Panel Discussion: The Challenges and Opportunities under the NAFTA Labor Cooperation Agreement

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James F. Smith: Let us first take a look at the issue of trade and social agreements concerning the environment, labor, and the relations between them. Although the economic integration process in this hemisphere is very different from the process of the European Union, there are some points of common experience that are worth reflection. It is true that the North American Free Trade Agreement (NAFTA) was born in conditions of fierce world trade competition and has not yet had time to evolve. The idea of bringing together U.S. capital and technology with Mexican labor to more effectively compete in the world economy without the problems of adversarial, confrontational proceedings to drag down that competitive posture is certainly unique to NAFTA.

The European Union has a very different origin. First, it has been around for about fifty years. Second, it was motivated by a desire in Europe after World War II to avoid yet another bloody continental war. Political integration as well as economic integration were contemplated. Nevertheless, environmental and labor agreements were not adopted in the European Union until 1986.

In addition to these contrasts, there are some points of comparison. It is certainly commonplace in the European Union to hear about the dangers of social dumping, labor migration and dislocation of workers in the absence of common standards of labor protection. Complaints come not only from individual workers, but from producers who allege they are being harmed by unfair competition. In our hemisphere, public exposure and discussion of labor and environmental problems will go a long way towards finding a solution. Social dumping, the runaway shops, the U.S. corporate migration south to avoid labor protection, the migration of Mexican workers north because of the absence of wage and working condition protections are problems of the past that continue to be of concern.

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By looking at the legal mechanisms in the European Union which address these issues, one will discover some interesting parallels. In the European Union, the primary dispute settlement forum is the European Court of Justice, which is a supranational institution functioning somewhat like the U.S. Supreme Court, with power to strike down member-state legislation inconsistent with community policy. Obviously, the European Union is a far cry from NAFTA. However, in comparison, the European Court of Justice has adopted the "direct effects doctrine," which reads similar to what was published in the Federal Register by the United States National Administrative Office (NAO). This doctrine provided the rationale for investigating a labor dispute about the alleged barriers to freedom of association and collective bargaining in Mexico. It was alleged that such barriers affect the labor market and the individual; therefore, they should be looked at in terms of their effects on overall trade policy.

We are a long way from evolving under NAFTA to avoid confrontation between labor, management, government and financial institutions. Nevertheless, there are some neutral process issues that offer hope.

The North American Agreement on Labor Cooperation (NAALC), for example, provides not only for multilateral remedies, but for unilateral remedies as well. Additionally, the NAO has some prerogatives, which are briefly described in the NAALC, to investigate circumstances affecting labor in the other Parties' territory. Although harmonization of law clearly does not seem to be contemplated, might this evolve into some kind of greater cooperation in enforcement of parallel measures? These are all issues that our speakers can shed light on.

Lance Compa: Despite a very strong emphasis in the direction of cooperation, the NAALC runs on two tracks: the cooperative track and the contention track. The cooperative track has provided for the exchange of information and technical assistance. The cooperative aspect of the labor side agreement is on a solid foundation, but there is also an element of contention. Whenever a procedure involves fines or trade sanctions, there is going to be a clash of interests. Clearly, the negotiators of the NAALC engaged in some tough negotiation over just what the proper balance between cooperation and contention would be.

The contention track can commence in one of two ways. It can commence at the NAO level. The NAALC differs from the North American Agreement on Environmental Cooperation (NAAEC), which does not establish such national bodies. Under the NAAEC, disputes go directly to a dispute resolution panel and to an equivalent of the NAO's Evaluation Committee of Experts. On the other hand, under the NAALC, the NAO of each country can, sua sponte, review an issue that might concern it. Reviews can also be initiated by a complaint-based process. The language

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5. NAALC, supra note 3, art. 16.
of the agreement provides for a "submission." Parties can make submissions, and the submissions may or may not be accepted by an NAO for review.

