LABOR REGULATION IN THE NORTH AMERICAN FREE TRADE AREA: A STUDY ON THE NORTH AMERICAN AGREEMENT ON LABOR COOPERATION

Emmanuelle Mazuyer†

I. INTRODUCTION: ECONOMIC INTEGRATION IN NORTH AMERICA

Starting after World War II, a wave of economic integration has led to the creation of free trade areas all over the world. In general, several types of economic integration are described from the free-trade zone to the economic and monetary union requiring a single currency.[1] Several examples can illustrate this regional integration process, although the European Community seems to be the most famous one and the most complete. As far as the American continent is concerned, regional economic integration has been "stop and go" from the 1960s, mainly in south and central Americas.[2] More recently, the increase of multinational firms, foreign investment, and movement of goods and services worldwide caused the so-called phenomenon of globalization of economy and a need to increase trading blocks. This was particularly the case for the United States facing the competition of Mexico and its lower costs of production.

In 1988, the United States and Canada had already concretized their economic interdependence and trade relationships through the

† Law Researcher, European University Institute, Florence, Italy. The author would like to thank Professor Silvana Sciarra, European University Institute, for her help and Professor Mark Barenberg, Columbia University School of Law, for his advice on this work.

1. Different degrees of economic integration exist, i.e. preference agreement, free-trade zone, customs union, common market, and economic and monetary union.

2. In 1960, the Latin America Free Trade Association (LAFTA replaced in 1980 by the Latin American Integration Association) was created, including South America, Central America, and Caribbean countries, followed by the Andean Group in 1968, the Central American Common Market (CACM), the Caribbean Free Trade Association (CARIFTA), and more recently, the Southern Common Market (MERCOSUR) set up in 1991. For more detailed information on American integration, *see* Luis Aparicio-Valdez, *Hemispheric Integration and Labour Law*, *in* AMERICAN REGIONAL CONGRESS OF LABOUR LAW AND SOCIAL SECURITY 78-153 (Y. Blair ed., 1995).

U.S.-Canada Free Trade Agreement (CFTA). Concerning the United States and Mexico cooperation, the Mexican President, Carlos Salinas, proposed to President Bush a free-trade agreement including both countries in 1990. The proposal was enlarged to include Canada, at its request, and the negotiation among the three countries for the North American Free Trade Agreement (NAFTA) was concluded in August 1992. On January 1, 1994, NAFTA entered into effect, creating the world's largest free-trade zone with nearly 400 million people. Shared land borders and geographic proximity made the three countries natural trade partners. The main purpose of NAFTA is to gradually eliminate all tariffs and other trade barriers on North American made goods.[3] Besides, NAFTA is not a common market because there are still borders between the three countries; there are still customs formalities, immigration requirements, separate laws, currencies, and languages.

The NAFTA negotiation became a real political issue on the American scene during the presidential election campaign between candidates Bush and Clinton. Clinton was strongly in favor of free trade, but he noted that despite an effective protection in the field of the intellectual property interests, the agreement "was silent in respect to labor laws and the environment."[4] From that point, he promised to negotiate, in case of his election as President, specific agreements to protect environment concerns and labor rights by reducing the risk of U.S. employment loss caused by the "runaway shop" phenomenon.[5] Indeed, the so-called *Maquiladora* program has been in existence for almost 20 years to take advantage of increased possibilities in Mexico by production sharing—assembling U.S. made parts and components in Mexico.[6]

3. On January 1, 1994, with the agreement's entry into force, half of all U.S. exports to Mexico became eligible for duty-free treatment and remaining tariffs were scheduled for elimination on five to fifteen years schedules. *See* Bill Clinton, *Study on the Operation and Effects of the NAFTA*, presented before the U.S. Congress (July 1997).

4. *See* Jerome Levinson, *NAFTA's Labor Side Agreement, Lessons From the First Three Years*, published by the Institute for Policy Studies, at 7 (November 1996), and Bill Clinton, *Expanding Trade and Creating American Jobs*, North California State University, Raleigh, North Carolina, at 15 (Oct. 4, 1992).

5. Named also "social dumping," a term that refers "to the actual or threatened movement of capital from high-wage economies to low-wage economies." *See* Mark Barenberg, *Law and Labor in the New Global Economy: Through the Lens of the United States Federalism*, 33 COLUM. J. TRANSNAT'L L. 448 (1995).

6. Actually, it was stated that American workers could be injured by three distinct but related factors: the flight of United States firms to Mexico, competition from imports to the United States, and regulatory competition. *See* Benjamin Rozwood & Andrew Walker, *Side Agreements, Sidesteps, and Sideshows: Protecting Labor From Free Trade in North America*, 34 HARV. INT'L L.J. 334 (1993).

However, this kind of "competition by law," including the use of lower labor standards to attract multinational firms on its territory, was already known and prevented by some specific tools. On May 3, 1991, the United States and Mexico signed a Memorandum of Understanding (MOU) to ensure both countries cooperation in enforcement of child labor and health and safety standards. This agreement was the first step towards a governmental cooperation in the field of labor rights, even if its objectives can appear rather modest: The MOU called for cooperative activities designed to facilitate exchanges of information not only on health and safety, but also on working conditions, labor standards enforcement, labor-management conflict resolution, collective bargaining agreements, social security, labor statistics, and quality and productivity.[7] Following this example, on May 4, 1992, Canada and Mexico signed a three-year MOU on cooperative labor activities within the context of the Canada-Mexico Joint Ministerial Committee established in 1968. The agreement concerned occupational health and safety, employment standards, job training, labor statistics, labor relations, and workplace innovations. Finally, at a meeting of the United States-Mexico Binational Commission in June 1993, labor secretaries agreed on cooperative activities until June 1994. They renewed commitment to the previously agreed activities and included new ones on worker training, public employment services, quality and productivity programs, research and studies, labor law and practice, and labor statistics.[8]

These first experiences of bilateral intergovernmental cooperation between the United States, Mexico, and Canada on labor concerns seem quite important to understand the future framework of the North American Agreement on Labor Cooperation (NAALC) and the labor side agreement of NAFTA that will be analyzed in a very precise way. In a second part, lessons from the first years of implementation of the NAALC will help to evaluate the North American mean to regulate labor standards at a regional level. This question seems to be a crucial point in these times of negotiation of the FTAA.

