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National Administrative Office of Mexico (NAO) for the
North American Agreement on Labor Cooperation (NAALC)

Report of Review of Mexico Submission 2001-1

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Report of Review by the Mexican NAO of Mexico Submission 2001-1

I. Executive Summary

The objectives of the North American Agreement on Labor Cooperation (NAALC) are to improve working conditions and living standards in each Party's territory; to promote, to the maximum extent possible, the labor principles set out in Annex 1; to encourage cooperation to promote innovation and rising levels of productivity and quality; to encourage publication and exchange of information; to pursue cooperative labor-related activities on the basis of mutual benefit; to promote compliance with, and effective enforcement by each Party, of its labor law; and to foster transparency in the administration of labor law.

The Agreement does not establish new labor standards, nor does it make any attempt to align the labor laws of the three countries. It does, however, seek to emphasize the interest and commitment of the three countries with regard to effective enforcement of their own labor laws by appropriate national authorities. The Agreement provides for a process of Submissions so that anyone can bring to the attention of their government matters relating to the effective enforcement of labor laws that have arisen in the territory of one of the Parties. This review is part of that process.

The NAALC provides for other mechanisms among the three governments to address matters relating to the effective enforcement of labor laws, such as ministerial-level consultations, committees of experts, and arbitral panels. It provides broad opportunities for dialogue and cooperation, but only the arbitral panel is authorized to determine whether a government has engaged in a persistent pattern of failure to effectively enforce its occupational safety and health, child labor or minimum wage labor laws, and to sanction the government in question.

On October 24, 2001, the National Administrative Office of Mexico, which reports to the Office of the General Coordinator for International Affairs of the Department of Labor and Social Welfare, received Mexico Submission 2001-1, which was submitted by four non-governmental organizations: the National Mobilization Against Sweatshops (NMASS); the Chinese Staff and Workers' Association (CSWA); the Asociación Tepeyac; and the Workers' Awaaz, and by 13 workers (nationals of China, Ethiopia, Guatemala, Mexico, Poland, the Dominican Republic, and El Salvador) from various industrial sectors of New York State.

Mexico Submission 2001-1 addresses alleged failures in the effective enforcement of labor laws by U.S. authorities in respect of Labor Principles 9 (Prevention of Occupational Injuries and Illnesses); 10 (Compensation in Cases of Occupational Injuries and Illnesses); and 11 (Protection of Migrant Workers).

The petitioners of Mexico Submission 2001-1 indicate that the U.S. labor authorities are not in compliance with the obligations established in Articles 3 and 5 of the NAALC on Government Enforcement Action and Procedural Guarantees, respectively, as a result of excessive and ongoing delays in the adjudication of compensation for occupational injuries and illnesses. The petitioners claim that these delays prove a persistent pattern of non-compliance with labor laws by the United States Government.

The petitioners believe that the systematic failure to guarantee fair, equitable, and transparent proceedings for workers suffering from occupational injuries or illnesses constitutes a violation by the U.S. Government of its obligations under the NAALC. They also note that the 1996 reforms of the workers' compensation law have reduced the amounts of compensation payments, have raised requirements for obtaining them, and have transferred medical treatment to the hands of the insurance companies, which can delay or suspend medical services.

The petitioners claim that the New York Workers' Compensation Board, by delaying the adjudication of compensation or reducing or suspending such payments to sick or injured workers, distorts companies' injury and illness statistics. This leads to lower insurance premiums for employers, thereby helping companies escape their obligations with regard to preventing occupational injuries and illnesses.

Concerning the protection of migrant workers, the petitioners state that some workers who meet the requirements for receiving workers' compensation cannot receive other government benefits because of their migrant status. The petitioners also feel that cases brought before the Workers' Compensation Board of New York to determine whether compensation should be paid are unfair to migrant workers who do not speak English, since translation services are inadequate, insufficient, or nonexistent.

On November 15, 2001, the Mexican NAO accepted for review Mexico Submission 2001-1 because the Submission met the requirements set forth in Article 1 of the Rules of Procedure of the National Administrative Office of Mexico on Submissions, to which Article 16(3) of the Agreement refers, as published in the Official Gazette of Mexico on April 28, 1995.

On December 17, 2001, the Mexican NAO requested consultations with the NAO of the United States of America under the terms of Article 21 of the Agreement, on the labor law matters raised in Mexico Submission 2001-1. As of the date of issuance of this report, no response to this request for consultations had been forthcoming.

Based on the provisions of Article 9 of its Rules of Procedure, the Mexican NAO is issuing this report on labor law matters arising in the territory of the United States, submitted by the petitioners, and on the relationship between these matters and obligations under the NAALC.

Owing to the lack of response from the NAO of the United States to the request for consultations by the Mexican NAO, the review of Mexico Submission 2001-1 was based on the information and documents submitted by the petitioners, and only the U.S. labor laws to which the petitioners referred was analyzed.

Regarding the alleged violations of compensation rights in the individual cases of occupational injuries or illnesses described by the petitioners, the Mexican NAO, in accordance with Article 5.8 of the NAALC, which provides that pending decisions will not be subject to revision, will offer no comments on them. This is because such matters, as implied in the Submission, are still pending before the New York Workers' Compensation Board.

Concerning the claims of the petitioners that the 1996 reforms relating to the mechanism for providing workers' compensation were harmful to workers, the Mexican NAO will offer no comments, in accordance with the provisions of Article 2 of the NAALC, which recognizes the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations.

