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THE NORTH AMERICAN AGREEMENT ON LABOR COOPERATION: MAIN PROVISIONS, STRUCTURE, EFFECTIVENESS, AND POSSIBILITY TO BE A MODEL

Roman IEDELIEV,
PhD student of International Law Department Institute of International Relations
Taras Shevchenko National University of Kyiv

SUMMARY

The article analyzes the North American Agreement on Labor Cooperation, which is an addition to the North American Free Trade Agreement. It is consider both legal and political reasons for its signature. The article provides study of basic provisions of this Agreement, the rights and obligations of the parties, and the structure of the organization, created for its proper implementation. This agreement, being the first international treaty that binds the economic integration and labor standards, has been the subject of criticism from all sides of social dialogue. The article deals with this criticism, assess the positive and negative aspects of the Agreement, gives the conclusion of its effectiveness.

Key words: North American Agreement on Labor Cooperation, economic integration, labor standards, cooperation.

АННОТАЦИЯ

Статья посвящена анализу Североамериканского соглашения о сотрудничестве в сфере трудовых отношений, которое является дополнительным к Североамериканскому соглашению о зоне свободной торговли. Рассматриваются как правовые, так и политические причины его подписания. Изучаются основные положения этого соглашения, права и обязанности его сторон, структура организации, созданной для его надлежащей имплементации. Данное соглашение, будучи первым международным договором, который связывает экономическую интеграцию и трудовые стандарты, стало предметом критики со всех сторон социального диалога. В статье рассматривается эта критика, оцениваются позитивные и негативные моменты соглашения, дается вывод о его эффективности.

Ключевые слова: Североамериканское соглашение о сотрудничестве в сфере трудовых отношений, экономическая интеграция, трудовые стандарты, сотрудничество.

Introduction. Regional trade agreements (RTA) have become a distinctive feature of the international trading landscape. Their number has increased significantly in recent years, as WTO member countries continue to pursue the negotiation of these agreements. Some 200-odd agreements have been notified to the WTO but their number may be actually higher, as some agreements are never notified to the multilateral bodies and many more are under negotiation [1, p. v]. As a result more and more trade is cover by such preferential deals, prompting many analysts to suggest that RTAs are becoming the norm rather than the exception.

Research problem and article's problem. The North American Agreement on Labor Cooperation (NAALC) was the first international agreement on labor to be linked to an international trade agreement. It provides a mechanism for member countries to ensure the effective enforcement of existing and future domestic labor standards and laws without interfering in the sovereign functioning of the different national labor systems, an approach that made it novel and unique. Likewise, the Commission for Labor Cooperation is the only international body since the founding of the International Labor Organization (ILO) in 1919, to be devoted exclusively to labor rights and labor-related matters.

Now we have a lot of trade agreements that contain labour standards. May it be considered as the NAALC achievement? Is the NAALC a real international organization or just a quasi-organization? Does it really create the same level of labor rights protection in Mexico as in the USA and Canada? May this experience be used in creation of new free trade areas? We still do not have special scientific researches in post-Soviet states. This article is aimed to fill this gap and answer previous questions.

The main material of research. The North American Free Trade Agreement (NAFTA) was negotiated in 1990–1992 during the administrations of US President George Bush, Mexican President Carlos Salinas, and Canadian Prime Minister Brian Mulroney. Each had a mix of economic and political motives for moving toward a continental trade treaty. These three heads of state signed the NAFTA in August 1992. NAFTA was ratified in short order by the Mexican Congress, and in May 1993 by Canada's parliament. But it took more than one year for the US Congress to act. The delay was attributable to a sharp struggle in the United States not just over NAFTA itself, but also over NAFTA's social dimension, the NAALC.

The NAFTA text contained only a passing reference in its preamble to advancing labor rights in North America.

The Bush–Salinas–Mulroney negotiators reached a Memorandum of Understanding on labor rights and labor standards (MOU) at the same time they agreed on NAFTA, but this MOU spoke only of cooperative programs and technical assistance, with no effort to set out norms and obligations to which the countries committed themselves.

The three leaders announced agreement on NAFTA just as the 1992 US presidential race was heating up. Labor, environmental and human rights organizations pressured Democratic party candidate Bill Clinton to repudiate NAFTA in his campaign for the presidency [2, p. 6]. They charged that the agreement favored multinational corporations and investors at the expense of workers and the environment, and they dismissed the labor MOU as meaningless. At the same time, however, Clinton's candidacy relied on support from important elements of the corporate and investment banking communities who supported NAFTA.

