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**THE NORTH AMERICAN AGREEMENT  
ON LABOR COOPERATION:**

**A TENUOUS LINK BETWEEN TRADE &  
LABOUR STANDARDS?**

by

Nikola Emmanuel Milanovic

A thesis submitted in conformity with  
the requirements for the degree of  
Master of Laws Graduate Department  
of Law University of Toronto

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## **Thesis Abstract**

Master of Laws

Graduate Department of Law

University of Toronto

### **The North American Agreement on Labor Cooperation: A Tenuous Link between Trade & Labour Standards?**

by Nikola Emmanuel Milanovic 1997

This thesis is an investigation into the usefulness of the North American Agreement on Labor Cooperation (NAALC) in promoting labour standards for workers. The author analyzes the relationship between free trade and international labour standards and demonstrates that an intersection exists between the theoretical and practical aspects of these matters. The connection between these subjects points the way to advancing labour standards within free trade arrangements. A review of NAALC indicates serious weaknesses in the formal ability of the agreement to promote labour standards in the context of regional free trade. However, regardless of its formal defects, the labour side agreement does have the potential to enhance labour standards within its free trade zone. Despite the serious flaws of the agreement, the NAALC has the potential to deliver concrete improvements for workers and improve labour standards reform in North America.

## ACKNOWLEDGMENTS

I wish to express my sincere appreciation to Professor Brian A. Langille for his assistance in the preparation of this manuscript. Although I am ultimately accountable for any errors or omissions still present in this work, Professor Langille is largely responsible for improving the quality of this thesis. My thanks are also extended to Professor Michael Trebilcock for his stimulating class which proved helpful during the early phase of this undertaking. In addition, *special thanks* to the Faculty of Law for extending financial assistance to me so that I could attend the University of Toronto and complete this dissertation. Thanks also to all the other members of the law school for their valuable input and friendship. Finally, I would like to thank Terry Collingsworth, Pharis Harvey and their families as well as everyone else at the International Labor Rights Fund for the warmth which they showed me during my internship with them in Washington DC. My experience with all of you significantly enhanced my educational experience as well as the caliber of this paper.

On a more personal note, I wish to express my genuine and heartfelt love to my family – Nick and Irene, David, Anyu, Apu, Ildiko, Les and Calla, Sandor and Moira, Audrey, Aaron, Andrew, Aiden, Sandor and Riley. Without their life long encouragement and support I would not have been able to return to university to complete this degree. Last and certainly not least, I also want to thank Catherine Decarie for her patience, love, support and assistance throughout this project.

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## *I n t r o d u c t i o n*

The linkage of trade relations to international labour standards protection in North America has caused a debate between the critics of free trade. In particular, critics of free trade -- referred to as fair traders because they call for a social dimension to be added to free trade arrangements that would make trade 'fair' among nations -- have engaged in a debate amongst themselves concerning the utility of this approach in North America. Fair traders have disagreed about the usefulness of the *North American Agreement on Labor Cooperation* (NAALC) in its attempt to link the passage of the *North American Free Trade Agreement* NAFTA to labour standards issues on this continent. Generally, fair traders have agreed that the introduction of regional free trade without international social obligations on states could lead to a negative downward spiral of labour law deregulation.

Fair traders argue, *inter alia*, that the globe is marked by areas of lax employment regulation. The diversity of labour law regulation and enforcement levels present in the global market could encourage multi-national corporations (MNCs) to shift either current or new investment to regions with sparse social regulation. Nations without barriers to trade and investment

remove concrete economic incentives to produce goods and services in countries with relatively high levels of social regulation. Corporations, that shift investment in this way, aim to pass on a part of the labour savings created by deregulation (i.e., eliminating the costs associated with unionization) to consumers in the form of reduced prices thereby enhancing their viability. Consequently, fair traders argue that in a highly competitive market, states with high levels of social regulation must adapt to that market. Thus it is in the interest of governments to lower their social standards, including labour law protections, in order to secure the employment gains of additional capital investment created by deregulation. If even only one nation engages in labour deregulation, other states have a stronger incentive to imitate this behavior. Ironically, this job creation strategy may be mutually destructive for all nations<sup>1</sup> because each state will 'harmonize its labour standards downward' to the lowest common denominator of regulation without necessarily attracting a greater proportion of employment from investment. In other words, no one state will be able to induce a shift of investment to its jurisdiction because every other government will engage in the same activity. After an initial round of labour law deregulation, national legal regimes, despite being harmonized

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<sup>1</sup> Brian Langille, 'General Reflections on the Relationship of Trade and Labour (Or: Fair Trade is Free Trade's Destiny)', in J. Bhagwati and R. Hudec, Eds. Harmonization and Free Trade, (Boston: M.I.T Press, 1996) at 253-254.

downward, will continue to remain somewhat unique. As a result, new cycles of de-regulation are encouraged that increase economic benefits for domestic businesses and MNCs while individual workers suffer intensified levels of employment insecurity.

Nations that view themselves as being vulnerable in this worldwide bidding contest for jobs, have begun to create international institutions within preferential trading pacts that ostensibly address this imbalance of international investment power. In particular, the signatories to the *North American Free Trade Agreement* (NAFTA), not unlike their counterparts<sup>2</sup> in the European Union, have been moved to contain the race of states to the regulatory bottom.<sup>3</sup> In the United States, Governor Clinton (as he was then) responded to political pressure created by the Bush administration to clarify his position regarding NAFTA's passage. Clinton laid out his strategy toward free trade in an election speech in 1992. Although he favored NAFTA's passage, he noted that

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<sup>2</sup> Although NAFTA nations, like members of the European Union (EU), have attempted to address these issues, they have done so in very different ways. The EU has constituted key institutions that function in a governmental like manner for its members. These institutions consist of the Commission, Council, Parliament and the Court of Justice and are not, generally speaking, similar to the more limited institutions of the North American Agreement on Labour Cooperation.

<sup>3</sup> Lance Compa, 'Going Multilateral: the Evolution of U.S. Hemispheric Labor Rights Policy Under GSP and NAFTA' (1995) 10 Connecticut Journal of International Law 337 at 338. Also see Jorge F. Perez-Lopez & Eric Griego, 'The Labor Dimension of the NAFTA: Reflections of the First Year' (1995) 12 Arizona Journal of International and Comparative Law 473 at 475 for an account of various U.S. labour unions' fears of free trade and a review of each concern in light of the implementation of NAFTA and its side agreements.



there was 'some reason to fear that people in this world and in our country...would take advantage of any provision insuring more investment opportunities to look for lower wages without regard to the human impact of their decisions.'<sup>4</sup> The future President explained that he sought the implementation of parallel accords, in conjunction with NAFTA's passage, to protect labour and environmental standards. In this way Clinton hoped to appeal to elements in the electorate and his Party that favored free trade as well as those who were against it.<sup>5</sup> Whether the Clinton Administration usefully protected labour standards with the passage of NAALC is at the center of the debate between fair traders. Although the side agreement is not a panacea, this thesis argues that NAALC is a useful tool for protecting and improving labour standards in North America.

A group of fair traders has criticized the ability of NAALC to provide protection for workers in the context of regional free trade. NAALC critics argue that the labour side agreement is not an effective tool for protecting or improving labour standards. On one hand, critics argue that the agreement is an inherently weak instrument that cannot produce concrete results for

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<sup>4</sup> Bill Clinton, 'Expanding Trade and Creating American Jobs' North Carolina State University (Raleigh, North Carolina: Speech Delivered to North Carolina State University, October 4, 1992) quoted in Jerome Levinson, 'NAFTA's Labor Side Agreement: Lessons From the First Three Years' (Washington DC: Institute for Policy Studies & International Labor Rights Fund, 1996) at 7.

<sup>5</sup> Ibid.

workers. These critics have focused on the formal legal ability of the agreements to better the lives of workers involved in NAALC cases and throughout North America. On the other hand, critics note that the terms of the accord cannot combat a regulatory race of governments to the bottom. For a number of reasons related to the design of the agreement, critics have argued that the NAALC is not structured in a way that could address the downward harmonization of labour standards in the NAFTA countries. Finally, they note that the outcome of the litigation conducted under the accord verifies their arguments that the agreement does not promote or advance the rights of workers. Critics believe that these cases have not resulted in improved conditions for workers in North America.

In contrast to NAALC critics, the agreement's supporters argue that this view is much too pessimistic. NAALC optimists view the passage of the labour side agreement as a means for protecting and improving labour standards in Canada, Mexico and the United States. Optimists argue that the agreement's informal, political use can create opportunities for labour advocates to network internationally. They measure the effectiveness of the NAALC by the opportunity it provides to workers to engage in labour standards reform. NAALC optimists also gauge the agreement's success by the increased level of enforcement of labour standards resulting from the

application of the accord. Unlike critics of the agreement, NAALC optimists believe that the labour side accord has been a useful instrument for workers because its use has led to some benefits for workers as well as inspiring meaningful labour law reform activity.

This thesis will explore and analyze the validity of these opposing views. Before directly examining the dispute between NAALC critics and optimists, the first chapter investigates the theoretical and practical links between free trade and fair trade. This chapter sets out and reviews several key free trade principles to determine the underlying connections between trade and labour standards. Next, the chapter goes on to investigate the presence of international labour standards (ILS) in the modern world trade regime. It briefly reviews the history of labour standards in the trade regime and explores the convergence of free trade doctrine with ILS. Finally, the chapter suggests ways in which the free trade link to labour standards can be promoted by governments as well as non governmental organizations. This chapter argues that free trade doctrine does accept some important fair trade concepts. It also suggests that free trade doctrine accepts the intervention of states in the labour market in order to establish ILS within the trade regime. Moreover, the chapter maintains that the international trade regime has already accepted the link between labour standards and trade in practice. Although the link between

international trade and labour standards does exist, this chapter notes that definition of that link cannot be furthered solely on a principled basis. This chapter ends by noting that trade doctrine and practice suggest that the further substantiation of a trade labour link can be promoted through the use of government institutions that promote a connection between free and fair trade.

While the first chapter establishes the theoretical and practical viability of a trade labour link, the second chapter explores NAALC's ability to effectively promote this linkage. This chapter describes the processes and substantive guarantees of NAALC by reviewing its terms and institutions as well as the case-law generated by the agreement. As well, this chapter presents the view of NAALC critics that the side agreement is a useless document. This chapter argues that the critique of NAALC – that it suffers formal legal weaknesses in its terms – is correct. Although NAALC critics accurately describe the agreement's formal shortcomings, the failure of the agreement to actually provide binding and effective relief to workers does not necessarily mean the accord is useless.

The third chapter presents the view of NAALC optimists -- that the labour side deal is an effective tool for promoting the interests of workers. This chapter re-evaluates the experience of labour advocates under the agreement and points to the benefits of NAALC litigation. In addition, the

chapter reviews the activities pursuant to NAALC and underscore the utility of participating in these undertakings. Although much of the criticism of NAALC's formal weaknesses may not be gainsaid, this chapter argues that the informal, political use of NAALC does offer a real opportunity to improve labour standards in North America. In particular, the side agreement has helped to redefine labour activism by, among other things, requiring international networking. The communication and cooperation of groups using the side accord has created a meaningful discussion that justifies the ILS and trade link as well as actually providing benefits to workers in North America. This chapter concludes by observing that NAALC critics have been overly harsh of the agreement because it is now slowly beginning to improve the lives of workers. In addition this chapter draws attention to the fact that the critics overlook the intangible values of NAALC. The side accord is valuable in an of itself because it promotes labour rights that normatively can be regarded as intrinsically beneficial. As well, the international discussion fostered by the agreement promotes a meaningful debate regarding the trade/labour link. At the end of the day, the side agreement provides a forum to agitate for labour law reform and thereby creates another avenue for the upward harmonization of labour standards in North America.

Before this paper can reach these conclusions it begins by considering the linkage between international labour standards and trade relations. This topic is at the heart of the next section of this thesis.

## Chapter 1

*When the premises were once established that the growing oneness of the world from a commercial and sanitary point of view demanded international cooperation, it was not difficult to argue the social and moral questions must seek the same solutions."*

Prominent trade academics, among others, have noted that the growth in demands aimed at correcting perceived deformities in our trading relationships squarely challenges the feasibility of an open trading regime. Repeated 'level playing field,' 'harmonization' and 'fair trade,' claims are made that seek to alter the market based orientation of free trade. Trade theorists committed to free trade have noted that it is impossible to harmonize every aspect of our domestic economy. Almost any difference in another nation's policy or economy is illegitimate or inappropriate by fair traders' standards.<sup>7</sup> As a result, fair trade claims conceivably extend to each and every policy or institution that discloses some type of 'unfair' advantage in trade. In turn, these trade 'differences' imply the absence of a level playing field between

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<sup>7</sup> John Culbert Faires, The Rise of Internationalism, (New York: W.D. Gray, 1915) at 52.

<sup>8</sup> Jagdish N. Bhagwati, 'Fair Trade, Reciprocity, and Harmonization: the novel challenge to the theory and policy of free trade' in Dominick Salvatore, Protectionism and World Welfare, (Cambridge: Cambridge University Press, 1993) at 18.

trading nations and this situation often triggers a demand for the harmonization of suspect variances. Alternatively, it is argued that intolerable differences in trade should be neutralized through the use of trade sanctions.<sup>8</sup> Essentially, fair traders concentrate on the role of the state in altering the market determined advantages that nations bring to trade. In doing so, fair traders lay down a challenge that is difficult for free traders to fathom. In a bid to establish acceptable *sources* of comparative advantage for nations, fair traders seem to require the examination of all government policies that shape market determined trade advantages. This challenge to free trade seems to be a fundamental threat to the liberal trading order. Determining fair or acceptable means of creating trade advantages is, at best, a precarious venture. Fair trade challenges the underlying tenets of free trade and stretches free traders' practicable ability to maintain an open trading regime.

Perhaps the most contentious dispute within this debate relates to the controversy that surrounds international labour standards (ILS).<sup>9</sup> As we have seen, critics of trade liberalization assert that free trade 'unfairly' exposes domestic labour standards to competition from nations that expose their workers to poor working conditions. Many (developing) nations employ weak

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<sup>8</sup> Bhagwati, *supra*, note 7 at 38.

<sup>9</sup> Robert Howse and Michael J. Trebilcock, 'The Fair Trade-Free Trade Debate: Trade, Labor, and the Environment' (1996) 16 International Review of Law and Economics 61.



labour standards or do not enforce standards effectively compared to the domestic application of laws.<sup>10</sup> As Multi-National Corporations (MNCs) begin to invest where wages and working conditions are relatively cheap, workers in other countries with higher social standards are beginning to feel pressured into accepting lower labour standards. The situation faced by many workers is simple: downgrade employment conditions or possibly face unemployment.<sup>11</sup> Indeed, the fears of workers are being exacerbated in developed countries over the last quarter century due to several economic changes. Fueling demands for ILS are a high 9.3 % average rate of unemployment in OECD-Europe and a dramatic 20 % decline in real wages for unskilled workers in the United States.<sup>12</sup> Moreover, both of these economic changes occurred roughly at the

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<sup>10</sup> Brian A. Langille, 'Competing Conceptions of Regulatory Competition in Debates on Trade Liberalization and Labour Standards' in Bratton, McCahery & Picciotto, International Regulatory Competition and Coordination - Perspectives on Economic Regulation in Europe and the United States, (Oxford: Oxford University Press, 1996) at 479.

<sup>11</sup> See William E. Sprigs & James Stanford, 'Economists' Assessments of the Likely Employment and Wage Effects of the North American Free Trade Agreement,' (1993) 10 Hofstra Law Journal 495 at 527; David A. Dilts & William H. Walker, 'Labour Standards and North American Free Trade: Economic Dynamics or Dilemmas?' (1993) 43 Labor Law Journal 445.

<sup>12</sup> The LDC share of world manufacturing employment grew from 40 % in 1960 to 53 % in 1986 . As well, U.S. imports from LDCs increased from 0.4 % in 1970 to 2.5% of GNP in 1990 whereas in the European Union these same imports grew from 0.5% to 2.1% of GNP over the same period. See Richard B. Freeman, 'Are Your Wages Set in Beijing' (1995) 9 Journal of Economic Perspectives 15 at 18; Also see Michael J. Trebilcock and Robert Howse, Maastricht Lecture in Law and Economics: Trade Liberalization and Regulatory Diversity: Reconciling Competitive Markets with Competitive Politics, (Toronto: University of Toronto Faculty of Law, 1997) at 18; Jeffrey Sachs, 'Globalization and Employment,' International Labor Organization: Public Lecture, (Geneva: ILO, 1996) at 2-5.

same time, extending from the early 1980s to the early 1990s. The increasing share of world manufacturing employment located in Less Developed Countries (LDCs), coupled with their increasing share of exports to developing countries, appears to verify workers' concerns relating to free trade.

This pressure to adapt to a shift in capital investment and production has also meant that governments will compete for capital investment through weakening labour market regulation. This strategy may not ultimately attract a greater share of capital to nations engaging in this practice. The collective approach of other states may be to similarly lower their standards. As a result, once all states have lowered their labour standards there will no longer be any additional incentive to redirect capital investment. Workers who live in nations that do subscribe to a policy of deregulation face the elimination of long standing workplace protection.<sup>13</sup> Consequently, even though 'fairness' is difficult to define in any context, workers' advocates are calling for the implementation of some set of internationally recognised labour standards in trade agreements. Formal labour standards that do not effectively promote basic labour rights, such as freedom of association or the right to strike, and

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<sup>13</sup> See Langille, *supra*, note 10 and Brian A. Langille, 'General Reflections on the Relationship of Trade and Labour (Or: Fair Trade is Free Trade's Destiny)' in Jagdish Bhagwati and Robert Hudec (eds.), Fair Trade And Harmonization: Prerequisites for Free Trade Vol.2 (Cambridge, Mass.: MIT Press, 1996) at 253-254 for a more detailed explanation of the prisoner's dilemma hinted at above.

labour rights regimes without effective enforcement mechanisms -- implicitly subsidises foreign producers. Such subsidies create unfair trade advantages for nations and an incentive for some domestic producers to relocate production or investment to these sparsely regulated countries. It is this uncomplicated connection between trade and labour standards made by trade unions, their members and some states that is resisted by many free traders.

In rejecting the link between free trade and labour standards, free traders have deployed a number of arguments. Free traders have attacked the motive of fair traders in linking these issues as a desire to protect domestic employment from competition. A number of LDCs and non-governmental organisations have repeatedly rejected this linkage as an indirect attack upon the competitiveness of developed nations.<sup>14</sup> Specifically, free traders tend to resist the notion that level playing field claims are normatively coherent within free trade theory because they seek to destroy difference between trading nations which is the very basis of comparative advantage. Moreover, although it is a non-economic perspective, free traders argue that these claims interfere

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<sup>14</sup> The European Employer's Association (UNICE), the Association of Southeast Asian Nations (ASEAN), which includes Brunei, Indonesia, Malaysia, the Philippines, Singapore, Burma and Thailand, and others such as Columbia, Nigeria, South Korea and Hong Kong have stated that links to labour standards are an attempt to eliminate the comparative advantage of developing nations. See Brian A. Langille, Canada's Unratified Core ILO Conventions - A New Look, (unpublished, 1996) at 3 and Lance Compa, *Labor Rights and Labor Standards in International Trade*, (1993) 25 Law & Policy in International Business at 187.

with (legitimate) domestic political decisions -- even where the effects of these policies are of a purely local nature.<sup>15</sup> Alternatively, U.S. advocates were portrayed as irrational moralists who would sacrifice global economic welfare and the development needs of LDCs for elusive moral goals.<sup>16</sup> As a result of this intractable dispute, any connection between international labour standards and the world trading regime remains controversial. It is the sharp divide between the camps in this debate that highlights the difficulty of implementing trade agreements that promote U.S.

Commonly, participants to any debate highlight the superiority of their position by exposing the fallacies of the position taken by their opponents. However, in the current debate, the participants tend to talk past each other while they avoid understanding that the chasm between them is not a 'winnable' debate.<sup>17</sup> A tendency to see the same issue from very different

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<sup>15</sup> Howse & Trebilcock, *supra*, note 9 at 72, and see Trebilcock, *infra*, note 37 at 16-17.

<sup>16</sup> Howse & Trebilcock, *supra*, note 9 at 61.

<sup>17</sup> See Langille, *supra*, note 15 at 485-481. The following is an example of the divergence of views between free traders and fair traders on the topic of social dumping or race to the bottom scenarios. A free trader notes the issue is one of perspective:

Such countries are said to be engaged in the practice of 'social dumping' as their lower labour costs enable them to undercut countries in economic competition that do provide proper social protection. While stated as a matter of high principle, this doctrine actually represents little more than an attempt to justify protectionism under the guise of concern for workers' rights. Social dumping rests in the eye of the higher-cost beholder: the charge levelled exclusively at countries that succeed in

perspectives marks the debate between free and fair traders. For example, in discussing the trade competition among nation-states, free traders are apt to see competition in beneficial terms. On the other hand, fair traders view the same phenomenon as a race between states to the lowest regulatory level permissible in a global economy. Of course, the latter situation is not a desirable result for workers being safeguarded by these regulations. This dilemma is not resolvable as long as the discussion attempts to demonstrate that the issues at hand are definable from the internally consistent world view of the fair trade or free trade proponents. It has been suggested -- at least as this debate pertains to collective action problems of regulation -- that we need to choose between the competing conceptions used in this debate. This means that we must *decide* which way to comprehend the problems that globalization and international trade issues create for all of us. However, before any determination of this question can be made -- one must accept that a problem exists.<sup>18</sup>

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attracting jobs and investment on the basis of having an advantage in unit labour costs.

See B. Steil, 'Labour and Free Trade: 'Social Correctness' Is the New Protectionism' (1994) Jan./Feb. Foreign Affairs 14. Langille offers a detailed description of 'double aspect picture' evident in this debate concerning regulation, *infra* at 486-487.

<sup>18</sup> Langille, *supra*, note 10 at 489.

This chapter focuses on broadening our understanding of the basic disputes relating to the trade/ILS debate. Free traders espouse the view that 'level playing field' arguments made by fair traders are incoherent trade claims. This investigation begins with a moderately skeptical approach to this more 'radical' free trade view and argues that it is unfounded. This segment of the thesis sets out and reviews several anti-fair trade claims that aim to decouple the trade/labour linkage increasingly associated with free trade agreements. Second, it notes the role of regulation in the free trade/fair trade debate and explores the apparent difficulty connected with regulation in the modern world trading system. Finally, an examination of the convergence between ILS and free trade approaches is conducted. In an effort to advance the connection between trade and labour standards in practice, a discussion of the intellectual difficulties of the approaches used in the debate is undertaken.

Looking ahead to the account presented below, this chapter argues that:

- 1) Free trade doctrine does tolerate some fair trade notions. In certain circumstances, the theoretical underpinnings of free trade theory *accept* and give logical coherence to fair trade desires to use government regulation to create 'level playing fields' by harmonizing or neutralizing foreign government policies. In this connection, free trade doctrine accepts the role of the state in regulating trade between nations, on a number of rationales, and allows the use of state intervention in the labour market as well as other areas of the economy.
- 2) While free traders outwardly denounce state regulation of trade, free trade policy has necessarily used regulation to advance some free trade goals. Moreover, the world trade regime has favoured

regulating ILS in the face of arguments that the international market should determine labour standards. In other words, free trade policy has viewed labour market regulation in trade agreements in positive terms.

- 3) ILS, unlike free trade doctrine, relies upon a human right approach to the market place. Although this rights based approach does not necessarily conflict with the utilitarian approach of free trade in all circumstances, an intellectually coherent method for distinguishing legitimate and illegitimate ILS trade-related claims is difficult to establish. The ability to expand the present level of labour market regulation likely rests upon our ability to harness state political capabilities to implement safe avenues of discussion, negotiation, cooperation and agreement. This may move the debate and policy action of states forward in this regard.

First, this chapter reviews the key tenets of international trade theory. The purpose of this section is to demonstrate many of the primary values espoused by trade doctrine. Next, this chapter examines the basis of international trade policy as it exists in our multilateral trade agreements. This section sketches a rudimentary picture of how trade doctrine has been converted into actual trade policy and illustrates the central role of regulation in the modern world trade regime. In addition, this chapter explores the development of ILS and indicates that both consensus and disagreement remains between free and fair traders in this context due to the different approaches utilized by these participants. Finally, this chapter will explain how this (re-framed) debate can be moved to actually promote effective ILS in trade agreements. In sum, by exploring the underlying theoretical and practical

aspects of this debate, this chapter's goal is to demonstrate ways in which governments and other organizations can advance the link between effective ILS and international trade agreements.

### **A. The Basics of International Trade Theory**

Modern international trade theory was established as an antidote to the prevailing trade wisdom of the late 1700s. Until that time, public policy was devoted to maintaining a system of state sponsored control of trade that aimed to promote several defined goals: 1) accumulating precious bullion; 2) promoting economic growth; 3) maintaining a favorable balance of trade with other nations; 4) protecting domestic industry; 5) maximizing employment; and 6) ultimately augmenting the power of the state.<sup>19</sup> This complex set of policy goals was to be achieved by the promotion of exports, which were viewed in positive terms, and by simultaneously taxing foreign goods -- as importing items was thought to be a wasteful activity. Through the use of a number of economic and nationalistic justifications, a system of controlled trade was developed. The logic of trade for mercantilists motivated them to establish a favorable balance of trade that would produce an inflow of currency

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<sup>19</sup> Douglas A. Irwin, Against the Tide: An Intellectual History of Free Trade, (Princeton, New Jersey: Princeton University Press, 1996) at 26.



into the nation. As well, they believed that the manipulation of imports through the use of tariff barriers would create a proper consumption of commodities which was thought to generate economic growth in domestic areas of production.<sup>29</sup> This system of trade rested on the presumption that the state should actively direct all trade through the use of tariff policies that would remedy the perceived misalignment of public and private interests in the economy.

### **I) Absolute Advantage in Trade**

Although the rise of free trade thought predated Adam Smith, his contribution to the thinking surrounding trade doctrine and policy was monumental in that he presented a new economic logic - a system for analyzing economics that laid bare the fallacy of mercantilist thought. Among other things, Smith reasoned that the entire basis for mercantilist protectionism was erroneous. He related his insights in a common sense manner that placed a considerable value on specialization and the international division of labour.

Smith noted:

What is prudence in the conduct of every private family can scarcely be folly in that of a great kingdom. If a country can supply us with a

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<sup>29</sup> Ibid at 34.

commodity cheaper than we can make, better buy it of them with some of the produce of our own industry.<sup>21</sup>

He espoused the proposition that consumers should purchase products that were created in a relatively more efficient manner compared to all other things being equal, any other (domestic) product. Consumers that specialized in producing goods for others, and perhaps a limited amount for themselves, could purchase those goods from persons who concentrated in the efficient production of other desired goods. Individuals could purchase desired goods with the value they created from their own production. Free trade, by encouraging the gains available through specialization, could remedy the difficulty of maintaining a self-sufficient society. Free trade was desirable because domestic production of all the goods required by a society was not viewed as a feasible option for any country.

The international division of labour, caused by trade with other nations, improved production and fueled the productivity of domestic labour and capital thereby improving the lot of individual citizens.<sup>22</sup> Smith understood that the continual refinement in the division of labour caused by trade stimulated productivity improvements, so that a given amount of capital and

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<sup>21</sup> Adam Smith, The Wealth of Nations 4:4 (Modern Library Edition, 1937), as cited in Michael J. Trebilcock & Robert Howse, The Regulation of International Trade, (New York: Routledge, 1995) at 2.

<sup>22</sup> This section heavily draws on Irwin, *supra*, note 19 at 77 - 80.

labour could produce more output with trade than without trade. His theory would suggest that similar specialization would provide gains from trade in international markets as the continual division of labour is only limited by the extent of the market available to those goods or services.<sup>23</sup> Consequently, as free trade with nations was adopted throughout the world, the power to increase output efficiently (enabled by the division of labour) would be extended even further by free trade than was previously possible. This process was dynamic and would help facilitate the exchange of knowledge pertaining to production and newly efficient business practices.<sup>24</sup>

Not unlike the classical economists he inspired, Smith judged the value of trade in terms of the net welfare it brought to a nation. If a trade policy would tend to 'increase the general industry of the society, or to give it the most advantageous direction' then its implementation would be justified.<sup>25</sup> Free trade rested on the crucial principle that competitive markets, not governments, provided the best practical mechanism for allocating resources to profitable undertakings. Smith noted:

If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage....It is certainly not employed to the greatest

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<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

advantage, when it is thus directed towards an object which it can buy cheaper than it can make. The value of its annual produce is certainly more or less diminished, when it is thus turned away from producing commodities evidently of more value than the commodity which it is directed to produce. According to this supposition, the commodity could be purchased from foreign countries cheaper than it can be made at home. It could, therefore, have been purchased with a part only of the commodities, or, what is the same thing, with a part only of the price of the commodities, which the industry employed by an equal capital, would have produced at home had it been left to follow its natural course. The industry of the country, therefore, is thus turned away from a more, to a less advantageous employment, and the exchangeable value of its annual produce, instead of being increased, according to the intention of the lawgiver, must be diminished by every such regulation.<sup>26</sup>

Smith recognized that the trade off (or opportunity cost) between alternative economic activities affected the net welfare of a society. Protective tariffs would interfere with this relationship and therefore reduce the hallmarks of net welfare - national income and growth. Smith's teachings called for *unilateral* trade liberalization of a nation's tariff regime irrespective of the trade policies of one's trading partners.<sup>27</sup>

## **II) Comparative Advantage in Trade**

Classic free trade theory, as presented by Smith, relied on efficiency to promote open trade. This approach was later modified by David Ricardo who demonstrated that all nations, regardless of their particular trading advantages,

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<sup>26</sup> Adam Smith, The Wealth of Nations as quoted in Irwin, *supra*, note 19 at 79.

<sup>27</sup> Trebilcock & Howse, *supra*, note 21 at 2.

could benefit from free trade given certain conditions. Regardless of the absolute advantage of any country in any good, trade could be a useful endeavor if the nations that traded possessed a *comparative* advantage in the products traded. Trebilcock and Howse explain Ricardo's insight in the following terms:

In his example, England could produce a given quality of cloth with the labour of 100 men. It could also produce a given quantity of wine with the labour of 120 men. Portugal, in turn, could produce the same quality of cloth with the labour of 90 men and the same quantity of wine with the labour of 80 men. Thus, Portugal enjoyed an absolute advantage over England with respect to the production of both cloth and wine i.e. it could produce a given quantity of cloth and wine with fewer labour inputs than England. However, Ricardo argued that trade was still mutually advantageous, assuming full employment in both countries: when England exported to Portugal cloth produced by the labour of 100 men in exchange for wine produced by 80 Portuguese, she imported wine that would have required the labour of 120 Englishmen to produce. As for Portugal, she gained by her 80 men's labour cloth that it would have taken 90 of her labourers to produce. Both countries would be rendered better off through trade.<sup>28</sup>

Trade, far from being a simple exchange function, would depend on a mix of cost ratios involving the comparative cost of producing goods in the domestic

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<sup>28</sup> *Ibid* at 2-3. Note that the assumption of full employment that free trade theory made simply does not exist in modern practice. Almost one billion people, or nearly one third of the global workforce is out of work or under-employed. See the International Labour Organization, World Employment Report 1996, (Geneva: ILO, 1996) & International Labour Organization, World Employment Report 1995, (Geneva: ILO, 1995) for a comprehensive review of world employment levels. The full employment assumption of free traders came under heavy scrutiny by John Maynard Keynes in the 1930s. This caused free trade policy to lose credibility until the end of World War II; See Irwin, *supra*, note 19 at 189-216, for a review of this debate.

market versus importing it from abroad. If the cost of importing a good was less expensive than producing it at home a nation should import. The cost at which a nation may import from abroad depends upon the cost of the commodity in the market versus the cost of producing it in the absence of importing the good or service from foreigners.<sup>29</sup> Ricardo's perceptiveness in this matter indicated that nations who wished to benefit from free trade ought to specialize in the production of goods and services destined for trade in areas where they maintained some level of comparative advantage. Although this explanation of Smith and Ricardo's contribution to free trade doctrine is only partial: this rough sketch of free trade's basic tenets is useful in illustrating the parameters of this doctrine and its fundamental values.

### III) The Essence of Trade Doctrine

The world that Smith and Ricardo based many of their theoretical assumptions upon simply does not exist. Among other things, many producers of goods are no longer solely located in the domestic realm of any one nation. Increasingly, international businesses are moving *from* organizations that operate with a single central location fixed in one country *to* firms that function

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<sup>29</sup> James Mill, Elements of Political Economy, as cited in Irwin, *supra*, note 19 at 91.

with production webs that literally span the globe.<sup>30</sup> Moreover, our very concept of 'trade' has expanded from the international exchange of goods to a notion of trade that encompasses other commercial activities. In the modern world of economic integration, trade is also concerned with international investment, services, intellectual property, government procurement, subsidies and dumping and the international movement of people. Moreover, the general assumption that factors of production, such as financial and human capital, were fixed within states has changed dramatically. The rise in mobility of services and capital seriously challenges the old world view of trade.<sup>31</sup> Finally, trade is connected to a growing list of issues that bear on trading relationships including the environment, development and labour standards.<sup>32</sup>

Free trade doctrine may be flawed or subject to qualification, either due to changes in our real economy or as a result of modern refinement by trade theorists,<sup>33</sup> but it still animates much of current economic thought. The theory's longevity relates to its ability to demonstrate its fundamental value to society. Free trade's continuing value to society is demonstrated by its

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<sup>30</sup> Robert B. Reich, The Work of Nations, (New York: Knopf, 1991) at 110-118 and 301-315.

<sup>31</sup> Trebilcock & Howse, *supra*, note 21 at 5. Refer to Langille, *supra*, note 10 and Langille, *supra*, note 13 for a discussion of the implications of capital mobility and labor's relative immobility.

<sup>32</sup> Langille, *supra*, note 13 at 1.

<sup>33</sup> See Irwin, *supra*, note 19 for a general review of the intellectual history concerning anti-free trade critiques.

capacity to expand contract opportunities between private parties and to illustrate that mutual gains are realizable from these exchange -- if parties are generally endowed with different specialized resources or skills.<sup>34</sup> In short, the kernel of truth evident in this theory is that it has explained the conditions necessary to improve consumer welfare and it has suggested the means by which that welfare may subsist over-time. The ability of this theory to improve welfare reveals two different underlying aspects of its value: one insight is abstract and the other is concrete.

On a practical level, a review of this theory demonstrates that its key principles have always been concerned with the *method* by which net welfare is increased. The success of free trade doctrine in explaining the manner by which welfare can be increased has rested upon utilizing labour in the most efficient manner possible given any particular set of circumstances.<sup>35</sup>

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<sup>34</sup> Trebilcock & Howse, *supra*, note 21 at 3.

<sup>35</sup> An alternative way of understanding comparative advantage is in terms of its labour value and opportunity costs in a single workplace. Again Trebilcock & Howse, *supra*, note 21 at 3, explain this point:

Suppose a lawyer is not only more efficient in the provision of legal services than her secretary, but is also a more efficient secretary. It takes her secretary twice as long to type a document than the lawyer could type it herself. Suppose, more specifically, that it takes the lawyer's secretary two hours to type a document that the lawyer could type in one hour, and that the secretary's hourly wage is \$20, and that the lawyer's hourly rate to clients is \$200. It will pay the lawyer to hire the secretary and pay her \$40 to type the document in two hours while the lawyer is able to sell for \$200 the hour of her time that otherwise would have been committed to typing the document. In other words, both the lawyer and the secretary gain from this exchange.