Thus far, there has not been any effort to undertake a *sua sponte* review process by any of the NAOs. The Honeywell and General Electric submissions to the NAO are the first experience in the submission-driven process of review. Both cases involve allegations by U.S.-based unions and by Mexican workers. U.S. unions cooperated with the Mexican trade unions and workers in trying to establish Mexican affiliates, subsidiaries or related companies of the parent U.S. corporations, and allege that employees were fired because they tried to form a union in Mexico. Such a discharge would be unlawful in Mexico, the United States, or Canada. The basic right to form or join a trade union is one of the fundamental international labor rights of the International Labor Organization (ILO). Honeywell and General Electric, for their part, deny the allegations. They agree that some of the workers were indeed fired, but maintain the discharges were for misconduct unrelated to union activity. The companies state that other discharges were simply the result of a normal economic downturn.

The right of association and the right to organize are among those subjects that can only be treated by the NAO process. These issues cannot go forward to any Evaluation Committee of Experts or to the dispute resolution system that might result in sanctions. A forum where workers or trade unions can voice their complaints or "submissions" was created. It is not a judicial or adversarial proceeding, and there is no real enforcement at the end of the process. Although this is new in relation to NAFTA, similar forums exist in many other institutions. For example, the Generalized System of Preferences under U.S. law provides a forum for raising claims of labor rights abuses in which the conduct of individual companies may be examined. The ILO and the Organization for Economic Cooperation and Development have guidelines for the conduct of multinational corporations. These guidelines also include labor provisions which provide a forum for complaints involving multinational corporations.

The European Union has quite an advanced system of labor rights. In fact, claims involving U.S.-based multinationals in the European Union may be adjudicated there. Thus, such a forum is not something extraordinary, even where the interplay between economic development, trade and labor relations, and the activities of multinational companies are involved.

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6. *Id.*


8. The ILO is a United Nations-related entity that fashions labor rights and standards adopted by government, business and labor delegates at the ILO's annual conference.

9. See 19 U.S.C. §§ 2461-2466 (1988) (This system provides trade benefits for lesser-developed countries.).
The submissions made to the U.S. NAO refer to two basic instruments. One is the NAALC itself and the other is the set of guidelines that was adopted by the NAO. Like any legal instrument, the words or phrases in those instruments can be interpreted narrowly or broadly. The NAO has been walking a careful line down the middle, neither too narrow nor too expansive. The result of this is that each of the two communities—the employer community and the trade union community—are angry at the NAO and think the other side got everything it wanted. A letter from the Council for International Business summarizes the employer community's view of how this issue should have been handled.

Briefly, the letter argues that the NAO should not have accepted the submissions of the International Brotherhood of Teamsters and the United Electrical, Radio and Machine Workers because they involve events which took place before January 1, 1994, the effective date of NAFTA. The alleged firings took place in November 1993. The letter also claims that a pattern of nonenforcement by the Mexican government must be shown and that these cases are individual cases which do not establish a pattern and are, therefore, not appropriate for review. An argument is also made that submissions in these cases spoke insufficiently to enforcement. Although I believe the submissions do speak to the enforcement issue, they speak more directly to the claim of violations by the companies. The employer community claims that this is really an effort to use the NAO as a substitute for the National Labor Relations Board (NLRB), and that it is not appropriate. A case also is made in the letter that the NAO should not accept submissions until domestic procedures have been exhausted, which constitutes a narrow reading of the NAALC.

This position is not correct. It is more than a question of narrow versus expansive reading. The problem is that it confuses the scope of review available to the NAO with the scope of review specified in the agreement for the Evaluation Committee of Experts (ECE) and the dispute resolution panels. The NAALC also allows each country to set up its NAO the way that it wants, so long as it complies with the agreement. These three issues, (1) the question of events after January 1, 1994, (2) the requirement for a pattern of a practice of nonenforcement, and (3) the question of enforcement as the key issue, do not arise in the side agreement itself until the discussion of the ECE and the dispute settlement panels.

