


## International Treaties and Constitutional Systems of the United States, Mexico and Canada - Foreword: Proceedings of the Seminar on International Treaties and Constitutional Systems of the United States, Mexico and Canada: Laboring in the Shadow of Regional Integration

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**ARTICLES**  
**INTERNATIONAL TREATIES AND CONSTITUTIONAL**  
**SYSTEMS**  
**OF THE UNITED STATES, MEXICO, AND CANADA**

**FOREWORD**

**PROCEEDINGS OF THE SEMINAR ON INTERNATIONAL**  
**TREATIES AND CONSTITUTIONAL SYSTEMS OF THE**  
**UNITED STATES, MEXICO AND CANADA: LABORING IN THE**  
**SHADOW OF REGIONAL INTEGRATION**

MARLEY S. WEISS\*

This Seminar on International Treaties and Constitutional Systems of the United States, Mexico and Canada was conducted as an outgrowth of Submission No. 9601, filed pursuant to the North American Agreement on Labor Cooperation (NAALC), commonly referred to as the Labor Side Agreement to the North American Free Trade Agreement (NAFTA).<sup>1</sup> The seminar is literally a part of the process of creating a body of international law pursuant to this regional agreement. It is not merely a seminar of experts addressing a topic pertinent to the interpretation of the international agreement; rather, the conduct of the seminar itself is part of the tri-national procedure for the exchange of information within the framework of ministerial consultations to resolve an actual dispute which has arisen under the Agreement.

Submission No. 9601 alleged, *inter alia*, that Article 68 of the Mexican Ley Federal de Trabajadores al Servicio del Estado (LFTSE) (the Federal Law of Workers in the Service of the State), which limits federal employees to one union per government agency,<sup>2</sup> violated guarantees to

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1. North American Agreement on Labor Cooperation, *done at* Mexico City, Sept. 14, 1993, *entered into force* January 1, 1994, 32 I.L.M. 1499 (1993) [hereinafter NAALC].

2. LFTSE, art. 68 provides: "En cada dependencia sólo habrá un sindicato. En caso de que concurren varios grupos de trabajadores que pretendan ese derecho, el Tribunal Federal de Conciliación y Arbitraje otorgará el reconocimiento al mayoritario." (Each agency shall have only one union. In the event that there are various groups of workers who desire to form a union, the Federal Labor Conciliation and Arbitration Tribunal will

workers of freedom of association and the right to organize labor unions. These labor rights are specified by International Labor Organization (ILO) Convention No. 87,<sup>3</sup> a convention which Mexico has ratified, as well as by the Political Constitution of the United Mexican States.<sup>4</sup> As a result, the submission contended, the challenged provision of the LFTSE also violated Article 3(1) of the NAALC.<sup>5</sup> Article 3(1) obligates each of the three nation-state Parties to “promote compliance with and effectively enforce its labor law through appropriate government action,” including, *inter alia*, domestic labor law ensuring workers’ right to freedom of association.<sup>6</sup>

The main theme of the seminar, the relationship between international treaties and constitutional and legal provisions in each of the three NAFTA/NAALC Party countries, is framed to elucidate a more specific inquiry: the relationship of treaty provisions to domestic constitutional and statutory law regarding freedom of association and the right to organize in Mexico, the United States and Canada. It is this latter issue on which uncertainty arose in the course of efforts to resolve the submission. The broader inquiry, however, is also highly relevant to future interpretation of the NAALC regarding any labor law issue addressed by an ILO Convention, international human rights treaty or convention, or

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grant recognition to the majority union), *quoted and translated in* Anna Torriente, Study of Mexican Supreme Court Decisions Concerning the Rights of State Employees to Organize in the States of Jalisco and Oaxaca: Final Report,” at 34 & n.105 (1996).

3. ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organize (1948), *reprinted in* 1 INTERNATIONAL LABOUR ORGANIZATION, INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 1919-1951 at 527 (1996). For useful discussion of the history and implementation of the convention, *see generally, e.g.*, Harold Dunning, *The Origins of Convention No. 87 on Freedom of Association and the Right to Organize*, 137 INT’L LAB. REV. 149 (1998); Lee Sweptson, *Human Rights Law and Freedom of Association: Development Through ILO Supervision*, 137 INT’L LAB. REV. 169 (1998); Geraldo von Potobsky, *Freedom of Association: The Impact of Convention No. 87 and ILO Action*, 137 INT’L LAB. REV. 195 (1998).

4. Petition Submitted to the USNAO by Human Rights Watch/Americas, The International Labor Rights Fund, and the National Association of Democratic Lawyers, 1, 4, 22-23, 26, 28-29 (June 13, 1996) [hereinafter Submission]. *See also* U.S. National Administrative Office, Bureau of International Labor Affairs, U.S. Department of Labor, NAO Submission No. 9601: Public Report of Review at 6-7(1997)[hereinafter NAO Report].

5. Submission, *supra* note 4, at 3-4, 22-23. *See also* NAO Report, *supra* note 4, at 6-7.

6. *See also* NAALC, *supra* note 1, art. 49 (listing “freedom of association and protection of the right to organize” among the topics encompassed within the definition of the term “labor law”).

other international body of law adopted by one or more of the three Party countries.

To establish the context for the seminar, a brief outline of the pertinent provisions of the NAALC, as well as Submission No. 9601, is in order. This will be followed by a short description of the points developed in the course of the seminar, and then a few concluding observations about the potential impact of the teachings from this seminar upon future developments under the NAALC and other labor rights provisions linked to free trade regimes.

### 1. *The Substantive Guarantees of the NAALC*

The NAALC is still a young trans-national agreement as international social guarantee systems go, being less than five years old at the time of this writing.<sup>7</sup> It came into existence, along with the environmental side agreement, as part of U.S. President William Jefferson Clinton's fulfillment of campaign promises to enter into NAFTA only upon the condition that adequate commitments accompanied the regional trade agreement to ensure against a downward spiral in labor and environmental standards.<sup>8</sup>

While the U.S. negotiators had initially hoped for a document which would contain tri-nationally binding labor standards, the agreement actually negotiated contains as its basic obligation something quite different—a commitment by each of the three member countries to adhere to, and enforce, its own domestic labor law in eleven core areas.<sup>9</sup> The eleven labor law fields covered are: (1) freedom of association and the right to organize; (2) the right to bargain collectively; (3) the right to strike; (4) the prohibition against forced labor; (5) labor protections for children and

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7. The North American Agreement on Labor Cooperation (NAALC) entered into force on January 1, 1994, *see* NAALC, *supra* note 1, art. 51, simultaneously with the North American Free Trade Agreement (NAFTA). *See* Sections 101(a), 101(b)(2) of the North American Free Trade Agreement Implementation Act, 19 U.S.C. " 3311(a), 3311(b)(2) (1998). The Agreement, however, was only partially applicable to Canada as of that date, because of the Canadian requirement of provincial ratification. *See id.*, Annex 46. As of March 27, 1998, the Provinces of Alberta, Manitoba, and Quebec had signed the accord. *See* Office of the Minister of Labor, Canada, Background, attached to News Release: National Advisory Committee appointed under Canadian Intergovernmental Agreement regarding the North American Agreement on Labor Cooperation (NAALC) (No. 98-27) (March 27, 1998).

8. *See, e.g.*, Gwen Ifill, *The 1992 Campaign: The Democrats; With Reservations, Clinton Endorses Free Trade Pact*, N.Y. TIMES, Oct. 5, 1992, at A1, *cited in* Lance Compa, *International Labor Rights and the Sovereignty Question: NAFTA and Guatemala, Two Case Studies*, 9 AM. U. J. INT'L L. & POL'Y 117,133 (1993).

9. *See* NAALC, *supra* note 1, art. 1(b), 1(f), 2, 3, 49; *id.*, Annex 1.

young persons; (6) assurance of minimum labor standards; (7) elimination of employment discrimination; (8) equal pay for women and men; (9) prevention of occupational injuries and illnesses; (10) compensation in cases of occupational illnesses and injuries; and (11) protection of migrant workers.<sup>10</sup>

The NAALC contains no firm, trans-national labor standards external to each Party's domestic law. It contains a vague commitment that "each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light."<sup>11</sup> The eleven guiding labor law principles are norms "that the Parties are committed to promote subject to each Party's domestic law, but do not establish common minimum standards for their domestic law."<sup>12</sup>

The focus of the negotiations which produced the NAALC was on ensuring preservation of full sovereignty of each Party country in legislating, regulating, and modifying its labor and employment policies, while avoiding a downward spiral under pressure of regional integration of markets.<sup>13</sup> These objectives led the three governments to limit the countries' NAALC obligations to "promoting compliance with and effectively enforc[ing] its [own] labor laws through appropriate government action,"<sup>14</sup> maintaining suitable domestic private party enforcement procedures,<sup>15</sup> ensuring due process and other procedural guarantees for all labor law enforcement litigation, public or private,<sup>16</sup> ensuring legal transparency,<sup>17</sup> and providing adequate public information regarding labor rights.<sup>18</sup> The benchmark for comparison in analyzing an alleged NAALC violation, then, is not a uniform standard set by international law, *i.e.*, set by the Agreement itself. Instead, the benchmark differs, country-by-country, and is constituted by the Party's own domestic labor law.

## 2. *Structural and Procedural Provisions of the NAALC*

The concern of its framers for preservation of national sovereignty is reinforced by the enforcement structure of the NAALC. While the pri-

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10. *See id.*, Annex 1 (identifying guiding labor principles); *id.*, art. 49 (defining "labor law").

11. *Id.*, art. 2.

12. *Id.*, Annex 1.

13. *See id.*, art. 2.

14. *Id.*, art. 3.

15. *Id.*, art. 4.

16. *Id.*, art. 5.

17. *Id.*, art. 6.

