

Law and Business Review of the Americas

Volume 1 | Number 1

Article 6

1995

Labor and Environmental

Recommended Citation

Labor and Environmental, 1 LAW & BUS. REV. AM. 103 (1995)

<https://scholar.smu.edu/lbra/vol1/iss1/6>

This Update is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Law and Business Review of the Americas by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

IMPLEMENTATION:

Labor and Environmental

I. Introduction

The North American Free Trade Agreement (NAFTA) was not intended to be an international organization like the European Community. The European Community is a full-range international agreement with fully-formed institutional organizations — institutional organizations that link the decision-making centers with the national systems of the member nations. The NAFTA is first and foremost a trade agreement, however, in order to effectively implement the Agreement, it will be necessary to more fully develop the institutional structures that must accompany such a wide-ranging agreement. This article is intended to review the institutional arrangements and relationships that have been set up in the NAFTA in regard to Chapter Twenty, the Environmental Side Agreement, and the Labor Side Agreement.

II. Chapter Twenty — Institutional Arrangements and Dispute Settlement Procedures

A. THE INSTITUTIONAL STRUCTURES OF THE NAFTA

This chapter establishes the institutions which are responsible for implementing the Agreement, ensuring its joint management, and avoiding and settling disputes which may arise between the participating nations.¹ Chapter Twenty creates the Free Trade Commission, a pivotal institution in the NAFTA. The Commission is comprised of ministers (or cabinet-level officials), but is not a truly independent structure because it has no formal decision-making process or ability. This is a clear example of the difference between the NAFTA and a more complete institutional arrangement such as the European Community. It was important for the NAFTA not to be “too political” if there was to be full cooperation between the member nations. Decisions in the Free Trade Commission are to be made by consensus, a central feature of the Agreement. While this may avoid the problem of politics playing too big a role, or the possibility of one country reigning supreme over another, it causes problems with authority and the ability to make decisions quickly and decisively. What happens if no consensus is reached? Will that issue just “go away”?

Also included as part of the institutional arrangement in Chapter Twenty is the Secretariat. This institution's purpose is to serve the Free Trade Commission, other subsidiary bodies, and the dispute settlement panels. President Clinton issued Executive Order 12889 on December 27, 1993, which established the United States Secretariat pursuant to Section 105(a) of the NAFTA Implementation Act.² The Secretariat's main function is to

1. North American Free Trade Agreement, drafted Aug. 12, 1992, revised Sept. 6, 1992, U.S.-Can.-Mex., 32 I.L.M. at 605 (entered into force Jan. 1, 1994) [*hereinafter* NAFTA].

2. Exec. Order No. 12889, 58 Fed. Reg. 69,681 (1993).

provide administrative and technical support to assist the Commission.³ The United States' Secretariat is part of the Department of Commerce and located in Washington, D.C. Mexico and Canada also have Secretariat offices pursuant to Chapter Twenty.

B. CHAPTER TWENTY DISPUTE SETTLEMENT MECHANISMS

The dispute settlement provisions in Chapter Twenty are modeled, in large part, on the Canadian Free Trade Agreement, and, in contrast to the other institutional structure sections in the NAFTA, are very detailed. The provisions establish stronger dispute mechanisms, procedures for disputes involving multiple parties, and firmer deadlines.⁴ In addition to the dispute resolution institutions set up to help resolve and avoid disputes between the member nations in Chapter Twenty, the Agreement also establishes separate dispute resolution mechanisms for investments, agriculture, labor, environment, and anti-dumping and countervailing duty matters. Only member states can bring an action under the Chapter Twenty dispute settlement provisions. Chapter Twenty also "extends the frontiers of dispute resolution by covering disputes that arise with respect to the Agreement's significant rules concerning...non-traditional subjects...and as NAFTA moves into such areas, which involve complex technical matters and (which) affect large constituencies, the process itself is likely to evolve even further to accommodate those types of issues."⁵

Dispute resolution provisions throughout the NAFTA focus, in large part, on non-adversarial techniques such as consultations, consensus, and panel reviews. Article 2003 states: "The Parties shall at all times endeavor to agree on the interpretation and application of this Agreement, and shall make every attempt through cooperation and consultations to arrive at a mutually satisfactory resolution of any matter that might affect its operation."⁶

The first step in this dispute settlement process is a consultation between the disagreeing parties. The parties request a consultation (in writing) from their national Secretariat. Requiring a party to request consultation in writing provides notice to other parties and also allows third party participation in the process if that party has a significant interest in the matter.⁷ The parties are expected to give consultation measures thirty to forty-five days before moving to the next step in the dispute resolution institution. Should consultations not resolve the issue, any party may request a meeting of the Free Trade Commission. If the Commission is unable to resolve the matter, then a party may request the establishment of an arbitral panel. The panel is composed of five members drawn from a special roster who agree to serve terms of three years. Roster members are comprised of persons with experience in law, international trade, and/or all matters covered in the NAFTA, and who are independent of and not affiliated with a Party.⁸ The panel organization is intended to ensure the integrity of the dispute resolution process and limit a Party's ability to

3. See NAFTA, *supra* note 1, art. 2002(3).

4. Jeffrey P. Bialos & Deborah E. Siegel, *Dispute Resolution Under the NAFTA: The Newer and Improved Model*, 27 Int'l Law. 603 (1993).

