

PUBLIC REPORT OF REVIEW OF NAO SUBMISSION NO. 9702

U.S. National Administrative Office
Bureau of International Labor Affairs
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I. INTRODUCTION

The U.S. National Administrative Office (NAO) was established pursuant to the North American Agreement on Labor Cooperation (NAALC). The NAALC, the labor supplemental agreement to the North American Free Trade Agreement (NAFTA), provides for the review of submissions concerning labor law matters arising in Canada or Mexico by the U.S. NAO. Article 16 (3) of the NAALC states:

[e]ach 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 its domestic procedures.

"Labor law" is defined in Article 49 of the NAALC, as follows:

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.

Procedural guidelines governing the receipt, acceptance for review, and conduct of review of submissions filed with the U.S. NAO were issued pursuant to Article 16 (3) of the NAALC. The U.S. NAO's procedural guidelines were published and became effective on April 7, 1994, in a Revised Notice of Establishment of the U.S. National Administrative Office and Procedural Guidelines.⁽¹⁾ Pursuant to these guidelines, once a determination is made to accept a submission for review, the NAO shall conduct such further examination of the submission as may be appropriate to assist the NAO to better understand and publicly report on the issues raised therein. The Secretary of the NAO shall issue a public report that includes a summary of the review proceedings and findings and recommendations. The review must be completed and the public report issued within 120 days of acceptance of a submission for review, unless circumstances require an extension of time of up to 60 additional days.

Submission No. 9702 was filed on October 30, 1997, by the Support Committee for Maquiladora Workers (SCM), the International Labor Rights Fund (ILRF), the National Association of Democratic Lawyers (*Asociación Nacional de Abogados Democráticos, hereinafter ANAD*) of Mexico, and the Union of Metal, Steel, Iron, and Allied Workers (*Sindicato de Trabajadores de la Industria Metálica, Acero, Hierro, Conexos y Similares, hereinafter STIMAHCS*) of Mexico. It was accepted for review by the NAO on November 17, 1997. On December 26, 1997, the Maquiladora Health and Safety Support Network (MHSSN) requested to be included as a co-submitter. This request was granted. On February 9, 1998, MHSSN, together with Worksafe! Southern California (WSC), the United Steelworkers of America (USWA), the United Auto Workers (UAW), and the Canadian Auto Workers (CAW) filed an addendum to the submission which provided additional information on the health and safety issues raised in the original submission. This addendum was accepted and incorporated into the NAO review, and WSC, the USWA, the UAW, and the CAW were included as co-submitters.

Due to the complexity of the health and safety issues, which are being raised under the NAALC for the first time, combined with the relatively late filing of the health and safety addendum, two reports will be issued on Submission No. 9702. The instant report will address the issues of freedom of association and the compliance by Mexico with its procedural obligations under the NAALC. The health and safety issues will be reviewed separately and a report will be issued at a later date in accordance with the NAO's procedural guidelines.

Submission No. 9702 raises issues of freedom of association and safety and health at a truck chassis welding/assembly facility in Tijuana, Baja California, Mexico, owned by Han Young de Mexico, S.A. de C.V. (hereinafter Han Young). Han Young assembles chassis for Hyundai Precision America, a subsidiary of Hyundai Corporation of Korea. The submitters argue that Mexico is in violation of NAALC Article 5(4) in failing to ensure that its labor tribunal proceedings are impartial and independent; Article 5(1) in failing to ensure that such proceedings are fair, equitable and transparent; Article 5(1)(d) in failing to ensure that such proceedings are not unnecessarily complicated and do not entail unwarranted delays; Article 5(2)(b) in failing to ensure that final decisions in labor proceedings are made available without undue delay; and Article 3(1)(g) in failing to enforce its labor laws protecting workers' rights and safety and health

through appropriate actions. The submitters assert that Mexico has failed to enforce its Federal Labor law which protects freedom of association as well as the safety and health of workers; the Mexican Constitution which protects freedom of association; and ILO Convention 87 on freedom of association, which Mexico has ratified, and ILO Convention 98 on the right to organize and bargain collectively, which, according to the submitters, is binding on Mexico as a member of the ILO.

The submitters also raised the issue of compliance by Mexico with its labor laws on wages, payment of wages, seniority, perjury,⁽²⁾ and profit sharing. However, the information provided by the submitters on these matters did not sufficiently establish that violations of Mexican law may have taken place and did not provide sufficient information to enable the NAO to adequately review these matters. Further, the submitters did not establish that

these issues may have involved the failure to enforce its laws on the part of the Government of Mexico. Therefore, these matters are not addressed in this report.

II. SUMMARY OF SUBMISSION 9702

A. Case Summary

According to the submitters, beginning in April 1997, workers at the Han Young maquiladora plant in Tijuana, Baja California, Mexico, began to organize an independent union. The submitters state that the workers wanted a union to address issues of safety and health, job classifications and wage scales, low wages, annual bonuses, profit sharing, lack of dining facilities, and the lack of a company doctor in the plant. Among the cited health and safety concerns of the workers was the frequent occurrence of injuries such as burns and broken bones. They also expressed concern about respiratory illnesses, hearing loss, and loss of vision. According to the submitters, the workers believed that these problems were caused by the lack of compliance with government regulations and failure to follow safety practices such as local exhaust ventilation, periodic hazard identification and control, exposure monitoring, medical surveillance, health and safety training and other hazard control measures. The submitters also asserted that the company failed to provide adequate personal protective equipment such as safety shoes, safety glasses, chemical-resistant gloves, respirators and face shields.

The workers elected a union executive committee on May 31, 1997, and presented a petition listing demands to the plant management. After the election of the executive committee, Han Young management arranged for the workers to meet with a representative of a union that was already present at the plant and had previously entered into a collective bargaining agreement with the company. This local union (*Union de Trabajadores de Oficios Varios "Jose, Maria Larroque"*) was affiliated with the Revolutionary Confederation of Workers and Peasants (*Confederacion Revolucionaria de Obreros y Campesinos - CROC*). The CROC is affiliated with the Labor Congress (*Congreso del Trabajo - CT*) which groups together union organizations aligned with Mexico's dominant political party, the Institutional Revolutionary Party (*Partido Revolucionario Institucional - PRI*).⁽³⁾ The submitters maintain that the union had never before

met with the workers at the plant and that workers had not seen a copy of the collective bargaining agreement, which had purportedly been signed between the company and the CROC union.

The workers struck for a day on June 2 and, following what appeared to be positive discussions with company management, returned to work the following day. On July 15, 1997, the workers temporarily suspended their efforts to organize an independent union and elected to affiliate with the already registered STIMAHCS. Though STIMAHCS already possessed registration, it had, at that time, no membership in the maquiladoras and is not affiliated to the CT. The submitters indicated that STIMAHCS is considered to be more responsive to the interest of workers, compared to the unions affiliated to the major confederations. ⁽⁴⁾

On June 16, in response to a request from the workers, a health and safety inspection of the factory was conducted by the Inspectorate of Labor, in which forty-one health and safety violations were cited. Specific corrective action was ordered for twenty-three of these violations. The company was given from fifteen to twenty-five work days, depending on the violation, to remedy these deficiencies.

In mid-July the company hired a new director of human resources and began, according to the submitters, a campaign of harassment, intimidation and reprisals against the supporters of STIMAHCS. Allegedly, several union supporters were fired and one was physically attacked by the plant manager. The dismissed workers filed petitions for reinstatement with the local Conciliation and Arbitration Board (CAB). The submitters maintain that the company attempted to persuade the fired workers to drop their petitions for reinstatement in return for severance payments, which they refused to do. They also maintain that the company attempted to persuade the workers to remain affiliated to the CROC.

On August 6, 1997, STIMAHCS filed for collective bargaining representation (*titularidad*)⁽⁵⁾ with the local CAB, in effect, challenging the CROC union for exclusive bargaining rights at the plant. During the first week of September, according to the submitters, twenty new workers were brought in by the company, allegedly to dilute support for STIMAHCS, and representatives from the Confederation of Mexican Workers (*Confederacion de Trabajadores Mexicanos - CTM*), which is also affiliated to the CT, arrived at the plant to meet with the workers.

On September 5, 1997, the Inspectorate of Labor conducted a follow-up safety and health inspection to verify compliance with the corrective measures mandated in the June 16 inspection. The inspector found that Han Young had corrected eighteen of the twenty-three violations for which corrective action had been ordered. No fines or other sanctions were levied at that time.

A hearing to verify the credentials of the contending parties, hear challenges, and set a date for a representation election, was scheduled to be held on September 3, 1997, by the CAB. According to the CAB, this hearing was postponed to September 25 because of a clerical error. The submitters assert the actual reason was to allow the company more time to campaign against the union. At the September 25 meeting, the CAB heard arguments, reviewed the credentials of the parties, and set the representation election date for October 6, 1997, despite efforts by the CROC union to further postpone the proceedings. At this hearing, the CAB overruled objections by the

CROC union that STIMAHCS lacked the appropriate certification to represent the Han Young workers in Baja California.