7. *See Highlights of the 1994 Cooperative Work Program: North American Agreement on Labor Cooperation (NAALC)*, U.S. Dept. of Labor, at 2 (April 1995).

8. For more detailed information on the results of these cooperative activities consisting mainly in seminars, meetings, and reports on labor law issues, *see North American Agreement on Labor Cooperation: A Guide*, U.S. NAO, U.S. Dept. of Labor, at 7-8 (December 1994).

II. AN OVERVIEW OF THE NORTH AMERICAN AGREEMENT ON LABOR COOPERATION

Personally involved in the hard negotiation of a separate agreement dealing with labor rights, Bill Clinton carried out his previous promise to provide a certain sort of cooperation in this matter, even though NAALC principles, institutional structure, scope of application, and member states obligations vary considerably from prior European similar experiences of labor legislation harmonization.

A. The NAALC Negotiation: Genesis

NAFTA was negotiated under the "fast-track" procedure, which guarantees that Congress will not be entitled to make any amendment to the legislation during the review process and will vote to approve the agreement and the implementing legislation within a fixed period of time. The negotiators of the general agreement establishing NAFTA avoided addressing labor issues because they were not considered within the scope of NAFTA.[9] Nevertheless, as opposition grew mostly among labor unions and their supporters in the United States Congress, it became obvious that providing mutual cooperation between the three countries on labor issues was inevitable. The Bush Administration agreed to enter into parallel negotiation and to establish a parallel track approach for labor concerns.

In November 1992, the election of President Clinton and his support from labor unions increased the need to pay attention to workers' rights issues. Once in office, the Clinton Administration promised to negotiate the supplemental agreement with his partners before submitting implementing legislation for NAFTA. The negotiation went on until September 1993, when finally the three partners agreed upon the substance of the labor side agreement that was signed on September 13, 1993. Implementation of the labor side accord was said to be "a lengthy and challenging feat"[10] for the Clinton Administration. The NAFTA Labor Accord is not an integral part of the Treaty; it stands alone as an executive agreement.[11]

9. The trade agreement passed by Congress contains 2,000 pages, covering most features of modern international trade relations. Many are similar to provisions in the General Agreement on Tariffs and Trade (GATT).

10. LESLIE ALAN GLICK, UNDERSTANDING THE NAFTA—LEGAL AND BUSINESS CONSEQUENCES OF NAFTA 120 (1994).

11. *See* Lance Compa, *Enforcing Workers' Rights Under the NAFTA Labor Side Accord. Access to Transnational Justice: Responding to the NAFTA*, The American Society of International Law, Proceedings of the 88th Annual Meeting, Washington D.C., at 537 (April 6-9, 1994).

At least the substantive issues were addressed in the implementing legislation. On January 1, 1994, NAFTA and the side accords went into effect.[12]

B. The NAALC's Institutional Structure

1. Trinational Institutions: A Diplomatic Cooperation

First experiences of bi-national cooperation obtained through the MOU have had a great influence on the institutional framework of NAALC. While the side agreement was being negotiated, governments agreed on the creation of a tri-national commission with power to enforce labor rights and standards, even if there were a number of alternate proposals suggested by negotiators. Finally, this "Commission for Labor Cooperation" is an international institution, created to facilitate the objectives of the Accord in a cooperative and consultative manner, principally by exchanging information. The Labor Commission consists of a Ministerial Council and a Secretariat.

The Ministerial Council is the governing body of the Commission and consists of three cabinet level labor officials from the parties. They establish priorities for cooperative activities and facilitate party-to-party consultation. The Council held its first meeting in March 1994. There is also a Secretariat that acts under its discretion and is recognized as a central office carrying out the day-to-day work of the Commission. The Secretariat of the Commission for Labor Cooperation is responsible for assisting technically the Council by preparing periodic reports on labor issues addressed in the parties, including labor laws and their enforcement, and the labor market conditions. The Secretariat is headed by an Executive Director, appointed by consensus by the three countries for a three-year term, which may be renewed once and its staff is drawn equally from the

12. Nonetheless, as far as Canada is concerned, the NAALC entered effectively into force later. Given that under its Constitution labor law lies primarily under provincial jurisdiction, NAALC Article 46 and Annex 46 provide that the Canadian federal government shall inform the other parties when Canadian provinces agree to bind themselves to the NAALC. Canada is precluded from seeking ministerial consultations on issues arising beyond the federal labor jurisdiction, until at least 35% of the national labor force is accounted for in the declaration of Canadian jurisdictions bound to NAALC provisions, and in relation to labor matters arising in a specific sector or industry, until 55% of the national labor force is bound to the Agreement. Canada's federal labor force jurisdiction was covered as of January 1994. For more details, *see* Ian Robinson, *The NAFTA Labour Accord in Canada: Experience, Prospects, and Alternatives*, 10 CONN. J. INT'L L. 475 (1995).

three parties.[13] The organizational structure of NAALC also includes a national component: the National Administrative Offices.