18. *Id.*, art. 7.

mary commitment is that each Party country will abide by and vigorously enforce its own laws, there is no cause of action under the NAALC based on any particular domestic employer's violation of domestic labor legislation, no matter how flagrant. There is no provision for remedial measures under the NAALC aimed at making whole the workers victimized by violations. The Agreement reserves the enforcement of domestic law to the usual domestic channels, and precludes collateral attack on pending or completed adjudication before domestic tribunals.<sup>19</sup> Nor may any Party "undertake law enforcement activities in the territory of another Party."<sup>20</sup>

The conceptual gravamen of the violation is that a competing NAFTA country is obtaining an unfair competitive advantage in regional trade and investment through non-enforcement of its domestic labor legislation.<sup>21</sup> The NAALC is concerned only with violations by a nation-state Party of its own obligations under the Agreement; *i.e.*, with systematic, rather than merely occasional failures to effectively enforce domestic labor legislation.<sup>22</sup>

The agreement is structured to promote voluntary compliance, through mutual education, shared research, and other cooperative activities among the Parties.<sup>23</sup> Disputes over interpretation, application, and

19. *Id.*, art. 5(8) ("For greater certainty, decisions by each Party's administrative, quasi-judicial or labor tribunals, or pending decisions, as well as related proceedings shall not be subject to revision or reopened under the provisions of the Agreement.").

20. *Id.*, art. 42.

21. This is the reason why higher levels of the interpretation and application process are reserved for situations which are trade-related. *See id.*, art. 23(3)(a) (finding of non-trade relatedness of matter precludes convening of Evaluation Committee of Experts); *id.*, art. 29(1)(a) (prerequisite for request for arbitral panel); *id.*, art. 36(2)(b) (determination by arbitral panel).

22. *See, e.g.*, NAALC, *supra* note 1, art. 23 (reserving Evaluation Committee of Experts step in process for "patterns of practice by each Party in the enforcement of its. . . technical labor standards. . ."); *id.*, art. 27 (limiting final stage of dispute resolution process to cases in which there has been a "persistent pattern of failure by that other Party to effectively enforce [occupational safety and health, child labor or minimum wage technical labor standards]. . ."); *id.*, art. 29 (same, as to request for an arbitral panel); *id.*, art. 36 (2)(b) (same characterization as to determination to be made in initial report of arbitral panel); *id.*, arts 38, 39(1) (same characterization as to predicate for imposition of remedial action plan upon Party); *id.*, art. 39(4) (determination to be made as to whether action plan proposed is "sufficient to remedy the pattern of non-enforcement").

23. *See id.*, art. 11. A description of cooperative activities and public education programs conducted pursuant to the NAALC may be found in National Advisory Committee to the United States National Administrative Office for the North American Agreement on Labor Cooperation, Report of the United States National Advisory Committee Reviewing the First Four Years of Operation of the North American Agreement on Labor Cooperation, at 9-21 (April 15, 1998) [hereafter NAC Four Year Review Report], *reprinted in*

compliance with the terms of the NAALC are subject to a complicated series of procedural steps, which culminate at different stages, depending upon which of the eleven labor principles is at issue.<sup>24</sup> An express provision precludes the possibility of one Party country's government pursuing litigation in its own domestic courts against another Party to establish violation of the second country's obligation to ensure enforcement of its own labor laws.<sup>25</sup>

The NAALC is administered under a tri-national Commission for Labor Cooperation, headed by a ministerial council, composed of the Labor Secretaries of each of the three Parties.<sup>26</sup> A Secretariat provides support to the Ministerial Council, and is made up of appointees from each of the three countries, whose allegiance, for the duration of their appointments, is owed solely to the tri-national body, rather than their home countries.<sup>27</sup> In addition, pursuant to the NAALC,<sup>28</sup> each country has established its own National Administrative Office (NAO), headed by a Secretary, to serve as the point of contact among the three countries, as well as with the Secretariat, and with other governmental entities of their home country.

The NAO's hold a key role in interpretation and application of the Agreement. The NAALC requires each NAO to provide for public submissions regarding "labor law matters arising in the territory of another Party," and the NAO with whom the submission has been filed is responsible for initially reviewing the matter.<sup>29</sup> It also should be noted that even the public submission and initial NAO review procedures are set by domestic law of each Party, rather than tri-nationally determined pursuant to the NAALC.<sup>30</sup>

Whether initiated by a public submission or by the NAO on its own initiative, any NAO may request consultations with another NAO regarding the other country's labor law, its administration or labor market conditions.<sup>31</sup> This is the first step in the processes for interpretation, application and enforcement of the Agreement.<sup>32</sup> If the NAO-to-NAO consultations fail to resolve the dispute, the next step is consultations at

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1998 DAILY LAB. REP. (BNA) No. 89, at D33 (May 8, 1998); *id.* App. A.

24. NAALC, *supra* note 1, arts. 16(3), 20-41; *id.*, Annexes 41A, 41B.

25. *See id.* art. 43.

26. *Id.*, arts. 8(2), 9.

27. *Id.*, arts. 10(1)(b), 12(5), 12(7).

28. *Id.*, art. 15(1).

29. *Id.*, art. 16(3).

30. *Id.* ("in accordance with domestic procedures").

31. *Id.*, art. 21.

32. *See id.*, Part Four (arts. 20-25).

the ministerial level.<sup>33</sup>

These two initial steps, taken together, constitute the first or consultative phase of the NAALC interpretation and enforcement procedure; it is the only phase applicable to the three collective labor relations provisions, addressing freedom of association, collective bargaining, and the right to strike. The other eight NAALC labor principles are subject to a second, "evaluation" phase of proceedings, if not settled during the first phase. In this second phase, an Evaluation Committee of Experts analyzes patterns of enforcement of the identified body of domestic labor law and issues a fact-finding report.<sup>34</sup>

A third, "dispute resolution" phase is applicable only to "persistent pattern[s] of failure by the Party complained against to effectively enforce its occupational safety and health, child labor, or minimum wage" laws.<sup>35</sup> This final phase may potentially culminate in binding arbitration by a five member panel, which makes determinations as to "persistent patterns of non-enforcement," and, if such a violation is found, has authority to propose a remedial "action plan." The action plan, in turn, after several additional procedural steps, may become subject to enforcement either through trade sanctions, if the complained-against Party is the U.S. or Mexico, or through a domestic court judgment, if the complained-against Party is Canada.<sup>36</sup>

Like Submission No. 9601, nearly all of the NAALC submissions and consultations thus far have involved freedom of association and other collective labor law issues.<sup>37</sup> Only Phase I of the interpretation, application and enforcement procedures is available to resolve these types of submissions. The Phase I process is best characterized as cooperative, investigatory, and consultative, rather than adversarial. The Parties are to "endeavor to agree on the interpretation and application of this Agreement,"<sup>38</sup> to "make every attempt through cooperation and consultation to resolve any matter that might affect its operation,"<sup>39</sup> and in ministerial consultations, to "make every attempt to resolve the matter through consultations under this Article, including through the exchange of sufficient publicly available information to enable a full examination of the mat-

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33. *Id.*, art. 22.

34. *Id.*, art. 23.

35. *Id.*, art. 27(1).

36. *Id.*, art. 29-41, Annexes 41A, 41B.

37. For a description of the submissions through the end of 1997, see NAC Four Year Review Report, *supra* note 23, at 26- 27; *id.* App. B.

38. *Id.*, art. 20.

39. *Id.*



ter.<sup>40</sup> The goal of the consultative process is to clarify the issues, develop mutual understanding of each country's labor law-related legal structure and enforcement scheme, and to resolve uncertainties and disputes under the Agreement through negotiated resolution.

### 3. *Submission No. 9601 - The Fishing Ministry Union Case*

The allegations underlying Submission No. 9601 are rather idiosyncratic and will be presented here only in brief.<sup>41</sup> As part of an overall reorganization of the federal government ministries, the small federal Fishing Ministry was consolidated with portions of the much larger Ministry of Agriculture and Water Resources, as well as with portions of the Ministry of Development. The combined entity was renamed the Ministry of Environment, Natural Resources, and Fishing (Secretaría del Medio Ambiente, Recursos Naturales y Pesca) (SEMARNAP). The trade union confederation Federación de Sindicatos de Trabajadores al Servicio del Estado (FSTSE), whose affiliates had represented employees at each of the three ministries, announced that a new affiliate would be created to represent employees at the new, combined ministry, to be known as the National Union of Workers of the Ministry of the Environment, Natural Resources and Fishing (Sindicato Nacional de Trabajadores de la Secretaría del Medio Ambiente, Recursos Naturales y Pesca) (SNT-SMARNAP). Efforts were unsuccessful to reach agreement on allocation of leadership positions among the former Fishing Ministry union, the Single Trade Union of Workers of the Ministry of Fishing (Sindicato Unico de Trabajadores de la Secretaría de Pesca) (SUTSP), and the other leaders of predecessor unions within the single, newly created FSTSE affiliate, however. The SUTSP, which had represented employees at the Fishing Ministry until the consolidation, sought to retain its union status despite the confederation's establishment of the new affiliate, SNT-SMARNAP, and the election of its leadership. The new ministry and the Federal Conciliation and Arbitration Tribunal (FCAT) (Tribunal Federal de Conciliación y Arbitraje), the body before whom questions of federal employee union registration and representation rights are litigated in the first instance, initially treated SUTSP as defunct because of elimination

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40. *Id.*, art. 22(3).

41. This over-simplified description of the case is drawn from information contained in the NAO Report, *supra* note 4, and in the Submission, *supra* note 4, where a more comprehensive presentation of both the facts and the legal issues may be found. Many facts and issues have been omitted here. This summary restatement is intended only to provide the reader with sufficient background to focus the discussion and analysis of the three countries' constitutional law treatment of the international law issues, and their implications for application of the NAALC.

of the Fishing Ministry as a separate entity. The FCAT, acting in concert with the ministry, deployed Mexico's union registration procedures together with its one union per agency rule so as to de-register SUTSP, and register and recognize the new union, SNTSMARNAP, as the union representative of all employees employed at the new, combined agency.