As the date of the election approached, the submitters claim that management continued its campaign of intimidation against STIMAHCS supporters and threatened workers with the loss of their jobs if that union won the election. Shortly prior to the election, the president of the local CAB, who had agreed to conduct the election, submitted his resignation. The submitters maintain, but do not substantiate, that this occurred at the instigation of the CROC and was intended to ensure an election outcome favorable to that organization.

On October 6, 1997, the representation election took place as scheduled at the offices of the CAB. According to the submitters, fourteen international observers, including representatives from U.S. unions and non-governmental organizations (NGOs) were present. The submitters allege that the company transported a group of thirty-five workers, including supervisory personnel and new hires, to the voting site, where they were allowed to cast their ballots. According to the submitters, none of these people were eligible to vote but STIMAHCS representatives and supporters were prevented from checking the credentials of voters, whereas the credentials of STIMAHCS supporters were carefully scrutinized. Following the balloting, it was announced that STIMAHCS had won the election by a vote of 54-34 over the CROC. (The CTM had withdrawn from the contest on the day of the vote.)

According to the submitters, in the days following the vote, the company dismissed another four workers who were supporters of STIMAHCS and the general manager announced that the company intended to bring in fifty replacement workers from Veracruz and fire all of the union supporters.⁽⁶⁾ The submitters maintain that a total of twelve workers were fired by the company for their support of STIMAHCS.

At a CAB hearing on October 16, both STIMAHCS and the CROC challenged a number of the ballots cast at the representation election. The CAB then announced that it had concluded its proceedings in this case and would certify the result of the election after reviewing the evidence. However, on November 10, the CAB issued a ruling that nullified the election results on the grounds that STIMAHCS had failed to adequately substantiate that it had the support of the majority of the workers at the plant and that it lacked the proper registration to represent the workers at Han Young. Union representation remained with the CROC union. STIMAHCS filed an appeal against this decision with a Federal Appeals Court. Additionally, four workers went on a hunger strike in protest.

Following considerable publicity on the case, the Mexican Federal Government intervened and mediated an agreement among the parties. The agreement called for a new representation election, to be conducted under the supervision of state and Federal authorities. The parties agreed to abide by the outcome of this election, suspend all legal action they had undertaken, and desist from further conflict within Han Young. Pursuant to the agreement, registration would be granted to an independent union named the Union of Industrial and Commercial Workers "October 6" (*Sindicato de Trabajadores de la Industria y del Comercio "6 de Octubre"*). The workers intended for this independent union to eventually supplant STIMAHCS as their collective bargaining representative. Additionally, all of the workers who were dismissed were to

be offered reinstatement to their jobs.

The second representation election at Han Young took place on December 16, 1997. An affiliate of the CTM took part in this three-way election.⁽⁷⁾ The election was won again by STIMAHCS, by a vote of 30 for STIMAHCS, 26 for the CTM affiliate, and two for the CROC union. The hunger strikers ended their fast. On January 12, 1998, STIMAHCS was recognized by the CAB as the collective bargaining representative at the plant and "October 6 " was granted registration. All but one of the workers accepted reinstatement to their jobs.

The submitters reported that, while these events were underway, a number of workers narrowly averted serious injury when a hoist dropped a chassis and another hoist swung out of control. On January 23, a delegation of forty-five workers went to the local office of the Secretariat of Labor and Social Welfare and demanded a repeat safety inspection of the plant. This inspection was conducted on January 27 and it was reported that, later in February, a fine of approximately \$9,000 was assessed against Han Young for safety and health violations. Apparently, this amount represented the total of two fines assessed against Han Young for violations found in the inspections conducted. The Mexican NAO subsequently informed the U.S. NAO that this apparently referred to two fines were assessed against Han Young for violations discovered during the inspections of June 16 and September 5, 1997.⁽⁸⁾

STIMAHCS requested negotiations with Han Young began in mid-March. The submitters assert that these negotiations have not progressed, however, and that the CROC and CTM continue to be active in the plant and continue to harass and intimidate workers with the cooperation of plant management in their joint effort to keep other unions out of the workplace. Further, the submitters assert that the reinstated workers have been subjected to reprisals by the company through denying them wage increases granted to other workers and other forms of harassment and that eleven workers have been fired in retaliation for union activities. Finally, the submitters allege that the company has hired additional workers as part of an effort to defeat STIMAHCS in a new representation election and that the CTM, in alliance with the CROC, has filed a petition for a new union election. The CAB has scheduled a hearing for May 21, 1998, at which a date for a new representation election will be set. The submitters assert that the outcome of this next election is in doubt given the recent efforts against the union by the company.

B. Issues

The submitters argue that Mexico is in violation of NAALC Article 3(1) in failing to enforce its labor laws through appropriate actions. In failing to enforce its labor laws, the submitters argue that Mexico is also in violation of the country's Constitution, which protects freedom of association, ILO Convention 87 on freedom of association, which Mexico has ratified, and ILO Convention 98 on the right to organize and bargain collectively, which Mexico has not ratified.

The submitters also argue that Mexico is not in compliance with NAALC Article 5(4) in failing to ensure that its labor tribunal proceedings are impartial and independent; Article 5(1) in failing to ensure that such proceedings are fair, equitable and transparent; Article 5(1)(d) in failing to ensure that such proceedings are not unnecessarily complicated and do not entail unwarranted delays; and Article 5(2)(b) in failing to ensure that final decisions in labor proceedings are made

available without undue delay.

C. Action Requested

The submitters requested that the NAO undertake the following measures regarding freedom of association violations:

1. urge that the CAB immediately certify the STIMAHCS election victory in the election of October 6 and enforce all Mexican laws regarding the rights of workers to organize and bargain collectively;
2. initiate a review pursuant to Article 16 of the NAALC;
3. hold public hearings on the case, preferably in Tijuana, Mexico; and
4. initiate a process to require the Mexican government to end the favoritism and political discrimination exhibited by the CABs in granting legal recognition and bargaining rights to unions.

III. NAO REVIEW

In conducting its review, the NAO sought and obtained information from the submitters, the employer, the Mexican NAO, and the Hyundai Corporation. A public hearing was held in San Diego, California, on February 18, 1998, at which the submitters, workers, employer representatives, and expert witnesses testified.

A. Information from the Submitters

Following the filing of the submission on October 30, 1997, and the health and safety addendum on February 9, 1998, the submitters provided updates on developments at the plant up to and subsequent to the public hearing conducted on February 18, 1998.

B. Information from the Mexican NAO

The U.S. NAO addressed questions to the Mexican NAO on the submission and Mexican law and its implementation in letters dated October 1, 1997 (prior to the receipt of the submission),⁽⁹⁾ February 10, and February 25, 1997.⁽¹⁰⁾ The U.S. and Mexican NAOs also engaged in a number of other consultations as the case developed.

In a letter dated October 24, 1997, the Mexican NAO provided information on Mexican labor law on the adjudication of disputes involving jurisdictional conflicts and representation rights among different unions in the same workplace. The Mexican NAO stated that it had received assurances from the Baja California labor authorities that the law had been complied with and that no violations of workers' freedom of association had occurred at the Han Young facility.

In letters dated March 27 and March 30, 1998, the Mexican NAO provided additional information on Mexican law and practice on determining union representation and on safety and

health laws and their application. ⁽¹¹⁾

C. Information from Han Young and Hyundai Corporation

Mr. Ho Young Lee, President of Han Young, responded by letter dated February 12, 1998, to a written inquiry from the NAO on the issues raised in the submission. ⁽¹²⁾ In his letter Mr. Lee stated that Han Young pays wages in excess of the minimum wage; the company provides adequate safety and health equipment; the company has been inspected regularly by the safety and health authorities; the company did not take sides in the jurisdictional dispute between the two unions; that workers who were dismissed were dismissed for cause; that he thought it unfair that workers hired after the petition for a representation election were not allowed to vote; and that Han Young had not received formal written notification designating the collective bargaining representative at the plant.

Hyundai Precision America replied in writing on December 29, 1997, to a letter from the U.S. NAO dated December 12 requesting information on the relationship between Han Young and Hyundai and the allegations made in the submission. Hyundai stated that while Han Young is a supplier of that firm, Hyundai has no ownership or any management control over the company. Hyundai stated that it supports the legal rights of workers to unionize in its own assembly plant in Baja California and that the plant complies with Mexican laws. ⁽¹³⁾

D. Public Hearing

The NAO conducted a public hearing on Submission No. 9702 in San Diego, California, on February 18, 1998. Notice of the hearing was published in the Federal Register on January 14, 1998. ⁽¹⁴⁾

Twenty-seven employees of Han Young testified as to their experiences in the union organizing effort and on health and safety conditions in the plant. Seven additional witnesses provided information on events at Han Young, Mexican labor law, and health and safety issues.

The General Manager of Han Young spoke on behalf of his company and counsel for Han Young testified on behalf of the company and on Mexican labor law as it applied to the case.

Mr. Eric Myers of the USWA read a prepared statement on behalf of George Becker, International President of the USWA.