2. The National Administrative Offices (NAO): The National Component to Monitor Effective Enforcement of Domestic Labor Legislation

The NAO are established within the federal labor administration in each country to serve as a point of contact between commission entities and national governments. Each country's NAO is led by a secretary and has to facilitate the provision of information to other parties on domestic law and practice. Each country can determine the functions and powers of its own NAO and decide upon its staffing.[14] Mainly, the purpose of NAO is to be a point of contact and of exchange of information by initiating seminars, conferences, joint research projects, and giving technical assistance in relation to the NAALC labor principles.

However, another NAO function, which can be considered as the most important, is to receive public communications regarding labor law matters arising in another NAFTA country. As far as this procedure is concerned, each NAO is empowered to establish its own domestic guidelines for reviewing public complaints and for deciding what actions to take in response to requests made of it. The main advancements in the NAALC evolution were made through NAO public complaint review.

C. The NAALC and Labor Regulation

The problem of labor regulation in NAFTA has to be envisaged through the analysis of the objectives and the principles of the Labor Accord, but also through the study of its dispute resolution framework. The objectives of NAALC are stated in Article 1 and they are to "improve working conditions and living standards; promote, to the maximum extent possible, labor principles set out in the Annex; encourage cooperation to promote innovations and rising levels of productivity and quality; encourage publication and exchange of information, data development and coordination, and joint studies

13. The Secretariat includes labor economists, labor lawyers, and other professionals with experience in labor affairs. They work in the three languages of North America (English, French and Spanish).

14. The U.S. NAO was established on January 1, 1994, and is located in the Department of Labor's Bureau of International Affairs in Washington, whereas the Mexican NAO is located in Mexico City and the Canada NAO is located in Quebec.

to enhance mutually beneficial understanding of the laws and institutions governing labor in each Party's territory; pursue cooperative labor related activities on the basis of mutual benefit; promote compliance with, and effective enforcement by each Party of, its labor law; and, foster transparency in the administration of labor law."

The purpose is not to create supranational labor standards, or even to pursue a certain kind of harmonization of national legislation; on the contrary, it is to obtain an effective enforcement of each country's domestic existing labor law. Indeed, this choice was made during the NAALC negotiation because the principal problem with the Mexican labor legislation was obviously its enforcement and not its level of protection. As a matter of fact, Article 123 of the Mexican Constitution constitutes a real charter of labor rights.[15] It gives workers the right to organize labor unions, to bargain, and the right to strike. It also creates certain minimum labor standards,[16] protects women and children workers, and establishes minimum health and safety standards. Clinton's solution was to obtain better enforcement by Mexican authorities of laws already on the books on worker standards and this can explain why no supplemental labor rights are provided at the NAFTA level. Consequently, each party has the right to establish its own domestic labor standards,[17] even to reduce the level of protection,[18] and national sovereignty prevails.

1. Scope of Application

In accordance with its domestic laws, each party is committed to promote the eleven following labor principles mentioned and defined in the Annex:

1. the freedom of association;
2. the right to bargain collectively;
3. the right to strike;
4. prohibition of forced labor;
5. restrictions on labor by children and young people;

15. *See* DAN LA BOTZ, MASK OF DEMOCRACY: LABOR SUPPRESSION IN MEXICO TODAY 43 (1992).

16. Some of the minimum labor standards are minimum wage, overtime pay, and the eight-hour day.

17. NAALC Art. 2.

18. *See*, on the possibility of reducing the core of protected labor rights, the analysis of Pierre Verge, *Les Dilemmes de l'ANACT: Ambiguité ou Complémentarité?*, 2 REL. INDUS. 230 (1999).

6. minimum labor standards (wage, 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 or illnesses; and,
11. protection of migrant workers.

This scope of application seems rather broad, but will be reduced as far as the dispute resolution is concerned.

2. States Obligations[19]

Each party is obliged to ensure that its labor laws and regulations provide for high level standards, and to continue to strive to improve those standards. It has to promote compliance with and effectively enforce its labor law through appropriate government action. Then, each country must ensure that persons with a legally recognized interest have appropriate access to administrative or judicial tribunals for enforcement of its labor law and that proceedings for this enforcement are fair, equitable, and transparent. Finally, each party is obliged to ensure that its labor laws, regulations, procedures, and administrative rulings of general application are promptly published or made available to the public, and to promote public awareness of its labor law.

3. Dispute Resolution

NAO are responsible for receiving and investigating public communications or complaints related to labor law issues in the territorial domain of another party.[20] Under the procedural guidelines of the U.S. NAO, any individual, legal representative, corporation, non-governmental organization, or labor organization may file a submission to request review of labor law matters arising in the territory of another party.[21] In practice, the U.S. NAO Secretary will initiate a review where the complaint relates to labor law matters in another party's territory and a review would further the objectives of the Agreement. If the complaint complies with these requirements, the NAO will examine whether the labor law matter subject in the

19. NAALC, pt. 2, Arts. 2-7.
20. NAALC, Art. 16(3).
21. *See Revised Notice of Establishing of the U.S. NAO and Procedural Guidelines*, 59 FED. REG. 67, 16660 (1994).

