

# **PUBLIC REPORT OF REVIEW OF NAO SUBMISSION NO. 9703**

FINAL  
Final.

**U.S. NATIONAL ADMINISTRATIVE OFFICE  
BUREAU OF INTERNATIONAL LABOR AFFAIRS  
U.S. DEPARTMENT OF LABOR**

**July 31, 1998**

**(Revised August 21, 1998)**



## NOTE

This version of the Public Report of Review of NAO Submission No. 9702 has been revised to include additional submitters whose names were inadvertently omitted from the Public Report issued on July 31, 1998.

U.S. National Administrative Office  
August 21, 1998

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## EXECUTIVE SUMMARY

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### U.S. NATIONAL ADMINISTRATIVE OFFICE PUBLIC REPORT OF REVIEW NAO SUBMISSION 9703

#### PURPOSE OF THE REPORT

- Submission No. 9703 was filed pursuant to the North American Agreement on Labor Cooperation (NAALC) on December 15, 1997, by the International Brotherhood of Teamsters (IBT), the Union of Needletrades, Industrial and Textile Employees (UNITE!), the United Electrical, Radio and Machine Workers of America (UE), the United Auto Workers (UAW), the Canadian Auto Workers (CAW), the United Paperworkers International Union (UPIU), the United Steelworkers of America (USWA), the USWA Canadian National Office, and a number of local unions affiliated to these national organizations. An additional thirty U.S. and Mexican union, human rights and non-governmental organizations are cited as concerned parties in the submission. The NAO accepted Submission No. 9703 for review on January 30, 1998. Subsequently, the American Federation of Labor/Congress of Industrial Organizations (AFL-CIO), the National Union of Workers (UNT) of Mexico, the Canadian Labour Congress (CLC), and the International Association of Machinists (IAM) joined as submitters in the case, as did three additional Mexican labor organizations.
- Submission No. 9703 raises issues of freedom of association and health and safety, at the ITAPSA export processing plant in Ciudad de los Reyes, in the State of Mexico, Mexico. ITAPSA is a subsidiary of Echlin Inc., a U.S. corporation with headquarters in Branford, Connecticut, that produces and distributes automobile replacement parts in the U.S., Canada, and Mexico. The ITAPSA facility employs approximately 350 people and exports to the U.S., Canada, Europe, and South America.
- In accordance with its procedural guidelines, the NAO completed its review of the case, which included a public hearing on March 23, 1998. In the attached report, the NAO recommends that the Secretary of Labor consult with the Secretary of Labor and Social Welfare of Mexico on the issues raised in the submission.

## **SUMMARY OF SUBMISSION AND ALLEGATIONS**

- Submission No. 9703 raises issues of freedom of association at the ITAPSA plant beginning in 1996. According to the submitters, workers attempted to organize a union to address problems of workplace safety and health as well as economic issues. Once the union organizing effort began, the established union at the plant, in alliance with plant management, began a campaign of threats and intimidation against the workers, including threats of dismissal, surveillance, and increases in the workload of selected employees. About fifty workers were fired from their jobs for supporting the independent union (STIMAHCS).
- At a representation election held on September 9, 1997, workers were required to publicly vote in the presence of the contending unions, management representatives, and about 170 aggressive thugs hired by the established union to intimidate the workers. Furthermore, the submitters maintain that a number of these thugs, who were not employed at the plant, were allowed to vote. The election was allowed to proceed by government authorities and the result was a resounding defeat for STIMAHCS. Additionally, workers were dismissed from their jobs on the basis of the exclusion clause, allegedly for how they voted in the representation election.
- According to the submitters, the labor tribunal with jurisdiction in the case conducted a hearing on the objections to the election without providing proper notice to the petitioners, who were not afforded an opportunity to present their case, and collective bargaining rights remained with the established union. A Federal Court later overturned the CAB and ordered a new hearing. In the meantime, representation has remained with the established union.
- A major concern of the workers at the plant is safety and health, especially exposure to asbestos and other toxic substances without adequate personal protective equipment (PPE).

## **ANALYSIS AND DISCUSSION**

- The review indicates that a group of workers who attempted to exercise their right to freedom of association were subjected to retaliation by their employer and the established union in the workplace, including threats of physical harm and dismissal. They were required to vote for union representation in an atmosphere of fear and intimidation and to cast open ballots in the presence of representatives of the contending unions, the representative of a management that had clearly expressed its union preferences and had already retaliated against workers for their union activities, and before a large number of aggressively acting and boisterous individuals who were not employees but were brought in by the company.

- Workers engaged in lawful organizational and informational activities outside a workplace were subjected to physical attack by persons associated with the established union at the plant and in the presence of company officials. The events described in the submission are not consistent with the principle of freedom of association and, for the most part, do not appear to be consistent with Mexican law.
- The information obtained by the NAO during its review is consistent regarding the actions of the Federal CAB, including the first postponement of the representation election, the conduct of the election itself, the review of the challenge to the election, and the delay in hearing the case of workers dismissed under the exclusion clause. The proceedings conducted do not appear to be in accordance with Mexican laws and regulations in all instances. When viewed in the context of the composition of the CAB and the interest of the CTM in the outcome of the proceedings before that tribunal, review of this submission raises questions about the impartiality of the CAB and the fairness, equitableness, and transparency of its proceedings and decisions.
- With regard to the health and safety issues raised, the information available indicates that the ITAPSA plant may suffer serious health and safety deficiencies that are hazardous to its employees. The fines that were assessed were minimal and the NAO has been unable to ascertain if they have been collected. Also, there are serious questions as to the efficacy of the inspections themselves. However, the information also indicates that the factory has been subjected to ongoing health and safety inspections by the authorities which have noted numerous shortcomings and that corrective action was undertaken on many of these.

## **FINDINGS**

- While Mexico's Constitution and Federal labor Law protect workers' freedom of association, in the instant case it appears that they were not afforded the protections to which they were entitled.
- The conduct of the proceedings by Federal CAB No. 15 was not always consistent with the Federal Labor Law and the obligation of the Parties to the NAALC to ensure impartial tribunals for the resolution of labor disputes.
- The attack on workers outside the premises of a factory raises troublesome questions as regards the rights of workers to engage in legitimate organizing activities without being subject to reprisals, including physical attack.

- The conduct of health and safety inspections of the ITAPSA facility appears to have been consistent with Mexican law, though questions are raised regarding the efficacy of the inspections. These questions are of special concern because of the presence of asbestos and other toxic substances at the plant which may not be adequately monitored.

## **RECOMMENDATION**

- In consideration of the above, the NAO recommends that the Secretary of Labor consult with the Secretary of Labor and Social Welfare of Mexico on (1) the freedom of association afforded Mexican workers in the conduct of an organization campaign and representation election; (2) the application of union security clauses in the context of freedom of association; and (3) the safety and health conditions prevailing at the plant, the efficacy of inspections and the effectiveness of Mexico's efforts to improve compliance with its safety and health laws.
- With regard to the incident of physical violence, the U.S. NAO will seek additional information on the matter from the Mexican NAO.

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## PUBLIC REPORT OF REVIEW OF NAO SUBMISSION NO. 9703

### **I. INTRODUCTION**

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

[e]ach NAO shall provide for the submission and receipt, and periodically publish a list, of public communications on labor law matters arising in the territory of another Party. Each NAO shall review such matters, as appropriate, in accordance with its domestic procedures.

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

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<sup>1</sup> 59 Fed. Reg. 16660-16662 (1994).

The Public Communication on Labor Law Matters Arising in Mexico: Election Contest Between Government and Independent Union (hereinafter Submission No. 9703) was filed on December 15, 1997. An amended submission was filed on February 13, 1998. The submitters are the Echlin Workers Alliance, a group of unions from the United States and Canada, which includes the International Brotherhood of Teamsters (IBT), the Union of Needletrades, Industrial and Textile Employees (UNITE!), the United Electrical, Radio and Machine Workers of America (UE), the United Auto Workers (UAW), the Canadian Auto Workers (CAW), the United Paperworkers International Union (UPIU), the United Steelworkers of America (USWA), IBT Local 745, UAW Locals 987, 2049, 428, UE Local 1090, UPIU Local 1056, USWA Locals 119A, 6363, 3590, and the USWA Canadian National Office. An additional thirty U.S. and Mexican union, human rights and non-governmental organizations are cited as concerned parties in the submission. The NAO accepted Submission No. 9703 for review on January 30, 1998.

On March 23, 1998, the American Federation of Labor/Congress of Industrial Organizations (AFL-CIO), the National Union of Workers (UNT) of Mexico, and the Canadian Labour Congress (CLC) joined as submitters in the case. On the same date the National Autonomous University of Mexico Workers Union (STUNAM), the Telephone Workers Union of the Republic of Mexico (STRM), and the National Union of Airline Service and Allied Workers "Independence" joined the submission. On April 8, 1998, the International Association of Machinists (IAM) joined as submitters.

Submission No. 9703 raises issues of freedom of association and health and safety, at the ITAPSA export processing plant in Ciudad de los Reyes, in the State of Mexico, Mexico. ITAPSA is a subsidiary of Echlin Inc., a U.S. corporation with headquarters in Branford, Connecticut, that produces and distributes automobile replacement parts in the U.S., Canada, and Mexico. Echlin has several plants in Mexico, including the ITAPSA plant. The ITAPSA facility employs approximately 350 people and exports to the U.S., Canada, Europe, and South America.

The submitters argue that Mexico has failed to enforce its laws relating to freedom of association and the right to bargain collectively through appropriate government action, in violation of NAALC article 3(1). Specifically, they maintain that Mexico has failed to enforce ILO Convention 87 on freedom of association; Article 22 of the International Covenant on Civil and Political Rights; Article 23(4) of the Universal Declaration of Human Rights; Article 8(1) of the International Covenant on Economic, Social and Cultural Rights; Article 123 §§ XVI (freedom of association) and XXII (unjustified dismissal) of the Mexican Constitution; Mexican Federal Labor Law (FLL) Articles 133 (prohibited practices of employers); 671 (obligations of worker and employer representatives on the CAB); 892-899 (special procedures to determine the collective bargaining representative *-titularidad*); and 931 (procedures for conducting elections for the collective bargaining representative).

The submitters further argue that Mexico has failed to enforce its laws that protect workers against dangerous health and safety conditions on the job. In particular, they argue that Mexico has failed to ensure that ITAPSA provide proper equipment and ventilation to protect workers from dangerous chemicals such as asbestos; has failed to conduct adequate safety inspections of the plant; and has failed to ensure that ITAPSA give regular medical evaluations to employees exposed to dangerous chemicals. The submitters argue that, in failing to take appropriate action, Mexico is in violation of Conventions 155 and 161 of the International Labor Organization (ILO); Articles 509, 511, 512 and 512-D of the FLL; and the Federal Regulation on Workplace Safety and Health (RFSHMAT).

The submission also raises issues of compliance by Mexico with its procedural obligations under the NAALC. The submitters argue that Mexico has not complied with Article 5(4) of the NAALC which obligates the parties to ensure that their labor tribunals are impartial and independent.

## **II. SUMMARY OF SUBMISSION 9703**

### **A. Case Summary**

According to the submitters, workers at the ITAPSA facility were concerned about unhealthy and unsafe working conditions at the plant. A number of their fellow employees had died or become seriously ill. According to the submitters, workers were forced to handle asbestos and other toxic materials without proper protection and ventilation. The workers were also concerned about low wages, abusive supervisors, sexual harassment, and the failure of their local union to respond to these problems. When the workers attempted to change their union representation to another union in order to address these concerns, they reportedly faced intimidation and harassment from the company and the existing union, including threats of physical violence and job loss.

According to the submitters, the plant is currently organized by Section 15 of the Confederation of Mexican Workers (*Confederación de Trabajadores Mexicanos* - hereinafter CTM). The CTM is the largest labor union organization in Mexico and is closely associated with the dominant political party, the Institutional Revolutionary Party (*Partido Institucional Revolucionario*), hereinafter, the PRI. Though most of the workers at the plant knew that a union was in place, they did not have copies of the collective bargaining agreement that had been signed.

The submitters assert that in 1996 the Union of Metal, Steel, Iron, and Allied Workers (*Sindicato de Trabajadores de la Industria Metálica, Acero, Hierro, Conexos y Similares*, hereinafter STIMAHCS) began a union organizing campaign at the plant and filed a petition for representation on May 26, 1997. According to the submitters, after the STIMAHCS organizing effort began, 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. The submitters allege that approximately 50 workers were subjected to retaliatory discharge for their support of STIMAHCS.

The Federal Conciliation and Arbitration Board (*Junta Federal de Conciliación y Arbitraje* - hereinafter CAB) with jurisdiction scheduled a representation election for August 28, 1997. According to the submitters, the labor member on the CAB comes from the CTM and was, therefore, inherently biased in favor of the CTM and against STIMAHCS in the subsequent proceedings. The submitters allege that the CAB postponed the election without informing STIMAHCS with the result that many of the STIMAHCS supporters showed up to vote before being informed of the postponement and were then filmed by individuals in a parked car and observed by a security guard. According to the submitters, about twenty workers were fired on this day and fifty were dismissed altogether for their support of STIMAHCS. Twenty-two filed claims for reinstatement with the Federal CAB. The remainder of the fifty did not pursue their cases and opted to take the severance pay the company offered.

The election was rescheduled for September 9, 1997. The submitters allege that on the day before the election, Echlin divisional Manager Guillermo Vela Reyna suggested to workers that they vote for the CTM union and that if STIMAHCS won they would suffer the consequences. The submitters also allege that, on that same date, workers observed a police agent distributing arms and armed men were observed patrolling the factory grounds.

The submitters maintain that the representation election was plagued by irregularities, including (1) the inability of workers who pledged support for STIMAHCS to enter the voting premises; (2) the use by the company of approximately 170 armed thugs to intimidate the workers against voting for representation by STIMAHCS; (3) the use of an open rather than secret ballot, which obliged the workers to state their union preference in the presence of government officials, company representatives, CTM representatives and armed thugs; and (4) manipulation of access to balloting so as to allow nonworkers to

participate. According to the submitters, the CAB representatives who were overseeing the election refused to order its suspension despite the clear atmosphere of intimidation and other irregularities. The final vote tally was 179 for CTM Section 15 to 29 for STIMAHCS.

Following the election, the CAB scheduled a hearing to review the results of the election and consider allegations of illegal conduct. According to the submitters, neither STIMAHCS nor its supporters received notice of the hearing. STIMAHCS filed an *amparo* appeal with the Federal Court claiming a violation of its rights by the CAB.<sup>2</sup> The Court held that the appeal was premature as the CAB had not yet issued a final decision on the case. The Court declined to hear the appeal until then. On December 4, 1997, the CAB issued its decision confirming the results of the election in favor of CTM Section 15. STIMAHCS filed an *amparo* appeal against this decision with the Federal Court on February 25, 1998. The Court found in favor of STIMAHCS in a decision issued in June 1998, and ordered the CAB to conduct another hearing, now scheduled to be held in August 1998.

