part.

Article 30: Roster

1. The Council shall establish and maintain a roster of up to 45 individuals who are willing and able to serve as panelists. The roster members shall be appointed by consensus for terms of three years, and may be reappointed.

2. Roster members shall:

- (a) have expertise or experience in labor law or its enforcement, or in the resolution of disputes arising under international agreements, or other relevant scientific, technical or professional expertise or experience;
- (b) be chosen strictly on the basis of objectivity, reliability and sound judgment;

- (c) be independent of, and not be affiliated with or take instructions from, any Party or the Secretariat; and
- (d) comply with a code of conduct to be established by the Council.

Article 31: Qualifications of Panelists

1. All panelists shall meet the qualifications set out in Article 30.
2. Individuals may not serve as panelists for a dispute where:
 - (a) they have participated pursuant to Article 28(4) or participated as members of an ECE that addressed the matter; or
 - (b) they have, or a person or organization with which they are affiliated has, an interest in the matter, as set out in the code of conduct established under Article 30(2)(d).

Article 32: Panel Selection

1. Where there are two disputing Parties, the following procedures shall apply:
 - (a) The panel shall comprise five members.
 - (b) The disputing Parties shall endeavor to agree on the chair of the panel within 15 days after the Council votes to convene the panel. If the disputing Parties are unable to agree on the chair within this period, the disputing Party chosen by lot shall select within five days a chair who is not a citizen of that Party.
 - (c) Within 15 days of selection of the chair, each disputing Party shall select two panelists who are citizens of the other disputing Party.
 - (d) If a disputing Party fails to select its panelists within such period, such panelists shall be selected by lot from among the roster members who are citizens of the other disputing Party.
2. Where there are more than two disputing Parties, the following procedures shall apply:

- (a) The panel shall comprise five members.
 - (b) The disputing Parties shall endeavor to agree on the chair of the panel within 15 days after the Council votes to convene the panel. If the disputing Parties are unable to agree on the chair within this period, the Party or Parties on the side of the dispute chosen by lot shall select within 10 days a chair who is not a citizen of such Party or Parties.
 - (c) Within 30 days of selection of the chair, the Party complained against shall select two panelists, one of whom is a citizen of a complaining Party, and the other of whom is a citizen of another complaining Party. The complaining Parties shall select two panelists who are citizens of the Party complained against.
 - (d) If any disputing Party fails to select a panelist within such period, such panelist shall be selected by lot in accordance with the citizenship criteria of subparagraph (c).
3. Panelists shall normally be selected from the roster. Any disputing Party may exercise a peremptory challenge against any individual not on the roster who is proposed as a panelist by a disputing Party within 30 days after the individual has been proposed.
 4. If a disputing Party believes that a panelist is in violation of the code of conduct, the disputing Parties shall consult and, if they agree, the panelist shall be removed and a new panelist shall be selected in accordance with this Article.

Article 33: Rules of Procedure

1. The Council shall establish Model Rules of Procedure. The procedures shall provide:
 - (a) a right to at least one hearing before the panel;
 - (b) the opportunity to make initial and rebuttal written submissions; and
 - (c) that no panel may disclose which panelists are associated with majority or minority opinions.
2. Unless the disputing Parties otherwise agree, panels convened under this Part shall be established and conduct their proceedings in accordance with the Model Rules of Procedure.

3. Unless the disputing Parties otherwise agree within 20 days after the Council votes to convene the panel, the terms of reference shall be:

"To examine, in light of the relevant provisions of the Agreement, including those contained in Part Five, whether there has been a persistent pattern of failure by the Party complained against to effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards, and to make findings, determinations and recommendations in accordance with Article 36(2)."

Article 34: Third Party Participation

A Party that is not a disputing Party, on delivery of a written notice to the disputing Parties and the Secretariat, shall be entitled to attend all hearings, to make written and oral submissions to the panel and to receive written submissions of the disputing Parties.

Article 35: Role of Experts

On request of a disputing Party, or on its own initiative, the panel may seek information and technical advice from any person or body that it deems appropriate, provided that the disputing Parties so agree and subject to such terms and conditions as such Parties may agree.

Article 36: Initial Report

1. Unless the disputing Parties otherwise agree, the panel shall base its report on the submissions and arguments of the disputing Parties and on any information before it pursuant to Article 35.

2. Unless the disputing Parties otherwise agree, the panel shall, within 180 days after the last panelist is selected, present to the disputing Parties an initial report containing:

- (a) findings of fact;
- (b) its determination as to whether there has been a persistent pattern of failure by the Party complained against to effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards in a matter that is trade-related and covered by mutually recognized labor laws, or any other determination requested in the terms of reference; and

- (c) in the event the panel makes an affirmative determination under subparagraph (b), its recommendations, if any, for the resolution of the dispute, which normally shall be that the Party complained against adopt and implement an action plan sufficient to remedy the pattern of non-enforcement.
3. Panelists may furnish separate opinions on matters not unanimously agreed.
 4. A disputing Party may submit written comments to the panel on its initial report within 30 days of presentation of the report.
 5. In such an event, and after considering such written comments, the panel, on its own initiative or on the request of any disputing Party, may:
 - (a) request the views of any participating Party;
 - (b) reconsider its report; and
 - (c) make any further examination that it considers appropriate.

Article 37: Final Report

1. The panel shall present to the disputing Parties a final report, including any separate opinions on matters not unanimously agreed, within 60 days of presentation of the initial report, unless the disputing Parties otherwise agree.
2. The disputing Parties shall transmit to the Council the final report of the panel, as well as any written views that a disputing Party desires to be appended, on a confidential basis within 15 days after it is presented to them.
3. The final report of the panel shall be published five days after it is transmitted to the Council.

Article 38: Implementation of Final Report

If, in its final report, a panel determines that there has been a persistent pattern of failure by the Party complained against to effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards, the disputing Parties may agree on a mutually satisfactory action plan, which normally shall conform with the

determinations and recommendations of the panel. The disputing Parties shall promptly notify the Secretariat and the Council of any agreed resolution of the dispute.

Article 39: Review of Implementation

1. If, in its final report, a panel determines that there has been a persistent pattern of failure by the Party complained against to effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards, and:

- (a) the disputing Parties have not agreed on an action plan under Article 38 within 60 days of the date of the final report, or
- (b) the disputing Parties cannot agree on whether the Party complained against is fully implementing
 - (i) an action plan agreed under Article 38,
 - (ii) an action plan deemed to have been established by a panel under paragraph 2, or
 - (iii) an action plan approved or established by a panel under paragraph 4,

any disputing Party may request that the panel be reconvened. The requesting Party shall deliver the request in writing to the other Parties and to the Secretariat. The Council shall reconvene the panel on delivery of the request to the Secretariat.

2. No Party may make a request under paragraph 1(a) earlier than 60 days, or later than 120 days, after the date of the final report. If the disputing Parties have not agreed to an action plan and if no request was made under paragraph 1(a), the last action plan, if any, submitted by the Party complained against to the complaining Party or Parties within 60 days of the date of the final report, or such other period as the disputing Parties may agree, shall be deemed to have been established by the panel 120 days after the date of the final report.