complaint is inconsistent with the party's obligations; whether the labor law matter at issue demonstrates a pattern of non-enforcement of labor law by another party; whether there has been harm to the plaintiff; whether appropriate relief has been sought in the domestic courts of the party complained against; or, whether the labor law matters pending at hand are pending before an international body.[22] Then, a public report will be published and the Secretary can request consultations with another NAO in relation to the other party's labor laws or regulations and their enforcement. In such consultations, the requested NAO shall promptly provide such publicly available information,[23] and may assist the consulting NAO to better understand and respond to the issues raised. If the matter is not resolved, another stage may be raised: the ministerial consultations.[24]

A last stage of dispute resolution is provided if ministerial consultations are insufficient to resolve a matter. Any consulting party can request the establishment of an Evaluation Committee of Experts (ECE), which is entitled to analyze patterns of practice by each party in the enforcement of its domestic labor law, under a certain number of restrictions. First, the area of the labor law issues must concern occupational health and safety, child labor, or minimum wage technical labor standards. Then, the alleged pattern of failure by the party complained against to effectively enforce must be both trade related and covered by mutually recognized labor laws. The ECE will present to the Council of Ministers its final report and if consulting parties fail to resolve the matter within 60 days, the Council may request, by a two-third vote, to convene an arbitral panel.[25] At the end, after several steps of reports, requests, recommendations, and action plans, if the party complained against fails to implement any action plan or fails to pay any monetary enforcement assessment,[26] the dispute resolution provides a suspension of NAFTA benefits based on the amount of the assessment.[27]

22. *Id.* at 16661-62, §§F & G.

23. Art. 21. This information can include: descriptions of its laws, regulations, procedure and practices; proposed changes to such procedures, practices and policies; clarifications; and, explanations related to such matters . . . .

24. Art. 22.

25. For more details on the composition of this panel and on the whole arbitration procedure, *see* Arts. 27-41.

26. Monetary enforcement assessment can be as much as the sum of $20 million (U.S.), *see* L.A. GLICK, UNDERSTANDING THE NORTH AMERICAN FREE TRADE AGREEMENT, LEGAL AND BUSINESS CONSEQUENCES OF NAFTA 125 (1994).

27. Art. 41.

To summarize the different levels of treatment under the NAALC,[28] four stages can be reached according to three groups of labor principles. Firstly, for the eleven principles, the NAO review and consultation process contemplates the filing of complaints, public hearings, and a written report that may request ministerial consultations. Secondly, ministerial consultations can be recommended by NAO or labor ministers of any NAALC partner. These levels of treatment cover the eleven labor principles. Thirdly, the establishment of an Evaluation Committee of Experts may be initiated following the ministerial consultation to analyze the effectiveness of enforcement of technical labor standards as defined by NAALC's Principles 4 to 11. Fourthly, in case of an alleged persistent of failure to enforce occupational safety and health, child labor or minimum wages technical labor standards (Principles 5, 6, and 9), the last level is the dispute resolution by an arbitral panel, which may develop an "action plan" for effective enforcement of national labor law. Failure to implement this plan may result in fines or trade sanctions.

The dispute of resolution procedures established by the NAALC has been described as "bureaucratic," "byzantine," "cumbersome, protracted and vague," and this "complicated, multi-tiered dispute resolution structure will hamper timely settlements. Such administrative delay may deter potential complainants from seeking redress through formal Commission proceedings even when a Party's behaviour raises legitimate questions about its compliance with the NAALC."[29] Yet, a further assessment of the NAALC's first results can be drawn after seven years of implementation.

III. EIGHT YEARS AFTER: WHAT ABOUT THE NAALC'S IIMPLEMENTATION?

To better understand what has been done within the NAALC and to get an objective view on these first years of implementation, great attention has to be paid on public complaints submitted to NAO. After details on each of these cases, the general question of the NAALC's efficiency will have to be asked. Finally, in order to have a large sight on labor rights protection at the North American level, it would be interesting to consider other legal tools to provide workers' rights multinational protection.

28. See the Annex.

29. *See* M. McGuiness, *The Protection of Labor Rights in North America: A Commentary on the NAALC*, 130 STAN. J. INT'L L. 587 (1994).

A. NAO's Public Submissions

Since the NAALC's entry into force in January 1994, a total of 23 submissions have been filed. Fifteen submissions have been filed with the U.S. NAO, of which thirteen involved allegations against Mexico and two against Canada. Five were filed with the Mexican NAO and involved allegations against the United States. Three submissions have been filed in Canada; one raising allegations against Mexico and two raising allegations against the United States.[30]

Three kinds of submissions were filed. The first submissions concerned individual cases, particular disputes in labor laws (mainly relative to collective rights), then some more general submissions were filed involving lack of enforcement of one or more particular rights.[31] And finally, another kind of broad cases due to lack of effective enforcement—mainly of technical labor standards[32]—is to be developed by labor experts, labor associations, or unions[33] in order to test the validity of the dispute resolution process by trying to reach the next stage of evaluation by committee of experts and the final suspension of NAFTA benefits. There is also a new tendency towards an increased use of "simultaneous complaint" with two or three NAO on the same topic.

Concerning the rights involved, twelve of the fifteen submissions filed with the U.S. NAO involved issues of freedom of association. One submission (9802) concerned the illegal use of child labor and another case (9701) raised issues of pregnancy-based gender discrimination. One submission (9901) concerned minimum employment standards. Four cases (9702, 9703, 9901 and 2000-01) also raised issues of safety and health. With the Mexican NAO, some files also involved workers' compensation and migrant workers protection. For the moment, no submission has been filed concerning right to strike (even if this right is very close to freedom of association frequently involved), prohibition of forced labor, and equal pay.