Understood in an alternative fashion, free trade essentially stated that the value of any good is a function, among other things, of the labour needed to produce it. As the division of labour is further refined, arrived at through specialization of skills, resources and increased market integration - labour (through increased productivity) became an important means of molding other factors of production involved in trade. Thus, these processes are intimately tied together and illuminate a social process for furthering the welfare enhancing effect of free trade.

This market-based ordering also indicated the pivotal role that the utilization of labour played in increasing welfare. For instance, free trade operates on a logic of improving the price of a good or service - if trading parties can obtain a cheaper price for a good or service than the price on the domestic market, then an incentive to trade is induced when the good is purchased. This welfare enhancing activity is supported by improving the cost ratios involved in creating improved prices. If firms can utilize cost effective factors of production (this includes endowments like labour) allowing the competitive pricing of goods, then the incentive to trade is created and maintained. Employing relatively cheaper labour - not in the sense of absolute labour costs but in terms of unit labour costs measured in relation to productivity- is an important means of reducing these cost and thereby the

price of goods and services in a marketplace. Without the division of labour, competition of markets and the self interested motivation of both consumers and states underlying free trade doctrine, the incentives for improving labour productivity would suffer. Indeed, modern trade theorists have indicated that the use of cheap labour may indeed play a role in the production cycle of certain goods and services in shifting investment and production sites to lower wage nations.<sup>36</sup> In this way, free trade doctrine demonstrates that the welfare enhancing nature of trade relies on the interrelationship of labour and competitive markets.

Despite, this highly simplified review of free trade doctrine, the account provided above illustrates that the theory itself provides a *prescriptive means* for improving welfare. In asserting free trade doctrine, the inherent assumption was made that consumers will (or should) attempt to maximize their infinite ends by wisely using their limited resources.<sup>37</sup> This approach, being primarily individualistic and subjective, raised questions relating to the incentives involved in any particular market transaction. The economic case for increasing welfare under free trade logically extended itself to policy

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<sup>36</sup> Nigel Grumwade, International Trade: New Patterns of Trade, Production and Investment, (New York: Routledge, 1989) at 21- 22.

<sup>37</sup> This section draws heavily upon Michael J. Trebilcock, An Introduction to the Economic Approach to Law, (Toronto: Faculty of Law, University of Toronto, 1994) at 3-21.

questions pertaining to the individuals involved in exchanges and whether they were better off in terms of their own perceived welfare. As well, larger economic questions relating to the theory itself sought to understand the impact that any particular tariff would have on the general pattern of economic activity and its distributive effects in society. Classical economics would subject free trade to abstract theoretical modeling that attempted to employ societal cost-benefit analysis to prove that free trade improved overall welfare. Focusing on the consequences or impacts of free trade policy and attempting to measure the net individual or social welfare of a given situation was a necessary prelude to forming prescriptive judgments as to the merits of economic policy advocated by free traders. Free trade doctrine focuses on the response of rational, self-interested agents to the incentives of free trade as policy. Thus, this theory attempted to formulate a normative basis for the implementation of free trade policy.<sup>38</sup> Free trade doctrine was presented as the superior choice for policy makers considering economic affairs because it could produce improvements in the well-being of citizens.

Moreover, the positive and normative approach described above also indicates that free trade theory is related to another set of theoretical values. The hallmarks of free trade theory - rational self interest, competitive markets,

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<sup>38</sup> Irwin, *supra*, note 19.

private exchange, elimination of tariffs, division of labour, efficient production, cheaper prices -- all demonstrate a concern with increasing the net welfare of citizens. The internal coherence of free trade theory also suggests it is a detailed form of economic utilitarianism.<sup>39</sup> Utilitarian theory in its simplest form asserts that the morally right act is that which produces the greatest well being for the members of society. It seeks to raise human welfare among all its citizens and demands that the consequence of an act be empirically verified. Utilitarians accept, and are guided by (morally good) acts which *actually* improve human welfare. As a result, a utilitarian tests moral questions against changes in human welfare, giving equal weight to each person's welfare.<sup>40</sup> Utilitarians may define welfare differently but they agree that welfare, however one defines it, is the litmus test of a society. Similarly, free trade doctrine, despite its acknowledgment that some citizens may be worse off as a result of free trade policies, seeks to increase the general welfare of citizens. Trade economists are continually testing trade policy on the basis of its impact on net national or global welfare -- measured in terms of economic growth, national wealth or production. Moreover, neo-classical economists use welfare tests

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<sup>39</sup> Trebilcock, *supra*, note 37 at 20.

<sup>40</sup> W. Kymlicka, Contemporary Political Philosophy, (New York: Oxford University Press, 1990) at 9-12.

almost exclusively to judge these changes without considering other moral standards by which human conduct may be determined.

If free trade doctrine, given its foregoing economic logic, is a positive, normative and utilitarian based theory it also is *not* representative of other theoretical schools of thought with which it is commonly associated. Despite the strong normative value neo-classical free trade theorists attach to private exchanges and ordering, free trade doctrine is *not* a theory that wholly advocates *laissez faire* philosophy. Typically, free traders have been skeptical of the capacity of collective decision makers (legislators, regulators, bureaucrats and judges) to adopt legal principles that unambiguously increase net social welfare.<sup>41</sup> The distrust of the state and its actors is based on the premise that parties entering into voluntary private exchanges must feel that the exchange is likely to make them better off, otherwise they would not have entered into the relationship in the first-place.<sup>42</sup> State actors are not always able to directly observe the utilities of these relationships, rendering any utility calculus associated with collective decisions erroneous. In terms of the social welfare consequences involved in collectively imposed decisions, state

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<sup>41</sup> Trebilcock, *supra*, note 32 at 16

<sup>42</sup> *Ibid* at 17.

decision makers cannot be sure that the net effect of a particular decision on all parties is enhanced or reduced.<sup>43</sup>

Similarly, *laissez faire* doctrine maintains that an economic system functions best where there is *no* interference by government. It promotes the belief that the 'natural' economic order tends, when undisturbed by artificial stimulus or regulation, to secure the maximum well-being for the individual and therefore the community.<sup>44</sup> In spite of the fact that Smith was influenced by this stream of thinking, free trade doctrine *does* provide a role for the state in economic affairs beyond simply enforcing contracts and property rights. Without doubt, classic free trade theory does not invite the state to actively or arbitrarily 'interfere' in private economic ordering. However, free trade doctrine did envision an important role for the state in the affairs of private individuals. Smith acknowledged many circumstances in which state intervention was beneficial for society, such as the establishment of law *and* justice which could allow the market to operate more effectively. Nonetheless, the existence of a state of affairs which invited government regulation did not

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<sup>43</sup> Ibid at 18. This justification for private ordering is closely related to the liberal political value of individual autonomy as a chief social value that is a precondition to individual freedom. For a fuller explanation of the relationship between the economic and political justifications see, *infra* at 17.

<sup>44</sup> Irwin, *supra*, note 19 at 64-74.

automatically justify a departure from free trade as a state policy.<sup>45</sup> Yet departures from free trade were justified in Smith's view for non-economic reasons. For instance, Smith allowed the imposition of import duties on the basis that national security considerations justified protecting defense related industries.

Ironically for modern free traders, Smith's original economic justification also allowed the use of some tariffs if government intervention could promote a truer approximation of *market* determined behaviour. Free trade could allow import duties in situations where *foreign government regulation* directly altered the competitive advantage of products in domestic markets. Smith reasoned that imposing *equivalent* import duties on foreign goods, which were not subject to taxes levied on domestic goods, would *equalize* the tax treatment of foreign and domestic products. Smith's call for tariffs to effectively neutralize the difference in national tax regimes would, in his view, have positive economic effects. He noted this policy:

would not give the monopoly of the home market to domestic industry, nor turn towards a particular employment a greater share of the stock and labour of the country, than would naturally go to it. It would only hinder any part of what would naturally go to it from being turned away by the tax, into a less natural direction, and would

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<sup>45</sup> This section draws heavily from Irwin, *supra*, note 19, 75-86 at 78. Smith allowed for tariffs in a number of other circumstances: the provision of public goods, reciprocity and safeguard measures, *infra* 82-83.

leave the competition between foreign and domestic industry, after the tax, as nearly as possible upon the same footing as before it.<sup>46</sup>

Smith's justification for limited protective policies indicated three significant aspects of free trade doctrine. First, a policy implication was apparent because a government could consider non-economic and economic rationales for intervention in the economy. Second, in keeping with its utilitarian orientation, non-economic policy objectives could depart from free trade policy if those non-pecuniary issues provided an alternative source of well-being for citizens. Also, again keeping with its utilitarian approach, state intervention which would replicate the effects of the market was permissible as a prescriptive means for furthering the welfare of citizens. Finally, government involvement in promoting trade tariffs must consider the means of eliminating the *actual* distorting effect that certain domestic policies between states could cause in the market. The implication of these comments are crucial to re-framing the current free trade/fair trade debate when these issues are contemplated in the specific context of ILS. The obvious assertion based on this finding is *not* that

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<sup>46</sup> Adam Smith as quoted in Irwin, *supra*, note 19 at 81. Smith's insight into the influence of government policy on trade found its way into U.S. trade policy regarding labour standards. On two separate occasions the United States incorporated a power in the *Tariff Act* allowing the President to adjust tariffs. In order to equalize the differences in the cost of inputs for production (including labour costs) between a domestic good and a similar foreign article the President could impose a tariff. These amendments were designed to address the problem of foreign low-wage competition at a time when labour costs amounted to a significant proportion of production costs. See Steve Charnovitz, *The Influence of International Labour Standards on the World Trading Regime: A Historical Overview*, (1987) 126 *International Labour Review* 565 at 568.



Smith was the father of fair trade ideas or that all fair trade claims that seek to neutralize any and all policy differences are valid. Rather, Smith's insight leads to another more interesting conclusion.

Generally speaking, the claim made by free traders that level playing field arguments are normatively incoherent and antithetical to basic free trade doctrine has been widely accepted as a justification for rejecting many fair trade demands. However, the rejection of this approach is not always valid within trade doctrine. Free trade doctrine would suggest that an economic case exists for the harmonization or neutralization of (any) policy differences between states *if* the use of tariffs promoted a truer approximation of *market* determined behaviour in the circumstances. This assertion would be subject to the normal evaluation that trade policy would have to 'increase the general industry of the society, or to give it the most advantageous direction.'<sup>47</sup> Fair trade policies that seek to diminish diversity among nations by harmonizing or neutralizing state acts may expand trade by reducing multiple compliance costs, permitting the realization of economies of scale, avoiding the cost of regulatory duplication and permitting the realization of regulatory economies of scale and specialization.<sup>48</sup> Of course, policy convergence or equivalence

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<sup>47</sup> Irwin, *supra*, note 19 at 34.

<sup>48</sup> Trebilcock & Howse, *supra*, note 12 at 42.

may also reduce trade. Consequently, if the use of tariffs could be manipulated to cancel out the effect of state regulation and thereby demonstrably increase the well-being of citizens, trade doctrine would accept, if not call for, the use of tariffs in such circumstances. In this connection, the claim of free traders that 'level playing field' arguments are normatively incoherent is false. The use of neutralizing tariffs or harmonization for the limited purpose of increasing welfare derives its normative coherence from free trade doctrine itself which in turn espouses the value of competitive markets and free trade policy. The refrain to the free trade query (why should a cost advantage - assuming nothing morally wrongful is involved - attributable to divergent policies not be treated like any other cost advantage?) is simple and familiar to free traders. Divergent policies should not be treated like other cost advantages if they reduce the general welfare of a society. In other words, if level playing field arguments for harmonization of policies or tariff neutralization can increase net welfare then they should be pursued within free trade doctrine.

Subjecting this insight to the many economic and non-economic qualifications of the 'real world' obviously leads to many qualms on the part of free traders: These reservations may include that:

- it is a primitive view of the economy;
- the theory displays a rudimentary understanding of the myriad of actions taken by the state which intentionally and unintentionally shape comparative advantage;

- the floodgates of regulations this approach suggests will effectively smother free trade;
- improving welfare will be a rare occurrence as our ability to judge the *optimal* tariffs to increase welfare is lacking;
- fair traders do not assert level playing field arguments from this perspective nor do they aim for increased welfare as a result of tariffs etc..

Although many of these comments may not be gainsaid, they do not refute the underlying acceptance of free trade doctrine of level playing field claims if tariff use can increase national or global welfare. Rather, the underlying objection to fair trade claims relates to the scope and mode of trade regulation that is to be pursued as a result of the acceptance of some level playing field arguments.

This chapter has briefly surveyed the basic tenets of free trade doctrine and noted that the theory explains the conditions necessary to improve consumer welfare. This doctrine's desirability rests on the gains from specialization inherent to trade, and therefore it strongly relies on the improvement of labour productivity derived from the international division of labour. Free trade doctrine describes a means for improving societal welfare and it implicitly issues a normative economic prescription supporting free trade as policy. Moreover, this theory employs a form of utilitarianism that judges matters in terms of improving the economic welfare of citizens. Although this doctrine possess a normative disposition to private ordering, it does allow an

important role for state intervention in the economy. In principle, this doctrine allows the state to prioritize welfare based on economic and non-economic forms of welfare. It specifically accepts the validity of 'level playing field' claims on the condition that the implementation of equivalent tariffs or harmonization of policies increases economic welfare. Thus fair trade claims can be normatively coherent within free trade doctrine which also suggests that fair trade remedies -- harmonization and tariff neutralization -- may be appropriate trade policies if such policy action improves welfare.

The implication present in this observation, that free trade doctrine may present some insights into moving the linkage between ILS and trade forward, seems to call into question the polarized nature of certain aspects of this debate. Ultimately, this thesis will examine whether some aspects of this theoretical investigation can be usefully applied in concrete circumstances of actual trade/labour arrangements. This question is, of course, a central component in forging a stronger connection between these issues than the one which presently exists in our current international trade regime. However, before assessing this larger question, this thesis must outline the basic functioning of our modern trade regime in order to assess the application of trade principles against our current trading system. This investigation will help define the manner by which basic trade tenets have been converted into rules which make

up the present multilateral trading regime. The issue of state regulation of international trade is at the center of this next section.

### **B. The Modern World Trading Regime**

Since its establishment in 1947, the General Agreement on Tariffs and Trade (GATT) has been the principal international agreement occupied with liberalizing world trade. From its inception, GATT has been concerned with negotiating the reduction of trade restrictions pertaining to goods. It has provided a multilateral framework for resolving international trade disputes between governments through the negotiated establishment of trade rules. These negotiating sessions have recurred regularly -- eight rounds since the founding of the GATT, with the Uruguay Round encompassing over 120 countries representing more than ninety per cent of world trade. These rounds have moved from originally focusing on the reciprocal reduction of tariff barriers to disciplining the use of non-tariff barriers such as import licensing, customs valuations, technical standards, government procurement and subsidy policies. Moreover, in 1994 the Uruguay Round proceeded to include: trade-related investment issues (TRIMs); international trade in services, trade-

related intellectual property issues (TRIPs); and trade in textiles, clothing and agriculture, under the GATT discipline.<sup>49</sup>

The World Trade Organization (WTO) was established in January of 1995 by the Uruguay Round to take charge of administering the trade rules established under the latest succession of GATT negotiations. Through the use of various councils, committees and agreements the WTO oversees the implementation of tariff cuts and the reduction of non-tariff barriers agreed to during the Uruguay Round. It is charged with regularly monitoring the trade regimes of individual members countries -- also known as Contracting Parties. Members of the WTO point out the measures of other Contracting Parties that cause trade conflicts and communicate their own trade measures and statistics to the WTO. It provides Contracting Parties with a dispute resolution process relating to trade conflicts. The WTO utilizes conciliation and, if necessary, adjudication of these conflicts. Disputes are adjudicated by panels of independent experts that are established to examine the dispute against the agreed trade rules of the GATT (1994). It also provides consultation for members by monitoring the global economy and publishing studies relating to

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<sup>49</sup> Trebilcock & Howse, *supra*, note 21 at 21-22.

the main trade issues of the day. Finally, the WTO provides a forum for countries to further reduce trade barriers around the world.<sup>50</sup>

### **1) Founding Principles of the International Trade Regime**

The rules implemented under the GATT are designed to liberalize trade through a process of mutually matching reductions in trade barriers. The principle of non-discrimination that promotes free trade between nations is referred to in the preamble to the GATT<sup>51</sup> and in the Most Favored Nation (MFN) and National Treatment provisions of the agreement. Under Article I (MFN) of the GATT, countries negotiating trade concessions (advantages, favours, privileges or immunities) between themselves must agree that they will unconditionally extend those subsequently negotiated trade benefits to all other third countries.<sup>52</sup> In other words, any binding tariff concession made to another country must be bestowed on all other GATT Contracting Parties. Also, the nations extending the trade benefit may not demand, as a condition of

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<sup>50</sup> Ibid at 38. Also see World Trade Organization website (<http://www.wto.org>) for general information pertaining to the functioning of the WTO.

<sup>51</sup> Article XXVII *bis* further recognizes that:

Customs duties often constitute serious obstacles to trade and that negotiations on a reciprocal and mutually advantageous basis, directed to the substantial reduction of the general level of tariffs are of great importance to the expansion of international trade.

<sup>52</sup> Trebilcock & Howse, *supra*, note 21 at 18.

granting the concession to others, any other trade privilege. Thus, the MFN principle encourages multilateral negotiations and cooperation in the design and promotion of trade concessions by discouraging members of GATT from discriminating amongst particular (undesirable) exporters.<sup>53</sup>

The rule of non-discrimination is also addressed in Article III of the GATT in the form of the National Treatment provision. Article III extends treatment (with respect to a nation's internal policies) to imported goods and services no less favorable than the treatment accorded to domestic goods and services. Again, in other words, a GATT member may not adopt domestic policies that favor domestic producers of a given product as compared to foreign producers of like products. National Treatment mandates that once tariffs have been collected on a foreign product entering a territory, it will face no additional burdens against it unless domestic producers bear those same encumbrances.<sup>54</sup> This provision includes situations where a domestic policy affecting a foreign product is accorded *exactly* the same legal treatment of a domestic product but the intent or effect of the policy is to accord adverse treatment only against the foreign product. Consequently, discrimination is avoided in these contexts by avoiding a wide range of non-tariff barriers to

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<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.* at 29.



trade. This approach to trade facilitates genuine cooperation in establishing mutual trade concessions because collective decisions made by states to reduce trade barriers cannot be avoided by using surreptitious policies that favour domestic producers. The key policy implements used to promote free trade guard against opportunistic cheating of WTO members. The solution to remedying trade disputes between countries is embedded in the basic structure of the world trade regime – nations have implemented safe avenues of discussion, negotiation, cooperation and agreement. It is the implementation of these avenues that highlights the role of regulation in establishing free trade policy.

## **II) Free Trade's Regulated Nature**

Paradoxically, the presence of other GATT articles related to non-discrimination principles suggests the exigency of governments regulating trade. As we have seen, the means by which states have chosen to liberalize trade allow for countries to lessen trade barriers over time by matching trade concessions made between states. In other words, major trade agreements have opted for a system of liberalization which rejects immediate full reciprocity as well as any notion of unilateral free trade envisioned by Smith.<sup>55</sup>

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<sup>55</sup> Bhagwati, *supra*, note 7 at 24-25.

It is telling to note that the implementation of non-discrimination principles which require matching trade liberalization has also sanctioned a host of qualifications to these canons of free trade.

Specifically, many exceptions have been created throughout the GATT, and within regional trade arrangements, that allow states to avoid or undermine non-discrimination principles. For instance, Contracting Parties have grandfathered trade preferences that were in force between a limited number of member states. Previously, states have also signed many non-tariff barrier codes that operate on a conditional MFN basis. Significantly, subject to certain conditions, member countries have also permitted the formation of customs unions and free trade areas between limited groups of GATT members.<sup>56</sup> In addition, the National Treatment principle authorizes government agencies to favor local producers of goods for their own procurement.<sup>57</sup> These exceptions to the cornerstone principles of free trade illustrate the fundamental dispute present in the free trade fair trade controversy.

Free trade policy has always been a qualified proposition in practice. In implementing the liberalizing logic of free trade doctrine, Contracting

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<sup>56</sup> Trebilcock & Howse, *supra*, note 21 at 27.

<sup>57</sup> Article III: 8. *Ibid* at 30. Note that government procurement became subject to the signatories of a Code negotiated under the Tokyo Round and is now subject to all members of the WTO by virtue of their membership.

Parties to the GATT built a number of specific mechanisms that condition open trading arrangements. These qualifications permeate the GATT discipline. For example, Article XI has prohibited the use of quotas and quantitative restrictions by member countries because these restrictions clearly protect domestic producers. However, many exceptions continue to allow exemptions under Article XI. Quantitative restrictions have been permitted for: agricultural imports (Article XI), balance of payments problems (Article XII); and LDCs - in order to remedy their balance of payments or infant industry problems. The trading regime has also allowed for safeguard provisions (Article XIX) that, subject to certain qualifications, permit Contracting Parties to temporarily suspend or alter trade concessions if import surges threaten serious injury to domestic producers of like products in a country.<sup>58</sup> Moreover, trade remedy law under Article VI of the GATT has recognized the right of members to take *unilateral* action under domestic trade law if domestic industries are materially injured by certain dumping or subsidization practices of foreigners. As well, disputants under trade remedy law may also claim any benefit, accruing directly or indirectly under GATT, as being "nullified or impaired" by a policy or practice of another member state.

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<sup>58</sup> See 'United States International Trade Commission, Report to the President on Certain Motor Vehicles and Certain Chassis and Bodies Thereof' in John H. Baron and Bart S. Fisher, International Trade Investment: Regulating International Business, (Boston: Little Brown, 1986) at 216-232 for an example of an American safeguard action brought by a trade union that ultimately was denied.

The numerous exceptions and conditions attached to free trade -- and its cornerstone principles of MFN and National Treatment -- do not necessarily indicate that free trade policy has been overwhelmed with protectionist devices. In spite of the fact that certain GATT provisions which qualify trading relationships, such as countervailing duties and anti-dumping claims, have often been utilized for protectionist purposes; it is not clear that all qualifications inevitably violate the goals of free trade. Rather, many of these conditions, such as the safeguards regime or the nullification and impairment qualifications, comfortably exist within GATT's framework because these mechanisms can foster open trading relationships. For example, safeguard provisions simply guard against the severe dislocation of domestic capital and labour. Instead of exempting an economy from liberalized trade after such a dislocation, a safeguards regime implements free trade in 'smaller gradations'<sup>59</sup> of time. Yet a safeguards mechanism within a trade regime does eventually liberate trade in the affected nation.

The qualifications to trade, whether viewed as justifiable means of practically pursuing open trade or not, point to the centrality of regulation within the modern trading regime. In practice, free trade does not contest trade

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<sup>59</sup> Smith quoted in Irwin, *supra*, note 19 at 82. Note Smith approved of safeguard mechanisms to promote trade. See *infra*.

regulation *per se*. This is evidenced by the network of language qualifying non-discrimination principles in the world and regional trade regimes which are designed to advance free trade. On the contrary, regulation of trade by the state is accepted as a legitimate tool of free trade policy. In fact, trade liberalization is one form of state regulation<sup>60</sup> that seeks to establish trading relationships to further the well-being of a particular nations' citizens. However, the regulation advanced by states pertaining to trade is under constant and rigorous scrutiny by the advocates of free trade. This supervision over the terms of trade operates to ensure that only a modicum of *justified* regulation invoking restrictive trade practices is accepted into the global trade regime. For instance, trade experts test trade policy that promotes trade restrictions against free trade's welfare enhancing capabilities. Public policies that support a tariff, rather than domestic regulation, to cure a market difficulty, are examined in order to demonstrate that the first-best use of a number of domestic policies is a superior course of action to the imposition of a tariff.<sup>61</sup> Similarly, trade lawyers design legal thresholds that justify the imposition of legal restrictions on trade if the policy objectives and the instruments of regulation legitimately avoid the 'fraudulent' and 'gratuitous' use of

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<sup>60</sup> Trebilcock & Howse, *supra*, note 21 at 178.

<sup>61</sup> Bhagwati and Ramaswami in Irwin, *supra*, note 19 at 169.

government ordering in the international market place.<sup>62</sup> All of this necessarily occurs because free trade doctrine suffers from an inherent contradiction in its nature. In order for global open trade to exist, relatively free of constraints to international trade and investment, states must employ particular forms of *regulation* to liberalize current trade practices. It is the discussion concerning the subjects and means of trade regulation, rather than the need for regulation itself, that actually occupies the fore of the free trade/fair trade debate.

This intrinsic tension between utilizing state regulation in any given trade area or foregoing regulation has existed since the birth of the debate between mercantilism and free trade. At the end of the day, the conflict between free traders and their opponents has always revolved around a familiar political controversy. To what extent should state regulation of market based economies occur? In answering this question, many free traders have grafted their disdain of regulation to the seemingly open ended demands of labour rights activists, among others, for a level playing field in trade. The conclusion of certain free traders is that these claims represent a systemic threat to the trading regime. This view rests on two basic, interrelated beliefs. First, free trade relies upon differences to enhance welfare. Second, the seemingly open ended nature of level playing field claims would logically require the unending

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<sup>62</sup> Trebilcock & Howse, *supra*, note 12 at 41.

task of regulation to establish trade. In turn, this degree of regulation would eliminate enough differences so that free trade's value would be seriously eroded. However, it was noted above that the neutralization of tariffs or harmonization of policies (i.e. the reduction of diversity) could improve economic welfare and therefore is consistent with free trade doctrine. Consequently, the true underlying basis of free traders' anxiety with fair trade propositions pertains to the seemingly limitless regulation of private enterprise. The normative position of free traders has been to scorn state regulation of trade as it interferes with the private ordering of the market and asserts state control over trade -- thereby interfering with the ability of free trade to improve welfare. Nonetheless, this argument surely amounts to the *reductio ad absurdum* of fair traders' position with regard to regulation as it exaggerates both the desire to regulate all state influenced comparative advantage and the consequences of ordering *some* trade relationships in the manner advocated by fair traders.

In truth, state regulation has always been viewed as a legitimate and necessary tool to promote free trade. A continuum has existed between imposing greater or fewer constraints on national trade policy ever since mixed markets have subsisted in Western nations.<sup>63</sup> States have always faced a

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<sup>63</sup> Ibid at 5.

choice between allowing relatively unfettered trade -- whereby national authorities, subject to a minimal set of internationally applicable legal constraints, provide for comparatively free(er) trade -- and a system of constrained trade. The latter form of trade allows for much greater levels of state intervention into, if not significant control of, the marketplace. The complication for states has been to choose among the many alternatives existing between the extreme ends of this continuum as it pertains to each specific aspect of trade. While there are numerous fair trade claims that could impose a 'level playing field' in many areas of trade, they are not all necessarily justified. Fair traders, at least in the context of ILS demands, have never required the complete regulation of the international labour markets. States that have made a choice to include a subject area (i.e. investment) for trade regulation often find the debate concerning regulation does not necessarily end with the decision to control the specific area. The debate simply shifts to the scope and means of regulating any particular trade topic.

This segment of the thesis outlined the basic structure of the world trade regime and the method by which this system fosters discussion, negotiation, cooperation and agreement amongst its members. As might be expected, the states involved in the trading regime have implemented key provisions that foster free trade but these policies have been subject to a host of



qualifying propositions. These qualifications to implementing free trade indicate the centrality of the role of the state in constructing a viable yet open trade regime. Regulation of trade, not level playing fields arguments, has proven to be the most controversial aspect of the free/fair trade debate. Paradoxically, many free traders seem to disdain the state for constraining free trade through the use of regulation while relying on the use of state regulation to forge more liberalized systems of international trade and investment. Once regulation is accepted as an appropriate measure, the debate concerning regulation may be expected to shift to question the degree and mode of regulation being implemented in any particular matter. However, as we will see in the next section, despite the regulation of some labour market issues in our current trading system, the present disagreement between certain free and fair traders continues to be centered upon whether to regulate these issues in the first place.

### **III) Regulating Labour Matters in the Trade Regime**

With the passing of World War II, liberal democracies convinced of the validity of free trade doctrine, implemented an ever growing open door trade policy abroad and a policy of (greater) state control of economic matters domestically. As the balance of policies that promoted "Smith abroad and

Keynes at home<sup>64</sup> began to recede and more 'non-traditional' trade issues began to be accepted as legitimate subjects of trade regulation, the entire nature of the term 'trade' changed. In effect, trade shifted from a purely economic concept to one which embraced economic and social concepts such as labour and the environment. The impact of the shift to a more inclusive definition of the term trade has been significant. Consequently, trade policy cannot resist, on a principled basis, the regulation of ostensibly domestic policy areas. Trebilcock and Howse assert:

In our view, having brought into GATT and to some extent legitimized the fair trade approach with respect to intellectual property and services, it is impossible to sustain principled resistance to consideration of environmental and labour standards - related claims as well. What is important at the outset is to distinguish the various concepts of fairness at issue and the different kinds of claims and then to consider their consistency with both liberal trade theory - both norms and institutions. Are these claims simply indeterminate or open ended, or can new benchmarks be found, or new institutional avenues established to develop means of distinguishing legitimate from illegitimate claims and thereby constraining purely unilateral approaches?<sup>65</sup>

In the international labour standards context, the evolving meaning of trade has suggested a reconstruction of the appropriateness of regulating certain trade-related topics.

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<sup>64</sup> Aristide R. Zolberg, 'Response: Working-Class Dissolution' (1995) 47 International Labor and Working-Class History 28 at 34.

<sup>65</sup> Trebilcock & Howse, *supra*, note 21 at 411.

In contrast to the acceptance of many newly regulated trade matters, the international trade regime has long occupied itself with various direct and indirect employment matters related to trade. Labour related subject-matter has always been present, in a collateral fashion, in the numerous articles that qualified trade. Issues that seemingly dealt with traditional trade matters also applied to several employment questions. For instance, infant industry exceptions – which justify the temporary use of tariffs to support the growth of competitive business -- to free trade have been justified on the basis of economic development. Understandably, the argument for economic diversification supporting an infant industry claim has been defended upon employment related concerns.<sup>66</sup> In turn, these types of labour standards issues were fixed firmly in the GATT regime. Legal thresholds establishing anti-dumping claims (Article 3.4) rely on, among other things, the negative effects on employment. Similarly, safeguards clauses (Article 6) that attempt to determine the existence of injury created by import surges, rely in part, on the loss of employment in the affected area. Comparable indirect arrangements are also found in regional trade regimes.

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<sup>66</sup> Ibid at 9.

For example, the *North American Free Trade Agreement (NAFTA)*<sup>67</sup> also bears indirectly upon labour related issues of employment. NAFTA members have created rules of origin to determine when a good emanates in one of their countries. In the complex set of rules governing the method by which a good 'originates' in a territory -- wholly obtained tests of imports which require goods to be entirely produced in the importing country versus component standard provisions that permit third country materials -- the local utilization of labour and capital helps satisfy the content requirement rules.<sup>68</sup> The production requirements have the effect of requiring local production of goods (read local employment) before they may obtain the trade benefits offered by NAFTA. Additionally, in a much more explicit example of labour regulation in the NAFTA, member countries have sought to include conditions upon the use of international labour during a domestic labour dispute.<sup>69</sup>

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<sup>67</sup> Unlike NAFTA, the European Union has utilized supra-national institutions in dealing with workers' rights issues in a much more explicit manner than the examples listed above. However, for the purpose of brevity and because it is beyond the scope of this section, the discussion presented above purposively avoids discussing NAFTA's parallel labour accord and the European Union's social charter.

<sup>68</sup> Jon R. Johnson, 'What is a North American Good?: The NAFTA Rules of Origin' (1993)40 *C.D. Howe Institute Commentary* at 4-5.

<sup>69</sup> Article 16C3 of NAFTA states that a party may refuse to authorize employment by a business person if that employee's temporary entry might adversely affect a labour dispute in the place of employment or the employment of any person involved in such a dispute. In a limited sense, this constitutes an anti-replacement worker clause that applies across the NAFTA members' borders. See Richard G. Lipsey, Daniel Schwanen & Ronald J. Wonnacott, *The NAFTA: What's In, What's Out, What's Next*, (Winnipeg: C.D. Howe Institute, 1994) at 96.

Although only a few examples<sup>70</sup> exhibited above illustrate the collateral and long standing link between trade-related labour issues, this indirect connection is clearly present.

Moreover, the labour trade link has existed explicitly within the GATT since its inception. Among other things, a single direct reference to labour in the GATT occurs in the general exceptions article (Article XX) of the agreement. Subject to certain conditions, this article allows Contracting Parties to dispense with certain trade obligations on the basis of various criteria. Specifically, the GATT permits states to use import restrictions against items 'relating to the products of prison labour' (Article XX(e)).<sup>71</sup> Moreover, there may be a further, untested, application of GATT obligations that directly obliges adherence to fair labour conditions. Article XXIX of the GATT, respecting the relationship of GATT to the Havana Charter, obliges members to recognize the general principles of certain chapters of the (stillborn)

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<sup>70</sup> There are, of course, examples of this indirect link elsewhere. For instance, both the GATT and NAFTA contain provisions permitting the protection of human health, on certain conditions, which arguably could extend to the domestic preservation and promotion of Health and Safety legislation designed to establish acceptable working conditions for employees. Furthermore, the United States of America takes the position that the GATT under the nullification and impairment article (NAFTA possesses a similar clause) can remedy trade conflicts concerning international labour standards. However, to date neither the GATT nor NAFTA has entertained such a case. See Charnovitz, *supra*, note 46 at 574-575.

<sup>71</sup> Trebilcock & Howse, *supra*, note 21 at 36. These measures may not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or used as a disguised restriction on international trade.

International Trade Organization.<sup>72</sup> Article XXIX(1) obliges members to 'observe to the fullest extent of their executive authority the general principle of Chapters I to VI inclusive and of Chapter IX....' Article 7 of Chapter II of the Havana Charter includes general principles that unfair labour conditions should be dissuaded in member countries. Article 7 states:

The Members recognize that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and agreements. They recognize that all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The Members recognize that unfair labour conditions, particularly for export, create difficulties in international trade, and accordingly each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.

These provisions directly address the international labour standards issues currently being *resurrected* by fair traders.

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<sup>72</sup> Robert T. Stranks, 'The New Jerusalem: Globalization, Trade Liberalization, and some Implications for Canadian Labour Policy,' (Ottawa: Policy Staff paper 94/02, Department of Foreign Affairs, 1994) at 35.

<sup>73</sup> Ibid. It seems that the negotiators of the Havana Charter intended to eliminate 'race to the bottom' scenarios created by free trade. The sub-committee that considered the general exceptions to Chapter IV noted that in discussing an amendment to Article XX(d), designed to exempt measures against 'social dumping' or a 'race to the bottom' the Sub-committee expressed the view that this objective was contemplated, for the short-term, by paragraph 1 of Article XIX and for the long term by Article 7 in combination with Articles 93, 94 and 95 (dispute settlement) of the Havana Charter. The text of Article 7 was not, however, directly included in the GATT. See Organization for Economic Cooperation and Development, Trade, Employment and Labour Standards: A Study of Core Workers' Rights & International Trade, (Paris: OECD, 1996) at 173; also see Infra 169 to 179 for a review of WTO disciplines and labour standards connections.