The hearing before the NAO on the labor union submissions took place on September 12, 1994. Four panels appeared at the hearing. One

12. Id.
13. Id.
14. Id.
15. NAALC, supra note 3, art. 23.
16. Id. art. 15.
Panel was composed of national officers from each of the two unions from Honeywell and General Electric. Panel Two consisted of one worker from each of the two plants who claimed that they were fired because of their attempt to form a union. They gave very detailed testimony about what was said inside the office and were accompanied by the union organizer who gave an overview of the union’s experience with the Junta and the Conciliation and Arbitration Board. Panel Three was a panel of four Mexican labor lawyers, who gave an overview of Mexican labor law and described a substantial divergence between what the law says and what is done in actual practice. Panel Four was a panel of U.S. labor attorneys and a Canadian labor expert who sought to bring a comparative perspective to the hearing. The NAO secretary actually resisted their testimony, insisting that they were really there to look at events in Mexico and not to hear about Canadian or Mexican comparative experiences.

Let me conclude with this prediction. The guidelines mandate that a report with findings and recommendations be prepared within three weeks. This becomes very sensitive because findings cannot be made without making some judgments, and recommendations, in turn, cannot be made without implying that some Party is not living up to the terms of the agreement.

There are a number of long range issues of interest to lawyers. Keep in mind that underlying the labor side agreement is the principle that each country still has the power to formulate and enforce its own labor laws and only the effectiveness of enforcement can be reviewed. For some time, there has been movement away from the traditional notions of sovereignty toward a more common, multilateral approach. It is quite normal for the labor side agreement and the NAOs to be moving in the same direction.

Michael O'Neill: First, this is a highly emotional process for the two companies that were involved, considering the rules that were promulgated, the organization that was set up to provide the nucleus of an operative forum, and that the U.S. NAO decided to be a tribunal. The NAO has absolutely no resources and no authority, but it is attempting to act because of political pressure. The system, however, can work as long as it is understood that a worldwide NLRB was not created. It is thus irrelevant that the labor grievances arose before 1994.

17. See Written Statement from Ron Carey and Amy Newell to the U.S. NAO (Sept. 12, 1994) (on file with U.S. NAO).
20. See Written Presentation by Judith A. Scott and Written Statement of Chris Schenk, Ontario Federation of Labor, Possible Recommendations and Agenda for Consultation by the NAO (Sept. 12, 1994) (on file with U.S. NAO).
The International Business Roundtable has taken the position that by its own procedures and authority, the NAO cannot hear the two labor union complaints. The governments of Mexico, Canada and the United States are not asking the NAO to make a decision as to whether the Mexican Labor Board or the NLRB needs to be fixed, or whether they are doing their job properly. The NAO also cannot make a decision on the issue of whether there is no cross-examination, no subpoena power and no investigatory power vested in the NAO.

The National Association of Manufacturers and other business persons have argued that these issues were settled by the Mexican Labor Board. Ofelia Medrano, one of the fired workers, agreed to a settlement. It was done in accordance with Mexican law when she signed an agreement stating that said she was rightfully terminated. I do not believe the NAO is empowered to go back and review that decision.

The other troubling aspect from a business perspective is that the NAO position is counter-productive to the goals of worldwide business and trade. Global competition has driven management to wake up, and to recognize that human assets require attention. Workers can be very valuable if empowered and allowed to solve their problems. In fact, if empowered enough, workers do not require management and, consequently, the management force can be reduced. The days of smoke-filled negotiation rooms with labor unions hammering out a contract are the “good-and-gone days” of the 1950s. United States industry and manufacturing associations agree with the guiding principles of the NAALC. United States business also supported the labor side agreement and labor protections for young people, minimum employment standards, freedom of association, and the right to organize. These labor rights are all protected and guaranteed—they are in our company policies, our code of conduct and our global standards of ethics.

