

NORTH AMERICAN AGREEMENT ON LABOR COOPERATION

PUBLIC REPORT OF REVIEW OF
OFFICE OF TRADE AND LABOR AFFAIRS
SUBMISSION 2005-03



OFFICE OF TRADE AND LABOR AFFAIRS
BUREAU OF INTERNATIONAL LABOR AFFAIRS
U.S. DEPARTMENT OF LABOR

AUGUST 31, 2007

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SUBMISSION 2005-03**

EXECUTIVE SUMMARY

PURPOSE OF THE REPORT

- Submission 2005-03 was filed pursuant to the North American Agreement on Labor Cooperation (NAALC) on October 14, 2005, by the *Federación de Trabajadores Vanguardia Obrera de la Confederación Revolucionaria de Obreros y Campesinos* (FTVO-CROC), with support from the U.S. Labor Education in the Americas Project and the Washington Office on Latin America.

- The submission was accepted for review on January 6, 2006, as it raised issues related to labor law matters in Mexico and because a review would further the objectives of the NAALC. In accordance with its procedural guidelines, the Office of Trade and Labor Affairs (OTLA) (formerly the U.S. National Administrative Office or NAO and the Office of Trade Agreement Implementation or OTAI) completed its review of the case, which included consultations in Mexico with Mexican government officials, workers, employers, union representatives, and an independent legal expert with knowledge of the case.

SUMMARY OF THE SUBMISSION

- Submission 2005-03 alleges that the Government of Mexico failed to fulfill its obligation under Article 3 of the NAALC to effectively enforce its labor laws in connection with freedom of association and protection of the right to organize, the right to bargain collectively, and the right to strike. The submission further alleges that the government did not effectively enforce its laws by failing to conduct required on-site inspections to detect and remedy labor law violations concerning forced labor, child labor, minimum employment standards, employment discrimination, and occupational safety and health.

- The submission also alleges that the Government of Mexico has failed to effectively ensure that administrative and labor tribunal proceedings related to collective bargaining and the right to strike are fair, equitable, and transparent, in violation of Article 5 of the NAALC.

The focus of the submission is on FTVO-CROC's efforts to obtain collective bargaining rights on behalf of workers at the Rubie's de Mexico (Rubie's) facility in the municipality of Tepeji del Rio, State of Hidalgo, Mexico. According to the submitters, the government's failure to enforce its labor laws led to a persistent pattern of labor law violations, which prompted the submitters to seek representation from the FTVO-CROC to address those problems. The submitters allege that efforts to obtain representation were improperly denied by Mexico's Federal Conciliation and Arbitration Board No. 6 and Local Conciliation and Arbitration Board No. 51. The Boards' denials were based on jurisdictional issues, procedural flaws in the FTVO-CROC's legal filings, and on the grounds that Rubie's was a party to an existing collective bargaining agreement with another union. The submitters allege that these denials represent an ongoing failure by the Government of Mexico to protect collective bargaining rights and provide access to fair and equitable labor tribunals.

FINDINGS

- The OTLA's review of the written documentation and oral testimony—including the decisions of federal and local labor authorities, information provided by Rubie's, communications from the Mexican NAO, and findings by an OTLA-retained legal expert in Mexico—supports the following general findings:
 - While the FTVO-CROC did not always follow proper legal procedures in seeking to represent interested workers at Rubie's, the Mexican labor authorities' handling of the process revealed several problematic aspects with the administrative procedures that allow for the registration of collective bargaining agreements and the exercise of collective bargaining rights. Areas of concern include reliance on technical grounds to reject union petitions seeking collective bargaining rights, unwarranted delays resulting from ineffective communication between federal and state labor authorities,

and a general lack of transparency as to how Mexican labor law recognizes unions and collective bargaining agreements.

- The Government of Mexico failed to conduct periodic inspections at Rubie's between 1998 and 2005, as required by Mexico's Federal Labor Law. As a result, labor law violations may have gone unchecked for several years, as evidenced by violations that were found when four Extraordinary Inspections were conducted by Mexican authorities in May 2005.
- Although inspections were conducted in May 2005, and overtime violations uncovered in those inspections were resolved by settlement, the inspections revealed inconsistencies between the federal and local labor authorities' processes and application of Mexico's labor law.
- The allegation of discrimination was not substantiated, but the OTLA review determined that pregnancy testing was used as part of the employment application process at Rubie's until July 2005. The finding raises concern as to whether Mexico is effectively meeting prior commitments to eliminate the practice.

RECOMMENDATION

Pursuant to Article 21 of the NAALC, the OTLA recommends consultations between the OTLA and the Mexican NAO on issues relating to the enforcement of labor laws addressing the following issues and obligations under Articles 3 and 5 of the NAALC:

- Compliance with procedural requirements in Mexico's labor law, and measures taken to prevent unwarranted delays and to improve coordination between federal and state authorities in the administration of labor justice procedures;
- Transparency in the union representation process, including the establishment of a publicly available registry of unions and collective bargaining agreements;
- Resources devoted to the periodic inspection of workplaces so that labor laws, such as those relating to the protections of young persons, minimum employment standards, and occupational safety and health, may be enforced effectively and consistently; and

- Clarification of discriminatory practices in Mexico and the current status of initiatives undertaken on this issue pursuant to the Ministerial Consultations Implementation Agreement relating to U.S. Submission 9701.
- Access to Mexican authorities responsible for relevant labor law enforcement.

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LIST OF ACRONYMS

CEDAW	U.N. Convention on the Elimination of All Forms of Discrimination Against Women
CRC	U.N. Convention on the Rights of the Child
CTM	<i>Confederación de Trabajadores Mexicanos</i> (“Confederation of Mexican Workers”)
FTVO-CROC	<i>Federación de Trabajadores Vanguardia Obrera de la Confederación Revolucionaria de Obreros y Campesinos</i> (“Workers Federation of the Revolutionary Confederation of Workers and Peasants”)
ICCPR	International Covenant on Civil and Political Rights
ILO	International Labor Organization
IMSS	<i>Instituto Mexicano de Seguridad Social</i> (“Mexican Institute of Social Security”)
JCA	<i>Junta de Conciliación y Arbitraje</i> (“Conciliation and Arbitration Board”)
JFCA	<i>Junta Federal de Conciliación y Arbitraje</i> (“Federal Conciliation and Arbitration Board”)
JLCA	<i>Junta Local de Conciliación y Arbitraje</i> (“Local Conciliation and Arbitration Board”)
LFT	<i>Ley Federal de Trabajo</i> (“Federal Labor Law”)
Mexican NAO	Mexican National Administrative Office
NAALC	North American Agreement on Labor Cooperation
NAFTA	North American Free Trade Agreement
OTLA	Office of Trade and Labor Affairs (U.S. Department of Labor)
RFSH	<i>Reglamento Federal de Seguridad, Higiene y Medio Ambiente de Trabajo</i> (“Federal Regulation on Safety, Health, and the Working Environment”)
STPS	<i>Secretaría del Trabajo y Previsión Social</i> (“Secretary of Labor and Social Security”)
UN	United Nations
U.S. NAO	U.S. National Administrative Office

1. Introduction

The U.S. National Administrative Office (U.S. NAO) was established pursuant to the North American Agreement on Labor Cooperation (NAALC), the supplemental labor agreement to the North American Free Trade Agreement (NAFTA). The U.S. NAO, which had been renamed the Office of Trade Agreement Implementation (OTAI) in 2004, was reassigned in 2006 to the newly created Office of Trade and Labor Affairs (OTLA). The OTLA has retained the functions of the U.S. NAO and continues to provide for the review of submissions concerning labor law matters arising in Canada or Mexico under the NAALC.¹ 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 domestic procedures.

“Labor law” is defined in Article 49 of the NAALC as follows:

laws and regulations, or provisions thereof, that are directly related to (a) freedom of association and protection of the right to organize; (b) the right to bargain collectively; (c) the right to strike; (d) prohibition of forced labor; (e) labor protections for children and young persons; (f) minimum employment standards, such as minimum wages and overtime pay, covering wage earners, including those not covered by collective agreements; (g) elimination of employment discrimination on the basis of grounds such as race, religion, age, sex, or other grounds as determined by each Party’s domestic laws; (h) equal pay for men and women; (i) prevention of occupational injuries and illnesses; (j) compensation in cases of occupational injuries and illnesses; (k) protection of migrant workers.

Procedural guidelines governing the receipt, acceptance for review, and conduct of review of submissions filed with the OTLA were issued pursuant to Article 16(3) of the NAALC. The OTLA’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.² Pursuant to these guidelines, once a determination is made to accept a submission for review, the OTLA conducts such further examination of the submission as may be

¹ 69 Fed. Reg. 77128 (2004).

² 59 Fed. Reg. 16660 (1994). The OTLA published revised procedural guidelines for the acceptance of submissions on December 14, 2006 (71 Fed. Reg. 76691 (2006)). Those guidelines do not apply to this submission, which was accepted for review under the U.S. NAO procedural guidelines published on April 7, 1994.

appropriate to better understand and publicly report on the issues raised therein. The Director of the OTLA then issues a public report that includes a summary of the review proceedings, findings, and recommendations.

Submission 2005-03 was filed with the OTLA on October 14, 2005, by the *Federación de Trabajadores Vanguardia Obrera de la Confederación Revolucionaria de Obreros y Campesinos* (FTVO-CROC), with support from U.S. Labor Education in the Americas Project and the Washington Office on Latin America. The submission centers on the alleged failure of Mexican authorities to effectively enforce labor laws at the Rubie's de Mexico (hereinafter "Rubie's") factory in the State of Hidalgo, Mexico. The allegations involve infringements of rights relating to freedom of association and protection of the right to organize, the right to bargain collectively, the right to strike, prohibition of forced labor, labor protections for children and young persons, minimum employment standards, elimination of employment discrimination, prevention of occupational injuries and illnesses, and compensation in cases of such illnesses and injuries. The submission was accepted for review on January 6, 2006, and a notice of acceptance for review—stating the rationale for acceptance and the objective of the review—was published in the Federal Register on January 12, 2006.³

The submitters claim that the events alleged indicate a failure of the Mexican government to fulfill its obligation to protect and promote worker rights. In particular, the submitters claim that "[t]he Mexican government has failed to provide workers at Rubie's: 1) impartial and independent agencies to enforce the labor law; 2) efficient resources to repair damages caused to workers; and 3) on-site inspections at plants to verify compliance with the labor law."

2. Summary of Submission

Rubie's was a small costume garment manufacturing factory located in Tepeji del Rio in the State of Hidalgo. Depending on seasonal needs, Rubie's employed approximately 60 to 125 workers, and its products included costumes, accessories, masks, and pet outfits.

³ 71 Fed. Reg. 2067 (2006).

According to the submission, numerous incidences of worker rights violations at Rubie's over the course of several years prompted workers to try to improve their working conditions by joining the FTVO-CROC and pursuing a collective bargaining agreement with factory management. The allegations include use of forced and child labor, occupational safety and health violations (poor cafeteria conditions, a lack of personal protection equipment, improper ventilation, and occupational injuries and illnesses), discriminatory practices (pregnancy testing), and violations of minimum employment standards (failure to pay overtime).

Believing the existing union, *Confederación de Trabajadores Mexicanos* (CTM), was not adequately representing their rights, some workers approached the FTVO-CROC. The FTVO-CROC began efforts to formalize its representation of Rubie's workers and negotiate a collective bargaining agreement, despite the existence of the CTM's legally valid collective bargaining agreement, which was registered at the *Junta Local de Conciliación y Arbitraje* (JLCA). In connection with the FTVO-CROC's attempts to obtain collective bargaining rights, the submitters allege that Mexico's state and federal labor boards failed to enforce labor laws protecting their right to freedom of association and collective bargaining, in violation of the NAALC. The FTVO-CROC's legal efforts to secure the bargaining rights of Rubie's employees and the actions of the Mexican authorities on these issues are discussed in greater detail in Section 6 of this report.

The submitters allege that the actions of Mexico's federal and state labor boards in this case represent a widespread and recurring problem throughout Mexico. In support of this allegation, the submitters cite the OTLA's public report on Submission 2003-01 (Puebla), which reiterated concerns about the continuing difficulty faced by Mexican workers in establishing unions and obtaining collective bargaining rights.

2.1 Summary of Allegations

2.1.1 Freedom of Association and Protection of the Right to Organize; The Protection of the Right to Bargain Collectively; and The Right to Strike

The submitters allege that the issues raised in this submission represent a systematic pattern of non-enforcement in Mexico concerning a failure to protect the rights of workers to form

independent unions. In support of this position, the submitters cite past U.S. NAO submissions that raised similar issues (U.S. NAO Submissions 9403, 9702, 9703, 9801, 9901, and 2003-01).

Specifically, the submitters allege that the Junta Federal de Conciliación y Arbitraje (JFCA) improperly denied the registration of an FTVO-CROC collective agreement with Rubie's. Allegations also include collusion between the JLCA of Hidalgo and the company in registering a collective bargaining agreement allegedly entered into with the CTM without the workers' knowledge ("protection contract"), failure to protect workers against reprisals for attempts to affiliate with the FTVO-CROC, and the use of police to intimidate and disperse picketers. If true, these allegations could constitute violations of Article 3 of the NAALC, which obligates each Party to promote compliance with and effectively enforce its labor law through appropriate government action, and of Article 5, which obligates each Party to ensure that its administrative, quasi-judicial, and judicial and labor tribunal proceedings for the enforcement of its labor law are fair, equitable and transparent.

2.1.2 Failure to Conduct Periodic On-site Inspections that Could Have Resulted in More Effective Enforcement of Labor Laws

The submitters allege that the Government of Mexico failed to conduct on-site inspections to verify compliance with the labor law in the areas of forced labor, child labor, minimum employment standards, employment discrimination, and occupational safety and health. As a result, the submitters allege that the following labor law violations were not timely remedied:

1. The submitters allege that workers were forced to work excessive hours without pay in order to meet production goals under the threat of losing their jobs, and that there were times when the plant doors were locked and a security guard was employed to force workers to meet production quotas, in violation of wage-hour and forced labor laws.
2. The submitters allege that there were minors—both illegally underage (13 years old) and those within the legal limits for minors (14–16 years old)—regularly employed at Rubie's, whose hours and conditions were in violation of limits and protections set by law.
3. The submitters allege that workers were not paid overtime in accordance with applicable labor law.

4. The submitters allege that females were forced to take pregnancy tests as part of their pre-employment physicals, were not hired if they refused to take the tests, and were periodically required to take pregnancy tests after being employed, in violation of anti-discrimination laws.
5. The submitters allege that health and safety conditions at the plant were in violation of Occupational Safety and Health laws and that workers were not properly compensated for illnesses and injuries caused by those conditions.