5. See *Id.*, note 4, at 604.

6. See NAFTA, *supra* note 1, art. 2003.

7. See Bialos & Siegel, *supra* note 4, at 615.

8. See NAFTA, *supra* note 1, art. 2009.

block resolution of the dispute.⁹ Ninety days after the panel is selected, it must issue an initial report containing the findings of fact; its determination as to whether the measure in issue is inconsistent with the objectives of the Agreement; and its recommendations, if any, for resolution of the dispute.¹⁰ The parties must then submit the final report to the Commission, who will publish it.

These improved procedures help to safeguard the integrity and effectiveness of the NAFTA, which should encourage the Parties to utilize this consensual mechanism as a means of resolving potentially contentious and disruptive trade disputes. "The dispute resolution process thus may reinforce the resolution of trade issues under the rules of international law rather than the 'go it alone' rules of the international trading game."¹¹

C. THE CURRENT EFFECT OF CHAPTER TWENTY INSTITUTIONS

Jeffrey Garten, Undersecretary of Commerce for International Trade, has approved a reorganization of the Commerce Department's international economic policy division that would create a NAFTA office for trade with Mexico and Canada, and would divide the Latin American and Caribbean Trade Policy and Export Promotion functions into separate offices. Garten tapped Regina Vargo, who previously led the Office of Mexico, to head the NAFTA office, which will be in charge of the NAFTA implementation, trade promotion in Mexico as a Big Emerging Market, and the border economic development task force along the US-Mexico border.¹²

As head of the Free Trade Commission, the Department of Commerce routinely issues the Notices of First Request for Panel Review. A selection of panel review notices include:

- 1) The Canadian Horticultural Council filed a First Request with the Canadian section of the NAFTA Secretariat. Review was requested of the final affirmative injury determination made by the Canadian International Trade Tribunal in regard to "Fresh, Whole, Delicious, Red Delicious, and Golden Delicious Apples."¹³
- 2) Bridon Cordage, Inc. filed a First Request with the Canadian Secretariat for final determination made by Canadian International Trade Tribunal regarding synthetic baler twine with a knot strength of 200 pounds or less, originating in or exported from the United States.¹⁴
- 3) US Steel, Inland Steel Company, I/N Kote, and LTV Steel requested Panel Review for determination of dumping made by the Canadian Deputy Minister of National Revenue respecting certain corrosion-resistant steel sheet products from the United States.¹⁵

9. See Bialos & Siegel, *supra* note 4, at 617.

10. See NAFTA, *supra* note 1, art. 2016(2).

11. See Bialos & Siegel, *supra* note 4, at 622.

12. *Garten Okays Commerce Plan That Would Separate Policy, Promotion*, Inside NAFTA, Aug. 10, 1994, at 5.

13. Canadian Horticultural Council, 59 Fed. Reg. 18,993 (Dep't Comm. 1994) (First Request for Panel Review).

14. Bridon Cordage Inc., 59 Fed. Reg. 31,206 (Dep't Comm. 1994) (First Request for Panel Review).

15. U.S. Steel, 59 Fed. Reg. 43,816 (Dep't Comm. 1994) (First Request for Panel Review).

4) Bethlehem Steel Corporation filed Request for Review with the Mexican Secretariat to review antidumping duty determination made by Secretaria de Comercio y Fomento Industrial with respect to imports of cut-length plate, covered by customs tariff classifications 7208.32.01, etc.¹⁶

5) Maquiladora Pieles Pitic, S.A. de CV & Pitic Leather filed Request for Review with the US Secretariat to review final countervailing duty determination made by the International Trade Administration in the administrative review of leather wearing apparel from Mexico.¹⁷

This summer, the parties signed a Memorandum of Understanding establishing a free trade Coordinating Secretariat (NCS) located in Mexico City.¹⁸ Although the NAFTA has only been in effect since January, 1994, the Chapter Twenty structures are already being used, and this can only bode well for the future success of the Agreement.