Recommendations

1. Considering the allegations put forth by the petitioners, and based on Article 9 of the Rules of Procedure of the Mexican NAO on Submissions, the Mexican NAO draws the attention of the U.S. Department of Labor to this report so that, in accordance with its own internal procedures, the DOL will allay the concerns of the petitioners and the public and determine, under the law, the appropriate action to take under the terms of U.S. domestic law and practice with respect to the following:

Determining whether the rights of sick or injured workers have been violated; means to streamline procedures for awarding compensation for occupational injuries or illnesses; and

ensuring that employers and the appropriate local authorities are familiar with and effectively enforce pertinent legislation on:

- (i) the prevention of occupational injuries and illnesses;
- (ii) compensation for occupational injuries and illnesses; and
- (iii) the protection of migrant workers.

2. The Mexican NAO places particular emphasis on the subject of migrant workers.

In accordance with the Joint Ministerial Declaration by the Department of Labor and Social Welfare of Mexico and the Department of Labor of the United States of America on April 15, 2002, on the labor rights of migrant workers, the Secretary of Labor and Social Welfare of Mexico and the Secretary of Labor of the United States confirmed their commitment to vigorously enforce labor laws within the purview of their authority in order to protect all workers, regardless of their status as migrant workers. Both Secretaries acknowledged that these workers are among the most vulnerable.

The Mexican NAO believes that the labor rights of migrant workers in the United States must be more broadly publicized, as must the resources available to these workers, through the channels of bilateral cooperation that the Secretaries promoted in their Joint Declaration.

3. The Mexican NAO requested consultations with the NAO of the United States under the terms of Article 21 of the NAALC, so that it could be informed of progress achieved with respect to recommended actions and be able to determine whether it should recommend that the Secretary of Labor and Social Welfare of Mexico request the Secretary of Labor of the United States to open ministry-level consultations on these matters.

II. Introduction

The review by the Mexican NAO was conducted within the context of the North American Agreement on Labor Cooperation signed by the Governments of Mexico, the United States of America, and Canada, which has been in effect since 1994. The governments undertake to encourage their labor authorities to effectively enforce their domestic labor laws. The Mexican NAO stresses that commitments under the NAALC do not provide for the establishment of common labor standards or changes in domestic law, nor do they constitute supranational fora.

This report addresses matters related to the enforcement of U.S. labor legislation, based on Mexico Submission 2001-1 submitted to the Mexican NAO. The petitioners argue that U.S. labor authorities have not effectively enforced labor laws with respect to:

- the prevention of occupational injuries and illnesses;
- compensation for occupational injuries and illnesses; and
- the protection of migrant workers.

This report refers to the allegations of the petitioners as they relate to these NAALC principles, the pertinent provisions of U.S. labor legislation, and the obligations of the U.S. Government with respect to the effective enforcement of its labor laws under the Agreement.

III. Legal Framework

The objectives of the NAALC include efforts “to improve working conditions and living standards in each Party's territory; to promote, to the maximum extent possible, the labor

principles set out in Annex 1;¹ to promote compliance with, and effective enforcement by each Party of, its labor law; and to foster transparency in the administration of labor law.”²

In order to attain these objectives, the Parties each have the following obligations:

- To abide by their labor law and enforce it effectively through appropriate government actions;
- To ensure access by individuals to proceedings;
- To ensure that their administrative, quasi-judicial, and labor tribunal proceedings are fair, equitable and transparent;
- To publish their laws, regulations, and proceedings; and
- To promote public information and knowledge of their labor laws.³

In its review, the Mexican NAO acknowledges that the NAALC stipulates that effective enforcement of labor laws is the responsibility of the appropriate labor authorities in each country, since the Agreement neither establishes nor recognizes supranational mechanisms. The Parties undertake to ensure full respect for each of their Constitutions, and to recognize the right of each Party to establish its own domestic labor standards and to modify accordingly its labor laws and regulations.⁴ In this regard, the Mexican NAO also notes that the NAALC provides that “decisions by each Party's administrative, quasi-judicial, judicial or labor tribunals, or

¹ The Labor Principles that the Parties undertake to promote under the terms of their domestic law 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 protections for children and young persons; 6. Minimum employment standards; 7. Elimination of employment discrimination; 8. Equal pay for women and men, based on the principle of equal pay for equal work in the same place of business; 9. Prevention of occupational illnesses and injuries; 10. Compensation in cases of occupational illnesses and injuries; and 11. Protection of migrant workers.

² NAALC, Article 1.

³ NAALC, Articles 3-7.

⁴ NAALC, Articles 2 and 42.

pending decisions, as well as related proceedings will not be subject to revision or reopened under the provisions of this Agreement.”⁵

The Agreement stipulates that each NAO will provide for the submission and receipt of Submissions on labor law matters arising in the territory⁶ of another Party. In this regard, the review of these matters by each NAO will be undertaken in accordance with the procedures of each country.⁷

Mexico published, in the Official Gazette of the Federation of April 28, 1995, the “Rules of the National Administrative Office of Mexico on Submissions referred to in Article 16.3 of the NAALC.” These rules provide that Submissions will:

- be sent to the principal office of the NAO;
- be written in Spanish;
- be disclosed to the petitioner;
- state whether they contain confidential information, in which case the NAO will safeguard the confidentiality thereof; and
- list the labor law matters arising in the territory of the other Parties (Canada and the United States of America).

Once the publication has been received, the Mexican NAO will notify the petitioner that it has been accepted or that data still need to be supplied. For purposes of the review, the Mexican NAO may request consultations for cooperation with the NAOs of the other Parties, in accordance with Article 21 of the NAALC. It may also obtain additional information from the petitioners and from experts and consultants, in addition to organizing briefing sessions.

⁵ NAALC, Article 5.8.

⁶ NAALC, Annex 49.

⁷ NAALC, Article 16.3.