E. Post-Hearing Information

In a letter to the NAO dated March 3, 1998, Han Young President Mr. Ho Young Lee, provided additional information on pay and benefits at the plant, challenged some of the testimony presented at the hearing, and submitted supporting documentation. ⁽¹⁵⁾

IV. NAALC OBLIGATIONS AND MEXICAN LABOR LAW

A. NAALC Obligations

Part One of the NAALC lists the objectives to which the Parties commit themselves, including the promotion, to the maximum extent possible, of the labor principles set out in Annex 1. The first principle is freedom of association and protection of the right to organize, which protects "the right of workers exercised freely and without impediment to establish and join organizations of their own choosing to further and defend their interests."

Part Two of the NAALC sets out the obligations of the Parties. Article 3 (1) commits the Parties to effectively enforce their labor law through appropriate government action. Article 5(1) states that: "[e]ach 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."

Article 5(2) states in relevant part that "[e]ach Party shall provide that final decisions on the merits of the case in such proceedings are . . . (b) made available without undue delay to the parties to the proceedings and, consistent with its law, to the public"

Article 5 (4) of the NAALC provides that "[e]ach Party shall ensure that tribunals that conduct or review such [labor] proceedings are impartial and independent and do not have any substantial interest in the outcome of the matter."

B. Relevant Mexican Law on Freedom of Association

Freedom of association is protected by Mexico's Constitution. Article 19 states that "[t]he right to association or to hold meetings for any legal purpose cannot be curbed."⁽¹⁶⁾ Article 123(A) provides the framework for regulating labor matters in the private sector and protects workers from dismissal or reprisal by employers for union activities.⁽¹⁷⁾

Mexican labor law in the private sector is codified as the Federal Labor Law (*Ley Federal del Trabajo*) (hereinafter FLL).⁽¹⁸⁾ Relevant to the freedom of association issues raised in the instant submission are Articles 47 (dismissal), 133 (employer prohibited practices), 357-359 (right to organize), 360 (types of union organization), 387 (obligation to bargain collectively), 388 and 389 (union representation), 527 (industries under Federal jurisdiction), 870-891 (proceedings

before the CABs), 892-899 (jurisdictional disputes), and 931 (representation elections).

C. Relevant Law on Labor Tribunals and Labor Tribunal Proceedings

FLL Articles 604 - 624 establish the CABs as the primary authorities responsible for the adjudication of individual and collective labor-management disputes, union representation and jurisdictional disputes, and other disputes deriving from the employment relationship. Federal CABs have authority over industries specifically identified in the FLL, while local CABs, operating under the authority of the states, have jurisdiction over all other industries. All CABs, however, enforce the same national law - the FLL.⁽¹⁹⁾ In the case of Han Young, jurisdiction was exercised by the local CAB for the city of Tijuana in the state of Baja California.

FLL Articles 625 through 675 govern the composition of the CABs. Each CAB consists of one representative from the government, who is the President, and one representative each from management and labor. A Secretary General, assisted by a support staff, manages the affairs of the tribunal. The Presidents are designated by the Secretary of Labor and Social Welfare in the case of Federal CABs, and by the Governors of the states in the case of local CABs, and serve for a term of six years. Labor and management representatives are selected in conventions held by their respective organizations conducted under the supervision of the federal or state labor authorities. They also serve for six-year terms. The FLL provides detailed procedures for convening the conventions, selecting delegates, and the election of representatives to the CABs. In practice, the largest and most representative labor organizations within the area of jurisdiction of the CAB are those represented on the CABs.⁽²⁰⁾ These unions are the large and established labor organizations, such as the CTM, CROM, and CROC, aligned with the dominant political party, the PRI.⁽²¹⁾

CABs have jurisdiction over a wide range of labor disputes from individual cases involving wrongful dismissal to collective cases involving union representation and strikes.⁽²²⁾ The Secretariat of Labor and Social Welfare estimated that the Federal CABs heard about 53,000 cases during 1996.⁽²³⁾

Oversight and regulation of unions are exercised by the Secretariat of Labor and Social Welfare (STPS) in the case of unions under Federal jurisdiction and by the local CABs in the case of industries under state jurisdiction. Two important instruments of regulation and oversight by the government are union registration and the determination of union representation rights. At the Federal level, union registration is handled by the Registry of Associations of the STPS, while the Federal CAB adjudicates matters involving collective bargaining representation. At the local level, jurisdiction over both of these important functions of collective labor relations is exercised by the local CABs under state jurisdiction.

1. Union Registration

In Mexico, registration by the administrative authorities grants unions the means by which they conduct their affairs. Without registration, a union cannot hold or dispose of property, represent itself or its members, or otherwise conduct business. Before a union can contest a representation

election, it must be registered.⁽²⁴⁾

FLL Articles 356-385 establish the procedures for obtaining union registration. Registration of the union requires the presentation of the following documents to the local CAB: (1) a certified copy of the minutes of the general meeting at which the union was established; (2) a list of the names of the members and of their employers; (3) a certified copy of the bylaws; and (4) a certified copy of the minutes of the meeting at which the Board of Directors was elected.⁽²⁵⁾

Once the required documents are presented to the CAB, registration occurs within sixty days unless the CAB determines that: (1) the purposes of the union do not coincide with those set out in Article 356 ("the study, advancement and defense of the . . . [rights of workers]"); the union does not have the minimum number of workers established by Article 365 (20 workers); or (3) the union has not submitted all of the documents required by Article 365.⁽²⁶⁾

A reading of the statute indicates that the registration of a union is to be granted automatically within a sixty-day period if the CAB does not rule to the contrary or fails to act at all, though in practice this is not always the case. In practice, the CAB must declare that a union is registered and issue a certificate to that effect for the union to possess the legal standing to represent itself or its members. The certification is reviewed by the authorities when the union appears before them in a legal proceeding. In effect, registration does not take place without the issuance of a certificate. Certificates attesting to registration are not issued automatically after the sixty-day period expires.

2. Union Representation

The CABs also award representation rights to unions within a workplace or within an industry, as appropriate, in accordance with FLL Articles 388, 389, 892-899, and 931. The representation election (*recuento*) is one method used for determining the union representation preference of the workers in cases where two or more unions contest representation within the same workplace.⁽²⁷⁾ Only registered unions may compete in a representation election. A union granted representation by the CAB has exclusive bargaining rights for all workers in the bargaining unit, or the workplace, as the case may be. FLL Article 395 provides that an "exclusion" clause may be included in the collective bargaining agreement. This clause obliges a company to hire only members of the union and may require the company to dismiss from employment any worker who has been expelled from the union. Most collective bargaining agreements in effect in Mexico have this clause.

D. International Labor Organization (ILO) Conventions 87 and 98

The submitters assert that Mexico is in violation of ILO Conventions 87 on Freedom of Association and Protection of the Right to Organize and 98 on the Right to Organize and Collective Bargaining. Mexico ratified Convention 87 in 1950, but has not ratified Convention 98.

The ILO has issued a number of reports on union registration requirements in different countries. These were reviewed and reported on by the NAO in its Public Report of Review of NAO

Submission No. 9601.⁽²⁸⁾ The Committee of Experts on the Application of Conventions and Recommendations, commenting on union registration requirements, has found that granting certain rights and prerogatives to the most representative labor organization in the workplace is consistent with Convention 87 provided that this does not deprive the other organizations of the means to conduct their own business and represent themselves.⁽²⁹⁾ On collective bargaining representation, the Committee has stated that the determination of the most representative organizations must be "based on objective, pre-established, and precise criteria so as to avoid any possibility of bias or abuse."⁽³⁰⁾ The Committee has also declared that efforts by governments⁽³¹⁾ and employers⁽³²⁾ to coerce workers or otherwise influence their choice of the organization to which they wish to belong are inconsistent with Conventions 87 and 98.

V. ANALYSIS

A. Freedom of Association

Article 1 of the NAALC commits the Parties to promote the labor principle of freedom of association and protection of the right to organize while Article 3 obliges the Parties to enforce their labor laws. The instant submission raises two issues related to the enforcement of laws on freedom of association, namely (1) enforcement by Mexico of its laws protecting workers from employer retaliation and interference in the exercise of their rights; and (2) enforcement by Mexico of its laws on union representation and jurisdiction.

Employer efforts to coerce or otherwise persuade workers to affiliate or not affiliate to a union are prohibited by FLL Article 133. There is information that strongly suggests the management of Han Young favored representation first by the CROC union and later the CTM union, and attempted to influence workers on their choice through threats, intimidation, and dismissal. According to the submitters, Han Young organized a meeting between the workers and the CROC union shortly after the workers began their organizing effort.⁽³³⁾ The submitters assert that Han Young offered a cash payment equal to \$2000 to one of the worker leaders to stop his union activities.⁽³⁴⁾ The submitters also provided information that Han Young offered cash payments of about \$125 to each worker who would vote for the CTM during the second representation election. There is also information that Han Young threatened to fire all of the supporters of STIMAHCS and replace them if STIMAHCS won the representation election and otherwise expressed its opposition to STIMAHCS.⁽³⁵⁾ The submitters assert that a total of twelve supporters of STIMAHCS were fired for supporting STIMAHCS.