According to the submitters, the CAB ordered the reinstatement of eleven of the discharged workers on November 21, 1997. Initially, ITAPSA management agreed to comply but when the employees attempted to return to work, they were barred from entry by security guards. They were informed that their reinstatement had been blocked by the CTM in retaliation for their support of STIMAHCS.

The submitters also allege that on December 15, 1997, a group of eight ITAPSA employees, two union organizers, and two observers traveled to the American Brakeblock factory in northern Mexico City, which is also owned by Echlin, to protest and distribute leaflets to employees on the events at ITAPSA. After being warned to leave by the local

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<sup>2</sup> An *amparo* is the legal instrument by which a person or legal entity seeks the protection of the courts against violations of constitutional protections by government authorities or their agents.

CTM representatives, they were assaulted and beaten by a group of seven men. Police who were summoned refused to take any action after the attack. One worker was subsequently fired by American Brakeblock after he filed a criminal complaint against American Brakeblock for this incident.

## **B. Issues**

### **1. Freedom of Association**

The submitters argue that Mexico is in violation of NAALC Article 3(1) in failing to enforce its labor laws on freedom of association through appropriate actions. In failing to enforce its labor laws, the submitters argue that Mexico is also in violation of the country's Constitution, which protects freedom of association, and ILO Convention 87 on freedom of association, which Mexico has ratified.

The submitters also argue that the Mexican government continues to countenance the lack of public registries and the dismissal of workers under the exclusion clause, which violate freedom of association and are contrary to NAALC Articles 1(d), 1(g), 3(1)(d), 7, and Annex 1.

Finally, the submitters argue that Mexico is not in compliance with its procedural obligations under NAALC Article 5(4) to ensure impartial labor tribunals.

### **2. Workplace Safety and Health**

The submitters argue that Mexico is in violation of NAALC Article 3(1) in failing to enforce its labor laws on safety and health in the workplace. By failing to enforce its safety and health laws, the submitters assert that Mexico is also in violation of ILO Conventions 155, 161, and 170, which Mexico has ratified.

**C. Action Requested**

The submitters request the following relief:

- (1) That the NAO initiate a review of the matter pursuant to Article 16 of the NAALC;
- (2) that the NAO hold a public hearing on the matter;
- (3) that the Mexican labor authorities obtain reinstatement for discharged workers;
- (4) that the Mexican labor authorities ensure that the freedom of association rights of workers of ITAPSA are respected;
- (5) that ITAPSA be required to comply with requirements regarding safety and health;
- (6) that the Mexican labor authorities develop specific guidelines and rules to ensure the right of freedom of association of workers;
- (7) the establishment of a public registry of unions and contracts;
- (8) a determination that the application of the union exclusion clause in union representation elections is violative of Mexican and international law;
- (9) that the U.S. NAO recommend ministerial level consultations if the relief outlined above is not obtained;

(10) that the U.S. NAO recommend the establishment of an Evaluation Committee of Experts (ECE) if relief is not obtained under ministerial consultations;

(11) that the U.S. NAO recommend the implementation of disputes resolutions procedures under Part V of the NAALC if an ECE does not provide the relief requested;

(12) that the U.S. NAO grant further relief, including convening an arbitral panel and the levying of monetary enforcement, if appropriate.

### **III. NAO REVIEW**

In conducting its review, the NAO considered information from the submitters, the employer, and the Mexican NAO. A public hearing was conducted in Washington, D.C. on March 23, 1998.

#### **A. Information from the Submitters**

Submission No. 9703 was filed on December 15, 1997. The petitioner's First Amended Submission with supporting affidavits was filed on February 13, 1998.<sup>3</sup> The NAO engaged in a teleconference and telephone conversations as well as written correspondence with the submitters in order to obtain additional information.

#### **B. Information from the Mexican NAO**

The U.S. NAO requested information from the Mexican NAO on freedom of association and safety and health as they apply to the instant submission, by letter on

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<sup>3</sup> The two documents are on file with the U.S. NAO.

March 4, 1998.<sup>4</sup> The Mexican NAO responded by letter dated April 23, 1998 providing information on Mexican law and practice on freedom of association and safety and health as well as the facts of the instant submission.<sup>5</sup> The Mexican NAO stated that the official records of the CAB with jurisdiction indicated that the allegations made by the submitters of violence and intimidation at the election are untrue.

**C. Information from the Employer**

The U.S. NAO requested information from both Echlin and ITAPSA in letters dated March 4, 1998.<sup>6</sup> Echlin responded on behalf of both by letter dated March 18, 1998.<sup>7</sup> Echlin stated it had contracted a third party observer to monitor the election and that the observer reported that the representation election was free of harassment and intimidation and that the vote was carried out without pressure or violence. Echlin also stated that ITAPSA did not hire armed agents but that CTM supporters armed themselves in response to intimidation by a large group of STIMAHCS supporters. Further, Echlin stated that, contrary to assertions by the submitters, it was STIMAHCS representatives who intimidated workers. Finally, Echlin asserted that allegations of the dismissal of fifty employees were false, but that eleven workers who alleged wrongful termination were reinstated by the company to their former positions. However, following a request by the union for their dismissal pursuant to the collective bargaining agreement and Article 365 of the FLL<sup>8</sup>, they were

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<sup>4</sup> Copy on file with the U.S. NAO.

<sup>5</sup> Copy on file with the U.S. NAO.

<sup>6</sup> Copies on file with the U.S. NAO.

<sup>7</sup> Copy on file with the U.S. NAO.

<sup>8</sup> FLL Article 365 is not relevant. FLL Article 395 is referred to as the Exclusion Clause, provides that a collective bargaining agreement may require the employer to hire only workers who are members of the representative union in the plant. The clause can also require that the employer dismiss from employment any worker expelled by the union.

removed from employment. Finally, Echlin stated that ITAPSA is regularly visited by safety and health inspectors and that it is in full compliance with health and safety laws.

**D. Public Hearing**

The U.S. NAO conducted a public hearing in Washington, D.C. on March 23, 1998. Notice of the hearing was published in the Federal Register on February 20, 1998.<sup>9</sup> Fifteen witnesses testified at the hearing, including representatives of the submitters, two of the workers involved in the case, two Mexican labor attorneys, and an expert on workplace safety and health in Mexico.

**E. Post Hearing Submission**

The submitters filed a post-hearing brief on May 25, 1998, elaborating on their arguments. The submitters provided information establishing the credentials of Dr. Francisco Mercado Calderón, the safety and health expert who testified at the hearing.<sup>10</sup> The submitters also submitted a Report on Violations of Human and Labor Rights in Mexico During 1997.<sup>11</sup>

The International Association of Democratic Lawyers submitted a report to the NAO on April 1, 1998, on its own review of the events that took place at ITAPSA. The report also

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<sup>9</sup> 63 Fed. Reg. 8690 (1998).

<sup>10</sup> On file with the U.S. NAO.

<sup>11</sup> Centro de Reflexión y Acción Laboral de Fomento Cultural y Educativo, A.C., *Derechos Humanos Laborales en México: entre la imagen protectora y una política de represión, Informe de violación de los Derechos Humanos Laborales en México, durante 1997*, (Mexico, March, 1998).

included information on the Han Young case<sup>12</sup> and that of the Mexican Petroleum Workers Union (PEMEX).

#### **IV. FREEDOM OF ASSOCIATION**

##### **A. NAALC Obligations and Mexican Labor Law**

##### **1. NAALC Obligations**

The relevant articles of the NAALC as they pertain to freedom of association in the instant submission are Articles 1, 1(b), 1(d), 1(g), 2, 3(1), 5(1), 5(2) and 5(4).

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

Article 1(d) states an objective of the Agreement is to:

encourage publication and exchange of information, data development and coordination, and joint studies to enhance mutually beneficial understanding of the laws and institutions governing labor in each Party's territory.

Article 1(g) commits the Parties to “foster transparency in the administration of labor law.”

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<sup>12</sup> See U.S. Department of Labor, Bureau of International Labor Affairs, U.S. National Administrative Office, *Public Report of Review of NAO Submission No. 9702*, (April 28, 1998).

Part Two of the NAALC sets out the obligations of the Parties. Article 2 addresses Levels of Protection and states:

Affirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each 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.

Article 3(1) commits the Parties to effectively enforce their labor law through appropriate government action, including:

- (a) appointing and training inspectors;
- (b) monitoring compliance and investigating suspected violations, including through on-site inspections;
- (c) seeking assurances of voluntary compliance;
- (d) requiring record keeping and reporting;
- (e) encouraging the establishment of worker-management committees to address labor regulation of the workplace;
- (f) providing or encouraging mediation, conciliation and arbitration services; or
- (d) initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor law.

Article 5(1) states that: "[e]ach Party shall ensure that its administrative, quasi-judicial, judicial and labor tribunal proceedings for the enforcement of its labor law are fair, equitable and transparent and, to this end, each Party shall provide that:

- (a) such proceedings comply with due process of law;
- (b) any hearings in such proceedings are open to the public, except where the administration of justice otherwise requires;
- (c) the parties to such proceedings are entitled to support or defend their respective positions and to present information or evidence; and

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

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

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

## **2. Relevant Mexican Law on Freedom of Association**

Freedom of association is protected by Mexico’s Constitution. Article 19 states that “[t]he right to association or to hold meetings for any legal purpose cannot be curbed.”<sup>13</sup> Article 123(A) establishes the framework for regulating labor matters in the private sector and protects workers from dismissal or reprisal by employers for union activities.<sup>14</sup>

Mexican labor law in the private sector is codified as the Federal Labor Law (*Ley Federal del Trabajo*) (hereinafter FLL).<sup>15</sup> Relevant to the freedom of association issues raised in the instant submission are Articles 47 (dismissal), 133 (employer prohibited practices), 357-358 (right to organize) 371 (union by-laws) and 395 (exclusion clause).

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<sup>13</sup> *Political Constitution of the United Mexican States* (hereinafter Constitution of Mexico or Mexican Constitution), Article 19.

<sup>14</sup> *Constitution of Mexico*, Article 123, Paragraph XXII.

<sup>15</sup> *Federal Labor Law*, (as amended through December, 1995) (Ormond Beach, Florida, Foreign Tax Law Publishers, Inc., trans.), hereinafter the FLL. This English translation of the FLL is used throughout this report.

FLL Article 47 lists the causes for which an employer can dismiss an employee for cause. The list includes fifteen causes, ranging from falsification of the employment application to committing immoral acts to drunkenness on the job.

FLL Article 133 lists prohibited employer practices, including obliging “workers by coercion or any other means to affiliate or withdraw from a union or group to which they belong, or vote for a determined candidate.”<sup>16</sup>

FLL Article 357 states that: “Workers and employers shall have the right to establish trade unions without prior authorization.”

Article 358 states:

Nobody shall be obliged to join or abstain from joining a trade union.

Any stipulation which prescribes an agreed fine for leaving a trade union is contrary to the provisions contained in the preceding paragraph and shall be null and void.

FLL Article 395, known as the Exclusion Clause, states:

A collective contract may stipulate that the employer shall admit to his employment only persons who are members of the trade union which is a party to the contract. This clause and any other clause laying down privileges in their favor shall not be applied so as to prejudice workers (non-members of the trade union) already employed in the enterprise or establishment prior to the date on which the trade union asks for a collective contract to be made or the revision of an existing collective contract with the inclusion therein of any such exclusion clause.

It may also be established that the employer shall dismiss members who withdraw or who are expunged from the contracting union.

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<sup>16</sup> FLL Article 133(IV).

According to the Mexican NAO, a worker who is the member of one union and requests representation by another union, may be terminated from employment using the exclusion clause.<sup>17</sup>

Article 395 is regulated, however, by Article 371, which specifies that union by-laws must contain the provisions for expulsion or other disciplinary action of members, and states, in relevant part:

The by-laws of the trade union shall contain:

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- VII. grounds and procedure for expulsion and disciplinary penalties. In the case of expulsion the following rules shall be observed:
- (a) a meeting of the workers shall be called for the sole purpose of informing them of the expulsion;
  - (b) in the case of trade unions subdivided into sections the expulsion procedure shall be carried out at a meeting of the section concerned; the motion of expulsion shall be submitted to the workers of each one of the sections of the trade union for their decision;
  - (c) the worker concerned shall be entitled to make a statement in his defense in accordance with the rules;
  - (d) the meeting shall hear the evidence on which the motion of expulsion is based and the evidence shall be submitted to the worker concerned;
  - (e) workers shall not be represented by proxy vote by correspondence or in writing;
  - (f) expulsion shall be approved by the two-thirds majority of the total membership of the trade union;

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<sup>17</sup> Letter from the National Administrative Office of Mexico (February 3, 1995) (on file with the U.S. NAO).

- (g) expulsion may be decided only in those cases expressly stipulated in the rules, duly evidenced and exactly applicable to the case.

### **3. Relevant Law on Labor Tribunals and Labor Tribunal Proceedings**

FLL Articles 604 through 624 establish the Conciliation and Arbitration Boards (CABs) as the primary authorities responsible for the adjudication of individual and collective labor-management disputes, union representation and jurisdictional disputes, and other disputes deriving from the employment relationship. Federal CABs have authority over industries specifically identified in the FLL, while local CABs, operating under the authority of the states, have jurisdiction over all other industries. All CABs, however, enforce the same national law - the FLL.<sup>18</sup> The Secretariat of Labor and Social Welfare may establish special CABs in different geographical locations with a geographic jurisdiction. The automotive industry is under Federal jurisdiction and authority in this case was exercised by Special Federal CAB No. 15 located in the State of Mexico.

FLL Articles 625 through 675 govern the composition of the CABs. Each CAB consists of one representative from the government, who is the President, and one representative each from management and labor. A Secretary General, assisted by a support staff, manages the affairs of the tribunal. The Presidents are designated by the Secretary of Labor and Social Welfare in the case of Federal CABs, and by the Governors of the states in the case of local CABs, and serve for a term of six years. Labor and management representatives are selected in conventions held by their respective organizations conducted under the supervision of the federal or state labor authorities. They also serve for six-year terms. The FLL provides detailed procedures for convening the conventions, selecting delegates, and the election of representatives to the CABs. In practice, the largest and most representative labor organizations within the area of

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<sup>18</sup> The Federal Labor Law (FLL) is national in scope. Enforcement and implementation is shared between Federal authorities and state governments.

jurisdiction of the CAB are those represented on the CABs.<sup>19</sup> These unions are the large and established labor organizations, such as the CTM, CROM, and CROC.<sup>20</sup> The labor representative on Special CAB No. 15 was nominated by the CTM.

