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NAFTA'S PROPOSED TRI-LATERAL COMMISSIONS ON THE ENVIRONMENT AND LABOR

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I. INTRODUCTION

This article details the legal institutions and arrangements created by the side agreements to the North American Free Trade Agreement (NAFTA).

Like NAFTA itself, the side agreements have become the object of intense controversy and lobbying on both sides of the issue. But the turmoil surrounding these accords was not inevitable. In fact, while it may seem hard to remember now, NAFTA began without much controversy.

A. *Birth of the Side Agreements*

The awakening of the American public to the ramifications of NAFTA (real or imagined) coincided with the 1992 Presidential Election. Not surprisingly, NAFTA became an important issue in the 1992 campaign. Ultimately, Candidate Clinton supported the agreement, but only on the condition that side agreements be negotiated to address and relieve NAFTA's impact on labor and the environment (as well as an agreement on import surges). Mr. Clinton outlined his position on NAFTA, including his insistence on negotiating the side accords, in an October 4 speech in Raleigh, North Carolina. In November he was elected President.¹

With the new administration in place, the proposed side agreements became a matter of immediate concern. With NAFTA already embodied in an agreement signed on August 12 of the previous year, the only remaining stumbling block to submission of the agreement for fast-track consideration was completion of three side agreements. The negotiations began in early 1993 and continued through the summer. Finally, in August, Mr. Clinton was in a position to sign the agreements. In the meantime, however, political momentum had been lost to NAFTA opponents.

Ironically, the side agreements themselves have been attacked by the very interest groups they were designed to assuage. These groups argue that the agreements miss the target because they do not themselves establish enforceable norms. That is unquestionably true, and as discussed below, the agreements are far more procedural than substantive. Moreover, critics

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1. See Peter Behr, *Clinton's Conversion on NAFTA*, WASH. POST, Sept. 19, 1993, at H1.

argue that even within this limited procedural scope, the agreements fail to assure enforcement of environmental standards and labor rights. This article agrees, however, that the side agreements have real significance and value and should not be readily dismissed.

II. ANALYSIS OF THE AGREEMENT

A. *The North American Agreement on Labor Cooperation*

1. Obligations

The labor accord is officially titled "the North American Agreement on Labor Cooperation." Under this Agreement, each party commits to set high labor standards,² to enforce labor laws,³ to publish its labor laws⁴ and to give due consideration to complaints of labor violations.⁵ It also ensures judicial access and due process for private persons claiming infringement of a Party's labor laws.⁶ "Further procedural guarantees include judicial review,⁷ written decisions,⁸ and impartial and independent tribunals."⁹

These commitments are process-oriented. The closest they come to establishing norms—and therefore the most important aspect from a U.S. political context—is the obligation to establish high labor standards and enforce them. Critics point out that the Agreement expressly provides that a Party has not failed to enforce its laws when an agency or official chooses not to take action based on prosecutorial discretion or a bona fide decision to allocate enforcement resources to higher priority violations.¹⁰ This provision has led to severe attack from U.S. labor organizations.

2. The Commission

To supervise the Parties' compliance with their obligations under the Agreement, the labor accord creates the Commission for Labor Cooperation.¹¹ The Commission consists of a Ministerial Council made up of cabinet-level representatives from each Party and a permanent standing Secretariat.¹² The Commission is assisted in its efforts by each Party's National Administrative Office, or NAO.¹³

2. North American Agreement on Labor Cooperation, Sept. 13, 1993, U.S.-Can-Mex., art. 2 [hereinafter NAALC].

3. *Id.* art. 3.1.

4. *Id.* art. 6.

5. *Id.* art. 3.2.

6. *Id.* arts. 4, 5.1(a).

7. *Id.* art. 5.3.

8. *Id.* art. 5.2(a).

9. *Id.* art. 5.4.

10. *Id.* arts. 3.1, 49.1.

11. *Id.* art. 8.1.

12. *Id.* arts. 8.2, 9.1

13. *Id.* art. 8.2.

The Ministerial Council governs the overall Commission. The Council will meet at least once every year and will be chaired successively by each Party.¹⁴ The Council's functions include overseeing implementation of the Agreement, making recommendations on developing the Agreement, directing the Secretariat and working groups established under the pact,¹⁵ and promoting cooperative activities between the Parties.¹⁶

Under the Agreement, a Secretariat will be established to assist the Council in exercising its functions,¹⁷ including preparation of reports on labor laws, trends and conditions using publicly available information supplied by the Parties.¹⁸ The Secretariat also may prepare reports on any matter requested by the Council.¹⁹

Before publication, all reports must be submitted to the Council for authorization to publish, subject to remand for further work if the Council considers a report materially inaccurate or otherwise deficient.²⁰ Secretariat reports and studies will be made public if the Council approves them.²¹ Critics complain that this assures that politically embarrassing or controversial reports will be swept from public view.