3. A request under paragraph 1(b) may be made no earlier than 180 days after an action plan has been:

- (a) agreed under Article 38,
- (b) deemed to have been established by a panel under paragraph 2, or

(c) approved or established by a panel under paragraph 4,
and only during the term of any such action plan.

4. Where a panel has been reconvened under paragraph 1(a), it:

- (a) shall determine whether any action plan proposed by the Party complained against is sufficient to remedy the pattern of non-enforcement and
 - (i) if so, shall approve the plan, or
 - (ii) if not, shall establish such a plan consistent with the law of the Party complained against, and
- (b) may, where warranted, impose a monetary enforcement assessment in accordance with Annex 39,

within 90 days after the panel has been reconvened or such other period as the disputing Parties may agree.

5. Where a panel has been reconvened under paragraph 1(b), it shall determine either that:

- (a) the Party complained against is fully implementing the action plan, in which case the panel may not impose a monetary enforcement assessment, or
- (b) the Party complained against is not fully implementing the action plan, in which case the panel shall impose a monetary enforcement assessment in accordance with Annex 39,

within 60 days after it has been reconvened or such other period as the disputing Parties may agree.

6. A panel reconvened under this Article shall provide that the Party complained against shall fully implement any action plan referred to in paragraph 4(a)(ii) or 5(b), and pay any monetary enforcement assessment imposed under paragraph 4(b) or 5(b), and any such provision shall be final.

Article 40: Further Proceeding

A complaining Party may, at any time beginning 180 days after a panel determination under Article 39(5)(b), request in writing that a panel be reconvened to determine whether the Party complained against is fully implementing the action plan. On delivery of the request to the other Parties and the Secretariat, the Council shall reconvene the panel. The panel shall make the determination within 60 days after it has been reconvened or such other period as the disputing Parties may agree.

Article 41: Suspension of Benefits

1. Subject to Annex 41A, where a Party fails to pay a monetary enforcement assessment within 180 days after it is imposed by a panel:

- (a) under Article 39(4)(b), or
- (b) under Article 39(5)(b), except where benefits may be suspended under paragraph 2(a),

any complaining Party or Parties may suspend, in accordance with Annex 41B, the application to the Party complained against of NAFTA benefits in an amount no greater than that sufficient to collect the monetary enforcement assessment.

2. Subject to Annex 41A, where a panel has made a determination under Article 39(5)(b) and the panel:

- (a) has previously imposed a monetary enforcement assessment under Article 39(4)(b) or established an action plan under Article 39(4)(a)(ii), or
- (b) has subsequently determined under Article 40 that a Party is not fully implementing an action plan,

the complaining Party or Parties may, in accordance with Annex 41B, suspend annually the application to the Party complained against of NAFTA benefits in an amount no greater than the monetary enforcement assessment imposed by the panel under Article 39(5)(b).

3. Where more than one complaining Party suspends benefits under paragraph 1 or 2, the combined suspension shall be no greater than the amount of the monetary enforcement assessment.

4. Where a Party has suspended benefits under paragraph 1 or 2, the Council shall, on the delivery of a written request by the Party complained against to the other Parties and the Secretariat, reconvene the panel to determine whether the monetary enforcement assessment has been paid or collected, or whether the Party complained against is fully implementing the action plan, as the case may be. The panel shall submit its report within 45 days after it has been reconvened. If the panel determines that the assessment has been paid or collected, or that the Party complained against is fully implementing the action plan, the suspension of benefits under paragraph 1 or 2, as the case may be, shall be terminated.

5. On the written request of the Party complained against, delivered to the other Parties and the Secretariat, the Council shall reconvene the panel to determine whether the suspension of benefits by the complaining Party or Parties pursuant to paragraph 1 or 2 is manifestly excessive. Within 45 days of the request, the panel shall present a report to the disputing Parties containing its determination.

PART SIX

GENERAL PROVISIONS

Article 42: Enforcement Principle

Nothing in this Agreement shall be construed to empower a Party's authorities to undertake labor law enforcement activities in the territory of another Party.

Article 43: Private Rights

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.

Article 44: Protection of Information

1. If a Party provides confidential or proprietary information to another Party, including its NAO, the Council or the Secretariat, the recipient shall treat the information on the same basis as the Party providing the information.

2. Confidential or proprietary information provided by a Party to an ECE or a panel under this Agreement shall be treated in accordance with the rules of procedure established under Articles 24 and 33.

Article 45: Cooperation with the ILO

The Parties shall seek to establish cooperative arrangements with the ILO to enable the Council and Parties to draw on the expertise and experience of the ILO for purposes of implementing Article 24(1).

Article 46: Extent of Obligations

Annex 46 applies to the Parties specified in that Annex.

Article 47: Funding of the Commission

Each Party shall contribute an equal share of the annual budget of the Commission, subject to the availability of appropriated funds in accordance with the Party's legal procedures. No Party shall be obligated to pay more than any other Party in respect of an annual budget.

Article 48: Privileges and Immunities

The Executive Director and staff of the Secretariat shall enjoy in the territory of each of the Parties such privileges and immunities as are necessary for the exercise of their functions.

Article 49: Definitions

1. For purposes of this Agreement:

A Party has not failed to "effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards" or comply with Article 3(1) in a particular case where the action or inaction by agencies or officials of that Party:

- (a) reflects a reasonable exercise of the agency's or the official's discretion with respect to investigatory, prosecutorial, regulatory or compliance matters; or
- (b) results from *bona fide* decisions to allocate resources to enforcement in respect of other labor matters determined to have higher priorities;

"labor law" means laws and regulations, or provisions thereof, that are directly related to:

- (a) freedom of association and protection of the right to organize;
- (b) the right to bargain collectively;
- (c) the right to strike;
- (d) prohibition of forced labor;
- (e) labor protections for children and young persons;
- (f) minimum employment standards, such as minimum wages and overtime pay, covering wage earners, including those not covered by collective agreements;
- (g) elimination of employment discrimination on the basis of grounds such as race, religion, age, sex, or other grounds as determined by each Party's domestic laws;
- (h) equal pay for men and women;
- (i) prevention of occupational injuries and illnesses;
- (j) compensation in cases of occupational injuries and illnesses;
- (k) protection of migrant workers;

"mutually recognized labor laws" means laws of both a requesting Party and the Party whose laws were the subject of ministerial consultations under Article 22 that address the same general subject matter in a manner that provides enforceable rights, protections or standards;

"pattern of practice" means a course of action or inaction beginning after the date of entry into force of the Agreement, and does not include a single instance or case;

"persistent pattern" means a sustained or recurring pattern of practice;

"province" means a province of Canada, and includes the Yukon Territory and the Northwest Territories and their successors;

"publicly available information" means information to which the public has a legal right under the statutory laws of the Party;

"technical labor standards" means laws and regulations, or specific provisions thereof, that are directly related to subparagraphs (d) through (k) of the definition of labor law. For greater certainty and consistent with the provisions of this Agreement, the setting of all standards and levels in respect of minimum wages and labor protections for children and young persons by each Party shall not be subject to obligations under this Agreement. Each Party's obligations under this Agreement pertain to enforcing the level of the general minimum wage and child labor age limits established by that Party;

"territory" means for a Party the territory of that Party as set out in Annex 49; and

"trade-related" means related to a situation involving workplaces, firms, companies or sectors that produce goods or provide services:

- (a) traded between the territories of the Parties; or
- (b) that compete, in the territory of the Party whose labor law was the subject of ministerial consultations under Article 22, with goods or services produced or provided by persons of another Party.