Dismissal without just cause is prohibited by FLL Article 47. The submitters assert that twelve workers, many of them STIMAHCS union activists or supporters, were dismissed after the organizing drive began and labor-management tensions increased, especially following the one-day strike in June. They assert that the dismissals were in retaliation for the organizing effort and intended to intimidate other workers. Management claims that these workers were dismissed for reasons unrelated to their organizing activities and that instead the dismissals were based on poor work performance or for violations of employer policies.

The NAO finds that the timing of these events raises serious questions about management's motives. All of these employees have been rehired to date, following negotiations and a settlement that was facilitated by both State and Federal Government officials. However, these same employees reported that management continues to single them out and treat them unfavorably as compared to employees who are not affiliated to or did not support STIMAHCS. ⁽³⁶⁾

Mexican law provides that a representation election may be used to determine the majority preference when two or more unions contest for representation in the same workplace. A representation election took place on October 6. There is considerable testimonial evidence that the election was plagued with irregularities including changing the election date with little notice, threats to the workers supporting STIMAHCS, and the ability of persons without proper credentials to enter the voting premises and cast ballots. ⁽³⁷⁾

FLL Article 931(IV) provides that workers recruited after the date of the petition for union representation may not participate in the election. Neither may "employees of trust" (*trabajadores de confianza*) ⁽³⁸⁾. STIMAHCS filed for representation on August 8, 1997, and workers hired by Han Young after that date should not have been permitted to vote. ⁽³⁹⁾ The submitters assert, and workers testified, that ineligible workers were brought in by management in support of the CROC union, and were allowed, by CAB officials, to take part in the voting, despite the objections of STIMAHCS representatives. ⁽⁴⁰⁾ In addition to the testimony of the workers, it was reported by the print media that international observers present at the election recounted similar irregularities with the election process. ⁽⁴¹⁾

Despite considerable irregularities designed to influence the workers and the voting process, STIMAHCS won a convincing victory in the election. However, the CAB nullified the vote, ruling that STIMAHCS failed to demonstrate that it had the support of a majority of the workers in the workplace. The CAB stated that the representation election only showed the sympathies of the workers toward STIMAHCS during a given moment in time and was insufficient to prove that STIMAHCS had majority support. The CAB cited decisions by appeals courts and the Supreme Court dated 1969, 1971, 1972, 1973, and 1974 in support of this position. ⁽⁴²⁾ The CAB did not specify how a union was expected to demonstrate that it had majority support.

The CAB also ruled that STIMAHCS was registered before the Registrar of Associations of the Secretariat of Labor and Social Welfare as a national industrial union in the metallurgical sector, rather than the automotive sector, and could not, therefore, represent Han Young automobile workers in the state of Baja California. The CAB cited FLL Article 360 in support of this argument.

Contrary to the reasoning by the CAB that the election results were an insufficient basis for determining the bargaining representative, the Mexican NAO had previously informed the U.S. NAO that the Supreme Court of Mexico had, in 1979, ruled that the representation election (*recuento*) was the most effective way of determining the union preference of the majority of workers in a workplace. ⁽⁴³⁾ However, in a letter dated March 27, 1998, the Mexican NAO cited a 1993 Supreme Court decision that stated that the representation election is not a sufficient basis to determine representation rights as, in accordance with FLL Article 931, only those workers

physically present at the representation election are entitled to vote. According to this decision, the majority of the votes cast for a contesting union must correspond to a majority of the workers in the workplace, less workers who are ineligible to vote, such as recent hires and management employees. The court's decision did not address situations in which neither union obtains the votes of a majority of the workers in the workplace.

In the absence of a representation election, the only alternative approach available to the workers of Han Young, according to the FLL and from information provided by the Mexican NAO, would have been for the workers to (1) disaffiliate from the CROC union; (2) seek affiliation to STIMAHCS; and (3) petition the CAB for collective bargaining representation. By following this procedure, however, the workers would be vulnerable to dismissal from employment should the CROC invoke the exclusion clause. Such dismissals would be legal and without prejudice to the company.⁽⁴⁴⁾ Under this scenario, the workers would face a limited choice of risking dismissal from employment or remaining with the CROC union.

In nullifying the October 6 election results, the CAB also decided that STIMAHCS lacked the proper registration to represent workers at Han Young. The CAB's decision, reversing its earlier recognition of STIMAHCS as a registered union for the purpose of the representation election, seems inexplicable. Mexican labor law requires that a union or union organization be registered before the appropriate authorities, be they of the Federal Government or the state government.⁽⁴⁵⁾ FLL Article 527 places a number of industries, including the metal and steel industry, under the jurisdiction of the Federal Government. Once registration is granted, the registered organization is authorized to represent itself and its members before state and Federal authorities. STIMAHCS was registered with the Federal Government and, according to the express language of FLL Articles 368⁽⁴⁶⁾ and 374, should have been recognized as a registered union before the Baja California CAB. Moreover, in arguing that the representation election, in itself, was not sufficient to determine the majority union, the CAB did not explain on what basis it chose to return representation to the CROC, which received fewer votes than STIMAHCS.

FLL Article 360 identifies the different kinds of unions that can be established. These are craft, company, industrial, and national industrial unions, and unions that include various crafts. There does not appear to be a legal delineation of industrial jurisdiction among different industrial unions. As a truck chassis welding operation, Han Young could presumably be classified under either the automobile or metalworking industries.

Moreover, the CAB verified STIMAHCS' credentials at the hearing held on September 25 before allowing the representation vote, rejecting at that time a challenge put forward by the CROC union that STIMAHCS lacked the legal authority to represent maquiladora workers in the state of Baja California. The decision of the CAB overturning the election result made no mention of this earlier decision which allowed the vote to take place and offered no explanation for the reversal.

On December 16, 1997, a second election took place, in part because the Federal Government and the State Government of Baja California intervened and negotiated a settlement between the parties.⁽⁴⁷⁾ The terms of the settlement included the second representation election between STIMAHCS and the CROC union and an agreement by both unions to abide by the results of the

election. The settlement also called for an end to all legal proceedings, including withdrawal of the NAO petition, by the two unions and an end to the inter-union conflict at the plant.⁽⁴⁸⁾ The CAB agreed to grant registration to an independent union called the Industrial and Commercial Workers Union "October 6" (*Sindicato de Trabajadores de la Industria y del Comercio "6 de Octubre"*). It was the apparent intention of the workers for this union to eventually supplant STIMAHCS as the collective bargaining representative at the plant. Following the second representation victory by STIMAHCS, "October 6" was granted registration, and the appropriate certificate was issued on January 12, 1998.

FLL Article 387 requires an employer to enter into a collective bargaining agreement with the union in the establishment. If more than one union exists in the workplace, the employer must negotiate with the union that has representation rights (*titularidad*). Pablo Kang, Han Young Human Resources Director, testified at the February 18 hearing that he had not received official notice of the election results,⁽⁴⁹⁾ and that in any event he believed that STIMAHCS enjoyed the support of only about 20 percent of the workers within the plant. When asked how he had arrived at this figure, he replied that he had calculated the number from watching protesters outside the factory gate on one occasion.⁽⁵⁰⁾ Though FLL Article 890 requires the CAB to immediately notify the parties of its decisions, the employer was not officially notified of the results of the representation election until March 2, 1998, although the outcome had been common knowledge. FLL Article 399 requires that bargaining begin at least sixty days prior to the expiration of the agreement that is in effect. The current collective bargaining agreement in effect at Han Young is scheduled to expire on May 22, 1998,⁽⁵¹⁾ and negotiations should have begun, therefore, on or about March 22, 1998. Until then, the employer was under no legal obligation to negotiate the terms of a new agreement unless the union initiated negotiations. STIMAHCS made such a request in mid-March. According to the submitters, however, Han Young rejected the union's demands and the negotiations have not progressed.

The submitters have informed the NAO that problems continue at the Han Young plant, that the company has hired twenty-seven new workers, and intends to hire additional workers, even if only for a limited period of time, so as to allow for a new union election which will ensure that STIMAHCS is voted out. If, in fact the company was attempting to influence a future election, it could do so by hiring additional workers. Mexican labor law makes no provision for a grace period during which challenges for union representation rights may not take place.⁽⁵²⁾ At last report, a CTM union has filed for a new representation election and the CAB has scheduled a May 21, 1998, hearing to set a date. This will be the third representation election held since October 6, 1997.

As of the date of this report, the workers at Han Young have obtained recognition of their independent union, obtained representation rights for STIMAHCS in their workplace, and gained reinstatement of the workers who were dismissed for union organizing activities. The workers also testified, however, that STIMAHCS affiliated workers continue to be harassed and denied benefits available to workers not affiliated to STIMAHCS and that eleven workers have been subjected to retaliatory discharge for their union activities.

The irregularities that the Tijuana CAB permitted to take place during the first representation election, its reasoning in not recognizing STIMAHCS as the bargaining representative, and its

delay in formally notifying Han Young of the results of the December 16 representation election, raise questions about its enforcement of those provisions of Mexico's FLL that govern procedures for determining union representation. These actions also raise questions about the impartiality of the CAB, particularly with regard to its duty to enforce the provisions of the FLL protecting workers from employer retaliation for the exercise of their freedom of association rights, and from employer interference in the establishment of a union.