Despite evidence of both indirect and direct regulation of labour standards in the trade regimes, unmodified free traders resist the inclusion of such regulation in trade agreements. The depth of conviction with which many free traders reject ILS claims has led to a view, noted above, that the discussion between free traders and fair traders has become polarized to the point where participants in the debate must choose between competing conceptions of regulatory competition. On the one hand, a decision that views international labour market regulation as a positive step for world trade would reject the contrary view. On the other hand, one can choose a view of free trade that posits regulatory competition among states in the labour market as an admirable course of action.<sup>74</sup> The latter view similarly rejects the positive aspect of regulating international labour markets. In fact, the community of states responsible for this choice has *already elected to regulate labour matters in international trade agreements*. The action to date, on the part of states, has been conservative but it has *actually* transpired. In other words, governments have chosen to view the regulation of labour standards in cautious but positive terms.<sup>75</sup> Despite objections to the inclusion of labour matters in free trade

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<sup>74</sup> *Supra*, note 16.

<sup>75</sup> The clarity of this choice is made crystal-clear by the presence of many ILS in, or along side, free trade agreements. NAFTA's labour side accord, the North American Agreement on Labour Cooperation (NAALC) and the European Union's inclusion of social policy issues on a weighted voting system through the Treaty on European Union (TEU) both indicate an increased acceptance of these issues at the regional trading level.

agreements, the task at hand is to move beyond this limited debate to a discussion that seeks to establish fitting uses of ILS -- that is to consider the scope and means of regulation. In situations where ILS are linked to an open trade regime, the provisions undertaken must strike a balance between open trade and labour market regulation. As succeeding issues of labour law are considered for regulation, this balance must not automatically rule out all level playing field or harmonization claims as a basis for regulation.

On the other hand, this balance should show *some* sensitivity (perhaps by limiting the scope or detail of standard setting) to the unwillingness of free traders to regulate *every* aspect of the international labour market. As free trade historically was based upon the lessening of state control over trade policy, the imposition of exacting regulation is not only anathema to free traders who value private market ordering but it also violates the *raison d'être* of free trade doctrine. Again, free trade casts off state regulation that distorts the market mechanism. However, staunch free traders must accept the validity of directly regulating more ILS in trade agreements if this debate is to move forward to establish a new balance of international labour market regulation. The difficulty, as noted above<sup>76</sup> by Howse and Trebilcock, is to select *legitimate* ways to determine suitable areas of regulation.

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<sup>76</sup> Supra, note 65.



This segment of this thesis has briefly surveyed the *prevailing* regulation of ILS in our modern world trade regime. It noted the expanded definition of the term 'trade' and outlined a short list of labour market issues that are either directly or indirectly included in the GATT and NAFTA disciplines. Despite the presence of ILS in our trade regime, the free trade/fair trade debate has not altogether moved in a direction that would allow a discussion of this issue in a way that fully accepts this linkage. As well, the more extreme partisans of this debate have not begun to engage in a discussion of the scope and means of effectively regulating new ILS in trade agreements. How to establish a redefined discussion in this area -- that would inspire governments and others to establish a stronger link between ILS and international trade agreements -- is crucial to any attempt to re-characterize this debate. Before assessing this attempt however, this chapter will outline the history and nature of ILS in order to help resolve this question in an informed manner.

### **C. International Labour Standards**

Unlike free trade doctrine, ILS were not derived from the presentation of a new economic or social logic compelling a swift reappraisal of state policies. Rather, the genesis of ILS is tied to experience derived from the growth of nascent capitalism. In some respects, it is a reaction to the economic

practices derived from the teachings of classical economic thought. The historical rise of labour's demands and acceptance into international treaties illustrates the rights based nature of ILS.

### **I) A Brief History of International Labour Standards**

The rise of ILS mirrors the mounting demands of working people in the early 1800s. Workers struggled, bargained and initiated settlements with their governments for the establishment of minimum conditions of work and freedoms to organize trade unions and engage in collective bargaining.<sup>77</sup> Prior to the mid 1800s, workers did not enjoy the specific legal ability to organize unions, to strike against employers, to organize politically or to draw compensation from public funds during times of economic hardship.<sup>78</sup> These privileges were only extended to workers, if they were granted at all, on the condition that they were members of qualified trades. With the public provision of various domestic legal entitlements, workers began to demand international action regarding working conditions.

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<sup>77</sup> Charles Tilly, 'Scholarly Controversy: Global Flows of Labor and Capital - Globalization Threatens Labor's Rights' (1995) 47 International Labor and Working-Class History 1 at 6.

<sup>78</sup> Ibid at 7.

Workers' advocates began to address the relationship of international commerce and labour standards out of a genuine concern to overcome the 'problems' of competitiveness.<sup>79</sup> The early trade union movement in Europe believed that the harmonization of national labour laws was necessary to improve the condition of workers across Europe -- since the establishment of any one law in a single country was difficult to accomplish without the foundation of the same law in all other European nations.<sup>80</sup> Initial suggestions for European labour standards hoped to secure an 'international factory law.' Later in the mid 1800s, workplace reforms focused on a number of issues -- such as child labour, hours of work, weekly rest for women & children and occupational health & safety.<sup>81</sup> These efforts eventually culminated in an international treaty that banned the use of white phosphorous in industry<sup>82</sup> and

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<sup>79</sup> Workers in the early to mid-1800s were not interested in limiting international trade. For instance, workers in the United Kingdom were not threatened by free trade given Britain's hegemonic position in the international economy. Labour and the industrialists shared an interest in maintaining free trade as long as the hegemony was maintained. The American labour movement took the same approach to free trade when the United States rose to prominence internationally. Support for free trade waned in these countries when the major depression of 1880 occurred. This subsequently altered the view of labour towards free trade in the coming year. See Zolberg, *supra*, note 64 at 33.

<sup>80</sup> Virginia A. Leary, 'Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, U.S. Laws) in Jagdish Bhagwati and Robert E. Hudec, Fair Trade and Harmonization: Prerequisites for Free Trade, Vol.2 (Cambridge, Massachusetts: MIT Press, 1996) at 183.

<sup>81</sup> *Ibid* at 184.

<sup>82</sup> The effects of working with phosphorous are eloquently depicted in Upton Sinclair's, The Jungle, also see the extract 'The Fertilizer Man' reprinted in Upton Sinclair, The Cry for Justice: An Anthology of the Great Social Protest Literature of All Time, (New York: Barricade Books, 1996) at 38.

prohibited night work for women. The efforts of trade unionists would be realized, in the early and mid 1900s, with the creation of international institutions fostering ILS and the rise of links between trade and labour standards in domestic trade legislation. This struggle to expand labour standards into the international arena highlighted the changing nature of the claims made by workers over this period. Workers legislative privileges would be transformed and recognized as universal human rights.

In the 1800s, the trade union movements in Europe and the United States worked to promote workers' international interests. In the course of the late eighteenth and early nineteenth centuries, developing out of ideas inspired by the American and French revolutions: 'the Rights of Man and Citizen' began to be asserted in Western societies.<sup>83</sup> The concept of rights promoted in this period of history was unique, for its time, in three respects. First, rights belonged to individuals. Second, the rights involved were perceived as being conceptually universal and equally available to all. Third, these rights were essentially *politico-legal* in nature -- since the *raison d'être* of proclaiming them were to provide social justice through institutional guarantees for citizens.<sup>84</sup>

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<sup>83</sup>Eric Hobsbawm, *Workers: Worlds of Labor*, (New York: Pantheon Books, 1984) at 302-309. These 'Rights of Man' created a basic set of rights which were implicit in earlier legal and political documents. This is not to be confused with such documents of revolution as the seventeenth-century British Petition of Rights of 1628 or the Bill of Rights in 1689, which were petitions against specific grievances rather than formulations of universally accepted rights. Intra at 302.

<sup>84</sup>Ibid.

Consequently, these rights implied domestic social and political action, insofar as they were not already effectively guaranteed by the law.

Later, labour militants<sup>85</sup> would attempt to inject social and economic goals into this set of rights. The freedoms guaranteed by such rights were negative in nature protecting citizens *from* certain conditions: 'rights' as they existed were viewed as being insufficient for labour. Workers demanded legal access *to* a variety of conditions.<sup>86</sup> The goal for labour unions was to *realise*

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<sup>85</sup>For instance, Jean Jaurès, a leader of French Socialism, during the early years of this century, agitated for broad social and economic rights in Europe. He stated in 1901 that:

We...claim that all the means of production and wealth accumulated by humanity must be put at the disposal of all human activities and help to make them free...Every individual has a right to demand of humanity everything that will aid his effort: he has the right to work, to produce, to create, and no category of men may draw usury from this work or be put under its yoke!...Socialism is not an arbitrary and utopian conception, it moves and develops in full reality: it is a great force of life, blended into the whole of life, and soon capable of directing life. To the incomplete application of justice and human rights by the bourgeois and democratic Revolution, it has opposed the full and decisive interpretations of the Rights of Man. To the incomplete, narrow, and chaotic organisation of wealth attempted by capitalism, it has opposed a magnificent conception of harmonious wealth, where the effort of each individual is strengthened by the mutual effort of all.

Posing a threat to the organisation of the war effort in France, he was assassinated in 1914 by a lone gunman. Jaurès' death marked the end of all hope that European socialists, presumably inspired by international sentiments, might keep the great powers from launching the First World War. See Irving Howe ed., Essential Works of Socialism, (New Haven: Yale University Press, 1986) at 119-124.

<sup>86</sup>Hobsbawm, *supra*, note 83 at 304. A notable first for the labour movement was the Chartist movement in England. One of the largest mobilisations in British history, Chartists agitated for the democratisation of Parliament. Democracy was necessary for Chartists because through a fair election the poor majority could, in their view, enact legislation which would realise their social programs. For an early North American view of the development of trade unionism and its relationship to human rights, see Gilbert Stone, A History of Labour, (New York: MacMillan, 1922) at 217-285 where the author notes the resistance to the 'radical' demands of labour.

the same freedoms as other segments of society by creating greater legal rights and civil liberties. The major contribution of nineteenth-century labour movements to human rights was to demonstrate that such rights required a greater extension and that they had to be effective in practice.<sup>87</sup> The development of adding social and economic rights to the traditional concepts of rights would strongly influence international concepts of guaranteeing human rights in the workplace.

Internationally, the early nineteenth century antecedents of the modern trade union movement began to demand similar rights in the context of maturing international commerce. More than four hundred unions were organised between the years 1840 and 1914 across Western Europe, Canada and the United States. In time, associations such as the International Association for the Legal Protection of Labor, founded in 1900, would provide a basis for the creation of the International Labour Organisation (I.L.O.)<sup>88</sup> almost

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<sup>87</sup> Ibid at 306.

<sup>88</sup> Diana Vincent-Daviss, 'Human Rights Law: A Research Guide to the Literature - Part III: The International Labour Organisation and Human Rights' (1982/83) 15 New York University Journal of International Law & Politics 211 at 214. Of course other international conferences preceded this development such as the First International Factory and Mineworkers Conference held in Berlin in 1890. It made recommendations for the regulation of mine labour, Sunday work and the employment practices of women and children. As well, there had been international trade union secretariats (ITS) for particular crafts since 1889. The ITS brought together individual national unions in particular sectors of industry to focus on issues relating to particular occupations or companies. See Greg Bamber and Russell Lansbury eds., International and Comparative Industrial Relations: A Study of Industrialised Market Economies, (London: Routledge, 1993) at 264.

twenty years later. The birth of the ILO occurred when several Western workers' organisations called for the creation of an international labour organisation. This body would regulate the conditions of employment, social security and occupational health & safety on an international basis.

The ILO was founded, in 1919, as a permanent organ of the League of Nations by Part XIII of the Treaty of Versailles which served as its original Constitution.<sup>89</sup> The Constitution stressed that, '[universal] peace can be established only if based on social justice.' The ILO would attempt to establish norms of conduct in its members' workplaces. Later in 1944, the ILO amended its Constitution by adopting the Declaration of Philadelphia and it became part of the United Nations. This instrument retained the ILO's original commitment to social justice by expanding its principles from the relatively narrow topic of safe-guarding working conditions to the broader considerations of social and economic life.<sup>90</sup> These social and economic considerations not only accorded with the original aim of early trade unionists, they also enunciated several important human rights concepts related to citizenship in a democratic nation.

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<sup>89</sup>Ibid at 214.

<sup>90</sup>Ibid.

Although initially not thought of as a human rights organisation, the ILO proclaimed several fundamental human rights.<sup>91</sup> The ILO established principles for the improvement of working conditions, including the freedom of association, absence of discrimination at work and the abolition of forced labour.<sup>92</sup> As the ILO moved into the mid to later half of the century it focused on the promotion of law.<sup>93</sup> Thus, the ILO set about to fulfil its most important function -- international standard setting which became the basis of many internationally recognised human rights.

The growth of international human rights law had an impact upon international trade agreements. As international institutions addressed

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<sup>91</sup> For example, the Declaration of Philadelphia proclaimed that: 'All human beings irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.'

<sup>92</sup> Vincent-Daviss., supra, note 88 at 213. Also note that when the ILO was brought under the aegis of the United Nations in 1948, the standards expressed in ILO Conventions and Recommendations were reinforced by the Universal Declaration of Human Rights, which included among other things, the founding of the freedom from discrimination, established freedom of association, and freedom of choice of employment, freedom from slavery and servitude, right to work, right to equal pay for equal work, right to education. It also included the Covenant on Economic, Social and Cultural Rights, addressing specific labour related issues such as equal rights for women, right to work, right to just and favourable conditions of work, the right to join labour unions and strike in conformity with local labour laws, (article 8) and the Covenant on Civil and Political Rights, establishing freedom of association but allowing it to be abrogated for reasons of national security, public safety, health, or order. Collectively these documents are known as the International Bill of Human Rights.

<sup>93</sup> Human rights concepts have been said, among other things, to express a form of 'natural law' higher than that of individual states. The concepts of human dignity became a founding principle of the ILO as it was essentially established to protect the human rights of workers - to protect them and to try and improve their living conditions. The founding concepts of the ILO, among other international instruments such as the Universal Declaration of Human Rights, which states that 'all human beings are born free and equal in dignity and rights', broadly frame their founding principles.



traditional workers' rights demands: international trade agreements have slowly begun to turn their attention to ILS matters. Treaties and domestic legislation aimed at regulating trade on the basis of moral concerns<sup>94</sup> have become a more common issue in trade relations over the last century. Action prohibiting or regulating the behaviour of states regarding working conditions spans a wide array of different legal and non-legal instruments. For instance, commodity agreements, domestic legislation, boycotts, anti-dumping duties, countervailing duties and export restrictions have been employed, at various times, to influence the labours standards of trading partners.<sup>95</sup> Recently, the debate concerning workers' rights has moved to the point where serious consideration is underway to include some ILS in the WTO discipline. However, largely as a result of pressure from developing countries such as India, Pakistan, Egypt and Malaysia this development has yet to occur. The WTO Ministerial Conference held late last year in Singapore failed to move beyond rhetorical endorsement of ILS. The Ministerial Declaration renewed the WTO's commitment to 'internationally recognised core labour standards' and added that the ILO was to be considered the competent body to deal with

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<sup>94</sup> For example, among other things, the issues of slavery, prison labour, forced labour and child labour have been variously included in trade legislation and international agreements from the late 1880s until approximately the 1950s. See Charnovitz, *supra*, note 46 569-573.

<sup>95</sup> *Ibid* at 569-578.

these standards. However, little real change in the official ILS position of WTO has occurred as a result of the Conference. Finally, after warning of the protectionism inherent in some ILS claims, the WTO pledged itself to continue existing collaboration with the ILO to promote these standards.<sup>66</sup> As we will see, although the inclusion of ILS measures has not yet occurred within the WTO, some regional trade agreements<sup>67</sup> have included a variety of these mechanisms into their trade regime.

This section briefly surveyed the development of ILS and detailed the evolution of workers' claims from simple demands upon the state to recognized universal human rights. These rights would alter the fundamental nature of legal rights and would be increasingly proclaimed by organizations such as the ILO. Labour rights have acquired limited recognition as they were implemented, in an *ad hoc* fashion, in various trade-related arrangements. Despite this history, the recent debate concerning the relationship of ILS to the modern world trade regime has rejected the notion of implementing expanded ILS in the WTO. In part, this rejection of these rights is connected to the

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<sup>66</sup> See Singapore Ministerial Declaration, adopted at the first Ministerial Conference of the WTO from 9 to 13 December 1996 at 1 and Padraig Yeates, 'ILO Split on Labour Standards Shakes Tradition' Irish Times (21 January 1997) at 1. The level of collaboration between the ILO and WTO did not begin well when the WTO withdrew the invitation of Michel Hansenne, ILO Secretary General to address the Conference. The United States continues to attempt to have this issue squarely addressed within the WTO discipline.

<sup>67</sup> *Supra*, note 75.

underlying theoretical orientation of ILS. As we will see, it is the very nature of ILS that makes the process of defining workers' rights within trade agreements among the most difficult tasks in creating a new trade-labour link.

## **II) International Labour Standards -- The Ramifications of the Human Rights Approach**

Clearly the modern debate has mirrored the historical experience regarding workers' claims for legal status -- a human rights dialogue has come to dominate the discussion. The current discussion regarding the inclusion of ILS in the WTO is instructive. A fundamental shift from a discussion regarding labour standards (a broad based approach) to a discussion of 'core labour rights' (a narrower approach) has permeated the ILS debate. Clearly, many practical advantages<sup>98</sup> result from this change in our collective wisdom and help to move the free trade fair trade debate out of its immobilised state. Free traders, as we have seen, reject many labour standards demands, such as an international minimum wage, because trade depends upon (among other things) 'differences' in policy choices. Demands that would create 'level playing fields' in many labour standards areas would eviscerate difference in labour markets and as a result are viewed as incoherent trade policies. As we

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<sup>98</sup> See Langille, *supra*, note 14 for a fuller discussion of the benefits of this shift.

have also seen.<sup>99</sup> within free trade doctrine.<sup>100</sup> this argument is not persuasive in situations where ‘level playing field’ claims demonstrably increase economic welfare. However, some free traders do permit non-economic considerations (wrongful acts) a place within trade agreements.<sup>101</sup> Thus, long standing labour concerns (e.g., restrictions on freedom of association, freedom to organize, freedom from forced labour, freedom from child labour) could constitute the ‘wrong’ necessary for some free traders to include labour standards within trade agreements. Furthermore, human rights claims can not simply be dismissed on the basis of economic welfare arguments because, theoretically the violation of human rights cannot be justified by the desire for economic gain.<sup>102</sup>

This last point illustrates the nature of workers’ legal claims in this discussion. The shift to international rights as opposed to international standards in the labour context moves the debate to rights centred justifications of trade-related labour issues. Rights discourse naturally discards welfare analysis in the free trade fair trade debate. Howse and Trebilcock explain:

...the most obvious and compelling normative basis for insisting on compliance with minimum standards may have little relation to economic welfare: this is particularly true in the case of universal

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<sup>99</sup> Supra, note 19.

<sup>100</sup> Supra, note 14 at 39.

<sup>101</sup> Supra, note 19.

<sup>102</sup> Langille, supra, note 14 at 40.

human rights, including labour rights, where a case for universal recognition of such rights is often premised on a deontological conception of human freedom and equality.<sup>103</sup>

Human rights are frequently and increasingly regarded as inalienable rights that belong to individuals regardless of their national affiliations, simply by virtue of being human. Such an understanding of rights is implicit in the Kantian understanding of human autonomy that has profoundly influenced contemporary liberal theory. Consequently, the human rights approach to international labour matters demands that the legal covenant extended to workers not be abridged by collective welfare analysis of economists.<sup>104</sup> In other words, the labour rights now being discussed, for inclusion in both global and regional trading arrangements, rely on normative judgements that there are things that one should never do such as: preventing the association of workers to join unions or go on strike, use prison or slave labour, exploit children and discriminate against workers on the basis of various criteria, such as race or gender. The 'wrong' envisioned by the deontological approach views rights as being inalienable in the sense that it would still be wrong, to keep slaves, regardless of the fact that the balance of advantages might favour slavery.<sup>105</sup>

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<sup>103</sup> Howse & Trebilcock, *supra*, note 9 at 65.

<sup>104</sup> Langille, *supra*, note 14 at 36.

<sup>105</sup> C. Fried, 'Right and Wrong - Preliminary Considerations' (1976) 5 Journal of Legal Studies 165 at 166.

The implication of this approach being married to a (sometimes) contradictory utilitarian approach is crucial to constructing a trade agreement that seeks to effectively implement labour rights. At first blush, the doctrinal approaches of utilitarian and Kantian approaches may not directly conflict. For instance, a Kantian analysis may determine that it is always 'wrong' to utilise slave labour and assert a right against the use, ownership and trade of slaves.<sup>106</sup> Regardless of any moral concerns relating to slavery, a true utilitarian may independently arrive at the same conclusion. A free trade economist, for example, may determine that the collective decision to implement slavery was not arrived at by the voluntary agreement of all the affected parties (i.e., the slaves). The net effect of such a decision for winners and losers in this arrangement may not be to increase the social welfare, as judged by all affected parties in terms of the impact of this decision on their utility.<sup>107</sup> In situations where the analysis of free traders and fair traders dovetails -- utilising whatever approach satisfies the parties involved in the decision -- these areas of agreement ought to be implemented immediately to deter immoral and inefficient behaviour in trade relationships. This approach seems relatively

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<sup>126</sup> In fact, the slave trade issue was the first precedent for regulating international trade on overtly moral grounds. A treaty banning the practice was signed in Brussels in 1889-90. See Charnovitz, *supra*, note 46 at 569.

<sup>127</sup> Trebilcock, *supra*, note 37 at 22.

uncontroversial as, intellectually at least, there is no disagreement that the practice in question is undesirable.<sup>108</sup>

The more difficult situation relates to the underlying approach of accepting ILS as human rights claims. Human rights claims present themselves to free traders as 'non-economic' decisions for regulating trade. Rights based concepts effectively trump utilitarian analysis because such an analysis is, in strict terms, irrelevant to a rights claim (viz., it is always wrong to do a thing). As a result, utilitarians are faced with the difficult task of analysing ILS based upon the underlying human rights rationale presented by fair traders. The ability of free traders to purposively define and agree to the inclusion of certain workers' rights is diminished as this is not an area of expertise for trade economists involved in this debate. On the other hand, fair traders who strictly adhere to a human rights approach, may face the peculiar dilemma that a particular labour standard is not included in a trade pact simply because it is not widely considered a universal human right. The strictures placed on trade-related ILS by the human rights approach may simply be too restrictive of certain ILS claims. For instance, depending on the definition of

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<sup>108</sup> Freedom of association and collective bargaining seem to offer enhanced economic efficiency and are highlighted as being 'core workers right'. Consequently, these rights ought to be implemented world wide. For an explanation as to why they are not universally adopted and further information on the rate of compliance with these standards see 'Trade, Employment and Labour Standards,' supra, note 73 at 26 -69

'core workers' rights.' certain labour issues, such as occupational health and safety,<sup>109</sup> may not be included in a trade agreement if they are not perceived to be 'human rights' issues. This may even occur where 'level playing field' arguments for the harmonisation of minimum health and safety laws cause a reduction in overall regulation that could result in increased economic welfare. These difficulties with defining the proper bounds of ILS, as human rights issues, bear upon a larger problem of establishing a principled approach to distinguishing between legitimate and illegitimate trade-related labour claims.

Despite the perceived advantages of defining ILS as human rights matters, such an approach will not necessarily diminish the opposition of free traders to the human rights claims of fair traders in all circumstances. Without doubt certain free traders can accept the presence of a limited number of non-controversial human rights such as restricting the importation of products made by prison labour.<sup>110</sup> However, some 'core labour rights' will be hotly contested by free traders because of their strong normative commitment to the private market. For instance, the issue of an international minimum wage is

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<sup>109</sup>Note this right has been discussed and included in the European Union and NAFTA's labour side agreement. However, as we will see, the inclusion of certain rights is not guaranteed by any agreed definition of these rights. For example, the recent, influential OECD study on trade and employment list of 'core rights' - freedom of association and collective bargaining, elimination of exploitative child labour, prohibition of forced labour, in the form of slavery and compulsory labour and non-discrimination - it did not include health and safety among these basic rights. See, *Infra*, note 73 at 26.

<sup>110</sup> See generally, Howse & Trebilcock, *supra*, note 9 and Trebilcock & Howse, *supra*, note 12



usually resisted by free traders for a number of reasons. Classical economists believe that an increase in the minimum wage motivates employers to adjust their operations so that workers become worth their new wage level. The adjustment preferred by employers is in substituting machinery and more highly skilled workers for their labour thereby reducing the employment of low wage workers.<sup>111</sup> In the context of international trade, increasing or implementing a minimum wage introduces rigidities in the labour market which in turn raise the cost of labour beyond a market clearing level.<sup>112</sup> The result for national economies that depend upon cheap labour in creating their comparative advantage is increased unemployment and a corresponding drop in the level of world wide competitiveness. Moreover, this device is seen as an artifice that allows non-competitive nations to maintain low skilled, low paid workforces that the market would not tolerate without a minimum wage. In a perverse turn of distributional justice, unfair competition ensues because this policy punishes developing nations only to benefit developed countries. Finally, as free trade depends upon utilising relatively cheap labour<sup>113</sup> to

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<sup>111</sup> D. Card and P. Krueger, Myth and Measurement, (Princeton: Princeton Univ. Press, 1995) at 1 -12. The authors challenge economic orthodoxy and demonstrate that the effects of increasing the minimum wage is not as mechanical as neo-classical economists believe. It may result in no loss of employment or alternatively in an increase of employment.

<sup>112</sup> Sachs, *supra*, note 12 at 15-16.

<sup>113</sup> *Supra*, notes 19-21.

provide benefits to consumers. the differences in key labour market policies that set wages are viewed as key prerequisites of trade. An international minimum wage is seen as being antithetical to the basis of trade because it eliminates wage differences that are a cornerstone of free trade.

Not unexpectedly, fair traders fundamentally disagree with the analysis provided above. Typically, fair traders<sup>114</sup> tend to believe that the presence of wage regulation can break the depressive forces of low wages and encourage incentives for productivity enhancements leading to overall development in a poor region.<sup>115</sup> Furthermore, ILS are viewed as a 'high road' approach to economic restructuring that nurtures efficiency enhancement through better management and organisation of the value added process.<sup>116</sup> ILS in trade agreements act as an 'enabling framework' for positive change that permits constructive competition which would not be feasible in the absence of these standards.<sup>117</sup> A minimum wage policy in trade agreements is a crucial factor in inspiring such development. Consequently, fair traders do not believe

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<sup>114</sup> Thomas R. Donahue, 'Workers' rights in the Global Village: Observations of an American Trade Unionist,' in W. Sengenberger and D. Campbell (eds.), International Labour Standards and Economic Interdependence, (Geneva: Institute for Labour Studies, 1994) at 200.

<sup>115</sup> W. Sengenberger, 'Labour Standards: An Institutional Framework for Restructuring and Development,' in W. Sengenberger and D. Campbell (eds.), Creating Economic Opportunities, (Geneva: Institute for Labour Studies, 1995) at 32.

<sup>116</sup> Ibid at 26.

<sup>117</sup> Ibid.

economic progress for developing nations and ILS are mutually exclusive prospects.

Beyond this fundamental disagreement concerning the welfare utility of ILS, it seems that fair traders could plausibly assert minimum wages as a human right. The basis for this right lies in various universally proclaimed human rights documents of the United Nations<sup>118</sup> that assert fair wages and acceptable conditions of work with respect to minimum wages. A right to a universal minimum wage would assert a value to remunerating workers a sustainable wage for their labour. In other words, it would always be wrong, using Kantian terminology, to pay wages below a level viewed as exploitative. These demands could be enforced through an absolute minimum wage or a relative wage setting based on the economic level of development. For example, a minimum wage that set the wage rate as a percentage of labour productivity in each sector of the economy. Moreover, similar demands for either an absolute or adequate wage as a right have been asserted by various (developed and developing) countries since the 1920s.<sup>119</sup> Yet, for the reasons stated above, free traders would remain sceptical of such a proposal. Consequently, 'core workers' rights' provide only a rough intellectual guide to

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<sup>118</sup> See the International Bill of Rights, *supra*, note 92 and Leary, *supra*, note 80 at 214 and 215.

<sup>119</sup> Charnovitz, *supra*, note 46 at 572.

determining which human rights claims might be considered legitimate regulation in a trade agreement.

Furthermore, attempting to temper the inclusion of these rights with different classification systems cannot resolve the legitimacy of certain claims. The various demands for certain labour rights have inspired different commentators to attempt to categorize rights based on their function. For instance, core workers' rights, such as freedom of association and collective bargaining, are rights entitling workers to a *process* -- to organize, strike and bargain about wages and working conditions. These rights do not guarantee any substantive entitlement to particular wages or working conditions.<sup>120</sup> Obviously, the right to strike or form a union is insignificant in and of itself. The importance of creating such a right is drawn precisely from what the right to strike and organize achieves for workers -- an important opportunity to improve the terms of work.<sup>121</sup> In this respect, these rights function instrumentally so as to secure the means and not the ends of 'social justice' for workers. As a result, the substantive standard setting that some core rights require is seemingly avoided. However, the function of a right (viz., to offer a process) may be specific to a particular claim. Nonetheless other rights, such

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<sup>120</sup> Langille, *supra*, note 14 at 4.

<sup>121</sup> Hobsbawm, *supra*, note 83 at 307.

as the elimination of exploitative child labour, prohibition of forced labour or non-discrimination, may require detailed substantive regulation. Moreover, a danger exists in the categorisation of rights because a normative system of selecting rights cannot distinguish all legitimate human rights claims from illegitimate demands. The various definitions of rights offered by different commentators<sup>122</sup> can confuse the function and nature of the legal entitlement claimed by workers thereby relegating some rights claims into simple ILS privileges. A rigorous intellectual system for determining legitimate ILS demands seems to be only partially effective in this context.

This section of the chapter outlined the ILS basis of the fair trade debate as a rights based argument pertaining to trade-related labour issues. It noted that ILS issues were framed in rights based discourse that rejects utilitarian welfare analysis employed by free traders in analysing the trade/labour link. Although these approaches are not inherently conflictual, the participants in this debate will contest certain issues as a result of their underlying normative approaches to this subject. A principled approach to resolving this debate which relies upon an intellectual method of distinguishing legitimate and illegitimate forms of ILS regulation is not able to resolve disagreement in this area. As we have seen earlier, the "distinction" between

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<sup>122</sup> See for an example, Compa, *supra*, note 14 at 169.

appropriate subjects of regulation is not always a justifiable differentiation (e.g., level playing field arguments can justify a policy harmonisation as it is a coherent claim within free trade doctrine). In addition, the identification of an appropriate list of rights for trade regulation is not a subject that all participants will be able to agree upon or even classify properly. Yet, this theoretical and practical investigation does suggest a method for strengthening the actual link between trade and labour issues.

### **III) A Preface to Progress**

Despite the normative debate that rages between free and fair traders, the process for establishing ILS in global or regional trade arrangements has not stemmed from the broad agreement of academics. The intellectual coherence between human rights and economic welfare analysis has never been the sole threshold for legislative action in this area. Given the continued (intense) debate on this subject, legal benchmarks proposing appropriate techniques for accepting international labour market regulation can only take the implementation of new ILS part of the way to reform. Without abstract legal boundaries to guide decision makers to suitable ILS inclusions into trade agreements, the free trade/fair trade debate will again be characterised by

disagreement. However, the implementation of some of these rights is possible because new legal rights are established in an inherently imperfect and often incoherent manner. Thus it is not necessary that there be agreement on a perfectly coherent set of labour rights for such rights to be included in trade agreements. Whether legal rights are theoretically grounded in deontological or utilitarian justifications, the actual selection process for fashioning legal rights relies on an unprincipled political process of discussion, negotiation and settlement. Charles Tilly explains this process:

Participants in social movements often speak as if...rights were given by God, by nature, by logic, or by universal assent, as if they existed prior to the obligations of any state to enforce them. Looked at closely, however, such claims always amount to demanding that certain authorities recognise, endorse, guarantee, or grant the rights in question. Social movements centre on sustained challenges to established authorities in the name of wrongly disadvantaged populations. Although sometimes the rights in question consist simply of unimpeded existence, they seek rights and enforcement of rights. They only acquire those rights as rights when authorities agree to act in reinforcement of their claims. Activists in [inter]national social movements attempt to bind [inter]national authorities - mostly agents of states - to the enforcement of [international] rights.<sup>123</sup>

As a result of this process, the various claims being forwarded by ILS advocates do not require full unanimity or even strict logical coherence to be implemented by states. The political bargaining present in this system requires

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<sup>123</sup> Tilly, *supra*, note 77 at 7.

fair traders to demand the inclusion of desired labour standards from a domestic state (its apparatus of government, the judiciary, bureaucratic institutions and quasi-governmental organizations). Nonetheless, the state in each nation negotiating ILS into a trade agreement, is at the same time encouraged by the common interest of business to resist 'unbridled' labour regulation in trade agreements.

However, this investigation into the theoretical and practical functioning of the modern world trading system suggests that secured avenues of discussion, negotiation and settlement offer the only viable means for moving beyond the parameters of the current debate. As we have seen, the world trading regime relies upon<sup>124</sup> a system of trade rules that promotes multilateral negotiations and co-operation to resolve trade disputes. Similarly, labour unions struggled to implement their common interest regarding ILS through discussion, bargaining and settlement with businesses and the state. In addition, I have suggested that the perceived dilemma for workers posed by globalization and free trade (capital flight and de-regulation), which has inspired the resurrection of ILS demands, is also resolvable through discussion and negotiation. The key for workers is to utilise institutional space that would enable them to establish their demands in a formally binding agreement. If

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<sup>124</sup> See Trebilcock and Howse, *supra*, note 21 at 18.



workers can secure state machinery to promote ILS in trade agreements, thereby settling contentious issues with business interests and the state, then the prospects for forging a stronger link between trade and labour issues should be advanced.

The conflict over regulation in trade agreements and the basic division of views concerning fair trade claims might result in a multilateral process that could create a framework for the negotiation and maintenance of a minimum list of ILS in trade agreements.<sup>125</sup> Domestic self interest of various organisations, political pressure, disagreements concerning ILS regulation and difficult bargaining sessions will all temper the final outcome of any ILS/trade link. As this bargaining process chooses to include some ILS issues for collective regulation (and rejecting other areas of regulation leaving the choice of regulating these issues to individual states) a new trade regime will emerge that accepts a greater social dimension to trade. The initial inclusion of a core set of rights may overtime be re-examined and modified utilising the same processes and institutions available to workers initially. These changes will likely be informed by our concrete experience with new ILS/trade links and future rounds of political bargaining. The debate between free and fair trade coupled with the political bargaining process will regularly revisit these issues

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<sup>125</sup> Trebilcock & Howse, *supra*, note 21 at 91.

until some final accommodation is made between the participants in this debate. The challenge for proponents of an expanded ILS trade link will be to find, secure and use the right channels of communication to initiate these policy changes.

#### **D. Conclusions**

This chapter has contended that many of the current positions in the free trade fair trade debate are misplaced in the context of the labour standards debate. It has attempted to highlight the importance of the normative, positive and utilitarian dimensions of free trade doctrine in order to demonstrate that, in certain situations, free trade theory accepts 'level playing field' arguments usually rejected by free traders. If all 'level playing field' claims are not incoherent within free trade doctrine then the polarisation caused by this part of the debate owes its discord to other factors. More accurately, the friction in this debate is caused by the relationship of regulation to trade. By establishing that free trade doctrine *is not laissez faire* in its orientation and that it is necessarily accepting of regulation, this chapter has argued that a basic tension exists between the ends of free trade doctrine and the means it needs to deploy to realise its aims. This paradox indicates that the issue of regulation and how it is viewed occupies a key place in the debate concerning ILS.