Responding to both pro- and anti-NAFTA forces, Clinton opted to support NAFTA if side agreements dealing with labor and the environment were added to the package sent to Congress for approval. After winning the November 1992 election and taking office in January 1993, the new Clinton Administration began negotiations on labor and environmental side agreements with Mexico and Canada [3, p. 771]. Negotiations commenced in March 1993. The United States first proposed a farreaching labor accord with a strong, independent commission and broad availability of trade sanctions to enforce labor standards. Canada and Mexico rejected this approach, calling instead for a small administrative secretariat with a modest research agenda, and no economic sanctions under any circumstances, and complete preservation of national sovereignty over labor matters.

The parties concluded negotiations with final agreements in August, 1993 on the NAALC and a companion environmental accord, the North American Agreement on Environmental Cooperation (NAAEC). The labor accord reflected a compromise of the countries' initial positions.

The NAALC begins with a preamble stating the Parties' intent to improve working conditions and living standards and to protect, enhance and enforce workers' basic rights as a complement to the economic opportunities created by NAFTA [4]. The Parties affirm their respect for each other's constitution and laws and their desire to strengthen their cooperation on labor matters. The three countries resolve to promote, in accordance with their respective laws, high-skill, high-productivity economic development in North America by:

– investing in continuing human resource development;

– promoting employment security and career opportunities;

– strengthening labor–management cooperation;

– promoting higher living standards as productivity increases;

– encouraging tripartite consultation and dialogue;

– fostering investment with due regard for the importance of labor laws and principles; and

– encouraging compliance with labor laws.

Article 1 of the NAALC sets forth the agreement's objectives of improving working conditions and living standards in each country, promoting the labor principles of Annex 1. The NAALC embraced eleven labor principles, which also comprised the definition of "labor law" in the article on definitions (Art. 49), although without establishing common minimum standards for domestic labor law. The eleven labor principles are (1) freedom of association and protection of the right to organize, (2) the right to bargain collectively, (3) the right to strike, (4) prohibition of forced labor, (5) labor protection for children and young persons, (6) minimum employment standards, (7) elimination of employment discrimination, (8) equal pay for women and men, (9) prevention of occupational injuries and illnesses, (10) compensation in cases of occupational injuries and illnesses, and (11) protection of migrant workers. These principles are central to understanding the steps in the NAALC's consultation mechanism as they fall into three groups of differential treatment [5, p. 232.].

Specifically, in terms of Obligations of the Parties and the Levels of Protection, Article 2 holds that affirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light. Government enforcement action is established under Article 3, which states that each Party shall promote compliance with and effectively enforce its labor law through appropriate government action.

The agreement safeguards private action in Article 4, which holds that each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of the Party's labor law. Further, each Party's law shall ensure that such persons may have recourse to, as appropriate, procedures by which rights arising under its labor law, including those in respect of occupational safety and health, employment standards, industrial relations and migrant workers, and collective agreements, can be enforced.

Under procedural guarantees, Article 5 establishes that each Party shall ensure that its administrative, quasi-judicial, judicial and labor tribunal proceedings for the enforcement of its labor law are fair, equitable and transparent and, to this end, each Party shall provide that such proceedings comply with due process of law; any hearings in such proceedings are open to the public, except where the administration of justice otherwise requires; the parties to such proceedings are entitled to support or defend their respective positions

and to present information or evidence; and such proceedings are not unnecessarily complicated and do not entail unreasonable charges or time limits or unwarranted delays. Further, each Party shall provide that final decisions on the merits of the case in such proceedings are in writing and preferably state the reasons on which the decisions are based; made available without undue delay to the parties to the proceedings and, consistent with its law, to the public; and based on information or evidence in respect of which the parties were offered the opportunity to be heard [6, p. 222]. Each Party shall provide, as appropriate, that parties to such proceedings have the right, in accordance with its law, to seek review and, where warranted, correction of final decisions issued in such proceedings.