If true, these allegations could constitute a violation of Article 3 of the NAALC, which lists on-site inspections as one of the means by which each Party to the NAALC can meet its obligation to promote compliance with and effectively enforce its labor law.

2.2 Action Requested

Action requested of the OTLA by the submitters includes:

1. Conduct cooperative consultations, as outlined in Article 21 of the NAALC, in order to resolve the issues raised in the submission;
2. Conduct Ministerial Consultation, as outlined in Article 22 of the NAALC, to discuss the failure to enforce applicable Mexican labor laws and international laws as cited in the submission; and
3. Convene an Evaluation Committee of Experts as outlined in Article 23 of the NAALC, to review the trade-related issues raised in the submission.

3. OTLA Review

The OTLA accepted Submission 2005-03 for review on January 6, 2006. The review was deemed appropriate as the submission raised issues relevant to Mexico's effective enforcement of its labor laws under Articles 3 and 5 of the NAALC and because a review would further the objectives of the NAALC, as set out in Article 1. Objectives include improving working conditions and living standards in each Party's territory, promoting the NAALC's labor principles, and encouraging publication and exchange of information, data development, and coordination to enhance mutually beneficial understanding of the laws and institutions governing labor in each Party's territory. The decision to review was not intended to indicate any determination as to the validity or accuracy of the allegations contained in the submission.

In conducting its review, the OTLA considered information from the submitters, workers (including one group that sought to affiliate with the FTVO-CROC and another group that remained affiliated to the CTM), Rubie's management and spokespersons, union representatives, government officials, attorneys for the parties involved, and an OTLA-retained Mexican labor law expert. The OTLA also visited Mexico City, as well as Pachuca and Tepeji del Rio in the State of Hidalgo, on a site visit from March 6-15, 2006. Documents reviewed by the OTLA are on file in its public reading room.

The purpose of the review was to gather information to assist the OTLA to better understand and publicly report on the issues raised in the submission concerning freedom of association and protection of the right to organize, the right to bargain collectively, the right to strike, prohibition of forced labor, labor protections for children and young persons, minimum employment standards, elimination of employment discrimination, and prevention of occupational safety and health injuries and illnesses, and compensation in cases of such illnesses and injuries. Pursuant to the NAALC, the review focused specifically on the Government of Mexico's effective enforcement of labor laws that guarantee the worker protections cited above. As such, the OTLA review is not intended to determine whether or not Rubie's may have acted in violation of the law, and nothing in the report should be taken as an independent finding by the OTLA on Rubie's compliance or failure to comply with Mexican labor law.

3.1 Information from Submitters

The submission included fifteen appendices containing newspaper articles, birth certificates and weekly paychecks, copies of complaints filed with the JFCA, a copy of an FTVO-CROC Assembly Act and strike notification, worker testimony before the JFCA, copies of worker complaints on forced overtime filed with a Municipal Conciliation Judge in Tepeji del Rio, a copy of JFCA resolutions, a copy of individual settlements, a copy of a signed Collective Bargaining Agreement between Rubie's and the FTVO-CROC, and copies of indirect appeals (*amparos*) lodged against the JFCA resolutions. The OTLA also engaged in meetings, telephone conversations, and written correspondence with the submitters in order to obtain additional information.

The OTLA received additional documentation in support of the submission at a February 1, 2006, meeting with the submitters. The supplement contains 25 legal documents, including strike petitions, indirect and direct *amparos*, and JFCA resolutions. Further information and materials submitted to the OTLA by the submitters included a compact disc of worker testimony, a legal analysis by two Mexican labor law attorneys regarding issues raised in the submission, photos of workers, FTVO-CROC's legal documents filed with the JLCA of Hidalgo, JLCA resolutions, and written responses to OTLA questions posed to the submitters.

3.2 Information from Mexican National Administrative Office (NAO)

The OTLA sent two sets of questions relating to the issues raised in the submission to the Mexican NAO dated March 2, 2006, and March 30, 2006. On June 27, 2006, the Government of Mexico provided the OTLA with responses to some of the questions. These responses and the attached annex provided useful analysis and citations of relevant law and practice.

3.3 Information from Visit to Mexico

Representatives from the OTLA and the U.S. Embassy traveled to Mexico City and the State of Hidalgo. In addition to the meeting with Mexican NAO officials, meetings were held with Mexican labor lawyers, the JLCA of Hidalgo's Board President and Secretary of Collective Issues, representatives of the CTM and the FTVO-CROC unions, representatives of the Solidarity Center, *Secretaría del Trabajo y Previsión Social* (STPS), two Mexican legal firms that represented Rubie's, management of the Rubie's factory, and two groups of workers from Rubie's—one affiliated with the CTM and another affiliated with FTVO-CROC. The OTLA was unable to meet, as it wished, with the JFCA of the Federal District (Mexico City). As it had done in a previous OTLA visit in conjunction with the review of U.S. Submission 2003-1 (Puebla), the Mexican NAO declined the request of the OTLA to arrange meetings with various authorities in Mexico responsible for labor law enforcement.

3.4 No Public Hearing

Pursuant to Section H.3 of the Guidelines, the OTLA did not hold a public hearing, deciding instead that an on-site visit would provide more useful information.

3.5 Information from Additional Sources

Rubie's provided extensive information regarding Submission 2005-03 through the law office of Jones Day, the company's legal representatives in Washington, D.C.. For example, the company provided a 30-page response to the submission that included over 500 pages of exhibits.⁴ As the OTLA's review progressed, Rubie's continued to provide additional materials, including responses to follow-up questions raised by the OTLA's review. During the visit to Mexico City, the company facilitated interviews with two Mexican law firms retained by Rubie's as local counsel during the dispute.

The OTLA also contracted the services of a Mexican law professor and experienced mediator with expertise in the field of Mexican labor law. This expert provided written and verbal replies to several questions posed by the OTLA on issues raised by the submitters involving the procedures for the Juntas de Conciliación y Arbitraje (Conciliation and Arbitration Boards (JCAs) to determine jurisdiction in labor law matters.⁵

4. Relevant NAALC Obligations

Article 3 obligates each Party to "promote compliance with and effectively enforce its labor law through appropriate government action." Article 49 defines "labor law," as indicated in Section 1 above. In addition, Article 3.2 obligates each Party to "ensure that its competent authorities give due consideration in accordance with its law to any request by an employer, employee or their representatives, or other interested person, for an investigation of an alleged violation of the Party's labor law."⁶ Article 5 of the NAALC sets out the Parties' obligations relating to procedural guarantees, committing each Party to "ensure that its administrative, quasi-judicial, judicial, and labor tribunal proceedings for the enforcement of its labor laws are fair, equitable, and transparent."⁷

⁴ Rubie's de Mexico, S. de R.L. de C.V., "Response to U.S. NAO Submission 2005-03 (Hidalgo)."

⁵ Fuentes Muñoz, Manuel, Esq., "Legal Analysis of the Rubie's de Mexico Dispute," June 2006.

⁶ NAALC, Art. 3.

⁷ *Ibid.*, Art. 5.

5. Relevant Mexican Government Agencies Responsible for Labor Law

Title XI (Articles 523–539) of Mexico’s *Ley Federal de Trabajo* (LFT)⁸ specifies the labor authorities and social service entities responsible for the application of labor laws in Mexico. Relevant labor authorities concerning U.S. Submission 2005-03 include STPS, the JFCA, the JLCA of Hidalgo, Mexican courts, and the Inspectorates of Labor at the state and federal levels.

Secretariat of Labor and Social Welfare

STPS is the leading labor body in Mexico and, as such, is the principal government agency on all matters related to the NAALC. LFT Article 524 defines the duties of STPS and its labor offices. STPS is an executive agency that oversees compliance with labor laws, as well as collective bargaining, fair labor standards, labor defense, and job training.⁹

Conciliation and Arbitration Boards (JCAs)

The federal and state JCAs are judicial labor tribunals within the executive branch of the Mexican government. The Boards are tripartite in composition, including representatives of the government, workers, and employers, with the number of members depending on the volume of cases within their particular jurisdiction. The Boards handle individual grievances between workers and employers as well as all aspects of industrial relations within their jurisdiction, such as union formation and registration, collective bargaining, plant closings, and the right to strike.¹⁰

Article 123, Section XXXI of the Mexican Constitution provides that the application of labor law is the responsibility of state authorities in their respective jurisdictions, and matters within state jurisdiction are the responsibility of the JLCAs.¹¹ Some sectors of the economy fall under the jurisdiction of Mexican federal authorities, and are listed in LFT Article 527. The JFCAs have

⁸ Federal Labor Law (Ormond Beach, FL: Foreign Tax Law Publishers, Inc., trans., 1998). This English translation of the LFT will be used throughout the report with exceptions to be noted. A copy is on file in the public reading room of the OTLA.

⁹ Labor Relations Law in North America (Washington, DC: Secretariat of the Commission for Labor Cooperation, 2000), 145. Copies of this book are available at: www.naalc.org (also available in Spanish and French). [hereinafter Commission, Labor Relations Law].

¹⁰ *Ibid.*, 147.

¹¹ Political Constitution of the United Mexican States (Constitución Política de los Estados Unidos Mexicanos). Cámara de Diputados del Honorable Congreso de la Unión de los Estados Unidos Mexicanos. This English translation of the Mexican Constitution will be used throughout the report with exceptions to be noted.

jurisdiction over matters involving the textile industry. In order for a factory to be classified as within the textile industry, it must either make thread or cloth, or dye material.

Final decisions of the state and federal labor authorities are referred to as *laudos*. A *laudo* is a judicial order, which may require the reinstatement of, or issuance of severance payment to, a worker unjustifiably discharged. A *laudo* may also order the employer otherwise to comply with the law or with the collective contract.¹² The decisions of a state or federal JCA may only be challenged on constitutional grounds through a separate proceeding referred to as the *amparo* lawsuit (*juicio de amparo*).¹³

Mexican Courts

Under constitutional and statutory rights of *amparo*, a private party injured by the decision or action of a JCA may seek review in the federal courts alleging that the JCA has engaged in a violation of fundamental rights or due process of law.¹⁴ Federal courts have exclusive jurisdiction over *amparos*, regardless of whether they involve a state or federal JCA, and complaints must be filed before the courts within 15 days of the issuance of the act or decision to be challenged.¹⁵ Where a JCA decision is overturned, the court will identify the legal errors committed, indicate the legal interpretations that should govern, and direct the JCA to reopen or resume its proceedings so that a decision may be reached in accordance with those interpretations.¹⁶

In Mexico's civil law system, the Supreme Court and the federal appeals courts (Collegiate Circuit Courts) create binding precedent, referred to as *jurisprudencia firme*, only when they issue five consecutive consistent decisions on the same point.¹⁷ In the absence of such a series

¹²Commission, Labor Relations Law, 156.

¹³ See Anna Torriente, Study of Mexican Supreme Court Decisions Concerning the Rights of State Employees to Organize in the States of Jalisco and Oaxaca (Study funded by the U.S. NAO: November 11, 1996) 8. [hereinafter Torriente, Study of Mexican Supreme Court Decisions].

¹⁴ Plant Closings and Labor Rights: A Report to the Council of Ministers by the Secretariat of the Commission for Labor Cooperation (Washington, DC: Secretariat of the Commission for Labor Cooperation, 1997) 48. See also Article 1 of Mexico's *Ley de Amparo* (*Amparo Law in Mexico*) and Articles 103 and 107 (Section V – D) of the Political Constitution of the United Mexican States. [hereinafter Commission, Plant Closings and Labor Rights].

¹⁵ Commission, Labor Relations Law, 154.

¹⁶ *Ibid.*, 155.

¹⁷ *Ibid.*, 101.

of decisions, a court ruling binds only the parties to a particular case in question and need not be followed in other cases.¹⁸ Thus, the decisions of lower courts and tribunals in labor matters are most often guided by analysis of specific statutory provisions, articles of the Constitution, or regulations.

Inspectorate of Labor

LFT Article 541 states in relevant part that labor inspectors shall have the following duties:

- I. [t]o ensure that the labor norms are observed, in particular those prescribing the rights and obligations of workers and employers, those concerning the prevention of employment injuries, safety and health;
- II. [t]o inspect enterprises and establishments during the hours of work (day or night) on producing identification;
- III. [t]o put questions to worker and employers, in the presence or in the absence of witnesses, on any matter connected with the application of the labor norms;
- IV. [t]o require the production of any books, registers or other documents required to be kept by the labor norms;
- V. [t]o suggest that any nonobservance of the employment conditions be corrected;
- VI. [t]o suggest that any duly ascertained defects in plans and methods of work be put right if they constitute a violation of the labor norms or a danger to the workers' safety or health, and the adoption of immediate measures in the case of any imminent danger;
- VII. [t]o examine the substances and materials used in the enterprises and establishments in the case of dangerous work; and
- VIII. [a]ny other powers and duties assigned to them by law....

Article 542 (Section II) states that labor inspectors shall “inspect enterprises and establishments periodically.” Pursuant to Section IV, inspectors are required to write reports, consult with workers and the employer, report any non-fulfillment or violation of the labor laws, provide a copy of such report to the parties consulted, and forward the report to the appropriate authority. In addition, Article 547 states that inspectors shall be held liable if they fail to carry out inspections, give false information in reports, or if they receive directly or indirectly any bribe or gift from the workers or employers.

Furthermore, according to the Mexican NAO, the General Regulations on Inspection and Application of Sanctions for Labor Law Violations (hereinafter “General Regulations”) indicate

¹⁸ Ibid.

that all workplaces shall be subject to inspection. The inspections contemplated in Articles 12–14 of the General Regulations include: (1) initial inspections; (2) periodic inspections, to be conducted at 12-month intervals or as necessary; and (3) verification of compliance with measures or orders previously issued by labor authorities.¹⁹ In addition to these ordinary inspections, which are required by law, there may also be “extraordinary” inspections based on knowledge of possible violations. As explained by the Mexican NAO in their response to OTLA questions on the issue of inspections, the types of inspections conducted at workplaces can vary based on conditions at the worksite.

6. Collective Rights: Freedom of Association and Protection of the Right to Organize; The Protection of the Right to Bargain Collectively; and The Right to Strike

6.1 NAALC Obligations

The submitters’ claims as to collective rights relate to obligations arising under Articles 3 and 5 of the NAALC. Article 3 obligates each Party to promote compliance with and effectively enforce its labor law through appropriate government action. Labor law is defined by Article 49 and includes freedom of association and protection of the right to organize, the right to bargain collectively, and the right to strike. Article 5 obligates each Party to ensure that its proceedings for enforcement of its labor law are fair, equitable and transparent, that “such proceedings comply with due process of law,” that “the parties to such proceedings are entitled to support or defend their respective positions and to present information or evidence,” and that “such proceedings are not unnecessarily complicated and do not entail unreasonable charges or time limits or unwarranted delays.”²⁰ Article 5.2(c) requires each Party to “provide that final decisions on the merits of the case in such proceedings are ...based on information or evidence in respect of which the parties were offered the opportunity to be heard.”²¹ Finally, Article 5.3 commits each Party to “provide, as appropriate, that parties to such proceedings have the right, in accordance with its law, to seek review and, where warranted, correction of final decisions in such proceedings.”²²

¹⁹ General Regulations on Inspection and Application of Sanctions for Labor Law Violations.