Political control over the Secretariat appears to be limited, however, by the Secretariat's rules of operation created under the Agreement, rules designed to promote evenhandedness in discharging the Secretariat's duties. The Secretariat will be led by an Executive Director appointed by the Council.²² This position will rotate consecutively between nationals of each Party. All hiring decisions will be based on merit and will reflect due regard for maintaining an equal balance of members from each Party.²³ Finally, the Executive Director is to act independently of any governmental or other authority external to the Council²⁴ and the Council may remove him for cause.²⁵

Each Party is also required to establish a National Administrative Office to serve as a point of contact between the Parties and provide publicly available information requested under the Agreement.²⁶ Further, any Party's NAO may request consultations with any other Party's NAO on labor-related matters in the other Party's territory.²⁷ To advise on implementation and elaboration of the Agreement, each Party may also convene a National Advisory Committee of citizens²⁸ or a government

14. *Id.* art. 9.3.

15. *Id.* art. 10.1.

16. *Id.* art. 11.1.

17. *Id.* art. 13.1.

18. *Id.* art. 14.1.

19. *Id.* art. 14.2.

20. *Id.* art. 14.3.

21. *Id.* art. 14.4.

22. *Id.* art. 12.1.

23. *Id.* arts. 12.2(a), 12.2(c).

24. *Id.* art. 12.5.

25. *Id.* art. 12.1.

26. *Id.* arts. 16.1, 16.2.

27. *Id.* art. 21.1.

28. *Id.* art. 17.

committee of federal, state or local officials.²⁹ Thus, if ultimately dissatisfied with the public pronouncements of the Commission, U.S., Canadian and Mexican labor interests will certainly have the forum and opportunity to air grievances.

3. Dispute Resolution

(a) General Procedures

Like NAFTA itself, the labor accord provides for dispute resolution. In the event a Party's compliance comes into issue, any Party may request Ministerial level consultations.³⁰ If this fails to resolve the matter, then the consulting Parties may request formation of an Evaluation Committee of Experts (ECE).³¹ An ECE will only be convened if an independent expert determines that the matter is either trade related or covered by mutually recognized labor laws.³²

Other procedures require the submission of a written report to the Council by the ECE of action taken.³³ Parties may respond in writing to a draft report, which the ECE must consider when preparing its final report.³⁴ The Parties also may submit to the Council, in writing, their views of the ECE's final report.³⁵ The Council is directed to publish the report within 30 days.³⁶ The Council must also consider the final report, and the Parties' written responses to it, but no other action is required.³⁷

For most disputes, an ECE report is the end of the line. For disputes involving the right to strike, unionize and bargain collectively, not even an ECE can be formed—only Ministerial level consultations are permitted. But for a select group of matters—those involving occupational safety and health, child labor and minimum wage—expanded dispute resolution is available. Following an ECE final report addressing these areas, any Party may request consultations to consider whether a Party has demonstrated a "persistent pattern of failure to effectively enforce such standards."³⁸

If consultations fail to resolve the matter, a Party may request a special session of the Council.³⁹ If that session does not settle the matter, an arbitral panel can be convened by a two-thirds vote of the Council, but only if the Council decides the dispute involves a standard that is both trade related and covered by mutually recognized labor laws.⁴⁰

29. *Id.* art. 18.

30. *Id.* art. 22.1.

31. *Id.* art. 23.1.

32. *Id.* art. 23.3 & annex 23.1.

33. *Id.* art. 25.1.

34. *Id.* art. 25.2.

35. *Id.* art. 26.3.

36. *Id.* art. 26.2.

37. *Id.* art. 26.4.

38. *Id.* art. 27.1.

39. *Id.* art. 28.1.

40. *Id.* art. 29.1.

Procedures provide for submission of an initial report containing factual findings, followed by a decision on the merits and a plan of action for redressing non-enforcement.⁴¹ If the Parties fail to agree on a plan of action corresponding to the plan proposed in the report,⁴² any disputing Party can ask that the panel be reconvened to consider this failure.⁴³

(b) Monetary Fines and Sanctions

One might draw from this description that the Agreement is toothless, and so its critics charge. But in fact, at this point the Agreement takes an imaginative—and unprecedented—step: the imposition of a monetary fine. The Agreement expressly provides that, for failure to implement an action plan, fines may be imposed, not to exceed \$20 million for the first year the Agreement is in force or .007% of total trade in goods between the Parties thereafter for the most recent year in which data are available.⁴⁴ Never before has the United States agreed to the imposition of monetary payments for failure to meet its obligations under a treaty or to provide itself with a remedy if its treaty partner is in breach.