B. Procedural Guarantees

Article 5(1) of the NAALC commits the Parties to ensure that labor tribunal proceedings are fair, equitable and transparent. Article 5(1)(d) obligates the Parties to ensure that such proceedings are not unnecessarily complicated and do not entail unwarranted delays. Article 5(2)(b) requires that final decisions in labor proceedings be made available without undue delay. Article 5(4) requires each Party to ensure that its labor tribunals are impartial, independent, and do not have a substantial interest in the outcome of the proceedings before it.

Submission 9702 raises the issue of compliance by Mexico with its procedural obligations under Article 5 of the NAALC. Namely, the submitters argue (1) that in permitting irregularities to occur during the representation election in favor of the CROC union, the CAB demonstrated that its proceedings are not fair and equitable, in violation of Article 5(1); (2) that in delaying the processing of workers' claims for unjustified dismissal and postponing the September 3 hearing, the CAB caused unwarranted delays in the case, in violation of Article 5(1)(d); (3) that in failing to officially notify the parties to the representation election of the outcome, the CAB failed to make available, without undue delay, its final decision in the case, in violation of Article 5(2)(b); and (4) that the failure to protect workers from dismissal for their union activities, the sudden change in the presidency of the CAB, the delay in certifying the election results, the earlier finding that STIMAHCS lacked the proper registration, and other actions by the CAB, demonstrate that it is not impartial and independent and is therefore in violation of Article 5(4).

1. Compliance with NAALC Articles 5(1) and 5(2)

Two hearings were held by the local CAB in accordance with its standard procedures. At the first hearing on September 25 following STIMAHCS's petition for representation rights, the CAB reviewed the credentials of the parties and ruled on their eligibility to participate in the representation election. Another hearing was held on October 9, following the representation election, at which the two parties to the election challenged the validity of a number of each other's ballots. On October 16, the CAB declared that the proceedings were closed.

The submitters assert that during the September 25 meeting, the CROC attempted to persuade the CAB to suspend the hearing on the basis of a technicality and to suspend the proceedings on the basis that the CTM intended to file for collective bargaining representation. According to the submitters, the CAB seemed prepared to accede to this request and refrained from doing so only after the workers protested loudly and threatened to occupy the CAB.

In spite of the foregoing allegations, the proceedings conducted by the CAB appear to have been consistent with the FLL as set out in FLL Articles 870-891. Access to the proceedings was

restricted to the parties, but minutes were kept and the results were printed and made available to the parties, who made them available to the public. From these documents it is clear that the parties were afforded the opportunity to present their respective positions and submit the appropriate evidence. FLL Article 873 calls for a CAB hearing on conciliation, argument, and submission and admissibility of evidence within fifteen days of the filing of the petition for certification. The petition was filed on August 6, 1997, logged in by the CAB on August 8, and the first hearing was scheduled for September 3, 1997. The hearing date was subsequently postponed to September 25 because of a clerical error, according to the CAB; in order to afford the company and the CROC union more time to defeat STIMAHCS according to the submitters. This resulted in a total period of thirty-four days elapsed from the filing of the representation petition to the first hearing. This was not an unreasonable delay. Finally, the record indicates that these two proceedings before the CAB were fairly straightforward and not unduly complicated and, therefore, in compliance with Article 5(1)(d).

The matter of the workers' claims alleging unjustified dismissal became moot after their reinstatement following the December 16 agreement. Nevertheless, without intending to comment on the validity of the claims, the period that elapsed in these cases was not excessive relative to the time period that normally applies in CAB cases.⁽⁵³⁾

FLL Articles 885-891 specify the time periods that may elapse from the conclusion of the hearings and the issuance of a final award. The FLL allows for up to thirty-three working days. In this case, the proceedings were declared closed on October 16, 1997, and the decision was issued on November 10, for an elapsed time of sixteen working days, well within the time period prescribed by the FLL and, therefore, in compliance with Article 5(2)(b).

The second representation election took place on December 16, 1997, and STIMAHCS was informed on January 12 that it was the collective bargaining representative. However, the CAB did not officially notify the employer of this until March 2, 1998. FLL Article 890 states that the CAB will immediately notify the parties of its decisions. The CAB's delay in informing the parties of the results does not seem to conform to the FLL language, nor with the language of NAALC Article 5(2)(b) that "[e]ach Party shall provide that final decisions on the merits of the case in such proceedings are . . . (b) made available without undue delay to the parties to the proceedings and, consistent with its law, to the public"⁽⁵⁴⁾

The Parties to the NAALC have a duty to promote labor rights by ensuring not only accessibility to tribunals but also that tribunals are impartial, independent and fair in applying the law. It is difficult to conceive of a legitimate reason why the CAB delayed until March 2 to officially inform the parties of the January 12 finding confirming the December 16 election result. This action by the CAB is troubling, especially when viewed within the context of its earlier decision of November 10 and the reasoning it provided for not recognizing STIMAHCS after the October 6 election.

2. Compliance by Mexico with NAALC Article 5(4)

The NAO has reviewed and reported at length on Mexico's labor tribunals, the CABs. All but one of the cases reviewed raised freedom of association issues and the enforcement by the CABs

of Mexico's laws protecting freedom of association.⁽⁵⁵⁾ Several submissions explicitly raised the issue of Mexico's obligations under NAALC Article 5 on procedural guarantees.⁽⁵⁶⁾ In its report on Submission 940003, the NAO found that the allegations of dismissal for union activity were plausible and that the workers involved lacked the financial resources and faced other impediments to obtaining impartial legal remedies. The NAO also found that workers were subjected to excessive delays and denied registration for their union on hyper technical grounds⁽⁵⁷⁾ and recommended ministerial consultations on the union registration process. The consultations resulted in a number of initiatives which produced a comprehensive examination of the institutions, procedures, and laws that make up the basis of Mexico's system of labor adjudication in the private sector.

It is especially noteworthy that, pursuant to the ministerial consultations agreement, a panel of labor experts convened by the Mexican Government made a number of recommendations which are relevant to the instant submission specifically and, more broadly, to the functioning of the local level CABs in general.⁽⁵⁸⁾ The panelists made several recommendations, two of which are particularly relevant to the instant submission:

1. Registration of local unions should be issued by the state Departments of Labor rather than the CABs. It was asserted that such a change would take into account the purely administrative nature of registering unions and avoid conflict of interest problems that often arise within the local CABs.
2. The law on union registration should be applied consistently. The panel recommended that registration be granted to every applicant complying with legal requirements and denied consistently to those that fail to do so.

In its report on ministerial consultations on Submission No. 940003, the U.S. NAO made a number of findings on the union registration process in Mexico and the role of the CABs.⁽⁵⁹⁾ Of relevance to Submission No. 9702 are the following:

a. *It is very difficult for workers to register an independent union at the local level in Mexico.* Independent union, as used here, refers to a union not affiliated or aligned with any of the large labor confederations in Mexico (CTM, CROC, CROM) which are allegedly aligned with the dominant political party in Mexico, the PRI.⁽⁶⁰⁾

b. *The composition of the labor boards often complicates the registration of an independent union.* The CABs are hybrid organizations that are administratively under the executive branch and dependent on the executive branch for their funding. However, they also fulfill a judicial role and, in the case of union registration, they have an administrative function. The labor representative on the CAB generally represents the incumbent or majority union, usually a CTM affiliate. Therefore, at least one member of the CAB has a competing interest with any independent union seeking registration.

c. *Registration laws are not uniformly applied in every CAB jurisdiction.* There is considerable disagreement among Mexican Government experts with respect to the proper application of some of the provisions of union registration laws.⁽⁶¹⁾ Different interpretations of the law have been given on whether an existing union in the same workplace precludes the registration of

another union; the number of unions that can co-exist in one workplace; and whether a CAB can correct deficiencies in a union's petition for registration in advance of denial of the petition, thereby providing an opportunity to cure the defect. Different interpretations amongst government officials on union registration requirements contribute to confusion on the part of workers and their independent unions.

For a union to petition for representation rights, it must first be registered. It was the Han Young workers' recognition of the problems and difficulties in registering an independent union that induced them to alter their strategy and decide to pursue representation with STIMAHCS rather than the independent union with which they had begun their effort. The difficulty in obtaining registration for an independent union is widely recognized in Mexico and has been documented in research by independent experts in the U.S. and Mexico as well as in NAO reports.⁽⁶²⁾ The workers in the instant submission elected to pursue representation by STIMAHCS, a union that was already registered. This procedure was, in fact, recommended by Mexican officials during a seminar pursuant to the ministerial consultations conducted in Submission No. 940003.⁽⁶³⁾

3. ILO Convention 87

The submitters raised the issue of Mexico's compliance with ILO Conventions 87 and 98. Convention 87, which Mexico has ratified, is most germane to this submission. Explanations as to the scope and meaning of provisions of ILO Conventions are found in the reports of the Committee of Experts on the Application of Conventions and Recommendations (hereinafter the Committee). These reports provide a basis by which to measure conformance with ILO conventions by the parties and also provide a body of expert information and opinion on major issues of industrial relations that are raised and reviewed at the international level.

