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Another Look at NAFTA

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Another Look at NAFTA

Abstract

"Weak," "toothless," "worthless" and "a farce"—these were some of the epithets applied to the North American Free Trade Agreement (NAFTA) labor side accord negotiated by the United States, Mexico, and Canada in 1993. Trade unionists and labor rights supporters were upset, first by the text of the North American Agreement on Labor Cooperation (NAALC) when it appeared, then by early experiences after it went into effect on January 1, 1994. But those wanting progress on labor rights and standards in international trade should be careful of making some idealized "best" the enemy of the good.

Keywords

labor movement, union, worker rights, North American Free Trade Agreement, NAFTA, United States, Mexico, Canada

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ANOTHER LOOK AT NAFTA

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weak,” “toothless,” “worthless” and “a farce”—these were some of the epithets applied to the North American Free Trade Agreement (NAFTA) labor side accord negotiated by the United States, Mexico, and Canada in 1993. Trade unionists and labor rights supporters were upset, first by the text of the North American Agreement on Labor Cooperation (NAALC) when it appeared, then by early experiences after it went into effect on January 1, 1994. But those wanting progress on labor rights and standards in international trade should be careful of making some idealized “best” the enemy of the good.

The Text

When the side accord was completed in mid-1993, critics cited three main problems with the text. First, it did not create common norms for the three countries. Instead, the negotiators preserved national sovereignty in the formulation of labor laws and the setting of standards, making “effective enforcement” of domestic law the focus of the accord. What good is an agreement, said critics, that leaves weak laws and standards in place instead of pulling them up to higher, harmonized levels?

The second major criticism involved the bureaucracy, procedural maze, and seeming cross-purposes built into the agreement. NAALC creates separate domestic agencies in each country’s Labor Department, called the National Administrative Offices (NAO), which are responsible for a first review of labor law matters in *another* country. This means that complainants must turn to another government,

often in another language, to raise their concerns.

The agreement sets up a council of ministers and a permanent, trinational secretariat that together make up a “Commission for Labor Cooperation.” The secretariat conducts research and reporting on comparative labor law and labor market issues and staffs *ad hoc* advisory groups, evaluation committees, and arbitration panels composed of nongovernmental experts from each of the countries.

Each of these bodies has complicated jurisdictional reach, and among them they combine various research, reporting, reviewing, consulting, advising, and decision making powers. Timetables for different levels of review, consultations, evaluations, and arbitrations make for a minimum of several months, and as much as two to three years, before procedures could be exhausted.

The side agreement also called for a broad program of cooperative activities on labor law and labor market matters among governments. Critics said this feature might make governments reluctant to question or criticize each other’s law enforcement under the agreement’s review, evaluation, and dispute resolution mechanisms.

The third objection addressed the division of NAALC’s eleven “Labor Principles”—basic labor rights to which the governments commit themselves in making the deal—into three categories or tiers of treatment. The first tier involves so-called “industrial relations” subjects covered by the first three labor principles: (1) freedom of association and the right to organize, (2) the right to bargain collectively, and (3) the right to strike. Though they lie at the

heart of international labor rights, these issues get the lowest level of treatment under the NAALC—the first-level “review” process, with optional ministerial consultations.

Eight labor principles covering prohibition of forced labor, nondiscrimination, equal pay for men and women, workers’ compensation, migrant labor protection, child labor, minimum wage, and occupational safety and health issues can proceed from review to evaluation. Only the last three of these are susceptible to the full range of treatment that includes review, evaluation, and arbitration, with possible application of sanctions in cases of a “persistent pattern of failure to effectively enforce” laws in those areas. Critics argued that narrowing the funnel as issues move forward only chokes off possibilities for enhancing labor rights in North America.

