

PUBLIC COMMUNICATION TO THE U.S. NAO

Public Communication to the U.S. National Administrative Office under the North American Agreement on Labor Cooperation (NAALC) Concerning the Introduction of Reforms to the Federal Labor Code of Mexico (Abascal Project), Which Would Seriously Diminish Current Labor Standards, including the Right to Freely Associate, to Organize and to Bargain Collectively, in Violation of the Mexican Constitution, ILO Conventions Adopted By Mexico, and the NAALC.

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I. Statement of Violations

1. Introduction

On December 12, 2002, a proposal to reform Mexico's labor legislation, supported by the federal government and in particular the Labor Secretariat, was presented to the Chamber of Deputies by a group of deputies. This proposal has been popularly known as the *Abascal Project* after Labor Secretary Carlos Abascal.

The *Abascal Project*, if passed, would substantially weaken existing labor protections, thereby codifying systemic violations of the right of free association, the right to organize and bargain collectively, and other core labor rights protected by the Mexican Constitution, International Labor Organization (ILO) Conventions ratified by Mexico, and the North American Agreement on Labor Cooperation (NAALC). Moreover, the proposed reforms fail to remedy laws and practices already identified by the ILO, the United Nations High Commissioner for Human Rights (UNHCHR), and the U.S. and Canadian National Administrative Offices (NAOs) as violative of international worker rights standards.

By promoting the *Abascal Project*, the Government of Mexico openly and intentionally violates the central obligation of the NAALC, namely to "provide high labor standards" and to "strive to improve those standards." Therefore, the undersigned request that the U.S. NAO immediately review this petition and enter into consultations with the Government of Mexico to dissuade it from enacting laws that violate the letter and spirit of the NAALC.

2. NAALC Obligations

- In the very act of submitting the *Abascal Project* to its Congress,¹ Mexico violates:

Article 1: Objectives

- (1) improve working conditions and living standards in each party's territory
- (2) promote, to the maximum extent possible, the labor principles set out in Annex I

¹ When proposed legislation is of sufficient precision and detail, as it is here, it is amenable to review as to whether it would violate international labor standards. See, e.g., Procedure for the Examination of Complaints Alleging Infringements of Trade Union Rights, ¶ 30. "When the Committee has had to deal with precise and detailed allegations regarding draft legislation, it has taken the view that the fact that such allegations relate to a text that does not have the force of law should not in itself prevent the Committee from expressing its opinion on the merits of the allegations made. The Committee has considered it desirable that, in such cases, the government and the complainant should be made aware of the Committee's point of view with regard to the proposed bill before it is enacted, since it is open to the government, on whose initiative such a matter depends, to make any amendments thereto." at http://www.ilo.org/public/english/standards/norm/sources/cfa_proc.htm. The most recent version of the *Abascal Project* is attached hereto.

Annex I: Labor Principles

- (1) freedom of association and protection of the right to organize
- (2) the right to bargain collectively
- (3) the right to strike

Article 2: Level of Protection, which provides that: "[E]ach Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light." [see Section IV.A.1, below]

Article 3: Government Enforcement Action

1. Each Party shall promote compliance with and effectively enforce its labor law through appropriate government action.

As described below, the proposed reforms both weaken existing legal guarantees of these principles, and fail to address serious flaws in current laws. As a result, the reforms will reduce the protections available to Mexican workers, contributing to a further decline in their living standards and working conditions.

- If the reforms are eventually enacted, Mexico will have also violated:

Article 4: Private Action, which states that "Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-administrative, judicial or labor tribunals for the enforcement of the Party's labor laws." This clause, to be meaningful, requires that the labor law itself promote the Labor Principles set forth in Annex I of the NAALC.

If this reform is enacted, Mexico would eliminate even the possibility that workers will have meaningful access to administrative, quasi-administrative, judicial or labor tribunals capable of enforcing a labor code that promotes the labor rights set forth in Annex I. For example, the *Abascal Project* would erect further *de jure* barriers to the right of workers to "freely and without impediment ... establish and join organizations of their own choosing," as set forth in Annex I. If a worker, by law, is unable or substantially impeded from exercising the right to organize, then he or she is similarly divested of a private action. While a procedural right may technically exist, it is useless without the underlying substantive right.

Article 6: Publication:

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

2. When so established by its law, each Party shall:
 1. publish in advance any measure that it proposes to adopt; and
 2. provide interested persons with a reasonable opportunity to comment on such proposed measures.

While various versions of the proposed reforms have circulated for several years, the text of the proposal that will be voted on by the Mexican Congress has not been made public.

3. Additional Violations Actionable under the NAALC

The *Abascal Project* will roll back core labor rights of Mexican workers, creating *de jure* barriers to the enforcement of the rights protected under the Mexican Constitution and ILO Convention 87 and other international human rights instruments that are directly incorporated into the federal labor law of Mexico.²

The Mexican Constitution of 1917 was the first in the world to enact social and economic rights in a country's basic charter. Article 123 guarantees the right to organize, to bargain collectively and to strike. It also guarantees a set of economic rights including the 8-hour day and the 6-day work week, minimum wages, overtime and occupational health and safety. In addition to creating substantial barriers to the enforcement of core labor rights, the reform also "flexibilizes" wages and hours of work in violation of Article 123 of the Constitution.