The ILO has addressed the issue of legal personality for workers' and employers' organizations, the requirements for registration of unions, and procedures for awarding representation. Article 7 of Convention 87 states:

[t]he acquisition of legal personality by workers' and employers organizations, federations and confederations shall not be made subject to conditions of such character as to restrict the application of the provisions of Articles 2, 3, and 4 hereof.

Article 2 provides that workers and employers, "without distinction whatsoever," have the right to form organizations of their own choosing "without previous authorization." Article 3 provides that workers' and employers' organizations have the right to draw up their own constitution and rules without interference by the authorities. Article 4 protects workers' and employers' associations from dissolution or suspension by administrative authorities.

In its 1994 *General Survey*, the Committee of Experts addressed the right to establish organizations without previous authorization, and commented on the application of union registration requirements in that context, stating:

In many countries, registration is compulsory and is a prerequisite for the normal functioning of an organization. The formalities covered by the concept of "registration" vary according to

national legislation. In some cases, all that is required is to deposit the organization's by-laws, possibly with details of the officers and constituent meeting, to satisfy the registration authority that the organization has complied with trade union legislation; in such cases the competent authority does not normally have discretionary power. In some other countries, however, legislation does not clearly define the procedures of the formalities which must be observed or the reasons which the competent authority may give for refusal, which may be tantamount to requiring previous authorization.⁽⁶⁴⁾

The Committee went on to note:

In some countries, legislation confers on the competent authority a genuinely discretionary power to grant or reject a registration request or to grant or withhold the approval required for the establishment and functioning of an organization. In the Committee's view, such provisions are tantamount to a requirement for previous authorization which is not compatible with Article 2 of the Convention.⁽⁶⁵⁾

The Committee also commented on the effect of lengthy and complicated procedures and on the excessive use of discretionary authority, stating:

Problems of compatibility with the Convention also arise where the registration procedure is long and complicated or when the registration regulations are applied in a manner inconsistent with their purpose and the competent administrative authorities make excessive use of their discretionary powers and are encouraged to do so by the vagueness of the relevant legislation. These factors may be a serious obstacle to the establishment of organizations and may amount to a denial of the right of workers and employers to establish organizations without previous authorization.⁽⁶⁶⁾

The Committee specifically addressed the matter of recognition of legal personality and the requirement that it not restrict the provisions of Articles 2, 3, and 4 of the Convention, stating:

Legislation is thus compatible with the terms of the Convention if it automatically confers legal personality on the organization in question at the time of establishment, be it without any formalities being observed, when the by-laws are deposited, or following a registration procedure or other formalities which are compatible with the Convention. However, when legislation makes the acquisition of legal personality a prerequisite for the existence and functioning of organizations, the conditions for acquiring legal personality must not be such that they amount to a de facto requirement for previous authorization to establish an organization, which would be tantamount to calling into question the application of Article 2 of the Convention. Legal personality should not be denied to organizations once they have met legal requirements.⁽⁶⁷⁾

Registration of unions in Mexico is necessary for those organizations to possess the legal personality to exercise their basic functions. The application of inconsistent and imprecise criteria in the registration process raises the possibility of a selective and arbitrary implementation of the law in an effort to influence workers' choices on union representation. The review of Submission 940003 and the various programs conducted pursuant to ministerial consultations agreed to following that submission, indicates that, whereas the registration of

unions in Mexico was intended to be a routine administrative function, this is not always the case.

The Committee of Experts also addressed the concept of collective bargaining representation and found that legislation that establishes the concept of the most representative trade union and granting to that union representation rights is not, in itself, "contrary to the principle of freedom of association provided that certain conditions are met."⁽⁶⁸⁾ The Committee, however, asserted that clear and precise criteria must be followed in making the determination, stating:

recognizing the possibility of trade union pluralism does not preclude granting certain rights and advantages to the most representative organizations. However, the determination of the most representative organization must be based on objective, pre-established and precise criteria so as to avoid any possibility of bias or abuse⁽⁶⁹⁾

C. Initiatives by the Government of Mexico

Previous consultations have shown that the Mexican Government recognizes problems involving the effective implementation by the CABs of its labor laws on freedom of association and is making efforts to address them. Two initiatives of note have been undertaken by the Government of Mexico to address problems of labor administration and to improve the system for adjudicating disputes. These are the *New Labor Culture and the Program for Employment, Training and the Defense of Labor Rights: 1995-2000*.

1. New Labor Culture

The NAO reported on the New Labor Culture (*Nueva Cultura Laboral*) in its Follow-up Report on NAO Submission No. 940003.⁽⁷⁰⁾ The New Labor Culture resulted from efforts by the Government of Mexico to improve labor-management cooperation, competitiveness, and productivity. Following tripartite negotiations among labor, management, and government representatives, a document entitled Principles of the New Labor Culture (*Principios de la Nueva Cultura Laboral*), was signed on August 13, 1996.

The Principles of the New Labor Culture does not have the effect of law, but rather is a statement of objectives and principles. It calls upon both labor and management to respect each other's rights and honor respective obligations. The document addresses two matters of labor law which were subjects of Submission No. 940003 and the subsequent ministerial consultations: (1) union democracy; and (2) union registration, including the lack of impartiality in the decisions of the labor tribunals. Under the Principles of the New Labor Culture, 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. Further, both unions and management call on the government to strengthen the system of labor tribunals by assigning career judges, as opposed to the current practice of assigning members of the executive branch, as the government representatives to these bodies. The document calls for the labor authorities to discharge their responsibilities in strict conformance with the law, and in the case of adjudicating jurisdictional matters, to do so quickly, completely, with justice, and impartially.

2. Program for Employment, Training and the Defense of Labor Rights: 1995-2000

The Program for Employment, Training and the Defense of Labor Rights: 1995-2000 (*Program de Empleo, Capacitación y Defensa de los Derechos Laborales: 1995-2000*) (hereinafter the Program) is a five-year policy and planning document adopted by the Secretariat of Labor and Social Welfare in 1995 and published in 1996.⁽⁷¹⁾ The Program is comprehensive and deals with employment, education, training, productivity, health and safety, and workers' rights and labor justice.

In the background statement, the Program states that "strengthening labor tribunals and improving the methods for preparing, selecting, promoting and remunerating the judges, by establishing a judicial career track, becomes a priority." It goes on to say: "[t]he fact that the labor tribunals sometimes use inconsistent criteria in the enforcement of the labor standards generates a lack of juridical certainty. Thus, it is desirable to hold periodic full meetings of the local boards, as established by the regulations, for the purpose of analyzing and setting uniform criteria for interpreting and enforcing the legislation."⁽⁷²⁾

The background statement of the Program addresses the registration of unions and states "[t]he function of registering labor unions under federal jurisdiction, federations and confederations, as well as taking note of changes in their leadership committees, fluctuations in the number of their members and modifications in their by-laws; these are all significant activities for which the STPS is responsible."⁽⁷³⁾ It further provides that "[t]he powers of the labor authorities in this matter are strictly delineated by the legislation in force. The procedures for registering and updating labor organizations, since they are mainly administrative, are not steps for settling disputes between unions; on the contrary, they are and ought to remain procedures intended to offer juridical security to labor organizations and the harmonious development of labor relations."⁽⁷⁴⁾ It concludes by stating "[t]he service involved in the registration function should be provided as efficiently and effectively as possible. Therefore, the analysis of the documents [submitted for registration], whereby compliance with the requirements of the Law is accredited, should be performed with the greatest legal precision, but also quickly, in order to guarantee both the full legal validity of the resolutions and their timely issuance."⁽⁷⁵⁾

In the Program, the Government sets forth guidelines for action, which include:

1. the establishment of an actuarial control system for the issuance of notifications and summons;
2. improving and expediting procedures for the presentation of evidence and determining its admissibility;
3. holding periodic and obligatory meetings of the boards, so they can adopt uniform criteria in the granting of awards, in accordance with the Law;
4. improvement in the professional level of the staff of the Federal CABs through the establishment of a judicial career track to deal with the increased complexity of the matters submitted to the Boards;
5. modernization of the systems for recruiting and selecting both legal and administrative personnel, in order to improve staff and retain highly qualified personnel, including the selection of personnel based on their employment history as well as the results of

competitive examinations.⁽⁷⁶⁾

The NAO has observed that the Government of Mexico has begun to implement some of these programs. A registry of all officially registered unions has been prepared and is available on the website of the Secretariat of Labor and Social Welfare. Several new Federal CABs have been established, including one in Tijuana. These measures are directed toward achieving a consistent and uniform application of the law by the CABs. If fully, implemented, these steps, among others, would significantly reduce the possibility of a selective application of the law and charges of bias and manipulation of the process.

Han Young's apparent efforts to influence the workers' union organization efforts through coercion, intimidation, and other means, appear well substantiated from the testimony and information available to the NAO. While this behavior on the part of the company is troubling, for the purposes of this review under the NAALC, the U.S. NAO's concern centers around allegations that the local labor authorities may not have acted in a manner consistent with the Procedural Guarantees on impartiality and independence pursuant to Article 5 of the NAALC.