²⁰ NAALC Art. 5.1 (a), (c), (d).

²¹ NAALC Art. 5.2.

²² NAALC Art. 5.3.

6.2 Mexican Law

The key sources of law governing labor relations in Mexico are the Political Constitution of the United Mexican States, the LFT and regulations promulgated under the LFT, and international treaties ratified by the Senate and signed into law by the President. Article 133 of the Mexican Constitution establishes that the Constitution, laws emanating from the Constitution (such as the LFT), and duly ratified treaties form “the supreme law of the land.”²³ In cases where there are no express provisions found in the sources above, LFT Article 17 provides that “general principles of law, the general principles of social justice deriving from Article 123 of the Constitution, case law and precedent, custom and equity shall be taken into account.”

6.2.1 Mexican Constitution

Collective rights in Mexico are guaranteed through constitutional protections for all citizens—such as Article 9, which establishes the right to assemble or associate peaceably for any lawful purpose—as well as through Article 123’s specific labor rights provisions. On freedom of association and the right to organize, Article 123(A), Section XVI provides that “both employers and workers shall have the right to organize for the defense of their respective interests, by forming unions, professional associations, etc.”

While the right to bargain collectively is not explicitly mentioned in the Constitution, the introductory clause of Article 123(A), which empowers the Congress to “enact labor laws which shall apply . . . in a general way to all labor contracts,” has been interpreted to provide a constitutional basis for the right to, and regulation of, collective bargaining.²⁴

The right to strike is covered in several sections of the Constitution’s Article 123. Section XVII states, “the laws recognize the strike and the lockout as a right of workers and employers.” Strikes shall be considered lawful, according to Section XVIII, if they “have as their purpose achieving balance between the different factors of production, harmonizing the rights of labor with those of capital. . . . Strikes shall be considered unlawful only when the majority of the strikers engage in violent acts against persons or property.” Section XXII states that “an

²³ Commission, Labor Relations Law, 101.

²⁴ *Ibid.*, p. 119.

employer who dismisses a worker without justifiable cause or because he has entered an association or union, or for having taken part in a lawful strike, shall be required, at the election of the worker, either to fulfill the contract or to indemnify him to the amount of three months' wages.”

In order to ensure enforcement of the collective rights discussed above, Article 14 of the Constitution provides a general guarantee of due process of law, stating that “no person shall be deprived of life, liberty, property, possessions, or rights without a trial by a duly created court in which the essential formalities of procedure are observed and in accordance with laws issued prior to the act.” As for the appropriate authority to handle labor disputes, Article 123(A), Section XX states that “differences or disputes between capital and labor shall be subject to the decisions of a Board of Conciliation and Arbitration, consisting of an equal number of representatives from workers and employers, with one from the Government.”

6.2.2 Federal Labor Law

Freedom of Association and Protection of the Right to Organize

Title VII (Chapters I and II) of the LFT provides further legal foundation for the constitutional guarantees of freedom of association and the right to organize. LFT Article 357 states that “[w]orkers and employers shall have the right to establish trade unions without prior authorization,” while LFT Article 358 states that “[n]obody shall be obligated to join or abstain from joining a trade union.”

LFT Article 364 states that trade unions must be formed with no less than 20 workers in active employment or no less than three employers. LFT Article 365 lays out union registration requirements. If the union is to be competent throughout the federal territory, it must register with the Ministry of Labor and Social Welfare. If it is to have only local competence, the union must register with the appropriate JCA. LFT Article 365 further requires that registration documents be endorsed or authenticated by the general secretary, the organizing secretary, and the minutes secretary of the union, unless there is a provision to the contrary in the union bylaws.

In accordance with Article 374, a trade union that has been lawfully constituted shall have “legal personality and have capacity to . . . defend its rights in dealings with authority and institute the corresponding legal actions.” To engage in these dealings, Article 376 requires that the union shall be represented by its general secretary or by a person designated by the union’s board of directors.

The Right to Bargain Collectively and Enter into Collective Labor Contracts

The laws pertaining to collective bargaining are set out in Title VII, Chapter III of the Mexican LFT. Article 386 defines a collective bargaining agreement as “any agreement concluded between one or more worker unions and one or more employers or employer unions, for purposes of prescribing the conditions that will govern the performance of work in one or more business enterprises or establishments.” In Mexico, there may be more than one registered union in a given enterprise. In such cases, Section I of LFT Article 388 provides that the collective contract shall be made with the union holding the greatest number of members employed in the enterprise. An insurgent union can at any time allege support of a majority of workers and file a challenge with the appropriate JCA to an incumbent union’s “title” to the collective bargaining agreement. Under Article 389, if a union “ceases to have the largest membership referred to in the preceding article, as determined by the JCA, it shall lose its “title” to the existing collective labor contract.” The union that demonstrates it has the support of the greatest number of employees then obtains or maintains “title” to the agreement, as the case may be. This is known as a titularity action and it is the process that should have been followed by the FTVO-CROC in its attempt to obtain collective bargaining rights at Rubie’s.

LFT Article 387 states that “an employer who employs workers who are members of a trade union shall be bound to conclude a collective contract with such trade union upon request.” If an employer refuses to sign the contract, workers may then exercise the right to strike as long as the strike is in furtherance of one of the objectives of LFT Article 450²⁵ and meets the requirements

²⁵ LFT Article 450(II) states, “A strike shall have the following objectives: to make the employer or employers agree to enter into a collective labor contract and to demand its revision on the expiry of its validity.”

of LFT Article 451.²⁶ In practice, the exercise of the right to strike generally compels the employer to engage in bargaining and to conclude a collective bargaining agreement with the union.²⁷

Strike Procedures

LFT Title XIV, Chapter XX (“Strike Procedures”) establishes the requirements for strike notice petitions. In relevant part, LFT Article 920, Sub-section I, requires that strike proceedings be initiated by the submission of a statement of petitions, which must “be sent to the employer in writing and shall formulate the workers’ petitions, announce their intention to strike if the petitions are not met, specifically indicate the purpose of the strike and fix the day and hour for the suspension of work or the terms of the strike.” LFT Article 923 states that “[n]o proceeding on a written notice of intention to strike shall be taken if it does not comply with the requirements of Article 920, if it is given by a trade union that is not a party to the collective labor contract or an approved agreement for the industry or if it seeks to demand the signature of a collective contract, notwithstanding that one has already been deposited with the appropriate Conciliation and Arbitration Board. The Chairman of the Board must make certain of the foregoing, certify that he has done so, and give notice in writing of his decision to the plaintiff before instituting any proceedings in connection with a notice of intention to strike.” LFT Article 928 establishes the rules for strike proceedings. Of particular relevance to this submission, Article 928, Sub-section V states that once the strike proceedings have commenced:

No motion on the question of competence may be made [by the employer or workers]. If the Board observes that the matter is not within its competence, after sending notice of the intent to strike to the employer, it shall make a statement to that effect.

The workers shall have 24 hours within which to designate the Board that they consider to be competent, so that the file can be remitted to it....

²⁶ LFT Article 451 states in relevant part, “Work shall not be suspended unless: I) the object of the strike is one or more of the purposes enumerated in the preceding article; II) the suspension is carried out by the majority of workers of the enterprise or establishment.”

²⁷ Commission, Labor Relations Law, 122.

Notification of Errors in Union Registration Petitions

LFT Article 685 provides that proceedings in labor disputes must be public, without cost, immediate and primarily oral in nature. Further, it calls on labor boards to take the necessary steps to ensure that proceedings are conducted with “the maximum of economy, concentration and simplicity.” LFT Article 685 also requires the JCA to correct a worker’s petition if it is incomplete as to the matters on which a remedy could be obtained. LFT Article 686 provides that the JCAs shall order correction of any irregularity or omission noted in the conduct of a labor dispute proceeding. Some JLCA officials and legal experts in Mexico have interpreted Articles 685 and 686 to require the JCAs to correct errors and omissions in petitions submitted by unions as part of administrative proceedings (*e.g.*, union registration petitions).²⁸ However, the Government of Mexico asserts that Article 685 applies in labor dispute proceedings between employers and employees and not in administrative proceedings. Mexico maintains that the LFT does not require a JCA to correct errors or deficiencies in the documentation submitted by unions as part of administrative proceedings. Separately, the Government of Mexico asserted before the International Labor Organization (ILO) that Article 685 provides for the JLCAs to correct petition errors for individual workers - not unions - and therefore there was no requirement for JLCAs to correct omissions or errors cited as justification for denial of a union’s registration petition.²⁹

6.2.3 International Conventions/Treaties Ratified by Mexico

As noted above, Article 133 of the Mexican Constitution provides that treaties concluded by the President and approved by the Senate will be the “supreme law of the land.” Mexico has ratified several international instruments relevant to collective rights, including ILO Convention 87 (Freedom of Association and Protection of the Right to Organize).³⁰ The Government of Mexico thereby recognizes the Convention as part of Mexico’s labor law. Articles 2–5 of ILO Convention 87 provide workers with the right to establish and join organizations of their own choosing without previous authorization and the right to unionize without interference that would restrict this right.

²⁸ Submission 2003-01 (Puebla) Public Report of Review, 32-33.

²⁹ Mexican Government Response of February 3, 2004, to the ILO Committee on Freedom of Association re: Case No. 2282 on Matamoros Garment S.A. case.

³⁰ ILO Conventions ratified by Mexico, available at <http://www.ilo.org/ilolex/english/newratframeE.htm>.

Mexico has also ratified several additional international agreements with provisions relating to freedom of association, the right to bargain collectively, the right to organize, and the right to strike. These include the American Convention on Human Rights,³¹ the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador),³² the International Covenant on Economic, Social and Cultural Rights,³³ and the International Covenant on Civil and Political Rights (hereinafter ICCPR).³⁴

6.3 Analysis

The submitters allege that the Mexican government violated Articles 3 and 5.1 of the NAALC by failing “to provide workers at Rubie’s . . . impartial and independent agencies to enforce the labor law” regarding freedom of association and protection of the right to organize, the right to bargain collectively, and the right to strike. As an example, the submitters allege that the JLCA and Rubie’s colluded to register a collective bargaining agreement entered into with the CTM without the workers’ knowledge (“protection contract”). This claim is based primarily on the submitters’ unsuccessful efforts to obtain collective bargaining rights at Rubie’s.

In order to consider the merits of the submitters’ claims, it is necessary to examine the enforcement jurisdiction of relevant Mexican labor authorities, the procedures followed by the FTVO-CROC, and the legal basis for the subsequent actions of the Mexican authorities.

6.3.1 Enforcement Jurisdiction in Labor Matters in Mexico

Article 123, Section XXXI of the Mexican Constitution states that “labor law enforcement belongs to the authorities of the States in their respective jurisdictions,” but provides a list of 22 key industries or sectors in which labor matters “remain within the exclusive competence of the federal authorities.”³⁵ LFT Article 527 reiterates the mutually exclusive nature of Mexico’s

³¹ Freedom of Association provisions are found in Article 16 of the American Convention on Human Rights.

³² Article 8 of the Additional Protocol specifically addresses “Trade Union Rights” and includes the Right to Strike.

³³ Freedom of Association and the Right to Strike are guaranteed in Article 8 of the International Covenant on Economic, Social and Cultural Rights.

³⁴ Freedom of Association is guaranteed in Article 22 of the International Covenant on Civil and Political Rights.

³⁵ These industries are: 1) Textile; 2) Electrical; 3) Cinematography; 4) Rubber; 5) Sugar; 6) Mining; 7) Foundries and steel mills; 8) Energy; 9) Petrochemical; 10) Cement; 11) Limestone; 12) Automotive; 13) Chemical; 14) Pulp

jurisdictional approach in labor matters, providing the same list of industries reserved for federal jurisdiction and stipulates in Article 529 that in cases not covered by the exceptions of LFT Article 527, “the application of labor rules shall belong to the State authorities.”

According to the Mexican Constitution and the LFT, there are certain matters—the training and skills development of workers, as well as issues of safety and health in the workplace—in which the state shall assist the federal authorities when it concerns enterprises or establishments whose other aspects of labor relations are subject to the jurisdiction of the state.³⁶ However, the jurisdiction of labor authorities in the issues discussed here—recognition of unions, registration of collective bargaining agreements, and strike procedures—appears to be mutually exclusive.

The determination of whether state or federal authorities are responsible for adjudicating labor matters at Rubie’s, therefore, depends upon whether the industrial classification of Rubie’s fits within the enumerated exceptions of LFT Article 527. As explained by the OTLA-retained legal expert, industrial classification is determined by the company at the time of incorporation based on its corporate purpose and description of activities. According to information provided by the Mexican NAO, in case of controversy, an interested employer or worker may challenge a company’s industrial classification before a JCA. In addition, Article 17 of the Internal Rules of the STPS authorizes interested workers or employers to request that the General Directorate of Federal Labor Inspections review a company’s industrial classification. The review includes consideration of relevant documents (*e.g.*, articles of incorporation, IMSS registration, descriptions of the raw materials and machinery used in the productive processes), which can then be compared with the equipment and physical characteristics of the workplace by means of an inspection. Parties are notified as to the outcome of the determination, and the appropriate labor authority receives the company file so it can monitor compliance with labor regulations. In the current submission, Rubie’s classified itself as part of the *confecciones* industry—the cutting and sewing of textiles—a non-textile industry, and the submitters never petitioned the General Directorate of Federal Labor Inspections or a JCA to determine whether this classification, which places Rubie’s under state jurisdiction, was proper.

and paper; 15) Vegetable oils; 16) Packaged food processing; 17) Brewing; 18) Railroads; 19) Lumber; 20) Glass; 21) Tobacco; and 22) Banks and credit unions. *Article 123, Section XXXI(a), Mexican Constitution.*

³⁶ Mexican Constitution, Article 123, Section XXXI(b) and LFT Article 527(A).

6.3.2 Proceedings at the Local Board of Conciliation and Arbitration

On December 17, 2004, 31 employees of Rubie's signed an Assembly Act (Act), indicating their affiliation with FTVO-CROC and authorizing the union to issue a strike petition in order to obtain a signed collective bargaining agreement with Rubie's. The JLCA of Hidalgo received the Act, along with supporting documentation regarding the legal personality of the union, and a copy of the proposed collective bargaining agreement, on January 7, 2005.