Article 133 of the Constitution establishes that a duly ratified international treaty becomes the controlling law of the land.³ In 1950, Mexico ratified ILO Convention 87, which guarantees a worker's right to freely associate. As set forth in Section IV.C, the *Abascal Project* also violates Mexico's obligations under Convention 87 and consequently its federal labor laws.

Additionally, the *Abascal Project* violates the 2000 Agreement on Ministerial Consultations between the U.S. and Mexico, entered into to resolve the Han Young and ITAPSA cases.⁴ In that agreement, Mexico committed itself both to promote a public registry of collective contracts and secret ballot elections in neutral voting places in the context of representation elections. Specifically, "The Mexican Department of Labor and Social Welfare will continue promoting the registry of collective bargaining contracts in conformity with established labor legislation. At the same time, efforts will be made to promote that workers be provided information pertaining to collective bargaining agreements existing in their places of

² These instruments include the American Declaration on the Rights of Man, the American Convention on Human Rights, the San Salvador Protocol, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights.

³ See, Mexico, Human Rights National Program (December 2004), p. 24, "In accordance with Article 133 of our Constitution, which recognizes international treaties as the supreme law of the land, those that deal with human rights and protective norms of the person should be considered to form a part of the Mexican juridical order."

⁴ Agreement on Ministerial Consultations, U.S. NAO Submissions 9702 and 9703, May 18, 2000

employment and to promote the use of eligible voter lists and secret ballot elections in disputes over the right to hold the collective bargaining contract." Mexico has failed to implement in law or in practice these agreements.

II. Statement of Jurisdiction

A. NAO Jurisdiction

NAO jurisdiction to review this submission is authorized by Article 16(3) of the NAALC, which grants each NAO power to review public communications on labor law matters arising in the territory of another party. This submission involves the introduction of reforms to the Federal Labor Code of Mexico that would substantially roll back existing labor rights protections and, further, would codify practices that violate rights protected under the NAALC. Such labor principles include freedom of association and the protection of the right to organize, the right to bargain collectively and the right to strike, among others.

B. Ministerial Review Jurisdiction

Article 22 of the NAALC empowers the Secretary of Labor of the United States to request consultation with the Secretary of Labor and Social Welfare of Mexico regarding the matters within the scope of the NAALC. The issues raised in this submission are within the scope of the NAALC.

III. Brief Background

Beginning in the late 1980s, the PRI (Institutional Revolutionary Party) and Mexican employers' associations began to put forward their vision of a "New Labor Culture" that emphasized productivity and flexibility. The first proposal was introduced in the late 1980s by the Mexican Employers Association (COPARMEX), but was ultimately not successful. However, after Vicente Fox Quesada (PAN) was elected president in 2000, Carlos Abascal Carranza, his Secretary of Labor, and a former head of COPARMEX, began the process by which a proposal for labor law reform was developed. In July of 2001, Abascal initiated the talks between the Secretariat of Labor and Social Welfare (STPS), the Business Coordinating Council (CCE) and the labor unions, both the Congress of Labor (CT) and the National Union of Workers (UNT), with a commitment that no legislation would be introduced in the absence of a consensus. However, the present piece of legislation, developed essentially by the STPS, is far from a consensus proposal, and would seriously diminish current standards in violation of domestic and international law.⁵

⁵ The UNT and the Frente Sindical Mexicano (FSM) strongly oppose the Abascal Project. See, e.g., El Barzón. Congreso Agrario Permanente, Frente Sindical Mexicano, Union Nacional De Trabajadores, Manifiesto De Lucha Unitaria, 10 December 2002, <http://www.unt.org.mx/docs/barzoncap.htm>.

The initiative presented on December 12, 2002, with the support of the Fox administration, will be voted on during the current session of the Chamber of Deputies which began on February 15, 2005. Together, these reforms would strengthen the system of corporatist control over labor,⁶ further stifling the rights of workers, while giving business the unrestrained "flexibility" it has been demanding. The *Abascal Project* further violates the "Twenty Commitments to Freedom of Association and Union Democracy" signed by President Fox while he was a candidate for the presidency and independent unions in 2000, which promised greater respect and protection of democratic rights in the labor arena.⁷

Already, independent labor unions, academics and labor lawyers have criticized the *Abascal Project* harshly. Lance Compa, former Director of Labor Law and Economic Research for the Secretariat of the Commission for Labor Cooperation, established under the NAALC, recently summarized the principal objections in terms of freedom of association to the *Abascal Project* thusly:

The proposal would tighten government control of union formation and collective bargaining while granting employers new unilateral powers to sidetrack unions... The *Abascal* proposal would do nothing to increase transparency in union affairs [and] rejects independent unions' long-standing demand to list local unions and collective bargaining agreements in a public registry available to all citizens ... The *Abascal* proposal would also create enormous obstacles to workers' right to organize. First, it would tighten jurisdictional rules defining which labor organization can represent workers according to craft, enterprise and company. The effect would be to lock in bargaining monopoly by incumbent official unions and insulate them from challenges from independent unions. Finally, the *Abascal* proposal would require prior disclosure of the name and address of every worker who joins an independent union, then have the federal or state labor board with jurisdiction in the matter investigate each worker's signature. ... [This] puts all workers at the risk of reprisals and would have a chilling effect on workers' freedom of association.⁸

IV. Argument

The *Abascal Project* Does Not Address Current Violations, and Creates New Ones

The *Abascal Project* seeks a substantial, comprehensive reform of the Federal Labor Law. Most of the changes are couched in seemingly innocuous procedural language, which could

⁶ See Section IV below.