Additionally, each Party shall ensure that tribunals that conduct or review such proceedings are impartial and independent and do not have any substantial interest in the outcome of the matter. Each Party shall provide that the parties to administrative, quasi-judicial, judicial or labor tribunal proceedings may seek remedies to ensure the enforcement of their labor rights. Such remedies may include, as appropriate, orders, compliance agreements, fines, penalties, imprisonment, injunctions or emergency workplace closures. Each Party may, as appropriate, adopt or maintain labor defense offices to represent or advise workers or their organizations. Nothing in this Article shall be construed to require a Party to establish, or to prevent a Party from establishing, a judicial system for the enforcement of its labor law distinct from its system for the enforcement of laws in general. Finally, for greater certainty, decisions by each Party's administrative, quasi-judicial, judicial or labor tribunals, or pending decisions, as well as related proceedings shall not be subject to revision or reopened under the provisions of this Agreement.

The Agreement establishes an organizational structure for implementation. The NAALC creates a Commission for Labor Cooperation that includes a cabinet-level Ministerial Council and a permanent staff Secretariat. The three labor ministers of each country make up the Council, the highest authority of the Commission. The Council must meet at least once a year in regular session, and may meet in special session at the request of any country, although in practice the Council has gone for several years without meeting. All decisions and recommendations of the Council are made by consensus, except where the NAALC provides for a two-thirds vote.

The Council oversees the implementation of the NAALC and directs the work and activities of the Secretariat. The Council sets priorities, approves an annual plan of activities and budget, approves reports and studies for publication, facilitates consultation among the Parties, promotes the collection and publication of comparable data on labor law enforcement, standards, and labor markets, and addresses any questions and differences that may arise between Parties regarding the interpretation or application of the NAALC. The Council also promotes cooperative activities on a variety of labor law subjects through seminars, workshops, conferences, joint research projects, and technical assistance.

The Secretariat of the Commission for Labor Cooperation is headed by an Executive Director chosen by the Council for a three-year term. The Executive Director's term may be extended for an additional three years. This position must rotate consecutively between nationals of each Party. As a matter of practice since the Secretariat opened in 1995, the Executive is supported by a Director of Research and a Director of Administration/Cooperative Consultations. These positions rotate between nationals of the other two countries. More often than not, these Directors are proposed by and generally appointed at the behest of the member governments' labor ministries.

The Executive Director appoints the staff of the Secretariat under general standards set by the Council, taking into account lists of candidates prepared by the Parties. The number of staff members is set at fifteen, subject to later change by the Council. The Council may reject by a two-thirds vote, in confidence, an appointment that does not meet the general standards. The agreement emphasizes the importance, but does not require, recruitment of an equitable proportion of the professional staff from among the nationals of each Party. In addition to the Directors of Research and Administration/Cooperative Consultations, the Executive Director has appointed a professional staff generally evenly divided between nationals of each of the three countries. The Executive Director also appoints a small locally recruited staff consisting of finance and administrative personnel to support the Secretariat's activities.

The Secretariat staff includes labor lawyers, economists, and other professionals experienced in labor affairs in their countries. They work in the three languages of North America, Spanish, French, and English. They have the status of international civil servants with an obligation not to accept instructions from any government or any other authority external to the Council. Correspondingly, each Party must respect the international character of the responsibilities of the Executive Director and the staff, and must not seek to influence them in the discharge of their duties.

The Commission's Secretariat was first based in Dallas, Texas where it began operations in September, 1995. In 2000 the Secretariat relocated to Washington, DC. The move was made on two main grounds: 1) the difficulty of recruiting to Dallas experienced labour experts, most of whom are based in capital cities in their countries, and 2) the absence of any international labor milieu with access to international institutions, national and international trade union and employer groups, research institutes and university centers with an international labor rights focus, and the like, all of which are present in the Washington DC area. An early signal of potential problems came when a prominent Dallas businessman told Secretariat staffers at

a welcoming reception in 1995 that the city of Dallas and the state of Texas were proud to be "union-free", and that he hoped the Secretariat would help spread the gospel of nonunionism throughout North America [7, p. 10].

The NAALC Secretariat serves as the staff support organization for the Council. It proposes a plan of activities and budget for carrying out three principal functions. The first is a research agenda under which the Secretariat publishes comparative reports on labor laws and labor markets of the three countries, and special reports as directed by the Council. Second, the Secretariat provides research and staff support to ad hoc Evaluation Committees of Experts and Arbitral Panels (see below). Finally, it serves as the general administrative arm of the Commission – organizing ministerial and subministerial meetings, retaining records, offering public information through a web site and a library open to the public, etc.