III. The Environmental Institutions of the NAFTA

The NAFTA is the first trade agreement with substantial provisions which are specifically directed toward safeguarding the environment. "The Agreement prohibits the erosion of national environmental standards to encourage investment, provides for the supremacy of key international environmental agreements, and encourages the harmonization of environmental standards among the three signatory states."¹⁹

A. THE NORTH AMERICAN COOPERATION AGREEMENT ON THE ENVIRONMENT

While the NAFTA is primarily a trade agreement, it also contains very important provisions regarding environmental matters. During the NAFTA negotiations, the United States and Canada were concerned about Mexico's lax environmental policies and laws, and were worried that Mexico could exploit this to gain an advantage in trade and commerce. Environmental groups in the United States and Canada also placed a great deal of pressure on the trade negotiators to include some kind of provisions that would protect the environment. "One of the prices Mexico paid for the admission into a North American Free Trade Zone" was The North American Cooperation Agreement on the Environment (hereinafter Environmental Side Agreement).²⁰

On May 13, 1994, President Clinton issued Executive Order 12915, which stated that effective implementation of the Environmental Cooperation Agreement is essential to the

16. Bethlehem Steel Corporation, 59 Fed. Reg. 47,116 (Dep't Comm.) (First Request for Panel Review).

17. Maquiladora Pieles Pitic, 59 Fed. Reg. 50, 729 (Dep't Comm.) (First Request for Panel Review).

18. *Negotiators Initial Pact to Set Up NAFTA Coordinating Secretariat*, Inside NAFTA, Aug. 24, 1994, at 3.

19. Nicolas Kublicki, *The Greening of Free Trade: NAFTA, Mexican Environmental Law, and Debt Exchanges for Mexican Environmental Infrastructure Development*, 19 Colum. J. Envtl. L. 59, 62 (1994).

20. J. Owen Saunders, *NAFTA and the North American Agreement on Environment Cooperation: A New Model for International Collaboration on Trade and the Environment*, 5 Colo. J. Int'l Envtl. L. & Pol'y 273, 284 (1994).

realization of the environmental objectives of the NAFTA and the NAFTA Implementation Act and promotes cooperation on trade and environmental issues between the United States, Canada and Mexico.²¹ The Environmental Side Agreement is characterized by commentators as an environmental agreement with some trade implications as opposed to a trade agreement with some environmental provisions (as the NAFTA is considered).²² This side agreement is intended to promote cooperation on the conservation, protection and enhancement of the environment, but more importantly to commit its signatories to effective enforcement of their environmental laws. If integration between environmental and commercial issues occurs, the NAFTA "may mark not only a significant step forward in international commerce, but also remarkable progress in the wise reconciliation of conflicting environmental and trade interests."²³ As opposed to the main NAFTA text, the environmental side agreement focuses heavily on the institutional structures needed to effectively implement the Agreement, and according to Saunders, the greatest potential for innovative approaches to improving cooperative action on the environment is found in the institutional provisions of the agreement.²⁴ The Environmental Side Agreement commits the parties to effectively enforce their environmental laws and regulations through appropriate governmental actions including: appointing and training inspectors; monitoring compliance; investigating suspected violations; publicly releasing noncompliance information; and requiring record keeping and reporting.²⁵

1. *The Commission for Environmental Cooperation*

The Commission for Environmental Cooperation was established pursuant to the North American Agreement on Environmental Cooperation and the NAFTA Implementation Act to promote cooperation on trade-related environmental issues between the NAFTA parties, to provide sustainable development, and to encourage compliance with applicable laws and regulations.²⁶ The Commission is comprised of the Council, the Secretariat, and the Dispute Resolution bodies. The Commission is charged with the duty to cooperate with the Free Trade Commission to achieve the NAFTA's environmental goals and objectives. The Commission may delegate its work to committees, working groups, or expert groups, including non-governmental organizations (NGOs). An NGO is defined as "any scientific, professional, business, non-profit, or public interest organization or association which is neither affiliated with, nor under direction of, a gov-

21. Exec. Order No. 12,915, 59 Fed. Reg. 25,775 (1994).

22. See Saunders, *supra* note 19, at 284.

23. Raymond B. Ludwiszewski, "Green" Language in the NAFTA: Reconciling Free Trade and Environmental Protection, 27 Int'l Law. 691, 706 (1993).

24. See Saunders, *supra* note 19, at 289.

25. North American Agreement on Environmental Cooperation Between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States, Sept. 13, 1993, 32 I.L.M. 1480 (entered into force Jan. 1, 1994) [*hereinafter* Environmental Side Agreement].

26. Public Meeting for Commission Established Under Environmental Cooperation: Meeting Agenda, 59 Fed. Reg. 33,970 (1994).

ernment.”²⁷ Permitting NGOs and private citizens an opportunity to become involved in the NAFTA process allows them a means to become environmental “watchdogs” on an international level. It is hoped that the CEC will become the principal clearing-house for regional environmental disputes.²⁸

As with the Free Trade Commission, the Council is comprised of a Cabinet-level representative from each member state in the area of environmental protection. Deputy Prime Minister and Environmental Minister Sheila Copps is the Canadian representative; SEDESOL Secretary Carlos Rojas is the Mexican representative; and Environmental Protection Agency Administrator Carol M. Browner is the United States representative. The Council is given a wide-ranging mandate to serve as a forum for environmental matters, and is to be a forum for discussing and making recommendations on all environmental issues, including settling actual or potential disputes among the NAFTA countries.²⁹ The Council will address questions the parties may have about compliance or interpretation of the Agreement, but its main function is to promote the exchange of information on the standards and methodology used by each country in the environmental area. It will strive to formulate recommendations to achieve the highest level of compatibility.