⁷ <http://www.unt.org.mx/docs/compfox.htm>

⁸ See Lance Compa, *Justice for All: The Struggle for Workers Rights in Mexico*, AFL-CIO Solidarity Center (2003), p. 18, www.solidaritycenter.org.

lead an inexperienced reader to the conclusion that the reforms were merely technical in nature or perhaps, as in the case of *recuento* elections, even benign. However, the insidious character of these proposals and their implications in terms of the decimation of workers' most fundamental rights cannot be over-emphasized: *The proposed changes would make it virtually impossible for most workers to exercise their rights to strike, bargain collectively, or join a union of their choosing.*

The current reform proposals fail to address the pattern and practice of violations of the NAALC principles documented time and again in recommendations by the U.S. and Canadian NAO's, the ILO, and other international bodies, including the institutional bias inherent in the tri-partite system of labor and conciliation boards, the lack of secret ballot elections in neutral locations, and the absence of public registries of unions and contracts. The proposal also fails to provide sufficient protections for workers facing pregnancy-based discrimination in hiring.

The failure to address these violations is not only unconscionable, but it also violates commitments made by the federal government of Mexico in resolving previous cases under the NAALC. Yet, far from honoring its commitments, the current reform package actually makes matters even worse.

In this section, petitioners highlight some of the most egregious proposals, all of which violate Mexico's obligations under the NAALC.

1. The Abascal Proposals Would Seriously Erode Workers' Rights

New Procedural Requirements Would Effectively Deny Workers Their Rights to Freedom of Association and Collective Bargaining:

By altering two articles of the Federal Labor Law and adding two others, the proposed reforms create a procedural obstacle course that is virtually insurmountable for workers seeking to establish an independent union or to bargain collectively. This is accomplished in three ways: 1) by requiring workers to reveal their individual identities in order to initiate the processes leading to collective bargaining or union recognition, thus exposing them to discharge; 2) by requiring as a pre-requisite that they produce documentation that is under the control of labor authorities who are institutionally opposed to independent trade unions; and 3) by prohibiting consideration of more than one representation petition at a time, enabling employers and "ghost unions" to preclude consideration of legitimate petitions and to create interminable delays.

Article 387 and Article 920, as amended, and when read together, provide that a request that an employer sign a contract must be accompanied by official documents under the control of the STPS or local labor board, both of which are closely tied to the employers and official unions and unlikely to issue the necessary documentation. As also discussed below, among the

documents required is a list of all of the workers who support the petition, opening them up to intimidation and retaliation.

Because the certification of the documents is considered a purely administrative process, the Registrar acts at his or her discretion in requiring documentation -- at best delaying the proceeding, at worst imposing requirements that are impossible to meet. Some labor boards have already begun requesting items such as workers' signatures, pay stubs, or even proof of withdrawal from the official union (on the basis that workers cannot belong to two unions at the same time) as proof that the union actually represented them.

The Mexican Supreme Court recently resolved a conflict between two lower courts, ruling that the imposition of such additional requirements violates the current Federal Labor Law. 121/2002, SS. The Mexican government, in attempting to reverse the Supreme Court, is clearly diminishing the protections currently afforded to workers.

Moreover, a new article, Article 893-A, would require that any demand to obtain legal control of a collective bargaining agreement must be signed by the workers who are making the demand and presented to the Local Conciliation and Arbitration Board or to the General Directorate for Registry of Associations of the Labor Secretariat in cases of federal jurisdiction. This would expose all workers to pressure, harassment or discharge by the employer or ouster by the incumbent union under an exclusion clause (See below for a fuller discussion of the routine -- and illegal -- application of exclusion clauses). As above, the workers would also need to request documents from the STPS or local boards, which would effectively curtail their ability to form a union or to bargain collectively.

An additional provision, Article 893C, would permit consideration of only one petition to unseat the pre-existing union at a time, opening the door to preemptive petitions by "ghost unions," which would then prevent consideration of the petition of a union that actually represents a majority of the workers.

Flexibilization of Employment - Days and Hours of Work

The proposed reforms would not only weaken the capacity of unions to defend the wages and working conditions of their affiliates, but would also further deepen the export-led model of development which over the past decade has produced "disappointing growth in manufacturing employment"⁹ without enabling workers to recover their loss in real wages, which lost 50% of their value from 1980 to 2000.¹⁰

⁹ Carnegie Endowment for International Peace, *NAFTA's Promise and Reality* (2003), p. 16.

¹⁰ Salas, Carlos and Zepeda, Eduardo *Empleo y Salarios en el México Contemporáneo*, in de la Garza, Enrique and Salas, Carlos eds., *La Situación del Trabajo en México*, 2003.

One of the central principles of the proposed reform is labor market flexibilization, which is accomplished in three ways. First, employers will be given increased rights to hire temporary and contingent workers, who may be fired at any time with no penalty.¹¹ Second, the reforms would allow firms wide latitude to change hours of work.¹² Finally, the reforms would give employers additional rights to substitute productivity bonuses for wages, but without specific obligations to share the benefits of increased productivity with the workers.¹³

Additional Curtailments of Union Rights

The proposed reforms would also curtail union rights by:

1. Adding three new ways in which a union's certification may be revoked by the Conciliation and Arbitration Board to Article 369.¹⁴
2. Weakening the requirement in Article 47 that an employer must provide notice to the worker or, alternatively to the union, concerning the cause of his or her dismissal.¹⁵

¹¹ For example, the reform would make significant changes to Article 35 of the LFT. As amended, Article 35 would provide that an employment contract could be of "determinate length, temporary, for initial training (probationary), or for an indeterminate length." The existence of these new contracts – temporary and probationary – radically changes the legal structure of labor relations and eliminates job security through the use of short, fixed term contracts of employment.