The Mexican NAO will issue a report within a reasonable period of time, depending on the complexity and nature of the Submission in question. The report will contain:

- The labor law matters arising in the territory of the other Parties;
- The relationship between those matters and the Parties' obligations under the NAALC;

and

- A recommendation on whether or not to request ministerial-level consultations under the terms of Article 22 of the Agreement, and any other measures to ensure fulfillment of the objectives of the tripartite Agreement.

As recommended by the NAO, the Secretary of Labor and Social Welfare may request ministerial-level consultations with regard to any matter within the scope of the Agreement with his U.S. or Canadian counterpart, with a view to conducting an exhaustive review of the case, particularly by examining publicly available information.⁸

If the matter presented by the petitioners has not been resolved after ministerial-level consultations have been held, any consulting Party may request in writing the establishment of an Evaluation Committee of Experts (ECE), which will analyze, in the light of the objectives of this Agreement and in a non-adversarial manner, patterns of practice by each Party in the enforcement of its occupational safety and health or other technical labor standards as they apply to the particular matter considered by the Parties in the ministerial-level consultations.⁹

If, after reviewing the final report of the ECE and having held the consultations described in Articles 27 and 28 of the Agreement, one of the consulting Parties concludes that there has been a persistent pattern of failure by another Party in the effective enforcement of technical

⁸ NAALC, Article 22.

⁹ NAALC, Article 23.

labor standards with regard to safety and health, child labor, or minimum wage, the ministerial Council may decide, by a two-thirds vote of its members, to convene an arbitral panel.

The arbitral panel is empowered to determine whether a government has engaged in a persistent pattern of failure to effectively enforce its labor laws on health and safety, child labor, and minimum wage, provided such persistent pattern is trade-related and covered by mutually recognized labor laws.¹⁰ The arbitral panel must issue a report on the basis of which the Parties may agree on an action plan. If the action plan is not implemented, the arbitral panel may penalize the Parties.

IV. Mexico Submission 2001-1

On October 24, 2001, the Mexican NAO received Mexico Submission 2001-1, submitted by non-governmental organizations: the National Mobilization Against Sweatshops (NMASS); the Chinese Staff and Workers' Association (CSWA); the Asociación Tepeyac; and the Workers' Awaaz, and by 13 affected workers from various industrial sectors of New York State.¹¹ This Submission refers to alleged failures by U.S. authorities to effectively enforce labor laws with respect to Labor Principles 9, 10, and 11 contained in Annex 1 of the Agreement: Prevention of occupational injuries and illnesses; Compensation in cases of occupational illnesses or injuries; and Protection of migrant workers, respectively.

In the Submission, the petitioners allege violations by the pertinent labor authorities of Labor Principle 9 of the Agreement on the prevention of occupational illnesses and injuries. They note that the delay in settling claims for the adjudication of compensation for work-related injuries and illnesses means that there is no real and effective accounting made of the number of occupational accidents and illnesses occurring in the work place. These delays give rise to lower

¹⁰ NAALC, Article 29.

¹¹ The text of Mexico Submission 2001-1 includes 13 affidavits by affected workers.

premiums charged by carriers and paid by employers, and serve as a disincentive in preventing occupational injuries and illnesses.

The petitioners claim that the system of employment compensation in New York imposes unwarranted delays in the proceedings of workers whose occupational injury or illness claims are being heard by the New York Workers' Compensation Board. These delays are in violation of Labor Principle 10 of the Agreement, on compensation in cases of occupational injuries and illnesses.

Concerning Labor Principle 10, protection of migrant workers, the petitioners indicate that some workers who qualify for workers' compensation do not qualify for other types of government benefits because of their migrant status. They note that proceedings before the New York Workers' Compensation Board to adjudicate compensation are unfair because of the lack or inadequacy of translation services available to migrant workers who do not speak English.

The Mexican NAO accepted the Submission for review on November 15, 2001, and notified the petitioners. In order to collect information, the Mexican NAO requested, on December 17, 2001, cooperative consultations with its U.S. counterpart, on the basis of Article 21 of the Agreement. As of the date of issuance of this report, no response to this request for consultations had been received. Mexico received additional information from the petitioners during a meeting held with their representatives on October 3, 2002, and requested information from attorneys for the New York Workers' Compensation Board, but has thus far received no response to its request.

V. Matters Relating to Labor Laws and NAALC Obligations

The purpose of the report is to set forth, systematically, the allegations presented by the petitioners in Mexico Submission 2001-1 and to describe applicable labor laws, as well as the

Articles and Principles of the Agreement concerning the obligations of the governments to effectively enforce their labor laws. First and foremost, reference is made to the matters raised by the petitioners; then, to obligations under the Agreement; and finally, to applicable U.S. labor laws, based on the information provided by the petitioners with regard to the three aforementioned NAALC principles, i.e., 9, Prevention of occupational injuries and illnesses; 10, Compensation in cases of occupational injuries and illnesses; and 11, Protection of migrant workers.

5.1 Prevention of Occupational Injuries and Illnesses

5.1.1 Allegations of the Petitioners

The petitioners note that the New York Workers' Compensation Law was enacted to encourage employers to maintain a safer and healthier workplace, since under the workers' compensation system, employers with a high rate of occupational injury or illness are penalized with higher insurance premiums.

The threat of higher premiums should serve as an incentive for employers to prevent the occurrence of occupational injuries and illnesses. Yet the incentive structure does not work efficiently, and the hazards do not decrease in the workplace, because of delays in the proceedings for adjudicating occupational illness and injury compensation. These proceedings generally result in small financial settlements, or else the New York Workers' Compensation Board dismisses them.