Since it took effect at the beginning of 1994, six cases have been treated under the NAALC. Four involved alleged interference with independent union organizing at Mexican maquiladora factories, one concerned union members’ rights in a Mexican government ministry, and one dealt with a shutdown by Sprint of a California facility in the midst of a union organizing campaign. These cases left labor rights advocates frustrated and disappointed because they did not lead to what complaining parties sought: reinstatement of fired workers or new union formation at each of the workplaces. Moreover, because each of these cases involved the right to organize, one of the three “first-tier” labor principles, they could not proceed to evaluation or arbitration.

These criticisms should not be discounted. A “level playing field,” at least for irreducible “core” standards on such issues as freedom of association, nondiscrimination, and forced labor, for example, and strong, rapid enforcement against violators is the goal of everyone who advocates labor rights in international trade. However, criticism should be measured not against an ideal but against the reality of international trade and labor negotiations in the current regional and global economy. Even then, judging the effectiveness of the NAALC should await a broad experience of the

agreement’s potential uses. In this light, the scorn directed at the NAALC reflects more impatience than analysis.

Common Standards, Bureaucracy, and Tiers

It’s easy to hold in principle that a labor rights clause in a trade agreement ought to provide for universal standards. But it’s not so easy in practice, particularly when there is wide economic disparity among the negotiating countries, and when a single country accounts for 85 percent of the economic activity in the trade area.

In the NAFTA context there is also a sensitive problem of sovereignty concerns in all three countries. These are not just concerns of government officials; they are deeply held in all sectors of society, including trade unions and social activist communities. Many Mexican and Canadian labor policy analysts look at the state of U.S. labor law and the U.S. labor movement, and recoil at the prospect of homogenized labor laws. They are not about to give up laws created by their own representatives, administered by agencies accountable to their own executive branches, and reviewed by their own judiciary, to a new supranational agency that might be dominated by the economic interests of the United States.

U.S. trade unionists ought to be equally skeptical about solving their own labor law problems through some kind of international legerdemain. Could the NAFTA side agreement overturn the frequently proclaimed deficiencies in U.S. law—National Labor Relations Board (NLRB) election rules, the striker replacement doctrine, contingent workers’ lack of protection, and others—without action by Congress? These are issues for American workers to address through their own organizing and political action, not by demanding some “silver bullet” in the NAALC.

Another problem with creating trinational labor norms lies in the fundamental labor law jurisdiction of each country. Mexican labor law is primarily based in the federal Constitution and federal statutes, with a large state role in enforcement. Most of the maquiladora factories come under state government jurisdiction in the five border states of Mexico, for example. U.S.

labor law is also federal, but with a constricted role for the states. State moves to ban striker replacements, for example, have been struck down by the courts as pre-empted by federal law. In contrast, Canadian labor law is almost totally provincial, not federal. Each province enjoys its own sovereignty in fashioning and enforcing labor laws, and is not disposed to let the federal government hand over these matters to a trinational agency.

These differences did not just happen. They result from national histories replete with anti-colonial wars, civil wars, constitutional crises, regional conflicts, and class struggles. With three ministries of labor sitting down to negotiate the first labor agreement connected to a trade pact, it is unrealistic to expect them to undo these differences and defer to a supranational power.

The approach taken in the NAFTA side deal, emphasizing "effective enforcement" of domestic labor law, is a more practical starting point than attempting to fashion common norms. Any system of law is really only as good as its system of enforcement. U.S. experience with a resurgent sweatshop industry in major American cities should give pause to demands that Mexico or any developing country "raise" its standards to the levels of industrialized countries before enforcement is strengthened in every country.

Instead of yielding sovereignty over their labor laws and standards, the NAFTA countries shaped the NAALC to open themselves up to trinational scrutiny of their enforcement regimes. Such scrutiny is conducted under the NAALC's review process, through special studies by the secretariat, and through evaluation and dispute resolution by independent, nongovernmental experts who are free to reach their own conclusions about the effectiveness of each country's labor law enforcement. This represents an extraordinary candor in international relations, in contrast to traditional sovereignty rules. It should not be scorned because it fails to achieve a supposed ideal of international fair labor standards and swift, sure punishment powers.