¹² Article 59 provides that workers and employers may set the hours of work as long as they don't exceed the legal maximum. As amended, Article 59 would permit workers and employers to count maximum hours on a weekly or monthly basis, thus eliminating maximum daily hours of work – a violation of Article 123 of the Constitution. This is also a concern in that the bargaining power between an individual and employer is unequal and employees will likely be forced to accept whatever hours of work are demanded by the employer or face dismissal.

¹³ See de la Garza, Enrique *La Polemica sobre la Reforma Laboral en Mexico*, (2004), pp. 20-21.

¹⁴ The first is for not reporting to STPS changes in the union's board or its statutes. The second is for not reporting increases or decreases in the number of union members. Given the complicated and bureaucratic measures imposed by the labor authorities to accept communications from unions, this poses an undue burden and threatens the very existence of unions. The third would permit the cancellation of a union registration if the collective bargaining agreement were not amended for two consecutive terms. The ILO Committee on Freedom of Association has ruled that "The administrative dissolution of trade union organizations constitutes a clear violation of Article 4 of Convention No. 87." *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, 4th ed. 1996, para. 665.

¹⁵ The notice to the worker turns out to be essential in exerting one's legal rights, and the failure to do so would result in the dismissal being deemed unjustified. The reform adds the phrase "except for evidence to the contrary," which modified substantively the protective character of the law. With the proposed modification, the employer would be able to make excuses or fabricate evidence, thus shifting the burden to the employee to prove that no notice was actually received. Thus, the amendment invites fraud and justifies dismissals in cases where the worker had no actual notice.

3. Diminishing the preference established in Article 154 for workers who have worked previously for the employer and as well for unionized over non-unionized workers, and modifying Article 159 to reduce the importance of seniority for filling vacancies.
4. Allowing election of union officers by voice vote.¹⁶
5. Shifting the burden of proof against workers in disputes concerning overtime hours.¹⁷
6. Introducing new legal concepts which have been used in practice by CABs to obstruct the formation of democratic unions.¹⁸

B. The Abascal Project Does Nothing to Address Current Violations

International bodies including the ILO, the UN High Commission for Human Rights, and the US and Canadian NAOs, as well as the ICFTU and other international trade union organizations, have repeatedly drawn attention to systematic deficiencies in Mexican labor law that impede workers' freedom of association, and have proposed measures to remedy these defects. Among the most serious of these problems, discussed more fully below, are the lack of a public registry of unions and collective bargaining agreements, conflicts of interest in the Conciliation and Arbitration Boards, systematic denial of union recognition on frivolous grounds, use of the "exclusion clause" to compel the dismissal of workers who seek a change in union representation or who advocate democratic reforms in their unions, and the requirement that workers declare publicly to the board their intention to support an independent union when they file a petition for a recuento election.

1. Lack of Public Registry of Unions and Contracts

¹⁶ Article 371 regulates what the statutes of a union must contain. As amended, the law provides that the union's statutes must include the manner in which the directors of the union are elected, *which can be by secret vote or direct ballot* (i.e. voice vote). In the majority of non-representative unions, the leaders will of course provide for election by voice vote. The failure to require secret ballot elections will mean that they only occur in democratic unions, totally failing to address the problem of coercion within non-democratic unions.

¹⁷ Article 784, as amended, modifies the rules relative to the burden of proof, such that the burden will in practice fall on the worker to prove overtime that exceeds nine hours weekly. The solution proposed is that the employer will provide the worker with a written note so that the worker can prove the excess hours worked. At the end of this article, a new paragraph is added which allows the employer to allege the loss or destruction of this document, and to prove the facts by other means. Until now, the employer has had the duty to record the hours worked. With the modification, it will be the obligation of the worker to record these hours, which actually is very difficult.

¹⁸ These concepts include "radius of action" (Article 371 III bis), processability (Article 893-A), and legitimation (Chapter 2 of Title XIV, also the second paragraph of Article 689). Radius of action limits the sectors in which a union can organize; processability is used to justify impeding the exercise of collective rights with no basis, and legitimation is borrowed from civil law to block unions based on employers' subjective perceptions. Legitimation has been declared illegal by appeals tribunals, on the grounds that it cannot be raised in a purely administrative proceeding. While these concepts may seem innocuous, they pose a serious threat precisely because of the broad scope of interpretation granted to the CABs.

With the recent and limited exception of the Federal District, there is no public registry of unions and no public access to contracts in Mexico.¹⁹ Thus, even where workers are represented by unions, they have no legal right to obtain information as to the name of their union, the name and addresses of the leadership, or copies of their contracts. Such unions are commonly known as "ghost unions." Moreover, when a union files a representation petition, it is required to follow one of the two legal procedures depending on whether another union exists in the work place or not. Where an incumbent union exists, the petition must contain its correct name, legal address, etc. A petition will be dismissed if the union has either chosen the wrong process or where information such as the name and address of the incumbent union is inaccurate. If the workers are unaware of the existence of a protection contract and file the wrong type of petition, it will be dismissed and the workers will be exposed to discharge directly by the employer or at the behest of the incumbent union pursuant to the exclusion clause.