FLL Article 671 lists causes for discipline or removal of employer and worker representatives in the CAB. Paragraph IX includes “voting for a resolution that is notoriously illegal or unjust.”

CABs have jurisdiction over a wide range of labor disputes from individual cases involving wrongful dismissal to collective cases involving union representation and strikes.<sup>21</sup> The Secretariat of Labor and Social Welfare estimates that Federal CABs heard about 53,000 cases during 1996.<sup>22</sup>

Oversight and regulation of unions are exercised by the Secretariat of Labor and Social Welfare (STPS) and Federal CABs in the case of unions under Federal jurisdiction and by the local CABs in the case of industries under state jurisdiction. The CABs adjudicate jurisdictional disputes between competing unions.

FLL Articles 892 through 899 prescribe procedures for adjudicating jurisdictional disputes; Article 895 provides for a representation election if appropriate to determine

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<sup>19</sup> U.S. Department of Labor, Bureau of International Labor Affairs, *Seminar on Union Registration and Certification Procedures*, San Antonio, Texas, November 8, 1995, p. 47. This seminar was the second in a series of three such programs conducted pursuant to an Agreement on Ministerial Consultations on NAO Submission No. 940003.

<sup>20</sup> *Foreign Labor Trends: Mexico, 1995-1996*, p. 14.

<sup>21</sup> FLL Article 604 defines the scope of jurisdiction of the CABs.

<sup>22</sup> *Program for Employment, Training and the Defense of Labor Rights: 1995-2000 (Programa de Empleo, Capacitación y Defensa de los Derechos Laborales: 1995-2000)*, Secretariat of Labor and Social Welfare, Mexico (1996), p. 79.

bargaining rights. FLL Article 899 states: "The provisions of Chapters XII and XVII of this Title shall be observed in all that is applicable to the special procedures in this Chapter." Articles 883 through 891 address procedures and time frames, relevant to this submission, in arriving at and issuing formal awards by the CABs.

Article 873 of Chapter XVII states:

**Hearing of conciliation claim and exceptions.** The Full or Special Board, within the 24 hours following the moment it receives the written petition, shall pronounce a decision in which it sets forth a day and hour for holding the conciliation hearing, petition, exceptions, offerings and admission of evidence, which must be carried out within the 15 days following the receipt of the written petition. In the same decision it shall order that the parties be notified personally at least 10 days in advance of the hearing, sending a copy of the petition to the defendant, and ordering that the parties be notified with the summons to the defendant, his affirmative answer to the petition and of the loss of the right to offer evidence if they do not attend the hearing.

Article 874 states:

Failure of notification of any or all of the defendants shall oblige the Board to stipulate *ex officio* a new day and hour for holding the hearing, unless the parties appear or the plaintiff desists from the actions brought against the defendants who have not been notified.

FLL Article 931 on the rules for a representation election (*recuento*) states:

If a recount of the workers is submitted as evidence, the following rules shall be observed:

- I. The Board shall fix a place, date and hour in which it must be made;
- II. Only workers employed in the enterprise who are present when the recount is taken shall have the right to vote;
- III. Workers dismissed after the date of presentation of the notice of intention to strike shall be deemed to be employees of the enterprise;
- IV. The votes of workers in positions of trust and workers recruited after the date of presentation of the notice shall not be counted.

According to the Mexican NAO, voting is conducted by open ballot in the presence of a representative of the CAB. Secret ballots are conducted only if the two contending unions agree.<sup>23</sup>

**B. International Labor Organization Conventions And Standards on Freedom of Association**

The submitters maintain that Mexico has failed to enforce ILO Convention 87 on freedom of association; Article 22 of the International Covenant on Civil and Political Rights; Article 23(4) of the Universal Declaration of Human Rights; and Article 8(1) of the International Covenant on Economic, Social and Cultural Rights.

Conventions of the ILO are the most germane to the review of this submission. The relevant conventions are No. 87, Freedom of Association and Protection of the Right to Organize Convention, 1948, and No. 98, Right to Organize and Collective Bargaining Convention, 1949. Mexico has ratified Convention 87 but has not ratified Convention 98.<sup>24</sup> Convention 87 aims to ensure the right, freely exercised, of workers and employers, without distinction, to organize for furthering and defending their interests. Convention 98 provides for the protection of workers who are exercising the right to organize; non-interference between workers' and employers' organizations; and the promotion of voluntary collective bargaining. In general, the ILO Committee of Experts on the Application of Conventions

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<sup>23</sup> Letter from the National Administrative Office (NAO) of Mexico dated February 3, 1995, Subject: Questions on Submissions Nos. 940003 and 940004, (on file with the U.S. NAO).

<sup>24</sup> The ILO Declaration on Fundamental Principles and Rights at Work, adopted by the 86th Session of the International Labour Conference in June, 1998, provides that all members, even if they have not ratified the Conventions in question, have an obligation to promote the principles concerning fundamental rights which are the subjects of those conventions, including freedom of association and the right to collective bargaining.

and Recommendations has found that efforts by governments<sup>25</sup> and employers<sup>26</sup> to coerce workers or otherwise influence their choice of the organization to which they wish to belong are inconsistent with Conventions 87 and 98.

The application of the exclusion clause, known as the closed-shop agreement in the U.S., is an important element of the submission. The exclusion clause is permitted under FLL Article 395 and usually provides that (1) an employer will hire exclusively members of the union; and (2) that workers who are expelled from the union will be dismissed from employment. The Committee of Experts has addressed the issues of trade union monopoly, unity and union security clauses, all of which are relevant to the exclusion clause as applied in this case and has attempted to strike a balance between trade union unity and the right of workers to choose their union. On the one hand, the Committee has found that union security clauses that require an employer to recruit only workers who are members of the union and for employees to remain union members to remain employed are compatible with Convention 87.<sup>27</sup> On the other hand, the Committee has stated clearly that, whereas unity is desirable, workers must be afforded freedom of choice. In this regard, the Committee stated:

The right of workers and employers to establish and join organizations of their own choosing raises the problem of trade union monopoly. The difficulty arises where the legislation provides, directly or indirectly, that only one trade union may be established for a given category of workers. Although it was clearly not the purpose of the Convention to make trade union diversity an obligation, it does at the very least require this diversity to remain possible in all cases. There is a fundamental difference between, on the one hand, a trade union monopoly established or maintained by law and, on the other hand, *voluntary* groupings of workers or unions which occur (without pressure

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<sup>25</sup> International Labour Conference, 81<sup>st</sup> Session, Report III (Part 4B), *Freedom of Association and Collective Bargaining* (Geneva, International Labour Office, 1994), par. 104.

<sup>26</sup> *Ibid.*, par. 231-232.

<sup>27</sup> *Ibid.*, par. 102.

from the public authorities, or due to the law) because they wish, for instance, to strengthen their bargaining position, coordinate their efforts to tackle ad hoc difficulties which affect all their organizations, etc. It is generally to the advantage of workers and employers to avoid proliferation of competing organizations, but trade union unity directly or indirectly imposed by law runs counter to the standards expressly laid in the Convention.<sup>28</sup>

The Committee went on to state:

Movements to group together may also occur among trade unions, independently of legislation or any pressure by the public authorities, when the workers or their unions join voluntarily in a single organization, for example in order to strengthen their position at the bargaining table or to better deal with structural reform or changes affecting their activities. In these circumstances, the committee believes that the same basic principle is applicable: Convention No. 87 implies that pluralism should remain possible in all cases. Therefore, the law should not institutionalize a factual monopoly; even in a situation where at some point all workers have preferred to unify the trade union movement, they should still remain free to choose to set up unions outside the established structures should they so wish. Furthermore, the rights of workers or employers who do not wish to join the existing trade unions or central organizations should also be protected.<sup>29</sup>

The Committee of Experts has also commented on interference in workers' and employers' organizations by each other, stating:

Article 2 of Convention No. 98 provides that workers' and employers' organizations shall enjoy adequate protection against any acts of interference by each other. It is important, therefore, that whenever it appears that there is insufficient protection against interference or that such acts do occur in practice, governments take specific action, in particular through legislative means, to ensure that the guarantees provided for in the Convention are respected and to give these provisions the necessary publicity to ensure that they are effective in practice.<sup>30</sup>

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<sup>28</sup> Ibid., par. 91.

<sup>29</sup> Ibid., par. 96.

<sup>30</sup> Ibid., par. 234.

The Committee considered that it is important that countries provide an objective means to determine collective bargaining representation in an enterprise, though it did not precisely specify how this should be done:

Representativity may be determined by the number of members or by secret ballot. The Committee considers that, in order to encourage the harmonious development of collective bargaining and avoid disputes, it would be desirable to draw up and apply objective procedures which make it possible to determine the most representative trade unions for the purpose of collective bargaining when it is not clear which trade unions the workers would like to represent them.<sup>31</sup>

ILO bodies have been consistent in criticizing employer efforts to control or favor one union organization over another. The Committee of Experts opined on an employer affording certain advantages to a union such as contributing to financing or making available premises or facilities:

In the view of the Committee, while there is no objection *in principle* to an employer expressing its recognition of a trade union as a social partner in this manner, this should not have the effect of allowing the employer control over a trade union, or favouring one trade union over another.<sup>32</sup>

In a complaint communicated to the ILO's Committee on Freedom of Association in 1975, the World Confederation of Labor (WCL) asserted that when it attempted to organize workers into a union at a the Spicer company in Mexico City, the company engaged in a campaign of pressure, physical, and other methods to dissuade the workers from disaffiliating from the existing union. The WCL alleged that the existing union:

[p]rohibited meetings, sold permanent posts, invented deaths in order to check off supplementary contributions from the workers, and dismissed, along with the company, workers who made any kind of protest.<sup>33</sup>

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<sup>31</sup> Ibid., par. 242.

<sup>32</sup> Ibid., par. 229.

<sup>33</sup> International Labour Office, 157th Report of the Committee on Freedom of Association, (Geneva, 1976) Case No. 827 (Mexico).

The WCL further asserted that the company threatened to dismiss workers and, subsequently dismissed a total of 650 workers after they went on strike. Following the intervention of the STPS, most, but not all, of the dismissed workers were reinstated. The dismissed workers, however, were paid the full indemnification to which they were entitled. The Committee stated that it considered that:

the events as described by the complainants tend to show that the attitude and measures adopted by the company, including the dismissals, resulted in the commission of acts of anti-union discrimination which were motivated by the exercise of the workers' right to organize and action taken by them to defend this right.<sup>34</sup>

The Committee went on to note the conciliatory intervention of the labor authorities in the case and recommended the Governing Body:

ask the Government to examine what measures could be taken in order to provide fuller protection to workers against acts of anti-union discrimination and interference in the establishment of their organizations . . .<sup>35</sup>

The Committee reviewed a complaint filed against the Government of India for violations of trade union rights in 1982. The complaint was made by the Centre of Indian Trade Unions (CITU) and alleged anti-union discrimination by management against tea plantation workers in the State of Assam, with the complicity of police forces, through such action as torture, unjustified dismissal, destruction of houses and property of trade unionists, and sexual harassment of the wives of union leaders. According to the CITU, the repression was for the purpose of pressuring the workers to leave the CITU affiliated union and return to the Indian National Trade Union Congress (INTUC), the largest union organization in the country which was closely associated with the dominant political party at the time, the Indian National Congress. The Committee noted:

Normally, the Committee considers that a matter consisting solely of a conflict within the trade union movement itself is the sole responsibility of the parties themselves. However, a complaint against another organization, if couched in sufficiently precise terms to be capable of examination on its merits, may

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<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

bring the government of the country concerned into the question, e.g. if the acts of the organisation complained against are wrongfully supported by the government or are of a nature which the government is under a duty to prevent.<sup>36</sup>

In this case the Committee observed that the complainant did not provide detailed information to substantiate the allegations and the Committee did not possess sufficient information to continue its examination. The Committee went on to state, however, that:

as regards the police violence in October 1980, the Committee draws the Government's attention to the principle that security of the person is one of the civil liberties which are essential for the normal exercise of trade union activities and expresses the hope that an inquiry into the police action will be carried out and will help to restore the situation to normal . . .<sup>37</sup>

## **C. Analysis**

### **1. NAALC Article 3 Issues**

The allegations of violations of freedom of association protections made by the submitters fall into four categories. These are:

1. Intimidation of workers, including surveillance, threats of closure, threats of dismissal, and dismissal of workers in the period leading up to the representation election in an effort to affect its outcome. These allegations are made against union officers of CTM Section 15 and supervisory employees of ITAPSA.
2. Manipulation of the representation election process by Special CAB No. 15, so as to affect the outcome of the election in favor of CTM Section 15. This

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<sup>36</sup> International Labour Office, 214th Report of the Committee on Freedom of Association, (Geneva, 1982), Case No. 1069 (India).

<sup>37</sup> Ibid.

includes the postponement without notice of the election date; the conduct of the election on September 9, 1997, in an atmosphere of intimidation and violence where workers were required to state their union preference publicly in the presence of representatives of the employer, both unions (including alleged hired thugs of the CTM), and government representatives; and allowing access to the polls to individuals who may not have been authorized to vote without checking their credentials.

Following the election, the submitters allege further manipulation of the adjudication process by Special CAB No. 15 in response to the efforts by STIMAHCS to challenge the outcome of the election. This includes allegations that STIMAHCS was not notified of a hearing; not informed of its proceedings; and denied the opportunity to present its case.

3. Retaliatory dismissal of workers who supported STIMAHCS and, following the reinstatement of a number of these workers by the CAB, through the application of the exclusion clause by CTM Section 15.
4. The physical attack on dismissed employees of ITAPSA and employees of American Brakeblock who were demonstrating outside the premises of American Brakeblock.

The Echlin Corporation challenged these allegations. In its written statement of March 18, 1998, the company argued that allegations of retaliation against and dismissal of employees for their support of STIMAHCS are false; that several workers who alleged termination were reinstated by the CAB only to be terminated for violation of Clause 10 of the collective bargaining agreement and Article 365 of the FLL; and that no acts of violence or intimidation took place during the balloting on September 9 that could have altered the outcome. Echlin maintains that any intimidation prior to and during the representation

election was initiated by STIMAHCS and its supporters, and that the strategy of the FAT and STIMAHCS "has been and continues to be one of distortions, misrepresentations, and lies."<sup>38</sup>

The Mexican NAO stated that the Federal CAB has no information concerning allegations of intimidation against workers at ITAPSA by either the CTM or the company management. Further, the CAB has no record of violence or intimidation occurring during the representation election and the Mexican NAO, therefore, concludes that the instances of violence and intimidation described in the submission did not take place. The Mexican NAO also stated that workers who allege they were dismissed in reprisal for their support of STIMAHCS have recourse to the Federal CAB to pursue individual actions.<sup>39</sup>

**a. The Representation Campaign.**

The submitters support their argument with written affidavits and testimonial evidence from workers involved in the case. Twelve workers signed affidavits attesting to intimidation and surveillance by both management and the CTM prior to the representation election, dismissal in retaliation for supporting STIMAHCS, the postponement of the August 28 election, and the circumstances surrounding the representation election on September 9, 1997. The affidavits and testimonial evidence are consistent in their description of events. With regard to the events prior to the election, Mr. Celestino García Luna stated:

We knew we were being watched by the supervisors and the CTM delegates in the plant. They knew who the supporters of the union were. The reason I knew that we were being watched is that every time we as workers who

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<sup>38</sup> Letter from the Echlin Corporation, March 18, 1998.