PART SEVEN

FINAL PROVISIONS

Article 50: Annexes

The Annexes to this Agreement constitute an integral part of the Agreement.

Article 51: Entry into Force

This Agreement shall enter into force on January 1, 1994, immediately after entry into force of the NAFTA, on an exchange of written notifications certifying the completion of necessary legal procedures.

Article 52: Amendments

1. The Parties may agree on any modification of or addition to this Agreement.
2. When so agreed, and approved in accordance with the applicable legal procedures of each Party, a modification or addition shall constitute an integral part of this Agreement.

Article 53: Accession

Any country or group of countries may accede to this Agreement subject to such terms and conditions as may be agreed between such country or countries and the Council and following approval in accordance with the applicable legal procedures of each country.

Article 54: Withdrawal

A Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties. If a Party withdraws, the Agreement shall remain in force for the remaining Parties.

Article 55: Authentic Texts

The English, French and Spanish texts of this Agreement are equally authentic.

IN WITNESS WHEREOF, the undersigned, being duly authorized by the respective Governments, have signed this Agreement.

ANNEX 1

LABOR PRINCIPLES

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

1. Freedom of association and protection of the right to organize

The right of workers exercised freely and without impediment to establish and join organizations of their own choosing to further and defend their interests.

2. The right to bargain collectively

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

3. The right to strike

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

4. Prohibition of forced labor

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

5. Labor protections for children and young persons

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

6. Minimum employment standards

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

7. Elimination of employment discrimination

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

8. Equal pay for women and men

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

9. Prevention of occupational injuries and illnesses

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

10. Compensation in cases of occupational injuries and illnesses

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

11. Protection of migrant workers

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

ANNEX 23

INTERPRETIVE RULING

1. Where a Party has requested the Council to convene an ECE, the Council shall, on the written request of any other Party, select an independent expert to make a ruling concerning whether the matter is:
 - (a) trade-related; or
 - (b) covered by mutually recognized labor laws.

2. The Council shall establish rules of procedure for the selection of the expert and for submissions by the Parties. Unless the Council decides otherwise, the expert shall present a ruling within 15 days after the expert is selected.

ANNEX 39

MONETARY ENFORCEMENT ASSESSMENTS

1. For the first year after the date of entry into force of this Agreement, any monetary enforcement assessment shall be no greater than 20 million dollars (U.S.) or its equivalent in the currency of the Party complained against. Thereafter, any monetary enforcement assessment shall be no greater than .007 percent of total trade in goods between the Parties during the most recent year for which data are available.
2. In determining the amount of the assessment, the panel shall take into account:
 - (a) the pervasiveness and duration of the Party's persistent pattern of failure to effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards;
 - (b) the level of enforcement that could reasonably be expected of a Party given its resource constraints;
 - (c) the reasons, if any, provided by the Party for not fully implementing an action plan;
 - (d) efforts made by the Party to begin remedying the pattern of non-enforcement after the final report of the panel; and
 - (e) any other relevant factors.
3. All monetary enforcement assessments shall be paid in the currency of the Party complained against into a fund established in the name of the Commission by the Council and shall be expended at the direction of the Council to improve or enhance the labor law enforcement in the Party complained against, consistent with its law.

ANNEX 41A

CANADIAN DOMESTIC ENFORCEMENT AND COLLECTION

1. For the purposes of this Annex, "**panel determination**" means:
 - (a) a determination by a panel under Article 39(4)(b) or 5(b) that provides that Canada shall pay a monetary enforcement assessment; and
 - (b) a determination by a panel under Article 39(5)(b) that provides that Canada shall fully implement an action plan where the panel:
 - (i) has previously established an action plan under Article 39(4)(a)(ii) or imposed a monetary enforcement assessment under Article 39(4)(b); or
 - (ii) has subsequently determined under Article 40 that Canada is not fully implementing an action plan.

2. Canada shall adopt and maintain procedures that provide that:
 - (a) subject to subparagraph (b), the Commission, at the request of a complaining Party, may in its own name file in a court of competent jurisdiction a certified copy of a panel determination;
 - (b) the Commission may file in court a panel determination that is a panel determination described in paragraph 1(a) only if Canada has failed to comply with the determination within 180 days of when the determination was made;
 - (c) when filed, the panel determination, for purposes of enforcement, shall become an order of the court;
 - (d) the Commission may take proceedings for enforcement of a panel determination that is made an order of the court, in that court, against the person against whom the panel determination is addressed in accordance with paragraph 6 of Annex 46;
 - (e) proceedings to enforce a panel determination that has been made an order of the court shall be conducted by way of summary proceedings;

- (f) in proceedings to enforce a panel determination that is a panel determination described in paragraph 1(b) and that has been made an order of the court, the court shall promptly refer any question of fact or any question of interpretation of the panel determination to the panel that made the panel determination, and the decision of the panel shall be binding on the court;
- (g) a panel determination that has been made an order of the court shall not be subject to domestic review or appeal; and
- (h) an order made by the court in proceedings to enforce a panel determination that has been made an order of the court shall not be subject to review or appeal.

3. Where Canada is the Party complained against, the procedures adopted and maintained by Canada under this Annex shall apply and the procedures set out in Article 41 shall not apply.

4. Any change by Canada to the procedures adopted and maintained by Canada under this Annex that have the effect of undermining the provisions of this Annex shall be considered a breach of this Agreement.

ANNEX 41B

SUSPENSION OF BENEFITS

1. Where a complaining Party suspends NAFTA tariff benefits in accordance with this Agreement, the Party may increase the rates of duty on originating goods of the Party complained against to levels not to exceed the lesser of:

- (a) the rate that was applicable to those goods immediately prior to the date of entry into force of the NAFTA, and
- (b) the Most-Favored-Nation rate applicable to those goods on the date the Party suspends such benefits,

and such increase may be applied only for such time as is necessary to collect, through such increase, the monetary enforcement assessment.

2. In considering what tariff or other benefits to suspend pursuant to Article 41(1) or (2):

- (a) a complaining Party shall first seek to suspend benefits in the same sector or sectors as that in respect of which there has been a persistent pattern of failure by the Party complained against to effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards; and
- (b) a complaining Party that considers it is not practicable or effective to suspend benefits in the same sector or sectors may suspend benefits in other sectors.

ANNEX 46

EXTENT OF OBLIGATIONS

1. On the date of signature of this Agreement, or of the exchange of written notifications under Article 51, Canada shall set out in a declaration a list of any provinces for which Canada is to be bound in respect of matters within their jurisdiction. The declaration shall be effective on delivery to the other Parties, and shall carry no implication as to the internal distribution of powers within Canada. Canada shall notify the other Parties six months in advance of any modification to its declaration.

2. Unless a communication relates to a matter that would be under federal jurisdiction if it were to arise within the territory of Canada, the Canadian NAO shall identify the province of residence or establishment of the author of any communication regarding the labor law of another Party that it forwards to the NAO of another Party. That NAO may choose not to respond if that province is not included in the declaration made under paragraph 1.

