RE: Designation of the Office of Trade Agreement Implementation as Contact Point for Labor Provisions of Free Trade Agreements; Procedural Guidelines

Dear Mr. Karesh:

The U.S. Chamber of Commerce (Chamber) is pleased to submit these comments in response to the Department of Labor’s notice, published in the Federal Register on December 23, 2004, designating the Office of Trade Agreement Implementation (Office) as the contact point for labor provisions of free trade agreements and the procedural guidelines pertaining to the public submission process.

The Chamber is the world’s largest business federation, representing more than three million businesses and organizations of every size, sector, and region, with substantial membership in all 50 states. Chamber members have significant operations internationally, in addition to the United States. Implementation of free trade agreements and any related labor provisions have a significant impact on Chamber members.

The Chamber strongly supports efforts by the Labor Department and its Office to foster cooperation and understanding among the free trade partners of the United States on labor and employment matters and among employers doing business or seeking to do business in those countries. However, we have significant concerns about how some parties have abused the submission process under the North American Agreement on Labor Cooperation (NAALC) and how the Department’s proposed submission process might be abused. While we appreciate the need for a submission process, the goals of labor provisions in free trade agreements will be best achieved by a focus on cooperative efforts and by modifying the submission process to include procedural protections to prevent abuse.

Submission Process

While the focus of labor provisions that have been included in free trade agreements is cooperative efforts among the parties, many labor provisions provide a mechanism for individuals, unions, employers, and other members of the public to submit communications to the government on labor and employment law matters, such as allegations that one party to a
trade agreement is not complying with its commitments under the labor provisions.\(^2\) For example, the NAALC includes a number of procedures by which submissions are considered by the parties, including consultations and potential review by an evaluation committee of experts. Certain unresolved matters could also be subject to dispute resolution procedures and ultimately monetary assessments and trade sanctions.

While the various trade agreements’ labor provisions differ, they are similar to the extent that the submission process plays a comparatively minor role. Nevertheless, the submission process typically attracts the most attention and criticism. We appreciate the view that members of the public should have a mechanism to raise concerns within the scope of appropriate labor provisions and ensure that those concerns be given due consideration. Unfortunately, there is significant potential for abuse of the submission process by those who may be motivated less by ensuring that the objectives of the labor provisions are carried out but by other factors, for example, influencing an ongoing labor dispute or waging an adverse publicity campaign, such as a corporate campaign, against an employer.

The Office faces a significant challenge in ensuring that the submission process is not abused by those with ulterior motives. This is largely due to the fact that the process is highly visible. The Department’s proposal makes very modest changes that might help alleviate the potential for abuse of the submission process. There remain a number of additional steps that the Department could take to ensure the submission process is not abused.

**Corporate Campaigns**

While a full discussion of corporate campaigns is beyond the scope of these comments,\(^3\) a brief description may be helpful to understand how the submission process could be used as one element of such a campaign. At its most basic level, a corporate campaign is a coordinated effort to force a corporation to take a particular action. For example, in the union representation context, it is not uncommon for a labor organization to wage a corporate campaign against an employer to force it to recognize the union without a secret ballot election conducted by the National Labor Relations Board. As described by one federal court, the corporate campaign encompasses a wide and indefinite range of legal and potentially illegal tactics used by unions to exert pressure on an employer. These tactics may include, but are not limited to, litigation, political appeals, requests that regulatory agencies investigate and pursue employer violations of state or federal law, and negative publicity campaigns aimed at reducing the employer's goodwill with employees, investors, or the general public.\(^4\)

As described by Communications Workers of America (CWA) President Morton Bahr, labor unions favor waging corporate campaigns as a way to exert economic pressure over employers as compared to striking, the traditional economic weapon of unions, because corporate campaigns “put even greater economic pressure on [employers] … while allowing union members to stay on the job, earning their wages.”\(^5\) Certainly, however, many corporate

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\(^2\) See, e.g., NAALC Article 16(3).


\(^4\) Food Lion, Inc. v. UFCW, 103 F.3d 1007, 1004 n.9 (D.C. Cir. 1997).