According to the petitioners, the ongoing delays in the proceedings of the New York Workers' Compensation Board in settling compensation cases serve as a disincentive to the proper recording of statistics on workplace injuries and accidents, which negatively impacts the

proper determination of employers' insurance premiums and discourages employers from maintaining a safe and healthy workplace.¹²

The petitioners allege in Mexico Submission 2001-1 that the U.S. Government has not guaranteed compliance with its labor laws, nor has it effectively enforced them through adequate government action, in view of the fact that the rights of sick or injured workers to receive compensation for occupational illnesses or injuries have been violated. This produces a situation of inadequate record-keeping for workplace accidents and illnesses, and, consequently, a lack of measures to prevent on-the-job injuries and illnesses.

In light of the above, the petitioners claim that the New York Workers' Compensation Law does not effectively fulfill its objective, violating NAALC obligations; for that reason, they note that the above-mentioned law is basically incomplete and inefficient. The petitioners allege a persistent pattern of noncompliance with labor laws by the authorities in question.

5.1.2 Obligations of the United States of America Under the Agreement

In the Agreement, the governments undertook to prescribe and implement standards to minimize the causes of occupational injuries and illnesses (Labor Principle 9, Prevention of Occupational Illnesses and Injuries).

In this regard, and in terms of the allegations of the petitioners that delays in processing compensation claims impede the prevention of occupational illnesses and injuries, the Government of the United States of America has the following obligations under the Agreement:

“Article 3: Government Enforcement Action

1. Each Party will promote compliance with and effectively enforce its labor law through appropriate government action, such as:

(b) monitoring compliance and investigating suspected violations, including through on-site inspections;

¹² Affidavits from the National Mobilization Against Sweatshops (para. 12) and Asociacion Tepeyac (para. 7).

(d) requiring record keeping and reporting;

(d) encouraging the establishment of worker-management committees to address labor regulation of the workplace;

(g) initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor law.

Article 5: Procedural Guarantees

1. Each Party will ensure that its administrative, quasi-judicial, judicial and labor tribunal proceedings for the enforcement of its labor law are fair, equitable and transparent and, to this end, each Party will provide that:

(a) such proceedings comply with due process of law;

(d) such proceedings are not unnecessarily complicated and do not entail unreasonable charges or time limits or unwarranted delays.

2. Each Party will provide that final decisions on the merits of the case in such proceedings are:

(b) made available without undue delay to the parties to the proceedings and, consistent with its law, to the public.”

5.1.3 Applicable Labor Laws

Workers' compensation for job-related hazards in New York is governed by the New York Workers' Compensation Law, which constitutes Chapter 67 of the "Consolidated Laws" of the State of New York. According to the petitioners, one of the purposes of the New York Workers' Compensation Law is to establish a system that penalizes employers showing a high rate of occupational injuries and accidents, by making them pay higher insurance premiums.

Article 7(110) of the New York Workers' Compensation Law orders an employer to record any injury or illness incurred by one of its employees in the course of employment. A copy of the record will be provided to the injured employee upon request. The employer is required to keep copies of these records for at least 18 years. The records may be reviewed at any time by the New York Workers' Compensation Board. The employer will file with the

Board and its insurer a report of accidents in which workers incur injuries, and any occupational illnesses causing a loss of time from regular duties or requiring medical treatment. The report will be filed within 10 days of the accident or the occurrence of the occupational illness. If the employer refuses to make a report or keep records, it will be fined no more than \$1,000, or the Board may impose a fine of no more than \$2,500.

Based on the information furnished by the petitioners, this NAO lacks knowledge of the remedies that affected workers could have availed themselves of in cases of employer noncompliance with the New York Workers' Compensation Law in terms of truthful reporting or recording occupational injuries and/or illnesses.

5.2 Compensation for Occupational Illnesses or Injuries

5.2.1 Allegations of the Petitioners

The petitioners allege that the New York Workers' Compensation Board delays adjudicating compensation claims for occupational injuries and illnesses. They claim that such delays are ongoing and excessive, and note that in some cases 20 hearings are held over a period of up to 10 years. One of the affected workers said that such delays average about six years.¹³

The petitioners claim that the New York Workers' Compensation Board unduly and frequently postpones hearings on claims for occupational injuries and illnesses. They point out that such postponements occur because the employers' doctors or witnesses, or their insurance carriers, fail to appear at the hearings, or they occur in order to give employers or insurers more time to obtain medical reports or documents to assist in their defense.¹⁴

¹³ Affidavit by Tomaszewski (paras. 19 and 20).

¹⁴ Affidavit by Abdulkader (para. 14).

The petitioners note that many hearings last only 15 minutes, and that during such hearings the judge addresses only one issue from among all those presented. They assert that injured workers have to answer the same questions at numerous hearings, which prevents the process from moving along smoothly.¹⁵ The petitioners argue that the amount of time that goes by between one hearing and another is very often more than a year, during which time the injured workers have no jobs and receive no compensation from the New York Workers' Compensation Board.¹⁶

According to the petitioners, the main reason that hearings are postponed and claims denied is because of errors or confusion on the part of the New York Workers' Compensation Board with regard to the suit or particular aspects of the proceedings involving the injured workers.¹⁷

The petitioners complain that since the rulings of the Board are appealable by the insurer or the employer, this leads to lengthy periods of time during which the payment of workers' compensation and medical reimbursements are suspended.¹⁸

According to the petitioners, a study conducted in 1999 on the workers' compensation system in New York concluded that:

“It is clear that the review delays ... are still occurring. Moreover, those delays are being used by insurance carriers and employers to obtain unfair advantage over claimants....The threat of a long contested claim proceeding followed by a long review process is potent enough to force many claimants to settle for less than they might

¹⁵ Affidavits by Sheng Ku (para. 16) and Labuz (para. 13).

¹⁶ Affidavit by Kocimska (paras. 9-10).