(c) Suspension of Trade Benefits as Sanctions

The Agreement also addresses remedies for failure to pay fines. A Party may suspend NAFTA trade benefits to collect a monetary fine or to punish a Party found not to be implementing an action plan fully.⁴⁵

When used to collect a fine, the value of suspended benefits cannot exceed the value of unpaid fines.⁴⁶ If a panel decides the fine has been paid or an action plan has been implemented, then suspension of benefits must be lifted.⁴⁷ The panel also may reconvene on written request of a Party and decide whether a suspension of benefits is manifestly excessive. The panel will report its findings to the disputing Parties.⁴⁸

Again, this provision in a labor agreement appears to be unprecedented. The United States has never agreed by treaty to the suspension of trade privileges for failure to meet labor standards.⁴⁹ Indeed, trade and labor commitments have rarely, if ever, been directly linked in a single agreement.

(d) Special Rules for Canada

In Canada's case, no fines or suspensions are available to force Canadian compliance with a panel report. Instead, under the Agreement

41. *Id.* art. 36.2.

42. *Id.* art. 38.

43. *Id.* art. 39.1.

44. *Id.* annex 39.

45. *Id.* art. 41.1 & annex 41B.

46. *Id.* art. 41.2.

47. *Id.* art. 41.4.

48. *Id.* art. 41.5.

49. To date, the most comparable U.S. action is the refusal to extend unilateral trade concessions to countries violating internationally recognized worker rights. See 19 U.S.C. 2462(a) (1984) (Generalized System of Preferences); 19 U.S.C. § 2702 (1983) (Caribbean Basin Initiative).

Canada guarantees that panel determinations can be made orders of its domestic court and enforceable as such.⁵⁰ This arrangement was made at Canada's insistence because of that country's open opposition to U.S. trade sanctions, which it considers abusive and a barrier to trade.

4. Evaluation of Criticisms of the Labor Accord

Although critics complain that the enforcement provisions of these agreements do not go far enough in protecting workers' rights, they go farther than other trade agreements in enforcing those rights. In fact, the labor agreement goes farther than most labor treaties in enforcing workers' rights.

If nothing else, these provisions provide a forum and process for exposing nonenforcement and directing attention to it. NAFTA panels or NAOs are not the way for Mexico or any Party to be forced to enforce its labor laws. But as drafted, the NAFTA side agreements should encourage self-enforcement, at least to the extent the Parties will want to avoid public disputes over worker rights, and will provide an opportunity for aggrieved parties to air complaints.

B. North American Agreement on Environmental Cooperation

The preceding section offers a general framework for operation of the labor agreement. The Environmental Accord is generally structured along these same lines, although the Environmental Accord is arguably more developed and has sharper teeth.

1. Obligations

Under the Pact, each Party is obligated to set high levels of environmental protection,⁵¹ publish its environmental laws and enforce them.⁵² As in the Labor Accord, a party may be excused for nonenforcement through prosecutorial discretion or a bona fide decision to allocate resources to higher priority violations.⁵³ Private access to remedies and procedural guarantees are also provided for in the Environmental Accord.⁵⁴

The Parties also agree to explicit environmental undertakings for which there are no analogues in the Labor Accord. The Parties promise to consider complying with Council recommendations on pollution controls and to consider banning export to another Party of pesticides or toxic substances whose use is banned in its own territory.⁵⁵

50. *Id.* annex 41A.

51. North American Agreement on Environmental Cooperation, Sept. 13, 1993, U.S.-Can-Mex., art. 3 [hereinafter NAAEC].

52. *Id.* arts. 4, 5.

53. *Id.* arts. 5.1, 45.1.

54. *Id.* arts. 6, 7.

55. *Id.* arts. 2.2, 2.3, 10.5(b).