3. Canada may not request consultations under Article 22, the establishment of an Evaluation Committee of Experts under Article 23, consultations under Article 27, the initiation of procedures under Article 28 or the establishment of a panel or join as a complaining Party under Article 29 at the instance, or primarily for the benefit, of the government of a province not included in the declaration made under paragraph 1.

4. Canada may not request consultations under Article 22, the establishment of an Evaluation Committee of Experts under Article 23, consultations under Article 27, the initiation of procedures under Article 28 or the establishment of a panel or join as a complaining Party under Article 29, unless Canada states in writing that the matter would be under federal jurisdiction if it were to arise within the territory of Canada, or:

- (a) Canada states in writing that the matter would be under provincial jurisdiction if it were to arise within the territory of Canada; and
- (b) the federal government and the provinces included in the declaration account for at least 35 percent of Canada's labor force for the most recent year in which data are available, and
- (c) where the matter concerns a specific industry or sector, at least 55 percent of the workers concerned are employed in provinces included in Canada's declaration under paragraph 1.

5. No other Party may request consultations under Article 22, the establishment of an Evaluation Committee of Experts under Article 23, consultations under Article 27, the initiation of procedures under Article 28 or the establishment of a panel or join as a complaining Party under Article 29, concerning a matter related to a labour law of a province unless that province is included in the declaration made under paragraph 1 and the requirements of subparagraphs 4(b) and (c) have been met.
6. Canada shall, no later than the date on which an arbitral panel is convened pursuant to Article 29 respecting a matter within the scope of paragraph 5 of this Annex, notify in writing the complaining Parties and the Secretariat of whether any monetary enforcement assessment or action plan imposed by a panel under Article 39(4) or (5) against Canada shall be addressed to Her Majesty in right of Canada or Her Majesty in right of the province concerned.
7. Canada shall use its best efforts to make the Agreement applicable to as many of its provinces as possible.
8. Two years after the date of entry into force of this Agreement, the Council shall review the operation of this Annex and, in particular, shall consider whether the Parties should amend the thresholds established in paragraph 4.

ANNEX 49

COUNTRY-SPECIFIC DEFINITIONS

For purposes of this Agreement:

"territory" means:

- (a) with respect to Canada, the territory to which its customs laws apply, including any areas beyond the territorial seas of Canada within which, in accordance with international law and its domestic law, Canada may exercise rights with respect to the seabed and subsoil and their natural resources;
- (b) with respect to Mexico,
 - (i) the states of the Federation and the Federal District,
 - (ii) the islands, including the reefs and keys, in adjacent seas,
 - (iii) the islands of Guadalupe and Revillagigedo situated in the Pacific Ocean,
 - (iv) the continental shelf and the submarine shelf of such islands, keys and reefs,
 - (v) the waters of the territorial seas, in accordance with international law, and its interior maritime waters,
 - (vi) the space located above the national territory, in accordance with international law, and
 - (vii) any areas beyond the territorial seas of Mexico within which, in accordance with international law, including the *United Nations Convention on the Law of the Sea*, and its domestic law, Mexico may exercise rights with respect to the seabed and subsoil and their natural resources; and

- (c) with respect to the United States,
 - (i) the customs territory of the United States, which includes the 50 states, the District of Columbia and Puerto Rico,
 - (ii) the foreign trade zones located in the United States and Puerto Rico, and
 - (iii) any areas beyond the territorial seas of the United States within which, in accordance with international law and its domestic law, the United States may exercise rights with respect to the seabed and subsoil and their natural resources.

ANNEX 8

Interview Questions

ANNEX 8 : Interview Questions

Social Dumping :

- Do you believe that social dumping is a direct result of free trade?
- Is social dumping unavoidable or controllable?
- Is social dumping a normal/natural consequence of the lifting of trade barriers (liberal point of view as being the natural effect of market forces) or is it something that must be minimized?
- Can social dumping be eliminated? What would it take to do so?

Link between international trade and the protection of workers' rights :

- Is there a link?
- Is this link appropriate? Should the protection of workers' rights be tied to the establishment of international trade agreements? Why or why not?

Comparison with Europe :

- Do you think it is possible to establish common labour standards for the NAFTA countries (as is the case in the European Union)?
- Do you think it would be realistic for North America to follow the European example of establishing a common political structure? Should we be going the way of the European Union? Why or Why not?
- Would this be a way to limit the possibility of social dumping?
- What do you think of comparing North America and Europe with regards to the structures/institutions in place to control social dumping?
- Do you think that one or the other system is better at limiting social dumping? Why?
- What can we learn from the European example?
- Are there modifications to the European example that we can make and use in North America?

Sanctions :

- Do you think that the three main areas where economic sanctions are currently possible (child labour, SST, minimum wage) are sufficient to ensure that each country respects its labour laws?
- Does the fact that sanctions exist in only these 3 areas affect the impact that the NAALC has on a country's respect of its labour laws?
- What is the role of economic sanctions in a side accord?

- Do you think that economic sanctions are necessary to ensure that labour laws are respected?
- Besides economic sanctions, what other ways can we ensure protection of workers rights?
- Besides the 3 areas where sanctions currently exist, in what other areas should economic sanctions be considered?
- Do you think that increasing the number of areas subject to economic sanctions would have an effect on the protection of workers' rights?
- Do you think that the economic sanctions are properly enforced? Are they strict enough to have an impact on the protection of workers' rights? Should they be stricter?

Common labour standards :

- Are these a possibility in the NAFTA context? Is it realistic?
- Would a harmonization of labour standards be a way of minimizing the transfer of production to countries where labour costs are lower?
- Would a harmonization of labour standards help to limit social dumping? Why or why not?

Recommendations :

- Besides the procedures currently in place for the handling of complaints, what other possible ways can the protection of workers' rights be ensured?
- What other procedures should the Commission establish in order to ensure the protection of workers' rights?
- What changes should be made, if any, in order to increase the effectiveness of the current procedures?

ILO :

- The 3 NAFTA countries have all ratified certain conventions of the ILO. As 'members' of the ILO, should economic sanctions be imposed if a NAFTA country does not respect ILO labour standards?
- In your opinion, what is the significance of the fact that Mexico has ratified far more Conventions of the ILO than the U.S. or Canada?
- There are currently no economic sanctions imposed on countries that ratify ILO conventions but then do not respect them. If sanctions were established for ILO members, could they be used effectively in the context of NAFTA countries to ensure the protection of workers' rights?
- Would the use of ILO labour standards (with or without economic sanctions) be an alternative to the NAALC? Why or Why not?

- In your opinion, would the enforcement of ILO standards be a more effective or less effective way of ensuring the protection of workers' rights than the NAALC?
- Why do you think that having a social clause (NAALC) tied directly to NAFTA is better than using labour standards established by the ILO?
- Do the conventions of the ILO have a place in the context of NAFTA? What would that place be?
- What is the role of the ILO and its Conventions in the context of NAFTA (i.e. where a side accord has been established to protect workers' rights)?