¹⁷ Affidavits by Qian (Para. 11) and Sheng Ku (para. 14).

¹⁸ Affidavit by Tomaszewski (para. 17).

otherwise be entitled to receive, especially in light of the automatic stay of benefits pending the outcome of an administrative review."¹⁹

The petitioners state that that it is unclear what resources, if any, are available to workers to prevent proceedings from being unnecessarily complicated, from being unreasonable costly or lengthy, or from involving unjustified delays. They also indicate that they are not informed in writing of the reasons for the postponements.

The petitioners claim that the New York Workers' Compensation Board suspends the payment of compensation long before issuing a final ruling. This generally occurs at the request of the insurance underwriters, who fail to submit substantial proof justifying the suspension of such compensation. The petitioners allege that many workers who suffer occupational injuries and illnesses frequently prefer not to file their claims for compensation because of the procedural dysfunction of the New York Worker's Compensation Board system. They believe that faced with the choice between continuing to perform a difficult and hazardous job or leaving the job market in hopes of obtaining compensation for job-related hazards, they would prefer to keep working despite their injuries or illnesses.²⁰

The petitioners note that as a result of the 1996 reforms of the workers' compensation system in the United States, employers' insurance premiums have gone down and insurance carriers' earnings have risen. In this regard, they point out that another study on the various systems of workers' compensation in the United States concluded that recent reforms had "clamped down on benefits, raised eligibility requirements, and put medical treatment mainly in the hands of insurance companies, which can delay or deny medical care or income payments."²¹

¹⁹ New York State Bar Association, *Report of the Special Committee on Administrative Adjudication* (Oct. 21, 1999). This study was annexed by the petitioners to Mexico Submission 2001-1.

²⁰ Affidavits by CSWA (paras. 9 and 10) and NMASS (paras. 5 and 7).

²¹ *Workers Comp: Falling Down on the Job*. Consumer Rep. 2, (Feb. 2000), on p. 14 of the Submission.

The petitioners claim that in New York, the authorities proposed to cap benefits for workers with permanent partial disabilities at 700 weeks. They also believe that those authorities have pushed to keep the minimum weekly compensation at a level amongst the lowest in the nation, \$40.00 per week.²²

The petitioners assert that the Executive, Legislative, and Judicial Branches of the State of New York have eliminated the possibility of claiming compensation for occupational injuries and illnesses under any system other than that of worker's compensation.

5.2.2 Obligations of the United States of America Under the Agreement

Under the Agreement, the governments undertake to establish a system providing benefits and compensation to workers or their dependents in cases of occupational injuries, accidents or fatalities arising out of, linked with or occurring in the course of employment (Labor Principle 10, Compensation in Cases of Occupational Injuries or Illnesses).

Concerning the alleged violations of the rights to compensation in the individual cases of occupational injuries or illnesses described by the petitioners, the Mexican NAO will not comment on them, in accordance with Article 5.8 of the Agreement, which provides that pending decisions will not be subject to revision. This is because these matters, as Mexico Submission 2001-1 implies, are still pending a decision by the New York Workers' Compensation Board.

Regarding the claims of the petitioners that the 1996 reforms relating to the workers' compensation system were harmful to workers, the Mexican NAO is offering no comments on this, in accordance with the provisions of Article 2 of the Agreement, which recognizes the rights

²² Affidavits by CSWA (para. 12) and NMASS (para. 6).

of the Parties to establish their own domestic labor standards, and to adopt or modify accordingly their labor laws and regulations.

As concerns the claim by the petitioners of a persistent pattern of noncompliance with labor laws by the New York Workers' Compensation Board, owing to ongoing and excessive delays in the adjudication of compensation based on claims for occupational injuries and illnesses; unjustified postponement of hearings; hearings lasting only 15 minutes; hearings addressing the same topic at hearing after hearing; the existence of technical errors in the proceedings; and employer appeals unduly prolonging the proceedings, the United States Government undertook to comply with the following provisions of the Agreement:

“Article 3. Government Enforcement Action

1. Each Party will promote compliance with and effectively enforce its labor law through appropriate government action, such as:
 - (g) initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor law.
2. Each Party will ensure that its competent authorities give due consideration in accordance with its law to any request by an employer, employee or their representatives, or other interested person, for an investigation of an alleged violation of the Party's labor law.

Article 5. Procedural Guarantees

1. Each Party will ensure that its administrative, quasi-judicial, judicial and labor tribunal proceedings for the enforcement of its labor law are fair, equitable and transparent and, to this end, each Party will provide that:
 - (d) such proceedings are not unnecessarily complicated and do not entail unreasonable charges or time limits or unwarranted delays.
2. Each Party will provide that final decisions on the merits of the case in such proceedings are:
 - (b) made available without undue delay to the parties to the proceedings and, consistent with its law, to the public.

3. Each Party will provide, as appropriate, that parties to such proceedings have the right, in accordance with its law, to seek review and, where warranted, correction of final decisions issued in such proceedings.

5. Each Party will provide that the parties to administrative, quasi-judicial, judicial or labor tribunal proceedings may seek remedies to ensure the enforcement of their labor rights. Such remedies may include, as appropriate, orders, compliance agreements, fines, penalties, imprisonment, injunctions or emergency workplace closures.

6. Each Party may, as appropriate, adopt or maintain labor defense offices to represent or advise workers or their organizations.

Article 6. Publication

1. Each Party will ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them.

Article 7. Public Information and Awareness

Each Party will promote public awareness of its labor law, including by:

- (a) Ensuring that public information is available related to its labor law and enforcement and compliance procedures.”