\(^5\) Elizabeth Lesly, *Union at AT&T Has Tough Option; Wants Workers, Pals To Use Competitors*, WASH. TIMES, Jun. 5, 1992.
campaigns do not have the interests of the workers most immediately impacted at heart. For example, as noted by George Washington University professor Jarol Manhein, among the top reasons unions wage corporate campaigns is to punish an employer, “even to the point of driving it out of business.”

In the context of labor provisions in trade agreements, organized labor has used the submission process under the NAALC as part of corporate campaigns similar to methods by which it uses agency investigatory processes to focus attention toward a company and to help drive public opinion. While such a submission may implicate issues covered by labor provisions of trade agreements, the principal purpose of the submission is not to better achieve the goals of the labor provision but to force a particular employer to engage in some desired conduct, for example, recognizing a union without a secret ballot election or to accept union demands during contract negotiation.

Example of Abused Submission Process Under the NAALC – Mexican Submission 9501 (plant closings)

One of the first submissions made under the NAALC was made through the Mexican NAO raising issues regarding freedom of association and the right to organize in the context of an employer that suddenly closes its business. The facts submitted to the Mexican NAO involved a single incident at a U.S. telecommunications company.

The factual background involved a U.S.-based multinational telecommunications company (the parent) that purchased a California-based company (the subsidiary) whose business model involved marketing long distance telephone service to Spanish speaking customers. Specifically, the employer decided to close the subsidiary on July 14, 1994, and immediately terminate its employees, with 60 days pay and benefits. The submitters felt that the employee layoffs interfered with the employees’ right to organize and bargain collectively, because when the shutdown was announced, the CWA and the subsidiary had already agreed to hold a representation election on July 22.

However, the assertion that worker rights were violated ignores the very serious financial difficulties that faced the subsidiary company. In fact, it was running a $4.5 million loss for the year in 1994 when the decision to close was made, in comparison to the $8 million in annual profit the parent company had expected.

While there were certainly additional facts that complicated analysis of the case, in the end a federal appeals court ruled that the employer did not act with anti-union animus in its decision to close the facility, but did so based on the “overwhelming record evidence that [the subsidiary] was in a serious and sustained financial decline throughout the months before its closure.” In other words, the company’s action in closing the subsidiary was base on lawful economic concerns, not an unlawful attempt to interfere with employee rights.

However, long before the federal courts ruled on the lawfulness of the shutdown, the union filed its NAALC submission for the principal purpose of helping shape public opinion toward the parent company as part of a corporate campaign with the ultimate goal of organizing

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6 MANHEIM, supra note 4, at 193.
7 Facts taken from LCF, Inc. v. NLRB, 129 F.3d 1276 (D.C. Cir. 1997).
8 Id. at 1283.
the parent company’s long distance company. While the union focused on traditional elements of organizing, including education campaigns targeting the employer’s employees, it also included corporate campaign elements. For example, to pressure the employer to yield to union demands, the union solicited the help of overseas unions who had more influence over the employer’s global partners. In fact, the CWA had laid the groundwork for a campaign using the NAALC by forming alliances with its Mexican and Canadian counterparts to strategically use the NAALC in pressuring employers. Indeed, the CWA explicitly consulted with its Mexican counterpart prior to its submission with the Mexican NAO.

Proposed Guidelines Related to the Submission Process

Using the plant closing case as an example, it is easy to see how the submission process is attractive in waging a corporate campaign and to identify flaws that should be corrected. The Labor Department’s proposed guidelines, if adopted, might modestly strengthen the integrity of the submission process by eliminating the presumption that a submission will be accepted and by eliminating the presumption that a hearing will be held on accepted submissions. In addition, requiring submissions to address whether they reference a sustained or recurring course of action and whether that action reflects something other than a reasonable exercise of discretion or a bona fide decision regarding the allocation of resources may help provide information that results in a decreased chance of accepting a submission designed to abuse the submission process. However, there are several additional steps that the Department could take to ensure that the integrity of the process is improved.

In particular, the Department should prohibit the acceptance of submissions based on a single incident as well as those submissions that have not been fully adjudicated in the country of jurisdiction. The Department should prohibit the identification of cases by names of employers and establish a presumption against holding a hearing. In addition, the Office should take affirmative steps to adopt processes to prevent misuse of the submission process to affect an ongoing labor dispute.