Furthermore, the conventional free trade/fair trade discussion did not acknowledge that the global and regional trade regimes had in fact employed a limited but positive view of ILS regulation. In fact, the GATT and NAFTA disciplines had indirectly addressed labour market issues and had also accepted a direct role for regulating ILS issues in trade agreements. The acceptance of some ILS issues for regulation has not dampened the conflict surrounding the regulation of new ILS. The history of ILS has indicated that many of these claims are viewed as human rights issues. However, the nature of the rights claimed by fair traders presents some difficulty in devising a principled system to distinguish legitimate and illegitimate claims. Although the respective deontological and utilitarian approaches of fair and free traders do not necessarily conflict in distinguishing some ILS claims, inevitably the human rights approach employed by fair traders' poses some difficulties in devising an acceptable means of establishing new ILS criteria in trade agreements. Despite the universal acceptance of some human rights claims, and a genuine willingness of a few free traders to embrace these claims -- free traders will dispute the propriety of including human rights claims because those claims deeply violate free traders' normative sensibilities. Fair traders also potentially sacrifice ILS claims that are not widely accepted as human rights despite the economic advantages of regulating certain issues. Attempting to systematise

the selection process for legitimate human rights claims may also improperly rule out areas of ILS regulation. Consequently, the establishment of a 'core workers' rights' approach only offers a rough guide for decision makers attempting to fashion a new list of ILS that would condition trade.

The political process utilised to choose the specific forms of regulation only needs to partially rely on a rational, coherent process of distinguishing ILS claims. The inherent conflict between free trade and the state regulation of trade requires a concerted effort by free traders to limit regulation if free trade is to maintain its welfare enhancing properties. This action is motivated, in part, by the interest of businesses to limit state regulation. Conversely, the claims on the state to regulate some new ILS issues by labour advocates, coupled with fair traders' genuine interest in limiting the negative effects of free trade on workers in a globalised economy, will also affect the decision of states to regulate these issues. The contradictory positions assumed in this debate will influence the decisions of states to expand ILS regulation. The self interest of governments and the interplay of interests might militate against a widely regulated international labour market thereby creating anemic institutional ILS arrangements.

However, the foregoing analysis suggests that these agreements will likely be central in facilitating the ability of individuals and non-governmental

organizations to participate in strengthening the ILS/trade link. The institutional arrangements created by governments, such as the *North American Agreement on Labor Cooperation* (NAALC), should provide the institutional means to secure avenues of discussion which are focused upon ILS issues. This should promote a continuing effort to refine and improve ILS. Institutional arrangements that concern themselves with the ILS trade link may provide enough dialogue and agreement between interested parties to pursue the revision of weak ILS into effective international labour regulation. If the political process can secure enough institutional space<sup>126</sup> for creating a dialogue that actually leads to effective ILS reforms then we might expect an evolution in the current free-fair trade debate. Any perceivable change in this debate might lead to a more positive prognosis for the future of ILS in the world trade regime. It might also focus the efforts of labour advocates upon using the institutional means of the state to bring about ILS in trade agreements.

The experience of labour advocates in utilizing the NAALC to promote workers' interests is at the heart of rest of this dissertation. A debate *among* fair traders relating to the NAALC's effectiveness as an ILS instrument has divided labour advocates on this question. Critics of the NAALC in this

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<sup>126</sup> See Langille, *supra*, note 10 at 251 to 259.

debate are skeptical about the agreement's present ability to promote workers' interests in the face of free trade. Consequently, chapter two explains the development and functioning of the NAALC and critically analyses its ability to effectively promote the labour standards present in this agreement. The final substantive chapter explores the NAALC's ability to foster the type of discussion and negotiation contemplated by the forgoing investigation. The proponents of NAALC in this debate reject the views of their critics and believe the agreement can foster the U.S trade link. However, before squarely addressing these questions, the next chapter begins by outlining the recent history behind the agreement's terms, institutions and case-law.

## Chapter 2

*Essential to the new internationalism of the left is the rejection of comprehensive trade agreements that enshrine the rights of capital and disenfranchise working people. In that spirit, it is clear that NAFTA cannot be made to serve the interest of working people in North America.*

James Laxer<sup>127</sup>

On August 4<sup>th</sup> 1993, the representatives of Mexico, Canada and the United States responded to arguments presented by various labour, church and social organizations for a trade labour link by finalizing the *North American Agreement on Labour Cooperation* (NAALC).<sup>128</sup> The NAALC was approved by the Clinton administration to specifically address the 'race to the bottom' concerns espoused by socially minded activists and Congressional representatives. The initial round of negotiations commenced in March 1993 with the Mexican government displaying its displeasure with the proposed

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<sup>127</sup> James Laxer, *In Search of a New Left: Canadian Politics After the Neo-Conservative Assault*, (Toronto: Viking, 1996) at 222.

<sup>128</sup> Canada-Mexico-United States: North American Agreement on Labor Cooperation (1993) 32 I.L.M. 1550 (hereinafter NAALC, Accord, side agreement or side deal). For a historical review of the political forces leading to the negotiation of this document see Robert E. Herzstein, 'The Labor Cooperation Agreement Among Mexico, Canada and the United States: Its Negotiation and Prospects' (1995) 3 *U.S.-Mexico Law Journal* 121; Ian Robinson, 'The NAFTA, the Side-Deals, and Canadian Federalism: Constitutional Reform By Other Means?' in R. Watts & D. Brown eds., *Canada: The State of the Federation* at 193-227 and Levinson, *supra*, note 4.

labour side agreement by requiring that: 1) issues settled in the main body of the NAFTA must not be re-opened, 2) the side deal must not constitute hidden protection, and 3) the agreement must not derogate from national sovereignty.<sup>129</sup> Similarly, the federal government in Ottawa demonstrated little enthusiasm for the labour side deal. Ottawa, concerned with Canadian sovereignty over labour relation, was not moved to not demand a labour accord as a precondition to continental free trade. As well, the federal government's primary NAFTA supporters - the business community - did not care for the social issues being attached to trade. As a result, Ottawa reluctantly proposed a version of the weakest American option presented to Congress - an agreement to oversee enforcement and issue reports on comparative labour law without any true enforcement mechanisms. Ottawa suggested two revisions to this proposal. One would bar private actors from initiating investigations of another countries' enforcement practices by the Secretariat, an institution created to help enforce the agreement. Second, the Canadian government proposed to bar the Secretariat from initiating its own inquiries into these matters.<sup>130</sup> Eventually, Mexican and Canadian resistance to the NAALC

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<sup>129</sup> Ian Robinson, North American Trade As If Democracy Mattered: What's Wrong with NAFTA and What Are the Alternatives, (Ottawa: Canadian Center for Policy Alternatives, 1993) at 37.

<sup>130</sup> Ibid at 38.



would threaten the enactment of NAFTA. The Mexican government resisted demands that the agreement extend sanctions to all the labour principles in its Constitution and the basic labour law. In the final agreement, Mexico maintained its objection but it also, as we will see, accepted trade sanctions for a limited number of labour rights violations. Ottawa refused to compromise on its position that Canada would be exempt from trade sanctions and that it retain a special provision limiting the applicability of the side agreement to provinces that formally acceded to the agreement.<sup>131</sup> The U.S. capitulated to these demands and accepted the asymmetry of the Canadian position in the final arrangement. It was upon these central compromises that the labour side agreement was born. However, despite the efforts of the American administration to bring into existence a relatively stronger side agreement than its NAFTA partners had wished for, this agreement has been the center of criticism by the same groups that Clinton's proposed labour side agreement was designed to mollify. Critics of the side accord maintain that President Clinton failed to safeguard labour standards from the type of behaviour (capital flight and pressure to lower domestic wages) that candidate Clinton signaled was a danger of continental free trade.

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<sup>131</sup> Ibid at 42.

This chapter examines the ability of the NAALC to protect workers' domestic labour standards in an era of regional free trade. First, it describes the basic terms of the agreement and the functioning of the NAALC by reciting its central provisions and institutional arrangements. The purpose of this section is to simply explain the processes and substantive guarantees offered to workers under the NAALC. Next, this chapter depicts the development of the 'case-law' under this agreement. Again, this section describes the submissions made under the agreement and gives an account of the resolution of each action. The purpose of this part is to explain the experience of labour unions, and other groups, under the agreement by explaining the issues, responses and outcome of each case. The following section presents the arguments of NAALC critics regarding the application of the NAALC to the cases. It also presents the position of critics pertaining to the terms and conditions of the NAALC. As we will see, critics argue that the NAALC, in its present form, cannot avoid a race of governments to the regulatory bottom in the context of labour law. Finally, this chapter presents a limited list of reforms to NAALC that critics of this agreement have indicated will improve enforcement of ILS in North America. This chapter then concludes by summarizing the arguments of the critics.

### **A) NAALC - Its Terms, Institutions & Case Law**

Generally speaking, the main objective of the side agreement is to promote closer economic ties among Canada, Mexico and the United States. It approaches this objective through the cooperation of these parties -- employing a number of mechanisms that help advance cross-boarder collaboration.<sup>132</sup> The goal of the agreement is to provide a number of formal and informal consultations before any dispute is brought to higher, more serious levels of inquiry. The NAALC establishes domestic and international institutions to oversee the process and ensure that the *domestic* labour laws are being enforced by the respective governments.<sup>133</sup> These oversight mechanisms are designed to encourage a better understanding of labour laws by the public. The underlying rationale of these devices is to magnify labour law transparency rather than punishing NAFTA partners with trade sanctions. However, the labour accord does provide parties to the agreement with an opportunity to impose trade sanctions as a last resort for the non-enforcement of certain labour laws by a party. This

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<sup>132</sup>This part draws heavily on U.S. National Administrative Office, North American Agreement on Labor Cooperation: A Guide, (Washington DC: Bureau of International Labor Affairs, U.S. Department of Labor, 1995) at 1-4.

<sup>133</sup> Ibid.

exceptional measure may only be initiated by complaints originating in other NAALC countries. A private party concerned about domestic labour law practices cannot launch a domestic complaint about those issues. Rather, a NAALC complaint can only emanate from other signatories to the agreement and must address the failure of a government to enforce its own labor laws.

The NAALC mandates that the domestic institutions created under the agreement receive and review submissions of specific labour law matters made by either of the other two parties to the agreement. The side agreement further delineates the types of issues that may be taken into account during the dispute resolution stages of the agreement.<sup>134</sup> The NAALC is specifically designed to address and settle labour law issues of the governments involved at the lowest possible level of the accord through international dialogue.<sup>135</sup> Consequently, the domestic institutions under the agreement are charged with considering a broad range of matters that may be considered under the accord. However, the agreement's authority to

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<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

address different subject matter is narrowed when issues are raised at higher levels of review.

In specific terms, the NAALC sets out a number of broad social objectives designed to enhance understanding and compliance of domestic labor law. The seven objectives of the side agreement are to:

- improve working conditions and living standards in each parties territory;
- promote, to the maximum extent possible, the Labour Principles set out in Annex I;
- encourage cooperation to promote innovation and rising levels of productivity and quality;
- encourage the publication and exchange of information, data development and coordination, and joint studies to enhance mutually beneficial understanding of the laws and institutions governing labor in each Party's territory;
- pursue cooperative labor-related activities on the basis of its labor law;
- promote compliance with, and effective enforcement by each Party of its labor law;
- foster transparency in the administration of labor law.<sup>136</sup>

However, despite the large scope of some of these objectives, this agreement makes the parties 'responsible' for a number of narrower obligations. These obligations include:

- ensuring that labour laws and regulations provide for high labour standards and that countries strive to improve those standards;
- promoting compliance with and effectively enforcing domestic labour laws through appropriate government action;
- ensuring that persons with a legally recognized interest under domestic laws have appropriate access to administrative, quasi-

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<sup>136</sup> NAALC, Article I

judicial, and labour tribunal proceedings to ensure that the enforcement of its labour laws are fair, equitable, and transparent:

- ensuring that labour laws, procedures, and administrative rulings are promptly published and are available in such a manner as to enable interested persons and parties to be acquainted with them; and,
- promoting awareness of the country's labour laws.<sup>137</sup>

The obligations and objectives of the agreement *do not* define the scope of labour law coverage under the NAALC. The terms of the agreement presented above may only be enforced, if they are enforceable at all, through the implementation of key labour principles.

The labour side agreement aims to promote a number of labour law principles. These labour standards are enforced domestically to the fullest extent of the applicable law. These 'principles' are:

1. freedom of association and protection of the right to organize;
2. the right to bargain collectively;
3. the right to strike;
4. prohibition of forced labor;
5. labor protection for children and young persons;
6. minimum employment standards;
7. elimination of employment discrimination;
8. equal pay for women and men;
9. prevention of occupational injuries and illness;
10. compensation in cases of occupational injuries and illness;
11. protection of migrant workers.

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<sup>137</sup> Joaquin F. Otero, 'The North American Agreement on Labor Cooperation: An Assessment of Its First Year's Implementation' (1995) 33 Columbia Journal of Transnational Law 637 at 642-643.

The signatories to NAALC *pledge* themselves to the domestic enforcement of these labour principles.

However, the text of NAALC does not adopt basic international labour standards. The side accord does not define any universal minimum standards that NAFTA member states must enforce. The Accord pledges the contracting states to enforce *their own labour and employment laws* and does not even provide for the enforcement of another party's laws through the use of the agreement. As well, it does not require that any of the parties implement new legislation that would bring national laws into compliance with the wide array of labour principles<sup>138</sup> -- including the Objectives or Obligations sections found in the agreement. These labour principles are to act as *guiding principles* only and none of these provisions possess the binding force of law. Furthermore, each state will be able to freely amend their current labour and employment laws, in any manner that it chooses, after entering into this agreement.<sup>139</sup> As we will see, the sole 'hard' obligation in the NAALC is the requirement that a demonstrated 'persistent failure' to enforce one or more of

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<sup>138</sup> Annex I of the agreement lists eleven principles.

<sup>139</sup> Annex I defines labour principles in the following manner:

The following are guiding principles that the Parties are committed to promote, subject to each Party's domestic law, but do not establish common minimum standards for their enforcement. They indicate broad areas of concern where the Parties have developed, each in its own way, laws, regulations, and interests of their respective workforce.

these standards (i.e., health & safety, child labour or minimum wage technical standards). The accused government *may* be subject to a binding dispute settlement process that *may* impose a monetary penalty against the violating party.<sup>140</sup>

### **I) Institutions**

The agreement avoids traditional, domestic styles of labour law adversarialism.<sup>141</sup> Instead it seeks to foster discussion and cooperation between the parties in order to resolve any disputes between nations. The agreement establishes its own institutions so as to secure the discussion and cooperation -- and only in the last instance enforcement -- necessary to settle outstanding matters. The Accord is administered by the Commission for Labour Cooperation and it is comprised of a Council of Labour Ministers (CLM) and an International Coordinating Secretariat (the Secretariat). The CLM, which consists of the equivalent of the federal labour minister from each nation, is designed to promote cooperative activities on a broad range of issues in the areas of labour markets, labour relations, labour standards and labour

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<sup>140</sup> Trebilcock & Howse, *supra*, note 21 at 184.

<sup>141</sup> The U.S. NAO, in its first two cases, repeatedly stressed the non-adversarial nature of this process. See U.S. National Administrative Office, North American Agreement on Labour Cooperation, Public Report of Review - NAO Submission #940001 and NAO Submission #940002 (Washington DC: Bureau of International Labor Affairs, U.S. Department of Labor, 1994)



law.<sup>142</sup> The Commission's mandate is to manage the implementation of the NAFTA side agreement and to develop recommendations on the further elaboration, interpretation and application of the Accord. In short, it is charged with improving working conditions in North America by promoting the labour principles found in the NAALC. It oversees the establishment of a National Administrative Office (NAO) by domestic officials in each nation and directs the activities of the Secretariat. These organizations are chiefly responsible for the functioning of the side agreement.

The Secretariat, headed by executive director John S. McKennirey, is staffed with fifteen professional employees who provide legal and economic advice to this body. The staff of the Secretariat are drawn equitably from each country covered by the agreement. The Secretariat's initial budget was set at \$600 000 (U.S.) and has risen to approximately \$1.85 million (U.S.). However, due to deficit reduction this amount fell short of the 1995 projected budget of \$3 million (U.S.).<sup>143</sup> It provides administrative support for the implementation of the agreement by preparing background reports on labour

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<sup>142</sup> The institutional structure of the NAALC is located in Part 3 of the document and consists of Articles 8-19. The NAALC also permits each government to establish National Advisory Committees. These domestic bodies may be guided by the private sector or government and provide advice to the governments on the administration and implementation of the agreement. All countries have established these committees.

<sup>143</sup> Baker & McKenzie, NAFTA Handbook, (CCH: Chicago, 1994) at 236; also see Pamela M. Prah, 'Budget Cuts' (1995) 144 Bureau of National Affairs C1 at C2.

legislation and its enforcement, labour market circumstances and training, and adjustment schemes in the NAFTA countries, or any other area the CLM directs.<sup>144</sup> The Secretariat may only investigate these areas if the CLM requests such information. Moreover, the report offered by it may only include non-binding recommendations for action. Further, these investigations may be based on existing information and the publication of the final report may be prohibited by a unanimous decision of the CLM.<sup>145</sup> The Secretariat must also report the results of any consultations and evaluations to the CLM under the agreement.

As well, the government of each country must establish and maintain a NAO. A domestic NAO acts as a contact point with other NAOs, the Secretariat and any government agencies. It is responsible for assembling information pertaining to the legislative and administrative procedures in each country. Moreover, the NAOs receive and respond to complaints regarding labour law issues arising in other NAFTA countries. Each NAO is responsible for establishing its own domestic procedures, for reviewing public

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<sup>144</sup> NAALC, Article 14 (a) through (d).

<sup>145</sup> NAALC, Article 14 (2). Mexico often lacks existing or public information concerning its labour statistics. See Susanna Peters, 'Labor Laws for the Maquiladoras: Choosing Between Worker's Rights and Foreign Investment,' (1990) 11 *Comparative Labor Law Journal* 229 at 240. In addition, there is a serious need for a fully developed public evidentiary record of the Council and the Commission to permit useful evaluation of the progress of the NAALC and to ensure compliance with the agreement. See David M. Helfeld, 'NAALC in the Eyes of the Beholder' (1995) 10 *Connecticut Journal of International Law* 365 at 372.

communications and deciding what, if any, action is to be taken in response to various requests.<sup>146</sup> To date, only the United States has issued formal binding rules by which it must process NAALC undertakings. The American rules<sup>147</sup> require, among other things, that the U.S. NAO Secretary accept or decline the review of a submission within 60 days of its receipt. Any submission should explain the matters complained of and how they demonstrate action inconsistent with another NAALC member's obligations. As well, the complainant must also appear to demonstrate a pattern of non enforcement of labour law by another NAALC member. Finally, the complaint must not be pending before another international body and relief must have been first sought under the domestic proceedings of the party involved. The U.S. NAO rules require a minimum threshold be met before a complaint can be accepted for review. The NAO may only accept a submission if it raises labour law matters in the territory of another party and a review furthers the objectives of the agreement. The U.S. NAO must hold a public hearing of any accepted

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<sup>146</sup>Each NAO may formulate its own rules governing the acceptance of complaints as long as they conform to the agreement. To date, Canada has only issued guidelines for the handling of complaints under the NAALC. These rules are very informal and provide the Canadian NAO with total discretion in handling NAALC complaints. For a more detailed explanation of the NAO process in the U.S. see Jorge F. Perez-Lopez, 'Implementation of the North American Agreement on Labor Cooperation: A Perspective from the Signatory Countries' (1995) 1 NAFTA: Law & Business Review of the Americas 3 at 4-8. Also see Human Resources Development Canada, Canadian NAO Guidelines For Public Communications Under Articles 16.3 and 21 of the North American Agreement on Labour Cooperation, (Ottawa: HDRC, 1997)

<sup>147</sup> Notice of the implementation of these rules published in the United States Federal Register, Vol. 59, No. 67 at 1666C.

review unless it determines that a hearing would not be suitable for the purpose of the complaint.<sup>148</sup>

In handling a complaint, the NAALC works in different stages to resolve issues between parties. First, a private party,<sup>149</sup> to aid in mutual cooperative consultation and evaluation, can initiate a submission - a term substituted for 'complaint' in order to avoid the appearance of a judicial process - to an NAO from another nation's NAO. If an NAO views a matter to be within its jurisdiction and complies with whatever rules it may have regarding submissions, it may launch a purely informational investigation designed to assist the consulting NAO to better understand and respond to the complaint raised by the party.<sup>150</sup> As a part of the information gathering process, NAOs may hold hearings<sup>151</sup> and then determine if a violation of the

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<sup>148</sup> U.S. NAO, *supra*, note 132 at 4-7.

<sup>149</sup> Generally speaking, legislation addressing trade agreements allows only governments to initiate and carry forward a trade-related complaint permitted under these arrangements. In this respect the NAALC, even though it is only a parallel agreement to a trade agreement, is an exception to the normal practice of multilateral trade dispute regimes. However, the NAALC is not unique in this regard as the investment chapter of NAFTA itself provides private investors the right to initiate *and carry forward* a complaint under its process. The ability of private investors to initiate and carry forward their litigation is a substantial advantage extended to these individuals as it affords them the opportunity to more fully control the legal process they engage in, whereas, labour unions and human rights groups under the NAALC, are almost wholly dependent on their (sometimes hostile or unenthusiastic) governments to resolve complaints under the NAALC.

<sup>150</sup> NAALC, Article 21. As well, the Commission could, with the approval of the CLM, investigate any relevant matter and make recommendations concerning the issue or a government could initiate discussions of a matter and if no resolution is forthcoming an Evaluation Committee of Experts could be established.

<sup>151</sup> U.S. and Mexican NAOs have made it part of their rules and/or practice to hold public hearings in the event of a complaint. However, the Canadian NAO has publicly stated that it will not automatically engage in this process. See May Morpaw, "The North

Accord – namely, the non-enforcement of labour principles - has taken place. The NAO may then recommend that Ministerial Consultations be held between the relevant federal labour ministers to address violations of the side agreement. These consultations may consider any of the eleven labour principles contained in the Accord. In addition, although it has never to date been pursued, an NAO may initiate this entire process *sua sponte*.<sup>152</sup>

However, if a matter remains unresolved after Ministerial Consultations (that is, if the governments involved cannot agree on the terms of the resolution of a submission) and the issue under consideration relates to technical labour standards<sup>153</sup> then the country initiating the complaint can proceed to an Evaluation Committee of Experts (ECE).<sup>154</sup> This body consists of three members selected by the CLM from a list of specialists who deal with labour issues. The ECE mechanism will only be utilized if a dispute centers on a trade-related subject<sup>155</sup> or is encompassed by mutually recognized labour

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American Agreement on Labour Cooperation: Highlights, Implementation and Significance,' Closing Address of the 1995 Conference of the Canadian Industrial Association, Montreal, Canada, May 29, 1995, at 7.

<sup>152</sup> Symposium, 'Panel Discussion: The Challenges and Opportunities Under the NAFTA Labor Cooperation Agreement' (1995) 3 U.S.-Mexico Law Journal 149 at 151.

<sup>153</sup> NAALC, Articles 23 and 49. Technical labour standards refer to all the labour standards of the eleven labour principles except the first three principles listed - 1) freedom of association and protection of the right to organize; 2) the right to bargain collectively, and 3) the right to strike.

<sup>154</sup> NAALC, Article 23.

<sup>155</sup> Article 49 defines 'trade-related' as 'related to a situation involving workplaces, firms, companies or sectors that produce goods or provide services: (a) trade between territories of the Parties; or (b) that compete, in the territory of the Party whose labor law was the

laws<sup>156</sup> and is relevant to technical labour standards.<sup>157</sup> The ECE will issue a report that assesses the matter and, where appropriate, it will issue any practical recommendations that may assist the parties. Each party is allowed to consider this report, file a response to it and then the ECE issues a final non-binding report for the CLM. The CLM will consider this report in attempting to fashion a settlement to the dispute. Finally, if the issues in the complaint relate to a persistent<sup>158</sup> failure to enforce occupational health and safety standards, child labour or minimum wage issues, the complaining party can request another round of consultations and a binding dispute resolution process. If a further round of consultation fails, a dispute resolution panel may be established with the consent of two of three members of the Ministerial Council. On the condition that the parties agree, the panel may seek expert advice, along with their submissions, in coming to a resolution of the matter. A panel finding in favour of a complainant may issue fines against the government of Canada or suspend NAFTA tariff benefits for the United States

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subject of ministerial consultations under Article 22 with goods or services produced or provided by persons of another Party.'

<sup>156</sup> Ibid. 'Mutually recognized labor law' means 'law of both a requesting Party and the Party whose laws were the subject of ministerial consultation under Article 22 (Ministerial Consultations) that addresses the same general subject matter in a manner that provides enforceable rights, protections or standards.'

<sup>157</sup> NAALC, *supra*, note 128.

<sup>158</sup> Article 49. This means a sustained or recurring practice of non-enforcement.

or Mexico.<sup>159</sup> As we will see, labour advocates to date have not proceeded with cases beyond the initial NAO level.

## **II) Case-law**

From the NAALC's implementation date of January 1, 1994 until September of 1997, the U.S.NAO has publicly reported the results of four submissions and the Mexican NAO has publicly reported one submission. Although these cases are too few to conclusively demonstrate the utility of the NAALC, they do begin to draw a picture of how the Accord will be utilized. Together these cases help depict the administration, application and interpretation of the side agreement. For critics of the agreement, as we will see, these cases highlight the weaknesses of the NAALC.

### **a) Public Reviews #940001 & #940002**

On February 14, 1994 the first two cases were simultaneously filed with the U.S. NAO in Washington, DC. The International Brotherhood of Teamsters (IBT) presented a submission<sup>160</sup> alleging that in late 1993,

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<sup>159</sup> NAALC, Annex 41A. A fine may be \$20 million (U.S) in the first year of the agreement and is calculated at .007% of the value of the total trade in goods between NAFTA countries. See NAALC, Article 39(4) and Annex 39.

<sup>160</sup> U.S. National Administrative Office, North American Agreement on Labour Cooperation, Public Report of Review - NAO Submission #940001 (Washington DC: Bureau of International Labor Affairs, U.S. Department of Labor, 1994). See generally

Honeywell Manufacturars de Chihuahua, S.A. (Honeywell) of Chihuahua, Mexico terminated the employment of about 20 production workers. These employees were involved in organizing, or interested in joining, an independent trade union, the Union of Workers of the Steel, Metal, Iron and Related Industries (known by its Spanish acronym as STIMAHCS) at the Honeywell facility. These workers were told that they were being discharged for their union activities and that they were required to sign a form that would allow them to collect their severance pay. Under Mexican law signing a severance form would legally waive their ability to file claims against Honeywell challenging their discharge. The submission alleged that workers who had been terminated for exercising their right to organize were forced by their economic circumstance to waive their right to contest the discharge and accept the severance pay package because they could not afford to wait for the domestic legal process to reinstate them. The submission also asserted that management used coercive force to attempt to gain information about other union oriented employees. The IBT submission focused on the violation of the workers' freedom of association as it was protected under Mexican constitutional law and under Annex 1 of the NAALC. The IBT requested a

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pages 2-7 for a review of the allegations in these cases and pages 9-12 for employer responses.



number of remedies resembling domestic labour law claims (reinstatement, compensation, posting of notices relating to the violations in the plant) and remedies specific to the NAALC (Ministerial Consultation, development of labour standards and guidelines for U.S. companies in Mexico and the implementation of non-trade sanctions to force domestic labour law compliance).

Honeywell responded to these accusations by stating that the elimination of 23 positions was due to layoffs at the operation. The company indicated that all employees, except one, were informed that they were eligible for rehire if positions became available. As well, each of the 22 employees received full separation benefits in accordance with Mexican law. Only one worker was discharged for cause (violation of workplace rules) and did not receive severance pay. This worker contested her discharge and reached a settlement with the company that was approved by the local Conciliation and Arbitration Board (CAB). Honeywell argued that the IBT did not present sufficient evidence to support a claim of a pattern of non-enforcement regarding Mexican labour law. It noted that since no matters were pending in front of Mexican authorities concerning the application or alleged violation of Mexican labour law, there was no reason to conclude there was any failure by the government of Mexico to enforce its labour laws in this matter.

In a similar case, the United Electrical, Radio and Machine Workers of America (UE) made allegations that Compañía Armadora, S.A. a subsidiary of General Electric (GE) located in Ciudad Juarez, Mexico, tried to illegally defeat a campaign of employees attempting to organize an independent union of the Workers' Authentic Front, (known by its Spanish acronym as FAT). The submission claimed that as many as 20 union activists were fired by the company for their union-related activities. Management altered the established practice of plant entry to prevent organizers from distributing campaign literature, removed campaign literature from workers and dismissed employees involved in organizing efforts. It also noted that management at the plant pressured dismissed workers into accepting statutory severance pay. The result of that action, as noted above, would be to relinquish any domestic legal claims for reinstatement. Additionally, UE alleged that GE violated several health and safety provisions including failing to provide: 1) light duties for pregnant women; 2) adequate ventilation and protective equipment; and 3) medical tests to employees to determine chemical exposure levels of workers. UE focused upon the violation of the workers' freedom of association as it was protected under, international law, Mexican constitutional law, and Annex 1 of the NAALC. The UE requested a number of solutions to its complaint that resembled domestic labour law remedies (reinstatement, compensation, posting

of notices relating to the violations in the plant, compliance with Mexican labour law) and remedies specific to the NAALC (holding an NAO public hearing, engaging in ministerial consultation etc.).

The employer raised several objections to the US NAO's jurisdiction to initiate a public review based on UE's submission. GE brought the following objections to light: 1) the complaint did not deal with a pattern of non-enforcement concerning domestic labour law by the government of Mexico; 2) the complaint did not allege that the UE made any attempt to resolve the complaint under Mexican law; and 3) the conduct in question predated the effective date of the NAALC. Later in a pre-hearing statement, the U.S. Council for International Business<sup>161</sup> (the Council), knowing a good thing when it saw it, reiterated GE's basic position and added that Honeywell and GE, being individual companies, were not parties to the NAALC and therefore could not be the subjects of a complaint.

In the alternative, GE stated that the terminations at issue were the result of work violations. Upon its review of the dismissals, at the behest of

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<sup>161</sup> The Council, which represents the 400 largest U.S. based MNCs, had attempted to preclude the filing of complaints under the domestic regulations governing the utilization of the U.S. NAO. Moreover, the Council protested every occasion when a private company was named in an NAO document, insisting that the agreement did not allow a corporation to be *mentioned* or criticized since the focus of a review concerns a country and not company practices. Initially, this pressure was successful in eliminating the citation of Sony in early NAO reports concerning Public Review #940003. See Harvey, *infra*, note 193 at 19.

UE. GE offered reinstatement to six discharged individuals despite having previously reached termination agreements with them. The employer also offered additional severance pay to those same employees in the event they did not wish to return to the employ of GE. All six workers accepted the additional severance pay. Regarding the other five former employees who were not offered reinstatement, GE noted that three had accepted severance packages and the two employees who were contesting their dismissals had been terminated from their employment in a just and legal manner. Consequently, GE argued that the totality of the situation did not disclose a pattern of non-enforcement of Mexican law because *the law* provided recourse to the affected individuals. For its part, UE disputed the signature of the workers' representative on the subsequent settlement.

As the complaints essentially centered on the issue of freedom of association and the right to organize, the U.S. NAO consolidated the submissions and proceeded to review the cases. The NAO accepted the cases, in the face of the objections,<sup>162</sup> as the two submissions addressed issues within

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<sup>162</sup> Honeywell and GE had raised a number of objections to the NAO accepting the reviews. In particular GE had, among other things, stated that no relief had been sought under the Mexican legal system. Thus GE argued that relief from the U.S. NAO was barred, as a finding of non-enforcement could not be made against the government of Mexico. For differing interpretations of the NAO's findings see, Lance Compa, 'The First Labor Cases: A New International Labor Rights Regime Takes Shape' (1995) 3 U.S.-Mexico Law Journal 159 for a view that supports the broad interpretation of the NAO and, Jason S. Bazar, 'Is the North American Agreement on Labor Cooperation Working for Workers' Rights' (1995) 25 California Western International Law Journal 425 for a less positive account of the ruling.

the scope of labour law as defined by the side agreement and furthered the objectives of the NAALC. The public report contained a detailed summary of the information gathered by the NAO including: information provided by the complainants, information presented by the companies, testimony of experts and the former employees of the companies and information provided by the Mexican NAO. Among other things, the NAO noted many of the difficulties facing Mexican workers in the following terms:

During the review, a number of other relevant issues regarding enforcement of labor law in Mexico, particularly in the *maquiladora* sector, were brought to the attention of the NAO. They include difficulties in establishing unions in Mexico, the hurdles faced by independent unions in attaining legal recognition, company black listing of union activists, the use of blank sheets, and government preferences for and support of official unions. Another such issue was the very high percentage of Mexican workers dismissed from their jobs who elect to take severance pay rather than seek reinstatement - which is their right under Mexican law. Apparently, workers generally do not have the financial resources to pursue reinstatement before CABS, often opting for settlement of their complaints in return for money.<sup>163</sup>

Despite acknowledging the troublesome situation confronting Mexican workers, the NAO declared that it was 'not in a position to make a finding that the Government of Mexico failed to enforce the relevant labour laws' because the dismissed workers *accepted severance pay*

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<sup>163</sup> U.S. National Administrative Office, North American Agreement on Labour Cooperation, Public Report of Review - NAO Submission #94C002 (Washington DC: Bureau of International Labor Affairs, U.S. Department of Labor, 1994) at 29.

thereby waiving their domestic legal recourse for reinstatement.<sup>164</sup> In effect, Secretary, of the U.S. NAO, Irasema Garza had rejected one of the unions' main submissions that the workers were forced to waive complaints against their former employers by accepting the severance pay extended to them. The effect of this situation on the workers' ability to exercise their right to associate and organize did not warrant Ministerial Consultation between the governments in this matter because the NAO did not recommend this process to the U.S. Secretary of Labor. However, the NAO did endorse a series of cooperative programs (government seminars on the right of association, conferences and public information to educate workers on their right of association and organization) and these meetings have been concluded.

In response to the public review conducted by the U.S. NAO, UE issued a public denunciation of the NAO process<sup>165</sup> that criticized the manner in which the hearings were conducted and questioned the desire of the NAO to effectively utilize its power under the NAALC. UE also withdrew another related NAALC complaint which had been accepted for public review by the U.S. NAO and stated that it would

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<sup>164</sup> Ibid at 3C-31.

<sup>165</sup> See United Electrical, Critique of the U.S. NAO September 12 Hearing on General Electric and Honeywell Complaints, (Pittsburgh: United Electrical, 1995)

refrain from using the side agreement until such time as the U.S. NAO demonstrated that it would fairly deal with workers' claims. For its part, the NAO Secretary issued a short response expressing its displeasure with UE's position and stating that the 'submitter misunderstands the role and authority of the NAO.'<sup>166</sup> This statement went on to explain that it regretted UE's decision and urged it to reconsider the withdrawal of its submission. UE never re-submitted its complaint to the U.S. NAO.

**b) Public Review #940003**

In contrast to the 'bold on process, cautious on outcome'<sup>167</sup> approach of the first two cases, the next U.S. NAO decision took a less reticent view of its role under the NAALC. On August 16, 1994, several human and workers' rights organizations: the International Labor Rights Fund (ILRF), National Association of Democratic Lawyers (NADL), the Coalition for Justice in the Maquiladoras (CJM), and the American Friends Service Committee (AFSC) filed the third

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<sup>166</sup> Irasema Garza, Statement by Irasema Garza, NAO Secretary Regarding Withdrawal of UE Submission, (Washington, DC: Bureau of International Labor Affairs, Department of Labor, 1995)

<sup>167</sup> Compa, *supra*, note 162 at 178.

