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Generalized System of Preferences (GSP) Subcommittee
of the
Trade Policy Staff Committee

1990 GSP Annual Reviews

Worker Rights Review Summary

Case: 001-CP-90
002-CP-90
003-CP-90
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008-CP-90
011-CP-90
El Salvador

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EL SALVADOR

The GSP Subcommittee of the Trade Policy Staff Committee conducted an interagency review of petitions challenging the continuing preference-eligibility of El Salvador under the U.S. Generalized System of Preferences (GSP). The challenge is based on allegations brought forward by the petitioners regarding El Salvador's failure to satisfy section 502(b)(7) of the Trade Act of 1974, as amended:

> "...the President shall not designate any country a beneficiary developing country under this section--if such country has not taken or is not taking steps to afford internationally recognized worker rights to workers in the country...."

The Subcommittee reviewed petitions filed by the following organizations during the 1990 GSP Annual Review:

- -- Americas Watch (AW)
- -- The AFL-CIO
- -- The Massachusetts Labor Committee in Support of Democracy, Human Rights, and Non-Intervention et al
- -- FENESTRAS (National Federation of Salvadoran Workers) and the Labor Coalition on Central America
- -- The International Union of Electrical, Salaried, Machine and Furniture Workers (AFL-CIO)
- -- The Philadelphia Labor Committee on Central American and the Caribbean
- -- The New York Labor Committee in Support of Democracy and Human Rights in El Salvador (NYLC).

The review was conducted under the terms of Part 2007 of the Regulations of the United States' Trade Representative Pertaining to the Eligibility of Articles and Countries for the Generalized System of Preferences Program (15 CFR Part 2007).

As it initiated the review, the Subcommittee recalled that El Salvador has been the subject of three previous requests for reviews of internationally recognized worker rights received in the 1987, 1988, and 1989 Annual Reviews of the GSP. In each instance, the Subcommittee established that the petitioner(s) had failed to satisfy the information requirements for a request laid out in Part 2007.2(a)(2). Specifically, the Subcommittee found that the information failed to provide sufficient information relevant to the statutory provisions of the Trade Act of 1974, as amended, and/or it was clear that the information provided did not fall within the criteria of those same statutory provisions.

Specifically, Part 2007.2(a)(2) states: "If a request submitted pursuant to Part 2007.0(b) does not conform to the requirements set forth above, or if the request does not provide sufficient information relevant to subsections 502(b) or 502(c)[19 U.S.C. 2642(b) and (c)] to warrant review, or if it is clear from available information that the request does not fall within the criteria of subsections 502(b) or 502(c), the request shall not be accepted for review."

In accordance with Part 2007.2(a)(2), as it began its examination of petitions submitted against El Salvador in the 1990 Annual Review, the Subcommittee again considered the information requirements described above. In this context, the Subcommittee observed that this year's petitions contained three broad categories of allegations. As in previous years, the first type of information consists of a number of allegations of harassment or violence against trade unionists in which no attempt was made to link the incidents to the victims' trade union activities or to the statutory provisions of the 1974 Trade Act, as amended. In all of these incidents, the Subcommittee observed, it had either been unable to verify the allegation or received information from the U.S. Embassy in El Salvador casting doubt on the relevance of the incidents to the specific worker rights outlined in the Trade Act.

As it considered the allegations falling into this first category of information, the Subcommittee recalled its longstanding determination that these types of cannot form the sole basis for a informationally sufficient petition challenging a country's eligibility under section 502(b)(7) of the Trade Act of 1974, as amended. This determination is based on the methodological difficulties of evaluating these incidents as relevant to the worker rights requirements of the law and the pervasive procedural difficulties in verifying such allegations. In this regard, the Subcommittee viewed the following passage from the 1990 Country Reports on Human Rights Practices (Country Report) as a representative example of the inherent difficulty in extrapolating from allegations of incidents of harassment or violence against individuals to allegations of broader classes of worker or human rights violations:

> "Discerning a trend or pattern in the level of political violence in El Salvador is difficult, and the collection and classification of information on politically motivated killings is inexact. Common criminal murders may be disguised as political killings while political murders may be wrongly classified as common crimes."