Appeals to the judicial labor tribunals three times overturned FCAT rulings adverse to SUTSP.<sup>42</sup> However, SUTSP alleged that the Ministry nevertheless persisted in treating the new trade union, SNTSMARNAP, as an incumbent collective bargaining representative. Finally, after eighteen months of disputes and litigation, the FCAT held an election between the two competing unions, which SUTSP lost. SNTSMARNAP was registered and recognized as the agency employees' bargaining representative, and SUTSP was accordingly de-registered.<sup>43</sup>

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42. Each of the three predecessor ministries had been represented by a union affiliated with the FSTSE. Another issue in the submission was the contention that the Federal Conciliation and Arbitration Tribunals (FCAT's), tri-partite bodies with management, union, and government representation, were in fact structurally biased, because the establishment trade union confederation's power to control the selection of the union appointees to the FCAT's meant that the FCAT's started out with union-side members strongly inclined to side with the position supported by the confederation. Ties between the union confederation and the political party long dominant in the Mexican government were alleged to further undermine the bodies' neutrality, because of the union confederation's ability to use its political party connections to influence the appointment of the government representatives on these bodies. However, because the dispute underlying Submission No. 9601 was in the nature of an internal dispute within the dominant federal employee trade union confederation, as well as because the courts on appeal had overturned the FCAT rulings against the SUTSP, the U.S. NAO declined further to pursue the issue of systematic bias within the FCAT's. See NAO Report, *supra* note 4, at 32. Before the ILO, another provision of the LFTSE has been successfully challenged as violative of principles of freedom of association, because it precludes union representation of federal employees by a union affiliated with another trade union confederation. In light of the fact that the insurgent union SUTSP was itself affiliated with the FSTSE, however, this provision was deemed by the U.S. NAO to have no bearing upon the dispute. *Id.*

43. A postscript to these events is that after the NAO Report on Submission No. 9601 had been issued, and before the date of the seminar, a new decision issued by the Third Collegiate Labor Court of Mexico struck down the application to SUTSP of the one union per agency provisions of the federal employment law, holding them to violate the Mexican constitutional principle of freedom of association. This resulted in the regained union registration of SUTSP, but to little avail. The ministry, SEMARNAP, continued to treat SNTSMARNAP, on the basis of its majority status, as the exclusive representative of the entire workforce for all legal purposes, and accorded SUTSP none of the usual privileges attendant upon registered union status. See Submission No. 9601, Request for Reconsideration, Human Rights Watch/Americas, International Labor Rights Fund, Asociación Nacional de Abogados Democráticos, December 3, 1997, at 4, 7-8 (citing Tercer Tribunal Colegiado del Primer Circuito en Materio de Trabajo, Amparo Directo: DT-33/97, at 154).

Several non-governmental organizations joined together to file Submission No. 9601 based on this series of events. The main thrust of their complaint was that the one union per government agency rule violates the workers' right to freedom of association under both ILO Convention No. 87, a convention ratified by Mexico, and under provisions of the Mexican Constitution. ILO bodies had several times found that Mexican federal and state public employee labor relations laws violated ILO Convention No. 87, either because of a one union per agency rule or because of a related rule requiring that unions representing public employees at that level of government could only be affiliated with one, designated union confederation. Relying on these precedents, the SUTSP had filed a successful challenge to the LFTSE one union per agency provision before the ILO Freedom of Association Committee in the course of SUTSP's efforts to retain union status in the dispute underlying Submission 9601.<sup>44</sup> In addition, in cases challenging the laws of two Mexican states, Oaxaca and Jalisco, the Mexican Supreme Court had held that the states' public employee laws, each of which contained a one agency-one union provision similar to that at issue in the challenged federal employee law, contravened Article 133B of the Mexican Constitution, which guarantees freedom of association. Each of the two judicial decisions also contained reasoning relying on the Mexican ratification of ILO Convention No. 87 and interpretations thereof by ILO bodies indicating that this type of Mexican legislative provision contravened the convention.<sup>45</sup>

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44. See International Labour Office, Governing Body, 300<sup>th</sup> Report of the Committee of Freedom of Association, Case No. 1844 (Mexico), paras. 215-244 (1995), *discussed in* NAO Report, *supra* note 4, at 23-25. The ILO Committee of Experts on the Application of Conventions and Recommendations' previous decisions finding union monopoly provisions of the LFTSE to violate workers' rights to freedom of association under the ILO convention include: International Labour Conference, 80<sup>th</sup> Sess., REPORT OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, at 211 (1993); International Labour Conference, 78<sup>th</sup> Sess., REPORT OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, at 190-92 (1991); International Labour Conference, 76<sup>th</sup> Sess., REPORT OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, at 192 (1989); International Labour Conference, 73<sup>rd</sup> Sess., REPORT OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, at 205 (1987); International Labour Conference, 69<sup>th</sup> Sess., REPORT OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS at 139 (1983), *all discussed in* Submission, *supra* note 4, at 17-18, 17 n.66, 18 n.68, *and in* NAO Report, *supra* note 4, at 27-29. As to relevant interpretation of ILO Convention No. 87, see generally L. Swepston, *supra* note 3, at 181-84.

45. A good description of the Mexican judicial decisions may be found in Torriente, *supra* note 2, at 37-51, 53-55. See also NAO Report, *supra* note 4, at 29-30 (discussing the two Mexican court decisions).

The submission was processed under the NAALC Phase I procedures. The U.S. NAO engaged in consultations with their Mexican counterpart, and eventually issued a report. The report found that successful pursuit by SUTSP of collateral judicial review of the original adverse FCAT ruling, as well as other facts specific to the case, had afforded it substantial relief.<sup>46</sup> Finding itself unable to resolve on the merits the legal issues raised by the submission, however, the U.S. NAO recommended ministerial level consultations "for the purpose of examining the relationship between and the effect of international treaties, such as ILO Convention 87, and constitutional provisions on freedom of association on the national labor law of Mexico."<sup>47</sup> Ministerial consultations pursuant to this recommendation ensued, including the conduct of this seminar.

The problem confronting the U.S. NAO, in attempting to respond to the submission, was that Mexican law was in apparent internal conflict. To fully analyze the submission on the merits, the U.S. NAO needed to resolve that internal conflict, that is, to determine the actual state of Mexican law, in accordance with the methodology the relevant Mexican authority would have deployed if confronted with the same problem. The fact that the Mexican federal employee union registration and representation scheme did not comport with some theoretical notion of freedom of association would be irrelevant. The NAALC explicitly eschews imposing any external understanding of the meaning of this term when it guarantees freedom of association and protection of the right to organize, promising only to assure these rights as they are specified under the domestic laws of each Party.

The question, therefore, was whether the LFTSE provision could itself be characterized as violating Mexican law. This could only be the case if three assumptions were true: (1) that under Mexican Constitutional law, duly adopted international agreements such as the ILO convention at issue, were regarded as having been incorporated into Mexican law upon completion of the Mexican constitutional process for adoption of treaties; (2) that the LFTSE one agency-one union provision contravenes the ILO freedom of association convention; and (3) that under Mexican law, application of the hierarchy of legal authority or other usual method of resolving conflict between international treaty law and domestic statutory law would result in priority for the international norm, hence invalidity of the LFTSE provision, assuming it conflicted with the ILO convention.<sup>48</sup>

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46. *Id.*, at 31-32.

47. *Id.*, at 33.

48. Also left unresolved was the question of potential conflict between the Constitution of Mexico and the challenged LFTSE provision, and in relation thereto, the relevance

The ministerial consultations and the expert views presented at the seminar, therefore, focused on these questions as to each of the three Party countries. Three experts from each of the three NAFTA/NAALC Parties presented their views on their home country's approach to these issues. As to each of the three countries, there was some disagreement among their respective experts on these matters, but those differences, as well as the points upon which the views reflected consensus, are nevertheless illuminating.

#### 4. *An International Law Analytical Schema*

John M. Jackson has laid out a "landscape" of constitutional and legal issues summarizing critical factors pertaining to the relationship between treaties and domestic law.<sup>49</sup> This schema provides a useful framework for considering the presentations of each of the contributors to the seminar, and the implications of their conclusions for administration of the NAALC. These issues include:

- the power to negotiate international instruments on behalf of the home country;
- the power to "sign" the international instrument, in the sense of certifying the text for domestic purposes;
- the power to "accept" the instrument as an international law obligation binding upon the home country, *i.e.*, the validity of the treaty to bind the home country under international law;
- the "validity" of the instrument under home country domestic law;
- the power to implement the treaty obligations;
- direct applicability of the treaty in domestic law;
- invocability of the treaty in domestic law;
- the hierarchy of norms in domestic law when the norms established by the international agreement conflict with those of domestic law.<sup>50</sup>

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of the prior state court decisions holding analogous Mexican state public employee organizing law to violate the constitutional provision ensuring freedom of association. There was little focus on this question during the seminar, perhaps in part because in a case decided after the U.S. NAO issued its report on Submission 9601, the Mexican Supreme Court held the LFTSE provision at issue violative of the Mexican constitutional right of freedom of association. *See supra* note 43.

49. John M. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 A.J.I.L. 310, 315-16 (1992). Somewhat different listings of pertinent factors may be found elsewhere. *See, e.g.*, LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 67-68 (1995).