<sup>39</sup> Mexican NAO letter dated April 23, 1998.

supported STIMAHCS would get together in the plant, one of the bosses would immediately come over to where we were.<sup>40</sup>

Mr. Gildardo Hernández Lopez testified that:

On or about the first week of August, Roberto, the CTM delegate in the factory, came by my work station and asked me if I knew anything about union activity in support of STIMAHCS. He told me that if we voted against the CTM the company would close the plant or fire some of the workers involved in helping STIMAHCS in the shop. He said this to other workers as well.<sup>41</sup>

In a written affidavit, Mr. Juan Miguel Parada León stated:

Between May 26 and August 28, 1997, many more workers were fired. August 28, 1997 was the scheduled vote for the union. I knew that a woman named Verónica was fired for her union activities, and she was the first of the five workers fired. The company told her that she was being fired for union activity, and she told us in a union meeting because a fellow worker had gone to the company to tell them that she was involved in union organizing. After her they fired another worker, Rubén Ruíz Rubio, on or about July, 1997. Rubén reported to us that he was told by a engineer from American Brakeblock that he was fired for his activism in support of STIMAHCS. American Brakeblock is part of ITAPSA. I saw that Rubén was called to this manager's office and afterwards he told me that he was fired. The other workers fired were David Gonzalez, a man named Alejandro and María Trinidad. I believe that these three who were fired in late July or early August were fired to intimidate the rest of the STIMAHCS supporters in the shop. I worried that I might be fired.<sup>42</sup>

Mr. Rubén Ruíz Rubio became active in the STIMAHCS organizing effort. In his written affidavit, Mr. Ruíz stated:

In between when the demand was filed on May 26th, 1997 and the date of the initial vote on August 28<sup>th</sup>, 1997, the company fired about 50 workers. Many of the people who were fired were involved in organizing, but also

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<sup>40</sup> *NAO Submission No. 9703*, affidavit by Celestino García Luna.

<sup>41</sup> *Ibid.*, affidavit by Gildardo Hernández López.

<sup>42</sup> *Ibid.*, affidavit of Juan Miguel Parada León.

many of them weren't. I believe they were just fired to intimidate the workers to stop us from supporting STIMAHCS.<sup>43</sup>

Mr. Ruiz testified at the hearing on the intimidation prior to the representation election:

In early June, and when the company was notified that there had been this request [representation petition], it started harassing the workers. We were called in one by one, into the offices, and we were asked who was involved in this movement. When they received no answer from the workers, the company started firing workers, trying to guess who the responsible individuals were.<sup>44</sup>

Mr. Ruiz went on to testify on shift changes and intimidation in response to his union activities and his eventual dismissal.<sup>45</sup>

Ms. María Trinidad Delgado Navarro, who also became active in the organizing testified that she was subjected to surveillance by the company and the CTM at her home:

[A] few days before the election, right outside my house, a green car was parked in front of my house and remained there for about an hour and a half, right in front of my house. This car had two people inside and I started to get real scared because I had been watched before by other people who had been hired by the company.

I started getting even more afraid when I realized that the car was going in and out of the company in the morning, at night, and in the morning it went in and out and I recognized it afterwards. I hadn't realized it originally, but I realized afterwards, and I got really panicky. I felt that the reason they were

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<sup>43</sup> *NAO Submission No. 9703*, affidavit of Rubén Ruiz Rubio.

<sup>44</sup> *Public Hearing on NAO Submission No. 9703*, (March 23, 1998), p. 81. The hearing was conducted in English with simultaneous translation from and to Spanish. The transcript is in English. The statements of Spanish speaking witnesses are translations.

<sup>45</sup> *Ibid.*, pp. 81-83.

doing this was to make me stop my union activities because I was always leafleting with my fellow workers who were still in the company.<sup>46</sup>

Ms. Delgado also testified on intimidation within the plant:

When the company and union realized that we were organizing a movement, we were called one by one to be verbally or psychologically intimidated. We were told many things. Personally, I was told not to get involved in that union movement because we were not acting right. We were told that if I lost my job because I was someone who did not have a permanent job in the company, what was I going to do? How was I going to get my children ahead in life? How was I going to be able to get the money to feed them and educate them? That's how they put it to me.

And they also told me that we had to think of all the other people who were older and who were not going to find jobs that easily if they were dismissed, and especially taking into consideration their age.<sup>47</sup>

Ms. Delgado was subsequently fired from her job.

Mr. Joaquin Hernández Alanis testified on the cancellation of the election scheduled for August 28:

On or about the 28th of August at about 11:00 during the time the union election was supposed to take place, I was called into a meeting with all of the workers from the morning shift. The meeting was led by Aceves, the representative of the CTM. In this meeting he emphasized that there would be no election today and that STIMAHCS had let us down and how can we support such a weak union. At one point during this meeting Aceves singled me out saying that the CTM doesn't buy people with tacos as Alanis says. I felt that Aceves said this because he wanted to make sure that I and all the other workers knew that the CTM and ITAPSA were watching us and that our jobs were at risk and to discourage us from organizing with STIMAHCS.<sup>48</sup>

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<sup>46</sup> Ibid., pp. 104-105.

<sup>47</sup> Ibid., p. 102.

<sup>48</sup> Ibid.

Mr. Benedicto Martinez Orozco, Secretary General of STIMAHCS, submitted a written affidavit and testified at the public hearing. On the sudden postponement of the August 28 vote, Mr. Martinez stated:

[A]t eleven o'clock in the morning, on the 27th of August, the CTM requests that the election be canceled, saying that it had not been notified and interestingly enough, the CAB agrees to that request and cancels the representational election on August 28th.

By that time we had convoked the second shift and third shift workers to come to the plant at the earlier time in order to vote. It's very important to stress this because the law states that only workers who are present may vote, and for us organizing these workers meant really gathering all of these workers and having them be present, even those who come in at ten o'clock at night, they had to make a special effort to show up at eleven o'clock in the morning which was the time set for the election.

I was very worried at that time because I all of a sudden understood the trick that they were playing against us and our workers. They were trying to keep them busy and prevent the workers who were trying to change unions from coming, because they are the ones that are going to vote. The company through its workers -- some of its workers -- was also filming everybody who was arriving. So that's the trick that they were using to discover who were the more active members in our union in order to be able to fire them.<sup>49</sup>

The Echlin Corp. denies that any workers were dismissed for their support of STIMAHCS or that ITAPSA otherwise intimidated or retaliated against its employees. However, Echlin acknowledged in its statement that a number of workers were reinstated following the CAB's order or elected to accept severance pay in lieu of reinstatement. Echlin's statement is unclear as to the reasons for the dismissal of these workers in the first place. The timing of the dismissals and the circumstances surrounding the representation campaign, however, raise questions as to management's motives. The statements and testimony of workers appear to be consistent and credible. The dismissals and retaliation described herein are consistent with those described in other submissions dealing with

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<sup>49</sup> Ibid., pp. 47-48.

union representation reviewed by the U.S. NAO.<sup>50</sup> The Mexican NAO did not provide information on the ITAPSA related CAB cases which precludes a full examination of the reasons and circumstances of the dismissals of the workers and the basis for the CAB's decision in ordering their reinstatement.

FLL Article 133(IV) prohibits employers from attempting to influence workers' affiliation or withdrawal to or from a union or to support a particular candidate. The information reviewed by the NAO is strongly indicative that the company engaged in prohibited activities, including surveillance, threats and intimidation, and outright dismissal, for the purpose of affecting the outcome of the representation election.

**b. The Representation Election.**

Written affidavits and testimonial evidence describe an atmosphere of intimidation and potential violence at ITAPSA on the day of the representation election on September 9, 1997. Mr. Gilberto García Galicia stated that:

I arrived at the factory with many other fired workers at around 8:00 a.m.<sup>51</sup> We met in the area outside the factory. There was a big group of people from the CTM whom I had never seen before. We call them "golpeadores" or hired thugs. They were standing outside the factory. They said that they didn't care if there was an election or not and that it would be better for us if we left. There was a group dressed in the northern style who looked like

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<sup>50</sup> Submissions No. 940001, 940002, 940003, 940004, 9501, 9602, and 9702 involved efforts by workers to organize an independent union or affiliate to a different union in opposition to the established union in the workplace. All of these submissions raised the matter of intimidation, harassment, retaliation and dismissal of workers for their union efforts. These allegations were found to be credible and reported on by the U.S. NAO in its reviews of Submissions 940003 and 9702.

<sup>51</sup> Workers who are fired after a petition for a representation election is filed are eligible to vote in the election. STIMAHCS filed its petition on May 26, 1997, and all workers dismissed after that date were entitled to vote in the representation election.

cowboys and another group not as well dressed who looked like street thugs and trouble makers. We decided to move away down the street a little way to avoid trouble.

At about 11:00 a.m. we returned to the front of the factory when the representatives of the government arrived. After the representatives of the government entered the factory, I and several other fired workers climbed on top of a truck parked outside the factory. From the top of the truck we were able to see over the factory wall. We saw many of the CTM thugs carrying thick sticks and pipes. We also saw many people from the third shift still inside the factory even though their shift had ended many hours early.<sup>52</sup>

Mr. Guillermo Hernández Márquez stated:

On September 9th, 1997 I arrived at the ITAPSA factory at 8:00 a.m. in the morning and I saw that there were about 50 persons who I did not recognize as workers of ITAPSA standing out front of the factory. I also saw one person on the roof with a rifle hanging from his shoulder. We moved away from the plant because other supporters of STIMAHCS said that these persons had threatened them. We gathered together to go to the factory together to defend ourselves from those who were threatening us. We went together at about 9:00 a.m.

When we returned to the factory, there were about 100 people with an aggressive attitude standing out front. Some of them appeared inebriated or drugged because their behavior was aggressive and strange. Some of them had blood shot eyes. Later a man with a black hat come out who I had not seen before either, and ordered them to come into the factory. They threw plastic bottles at us from inside the plant and would yell out insults.

I and other fired STIMAHCS supporters waited outside during the voting. We had hopes that we would be allowed to enter but that was not the case. The JFCA [CAB] authority came out of the factory to take our votes. At about 12:00 p.m. the official came out to take our vote.<sup>53</sup>

Ms. Delgado described the scene at the plant on the day of the representation election:

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<sup>52</sup> *NAO Submission No. 9703*, affidavit of Gilberto García Galicia.

<sup>53</sup> *Ibid.*, affidavit of Guillermo Hernández Marquez.

Before the voting started, a few minutes before we returned, we saw the same people that we had seen in the morning, and some more who were on top of the walls, and even more people who were carrying some communicating devices . . . in a very aggressive attitude against us. They were looking at us in a threatening way and yelling things at us, and throwing things at us -- bottles and trash.

And we saw the labor authorities arriving with our lawyer and the secretary general to go into the plant so that the election could take place. To our surprise, we saw that as they came close to the door, they were denied entrance, and we even saw that the person who was representing the labor authority was not being allowed to go in and we thought that the election was not even going to take place again. We didn't know what was going on though.

But fighting and continuing -- they finally spoke or were allowed in. We went on -- into -- onto a very high car and were able to see what was going on inside, because we were worried for the people who were still inside and working, and were going to be voting because the company put on these sort of loudspeakers with terribly loud music, and it was impossible to hear what was going on inside.<sup>54</sup>

She also described the effect this had on her fellow workers:

We climbed onto the car and we saw a large number of people inside with clubs and sticks . . . I don't know what exactly they were being told, but our fellow workers were really panicky. They were scared. We'd never seen such fear in anybody's face. They were really scared.

The people were yelling to us from inside --something that we couldn't hear unfortunately, but we imagined from the expressions on their faces that they were yelling rude things at us, and cussing, and they were making a lot of noise, and they were receiving all these orders from the gentleman with the black hat, who was telling them and shoving them places, and then they would go to the places he pointed to.<sup>55</sup>

STIMAHCS Secretary General Martinez described the representation election as follows:

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<sup>54</sup> *Public Hearing on NAO Submission No. 9703*, pp. 106-107.

<sup>55</sup> *Ibid.*, p. 107.

We finally were able to enter [the plant property] with the authorities, and when we did so, we found to our surprise that in the yard of the plant there were more than about 150 people -- it was full -- they had clubs and pipes -- metal pipes, and they were verbally threatening us with signs in their hands and saying that they had the photographs showing us, that it meant we were going to be killed.

And we start forcing our way in and finally reached the office where the representation election was going to take place. For some of us who participated in any of these representation elections -- I don't want to say we're used to it -- we're still afraid, but the first thing that comes to mind is how would the workers feel when it's their first experience of an election like this? And when we've told them that they have the right enshrined in the law and that it's not illegal, and they find themselves with circumstances like that?<sup>56</sup>

Mr. Martinez described the scene inside the room where the balloting was to take place:

The first agreement we reached [with CAB officers and CTM representatives] was that we insisted the authority get rid of any of the people that were alien to the company from the office where the agreement was going to be discussed. There was 20-30 people that had nothing to do there in this small office which was maybe four times five meters large, and the first agreement was that only three of each one of the organizations -- three from the CTM, three from us and three from the company -- we were the only ones to be allowed to go in.

Well, we thought we had progressed, we had an agreement. We thought that they were going to comply with the agreement, and when the representation election begins, we find to our surprise, that the office is full of these thugs, and there's only three of us.

Right then we asked the authorities [CAB officers] that we interrupt the elections under those circumstances and that they are in the obligation of suspending the representation election because there's threats, there are acts of violence because throughout the process and the discussion we felt the threat personally, and our brother David was finally struck -- were always threatened that we were going to be hit and we were constantly being threatened and we were asking them to suspend the election because it was

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<sup>56</sup> Ibid., p. 48.

impossible to carry out the elections under those circumstances, and the workers had to go one by one to cast their vote in front of all these people.

I don't know whether the authorities were disregarding what we were saying or were closing their eyes to what was going on, it seemed to us that they were in some other world because they continued the process. We continued to insist. The first worker comes in and the thugs formed like a whole corridor for them to go through, and the legal counsel of the CTM union is the one who goes and asks for the credential to bring him in, to identify himself at the election table and we protest. We say that cannot be done. You are forcing them, you're intimidating the worker to vote and then he knows who's in control. He knows who's there and that's forbidden, we insist.