NAO case against the *maquiladora* operations of Sony Corporation located in Nuevo Laredo, Mexico. These groups alleged that Sony had engaged in 'persistent violations of workers' rights, particularly in the area of freedom of association'. In brief, the specific allegations concerned:

- *Discharge* – allegations that workers were dismissed or disciplined in connection with their union organizing activity, employer threats of blacklisting, pressure to accept severance pay and sign releases of Sony or resignations from their employment;
- *Union elections* – allegations of a flawed union election, i.e. that little or no notice of the election occurred; open instead of secret voting; intimidation and coercion used to gather votes, work reprisals against individuals who did not support the 'official' union;
- *Work stoppage* – allegations that the employer used police violence to suppress a strike and demonstration as a result of the election, and
- *Union registration* – allegations that a petition for an independent union was improperly rejected by the government's labour tribunal on overly technical grounds.<sup>168</sup>

The allegations also involved violations of minimum employment standards relating to hours of work or holiday work.<sup>169</sup> Essentially the complaint

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<sup>168</sup> U.S. National Administrative Office Report on Ministerial Consultations on NAO Submission #940003 under the North American Agreement on Labor Cooperation (Washington DC: Bureau of International Labor Affairs, U.S. Department of Labor, 1996) at 2.

<sup>169</sup> U.S. National Administrative Office, North American Agreement on Labour Cooperation, Public Report of Review - NAO Submission #940003 (Washington DC: Bureau of International Labor Affairs, U.S. Department of Labor, 1994) at 3. Note that, like the previous two cases, the issues beyond freedom of association and the right to organize are not addressed by the NAO. The NAO's position on these matters is that these issues, pursuant to its rules, were not accepted for review because they were not the central issues in the case.



indicated that the employer, along with the officially recognized union, Confederación de Trabajadores de México (CTM), actively blocked attempts to register an independent union endeavoring to organize workers at the plant. Sony allegedly fired or demoted and harassed workers who tried to join the union or who criticized the relationship between the employer and the official union. The CTM, with the company's cooperation, had blocked secret voting to select union representatives. Instead, they forced an open vote near the workplace. Workers were instructed to walk to a section of an open field, in full view of Sony managers, if they supported the independent union. The independent union lost the "election". Significantly, in view of the terms of the side agreement, the rights groups had also alleged that the Mexican government's decision to deny registration of the independent union at Sony violated its obligations, in that it breached workers' freedom of association and right to organize guaranteed under international law, Mexican constitutional law and the NAALC.<sup>170</sup> Among other things, the submitters requested that Sony comply with all domestic labour laws of Mexico and that Ministerial Consultation of the matter be recommended by the U.S. NAO.

Not unexpectedly, like GE and Honeywell, Sony denied all the allegations against it. First, Sony emphasized that it was not a party to the

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<sup>170</sup> Ibid at 1-7.

matter. Further, it argued that it had complied with Mexican laws. It specifically contradicted the submitters' allegations concerning terminations at its facilities when it stated that only two of the employees identified in the submission who were discharged or resigned, executed full releases of Sony, and accepted severance pay consistent with Mexican law. This settlement was subsequently endorsed by the State government.<sup>171</sup> The employer went on to argue that the election in question was not to select union delegates for each maquiladora, but rather was an election to attend a convention aimed at forming separate union 'sections' at each maquiladora. Moreover, despite Sony 'knowing' the purpose of *union* elections, it denied attending or witnessing the union election. As well, Sony specifically contradicted the allegation that it intimidated employees organizing an independent union.<sup>172</sup> It also disputed the extent of police violence at the demonstration. In sum, Sony argued that no evidence was presented that Sony violated any labour laws or that the Mexican authorities condoned any such violations, which, in any event, it specifically denied.

In issuing its public review, the U.S. NAO considered whether Mexico complied with, and effectively enforced its labour laws that guaranteed the

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<sup>171</sup> Ibid at 11.

<sup>172</sup> Ibid at 12.

right of workers to freely associate and organize labour unions. It then considered whether the Mexican government prohibited the dismissal of employees for exercising those rights.<sup>173</sup> It also weighed whether the government of Mexico ensured that persons have appropriate access, and recourse to, tribunals and procedures under which labour laws and collective agreements can be enforced.<sup>174</sup> Finally, the NAO examined whether Mexico ensured that its labour law tribunal proceedings for the enforcement of employment laws are fair, equitable and transparent.<sup>175</sup>

The U.S. NAO reviewed each issue and came to the following conclusions. With respect to the alleged discharges and discipline, Secretary Garza noted the similarities between this submission and the previous two submissions related to the severance pay matter. The difference between the cases, according to the Secretary, was that all the testimony revealed that Sony and the CTM pressured and intimidated workers into signing full releases and accepting severance pay in order not to risk losing the election and or avoid being blacklisted in the maquiladora.<sup>176</sup> The U.S. NAO highlighted the long duration of employment of the former employees in question, their

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<sup>173</sup> NAALC, Article 3.

<sup>174</sup> NAALC, Article 4.

<sup>175</sup> NAALC, Article 5.

<sup>176</sup> NAO Submission #940003, *supra*, note 161 at 26.

documented association with the independent union movement, and the close relationship in time between the discharge and the organizing activity at Sony.<sup>177</sup> Moreover, unlike the previous two U.S. NAO cases, the NAO report, commenting on domestic legal protection of workers, recognized that ‘the economic realities facing these Mexican workers make it very difficult [for them] to seek redress from the proper Mexican authorities for violations of Mexican labor law.’<sup>178</sup> In light of this evidence, the NAO stated that it was ‘plausible that the workers’ discharge occurred for...participating in organizing activities.’<sup>179</sup> Secretary Garza concluded that a tri-national program, that emphasized exchanges of information pertaining to laws and procedures that protect workers from discharge for exercising their right to organize and freedom to associate, was warranted.

Regarding the allegations connected with the union election, the NAO noted that it appeared that the *Federal Labour Law* in Mexico left the conduct of elections entirely within the purview of labour unions themselves. The NAO was of the opinion that the issue remained unclear as to whether there were any applicable laws addressing these issues and whether workers had any

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<sup>177</sup> Ibid at 27.

<sup>178</sup> Ibid.

<sup>179</sup> Ibid.

recourse against improper union activities.<sup>180</sup> Consequently, the NAO proposed to add this issue to the previously mentioned tri-national exchange.

Moreover, with respect to the work stoppage and demonstration that followed the union election, the NAO found that the testimony of workers and local news accounts of the events – establishing police use of physical force against workers -- contradicted Sony's interpretation of the actual events. The NAO stated that allegations of police violence heightened concerns regarding the enforcement of Mexican law.<sup>181</sup> As a result, the U.S. proposed that the Mexican NAO provide any available information on the police involvement in the work stoppage at Sony.

Finally, acting almost as it were a higher court entertaining an appeal, the NAO report strongly criticized Mexican labour authorities for utilizing 'technicalities' of Mexican law to thwart the registration of an independent union. The NAO reviewed the domestic tribunal's decision for not awarding union registration to the independent union (i.e. the failure to submit duplicate copies of the petition, not sufficiently stating union objectives, 'generalized' deficiencies, existence of another union at the facility) and found all of them to be implausible under Mexican law. It also suggested that an allegation of bias

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<sup>180</sup> Ibid at 29.

<sup>181</sup> Ibid.

directed at the Mexican labour tribunal was supported because the denial of the petition involved the participation of the Secretary General of the CTM (an agent of the existing union at Sony) in the denial of union registration.<sup>182</sup> As well, the NAO indicated that the action of the local CAB caused irreparable harm to the workers involved because the delay would likely disrupt or defeat the organizing drive and that the terminations were designed to punish the workers involved. The report concluded that the formation of independent unions was an essential attribute of free association and the right to organize, but that 'serious questions' had been raised about Mexican 'workers' ability to obtain recognition of an independent union through the local registration process.<sup>183</sup> The U.S. NAO requested Ministerial Consultation as well as tri-national programs directed at understanding the issues involved in the case.

The U.S. Secretary of Labor and the Mexican Secretary of Labor and Social Welfare agreed to resolve the complaint<sup>184</sup> by providing for three activities to be carried out relating to the complaint. First, a tri-national joint work program was agreed to that aimed to better explain and improve public understanding of procedures for union registration and certification at the

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<sup>182</sup> Ibid at 30-32.

<sup>183</sup> Ibid.

<sup>184</sup> Ministerial Consultations - Submission 94003 Agreements on Implementation, see Perez-Lopez, *supra*, note 146 at 19.

federal and state levels in the United States and Mexico. This program consisted of three tri-national public seminars on union registration and certification that were attended by government officials from all the NAFTA member countries.<sup>185</sup> Further, the Mexican NAO contracted a group of independent experts to conduct a study of union registration. This study called for the elimination of the registration process at the local level and recommended a transfer of these functions to the local administrative authority so that it paralleled the federal system in Mexico.<sup>186</sup> Finally, the Mexican Labour Ministry met separately with workers and managers at the Sony plant, as well as local government officials, to discuss their remedies under Mexican law regarding union registration. Although the U.S. NAO regards the Ministerial Consultation in very positive terms, it noted that workers who signed the petition were subsequently dismissed from their employment by Sony and remain unemployed. As well, the independent union found it increasingly difficult to organize workers after these dismissals. The combination of these discharges and the repeated denials of the union's registration by the CAB must, as the U.S. NAO notes, 'be seen as having a chilling effect on workers interested in forming a new independent union.'<sup>187</sup>

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<sup>185</sup> Report on Ministerial Consultation #94CCC3, *supra*, note 168 at 4.

<sup>186</sup> *Ibid* at 5.

<sup>187</sup> *Ibid* at 10.

Recently, the union was involved in another lengthy appeals process. This time consuming appeal ultimately works against the petitioner's ability to organize workers at Sony.<sup>188</sup> Although workers at Sony have not yet formed an independent union, this has been the most comprehensive result from a Ministerial Consultation.

**c) Public Review #9601**

The most recent U.S. NAO decision<sup>189</sup> was filed by human and workers' rights organizations (Human Rights Watch/Americas, the International Labor Rights Fund, and the National Association of Democratic Lawyers) against the government of Mexico. The submitters alleged that workers represented by the Single Trade Union of Workers of the Fishing Ministry (known by its Spanish acronym as SUTSP) had been illegally de-registered after a merger of governmental Ministries had taken place. This left

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<sup>188</sup> Ibid.

<sup>189</sup> U.S. National Administrative Office, North American Agreement on Labour Cooperation, Public Report of Review - NAO Submission #9601 (Washington DC: Bureau of International Labor Affairs, U.S. Department of Labor, 1997). On May 15, 1997, Human Rights Watch Women's Rights Project, Human Rights Watch/America, the International Labor Rights Fund and the National Association of Democratic Lawyers submitted a complaint entitled, 'Submission Concerning Pregnancy-Based Sex Discrimination in Mexico's Maquiladora Sector to the United States National Administrative Office.' This complaint was recently accepted by the U.S. NAO for a public review. This case will constitute the next formal decision of the U.S. NAO and it is the first case not to center upon associational rights. Consequently, it may possibly attract a higher level of review than simple Ministerial Consultation.



SUTSP's members to be represented by the National Union of Workers of the Ministry of the Environment (known by its Spanish acronym as SNTSMARNAP) because Mexican labour law prevents more than one union per workplace in the federal (public) sector. The rights groups alleged that the workers' freedom of association, the right to organize, procedural guarantees of impartiality provided by the NAALC, and international law were violated by the government's labour tribunal the Federal Conciliation and Arbitration Tribunal (FCAT) when it, among other things, refused to reinstate its union registration.<sup>190</sup>

In brief, the submission alleged that the FCAT reviewed and rejected four different petitions filed by SUTSP stemming from the merger of the Ministries. These cases were appealed to the courts where three of the appeal decisions favored the union's position in the matters. The decisions granted much of the relief sought by SUTSP (i.e. granting union recognition, unlimited recognition of the union's executive committee, and de-registering its union competitor SNTSMARNAP).<sup>191</sup> The submitters argued that throughout the litigation, noted above, the FCAT acted improperly toward SUPST. Among

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<sup>190</sup> In Mexico, federal union registration by the FCAT grants unions the means by which they can conduct their affairs. Without registration a union cannot legally hold or dispose of property, represent itself or its members or otherwise conduct any business. Ibid at 3.

<sup>191</sup> U.S. NAO Public Report, *supra*, note 189 at 31.

other things, the FCAT precluded ST PST from representing its members, continued to work with SNTSMARNAP even though its registration was canceled, implicitly recognized SNTSMARNAP and aided them in their election bid to organize the disputed members. Despite the objective success of the legal process in this case, submitters argued that the facts leading to the NAO submission raised two key legal issues:

The submission alleged that FCAT violated Mexican labour law by arbitrarily de-registering ST TSP and refusing to re-register it with full recognition. The rights groups challenged the *substance* of Mexican labour law arguing ILO Conventions and investigations, as well as domestic Supreme Court rulings, obligated the government to allow workers a choice of which federal union they could join. Second, the submitters asserted that the FCAT tribunal was inherently biased because all of the tribunal's labour representation was drawn from ST TSP's main union competitor SNTSMARNAP in this case. In turn, SNTSMARNAP is very closely aligned to the ruling political party, the Institutional Revolutionary Party (PRI). The PRI is responsible for the appointment of the disputed tribunal members. In short, the submitters argued that the practice of the government, through its use of biased labour tribunals and passage of illegal labour legislation, inhibits the formation of independent unions, thereby infringing core labour rights such as

the right to association. Consequently, *inter alia*, the submitters requested that the Mexican government be engaged in a process designed to effect the elimination of the portions of the labour law violating workers' right of association.

The U.S. NAO contacted its Mexican counterpart for information pertaining to the case – the Mexican NAO recommended that a public review of the matter was inappropriate. The government of Mexico also argued that it had adequately enforced its laws in this case. As well, it stated that the scope of the NAALC was limited to monitoring the "effective compliance with, and effective enforcement of, each Party's labour law. As per the earlier request, the Mexican NAO also provided information to the U.S. NAO detailing its administrative and legal proceedings in this matter."<sup>192</sup>

After considering: 1) the legal history of the cases launched by SUTSP (and denied by FCAT) to remedy their claim, 2) domestic judgments, 3) constitutional law and 4) the international law relevant to the case, the NAO came to its decision. Secretary Irasema Garza noted that all the cases launched by SUTSP were accepted for review by Mexico's appellate courts and that the union was successful in a majority of its claims. The union had been forced to delay exercising their rights under NAALC as it had to first appeal the decision

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<sup>192</sup> Ibid at 11.

of the tribunal. However, even though the U.S. NAO recognized the delay in exercising their rights caused by the appeal, it stated the delay was unavoidable. Of course, delay issues are central to all union organizing campaigns because any significant time lag can easily stall an organizing campaign and eventually defeat the union. The U.S. NAO's position regarding delay changed from its stance on delay in the Sony case. In that case, the U.S. NAO had castigated the local CAB because its tactics had caused a similar delay that was characterized by the Secretary of the NAO as causing 'irreparable harm' to the union. Nevertheless, the union's appeal, unlike the Sony case, was eventually successful in obtaining many of its goals. SUPST brought about its registration, it succeeded in a temporary de-registration of its union rival and it also obtained an election (that the union argued was awash with irregularities) to represent SUPST's former members. The U.S. NAO noted the dispute concerning the fairness of the election, but it also explained that the FCAT (the subject of SUPST's claim that the tribunal's composition made it inherently biased and an assertion that it supported SNTSMARNAP in the same election) ruled the irregularities were insufficient. In effect, the NAO rejected the allegation of bias directed at the Mexican government's labour tribunals concerning the fair administration of Mexican labour law.<sup>193</sup>

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<sup>193</sup> Pharis J. Harvey, *The North American Agreement on Labor Cooperation: A Non-Governmental View*, (Brussels, Belgium: Conference on Social Clauses and

However, the NAO also reviewed Mexico's NAALC obligations, relevant Mexican law, international treaties ratified by the government, ILO conventions, Freedom of Association Committee Reports and other documents. Secretary Garza concluded that Ministerial Consultation was warranted as it would enable the U.S. NAO a full examination of the relevant legal doctrines in Mexico, including the effects of constitutional provisions on Mexican labour law. This review of Mexican labour law would also aid the NAO in examining the relationship between, and the effect of, international treaties (such as ILO Conventions pertaining to freedom of association) and Mexican constitutional provisions on freedom of association on national labour laws.<sup>194</sup> Despite a lack of public information concerning the specific terms of any resolution being contemplated by the various labour ministers -- U.S. NAO staff expect the Ministerial Consultation to conclude with an agreement to resolve the case sometime in September 1997.

#### **d) Public Review #9501**

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Environmental Standards in International Trade Agreements: Links, Implementation and Prospects, May 31, 1996) at 17. This marks the second time that the NAO rejected this argument. The submitters in Sony petitioned the U.S. NAO to reopen the Ministerial Consultation relating to that complaint to specifically address concerns relating to the bias, transparency and accessibility of Mexican labour tribunals. The NAO's rejections of these issues specifically led to the institution of the Public Review #9601.

<sup>194</sup> Ibid at 31-33.

Finally, the only Mexican NAO decision to date<sup>195</sup> stems from a complaint launched by the Telephone Workers Union of Mexico (known by its Spanish acronym as STRM), working with the Communication Workers of America (CWA), against Sprint Corporation. On February 9, 1995, the union complained that Sprint closed its 'Latino' telemarketing company, La Conexcion Familiar located in San Francisco, after the employer engaged in an anti-union campaign. STRM alleged that this campaign was commenced in response to an effort to organize a union at this facility. STRM maintained that eight days before a scheduled vote on the issue of unionization, following a campaign that signed a majority of workers and a strong showing in a pro-union demonstration, Sprint shut down its facility in order to avoid unionization by the CWA. Moreover, the submitters complained that the prospect of a lengthy appeal to enforce guaranteed rights of association and organization demonstrated the inability of the U.S. legal system to comply with NAALC principles. The closure resulted in the elimination of 177 Latino held jobs. Once again, the NAO submission centered on the denial of the workers' ability to exercise their freedom of association, and right to organize as guaranteed by the NAALC.

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<sup>195</sup> Mexico National Administrative Office, North American Agreement on Labour Cooperation, Public Report of Review - NAO Submission #9501 (Mexican Secretariat of Labour and Social Welfare, 1995)

Sprint denied the allegations and submitted that it closed the plant because it was losing money at the facility. It also denied any anti-union animus and maintained that its decision to close the plant was within the spirit of the law. Initially, Sprint succeeded in its argument before the National Labor Relations Board (NLRB) when an administrative law judge (ALJ) agreed that, despite the presence of many unfair labour practices, Sprint had closed the facility primarily because it was losing money. That decision was appealed to the NLRB where it found that Sprint's Vice President of Labor Relations fabricated evidence presented to the tribunal to make it appear that the company had decided, before the petition for a union election was ordered, to close its facility for economic reasons. Moreover, the NLRB cited Sprint for more than fifty violations of the *National Labor Relations Act*. This case is now on appeal to the U.S. federal courts.<sup>196</sup>

The Mexican NAO accepted the submission for public review. Secretary Miguel Angel Orozco examined the structure and functioning of the major U.S. legal instruments designed to protect the freedom of association and the right to organize of American workers. As well, the NAO attempted to define the causal relationship between said labor law issues and the

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<sup>196</sup> Communication Workers of America News, 'Labor Board Panel in Washington Backs CWA Appeal Over Shutdown of Sprint/La Conexion Familiar in San Francisco' (Washington DC: Communication Workers of America, December 30, 1996) at 1.

obligations established by the N.A.A.C. for each of the parties.<sup>197</sup> The NAO cryptically declared that it was concerned with the 'effectiveness of certain measures designed to guarantee these fundamental labor principles.' It further stated that 'the NAO was unable to assess with complete certitude the effects on the rights of workers when an employer, suddenly, closes the place of work'.<sup>198</sup> The NAO recommended Ministerial Consultation to take place so that it could further study the effect of the sudden closure of a place of work on the principles of freedom of association and the right to organize.<sup>199</sup> This recommendation was formally accepted on June 23, 1995 and an agreement was reached between the U.S. and Mexican governments as a result of Ministerial Consultation. Their agreement called for the Secretariat to carry out a study on the issue of the 'effects of sudden closing of a plant on the principle of freedom of association and the right of workers to organize' in Mexico, Canada and the United States. The study was released to the public in June 1997<sup>200</sup> and came to a number of findings regarding the effect of plant closings on the rights of workers.

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<sup>197</sup> Ibid at Introduction.

<sup>198</sup> Ibid at 11-12.

<sup>199</sup> Ibid.

<sup>200</sup> Perez-Lopez, *supra*, note 146 at 18.



The plant closings report<sup>201</sup> described how the labour laws of each country protected against the use of plant closures or threats of closures to prevent union organization. It also examined the experience with the administration of these laws over the past decade. The report found that in the United States illegal plant closings and threats of plant closings were actively contested by the NLRB.<sup>202</sup> It also determined that plant closing threats occurred in half the organizing campaigns sampled, with a higher incidence of threats in industries (i.e., trucking, manufacturing and warehousing) more susceptible to plant closings. In Canada, the proportion of these cases in relation to union organizing drives was much lower than in the United States. However, in 60% of the cases litigated across Canada employers were found to have acted illegally.<sup>203</sup> Finally, in Mexico because the law is fundamentally different -- threats to close plants based on an anti-union animus are not illegal because Mexican labour law targets employer actions not statements<sup>204</sup> -- the relevant issue in a plant closing case is whether an employer met one of the specified and permitted reasons for closing a plant. There are, therefore, no

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<sup>201</sup> Commission for Labor Cooperation, Plant Closing and Labor Rights: A Report to the Council of Ministers by the Secretariat of the Commission for Labor Cooperation on the Effects of Sudden Plant Closings on Freedom of Association and the Right to Organize in Canada, and the United States, (Dallas, Commission for Labor Cooperation, 1997).

<sup>202</sup> Ibid at 60-63.

<sup>203</sup> Ibid at 64-68.

<sup>204</sup> Ibid at 16-17.

cases in Mexico dealing with threats of plant closings. Instead, Mexican cases focus on whether or not plant closings were justified for business reasons unrelated to union organizing efforts. However, the plant closing study did find that the procedure in Mexican law permitting workers to challenge a plant closing is virtually never employed. Mexican workers and their unions tend to press for enhanced severance pay packages and other increased benefits in exchange for not challenging a plant closing.<sup>205</sup> Mexico's lack of a national unemployment insurance system increases workers' need to extract these agreements in the face of a plant closing.

As well, the U.S. NAO was instructed to hold a public forum in San Francisco relating to the issue of plant closures and their effect on workers. Despite the official study and the public forum held by the NAO which allowed the affected workers to publicly express their experience at Sprint, the 177 Latino workers at Sprint lost their employment and are still deprived of their right to form a union and bargain with their employer to improve their working conditions. No workers have been rehired as a result of the NAALC process or received any direct redress from the Corporation as a result of the NAO review or Ministerial Consultation.<sup>206</sup>

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<sup>205</sup> Ibid at 71-76.

<sup>206</sup> Depending upon the outcome of its appeal, Sprint may have to comply with the NLRB's order to rehire the discharged La Conexion workers to 'a position in its existing operation that is substantially equivalent to the employee's former position' and provide

## **B. NAALC Critics**

Critics of the side agreement focus upon the formal legal weakness of the agreement to both improve the situation of the workers involved in specific NAALC cases or the general state of worker rights through out North America. They note that the side agreement to the NAFTA has not been engineered in a way that effectively protects workers' rights from a potential downward spiral of international de-regulation. Significantly, despite the complex scheme of the agreement, it cannot extensively constrain the ability of MNCs to make investment decisions on the basis of the inferior labour law regulation of NAFTA countries. The failure of the labour side agreement to prevent its member states from individually reducing the substance of their labour law regimes, so as to attract investment, is evident in several areas of the Accord. NAALC critics cite the agreement's inability to limit a race to the bottom because it is a 'weak' or 'toothless' document. In other words, the NAALC is devoid of the necessary legal apparatus that would hamper a jurisdictional contest for investment that was based on de-regulation. Critics argue that the

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'appropriate moving expenses'. Sprint was also ordered to pay compensation for lost wage and benefits, plus interest, which would extend from the date of the closing to the date of rehire. Finally, despite the company being ordered to cease and desist from 'threatening employees with the closure of any facilities if the union is certified and from coercing, interrogating and spying on workers for union activity, the NLRB did not issue a *Gissel* recognition order so that the workers could unionize and enter into a bargaining relationship with Sprint. CWA News, *supra*, note 196 at 2.

NAALC suffers from a wide range of deficiencies relating to the adequacy of rights enforcement in specific cases and to structural flaws of the side deal itself.

First, the NAALC does not impose a tri-national set of labour standards in North America. Rather, each member of NAFTA 'guaranteed' that its domestic labour law would be enforced within its territory. This form of dispute resolution raises concerns pertaining to the substantive guarantees found in private sector labour law in North America. Despite the argument, presented initially by the Bush administration,<sup>207</sup> that the labour law guarantees of Mexico were comparable to the United States and that it was only enforcement that needed improvement, comparative labour law differences in North America should not be entirely dismissed. Although each aspect of Mexican labour law is by no means inferior to the substance of American labour law -- in fact, it is often superior to it -- the substantive distinctions in various aspects of Canadian, Mexican and American regimes do involve significant differences. These differences may be important enough to encourage capital flight.

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<sup>207</sup> Shelly G. McCaffery, 'North American Free Trade and Labor Issues: Accomplishments and Challenges' (1993) 12 Hostra Labor Law Journal 449 at 469.

For example, Canadian labour law policy is similar to the American approach in its structure and many of its terms but Canadian labour law policy has been substantially more generous than the U.S. regime with respect to worker protection. On virtually every issue from minimum wages to collective bargaining, labour law is more generous in Canada than in the United States and has resulted in higher union density figures in the private sector which, in turn, has had implications for the level of labour law enforcement in Canada.<sup>208</sup> In a number of substantive areas -- permanent strike replacements, union security, card check and quick vote requirements pertaining to organizing -- labour law policy north of the forty -ninth parallel has been more protective of workers' interests.

The substantive differences between Mexican labour law and American and Canadian legal approaches on many of these issues may not be as pronounced in all circumstances. But the different approaches between Mexican law and the Wagner Act approach of Canada and the United States

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<sup>208</sup> Langille, *supra*, note 13 at 248. For thoughtful and comprehensive explorations of the barriers to organization in the United States see generally Paul Weiler, 'Promises to Keep: Securing Workers, Rights to Self-Organization Under the NLR Act' (1983) Harvard Law Review 1769 which discusses and compares Canadian and American approaches to this matter and; Craig Becker, 'Democracy in the Workplace: Union Representation Elections and Federal Labor Law,' (1993) 77 Minnesota Law Review 495 for a review of the development of U.S. domestic law on this subject; Also see Nestor de Buen Lozano and Carlos E. Buen Unna, A Primer on Mexican Labor Law (Washington DC: Bureau of International Labor Affairs, Department of Labor, 1991) for an outline of the structure of Mexican labour law.

can have serious implications in the context of globalization and free trade. In certain areas, such as the duty to bargain, Canadian and American labour law regimes impose obligations which Mexican law ignores. For example, an affirmative obligation to bargain in good faith with the employer exists in Canada and the United States whereas the Mexican system simply has no parallel because its law presumes the force of events, rather than a legal duty, will compel bargaining. Nevertheless, a Mexican employer may refuse to bargain with a union that seeks a collective agreement.<sup>209</sup> It is the combination of the absence of regulation in particular areas in all NAALC countries, among other things, that may prove attractive to employers seeking to shed labour regulation.

In the context of NAALC, the domestic supremacy of labour law in each country preserves capital's incentive to invest in any territory with the least effective level of employee protection. Consequently, each government regulated by the NAALC still has, all other things being equal, an incentive to attract investment through the lessening of its social safety net – including relaxing its labour law regime to favour employers' interests. Although no immediate exodus of capital has taken place from developed areas to less

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<sup>209</sup>Commission for Labor Cooperation, Preliminary report to the Ministerial Council: Labor and Industrial Relations Law in Canada, the United States, and Mexico (Dallas: Commission for Labor Cooperation, 1996) at 19-20.

developed areas of the continent on this basis -- U.S. foreign direct investment to Mexico dropped to an average of less than \$3 billion (U.S.) a year since NAFTA's passage which represents 0.5% of all U.S. private sector investment on plants and equipment<sup>210</sup> -- it is the *potential* of footloose capital to exploit legal disparities in a truly global economy that is discouraging to ILS advocates. However, it is worth noting that labour law amendments that weakened labour standards in Ontario recently, were justified on the basis of remaining competitive with the United States.

Moreover, viewed in this context of a potential race to the bottom, NAALC's attempt at regulating labour law leaves much to be desired. The architects of NAALC did not protect workers' rights through the use of comparable binding mechanisms of the agreement. After a very long dispute resolution process,<sup>211</sup> the NAALC only provides for binding remedies when an arbitral panel rules that a violation in the area(s) of workplace health and safety, child labour or minimum wages has transpired. These categories of rights entitle workers to benefit from the full range of redress offered by the NAALC, which includes consultation mechanisms, expert evaluations and a

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<sup>210</sup> The NAFTA Effect, The Economist (July 5th-11<sup>th</sup> 1997) at 21. For a general discussion of North America's changing labour market see, Commission for Labor Cooperation, Comparative Labor Market Profile (Dallas: Commission for Labor Cooperation, 1996)

<sup>211</sup> It is possible that the entire dispute resolution process can consume between two and one half to three years. See Harvey, *supra*, note 193 at 14.

dispute resolution panel. However, if a violation of a right considered to be a technical labour standard occurs, such as employment discrimination, and the breach is consistent with a pattern of non-enforcement, a complaint alleging this breach can only attract the consultation and/or expert evaluation processes. At no time will any technical labour standard violations lead to a monetary penalty under this agreement. Finally, a fundamental set of labour principles (also known as international human rights) -- the freedom of association and protection of the right to organize, the right to bargain collectively, and the right to strike -- are exempt from all mechanisms under the agreement except for the consultation process (See Appendix A). In other words, a justified complaint concerning the non-enforcement of these basic rights by a party to the side agreement cannot lead to any legal sanctions being imposed by a disputes resolution panel under the labour side agreement.

A majority of the case law to date validates this observation. A tallying of all the submissions indicates that workers have failed to significantly benefit from the use of the side agreement. None of the workers dismissed has been rehired or compensated as a *direct* result of the NAALC submissions filed with the NAOs. The review of these results by Adams and Singh confirms the poor redress obtained by workers involved in this process:

In the Honeywell case [of the] 23 workers who were dismissed, 22 were given severance pay and the other worker contested her termination with the Chihuahua Conciliation and Arbitration Board



(CAB). None of the workers regained their jobs principally because they accepted severance pay packages... In the GE case, of the 11 workers dismissed, six accepted full severance pay. However, after UE requested investigations into the cases, GE offered these workers the opportunity to be reinstated, but they elected to accept an additional monetary settlement instead. Of the five other workers, three reached settlement with GE and two filed unsuccessful cases with the Ciudad Juarez CAB. In the Sony case, 13 workers were dismissed or resigned during the period in question. Of these, 11 accepted severance payments; the other two workers filed unsuccessful complaints with the local CAB.<sup>212</sup> (footnotes omitted)

As well, in the Sprint case, the scope of the Ministerial Consultations would not provide for the reinstatement or compensation by the company of any worker effected by the plant closure. As noted earlier, 177 of the affected Latino La Conexion workers continue to be without employment or compensation despite the U.S. NAO's review.

These cases expose the substantive inability of consultation to actually produce an acceptable resolution for workers in these disputes. To date, each case presented to an NAO has dealt primarily with the freedom of association and the right to organize. Despite an unnecessarily hesitant beginning in deciding the cases, these complaints have been forwarded for the highest level of consultation available for these issues under the agreement -- Ministerial Consultation. This low level of review, the lack of a tariff sanction or fine for these violations and the poor results for workers, all illustrate the serious

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<sup>212</sup> Roy J. Adams and Parbudyal Singh, 'Early Experience With NAFTA's Labour Side Accord' (Hamilton, Ontario: 33rd CIRA Annual Conference Brock University, St. Catharines, ON., May 29-31, 1996) at 14.

inadequacies with the Ministerial Consultation process. Governments that (allegedly) violate these core labour rights are made to consult with the government of the party bringing the complaint. The remedy available is to attempt to reach some sort of mutual arrangement that will address the concern expressed by the NAO. Notwithstanding this process, it seems to ignore the fact that the NAO, as it already has in the cases presented above,<sup>213</sup> is likely to diplomatically state that the government being reviewed 'may' have *intentionally* ignored its own labour laws. Not unexpectedly, the only result likely to come out of Ministerial Consultation, in these circumstances, is a series of studies or informational meetings that do not *directly* advance the cause of the workers involved in the process.<sup>214</sup> In light of the obvious self interest of states to maintain sovereignty over labour matters and avoid embarrassing revelations regarding their labour rights record it is unlikely that a Ministerial Consultation will ever result in an agreement acknowledging a government's anti-union animus. Ministerial Consultation inherently relies on the goodwill of the party complained against for a just resolution of a dispute.

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<sup>213</sup> See NAO decisions, *supra*, notes 162 and 163. For a more detailed description of the negative environment for labour rights activists perpetuated by the government of Mexico against trade unions See Manuel Fuentes Muñiz, 'The NAFTA Labour Side Accord in Mexico and Its Repercussions for Workers,' (1995) 10 Connecticut Journal of International Law 379 and Leonard Bierman & Rafael Gely, 'The North American Agreement on Labour Cooperation: A New Frontier in North American Labor Relations' (1995) 10 Connecticut Journal of International Law 533 & Dan La Botz, Mask of Democracy: Labor Suppression in Mexico Today, (Boston: South End Press, 1992).

<sup>214</sup> For an example of this see Perez-Lopez, *supra*, note, 146 at 19.

Nor would any agreement be significant enough to alter a state's anti-union policy toward workers. In addition, as governments control access to the NAALC process and decide the terms for resolving a complaint -- or alternatively which case will be advanced to other dispute resolution levels -- the ability of unions and non-governmental groups to actually obtain a binding dispute resolution panel is severely limited. The resolution of the cases to date by the NAOs -- mandating seminars and academic studies as an antidote to serious labour rights violations -- tends to indicate that effective labour rights enforcement is not a key priority of the states involved in the NAALC process.

In addition, aside from of the above noted exemptions of particular labour principles, for a right to be enforceable under the NAALC, the right in question must exist in the jurisdiction of the nation centered out in the complaint. For example, in the case of Ontario's pay equity legislation few, if any, complaints could be launched because of a lack of similar laws in other member countries (not to mention other Canadian provinces and territories).<sup>215</sup> As a result, if a complaint was instituted against Mexico on the basis of equal pay for work of equal value, an arbitration panel under the NAALC might not have jurisdiction to hear the matter. This may result because equal pay for

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<sup>215</sup> F. Eyraud, Equal Pay Protection in Industrial Market Economies: In Search of Greater Effectiveness, (Geneva: International Labour Office, 1993) at 45.

work of equal value is not an enumerated labour principle and because Mexico has no equivalent gender pay equity legislation. Consequently, in the worst case scenario, a range of labour law rights may not be directly addressed by the side agreement simply because there are no domestic legal parallels in the other NAFTA countries. At best, the decision on the inclusion of these rights is left to the interpretive ability of a non-judicial body, the NAO, that specifically avoids acting judicially. In any event, some classes of rights are potentially outside the ambit of the agreement thereby maintaining an incentive for NAFTA states to de-regulate employment protection in areas left unacknowledged by the side agreement.