Despite its determination that allegations of such incidents were unsuitable as information for the purpose of evaluating El Salvador's eligibility under Section 502(b)(7), the Subcommittee was pleased to note the following passage from the 1990 Country Report:

> "Virtually all human rights monitors, including the United Nations Human Rights Commission (UNHRC) Special Rapporteur for El Salvador, agreed that there were fewer human rights violations by both the ESAF [Armed Forces of El Salvador] and the FMLN [Farabundo Marti Front for National Liberation] during 1990 than in 1989. The Special Rapporteur also noted that both sides were making conscientious efforts to improve their human rights performance...."

The second broad category of information presented in the petitions accepted for review consists of a smaller number of allegations of government complicity in acts of violence or harassment against trade unions or trade unionists directly engaged in lawful trade union activities. Because such allegations, if verified, could plausibly be held to restrict trade unions' ability to exercise the right to organize and bargain collectively, the Subcommittee determined that the information presented by such allegations fell within the statutory provisions of the 1974 Trade Act, as amended. Aware that these are generally subject to the same methodological difficulties as the first type of incident-based allegations, these allegations are discussed below.

The third broad category of information presented consists of a number of allegations of worker rights violations resulting from weaknesses in the content and administration of Salvadoran labor laws or Government of El Salvador policy decisions. Since several of these allegations had not been examined previously and appeared relevant to the worker rights outlined in the 1974 Trade Act, as amended, the Subcommittee determined that the information presented by such allegations also fell within the criteria of the statutory provisions of Act. These allegations are discussed below.

INCIDENTS OF VIOLENCE OR HARASSMENT OF TRADE UNIONS OR TRADE UNIONISTS WHILE DIRECTLY ENGAGED IN LAWFUL TRADE UNION ACTIVITIES

As it examined the information contained in the seven petitions, the Subcommittee was able to identify five allegations which, if verified, could plausibly be held to materially restrict trade unions' ability to exercise the right to organize and bargain collectively. These allegations are outlined below along with any supporting or rebutting information received from the U.S. Embassy in San Salvador.

> "Political intervention in union affairs has worsened...the D'Aubuisson wing of the ARENA party has been actively violating freedom of association. (AFL-CIO)."

> "The governing party has used government agencies, intimidation, and coercion to bring unions and campesino organizations to heel under ARENA control...[T]he standard policy is to break up Phase I co-ops and parcel them out to individual ownership (AFL-CIO)."

In support of these general allegations, the Subcommittee noted that the AFL-CIO listed a number of specific examples of what it considered to be efforts by the ARENA party to limit the exercise of the right of association on the part of campesino organizations. Many of these alleged incidents were neither linked to victims' performance of trade union activities nor verifiable by the U.S. Embassy in San Salvador. In a more general context, however, the Subcommittee noted the following language from a report by the U.S. Embassy in San Salvador which it believed served to clarify government policy toward land reform and campesino organizations:

> "The very few evictions [of campesinos] which have taken place over the years since the land reform was begun reflect legal problems in the reform's implementation. Despite that, most of the affected owners have accepted monetary reimbursement, and very few peasants have been affected. Parcelization does not threaten the land reform, but instead would extend to the peasant the option of assuming individual title to property currently worked in a cooperative fashion--however, he may also opt to remain in the cooperative, or select a variety of intermediate steps. This is an effort to increase peasant rights, not subvert them."

> "...Legislation currently being discussed by government agencies and campesino organizations, including affiliates of the UNOC, proposes at least five alternatives for phase one beneficiaries, ranging from the issuance of individual titles to maintaining the status quo. Some of the reasons for the proposed changes include an effort to extend the reform to a greater number of campesinos, and to improve the economic performance of some cooperatives."

"...[T]hese visits [by Roberto D'Aubuisson to cooperatives] all took place in July-August 1989, and were stopped after UNOC complained directly to President Cristiani...D'Aubuisson does not represent the [Government of El Salvador], and has no post in the executive branch. D'Aubuisson, in fact, is a member of the National Assembly and serves on its Committee on Agrarian Reform. In most cases...the visits had no impact, and they did not reoccur after UNOC carried its protests to President Cristiani."