This practice was noted and questioned in NAO Submissions 940002 (General Electric), 9702 (Han Young) and 9703 (ITAPSA), and, as noted above, the Mexican Government made a commitment to promote public registries of collective bargaining agreements in its May 18, 2000 Ministerial Agreement with the U.S. Department of Labor. The issue is particularly important in Mexico where the widespread practice is for employers to negotiate minimal contract terms with non-representative ghost unions. These are known as "protection contracts" because of the protection they provide to employers by locking in minimum conditions for the period of the contract, thus precluding improvements, while at the same time necessitating the application of the more complex and time consuming legal processes for changing (as distinguished from initially selecting) a labor union. Without a registry, workers often have no idea if they are represented, nor do they have access to contracts detailing their rights under agreements negotiated in secret.

2. Lack of Impartial Dispute Resolution and Denial of Union Registration

The labor relations system in Mexico already operates to the detriment of independent unions. In Mexico, labor law is enforced by local or federal Conciliation and Arbitration Boards (CABs), which are tripartite in structure and include representatives from government, labor and business. The CABs have jurisdiction over most disputes, and further play a role in whether unions obtain legal recognition and whether they have a right to bargain in the workplace. In practice, and despite provisions of the Federal Labor Law that prohibit conflicts of interest,²⁰ independent unions must often seek registrations from CABs whose labor and

¹⁹ See *María Xelhuantzi López, La Democracia Pendiente* (2000); *José Alfonso Bouzas Ortiz y María Mercedes Gaitán Riveras, Contratos Colectivos de trabajo de protección* (2000). Although not sufficiently comprehensive, a registry of unions has been established in Mexico City. On limited occasions, the Junta Local in Mexico City has conducted elections within the neutral facilities of the Board. However, it has not implemented this as a routine practice, nor has it prevented the entry of thugs during such proceedings.

²⁰ Federal Labor Law, Article 707.

business representatives, and often the government representatives as well, oppose their very existence. Thus, while recognition is theoretically available through administrative processes, they are often denied to independent unions for any number of pretextual reasons that, taken together, demonstrate an institutional bias against them.

The impartiality of the CABs has been questioned in numerous U.S. NAO reports but stated most forcefully in *Han Young I*, finding that Mexico had indeed violated Article 3 of the NAALC.²¹ There, the U.S. NAO found sufficient evidence to "raise questions about the impartiality of the CAB" and concluded that, "[t]he placement, by the Tijuana CAB, of obstacles to the ability of workers to exercise their right to freedom of association, through the application of inconsistent criteria and standards for union registration and for determining union representation, is not consistent with Mexico's obligation to effectively enforce its labor laws on freedom of association in accordance with Article 3 of the NAALC."²² The ILO's Committee on Freedom of Association has also criticized the CAB's denial of registration to independent unions. See Case No. 2013 (SINTACONALEP), and Case No. 2282 (Matamoros Garment).

3. Exclusion clause

Protection contracts usually contain an exclusion clause - giving the union the right to instruct the employer to fire workers. While unremarkable in most situations, the application of these clauses has been challenged as violative of associational rights when invoked to fire workers who seek to organize a different union. Mexican courts have held it unconstitutional to fire

²¹ In that case, the independent union, STIMAHCS, filed for collective bargaining representation with the local CAB, challenging the CROC for exclusive bargaining rights. A representation election was held in October 1997, which STIMAHCS won despite threats by the employer and the CROC and dismissals of union activists by the employer. Afterwards, the CAB nullified the election results, alleging that the union failed to demonstrate majority status and had also lacked proper registration to represent the workers. This reversed a previous finding by the same CAB that STIMAHCS could properly represent the workers. Another election was held in December, which STIMAHCS also won. However, the CAB delayed informing the parties of the results of the election until March of the following year.

²² See also, US NAO Reports of Public Communications 940001/940002 (GE/Honeywell)(discussing bias in Ciudad Juarez CAB); 940003 (SONY)(expert testimony discussing influence of CTM over Ciudad Victoria CAB and NAO conclusion that there are "serious questions" concerning the ability of independent union to obtain recognition through registration process through the CAB); 9703 (ITAPSA)(NAO finding "several aspects of representation election raise questions as to impartiality of the presiding CAB representatives"); 9901 (TAESA)(questioning impartiality of CAB where CTM is represented on board); 2003-1 (Puebla) ("It is not difficult to foresee a potential for conflict of interest if the union representative on the JLCA considering the petition is a representative of a union affiliated with the union the workers intend to challenge."); NAO Report of Public Communication 9801 (ITAPSA)(finding that "it is uncertain that the current provisions of the LFT can ensure that the JFCA is impartial and independent and does not have any substantial interest in the outcome of its proceedings as required by Article 5(4) of the NAALC").

workers because they seek to organize an independent union.²³ Nonetheless, the exclusion clause is routinely employed for this purpose.²⁴

This practice was reviewed in depth by the U.S. NAO in the ITAPSA case, taking into account both federal labor law and ILO jurisprudence. In that case, STIMAHCS began to organize an independent union at Echlin. Both the employer and the CTM began a campaign of intimidation against the workers who supported this effort, including surveillance of workers both within and without the plant, shift changes to punish STIMAHCS supporters, and increases in the workload of selected employees. Shortly thereafter, approximately 50 workers were subjected to retaliatory discharge for their support of STIMAHCS under the contract's exclusion clause.