On January 10, 2005, the JLCA of Hidalgo dictated their denial of the strike petition. Relying on LFT Article 376, the JLCA denied the petition based primarily on their determination that the signature of the Secretary General, Salim Kalkach Navarro, on the strike petition was inconsistent with his signature on supporting documentation.³⁷ In further support, the JLCA also cited Article 920, which contains the technical requirements for a strike petition, as well as jurisprudence from the 4th Circuit Collegiate Tribunal and the 2nd Circuit Collegiate Tribunal.³⁸

After being informed of the JLCA of Hidalgo's initial denial of the strike petition, the FTVO-CROC filed the petition for a second time on February 1, 2005. On March 4, the JLCA of Hidalgo once again denied the petition based on a failure to comply with LFT Article 376.

On February 18, 2005, the FTVO-CROC held an Extraordinary General Assembly, at which 58 employees of Rubie's ratified their desire to affiliate with the union in an Assembly Act. The workers expressed dissatisfaction with the CTM in the Act, stating that the CTM did not guarantee the workers' rights as established in the collective bargaining agreement, as well as those stipulated in the LFT. The Act concludes by authorizing the FTVO-CROC to file a titularity action with the JLCA of Hidalgo in order to secure the collective bargaining rights of Rubie's workers.

Despite the language of the February 18 Act specifically authorizing a titularity action, the FTVO-CROC filed a strike demand for the third time with the JLCA of Hidalgo on March 14,

³⁷ In the Board's words, the signatures were "*notoriamente diferentes*" ("notoriously different").

³⁸ The jurisprudence emphasizes the importance of the JCA's role in verifying that fundamental elements of the LFT have been followed in legal filings.

2005, accompanied by a copy of the Secretary General's voter registration card in order to authenticate his signature. The next day, the strike demand was rejected, with the JLCA notifying the FTVO-CROC that a union (which was not named) was already present in the plant and had registered a collective bargaining agreement with the JLCA on March 8, 2005. Therefore, based on LFT Article 923, the JLCA concluded that because the FTVO-CROC was not a party to the existing labor contract, it was not legally authorized to proceed with its strike petition.

On March 18, 2005, the FTVO-CROC filed a titularity demand with the JLCA of Hidalgo. This demand was rejected on procedural grounds and archived as a concluded matter by the Board on March 22, 2005. Notice of these actions was posted on a bulletin board outside the JLCA hearing room and sent to the representatives of the FTVO-CROC on April 4, 2005. In their resolution, the Board offered two reasons for rejecting the titularity demand: (1) the petitioners did not provide any valid documents proving that the workers the FTVO-CROC claimed to represent were connected to the enterprise; and (2) as in the earlier strike petitions, the signature of the FTVO-CROC's Secretary General could not be authenticated due to inconsistencies with the signature on other documents submitted to the JLCA of Hidalgo.

It should be noted that the FTVO-CROC's efforts to file a strike petition and titularity demand with the JLCA of Hidalgo were not mentioned in the original submission received by the OTLA. On several occasions, the OTLA asked the submitters whether there had been any proceedings at the local level and the FTVO-CROC responded that they had only pursued their legal rights at the federal level. The OTLA learned of the proceedings during the site visit to Mexico in March of 2006, at which point the FTVO-CROC provided documentation of these proceedings and amended the allegations made in the original submission to include violations on the part of the JLCA of Hidalgo. The FTVO-CROC explained that it was only after the JLCA's repeated denial of the strike petitions and the titularity demand that it approached the federal authorities.

In prior submissions, the issue of denying union registration on technical grounds has raised concern (e.g., U.S. Submission 2003-01) of inconsistencies with international standards as well

as with Mexican LFT Article 357.³⁹ In the current case, the FTVO-CROC was informed of the technical basis for the rejection of their petitions, but was not notified of possible remedies for the technical errors in their petitions. As noted in the public report for U.S. Submission 2003-01, it remains unclear to what extent the labor authorities in Mexico are required not only to inform workers of deficiencies in their petitions, but to provide guidance on how to correct those deficiencies, and the ILO has urged the Government of Mexico to take measures to ensure that the JCAs provide petitioners with the opportunity to correct irregularities identified in union registration documents when submitted.⁴⁰

6.3.3 Proceedings at the Federal Board of Conciliation and Arbitration

On March 4, 2005 (the same day that the JLCA rejected the strike demand for the second time), the FTVO-CROC filed a strike petition with the JFCA Special Board No. 6, stating their intention to go on strike if Rubie's did not agree to conclude a collective bargaining agreement with the union. As noted above, the FTVO-CROC also pursued a parallel process at the state level when it filed a third strike petition with the JLCA of Hidalgo on March 14, 2005.

As the strike petition made its way through the JFCA, the FTVO-CROC and company representatives engaged in negotiations to attempt to resolve the dispute. On April 13, a legal representative of Rubie's signed a collective bargaining agreement with the FTVO-CROC, which FTVO-CROC immediately attempted to register with the JFCA. The agreement was rejected by factory management the following day. Attorneys for Rubie's contend that the representative signed the collective bargaining agreement without informing the company and without due regard for a pre-existing collective bargaining agreement with the CTM.

On April 18, 2005, the JFCA issued a resolution setting a conciliation "hearing" for April 22, 2005, in order to assist in resolving the issues that led to the strike notice petition and the dispute over the April 13 collective bargaining agreement. The conciliation hearing is better classified as an informal meeting, intended as the first step in the JFCA's efforts to resolve labor disputes. The hearing is not an opportunity for parties to submit evidence in relation to the matter in

³⁹ ILO Committee on Freedom of Association Definitive Report on Case 2282 concerning Matamoros Garment, June 22, 2004.

⁴⁰ Ibid.

dispute. If a settlement is not reached at the conciliation stage, the JCA will convene a formal hearing, where such evidence may be submitted.⁴¹ Both parties appeared at the hearing and asked the JFCA to defer the hearing until May 11 in order to allow the parties to continue to negotiate a settlement to the dispute.

On April 25, 2005, and during the negotiation period, the submitters alleged that 58 of the workers who were seeking to affiliate with the FTVO-CROC were dismissed from work at Rubie's. Rubie's contends that these workers (of whom nearly 20 were seasonal workers whose contracts were not scheduled to be renewed) walked off the job. The submission further claims that the Hidalgo State government sent police officers to the scene in order to "intimidate and discourage workers from standing up for their rights," an allegation that Rubie's firmly denies. The submitters provided a copy of a complaint asserting these allegations that they filed with a Municipal Conciliation Judge in Tepeji del Rio on April 26, 2005; however, the Judge informed the workers that because she had no jurisdictional competency over labor matters, they should take their complaint to the appropriate JLCA. There is no evidence that the submitters filed their complaint with the JLCA, and the OTLA could not corroborate the allegations regarding improper dismissal of workers or police intimidation.

On May 11, 2005, the conciliation hearing was held and a settlement agreement was drafted by the Board's clerk, recognizing the FTVO-CROC representation of Rubie's workers and withdrawing the list of demands that had accompanied the strike demand. The agreement also included a commitment on the part of the company to reinstate the workers who were allegedly dismissed on April 25.⁴² Following the meeting, a sealed copy of the agreement was submitted to the parties by the JFCA clerk. Importantly, however, it was not made clear to the submitters or Rubie's representative that the President of JFCA Special Board Number 6 and its worker and employer representatives had not yet voted on the matter and that the agreement needed their signatures to have a legally binding effect. This resolution, if adopted and finalized, would have given full legal effect (within the federal jurisdiction) to the collective bargaining agreement

⁴¹ Commission, Labor Relations Law, 150.

⁴² Attorneys for Rubie's have stated that the company representative who agreed to the proposed settlement at the May 11 meeting was their previous Mexican counsel who acted without the knowledge or consent of the company. Furthermore, according to the attorneys, this individual did not have (or present to the JFCA) the requisite power of attorney to represent Rubie's in this matter.

signed on April 13. However, when presented to the members of the JFCA for signature, the President of the Board rejected the proposal, noting that the Board lacked competent jurisdiction in the matter “given the fact that the corporate purpose of the company called to strike . . . does not fit in any of the industrial branches contemplated in Article 527 of the Mexican Federal Labor Law.”

Following the May 11, 2005, hearing the JFCA issued two resolutions, one on the strike notice petition and the other on the FTVO-CROC’s attempt to register the April 13 collective bargaining agreement. The first—issued on May 17, 2005, by the Assistant Secretary of Strike Notices—concluded that under Article 123 of the Constitution and LFT Article 527, the JFCA “lacked competent jurisdiction to know of the strike proceeding at issue.” This decision was based on the determination that Rubie’s did not fit the definition of a textile manufacturer, and was not, therefore, within the exclusive jurisdiction of federal authorities. For evidence of Rubie’s corporate purpose, the Board cited the registration of the Rubie’s corporate partnership, which was certified before Notary Public No. 21 of the federal district in 2003. This document, which had been entered into the court record by the FTVO-CROC, described the “social object” of Rubie’s as “the purchase, sale, manufacture, assembly, distribution, import, export and trade in general of all sorts of pieces of clothing and disguises.” These activities, according to the JFCA, “do not fit any of the sub-sections of Article 527 of the Mexican Federal Labor Law . . . since the term ‘textile industry’ must be understood as the group of operations needed for obtaining and transforming natural products or raw materials.”⁴³

Upon its determination that Rubie’s did not fit the definition of “textile industry” for coverage under Article 527, the JFCA cited Article 698, which identifies the JLCAs as the appropriate venue for cases outside of federal competence. As support for the procedural aspects of their resolution, the JFCA relies upon Article 928, Sub-section V, which authorizes the JFCA to declare itself without jurisdictional competency during strike proceedings if appropriate.

⁴³ To support this definition of “textile industry,” the Board cited *Octava época, Cuarta sala, Gaceta del Semanario Judicial de la Federación, Tomo 84, Diciembre de 1994, Tesis 4/J. 49/94, pág. 25* (holding that JLCAs shall have competence when the delineated conflict refers to works that do not belong to the textile industry).

In accordance with Sub-section V, the JFCA granted the FTVO-CROC a period of 24 hours to select another JCA to receive the file. The JFCA resolution stated that failure to identify another JCA would result in the file being archived as a concluded matter due to a lack of juridical interest on the part of the FTVO-CROC. There is no indication that the FTVO-CROC selected another JCA to consider the matter upon receiving the JFCA's resolution. Instead, the union initiated an appeal against the actions taken by the Assistant Secretary of Strike Notices under the *amparo* process (discussed below).

On May 19, 2005, Special Board Number 6 of the JFCA issued the second resolution, notifying the parties (FTVO-CROC and Rubie's) that the JFCA "lacked competent jurisdiction to know of the registration and filing of the collective bargaining agreement executed by [the parties]." The legal reasoning was identical to the resolution of May 17, 2005, again determining that Rubie's was not subject to federal jurisdiction. For that reason, the JFCA ordered that the file be remitted to the JLCA of Hidalgo. In response to this resolution, the FTVO-CROC prepared a second *amparo* action.

The submitters assert that the collective bargaining petition has not been processed "due to an unjustified delay by the Local Conciliation and Arbitration Board . . . [resulting] in a delay of impartial justice for the workers." The President of the JLCA of Hidalgo informed the OTLA that as of June 2006, his office had not yet received the file from the JFCA. However, given the existence of a valid CTM collective agreement with Rubie's, the Board President informed the OTLA that the JLCA of Hidalgo would not have been able to register the contract and would have sent the file to the archives as a concluded matter. The OTLA was unable to determine why the JLCA did not receive the file.

6.3.4 *Amparo* Proceedings

As noted above, after the JFCA determined that Rubie's was not subject to federal jurisdiction and rejected FTVO-CROC's efforts to register a collective bargaining agreement at the May 11, 2005, conciliation hearing, the FTVO-CROC filed several appeals under the *amparo* process. Article 848 of the LFT provides that "[d]ecisions of the Boards [JCA] shall not be subject to any appeal....and [t]he Boards may not revoke their decisions." Therefore, the only recourse to

appeal a JCA decision is by filing an *amparo*. The action for *amparo*⁴⁴ permits judicial review of the acts or decisions of public authorities that allegedly violate constitutionally guaranteed individual rights.⁴⁵ In the Mexican legal system, there are two types of *amparo* proceedings. A “direct” *amparo* can be filed with the JCA, requesting a temporary suspension of the contested decision while the case file is sent to the Collegiate Circuit Court for review.⁴⁶ The “indirect” *amparo*, which is usually filed with the relevant district court, seeks review of an interlocutory decision or procedural ruling that is alleged to have caused the filing party irreparable harm. In the case at hand, the FTVO-CROC filed two “indirect” *amparos*, which were accepted by the First District Judge in Labor Matters.

6.3.4.1 Strike Process *Amparo* Proceedings

The first indirect *amparo* was filed by the FTVO-CROC on June 7, 2005, challenging the JFCA’s May 17, 2005, resolution that it lacked jurisdiction to consider the strike petition. The FTVO-CROC’s claim alleged that the JFCA’s resolution infringed on rights provided in Constitutional Articles 14 and 16.⁴⁷ The FTVO-CROC also alleged that the JFCA violated several provisions of the LFT, including Articles 18,⁴⁸ 685, and 848. Primarily, the submitters allege that the JFCA resolution violated Article 848 in that it illegally revoked a previous JFCA decision. The FTVO-CROC contended that the JFCA-sponsored conciliation hearing on May 11, 2005, resulted in a legally-binding agreement between the union and Rubie’s, which constituted an irrevocable final decision of the JFCA. In addition, the *amparo* challenged the JFCA’s substantive determination that Rubie’s did not qualify for federal jurisdiction. In support of this claim, the FTVO-CROC cited the third clause in the May 11 agreement negotiated with Rubie’s before the JFCA, which stated: “The company called to strike states under affirmation that in abundance to the corporate purpose described in the power that is in the court record . . . its main activity is the manufacture of material, dyed and cotton textile products.” In further support of their claim, FVTO-CROC cited to the April 13 collective bargaining agreement

⁴⁴ Literally translated as “shelter” or “protection.”

⁴⁵ Commission, Labor Relations Law, 154.

⁴⁶ Ibid.

⁴⁷ Article 14, cited in section 5 above, contains general due process rights. Article 16 generally requires that acts or decisions of public authorities which directly affect individual persons or their property be specifically authorized by law and be permitted by law.

⁴⁸ LFT Article 18 states: “In interpreting labor norms . . . in case of doubt, the more favorable interpretation shall be made in favor of the workers.”

signed with the company, which specified that the activity of the company is the fabrication of cotton textiles. Finally, the *amparo* also challenged a May 27, 2005, resolution of the JFCA in which the CTM—as the titleholder of the collective contract with Rubie’s—was recognized as a party of interest in the case. As the basis for this claim, FTVO-CROC argued that the CTM was not the “legitimate” or “authentic” representative of the workers.