30. *See*, for more details on these submissions, the bibliography and public communication available on the website of the NAALC Organization, *at* http://www.naalc.org or http://labour-travail.hrdc.gc.ca/doc/ialc-cidt/fra/f/submiss-f.html, for the French version.

31. *See, e.g.*, *Gender Discrimination in the Maquiladoras*, U.S. NAO 9701, or application of labor standards on protection of migrant workers, minimum employment standards, safety and health, employment discrimination, and compensation in case of injuries and illnesses in the State of Washington; Mex. NAO No. 9802.

32. Examples of technical labor standards are child labor protection, safety and health, and minimum employment standards.

33. There are no "standing" requirements for filing NAALC claims, so that trade unions, human rights organizations, and student groups, community coalitions, or even private individuals with no other "interest" than a general concern for workers' rights can raise complaints.

Of the submissions filed thus far with the U.S. NAO, three (940004, 9602, and 9803) were withdrawn by the submitters before hearings were held or the review process completed. Hearings were held on eight (940001, 940002, 940003, 9601, 9701, 9702, 9703, and 9901). Five of the United States submissions (940003, 9601, 9701, 9702, and 9703) have gone to ministerial level consultations. The U.S. NAO declined to accept submissions 9801, 9802, and 9804 for review.

Mexican NAO submissions 9501, 9801, 9802, and 9803 resulted in ministerial consultations. One Mexican NAO submission is under review. Canadian NAO submission CAN 98-1 resulted in a request for ministerial consultations. Canada declined to accept submission CAN 98-2 in April 1999, and CAN 99-1 for review in June 1999. What kind of conclusion can be deducted from these first reviews by the various national administrative offices concerning their effects in national legal orders as far as labor law is concerned?

B. Is This "Cross-Border Monitoring" Sufficient to Protect Effective Labor Rights?

It can appear arduous to have a valid idea on the sufficiency or the efficiency of the system of labor cooperation set up by the Labor Accord; nonetheless, some impacts in the field of domestic labor legislation or jurisdiction took place in the last few years.

1. Some Positive, Albeit Indirect, Results

Even though some critics have applied epithets such as "weak," "toothless," "worthless," and "a farce" to the NAALC,[34] criticism and pessimism should be counterbalanced with the analysis of the agreement implementation. Of course, comparing this monitoring with the effective enforcement of European binding instruments, such as "Directives," which under the jurisdiction of the European Court of Justice harmonize some broad fields of national labor laws, would lead to a severe judgment against the NAFTA Labor Side Agreement. Yet, in practice, unexpected positive signs have indirectly followed even the weakest level of treatment provided under the NAALC: NAO review and Ministerial Consultations.[35] This was

34. *See* Lance Compa, *Another Look at the NAFTA Labor Accord*, Remarks made at the Conference Workshop on "Labor Law in the Era of Free Trade," San Francisco, California (May 16, 1996).

35. For a complete overview of some possible national consequences of the NAALC implementation, *see* R.J. Adams, *Using the NAALC to Achieve Industrial Relations Reform*, 7 CAN. L.& EMP. L.J. 31 (1999).

certainly due, as far as political consequences are concerned, to a sort of moral pressure put on governments by public debate and public hearings, and their supposed effects on public opinion.

a. Parallel Effects on the U.S. Territory

After the first submission filed against the United States with the Mexican NAO involving the effects on a sudden closing of a Sprint Corporation facility in San Francisco on union rights (submission 9501), an American labor tribunal has to review the case of the dismissed workers. In December 1996, the U.S. National Labor Relations Board (NLRB)[36] ruled that the plant closing was motivated by anti-union animus and ordered the employer to rehire affected workers into openings in other divisions of the company and to provide back pay for lost wages. Of course, the NLRB decided the case strictly in terms of established U.S. labor law without any reference to the NAALC. Moreover, on November 25, 1997, the United States Court of Appeals overturned this decision. The Court ruled that the claim that the facility was closed because of union organizing activities was not substantiated and that the decision was justified by legitimate financial reasons. The NAO has only been able to recommend ministerial consultations; its report of review addressed the broad issue of anti-union plant closings, not the specific case. And when the United States Court overruled the NLRB, this was only on the basis of U.S. law and precedent. That is why the national effects are made to be autonomous.

Another more comprehensive link between public submissions and U.S. authority's decisions can be found with the new Memorandum of Understanding issued between the United States Immigration and Naturalization Service (INS) and the Department of Labor (DOL). This was due to Canadian NAO submission 98-01 and Mexican NAO submission 98-04, both filed by the Yale Law School Workers' Rights Project on the same allegation: The United States was said to fail to enforce its existing minimum wage and overtime protections in workplaces employing foreign nationals and then to discriminate migrant workers. A new Memorandum of Understanding was issued on November 25, 1998.

36. LCF, Inc., d/b/a La Conexion Familiar and Sprint Corporation and Communications Workers of America, District Nine and Local 9410, AFL-CIO, Case 20-CA-2603, 322 NLRB No. 137 (Dec. 27, 1996).

b. Indirect Consequences in Mexico

As far as Mexico is concerned, given that this country has been the most often involved in public submissions, NAO reviews and ministerial consultations were followed by two initiatives that might impact Mexican labor law and industrial relations, and by two decisions of the Mexican Supreme Court on the same issues as those raised in the first NAO submissions.[37]

First, in 1995, the principal opposition party in Mexico[38] submitted for consideration a comprehensive bill proposing to reform the Federal Labor Law of Mexico.[39] Briefly, this bill proposed to transfer jurisdiction over the federal and state Conciliation and Arbitration Boards (CABs), which register unions from the federal and state executive branches to the respective judicial branches. Then, the removal of discretionary authority would have facilitated the registration of more than one union by each workplace and end the current practice of appointed tripartite labor, management, and government representatives to these tribunals. It was this practice that resulted in the allegations in submissions before the NAO of inherent bias and lack of impartiality in the decisions and composition of the CABs. This reform would have addressed many of the concerns raised by the U.S. NAO in its Report of Review of Submission No. 940003. However, after its proposal by the Mexican opposition, the bill was referred to the appropriate Senate committee where no further action has been taken.