Effectiveness of current structures/procedures :

- Are the current procedures effective (i.e. do they help to attain the initial objectives of the NAALC)?
- Do you think that the procedures established under the NAALC for protecting the rights of workers (e.g. complaints being made by unions of another member country, possibility of forming a committee to evaluate a problem, meetings of the 3 labour ministers, delays allowed, etc.) are efficient? (define efficient as 'working smoothly, to the satisfaction of all parties involved, delays in decision-making not too long, not too many useless steps, not costing too much money, not requiring excess work, etc.) What are the weak / strong points?
- What suggestions would you make to improve the efficiency of the procedures?
- In your opinion, are all the steps currently in place being followed as intended by the text of the NAALC?
- Are all the steps in the procedure for filing a complaint necessary? Which ones? Why or why not?
- Are all the steps in the procedure for studying and resolving a complaint necessary? Which ones? Why or why not?
- Do you think that the other 2 actors (employers and unions) perceive the NAALC as working effectively and fairly?
- How do you perceive the procedures followed in the handling of the complaints received to date (Sony, Sprint, etc.)?
- Did the decisions taken to date in these cases have the desired outcomes (with respect to the objectives of the NAALC)?
- Will these decisions have an impact on the protection of workers' rights in the future?

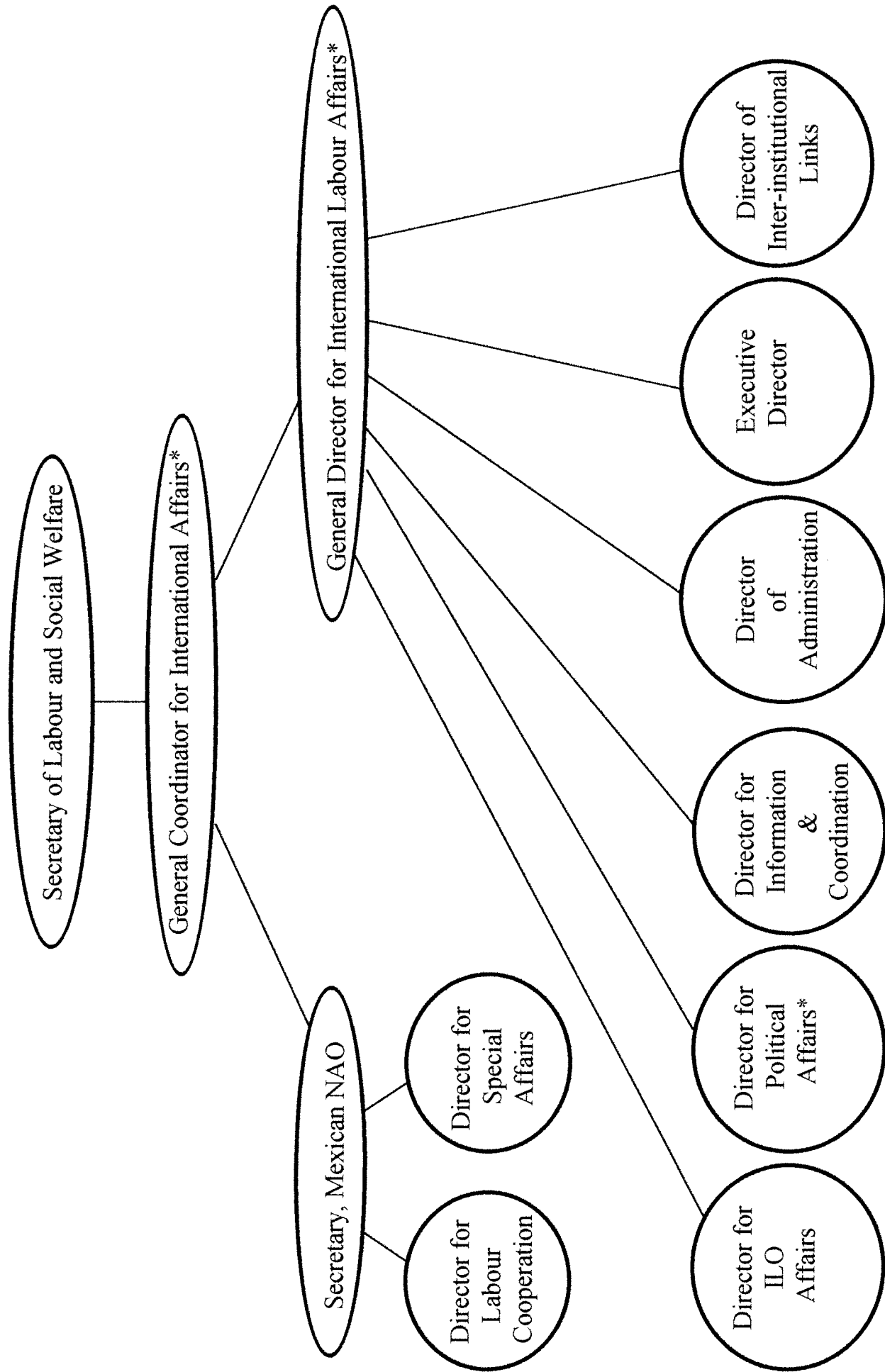
- Will governments be more likely to enforce the respect of their labour laws as a result of these cases? Why or why not?
- Will these cases have an effect on employers' respect of their workers' rights? Why or why not?
- Should the decisions made in these cases have been harsher / more lenient?
- The NAALC has been criticized for not having any 'teeth'. What is your opinion of this? Do you think that the NAALC needs to be harsher? Would that change the effectiveness of the side accord?
- Do you think that the element of cooperation under which the NAALC was established is an important element in the protection of workers' rights? Why or why not?
- Do the activities / projects developed to date to promote cooperation have an impact on the objectives which the NAALC set out to attain? Explain.
- Is the NAALC capable of accomplishing what it set out to do (i.e. its initial objectives)? Why or why not?

Annex 8 (continued)

ANNEX 9

Organizational Chart, Mexican NAO

ANNEX 9 : Organizational Chart, Mexican NAO



* Positions outside the NAO which handle a significant amount of NAO affairs.