"[A]fter the new government was installed, ANTMOP [The Association of Workers in the Public Works Ministry] leaders were told that all payday assemblies are prohibited (AFL-CIO)."

Regarding this allegation, the Subcommittee noted the following passage in a report from the U.S. Embassy in El Salvador:

"ANTMOP leaders reported they were allowed to organize without interference by management. They were concerned about the dismissal of 12 employees from Chalatenango, but admitted the 12 were contract employees, and therefore subject to different employment standards under the law."

"Union leaders report threats and intimidation by security forces restrict their freedom of association (AFL-CIO)."

To substantiate this allegation, the Subcommittee noted, the petitioner listed a number of specific allegations of threats and intimidation against trade unions or trade unionists. Most of these examples, the Subcommittee observed, again failed to establish any link to the victims' trade union activities or to the statutory provisions of the 1974 Trade Act, as amended. Several other allegations appeared more directly relevant to the 1974 Trade Act's worker rights provisions, however, including claims of Civil Defense Force (CDF) interference in cooperative association meetings in Santa Ana and Morazan Departments and police interference in the INSINCA textile factory strike.

While it was unable to verify the individual allegations of CDF interference in cooperative association meetings, the Subcommittee noted that a number of observers have long commented on problems with the CDF, particularly in largely rural Departments such as Santa Ana and Morazan. These problems stem largely from abuses of authority, and are seen as extending beyond worker rights issues. In this context, the Subcommittee noted the following passage from the 1990 Country Reports:

"...In July the CDH [Government Human Rights Office] charged that civil defense members were committing violent crimes and abuses of authority with alarming frequency, and that these actions were provoking fear and insecurity among civilians. The U.N. Special Rapporteur also noted the use of intimidation and threats, including the circulation of death lists, by government forces against certain groups such as labor unions, cooperatives, and peasant movements which are perceived as sympathetic to the FMLN.

As the Subcommittee continued on to consider allegations of police interference in the INSINCA strike, it drew its attention to a report from the U.S. Embassy San Salvador. According to the Embassy, the petitioner's account of the strike lacks key details:

"On August 19, after the employer cut off water to the [factory] building, the Ministry of Labor intervened to have water turned on and food brought in to the strikers. After the strike was declared illegal, the strikers admitted their occupation of the premises was illegal, and told [the Embassy] that the military effected the evacuation of the factory without violence. The Ministry of Labor continued for several months to try to bring the striking workers and the employer to agreement on appropriate dispensation, but the employer refused to hire back the strikers. The Ministry of Labor did negotiate severance benefits for the dismissed strikers, according to the Minister."

"ANTEL's [the national telecommunications monopoly] military management unleashed a violent repression aimed at dismantling ASTTEL [the company's workers' association]...ASTTEL leaders have been the target of numerous incidents of abduction/torture...."

The Subcommittee next turned its attention to a number of allegations of a Government of El Salvador campaign aimed at "dismantling" and "breaking" ASTTEL, the association of workers of the state telecommunications monopoly ANTEL. In support of these charges, the petitioners (primarily Americas Watch and the New York Labor Committee) offer a great number of incidents of alleged harassment, abduction, torture, and assassination of members and officials of the two workers' organizations. While not dismissing the seriousness of a charge of a government campaign against a legitimate workers organization, as the Subcommittee examined the two cases it was again forced to note that in the majority of the incidents no plausible attempt was made to link the incidents to the victims' trade union activities or to the statutory provisions of the 1974 Trade Act, as amended. Other incidents, while conceivably related to the victims' trade union activities, could not be verified by the U.S. Embassy.