And yet they do it. And the authorities do not object to this. They continue to carry out the process under those circumstances.

Another event that took place was that we received a general list of workers . . . and for me it was impossible to check which -- whether the worker that was casting his vote was a worker or not. There were three actuaries who were there, and I was alone because the lawyer was on one side and David was trying to make sure that they didn't hit the brothers that were elsewhere, doing other things that we had asked them to do. So it was really very difficult to make sure that those who were casting the vote were really the workers who had a right to do so.<sup>57</sup>

Mr. Rubén Ruíz spoke of the balloting and the aftermath:

We were very afraid, by the way, because we were outside and we imagined the people inside would have been even more afraid. We were totally confused. We knew that it would be difficult to beat the company and the union, but we were sure that we were going to win the election because most of the people -- 70 percent, 80 percent of the people had told us they would vote for us. They were sure. We were sure as well.

But given the circumstances, fear gained the upper hand. They didn't vote for the reasons that Mr. Martinez has given you, and we also were afraid. When we voted, we were shaking. We were shaking in fear because we voted in the presence of the actuary and the secretaries general of both unions, and of the thugs, and they were insulting us and calling us names. We were very scared.

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<sup>57</sup> Ibid., pp. 49-51.

But the group outside felt a little safer, but we were still very -- very afraid. After the election, the Secretary General came out and said that we had lost. This was a disaster. We were very sad. We felt miserable. We didn't know what to do and we didn't know what solution to adopt or what to do next.<sup>58</sup>

Mr. Martinez stated STIMAHCS filed objections to the conduct of the election:

And under those conditions, we finally concluded the representation election. Immediately in the minutes -- we stated that we object to the procedure and it's set down in writing and all the parties signed. We objected to the whole procedure because it was carried out incorrectly because there are a series of violations of all rights, and a violation of the procedures itself . . . ."<sup>59</sup>

The official minutes closing the election proceeding include this statement that the election was conducted in an atmosphere of violence and intimidation in the presence of hired thugs of CTM Section 15. The document records the statement of the Section 15 representative that the allegations made by STIMAHCS are false and that the CAB should certify the results of the election. The representatives of the CAB made no statement of their own as to the facts. However, press accounts in two of Mexico's major daily newspapers, *La Jornada* and *El Universal*, stated that the workers of ITAPSA were practically held hostage in the plant and required to vote in the presence of 170 armed thugs.<sup>60</sup>

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

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<sup>58</sup> *Ibid.*, pp. 86-87.

<sup>59</sup> *Ibid.*, p. 52.

<sup>60</sup> Ramón Alvarado, René, and Martínez, Fabiola, "In La Paz, Thugs Prevent Workers of ITAPSA from Leaving the CTM" (*En La Paz, golpeadores impidieron a trabajadores de Itapsa dejar la CTM*), *La Jornada*, September 10, 1997, p. 58; Aziz Nassif, Alberto, "Union Democracy: The Next Step" (*La democracia sindical: siguiente paso*), *La Jornada*, September 23, 1997; Lazaro, Juan, "ITAPSA Workers Intimidated so as Not to Leave the CTM" (*Intimidan a trabajadores de Itapsa para que no abandonen a la CTM*), *El Universal*, September 11, 1997.

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.

FLL Article 133(IV) prohibits employers from attempting to influence workers' affiliation to, or withdrawal from, a union or to support a particular candidate. Article 358 states that nobody may be compelled to join or withdraw from a union. The information reviewed by the NAO is strongly indicative that CTM Section 15 engaged in threats and intimidation for the purpose of affecting the outcome of the representation election. It is also apparent that the company at least condoned this intimidation by providing access to the plant premises for supporters of CTM Section 15, who were not employees of the company, before and during the election.

In its letter to the U.S. NAO, Echlin acknowledged that a number of workers successfully challenged their dismissal from ITAPSA:

Eleven workers, who alleged termination, filed a suit before the JFCyA [CAB] requesting reinstatement to their former positions and were subsequently reinstated by the company under the same terms and conditions.<sup>61</sup>

In the same letter Echlin stated that "Allegations of retaliation and dismissal of 50 employees are false." The NAO is unaware of the arguments submitted to the CAB or of the rationale of that tribunal in ordering the reinstatement of the workers. However, in

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<sup>61</sup> Letter from the Echlin Corporation, March 18, 1998.

ordering the workers to be reinstated it would appear that the CAB undertook the appropriate enforcement under Mexican labor law regarding the unjustified dismissal of these eleven workers. According to the submitters, the other fired workers accepted mandated termination payments rather than challenge their dismissals.

In ordering the reinstatement of the workers the CAB provided the appropriate remedy in the individual cases. However, in addressing the complaints as individual cases of unjustified dismissal the CAB apparently did not consider the impact the dismissals had on the collective labor relations at the plant and whether the company engaged in prohibited activity under FLL Article 133. The decision did not address the effect that the alleged employer interference through surveillance, intimidation, and threats may have had on the outcome of the representation election. The timing of the dismissals in the period leading up to the election, combined with other action by employer representatives together with representatives of CTM Section 15, could have significantly affected workers' votes. The reinstatement of these workers several weeks later occurred too late to provide redress to STIMAHCS for its election loss. While STIMAHCS filed objections to the conduct of the election, it is not clear if the dismissal of the workers and other actions by the employer during the period leading up to the election were included in the STIMAHCS petition. Nor is it clear what remedy Mexican labor law provides in these types of situations.

The conduct of the representation election raises questions as to the motives of of the company in affording access to the plant's premises to a large number of supporters of the CTM. The aggressive behavior of the CTM supporters, supported by substantial evidence, leaves little doubt as to their intentions. Also troublesome is the actions, or absence of action, on the part of the CAB representatives who were present.

Workers were required to vote by declaring their preference openly in the presence of representatives of both unions, management, and a large number of aggressive and vociferous Section 15 supporters. Secret ballots are provided for, apparently, only if the

two contending unions agree.<sup>62</sup> Yet, the U.S. NAO has been unable to locate any legal basis either providing for or precluding the use of a secret ballot in a representation election. Whereas a secret ballot election may not be the preferred solution to determining union representation in Mexico, it appears that the CAB could have done more to ensure that the balloting took place under conditions more favorable to protecting workers' freedom of choice.

Further, the practice of having management representatives present is not provided for in the FLL. The Mexican NAO has stated that such voting takes place in the presence of a CAB representative<sup>63</sup> but the practice is to conduct voting in the presence of labor representatives from the contending unions and management representatives as well.<sup>64</sup> The FLL, however, is silent on who should observe balloting and the NAO has found no legal basis providing for the presence of anybody other than representatives of the CAB. The presence of union representatives is compatible with the conduct of a fair and orderly representation election in order to permit the verification of workers' voting credentials and challenges to the validity of ballots. Management is present, presumably, because it is a party to the proceedings for representation. However, the presence of representatives of a management that has made its union preferences clear, combined with the open character of the voting, may well affect the voting of workers. Finally, the presence of a large number of vociferous supporters of one union (or both, for that matter) at the polls is not conducive to the security, orderliness, and equity of the election process and can only have a negative impact on the exercise of freedom of association by workers.

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<sup>62</sup> Mexican NAO letter dated February 3, 1995, in response to the U.S. NAO for use in its review of NAO Submission No. 940003 (on file with the U.S. NAO).

<sup>63</sup> Ibid.

<sup>64</sup> Open voting before representatives of labor, management and CAB representatives took place in the cases of U.S. NAO Submissions Nos. 940003 and 9702.

The submitters allege that it was not possible to verify the identity and credentials of many voters, and, therefore, many votes were cast by individuals not employed at ITAPSA. This is not a surprising development in view of the atmosphere that prevailed at the polls. Such charges have been made in other representation elections, including one recently reviewed by the U.S. NAO.<sup>65</sup> FLL Article 931 is explicit in providing that only workers employed at the enterprise may vote, including those who were fired after the filing of the petition for representation. Workers in management positions and those hired after the date of the filing of the representation petition may not vote.

**c. Post Election Developments.**

The submitters maintain that in response to the objections filed by STIMAHCS on the day of the representation election, the CAB scheduled a hearing for September 23, 1997, to hear petitions, exceptions, offerings and admission of evidence. The submitters further assert that STIMAHCS was not notified of the hearing in advance, that it took place without representation from STIMAHCS, and that the details of what occurred at the hearing have not been made available. In its response to the U.S. NAO inquiry, the Mexican NAO stated:

[F]ollowing the election on September 9, 1997, the Board summoned both parties to a hearing for the presentation of evidence with respect to the objections formulated in the official record of such proceedings, which were entered in the record by the clerks empowered to do so, which hearing was not attended by the petitioning union, despite the publication of an advance notice of the hearing in the official bulletin of the labor tribunal, which is put out daily. The petitioner subsequently attempted to challenge the form in which it was notified of the hearing, claiming that it should have been served with personal notice of the hearing by the clerk. However, in any event, the fact is that it failed to regularly consult the bulletin, subsequently endeavoring

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<sup>65</sup> Submission No. 9702.

to remedy this situation by raising a strictly technical procedural issue which, while it may be applicable according to Mexican law, has absolutely no relevance whatsoever to the alleged historical fact in this case.<sup>66</sup>

FLL Article 873 clearly requires the personal notification of the parties to a hearing on the presentation and admissibility of evidence as in this case. The failure to notify an interested party of an administrative hearing in which it has an interest does not appear to constitute simply a technical issue. Article 874 provides that in the case of failure to notify a party, the CAB must set a date for a new hearing, unless the parties agree to abide by the decision of the hearing in question. It appears that this is the remedy that the Federal Circuit Court found appropriate in this case.

The submitters state that when STIMAHCS attempted to file an *amparo* appeal with the appropriate Federal Court shortly after the representation election, the court initially declined to hear the case on the ground that this would be premature as the CAB had not yet issued a final decision confirming the results of the election. According to the submitters, the CAB issued its decision on December 4, 1997, confirming CTM Section 15's victory. STIMAHCS filed an *amparo* appeal on February 25, 1998. The Court issued its decision on the *amparo* in June and found in favor of STIMAHCS. A new hearing is scheduled to be held before the CAB in August. However, ten months have elapsed since the representation election took place. During this period, the status quo has continued at ITAPSA.

Four of the workers fired prior to and following the representation election submitted affidavits stating that they filed for reinstatement with the CAB alleging wrongful dismissal. According to their testimony, the four, and six other dismissed workers, were ordered reinstated to their jobs by the CAB. However, when they attempted to return to

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<sup>66</sup> Mexican NAO letter dated February 3, 1998.

work, they were informed by the company that CTM Section 15 had invoked the exclusion clause against them and they were again fired.<sup>67</sup>

The statement of the Echlin Corporation supports the testimony of the workers with regard to the application of the exclusion clause. Echlin stated that the CAB ordered the reinstatement of eleven workers who alleged termination. After the company did so, however, the union requested that they be removed from their positions for violating clause 10 of the collective bargaining agreement and article 365 of the FLL. Article 365 addresses the documents required for a union to obtain registration. Article 395 allows for including the exclusion clause in the collective bargaining agreement. In this context, the issue is the application of the exclusion clause by CTM Section 15 and their consequent dismissal by ITAPSA.

The exclusion clause is a powerful and controversial tool for enforcing union discipline in Mexico.<sup>68</sup> Its legality has been upheld by the Mexican courts, which have also ruled that an employer is not obligated to verify if the union in question has applied the clause in accordance with the FLL and its own by-laws. However, the exclusion clause is regulated under FLL Article 371, which establishes the procedures for the expulsion of members from the union and establishes a measure of control on the application of the clause by providing that a member can be expelled only if his behavior is explicitly prohibited in the union by-laws, that he be afforded the opportunity to defend himself, and that a 2/3 vote of the union membership in favor of expulsion is required.

The CAB's have jurisdiction to determine if the exclusion clause has been applied correctly and can order the reinstatement of a worker to the union and, therefore, his job

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<sup>67</sup> Ibid., affidavits of Joaquín Hernández Alanís, Rubén Ruiz Rubio, Celestino García Luna, and Gildardo Hernández López.

<sup>68</sup> See de Buen L., Nestor, *Derecho del Trabajo*, Editora Porrúa, Av. República Argentina, 15, México, 1997, pp. 621-629.

in those cases where the clause has been applied illegally. The Supreme Court of Mexico has reviewed CAB decisions on the application of the exclusion clause and issued a number of rulings on different aspects of the clause. In a decision establishing jurisprudence, which is binding on the lower courts, the Supreme Court ruled that a union is bound by the requirement that at least 2/3 of the union membership vote for expulsion of a member, in accordance with FLL Article 371, and the union must follow strictly its own bylaws in such proceedings.<sup>69</sup> In another ruling which established jurisprudence, the Court ruled that only the minutes of the meeting in which the expulsion was voted, showing the attendance of members, authenticated by their signatures, constitute sufficient evidence that the vote was conducted in accordance with the law.<sup>70</sup>

In a decision dated August 15, 1988, the Court found that the application of the exclusion clause because of the way workers may have voted in a representation election amounted to a reprisal for exercising a constitutional right.<sup>71</sup> Though this decision does not constitute jurisprudence it may be used as guidance and raises a serious question on the appropriateness of applying the exclusion clause against workers who vote the wrong way in a representation election.

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. Mexican labor law goes out of its way to enunciate and protect the right of

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<sup>69</sup> *Jurisprudencia definido por reiteración de criterios*, 5a Epoca, Apéndice al Semanario Judicial de la Federación, 1917-1995, Tomo V, Materia del Trabajo, Tesis No. 58, p. 39.

<sup>70</sup> *Jurisprudencia definido por reiteración de criterios*, 7a Epoca, Apéndice al Semanario Judicial de la Federación, 1917-1995, Tomo V, Materia del Trabajo, Tesis No. 57, p. 38.

<sup>71</sup> *Amparo Indirecto 2609/87, Sindicato Nacional Independiente de Trabajadores de la Industria Automotriz, Similares, y Conexos*, 15 agosto de 1988, Semanario Judicial de la Federación, Octava Epoca, Tomo II, Primera Parte, julio-diciembre de 1988, p. 277.

workers to join the union of their choice without restriction or reprisal. Article 19 of the Constitution states that the right of association cannot be curbed. Constitutional Article 123(A) protects workers from dismissal for their union activities. FLL Article 47 protects workers against unjustified dismissal. FLL Article 133 lists as a prohibited practice an employers' attempts to "influence workers by coercion or any other means to affiliate or withdraw from a union or group to which they belong, or vote for a determined candidate." Article 358 states that nobody shall be obliged to join or refrain from joining a trade union and prohibits any stipulation of a fine for leaving a trade union.