The hearing on this *amparo* was held on October 14, 2005, and the FTVO-CROC’s appeal was dismissed based primarily on Article 73, Section XVI of the Federal Law of *Amparo*. This Article states that an *amparo* action is contrary to law (“*improcedente*”) when the legal effects of the contested act cease to exist. In this case, the District Judge ruled that the legal effects of the May 17 strike petition resolution ceased to exist when the JFCA issued its May 19 ruling of jurisdictional incompetence and ordered the JLCA to determine the validity of the April 13 collective bargaining agreement. As a result of the May 19 resolution, the court concluded that there was no longer a basis for the *amparo* since the issue that was the genesis of the strike petition (the signing of a collective bargaining agreement) was now being resolved at the local level.

The District Court also rejected the FTVO-CROC’s challenge of the JFCA’s May 27, 2005, resolution. The Court ruled that the recognition of the CTM as a party of interest and the accompanying opportunity to present their views on the case was not an act of “impossible reparation”—an act that would leave the party without recourse to further legal proceedings—pursuant to the Federal *Amparo* Law, Article 73, Section XVIII. The Court reasoned that neither the submission of such information by the CTM nor its consideration by the JFCA were certain to occur, and therefore, the resolution did not have the effect of denying the FTVO-CROC access to future legal proceedings on the matter.

6.3.4.2 Collective Bargaining Agreement *Amparo* Proceedings

On June 24, 2005, the FTVO-CROC filed a second indirect writ of *amparo* with the First District Judge in Labor Matters challenging the JFCA’s May 19 resolution. In the *amparo*, the FTVO-CROC alleged that by denying the registration of the April 13 collective contract with Rubie’s, the JFCA resolution again violated constitutional Articles 14 and 16. The union’s legal

arguments were similar to those of the prior *amparo*, arguing that the JFCA violated LFT Articles 18, 685, and 848. In addition, the FTVO-CROC alleged that the ruling of the JFCA violated LFT Articles 701⁴⁹ and 706,⁵⁰ which address the general procedural rules for declarations of jurisdictional incompetence by JCAs.

After several delays due to Rubie's not receiving proper notice of the *amparo* process, the hearing on the second indirect writ of *amparo* was held on October 20, 2005. Relying again on the Federal Law of *Amparo*, Article 73, Section XVIII, the District Judge again ruled that the writ of *amparo* was *improcedente*. This, according to the District Judge, was because the JFCA had ordered that the file be remitted to the JLCA of Hidalgo for consideration at the local level. In addition, the District Judge also relied on jurisprudence from other legal bodies for support of his decision.⁵¹

6.3.4.3 *Amparo* Revisions

On November 7, 2005, the FTVO-CROC sought review of both the strike and collective bargaining agreement *amparo* rulings. The *amparo* review on both issues was accepted by the 10th Collegiate Court in Labor Matters of the First Circuit (hereinafter "Collegiate Court"). On December 1, 2005, the Collegiate Court vacated the District Court's original ruling (issued October 14, 2005) on the strike *amparo* on the grounds that the CTM union was an interested third party and had not been given proper notice of the *amparo*. The Collegiate Court ordered that the FTVO-CROC begin the strike process *amparo* anew in the District Court, ensuring that the CTM was properly notified of any future proceedings.

⁴⁹ LFT Article 701: "The Board of Conciliation and the Boards of Conciliation and Arbitration must be declared incompetent ex officio, at any stage of the process, up until the hearing of the evidence, when justified.... If the Board is declared incompetent, with the citation of the parties, the file shall be immediately remitted to the Board or Tribunal which is deemed competent...."

⁵⁰ LFT Article 706: "Nullity – Proceedings before an incompetent Board shall be null and void, except in regards to the act of admission of the complaint and that which is provided in articles 704 and 928, item V of this law or, if applicable, where an agreement has been executed which shall terminate the suit in the stage of conciliation."

⁵¹ For example, the Judge cited Jurisprudence 267, page 216, Volume V, Labor Matters, Fourth Chamber, Weekly Federal Court Report 1917-2000, Eighth Epoch, which states in relevant part that the declination of jurisdiction of the labor authority that first knows of a labor action and that remits the case record to another authority it believes to have competent jurisdiction is not an act of "impossible reparation" (thereby making the indirect *amparo* inadmissible), given that it is not certain that the second authority will accept or deny jurisdiction.

The FTVO-CROC filed the strike process *amparo* for a second time with the District Court. On January 25, 2006, the District Court issued a resolution rejecting the FTVO-CROC's strike process *amparo*, again citing *Ley Amparo* Article 73, Section XVI in finding that the *amparo* action was *improcedente*. The District Court also dismissed the FTVO-CROC's challenge of the May 27, 2005, resolution recognizing the CTM as a legitimate party of interest in the case, stating that the complainants did not formulate any specific or precise legal arguments as to the harm caused by the resolution and offered no evidence that challenged the validity of the existing collective bargaining agreement with the CTM.

In response to the District Court's latest ruling, the FTVO-CROC again requested a review of this strike process *amparo* ruling, filing a second petition with the Collegiate Court on February 20, 2006. The Collegiate Court issued a ruling on May 20, 2006, upholding the District Court's prior ruling. The OTLA understands that this ruling concludes the FTVO-CROC's legal challenges to the JFCA's ruling on the FTVO-CROC strike petition.

As for the collective bargaining agreement *amparo*, the Collegiate Court held a hearing on December 14, 2005, and issued a ruling upholding the District Court's dismissal of the writ of *amparo*. The Collegiate Court reiterated that the declaration of jurisdictional incompetence was not an act of "impossible reparation" as required by the Federal Law of *Amparo* because the authority to which the case was sent—the JLCA of Hidalgo—had not yet determined whether to accept or deny jurisdiction. Additionally, the Collegiate Court noted that if the JLCA of Hidalgo denied jurisdiction, it would only be appropriate for the FTVO-CROC to initiate an *amparo* process against the JLCA of Hidalgo and not against the JFCA.

6.4 Findings and Recommendations

This submission is complicated by the fact that FTVO-CROC's legal strategy seems to have contributed in part to the confusion and delays in processing their petitions to obtain collective bargaining rights at Rubie's. Nonetheless, the handling of the FTVO-CROC's petitions, together with earlier submissions reviewed by the OTLA, raises concerns about the application of procedural guarantees under Mexican labor law, that warrant NAO consultations under Article 21 of the NAALC to examine Mexico's compliance with Article 5.1 of the NAALC.

Based on the evidence reviewed by the OTLA, it appears that Rubie's classification as a non-textile industry required the FTVO-CROC to initiate their challenge to the collective bargaining agreement apparently held by the CTM at the JLCA of Hidalgo. However, by engaging both the state and federal labor authorities in a matter that should have been within the exclusive jurisdiction of only one JCA, the FTVO-CROC appears to have attempted to circumvent established legal procedures in Mexico. There is little doubt that the FTVO-CROC was aware of the CTM's presence at Rubie's prior to filing their strike petition with the local and federal boards. Further, the union's Act of Assembly in 2005, which authorized the FTVO-CROC to seek a titularity demand with the JLCA of Hidalgo, support the OTLA's conclusion that the FTVO-CROC was aware of the proper means to challenge the CTM's presence at the company. However, following the rejection of this demand by the JLCA of Hidalgo on technical grounds, the FTVO-CROC made no effort to file a titularity petition or to challenge the JLCA ruling through the available *amparo* process. Instead, the FTVO-CROC attempted to pursue a strike and registration of a collective bargaining agreement at the federal level, which was inconsistent with LFT Article 389.

To establish that federal jurisdiction was appropriate, the FTVO-CROC and/or Rubie's would have been required to prove before a JCA or through the General Directorate of Federal Labor Inspections that the activity of the company fit within an industry enumerated in LFT Article 527 (*i.e.*, textile). According to the legal expert consulted by the OTLA on this matter, if it had been shown that federal jurisdiction was indeed proper, the collective agreement of the incumbent union—which was registered at the JLCA of Hidalgo—would have to be transferred to the JFCA in order to retain its validity. However, there is no indication that the non-textile industrial classification of Rubie's was challenged before a JCA or the General Directorate prior to the filing of the indirect *amparos*.

While the FTVO-CROC's own actions contributed to delays and confusion in resolving the legal issues raised by the union's attempt to acquire collective bargaining authority at Rubie's, the OTLA concludes that the Mexican local authorities' handling of this case may have precipitated the FTVO-CROC's resort to federal authorities and exacerbated the delays and confusion. In

particular, the JLCA's continued reliance on technical grounds to deny three strike petitions and a titularity petition, without providing technical assistance to help correct those deficiencies, limited the union's options in seeking representational rights. It also appears that once the JLCA received a deficient petition from the union, there was no clear mechanism for future petitions to rectify the problem, making it almost impossible for such petitions to ever comply with the technical requirements of filing petitions. The use of administrative formalities to deny union registration has been raised as a concern in prior reports issued by the OTLA (*e.g.*, Submission 2003-01) and has been criticized by the ILO as inconsistent with international standards as well as LFT Article 357.⁵² Although in this case technical grounds were not used to deny a union's registration,⁵³ their use in denying strike petitions and titularity challenges raises similar concerns.

At the federal level, the lack of information about the locally registered collective bargaining agreement prevented the JFCA from immediately dismissing FTVO-CROC's petition on the grounds that it lacked jurisdiction, which resulted in additional delays. This lack of coordination between state and federal labor boards raises concern as to whether Mexico is meeting its obligation under NAALC Article 5.1(d) to ensure that proceedings are "not unnecessarily complicated and do not entail...unwarranted delays," as it relates to procedures for establishing collective bargaining rights.

The handling of the May 11 agreement led to further confusion and delays. By providing the parties with a document that contained the official seal of the Board, the JFCA led the FTVO-CROC to believe the May 11 agreement had legal effect, and that it validated the April 13 collective bargaining agreement between their union and Rubie's. However, as explained by the Mexican NAO in their responses to the OTLA's questions, LFT Article 839 requires that decisions of the labor boards "be signed by the members thereof and by the Secretary, on the same day on which they were voted." Therefore, without the required signatures, this document

⁵² ILO Committee on Freedom of Association Definitive Report on Case 2282 concerning Matamoros Garment, June 22, 2004.

⁵³ It should be noted that the OTLA investigation did not reveal any evidence to support the submitter's vague allegation of collusion between the JLCA and Rubie's to register a protection contract. Evidence suggests that although some workers at Rubie's may have been unhappy with CTM representation, they were aware of the existence of a CTM collective bargaining agreement at the company.

had no legal validity at all. Although the OTLA review cannot conclude that the actions of the JFCA clerk are indicative of systemic problems in the handling of labor disputes before JFCAs, the release of a document to the parties that on its face appeared to be a JFCA-sanctioned resolution, but had no legal validity, is an example of procedural irregularities in this case.

Notwithstanding the apparent lack of jurisdiction by the JFCA to review the strike petition and to register the April 13 collective bargaining agreement, the JFCA's procedures for issuing its May 17 and May 19 resolutions also raise concerns about potential procedural irregularities. As explained by the OTLA-retained legal expert, the strike procedure initiated by FTVO-CROC concluded on May 11, 2005, when the union agreed to withdraw its strike notice petition. As a result, the expert concluded that the appropriate legal procedure for the JFCA to determine jurisdictional competency should have been LFT Article 701, which would have given the submitters the right to a hearing in which they could have presented evidence that the JFCA was the appropriate venue for their strike petition. Instead, the legal expert asserts that the JFCA improperly continued to treat the strike petition as an active strike proceeding under Article 928, Sub-section V, which resulted in an expedited ruling of jurisdictional incompetence on May 17, 2005, that denied the submitters an opportunity to present evidence disputing the JFCA's ruling on jurisdiction. The expert further concluded that failure to provide such a hearing violated the general procedural protections found in Article 14 of the Mexican Constitution.

Finally, although the prompt transfer of the collective bargaining agreement registration petition to the JLCA may not have resulted in a favorable outcome for the FTVO-CROC, the delay in remitting the case from the federal to the state authorities raises concerns as to whether the Government of Mexico has effectively enforced the procedural guarantees of LFT Article 685, which requires labor dispute proceedings to be "expeditious." As of the conclusion of the OTLA's review, the file had not been remitted to the JLCA of Hidalgo (as ordered by the JFCA) and the OTLA has received no explanation as to why the file has not been transferred. As a result, the FTVO-CROC was denied a formal decision on the jurisdictional aspects of their case at the state level with regard to the collective bargaining agreement petition. Without a formal ruling on the disposition of their claim, FTVO-CROC was denied the opportunity to employ the *amparo* process to potentially appeal the resulting JLCA decision. The delay raises concern as to

whether the process, as applied, ensures that labor justice proceedings do not entail “unwarranted delays” and that parties to such proceedings have the right “to seek review and, where warranted, correction of final decisions issued in those proceedings,” as required by NAALC Articles 5.1(d) and 5.3.

A review of the facts in the case suggests that improved communication and information sharing between the state and federal labor authorities would have resulted in a more efficient and effective resolution of the submitter’s claims for collective bargaining rights at Rubie’s. This extends beyond the exchange of information required for active disputes—such as the prompt transfer of case files—and should include steps taken to improve transparency that may serve to prevent disputes from arising. In particular, the OTLA reiterates its recommendation from prior reports of review (*e.g.*, U.S. Submission 2003-01) that the Mexican government commit to making up-to-date information on unions and collective bargaining agreements available to interested parties through the establishment of a public registry. As demonstrated in this case, such information could have made federal authorities aware of the registration (at the state level) of the CTM collective agreement prior to the May 11 hearings. In addition, although the OTLA review has concluded this was not an issue in this case, a union seeking to organize workers at a plant will be able to determine whether there is an incumbent union, and the appropriate method and venue to challenge that union’s incumbency. Finally, and perhaps most importantly, workers could have been made aware of their union representation rights at Rubie’s, allowing them to follow the proper avenues for addressing any possible violations of those rights.

Accordingly, the OTLA recommends government-to-government consultations at the NAO level under Article 21 of the NAALC to discuss what means are available under Mexican law to inform workers of deficiencies in their petitions to the JCAs and to provide assistance to correct those deficiencies, and what mechanisms are available for communication between federal and state JCAs to handle improperly filed petitions. These consultations are recommended to facilitate a better understanding of the technical and substantive aspects of legal proceedings at state and federal boards raised in this submission. In particular, consultations would clarify the procedural guarantees provided for workers during the filing of strike notice and collective bargaining registration petitions. In addition, consultations would serve as an opportunity for the

OTLA to receive additional information on the status of the commitments made by the Government of Mexico in the May 18, 2000 Ministerial Consultations Joint Declaration, which states in relevant part: “The Mexican [STPS] will continue promoting the registry of collective bargaining contracts in conformity with established labor legislation. At the same time, efforts will be made to promote that workers be provided information pertaining to collective bargaining agreements existing in their place of employment....”