As for bureaucracy, it is true that the NAFTA

labor side accord sets up a complex structure and procedures. But this is typical of international agreements. Anyone who ever brought a labor rights case to the International Labor Organization (ILO), to the Organization for Economic Cooperation and Development (OECD), or to the Organization of American States (OAS) or the United Nations Human Rights Commissions can attest to their complex links, slow turns, and elliptical conclusions. For that matter, American trade unions and employers who have been through the mill of NLRB proceedings and their judicial appeals should hardly be disappointed in the world's first international trade and labor agreement's red tape.

Similarly, a "tiered" approach to labor issues is not unusual in the international context. The European Union (EU) also divides the twelve elements of its Social Charter into three tiers of treatment, much like those of the NAFTA labor pact. To be precise, the same subjects susceptible only to first level review in the North American scheme—rights of association and organizing, collective bargaining (as distinct from consultation with "works councils," which are something else in the EU scheme), and the right to strike—are specifically *excluded* by the Maastricht Treaty from any form of Europe-wide legislation. For now, these issues are so central to national identity, history, and workplace culture that no society accepts changes forced from outside its own body politic.

The Cases

The first cases under NAALC provided an important forum for public discussion of labor conditions in NAFTA countries. Such matters had usually been taken up by anonymous officials in obscure proceedings. Now they are subjected to a formal, public review with cleansing sunshine effects.

While the first maquiladora cases ended with no follow-up ministerial consultations, publicity surrounding them prompted reinstatement of several workers, and widespread instructions from U.S. firms' headquarters to their Mexican subsidiaries to comply carefully with Mexican labor laws.

Ministerial consultations in the other cases

led to a wide range of trilateral contacts and events that illuminate labor law realities in the three NAALC countries. One discussion, for example, compared Mexico's union registration system, the U.S. NLRB election system, and several Canadian provinces' "card-check" systems for union certification. In the Sprint case, the three labor ministers held a widely publicized public forum and instructed the trilateral labor secretariat to conduct the first-ever comparative study of the effects of plant closings on workers' freedom of association and right to organize in the three countries. Such mutual efforts are indispensable for creating a knowledge base for progress in trilateral treatment of labor rights issues.

Continued reviews can encourage governments to strengthen their enforcement efforts and encourage businesses to turn toward voluntary codes of conduct or some other form of self-regulation on workers' rights and labor standards. Where trade union actions are implicated in a review, efforts to strengthen democratic participation in union affairs may result.

NAFTA's labor side agreement contains several positive features for labor rights advocacy that ought to be appreciated, or at least tested over a long term, before drawing any conclusions about its worth. Used creatively, the agreement provides an opportunity for advancing workers' rights in the globalizing economy. It can be used in all three countries by trade unionists and labor rights advocates, by government officials responsible for labor standards, and by enterprises looking to a "high road" employment relations strategy. The challenge for labor rights supporters is to find such creative uses, not to lament lost opportunities for the perfect agreement.

The agreement's positive features include the establishment of the labor rights-trade linkage as a matter of policy in trade agreements; the wide range of the agreement's "Labor Principles," compared to the narrower definition of international labor rights in most other trade and labor contexts; and the variety of cross-border avenues and arenas that it opens up for international cooperation in support of workers' rights.

The Principle of the Thing

A strong reaction is underway against the very idea of a labor rights-trade link, also known as the "social clause" in trade discourse. The prime minister of Malaysia, for example, has repeatedly attacked labor rights proposals as an attempt to impose "Western values" and "Western concepts of trade unions" on developing Asian countries.

The ILO, the OECD, the World Bank, the World Trade Organization (WTO) and other international bodies have all shied away from linking trade and labor rights. In this light, the NAALC is a unique accomplishment of the governments of Canada, Mexico, and the United States. It backs up the linkage of labor rights and trade policy with mechanisms for cross-border reviews and potential sanctions when workers' rights are violated and governments fail to enforce their laws. Critics should appreciate just how big a breakthrough it was for the North American trade negotiators to reach this point, compared to progress on the "social clause" in other contexts.