First, submissions based on a single incident should not be accepted. Submission processes typically permit members of the public to challenge whether a free trade partner country is effectively enforcing its labor and employment laws. However, determining whether enforcement has been effective is hardly possible based on a single set of facts and circumstances. Indeed, it would seem that any fair analysis of whether enforcement has been effective could only be made after examining enough separate events or circumstances to establish a systemic failure to effectively enforce labor laws.

Section F(2)(c) of the Labor Department’s proposal would require a submission to address and explain to the fullest extent possible whether “the matters referenced in the submission demonstrate a sustained or recurring course of action or inaction of non-enforcement of labor law” while existing guidelines refer instead to an appearance demonstrating “a pattern

9 See GTE-Sprint First Nonunion Long Distance Target for CWA, COMM. DAILY, Dec. 18, 1984.
10 See Tim Shorrock, Mexican Trade Union Steps In To Defend US Workers’ Rights, J. OF COM., Feb. 13, 1995 (“the CWA has also applied pressure of Sprint through German unions that sit on the board of directors of Deutshce Telekom AG, which is negotiating a 10 percent state in Sprint valued at more than $2 billion.”).
12 Shorrock, supra note 11.
of non-enforcement ...". It is unclear how the proposed language, “a sustained or recurring course of action or inaction,” relates to the current “pattern” language. We encourage the Department to explain the new phraseology and, if the proposed language is intended to create a lesser burden, we encourage the Department to retain the current language.

The addition, in proposed section F(2)(e), of language requiring submissions to include an explanation of whether the “course of action or inaction reflects something other than a reasonable exercise of discretion or a bona fide decision regarding the allocation of resources” is a modest improvement. This language may help the Office determine whether a submission relates to legitimate governmental decisions rather than a violation of a labor provision and, to that extent, the Chamber supports its adoption.

However, we remain concerned that it would be possible for the Office to accept submissions based on a single incident. We encourage the Department to add additional language to help ensure that submissions based on single incidents are not accepted.

Second, submissions should not be accepted based on claims not fully adjudicated. It should be axiomatic that no claim for ineffective enforcement can be made until the results of any enforcement action are known. In the plant closing case described above, the employer was found to have acted within the law and thus its actions could not implicate the NAALC. Yet, the employer was still faced with the adverse publicity generated by the NAALC submission. The Department has recognized the importance of the domestic enforcement process in its existing submission guidelines by reserving the right to reject submissions where appropriate relief has not been sought under domestic laws. The proposal retains this language.

It should be clear that no judgment can be made about the effectiveness of a law or enforcement thereof while legal proceedings are still ongoing or if the disputing parties have yet to exhaust the legal resources at their disposals. Ensuring that claims not fully adjudicated are not accepted in conjunction with our recommendation that NAOs not accept submissions based on a single incident would go a long way toward ensuring that submissions are focused on a NAALC country’s systemic failure to enforce the relevant laws.

Third, there should be no presumption that a submission will be accepted. Given the experience under the NAALC, it is likely that many submissions that the office will receive will be designed to influence an ongoing labor dispute or for some other ulterior motive rather than rectifying a systemic failure of a trading partner to uphold its agreement under the labor provisions of a free trade agreement. Consequently, the Office should have no presumption that a submission will be accepted. The Labor Department’s current guidelines, at Section G(2) create a presumption that the Office will accept the submission. The Department’s proposal uses different language and instead of creating a presumption, lists various factors that the Office is to consider in determining whether to accept the submission. We support this change.

17 Id.
Fourth, cases should not be identified by employer names. Employers are not party to free trade agreements, countries are. Proper submissions should allege failure of a party to carry out its responsibilities under the agreement. While we understand that such a case may necessitate consideration of a number of specific facts and cases that could include the use of an employer’s name, labeling a case based on the name of an employer at the least implies that the employer is a party to the case and may bear some culpability. We urge the Department to move away from this practice and find alternative ways of referring to cases.