7. Failure to Conduct Periodic On-site Inspections that Could Have Resulted in More Effective Enforcement of Labor Laws

The submitters allege that the Government of Mexico failed to conduct on-site inspections to verify compliance with the labor law in the areas of forced labor, child labor, minimum employment standards, employment discrimination, and occupational safety and health. As a result, the submitters allege that the following labor law violations were not timely remedied.

7.1 The Prohibition of Forced Labor

7.1.1 NAALC Obligations

Article 3 of the NAALC sets out each Party’s obligation to promote compliance with and effectively enforce its labor law through appropriate government action, such as “monitoring compliance and investigating suspected violations, including through on-site inspections.” Labor law is defined by Article 49 (d) of the NAALC to include the “prohibition of forced labor.”

7.1.2 Mexican Law

7.1.2.1 Mexican Constitution

Article 1 of the Mexican Constitution prohibits slavery, and Article 5 specifies that no one will be obligated to work without just compensation and without his or her full consent. The Mexican Constitution also establishes relevant minimum employment standards in Article 123, providing for an eight-hour work day during daytime and seven hours at night. Article 123(A)(XI) states:

When, because of extraordinary circumstances, the hours of work must be increased, wages or salary must be paid at the rate of 100% more than the amount set for normal time. In no case may the overtime exceed

three hours daily, or three consecutive times. Those younger than sixteen years of age are not included in this class of worker.⁵⁴

7.1.2.2 Federal Labor Law

LFT Title I, Article 3, provides that work shall be performed in an environment of respect for the freedom and dignity of the person performing it and under conditions that insure life, health, and a decent standard of living for the worker and his or her family. LFT Title III specifically prohibits forced labor through its regulations relating to hours of work, rest days, vacation leave, and wages.

Of particular relevance to forced labor is LFT Article 61 in Title III, which details hours of work. The maximum daily hours of work shall be eight hours for day work, seven hours for night work, and seven and a half in the case of mixed hours. LFT Article 66 provides that daily work hours may be extended for exceptional circumstances, but never by more than three hours per day or three times a week. The employer determines what constitutes extraordinary circumstances that merit overtime work, but there is no express obligation for employees to work these overtime hours. LFT Article 68 provides that no worker shall be compelled to work hours in excess of those determined by law and that overtime over and above nine hours per week shall be paid for by the employer at the rate of three times the ordinary rate paid for normal working hours.

As indicated above, LFT Article 542 (Section II) states that labor inspectors shall “inspect enterprises and establishments periodically.” Requirements for worksite inspections are set out in the General Regulations. As explained by the Mexican NAO in response to the OTLA’s questions, Article 542 and the General Regulations authorize labor inspectors to conduct random workplace inspections as determined by the particular circumstances of the workplace.

However, the Mexican NAO did not specifically address whether periodic inspections should have been conducted at Rubie’s. The Mexican NAO did indicate that the State of Hidalgo and federal labor authorities work together in implementing a program of self-compliance in which the authorities provide support and technical assistance in complying with Mexican labor laws. According to the Mexican NAO, there are 86 companies of various sizes and activities that

⁵⁴ Political Constitution of the United Mexican States.

participate in this program in the State of Hidalgo, benefiting 12,400 workers. However, the Mexican NAO did not provide any information as to whether Rubie's participated in this program and the OTLA investigation did not examine Rubie's participation.

7.1.2.3 International Conventions/Treaties Ratified by Mexico

Mexico has ratified both ILO Convention 29 on Forced Labor and ILO Convention 105 on the Abolition of Forced Labor. In Article 2 of Convention 29, forced labor is defined as "all work or service which is exacted from any person under the menace of penalty and for which the said person has not offered himself voluntarily." The Preamble to Convention 105 calls for the complete abolition of debt bondage and serfdom, stipulates that wages shall be paid regularly, and prohibits methods of payment "which deprive the workers of a genuine possibility of terminating his employment." Mexico has also ratified the ICCPR, which prohibits forced or compulsory labor.⁵⁵

7.1.3 Analysis

The submission alleges that the Government of Mexico failed to conduct on-site inspections to enforce protections against forced labor. Citing Articles 540-543 of the LFT, which sets out the functions and obligations of the Labor Inspectorate, the submitters allege that there is no evidence that the government conducted inspections at Rubie's or, if it did, that such inspections resulted in any findings of violations. The submission alleges that forced overtime was required of workers to meet production quotas. Workers affiliated with the FTVO-CROC also alleged that on those occasions factory doors were locked and a security guard was posted at the door. This allegation was further expounded on in interviews with workers in which they explained that if workers did not stay past normal working hours they were forced to sign a resignation letter ("*renuncias*") or were fired if they refused. Rubie's denied these allegations, explaining that a security guard was hired by the company to protect company property from being stolen, which included checking identification of workers entering the plant, but not to keep workers from leaving the plant.

⁵⁵ Article 8 of the ICCPR provides that "[n]o one shall be required to perform forced or compulsory labour."

Although the submitters alleged these instances of forced labor in their submission, and reiterated those allegations during the OTLA's review, they did not file complaints concerning forced labor with Mexican labor authorities. Several workers did present such allegations first to the Municipal President⁵⁶ and subsequently to the Municipal Conciliation Judge in Tepeji del Rio on April 26, 2005; however, because the judge had no jurisdictional competency in the labor field, she recommended that the workers take their complaints to the relevant labor authorities. Because no complaints concerning forced labor were lodged with the appropriate labor authorities, no investigation or enforcement action was conducted concerning these allegations.

Nonetheless, the OTLA's review concluded that from 1998 until May 2005, there were no inspections of any kind conducted at Rubie's. In May 2005, state and federal inspectors conducted four "extraordinary" (self-directed or complaint-driven) inspections. As explained by the Mexican NAO in their June 26 responses to the OTLA's request for information, two federal inspections were conducted on May 30, 2005, focusing on health and safety and general working conditions. The Government of Mexico provided no information as to the state extraordinary inspections, which were conducted on May 24 and May 26, 2005. As determined by the OTLA, none of the inspections appeared to have been conducted in response to complaints filed with the state or federal labor boards, but in response to press reports of alleged labor law violations at Rubie's. Inspections conducted in May 2005, did not report any violations of federal labor laws related to forced labor, but they did indicate problems with failure to pay overtime, discussed in section 7.3 below.

7.1.4 Findings and Recommendations

As a general matter, the submissions process under the NAALC should not be used to obtain review of matters that were never brought to the attention of the appropriate enforcement authorities. In this case, the allegations of forced labor that the OTLA is being asked to address do not appear to have been brought to the attention of the appropriate labor authorities in Mexico, and consequently the Mexican authorities were not given an opportunity to enforce applicable Mexican law at the time the violations allegedly occurred. Nonetheless, had the

⁵⁶ According to the OTLA's legal expert, to the extent that the allegations asserted possible criminal violations, the Municipal President should have taken the initiative and forwarded the workers' allegations of deprivations of their freedom to the appropriate authorities.

Government of Mexico conducted periodic inspections as required by LFT Article 542 and General Regulations, conditions of forced overtime, if they existed, may have been detected and addressed earlier, without the need for filing of individual complaints. Therefore, the OTLA recommends NAO consultations pursuant to Article 21 of the NAALC in order to discuss the frequency and efficacy of periodic inspections conducted by Mexican authorities, in light of Mexico's obligation to promote compliance with and effectively enforce of its labor law through appropriate government action, such as "monitoring compliance and investigating suspected violations, including through on-site inspections" under Article 3 of the NAALC.

7.2 Labor Protections for Children and Young Persons

7.2.1 NAALC Obligations

Article 3 of the NAALC sets out each Party's obligation to promote compliance with and effectively enforce its labor law through appropriate government action, such as "monitoring compliance and investigating suspected violations, including through on-site inspections," "requiring record keeping and reporting," and "initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor law." Labor law is defined by Article 49(e) to include "labor protections for children and young persons."

7.2.2 Mexican Law

7.2.2.1 Mexican Constitution

In Mexico, the Constitution establishes protections against exploitive child labor. Article 123(A) of the Constitution, Sections II, III, IV, and XI, establishes minimum requirements that must be observed for working minors in terms of general working conditions and safety and health.

These protections include prohibitions against:

- The use of labor of any minor under 14 years of age. Persons above 14 years of age and below 16 years of age shall have a maximum work day of six hours.
- Unhealthy or dangerous occupations, industrial night shifts, and all other work after 10:00 p.m. for those under 16 years of age.
- Any overtime work (once the regular shift is completed) for those under 16 years of age.

7.2.2.2 Federal Labor Law

The LFT gives effect to the constitutional precepts regulating child labor, principally in Articles 173 through 180. It establishes 14 years as the minimum age for employment, and the penalties for violations are established in Articles 992 and 995.

LFT Article 173 calls for the work of minors between 14 and 16 years of age to be subject to special supervision and protection of the labor inspectorates. LFT Article 23 requires parental permission to allow minors 14 to 15 years of age to work. LFT Article 180 also sets obligations for employers that hire children who are under 16 years of age. Employers that hire such children are specifically obligated to:

- Require medical certifications that certify the minor's ability for work;
- Keep a special register available for inspection, indicating the minor's date of birth, type of work, hours, salary, and other general conditions of their job;
- Assign the work so that minors have the time necessary to fulfill their school programs;
- Provide education and training in the terms of this law; and
- Provide the labor authorities with such information and reports as it may require.

These minors must also submit to medical examinations periodically as ordered by the labor inspectorate.

Article 175 of the LFT also defines certain restrictions for workers under 16 years old that, in relevant part, include the prohibition of: dangerous or unhealthy jobs; jobs beyond their strength or that may impede or retard their normal physical development; and work in non-industrial establishments after 10:00 p.m. Article 178 also prohibits children under 16 years of age from working overtime, on Sundays, and public holidays. If, however, they do work overtime, Article 178 stipulates triple pay per hour for any work over six hours per day.

With particular relevance to the allegations in the submission, Article 177 states that the workday of persons less than 16 years of age may not exceed six hours, which shall be divided into periods not exceeding three hours with an hour rest period between work periods.

7.2.2.3 International Conventions/Treaties Ratified by Mexico

Mexico has ratified ILO Convention 182 on the Worst Forms of Child Labor, and adopted the UN Convention on the Rights of the Child (CRC). Article 32 of the CRC stipulates that the Signatory States recognize a child's right to be protected against economic exploitation and against the performance of any kind of work that may be dangerous and hinder his or her education or that may be harmful to their health, physical, mental, spiritual, moral, or social development. In addition, the ICCPR and the UN Covenant on Economic, Social, and Cultural Rights, obligate Mexico to prohibit the economic exploitation of children and discrimination against them. Mexico has not ratified ILO Convention 138 on Minimum Age.

7.2.3 Analysis

The submission alleges that the Government of Mexico failed to conduct on-site inspections to enforce protections against exploitive child labor. As a result of a lack of inspections, the submitters alleged that as many as one in six workers at Rubie's were between 13 and 15 years of age. This happened, according to the submission, by a managerial practice in which minors were offered fake birth certificates in order to work at the plant. The forged documents were held by Rubie's management and never provided to the workers, which is why, according to the submitters, they were unable to provide these falsified documents in the submission. By virtue of the false documentation, it is alleged that the minors were unable to access the *Instituto Mexicano de Seguridad Social* (Mexican Institute of Social Security, hereinafter IMSS) system.

As explained in section 7.1.3 above, the OTLA's review determined that state and federal inspectors conducted four "extraordinary" (self-directed or complaint driven) inspections at Rubie's in May 2005. Consistent with findings of the May 30 federal inspection, the OTLA's review found that all of the working minors between 14 and 16 years of age had the required parental permissions. However, the inspection report cited five instances where minors under 16 worked overtime throughout 2005 but were not paid accordingly. The OTLA review of settlement agreements reached with individual workers on June 3, 2005, indicate that at least three of these cases were resolved by Rubie's.

The issue of underage workers was also noted in the May 24 state inspection report, but with significantly different findings than in the federal report. The state inspectors reported that minors worked from 7:00 a.m. to 4:00 p.m. Monday through Friday with an hour-long break. Despite the fact that this schedule results in eight hours of work per day for minors (in excess of the six hours daily contemplated by LFT Article 177), the state inspectors reported that minors worked no overtime hours.

The submitters provided no evidence that any complaints alleging that Rubie's provided false documentation of children's ages were filed with government authorities. In their report of May 30, 2005, federal labor inspectors addressed an allegation that a particular female worker was only 14 years of age when she began working at Rubie's, but dismissed the allegation upon concluding that the document provided by the FTVO-CROC was "altered regarding the date of birth."

The most serious allegation regarding child labor is that of a 13 year-old male working at Rubie's. The boy's parents worked at the factory, and it is alleged that he worked there as well. After hearing various versions of his presence at Rubie's, it is the OTLA's determination that there is no conclusive evidence that the boy's presence at Rubie's was secured through fraudulent documentation, leading to the inference that he was likely on the premises during work hours at his parents' request, he was not formally employed there, and he did not perform any work at the request of Rubie's management. There is no record of complaints being filed with the Mexican government regarding this minor.

Regarding the alleged lack of access by minors to the IMSS medical system, the submitters provided no evidence to substantiate the claim that Rubie's workers ever sought and were denied medical attention through IMSS. There is also no record of any complaints filed with the labor authorities, nor evidence of private medical visits.

7.2.4 Findings and Recommendations

The evidence presented to the OTLA does not support allegations that the Government of Mexico failed to enforce its child labor laws in connection with alleged illegal hiring of minors.

In fact, the federal labor inspection report found that all workers under the age of 16 during the period of concern had the required forms on file (*i.e.*, written parental permission, birth certificates, and a completed state health form). There is also no evidence that complaints were filed with the Mexican government alleging that Rubie's falsified birth certificates.

Labor inspections conducted by federal authorities found that some minors who worked in excess of the allowable hours were not paid for extra time, which would appear to be a violation of Article 123 of the Mexican Constitution and LFT Article 178. In addition, the OTLA review raised concerns as to discrepancies between the findings of federal and state labor inspection reports regarding possible failures to pay overtime to young workers. Such inconsistencies raise questions as to the government's ability to detect and effectively seek appropriate sanctions or remedies for violations of its labor law. In addition, as discussed above, the OTLA's review concluded that from 1998 until May 2005, there were no inspections of any kind conducted at Rubie's.

In light of the violations found by the federal inspection, the lack of periodic inspections that could have uncovered and resolved those violations in a more timely manner, and apparent inconsistencies in the enforcement of those laws between federal and state labor authorities, the OTLA recommends NAO consultations under NAALC Article 21 on these matters.