### 5. *The Presentations Examined in Light of These Factors*

#### (a) *The Power to Negotiate and Adopt Treaties*<sup>51</sup>

The first three of these points were not very contentious as to any of the three countries. David P. Stewart summarized the U.S. system.<sup>52</sup> Article II, Section 2, clause 2 of the Constitution authorizes the President to enter into treaties with the advice and consent of the Senate. The executive branch negotiates treaties, the Secretary of State normally submits the proposed treaty to the President, the President submits it to the Senate, and if the Senate by a two-thirds majority passes a resolution of advice and consent endorsing the treaty, it has been duly adopted. Executive agreements are not mentioned in the constitutional text, but have long been accepted practice in the U.S. They are negotiated by the executive branch, and require no advice and consent from the Senate. Where they rest exclusively on the power of the executive branch, they require no legislative approval. So-called "joint executive agreements," rest in part on the power of the legislative as well as the executive branch of government, and are negotiated by the executive, but entered into either on the basis of enabling legislation, enacted before negotiation of the international agreement, or implementing legislation, enacted thereafter. Subsidiary agreements, contemplated by a duly adopted treaty, to effectuate some aspect of the treaty, also fall under this category.

Dr. Javier Moctezuma Barragan and Lic. Loretta Ortiz Ahlf outlined the parallel Mexican body of law.<sup>53</sup> Under the Political Constitution of the United Mexican States, a treaty must be signed by the President of Mexico, approved by the Senate, one of the two houses within the Mexican federal legislature, and must be published in the Federal Official Gazette (*Diario Oficial de la Federacion*) to satisfy procedural requirements for valid adoption.<sup>54</sup>

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50. *Id.* Jackson includes a ninth factor, the power to administer the treaty, not relevant to the discussion here.

51. The more general international law usage, "treaties," will be employed here without differentiating between treaties and executive agreements, except to the extent required by a description of relevant aspects of U.S. practice.

52. See also HENKINS *supra* note 49, at 68-71.

53. In addition to the constitutional provisions, treaty-making is also subject to a 1992 statute, which clarifies some uncertain matters regarding the entering into of international agreements by Mexico. An English translation, preceded by a brief commentary by Antonio Garza Canovas, may be found at *Mexico: Law Regarding the Making of Treaties*, 31 I.L.M. 390 (1992) [hereinafter *Law Regarding Treaties*].

54. See Political Constitution of the United Mexican States [hereinafter Mexican Constitution], art. 76.

Ton Zuijdwijk addressed Canadian law and practice on these points. Treaty-making in Canada is lineally descended from the Crown prerogative, nowadays exercised by the Governor General of Canada upon advice of the Canadian ministries; *i.e.*, functionally, by the executive branch of government. Therefore, no legislative approval is required to make the treaty binding upon Canada as a matter of international law.

(b) *Domestic Invalidity of an Internationally Valid Treaty*

It is the remaining six issues that are problematic, and the remarks of the commentators suggest that they pose difficulties, albeit in varying respects, in each of the three Party countries. Circumstances which may render a treaty, negotiated, signed, and accepted by the duly authorized governmental entities and therefore valid under international law, invalid under domestic law include inconsistency of the treaty with provisions of the domestic constitution, at least absent a rule treating the international agreement as *de facto* amending the constitution. A nation's representative may also act *ultra vires* in some other respect.<sup>55</sup> In all three countries, these possibilities exist, although to a lesser degree in the United States than in either of the other two countries.

First, none of the three are among the countries which treat adoption of a treaty as overriding prior, inconsistent federal constitutional provisions, or as preventing subsequent adoption of federal constitutional provisions inconsistent with a duly adopted treaty. Conflict between international treaty obligations and commands of the federal constitution is therefore possible in each of the three countries. The consequences of such a conflict and the method of its resolution depend in part on the extent to which mere adoption of the treaty renders it a part of domestic law, a separate issue which will be addressed shortly, and as to which each of the three countries takes a different approach.

The *ultra vires* issue, however, under some circumstances may pose the more difficult problem as to domestic law validity of international treaties. A treaty can be *ultra vires* if the federal government takes action outside the sphere of authority of the actor. By and large, this implicates federal separation of powers issues on the one hand, and federal-state allocation of powers issues on the other, although a third possibility is areas constitutionally preserved to private actor autonomy. The constitutional allocation of legislative competence plays a key role here, as does the relationship between treaty power and domestic law-making authority.

In the United States, David Stewart's presentation indicates, this problem will rarely arise. There is some suggestion in the case law that

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55. See Jackson, *supra* note 49, at 316-17.

the federal treaty power can expand Congressional authority to act vis á vis other branches of the federal governments, as well as vis á vis the states.<sup>56</sup> More to the point, expansive readings of both the necessary and proper clause and the interstate commerce clause have greatly reduced the area regarded as falling within exclusive state competence. Labor and employment law, in particular, has been federalized to a very great extent, all but eliminating any possibility that a properly adopted labor rights treaty would be deemed unconstitutional on grounds that it invaded the sphere of authority reserved to the states or private actors.

In Mexico and Canada, the situation is otherwise. The presentations of Dr. Manuel Gonzalez Oropeza and Dr. Javier Moctezuma Barragan noted that the Mexican Constitution specifically requires treaties to conform to the Constitution in order to be valid. The division of competence in Mexico between federal and state authorities is almost the reverse of the U.S. Article 163 of the Constitution of Mexico includes a provision similar to the "necessary and proper" clause of the American Constitution, but the broad interpretation placed upon Article 124, which allocates authority between federal and state levels, has rendered the clause nonfunctional. Mexico is much closer to Canada than to the U.S., treating its constitution as allocating separate and exclusive spheres of authority to the states and to the federal government, with no overlap. Many treaties address topics which in Mexico fall within the exclusive authority of the states.

However, the labor law area is one in which competence is primarily allocated to the federal government in Mexico; state government employment regulation is the one exception, and that is reserved to the exclusive authority of state governments. Thus in Mexico, entering into treaties regarding labor rights will rarely raise *ultra vires* problems because of domestic federalism constraints;<sup>57</sup> other matters might well engender such difficulties. This depends, however, on whether exercise of the treaty authority is deemed federal governmental action; the remarks of Lic. Ortiz suggest that it may not be.

The Canadian speakers referred to precedents dating back to the period when the Privy Council in London served as the highest appellate court for Canada, holding that the allocation of legislative competence

56. See *Zschemig v. Miller*, 389 U.S. 429 (1968).

57. This aspect of the seminar presentations suggests, however, that Mexico could face this type of federalism-based *ultra vires* issue if a NAALC submission were filed challenging provisions of Mexican state public employee laws, since non-federal public employment is the one area of labor law reserved to state competence in Mexico. Lic. Ortiz' view that treaty-making is national governmental action, rather than federal or state, however, would appear to eliminate any *ultra vires* problem.



between federal and provincial governmental levels was mutually exclusive, in the sense that all matters were assigned to one or the other sphere, without any areas of mutual jurisdiction.<sup>58</sup> Under these precedents, labor law related matters are allocated between federal and provincial governments based upon the industry of the employer. The federal government regulates federal government employment, as well as private sector employment in transportation, banking, telecommunications, and a handful of other industries deemed to be intrinsically inter-provincial in nature; about 10% of the labor force is covered by federal law. Provincial government employment, and employment in all other private sector industries is subject solely to provincial level regulation. There was some disagreement about the extent to which modern judicial decisions would be likely to continue to adhere to this constitutional "watertight compartments" treatment, which Prof. Robert Howse characterized as arising from the Canadian equivalent to the *Lochner* era.

In any event, however, in Canada the treaty-making power is possessed exclusively by the federal government, and that power extends to any topic, regardless of its provincial or federal constitutional allocation for domestic law purposes. A treaty therefore may be concluded by the federal government validly for domestic as well as international law purposes, regarding labor law matters. Implementing the treaty, however, is seen as raising entirely different questions.

In Mexico, as Lic. Ortiz characterized the system, a similar result is achieved through a different conceptual device. The allocation of powers between state and federal government under the Mexican Constitution is deemed to permit no exceptions; the treaty power, however, is not viewed as one exercised by the federal government. Rather, the system may be conceptualized as composed of three levels: national, federal, and state. Both the constitution and international treaties fall within the national level. The treaty power is exercised by the President and the Senate acting as the national level, the President functioning as head of state, and the Senate acting legislatively on behalf of the nation-state itself, in effect negotiating and entering into agreements internationally on behalf of the entire country, including both the federal and state levels. Constitutional treaties may therefore be adopted only by the national government, and may address any issue, whether it is domestically allocated to the federal or to the state sphere of legislative authority. As with Canada, however, implementation of the treaty is regarded as posing separate

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58. Major precedents include *Toronto Electric Commissioners v. Snider*, 1925 DLR LEXIS 817, 2 D.L.R. 5 (1925) and *Attorney-General Canada v. Attorney-General Ontario (Reference Re Weekly Rest in Industrial Undertakings Act, Minimum Wages Act and Limitation of Hours of Work Act)*, 1937 DLR LEXIS 535; 1 D.L.R. 673 [1937].

questions. Both Mexico and Canada may therefore validly enter into international treaties regarding labor law matters.

(c) *Power to Implement and Direct Applicability*

The fifth issue regarding the inter-relationship between international and domestic law poses the most difficulty analytically, as well as creating the greatest problems for an international agreement such as the NAALC, whose application is dependent upon accurate analysis of Party countries' domestic law. The issue is what level and organs of government have the power to implement the treaty obligations.<sup>59</sup> This issue is heavily intertwined with the sixth issue, to what extent treaties are "directly applicable" under domestic law, that is, what is the role played by international obligations within the Parties' domestic legal systems.<sup>60</sup> The two questions will be taken up together.