ANNEX 10

Table of Public Submissions

ANNEX 10 : Summary of Public Submissions¹

Case	HONEYWELL	GE	SONY	SPRINT	SECR. de PESCA	MAXI-SWITCH
Submission #	940001	940002	940003	9501	9601	9602
Submission date	Feb. 14, 1994	Feb. 14, 1994	Aug. 16, 1994	Feb. 9, 1995	June 13, 1996	Oct. 11, 1996
Company location	Chihuahua, Mex.	Ciudad Juarez, Mex.	Nuevo Laredo, Mex.	San Francisco, USA	Mexico, D.F.	Cananea, Mex.
Submitted by	IBT (International Brotherhood of Teamsters)	UE (United Electrical, Radio and Machine Workers of America)	2 Mexican and 2 US worker and human rights organizations ²	STRM (Sindicato de Telefonistas de la República Mexicana)	Human Rights Watch/Americas; ILRF, ANAD	Communications Workers of America; FESEBS; STRM
Events	23 workers fired; 22 accepted settlement packages, waiving right to file complaint against the company	11 workers fired; 9 accepted settlement packages, waiving right to file complaint	13 workers fired or resigned; 11 accepted settlement packages, waiving right to file complaint	235 workers dismissed upon closure of plant	Existing SUTSP union at Secr. de Pesca was deregistered following the ministry's consolidation with another ministry; registration was granted to competing union tied to the PRI	Local CAB refused recognition of newly formed union on grounds that another union already existed; 3 officials of the newly formed union were fired and one was forced to resign
Allegations	Violates freedom of association and right to organize; workers were fired for trying to form an independent union; company made illegal threats to employees and used coercive measures to gain information on pro-union workers; submission requested reinstatement of workers, with back pay.	Violates freedom of association and right to organize; were fired for trying to bring in an independent union; company used intimidation tactics, prevented workers from distributing union literature, violated health and safety regulations, and refused to pay overtime; submission requested the reinstatement of workers, with back pay.	Violates freedom of association and right to organize; were fired/forced to resign for challenging the CTM union and trying to bring in an independent union; company violated min. employment standards and collaborated with CTM; union vote not done by secret ballot; company collaborated with police violence; Mex govt (CAB's) thwarted attempts to register indep. union.	Violates freedom of assoc. and right to organize; plant closure was motivated by the company's desire to avoid union organizing by the mostly Hispanic workers; plant was suddenly closed just 8 days before workers were to vote on joining the union; mgmt used various forms of coercion, harassment, threats & intimidation; mgmt warned that plant would close if a union came in.	Mexican govt violated laws of freedom of assoc. and right to organize; the federal tribunal (FCAT) that deregistered SUTSP and recognized the other union is biased against independent unions like SUTSP; the other union which the FCAT recognized has ties with the ruling PRI party. Mex. law limits freedom of assoc for federal workers, as only 1 union permitted in each govt entity.	Violates freedom of assoc. and right to organize; mgmt used threats, intimidation & violence to block union organization; company signed an agreement with a 'phantom' union affiliated with the CTM, in order to avoid having to bargain with the new union; CAB decision goes against Mex law; CAB is biased, as its chairman and labour rep. are affiliated with the CTM.

Case	HONEYWELL	GE	SONY	SPRINT	SECR. de PESCA	MAXI-SWITCH
Mgmt's view	22 positions were eliminated due to downsizing; 1 person was terminated for violation of workplace rules	Terminations were due to various work rule violations and performance problems	8 terminations were due to the workers' participation in an illegal work stoppage; 4 resigned when they lost status as union delegates; one was caught engaging in wrongful activities; company denies all accusations by workers	Plant was shut down for valid financial reasons (a surprising and unexpected decline in business); the company denies that mgmt used any form of intimidation to stop workers from unionizing	Mexican laws were followed in all procedures, therefore the submission is not founded and there is no reason for the NAO's to get involved; NAALC has no jurisdiction in conflicts between unions; the ILO is already involved in this case	No official record is available
Public hearing	Sept. 12, 1994 at the Dept of Labor, Washington, DC		Feb. 13, 1995 in San Antonio, Texas	Feb. 27, 1996 in San Francisco, California	Dec. 3, 1996 in Washington, DC	Apr. 18/97 in Arizona - CANCELLED
Public report	Oct. 12, 1994		April 11, 1995	May 31, 1995	January 27, 1997	-
Ministerial consult.	not recommended	not recommended	yes	yes	yes	-
Decision	Ministerial consultations were not recommended because, in both cases, there is no evidence that the Mexican govt failed to enforce its labour laws. The US NAO recommended (1) trilateral seminars on the right to organize and freedom of association, and (2) public information and education programs in each country on the NAALC, its institutions and its procedures.		The US NAO recommended (1) joint seminars among the 3 countries about the union registration and certification process, (2) a study on union registration, by 3 indep. Mexican labour law specialists, (3) a series of meetings between Mexican Secretary of Labor, workers, union reps and company mgmt.	Case heard before a US administrative law judge, who decided that, although there was evidence of union blocking, plant closure was due to financial problems; appeal to NLRB = order to rehire workers; results of Minist' l consultations: (1) must monitor the appeal, (2) Secretariat to do a study on the effects of plant closings on freedom of assoc. and right to organize, (3) public forum in San Francisco to discuss issues raised by case.	As a result of minist' l consultations, a seminar on the effects of international treaties and of constitutional provisions on domestic laws was held on Dec. 4, 1997, in Baltimore.	SUBMISSION WAS WITHDRAWN BY THE PETITIONERS ONLY 3 DAYS BEFORE THE SCHEDULED PUBLIC HEARING, AS THE INDEPENDENT UNION WAS FINALLY RECOGNIZED BY THE LOCAL CAB.

¹ All information is derived from the actual submissions and from the public reports issued by the NAO's in each case.

² The International Labor Rights Education and Research Fund, now the International Labor Rights Fund (ILRF); the Asociación Nacional de Abogados Democráticos (ANAD); the Coalition for Justice in the Maquiladoras; and the American Friends Service Committee.

Case	PREGNANCY DISCRIMINATION	HAN YOUNG
Submission #	9701	9702
Submission date	May 15, 1997	October 30, 1997
Company location	Maquiladora regions, Mexico	Tijuana, Mexico
Submitted by	Human Rights Watch; ILRF, ANAD	ILRF; ANAD; Support Committee for Maquiladora Workers; STIMAHCS ³
Events	Women applicants are subjected to pregnancy testing; pregnant women are refused jobs; women becoming pregnant after hire are mistreated; CAB mechanisms not available before hire; CABs claim pregnancy discrimination is legitimate.	Company has contract with union affiliated with ruling PRI party; company harassed workers during organization campaign for an independent union; 4 union supporters fired by the company; CAB refused recognition of the independent union despite worker claims that the union won the elections.
Allegations	Mexican govt violated its obligations under the NAALC to promote compliance with and to enforce laws related to sex discrimination; Govt failed to ensure appropriate access to tribunals and failed to ensure that persons have recourse to procedures that can enforce their rights.	Mexican govt violated obligations under Articles 3 and 5 of the NAALC (to promote compliance with and enforce laws, and ensure fair, equitable tribunals; also violated Constitution (freedom of association) and ILO Convention 87 (right to organize and bargain collectively).
Mgmt's view	Not applicable	Not yet available
Public hearing	Nov. 19, 1997 in Brownsville, Texas	Not yet scheduled
Public report	Not yet available	Pending hearing
Ministerial consult.	-	-
Decision	-	-

³ Sindicato de Trabajadores de la Industria Metalica, Acero, Hierro Conexos y Similares (Mexico)

ANNEX 11

Table of Cooperative Activities

ANNEX 11 : Cooperative Activities

1995			
ACTIVITY	DATE	LOCATION	
THEME : OCCUPATIONAL SAFETY AND HEALTH (OSH)			
Annual Meeting of Senior OSH Officials in Canada	June 5-8	Vancouver	
Canadian OSH Centre Seminar	July 13	Mexico City	
Construction Study Tour	Nov. 7-10	Dallas	
THEME : EMPLOYMENT AND JOB TRAINING			
Equality in the Workplace	June 21-22	Mexico City	
THEME : LABOUR LAW AND WORKER RIGHTS			
Workshop on the Right to Organize and Freedom of Association	Mar. 27-28	Washington DC	
Workshop on the Right to Organize and Freedom of Association (follow-up)	Sept. 20-21	Washington DC	

Source : Secretariat of the Commission for Labor Cooperation, 1995 and 1996 Annual Reports.