The NAO was wrong in accepting these submissions. This brings up the issue of credibility of the NAO. If the NAO becomes a forum for membership drives for a union, it is not going to have credibility. In this case, the Business Roundtable submission of the judicial ruling from the Mexican Labor Board to the NAO, prior to the acceptance of the complaint, should have resolved the issue.

Second, accepting such submissions is costly. International businesses make decisions about where to produce based on very minor differences. The difficulty of doing business, created by administrative organizations, is factored in by financial analysts. The costs associated with defending this issue becomes a cost of doing business and goes on the books of Honeywell Mexico. A process that does not work becomes more expensive and less competitive.

This process must be made to work because there are intrinsic benefits for business, which were hard lessons learned in the 1970s and the 1980s. Also, if a company does business in ninety-five countries, for example, conflicts are inevitable. It makes good business sense not to destroy the environment and to invest in human assets. That would be more effective than creating an ill-equipped and unauthorized tribunal.
Robert Herzstein: From our discussion, the central issue is what kinds of cases the NAO should take and what procedures it should follow. A key provision is Article 16.3, which says that, "each NAO shall provide for the submission and receipt and periodically publish a list of public communications on labor law matters arising in the territory of another party."\textsuperscript{22} Another key provision states, "each NAO shall review such matters as appropriate in accordance with domestic procedures."\textsuperscript{23} As Mr. Compa has pointed out, this language is susceptible to both broad and narrow readings. If read broadly, the NAALC establishes an elaborate, quasi-judicial forum. Conversely, it could be read very narrowly to say one person has full power to review. Those are both in accordance with domestic procedures. It is very hard to assert that the NAO provision does anything other than represent an agreement by the three countries that each government is supposed to administer its NAO with complete discretion.

One concern is that each government may exercise discretion that is consistent with the overall purposes of the NAALC. The NAOs of each nation should accomplish the kind of cooperative progress that the NAALC is designed to achieve. The question becomes how far should NAO guidelines go and what level of scrutiny should the NAO accord to communications from the public regarding labor law matters arising in the territory of another party? There are millions of workers going to work every day in each of the three countries where there are very complex laws governing the behavior of millions of different employers. There are thousands of violations occurring every day. Any lawyer who has worked on labor law matters knows how everyone has a different version of reality and the law is not equipped to arrive at a "truthful" resolution. Consequently, the NAFTA nations must not establish a practice of making it easy to "point fingers" at violations taking place in other countries.

The kind of situation where there is continual finger-pointing would be inconsistent with the establishment of a sound and cooperative trading relationship among the three countries. Thus, the question becomes what kind of guidelines or criteria are needed by the NAOs for accepting matters for review under Article 16.3? Without providing an answer, I believe there is some danger in the guidelines that the U.S. Labor Department has adopted which seem to establish a presumption that hearings will be held.\textsuperscript{24} Furthermore, these regulations provide for findings, when the language in the NAALC does not provide for NAO findings.

The presumption that the U.S. NAO will conduct public hearings and issue findings facilitates the use of the NAO as a tribunal. That process is not appropriate in some cases, but one must be very discreet about

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  \item \textsuperscript{22} NAALC, supra note 3, art. 16.
  \item \textsuperscript{23} Id.
\end{itemize}
when it is used. There is undoubtedly an interaction between the standard for accepting cases and what kind of hearings should be conducted. There is a high standard for accepting cases, and perhaps it is appropriate to have a hearing in every case. Perhaps having a hearing in every case with a low standard creates the “finger-pointing” phenomenon referred to earlier.

Jorge Pérez-López: The U.S. NAO intends to remain faithful to the agreement. The NAO recognizes that there are differences among the three countries in the way business is conducted. When a public hearing is held, the NAO clearly indicates that it is an information-gathering hearing, not an adjudicatory process. The NAO is not trying to find right or wrong, or determine whether the workers were fired for a particular reason; it is trying to keep its focus on the obligations of the agreement by determining whether the governments are enforcing their labor laws. That is the NAO’s intention and focus.