International law scholars have historically broadly categorized national approaches to the interrelationship between international and domestic law in terms of the two traditional extremes: monism and dualism.<sup>61</sup> The monist state treats international agreements which it has ratified as automatically incorporated upon adoption directly into the domestic legal order; indeed, there is deemed to be only one body of law, conjoining international and domestic law, with international law higher in the hierarchy.<sup>62</sup> While no country today fits the pure monist model, the Netherlands prioritizes treaties over its constitutional provisions, while France, Belgium and Luxembourg treat treaties as overriding subsequently as well as previously enacted statutes, so that treaties in those countries function in a manner akin to constitutional provisions.<sup>63</sup> On the other hand, the dualist state views international law and domestic law as occupying two separate, parallel legal orders. International obligations assumed by a dualist state are only enforceable against it through the international dispute resolution mechanism, if any, incorporated into the international treaty itself, or through diplomatic means. The treaty norm will only be applicable within the ratifying country's domestic legal order if the country engages in an "act of transformation," such as enactment of a domestic law or regulation incorporating the ratified international norm. On this view, the treaty itself is never directly applicable to domestic

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59. See Jackson, *supra* note 49, at 317.

60. See *id.*

61. See generally HENKIN, *supra* note 49, at 63-77.

62. *Id.*, at 64, 67.

63. *Id.*, at 73.

law; rather, the domestic statute or regulation adopted to effectuate the treaty is the only operative provision under domestic law.<sup>64</sup>

Canada is a classic dualist jurisdiction.<sup>65</sup> Ton Zuijdewijk explained that treaties in Canada are regarded as wholly separate from domestic law; there is no such thing as a self-executing treaty. There is no priority for treaty over domestic law in the event of conflicting commands; the treaty is inapplicable to domestic legal analysis absent implementing legislation, so technically no conflict arises. In addition, following the Privy Council precedents, the provinces retain the power to legislate within their sphere of authority in contravention of international treaty commitments even if no conflict exists at the time of initial adoption of the treaty. Even treaties which require no legislative action for implementation normally require administrative action, a form of domestic legal activity. In the labor law area, where treaties usually obligate governments to assure certain fundamental rights to workers, a legislative or regulatory act transposing the international norm into domestic law is usually unavoidable. It is worth emphasizing that the critical 1937 Privy Council precedent itself overturned federal legislation implementing a series of ILO conventions on minimum wages, weekly rest periods, and maximum working hours, holding that as to domestic legislation, the subject was reserved exclusively to provincial competence.<sup>66</sup>

As to treaties addressing subjects falling within the Canadian federal sphere of authority, the issue of implementation poses little practical difficulty. The same political party normally controls both the majority in the federal Parliament and the executive branch ministries. While the executive acts without input from Parliament in entering into treaties, there is normally little or no difficulty in winning Parliamentary approval of legislation necessary to implement the treaty. However, when provincial action is needed, the obstacle is likely to be insurmountable. Different political parties are likely to command parliamentary majorities and to control the government among the provinces, and often the provinces will have differing views about either a treaty itself or the body of legislation required to implement it. On its face, the independence of the provinces from federal control within the provincial sphere of compe-

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64. See generally Jackson, *supra* note 49, at 314-15; HENKIN, *supra* note 49, at 64-67.

65. The Canadian approach is the result of application to it in the colonial era of the British model, which "is generally considered the prime example of a dualist system." Jackson, *supra* note 49, at 319.

66. *Attorney-General Canada v. Attorney-General Ontario (Reference Re Weekly Rest in Industrial Undertakings Act, Minimum Wages Act and Limitation of Hours of Work Act)*, 1937 DLR LEXIS 535; 1 D.L.R. 673 [1937].

tence would seem to render it impossible for the federal government to responsibly enter into international obligations entailing binding provincial legislation.

Ton Zijldwijk described the two practical solutions Canada has relied on for the last several decades to provide a limited solution to this problem. The first is to negotiate a so-called "federal state clause," which permits the federal government to obligate itself to observe the treaty commitments, insofar as they can be performed under auspices of the federal government's authority, and permits it to extend coverage of the treaty to the provinces one-by-one, as each province accepts the treaty. A version of this approach was adopted in the NAALC itself.<sup>67</sup> The second solution is for the federal government to seek advance concurrence from all ten provinces, in which each province commits to implement the treaty, and even one province may hold out with an effective veto. Both he and Prof. Dufour noted that this is the procedure which usually has been resorted to regarding adoption of ILO conventions, which is one explanation for the fact that Canada has adopted very few of them.<sup>68</sup>

Prof. Dufour described in some detail the institution and operation of the Quebec provincial Minister of International Affairs, whose office is responsible *inter alia*, for analyzing international instruments falling at least in part within provincial legislative competence, initiating inter-ministerial consultations to assess the extent of provincial conformity or legislative change necessary to ensure conformity with the international instrument, and communicating to the federal Secretary of State on External Affairs the province's assent, sometimes conditioned on reservations or declarations, to the instrument. Mr. Zijldwijk characterized the practice of the federal Canadian government as being uniformly to adhere to the requirement that one of these two methods of solving the provincial authority problem be available before it would enter into an international obligation. Prof. Dufour concurred that this is normally the case, and described federal-provincial cooperation as to implementation both of international human rights treaties and labor rights conventions.

Robert Howse regarded considerably more skeptically the precedents regarding the relationship between the federal government's treaty power and the domestic allocation of authority between federal and provincial levels, and hinted that it may be used as an excuse by the federal government to avoid international pressure to enter into certain treaties. He

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67. See NAALC, *supra* note 1, Annex 46.

68. By Prof. Dufour's count, Canada has ratified 29 of the 176 conventions. As both she and Prof. Aaron observed, the U.S. has ratified only 11, but most industrialized nations have ratified many more.

viewed the doctrine as likely to be interpreted by the modern Canadian Supreme Court much more flexibly. He pointed to instances in which Canada has in fact entered into human rights treaties without either a federal-state clause, or advance provincial concurrence, and indeed under circumstances where at least one province, Quebec, was thereafter required to modify its legislation. He also viewed the federal government as having the ability to exercise the power of the purse to induce the provinces to conform their legislation to international treaty requirements. It could thereby avoid resort to the heavy strong-arm tactics of enacting preemptive federal legislation on the subject, and then litigating whether the federal treaty authority provides sufficient basis to support such an overriding federal statute.

Mexico likewise labels itself a “dualist” rather than “monist” country, although the concept of three layers of government, national, federal, and state, advanced by Lic. Ortiz, suggests that it may be better characterized as “hybrid.” Dr. Moctezuma asserted that Mexico has rejected the monistic approach of automatic incorporation of international obligations into domestic law, and then described Mexican practice in dualistic terms, as requiring that domestic legislation be enacted to transform any international treaty obligation into enforceable domestic law. However, he pointed to a Mexican constitutional provision which appears to some extent at odds with this.

Article 123, which Dr. Moctezuma noted, is similar to Article 6 of the U.S. Constitution, provides that “[t]his Constitution, the laws that emanate from it, and all [duly adopted] treaties that are in agreement with it. . . will be the supreme law of the land,” binding judges in their rulings notwithstanding any conflicting provisions of state law. A reading of this text would suggest first, that treaties are valid only if substantively in accord with the constitution, as well as properly adopted procedurally, second that treaties are superior to conflicting state law, and third, that at least to the extent of such conflict, treaty law should be directly applicable to nullify the operation of the state law.

Dr. Moctezuma’s view was that pre-existing federal or state law would not be nullified or automatically modified in the event of proper adoption of a conflicting international instrument. However, he deemed it unclear whether the usual rule applicable to statutes, that is, later in time prevails, would govern enactment of contradictory federal legislation after proper adoption of a treaty. Because the two types of legal norm are adopted through different processes under the Mexican constitution, and because in his view, the two types of legal norms occupy an equivalent position in the Mexican hierarchy of laws, he suggested, it is uncertain how such a conflict would be resolved. In addition, as both Dr. Moctezuma and Dr. Gonzalez emphasized, Mexico, unlike its North

American partners, is a civil law jurisdiction, which normally does not treat judicial decisions as creating binding precedent. The special "amparo" proceeding would be used to resolve a conflict of this sort, but it too produces precedent binding only in the case at bar, until five similar decisions have been rendered. Political solutions include ensuring that federal legislation is conformed to the treaty or renouncing the international convention; the latter, it should be noted, requires a different procedure under Mexican law than enacting federal legislation.

A different sort of uncertainty seems to exist as to treaty conflict with state law. Treaty law, unlike federal law, can validly be adopted covering topics which overlap with those vouchsafed to the states under the Mexican constitution. The constitutional text rendering the treaty law, like the constitution itself, supreme in the event of conflict with the state law, suggests strongly that some form of direct applicability exists in those circumstances. Were Mexico classically "dualist," in the way that Canada is, a treaty would be rendered without domestic effect until legislation was enacted transposing its norms into Mexican law. The preclusion of federal government legislative action on topics reserved to the states would prevent the Mexican federal government from adopting implementing legislation and would require that such legislation be enacted by the states, creating a situation resembling that of Canada. This is difficult to square with the constitutional language commanding judges to apply the treaty in the event of conflict with state law.

Dr. Gonzalez took the position that the Mexican courts, as well as Congress, reject that notion that adoption of a treaty, standing alone, could operate to modify existing Mexican law. On the other hand, as he put it, "neither branch of the Mexican government has established views on the hierarchy between these laws." Agreeing with Dr. Moctezuma, he stated that "because treaties are created through a process different from federal or state law, there is no hierarchical relationship, and no rule for resolving conflicts between law and treaty" assuming both are constitutional. One solution he offered would be for Mexico only to adopt non-self-executing treaties, and to uniformly require implementing legislation for every treaty; however, he concluded that Mexico had yet to adopt this policy in resolution to the problem. In response to a question posed by Prof. Hannum, Dr. Gonzalez stated that since both treaty and federal legislation are equal in hierarchy and adopted under parallel procedures, neither can supersede the other. A court confronted with such a conflict, having first ascertained that both the treaty and statute were constitutional, might well declare the matter non-justiciable, regarding it as a matter for the political branches of government to settle.