5.2.3 Applicable Labor Laws

As mentioned in Section 5.1.3 of this report, workers’ compensation for on-the-job hazards in New York is governed by the New York Workers’ Compensation Law. The New York Worker’s Compensation Board administers the worker’s compensation system in that state.²³

Concerning the employers’ obligation to compensate employees for their occupational injuries, Article 2(10)(1) of the above-mentioned law provides that every employer will secure compensation for their employees for their disability or death arising out of or in the course of

²³ Article 8(140) of the New York Workers’ Compensation Law.

employment,²⁴ except (i) when the injury has been occasioned by intoxication from alcohol or a controlled substance while on duty; (ii) by willful intention; or (iii) where the injury was sustained in or caused by voluntary participation in an off-duty athletic activity unless the employer requires the employee to participate in such activity, or compensates the employee for participating in such activity or otherwise sponsors the activity.

According to Section 13(a) of the New York Workers' Compensation Law, the employer will promptly provide for an injured employee such medical, surgical, optometric, crutches, eye glasses, and other functional devices as required by the nature of the injury or the process of recovery, as well as nurse and hospital services, medicines, and prostheses as necessary.

As for the petitioners' claim that the workers' compensation system in the New York Workers' Compensation Law is the only remedy for occupational injuries and illnesses, Section 11 of the Law provides that the only means available to the employee injured on the job vis-à-vis his employer are those provided under said Law. The employee maintains the right to take legal action to assert his rights vis-à-vis third parties, i.e., against a motorist who has injured him as he traveled to his place of employment.

In accordance with the above-mentioned Law, claims to collect compensation for occupational injuries or illnesses may be filed with the employer or with the New York Workers' Compensation Board at any time after the first seven days of disability or injury, or at any time

²⁴ Under Article 4(50) of the New York Workers' Compensation Law, employers may secure compensation for occupational injuries or illnesses in one or more of the following ways (i) by proving that they have sufficient resources to pay the compensation themselves; (ii) by insuring the payment with an insurance company or mutual corporation; or (iii) by keeping the payment in the state insurance fund.

after his or her death. The Board will conduct an investigation or order an investigation to be conducted, and at the request of a party, will schedule a hearing.²⁵

Within 30 days of the filing of a workers' compensation claim, or after the hearing, the New York Workers' Compensation Board will adjudicate the claim and will file its decision with the Chair. The Chair will notify the parties of the decision.²⁶

If the employer is unsure of the extent of its liability with respect to the worker's injury, it may at any time, or in any instance, initiate compensation payments and continue such payments for up to one year without incurring liability. At the end of one year, the employee will negotiate with the employer to ensure the continuation of payments of temporary compensation. If payments of temporary compensation are suspended, the parties retain all rights, defenses, and obligations under the New York Workers' Compensation Law.²⁷

If the employer refuses to pay compensation to the injured worker, the employer must, within 18 days of the occurrence of the disability or within 10 days of when the employer first has knowledge of the accident, whichever period is the greater, notify the Chair in writing of its objections. When a claim for payment of compensation is filed against the employer and the employer or its insurance carrier refuses to compensate, the employer or carrier will notify the Board in writing of its objections within 25 days of the date on which the Board notified them of the claim against them. If the New York Workers' Compensation Board determines that the objections submitted by the employer or its insurance carrier were without just cause, the Board

²⁵ There are three types of hearings for the adjudication of compensation for occupational illnesses or injuries before the New York Labor Compensation Board, regular, pre-hearing conference, and conciliation.

²⁶ Article 2, section 20(1) of the New York Workers' Compensation Law.

²⁷ Article 2, section 21-a of the New York Workers' Compensation Law.

will require the employer or its insurer to compensate the claimant and will impose a fine of \$300.²⁸

After the Board has received the written objections from the employer or its insurance carrier, it will schedule a pre-hearing conference before a referee or conciliator no later than 60 days after receipt of the objection. The Board will notify the parties of the date of the hearing. The referee or conciliator may, with the consent of the parties, issue a decision that will constitute a decision of the New York Workers' Compensation Board. If one of the parties fails to attend the hearing or is not represented, the decision of the referee or conciliator will not be valid until it has been reviewed and approved by the Board's Chair or by the referee or conciliator designated for that purpose by the Chair. The absent or unrepresented party may reject the agreement within 10 days of notification, in which case the Board will rescind the decision made by the referee or conciliator, and must restore the case to the regular hearing calendar process.²⁹

Once the Chair receives notification from the employer or its insurance carrier or from the injured workers that the employer or insurer objected to the payment of compensation or that payment has been suspended, the Chair will schedule a regular hearing to hear the parties and protect their rights in terms of the compensation payments. The New York Workers' Compensation Board must keep a record of all hearings held.³⁰

There is also a possibility for the parties to request a conciliation process, in which a conciliation hearing is scheduled within 30 days of receipt of the request to initiate the process. During the hearing, a conciliation council appointed by the Board will inform any claimant participating in the meeting without benefit of counsel or representation of their rights within the

²⁸ Article 2, section 25(2) of the New York Workers' Compensation Law.

²⁹ Article 2, section 25 (2-a) of the New York Workers' Compensation Law.

conciliation process. The conciliation council will issue a decision based on the information submitted by the parties. Any of the parties may object to the decision and request a regular hearing within the next 30 days.³¹

When the hearing process is extended because of delaying tactics on the part of the insurance carrier or the employer,³² the New York Workers' Compensation Board will fine them \$25 for the State fund,³³ and another \$75 for the injured worker or his dependents.