Regarding the ASTTEL case, the Subcommittee also noted a number of broader considerations, primarily the fact that a number of the allegations of violence against ASTTEL members occurred during the 1989 offensive by the FMLN. Regarding this point, and other general considerations concerning an alleged government campaign against ASTTEL, the Subcommittee noted the following language from reports of the U.S. Embassy in San Salvador:

"Relations between ASTTEL and the GOES [Government of El Salvador] have clearly not been good, and security forces have detained several ASTTEL leaders...because they felt the leaders were actively supporting the FMLN and its offensive. ASTTEL as a union, however, has been in constant negotiation with ANTEL management, carrying out monthly meetings (except during the offensive). In March, 1990, after negotiations between the union and ANTEL management, ASTTEL leaders who had been excluded from the workplace for the prior two years (although still drawing a salary from ANTEL) were allowed to return to work. Other concessions were also negotiated, and management and ASTTEL continue to meet monthly, at the union's request."

"ANTEL management denies that workplaces are militarized. ANTEL has a security force designed to protect the telephone company's employees and installations--the utility has been subject to at least 29 separate FMLN terrorist attacks in the first five months of 1990."

"ANTEL management contends that the number of firings is actually much lower [than the number claimed by Americas Watch and the New York Labor Committee], and that any dismissals of ASTTEL workers can be justified for cause...."

"...[T]he ANTEL personnel officer denied that the agency has practiced punitive dismissals against ASTTEL members. The personnel officer estimates that less than the 62 persons claimed in the petition have been fired over the last year, and says that most of them were not ASTTEL members. [According to the personnel officer,] [t]hose who were fired were fired for cause, and were indemnified in accordance with the law. On occasions where ASTTEL has challenged the firing of an ANTEL employee, management has met willingly with the labor organization's management, and is some case where extenuating circumstances merited, reinstated the employee. The personnel officer denies that ANTEL employees are fired on the basis of union membership..."

"...ASTTEL is an association, rather than a union, and...it effectively functions as a union. This is not only because of the organization's strength, but because of management's interest in cooperating with organized labor."

...[T]he personnel officer denied that ANTEL violated the labor code, noting that the work week averaged 40-44 hours for all employees, and that differentials were paid to those who worked late shifts, extra hours, or in extraordinary circumstances."

"...[M]ilitary forces are not permanently stationed around ANTEL facilities or offices. ANTEL does maintain a security force, made necessary in part because of FMLN attacks against ANTEL facilities and personnel. During the offensive (November 1989 - January 1990), military personnel may have been temporarily located on or near ANTEL installations. This was a result of extraordinary circumstances and does not reflect ANTEL policy. ANTEL is currently under civilian management."

As it considered the petitioners' allegations regarding ASTTEL, as well as the above information from the U.S. Embassy, the Subcommittee noted that the large number of allegations over a long period of time made the case extremely difficult to judge. While the Subcommittee was alarmed by the large number of incidents of violence and harassment against association officials, it also noted that ASTTEL meets regularly, appears to be representing its members in collective negotiations, and cooperates with the management of ANTEL, the party held responsible for the campaign against the association. With that in mind, the Subcommittee determined that the information presented to date fails to substantiate the charge that the Government of El Salvador is waging a campaign against ASTTEL with the goal of "breaking" the association.

ALLEGATIONS OF WORKER RIGHTS VIOLATIONS RESULTING FROM WEAKNESSES IN THE CONTENT AND ADMINISTRATION OF SALVADORAN LABOR LAWS OR GOVERNMENT OF EL SALVADOR POLICY DECISIONS

As it considered allegations falling into this third, and final category, the Subcommittee observed that although it had examined a number of the allegations previously, the number and specificity of allegations far exceeded those presented in petitions filed in previous years. In this regard, the Subcommittee recalled that the inclusion of such detailed allegations in this year's petitions was the principal factor

which had lead it to recommend the acceptance of the petitions for further review. This recommendation was based on the Subcommittee's longstanding belief that questions of labor law and administration are particularly relevant to a discussion of the protection of worker rights.

As it reviewed allegations of this type in the petitions accepted for review, the Subcommittee was able to identify eleven allegations which, if verified, could be held to restrict trade unions' ability to exercise the right of association and the right to organize and bargain collectively. However, for three of these allegations, all highly general in nature, the Subcommittee was unable to develop any meaningful information which could serve to confirm the charges. These allegations, presented by the AFL-CIO, follow:

> "The Supreme Court has become more aggressive in issuing decisions against workers' interests."
>
> "The Ministry of Labor has shifted from neutral to anti-labor orientation."
>
> "Obtaining legal recognition for unions has become a significant problem because of Government of El Salvador insistence that registration procedures be strictly adhered to."