The NAALC critics argue the side agreement indulges other impediments in its mediocre attempt to avoid a race to the regulatory bottom. If a dispute resolution panel has ruled that a pattern of non-enforcement of a particular labour law occurred in Canada, then any fine levied as a result of this breach would be paid by the appropriate federal or provincial government found to have violated NAALC out of the general consolidated revenue fund of the affected jurisdiction.<sup>216</sup> In effect, Canadian taxpayers will be saving private businesses harmless for not complying with its domestic legislation because the federal Tory government of the day insisted on this procedure.

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<sup>216</sup> NAALC, Annex 41A.

Under this system, a government will presumably pay the fine after an international dispute resolution panel has condemned a corporations' labour relations practices and the governments lack of enforcement of the relevant labour law. Accordingly, a corporation in Canada will have little incentive to comply with domestic laws, as they will suffer no penalty under the side agreement.<sup>217</sup> As well, the United States and Mexico are allowing the Canadian government to pay a fine, for not enforcing domestic labour law. This fine is forwarded to the Ministerial Council in order that the money be expended to enhance labour law<sup>218</sup> protection in Canada.

In addition, the federal government, through their cabinet ministers sitting on the Council, will have final veto power over the expenditure of the monetary enforcement assessments<sup>219</sup> since the Ministerial Council operates on a consensual basis. Consequently, a monetary enforcement against Canada amounts to little more than a delayed inter-governmental transfer of funds (from a province to the Federal Court to the Federal Government) or an intra-

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<sup>217</sup> Indeed, the federal government of Canada, in a debate concerning recent amendments to the *Crown Liability and Proceeding Act*, necessary to implement the fine system envisioned by the NAALC, stated that once 'the decision becomes an enforceable obligation of the Government of Canada..., like all good citizens, complies in all respects with the orders of its court. Therefore there should not be further need for enforcement. See the comments of Mr. Peter Miliken in the House of Commons Lansard, 35<sup>th</sup> Parliament of Canada, 1<sup>st</sup> Session January 1, 1994 to July 13, 1995, Friday February 4, 1994 at 955.

<sup>218</sup> NAALC, Annex 39(3)

<sup>219</sup> NAALC, Article 9(6)

governmental transfer of moneys (from the Federal Labour Ministry to the Federal Court to the Federal Government) to enforce labour law that should be enforced in any event. Similar provisions apply to Mexico and the United States in the event of a tariff suspension with one notable exception – the businesses violating certain labour laws will pay an increased tariff for these breaches. These fines will then be utilized to improve labour law enforcement in either the United States or Mexico. Although the development of adequate labour standards and their enforcement are important goals, that ought to be encouraged under NAALC, this system of monetary penalties does not inexorably encourage the enforcement of domestic labour laws. The payment of monetary penalties to governments that intentionally or negligently fail to enforce labour standards removes any (coercive) incentive against them to ensure their country's exporters are complying with domestic labour laws. No appreciable financial discipline is directly created by the monetary penalty on governments (given the repayment forthcoming under this process) that ignore their own established labour laws.

Finally, private businesses can continue to transfer investment to other areas of the continent if domestic governments begin to strictly enforce previously ignored labour laws regardless of the NAALC. Even if no 'fine repayment' scheme existed under the NAALC, the imposition of a slight tariff

(.007% of total value of goods traded) against a firm operating in the United States or Mexico for the non-enforcement of labour law may not achieve the desired compliance effect. An inconsequential tariff may not necessarily compel an employer to re-establish its business in an area that it sought to avoid given higher rates of labour law enforcement. The lower labour and/or regulatory costs of locating in a region could offset the burden created by NAALC's small tariff. At best, any increased business compliance costs caused by NAALC's low tariff would operate at the margins to discipline a handful of highly market sensitive businesses.<sup>220</sup> The formal binding monetary enforcement scheme envisioned under the NAALC is an extremely weak system for enforcing the labour principles in the agreement because it can have little widespread deterrent effect against labour law violations of MNC's given the limited tariff that may be applied under the side agreement. Moreover, this 'enforcement' system is further diluted by the absence of effective penalties against Canada, Mexico and the United States if those governments

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<sup>220</sup>It is more likely that business - vulnerable or otherwise - will move to take advantage of lower labour costs. Regardless of the overall effect of NAFTA on employment, there is little evidence that NAALC can reverse this trend. The IBT's complaint was the first case brought to the U.S. NAO because, in part, it was an attempt by the union to prevent further relocation of investment to the Mexican Honeywell plant from its United States facility. Although an argument has been made that the implementation of NAFTA would reverse the effect of vulnerable businesses locating in Mexico, or to low wage areas of the United States, (because the elimination of tariffs reduces the incentive to locate in these areas), little statistical evidence of this shift has been demonstrated. See Calvin Siebert and Mahmood Zaidi, 'Employment, Trade and Foreign Investment Effects of NAFTA' (1996) 5 *Minnesota Journal of Global Trade* 333 at 342 for a description of the latter view.

purposely attempt to attract investment to their jurisdiction on the basis of weakening their labour law regime. Ironically, the governments of the United States and Mexico potentially *increase* their (tariff-based) revenues under NAALC for *not* enforcing their labour law. As well, under the fine repayment system, Canada simply transfers governmental money to itself to satisfy its obligations under the agreement. This implementation system cannot deter a race of states to the regulatory bottom because it provides little real disincentive to avoid this behaviour.

As a result of the final version of the side agreement, based on arguments relating to the Canadian constitutional division of powers granting individual provinces almost exclusive control over labour relations matters, the Canadian federal government secured a system of gradual adherence to the NAALC. The federal government must give its counterparts notice as to which provinces, if any, agree to be bound by the side agreement in the future.<sup>221</sup> This arrangement has meant that the labour law matters outside the federal government's jurisdiction could not be challenged by Canadians under NAALC. Practically speaking, for Canada this has meant that most labour law enforcement arrangements are outside the scope of the side agreement.

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<sup>221</sup> Alberta became the first Canadian province to formally agree to be bound by the Accord when it signed the *Intergovernmental Agreement Regarding the North American Agreement on Labour Cooperation* on May 31, 1995. Since that time both Quebec and Manitoba have joined the side agreement.



Furthermore, where Canadian provinces agree to be bound by the NAALC, the mechanisms available for its use must meet a threshold pertaining to the national workforce. The federal government, and the provinces included under the Accord, must account for 35% of the labour force; and where the matter relates to a specific industry at least 55% of the workers concerned must be employed in the provinces included under the NAALC. The federal government has jurisdiction over approximately 10% of the workforce, and slightly over 70% of the remaining workforce is concentrated in three provinces, – 37% in Ontario, 24% in Quebec and 12% in British Columbia.

Consequently, it would seem critical to include these provinces in the side agreement if it is to have even a limited effect.<sup>222</sup> In addition, given the threshold regarding specific industries under the Accord, the exclusion of Ontario from the NAALC exempts the vast majority of Canadian industries from the side agreement. This situation has only recently changed with the accession of Quebec and Manitoba to NAALC. Canada has just met its 35% minimum threshold to utilize the Accord. Yet the restrictions on the use of the side deal for Canada remain if a complaint singles out a specific industry because Ontario has still not acceded to the agreement. However, these legal intricacies remain largely irrelevant as long as the Canadian NAO, the labour

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<sup>222</sup> J. Pitts et al (eds.), The NAFTA Handbook, (Chicago: CCH Inc., 1994) at 233-243.

movement and other Canadian organizations fail to attempt to utilize the side agreement. Again, the Accord maintains incentives for business located in Canada to direct investment to the United States or Mexico on the basis of lower social standards because Canadian governments could not engage NAALC's machinery to avoid a race to the bottom among NAFTA nations. Although, as noted the NAALC would be largely ineffective in any event, governments would continue to be able to compete for job creation through the de-regulation of employee rights in North America. This is as a result of the failure of the side agreement to equally monitor each parties' labour law compliance. The Accord does not significantly curtail races among the NAFTA countries to the regulatory bottom. In fact, by not deterring a potential for governments to race to the bottom, it seems that the NAALC virtually institutionalizes this circumstance through the creation of a weak side agreement.<sup>223</sup>

#### **I) Proposal for Reform**

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<sup>223</sup> The proof of this pudding is in the eating for free trade skeptics. To date, of the five cases litigated under the agreement, not one worker dismissed from his or her job has won the job back as a direct result of an NAO report or an agreement that stemmed from Ministerial Consultation.

NAALC critics, among others, have suggested the following guidelines for reforming the side agreement<sup>224</sup> in order to further labour standards protection and avoid races of states to the regulatory bottom in North America. In order to avoid conflicts between NAFTA parties pertaining to unequal treatment -- applying labour standards to one nation that are not applied in every other NAALC nation -- a regional side agreement ought to establish a regime in which mutually acceptable basic labour standards are codified. The goal of any such agreement should focus upon remedying the labour law violation -- not simply imposing trade sanctions -- through utilizing a range of corrective mechanisms. These devices could, among other things, extend from consultation to the suspension of trade benefits. A labour side agreement should, given the foregoing criticism, promote the direct access of interested parties to, and controls over, the procedures for remedying perceived violations of NAALC labour standards. Any body governing the resolution of these disputes should seek to proactively further the labour principles of the Accord. As well, it should have the necessary power to adjudicate complaints independently and effectively. The proactive role of this body should not only be limited to the promotion of labour principles in law but should seek their *de*

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<sup>224</sup> See Harvey, *supra*, note 193 and Lance Compa, Trade & Labor Unions (Dallas, 1997)(unpublished memo)

*facto* development. This may include addressing other issues that touch on the development of a continental labour market such as the protection of migrants and indigenous labour. Any labour side agreement to the NAFTA should allow its adjudicative arm to truly enforce its orders. It should have a wide range of powers, including the ability to prevent goods and services from being traded for the violation of certain core labour rights (i.e., use of slave, prison or forced labour, exploitative child labour, life threatening health and safety practices). In the light of these guidelines and the weaknesses of the current side agreement, especially as they relate to issues of effectiveness, timeliness and control and access, the following specific reforms should be made to improve NAALC.

**a) Improving the Enforcement Ability of NAALC**

- Eliminate the 'three-tier' division of rights enforcement that excludes all existing labour rights under the NAALC (i.e. freedom of association, right to organize, bargain and strike, forced labour, discrimination, equal pay, workers' compensation and migrant labour) from full treatment under the Accord with the result that all labour matters under the side agreement would be subject to consultations, evaluations and arbitrations;
- Prohibit, with additional penalties, any party from waiving or derogating, or offering to waive or derogate from, any NAALC labour principle as an inducement to establish, acquire, expand or retain an investment;
- Create new rights under the agreement to permit an arbitral disputes panel to prevent certain goods and services from entering any NAALC nation if they are produced, harvested or processed with: a) exploitative child labour

in contravention of ILO convention 138, b) slave, prison, forced or compulsory labour, c) products made under conditions or with processes that are banned domestically due to the deleterious effects of a procedure on workers' health and safety:

- Permit monetary enforcement assessments to be uncapped and allow the suspension of NAFTA tariff benefits to a level equivalent to the greater of: a) the rate that was applicable to those goods immediately prior to the date of entry into force of the NAFTA, and the Most-Favored-Nation rate applicable to those goods on the date the Party suspends those benefits;
- Distribute all moneys collected from monetary enforcement to the International Coordinating Secretariat. The expenditure of these funds by the Secretariat shall be made in an independent manner consistent with, and in order to promote, the goals of the NAALC;
- The Commission establish a needs based systemic program for the upward harmonization of wages and working conditions in NAALC countries, administered by the Secretariat that would focus on development of poor regions on the continent;
- NAALC countries agree on a process to negotiate protocols, to be incorporated into the NAALC, to regularize immigration and protect the rights of immigrant workers and to protect indigenous workers and tribal populations;
- Adopt a Corporate Code of Conduct for businesses operating in two or more NAALC countries modeled on the Codes already recognized by the U.S., Canada and Mexico in the Organization for Economic Cooperation & Development (OECD) *Guidelines for Multinational Enterprises* and the ILO's *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*;
- Require a Labour Information Audit of general labour relations information by businesses operating in two or more NAALC countries requiring an annual date for reporting information pertaining to all their operations, whether under their own corporate form or through subsidiaries, joint ventures or other business forms, and an obligation to accurately inform themselves of the relevant information;

- Repeal Article 43 (Private Rights) preventing a right of action under domestic law against another Party on the ground that that Party has acted in a manner inconsistent with this Agreement and substitute it with a private right of action allowing workers, unions and other groups to bring legal actions against corporations, operating in two or more NAALC nations, in domestic court for violations of NAALC's principles. As well, make parent and/or partner corporations fully liable for NAALC violations of subsidiaries or joint ventures thereby eliminating corporate veil defenses against these violations. Finally permit targeted trade sanctions (i.e. the loss of favourable NAFTA trade benefits) against businesses found liable under domestic law for violation of NAALC labour principles and/or a Code of Conduct created under NAALC;
- Require an adverse interest be drawn against private parties who refuse to be present and meaningfully participate in public NAO, ECE or Panel proceedings;
- Require adequate funding for the Commission for Labour Cooperation's International Coordinating Secretariat, any ECE's or Arbitral Panels. The funding provided should be of an amount that is sufficient to sustain large-scale research or to support the work of an ECE or Arbitral Panel. As well, require a minimum of five percent of the Commission's annual budget to be directed -- in the form of grants -- to funding NAALC based educational work, conference support and research work to trade unions, non-governmental groups and other groups and individuals devoted to promoting the NAALC principles;
- Establish a procedure within NAALC to independently adjudicate the failure of Parties to meet the treaty obligations themselves;
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#### **b) Improving Access to the NAALC Process**

- Permit *complainants* (not just states) the right to file submissions directly and independently pursue NAALC submissions against Parties under the agreement up to and including the final dispute resolution stage;
- Amend Article 24 (Rules of Procedure for Evaluation Committees of Experts) and Article 33 (Rules of Procedure for Arbitral Panels) to require

publishing, in draft form, for public review and commentary before adoption of the final report or decision:

- Repeal Article 25 (Draft Evaluation Reports) stage of an ECE, and Article 36 (Initial Report) stage of an Arbitral Panel as they cause delay and impair the independence of the findings of the final report or decision:
- Repeal Article 39 (Review of Implementation) stage following an Arbitral Panel's decision and Article 40 (Further Proceedings) stage because these articles add more than one year's time to the process before results are final:
- Require public hearings in all NAO reviews and public participation for relevant private parties in all proceedings by an Evaluation Committee of Experts and Arbitral Panels:
- Require all public hearings and other means of public participation to be held at site most convenient for complainants:
- Require the prompt release of all International Coordinating Secretariat reports with an exception for reports containing obvious material errors of fact:
- Permit interested parties to a complaint the ability to subpoena all relevant persons & materials arising from a submission:
- NAALC countries agree on a process to negotiate protocols, to be incorporated into the NAALC, that attempted to allow Canada to fully utilize all aspects of the side agreement that comply with its domestic constitutional laws.

### **C. Conclusions**

This chapter described the terms and institutions of NAALC and illustrated the case-law generated by this agreement. The labour side agreement is essentially designed to foster discussion and cooperation among

NAFTA countries to resolve potential labour law concerns generated by regional free trade. The agreement generally avoids the imposition of binding monetary enforcement relating to the labour principles listed in the Accord. This system for promoting ILS in North America has attracted the scorn of NAALC critics who harshly criticize the ability of the side deal to promote workers' interests with the Accord.

Outwardly, critics argued that the NAALC was designed to assuage the fears of free trade skeptics by addressing their concerns relating to the downward harmonization of labour standards on this continent. However, the effort to bring about a NAFTA that fairly dealt with social concerns through the NAALC never truly materialized. The NAALC itself is not able to prevent a race of governments to the regulatory bottom by preventing states from dismantling or ignoring their current labour law regimes. The Accord is, in many circumstances ineffective, conditional, subject to qualification or plainly unenforceable. The areas of labour law regulated in the Accord are managed with instruments that do not deter a race to the bottom because no uniformity of enforceable, basic employment standards exists in North America. The experience of trade unions and non-governmental organizations with the agreement has been discouraging because the cases litigated failed to directly advance the cause of workers involved in their complaints. Moreover, these



cases have not been able to generally improve the enforcement of ILS through the use of these non-punitive mechanisms. In addition, the NAALC's cross-boarder enforcement scheme establishes *disincentives* for member states to raise or equalize labour standards. As each country will potentially lose business investment if it imposes a higher level of labour law regulation than its counterparts, states are dissuaded from acting in this manner.<sup>225</sup> Consequently, NAFTA nations have not actually regulated labour law at an international level that would address the problems presented by the diverse legal and economic circumstances of the NAALC countries.

In failing to actually regulate labour law internationally, critics note that the side agreement misses important opportunities to truly address the social problems for workers created by globalization. It bypasses an opportunity to address labour relations issues that would promote the creation of a large market, by implementing a universal minimum labour code of production across North America. NAALC critics believe the agreement cannot begin to construct a regime that builds a fair basis from which economic competitiveness can be pursued without accepting at least some of their previously suggested amendments. Critics assert, based on the foregoing

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<sup>225</sup> Katherine Van Wezel Stone, 'Labor and the Global Economy: Four Approaches to Transnational Labor Regulation' (1995) 16 Michigan Journal of International Law 987 at 1025.

analysis of NAALC's structure and case-law, that the demonstrated formal legal weaknesses of the agreement cannot advance the ILS aspirations of workers in North America.

Are the formal legal flaws of the agreement the only basis on which to judge the utility of the NAALC? This question is at the center of the next chapter.

### *Chapter 3*

*Do not use a hatchet to remove a fly from your friend's forehead.*  
Chinese Proverb.

The criticism levied at the formal legal ability of the side agreement to protect and improve labour standards in North America is not entirely misplaced. As we have seen, the agreement did not create international labour standards among the United States, Mexico or Canada. Instead, it constructed a dispute resolution process that attempts to enforce domestic labour laws within each country. As we have seen, NAALC also classified certain labour rights for varying levels of enforcement. This system progressively eliminates issues from review and eventually ends with binding dispute resolution. Critics argued the public review system excluded the possibility of strengthening labour rights, and the enforcement of such rights across the continent. Moreover, the agreement gave birth to a procedural maze of rules executed by a new bureaucracy that 'resolved' matters in an exceedingly time consuming manner. The entire scheme of government involvement in this process impedes independent criticism of NAFTA partners for their

antagonistic labour policies. Finally, the experience of unions and other groups with the complaint process only disappointed ILS advocates. The resolution of these matters did not lead to reinstatement or proper compensation for the affected workers, nor did it lead to the establishment of newly organized and independent labour unions at each workplace. In sum, the critics have complained that the NAALC fell short of implementing a strong international labour rights regime that engaged swift enforcement mechanisms to resolve disputes.

While early experiences with the labour side agreement have drawn some justified criticism, there are benefits to the agreement that should not be overlooked. Several ILS supporters have attempted to revise the critics' harsh view of the side agreement. Labour rights advocates, such as Lance Compa, have approached the critique of the agreement in two separate ways. First, the completely negative view of NAALC is tempered with a more balanced appraisal of the agreement. Compa, among others, cautions against premature evaluation of the side agreement and attempts to measure the NAALC against current regional and global trade arrangements. NAALC optimists argue the failure of NAFTA countries to include universal ILS in their free trade agreement (or in a parallel accord) reflects the practical difficulties of overcoming Canadian and Mexican government's preoccupation with

sovereignty.<sup>226</sup> Canada and Mexico simply will not cede jurisdiction over labour law matters, that were created historically through domestic institutions and accountable to the executive branch of their respective governments, to a new, untested supranational agency. Especially since this body is, in their view, likely to be dominated by the economic interests of the United States. Any attempt to create universal labour rights would be complicated by technical legal issues relating to the different jurisdictional approach that each country employs in regulating labour relations. Moreover, since Congressional legislative action would likely interfere with any effective ILS regime put in place by the parties, American trade unionists will need to improve their labour standards through domestic organizing and political action.<sup>227</sup> Given these difficulties, NAALC optimists view the 'effective enforcement' of existing labour laws as a more practical starting point than attempting to fashion common continental labour norms.<sup>228</sup> As well, contrary to NAALC critics, optimists of the agreement argue that this process allows for extraordinary candor in international relations because the Secretariat and the independent

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<sup>226</sup> This section relies heavily on Lance Compa, 'Another Look At NAFTA' (1997) Winter *Dissent* 45 at 46. Also see Compa, *supra*, note 162 and Compa, *supra*, note 3.

<sup>227</sup> Compa, 'Another Look', *supra*, note 226 at 46.

<sup>228</sup> *Ibid* at 47.

experts involved in dispute resolution are formally free to reach their own conclusions in any investigation under the agreement.

In addition, optimists of the side agreement argue that the delay inherent in the NAALC dispute resolution mechanism -- of up to three years -- is comparable to the speed with which the National Labor Relations Board or other international institutions resolve (U.S) complaints. Moreover, the multi tiered process utilized by NAALC in resolving the various issues presented to an NAO is not unusual for international institutions dealing with U.S matters. NAALC supporters submit the NAALC is more permissive than other (e.g., the European Union) international bodies because it accepts more U.S issues for review than other similar dispute resolution mechanisms. In short, the picture painted by NAALC critics is not as dreadful as their strident criticism would indicate. Optimists argue the 'received wisdom' dispensed by many labour lawyers on this topic is mistaken. Despite many difficulties with the agreement -- the NAALC is a positive first step forward in forging a strong ILS/trade regime in North America.

Second, Compa, and others, argue the NAALC provides institutional competencies that may actually improve labour conditions in NAFTA countries.<sup>229</sup> NAALC optimists reject critics that exclusively judge the

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<sup>229</sup> Ibid at 47-48.

NAFTA side agreement on its formal legal ability to reverse specific worker rights violation. Instead, NAALC optimists try the side agreement's effectiveness on its ability to mobilize labour law reform in North America.<sup>230</sup>

NAALC optimists maintain that the creative use of the side agreement could improve labour standards on this continent. The potential of the labour side agreement is seen in the following terms:

- It promotes avenues of international cooperation in support of workers' rights and sustains public discussion regarding the real state of labour standards in North America;
- The NAALC is central to creating a knowledge base for progress in tri-national treatment of labour rights issues;
- It permits political mobilization of organizations to directly challenge government and reform the existing state of labour standards in North America;
- Public reviews can encourage states to strengthen general enforcement efforts and aid specific worker rights' claims;
- Public reviews can encourage businesses to voluntarily comply with workers' rights and labour standards;
- Public reviews can strengthen democratic participation in union affairs where unions are implicated in rights violations.<sup>231</sup>

Although the complainants using NAALC have only secured cooperative programs and public reviews to date – excluding the use of Evaluation Committee of Experts (ECEs) and dispute resolution panels -- Compa stresses

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<sup>230</sup> Stephen Herzenberg, Switching Tracks: Using NAFTA's Labour Agreement to Move Toward the High Road, (Interhemispheric Resource Center : Albuquerque, New Mexico, 1995) at 5.

<sup>231</sup> See Compa, 'Another Look,' supra, note 226 at 46-48 and Herzenberg, supra, note 230 at 3-18.

the ability of the side agreement to engage in the social activities necessary to enhancing the future of ILS.

In particular, Compa argues the NAALC 'opens up' space for governments, businesses and labour to honour workers' rights. The structure of the side agreement, which requires a complaint to be filed from another NAALC country, demands international networking of fair traders to establish labour standards violations. In turn the NAALC, by creating mutual obligations of states as well as domestic and international agencies, engages and promotes the labour standards linked to trade on this continent.<sup>232</sup> NAALC optimists suggest that the use of the agreement's institutions (cooperative programs, evaluation committees of experts, tri-national dispute settlement panels, public reviews of complaints by NAOs) should improve worker rights and labour standards in NAFTA countries by fostering an atmosphere for positive change in this area. For the optimists of the side deal, the yardstick by which NAALC can be measured is whether this agreement provides a *real* opportunity to improve workers' rights in North America. In short, Compa's position is that the NAALC has the potential to the upward harmonization of labour standards in North America by generating cooperation, discussion and knowledge. This can result in improved

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<sup>232</sup> Compa, 'Another Look,' supra, note 226 at 50.



enforcement of national and international labour standards by the state, business and unions.

This chapter reviews the institutions of NAALC that have been utilized to date and measures their use against these assertions. The first section will reconsider, in light of NAALC optimists' view, public reviews that have been conducted under NAALC. It will assess the extent to which these reviews have promoted the sorts of action suggested by Compa, and which would be necessary to enhance ILS. Next, this chapter will review NAALC's cooperation activities, to gauge the effects of these activities on the enforcement of labour standards in North America. Finally, this chapter will shift its perspective to assess the overall effects on ILS of the application of NAALC. This chapter argues that NAALC optimists have properly assessed the effect of NAALC – that is, the agreement does promote discussion, cooperation, enhanced knowledge and the improved enforcement of ILS.

#### **A. NAALC Submissions: A New Perspective**

The critics cite the results of the litigation under NAALC as proof that the side agreement is a poor instrument to improve the state of ILS in North America. NAALC critics have judged the NAALC on its formal legal ability to improve workers' rights largely by the ability of the side agreement being able

to issue binding effective remedies against the governments or MNCs involved in the various cases. On the other hand, NAAALC optimists have pointed to the informal ability, through discussion and cooperation, to effect real improvements in the lives of workers involved in these cases and generally throughout the continent. This segment of this chapter re-examines some of the cases that demonstrate that informal activities can lead to limited improvements in ILS enforcement under the agreement. As we will see, the background and non-legal aspects of these cases do lend credence to NAALC optimists informal approach to promoting workers' rights.

#### **I) Public Reviews #940001 and #940002**

The first two complaints brought to the U.S. NAO, Submission # 940001 (Honeywell) and Submission # 940002 (General Electric), were the result of a preexisting, formal relationship between the United Electrical Radio and Machine Workers of America (UE) and the Mexican based Workers' Authentic Front (FAT). UE and FAT had entered into a 'Strategic Organizing Alliance' that obligated FAT to attempt to organize U.S. owned MNCs operating along the U.S. Mexican border that were already organized by UE in the United States. In return, UE financially supported FAT's organizing drives at these facilities and exerted pressure on the targeted companies in the

U.S..<sup>233</sup> As a result of this arrangement, FAT organizers in Mexico judge the worth of organizing a number of plants and determined that the General Electric plant in Juarez and Honeywell's facility in Chihuahua were viable targets for unionization.

FAT initiated its campaign at the GE plant and met strong resistance from government officials regarding union recognition. The FAT continued organizing despite the government's official refusal to recognize the union. Meanwhile, UE launched an aggressive public relations campaign in the United States. UE local unions began to pressure their own GE managers and began a public letter writing campaign to expose GE's initial resistance to the union campaign in Mexico.<sup>234</sup>

In an effort to side-step the Mexican government's resistance to unionization at GE: the unions attempted to create a process that could lead to voluntary recognition of FAT at the facility. Given the combined efforts of FAT and UE, General Electric agreed to hold the first U.S. style secret ballot union election in Mexican history.<sup>235</sup> With this agreement came a U.S. style anti-union campaign by the employer. This election campaign was

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<sup>233</sup> John Hovis, 'Submission to U.S. NAO Regarding General Electric Company' (United Electrical, Radio and Machine Workers of America, Pittsburgh, 1994) at 3-4.

<sup>234</sup> See generally, Jeffery S. Rothstein, 'Cross-Boarder Labor Solidarity' (M.I.R. thesis, University of Wisconsin, 1997) at 32-35.

<sup>235</sup> Ibid.

characterized by UE's Director of International Labor Affairs as a "viscous anti-union campaign which was similar to, but worse than, anything I have experienced in the United States."<sup>236</sup> As we have seen earlier, General Electric, among other things, allegedly prevented union organizers from distributing pro-union literature; terminated the employment of union organizing activists and pressured workers into relinquishing any legal claim for reinstatement as a condition of accepting severance pay packages.<sup>237</sup> FAT lost the ensuing vote by a large margin of the ballots cast.

In November of 1993, FAT began organizing Honeywell's plant and had successfully organized private meetings with workers who had expressed interest in joining the union. Honeywell quickly discovered the organizing effort and dismissed many of the union's key organizers. They required every discharged employee to sign resignation slips releasing the company from reinstatement claims as a precondition to collecting their severance pay packages. The FAT protested the actions of both Honeywell and General Electric when it filed complaints with the Mexican Conciliation and Arbitration Boards (CABs) alleging these employers interfered with, and

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<sup>236</sup> Robin Alexander quoted in Rothstein, *supra*, note 234 at 30

<sup>237</sup> Hovis, *supra*, note 233 at 3-6. Also see generally, Letter of Robin Alexander, UE Director of International Labor Affairs to Jorge F. Perez-Lopez, U.S. NAO, 29 June 1994 for a description of the FAT organizing campaign.

denied their employees' right to organize. The CAB had denied the unions' request. These developments led UE and FAT to approach the International Brotherhood of Teamsters (IBT) -- who represented Honeywell workers in the United States -- to become involved in the Honeywell organizing effort in Mexico.<sup>238</sup> As we have seen the IBT joined the campaign and launched the first NAO complaint under the NAALC.

After UE and the IBT retold their story to the NAO in their complaints,<sup>239</sup> the submitters attempted to create "space" for the NAO to promote the workers' rights at these factories. Despite the appearance that the relief requested of the NAO overreached its bounds, the submissions essentially challenged the U.S. NAO to establish broad parameters of conduct for itself in these cases. For instance, the IBT requested relief that would *require* the Mexican government, and by extension Honeywell, to reinstate discharged workers. The IBT also requested the NAO improve upon its rules of conduct in NAALC proceedings by "developing standards and guidelines for determining when U.S. employers violate basic labor norms."<sup>240</sup> The IBT sought an explicit acknowledgment of the link between international trade and

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<sup>238</sup> Rothstein, *supra*, note 234 at 31.

<sup>239</sup> See the text between, *supra*, note 160 and 165 set out in Chapter 2 for a recounting of these complaints.

<sup>240</sup> Earl V. Brown, Jr., "Submission to U.S. NAO Regarding Honeywell Inc." (International Brotherhood of Teamsters, Washington DC, 1994) at 5-7.

domestic workers' rights. It demanded the NAO 'request the National Labor Relations Board begin appropriate rule making...to address the chilling effect of the alleged violations on the rights of IBT members and any injury to their economic interests.'<sup>241</sup> Similarly, the UE requested the NAO *direct* General Electric to comply with various rights it asserted GE violated, such as unjust dismissal.<sup>242</sup> The breadth of this relief clearly rested outside the jurisdiction of the NAO as it had been defined by the NAALC.

Yet, as we have seen, the resolution of this case (Ministerial Consultation was not recommended and seminars were arranged to further discuss the labor issues in the complaint) resulted in recrimination that the U.S. NAO had failed the workers at the center of the matter. The UE claimed that a number of irregularities tainted the U.S. NAO's inquiry into its complaint and indicated a callous disregard for the issues or individuals involved. In particular, they claimed:

- Non-simultaneous translation was provided at the public hearing which resulted in numerous errors in the official record. The transcript contained translating errors, the omission of submissions, the omission of witnesses in attendance and their testimony, errors in witness employment positions and a general delay in holding the hearing;
- Limiting the time for testimony (to generally ten minutes per witness) and the subject matter of testimony (no statements concerning GE pre-election behaviour, intimidation etc.), failure

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<sup>241</sup> Ibid.

<sup>242</sup> Hovis, *supra*, note 233 at 15-16.

- to hold the public review in a place physically and financially accessible for workers to attend and give evidence:
- Prohibition of electronic media at the hearing leaving a seriously flawed transcript as the only official record;
  - The tenor of U.S. NAO questioning centered on union complaints only in order to eliminate them as issues in the final report, failure to ask obvious and substantive questions of expert witnesses at the hearing relating to the complaint that were only solicited after the hearing.
  - NAO findings ignored oral evidence and sworn affidavits regarding, 1) health and safety issues, 2) collective agreement irregularities, 3) pre-election behavior of GE relating to intimidation of employees, 4) first hand oral evidence indicating the Mexican government failed to process union recognition of the independent union *because* GE was a maquiladora employer and the government's interests were too great in the case.<sup>243</sup>

As a result, UE argued the NAO's resolution of the case by the public report was unfair and inadequate response to their submissions.

It would seem that NAALC optimists *cannot* point to UE's decision to permanently withdraw Submission 940004 (General Electric #2) as evidence that the agreement leads to 'space' for an arm of the government -- in this case the U.S. NAO -- to better enforce ILS. This complaint related to GE's pre-election behaviour referred to in the initial complaint and only became a separate complaint because the NAO would not accept amended pleadings

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<sup>243</sup> See Letter from John Hovis, President of United Electrical to Irasema Garza, Secretary U.S. NAO, 19 January 1995 describing why UE withdrew Submission 940004 complaining of GE's pre-election behaviour in the organizing drive. Also see Letter from Robin Alexander, Director of International Labor Affairs to Irasema Garza, Secretary U.S. NAO, 27 September 1994, and Letter from Robin Alexander, Director of International Labor Affairs to Irasema Garza, Secretary U.S. NAO, 3 October 1994.

from UE.<sup>244</sup> The fact that UE withdrew the submission seems to indicate the utter failure of NAALC to inspire labour friendly action on behalf of governments. UE's negative response to the NAO would further suggest that the NAALC has not motivated the sort of discussion and cooperation necessary to cause state officials to use the NAO in a way that would improve ILS on the continent.

However, this NAALC case *did* produce some positive benefits for other workers involved in the NAO complaint process. Although FAT, its affiliates, the IBT and UE could not entice the NAO into granting any of the generous relief it had requested in the submission, thereby bypassing an opportunity to create institutional space for labour rights enforcement, it did improve the application of the U.S. NAO's rules pertaining to hearings. The intemperate reaction of UE to boycott the NAO set in motion a self-evaluation process within the NAO which led to a more generous application of its discretion in conducting public reviews. Since the consolidated IBT/UE hearings, no group before the NAO has had to endure the questionable treatment which led UE to complain of unfairness in the review. The NAO has now proven to be useful in allowing workers to communicate their experiences with the labour relations practices of their employers and governments. The

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<sup>244</sup> Ibid.



NAO currently helps to ensure that public hearings are held in a domestic location closest to the dispute. As well, it arranges attendance for foreign witnesses with immigration officials to ensure these witnesses are granted admission to the United States for the purpose of the NAO hearing. Crossing the border from Mexico into the United States had proven to be somewhat of a difficulty so that the removal of this barrier was a significant step in allowing unions and other bodies to present their best case at the hearing.<sup>245</sup> In addition, the NAO now employs simultaneous translation at public reviews so as to avoid previous difficulties with the transcript. In turn, the relationship between the U.S. NAO and the groups that have brought forward complaints has improved considerably as has their experiences in public reviews.<sup>246</sup>

In particular, the review process undertaken by the NAO in these cases also created, what has become the norm in NAO filings, an enormous amount of legal investigation and reporting. In an effort to understand the legal issue in question presented by the dual submissions of UE and the IBT, the NAO expended effort to establish the context behind the complaint. The NAO has since improved its communication with submitters and now repeatedly contacts parties to expand their understanding of the case. In these cases, the

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<sup>245</sup> Pharis Harvey, Interview 1 July 1997.