Montreal, Canada, was chosen in March 1994 to be the headquarters for the “Environmental” Secretariat. It will be headed by Executive Director Victor Lichtinger, a Mexican economist, who was appointed by the Council for a three-year term. It is hoped that the Director and staff will be free from political influence. The Secretariat has the power to undertake reports on its own initiative (compared with the limited role of the Free Trade Secretariat), which may be an effective tool for raising the international visibility of environmental issues.³⁰ Like the Free Trade Commission Secretariat, this Secretariat is also responsible for providing technical and administrative support to the Council. In a significant departure from the Agreement, the Environmental Secretariat can obtain information from private citizens and non-governmental organizations (NGOs) about the participants’ compliance (or lack of). This aspect of the Side Agreement provides a significant opening of the process to the public, an opportunity not really found elsewhere in the NAFTA.

Another institutional structure found in the Environmental Side Agreement is the Joint Public Advisory Committee (JPAC), which is made up of fifteen members (five from each country), who do not have to be government officials. The JPAC is considered to be the most innovative institution established under the Environmental Agreement, and will meet at least once a year. Its main function is to provide the Secretariat with scientific and technical information on any environmental matters regarding the NAFTA countries.

The dispute resolution institutional structure formulated in the Environmental Side Agreement is set up much like the dispute settlement structures in Chapter Twenty of the NAFTA text, with the main exception being that parties other than the NAFTA governments may participate in the process. The dispute resolution structure is a three-tiered

27. See Environmental Side Agreement, *supra* note 24, art. 45.

28. Christine MacDonald, *Environmentalists Discuss NAFTA*, Dallas Morning News, Oct. 15, 1994, at A26.

29. Office of the US Trade Representative, *The NAFTA: Report on Environmental Issues*, Issue 65, (1993).

30. See Saunders, *supra* note 19, at 292.

process, and may only be used where there has been a persistent pattern of failure by a party to effectively enforce its environmental laws.³¹ As with the main NAFTA dispute settlement provisions, consultation between the aggrieved parties should occur first. This is triggered by a written request by a party stating that another party has shown a "persistent pattern of failure enforcing its environmental laws." Should this not resolve the dispute, the parties have the option of contacting the Commission for Environmental Cooperation, where it would then go to the Council for review and discussion. If this does not effectively end the problem, the matter next goes to an arbitral panel.³² The Environmental Protection Agency held its first meeting of the Council on July 26, 1994, in Washington, D.C. The purpose of the meeting was to afford the public an opportunity to present to the Council their ideas and expectations. The Council announced selection of the Executive Director, members of the Joint Public Advisory Committee, initial priorities of the Council and expected funding for the Commission.³³

2. Other Environmental Institutional Structures

Two advisory committees, one public and one private, will advise EPA Administrator Browner in her role as the United States council member at the Commission for Environmental Cooperation. The National Advisory Committee will be headed by Mary Kelly, Executive Director of the Texas Center for Policy Studies, and will meet twice annually. This committee will be composed of fifteen representatives from industry, non-profit organizations, and academia, and will hold their posts for one year. The other institutional structure is the Governmental Advisory Committee, which is chaired by Judith Espinosa, the Secretary of the New Mexico Department of Environment. The Committee will consist of thirteen members representing state, local and tribal governments.³⁴

The Side Agreement also establishes the North American Development Bank, whose primary objective is the funding of environmental projects and infrastructure for the border region. It will be headquartered in San Antonio, Texas. The Development Bank has received \$168 million in first-year funding as of October 1, 1994, but is not expected to start lending much before the beginning of 1995.³⁵ It will also help fund community development projects in towns that have industries that are severely affected by the increase in foreign competition.

The Border Environmental Cooperation Commission is intended to strengthen environmental cooperation between Mexico and the United States and help the two countries deal with the enormous problems associated with the environmentally overstressed border region. The Border Commission will establish a variety of cooperative environmental projects and provide technical assistance for environmental matters (especially for the Mexicans, whose technology in the environmental area lags behind that of the United States).

31. See Environmental Side Agreement, *supra* note 24, art.22(1).

32. See Environmental Side Agreement, *supra* note 24, art. 24.

33. Meeting of the Environmental Protection Agency, 59 Fed. Reg. 33,970 (1994).

34. Two Advisory Committees, 11 Int'l Trade Rep. 31, d53 (Aug. 3, 1994).

35. Christine MacDonald, *Environmentalists Discuss NAFTA*, Dallas Morning News, Oct. 15, 1994, at A26.

Border offices will be located in El Paso, Texas and San Diego, California. Creation of the Border Environmental Cooperation Commission has been slowed due to a dispute over whether a Mexican or United States citizen would lead the Commission. The countries have now agreed that a U.S. citizen will head up the institution.