In eight other instances, the Subcommittee was able to develop relevant information. These allegations are examined below, along with supporting or rebutting information received from the Government of El Salvador and the U.S. Embassy in San Salvador.

> The presentation of Decree 483 restricts the right of association for employees of autonomous agencies by converting these agencies to government agencies, where workers are not permitted to organize unions (NYLC).

Because it alleged a positive action on the part of the Government of El Salvador which would restrict the ability of some classes of civil servants to exercise their right to organize, the Subcommittee viewed this allegation particularly seriously. As it examined the allegation, the Subcommittee not only took particular care to develop all available documentary information, but also requested the Government of El Salvador to provide additional information concerning the decree during the September 1990 GSP public hearings. The basic allegation, the Subcommittee noted, was that:

> "...Decree 483 would strip all government agencies of their autonomy. Responsibility for all agency budgets would be centralized in the Treasury Ministry. This would place in jeopardy all previous labor agreements between public sector unions and state agency managements, and would seriously weaken the unions in their future negotiations (NYLC petition)."

Regarding this charge, the Government of El Salvador stated in its October 17 posthearing brief that Decree 483 has been modified by Decree 538, which "deleted the troublesome provisions, including one which required governmental approval of all personal contracts." According to the Government:

> Decree 538, therefore, retains only those articles of the previous legislation relating to governmental control by the Ministry of Finance of the administration and budgets of the autonomous public institutions...Decree 538 in no way impinges upon the right of workers in the autonomous public institutions to unionize.

The Subcommittee noted that information received from the U.S. Embassy in San Salvador generally tended to confirm the Government's claim. According to Embassy reports:

> "...[T]he legislative assembly approved reforms to the controversial decree on July 12, including striking a clause (Article 14) which gave the decree dominance over other laws or regulations...The initial purpose of decree 483 was to bring the various autonomous agencies under greater fiscal control....The decree does not change the status of the autonomous institutions, and thus does not affect labor's ability to form unions within those institutions."
>
> "Neither decree [483 or 538] restricts unions' or management's ability to bargain collectively in the autonomous agencies."

The Subcommittee next turned its attention to four allegations of worker rights problems which principally result from weaknesses of Salvadoran labor laws:

> Agricultural workers, central government employees, and employees of autonomous government agencies are denied the right of association (various petitions).
>
> Agricultural workers, central government employees, and employees of autonomous government agencies are denied the constitutional right to organize and bargain collectively (AW, FENESTRAS).
>
> Strikes are virtually impossible to call legally (AW, FENESTRAS).
>
> The Government of El Salvador refuses to provide a mechanism to enforce organizing and collective bargaining rights (FENESTRAS, AW).

As it examined these allegations, the Subcommittee noted that the issue of the protection of key worker rights for agricultural, central government, and autonomous agency workers in El Salvador was extraordinarily complex. On the one hand, the Subcommittee noted, it was clear from a variety of sources, including the 1988 Americas Watch report Labor Rights in El Salvador, that in a strict legal sense the first two of the above allegations are true. This, of course, is due to the longstanding and well-known divergence between the worker rights protections of the Salvadoran Constitution and Labor Code. In this regard, the Subcommittee noted the following language from the 1990 Country Reports, which it believed was a fair summary of the situation:

> "The 1983 Constitution prohibits the Government from using nationality, sex, race, creed, or political philosophy to prevent workers from organizing themselves into unions or associations. This provision was intended to provide the legal framework for secondary legislation, including a revised labor code which has never been enacted."
>
> "A confusing and sometimes conflicting set of laws governing labor relations remains in place. While existing statutes provide protections which are enforceable under the Constitution, their inconsistencies often result in cumbersome procedures and significant delays."

"Legally, only private sector nonagricultural workers have the right to form unions and to strike. Employees of the nine autonomous public agencies may form unions but are barred from striking...Existing law bars agricultural workers and employees of government ministries and departments from forming unions or striking. These employees are represented by associations which, in practice, participate in activities the same as unions, including resorting to strikes."