<sup>246</sup> *Ibid.*

American unions relied upon their contacts in FAT, and elsewhere, to generate the responses requested of the NAO to specific factual and legal questions regarding Mexican labour law and practice.<sup>247</sup> Apart from the written submissions themselves, the 'parties' to the complaint issued summary positions, supplemental submissions, post-hearing submissions, responses to notices soliciting information, and sworn affidavits. Moreover, the NAO itself contracted a number of individuals to conduct detailed legal studies of Mexican labor law enforcement to complement the information supplied by employers and unions in these cases.<sup>248</sup> The NAO specifically relies upon this information in its decisions and released all documentation for public use. Although it is often normal for public hearings to gather a large amount of information -- the NAO produced information on comparative labour law in NAFTA countries that directly applied to the issues in the cases. This information was not previously or widely available to the participants in the public review until the NAO produced the material. As a result of criticism

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<sup>247</sup> For instance in the IBT complaint see -- Letter from Glen J. Skovholt, Vice President Corporate Government and Community Affairs to Irasema T. Garza, Secretary, U.S. NAO, 31 August 1994 for a summary of Honeywell's position; IBT, 'Post Hearing Brief of the International Brotherhood of Teamsters' (IBT, Washington DC, 1994).

<sup>248</sup> See Paul A. Curtis and Alfredo Gutierrez Kichner, Questions on Labour Law Enforcement in Mexico and the Role of the Federal and State Conciliation and Arbitration Boards (U.S. NAO, Washington DC, 1994) and National Law Center For Inter-American Free Trade, Labor Law Enforcement in Mexico and the Role of the Federal and State Conciliation and Arbitration Boards (U.S. NAO, Washington DC, 1994).

that the NAO did not fully investigate the UE's complaint or rely on its material. The public reviews beginning with Sony has attempted a more balanced and detailed investigation. The U.S. NAO endeavored to invoke practices that build an accessible, comprehensive resource of information that would assist petitioners in the resolution of NAO cases. Its effort to cooperate with petitioners in gathering information has improved and it tends to promptly provide and/or solicit information from all parties involved in a submission.

Moreover, despite the almost universal condemnation by labour rights activists in the first public report issued by the NAO dealing with the GE and Honeywell cases, these investigations did result in an improved situation for some workers. In addition to the improved severance package offered to some workers at GE<sup>249</sup> the publicity surrounding these two cases generated by this investigation prompted the reinstatement of several workers and widespread instructions from U.S. firms' headquarters to their Mexican subsidiaries to carefully comply with Mexican labour laws.<sup>250</sup> As well, these two cases and the cooperation between the unions involved were directly inspired by the matters 'regulated' in the NAFTA labour side agreement. The underlying cause of cross border links between F&T, its affiliates and UE were based in

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<sup>249</sup> See text accompanying Chapter 2, *supra*, notes 160 to 165.

<sup>250</sup> Compa, 'Another Look', *supra*, note 226 at 47.

the movement of thousands of 'United Electrical jobs moving to Mexico.'<sup>251</sup> Yet the NAALC helped to bring the complainants together by allowing them the institutional room necessary to oppose the NAFTA. They shared a common philosophical approach to unionism, (viz. independent, democratic unions with an emphasis on organizing) and a litany of economic problems that motivated greater cooperation between the unions.<sup>252</sup> The NAALC provide these unions with an institutional 'vehicle' – by requiring labour advocates to cooperate with fair traders from other countries in order to bring forward a complaint -- to publicly explore issues such as globalization in North America and the difficulty of establishing independent trade unions in Mexico.

In addition, as a direct result of the two failed NAO cases the organizing strategy of the UE and FAT had been re-evaluated. Given their failure at GE and Honeywell the unions agreed to re-concentrate their organizing efforts on the interior of the country where FAT had its organizational base. The UE IBT complaints helped the union leadership realize that a plant by plant organizing approach could not succeed until the workers in the maquiladora workers could build solidarity among themselves. The construction of a new union ethic in the maquiladora had to rely upon

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<sup>251</sup> Alexander quoted in Rothstein, *supra*, note 234 at 28.

<sup>252</sup> *Ibid.*

educating workers about their labour rights and an alternative and progressive vision of independent unionism. As well, these workers needed various forms of support which included providing legal assistance in their disputes with their employers.<sup>253</sup> The IBT, U.E. FAT, Unitarian University at Shelter Rock and the Funding Exchange all helped establish a workers center in Ciudad Juarez known as the Centro de Estudios y Taller Laboral (CETLAC) to provide the education and services, described above, to Mexican workers.<sup>254</sup>

The UE and FAT continue international cooperation by promoting worker exchanges, inter-union funding and cross border participation in union organizing campaigns. Roberto Valerio, a union organizer at the CFI plant in Juarez, had been fired by his employer for participating in the union organizing activities initiated by the UE/FAT alliance. Recently, Valerio later assisted UE in an organizing effort of Aluminum Casting and Engineering, a foundry in based in Milwaukee, Wisconsin with over four hundred employees. Valerio was responsible for organizing a large portion of the plant's Mexican immigrants who had been reluctant to join the union given their experience with the pro-government CTM.<sup>255</sup> Valerio was successful in establishing UE as a credible voice in the eyes of the large Mexican population at the plant and

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<sup>253</sup> Rothstein, *supra*, note 234 at 34.

<sup>254</sup> *Ibid.*

<sup>255</sup> *Ibid.* at 36.

his assistance was pivotal in securing a majority of workers to support the union in the certification election.<sup>256</sup>

Obviously, the contact UTE and FIAT made as a result of their NAALC activities proved invaluable to this organizing effort. NAALC critics would acknowledge that no matter how minor these victories may seem to them in the context of the overall formal impact of NAALC, these results did improve the circumstances of the workers involved because they indirectly benefited from the litigation of the first cases. As well, other workers' groups that have since presented cases to the U.S. NAO have also benefited from the first cases. This is because the IBT, UTE, and FIAT alliance improved and refined the NAO complain process. This has enabled U.S. advocate to more easily explain their complaints to the NAO and the public. Similar limited yet positive results have been produced by the litigation of other cases.

#### **IID Public Reviews #9501 & #9602**

Long before developing their case and submitting it to the U.S. NAO, the CWA had entered into a formal relationship with its Mexican counterpart in its NAALC submission. On February 19, 1992, the CWA had signed an agreement with the Union of Telephone Workers of Mexico (known by its

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<sup>256</sup> Ibid.

Spanish acronym as STRM) which was affiliated with the Federation of Unions of Goods and Services Companies of Mexico (known by its Spanish acronym as FESEBES) a non-CTM labour central. The agreement pledged both unions to cooperating and coordinating their efforts in the political arena and to an exchange of labour union information, knowledge and experience. In that spirit, the agreement specifically obliged the unions to work together to promote the rights and interests of telecommunication workers.<sup>257</sup> As well, the CWA and STRM had a common affiliation with the Postal, Telegraph and Telephone International (PTTI) an international organization that represents 254 affiliated telecommunication organizations and their 4.6 million members. The formal relationship between the CWA, the STRM and their affiliates aided the unions in using NAALC in a way that promoted their high profile union organizing campaign.

The CWA viewed the NAALC as a forum for expressing the problems of U.S. and Mexican workers. As a result, it developed a strategy to publicize the fate of Sprint workers who attempted to organize the La Conexion facility. The center piece of its public campaign was an attempt to exploit the publicity value of NAALC to its fullest potential. The CWA and STRM entered into a

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<sup>257</sup> STRM, Complaint filed by the Union of Telephone Workers of the Republic of Mexico with the National Administrative Office of the United States, (Washington DC: Bureau of International Labor Affairs, U.S. Department of Labor, 1995)

labour organizing campaign that challenged Sprint's actions domestically in front of the NLRB. This part of their strategy focused on the exposing Sprint's anti-union activity in defeating the union organizing effort. At the same time, the STRM, FESEBES, CWA and PTTI would pressure the U.S. NAO to highlight the ineffectiveness of U.S. law (and by implication question the effectiveness of the NLRB) to protect U.S. workers right to freedom of association and the right to collective bargaining and strike.<sup>258</sup> This pressure would extend beyond the NAO and would rely upon the unions' NAO complaint as a basis for employing political pressure on Sprint to accept their workers' right to establish a union with the telecommunications giant.

The STRM launched a complaint on behalf of the CWA which request broad relief similar to the relief requested by UE and the IBT.<sup>259</sup> Again, the complaining unions requested relief that was *ultra vires* of the American NAO but attaining all of their relief was clearly not the true focus of the complaint. The CWA attempted to maintain national and international attention on their campaign through the use of NAMLC in order to establish their unions as a credible force in organizing the telecommunications field. Conversely, the

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<sup>258</sup> Rothstein, *supra*, note 234 at 41.

<sup>259</sup>STRM, *supra*, note 257 at 4-5. For example, the 'Actions' section of the complaint requested, among other things, that 'Sprint will not be allowed to establish itself in Mexico' given its poor worker rights record.



NLRB complaint attempted to advance the organizing drive at the plant in the normal course of U.S. labour relations. The campaign at Sprint was turned into an international and high profile complaint only through the utilization of the NAALC.

Among other things, the CWA used its affiliation with the PITTI to involve the German Post and Telephone Workers' Union, (known by its German acronym as DPG) to protest the closing of La Conexion. The union began a letter writing campaign to the Chief Executive Officer of Sprint, Mr. William T. Esrey, urging him to recognize the CWA at the La Conexion facility. The campaign also called on Sprint to eliminate its official union-free policy from its management guide.<sup>260</sup> As well, by using its DPG representative on the Board of Directors of their employer, Deutsche Telekom, a major Sprint shareholder, the union helped pass a resolution recognizing that respect for basic workers' rights would be a precondition for any future joint ventures it pursued with Sprint.<sup>261</sup> At the time, this resolution added pressure on Sprint to assure France Telecom and Deutsche Telekom, prospective partners in a joint venture, that it respected its American employees right to

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<sup>260</sup>Veronika Altmeyer, Managing Executive DPG, cited in U.S. NAO, Public Forum (San Francisco: Bureau of International Labor Affairs, Department of Labor, February 27, 1996) at 96-103.

<sup>261</sup> Ibid.

join a union. The news of Sprint's alleged anti-union activity in San Francisco did reach news programming in Germany and this story was followed closely by its media.<sup>262</sup>

While the DPG and STRM exerted international pressure on Sprint, the CWA began to organize domestic forces against Sprint. The CWA began to enlist the help of American politicians to exert pressure on Sprint to reopen its facility and recognize the CWA as the workers' bargaining unit. The CWA had arranged for vice-president, Al Gore, to meet with former Sprint employees involved in the labour dispute.<sup>263</sup> This meeting led to the Administration to monitor the development of the case. As well, Administration staff meet with CWA staff to follow up on the CWA's concerns regarding the dispute. Morton Bahr, President of the CWA, received letter of support from the President of the United States who was personally

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<sup>262</sup> Ibid.

<sup>263</sup> Letter from Bill Clinton, President of the United States to Morton Bahr, President Communication Workers of America, 3 March 1997 (unpublished on file with the author). As a result of the political lobbying exerted by various groups connected to NAALC cases, the President was repeatedly solicited by a number of community leaders. In many of the NAALC cases he often responded with perfunctory letters referring the authors to the U.S. NAO, for example see Letter from Bill Clinton, President of the United States to George Clark and Jamie Martinez, IUE District No.11, 26 August 1994. Ironically, in the Sprint case, the President and Mr. Bahr attended a State Dinner for the President of Chile. Mr. Frei, the President of Chile, is a free trader who engaged in discussions with the President of the United States to expand the NAFTA to include Chile. President Clinton is currently seeking fast track authority from Congress to begin a new round of negotiations to expand NAFTA to Chile. Congressional Republicans have threatened to scuttle fast track authority if that would allow the President to extend the NAALC to Chile.

kept abreast of the dispute as it developed. As well, over sixty members of the House of Representatives wrote CEO Esrey to express their concern that members of Congress had been misled by Sprint regarding its actions in the union's NLRB appeal. The members of Congress reminded Esrey that Sprint's largest customer was the U.S. federal government and they urged Sprint to re-open the La Conexion facility, agree to an union election and desist from any interference with Sprint workers' right to organize.<sup>264</sup> The CWA also organized a group of Congressional members, individuals of State Legislatures, a number of women's organizations, labour unions and other organizations, as well as individual celebrities to publicly support CWA's Sprint organizing campaign.<sup>265</sup>

If NAALC critics were skeptical about the results of this case -- to hold a public forum and initiate a plant closing study -- as a means of seriously addressing the issues involved in the case, their views did not accord with the attitude of unions involved in this process. The remedies provide by Sprint, to

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<sup>264</sup> Letter from Tom Lantos et al, Member of Congress to William T. Esrey, Chairman and CEO, Sprint Corporation, 14 October 1994 (unpublished but on file with the author). From the very beginning Congressional pressure was exerted on government officials in each NAALC case, see Letter from Richard A. Gephardt, Majority Leader House of Representatives to Irasema Garza, Secretary U.S. NAO, 5 August 1994 for an early example of the many letters sent to the U.S. NAO.

<sup>265</sup> CWA, Prominent Supporters of Sprint Worker's Rights (Washington DC: CWA, 1995) Notable among those who would not publicly support Sprint workers' right to freely organize, despite being approached by the union, was Candice Bergen, Sprint's television spokesperson.

hold a public forum was a specific result of STRM's request for that relief in its complaint. This remedy apparently satisfied the STRM and CWA leadership that the NAALC complaint process was a valuable tool to promote workers' rights. At the public forum held to discuss the experiences of La Conexion workers, Francisco Hernandez Juarez, President of STRM explained that the NAALC helped his union send a clear message to the public and MNCs that workers and trade unions were willing to defend themselves.<sup>266</sup> Although he acknowledged that the NAALC did need to be reformed to include more specific and functional regulation, he acknowledged that the labour accord helped redefine traditional patterns of international labor organization and that trade agreements with ILS would promote a more balanced and fair working environment.<sup>267</sup> The NAALC would allow unions to appeal to their governments to implement these changes and the Sprint case marked the first time that Mexican workers initiated legal action to support American workers in a labour dispute.<sup>268</sup> The Sprint complaint was symbolic of this new change in international labour organization.

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<sup>266</sup> U.S. NAO, *supra*, note 260 at 28.

<sup>267</sup> *Ibid* at 29-30.

<sup>268</sup> *Ibid* at 30.

The President of the CWA also recommended improving the NAALC.<sup>269</sup> but was extremely positive about the resolution of Sprint. Mr. Bahr expressed satisfaction with the decision to hold a public forum and indicated that a forum was useful to the CWA because it exposed the use of sudden plant closings to thwart U.S. labor law. Bahr characterized the public forum in San Francisco as a 'breakthrough' for workers in North America because it focused public attention on deplorable corporate practices.<sup>270</sup> The CWA also believed that the forum's concrete value rested in educating the public and elected officials on the need for domestic labour law reform. In Bahr's view, the NAALC provided another vehicle to examine corporate action that violate workers' rights.<sup>271</sup> Public reviews would contribute to an environment which would help reform domestic labour standards and improve the international atmosphere for effective ILS. Of course, these sentiments almost directly mirror the assertions that Compa. and others, have made about the value of NAALC.

The Sprint submission had proven so useful to the CWA. STRM alliance that the unions launched another NAO case, which has proven to be

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<sup>269</sup> Ibid at 35-40. Bahr recommended implementing the PTTI Code of Corporate Conduct to improve the NAALC.

<sup>270</sup> Ibid at 31-32.

<sup>271</sup> Ibid at 33.

the most effective resolution of a NAALC case to date. On October 11, 1996, the CWA, STRM and FESEBES submitted their complaint to the U.S. NAO. Submission #9602 (Maxi-Switch) was supported by PTTI and the American Federation of Labor and Congress of Industrial Organization (AFL-CIO).<sup>272</sup> The NAO agreed to a review and scheduled a public hearing for April 18, 1997 at Tucson, Arizona.<sup>273</sup> The submission centered on a unionization effort at Maxi-Switch, a subsidiary of Silitek -- a Taiwanese company that owns ten other facilities located in the United States. Maxi-Switch produces high technology keyboards for computers and computer games and is located in Cananea, Mexico.

In a nutshell, the submission contended that STRM began organizing at the plant in response to the low wages and poor benefits provided to workers.<sup>274</sup> The employer discovered the campaign and began to intimidate workers (threatening a plant closing if the union was organized) into

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<sup>272</sup> Letter from John J. Sweeney, President of the AFL-CIO to Irasema Garza, Secretary U.S. NAO, 21 October 1996. Previously, the AFL-CIO had not formally involved itself as a complainant in a NAALC submission. It was invited to formally involve itself in the Sony complaint but it chose not to respond to the invitation. See Letter from Pharis Harvey, Executive Director ILRF to Tom Donahue, Secretary-Treasurer AFL-CIO, 6 August 1994. The AFL-CIO may be growing less hesitant to directly challenge the CTM, the official union sanctioned by the government of Mexico, even though it may be viewed as being partisan in the internal union affairs of Mexican labour unions.

<sup>273</sup> U.S. NAO, Notice of Address for Hearing on Submission #9602 (Washington DC: Bureau of International Labor Affairs, Department of Labor, 1997).

<sup>274</sup> CWA et al, Submission to the United States National Administrative Office Regarding Persistent Pattern of Failure to Enforce and Discrimination of the Mexican Labor Law (Washington DC: CWA, October 11, 1996) at 4.

abandoning their effort. The employer discharged a total of twenty employees including four leaders of the union. Among the discharged was the newly elected, eighteen year old female Secretary General of the independent union. Managers had repeatedly punched the Secretary General and forced her to sign a 'voluntary resignation slip' that ostensibly waived her right to dispute her discharge. Despite having organized a union and complied with the procedures for obtaining recognition of the union,<sup>275</sup> the local Conciliation and Arbitration Board refused to recognize the union. The CAB informed the workers that they were already recognized by a union and were covered by a collective agreement. This was surprising to the workers as they had had no contact with this union or seen the collective agreement.

An appeal was launched to the district judge which complained that this action violated the workers' right to association under the Mexican Constitution and under the *Federal Labour Law* because multiple unions were specifically allowed in Mexico. Thus denying the union on this basis could not constitute a legal reason in the CAB's recognition decision. As well, the

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<sup>275</sup> Ibid at 7-8. Under Mexican law multiple unions may organize more than one union in a bargaining unit, if 20 or more workers present a recognition petition to the CAB and comply with various formal technical requirements, such as the by-laws being in conformity with the statutory purpose of the Federal Labour Law. In workplaces with multiple unions, the one demonstrating majority support, through an election, obtains exclusive bargaining rights with the employer. Maxi-Switch workers complied with all the technical formal requirements and produced 56 supporters of their independent union.

independent union complained that the recognized union: a CTM affiliate known as the Union of Workers of Contract Manufacturing Companies, Shoe Stores, Garment Stores and Commercial Establishments in the General State of Sonora, had been improperly recognized. Shortly after independent union had begun organizing Maxi-Switch, the recognized union had filed documents for registration that lacked the correct number of signatures by the union executive thereby being improperly incorporated under Mexican law. As a result, the CAB could not deny union recognition to the Maxi-Switch workers on the grounds that another union already existed at the plant because no other union did exist at the plant -- this error resulted in no other union legally being formed.<sup>276</sup> The judge agreed with the latter argument, annulled the original decision and instructed the CAB to either deny or accept the registration sought by the FESEBES-affiliated Maxi-Switch union. The CAB did not comply with this decision and abstained from this action.<sup>277</sup>

In addition to challenging the dismissals at Maxi-Switch, the CWA's submission challenged the practice of 'protection contracts' signed between employers and CTM affiliated 'phantom' unions as method of avoiding independent union organizing. The submission claimed the Mexican

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<sup>276</sup> Ibid at 8-9.

<sup>277</sup> Ibid at 7.



government condoned this action by refusing to recognize unions at facilities where protection contracts have already been signed.<sup>278</sup> Along with other relief, STRM and the CWA had specifically asked the Mexican government to *immediately* grant legal recognition to the independent union. Not unlike the Sprint campaign the CWA had been pressuring the Clinton Administration to engage the Mexican government to rectify this situation. On April 15, 1996, the local CAB was instructed by officials in Mexico City to fully recognize the independent union and schedule reinstatement hearings for the four discharged union leaders. These hearings are expected to reinstate the four discharged employees.<sup>279</sup>

Currently, these hearings are pending and the company still asserts the resignations were voluntary. As well, it has reinstated the sixteen other employees originally discharged in the initial organizing effort. Regardless of the reinstatement hearing of the other four employees, if the independent union wins exclusive bargaining rights at the plant in an election the discharged union leaders would all be entitled to automatic reinstatement at Maxi-Switch under Mexican law. The union, known as the Union of Maxi-Switch Workers, is currently attempting to organize support for an election to determine the

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<sup>278</sup> *Ibid* at 10-11.

<sup>279</sup> Letter from Francisco Hernandez Juarez, President of STRM to Louis Moore, Director of International Affairs, CWA, 15 April 1997.

exclusive bargaining rights of employees at Maxi-Switch. This election is to be scheduled toward the end of September, 1997.<sup>280</sup> The CWA at the request of STRM and FESEBES withdrew the complaint from the U.S. NAO and no public review was ever conducted into this submission. Although the CWA still believes the NAALC needs to be strengthened, it maintains the abrupt change in the CAB's position is a significant victory for the workers at Maxi-Switch. In addition the reinstatement of some of the workers seems to be a direct result of the NAALC complaint.<sup>281</sup> As well, the events of this case indicates that NAALC can be an effective tool on behalf of workers' rights.<sup>282</sup> Not only does NAALC seem to be inspiring cooperation and some level of increased labour standards enforcement in the circumstances of these case, it also is building a large bank of knowledge pertaining to labour relations law and practice in North America.

### **B. Cooperative Programs: Building A New Knowledge Base**

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<sup>280</sup> Louis Moore, Director International Affairs CWA, Interview 3 September 1997.

<sup>281</sup> The reinstatement of workers through the pressure exerted by NAALC is not an isolated incident under NAALC. As we have seen, in the UE and IBT cases several workers were eventually reinstated. As well, after the public review initiated in the Sony case, the lobbying of the submitters, various members of Congress and the Secretary of the U.S. NAO prevented the discharge of a number of Sony employees who crossed the boarder to testify in the case by urging the CEO of Sony to intervene to prevent threatened dismissals. See Harvey, *supra*, note 245.

<sup>282</sup> *Ibid.*

As we have seen, under Article 22 of the NAALC, any party may request Ministerial Consultations pertaining to any manner within the scope of the NAALC. This article has been invoked twice in relation to the resolution of complaints brought forward under the NAALC -- once by the U.S. government and once by the Mexican government. The implementation of this article has led to two cooperative work programs<sup>283</sup> that were designed to address the specific issues raised in the cases. The completion of these programs served to increase the understanding of the domestic labour relations systems in North America. As we will see, the very nature of these activities, through their use of studies and seminars, expanded the exchange of knowledge pertaining to several serious labour law issues in the respective nations.

### **1) Case-based Cooperative Activities**

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<sup>283</sup> A cooperative activity was held in Honeywell (the IBT complaint) and General Electric (the UE complaint) pursuant to Article 11 of the NAALC which also allows cooperative work programs. In response to the recommendation of the U.S. NAC in the public report of the review, a workshop was held in Washington DC on March 27-28, 1995 concerning the right to organize and the freedom of association. This meeting was designed to address the issues raised in the first two complaints. It provided a small group of experts from each country to discuss and exchange information on a number of comparative labour law issues including: 1) organizing employees and union representation elections, 2) protection against anti-union discrimination, 3) remedies and procedural guarantees, and 4) union democracy issues. This workshop also allowed participants to expand their knowledge of the labour law regimes of these three countries.

In response to the public review of Sony, the U.S. NAO recommended Ministerial Consultation and joint cooperative activities on matters of internal union elections and democracy. It also requested the Mexican NAO to investigate the use of police violence to suppress a workers' demonstration following a flawed union election. The result was an investigation into these events and a series of tri-national public seminars on union registration and certification. These seminars were also supplemented by investigations into the law and facts relevant to the Sony complaint.

The first public seminar was held in Mexico City on September 13-14, 1995. The panelist involved in this meeting were government officials from each of the NAALC nations that had responsibility for the enforcement of laws pertaining to the subject matter of the seminar. The seminar simply reviewed the law concerning union registration and certification procedures in the respective countries.<sup>284</sup> The second public seminar was held in San Antonio, Texas by the U.S. NAO on November 8-9, 1995. The panelist involved in this seminar were independent labour law experts from the respective NAALC countries. The seminar reviewed organizing procedures, recognition, the law and practice of certification and registration, including unfair labour practices.

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<sup>284</sup> U.S. NAO, *supra*, note 168 at 4.

in each country.<sup>285</sup> The seminar provided an opportunity for the participants to compare and contrast the procedures and practices of the NAALC countries. The final seminar was jointly held in Monterrey, Nuevo Leon on February 28 - March 1, 1996 by the U.S. and Mexican NAOs. This meeting was a tripartite and tri-national event with representatives of labour, management and government attending from Mexico, Canada and the United States. This seminar focused on the implementation of labor law pertaining to organizing and registration.<sup>286</sup> All of these seminars allowed the public to directly participate, by asking questions of the panelists, and the proceedings were recorded by significant press coverage. Significantly, during the San Antonio hearings, Sony workers and lawyers from the National Association of Democratic Lawyers, among others, publicly charged Mexican officials and the Sony Corporation of a conspiracy to violate workers' rights in Nuevo Laredo, Mexico.<sup>287</sup> They pressed the Sony to rehire the discharged workers and recognize an independent union being organized by the fired worker.<sup>288</sup>

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<sup>285</sup> Ibid. Also see U.S. NAO, Seminar on Union Registration and Certification Procedures (Washington DC: Bureau of International Labor Affairs, Department of Labor, 1995)

<sup>286</sup> Ibid at 4-5. Also see NAOs, Third Seminar on Procedures For Resisting Labor Unions (Monterrey, Nuevo Leon: Bureau of International Labor Affairs, Department of Labor, 1996)

<sup>287</sup> Coalition for Justice in the Maquiladoras, "Mexican Government and Sony Blasted for Violating Workers' Rights" Press Release (8 November 1995)

<sup>288</sup> Ibid.

Although Sony did not meet this challenge the Mexican government and Sony were forced to justify their actions publicly at this seminar.

In addition, the seminar portion of the Ministerial Consultation in Sony, the U.S. NAO undertook two investigations. The first was to contract independent expert to investigate the history of workers' associations in Mexico, the development of freedom of association as well as the democratic process within unions and the current implementation of Mexican legislation regarding union registration.<sup>289</sup> Among other things, this study recommended eliminating the union registration process at the local CAB level and transferring those duties to the local administrative authority (that is, the State Secretary of Labor) so as to parallel the federal registration system. Second, the NAO was to request an investigation into police violence during a workers' demonstration. That report itemized the events leading up to the police involvement and concluded that several activities (better coordination of officials etc.) could avoid future re-occurrences of these events.<sup>290</sup> The

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<sup>289</sup> Ibid at 5. See Letter with Attachment from Armando Vivanco Castellanos, Secretary Mexican NAO to Irasema Garza, Secretary U.S. NAO, 16 February 1996.

<sup>290</sup> See Mexican NAO, Informative Report Pertaining to the Assignment Given to Francisco G. Robles Maldonado to Intervene as a Representative of the Government of the State to Resolve the Problem Which Affected the Company Magneticos de Mexico (Nuevo Laredo, Tam.: STPS, 1996). In contrast to much of the material initiated by any NAO under NAALC, this report is *stunningly biased* in its support of the police action as well as being unwittingly revealing regarding actual labour policy in Mexico. It essentially concludes that the police violence was used to secure the investment of Jerry Lee Brochin, President of the Sony subsidiary, to build a new manufacturing plant in the area. The police violence, in the words of the author of the report, 'guarantees labor peace to support more investment and productivity' in Tamaulipas Infra at 3.

completion of the cooperative activities led the U.S. Secretary of Labor to continue to monitor union registration developments in Mexico which generated one further report concerning Mexican law in this area.<sup>291</sup>

These cooperative activities, undertaken as a result of the public review and Ministerial Consultations, accomplished one basic yet important task. They broadened American and Canadian knowledge and understanding of Mexico's law pertaining to union registration, including the practical application of the union registration process.<sup>292</sup> The understanding of relevant laws and practices through the use of this process does add to the knowledge base of governments, businesses and labour unions interested in complying with labour law regulation in Mexico. Similarly, Mexico's active participation in other cooperative activities has accomplished the same thing - a better understanding of Canadian and American labour law systems.

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<sup>291</sup> See U.S. NAO, Study of Mexican Supreme Court Decisions Concerning the Rights of State Employees to Organize in the States of Jalisco and Oaxaca (Washington, DC: Bureau of International Labor Affairs, Department of Labor, 1996). Labour rights organizations speculate that a number of recent Supreme Court decisions in Mexico have signaled a greater sensitivity to the labour rights provisions of the ILO and the Mexican Constitution because the NAALC cases brought forward by these groups repeatedly stressed these issues in the various complaints; also see Kevin J. Middlebrook and Cirila Quintero Ramirez, Conflict Resolution in the Mexican Labor Courts: An Examination of Local Conciliation and Arbitration Boards in Chihuahua and Tamaulipas (Washington DC: Bureau of International Labor Affairs, Department of Labor, April 1996) for a discussion of the investigation into Mexico's CAB system of dispute resolution which was not strictly a cooperative activity but constituted a term of the Ministerial Consultation.

<sup>292</sup> This information gathered as a result of cooperative activities, was utilized in the CWA's Maxi-Switch complaint, *supra*, note 274 at 11. It would not be surprising to see more of the information generated by NAALC included in future complaints as the agreement is just now providing a detailed base of knowledge which can be utilized by potential complainants.

As we have seen, in answering the sole Mexican complaint, to date, Sprint's resolution employed two cooperative programs under the NAALC. The Commission for Labour Cooperation instituted a study of the impact of plant closings on the principle of freedom of association and the right of workers to organize in all three countries. As well, the U.S. NAO also held a public forum for workers on their right of association. This forum also allowed workers the opportunity to convey their concerns regarding the closing of La Conexion on their right of association. Both the study<sup>293</sup> and the public seminar<sup>294</sup> allowed Mexican business, labour and government officials to better understand the American and Canadian approaches to these issues. The information gathered is being used by the CWA and STRM to educate the public at large by exposing the flaws with domestic labour law. They also have used this information to highlight the limitations of NALLC. These are exactly the uses that NAALC optimists have indicated would be useful to improving labour rights enforcement in North America. The use of the NAALC by the CWA and STRM seem to verify the informal ability of NAALC to help workers attain their goals. Other cooperative activities under

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<sup>293</sup> See text in Chapter two accompanying notes 201-205.

<sup>294</sup> See text accompanying notes 265-271.



the side agreement have actually helped improve the enforcement of labour standards in the three NAALC countries.

## **II) General Cooperative Programs**

Originating from the successful experiences based upon the bilateral memorandums of labour cooperation between the NAALC countries, that preceded the labour side agreement, the NAALC provided for cooperative activities among the three countries regarding a long list of labour relations issues. Among other things, the NAALC specifically allowed issues such as: human resource development, compensation for work-related injury and illness, and forms of cooperation among workers, management and government.<sup>295</sup> These activities may include trilateral government working sessions, training programs, public conferences and seminars as well as technical information and other documentation to be exchanged between participants in these ventures. These activities were organized by agreement by the respective governments and were originally accessible by invitation. As we will see, the bilateral and trilateral activities have broadened the knowledge of the government officials, business people, labour unions and academics

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<sup>295</sup> NAALC Article 11.

involved. In so doing, they have improved the probability of national labour standards enforcement.

In the first year of the side agreement over twenty cooperative activities were undertaken, averaging about 2 per month.<sup>296</sup> The cooperative activities between governments have focused upon large scale events such as trilateral conferences (three of these occurring in the area of occupational health and safety and one on comparative labour law) and some smaller scale meeting focusing on highly defined topics. Generally, these meetings have been divided into four areas: 1) occupational health and safety, 2) employment and job training, 3) productivity and quality, and 4) labour law and workers rights. Of these activities, the respective governments have focused mainly on health and safety issues because of the high practical value of these conferences to enforcement agencies.<sup>297</sup> The health and safety seminars were organized around a variety of basic issues. They include: 1) occupational health and safety training, 2) high hazard industries, 3) technical issues in the electronics, construction and petrochemical industries, and 4) occupational health and safety statistics.<sup>298</sup> Not unlike the other cooperative activities inspired by

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<sup>296</sup> Commission for Labor Cooperation, Labor Cooperative Activities Between The US, Canada and Mexico: A Summary (Dallas: Commission for Labor Cooperation, 1996) at 3.

<sup>297</sup> Ibid at 2-3.

<sup>298</sup> U.S. NAO, Highlights of the 1994 Cooperative Work Program North American Agreement on Labor Cooperation (Washington DC: Bureau of International Labor Affairs, Department of Labor, 1995) at 3-4. The other areas of cooperation, employment

Ministerial Consultations, these numerous seminars -- over thirty five to date -- have been useful in expanding tri-national understanding of the various labour standards issues that confront governments, businesses and labour unions in North America. More importantly, they have helped increase the likelihood of actual labour standards enforcement.

A number of these seminars, especially in the area of health and safety, have stressed the practical enforcement of labour standards through the utilization of new methods of analysis and enforcement. However, where the utility of expanded knowledge in these area has been limited by the lack of resources governments (and even some non-governmental groups)<sup>299</sup> have acted by donating time and money to increased enforcement activities. For example, in April 1994, the Canadian government donated 40 units of air sampling equipment to the Mexican government to detect hazardous substances. Along with this equipment the Canadian government also sent two technical specialist to train 35 Mexican labour inspectors.<sup>300</sup> Many of these seminars also focus on more than the simple exchange of information.

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and job training, productivity and quality and labour law were also divided into the following respective seminars: 1) Micro-enterprises and the informal sector, 2) Productivity trends and indicators, 3) Equality in the workplace, 4) Labour law and practice, 5) Labour law and industrial relations, and 6) Labour law and freedom of Association.

<sup>299</sup> For example, the Laborers International Union of North America have been providing health and safety training to Mexican construction workers in an effort to improve the working conditions of fellow workers in this industry.

<sup>300</sup> Ibid at 5.

These government seminars have often been coordinate with non-governmental organizations (such as the Canadian Centre for Occupational Health and Safety and the National Safety Congress) that focus on specifically training the participants to the conference.<sup>101</sup> For instance, at a conference in Mexico city in July 1995 the CCOHS, whose goal is to promote the physical and mental health of working people, trained twenty-five American and Mexican participants on the use of a world wide electronic information service. The service contained over fifty occupational health and safety databases which would be of use to researchers, officials and inspectors in the three countries.<sup>102</sup> The training and increased availability of vital equipment and information has helped the various participants to these conferences to enforce their domestic labour standards. Again, this result almost directly parallels the prediction of Compa, and others, who stated that the NAALC would help bring about enough discussion, cooperation and learning to improve labour rights enforcement in the three countries.

Up to this point, this chapter has surveyed the position of NAALC optimists that the labour side agreement can lead, through discussion, cooperation, and the study of interested parties, to improved ILS enforcement

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<sup>101</sup> Commission for Labor Cooperation, 1995 Annual Report (Dallas: Commission for Labor Cooperation, 1996) at 20-21.