IV. NAFTA, Labor Relations, and the North American Agreement on Labor Cooperation

As discussed above, the North American Free Trade Agreement has had a major impact on environmental issues and relations between the United States (hereinafter U.S.), Mexico, and Canada. However, the NAFTA not only affected the environmental arena, but it has also had a major impact on labor relations between the countries. In order for the NAFTA to be fully implemented with respect to labor, the signatory countries have signed a side agreement dealing with labor, the North American Agreement on Labor Cooperation.

The North American Agreement on Labor Cooperation (NAALC) was signed by the leaders of the NAFTA nations at Mexico City, Washington, D.C. and Ottawa on September 8, 9, 12, and 14, 1993.³⁶ In its preamble, the NAALC, affirms its trilateral commitment to the creation of an expanded and secure market for goods and services produced in the NAFTA national territories; enhancement of the competitiveness of national firms and global markets; creation of new employment opportunities and improvement of the working conditions and living standards in the respective territories; and the protection, enhancement, and enforcement of basic worker's rights. The NAALC was required by section 101(b)(2) of the North American Free Trade Agreement Implementation Act. In order for the NAFTA to enter into force with respect to Canada or Mexico, this section requires that "the government of each country must exchange notes with the U.S. providing for the entry into force of the NAALC for that country and the U.S."³⁷

A. NAALC REQUIRES THE SETTING UP OF NAO'S

Under Article 15.1 of the NAALC, each Party is required to set up a National Administrative Office (NAO) to deal with labor disputes which may arise between the countries. Each NAO must be at the federal government level and each Party must notify the other Parties of the NAO's location. Created under Article 22 of the NAALC is the Ministerial Council, which reviews decisions reached by the NAOs with respect to labor disputes in the signatory countries.

The NAALC also outlines the procedures which the NAOs must follow to consult with one another about labor laws in the NAFTA countries, its administration, and labor market conditions.³⁸ These consultations require each NAO provide to the other NAO's all publicly available information including, but not limited to: description of relevant laws in their country, description of regulations and procedures, and a description of the policies

36. *Revised Notice of Establishment of U.S. National Administrative Office*, 59 Fed. Reg. 16,660 (April 7, 1994).

37. *Notice of Establishment and Request for Comments*, 58 Fed. Reg. 69,410 (Dec. 30, 1993).

38. *Id.*

and practices followed in their country. Also required is information dealing with any proposed changes to these procedures, policies, and practices, as well as clarifications and explanations that relate to any of these matters, which may assist consulting NAO's to better understand and respond to the issues raised by submitting parties.³⁹

B. ACTUAL ESTABLISHMENT OF THE UNITED STATES NAO

On December 30, 1993, the Office of the Secretary of the United States set forth a Notice of Establishment for the NAO in the United States, which stated the proposed establishment procedures for the U.S.⁴⁰ Procedures for governing the activities of the NAO were presented, and the Secretary requested written suggestions and comments. Two sets of comments were timely received from The Industrial Relations Committee of the U.S. Council for International Business (the Business Roundtable's Task Force on Human Resources and International Trade and Investment concurred on these comments, also endorsed by the international labor affairs group of the National Association of Manufacturers), and The International Labor Rights Education and Research Fund.⁴¹ On April 7, 1994, the Office of the Secretary issued a revised Notice of Establishment of the U.S. NAO and procedural guidelines. This revised notice incorporated certain modifications made by the various written suggestions and comments.⁴²

C. LABOR LAW DEFINED UNDER THE NAALC

With respect to the NAALC, labor law is defined very broadly as to include laws and regulations directly related to the following: (1) freedom of association and protection of the right to organize; (2) the right to bargain collectively and the right to strike; (3) prohibition of forced labor; (4) labor protection for children and young persons; (5) minimum employment standards, including minimum wages and overtime pay, covering wage earners, including those not covered by collective agreement; (6) elimination of employment discrimination on the basis and grounds such as race, religion, age, sex, or other grounds determined by each countries domestic laws; (7) equal pay for men and women; (8) prevention of occupational injuries and illnesses; and (9) protection of minor workers. Obviously, the NAALC seems to govern just about any matter that slightly affects labor.

The signatory countries are also expected to follow "high labor standards" and to continue improving labor relations within their own countries as well as with the other signatory countries. The Agreement encourages countries to promptly comply with, and effectively enforce, its labor laws through "appropriate" government action.