1996

ACTIVITY	DATE	LOCATION
THEME : OCCUPATIONAL SAFETY AND HEALTH		
OSH Planning Session to generate OSH ideas	March 25-26	Mexico City
Planning Meeting in preparation of OSH Week (OSH Week to be held simultaneously in the 3 countries, June 2-6, 1997)	Sept. 19-20	Dallas
NAALC Petrochemical Study Tour on Preventing Catastrophic Explosions in the Petrochemical Industry	Oct. 27-31	Orlando, Florida
THEME : EMPLOYMENT AND JOB TRAINING		
Workshop on Continuous Learning and Development in the Workplace	April 23-24	Dallas
Workshop on Income Security Programs	Oct. 3-4	Ottawa
Tripartite Seminar on Responding to the Growth of Non-Standard Work and Changing Work Time Patterns and Practices	Nov. 25-26	Ottawa
THEME : LABOUR LAW AND WORKERS RIGHTS		
Tripartite Conference on Industrial Relations for the 21 st Century	March 18-20	Montréal

Source : Secretariat of the Commission for Labor Cooperation, 1995 and 1996 Annual Reports.

1997

ACTIVITY	DATE	LOCATION
THEME : OCCUPATIONAL SAFETY AND HEALTH (OSH)		
North American Occupational Safety and Health Week	June 2-6	US, Canada, Mexico
OSH Week Review Meeting	Sept. 25-26	Dallas
THEME : PRODUCTIVITY AND QUALITY		
North American Seminar on Incomes and Productivity	Feb. 28 - Mar. 1	Dallas
THEME : LABOUR LAW AND WORKERS RIGHTS		
International Conference on Child and Youth Labor in North America	Feb. 24-25	San Diego, Calif.
Trinational Conference on Women and Work in the 21 st Century	April 23-25	Queretaro, Mexico
Tripartite Conference on Protecting Working Children in North America - A Shared Responsibility (follow-up to the February Child Labor Conference)	Oct. 15-16	Ottawa

Source : List of 1997 and 1998 Cooperative Activities provided by the Canadian NAO.

1998 (planned - subject to change)

ACTIVITY	DATE	LOCATION
THEME : OCCUPATIONAL SAFETY AND HEALTH (OSH)		
Conference on OSH Border Training - US/Mexico	April	?
Conference on OSH in the Mining Industry	May	Winnipeg
North American OSH Week	June	US, Canada, Mexico
Conference on OSH Inspector Training - US/Mexico	September	?
Conference on OSH in the Bottling Industry	October	Mexico
THEME : EMPLOYMENT AND JOB TRAINING		
Conference on Labor Market Trends and the Role of Government	January	Mexico
Conference on Contracting Out	November	Canada
Technical Assistance Follow-up to Labor Market Trends Conference (tentative)	May	?
THEME : LABOUR LAW AND WORKERS RIGHTS		
Fourth Major Conference on Labor Relations	March	US
THEME : PRODUCTIVITY AND QUALITY		
Secretariat Seminar on Incomes and Productivity	February	Dallas

Source : List of 1997 and 1998 Cooperative Activities provided by the Canadian NAO.

ANNEX 12

Canadian Intergovernmental Agreement

ANNEX 12 : Canadian Intergovernmental Agreement (CIA)

**CANADIAN INTERGOVERNMENTAL AGREEMENT
REGARDING
THE NORTH AMERICAN AGREEMENT
ON LABOUR COOPERATION**

**CANADIAN INTERGOVERNMENTAL AGREEMENT
REGARDING
THE NORTH AMERICAN AGREEMENT
ON LABOUR COOPERATION**

PREAMBLE

GIVEN that Canada has entered into the North American Free Trade Agreement (NAFTA) and the North American Agreement on Labour Cooperation (NAALC) with the United Mexican States and the United States of America;

ACKNOWLEDGING the commitment to promote, to the maximum extent possible, the labour principles set out in the NAALC;

RECOGNIZING that partnership and cooperation between the federal, provincial and territorial governments are essential in order to achieve the goals of the NAALC and the goals of the NAFTA;

AFFIRMING the importance of continuing interjurisdictional cooperation on labour matters;

RECOGNIZING the roles and respective responsibilities of the federal, provincial and territorial governments in labour matters;

RECOGNIZING that labour laws in Canada apply to workplaces and workforces that for the most part fall within provincial or territorial responsibility; and

CONFIRMING that nothing in this Agreement affects in any way the respective powers, status or jurisdictional authority of any of the signatories to this Agreement;

The undersigned governments have agreed as follows:

OBJECTIVES

Article 1

The objectives of this Agreement are to:

- (a) continue to ensure cooperation with regard to labour matters through the effective and efficient implementation of the NAALC;
- (b) establish a mechanism that will provide for the full participation of the provincial and territorial governments with the federal government in the implementation, management and further elaboration of the NAALC in accordance with the terms of this Agreement; and
- (c) define roles in the implementation, management and further elaboration of the NAALC.

RIGHTS AND OBLIGATIONS OF THE NAALC

Article 2

The signatory governments to this Agreement shall enjoy the rights of the NAALC and shall be bound by its obligations in accordance with their respective jurisdictions.

GOVERNMENTAL COMMITTEE

Article 3

1. A Governmental Committee is hereby created to develop and manage Canada's involvement in the NAALC including, without limiting the foregoing, the establishment of Canada's positions and approaches as well as the preparation for, participation at and follow-up to meetings of the Council of the Commission for Labour Cooperation (Council).
2. The Governmental Committee will be composed of the ministers responsible for labour, or their designees, from each signatory government. It will be co-chaired by the federal minister and a minister from one of the other signatory governments, the latter chosen for a one-year term, and in a manner to be determined by the Governmental Committee. The Governmental Committee will meet at the ministerial level at least once a year and as necessary.
3. The Governmental Committee will be supported by a Committee of Senior Officials composed of representatives from each signatory government. It will be co-chaired and operate on the same basis as the Governmental Committee.
4. Both Committees will function on the basis of consensus, unless otherwise specified in this Agreement.
5. Both Committees will cooperate with the appropriate intergovernmental committees on international trade when addressing trade-related matters under the NAALC or the NAFTA.
6. Representatives of governments that have not signed this Agreement may participate in the meetings of both Committees. They will have the opportunity to comment and will normally be invited to participate in cooperative activities of the NAALC and, as appropriate, in other activities under this Agreement. They shall not be included in the determination of consensus under paragraph 4 above.
7. The Committees will perform their functions in a cost-effective manner. To this end, existing intergovernmental mechanisms such as the Canadian Association of Administrators of Labour Legislation (CAALL) may be invited to provide support as appropriate.
8. Secretariat services for and as assigned by the Governmental Committee will be provided by the federal government. Other signatory governments may second officials for this purpose as well as to the National Administrative Office (NAO).
9. The Governmental Committee will adopt its own rules of procedure.

REPRESENTATION ON THE COMMISSION FOR LABOUR COOPERATION

Article 4

The federal Minister of Labour will represent Canada on the Council. Canadian delegations to Council meetings will be determined by the Governmental Committee and will normally include a representative of at least one other signatory government. Participation in Council working groups and other bodies of the Commission for Labour Cooperation will be established by the Governmental Committee.