The NAO concluded, "It is difficult to reconcile the dismissal of workers for their support of a particular union in a legally authorized representation election with the principle of freedom of association. . . . Without oversight and controls, the exclusion clause may constitute a serious threat against the rights of workers and the principle of freedom of association. The matter becomes especially problematic when the labor representative on the tribunal that adjudicates such cases, in this case Federal CAB No. 15, is a member of the union organization which is applying the clause."²⁵

4. Lack of secret ballots in recuento elections

If a union exists in a plant, the challenger union must file a petition with the labor board seeking an election to determine which union in fact represents a majority of the workers. Since the labor boards are almost always institutionally biased against independent unions (as described above), this generally results in interminable delays. Moreover, the requirement that workers declare publicly to the board their intention to support an independent union when they file a petition for a recuento election puts them at risk.

When an election is finally held, it is almost always by voice vote rather than secret ballot, and does not take place on neutral ground. Thus, workers have to present their credentials to a representative of the labor board who will be flanked by multiple representatives of the employer and official union, and will often have to confront psychological or physical violence, with only a limited number of representatives of the independent union present.

Although the proposed Article 931 purports to require a secret ballot in *recuento* elections, this provision is disingenuous at best, given the new pre-requisite discussed earlier which requires

²³ See Suprema Corte de Justicia de la Nación, Comunicación Número 385, *Inconstitucional, La Cláusula de Exclusión en Los Contratos Colectivos de Trabajo*: SCJN, México, D.F. A 17 De Abril De 2001; *Amparo Indirecto 2609/87, Sindicato Nacional Independiente de Trabajadores de la Industria Automotriz, Similares, y Conexos*, August 15, 1988, *Semanario Judicial de la Federación*, Octava Epoca, Tomo II, Primera Parte, julio-diciembre de 1988, p. 277.

²⁴ See ILO Committee on Freedom of Association, Case No. 2393 (Macoelmex)

²⁵ USNAO Report of Public Communication 9703.

disclosure of the identities of workers at the time they file the petition. Whether workers would ever venture to file a petition under such circumstances, or whether a vote would ever take place if they did so is a vital concern under the *Abascal Project*, given the virtual certainty of mass dismissals of union activists by employers directly or through application of exclusion clauses.²⁶

This issue of anti-union activity during elections has been raised repeatedly in previous NAALC petitions, and the facts set forth in Public Communications 9703 (ITAPSA) and 9901 (TAESA) are unfortunately all too common.²⁷

On May 18, 2000, the U.S. and Mexico entered into a Ministerial Agreement following the conclusion of the *Han Young/ITAPSA* cases. In that agreement, Mexico committed itself to promote secret ballot elections in neutral voting places in the context of representation elections. Yet in a *recuento* election at Arneses K&S in Aguascalientes on September 4, 2000, the independent union was barred from the election site and workers were forced to openly declare their vote.²⁸ In another *recuento* election at the Duro Bag factory in Rio Bravo in March 2001, workers were forced to publicly declare their choice of representative in a non-neutral location.²⁹ Indeed, even though the Han Young/ITAPSA agreement was attached to the petition to request a secret ballot election, it was expressly rejected by the Labor Board which held that it was not bound by the agreement, and that a secret ballot election would prevent access to information about how each worker voted. Likewise, in a *recuento* election at the Federal Consumer Protection Agency (PROFECO) on June 4, 2004, the Federal Arbitration and Conciliation Board refused a request from the independent union for a secret ballot. These

²⁶ In connection with its petition at KyS, STIMAHCS was required to file lists with the labor board containing the names of its members, although another official union which also filed a petition was not subjected to the same requirement. Not surprisingly, the company fired 250 suspected supporters of the independent union. Predictably, the CTM won the subsequent election: K&S (exp. IV-357/99). Allen Laboratories, S.A. de C.V. (Exp. No. IV-419/99) provides a second example of a case where the employer's knowledge of the names of union supporters resulted in their coercion and subsequent discharge.

²⁷ In ITAPSA, for example, the U.S. NAO found:

There is considerable testimonial evidence of efforts by CTM representatives and agents to intimidate workers during the conduct of the representation election. The testimony and other evidence is consistent, convincing, and disturbing. Workers were expected to demonstrate their union preference through a voice vote, in the presence of management and CTM Section 15 union representatives, who had threatened them with dismissal and already dismissed a number of workers, as well as representatives of STIMAHCS and the CAB. Further, workers were aware that the union could request their dismissal from employment, and the company would be required to comply, for supporting an opposing union. Aggressive thugs, armed at least with clubs, were present to intimidate workers and make it impossible for the STIMAHCS representatives to verify the credentials of workers who were voting. Finally, CAB officials allowed the proceedings to continue despite this atmosphere of violence and intimidation.

²⁸ Letter from John H. Hovis, President, United Electrical Workers, to Alexis Herman, Secretary of Labor, October 13, 2000.

²⁹ Public Communication by AFL-CIO and PACE to U.S. NAO regarding Duro Bag Company, May 29, 2001.

are just a few of the many examples where requests for secret ballot elections have been rejected, despite the commitment made by the Mexican government in resolving the Han Young and ITAPSA cases.