39. *Id.*

40. *Id.*

41. *Id.*

42. See *Id.*, note 36.

V. National Administrative Organizations (NAO)

A. FUNCTIONS OF THE U.S. NAO

Each NAFTA signatory countries is required to set up a NAO under Article 16(1) of the NAALC.⁴³ Article 16 sets out NAO functions including: (1) to serve as a U.S. point of contact with respect to the NAALC for other U.S. agencies, the NAOs of Canada and Mexico, and the Secretariat of the Commission for Labor Cooperation established by the NAALC; (2) to provide publicly available information about U.S. labor law matters upon request from the trinational Secretariat of the Commission for Labor Cooperation, the Canadian or Mexican NAO, or an ad hoc trinational Evaluation Committee of Experts formed to analyze labor law matters; (3) to provide for the submission, receipt, and review of labor matters; and (4) to periodically publish a list of public communications on labor law matters in Canada and Mexico and the review of such matters by the United States.^{44,45} Along with publishing communications between the parties, the NAO is required to publish periodic and special reports, collect information on labor matters involving another Party, and compile materials concerning any labor law legislation of another Party.⁴⁶ The NAO shall consider the views of other committees created under the NAALC and shall consult with any appropriate U.S. government entities.

On July 19, 1994, Irasema T. Garza, Executive Director of the Congressionally mandated Commission on Family and Medical Leave, was appointed as Secretary of the United States NAO by Labor Secretary Robert B. Reich.⁴⁷ The U.S. NAO serves as the official review agency of labor law matters in the United States, which reviews decisions promulgated by the Ministerial Council.⁴⁸ In regard to review of submissions for labor law violations, the NAO shall receive, accept for review, and review all submissions on labor law matters arising in the territory of another Party. The NAO, at the discretion of the Secretary, may initiate a review of any matter covered under this Agreement.⁴⁹

1. Requirements for submission to the NAO

Any person may file a submission with the NAO regarding labor law matters arising in the territory of another Party. To make a submission for NAO review, certain guidelines must be followed. Only a single copy is required; it can be mailed, hand delivered, or faxed to the Office. The submission must clearly identify the person filing, should be signed and dated, and should clearly state the matters that the submitter requests the Office to

43. See *Id.*, notes 36 and 37.

44. Ofc. of Info., U.S. Dep't of Labor, Press Release No. 93-584, Office to Monitor Labor Issues Under NAFTA Set Up at Labor Department (Dec. 1993).

45. *Revised Notice of Establishment and Procedural Guidelines*, 59 Fed. Reg. 16,660 (April 7, 1994).

46. *Id.* at Section J.

47. *Irasema T. Garza*, 11 Int'l Trade Rep. 30 (July 27, 1994).

48. *Labor: NAFTA Signatory Officials Meet on Establishment of Labor Secretariat*, 11 Int'l Trade Rep. 27 (July 6, 1994).

49. *Revised Notice of Establishment of U.S. NAO and Procedural Guidelines, Section C(5)*, 59 Fed. Reg. 16,661 (April 7, 1994).

consider.⁵⁰ These matters should be explained with great specificity and include any supporting information available. To the fullest extent possible, the submission should discuss whether: (1) the matters complained of appear to demonstrate action inconsistent with another Party's obligations under the Agreement; (2) there has been harm to the submitter or other persons, and, if so, the extent of that harm; (3) the matters complained of appear to demonstrate a pattern of nonenforcement of labor law by another Party; (4) relief has been sought under domestic laws of another Party, and, if so, the status of the legal proceedings; and (5) matters that are pending before any international body.⁵¹

2. Guidelines for acceptance by the Secretary

The Agreement also delineates guidelines for acceptance of submissions. The Secretary must determine within 60 days whether to accept the submission for review. In general, the Secretary will accept a submission for review if it raises issues relevant to labor law matters in the territory of another Party or if a review would further the objectives of the Agreement.⁵² However, the Secretary may decline to accept a submission for review if the submission does not identify the person filing the submission, or if it is not signed and dated. Also, if there is not enough specific information to determine the nature of the request which would permit appropriate review, the Secretary may refuse review.⁵³ Even if the statement in the submission contains sufficient specific information, and could be substantiated but would not constitute a failure of another Party to comply with its obligations under the Agreement, review will be denied. If the submitting party has not sought the appropriate relief under the domestic law of another Party, or if the matter is pending before an international body, the Secretary may also decline review.⁵⁴ Lastly, if the submission is substantially similar to a recent submission, and significant, new information is not available, the Secretary may decline the opportunity to review the new submission.

Once a submission for review is accepted, the Secretary will publish a notice of the determination in the Federal Register. The Notice of Determination is a statement specifying why such review is warranted, and includes the terms of review.⁵⁵ If the Secretary declines to accept a submission for review, the Secretary shall promptly notify the appropriate persons, and provide reasons for this determination.⁵⁶

3. Accepted Submissions: Honeywell and General Electric

To date there have only been two submissions accepted for review by the U.S. NAO. In order for submissions to be accepted, they have to allege that one of the signatory countries is not enforcing its labor laws and provide evidential proof to support these allegations.⁵⁷

50. *Id.* at Section F(1).