Lic. Ortiz reached a similar conclusion as to federal laws. On the other hand, as to state legislation, Lic. Ortiz regarded the problem as one

with a definite solution. She construed the supremacy provision as requiring the judge to follow the treaty in the event of conflict with the state provision. Lic. Ortiz pointed out that the distinction between self-executable and non-self-executable treaties has yet to be addressed by the Mexican courts, nor have they focused on the question of how issues within the competence of the federal authorities should be addressed when also covered by a duly adopted, international treaty. Finally, she would appear to differentiate the impact of self-executing treaty provisions and non-self-executing provisions upon state law: in the event of direct conflict, a litigant opposing application of state law could apparently rely on the treaty to contend the state law invalid, hence avoid its application. Where implementing legislation is necessary to effectuate the terms of a treaty, however, and the matter is one reserved to the states, it would appear that federal legislation would not be constitutional hence each state would be required to enact whatever laws are necessary to effectuate the international instrument.<sup>69</sup>

As to the U.S., David Stewart reviewed the fairly well-settled approach. Article VI of the Constitution renders properly adopted treaties "the supreme law of the land," and treaties displace conflicting state constitutional and statutory provisions. The "later in time" rule is employed to resolve conflicts between federal statutes and treaties, because treaties and federal statutes theoretically occupy an equal position in the U.S. hierarchy of sources of law. However, the courts apply interpretative rules disfavoring implication of Congressional intent to overturn prior treaty-based law, and attempting as much as possible to give effect to both the treaty and the statute. The judicially-developed doctrine distinguishing between "self-executing" and "non-self-executing" treaties determine whether further legislation is needed to render a treaty part of the corpus of domestic law, or whether the Senate confirmation of the treaty is sufficient to make it effective on its own as part of domestic law.<sup>70</sup>

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69. On the other hand, the seminary presentations contradict prior representations by the government of Mexico, which has repeatedly asserted before ILO supervisory bodies that Article 133 of its constitution automatically incorporates ILO conventions into Mexican law. See VIRGINIA A. LEARY, *INTERNATIONAL LABOUR CONVENTIONS AND NATIONAL LAW: THE EFFECTIVENESS OF THE AUTOMATIC INCORPORATION OF TREATIES IN NATIONAL LEGAL SYSTEMS*, 13, 25-26, 101-05, 143-44, 146-47 (1982). Leary also characterizes the Mexican constitution as clearly providing for supremacy of treaties over state law, and several times asserts as a settled proposition of Mexican law that the later in time rule applies to resolve conflicts between treaties and federal Congressional legislative enactments, which are of equal status in the Mexican hierarchy of laws. See *id.* at 45, 117, 128, 129, 143-44, 146-47.

70. See generally HANKIN, *supra* note 49, at 68-71.

Whether the treaty may be asserted defensively, to preempt conflicting state law, as well as whether the treaty may be asserted affirmatively, as the basis of a claim, and by whom, in U.S. law depend upon the extent to which the treaty is self-executing. The U.S. is therefore not dualist, as the term is usually used to describe other common law countries, such as Canada and the U.K., nor is it monist, in the way that the Netherlands or France might automatically treat a ratified treaty as part of domestic law. It neither resembles most common law countries with a strong, if not absolute presumption against a treaty being self-executing, nor most civil law countries, with a strong, if not absolute presumption in favor of a treaty being self-executing.

There is considerable debate over whether the determination that a particular treaty is or is not self-executing properly belongs to the President and Congress in approving the treaty, or to the courts, in construing it. Among the presenters at the seminar, Mr. Stewart viewed it as appropriate that increasingly, the President and Congress create legislative history in the course of submission of the treaty for Congressional approval and ratification or adoption by the Senate, which courts later rely on, designating the treatment to be given to the treaty, usually characterizing it as non-self-executing. There are also competing views about whether there ought to be a presumption for or against self-executability of treaties. Prof. Hurst Hannum's presentation suggested that executive and Senatorial designation of the self-executing or non-self-executing status of a treaty distorts the constitutional framework, and that in light of the constitutional designation of treaties as "the supreme law of the land," equal in status with Congressionally-enacted legislation, they should at least enjoy the presumption that they are self-executing, requiring no further legislative action to make them effective within domestic law.

In the U.S., the issue of the "self-executing" characterization of a treaty or other international agreement is determined separately for each treaty, without benefit of a presumption in either direction. The courts have developed a series of factors for utilization in making such a determination, including language and purpose of the treaty; circumstances of its execution; nature of the obligations imposed by the treaty; existence of domestic institutions and procedures appropriate for direct implementation, including institutional capacity of the judiciary to resolve the dispute; availability and feasibility of alternative enforcement methods; and the consequences of treating the treaty as self-executing or failing to do so.

#### (d) *Domestic Invocability and the Hierarchy of Norms*

The seventh and eighth issues pertaining to the relationship between international and domestic law both arise only on the assumption that the



treaty provision in question is self-executing under domestic law. The seventh issue is then the invocability of the treaty in domestic law, while the eighth addresses the hierarchy of norms in domestic law when the norms established by the international agreement conflict with those of domestic law. The seventh issue asks who may sue or defend a suit, relying on the international norm either to state a cause of action, or to invalidate the other party's claim. The notion is akin to standing to sue under American law, but more broadly encompasses both causes of action and defenses.<sup>71</sup> The eighth issue asks the question, assuming the international norm is properly asserted, and in conflict with another domestic legal norm, which body of law will prevail in domestic judicial application.<sup>72</sup>

As to Canada, the presentations made it clear that neither issue is meaningful: the treaty never has domestic legal effect, it is never invocable independent of implementing legislation in domestic litigation, by any party, public or private, and it has no place in the hierarchy of domestic norms, since it is regarded as occupying a separate universe. That is not to say, however, that the international provisions may not be given any weight in judicial proceedings in construing domestic law.

As to the U.S., Mr. Stewart's and Prof. Hannum's presentations indicate, the general rules regarding these two issues are fairly clear, but their application in individual cases is highly contestable. The hierarchy of laws is settled, provided that the treaty is self-executing, hence itself a part of domestic law: a treaty is superior to state constitutional, statutory and other law, equal to federal statutory law, and below federal constitutional law. In the event of conflict, the treaty controls over conflicting state law. In the event of conflict with a federal statute, the courts will seek to construe both provisions to avoid the conflict, but failing that, whichever was enacted later in time will control.

The issue of invocability, however, is far less clear, and differs on a case by case basis. Moreover, courts seem to frequently confuse it with the self-executability question,<sup>73</sup> so that the U.S. judicial analysis of these cases is uncertain. A self-executing treaty may nevertheless be deemed not invocable in judicial proceedings. It may be invocable vertically, by a private party against a governmental actor, but not horizontally, against a private actor. It may be invocable defensively, by a defendant asserting it to invalidate application of a conflicting federal or state law. Perhaps less often, it may be invocable affirmatively, to assert a cause of action

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71. See Jackson, *supra* note 49, at 317-18.

72. See *id.*, at 318.

73. See *id.*, at 317.

against a governmental actor. The type of issues relevant in the U.S. to determining questions such as standing to sue under domestic law are similar to those considered by the courts in construing a treaty to ascertain its invocability by the party seeking to rely on its provisions in the course of U.S. domestic litigation.<sup>74</sup>

In Mexico, some aspects of these two issues are clear, while others appear to be unresolved. All three Mexican commentators agreed that treaties occupy the same level in the Mexican legal hierarchy as federal congressionally enacted legislation: below the constitution, but above state legislation. They also agreed, however, that while treaties and federal statutes occupy an equivalent position in the Mexican hierarchy of law, neither the later in time rule nor any other established method exists to resolve conflicts between them.<sup>75</sup>

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74. *See id.*

75. *But see* Leary, *supra* note 69, at 45, 120, 128, 143-44 (*lex posterior derogat priori* (later in time) rule is the established method in Mexico for resolving conflicts between treaty and federal legislation, which are of equal status in the hierarchy of sources of law), *see also id.* at 120, 134 n.20 (citing ENRIQUE PAEX STILLE, INTERPRETACIÓN DEL ARTICULO 133 DE LA CONSTITUCION at 29-34 (México, Tesis, Universidad de México, 1945)). Prof. Nestor de Buen, however, quotes Article 6 of the Federal Labor Law (FLL), applicable in the private sector, as follows: "Respective laws and treaties, formalized and approved in terms of Constitution Article 133 will be applicable to labor relations in everything that would benefit the worker, starting from its effective date." Nestor de Buen, *Mexico*, in 8 INTERNATIONAL ENCYCLOPAEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS (Mexico tab), at 55, ¶180 (Roger Blanpain, editor-in-chief) (Supp. 1991). This language strongly suggests that at least as to private sector labor relations law, treaties are incorporated into domestic law and are directly applicable. The FLL provision appears to resolve conflicts between provisions embodied in legislation with those contained in treaty law on the basis that the applicable rule is whichever one would operate more in favor of the worker. The reader may wish to note that such an approach to resolving conflict between competing norms is not unusual in foreign labor legislation. *See, e.g.*, Mt. § 13, Act. No. XXII on the Labour Code of Hungary (permitting negotiation of collective agreements which contain terms which differ from those set forth in the law, but only to the extent the terms favor the employee). De Buen lists the hierarchy or sources of labor law in the private sector, from highest to lowest, as (1) the Mexican Constitution; (2) Federal Labor Law; (3) executive regulations implementing federal legislation; and (4) international treaties, which he would appear to regard as incorporated into Mexican law, but lower in the hierarchy than not only federal legislation but also federal regulation, *i.e.* executive regulatory acts. De Buen, *supra*, at 53-55, ¶¶ 174-180, *citing* FLL art. 17.