5. Union Monopolies

The Federal Labor Law in Mexico provides that within the public sector only specifically designated unions have the legal right to represent workers. Although the Supreme Court of Mexico has held that laws creating union monopolies are contrary to the Constitution, the law remains unchanged and union monopolies persist in the public sector. As such, workers are severely limited in their ability to freely choose their representative, in open violation of ILO Convention 87 and Mexican law. This issue was squarely raised in NAO Submission 9601 (SUTSP), which also found that union monopolies ran afoul of domestic and international law.

In that case, several federal ministries were merged in a re-organization. The union representing the workers of the fishing ministry, SUTSP, was decertified as representative of the workers when the ministry ceased to exist as an independent entity. Another union, FSTSE, held a constituent assembly of the workers of the consolidated ministries in order to constitute a new union, SNTSMARNAP. An election was held and the new union was registered with the federal board (FCAT). The consolidated ministry alerted the FCAT that two unions existed, leading SNTSMARNAP to file a petition with the labor board to deregister SUTSP. After several appeals and reversals, the FCAT eventually deregistered SUTSP, on the basis that only one union can represent members under the Federal Law for Public Service Employees (LFTSE).

The U.S. NAO expressed concern that the FCAT had decertified SUTSP as the bargaining representative of the workers of the former Ministry of Fisheries. In particular, the NAO cited the decision of the ILO's Committee on Freedom of Association (CFA) on the same case. The CFA noted "that the major problem lies in the fact that there cannot be more than one trade union within one department, as laid down in Sections 68, 71, 72, and 73 of the Federal Act pertaining to Public Service Workers. These provisions have given rise to observations by the Committee of Experts for a number of years." On the dissolution of SUTSP and the limitation of one union per workplace in the federal sector, the CFA "draws the Government's attention to the fact that Article 2 of Convention 87, ratified by Mexico, stipulates that workers and employers are entitled to establish, and subject only to the rules of the organization concerned, to join organizations of their own choosing. Furthermore, Paragraph 2 of Article 3 stipulates that public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof."³⁰

In 2004, the ILO's Committee of Experts on the Application of Conventions and Recommendations again noted that Mexico had failed to amend its law to permit union plurality in the public sector. "The Committee notes that, according to the ICFTU, the trade

³⁰ International Labour Office, Governing Body, 300th Report of the Committee of Freedom of Association, Case No. 1844 (Mexico), 1995.

union monopoly imposed by the Federal State Workers' Act and by the Constitution remains in force, despite the fact that the Supreme Court of Justice held in 1999 that such a monopoly was in breach of the guarantee of freedom of association laid down in Article 123 (B) (X) of the Constitution ... In its previous observation the Committee noted the Government's confirmation that the legislation imposes a monopoly. The Committee again reiterates the comments it made in that connection and expresses the firm hope that the Government will take steps to repeal or amend these provisions of the law so as to bring them into line with the Supreme Court ruling and the Convention."

6. Failure to Protect Workers' Right to Freedom from Sex Discrimination

The International Labor Organization's Declaration on Fundamental Principles and Rights at Work has also recognized the right to freedom from workplace and employment discrimination, understood as including pregnancy-based discrimination, as a fundamental right that all ILO members must protect. The U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the U.N. International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women ("Convention of Belém do Pará"), all of which Mexico has ratified, also protect this right. Parties are required to provide effective legislative protection to guarantee the rights in these conventions, yet the Abascal Project does not.

Pregnancy-Based Discrimination

Human Rights Watch documented systematic pregnancy-based discrimination in Mexico's free trade zones, both post-hire and in the hiring process, in August 1996 and December 1998. In January 1998, the U.S. National Administrative Office also concluded that the practice was widespread. And the U.N. Committee on Economic, Social and Cultural Rights (CESCR) stated in 1999 that it was "deeply concerned about the situation of women workers in the maquiladoras, some of whom are subjected to pregnancy tests upon recruitment and at intervals during work, and are dismissed if found to be pregnant." Human Rights Watch has recommended clarifying federal legislation to explicitly prohibit requiring proof of pregnancy status as a condition to gain or retain work and to explicitly ban employment and workplace pregnancy-based discrimination.

The Abascal Project only partially addresses these problems. It would amend existing law to explicitly prohibit employers from firing or pressuring a worker to resign due to her pregnancy, but it fails to address pregnancy-based discrimination in the hiring process. This omission is contradictory to President Fox's National Human Rights Program, which includes as a goal "to verify that pregnancy tests are not demanded of women wishing to access employment." Similarly, it flouts the 1999 CESCR recommendation that Mexico "adopt immediate steps towards the protection of women workers in the maquiladoras, including prohibiting the

practice of demanding medical certification that prospective workers are not pregnant and taking legal action against employers who fail to comply.”