If the issues have not been resolved within two years after such issues have been raised before the Board, or if multiple claims arise from the same accident, or if the Chair otherwise deems it necessary or if the Parties so agree, the Chair may order that the case be transferred to a special part for expedited hearings. Cases in such special part will be resolved at one hearing.³⁴

Hearings in adjourned or postponed cases will be rescheduled no later than 30 days following the adjournment or postponement. If the Board considers that a request for postponement made by a carrier or employer is frivolous, a penalty of \$1,000 will be imposed by the Board. If the employer or carrier fails to submit the information requested in a timely manner, or if no time period is specified, within 10 days of the request, a fine of \$50 will be imposed. If the employer or insurance carrier fail to make payment of compensation within 10 days of the ruling or decision by the dates determined therein, a penalty will be imposed equal to twenty percent of the unpaid compensation which will be paid to the injured worker or his or her

³⁰ Article 2, section 25 (3) of the New York Workers' Compensation Law.

³¹ Article 2, section 25 (2-b) of the New York Workers' Compensation Law.

³² The New York Workers' Compensation Law treats the following, among others, as delaying tactics: failing to produce information or documents requested by the Board; failing to appear; failing to produce witnesses when requested by the Board; concealing evidence; or repeatedly delaying the resolution of the conflict.

³³ This fund was established in order to be able to pay compensation to injured workers whose companies were not insured with private insurance carriers.

³⁴ Article 2, section 25 (3-d) of the New York Workers' Compensation Law.

dependents, and there will also be imposed an assessment of \$50, which will be paid into the state treasury.³⁵

In late 2000, the New York Workers' Compensation Board issued document 046-96, which establishes new procedures for reviewing and approving agreements under the terms of section 32 of the New York Workers' Compensation Law. The document applies to compensation cases decided previously, with no matters pending before the Board, and legal issues requiring clarification, or in which the claimants are unrepresented, with a view to expediting such cases.

As for the allegations of the petitioners with respect to the fact that rulings or decisions by the New York Workers' Compensation Board are appealable by employers and their insurance carriers, thereby lengthening the amount of time during which compensation payments and medical reimbursements are suspended, the New York Workers' Compensation Law stipulates that rulings or decisions by the Board are final and binding, unless they were reversed or modified on appeal. Within 30 days of notification of the ruling or decision, any party may apply in writing to the Board for modification or review. The Board will rule on the application as soon as possible and give the reasons for its decision, which may be appealed, either to the full Board or to the Appellate Division of the Supreme Court, Third Department. In either case, the appeal must be filed within 30 days after notice of the decision of the Board upon such application has been served upon the parties.³⁶

The petitioners complain that the New York Workers' Compensation Board suspends payment of compensation for job-related hazards before issuing a ruling or decision. The Mexican NAO lacks information with regard to applicable U.S. law in this regard.

³⁵ *Ibid.*

³⁶ Article 2, section 23 of the New York Workers' Compensation Law.

The petitioners claim that the maximum amounts and periods of compensation payment for occupational injuries or illnesses have decreased. In this regard, Article 2, section 15 of the New York Workers' Compensation Law stipulates the amounts and periods of payment for full permanent disability, full partial disability, partial permanent disability, and partial temporary disability.

The Mexican NAO has no information as to whether fines were imposed in the cases indicated by the petitioners, or if the amount of the fines is enough to ensure that employers will try to provide adequate, prompt compensation to workers suffering from occupational injuries or illnesses.

5.3 Protection of Migrant Workers

5.3.1 Allegations of the Petitioners

The petitioners claim that some workers who qualify for workers' compensation do not qualify to receive any other type of government benefits, owing to their status as migrant workers.

They also allege that foreign workers who do not speak English do not understand what is said to them in the hearings, since translation services are inadequate, insufficient, or nonexistent.³⁷

According to the petitioners, most foreign workers who suffer occupational illnesses or injuries in New York State do not seek help from their respective consulates because they believe the appropriate authority to be the New York Workers' Compensation Board and that the consulates would not be able to help them.

³⁷ Affidavits by Kocimska (para. 15); Sheng Ku (para. 17); Labuz (para. 16); Qian (para. 12); and Santana (para. 12).

5.3.2 Obligations of the United States of America Under the Agreement

Under the terms of the Agreement, the governments undertake to “provide migrant workers in a Party's territory with the same legal protection as the Party's nationals in respect of working conditions” (Labor Principle 11, Protection of Migrant Workers).

With regard to the claim by the petitioners that some workers who qualify for workers' compensation do not qualify to receive other government benefits because they are migrant workers and because of communication problems limiting their participation in the proceedings, the obligations of the U.S. Government under the Agreement are as follows:

“Article 4. Private Action

1. Each Party will ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of the Party's labor law.
2. Each Party's law will ensure that such persons may have recourse to, as appropriate, procedures by which rights arising under:
 - (a) Its labor law, including in respect of occupational safety and health, employment standards, industrial relations and migrant workers, and ...

Article 5. Procedural Guarantees

1. Each Party will ensure that its administrative, quasi-judicial, judicial and labor tribunal proceedings for the enforcement of its labor law are fair, equitable and transparent and, to this end, each Party will provide that:
 - (a) Such proceedings comply with due process of law;
 - (c) the parties to such proceedings are entitled to support or defend their respective positions and to present information or evidence.
- 2.6 Each Party may, as appropriate, adopt or maintain labor defense offices to represent or advise workers or their organizations.

Article 7. Public Information and Awareness

1. Each Party will promote public awareness of its labor law, including by:
 - (a) Ensuring that public information is available related to its labor law and enforcement and compliance procedures; and

- (b) Promoting public education regarding its labor law.”