The results of previous submissions and the Government of Mexico's own efforts to strengthen the professionalism and capabilities of its CABs seem to substantiate the NAO's basis for concern that the actions by the Tijuana CAB may be inconsistent with the FLL. Registration, which is supposed to be a routine administrative transaction, is sometimes withheld in a manner which grants the administrative authorities (CABs) control over the right of unions to exist. Though the law requires that registration be granted automatically in the absence of any action by the CABs, this is not always the case and unions that lack registration lack the legal status to exist. As far as the NAO has been able to determine, the instant case represents only the second time that an independent union has been registered in the entire maquiladora sector.⁽⁷⁷⁾ It also appears, from the instant submission, that union representation rights were initially awarded on the basis of criteria that were not impartial and transparent and that this was prevented from occurring only by the intervention of the Federal and state governments. Finally, it appears that the workers of Han Young may be required to defend, once again, their hard-won representation rights in a third representation election.

It is evident that the Federal Government of Mexico is aware of the problems associated with some of the state CABs and has initiated efforts to achieve improved compliance with the law by the appropriate authorities. Unfortunately, it is further evident from the instant submission, that in spite of serious efforts on the part of Mexican Federal labor authorities, independent unions continue to experience difficulty gaining the authority and ability to exist and function as provided for under the Mexican Constitution and the FLL.

VI. FINDINGS

This review indicates that a group of 120 workers at Han Young obtained union representation only after extensive litigation, intervention by the Mexican Federal labor authorities, two representation elections which they won, international public attention, and extensive media

coverage. It is worth noting that until the instant case, from the information available to the NAO, not one independent union had been registered or had obtained collective bargaining representation rights in Tijuana and only one other exists in the entire maquiladora sector.⁽⁷⁸⁾ This has occurred despite the provisions of the Mexican Constitution, the Federal Labor Law, the North American Agreement on Labor Cooperation, and Conventions 87 and 98 of the International Labor Organization that are intended to protect this right. The workers in question have expressed their union preference through two representation elections, strikes, and fasts, and in the face of determined opposition from the company, including intimidation, threats, and dismissals. Additionally, serious questions have been raised as to the legal decisions of the Tijuana CAB responsible for enforcing Mexico's laws on the freedom of association rights of workers. It also appears that the workers may be required to undergo still another representation election to demonstrate their union preference.

The NAO makes the following findings:

1. Mexico's Constitution and Federal laws protect the freedom of association of workers to organize and join the unions of their choice.
2. The proceedings conducted by the Tijuana CAB in the instant submission were transparent, took place expeditiously, and appear consistent with Mexican law and NAALC Articles 5(1)(b) and 5(1)(d).
3. Provisions of the Federal Labor Law on representation elections in determining the majority union are unclear. The U.S. NAO has received conflicting information on this matter. The actions of the Tijuana CAB, including the delay in informing the parties of its decisions in the case, the rationale of its decision not to certify the first representation election, and irregularities in the conduct of the first representation election, appear inconsistent with Mexico's obligations under Articles 5(1), 5(2)(b) and 5(4) of the NAALC.
4. The placement, by the Tijuana CAB, of obstacles to the ability of workers to exercise their right to freedom of association, through the application of inconsistent and imprecise criteria and standards for union registration and for determining union representation, is not consistent with Mexico's obligation to effectively enforce its labor laws on freedom of association in accordance with Article 3 of the NAALC.
5. The Government of Mexico apparently recognizes that a number of shortcomings exist in the labor tribunal system. This is demonstrated by the Federal Government's initiatives to improve the performance of the Federal level CABs and the recommendations of its independent experts to implement similar changes in the local CABs. However, the actions by the Tijuana CAB demonstrate that independent unions can continue to experience difficulty in obtaining registration and collective bargaining rights.

Given the above, ministerial level consultations on the implementation of the various recommendations emanating from the Government of Mexico, such as the *Principles of the New Labor Culture and the Program for Employment: 1995-2000*, would further the objectives of the NAALC. Consultations should discuss any strategies being considered by the Government of

Mexico to address these issues and in particular those strategies designed to address problems such as those with the Tijuana CAB in Baja California, as well as other measures to ensure that workers' freedom of association and right to bargain collectively are protected.

VII. Recommendation

Accordingly, the NAO recommends ministerial consultations on these matters pursuant to Article 22 of the NAALC.

Irasema Garza
Secretary
U.S. National Administrative Office

April 28, 1998

Based on the foregoing report, I accept the NAO's recommendation to request ministerial consultations under Article 22 of the NAALC on the issues concerning union registration and representation raised in Submission No. 9702.

Alexis M. Herman
Secretary of Labor

ENDNOTES

1. *59 Fed. Reg. 16660-16662 (1994).*
2. *The submitters allege that Han Young induced recently hired workers to perjure themselves before CAB officials when asked for their date of hire.*
3. *About 85% of organized labor in Mexico is affiliated to the Labor Congress (Congreso del Trabajo - CT). The CTM, the CROC, the CROM and most of the other thirty-five confederations, federations, and national unions affiliated to the CT are closely associated with the PRI. See U.S. Department of Labor, Bureau of International Labor Affairs, Foreign Labor Trends: Mexico, 1995-1996, (Prepared by American Embassy, Mexico City), p.14.*
4. *Mexican labor experts consider union strength in Baja California to be minimal, and the established unions in Tijuana are considered, for the most part, to be "protection" unions which are used by employers to exclude other, possibly more militant unions, from the workplace. See Toledo, Enrique de la Garza, "Industrial Democracy, Total Quality and Mexico's Changing Labor Relations," in Regional Integration and Industrial Relations in North America, eds. Cook, Maria Lorena and Katz, Harry C., (Ithaca, New York, ILR Press, New York State School of Industrial and Labor Relations, Cornell University, 1994). p. 26. See also Quintero, Cirila*

"Reestructuraci3n Sindical en las Maquiladoras Mexicanas, 1970-1990", (Ph.D. diss., University of the Northern Frontier, 1992) pp. 308-312. See also Carillo, Jorge V., *"Maquiladoras and Labor Relations,"* in *Unions, Workers, and the State in Mexico*, ed. Kevin J. Middlebrook, (Center for U.S.-Mexican Studies, University of California, San Diego 1991), p. 229.

5. Literally, "title" to the collective bargaining agreement.

6. *The Case of Han Young de Mexico, S.A. de C.V., in Tijuana, Mexico: Submission to the United States National Administrative Office (hereinafter NAO Submission No.9702), U.S. Department of Labor, Bureau of International Labor Affairs, National Administrative Office, (1997) p. 18, and Exhibit RR (affidavit from two workers).*

7. *The submitters assert that the CROC and the CTM are working together to defeat the efforts of STIMAHCS and the independent union.*

8. *Letter from National Administrative Office of Mexico (March 30, 1998).*

9. *The NAO began monitoring developments in Han Young in July 1997, and had received a number of inquiries from the public on the situation.*

10. *On file with the U.S. National Administrative Office.*

11. *On file with the U.S. National Administrative Office.*

12. *Letter from Ho Young Lee, President of Han Young de Mexico, S.A. de C.V., to the U.S. National Administrative Office, (February 12, 1998), (on file with the U.S. National Administrative Office).*

13. *Letter from Ted Chung, President, Hyundai Precision America, (December 29, 1997), Subject: Response to your December 12, 1997 Letter, (on file with the U.S. National Administrative Office). The submitters have informed the NAO that Hyundai has attempted to play a constructive role in resolving the Han Young case.*

14. *63 Fed. Reg. 2266-2267 (1998).*

15. *On file with the U.S. National Administrative Office.*

16. *Political Constitution of the United Mexican States (hereinafter Constitution of Mexico), Article 19.*

17. *Constitution of Mexico, Article 123, Paragraph XXII.*

18. *Federal Labor Law, (as amended through December, 1995) (Ormond Beach, Florida, Foreign Tax Law Publishers, Inc., trans.). This English translation of the FLL is used throughout*

this report.