The U.S. NAO report on Submission No. 9601, however, summarized its own experts' analyses of the state of Mexican law somewhat differently:

There are conflicting opinions among legal scholars on the position of international treaties and federal laws within the hierarchy of Mexican law. One school of thought is that international treaties are superior to federal law, provided that the treaty was ratified in accordance with Mexico's constitutional requirements. This is the prevailing view. Another view places federal law above treaties. A third view is that international treaties and federal law appear to enjoy equal status within the Mexican legal hierarchy.<sup>76</sup>

The seminar presentations seemed to contain contradictory implications as to both invocability of treaty law in Mexican judicial proceedings, and as to competence of the judiciary rather than the political branches to resolve conflict between treaty and domestic statute.<sup>77</sup> Moreover, the answers to these questions may differ depending on whether the conflicting domestic law is a state law, rather than federal legislation. Mexican civil procedure, and the differences between its civil law system, largely lacking in binding precedential effect for judicial proceeding, and the common law systems of both Canada and the U.S., exacerbate the problems in discussing these questions. All of these problems highlight broader issues about the difficulties with implementing an international instrument such as the NAALC whose construction and application are dependent upon the domestic law of its signatories.

#### 6. *Concluding Observations: The Inherent Interpretation Problems of the NAALC*

The NAALC represents an innovative approach to regional and international legal regimes. Treaties pertaining to relations between governmental authorities and domestic private actors or to relations among do-

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76. NAO Report, *supra* note 4, at 22 (citing Torriente, *supra* note 2, at 21-24; Paul A. Curtis and Alfredo Gutierrez Kirchner, Questions on Mexican Federal Labor Law and Enforcement in the Federal Government Sector 8-9 (December, 1996)).

77. Leary cites Mexican government reports to ILO supervisory bodies as asserting that Mexican ratification of the ILO convention is sufficient to permit its direct domestic application, and to render it invocable by those entitled to its protections. Leary, *supra* note 69, at 25-26. She also states that the concept that some treaties are self-executing or directly applicable; concepts which presume invocability by at least some litigants, is established under Mexican law. *Id.* at 70 (citing STILLE, *supra* note 75, at 31-32).

mestic private actors normally create an international standard. A country's adoption of the international agreement obligates the country to ensure that its domestic legislation first, does not contravene the requirements of the international norm, and second, binds the relevant domestic public and, if so specified, private actors to conform their conduct to at least as stringent a standard as that established by the international norm. Where necessary to accomplish these ends, the relevant governmental authority must enact suitable law or regulation to ensure that the international norm becomes a part of domestic law, and legally applies to the activities of appropriate public or private actors. As Prof. Ben Aaron's presentation indicated, ILO conventions generally operate in this fashion.

Many claims of violation of this type of international regime involve a fairly straightforward comparison of the language of the international norm and the language of the country's pertinent domestic law. Occasionally, the issue is national practice alleged to be at odds with the international norm, and sometimes in contravention of the nominal domestic standard as well. While resolution of these issues involves comparative law methodology, a correct understanding of the challenged country's statutory scheme bears more on remedy than on violation. The country violates its international obligations by engaging in practices which contravene the international norm, whether this is because the domestic law itself conflicts with the norm, or because the practice pursuant to a non-conflictual statute contravenes the international norm, whether or not the domestic statute is itself violated by the practice.

If, for instance, a country promises to abide by ILO Convention No. 100,<sup>78</sup> providing for equal pay for equal work by men and women, the country will violate this convention by a statute requiring or allowing employers to pay men and women differently for doing the same job, or by failing to enact a law prohibiting such discriminatory treatment in compensating employees, or by enacting a domestic statute forbidding discrimination but rendering it unenforceable, by, for example, requiring government prosecution of claims and funding no prosecutorial positions. The key in all instances is to measure the country's formal law and informal practices against the benchmarks set by the international obligation.

The NAALC, however, operates quite differently. While in the usual case, the international law creates a uniform norm which must be "transposed" into domestic law of each signatory nation-state, the NAALC transforms the domestic law of each signatory nation-state into an inter-

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78. ILO Convention No. 100 Concerning Equal Remuneration of Men and Women Workers for Work of Equal Value, May 23, 1953, *reprinted in* 1 INTERNATIONAL LABOUR ORGANIZATION, SELECTED INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 191- 1951 at 649 (1996).

national norm uniquely applicable to that country. The goal of avoiding supranational intrusion into nation-state sovereignty in norm setting, ironically, entails intrusive external examination of the internal consistency, transparency, and enforceability of the Party countries' domestic labor law norms.

(a) *The Problem of Interpretation of Precedent in Construing a Party's Law*

A renewed focus on Submission No. 9601 itself will highlight the interpretative uncertainties that may arise under the NAALC, because of its construction being inherently dependent upon domestic law. The difficulties are multiplied when domestic law is unsettled and reference must be had to judicial precedents. Submission No. 9601 relied in part on the two state public employee law precedents, striking down laws limiting state employees to one union representative in both Oaxaca and Jalisco. In both cases, the courts pointed to the freedom of association provision contained in Article 133B of the Mexican Constitution, but also to Mexico's obligations under ILO Convention No. 87.

However, during the discussion portion of the seminar, Dr. Gonzalez contended that the two courts referred to the ILO convention not as directly controlling and dictating preemption of the state labor laws, but rather to support the courts' interpretation of the Mexican constitutional provision, on which the courts did rely to hold the conflicting state law provisions unconstitutional. This position is consistent with the view that the conventions, along with other international law, are treated in Mexico as they would be in Canada; absent implementing legislation, disconnected from domestic law analysis, not self-executing, hence not invocable in domestic legislation in their own right.<sup>79</sup> Other Mexican legal scholars and judges might disagree with this analysis. Lic. Ortiz's presentation seemed to imply that as to state law contravening a clear command of a duly adopted treaty, the treaty itself could be invoked in judicial proceedings to invalidate the state statute. In any event, even assuming the courts could properly rely on the ILO convention, it is a different matter to correctly construe the two judicial opinions to determine whether they, in fact, did. The nice distinction between holdings and obiter dicta, between legal sources relied upon and followed, and those cited for corroborating, non-binding but persuasive value, is one only beginning to be embraced in many civil law jurisdictions,<sup>80</sup> most likely in-

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79. *But see supra* notes 69, 75, 77, supporting contrary view as to Mexican law.

80. *See e.g.*, Thomas Lundmark, *Book Review: Interpreting Precedents: A Comparative Study*, 46 AM. J. COMP. L. 211, 217-19 (1998) (discussing Germany, Finland,

cluding Mexico.

It is yet another question, even if the Mexican Supreme Court did rely on the ILO convention in its state public employee law decisions, to determine what weight the state labor law cases are entitled to as precedent when the court addresses the federal labor law question at issue in the NAALC submission, for several reasons. First, without five decisions in a row, the results of an *amparo* proceeding do not have formal binding precedential effect. Second, the Federal public employee law (LFTSE) was at issue in the submission, while a different state public employee law was at issue in each of the two Supreme Court decisions. On the other hand, while not binding, these precedents might have strong persuasive value. Like the judiciary in most civil law countries, Mexican courts treat judicial decisions as carrying less interpretative authority than academic commentary, and give it less weight than would courts in common law countries. Nevertheless, the general judicial inclination to defer to the reasoning of courts higher in the judicial hierarchy is present in Mexico as in other civil law countries. Indeed, the fact that the Supreme Court of Mexico in the Oaxaca case also cited and relied on its reasoning in the Jalisco case is some indication that it could do likewise in a case challenging the federal law. These Supreme Court precedents have now been reinforced by a lower court decision following them and holding the LFTSE provision unconstitutional in further litigation conducted by SUTSP.<sup>81</sup>

Third, to the extent that courts may resolve conflicts between treaty law and state law by holding state law preempted, but cannot resolve similar conflicts between federal statutes and treaties, under a doctrine akin to the political question doctrine, the state law decisions would seem to lack precedential force as to the federal provisions, even if the terms of the challenged labor law statutes are virtually the same. If the question is what a Mexican court would do faced with the situation, the answer might be, "refuse to decide," or perhaps decide without paying any deference to the Oaxaca and Jalisco decisions. The recent intermediate appellate court decision in the SUTSP challenge to the constitutionality of the LFTSE one union per agency rule, however, undercuts this contention.<sup>82</sup>

This question of what Mexican courts would do if confronted with the domestic law issue posed in a NAALC submission, however, may

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France, Italy, Norway, Poland, Spain, and Sweden).

81. See *supra* note 43. This decision, however, may have been based only on constitutional grounds.

82. It would also appear to contradict prior representations of the Mexican government to ILO supervisory bodies. See *supra* notes 69 and 77.

not be the same as the question raised by the NAALC when it asks whether the Party has “promote[d] compliance with . . . its labor law,” and has “effectively enforced its labor law. . . .”<sup>83</sup> The fact that domestic tribunals may lack competence to decide what is the Party’s labor law, in certain cases of conflict, does not mean the Party has no labor law, nor does it necessarily relieve the Party of its NAALC obligation to ensure compliance with that labor law and effectively enforce it, whatever it may be.

(b) *The Meaning of “Its Labor Law” Under the NAALC*

Central to the resolution of Submission No. 9601 is the only obliquely explored issue of the meaning of “its labor law” as used in the NAALC. The presenters offered information bearing upon the question of when, if ever, a duly adopted international treaty provision qualifies as “the Party’s labor law” or “its labor law” or the Party’s “domestic law,” terms used in both singular and plural form, seemingly interchangeably, throughout the NAALC to define the body of law each Party commits to observe and enforce. A preliminary matter must first be resolved: whose law determines the meaning of the phrase “its/the Party’s/ domestic labor law(s)” — that of the tri-national NAALC regime, or each Party’s. The Agreement itself purports to define the term, albeit by cross-referencing the domestic law of each Party.<sup>84</sup> It is also worth noting that the definitions of Article 49 on their face, purport to uniformly apply to each Party; Annex 49 contains “country specific definitions” only as to the meaning of the word “territory.” The Article 49 definition of “labor law” seems more focused on establishing what falls within “labor” as opposed to other domestic law, and gives only a few hints about the terms Submission No. 9601 calls into play, “its/the Party’s/domestic” and “law.” The “labor law” definition does speak of each Party’s “laws and regulations, or provisions thereof” related to the specified labor topics. A strict technical reading of this phrase, however, as excluding international obligations, would presumably also exclude case law in the common law jurisdictions of Canada and the U.S., as well as perhaps constitutional law in all three countries, an interpretation that seems unlikely to reflect the intent of the negotiators.