51. *Id.* at Section F(2)(a)-(e).

52. *Id.* at Section G(2).

53. *Id.* at Section G(3)(a).

54. See *Id.*, note 46, at Section G(c)(3).

55. See *Id.*, note 46, at Section G(4).

56. See *Id.*, note 46, at Section G(5).

57. See *Id.*, note 48.

The first petition accepted for review was an allegation against Honeywell Incorporated (hereinafter Honeywell) for supposedly firing workers due solely to their union activities. The petition was filed on February 14, 1994, by the International Brotherhood of Teamsters (Teamsters).⁵⁸ The Teamsters charged that Mexican workers were fired for attempting to organize workers at Honeywell's electronics factory in Chihuahua, Mexico.⁵⁹ The submission requested the NAO require Honeywell to reinstate the workers, and to allow Honeywell workers in all Mexican facilities to unionize without intimidation from management. The Teamsters also asked the NAO to approve sanctions against any U.S. corporations that violates NAALC.⁶⁰

Honeywell released a statement that its actions in Chihuahua "have been distorted as part of an orchestrated anti-NAFTA union campaign."⁶¹ The company claimed it eliminated the fifteen office workers and eight factory workers in an attempt to reduce the workforce at the facility from four-hundred-eighty-six to four-hundred-fifteen by the middle of 1995.⁶² Honeywell says the reduction was driven by several factors, including the planned relocation of a subassembly line to its facility in Tijuana, Mexico. Twenty-three of the workers were laid off and received full separation benefits, while the other worker was fired for violations of written workplace rules. Honeywell felt its actions were in compliance with Mexican law and did not violate any agreement between the U.S. and Mexico.⁶³

The second petition for review was filed by the United Electric Workers against General Electric Company (hereinafter GE). Also filed on February 14, 1994, This petition, also filed on February 14, claimed unfair labor practices with respect to the alleged firing of workers for union activities.⁶⁴ GE also denied that the company violated the NAFTA or any law of the United States or Mexico. GE terminated eleven employees at its Juarez plant, and attributed these terminations to work rule violations. An internal review by GE found that four workers were properly terminated by local management for violating "clearly communicated company work rules."⁶⁵ Six other employees denied the company's offer for reinstatement and accepted severance pay. GE is still reviewing the case of another employee who was "affected by the reduction in the workforce."⁶⁶ GE felt these actions were fueled by a union organizing campaign in Mexico and the Union's continued anti-NAFTA efforts.

Both of these petitions were reviewed by the U.S. NAO, and Mexican workers testified before the review panel. They described the workplace as filled with fear, repression, and

58. *Labor: NAFTA Labor Protections Put to Test as Mexican Workers Testify before NAO*, 11 Int'l Trade Rep. 36, (Sept. 14, 1994).

59. *Labor: Unions File Charges under NAFTA against General Electric and Honeywell*, 11 Int'l Trade Rep. 8 (Feb. 23, 1994).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Labor: NAFTA Labor Protections Put to Test as Workers Testify Before NAO*, 11 Int'l Trade Rep. 36 (Sept. 14, 1994).

64. *Id.*

65. See *Id.*, note 59.

66. See *Id.*, note 59.

retaliation against those workers who supported union activity. One Honeywell worker testified that she was fired after refusing to give company officials the names of other workers who supported the union organizing drive.⁶⁷ This worker also stated that workers were not adequately protected against the toxic chemicals used, and that some workers were forced to work so hard and fast that they became physically exhausted. A worker at GE's *Compania Armadora* plant testified he was fired after talking to a U.S. reporter about safety problems at the plant.⁶⁸ GE and Honeywell officials both state they fully complied with the labor laws of Mexico.

4. *Decision by NAO With Respect to Honeywell and GE*

The NAO released its report on October 13, 1994, stating that it found no evidence that Mexico failed to enforce its labor laws when dealing with complaints from the union activists terminated by Honeywell and GE.⁶⁹ This decision seemed to rest on the fact that most of the terminated workers received severance pay following their discharge. Based largely on this, the NAO determined that the Mexican authorities were pre-empted from establishing whether the dismissals were justified or retaliatory.⁷⁰ The NAO also refused to recommend that the unions' complaints be forwarded for ministerial review.⁷¹ The NAO did, however, make a series of recommendations aimed at establishing cooperative activities on the issues of freedom of association and the right to organize.