Second, the government of Mexico promoted tripartite negotiations during 1996 that resulted in the signing of a document entitled Principles of the New Labor Law Culture (*Principios de la Nueva Cultura Laboral*) on August 13, by representatives of major labor and business organizations. These principles do not have legal effects, but are rather statement of objectives. The document addresses two legal issues of the Submission No. 940003: union democracy and union registration, including the lack of impartiality in the decisions of Mexican labor tribunals.[40] Further, the government is

37. These outcomes have been brought to light in U.S NAO Follow-up Report on Submission No. 940003, U.S. Department of Labor (Dec. 4, 1996).

38. National Action Party (NAP).

39. Senate of the Republic, National Action Party Parliamentary Group, Initiative to Reform the Federal Labor Law, Art. 235-296, at 106 (1995).

40. Under these principles, unions pledge to conduct their business in accordance with the law, to observe the principle of freedom of association, and to conduct their elections in a climate of harmony, respect, and democracy (Principles 8.5-8.6).

called to strengthen the system of labor tribunals by assigning career judges as opposed to members of the executive branch.

Third, a policy document entitled "Program for Employment, Training, and Defence of Workers' Rights, 1995-2000," was issued as part of the National Development Plan of the Mexican Executive Branch. In this document, it is acknowledged that Mexico's labor tribunals' application and interpretation of Mexico's labor law has been inconsistent. Therefore, several means to address these problems are proposed[41] and, for the most part, were included in the Principles of the New Labor Law Culture.

Then, on May 21, 1996, the Supreme Court of Mexico, in two unanimous decisions, found provisions of two states' statutes that prohibited employees from forming more than one union per workplace to be unconstitutional, according to Article 123 of the Constitution of Mexico and its implementation by the Federal Labor Law.[42] Of course, the immediate effect of these decisions is only on those individuals or institutions that were parties to the appeal, but they are significant because they signal a departure from a restriction to the right to organize that has existed in the government of Mexico since the sixties.[43] Yet, who can determine the exact influence of the North American cooperation on labor in these changes?

A last positive example of indirect consequence in Mexico is illustrated by the TAESA case,[44] raising issues about freedom of association, minimum employment standards, and occupational safety and health at the Mexican airline company, Executive Air Transport, Inc., TAESA. The submitters alleged that the union election process inhibited flight attendants' rights to organize and bargain collectively and led to the dismissal of the workers who voted. After the public hearing in the case, the Mexican authorities allowed flight attendants in another airline to seek a craft union, something that had been denied to the TAESA flight attendants.[45] As a matter of fact, employers as well seem to be concerned by the impact of some public

41. U.S. Department of Labor, *Study on the Effects of the NAFTA; Chapter 3: Worker's Rights: Cooperation and Labor Law Enforcement*, 108 (July 1997).

42. *Union of Academic Personnel of the University of Guadelajara*, Amparo Decision 337/94; *Solidarity Union of Employees of the State of Oaxaca and Decentralised Agencies*, Amparo Decision 338/95.

43. For a more detailed study on these decisions, *see* Anna Toriente, *Study of Mexican Supreme Court Decisions Concerning the Rights of State Employees to Organise in the States of Jalisco and Oaxaca*, U.S. Department of Labor, U.S. NAO, NAALC (Nov. 1996).

44. U.S. NAO Submission No. 9901 (TAESA), filed November 1999, by the Association of Flight Attendants (AFA) and the Association of Flight Attendants of Mexico (ASSA).

45. Public Report of Review of NAO Submission No. 9901, U.S. DOL, U.S. NAO, at 32 (July 7, 2000).

debates on the image of their company; therefore, some companies in the *Maquiladora* region have become more cautious in their practices with pregnancy of female employees.[46]

c. Influence of the NAALC on Canada

Even though the exact link between this event and the NAALC is again still hard to define, we can report that in 1996, when the conservative provincial government in Alberta announced plans to privatize health and safety standards enforcement, public employee unions and their allies responded with a promise to file a submission under the NAALC. This threat was strong enough to force the government to drop its proposal.[47]

2. The So-Called "Weakness" of the NAALC's Framework Remains

After this analysis on its primary implementation, many critics on the inadequacy of the NAALC remain justified. First of all, the scope of labor principles that can lead to the last degree of dispute resolution, that is to say to the establishment of an arbitral panel and to fines or trade sanctions, is certainly unsuitable for giving a good remedy against labor rights violations. Only three of the eleven principles—those on child labor, occupational health and safety concerns, and minimum wage—can move forward the strictest sanctions, whereas the most common issues involved in public submissions before NAO are the right to organize and freedom of association, which get the lowest level of treatment—the review and consultations process. According to certain authors, there are in fact no remedies offered for infringement against workers' rights to free association, to collective bargaining, or to withhold labor strikes and "the consultation and dispute resolution process are protracted and tortuous as to make the timely resolution of disputes almost inconceivable. For covered practices, it appears that the enforcement process would take more than 1,210 days."[48] In 1998, some labor lawyers from the three NAFTA countries claimed for eliminating the

46. For more details, *see* L.J. Bremer, *Pregnancy Discrimination in Mexico's Maquiladora System: Mexico's Violation of its Obligations Under NAFTA and the NAALC*, *in* NAFTA, L. & BUS. REV. OF THE AMERICAS 574 (Autumn 1999).