On the other hand, as the above passages indicate, the absence of secondary legislation implementing the constitutional protections does not appear to have deterred workers' ability to organize and strike in many cases. It is this failure to pass secondary legislation, the Subcommittee noted, which underlies FENESTRAS' and Americas Watch's allegation that the Government "refuses" to provide a mechanism to enforce organizing and collective bargaining rights. However, the Subcommittee also noted that the petitioners themselves in many instances refer to bargaining, organizing, and striking on the part of associations which are legally prohibited from these activities. The Subcommittee further noted the following language from reports of the U.S. Embassy:

"In practice, public sector associations act very much like unions...While the legal situation should be adjusted, in fact it is not significantly impeding workers' right to representation."

"In reality, campesino unions exist and are functioning -- in the case of the Union Communal Salvadoreno, for the last 26 years...agricultural workers successfully agitated for agrarian reform...."

"Under present Salvadoran law salaries and most conditions of employment for public employees are not legally subject to collective bargaining. Agreements between associations and government ministries can thus not be enforced under the labor code. In practice, salaries, conditions of work, retirement benefits, health benefits, rules of employee dismissal, etc. are indeed subject to collective bargaining. The association of workers of the public works ministry (ANTMOP) has negotiated agreements dealing with the provision of uniforms, timely payment of overtime, the status of contract employees, general conditions of work, and wages. The association of teachers regularly negotiates wages and benefits, working hours, etc., and recently negotiated an expanded health care plan. None of these de facto collective bargaining agreements are covered under the Labor Code but are treated as if they were. The agreements are typically documented and signed by the parties and ministers negotiate hard and take seriously the agreements that are reached."

"Association officials do not enjoy the legal protections contained in Article 248 of the Labor Code. Under the Civil Service Act, association officials enjoy the same protections as other civil servants. In practice, however, association officials are treated like union officials and allowed to dedicated themselves full-time to 'union' activities, participate in labor federation activities, organize workers, hold meetings, bargain, etc. Many of the most prominent labor leaders in El Salvador are, in fact, association officials."

As it sought to balance and analyze this conflicting information, the Subcommittee reached two observations concerning the adequacy of the legal protection of worker rights in El Salvador: 1) That it lacked detailed, in depth information (such as the number and percentage of associations, strikes, and collective bargaining agreements among agricultural and public sector workers) which might enable it to reach a determination on this issue,

and; 2) that a critical factor in the overall assessment of the adequacy of the legal protection of worker rights in El Salvador (in respect to section 502 of the 1974 Trade Act, as amended) would be the status of any effort on the part of the Government to take legislative action to resolve the discrepancies between the Salvadoran Constitution and Labor Code. Any such effort, the Subcommittee observed, would also speak directly to petitioners' allegations regarding the Government's "refusal" to carry out labor code reform. In this context, the Subcommittee noted that the Government of El Salvador had indeed made an attempt to initiate a labor code reform process during 1990. According to the 1990 Country Reports:

> "In the wake of the April 1990 agreement between the Government and the FMLN to renew peace talks, President Cristiani established a tripartite socioeconomic commission to review conditions in El Salvador. The commission formed six subcommittees, one of which is dedicated to discussion the reform of labor legislation. The subcommittee is chaired by the Labor Minister and includes prominent labor and business leaders. Efforts to achieve a consensus on labor legislation reform continued, but no proposal had been forwarded to the legislature by year's end."

The Subcommittee noted, however, that momentum toward reform of the Salvadoran Labor Code dissipated in the latter half of 1990. This lack of momentum is documented in the following passage from a report of the U.S. Embassy in San Salvador:

> "Labor returned to the subcommittees of the tripartite socio-economic commission, including the committee on Labor Code reform, in August of 1990 after a short absence. The talks made little headway, however, and enthusiasm on all sides diminished gradually throughout the fall of 1990. Labor reportedly demanded that current labor disputes be settled before dealing with the Labor Code, while both business and GOES [Government of El Salvador] representatives declined to discuss specific labor conflicts in this forum. The meetings have essentially ceased but the Labor Ministry plans to reconvene the committees after the March 10 elections."