Consultations addressing the application and enforcement of LFT Article 178, requiring minors under 16 to receive triple pay per hour for any work over six hours per day, are needed to facilitate understanding of the apparent differences in application of that law by the state and federal authorities. In addition, consultations should explore the means used by Mexican labor authorities to educate young workers about their labor rights, such as assisting employers in publicly displaying provisions of federal labor laws in the workplace that emphasize the special protections for young workers. In addition, as discussed above, the OTLA recommends consultations to discuss the frequency and efficacy of periodic inspections conducted by Mexican authorities, in light of Mexico's obligation to promote compliance with and effectively enforce of its labor law through appropriate government action, including on-site inspections under Article 3 of the NAALC.

7.3 Minimum Employment Standards

7.3.1 NAALC Obligations

Article 3 of the NAALC sets out each Party's obligation to promote and effectively enforce its labor law through effective government action, such as "monitoring compliance and investigating suspected violations, including through on-site inspections." Labor law is defined by Article 49(f) to include "minimum employment standards, such as minimum wages and overtime pay, covering wage earners, including those not covered by collective agreements."

7.3.2 Mexican Law

7.3.2.1 Mexican Constitution

Article 123, Title VI, of the Mexican Constitution establishes minimum employment standards in Mexico. For example, Article 123(A)(I) and (II) provides that the duration of the work day is eight hours during daytime and seven hours at night. In addition, Section XVI of Article 123 sets out requirements for overtime hours and payments as stated in Section 7.2.1 above.

7.3.2.2 Federal Labor Law

In general, LFT Article 3 provides that work shall be performed under conditions that ensure the life, health, and decent standards of living for the worker and his family. The following federal labor laws refer more specifically to the relevant aspects of hours, wages, and conditions that are involved in this submission. For labor laws on hours of work, see references to LFT Articles 61, 66, and 68 in Section 7.2.2 above.

Wages

Pursuant to LFT Article 85, wages shall be sufficiently remunerative and never less than the amount fixed by the LFT as a minimum. LFT Article 88 provides that the intervals between paydays shall in no case exceed one week (in the case of persons engaged in manual work) or 15 days (in the case of all other workers). LFT Article 83 states that wages may be fixed according to unit of time, on a piecework or commission basis, in the form of lump sum, or in any other manner.

Weekly Rest and Holidays (Compulsory Rest Days)

Pursuant to LFT Article 69, workers shall be entitled to at least one rest day with full pay every six days. LFT Article 74 provides for compulsory days of rest, including specific holidays.

Employers' Obligations

LFT Article 132, Section II, states that employers shall pay workers the wages and other payments to be made to the workers, in accordance with the rules applicable in the enterprise or establishment, and Section VI provides that employers shall behave toward the workers with proper consideration and abstain from ill treatment by word or deed.

Wage Privileges

LFT Article 103 provides the rules by which stores for clothing, food, and household items may be established by workers and employers. The Article states that workers must be free to acquire merchandise without coercion or pressure. The prices of the goods sold shall be determined by agreement between workers and employers and may never be higher than official prices, or in the absence of official prices, the prevailing market prices. Any changes in such prices are subject to agreement between workers and employers.

Obligations of Labor Inspectors

See LFT Article 542 and General Regulations as discussed in Sections 5 and 7.2.2 above.

7.3.2.3 International Conventions/Treaties Ratified by Mexico

Mexico has ratified numerous ILO Conventions related to minimum employment standards including Convention 95 on Protection of Wages and Convention 131 on Minimum Wage Fixing Machinery. Article 1 of Convention 131 calls for ratifying members to “establish a system of minimum wages which covers all groups of wage earners whose terms of employment are such that coverage would be appropriate.” Pursuant to Article 2, minimum wages shall have the force of law and shall not be subject to abatement, and failure to apply them shall make the person or persons concerned liable to appropriate penal or other sanctions. Article 3 provides for protections concerning the level of minimum wages.

7.3.3 Analysis

The submission alleges that the Government of Mexico failed to conduct on-site inspections to enforce Mexican labor law on minimum employment standards. The submitters raised several issues relevant to minimum employment standards, including: (1) failure to pay overtime; (2) verbal abuse; and (3) required purchase of consumer goods at Rubie's at prices above the prevailing market rates. To support their allegations, the submitters presented weekly paychecks, press articles and legal documents in which workers demanded overtime pay.

7.3.3.1 Overtime

Concerning alleged overtime violations, the submitters alleged that workers were expected to work overtime but were not paid in accordance with their individual employment agreements, or in accordance with labor laws. According to the submitters, normal working hours were 7:00 a.m. to 2:30 p.m., Monday through Saturday, but workers stated they always worked from 7:00 a.m. to 6:00 p.m., including on some Sundays. In interviews conducted by the OTLA, other workers said they were hired to work from 7:00 a.m. to 4:30 p.m., but they actually worked from 7:00 a.m. to 10:00 p.m. each day.

The federal and state inspection reports contain further discrepancies as to the normal work schedule at Rubie's. The federal inspectors—citing the factory management—recorded the normal work hours for all employees as 7:00 a.m. to 4:30 p.m. Monday through Friday with a half-hour break. The state inspectors, however, reported a work schedule of 7:00 a.m. to 4:00 p.m. Monday through Thursday and 7:00 a.m. to 5:00 p.m. on Friday. None of the schedules above seem to be accurate in relation to the wages, as copies of the pay stubs reflect that workers were paid a daily rate (based on an eight-hour work day) for six days per week and received a paid day of rest on Sundays. For the extra hours, workers allege that they received either overtime pay for only part of the hours or no overtime pay at all.

In interviews, workers alleged that production quotas were manipulated to make it seem that they were not reaching their daily quotas. According to the workers, when they submitted production coupons to show how much they had produced, management would alter the numbers to

minimize production amounts. It was never made clear to workers on what basis they were being paid—on a piecework rate, hourly, or some combination of both.

The submitters supported these allegations with copies of nearly 60 individual complaints filed by former Rubie's employees, including some minors, before the JFCA on April 14, 2005, and May 20, 2005, in which workers demanded overtime pay and other benefits for various time periods between 2003 and 2005. The lawsuits demanded 3.5 hours of overtime pay for the hours worked between 2:30 p.m. and 6:00 p.m. during the course of several weeks. The information contained in reports from the May 2005 inspections also support the submitters' allegations that overtime payments were not in compliance with the law. However, settlement agreements reached with the individual complainants on June 3, 2005, which provided monetary awards based on the length of employment at Rubie's, suggest that these violations were resolved by the company.

7.3.3.2 Mistreatment of Workers – Verbal Abuse

Concerning unacceptable work conditions, submitters alleged that workers, both male and female, often were mistreated with insults, intimidation, threats, harassment, and other forms of verbal abuse by the plant's manager. Workers also alleged that they felt intimidated from speaking out regarding these conditions out of concern that they would be branded as troublemakers and fired if they complained. While the site visit conducted by the OTLA included interviews with a number of former Rubie's employees, who provided testimonial evidence of disparate treatment based on personality clashes with the plant manager, there was no evidence that workers filed complaints with federal or state labor authorities alleging a violation of LFT Article 132, Section VI.

7.3.3.3 Required Purchases

In interviews with workers affiliated with the FTVO-CROC, workers claimed that they had to buy water, toilet paper, and medical supplies on site at a much higher price than they would have paid outside the factory. The workers were allegedly required to subsidize their own food at the plant's cafeteria by deducting the cost from their salaries. Submitters also alleged that workers also were made to buy work tools and safety equipment, such as masks, gloves, and belts from

the company. Rubie's denied this allegation, maintaining that no one was required to pay for toilet paper, purified water, weight belts or tools of any kind. Rubie's asserted that it provided every worker with a weekly food allowance and a daily subsidy for food purchases in the cafeteria. Finally, Rubie's explained that the sewing and cutting process engaged in by workers at the plant did not produce any noxious or toxic fumes, nor did it involve any other process that would require the use of personal protective equipment such as masks or gloves. During the OTLA's review, the submitters failed to provide any documentation to substantiate these claims, nor did they provide evidence of complaints filed with the government. Further, interviews with workers not affiliated with FTVO-CROC did not support the submitters' allegations.

7.3.4 Findings and Recommendations

A review of the written documentation and oral testimony, including the federal and state labor inspection reports conducted in May 2005, supports the submitters' allegations that there were problems with overtime pay. The problems constitute a possible violation of LFT Article 68, which requires that overtime over and above nine hours per week be paid for at a rate of three times the ordinary rate paid for normal working hours and Article 85, which calls for wage payments at intervals not to exceed one week or 15 days. Settlement agreements reached with individual workers support the company's assertion that the matters were satisfactorily resolved. However, despite the apparent resolution of such violations, the fact that periodic inspections were not conducted at Rubie's raises concern as to the efficacy of the Government of Mexico's compliance with Article 3 of the NAALC. Therefore, the OTLA recommends NAO consultations to discuss the application of laws and regulations relating to periodic inspection of workplaces.

Regarding allegations of verbal abuse and required purchases, the submitters provided no evidence beyond the testimony of the workers that were allegedly victimized by these violations. Further, they filed no complaints with the appropriate state or federal labor authorities and there is no indication in the May 2005 inspection reports that there were problems in these areas. Therefore, the OTLA is unable to determine that the Government of Mexico has failed to enforce its labor laws in these areas.

7.4 Elimination of Employment Discrimination

7.4.1 NAALC Obligations

Article 3 of the NAALC sets out each Party's obligation to promote compliance with and effectively enforce its labor law through appropriate government action, such as "monitoring compliance and investigating suspected violations, including through on-site inspections." Labor law is defined by Article 49(d) of the NAALC to include "elimination of employment discrimination on the basis of grounds such as race, religion, age, sex, or other grounds as determined by each Party's domestic laws."

7.4.2 Mexican Law

7.4.2.1 Mexican Constitution

Article 1 of the Mexican Constitution guarantees equality of all persons before the law. In 1974, Article 4 was amended to make equality between the sexes explicit. In relevant part, Article 4 states "[a]ll persons have the right to decide in a free, responsible and informed manner, on the number and spacing of their children." Similarly, Article 5 of the Constitution protects the rights of individuals to pursue employment of their choosing. Constitutional Article 123(A) establishes special employment protection for pregnant workers, as well as the principle of equal pay for equal work.

7.4.2.2 Federal Labor Law

LFT Article 3 prohibits employment discrimination against workers based on gender, race, age, creed, religion, political views, or social status. Under LFT Article 133, employers may not "refuse to accept workers for reason of age or sex...." Title V of the LFT (Art. 164-172) addresses women's employment and corresponding issues. Article 164 states that "women enjoy the same rights and have the same obligations as men." Article 170 specifically addresses pregnancy and maternity issues for working mothers, guaranteeing them maternity leave, breast feeding breaks, and protections from performing certain types of physically demanding work. Finally, Article 47 includes a specific list of 15 causes for justified termination of the labor relationship, none of which includes pregnancy.

7.4.2.3 International Conventions/Treaties Ratified by Mexico

Mexico has ratified ILO Convention 111 concerning Discrimination (Employment and Occupation). Article 1 of the Convention defines the term discrimination to include:

a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' organizations, where such exist, and with other appropriate bodies.

Mexico has also ratified the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Article 11 of CEDAW addresses discrimination against women in the field of employment, stating in relevant part that State Parties should take appropriate measures:

2.(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status

7.4.3 Analysis

According to the submission, the Government of Mexico violated Article 3 of the NAALC when it failed to prevent gender-based employment discrimination at Rubie's. The submitters allege that women seeking employment at Rubie's were required to take a pregnancy test to demonstrate that they were not pregnant in order to be eligible for work. According to the submission, pregnancy tests were also required on an ongoing basis, costing affected workers the equivalent of one week's salary. Contrary to the information presented in the submission, interviews with workers suggested that pregnancy tests were not required on an ongoing basis and that the cost of the pre-employment exam—while borne by the potential employee—was for the whole physical examination, which included the pregnancy test.

The OTLA review determined that until July 2005, job applications at Rubie's included a question about pregnancy and female employees were required to take a pregnancy test as part of

a physical examination given to all applicants. However, the submitters did not provide any evidence that such information was used by the company to discriminate against pregnant job applicants or against pregnant workers. Interviews with workers at Rubie's also failed to uncover any evidence of employment discrimination based on pregnancy. In addition, there is no evidence that the JLCA of Hidalgo received any complaints against Rubie's on the aforementioned allegation. Further, the labor inspection conducted by the state inspection authority on May 24, 2005, found that the one pregnant woman working at Rubie's was provided with appropriate rest periods.

Following Ministerial Consultations and recommendations resulting from U.S. Submission 9701⁵⁷, the Government of Mexico committed to an action plan to eliminate pregnancy-based hiring discrimination. To demonstrate its commitment to end this discriminatory practice, the Government of Mexico undertook a series of steps, including the establishment in 1998 of a Gender and Equity Bureau within STPS that provides public education programs on women's rights in the workplace. Further, in April 2002, the Government of Mexico signed an agreement with the *Consejo Nacional de la Industria Maquiladora de Exportación* (National Council of Maquiladora Industries) in which the organization agreed to recommend to its member companies that they not subject female workers to mandatory examinations or tests of any type designed to certify non-pregnancy as a condition for hiring or continued employment. By December 2003, STPS had reportedly signed 13 agreements with states throughout Mexico dealing with the elimination of pregnancy-based workplace discrimination. In that same year, the Federal Prevention and Elimination of Discrimination Act, which prohibits discrimination on the basis of pregnancy, came into force in Mexico.

7.4.4 Findings and Recommendations

The evidence available to the OTLA does not substantiate the submitter's claim that the Government of Mexico failed to enforce labor laws on employment discrimination. However, the OTLA determined that until July 2005, the employment application at Rubie's contained a question on pregnancy status and that a medical certificate stating pregnancy status was required

⁵⁷ Submission 9701 was filed on May 16, 1997, and concerned allegations of pregnancy-based discrimination in Mexico's maquiladora sector.

to verify applicants' responses. Therefore, the OTLA recommends NAO consultations on efforts made by the Government of Mexico to implement the commitments in the Ministerial Consultations Agreement on U.S. Submission 9701 to end pregnancy-based employment discrimination in the hiring process. Specifically, the OTLA requests that STPS provide up-to-date information on the activities of the Gender and Equity Bureau and the application of the Federal Prevention and Elimination of Discrimination Act. In this regard, we reiterate the request made by the OTLA on numerous occasions for copies of agreements signed between STPS and state governments to end pregnancy testing and promote the rights of working women.

7.5 Prevention and Compensation in Occupational Injuries and Illnesses

7.5.1 NAALC Obligations

Article 3 of the NAALC sets out each Party's obligation to promote compliance with and effectively enforce its labor law through appropriate government action, such as "monitoring compliance and investigating suspected violations, including through on-site inspections." Labor law is defined by NAALC Article 49(j) to include "prevention of occupational injuries and illnesses" and related to "compensation in cases of occupational injuries and illnesses."