47. Lance Compa, *NAFTA's Labour Side Agreement: Five Years On Progress and Prospects for the NAALC*, 7 CAN. L. & EMP. L.J. 25 (1999).

48. Thomas R. Donahue, Secretary-Treasurer of the AFL-CIO, *Understanding the NAFTA* 129 (1994).

three-tier division of the 11 principles for purposes of ECE and arbitral panel treatment.[49]

Next, the main mean to resolve labor law violations totally depends on the willingness of national governments; all the system relies on is the political goodwill of national executives so that political changes in Mexico and in the United States with conservative executives could make this kind of cooperation turn out to be a real dead end.[50] There is no judicial jurisdiction at the NAALC's level empowered to force national authorities or employers to comply with labor rights provisions. The absence of a supranational court dealing with labor concerns in NAFTA fits with the global approach chosen by the three parties reproducing the shape of the World Trade Organization and its kind of "social clause," reduced to the good functioning of a free-trade zone in which labor rights violations are just considered potential distortion in competition and trade conditions. Indeed, in many aspects, the NAALC could be assimilated to a "social clause," as the public communications or ministerial consultations stage, labor, and international trade are equally protected. Then, at subsequent stages, that is, the appointment of an ECE and the arbitration stage, including the sanctions imposed by arbitral decisions, a number of NAALC's specific provisions demonstrate that it is concerned with just some of the "labor principles" and then only to the extent that they relate to international trade. And this aspect leads to the conclusion that "this position lags behind the development of the international defence of human social rights."[51]

Finally, the main problem comes from the examination by NAO of public communications: U.S. NAO and its procedural guidelines, including public hearings, lead to a quasi-judicial process, but the process has no sanctions; toothless remedies are insufficient. Even if the new rules have had some effects, often in national policymaking, they are not due to specific charges. In the long run, this may provoke disenchantment on the part of plaintiffs who submit public communications to seek immediate redress for concerned workers. Some experts support the creation of a code of conduct that would

49. A website on these lawyers' meetings and their continuing work has been established and is *available at* http://www.unam.mx/iie/cambios.html.

50. The NAFTA itself fails to provide direct access to private entities and Chapter 20 disputes of the general agreement. The parties have created a bastardized version of power diplomacy disguised as rule-based diplomacy, instead of adopting a true rule-based diplomacy. *See* J. Byrne, *NAFTA Dispute Resolution: Implementing True Rule-Based Diplomacy Through Direct Access*, 35 TEX. INT'L L.J. 415 (2000).

51. *See* Verge, *supra* note 18, at 243.

obligate corporations, not just governments, under NAALC discipline and with NAALC sanctions.[52]

IV. CONCLUSION

Even if this paper is entitled "labor regulation in the NAFTA," many issues analyzed indicate that NAFTA, which imposes no substantive cross-border regulations, comes close to a "no-regulation" regime and solves none of the problems posed by globalization for labor. Contrary to many multilateral trade arrangements with a permanent adjudicative body, such as the European Economic Community or the Andean Pact, the Labor Side Accord of NAFTA takes the less judicial direction of an ad hoc dispute resolution. The whole framework of NAFTA makes economic realities, political power, and national sovereignties prevail. The proposal for the creation of a permanent trilateral tribunal under NAFTA for the resolution of disputes between the parties was rejected.[53] Consultation, mediation, and arbitration remain the keywords of a dispute resolution based on political goodwill under the NAALC. This Accord cannot serve as a vehicle to improve the enforcement of labor laws because it was not intended to serve this function. Yet, "subsequent experience under NAFTA demonstrates that, without serious mechanisms to improve domestic enforcement of labor laws and some process for maintaining reasonable minimum standards to resist deregulation, worker rights will remain abandoned by NAFTA."[54] Indeed, the question of a reform of NAFTA could lead to some developments addressing these concerns. Although the time seemed right for such reform with the pending Chilean negotiations and the expansion of NAFTA from a trilateral to a multilateral trade body mandates such an approach,[55] the NAALC scheme was exactly reproduced for the Chilean and Canadian Agreement on Labor Cooperation in 1999.[56]

This lack of effective enforcement of labor laws provided by the NAALC obliges the commentators to search for other forms of labor

52. *See* Compa, *supra* note 47, at 29.

53. Jack I. Garvey, *Trade Law and Quality of Life—Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment*, 89 AM. J. INT'L L. 447 (1995).

54. International Labor Rights Fund, *NAFTA and Labor Rights*, *in* THE FAILED EXPERIMENT: NAFTA AT THREE YEARS, Study submitted to the U.S. Congress by the President, at 17 (June 26, 1997).

55. Craig L. Jackson, *Social Policy Harmonisation and Worker Rights Protection in the European Union: A Model for North America?*, 21 N.C. J. INT'L L. 8 (Fall 1995).

56. This agreement is *available at* http://lanour.hrdc-drhc.gc.ca.

regulation on the North American continent beside the NAFTA. In practice, a certain kind of worker rights' protection could be found either in some unilateral U.S. actions or through the development of transnational trade unions' cooperation and multinational collective bargaining.