The Subcommittee next turned to three allegations of worker rights problems which principally result from Government of El Salvador administration or adjudication of Labor Laws:

> Union organizers are denied protection from dismissal while attempting to organize workers (various petitions).
>
> Strikes are often declared illegal and are violently repressed by the GOES or employers (various petitions).
>
> Workers in export processing zones are denied the right of association (AW, AFL-CIO).

Regarding the first of these allegations, that of a lack of protection for union organizers, the Subcommittee noted that it had received a substantial amount of conflicting information from the petitioners, the Government of El Salvador, and the U.S. Embassy. According to the FENESTRAS petition, for example, the only remedy for the improper discharge of an employee under Article 58 of the El Salvadoran Constitution is severance pay of one month's pay for each year of service. The AFL-CIO, in contrast, approaches the issue in a more historical and dynamic fashion, arguing that:

[E]ven under Duarte, retaliatory firings by employers were considered to be a major problem by all segments of the labor movement. Since the election, trade unionists report that such employer retaliation has increased dramatically... [UNOC believes that] employers have interpreted the ARENA victory as a green light to proceed with illegal firings and reprisals without fear of serious government sanctions."

These views, the Subcommittee noted, differed strongly from the Government's rebuttal. According to Government of El Salvador submissions to the Subcommittee:

"The unjustly dismissed employee may elect between two alternate mechanisms for enforcement of his/her rights as set forth in the Labor Code and the Organic Law of the Ministry of Labor and Social Welfare. The latter mechanism consists of conciliation, whereby the parties negotiate remuneration or reinstatement in the presence of the Director General of the Ministry of Labor (DGT) or an appointed designee...Ministry of Labor statistics establish that 1,663 complaints were lodged with the DGT by individual employees during the period June 1, 1989 to May 31, 1990. To date, 849 of those disputes have reached final settlement with 774 resulting in monetary payments of $164,106 and 75 resulting in the reinstatement of the dismissed workers."

As it considered this information, the Subcommittee noted that although it could be said that reinstatement of workers fired for unjust reasons existed in law and practice, it was also clear that in the vast majority of such cases monetary payment was the preferred option for compensating employees. The Subcommittee further noted that with the exception of the following inconclusive report by the U.S. Embassy, it had little information referring specifically to workers fired for union organizing activities:

"The Labor Ministry officially reports that virtually no union leaders are fired illegally (without just cause as determined by a judge). The Director General of Labor reports that approximately 10 complaints of such firings were received over the last 12 months and that all but one were resolved after Labor Ministry inspections. The remaining case involves a company which is paying the union officials in full but has not permitted them to return to work; the union officials continue to demand reinstatement and the Labor Ministry is consulting the employer about a solution. Such cases rarely reach the courts, however, since the tendency of companies to continue to pay fired union officials is generally perceived as complying with the spirit, if not the letter, of the law. Union officials claim this tactic is used to displace union leadership or the unions themselves. Labor leaders claim that, although it is illegal to fire union officials without just cause determined by a judge, the payment of salaries and benefits to the dismissed leaders is the only remedy called for in the law. One labor leader estimated that there are approximately 25 cases of illegal firings of union leaders per year and that in many of them the leaders are "paid off" but never rehired...The law has no efficient mechanism to deal with these cases. Labor ministry officials admit privately that this loophole in the law is used by some companies to pressure or fire union leaders and should be changed when the labor code is revised."

As it moved on to the allegation that strikes are often declared illegal and violently repressed, the Subcommittee found itself in much the same position concerning the discrepancy between Salvadoran law and practice. A variety of sources, including the 1988 Americas Watch report, various Country Reports, and Embassy reports have noted the

tension between the cumbersome, time-consuming procedures for calling a legal strike and the fact of frequent, albeit illegal strike activity. This situation, the Subcommittee noted, can be broken down into three distinct elements: 1) The degree to which the cumbersome strike procedures themselves limit the ability of unions to legally strike; 2) the degree to which actually declaring a strike illegal restricts unions' right to strike in practice, and; 3) the degree to which participants in illegal strikes are subject to retribution. Regarding these three elements, the Subcommittee was able to develop the following information:

> "The labor code requires that labor disputes go through stages of direct bargaining, conciliation, and arbitration before a strike or a lockout can be called. Prior to initiating this procedure, the complainant must present a list of grievances to the DGT. Labor courts are competent to determine the legality or illegality of a strike (U.S. Embassy Report)."
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> "The Code provides further that, from the moment the employer is notified of the strike decision, he may not fire the strikers nor transfer them nor worsen their work conditions, without prior judicial approval. (Art. 537) The employer is not permitted to contract for substitute labor to minimize the effect of the strike on his business (1988 Americas Watch Report).
>
> (Art. 535) Employers are...obliged to continue paying workers who are on strike, but this rarely, if ever, occurs. Often, however, poststrike settlement agreements will provide back wages for strike days (1988 Americas Watch Report)."
>
> "According to the Labor Code strikes can end through A) direct agreement between the parties, B) arbitration, C) a declaration that the strike is illegal. The termination of a strike under conditions A or B would not affect legal protections for strikers. Article 554 of the Labor Code governs illegal strikes and reads in part: 'In the same resolution in which a strike is declared illegal, the court will determine the period, not to exceed 5 days, in which the strikers must return to work; at the end of this period any workers who have, without just cause, refused to return to work can be fired' (U.S. Embassy Report)."
>
> "Legally, only private sector nonagricultural workers have the right to form union and to strike. Employees of the nine autonomous public agencies may form unions but are barred from striking. The absence of specific laws granting public employees the right to strike does not deter such strike activity...Public sector associations, through a coordinating body called the Interstatal, staged a series of coordinated strikes during the year demanding wage increases (1990 Country Reports)."
>
> "A substantial number of strikes occurred in 1988 (35), and the first six months of 1989 (15)...[T]he weakness of labor legislation has not impeded union activity, even when a strict interpretation of the law would render it illegal (U.S. Embassy Report)."
>
> "[We are] aware of only three instances in the last year in which military forces became involved in strike activity--in only one incident was violence reported. In all cases, strikers were, by their own admission, occupying premises illegally. The last case occurred in August 1989."

Turning to the final allegation, that of the denial of the right of association to workers in El Salvador's export processing zone (EPZ), the Subcommittee noted that it

was faced with a qualitatively different allegation from those present previously. Rather that alleging that weak Salvadoran laws lead to a lack of unions in El Salvador's export processing zone, the petitioners allege that extra-legal company intimidation discourages unions from forming. In support of this allegation, the AFL-CIO petition cites the 1989 Country Reports:

> "There are no differences in labor regulations in this area and those which prevail in general. However, there are no labor unions represented in any of the firms in this zone, and the firms discourage labor organizing by preventing workers from entering the zone and intimidating workers who attempt to organize."

In response to the allegation, the Government of El Salvador stated that:

> "El Salvador has one export processing zone..., which is subject to the same labor laws as all other sectors in El Salvador. No unions currently represent any of the workers in the zone, but there is also no record that any unions have attempted to do so."

As it assessed the above information, the Subcommittee observed that the critical point was not so much company attempts to intimidate unionists, per se, but rather the Government's response, or lack thereof, to such intimidation. The Subcommittee further observed that its deliberations were hampered by the fact that neither the petitioners nor the Government had presented any concrete evidence illustrating the nature of the Government's response to unionizing attempts in the EPZ.

CONCLUSION

In light of the complexity of the interplay between an inconsistent legal framework for trade union activity and actual worker rights practices on the ground, both of which are influenced by the ongoing civil war in El Salvador, the Subcommittee was unable to satisfactorily assess many of the allegations against El Salvador. In order to collect more information on key allegations, develop a more sophisticated information base on the structure and functioning of the trade union movement in El Salvador, and monitor the progress of a number of initiatives which could positively affect worker rights in El Salvador, including the ongoing peace negotiations between the Government and the FMLN, the labor code reform effort, and the implementation of the July 1990 human rights agreement signed between the Government and the FMLN, the Subcommittee recommended that the review of El Salvador continue for another year.