7.5.2 Mexican Law

7.5.2.1 Mexican Constitution

Various articles of the Mexican Constitution provide authority for regulating the labor conditions and health of Mexican citizens. Article 4 provides for the basic right to the protection of an individual's health. Article 123(XV) requires an employer to observe safety and health regulations at its company and Article 123(XXXI) describes federal and state jurisdictional responsibilities for safety and sanitation at the workplace. Article 123 also allows for the imposition of sanctions in cases of occupational safety and health violations.

7.5.2.2 Federal Labor Law

Mexican labor law provides extensive coverage of occupational safety and health at the workplace. LFT Article 512 (sections A–F) sets forth the regulations and instructions issued by the labor authorities to establish the necessary measures to prevent employment-related hazards and to create safe workplaces for workers. The *Reglamento Federal de Seguridad, Higiene y*

Medio Ambiente de Trabajo (Federal Regulation on Safety, Health, and the Working Environment, hereinafter RFSH), enacted in 1997, replaced the General Regulation on Safety and Health in the workplace. The objective of the RFSH is to ensure that work takes place under conditions of safety and health that are appropriate for workers and in accordance with the LFT and international treaties ratified by Mexico.

General Occupational Safety and Health Standards

LFT Article 132 (Section XVI) provides that employers shall equip the factories, workshops, offices, and other places in which the work is to be performed in accordance with the principles of safety and health to prevent work accidents and losses to the worker, as well as adopt the necessary measures to assure that contaminants do not exceed the maximums permitted in the regulations. Section XVII calls for the adoption of statutory and other suitable measures for the prevention of accidents and sickness in the work centers and places in which work is performed. Finally, Section XXVII calls for the protection of pregnant women in the workplace.

Government Compliance Through Inspections

STPS conducts safety and health inspections in the workplace and monitors proper compliance with labor standards with regard to pollutants in the workplace environment, personal protective equipment, and accidents in the workplace as set forth in the RFSH and the *Normas Oficiales Mexicanas* (Official Mexican Standards) issued by STPS.⁵⁸

According to the Mexican government, under LFT Article 527, STPS—through the *Dirección General de Inspección Federal del Trabajo* (Bureau of Federal Workplace Inspection) and the *Delegaciones Federales del Trabajo* (Federal Labor Branch Offices) located throughout the states—is responsible for monitoring compliance with labor regulations in the areas of general labor conditions and general occupational safety and health conditions in firms and establishments subject to their authority.⁵⁹ LFT Article 542(II) obligates labor inspectors to inspect enterprises and establishments periodically. In addition, Article 547 states that inspectors

⁵⁸ See Government of Mexico responses to the U.S. NAO, dated June 2006, and March 2001 concerning U.S. Submission 2000-01. The later document is on file in the public reading room of the OTLA.

⁵⁹ *Ibid.* See also LFT Art. 527.

shall be held liable if they fail to carry out inspections, give false information in reports, or receive directly or indirectly any bribe or gift from the workers or employers.

Reporting Violations

LFT Article 1003 states: “any worker, employer, trade union, federation or confederation of employers or workers may report violations of the labor norms to the authorities.”⁶⁰ Workers may complain individually or through a union about unsafe work, inaccurate reports, and joint committee failures to identify hazards or secure abatements.⁶¹ Authorities review complaints along with incident reports and other information to determine whether special inspections are warranted.⁶² In March 2001, the Government of Mexico provided information to the OTLA concerning employer obligations to report occupational injuries and illnesses:

According to provisions of the Social Security Law itself, the employer must notify the [IMSS] of the accident or illness within a period no longer than 24 hours if the incident occurs in the workplace (SSL, Article 58).⁶³

Workplace Safety and Health Committees

LFT Article 509 provides that “[s]afety and health committees consisting of an equal number of representatives of the workers and the employer shall be established as found necessary in every enterprise or establishment, to investigate the causes of accidents and diseases, proposing preventive measures and enabling compliance therewith.”⁶⁴ LFT Article 510 states that the committees shall meet during work hours and cannot be paid.

7.5.2.3 International Conventions/Treaties Ratified by Mexico

Mexico has ratified ILO Conventions 155 (Occupational Safety and Health Convention), 161 (Occupational Health Services), 167 (Safety and Health in Construction), and 170 (Chemicals

⁶⁰ LFT, Art. 1003.

⁶¹ Occupational Safety and Health Administration, U.S. Department of Labor & General Directorate of Medicine & Safety in the Workplace, Mexican Secretariat of Labor and Social Security, A Comparison of Occupational Safety and Health Programs in the United States and Mexico: An Overview, II-11 (1992).

⁶² *Ibid.*, II-4, 5.

⁶³ See Government of Mexico responses to the U.S. NAO submitted in March 2001 concerning U.S. Submission 2000-01.

⁶⁴ LFT, Art. 509.

Convention) pertaining to occupational safety and health matters.⁶⁵ Mexico is also a member of the World Health Organization and the Pan American Health Organization, which promote workplace safety and health.⁶⁶

7.5.3 Analysis

The submitters allege that the Government of Mexico has failed to conduct worksite inspections to enforce worker rights protections at Rubie's in the area of safety and health. As a result, the submitters allege that workers at Rubie's suffered from a lack of adequate safety equipment (*i.e.*, first aid kit, belts, tools, masks, and gloves), poor ventilation, intemperate climate, occupational injuries (*i.e.*, cuts from needles on sewing machines, respiratory problems, and illness due to fiber dust and fumigation), and persistent unsanitary conditions in the factory's cafeteria and bathrooms. In interviews, workers also claimed that if they were ill or injured they were not treated or allowed to seek medical care and were required to purchase medicine from the plant manager's sister. The submitters provide no corroborating evidence to substantiate allegations related to the lack of safety and health equipment, worksite conditions, and work-related injuries. Rubie's denied these allegations, and federal and state inspections conducted at Rubie's in May 2005 revealed no evidence of such conditions. Finally, the OTLA's review did not reveal any evidence to corroborate the allegations.

In addition, there was no evidence that workers sought assistance from the Mexican government on these specific issues. In interviews, they informed the OTLA that they did not approach the JLCA because they believed that individual complaints would not be taken seriously. This issue was raised with representatives of the JLCA during the OTLA site visit to Mexico. In response, officials from the JLCA of Hidalgo stated that individual complaints received significant attention in their office and that workers could receive free legal assistance upon request. These officials provided data showing that from April 1, 1999 to March 31, 2004, the JLCA of Hidalgo had received 3,417 individual complaints. For 2005, 748 individual complaints had been received. Of these complaints, approximately 70 percent were resolved through mediation efforts involving the worker and employer.

⁶⁵ See Government of Mexico responses to the U.S. NAO submitted in March 2001 concerning U.S. Submission 2000-01.

⁶⁶ *Ibid.*

As explained above, state and federal labor authorities conducted two extraordinary inspections focusing on safety and health at Rubie's in May 2005. The Mexican NAO indicated that an administrative process to issue fines based on health and safety violations was initiated, but that the company failed to attend an administrative hearing on the issue. The company was apparently fined \$660.75 pesos on May 4, 2006, for their failure to participate in the hearing. On May 15, labor inspectors attempted to notify the company of the fine, but they discovered that the plant was closed. The Mexican NAO provided no details as to the nature of the potential safety and health fines or further efforts to impose and collect the fines.

While there were some significant differences in the specific findings of the state and federal labor inspections, both reports found that Rubie's did not have a plan to prevent and combat fires. They also both cited the factory for improper maintenance of certain factory machinery and equipment. The inspection reports concurred that Rubie's did not provide an analysis of the risks to which personnel are exposed for the purposes of the selection and use of personal protection equipment. The two reports also found that Rubie's failed in its responsibility to establish and maintain a Safety and Health Committee. However, contrary to the claims of the submitters, neither the state nor the federal inspections found any problems with lighting, ventilation, or climate at the factory. Further, there were no sanitation or public health violations found relating to conditions of the bathrooms or the cafeteria.

The inconsistencies between the federal and state labor inspection results are worth noting. First, the federal inspection found that there was no annual registration of the electrical installation system, but the state inspection stated that this item "did not apply." Second, the federal inspection had a record of two accidents in the previous year, but the state inspection stated that there were none. Third, the federal inspectors found that the individual contracts did not contain a specific clause concerning worker training as required by LFT Article 132, Section I and Article 25, Section VIII. The state authorities, however, reported that this clause was found in Article 4 of the contracts. Given the fact that this issue was examined further by the federal authorities (with the administrative unit of STPS issuing a fine of \$2,643 pesos), it is difficult to reconcile these conflicting inspection reports.

7.5.4 Findings and Recommendations

In view of the lack of evidence that the submitters filed complaints with the Government of Mexico concerning occupational safety and health, the OTLA cannot find that the Government of Mexico failed to enforce labor laws encompassing health and safety protections.

Nevertheless, it is the OTLA's conclusion that Mexican authorities did not conduct any periodic inspections at Rubie's, as required under LFT Article 542 and the General Regulations. Further, as was the case with portions of the inspections focused on child labor and overtime violations, there were significant discrepancies between the federal and state level reports. As indicated in Section 7.2.4 and 7.3.3.1 above, the inconsistencies raise concern as to the government's ability to detect and effectively seek appropriate sanctions or remedies for violations of its labor law.

The fact that a Safety and Health Committee was not established at the facility can be viewed as a failure shared equally by the Government of Mexico, the employer, and the union because each had a responsibility to ensure that it existed. However, this failing also could have been remedied through regular workplace inspections. The lack of regular inspections serves as a significant limitation on the government's ability to effectively monitor and enforce compliance with its labor laws, as required under Article 3 of the NAALC. Therefore, the OTLA reiterates its recommendation for NAO consultations in order to discuss the frequency and efficacy of periodic inspections conducted by Mexican authorities. As noted in U.S. Submission 9702, "a major instrument to ensure compliance with workplace safety and health regulations is the deterrent effect afforded by the conduct of comprehensive periodic inspections combined with the certainty of significant financial penalties against violators."⁶⁷

8. Conclusion

In this review, the information presented by various workers, employer representatives, an OTLA-retained legal expert, and trade union leaders contains different views with respect to the situation at the Rubie's plant, and, in turn, the obligations by the Government of Mexico under Articles 3 and 5 of the NAALC. The submitters did not provide sufficient evidence to corroborate many of their claims. For many of the alleged violations at Rubie's—particularly

⁶⁷ Public Report of Review of NAO Submission No. 9702-Part II: Safety and Health Addendum, August 11, 1998, p. iii.

those relating to working conditions and occupational safety and health—without evidence that domestic remedies were pursued, the OTLA cannot conclude that the Government of Mexico failed in its obligations to enforce its own law and provide appropriate remedies. As noted in the U.S. Submission 2003-01 Public Report of Review, “when utilizing international processes to raise allegations that domestic authorities have failed to enforce the law, the credibility of the allegations would be stronger if workers were able to show that they attempted to utilize available domestic processes. Such action would seem to benefit individual workers and the domestic processes, as well as enhance the value of international procedures.”

For other claims—such as those relating to payment of overtime wages, child labor protections, and employment discrimination—there is credible evidence that a number of remedial measures have been taken. As to alleged violations of overtime laws, settlement agreements were paid to all but four of the workers who filed complaints with the JFCA. As to allegations that Rubie’s illegally hired minors, the OTLA review determined that such allegations were unfounded. Allegations of gender-based employment discrimination as a result of pregnancy could not be substantiated by the OTLA review. In response to such allegations, however, it appears that Rubie’s removed a question on pregnancy status from its application questionnaire in July of 2005 and required that all workers be at least 16 years of age. Despite the remedial action taken by Rubie’s, the use of questions and tests to determine the pregnancy status of female applicants raises concern as to the effectiveness of Mexico’s commitment to eliminate such practices.

Notwithstanding the lack of complaints filed with the Government of Mexico and the fact that overtime violations uncovered by federal and state inspections appear to have been remedied by Rubie’s, the OTLA is concerned by the lack of periodic inspections. As explained above, periodic inspections might have resulted in more timely resolution of alleged violations of labor laws. The absence of such inspections raises questions as to the extent to which the Government of Mexico is using labor inspections as a means of effectively enforcing its labor law under Article 3 of the NAALC.

The OTLA review also raised concerns as to the Mexican labor authorities’ handling of the procedures followed by the FTVO-CROC to obtain collective bargaining rights at Rubie’s (*i.e.*,

strike petition and registration of a collective bargaining agreement before the JFCA). While the OTLA review established that the FTVO-CROC's failure to use the proper mechanism to obtain such rights (*i.e.*, titularity action) in the appropriate venue (*i.e.*, a JLCA) contributed to the confusion and delays in the administration of the FTVO-CROC's petitions, the JCAs' reliance on technical grounds to dismiss the petitions, the lack of communication between federal and state labor boards in determining the pre-existence of a properly registered collective bargaining agreement at Rubie's, the ineffective handling by the JFCA of a May 11, 2005, agreement brokered by the Board's clerk, the potential failure to grant the FTVO-CROC a hearing on JFCA jurisdiction, and the failure of the JFCA to transfer the case file to the JLCA of Hidalgo pertaining to the FTVO-CROC's attempt to register the April 13 2005, collective bargaining agreement between Rubie's and the FTVO-CROC, raise questions as to the effectiveness of Mexico's compliance with its obligations under Article 5.1 of the NAALC to provide procedural guarantees that are fair, equitable, and transparent.

As noted above, the submitters failed to provide sufficient evidence to corroborate many of their claims and failed to pursue domestic procedures to remedy many of the alleged violations. In certain other situations, there is credible evidence that remedial measures were taken or that the claims were unfounded. Further, there are indications that legal strategies chosen by FTVO-CROC contributed in part to delays and confusion in processing its petitions before domestic authorities. Thus, based on the available information, consultations at the ministerial level are not warranted at this time.

9. Recommendation

In accordance with the findings above, the OTLA recommends NAO consultations pursuant to Article 21 of the NAALC to discuss the following:

- Compliance with procedural requirements in Mexico's labor law, and measures taken to prevent unwarranted delays and to improve coordination between federal and state authorities in the administration of labor justice procedures;
- Transparency in the union representation process, including the establishment of a publicly available registry of unions and collective bargaining agreements;

- Resources devoted to the periodic inspection of workplaces so that labor laws, such as those relating to the protection of young persons, minimum employment standards, and occupational safety and health, may be enforced effectively and consistently;
- Clarification of discriminatory practices in Mexico and the current status of initiatives undertaken on this issue pursuant to the Ministerial Consultations Implementation Agreement relating to U.S. Submission 9701; and
- Access to Mexican authorities responsible for relevant labor law enforcement.