While Article 395 does provide for the application of the exclusion clause, the interpretation given by the Mexican Supreme Court would restrict its use, at least with regard to a representation election. Furthermore, Article 371 provides clear and precise procedural rules for the application of the exclusion clause. The submitters maintain that the procedures were not followed and this is supported by the affidavits of the workers against whom the clause was applied. 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.

An ancillary issue to freedom of association emerged in the review of this submission: that of union representation and collective bargaining agreements. There is testimonial evidence that workers at the plant had never seen copies of the collective bargaining agreement in effect at ITAPSA, were not familiar with its contents, and some were even unaware that they belonged to a union, CTM Section 15 in this case.<sup>72</sup> Similar allegations were made in previous submissions reviewed by the U.S. NAO<sup>73</sup> and allegations have been made that the practice of negotiating such "protection" contracts

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<sup>72</sup> *Public Hearing on NAO Submission No. 9703*, pp. 81-82.

<sup>73</sup> NAO Submissions 940003 and 9702.

without the consent, or even the knowledge, of workers is widespread in certain regions of Mexico.<sup>74</sup> The Mexican STPS has begun efforts to improve transparency by providing information through publishing a register of legally registered unions and making the information available on its internet website. The information includes names of unions, registration numbers, dates of registration, addresses, names of the secretary general, membership, type of union, branch of industry, and national affiliation. However, the information provided is insufficient to ascertain union representation at the company level or the contents of the collective bargaining agreement. While collective bargaining agreements must be registered with the appropriate CAB, the law does not impose an obligation on a union to share copies of the agreement, or information on its contents, with union members. From the review of this case and others,<sup>75</sup> it appears that in some cases few workers obtain copies of their collective bargaining agreements or are familiar with their contents.

**d. The Violence Outside American Brakeblock.**

The physical assault on workers who were distributing pamphlets outside the American Brakeblock plant on December 29 is an ancillary, but relevant, issue. The submitters support their allegations with two written affidavits and the oral testimony of one worker at the public hearing. Mr. Jose Luis Mendoza Hernández, an employee of American Brakeblock, stated that after he completed his shift on December 15, 1997, he

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<sup>74</sup> See Toledo, Enrique de la Garza, "Industrial Democracy, Total Quality and Mexico's Changing Labor Relations," in *Regional Integration and Industrial Relations in North America*, eds. Cook, Maria Lorena and Katz, Harry C., (Ithaca, New York, ILR Press, New York State School of Industrial and Labor Relations, Cornell University, 1994). p. 26. See also Quintero, Cirila "Reestructuración Sindical en las Maquiladoras Mexicanas, 1970-1990", (Ph.D. diss., University of the Northern Frontier, 1992) pp. 308-312. See also Carillo, Jorge V., "Maquiladoras and Labor Relations," in *Unions, Workers, and the State in Mexico*, ed. Kevin J. Middlebrook, (Center for U.S.-Mexican Studies, University of California, San Diego 1991), p. 229.

<sup>75</sup> NAO Submissions 940003 and 9702.

stopped and spoke to workers from ITAPSA who were handing out leaflets outside the plant when he was approached by a CTM representative. Mr. Mendoza then described the episode:

I got out my wallet and was showing them my employee card, when I heard Antonio [the CTM representative] yell “Kick all their asses” (*Dales en la madre a todos!*), and I saw a metal gleam out of the corner of my eye. I turned my head and saw a fist with brass knuckles coming towards me. I reflexively turned my head back the other way as I was struck in the right side of the head above the ear. The blow glanced off a little bit and cut me above my right eye. Fortunately, I was turning with the blow or my skull could have been fractured. I was struck again as I fell over a bit and lost consciousness.<sup>76</sup>

According to Mr. Rubén Ruíz, the assault on Mr. Mendoza and four others took place in the presence of company management of American Brakeblock as well as CTM representatives. After notifying the police at the scene Mr. Ruíz and his colleagues were initially arrested for perpetrating the violence and released shortly thereafter. The police did not pursue the perpetrators into the plant claiming they lacked the authority to enter the premises of American Brakeblock. Mr Mendoza and the others filed a criminal complaint against the company. Mr. Mendoza was fired on December 29, 1997. He believes that he was fired because of the complaint.<sup>77</sup> Photographs of a battered Mr. Mendoza were submitted to the NAO.

The events described are troubling. The principle of freedom of association is not restricted to employees within a workplace, but includes workers and their representatives engaged in lawful informational and organizational activities. It is not clear from the information available if the Mexican authorities have undertaken the steps necessary to investigate the matter and to protect the rights of workers to conduct lawful organizational and informational activities in public places.

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<sup>76</sup> NAO Submission No. 9703, affidavit of Jose Luis Mendoza Hernández.

<sup>77</sup> Ibid., affidavits of Jose Luis Mendoza Hernández and Rubén Ruíz Rubio.

## 2. NAALC Article 5 Issues

The submitters argue that Mexico is not in compliance with NAALC Article 5(4) which states:

“[e]ach Party shall ensure that tribunals that conduct or review such [labor] proceedings are impartial and independent and do not have any substantial interest in the outcome of the matter.”

Article 5(1) on labor tribunal proceedings and Article 5(4) on the timeliness of final decisions of labor tribunals are also relevant to this submission.

Special Federal CAB No. 15 is composed of three members, representing labor and management, and presided over by a government representative, as are other Federal and State CABs. The labor representative at the time of the election campaign and representation election came from the petrochemical workers union of the CTM and was nominated to the CAB by the CTM .

CTM Section 15 is an affiliated organization of the CTM, and it would appear that the CTM has an interest in maintaining union representation rights at ITAPSA. In this sense, at least one CAB official had a substantial interest in the outcome of the cases before it. These cases include (1) the conduct of the representation election between STIMAHCS and CTM Section 15; (2) the petitions for reinstatement of the workers dismissed for their union activities in favor of STIMAHCS and against CTM Section 15; (3) the objections to the election results filed by STIMAHCS against CTM Section 15; and (4) the petitions for reinstatement by workers filed against ITAPSA and CTM Section 15 asserting the wrongful application of the exclusion clause.

Several aspects of the representation election raise questions as to the impartiality of the presiding CAB representatives. These include the atmosphere of intimidation and threats that prevailed, allowing the presence of a large number of individuals of

threatening appearance and doubtful purpose at the polls, and the inadequate verification of their credentials. Of even greater concern is the practice of requiring workers to openly state their union preference in the presence of government officials, representatives of the contending unions, and a representative of a management that has made its union preference obvious. The election proceedings that took place raise questions as to their fairness, equity, and transparency, as required under NAALC Article 5(1), and whether the CAB demonstrated that it was impartial and independent and did not have any substantial interest in the outcome of the matter, in accordance with NAALC Article 5(4).

In the second case before the CAB, the tribunal acted quickly on the cases alleging wrongful dismissal, ordering the reinstatement of the eleven workers less than two months after their original dismissal by the company, and appears, in this case, to have acted in an impartial manner. The petitions alleging wrongful application of the exclusion clause have not yet been heard, however. That an official named by the CTM is one of three presiding officers in a case to which a CTM affiliate is a party raises questions as to compliance with NAALC article 5(4) on ensuring that labor tribunals be impartial, independent, and not have a substantial interest in a case's outcome.

The failure to personally notify STIMAHCS of the hearing of September 23 on the admissibility of evidence on the objections that STIMAHCS filed against the representation election raises the question of compliance with NAALC Article 5(1)(c) on the right of the parties to support or defend their positions in labor tribunal proceedings. This actions by the CAB also raises questions as to compliance with NAALC Article 5(1) and 5(1)(d) that labor tribunal proceedings be equitable and transparent, and that such proceedings are in accordance with due process of law; though ultimately the federal court ruled that the failure to notify STIMAHCS was improper and ordered a new hearing.

## **V. WORKPLACE SAFETY AND HEALTH**

### **A. NAALC Obligations and Mexican Labor Law on Safety and Health**

#### **1. NAALC Obligations**

The provisions of the NAALC on safety and health in the workplace that are relevant to this submission are: (1) Article 1 of Part One which lists the objectives to which the Parties commit themselves; (2) Article 1(b) which commits the Parties to the promotion, to the maximum extent possible, of the labor principles set out in Annex 1; (3) Article 1(g) which commits the Parties to “foster transparency in the administration of labor law”; (4) Annex 1 which lists eleven labor principles that the Parties are committed to promote, including the ninth principle which commits the Parties to prescribing and implementing standards to minimize the causes of occupational injuries and illnesses; (5) Article 3(1) which commits the Parties to effectively enforce their labor law through appropriate government action; and (6) Article 5(1) which commits each Party to ensure its administrative, quasi-judicial, judicial and labor tribunal proceedings for the enforcement of its labor law are fair, equitable and transparent.

#### **2. Relevant Mexican Law on Safety and Health**

##### **a. Federal Labor Law (FLL).**

FLL Article 133 VII prohibits employers from taking any actions that restrict workers in the exercise of their rights under the law. FLL Article 509 requires that safety and health committees be established in each workplace. Article 511 specifies the duties of labor inspectors. Articles 512 and 512D require that business establishments comply with safety and health laws and comply with orders from the labor authorities to modify their establishments in accordance with the law and regulations, providing for increased financial penalties in the case of failure to comply with corrective measures.

Workplace inspections are carried out by the Inspectorate of Labor (*Inspección del Trabajo*) of the STPS and supported by the respective state governments. Article 541 of the FLL charges the Inspectorate of Labor with responsibility for supervising compliance with labor standards, including those protecting safety and health in the workplace.<sup>78</sup>

FLL Articles 992 and 994-V specify the basis for the calculation of financial penalties and provides that penalties may be doubled in the case of failure to undertake corrective action.

**b. Federal Regulation on Safety, Health, and the Workplace (RFSHMAT).**

The Federal Regulation on Safety, Health and the Workplace (*Reglamento Federal de Seguridad, Higiene y Medio Ambiente de Trabajo*), hereinafter the RFSHMAT, implements the safety and health provisions of the FLL and establishes the rules and procedures for the enforcement of safety and health standards.<sup>79</sup> The RFSHMAT is intended for application throughout Mexico and has as its purpose the establishment of measures necessary for the prevention of workplace accidents and illnesses. The objective of the RFSHMAT is to ensure that work takes place under conditions of safety and health that are appropriate for workers and in accordance with the Federal Labor Law and international treaties ratified by Mexico.

The RFSHMAT consists of six titles and 168 articles, namely Title One (general dispositions and obligations of employers and workers); Title Two (workplace safety

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<sup>78</sup> For detailed information on Mexican laws, standards, and procedures on occupational safety and health, see U.S. Department of Labor, Bureau of International Labor Affairs, U.S. National Administrative Office (NAO), *Public Report of Review of U.S. NAO Submission No. 9702(II)*, (July 1998).

<sup>79</sup> The RFSHMAT replaced several previous laws on safety and health and came into effect on April 21, 1997.

standards); Title Three (workplace health); Title Four (workplace safety and health organizations); Title Five (protection for minors and pregnant or nursing women); and Title VI (compliance, inspections, and administrative sanctions).

RFSHMAT Articles 3 through 13 address the development and enforcement of standards on the full range of safety and health issues. The standards are known as the Official Mexican Standards (*Normas Oficiales Mexicanas*), hereinafter NOMs. There are more than 120 NOMs which cover matters ranging from specific hazards to technical specifications for protective and monitoring equipment and analytical methods. NOM Nos. 9 and 10 are particularly relevant to this submission. NOM # 9 addresses hazardous materials handling. NOM # 10 addresses standards for toxic substances, designates asbestos as a carcinogen, and restricts the asbestos levels that may exist in the workplace.

**c. Administrative Procedures.**

Procedures for administrative actions conducted by the Federal Government, including workplace health and safety inspections, fines, and appeals, are established in the Federal Law on Administrative Procedures (*Ley Federal de Procedimiento Administrativo*), hereinafter LFPA. This law establishes procedures for enforcement actions by the executive branch.

Internal procedures for the conduct of inspections are included in the Internal Regulation of the Secretariat of Labor and Social Welfare (*Reglamento Interior de la Secretaría del Trabajo y Previsión Social - RISTPS*). The Federal Labor Inspection Regulation (*Reglamento de Inspección Federal del Trabajo-RIFT*) specifies the duties and responsibilities of inspectors in conducting inspections.

The Regulation that Establishes the Procedures for the Application of Administrative Sanctions for Violations of the Federal Labor Law (*Reglamento que*

*Establece el Procedimiento para la Aplicación de Sanciones Administrativas por Violaciones a La Ley Federal del Trabajo - REPASA*) provides specific guidelines for the assessment of penalties for violations of the laws and regulations on labor matters.

The Mexican NAO provided detailed information on the process by which workplace inspections and the application of sanctions take place.<sup>80</sup> The Inspectorate of Labor conducts workplace inspections for general working conditions as well as occupational safety and health. Inspections for general working conditions focus on such matters as the compliance with legislation and regulations with respect to wages, bonuses, the length of the work day, vacations, profit sharing, and training. Inspections for safety and health monitor such items as the presence of contaminants in the working environment, the installation of safety devices on machinery and equipment, security measures for pressurized containers and steam generators or boilers, fire prevention, and first aid.<sup>81</sup>

There are four categories of inspections: (1) initial, or first time inspections, when a workplace first opens for business or when a company changes its name and/or address; (2) regular, or periodic inspections, conducted at standard intervals; (3) follow-up, or verification inspections, to confirm employer compliance with improvements and modifications ordered by the inspectors during the initial or periodic inspection; and (4) special inspections to investigate suspected violations or in response to the request of other authorities.<sup>82</sup>

Inspections may be conducted by the local office of the STPS or by the state STPS. ITAPSA is under Federal jurisdiction and inspections were conducted by the

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<sup>80</sup> Mexican NAO letters dated April 23, 1998 and March 27, 1998 (the latter in response to Submission No. 9703).

<sup>81</sup> Mexican NAO letter dated April 23, 1998.

<sup>82</sup> Ibid.