<sup>102</sup> Ibid at 21.

in North America. Another look at some of the key NAALC cases and a description of cooperative activities held under the auspices of the side agreement has indicated that NAALC optimists have correctly identified the use of the side agreement. The informal, political use of the labour side agreement has meant that a purposeful role for the accord does exist. As we have seen, the public reviews allowed by NAALC does assist the labour rights enforcement. The NAO cases have been able to improve the administration and application of the side agreement. MNCs are more aware of the necessity of complying with domestic labour laws and some have moved to ensure their compliance. As well, the presence of NAALC cases has moved corporate parties to repair some of their labour rights violations. Workers in NAALC cases have received better compensation for rights violations and others have actually been reinstated. These cases have also led labour unions to use their network of contacts created by NAALC cases to organize and aid other workers.

Moreover, the cooperative activities initiated under NAALC has also assisted in an enhancement of ILS in North America. The discussion and study created by cooperative activities has increased ILS knowledge among governments, businesses, unions and academia. As well, the public seminars held as a result of specific cases also improve the knowledge of different

labour law regimes in each of the three countries. Occasionally, these meetings have provided training and resources for participants to return to their nations and better labour standards enforcement. Consequently, cooperative activities have provided participants an opportunity to exchange information, train others and improve the availability of equipment and expertise in order to enhance ILS enforcement across this continent.

NAALC has provided tri-national and tripartite cooperation to better ILS. The agreement has provided labour advocates with an institutional place to pressure governments, corporations (and unions) to comply with the terms of the side agreement and ILS. Organized labour and non-governmental organizations in NAALC countries have used the institutions of the agreement to develop cross boarder strategies, draft submissions, plan testimony, mount press conferences, pressure politicians, demonstrate, participate in cooperative activities and the other events that flow from NAO hearings and learn about labour law regimes in the three countries as they agitate to improve ILS enforcement in North America.

The NAALC has redefined the ability of labour advocates to protect workers' rights and projected their efforts on to an international level. As a result, the NAALC may be viewed as an invitation to creatively link local political dynamics to the international arena. This change is significant in light

of literature<sup>503</sup> that suggests the growing clout of international markets is stripping government's ability to perform its basic regulatory tasks. If key state functions of national regulation are being eroded -- simultaneously enhancing the international and local level (due to open global markets and technological change) then the NAALC may be viewed as an important connection between the local and international plane. The side agreement's institutional framework promotes the connection between local events and international regulation through the NAALC's unique complaint procedure which fosters international cooperation between locally based groups in different countries and national organizations. Ironically, this international agreement between nations may help make the nation state more relevant despite these economic changes because national governments play a key role in the resolution of these matters. Despite the obvious effect specific NAALC institutions are having in certain instances of labour rights enforcement, a question remains: How widespread is the informal use of NAALC?

### **III) Scope of NAALC Activity**

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<sup>503</sup> See generally B. Barber, *Jihad vs. McWorld* (New York: Random House, 1995); Kenichi Ohmae, 'The Nation State's Response' in *The End of the Nation State* (New York: Free Press, 1995) at 117-149 and Joel Tractman, 'L'Etat, C'est Nous: Sovereignty, Economic Integration and Subsidiarity' (1992) 33 *Harvard International Law Journal* 459.

As Compa suggests, if NAALC's value rests in the agreement's informal ability to improve ILS enforcement in North America, then its under utilization erodes the potential of labour advocates to attain that goal. To date no party has been able to use an Evaluation Committee of Experts (ECE), although such a request could result in serious independent expert review of a particular issues. ECEs have the potential of focusing on broad social objectives (i.e., to secure improved working conditions: improve equality and promote labour rights) if complaints center on trade related or mutually recognized technical labour standards.<sup>304</sup> These objectives could give experts sufficient room to critically review issues and present non-binding action plans for the three countries to follow. An ECE report may also include public participation in the form of public hearings. This development could serve to inject a political element into the side agreement thereby fueling debate about its legitimate role in promoting labour rights. As it is crucial for labour groups to reform the NAALC, this development would seem important to forming a future agenda for groups that wish to exploit the side agreement's informal capacities.

In addition, NAFTA governments may agree to undertake any cooperative consultation without a complaint being lodged so that broad areas

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<sup>304</sup>Herzenberg, *supra*, note 230 at 9.



of concern to communities could be studied without strict adherence to the criteria listed in the agreement. As a result, ECEs have the ability to address the underlying causes of a race to the regulatory bottom and the deregulation of labour law. This result would directly address a central criticism of NAALC critics who argue that the agreement's formal inability to challenge a race to the bottom is a serious weakness in the side agreement.

The involvement of government, whether pertaining to the use of ECEs, or even dispute resolution panels is important to the functioning of the side agreement. Federal and sub-national governments tend to control the access points in the application of the Accord. For example, governments control appointment of ECE experts to review committees and they control the release of these reports to the public. If an ECE report is to result in the appointment of an arbitral disputes panel, it must have the support of a majority of federal governments involved in the Accord. Without the support of progressive governments advancing community concerns, the full value of employing the Accord could be lost. Government must take a proactive role along with complainants if the side agreement is to effect any change in the NAALC *status quo*. Where governments are reluctant to participate in the side agreement or advance complaints, traditional forms of lobbying and political

pressure will be necessary to persuade states of the merits of involvement in the Accord.

The goal for NAALC optimists must be to provide disincentives for capital to select investments primarily on the (lack) of labour law regulation or enforcement. If any changes are to occur to the NAALC they are likely to be gradual. The greater the participation of unions and other groups in the informal uses of the NAALC the greater potential these organizations have of effecting minor amendments to the Accord. As such, the NAALC must be utilized to address more than just freedom of association issues so that other issues such as discrimination can attract ECEs and dispute resolution panels. If the side agreement is used creatively to shed light on the problems associated with globalization<sup>305</sup> then the informal uses of NAALC will gain further credence. On the one hand, it is clear that harnessing NAALC institutions will be central in transforming labour standards enforcement in North America. On the other hand, until NAALC critics decide to bring different legal issues to NAOs so as to use the full range of institutions (ECEs and dispute resolution panels) this change is less likely to transpire. In addition, despite the under utilization of NAALC institutions, another similar disparity in the agreement's use is evident.

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<sup>305</sup> Ibid.

The center of NAALC activity has been among American non-governmental organizations based in Washington DC. Generally, initiatives to exploit NAALC have come from local and regional organizations taking the first steps to call attention to their particular dilemmas. These groups learned to network with the central American organizations opposing NAFTA that were mainly based in Washington, DC. Among other things, the regional groups relied upon the belt-way groups, such as the Citizen's Trade Campaign and the Alliance for Responsible Trade, for research material about NAFTA, fund raising to pull coalitions together, public relations and providing other contacts to network with regarding various fair trade issues.<sup>306</sup>

For example, the International Labor Rights Fund (ILRF), based in Washington DC, is a non-profit, non-governmental organization that represents human rights, labor, religious, consumer, academic and business groups, as well as individuals, dedicated to affirming the right of all workers to labour under reasonable conditions of work.<sup>307</sup> The Fund is particularly concerned with workers' ability to exercise their right to associate, organize and bargain

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<sup>306</sup> Allen Hunter, 'Globalization from Below? Promises and Perils of the New Internationalism' (1995) 25 *Social Policy* 6 at 9.

<sup>307</sup> The following segment relies on information drawn from the author's personal experience as a student intern at the ILRF. The author spent 10 weeks with the Fund during the summer of 1997 and was involved in a wide array of activities including the preparation of the most recent NAALC complaint concerning pregnancy discrimination in the maquiladoras. This information is drawn primarily from discussions with Terry Collingsworth, ILRF General Counsel and Pharis Harvey, ILRF Executive Director.

collectively. As well, it monitors child and forced labour practices throughout the world. Currently, the ILRF is focusing its work on a variety of topics such as studying World Bank projects that impact on workers' rights, the development of a social clause for the Free Trade Agreement of the Americas and international human rights litigation to end the use of forced labour by UNOCAL corporation -- an American gas and oil company involved in a partnership with the government of Burma that allegedly compels Burmese citizens to contribute their labour to the construction of a pipeline. The ILRF also actively promotes broad based development policies that focus on economic growth *and* an equitable distribution of wealth. It does not simply criticize trade liberalization. It focuses on linking trade and investment agreements to labour standards in order to more broadly distribute the economic benefits of globalization.

The Fund was primarily established by Pharis Harvey, the Executive Director, in 1986 as a way to advance U.S. and international trade and investment policies that promoted workers rights in countries around the world. It has grown quickly over the past decade and is staffed by a General Counsel, Executive Director and a administrative assistant. The Fund relies upon volunteers to undertake much of its work, including an international network of lawyers, academics and labour activists. It accepts student interns

that are mainly recruited in the United States and also utilizes full time volunteers for specific projects. The ILRF consists of a volunteer Board of Directors and an Advisory Council<sup>508</sup> that guide the activities of the organization. It has a small yearly budget of approximately \$250 000 (U.S.) which it acquires from the contributions of individuals, local unions and the AFL-CIO. In addition, it applies for, and receives, grants from various foundations including the Ford and the MacArthur foundations. Finally, the Fund raises money by producing and selling books and essays as well as conducting research and providing labour centered reports for different organizations.

The Fund has been directly involved in three U.S. NAO complaints and indirectly involved in the remaining cases. It has networked with other domestic groups and Mexican organizations that eventually became its competitors in these cases. The Fund has initiated cases it believed were important to bring forward and has had cases delivered to it in a bid to counter the situation of workers caught in challenging organizing campaigns. It has expended a great deal of energy networking with various governmental and non-governmental organizations in order to launch NAALC complaints. This

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<sup>508</sup> This Board and its Advisory Council is comprised of an international array of notable individuals, academics, lawyers, politicians, religious figures and long time labour leaders. For example, Coretta Scott King, Barry Bluestone, Arturo Alcade Justiniani, Senator Tom Harkin, Bishop Jesse DeWitt and John Sweeney.

has required the Fund to rely on its various volunteers to conduct detailed work to bring NAALC claims forward. This work has included legal research, drafting and presentation of briefs, traveling to interview potential witnesses and the translation of numerous documents. These efforts have resulted in the ILRF gaining a solid reputation as labour rights advocates for their presentation of persuasive and detailed submissions to the U.S. NAO in NAALC cases. The most salient argument groups like the Fund bring to the debate between critics and optimists is that using the NAALC to promote ILS is intrinsically useful because promoting labour rights internationally is a 'good thing' in and of itself. This is true regardless of the actual record of these groups in securing effective labour standards regimes in trade agreements.

Nonetheless, this reliance on Washington DC based groups, perpetuated by the centrality of that city in national politics, helped centralize many of the key fair trade groups on the Potomac. A strong anti-NAFTA group continues to be very active organizing against current free trade initiatives. Approximately fifteen different environmental and labor groups<sup>309</sup> regularly meet at the offices of the Economic Policy Institute's offices once a month to develop strategies that highlight their concerns and modify the

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<sup>309</sup> A short listing of these groups would include the International Labor Rights Fund, Economic Policy Institute, Public Citizen, AFL-CIO, Sierra Club, Institute for Policy Studies, and various Congressional representatives.

advance of free trade in national affairs. These meetings generate a variety of ideas to organize against political forces that seek to perpetuate policy initiatives that support free trade. These strategies often centers on the belt-way politic of the moment and a broader, long term coordination of strategies often gets sacrificed to the immediacy of the agenda being driven in Washington DC. Although much of this action is commendable from a fair trade perspective, this activity also signifies the imbalance in the use of the NAALC.

Outside of the United States very little NAALC activity is being pursued by the international networks of North American labour, environmental and human rights groups. Yet these are the very organizations discussing the modification of NAALC. Initially, this inactivity might have been explained by the rejection of NAALC in Mexico and Canada. In particular, Canadian labour unions refused to legitimize NAFTA by using its side agreements. However, that view of NAALC has been eroded in Canada and this anti-NAALC view is only now changing.

Despite not filing a formal NAALC complaint,<sup>310</sup> labour unions and other groups have been interested in the effect that NAFTA's passage would

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<sup>312</sup> Canadian unions likely did not consider filing a complaint under NAALC for the first two years of the agreement's existence because it was not clear that the agreement could be used to complain about American and Mexican labour practices. See Chapter two, Robinson, *supra*, note 128 and 129 for an explanation of Canada's unique position under the NAALC in its first years.

have in Canada. In the only significant activity indirectly related to NAALC, the Canadian Labour Congress (CLC) held a conference on March 6-7, 1996 on free trade entitled 'Challenging 'Free Trade' in the Americas: Building Common Responses.'<sup>311</sup> This meeting focused on a summary of various economic and social changes in each country since the passage of NAFTA and was attended by delegates from North and South America as well as Europe. This conference and the Canadian labour movement's increased participation in international trade-related meetings<sup>312</sup> along with other fair trade groups<sup>313</sup> symbolized the shift of the CLC, and their allies, to promoting a 'social clause' in future free trade agreements. Regardless of the political shifting of Canadian fair trade groups not one organization has filed a NAALC claim.

In the fall of 1996, the Canadian Association of Labour Lawyers (CALL) and the Alberta Union of Provincial Employees (AUPE) demonstrated some interest in filing a NAALC complaint. As a response to the Alberta

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<sup>311</sup> This Conference was funded by a number of unions including the Canadian Union of Public Employees, the Canadian Autoworkers and the United Steelworkers of America.

<sup>312</sup> For example, Canadians such as Dick Martin, a vice-president of the CLC, played a central role in brokering the Declaration of Belo Horizonte, Brazil entitled 'Building a Hemispheric Social Alliance to Confront Free Trade' on May 15, 1997. This declaration was made by a number of Canadian, American and South American fair trade groups calling for the inclusion of social issues in any free trade agreement of the Americas.

<sup>313</sup> Mexican Action Network on Free Trade, Alliance for Responsible Trade, Common Frontiers, Action Canada Network, Chilean Network for a People's Initiative, Coalition for Justice in the Maquiladora, Réseau Québécois sur l'Intégration Continentale, Confédération des Syndicats Nationaux and the Canadian Association of Labour Lawyers.



provincial government indicating it would, among other things, privatize its employment standards enforcement branch of the Ministry of Labour. CALL and AUPE began preliminary research into filing a NAALC complaint. However, the effort quickly fizzled when the government announced it had dropped that aspect of its legislative amendments. This left CALL and the AUPE to speculate that the specter of a NAALC review caused the government's to withdraw this proposal. Recently, the United Steelworkers of America (USWA) national office in Canada has been monitoring the developments of an organizing drive in Matamoros, Mexico. Workers at a twin automobile parts factory, organized by the Steelworkers in Canada, has been having difficulty reinstating 28 employees discharged by the employer. If the local CAB does not move to reinstate these workers, the Humanity Fund of the Canadian Steelworkers is considering filing a NAALC complaint. However, the resolution of this matter may be months away and the level of NAALC activity in Canada remains insignificant. This level of activity contrasts favorably with the single NAALC complaint filed by Mexican labour advocates. With the sole exception of ILS advocates in the United States, informal political action related to the accord has been almost nonexistent.

In sum, the informal activity linked to the side agreement suffers from two key weaknesses. The labour agreement's institutions (ECEs and dispute

resolution panels) have not been utilized to its full capacity. This leaves serious questions regarding the utility of engaging in further informal activities. Without the full use of the NAALC's institutional ability to positively influence the agreement's reform it remains doubtful if further informal use of the agreement would be beneficial. In addition, the use of the side agreement has almost entirely been initiated in the United States. This has left an unevenness in the application of the agreement that has excluded a number of organizations from obtaining any value from the NAALC. This situation also serves to limit the value of engaging in informal activities under the NAALC because the agreement's international dimension would be substituted for a domestic approach that inherently limits the type of international dialogue and cooperation promised by the agreement. The under utilization of NAALC along with its uneven application serves to somewhat temper the view that the informal use of the side agreement would lead to better labour rights enforcement in North America.

### **C. Conclusions**

The position of NAALC proponents, that the side agreement provides institutional space to improve labour rights enforcement in North America, has proven accurate. First, the NAO process led to specific improvements in the

treatment of workers involved in NAALC complaints. Workers have been compensated or reinstated for labour rights violations and in once case a trade union was organized largely because of the informal use of NAALC. The use of the agreement against MNCs and governments has also heightened the awareness of labour standards enforcement in North America. The NAO process itself has been reformed to allow for a more fair and informed hearing process. This development is likely to help future complainants exploit the NAALC. As well, the cooperative programs implemented under the agreement have helped educate participants and led to ILS training. The governmental, business and labour participants in these activities return to their respective countries better able to implement domestic labour standards. Despite the criticism that the NAALC has 'no teeth', the use of the side agreement has demonstrated the opposite: the NAALC is slowly developing the 'teeth' it requires to advance workers' rights causes.

However, the informal, political use of NAALC institutions has also illustrated weaknesses in the actual use of the side accord. The accord has not been fully exploited and fully one half of its institutions remain untested. This diminishes the ability of NAALC participants to benefit from the full range of remedies offered by the agreement. As well, the under utilization of the side agreement lessens the incentive to creatively use the NAALC because the lack

of the agreement's use inherently diminishes the potential for ILS reform. This situation is compounded by the uneven application of NAALC. American fair trade organizations tend to dominate the informal use of the side agreement. The lopsided application of the labour accord also intrinsically diminishes the ability of groups to exploit the NAALC. As the informal, political uses of NAALC depend upon international cooperation, the continued uneven use of the accord may lessen the participation of Canadian and Mexican groups. The ability of American groups to use the side agreement is also decreased by the lack of NAALC based activities of its neighboring countries. These weaknesses serve to qualify the effectiveness of informal NAALC activity to reform or advance ILS in North America.

Up to this point, this thesis has surveyed the opposing views of NAALC critics and optimists and has found both positions to be credible. NAALC critics have been able to expose many weaknesses in the formal legal application of the agreement. In addition, NAALC optimists have demonstrated that the informal use of the labour accord does have some positive effects for workers. The discussion, cooperation and learning of NAALC's participants have revealed that the agreement is, to a limited degree, improving ILS enforcement on the continent. The question for remaining students of this agreement is obvious: Given the divergent views on the side

agreement's value, is utilizing the NAALC in informal ways worth the effort?

That inquiry is at the heart of the last section of this thesis.

## *Conclusions*

As we have seen, NAALC critics legitimately focused their investigation on the side agreement's formal inability to enhance ILS for workers. NAALC critics judged the agreement entirely on the capacity of the accord's legal terms to correct the potential harm that globalization posed for workers. Their analysis rested on three interrelated points. First, the critics pointed to the weakness of various articles in the accord. NAALC's scheme did not impose a set of trilateral labour standards on its signatories. Further, the NAALC could impose binding remedies on Mexico, Canada and the United States only if health and safety, child labour or minimum wage laws had been ignored by a government accused in a submission. Moreover, the ability to sanction a government was delayed by a complex set of rules that seriously delayed obtaining any relief under the agreement. As well, the primary role of governments in the dispute resolution process fueled anxiety that state self interest would prevent legitimate claims from being fairly resolved. Even if issues were resolved by binding dispute resolution under the agreement the emasculated system of fine 'enforcement' left little hope of altering the anti-union behaviour of firms or governments. Designing the labour side

agreement in this way would not deter entrepreneurs from investing in areas with either inadequate labour laws or poor enforcement records.

Second, the labour side agreement was criticized for not being constructed in a way that actually prevents a race of states to the regulatory bottom. Several aspects of the NAALC failed to regulate different aspects of labour law in North America. In certain circumstances, the side agreement's requirements for NAALC review restricted this process to mutually recognizable labour laws, potentially leaving various areas of law outside the scope of NAALC's regulatory ambit. As well, the asymmetry of the labour side agreement worked to exclude Canadian complaints of a race to the bottom. The concessions made to Canada, that made provincial accession to the accord voluntary, restricted the ability of interested Canadian labour advocates to use the agreement in certain situations. As well, limitations pertaining to Canada's labour market also restrict the use of the agreement even after provincial accession. The potential absence of regulation in the side agreement also provided incentives for capital to invest in areas with sparse social regulation because the agreement would not always be able to address the diversity of labour law regulation in North America. The concern that the NAALC could not effect *any* positive labour rights changes was seemingly confirmed in the minds of critics after the several NAO decisions.

Third, the case-law experience of various NAO complainants confirmed the belief of NAALC critics that the agreement could not aid workers in their bid to improve the ILS regime on this continent. Each experience with the NAOs under the agreement failed to produce results that were satisfactory from the standpoint of the workers involved or from the perspective of an overall improvement in the general acceptance of ILS. The formal resolution of public reviews – public reports of Ministerial Consultations -- repeatedly failed to compensate or reinstate workers for labour rights violations. Moreover, organizing attempts were thwarted by MNCs and governments failed to suitably enforce their labour laws despite these reviews. NAALC critics were disappointed with the ability of the side agreement to employ legally binding rules which would significantly alter the behaviour of governments, businesses and even some unions toward workers' rights. The following then proved to be the critics' standard of evaluation of the agreement's usefulness to working people – what positive effects are occurring for workers as a direct result of the NAALC?

In sum, the critics approached the establishment of the NAALC from a minimalist perspective. Critics have only been able to value the accord in terms of a 'bottom-line' results oriented approach that focused entirely on the ability of the side agreement to produce immediate, concrete results for



workers. This view of the side agreement is similar to the approach of practicing labour lawyers who expect the use of labour legislation to lead to effective remedies for their clients. Critics have adopted this same approach to the NAALC. Although much of the criticism directed at NAALC is not refutable, the critic's evaluation of this agreement failed to value any informal use of the accord which could lead to improvements in workers' lives. This omission is a serious flaw in the critics portrayal of the labour side agreement and it represents a mistaken view that the activities undertaken due to the agreement are 'hollow.'<sup>14</sup>

NAALC optimists reject the critics' evaluation of the agreement as a hypercritical response to this ILS regime. In their view, the side accord is simply not an entirely useless undertaking and the investigations presented here have confirmed that view. Lance Compa, among others, has indicated that the side agreement has the potential to meaningfully contribute to the ILS/trade linkage. NAALC optimists argued that the side agreement's informal use could prove to be a useful 'first step' in the reform of the accord and improve the overall acceptance of ILS on the continent. At a very minimum, NAALC optimists viewed the engagement of the agreement as a useful tool to agitate for workers rights and their enforcement.

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<sup>14</sup> See Chapter 2, Levinson, *supra*, note 4 for an example of this view.

After a broader evaluation of some key side agreement cases and a general overview of the cooperative activities held under the auspices of the agreement, it is clear that the view of NAALC optimists has some merit. A review of NAALC cases demonstrates that public reviews have not been useless affairs when they are viewed against a wider background. The NAALC has affected labour standards reform in three distinct ways.

First, in keeping with the basic logic of the agreement, the NAALC has changed the manner in which labour law reform is promoted. Fair traders drew lessons from free trade doctrine and the operation of the world trading regime. Free trade theory and policy both indicated that any reform linking ILS to the world trading system could only be achieved by exploiting safe avenues of discussion in order to attain any new ILS trade link. An exploration of trade theory and practice indicated that free trade could, in certain circumstance, accept ILS regulation. The difficulty of implementing any ILS link to trade would be in defining the proper bounds of regulation and finding enough normative common ground for formalizing this connection. NAALC optimists noted that the use of the side agreement gives some internal coherence to a process which could ultimately reform the modern world trading system. The informal use of NAALC not only employs the means of reform suggested by free traders – discussion – it also provides a useful debate regarding the ILS

trade link. The informal use of NAALC in wider labour rights campaign helps to express the need for reform. The ability of NAALC to offer a process that forces certain parties to justify their position on their labour rights activity, not only keeps the issue of ILS reform alive; it helps define the boundary ILS regulation ought to follow if there is to be any reform. As well, the use of NAALC maps out the areas of normative disagreement and convergence between interested participants on ILS issues. This, in turn, may one day help form a consensus for agreement on a new set of formal legal rules that provide swift enforcement for international labour rights violations. The agreement has provided a meaningful process for ILS activists to engage in progressive labour law reform. This is likely to be the single greatest contribution of NAALC and one that is easily measured. At the end of the day, NAALC optimists remind us that the means of a process is often as important as the ends that can be attained.

Second, the use of the NAALC has altered the way fair traders conduct labour standards reform in North America. It has invited labour advocates to engage in cross border cooperation because the agreement's complaint system requires submissions from other parties to trigger public investigations. Significantly, NAALC cases have played an important part in the larger political campaigns to organize unions and muster support for domestic labour

law reform. As we have seen, the informal use of the agreement relied primarily on the international discussion, cooperation and learning of labour advocates to advance an ILS agenda in North America. The informal use of the labour side agreement, in conjunction with wider political campaigns, focused on governments and businesses to account for their labour relations (in)action. As well, the agreement has helped link the local experiences of various groups to the international realm of ILS. This development is useful because the economic changes being felt in North America parallel the shift in the state's ability to regulate these activities. Thus the state's ability to regulate a race to the bottom is enhanced as the NAALC makes national governments more conscious of international labour market regulation.

In addition, by forcing the hands of these parties to demonstrate the reasons, justifications and arguments for specific labour rights actions or omissions, labour advocates have been able to shed light on the meaningfulness of labour rights activism. The bevy of lawyers, trade unionists, politicians and bureaucrats fostering this debate with NAO submissions and various forums for international networking contribute to an environment for labour law reform. This work, although the results seem intangible, aids in explaining the need for a better ILS link to trade in North America. The effort of human rights and labour unions to forge this link is

also valuable in and of itself because agitating for these rights is in itself intrinsically worthy. In short, this labour law activism gives significance to the agenda of NAALC critics and optimists alike – a stronger, effective labour standards regime on this continent and by implication, in the world trading regime.

In addition, the provision of cooperative activities has led to the creation and exchange of a significant amount of information. These meetings have meant participants have returned to their countries better able to enforce existing laws. This is especially true when participants in various seminars have returned home with specific enforcement training and the equipment necessary to enforce various labour laws. Consequently, unlike the criticism levied at it by NAALC critics, the labour side agreement is more than a stop gap measure against a race to the regulatory bottom. The advent of the NAALC has provided labour advocates with a real opportunity to advance the ‘upward harmonization’ of labour standards in North America.

Despite the improved application of the labour standards contained in NAALC, the informal use of the agreement has been hampered by certain aspects of the actual use of the agreement. Major instruments in the NAALC have not yet been employed and the omission of more labour advocacy inherently weakens the ability to use the accord to its fullest potential. As well,

the agreement's use has been centered in the United States. As a result, the continued use of the NAALC by only one country diminishes the extent to which the informal use of the agreement can benefit ILS reform in North America as a whole. The domination of the NAALC by a single, yet well intentioned, group of labour advocates from the United States sacrifices a more balanced form of international cooperation between an assemblage of Canadian, Mexican and American fair traders. International discussion and cooperation is indispensable to the informal uses of the labour side agreement and a continuation of this lopsidedness could threaten future informal, political uses of the accord

Nonetheless, some NAALC cases have actually been responsible for improvements in the lives of workers. NAO public reviews have indirectly contributed to the reinstatement and compensation of workers who have been the victims of labour rights violations. At times, these campaigns have heightened the awareness of MNCs to obey Mexican labour law. The strongest evidence to date, that the NAALC possesses the vitality that its optimists claim for it, is the organization of an independent union in Mexico. Given the current parameters of Mexican labour law practice this is not an entirely minor affair. Moreover, these results satisfy the 'bottom-line' of NAALC critics and should indicate the agreement's potential for future labour

standards reform to them. On the basis of the critics' 'ultimate test' -- that is to say, has there been any positive change for workers involved? -- the NAALC has passed the test.

Whether the informal use of NAALC is actually a 'first step' in this process of ILS reform in North America is a question only time will resolve. This judgment must be read in the context of the actual economic changes that NAFTA brings about in North America. If these economic conditions contribute to significant capital flight and to the momentum of forces pressing forward for free trade, the NAALC's effect may be far too small to counter these developments. At this point in time, however, one cannot confidently predict the outcome of this issue without understanding the actual changes in our economy caused by globalization and NAFTA. Yet this investigation has revealed that the informal use of NAALC is a useful activity that can promote actual improvements in the lives of some workers. Utilizing NAALC to promote non-legal activities also provides meaningfulness for international labour rights reform. Although it is difficult to measure the effect of using the NAALC in this way, it is not perverse to suggest that NAALC optimists provide an agenda for bettering the lives of workers who need ILS matters addressed. The NAALC process -- discussion and cooperation with the potential for some binding ILS enforcement -- offers some opportunity for

workers to improve their situation. Conversely, although NAALC critics accurately bemoan the failures of the side agreement, they offer no solution to the dilemmas of workers other than ignoring the NAALC. This surely must be cold comfort for workers that desperately need some type of positive intervention in their labour rights disputes.

Notwithstanding the positive potential role of NAALC, it is important to note that the informal use of NAALC is not a panacea to workers' ILS difficulties. Although NAALC critics and optimists alike hope to move ILS reform forward, there is no indication of this happening. Governments in North America simply are not considering improving the terms of the NAALC. The only activity of governments in this regard is the agreement between Canada and Chile, anticipating Chilean accession to NAFTA, in which the governments included an almost identical version of NAALC along side their new regional free trade pact. As a result, the informal use of NAALC can in no way be defined as an overwhelming success in promoting the improvement of labour law reform. However, this is not to say that the agreement's application is useless. This thesis has argued that NAALC optimists can demonstrate that the labour side agreement is a useful tool for advancing the ILS claims in North America. Even though no significant positive change has



occurred as a result of the accord, the side agreement's tangible and intangible results indicate that it is still a worthwhile implement for ILS activism.

The task ahead for NAALC critics and optimists is to learn how to use this tool to its maximum effect. The aggressive use of the agreement may help ILS activists to promote reform. As well, it may also inspire research into proposing a comprehensive alternative vision of the ILS/trade link -- one that would promote an effective, rules-based system that could discourage a race to the regulatory bottom. Of course, the opposite may come true, it may be too long before the critics come around to the view that NAALC is a somewhat useful tool for acquiring a better ILS system in North America. If that occurs and fair traders miss an opportunity to further their cause it will not be solely because of the opposition to these ideas from free traders -- it will also be a result of the division between NAALC critics and optimists. In the final analysis, it remains up to these fair traders to promote their ILS agenda. Critics and optimists should not miss an opportunity to contribute to a useful process that may bear fruit for workers in the future.

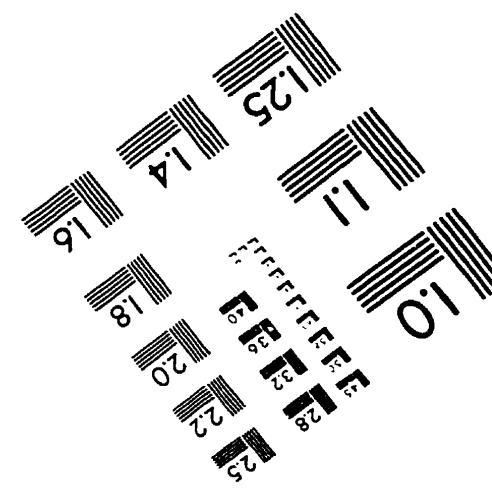
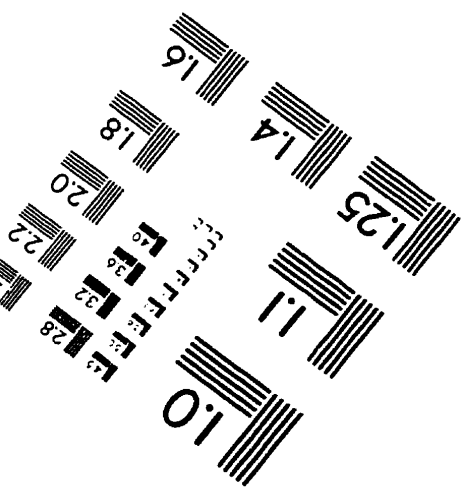
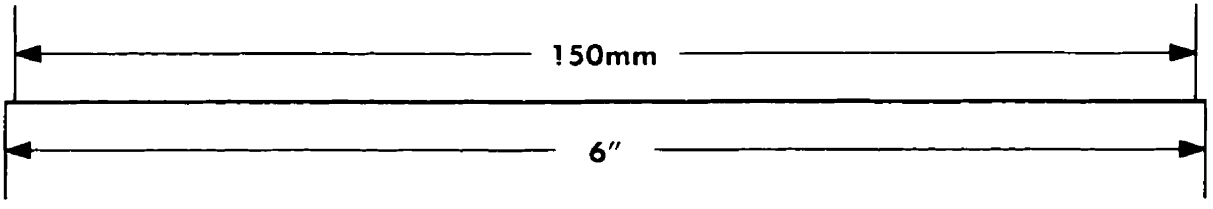
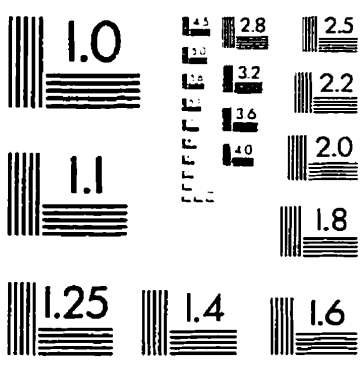
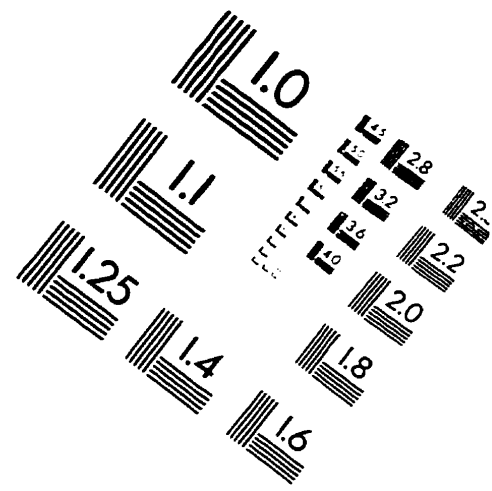
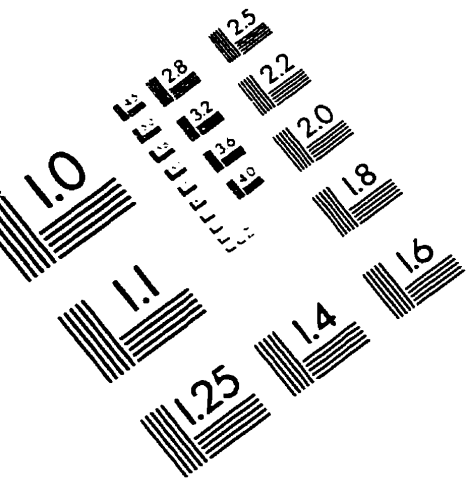
## APPENDIX ONE<sup>1</sup>

### LEVELS OF TREATMENT UNDER NAALC

LABOUR PRINCIPLES	NAO REVIEW & REPORT	MINISTERIAL CONSULTATIONS	EVALUATION COMMITTEE OF EXPERTS (ECE)	COUNCIL REVIEW OF ECE REPORT	POST-ECE MINISTERIAL CONSULTATIONS	ARBITRAL PANEL	FINES OR SUSPENSION OF NAFTA BENEFITS
Freedom of Association/ Right to Organize							
Right to Bargain Collectively							
Right to Strike							
Prohibition of Forced Labour							
Child Labour Protection							
Minimum Employment Standards							
Non-Discrimination							
Equal Pay							
Safety & Health							
Workers' Compensation							
Migrant Worker Protection							

<sup>1</sup> This chart originally used by Lance Compa, without copyright, in various conferences.

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