PROVISION OF INFORMATION

Article 5

1. The Governmental Committee will provide a forum for the on-going mutual exchange of information between and among the federal government and the provincial and territorial governments regarding issues related to the NAALC.
2. As a general rule, all documents relating to the operation of this Agreement and to Canadian activities under the NAALC will be provided promptly to all governments. All governments will be advised promptly of all other NAALC documents and will be provided with the documents upon request.
3. The NAO will immediately convey to the provincial and territorial governments any request pursuant to sub-paragraphs (a), (b) or (c) of Article 16(2) of the NAALC for information for Secretariat reports and studies and in response to a request from an NAO. The signatory government concerned will prepare an appropriate response, consulting with other interested governments, and will transmit the response to the NAO, for submission to the Secretariat of the Commission for Labour Cooperation (Secretariat), or to the requesting NAO.
4. Where information is requested from the NAO pursuant to the NAALC, the signatory governments shall ensure that all the rights and obligations of the NAALC are respected, including those of Article 44 (Protection of Information). The NAO will only convey information on or regarding a province or territory after the provincial or territorial government concerned has been afforded a reasonable opportunity to provide written advice to the federal government regarding the information that may be conveyed and the information that must be withheld in accordance with the NAALC and domestic law.
5. The Secretary of the NAO shall regularly prepare and submit to the Governmental Committee reports on:
 - (a) communications received from the public on labour law matters arising in the territory of another Party;
 - (b) NAO activities under Article 16 of the NAALC; and
 - (c) NAO activities under Part Four of the NAALC.

COOPERATIVE CONSULTATIONS, EVALUATIONS AND RESOLUTION OF DISPUTES

Article 6

1. The NAO will promptly bring to the attention of the Governmental Committee any public communication which may warrant a request for consultations pursuant to Article 21 of the NAALC.
2. Notwithstanding the general rule of consensus, if the NAO or a signatory to this Agreement brings to the attention of the Governmental Committee practices on the part of another Party to the NAALC that may be inconsistent with that Party's obligations, the Canadian Representative, after an opportunity for discussion and comment in the Governmental Committee, will as a general rule pursue the matter in accordance with the terms of the NAALC.
3. If, exceptionally, the Canadian Representative should wish to delay or not to pursue a matter, the Canadian Representative will cooperate with the government that raised the matter, with a view to developing an agreed course of action.

Article 7

1. The NAO will immediately convey to provincial and territorial governments any request for NAO consultations pursuant to Article 21 of the NAALC. Where the request concerns a provincial or territorial matter of a signatory government, that government shall respond promptly by providing the relevant data or information to the NAO for transmission to the requesting NAO. Any such NAO consultations under the NAALC shall include representation from both the federal government and the other signatory government concerned.
2. When the Canadian Representative receives a request for ministerial consultations under Article 22 of the NAALC relating to a provincial or territorial matter, the Canadian Representative shall immediately notify the signatory government concerned. The signatory government shall respond promptly by providing the relevant information to the Canadian Representative. The Governmental Committee shall have the opportunity to discuss the matter before ministerial consultations occur. When the request concerns a provincial or territorial matter, the ministerial consultations under the NAALC shall include representation from both the federal government and the other signatory government concerned.
3. The Canadian Representative will immediately convey to provincial and territorial governments any request to convene an Evaluation Committee of Experts (ECE) pursuant to Article 23 of the NAALC. When the practices of any signatory government are analyzed by an ECE, that government shall have the opportunity to provide through the Canadian Representative comments on the information submitted to the ECE, written submissions, written views on the draft report and written responses to recommendations in the final report of the ECE. The government concerned will prepare these comments, submissions, views and responses in consultation with other interested governments.
4. When the Canadian Representative is notified of a request for consultations under Article 27 of the NAALC, the Canadian Representative shall immediately notify the signatory government concerned. The signatory government concerned shall report to the Governmental Committee on the circumstances and there shall be an opportunity for the Committee to discuss and comment. When the request concerns a provincial or territorial enforcement practice, the consultations under the NAALC shall involve, and include representation from, both the federal government and the other signatory government concerned.
5. When a special session of the Council is requested under Article 28 of the NAALC, the Canadian delegation to the Council will include representation from the provincial or territorial government whose enforcement practice is the subject of the dispute.
6. Notwithstanding the general rule of consensus, in the event that a signatory government is the subject of a request for an arbitral panel under Article 29 of the NAALC, the dispute settlement procedures will be led and positions established by the government or governments whose enforcement practice is the subject of the dispute.
7. Where a provincial or territorial government enforcement practice is the subject of an arbitral panel, the federal government shall participate in all proceedings. Where a federal enforcement practice is the subject of an arbitral panel, any province or territory may provide appropriate advice or assistance.
8. A provincial or territorial government may invite the federal government to co-manage an arbitral panel procedure where the provincial or territorial practice is the subject of the dispute.
9. The Governmental Committee will be kept informed and have an opportunity to comment on arbitral panels in progress.

Article 8

Each signatory to this Agreement shall take all necessary measures within its jurisdiction to implement any action plan or ensure payment of any monetary enforcement assessment, with respect to the non-enforcement of its labour law, imposed by an arbitral panel pursuant to the NAALC.

Article 9

1. Any implementation of an action plan or payment of a monetary enforcement assessment shall be the responsibility of the government whose labour law is the subject of the complaint under the NAALC.
2. The Canadian Representative will consult with the government whose enforcement practice is the subject of a dispute prior to making a written declaration pursuant to paragraph 6 of Annex 46 of the NAALC.
3. Further to paragraph 3 of Annex 39 of the NAALC, the Canadian Representative will seek to ensure that any monetary enforcement assessment expended in Canada will be expended in the jurisdiction whose enforcement practice was the subject of the complaint.

NATIONAL ADVISORY COMMITTEE

Article 10

The Governmental Committee will establish and appoint members to a National Advisory Committee to advise it on the implementation and further elaboration of the NAALC. The National Advisory Committee may provide advice on its own initiative or at the request of the Governmental Committee.

FUNDING

Article 11

Each government shall bear the cost of its own participation in the ongoing implementation of this Agreement, including costs related to its participation in delegations, committees or working groups established under the NAALC.

AMENDMENTS

Article 12

Any modification of or addition to this Agreement shall be by agreement of the signatory governments.

ENTRY INTO FORCE

Article 13

1. This Agreement shall enter into force upon the signature of the federal government and a minimum of one provincial government. The federal government will notify the other Parties accordingly under Annex 46 of the NAALC.

2. A provincial or territorial government may sign this Agreement at any time and the federal government will amend the declaration under Annex 46 of the NAALC accordingly.

WITHDRAWAL

Article 14

A government may withdraw from this Agreement six months after it provides written notice of its intent to withdraw to the other signatory governments and the federal government will amend the declaration under Annex 46 of the NAALC accordingly. If a government other than the federal government withdraws, the Agreement remains in force for the remaining governments.

AUTHENTIC TEXTS

Article 15

The English and French texts of this Agreement are equally authentic.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective governments, have signed this Agreement.

For the Government of Canada

Signed at Montreal, on May 23rd 1995

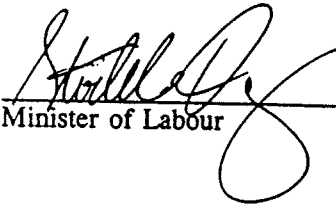
Canada


Lucienne Robitaille
Minister of Labour

For the Government of the Province of Alberta

Signed at Edmonton, on May 31, 1995.

Alberta


Minister of Labour


Approved by the Minister of Federal
and Intergovernmental Affairs