The implicit assumption underlying the approach of the seminar itself is that the domestic law of each Party regarding treatment of duly adopted international treaties determines whether an international norm should be regarded under the NAALC as “its” law. This approach seems

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83. NAALC, *supra* note 1, art. 3(1).

84. *See* NAALC, *supra* note 1, art 49; *id.* Annex 1.

the most reasonable, both as a matter of interpretative logic and in conforming to the NAALC policy generally maximizing preservation of Party sovereignty. The alternative, however, is to view the NAALC itself as creating a uniform definition of the meaning of "its," "the Party's," and "domestic" law. The United States Council for International Business has suggested that only domestically-enacted legislation qualifies for purposes of the NAALC, presumably treating words such as "its" as being subject to NAALC definition, without regard to the Parties' own usage. The Council's assumption, however, that the NAALC determines the meaning of "its" leaves open other possibilities. One is that "its" is itself intended to incorporate the diverse domestic constitutional law of each Party, while another possibility would be that the NAALC views each Party's law as including its properly assumed international law obligations whether or not they have been transformed into domestically litigable law. The notion that each Party's domestic constitutional law treatment of international obligations determines the sources of law to be included in assessing "its" domestic labor law seems to this observer the most plausible. However, it does have the glaring drawback of miring the Parties in the quicksand of accurately determining each other's constitutional approach to international law obligations over and above the necessity to fairly comprehend the substantive labor rights each Party has created.

The presentations illustrate a second interpretative problem as to the phrase "its labor law." Whatever the resolution of the meaning of "its," there is the further question of the meaning of "law." Again, the preliminary decision is whether the NAALC defines a common conception of "law" to be followed in interpreting and applying its provisions, or the extent to which the meaning of "law" itself depends on domestic understandings of each Party. The differences between civil and common law procedures and treatment of precedent combine here with different ideas of what constitutes "law" itself.

Does the construction of "its labor law" depend on differing domestic views about the default position when the law is unclear? In the U.S. and Canada, this would mean divining a best guess position on what courts would do to resolve the dispute were it to come before them. The Mexican conceptualization of "its law," however, may include only unambiguous commands of positive law, or only positive law and binding precedent, rather than predictive resolutions of unsettled questions. The presentations of all three Mexican speakers suggested this underlying assumption. If so, and if "its law" is itself dependent upon each Party's legal conceptual structure as well as its positive law and interpretations thereof, then as to Mexico, uncertainty means "its law" does not exist



whenever there is uncertainty.<sup>85</sup> This would differ greatly compared to the common law jurisdictions, Canada and the U.S., in which uncertainty permits debate over the “correct” or “actual” or “better” interpretation and “its law” is plainly agnostic about alternative meanings. If the default assumption is that there is no law, of course, uncertainty about construction of a law could mean that no legal norm exists binding Mexico under the NAALC. Such an assumption, given the likelihood of uncertainty about domestic labor law interpretation, never mind application of international law norms within the domestic system, would tend to render nugatory Mexico’s NAALC commitment to enforce its own law. One could rewrite the promise as being to enforce only those aspects of its own law that were unambiguous under positive law, but not those involving any sort of interpretative uncertainty or potential conflict with other domestic law provisions. On the other hand, if the Mexican conception of “law” is itself in flux, what impact should this have on the construction of the NAALC?

(c) *ILO Freedom of Association Principles as Domestic Law Under the NAALC*

Let us assume, as seems most likely, that “its labor law” includes international obligations to the extent domestic law of the Party treats them as “its law.” The issue of whether treaties and conventions duly adopted by a Party country constitute part of “its labor law” which it is obligated under the NAALC to observe, it is thus assumed, depends upon the Party’s constitutional approach to incorporation of its international obligations into what the Party’s constitutional structure identifies as domestic law.

The critical factors for such a determination are the country’s allocation of the power to implement treaty obligations, and the direct applicability of the treaty in domestic law.<sup>86</sup> The issue of invocability of the norms, and the issue of how a domestic court would resolve hierarchically a conflict between two norms,<sup>87</sup> do not enter into this question, ex-

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85. The legal theory of many civil law countries formally takes the position that judicial decisions are merely “declaratory” of the law, and do not themselves constitute a source of law; for the same reason, judicial decisions are often omitted from listings of the hierarchy of sources of law in such jurisdictions. *See, e.g.* Lundmark, *supra* note 80, at 214. On the other hand, it is typical that precedent in operation has considerable binding force in subsequent litigation, and is a major source of legal norms even in jurisdictions which deny that the judicial decisions themselves constitute “law”. *See, e.g., id.* at 221.

86. Factors five and six in the Jackson taxonomy discussed *supra* Part 5(c).

87. Factors seven and eight in the Jackson taxonomy discussed *supra* Part 5(d).

cept to the extent that invocability by specified parties or settled hierarchy of norms incorporating treaty law supports the conclusion that there is at least some degree of direct applicability and that treaties may sometimes have domestic effect absent any implementing legislation.

If this analysis is correct, the questions of hierarchy of norms and of invocability go to determining the substance of the Party's labor law, where treaty provisions and domestic statutes conflict, and identify or preclude availability of certain forums for certain types of would-be litigants, who wish to obtain a ruling resolving the apparent conflict. On this view, however, even the total lack of a judicial forum would not prevent a determination for example, that conflict between an adopted treaty and a state law requires that the state law be deemed superseded, in a country such as the U.S. or Mexico, whose constitution proclaims treaties to be supreme over state law. The determination of what the labor law of the Party country is, once conflicts and ambiguities are resolved, may not be the same as asking what a court would do if faced with the situation. Moreover, the lack of judicial redress for such conflicts, or the lack of a reasonably clear rule establishing a legal hierarchy between treaty and federal statutory law may itself implicate other provisions of the NAALC, such as those requiring access to tribunals and those demanding legal transparency.

On the other hand, the NAALC also pays great deference to the existing constitutional order of each Party.<sup>88</sup> Perhaps constitutional provisions requiring legislative action to resolve the conflict between treaty law and statutory law, treated deferentially, mean neither of the two conflicting provisions is dispositive until the Congress enacts a resolution. The problem with this notion of co-equal status, however, is that it seems apparent that it operates like George Orwell's version of equality, in which some pigs are more equal than others.<sup>89</sup> Until Congress acts, Mexican governmental agencies appear to continue to follow the federal statute, to the exclusion of the contradictory treaty obligations; it is, however, less definite what the courts do in such situations.

It is clear that Canada's adoption of ILO Convention No. 87 does not affect its domestic law, and uncertain whether Mexico's adoption of the of the convention renders it part of its labor law, subject to the NAALC. As to the U.S., Hurst Hannum conjectured over the extent to which the convention would be deemed self-executing, hence a part of domestic U.S. law if it were to be ratified, while Prof. Aaron spelled out

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88. *See, e.g.*, NAALC, *supra* note 1, Preamble ("affirming their continuing respect for each Party's Constitution and law").

89. *See* GEORGE ORWELL, *ANIMAL FARM* (1954).

the sad history and rationalizations for U.S. failure to adopt all but a handful of primarily maritime ILO Conventions. The reader might think therefore, that the question of binding international labor norms and their role vis á vis domestic law is irrelevant regarding U.S. fulfillment of its obligations under the NAALC. However, to the extent that the U.S. is bound as a member of the ILO by the principle of freedom of association contained in the ILO Constitution, at least the broad principle would appear to apply to the U.S., even if the more detailed prescriptions of Convention No. 87 do not.<sup>90</sup>

(d) *The NAALC as Model for Trans-National Agreements*

The impact of these issues is, of course, not limited to the NAALC. To the extent that any future international agreements are designed upon similar premises, preserving maximal domestic sovereignty and legal flexibility, while creating binding international obligations to abide by the nation-states' own laws, they will encounter similar difficulties. Stronger enforcement and remedial provisions might ensure greater compliance with certain aspects of the NAALC. It would, however, do nothing to solve the underlying structural problem inherent in NAALC's innovative approach—transforming domestic law into international obligations, rather than vice versa. Principles of democracy and notions of subsidiarity nevertheless may militate in favor of future trans-national experiments along these same lines.

Experience with the NAALC model suggests that framers should give serious consideration to questions of what is meant by generic terms such as "domestic law," how domestic law uncertainties are to be resolved for purposes of interpretation and application of the international agreement, and how different approaches to federalism may affect the meaning of "law" and "domestic law" in the participating countries' domestic systems. The manifest difficulties of interpreting and applying an international agreement such as the NAALC, whose commitments are expressed in terms which incorporate by reference each Party's own law are compounded when the Party's legal system lacks ready avenues for producing binding domestic interpretations of the points most troublesome under the international agreement. They are further exacerbated when Parties are structured on federal principles.

Drafters and designers of such international instruments need to consult knowledgeable comparatists and international law experts, to have a

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90. See generally Hilary Kellerson, *The ILO Declaration of 1998 on Fundamental Principles and Rights: A Challenge for the Future*, 137 INT'L LAB. REV. 223, 224-25 (1998).

more concrete understanding of the implications of incorporating domestic law into trans-national obligations. Finally, scholars of comparative as well as international law must devote serious consideration to the functioning of their disciplines' theories and methods in this novel type of environment, so conducive to circularity and uncertainty.