5.3.3 Applicable Labor Laws

The labor law under which some workers do not qualify to receive certain benefits by reason of their status as migrants is the New York Workers' Compensation Law, Article 2, Section 25-b, which provides that when a ruling or decision by the New York Workers' Compensation Board determines the payment of compensation for occupational injuries or illnesses to persons who are not U.S. residents, to U.S. citizens who do not reside in the United States, or to dependents or beneficiaries abroad who are not entitled to receive or have control of the compensation, or when the compensation must be retained owing to other circumstances, the employer or his insurance carrier will pay the compensation to the New York State Comptroller, who will deposit it in the Non-Resident Compensation Fund.

Amounts deposited in that fund will remain there until the New York Workers' Compensation Board determines otherwise, when the reasons and conditions for depositing the amounts in the fund have changed. At that time, the Board will order the New York State Comptroller to pay the compensation, without interest, to the person or persons who was to have received it on the basis of the Board's ruling or decision. If the Board determines that the deposits in the fund are not due and payable to the non-resident person or persons, it will order the Comptroller to make reimbursement to the employer or carrier who paid them. The rights of the non-resident persons will become statute-barred after eight years.

As regards the claim by the petitioners that translation services are inadequate, insufficient, or nonexistent, the Mexican NAO found no legal provision establishing such services.

VI. Recommendation

Mexico Submission 2001-1 refers to alleged failures by U.S. authorities to effectively enforce labor laws in terms of Labor Principles 9, Prevention of Occupational Injuries and Illnesses; 10, Compensation in Cases of Occupational Injuries or Illnesses; and 11, Protection of Migrant Workers, set forth in Annex 1 of the Agreement.

The petitioners claim that U.S. labor authorities fail to comply with the obligations under Article 3, Government Enforcement Action, and Article 5, Procedural Guarantees, owing to a systematic failure to guarantee fair, equitable, and transparent proceedings in the award of compensation for occupational injuries and illnesses. They allege that repeated delays in proceedings to determine whether payment should be awarded prevents proper accounting of the number of work-related injuries and accidents, which adversely affects the proper determination of employers' insurance premiums and serves as a disincentive to maintaining a safe and healthy workplace.

With regard to the protection of migrant workers, the petitioners assert that some workers who meet the requirements for receiving workers' compensation cannot receive other government benefits owing to their status as migrant workers. In their opinion, proceedings to determine whether workers' compensation should be awarded are unfair to migrant workers who do not speak English because translation services are inadequate, insufficient, or nonexistent.

The review by the Mexican NAO was conducted within the context of the Agreement, at the request of the petitioners. The review does not seek to establish supranational mechanisms since, under the Agreement, it is not the function of the NAOs to adjudge or to modify the laws of the other Parties. In accordance with the Agreement, the purpose of the reports submitted by

the Mexican NAO is to draw the attention of the U.S. labor authorities to certain matters relating to alleged noncompliance with labor laws, raised in Mexico Submission 2001-1.

In order to comply with the provisions of Article 5.8 of the Agreement, the Mexican NAO sought to obtain information on certain matters that might be pending a decision, and to omit from this report any matter *sub judice*. In this regard, under Article 5.8 of the Agreement, it makes no observation whatsoever with respect to alleged violations of the right to compensation in individual cases of occupational injuries or illnesses. The reason for this is that these matters, as the Submission implies, are still pending a decision by the New York Workers' Compensation Board.

Concerning the petitioners claims that the 1996 reforms of the workers' compensation system harmed workers, the Mexican NAO will offer no opinions, based on Article 2 of the NAALC, which recognizes the right of the Parties to establish their own domestic labor standards, and to adopt or modify accordingly their labor laws and regulations.

Under the Agreement, the U.S. Government is required to effectively enforce U.S. labor laws, such as the New York Workers' Compensation Law; to guarantee access by individuals to proceedings; to ensure that their proceedings are fair, equitable, and transparent; to publish their laws, regulations, and proceedings; and to promote public information and knowledge of their labor laws, in order to safeguard the following Labor Principles: (i) Prevention of occupational injuries and illnesses; (ii) Compensation for occupational injuries and illnesses; and (iii) Protection of migrant workers.

1. In light of the allegations presented by the petitioners, and based on Article 9 of the Mexican NAO Rules of Procedure on submissions, the Mexican NAO draws the attention of the U.S. Department of Labor (DOL) to this review so that the DOL can, in accordance with its

own rules of procedure, allay the concerns of the petitioners and of the public and determine, under the law, the appropriate action to take under the terms of its laws and domestic practices with regard to the following:

Determining whether the rights of workers suffering from occupational illnesses or injuries have been violated; measures to streamline procedures for awarding compensation for occupational illnesses or injuries; and ensuring the employers and the appropriate local authorities are familiar with and effectively enforce pertinent legislation with regard to: (i) the prevention of occupational injuries and illnesses; (ii) compensation for occupational injuries and illnesses; and (iii) the protection of migrant workers.

2. The Mexican NAO places special emphasis on the subject of migrant workers. In accordance with the Joint Ministerial Declaration by the Department of Labor and Social Welfare of Mexico and the Department of Labor of the United States on April 15, 2002, on the labor rights of migrant workers, the Mexican Secretary of Labor and Social Welfare and the U.S. Secretary of Labor confirmed their commitment to vigorously enforce labor laws within the purview of their authority in order to protect all workers regardless of their status as migrant workers. Both Secretaries acknowledged that these workers are among the most vulnerable.

The Mexican NAO believes that the labor rights of migrant workers in the United States must be more broadly publicized, as must the resources available to these workers, through the channels of bilateral cooperation that the Secretaries promoted in their Joint Declaration.

3. The Mexican NAO will request consultations with the U.S. NAO under the terms of Article 21 of the NAALC in order to keep abreast of progress on recommended actions and to be in a position to determine whether to recommend to the Secretary of Labor and Social

Welfare of Mexico to request ministerial-level consultations on these matters with the U.S.

Secretary of Labor.