2. The Commission

Like its labor counterpart, the Environmental Agreement establishes a Commission, the Commission for Environmental Cooperation.⁵⁶ The Commission includes a Council consisting of cabinet-level officers (for the U.S., the EPA Administrator) or their designees, a Secretariat and a Joint Public Advisory Committee.⁵⁷

The Council's functions include those listed for the Labor Agreement Council, such as overseeing the Secretariat and making recommendations on the further elaboration of the Agreement.⁵⁸ The Environmental Council is also directed to take steps beyond those in the Labor Agreement, including promoting the environmental objectives of NAFTA,⁵⁹ developing with the Parties' consent a system of assessing the environmental impact of proposed projects subject to government approval,⁶⁰ and making recommendations on how each Party can improve its judicial access for non-nationals injured or likely to be injured from pollution created in the Party's territory.⁶¹ The Council is further directed to make recommendations on pollution abatement techniques, scientific data gathering, conservation, and similar issues.⁶²

The Environmental Secretariat is also similar in structure and function to its Labor Agreement counterpart. As in the Labor Accord, the Agreement provides for an Executive Director.⁶³ Unlike the Labor Secretariat (which will have only 15 staff members),⁶⁴ however, the Environmental Secretariat is not limited in its staff size. The Secretariat will prepare annual reports subject to Council review⁶⁵ and report on any matter within the scope of the annual program, although such matters may not include the nonenforcement of domestic environmental law or regulations.⁶⁶ Investigating the nonenforcement of domestic environmental law is left to dispute settlement panels.

The Secretariat may consider submissions from a person or a non-governmental organization (NGO) alleging ineffective enforcement of environmental laws, but only if set criteria are met.⁶⁷ The Secretariat shall prepare factual records based on such submissions only if two-thirds of the Parties so instruct after a request from the Secretariat.⁶⁸ If two-thirds of the Parties agree, the Secretariat will make the factual record publicly

56. *Id.* art. 8.1.

57. *Id.* arts. 8.2, 9.1.

58. *Id.* art. 10.1.

59. *Id.* art. 10.6.

60. *Id.* art. 10.7.

61. *Id.* art. 10.9.

62. *Id.* art. 10.2.

63. *Id.* art. 11.1.

64. *Id.* art. 12.3.

65. *Id.* art. 12.1.

66. *Id.* art. 13.1.

67. *Id.* art. 14.1.

68. *Id.* art. 15.2.

available.⁶⁹ Similar powers of investigation are not vested in the Labor Secretariat.

As in the Labor Agreement, each Party may convene a National Advisory Committee, or NAC.⁷⁰ A Joint Public Advisory Committee, however, is an additional body provided for in the Environmental Agreement⁷¹ but not in the Labor Accord. Each Party or its NAC will appoint an equal number of members.⁷² The Joint Committee's purpose is to provide advice to the Council on any matter within the scope of the Agreement⁷³ and to provide information to the Secretariat.⁷⁴

3. Dispute Resolution

As in the Labor Agreement, the Environmental Pact includes detailed dispute resolution provisions. Any dispute settlement process must start with consultations of the same type as in the Labor Agreement. The Environmental Pact authorizes any Party to inform another Party of alleged violations of environmental laws and also to allow the offending Party to investigate.⁷⁵ For these purposes, the term "environmental laws" refer to laws regulating pollution, toxic substances and protection of flora and fauna, but not laws whose primary purpose is managing commercial harvest or exploitation, or subsistence or aboriginal harvesting of natural resources.⁷⁶ This limit on the scope of protection is viewed by many in the green movement as a serious failing of the pact.

If the Parties fail to settle the matter, a disputing Party may request the intervention of the Council. Failing Council resolution of the dispute, an arbitral panel will be convened if by a two-thirds vote of the Council the matter is determined to relate to a persistent pattern of failure to effectively enforce an environmental law that "relates to a situation involving workplaces, firms, companies or sectors that produce goods or provide services traded between Parties or that compete with goods produced and services provided by another Party."⁷⁷ Finally, the panel is directed to act within specified time frames in issuing an initial report, final report and action plan.⁷⁸

4. Fines and Sanctions

The Environmental Pact also provides for fines and sanctions.⁷⁹ Like those provided for in the Labor Accord, these enforcement techniques are unprecedented. For the first time, the United States has sought, and

69. *Id.* art. 15.7.

70. *Id.* art. 17.

71. *Id.* art. 16.

72. *Id.* art. 16.1.

73. *Id.* art. 16.4.

74. *Id.* art. 16.5.

75. *Id.* art. 20.4.

76. *Id.* art. 45.2.

77. *Id.* art. 24.1.

78. *Id.* arts. 31-35.

79. *Id.* art. 36.

agreed to in this agreement, the potential imposition of generalized trade sanctions to enforce compliance with a highly specialized environmental agreement.