C. The Abascal Project does not Address Numerous Violations of Freedom of Association Criticized by the ILO

In 2004, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) reviewed a number of concerns raised by the ICFTU as to how the Federal Labor Law violates ILO Convention 87. In most cases, the Committee sustained the objections of the ICFTU and requested that Mexico reform its law consistent with the principles articulated in Article 87. As stated in the Committee's report:

- **Workers in export processing zones.** The Committee notes that, according to the ICFTU, although Mexican laws and regulations guarantee the same trade union rights for all workers, workers in export processing zones (maquiladoras) wishing to form trade union organizations are coming up against considerable obstacles raised by employers with the connivance of the local authorities. The Committee notes with regret that the Government has not sent its comments on this matter and asks it to ensure both in law and in practice that all workers in the export processing zones enjoy the right of association as provided in the Convention.
- **Workers under service provision contracts.** The ICFTU observes that many workers are treated as service providers and are consequently not covered by labor legislation and are unable to exercise their trade union rights. The Committee notes that the Government merely states that the labor regime is a matter of public policy and that, consequently, any definition in contracts which is contrary to such policy, or which aims to circumvent it is void (having no effect in law). The Committee requests the Government to take steps to ensure that all workers, including those defined as service providers, are able to exercise their trade union rights both in law and in practice.
- **Domestic workers.** The Committee notes that, according to the ICFTU, domestic workers are not protected under the labor regime and consequently can neither join nor form trade union organizations. The Committee also notes that, according to the Government, domestic workers are covered by the rights and obligations laid down in the federal labor law for workers in general and are also covered specifically by Chapter XIII, Sixth Title, sections 331-343 of the said law. The Committee requests the Government to ensure that domestic workers enjoy, in practice, the guarantees of the Convention that are established in the legislation.
- **The right of workers' organizations to elect their representatives in full freedom.** Prohibition of the re-election of trade union leaders in trade unions of public employees (section 74). The Committee notes with regret that the Government has not commented on these points and requests it to take the necessary measures to ensure that public employees, like other workers, are free to elect their representatives in accordance with the provisions of the Convention.

- The right of workers to draw up their programs. Strikes. The Committee notes that according to the ICFTU, conciliation and arbitration boards have the authority to declare strikes "non-existent", which can entail the dismissal of workers participating in them. The ICFTU gives figures showing that the boards make frequent use of this authority, strikes being seldom deemed legal. The Committee notes that, according to the Government, the boards may declare strikes to be non-existent only if they meet one or more of the conditions laid down in the legislation: where the object of the strike is not one of those listed in the legislation, where the strike was not decided on by the majority of the workers in the enterprise or when the strike procedure was not triggered by the submission of claims that comply with requirements set by law. The Committee requests the Government to provide statistics on claims submitted with a view to a strike and strikes actually held, indicating specifically those that were declared non-existent and the grounds given by the administrative authority.

D. The Abascal Project Fails to Address the Recommendations of the United Nations High Commission for Human Rights

In December 2003, the Office of the United Nations High Commission for Human Rights in Mexico published a *Diagnostic of the Situation of Human Rights in Mexico*. Chapter 4.3.4 of this study includes extensive and specific recommendations to improve respect for labor rights, including the establishment of public registries of unions and collective bargaining agreements, transparency in the management of union dues and finances, elimination of Apartado B for public employees, and shifting the responsibility for labor justice from the Executive to the Judicial branch. Neither the Government's National Human Rights Program, published in December 2004, nor the *Abascal Project* addresses the UN's recommendations.

IV. Conclusion

As explained above, the *Abascal Project* will prejudice the exercise of the fundamental labor rights of Mexican workers. Not only does it set forth new provisions that threaten these rights, but it also fails to take into account some of the most fundamental problems with the Mexican labor relations system, a system that has been roundly criticized by the ILO, the UNHCHR, and by the U.S. and Canadian NAOs in previous cases. The current proposal would not constitute modernization of Mexico's labor laws, but rather is a step backwards, further consolidating practices that deny basic liberties to workers while employers and unrepresentative unions monopolize labor relations. Fortunately, the NAALC unequivocally prevents such retrenchments in law and practice. Thus, the Petitioners respectfully request that the U.S. NAO accept this submission and undertake the actions requested in Section V.

V. Action Requested

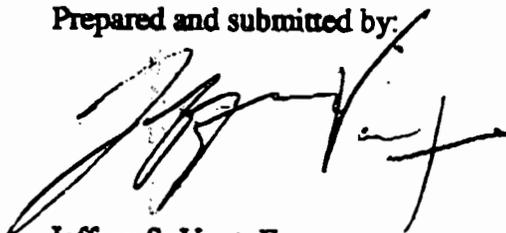
The Petitioners ask the U.S. NAO to immediately review this submission. The Government of Mexico will submit the proposal to its legislature upon commencement of the 2005 legislative session, on or about February 15, 2005. If the U.S. NAO accepts this submission, we request, taking into consideration the urgency of the matter, that the NAO:

1. Undertake an expedited review of the Abascal Project and make comments on its consistency with the NAALC, taking into account the observations raised in Petitioners' submission.

If the NAO finds that any of the provisions of the *Abascal Project* would violate the NAALC, petitioners urge that:

2. the Labor Secretaries of the United States and Mexico immediately enter into consultations on those provisions of the proposal that the US NAO believes violates the NAALC.
3. the U.S. NAO request that Mexico, with regard to those provisions that may violate the NAALC, withdraw or otherwise strike them from the text of the reform proposal before its legislature.
4. the U.S. NAO encourage Mexico to consider other proposals that take into account the concerns expressed regarding the deprivation of rights of freedom of association.
5. the U.S. NAO encourage Mexico to publish any and all new proposals and ensure that interested persons are given a reasonable opportunity to comment, consistent with Article 6(2) of the NAALC, before such proposals are enacted.

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