The Scope of the NAALC's "Labor Principles"

Another important breakthrough in the NAFTA side agreement lies in its movement beyond the usual formulation of "core" labor standards. Even while they reject a labor rights-trade link, the ILO, the European Union, the World Bank, and the OECD limit their debate to a labor rights "core" embracing freedom of association and the right to organize while barring forced labor and discrimination (sometimes adding child labor).

In contrast to these three or four issues, NAALC specifies eleven Labor Principles that run the length and breadth of workers' concerns. They include all those mentioned in other attempts to define a "core," and add a forthright endorsement of the right to strike—something most international instruments avoid (there is no ILO Convention on the right to strike, for example). NAALC goes on to embrace matters usually untreated in labor rights discourse but vitally important to workers—minimum wages,

hours of work, overtime pay, workers' compensation, protection of migrants, occupational safety and health. The fact that these issues are opened up to cross-border treatment gives the agreement a concrete content often lacking in vague "core" labor rights definitions.

Untested Forums

The cases raised thus far under the NAALC all involved the first of the agreement's eleven principles: freedom of association and the right to organize. No cases involving any of the other ten principles has been initiated. The agreement's independent evaluation procedure has not been invoked, nor has the arbitration mechanism been put to the test.

In sum, one subject matter—organizing—has been treated at the stage-one review level, when the potential exists for three subjects—organizing, bargaining, and striking—to get such first-level treatment. Five other subjects—forced labor, equal pay, nondiscrimination, workers compensation, and migrant labor—can get two levels of treatment: review and evaluation. Three more—child labor, minimum wages, and safety and health—can get all three levels of treatment: review, evaluation and arbitration. Experience with just one of a possible twenty-two combinations of subject and treatment is hardly the basis for conclusions about the agreement's worth.

The potential use of an Evaluation Committee of Experts (ECE) is especially interesting. Eight topics are susceptible to an evaluation under the NAALC. The ECE procedure is deliberately nonaccusatory. It can be initiated by one government alone, as long as it is willing to open up its own enforcement record in the subject matter being evaluated. But now it is not government officials undertaking the evaluation. It is an independent panel of experts from the three countries who can undertake their own comparative analysis, reports, and recommendations. This could be a powerful tool for promoting effective labor law enforcement. Interested unions, employers, or other groups could call to their government's attention problems that might lend

themselves to a ministerial request for an ECE. Collaborating across borders, such groups could encourage all the governments to undertake an ECE in a recognized area of common concern. Beyond that, they could ask for cases implicating child labor, minimum wage, or occupational safety and health issues to advance beyond evaluation to the dispute resolution level of treatment, if two governments agree to carry such cases forward.

Another key outgrowth of the NAFTA labor side accord is the process of exchange, communication, and collaboration among labor rights advocates at the trilateral level (see box). Under the agreement's unusual cross-cutting procedures, issues involving practices in one country must be initiated in or by another country. Thus, trade unionists and their allies are compelled to collaborate across North American borders to use NAALC mechanisms.

Labor rights advocates need to view the side agreement not as a chariot of fire righting all wrongs against labor, but as one that creates new space for governments, employers, and unions to honor workers' rights. This "opening up" of labor rights debates in both domestic and international forums is one of the most important results of NAALC.

Any number of idealized "social charters" with universal standards and swift, powerful enforcement powers could be drafted by critics of the labor side agreement. But the agreement had to be negotiated by sovereign governments, each with its own swirling, often clashing, business, labor, and political currents.

The result is a hybrid agreement. It preserves sovereignty, but creates mutual obligations. It sets up new domestic agencies as well as a trilateral secretariat. It combines broad cooperation and consultation programs alongside review, evaluation, and dispute resolution mechanisms. But above all, the agreement promotes *engagement* on labor rights and labor standards on an unprecedented international scale. It's worth becoming a player, not just a critic. □