Federal Inspectorate of Labor of the STPS. Inspection schedules are prepared in advance in accordance with an annual program, but may also take place in response to requests of other government agencies or complaints by workers. Inspections must be authorized by the appropriate authority, but can take place without prior notice. However, access to the facility without prior notice is not obligatory in the absence of the employer or his legal representative. Therefore, in order to ensure the effectiveness and efficacy of an inspection, prior notice is usually given to ensure that access to the workplace will be obtained and that the required documentation and records will be made available to the inspector. The frequency of inspections may be increased in cases of workplaces where compliance has been a problem, and reduced in cases of workplaces that have demonstrated a positive record of compliance.<sup>83</sup>

According to the Mexican NAO, a written report, prepared at the site and time of the inspection, specifies the violations encountered. It also provides a time period within which corrective action must be implemented for those items requiring corrective action. The report is filed with the Inspectorate of Labor for the region and a hearing before the local STPS office is scheduled. Usually, the respondent has fifteen days within which to appear before the authority. At the hearing, the respondent is given the opportunity to present evidence in his defense and in mitigation. The hearing officer determines whether a fine should be levied and the amount of the fine. The amount of the fine depends on the seriousness of the violations, special circumstances, the harm done to workers, the economic condition of the company, and other considerations. If the respondent fails to appear at the hearing, a judgement imposing the fine may be issued.<sup>84</sup>

A verification inspection is then conducted and confirms whether corrective action was implemented in accordance with the earlier inspection. A report on uncorrected

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<sup>83</sup> Mexican NAO letter dated March 27, 1998.

<sup>84</sup> Ibid.

violations is forwarded to the administrative authorities where the proceeding is the same as outlined above. If the respondent is found to have failed to abate the deficiencies, additional fines may be imposed. Fines may be imposed whenever a verification inspection shows that a violation remains unabated and will be doubled if the violation continues unabated.<sup>85</sup>

A respondent has the right to appeal any penalties by (1) requesting a review by the administrative authorities within fifteen days of the order imposing the penalty; (2) requesting the dismissal of the fine before the Federal Fiscal Tribunal (*Tribunal Fiscal de la Federación*) within forty-five days of the order imposing the penalty; and (3) through an *amparo* appeal in the appropriate court.

Notwithstanding any of the above, if violations of safety and health laws and regulations persist in the workplace, the STPS may initiate procedures for a partial or complete closure of the facility. Labor inspectors, themselves, do not have the authority to impose fines or close a facility. This authority resides with the appropriate STPS office. Fines are collected by local offices of the Secretariat of the Treasury.<sup>86</sup>

According to the Mexican NAO, 293 safety and health inspections were conducted in the State of Mexico during 1997. Sanctions were imposed in 114 cases totaling Pesos 336,822.90 (U.S.\$42,100 approx.).<sup>87</sup>

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<sup>85</sup> Ibid.

<sup>86</sup> Mexican NAO letter dated March 27, 1998.

<sup>87</sup> Mexican NAO letter dated April 23, 1998.

**d. Safety and Health Committees.**

RFSHMAT Articles 123-126 implement FLL Article 509 and provide for the establishment and functioning of Safety and Health Committees at the workplace. These committees must be established within thirty days after an establishment opens for business or after the RFSHMAT came into effect. The duties of the workplace committees include the investigation of workplace accidents and illnesses, the supervision of compliance with the RFSHMAT and the NOMS, and proposing preventive measures to management.

**B. International Labor Organization Conventions And Standards on Safety and Health**

The International Labor Organization has developed and enacted a number of international conventions addressing occupational safety and health. Conventions 155, 161, and 170 have been ratified by Mexico and are relevant to this submission, as is Recommendation 164.

Convention 155: Occupational Safety and Health, 1981, aims to establish in each Party a national policy on occupational safety, occupational health and the working environment, and promote communications and cooperation at all levels in this area. The convention requires the parties to formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment. Convention 155 applies to all branches of economic activity (with a few specific exclusions) and lays down a series of detailed provisions concerning action at the national level and at the level of the undertaking. The convention provides for the adoption of laws or regulations or any other appropriate method (including training), for the operation of a system of inspection and measures to be taken, and requires that employers shall be required to supply protective clothing and protective equipment to workers. Finally, the convention provides that workers and their representatives shall

cooperate in the fulfillment of the obligations placed on the employer, but also provides that workers who remove themselves from a work situation where they have reasonable justification to believe they are in imminent and serious danger, shall be protected from undue consequences.

Convention No. 161: Occupational Health Services, 1985, aims to maintain safe, health, and well-adapted working environments to promote the physical and mental health of all workers by means of a preventive service. The convention calls for the establishment of occupational health services with preventive and advisory functions within the framework of a national policy. This policy should be developed through consultations with the most representative organizations of employers and workers. Safety and health services may be organized by undertakings or groups of undertakings, by public authorities or social security institutions, or by any other competent body. Employers, workers, and their representatives should cooperate and participate in the implementation of these services. The tasks of the services include the identification and assessment of risks from health hazards in the workplace by surveillance of the working environment and working practices, as well as workers' health in relation to work; technical advice; training and education; first aid; analysis of occupational accidents and diseases; and vocational rehabilitation.

Convention No. 170: Chemicals, 1990, aims to reduce the incidence of chemically induced illnesses and injuries at work. The convention calls for detailed regulations concerning classification systems of chemicals, their labeling and marking, chemical safety data sheets, and the responsibilities of suppliers and those of employers, particularly with regard to the identification of chemicals, their transfer and disposal, the exposure of workers, as well as information and training. Convention 170 provides that workers will cooperate with employer efforts in this regard, but also that they shall have the right to remove themselves from danger.

### **C. Analysis**

Submission No. 9703 describes a workplace with a high level of airborne contamination including asbestos dust and fumes from solvents; high noise levels; inadequate ventilation; inadequate personal protective equipment (PPE); no health and safety plan; lack of lockout/tagout program for machinery; malfunctioning machinery; inadequate fire prevention measures; defective electrical wiring; inadequate medical exams the results of which the workers did not have access to; inadequate labeling of chemicals; and no written safety information provided to workers. Exposure to asbestos dust and fumes produced by other hazardous material used in the manufacture of brakes were a major concern to the workers of the plant when they began their organizing effort. The health hazards posed by toxic chemicals are well documented and the subject of several international conventions of the International Labor Organization (ILO), particularly Convention No. 170 which addresses the labeling of hazards and exposure levels.<sup>88</sup> Substances such as asbestos, naphtha, graphite, toluene, and barite, all identified by STPS inspectors at ITAPSA, are considered toxic and subjected to considerable regulation by the Mexican STPS under the RFSHMAT.

In support of their allegations, the submitters obtained written affidavits of several workers at the plant who described the health and safety conditions. Mr. Rubén Ruíz Rubio stated:

When I worked in the department, everyday I was always around dust. There was dust everywhere, from asbestos and the other materials we worked with. We would sweep the dust up once at the end of the shift, but there was not time to do it during our shifts. In addition, there was water vapor that was constantly coming out of the steam heated machines. It made the floor wet, slippery and dangerous. In addition, there was oil and

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<sup>88</sup> Also No. 136 (Benzene convention); No. 162 (Asbestos Convention); No. 148 (Working Environment Convention [Air Pollution, Noise and Vibration]).

other vapors that always leaked. With the high level of noise in the shop and the mixture of vapors and dust where we could hardly see and concentrate. It was dangerous.<sup>89</sup>

Ms. María Trinidad Delgado Navarro described noise levels:

There is a lot of noise in the plant. In order to get earplugs, you have to demand and demand that they be given to you. The company always responded with excuses, saying that they didn't have them, asking us how we were going to be able to hear to do our work properly, etc. The noise gave me headaches, and brief periods of hearing loss. Also, after work sometimes my ears would ring. Since I stopped working in this environment my hearing has improved.<sup>90</sup>

Mr. José Eugenio Nájera Vázquez described airborne contamination and the poor ventilation:

The process would create some small particles and a lot of larger thick grainy pieces coming off the brake pads. This material was usually asbestos-based coming from the asbestos-based pads, but sometimes I would drill the non-asbestos metal-based pads. We would end up breathing this dust, because the masks didn't work well and the dust would get in. It would also get in our eyes. We were given safety glasses, but it was difficult to see with them on and I was afraid that I would drill my finger. Also it was easy to drill too far or in the wrong place and ruin a brakeshoe or hurt the drill bits. When we would break drill bits the supervisors would yell at us.<sup>91</sup>

Ms. Delgado described the solvents used in the manufacturing process:

Then this basket goes into the machine, and the washing process begins. When the washing process is being carried out, the solvent that is in a kind of drum about two meter deep, or a meter and a half deep, that drum has to be filled at three quarters to be able to do the washing. So it goes in and the machine begins balancing, then the solvent falls outside of the machine and

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<sup>89</sup> Submission No. 9703, affidavit of Rubén Ruíz Rubio.

<sup>90</sup> Ibid., affidavit of María Trinidad Delgado Navarro.

<sup>91</sup> Ibid., affidavit of José Eugenio Nájera Vázquez.

it sprinkles the clothing of the people nearby. This solvent is called toluene. And it falls onto the clothing of the people present there because there's very little space to move around there.<sup>92</sup>

She went on to describe the effect of the solvent and fumes on the workers:

Lately my former colleagues have told me that the brand and color of this adhesive has changed. Now it's black, very strong smell, but it has really affected my colleagues. Some of them their hands -- they have had some kinds of little blisters on their skin, and at the same time the skin is sort of coming off, so it has been worse than the previous material.

After many hours of working in this place, after working there five hours or more, one starts feeling affected. One's body is affected. You start feeling nauseous. You start getting headache and feeling dizzy. So of course your movement becomes more difficult, and due to the lack of space in the area you tend to sort of hit yourself.<sup>93</sup>

Mr. Ruiz described personal protective equipment as follows:

The ear plugs were not sufficient or good enough, the gloves are short gloves, they're made of very thin plastic material -- it's the kind of gloves that women use when they do their dishes and we have to work with asbestos, and we've got to put our whole bodies in so that we can grab the material that's used in processing these various parts. Our goggles -- safety goggles are plastic. They're not sturdy enough, they're not hermetic enough. We get dust into our eyes which is very irritating.

The masks are also made of cotton, very simple, very thin. After two days they're totally blackened and in many cases we just have gotten fed up asking for new masks and we were told we can't give you new masks because not enough time has gone by -- it's something we do only every two weeks, and the company cannot provide you with masks every time you ask for them. You've got to wait for two weeks until you get a new supply of masks.

Our uniform -- work uniform -- well, we had no laundry system, so we had to wash these uniforms at home, but we had no information and we just put

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<sup>92</sup> Public Hearing on NAO Submission No. 9703, p. 164.

<sup>93</sup> Ibid., pp. 164-165.

them in our clothes washer together with our family laundry, and we didn't know that that was a bad thing to do.<sup>94</sup>

Mr. Ruíz described accidents that took place caused by defective machines and inadequate, or malfunctioning, safety devices:

There have been accidents in my department that have been caused by the poor conditions at work and the defective machines. My friend Marco Antonio Fuentes was seriously injured several years ago when this occurred. He had set down the chunk of metal he used to tap his iron bar under the molds on the bottom part of the press. He was leaning down when the piston went off spontaneously and shot the piece of metal out of the press and it hit him in the forehead. They took him to the emergency room and he was in the hospital fifteen days after that. When Marco returned to work he had lost control of some of the muscles of his face, like he had had a stroke.

I also remember vividly another case that happened the first day I worked in the plant, July 7, 1994, when the same type of accident occurred. In this case I actually witnessed the accident. Again the piston shot up, and this time caught a workers' fingers in a vice between the piston and the metal in the machine. He lost four of his fingers and was not able to return to work until a year later. After he came back the company fired him after a couple of months.<sup>95</sup>

Ms. Delgado described an explosion in the plant and the shortage of fire fighting equipment:

I should add that at one point an oven exploded within the plant. This oven, a furnace that exploded, brought about a very big fire. But we could not tackle it because there were no fire extinguishers within the plant. There are one or two but they simply don't work properly. So as a result a person was -- his forehead was hurt -- well, nothing serious happened because there wasn't a lot of personnel there, but this oven is near the ladies' bathrooms, ladies' dressing rooms. These bathrooms and dressing rooms are also within the plant. So that is a terrible risk.<sup>96</sup>

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<sup>94</sup> Ibid., pp. 172-174.

<sup>95</sup> Submission No. 9703, affidavit of Rubén Ruíz Rubio.

<sup>96</sup> Public Hearing on Submission No. 9703, pp. 168-169.

Mr. Nájera described handling asbestos and unlabeled chemicals:

I helped him put a number of different chemicals in a huge vat in the shape of a huge cylinder. I know I put 45 to 50kg. bags of asbestos in to this vat. I believe that the other chemicals that I put into this vat included a resin called "AG" which came in drums which said "Resina Fenólica Líquida" on them; a powder chemical called CM (carbon marino); yellowish bars that weighed about 3.5 kg. called "V" which looked like cotton and came in bags; "CB" which said "Negro Color" on the outside; mica sorzoriga which was like metal scrapings but a little more fine; ground rubber; and a white powder that we called "W" which I believe was short for Walastonita. The majority of the bags I put into the vat weighed 45 to 50 kg. and I lifted them in myself. They did not give me a belt to protect my back. I know that many of the bags I put into the vat were asbestos because they had tickets or tags on them in Spanish that said that the material inside was asbestos and that it could cause lung cancer. The other chemicals either did not have any of these tags on them or they were in English, which none of us could read.<sup>97</sup>

Mr. Ruíz described the lack of safety information:

There's another situation -- we were never, never given any training on anything. There were no posters. There were no safety warning indications or signs -- nothing. We were supposed to have a health and safety commission, but we never knew who the members of the commission were or how the commission operated.<sup>98</sup>

Ms. Delgado also spoke of the absence of a functional health and safety commission:

Now there were some people who were affected by toxic fumes. We asked the company to tell us which workers were on the health and safety commission, but we were never told the names of the members of the health and safety commission. We were told that there was such a commission, but we were never told who the members were.<sup>99</sup>

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<sup>97</sup> Submission No. 9703, affidavit of Jose Eugenio Nájera Vazquez.

<sup>98</sup> Public Hearing on Submission No. 9703, p. 175.

<sup>99</sup> Ibid., p. 169.

Mr. Ruíz also testified that he was unaware of the composition of the health and safety committee and Mr. Nájera stated that there was no committee of which he was aware.<sup>100</sup>

Dr. Francisco Antonio Mercado Calderón, an expert on industrial hygiene, provided expert testimony at the hearing. Dr. Mercado is a professor of industrial toxicology at the National Public Health Institute of Cuernavaca, Morelos, and an advisor on occupational health matters for the Mexican Petroleum Institute and for PEMEX Petroquímica, the petrochemical branch of Mexico's national petroleum company. Dr. Mercado acknowledged that he had never inspected ITAPSA but that the complaints of the workers at that plant were consistent with problems he found in an inspection of American Brakeblock, a sister company of ITAPSA, also owned by the Echlin Corporation, that employs a similar process in the manufacture of brakes. Dr. Mercado explained that American Brakeblock fell under a separate governmental jurisdiction from ITAPSA and thus he was able to conduct his inspection without prior notice, something he considers would not have been possible in the state jurisdiction where ITAPSA is located.<sup>101</sup>

During his inspection of the plant, Dr. Mercado noted dozens of bags of white asbestos chrysotile stored in the warehouse. These had tags in English which stated: "Avoid creating dust - cancer and lung disease hazard." There were no tags in Spanish, however, and no announcements, security data sheets, or signs warning of hazards in Spanish anywhere in the factory. He described a dusty atmosphere with inadequate extraction/ventilation systems in dust emitting and asbestos emitting zones. The protective masks available to workers were intended for protection against dust but were inadequate for protection against asbestos. No gloves or respirators were available for workers handling solvents. He found it especially disturbing that workers swept asbestos dust and

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<sup>100</sup> *Public Hearing on Submission No. 9703*, p. 172; *NAO Submission No. 9703*, affidavit of Jose Eugenio Nájera Vazquez.