The United States has taken several unilateral measures to promote labor rights in international trade in the past decade: It has enacted a kind of "social clause" in status providing preferential trade status with exporting countries under which they must respect internationally recognized worker rights as a condition of beneficial status in trade programs.[57] Additionally, another form of transnational labor regulation is the application of domestic labor regulation extraterritorially. Extraterritorial jurisdiction is becoming an important feature of American labor law and U.S. courts are beginning to interpret some of the labor relations statutes in ways that give them extraterritorial reach.[58] Furthermore, the United States Congress amended two major labor law statutes—the Age Discrimination in Employment Act in 1984, and the Civil Rights Act in 1991—so as make them expressly extraterritorial. This can promote regulatory uniformity and requires only unilateral action, making it easy to implement. Nevertheless, there is no systematic application of an entire regulatory regime and, mostly, this approach can create diplomatic tensions and destabilize international relations because applying one country's domestic laws on foreign territories can be seen as an aggressive mark of sovereignty.

Another means to protect some labor rights abroad can be pursued through private codes of conduct, a new kind of "social label," such as the *Maquiladora* code, the "Levi Strauss & Co. Terms of Engagement and Guidelines," the "Reebok's Human Rights Initiatives and Production Standards," and the "Starbucks Coffee and Guatemalan Farmworkers Agreement,"[59] even though it still relies on

57. Lance Compa, *Labor Rights and Labor Standards in International Trade*, 25 LAW & POL'Y INT'L BUS. 181 (1993); Barenberg, *supra* note 5, at 451.

58. For more details, *see* Katherine Van Wezel Stone, *Labor and the Global Economy*, 16 MICH. J. INT'L L. 1011 (1995). For a detailed presentation of the judicial treatment of the extraterritorial scope of domestic labor laws, *see* R. Taly Epstein, *Should the Fair Labor Standards Act Enjoy Extraterritorial Application? A Look at the Unique Case of Flags of Convenience*, 12 U. PA. J. INT'L BUS. L. 657 (1993).

59. For a detailed presentation of these initiatives, among others, *see* L. Compa & T. Hinchliffe-Darricarrère, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663 (1995). *See also* J. Diller, *A Social Conscience in the Global Marketplace? Labour Dimensions of Codes of Conduct, Social Labeling and Investor Initiatives*, 138 ILR 99 (1999).

private enforcement, public opinion's awareness, and willingness of multinationals.

A form of labor regulation at the level of the North American area would also be transnational cooperation between trade unions. Earlier experience of such cooperation took place during the sixties between U.S. and Canadian trade unions affiliated to a common international structure. Actually, in the automobile sector, the creation of works councils led to the several collective agreements, dealing with wages concerns that permitted an equalization of pay levels for Canadian and U.S. subsidiaries of Ford, General Motors, and Chrysler.[60] Nowadays, U.S. trade unions try to promote certain assistance towards their Mexican partners, even if this cooperation remains informal.[61] The weakness of U.S. trade unions themselves and the low level of unionized workers worsen this insufficiency. Nevertheless, the NAALC can have a positive influence on some unions' coalitions and new cross-border labor solidarity can appear. This is maybe a good way to make the NAALC become more effective because it would be nothing without positive actions coming from unions.

We can note another effect of the NAALC. Even if no attempt to positively harmonize national legislation is pursued, there seems to be a moral pressure to basically comply with the NAALC principles lying on countries applying to join NAFTA. As a matter of fact, large reforms of Chilean labor law are on their way since 1994. Chile, candidate to accede to NAFTA, is making an effort to bring Chilean labor standards into full compliance with the NAALC. For North American commentators, it is imperative that "the deficiencies in enforcement mechanisms are addressed before Chile accedes to the NAFTA . . . the NAALC cannot credibly function as a tool to address violations of its basic principles as they arise within a signatory country if the basal state of a Party's law and practice violates those principles."[62] And this obligation looks really closed to a kind of "pre-

60. This was during the Canada-U.S. "Pact of Automobile" area: 1965-1980.

61. It mainly consists in some meetings and exchange of information, but it seems insufficient to effectively lead to concrete results. For instance, Mexican unionists who filed the Washington State apple workers' complaint in Mexico, came to Washington in 1998 to help the Teamsters' union in NLRB election campaigns and the Mexican supporters hosted a delegation of Washington state apple workers who presented their case in an "informative session" held by the Mexican NAO. This attitude required a close cooperation between national unions and now they are trading bargaining information, translating papers, and studies on the social effects of economic integration in the continent as they try to find new ways to link their movement.

62. Carol Pier, *Labor Rights in Chile and NAFTA Labor Standards: Questions of Compatibility on the Eve of Free Trade*, 19 COMP. LAB. L. & POL'Y J. 277 (1998).

harmonisation" or to the European *acquis*[63] that each applying country has to respect before joining the European Community. Could there be in the NAALC primary obligatory informal common set of rules?

ANNEX: LABOR PRINCIPLES AND LEVELS OF TREATMENT UNDER NAALC

Levels of Treatment & Labor Principles	NAO Review & Report	Optional Ministerial Consultations	Evaluation Committee of Experts (ECE)	Council Review of ECE Report	Post-ECE Ministerial Consultations	Arbitral Panel	Fines or Suspension of NAFTA Benefits
1. Freedom of association/ Right to organize							
2. Right to bargain collectively							
3. Right to strike							
4. Prohibition of forced labor							
5. Child labor protection							
6. Minimum employment standards							
7. Non-discrimination							
8. Equal pay							
9. Safety & health							
10.Workers' compensation							
11.Migrant worker protection							

63. Implying compliance with all European primary and secondary law, including European Court of Justice cases.