Both the Teamsters and the United Electrical Workers expressed their displeasure with the ruling, especially the NAO's failure to request consultation by U.S. and Mexican officials.⁷² Teamsters President Ron Carey felt this ruling was a clear indication that the Clinton Administration will not keep its promise of using the NAFTA to protect both U.S. and Mexican workers' rights. He described the NAALC as "toothless and ineffective,"⁷³ thereby allowing GE and Honeywell to violate workers rights while being protected by an inactive U.S. government. Secretary Garza, in response to the unions' charges, stated that the overall process was productive, and allowed the NAO to learn about Mexican labor law. Both Honeywell and GE were pleased to be vindicated, and Honeywell felt the NAO addressed the matter in a fair and thoughtful manner.⁷⁴

5. *Reviews and Public Reports by the NAO*

Once the Secretary has made a determination to review a submission, the Office shall conduct a further examination of the submission to assist it in better understanding the

67. See *Id.*, note 63.

68. See *Id.*, note 63.

69. *Labor: NAO Closes Book on Union NAFTA Charges Against Honeywell and General Electric*, 11 Int'l Trade Rep. 41, (Oct. 19, 1994).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

issues.⁷⁵ This information should be made public, unless it is exempt from public inspection.⁷⁶ The Secretary should then promptly hold a hearing on the submission, and notice of this hearing should be published in the *Federal Register* 30 days in advance. The hearing should be open to the public, with all proceedings conducted in English.⁷⁷ The hearing will be chaired by the Secretary, and assisted by the Office staff and legal counsel, and within 120 days of accepting the submission, the Secretary shall issue a public report, which will include a summary of the proceedings and any findings and recommendations.⁷⁸

VI. Ministerial Council Commission for Labor Cooperation

The Ministerial Council was created by the NAALC for the purpose of the ministerial review discussed above. The Council is chaired by U.S. Labor Secretary Robert B. Reich. The Council had its inaugural meeting on March 21, 1994; the meeting was attended by Mexican Secretary of Labor and Social Welfare, Arsenio Farrell, and Canadian Minister of Human Resource Development, Lloyd Axworthy.

If the Secretary determines that the matter has not been satisfactorily resolved, the NAO Secretary shall recommend that the Secretary of Labor request consultation at the ministerial level. This level of review was refused in the report submitted by the Teamsters and United Electrical Workers against GE and Honeywell, respectively.⁷⁹ If after ministerial consultations the matter has still not been satisfactorily resolved, the Secretary shall request that the Secretary of Labor set up an Evaluation Committee of Experts. If still not resolved, the Secretary of Labor shall recommend dispute resolution. Before making such a recommendation, the Secretary should consult the appropriate entities of the U.S. Government.⁸⁰

A. MINISTERIAL COUNCIL MEETING

The meeting was designed to allow the Parties to exchange views on the structure of the Commission, which includes the Council of Ministers and a supporting Secretariat. The members also discussed how they intend to achieve the objectives of NAALC. Their actions included creating: (1) an organizational structure for the trinational Secretariat in Dallas, Texas; (2) a process for hiring the Executive Director of the Secretariat; (3) a salary structure for staff of trinational Secretariat; (4) a budget and work plan; (5) a program for trinational cooperative activities; and (6) financial procedures and guidelines for the Secretariat and Commission.⁸¹

75. *Revised Notice Of Establishment of U.S. NAO and Procedural Guidelines*, Section H (1), 59 Fed. Reg. 16,662 (April 7, 1994).

76. *Id.*

77. *Id.*, at Section H(5).

78. *Id.*, at Section H(8).

79. *Labor: NAO Closes Book on Union NAFTA Charges against Honeywell and General Electric*, 11 Int'l Trade Rep. 41, (Oct. 19, 1994).

80. *Revised Notice of Establishment of U.S. NAO and Procedural Guidelines*, Section I (1)-(3), 59 Fed. Reg. 16,662 (April 7, 1994).

81. Ofc. of Info., U.S. Dep't of Labor, Press Release No. 94-143, First Meeting of the Ministerial Council Commission for Labor Cooperation North American Agreement on Labor Cooperation (1994).

The Council members also agreed to take several joint initiatives under the Cooperative Work Plan set out in the NAALC, and they agreed to work foremost on safety and health in the workplace. They also discussed employment and training issues, productivity and quality in the workplace, and several approaches to industrial relations in the three member countries.⁸²

In July, 1994, senior officials of the three signatory countries met to establish the trilateral secretariat in Dallas, Texas. The officials decided that the head of the labor group would be a Canadian. The head of the environmental secretariat in Montreal, Canada will be a Mexican citizen, and the head of the trade secretariat in Mexico City, Mexico; an American. The trilateral secretariat will have 15 members, five from each NAFTA country.⁸³

VII. Conclusion

It will be essential to the effective implementation and future success of the NAFTA that its institutions work smoothly and operate in such a manner as to encourage the Parties to use them. Unfortunately, there has been much delay in getting the institutions up and running; but the structures and organizations already in place are showing a good return. The potential is there to make the NAFTA one of the most complete trade agreements in history. The Environmental and Labor Side Agreements, and the structures created therein, dramatically increase the scope of the NAFTA's boundaries.

82. *Id.*

83. *Labor: NAFTA Signatory Officials to Meet on Establishment of Labor Secretariat*, 11 Int'l Trade Rep. 27 (July 6, 1994).