C. *Extent of Application of Obligations Under Labor and Environmental Agreements*

As between Mexico and the United States, obligations of the side agreements apply at all levels of government. With respect to Canada special rules (even beyond those discussed above regarding fines and sanctions) will apply because ratification by the federal government will not bind the provinces, and some of those provinces may not sign on to the agreements. Indeed, after the recent election, that seems to be near-certain. Because Canada should not enjoy the benefits of dispute resolution without its burdens, the following special rules of application have been fashioned.

Canada cannot sue or be sued under either accord regarding matters which happened in Canada and would be under provincial jurisdiction unless certain conditions apply.⁸⁰ The Environmental Pact will apply to Canada's provincial governments only if provinces subscribing to the Agreement represent at least 55 percent of Canada's GDP for the most recent year in which data are available.⁸¹ The Labor Pact will apply to Canada's provincial governments only if provinces subscribing to the Labor Agreement account for at least 35 percent of Canada's labor force for the most recent year in which data are available.⁸²

If the matter concerns a specific industry or sector, provinces subscribing to the Environmental Agreement must represent at least 55 percent of total Canadian production in that industry or sector for the most recent year in which data are available, or the Environmental Pact will not apply.⁸³ For the Labor Pact to apply in industry-specific cases, provinces subscribing to the Agreement must represent at least 55 percent of the workers in that industry or sector.⁸⁴

III. SEEDS OF CONTROVERSY WITHIN THE UNITED STATES: PERCEIVED FLAWS AND STRENGTHS OF THE LABOR AND ENVIRONMENTAL ACCORDS

A. *Critiques of Environmental and Labor Groups*

The Labor Accord has been castigated more for what it does not do than for what it does. The Pact DOES NOT:

- provide remedies for all types of labor law;

80. *Id.* annex 41; see also NAALC, *supra* note 2, annex 46.

81. NAAEC, *supra* note 50, annex 41.4.

82. NAALC, *supra* note 2, annex 46.4.

83. NAAEC, *supra* note 50, annex 41.4.

84. NAALC, *supra* note 2, annex 46.4.

- allow the Secretariat to prepare or publish a report without the council's approval;
- allow the Secretariat to request a Panel; or
- make labor law.

The Environmental Accord also has been criticized more for what it does not do than for what it does. The Pact DOES NOT:

- protect the environment against exploitation of natural resources;
- allow the Secretariat to prepare and publish a factual record unless two-thirds of the Parties agree;
- allow the Secretariat to request a Panel;
- allow the Secretariat to freely accept submissions from private parties; or
- make environmental law.

Despite these flaws and shortcomings, the side pacts represent an unprecedented use of trade agreements to address trade-related social, labor and environmental issues.⁸⁵ Historically, the United States has limited trade agreements strictly to trade issues. Merely including environmental and labor cooperation provisions represents a departure from set U.S. practice. No similar provisions appear in the Canadian Free Trade Agreement.

B. Countercriticisms: Infringing Sovereignty

Establishment of supra-national bodies to enforce the agreements is another major departure from U.S. practice in trade agreements. Historically, the United States has objected to international organizations established to oversee and interfere in trade issues. This policy dates back at least to the GATT in 1948, when the United States refused to establish the International Trade Organization to oversee the GATT and enforce its terms.

Therefore, the labor and environmental Commissions included in the NAFTA side deals, with their standing Secretariats, have provided fodder for Congressional and public critics charging that these Commissions represent a threat to U.S. sovereignty. It may seem ironic, but the steps taken by the Clinton Administration to establish independent watchdogs over environmental and labor issues have at the same time failed to assuage labor and environmental activists (who claim that these groups have no power) and yet activated conservative groups (who claim they have too much).

IV. CONCLUSION: PROSPECT FOR U.S. IMPLEMENTATION OF NAFTA

If used effectively, these agreements can lead to the intended goals of their proponents in the environmental and labor movements. But this

85. *Hearings Before the House Comm. on Energy and Commerce*, 103d Cong., 1st Sess. 5 (Sept. 29, 1993) (statement of Carol M. Browner, EPA Administrator).

would involve a political commitment by the Parties, and labor and the green movement are skeptical that such political will can be relied upon in the long run. Ultimately, the agreements may fail to guarantee new standards of conduct, but they provide tools which could lead to such standards in practice. While they may not live up to the early expectations of the Clinton campaign, these agreements can not and should not be dismissed as irrelevancies. In any event, they may presage future U.S. trade policy, which will now have to recognize and factor in the political reality of a more complicated (and perhaps volatile) blend of the traditional trade agreement issues with new-age environmental and labor concerns which were never before a part of the equation.