<sup>101</sup> *Ibid.*, pp. 185-186.

did not have vacuum cleaners to clear it safely. Dr. Mercado did not observe any hearing protection for workers.<sup>102</sup>

Besides asbestos, Dr. Mercado said that other chemical products used in the manufacturing process at American Brakeblock include solvents, phenol and naphtha. NOM 10 requires ongoing monitoring of levels of all of these. On asbestos levels permitted under NOM 10, Dr. Mercado stated:

It's interesting to note that the values of the 010 standard of asbestos exposure is 2 fibers per cubic centimeter, while in the United States, according to the Federal Administration of Occupational Health and Safety, OSHA . . . it's .1 fibers per cubic centimeter, which is ten times less.<sup>103</sup>

The way in which the 010 Mexican standard classified cancer causing chemical substances is not in keeping with the most recent scientific information, nor does it take into consideration the classification of the International Cancer Research Agency which has the clearer and more explicit classification.

This agency, as we mentioned initially, classifies asbestos as a cancer-causing chemical substance, confirmed in humans; while the NOM-010 places it only as potentially cancer-causing. And the same happens, by the way, with other compounds which are also confirmed cancer-causers, and in this standard, everything is only potentially cancer-causing.<sup>104</sup>

Dr. Mercado described the safety and health conditions at American Brakeblock as "a critical situation in the health and safety conditions . . . which require changes to protect the health of its workers."<sup>105</sup>

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<sup>102</sup> Ibid., pp. 187-190.

<sup>103</sup> The allowable asbestos levels mentioned by Dr. Mercado are correct. The difference between the U.S. and Mexican standards is not ten times, however, but twenty times ( $2 / .1 = 20$ ).

<sup>104</sup> Ibid., pp. 190-191.

<sup>105</sup> Ibid., p. 192.

While the information from the workers and the testimony of Dr. Mercado depict workplaces replete with hazards, inspection reports by Mexican Government inspectors are somewhat less condemnatory. The information provided by the Mexican NAO indicates that ITAPSA underwent three health and safety inspections and three verification inspections, from 1995 through January, 1998. During that same period, two partial inspections of steam generators and compressed gas tanks were conducted. The NAO has reviewed the reports of these inspections carried out of the factory by the Inspectorate of Labor beginning in May 1995. These documents provide a picture of Mexican government efforts to enforce health and safety laws and standards.

The NAO reviewed the records of inspections conducted on May 26, 1995, June 3, 1996, June 25, 1996 (verification inspection), August 26, 1997 and January 13, 1998 (verification inspection). In the reports, the inspectors noted the presence of asbestos, naphtha, phenol, graphite, barite, and toluene for use in production. The inspection conducted on May 26, 1995, resulted in an order to the company to undertake corrective and abatement measures on eighteen items including the measurement of noise levels; the repair of air extraction ducts and powder collectors; insulation of electrical cables; and the installation of safety devices on machinery. Following a verification inspection, the company was fined Pesos 795.75 (U.S.\$113.00 approx.) for the failure to abate four violations.

An inspection conducted on June 3, 1996, found violations which included the lack of an evaluation of solvents and airborne pollution and no written procedures for handling toxic and corrosive substances. The same inspection ordered corrective measures on twenty-five items including the measurement of noise levels; an evaluation of thermal conditions; an evaluation of toxic contaminants and airborne pollution; replacement of powder extraction ducts; the installation of safety devices on machinery; and the insulation of electrical wiring. Neither the head of the local union nor the members of the health and safety commission were present at the time of this inspection or the verification inspection

conducted on June 25.<sup>106</sup> The company was cited for three violations and fined Pesos 571.50 (U.S.\$82.00 approx.). A verification inspection found that the company had failed to abate five violations for which corrective action had been ordered. The case was remitted to the Director of Sanctions of the Directorate General of Legal Affairs of the STPS for appropriate action.

Still another inspection was conducted on August 26, 1997. This is the first inspection conducted following the enactment of Mexico's new RFSHMAT in April, 1997, and was the most thorough and comprehensive of those that the NAO reviewed. This inspection noted fourteen violations including the lack of a workplace hazard study; no materials handling procedures; no roster of people authorized to handle hazardous material; no internal work rules; and no record of training in health and safety. In the same inspection report, abatement or corrective action was ordered on 21 items, including conducting a hazard evaluation study at the company for the Social Security Institute; replacing powder recuperators; repairing powder collection ducts; insulation of electrical cables; and installation of safety devices on machinery. Again, neither the union officers nor members of the health and safety committee were available to accompany the inspector. The company was cited for two violations and, following a verification inspection in January, 1998, for the failure to abate four additional items for which corrective action was ordered. Action to assess the appropriate financial penalty was initiated. The NAO has been unable to verify if any of the fines were collected.

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<sup>106</sup> FLL Article 509 requires that a joint health and safety committee be established in every workplace. Article 32 of the RIFT empowers inspectors to request the assistance of the appropriate committees in executing their duties. All of the periodic inspection reports reviewed by the U.S. NAO in this and other submissions include an annotation on whether a union exists in the workplace, if its officers are present, if a joint health and safety commission was established, if its member are present, and a request for both the union representative and safety and health committee representatives to accompany the inspector.

The inspections appear to have been thorough and comprehensive and the reports note the presence of asbestos and other toxic chemicals in the workplace. A notable omission is the failure of inspectors to conduct their own sampling and monitoring. In a workplace in which the presence of asbestos and other toxic materials has been noted, this is a curious oversight. NOM 10 makes monitoring and sampling the responsibility of the employer and Annexes 1 and 2 provide detailed specifications on monitoring. The inspection reports note that ITAPSA has conducted its own evaluation of toxic contaminants and that this has been submitted to the STPS. There is nothing to indicate, however, what exposure levels were detected.

The absence of the union secretary general, his representative, and members of the health and safety committee is also notable. Though the records indicated that a safety and health committee had been constituted in the plant, members of the committee were unavailable in the four periodic and verification inspections conducted during 1996, 1997 and 1998.

There are several items that can be observed in the inspection reports which merit comment. Problems in ventilation equipment such as extractors and powder collection ducts are noted in the three periodic inspections conducted in 1995, 1996, and 1997. Given the presence of asbestos and toxic chemicals, proper ventilation and the adequate extraction of airborne contaminants are major concerns. Though the verification inspection reports indicate that these violations were abated, they were identified again in the subsequent periodic reports. No fines were imposed. The reports show a similar pattern with regard to insulation of electrical cables and steam tubing.

Three violations related to hazardous materials were noted in the June, 1996, inspection report, of which one was cited for the imposition of a fine. The others were reported as abated in the verification reports. Eight violations related to hazardous materials were noted in the August, 1997, inspection report. One was noted as unabated in the verification inspection and cited.

Dr. Mercado's testimony, though not of the ITAPSA plant, provides expert information on workplace hazards associated with the production process of vehicular brakes in Mexico. Many of the problems and deficiencies he identified at the nearby American Brakeblock facility are consistent with the problems workers identified at ITAPSA. These hazards and problems include inadequate or no labeling in Spanish of hazardous materials; inadequate or no information and/or training on toxic hazards for workers; high noise levels with inadequate or no hearing protection; inadequate ventilation; lack of lockout/tagout program; inadequate personal protective equipment for workers; lack of access for workers to the results of their own medical examinations; and inadequate control of dust generation in the production process, such as mixing asbestos and other materials in open containers. Dr. Mercado also noted that workers who work with asbestos should shower before leaving work and have their work clothing laundered at the workplace.

Mexican Government inspection reports of ITAPSA are also consistent with a number of the health and safety complaints of workers, though differing considerably as to degree. These include problems with ventilation and dust control devices; high noise levels; lack of safety devices on moving machinery; inadequate fire prevention and fire fighting measures; the presence of electrical hazards; the absence of procedures for hazardous materials handling; and inadequate training on workplace hazards. In most of the cases, however, the company was able to show compliance or abate the hazards so as to avoid paying financial penalties. The noticeable variances between the inspection reports, on one hand, and the testimony of Dr. Mercado and the workers of ITAPSA, on the other, are (1) a matter of degree; (2) the matter of personal protective equipment, which Dr. Mercado found to be inadequate but which is not addressed in the inspection reports; and (3) the issue of inadequate shower and laundering facilities, mentioned by both Dr. Mercado and the workers, which is not addressed in the inspection reports. NOM 18 contains language requiring employers to notify workers of the possibility of contamination of their work clothes and that contaminated work clothes be deposited in a designated central location at the end of the workday.

A major concern to the NAO is the absence of information on safety and health hazards available to workers. Testimonial evidence indicates that hazardous materials were unlabeled, or not labeled in Spanish so as to be understood by workers. Hazardous materials warning signs and data sheets were also unavailable to workers as was, apparently, the information on makeup of the health and safety committee. The information available to the NAO depicts a workplace where asbestos and toxic chemicals are used in the production process; where inspection reports do not indicate the level of contaminants; where adequate personal protective equipment may be unavailable; where toxic chemicals are unlabeled or not labeled in Spanish; where monitoring of airborne contaminants and toxic levels is not conducted by STPS inspectors; and where basic information on safety and health is unavailable to workers. These conditions persisted despite regular and ongoing inspections by the STPS.

Mexico's safety and health laws provide for significant fines for violations of safety and health laws, standards and regulations. In accordance with FLL Article 512D, RFSHMAT Article 168, LFPA Article 71, and REPASA Article 15, these fines may be substantially increased in cases of repeated violations or the failure to correct deficiencies. LFPA allows for the imposition of sanctions for every day in which an infraction persists. The purpose of such increments in penalties is deterrence. The deterrent effect is lost if sanctions are not applied consistently and uniformly. The NAO is unable to ascertain if such is the case in the instant submission. However, the only fines assessed against ITAPSA thus far amount to less than U.S. \$200.00. The modesty of this sum and the fact that a number of the violations appear in more than one inspection report are a cause for concern.

## **VI. FINDINGS**

This review indicates that a group of workers who attempted to exercise their right to freedom of association were subjected to retaliation by their employer and the established union in the workplace, including threats of physical harm and dismissal. They

were required to vote for union representation in an atmosphere of fear and intimidation and to cast open ballots in the presence of representatives of the contending unions, including the one threatening reprisals and dismissals; the representative of a management that had clearly expressed its union preferences and had already retaliated against workers for their union activities; and before a large number of aggressively acting and boisterous individuals who were not employees but were allowed in by the company. Finally, workers engaged in lawful organizational and informational activities outside a workplace were subjected to physical attack by persons associated with the established union at the plant and in the presence of company officials. The events described herein are not consistent with the principle of freedom of association and, for the most part, do not appear to be consistent with Mexican law.

The information obtained by the NAO during its review is consistent regarding the actions of Federal CAB No. 15, including the first postponement of the representation election, the conduct of the election itself, the review of the challenge to the election, and the delay in hearing the case of workers dismissed under the exclusion clause. The proceedings conducted do not appear to be in accordance with Mexican laws and regulations in all instances. When viewed in the context of the composition of the CAB and the interest of the CTM in the outcome of the proceedings before that tribunal, review of this submission raises questions about the impartiality of the CAB No. 15 and the fairness, equitableness, and transparency of its proceedings and decisions.

With regard to the health and safety issues raised, the information available indicates that the ITAPSA plant may suffer serious health and safety deficiencies that are hazardous to its employees. The fines that were assessed were minimal and the NAO has been unable to ascertain if they have been collected. Also, there are serious questions as to the efficacy of the inspections themselves. However, the information also indicates that the factory has been subjected to ongoing health and safety inspections by the authorities which have noted numerous shortcomings and that corrective action was undertaken on many of these.

The NAO makes the following findings:

1. While Mexico's Constitution and Federal Labor Law protect workers' freedom of association, in the instant case it appears that they were not afforded the protections to which they were entitled.
2. The conduct of the proceedings by Federal CAB No. 15 was not always consistent with the Federal Labor Law and the obligation of the Parties to the NAALC to ensure impartial tribunals for the resolution of labor disputes.
3. The attack on workers outside the premises of American Brakeblock raises troublesome questions as regards the rights of workers to engage in legitimate organizing activities without being subject to reprisals, including physical attack.
4. The conduct of health and safety inspections of the ITAPSA facility appears to have been consistent with Mexican law, though questions are raised regarding the efficacy of the inspections. These questions are of special concern because of the presence of asbestos and other toxic substances at the plant which may not be adequately monitored.

In consideration of the above, ministerial level consultations on the freedom of association protections afforded Mexican workers in a union organizing campaign and the conduct of representational elections would further the objectives of the NAALC. Consultations should address, at a minimum, the intimidation of workers by management and CTM Section 15 prior to and during the representation election; the application of the exclusion clause; the use of secret ballot in representation elections; and other procedural matters in the conduct of representation elections.

Consultations at the ministerial level would contribute to a better understanding on the matter of the actions of Federal CAB No. 15 as regards the instant submission and whether there exists, within Mexican law, means and procedures by which concerns of

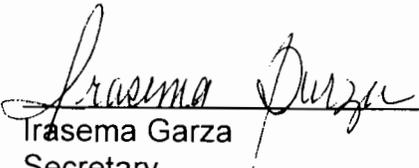
partiality by the CAB and fairness in its proceedings and decisions, may be addressed. Such consultations would also serve to clarify the operation and functions of the exclusion clause, its compatibility with freedom of association, and the scope and application of the Supreme Court decision that found that the application of the clause in the context of a representation election may be inappropriate.

With regard to the health and safety issues raised in the submission, ministerial consultations would contribute to a better understanding of the health and safety conditions prevailing at the ITAPSA plant, the efficacy of inspections conducted of the plant, and the overall effectiveness of Mexico's efforts to secure compliance with its health and safety laws.

With regard to the incident outside the premises of American Brakeblock, the U.S. NAO will seek additional information on the matter from the Mexican NAO.

## **VII. RECOMMENDATION**

Accordingly, the NAO recommends ministerial consultations on the freedom of association, procedural, and safety and health issues raised in Submission No. 9703, pursuant to Article 22 of the NAALC.

  
Irasema Garza  
Secretary  
U.S. National Administrative Office

July 31, 1998