19. *The Federal Labor Law (FLL) is national in scope. Enforcement and implementation is shared between Federal authorities and state governments.*

20. *U.S. Department of Labor, Bureau of International Labor Affairs, Seminar on Union Registration and Certification Procedures, San Antonio, Texas, November 8, 1995, p.47. This seminar was the second in a series of three such programs conducted pursuant to an Agreement on Ministerial Consultations on NAO Submission No.940003.*

21. *Foreign Labor Trends: Mexico, 1995-1996, p. 14.*

22. *FLL Article 604 defines the scope of jurisdiction of the CABs.*

23. *Program for Employment, Training and the Defense of Labor Rights: 1995-2000(Programa de Empleo, Capacitación y Defensa de los Derechos Laborales: 1995-2000), Secretariat of Labor and Social Welfare, Mexico (1996), p. 79.*

24. *See U.S. Department of Labor, Bureau of International Labor Affairs, U.S. National Administrative Office, Public Report of Review of Submission 940003, pp. 23-24 and 30-32. See also U.S. Department of Labor, Bureau of International Labor Affairs, U.S. National Administrative Office, Report on Ministerial Consultations on NAO Submission #940003, pp. 13-14, for a detailed account on union registration in Mexico.*

25. *FLL Article 365.*

26. *FLL Article 366.*

27. *In a letter to the U.S. National Administrative Office (February 3, 1995) in response to a letter from the U.S. National Administrative Office (January 9, 1995) requesting publicly available information related to Submissions No. 940003 and 940004 (on file with the U.S. National Administrative Office), the Mexican NAO stated that in a 1979 decision, the Supreme Court of Mexico had determined that the representation election was the most effective way of determining union representation in these cases. In a subsequent letter dated March 27, 1998, the Mexican NAO provided information on later decisions by the Mexican Supreme Court indicating that a majority of all workers in the establishment, not simply those voting, is necessary to obtain collective bargaining representation. .*

28. *U.S. Department of Labor, Bureau of International Labor Affairs, National Administrative Office, Public Report of Review of Submission No. 9601, (1997) pp. 25-26.*

29. *International Labour Conference, 81st Session, Report III (Part 4B), Freedom of Association and Collective Bargaining (Geneva, International Labour Office, 1994), par.97.*

30. *Ibid., par. 98.*

31. *Ibid.*, par. 104.
32. *Ibid.*, par. 231-232.
33. NAO Submission No. 9702, p. 8.
34. *Ibid.*, p. 12.
35. *Ibid.*, p. 18.
36. Public Hearing on Submission No. 9702, pp. 76, 89, 91, 93-94, 98-100, 101-102, 162-163.
37. Public Hearing on Submission No. 9702, pp. 49-50, 83-84, 108-110.
38. In Mexico this term usually refers to high level administrative employees.
39. Notwithstanding the law, Mr. Ho Young Lee, the President of Han Young, stated in his letter of February 12, 1998, to the U.S. NAO, that he thought workers hired after that date should be allowed to vote. (Letter on file with the U.S. NAO.)
40. Public Hearing on Submission No. 9702, pp. 108-110.
41. Calbreath, Dean, "Workers Rebel at Maquiladora," *The San Diego Tribune*, 7 October, 1997, p. 1; Nagel, John, "Fraud Charged in Historic' Vote at Maquiladora Plant in Mexico," *Daily Labor Report*, Bureau of National Affairs, 8 October, 1997, pp. A6-A7; Bacon, David, "Independent Union Defeats Old Guard at Tijuana Plant," *San Francisco Chronicle*, 8 October, 1997, pp. A8-A10.
42. Conciliation and Arbitration Board, Tijuana, Baja California, Judgement on Labor Proceeding No. 1722/97-1, November 10, 1997, (on file with the U.S. National Administrative Office).
43. Letter from the National Administrative Office of Mexico (February 3, 1995).
44. Letter from the National Administrative Office of Mexico (February 3, 1995).
45. At the September 25 hearing, the CAB President dismissed the argument of the CROC challenging the credentials of STIMAHCS to represent workers in Baja California on this ground, citing: "Article 374, Paragraph III of the Federal Labor Law, which establishes that legally constituted unions shall have legal personality before all the authorities"
46. FLL Article 368 states: "[r]egistration of the trade union and its board of directors shall take effect for the purposes of transactions with all authorities once it has been confirmed by the Ministry of Labor and Social Welfare or by the local Conciliation and Arbitration Boards."
47. Memorandum from the National Administrative Office of Mexico to the U.S. National

Administrative Office (December 19, 1997), Subject: Han Young (on file with the U.S. National Administrative Office).

48. Agreement dated December 16, 1997, signed by representatives of STIMAHCS, CROC, the Secretariat of Labor and Social Welfare, and the State Government (on file with the U.S. National Administrative Office).

49. In a letter dated March 30, 1998, the Mexican NAO stated that the formal notification was made on March 2. The NAO stated further that it was the responsibility of STIMAHCS to request that the notification be made. FLL Article 890, however, states that the CAB will notify the parties to a dispute immediately of its decision.

50. Public Hearing on Submission No. 9702, p. 35.

51. The agreement is actually for an indefinite period, but FLL Article 399 allows for the renegotiation of an indefinite period agreement after two years from the original signing at the request of one of the parties.

52. Public Hearing on Submission No. 9702, pp. 52-53, 124-125.

53. See Middlebrook, Kevin J., and Quintero, Cirila Ramirez, Conflict Resolution in the Mexican Labor Courts: An Examination of Local Conciliation and Arbitration Boards in Chihuahua and Tamaulipas, prepared for the National Administrative Office, U.S. Department of Labor, (1996).

54. On April 17, 1998, the Mexican NAO asserted that the CABs are not obligated to make an immediate notification to the parties of their decisions in these types of cases. The Mexican NAO cited FLL Article 742 which lists the types of decisions that require immediate notification, and which does not include the certification of elections. However, the Mexican NAO did not support this argument with cases or interpretations by the Mexican courts and could not explain why the plain meaning of FLL 890 does not apply.

55. The sudden resignation of the President of the Tijuana CAB in the instant submission, ostensibly at the request of the Governor of Baja California, who allegedly responded to pressure from the CROC, raises troubling questions as to the workings of the tribunal, especially following the subsequent decision of the CAB nullifying the outcome of the first representation election. This latter decision essentially reversed the CAB's earlier decision allowing the election to proceed without providing an explanation and, apparently, without reviewing new information or evidence. The NAO cannot confirm these allegations. However, the NAO's concern with respect to this issue stems in part from a broader and ongoing consideration of the various submissions presented before the U.S. NAO which raised issues concerning the operation of the CABs.

56. The enforcement of Mexican labor law on freedom of association by labor tribunals was raised in NAO Submissions 940001, 940002, 940003, and 940004. Submissions 9601, 9602, and 9703 (currently under review), as well as the instant submission, specifically raised the issue of Mexico's compliance with its obligations under NAALC Article 5(4) on the impartiality of its

labor tribunals.

57. *For example, the failure to submit duplicate copies of required documentation.*

58. *U.S. Department of Labor, Bureau of International Labor Affairs, U.S. National Administrative Office, Report on Ministerial Consultations on NAO Submission #940003 (1996).*

59. *Ibid.*

60. *At a seminar held on September 13-14, 1995, in Mexico City, a Mexican government panelist suggested that workers resolve this problem by affiliating to an already existing union organization and then seeking collective bargaining representation rights. This was the approach of the Han Young workers when they sought to be represented by STIMAHCS.*

61. *For example, see the discussions on this matter that took place at the seminar held in Mexico City on September 13-14 and a subsequent seminar held in San Antonio, San Antonio, Texas, on November 8-9, 1995.*

62. *See Middlebrook, (ed.), Unions, Workers, and the State in Mexico. See also Cook and Katz, (eds.), Regional Integration and Industrial Relations in North America.*

63. *Report on Ministerial Consultations on NAO Submission #940003, pp. 9-10. In this submission, workers' efforts to register an independent union had been unsuccessful, though they had pursued a number of available remedies through the local CAB and the courts. It was suggested, by Mexican authorities, that by joining with a union organization that already possessed registration, workers would avoid this obstacle and could then proceed directly to seeking representation rights.*

64. *ILO, Freedom of Association and Collective Bargaining, par. 73.*

65. *Ibid., par. 74.*

66. *Ibid., par. 75.*

67. *Ibid., par. 76.*

68. *Ibid., par. 97.*

69. *International Labour Office, Governing Body, 300th Report of the Committee of Freedom of Association, Case No. 1844 (Mexico), 1995, Paragraph 241.*

70. *U.S. Department of Labor, Bureau of International Labor Affairs, U.S. National Administrative Office, Follow-up Report: NAO Submission #940003 (December 4, 1996).*

71. *Poder Ejecutivo Federal, Secretaría del Trabajo y Previsión Social, Programa de Empleo, Capacitación y Defensa de los Derechos Laborales: 1995-2000, trans. U.S. Department of State,*

(Mexico, 1996).

72. *Ibid.*, p. 78.

73. *Ibid.*, p. 84.

74. *Ibid.*

75. *Ibid.*, p. 85.

76. *Ibid.*, pp. 89-90. *It should be noted that the Program is targeted toward improving those elements of labor and industrial relations administration and adjudication that are within the jurisdiction of the Federal Government. Under Mexico's system of labor law, one national law, the FLL, governs labor matters in the private sector, whereas the administration and implementation of the law is shared between the Federal Government and the state authorities. Local CABs are under the jurisdiction of the states and adjudicate significantly more cases than do the Federal CABs..*

77. *The first being a union organized at the Maxi-Switch Company in Cananea, Sonora. NAO Submission No. 9602 raised the issue of the denial of registration to this union by the local CAB. The CAB later reversed its decision and granted registration to the union, prompting the submitters to withdraw the submission. A copy of the submission is available from the U.S. NAO.*

78. *According to the National Institute for Statistics, Geography, and Information (Instituto Nacional de Estadística, Geografía e Informática), as of December, 1997, there were 2,867 maquiladoras employing 938,438 workers in operation in Mexico. Of these, 954 plants employing 199,131 workers were located in Baja California.*