The NAALC also sets up three National Administrative Offices (NAOs), one in the labor ministry of each country. This feature distinguishes the NAALC from it companion environmental side agreement, which does not have such domestic offices in each country's environmental ministry. Labor concerns are sensitive and complicated in each country. Relations with peak labor organizations like the AFL–CIO in the United States, the Canadian Labor Congress in Canada, and the CTM in Mexico has more profound political implications than with a decentralized environmental movement with hundreds of organizations. The three countries wanted to keep one agency that each fully controls among the new institutions created by the NAALC.

Under the NAALC, each government must designate a Secretary who is responsible for administering and managing of the NAO, and each country provides the financial support it deems necessary to support the work of its NAO. This is distinct from the budget of the Secretariat, which is funded in equal proportion by each of the countries.

In addition to the secretary, each of the three national NAOs has created a professional and administrative staff of 5–10 persons to carry out its work. Professional staff include labor lawyers, labor economists, and public policy experts. Each NAO may convene a tripartite national advisory committee, as well as an advisory committee of government officials from other federal agencies or from states or provinces, to advise it on the implementation and further elaboration of the NAALC.

Each NAO serves as a point of contact with each other, with other agencies in each of their own governments, and with the Secretariat. Upon request, the NAO must provide publicly available information to each other, to the Secretariat, and to an Evaluation Committee of Experts.

The key mandate of the NAO's is found in Article 16 (3) of the NAALC, presented here in full because of its importance: "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. Each NAO shall review such matters, as appropriate, in accordance with domestic procedures".

The "public communications' noted here are complaints from any person or organization about workers" rights violations related to "labor law matters issues arising in the territory of another Party" (emphasis added). This is an unusual but critical feature of the NAALC: workers, unions and allied NGOs, employers, or other persons or organizations filing a complaint must submit it to an NAO in another country, not in the country where events giving rise to the submission occurred, to start the review process.

Each NAO has established domestic procedures for receiving and reviewing complaints about labor law matters in other countries. In general, they provide first for a threshold consideration to ensure that a complaint meets minimum requirements for acceptance for review. Once a case is accepted for review, usually within sixty days of submission, the NAO begins a 4–6 month process of conducting a review and writing a report.

There are two big criticisms of the NAALC [8, p. 838]. The first big criticism of the NAALC is that there are no common trinational, harmonized, uniform, minimum, mandatory, enforceable standards. I probably could have shortened that, but you get the idea. The idea is that instead of having a common set of standards to which the countries must adhere, you have this formulation: that the NAALC is all about national enforcement of national law; that each country remains sovereign to establish its own domestic labor law and set its own labor standards; and that what the NAALC is concerned with is effective enforcement of domestic laws, and not adjusting domestic laws to some new harmonized minimum standard to which everybody must adhere. In theory, this is not an unfair criticism. In the best of all worlds, everybody would agree on a common set of standards, stick to them, and establish some mechanism to back them up.

The second major criticism of the NAALC concerns the division of the 11 labor principles into 3 tiers of treatment under the agreement, as has already been outlined this morning. Certain specified labor rights are excluded from the NAALC process of enforcement. These include, namely, the freedom of association and the right to organize, the right to collective bargaining, and the right to strike. These subjects can only be treated by the NAO review and a ministerial consultation. They cannot go forward to evaluation or arbitration.

The deficiencies of the NAALC text and procedures include: its limited scope; the lack of parity in enforcement procedures; the complex time-consuming steps; the lack of participation by nongovernmental actors; the lack of transparency and openness; the lack of effective remedies; and the lack of accountability. Subsequent trade treaties, both bilateral and regional, have not overcome the weaknesses of NAFTA [9, p 207]. Several such treaties including the

Central America Free Trade Agreement (CAFTA) are now under consideration by national legislatures, while more than a score of new trade agreements are being negotiated around the globe.

Conclusions. Based on the NAFTA experience, there are key components that must be in all future trade and investment agreements if occupational health is to be effectively protected. These elements include: a minimum floor of occupational health and safety regulations; an "upward harmonization" of regulatory standards and actual practice; inclusion of employers so that they have formal responsibility and liability for violations of the standards; effective enforcement of national regulations and international standards; transparency and public participation; and recognition of disparate economic conditions among trading partners and provision of financial and technical assistance to overcome economic disincentives and lack of resources.

There have been a few positive aspects of the NAALC experience: greater awareness of occupational health and safety issues in some Mexican workplaces, broader knowledge of government regulations and enforcement procedures among some Mexican workers, and unprecedented cross-border solidarity and joint activities between workers, unions, women's groups, environmentalists, and occupational health professionals in Canada, Mexico, and the United States.

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