I am familiar with some of the challenges that are being made, such as the letter on behalf of the U.S. Council for International Business. Like Mr. O’Neill, I wish the letter had not raised the issue of jurisdiction. Article 49 of the NAALC makes clear that the only place where the date of entry becomes relevant is in the definition of a pattern of practice. The pattern of practice is a threshold for an Evaluation Committee of Experts. The issues before the NAO at the present time are not appropriate subject matters for the Evaluation Committee of Experts. These are not matters that are subject to dispute resolution because an Evaluation Committee of Experts is a prerequisite for dispute resolution.

Smith: Any international trade agreement significantly deals, in negotiation and in the agreement itself, with the issue of transparency. How does the system really work in Mexico, Canada and the United States? Mr. Pérez-López stated, in accordance with the Federal Register, that the purpose of a hearing is to gather information so that there can be more clarity about the whole process of organizing the severance packages. If transparency and information-gathering is at issue, what is wrong with the NAO doing just that, do they not have an obligation and why not in the context of a particular controversy?

O’Neill: Exactly. The NAO was created to deal with issues between countries, not between private parties.

Smith: But you would agree that it is perfectly legitimate for the NAO to carry out an information-gathering hearing?

O’Neill: The Business Roundtable supported the labor side agreement for review of those issues. But the NAO is not equipped to deal with private controversies between labor and management.

Compa: The union submissions happened to involve Honeywell and General Electric, but it could have been any number of other companies.

25. NAALC, supra note 3, art. 49.
26. Id. art. 27.
27. See supra note 10.
It is unrealistic to expect this process of review to take place in a vacuum. The fact is that the scope of NAO review is labor law matters arising in the other countries, without necessarily narrowing it to enforcement. Enforcement is driven by cases and, realistically, this process will not occur without cases and controversies.

O’Neill: But there are substantial costs involved here.

Herzstein: There is also the danger that it discourages companies from investing in Mexico.

Compa: Again, it is a question of perspective. The labor side agreement is really very modest. It is unlikely that a controversy would ever get to the point of sanctions. The thought that a company would not invest in Mexico because of the NAALC seems to exaggerate its effects.

Abdon Hernández: Labor unions in the United States normally tend to defend and protect the interests of their workers. Labor unions in Mexico originally were created to protect and defend the interests of workers. However, Mexican labor unions are no longer devoted to that objective. They are instead almost exclusively devoted to political ends. It is very risky to get involved in the internal politics of the unions of another country. If a Mexican-owned company gets involved in a similar case, how is the NAO going to get the facts?

Pérez-López: The NAO, indeed, has no subpoena powers. In fact, it is quite clear in the agreement that the U.S. NAO has no ability to go into Mexico. The U.S. NAO is aware of the sovereignty issues and is not going to violate them.

Bill Kryzda: What is the purpose of the committee or hearings?

O’Neill: The system has to be designed to elicit truth; it cannot simply bring in someone, who is paid by another party, to testify and expect to get the truth.

Smith: But the issue is not whether a worker was fired for union activity. The issue is whether or not the enforcement of the right to organize and engage in collective bargaining in Mexico is being thwarted by private and public practices that render that particular right a nullity.

Pérez-López: The intention of the hearings was not to focus on whether somebody got fired, but to look at whether the government of Mexico enforces its labor law with regard to freedom of association and collective bargaining.

Compa: This is a fair point and it may be healthy for the NAO to move in that direction. It will be necessary for the unions to educate themselves about the possibility of a generalized review of practices, without getting into specific companies. The problem is that there were specific incidents that took place in companies where there was a degree of cooperation between U.S. and Mexican unions. Workers and unions in both countries are used to a system of filing a charge or making a denuncia. They naturally tend to think of this as the first thing to do. Because the guidelines contemplate public communications, it happened that the first public communication took the form of a complaint that specified what happened at a specific company. But this is a valid criticism, and it behooves the unions to think more strategically and globally.