Fifth, the hearing process should not be used as a platform for corporate campaigns. Even though the Office may advise witnesses that public hearings on submissions are not adversarial, witnesses tend to treat the hearings as adversarial and testimony frequently singles out a particular employer. For example, in the plant closing case discussed above, CWA President Morton Bahr’s testified that the forum demonstrated that the NAALC “would provide another vehicle to hold [the employer] and other companies who violate workers rights accountable for their actions.” Bahr also testified that the employer “must be reminded again and again that the CWA and all those who have stood up for the rights of these workers will never give up this fight until [the employer] provides them with meaningful remedies, including compensation and job opportunities at other … locations.”

While hearings may be a useful tool for receipt of information, it is likely that less formal methods will generally produce sufficient information for the NAALC secretariat or an NAO to complete its work. Unfortunately, hearings too often fail to produce the kinds of substantive discussions that are helpful to truly understand a complicated issue and, on the contrary, frequently serve only as a highly visible platform for propagating inflammatory rhetoric that can all too easily be used to mount an adverse campaign against employers. In addition, it is important to note that neither the International Labor Organization nor the Organization for Economic Cooperation and Development permit hearings under their procedures, rather they seek to resolve matters through investigation, exchange of information, and dialogue.

The Department’s proposal makes one helpful change regarding the hearing process in that proposed section H(3) eliminates the presumption that a hearing will be held. However, for the reasons stated above, we urge the Department to adopt stronger language to create a strong presumption against holding a public hearing.

Finally, to protect the submission process from misuse, the Department should adopt further guidelines to ensure that the submission process is not being used to intervene or interfere with labor disputes. In particular, when a submission is received, the Office should assess whether an ongoing labor dispute is in progress and whether acceptance of the submission or further proceedings would tend to have an impact on that dispute. The submission process was not designed for the redress of individual grievances, but rather to examine the systemic failure of a trading partner to enforce its labor laws. For this reason, submissions that involve ongoing labor disputes should be rejected. At the very least, the office should proceed with

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20 Id.

extreme caution in such cases, taking care to ensure that it does not get drawn into the dispute and to ensure that those seeking to resolve a particular grievance do not exploit processes under the labor provisions of our trade agreements. Taking such a step would not be unprecedented. For example, in the immigration context, the U.S. Citizen and Immigration Service has recognized that in some cases reports will be filed about the employment of undocumented workers for the purpose of interfering in a labor dispute. To help ensure that government processes are not misused in this manner, the Service maintains “operating instructions” that provide advice on how to proceed if information creates a suspicion that an enforcement action might involve the government in a labor dispute.22

Cooperative Processes

The cooperative activities of the Office have received scant attention, yet remain the Office’s most important duties. Indeed, experience under the NAALC shows that cooperative activities are an important tool that has made a significant contribution toward improving understanding of and compliance with differing regimes of labor and employment regulation among our trading partners.

Examples of successful cooperative efforts under the NAALC are numerous. Many include publications and efforts by the NAALC Secretariat, such as its comparative profiles of North American labor markets, publications comparing labor laws of the three parties to the agreement, and the periodic seminars that the Secretariat has held on income and productivity in North America that have produced scholarly work and allowed academics, business, and labor to discuss in great depth both transcontinental macroeconomic issues and microeconomic issues such as compensation and employee involvement. These efforts have enhanced the ability of academics, policymakers, businesses, and workers to understand more about the labor markets in which they work and how the market has evolved since NAFTA’s inception.

Unfortunately, it is our experience that comparatively few stakeholders are aware of the Office’s efforts in these areas. We encourage the Office to take steps to improve access to and awareness of these important efforts. We would also welcome similar efforts by the Office and its counterparts in other nations party to free trade agreements.

Meetings and Forums

Meetings and forums that have been held in a cooperative spirit, based on experience under the NAALC, have been largely successful at meeting the agreement’s goals. For example, the NAALC members have hosted numerous forums with a focus on occupational safety and health that we believe have had a positive effect on increasing employee and employer awareness of particular issues and have helped guide development of policies that will result in decreased rates of occupational accidents, injuries, and illnesses. For example, two recent technical workshops discussed voluntary protection programs, including employer best practices and key elements for effective occupational and health management systems, as well as compliance assistance.23

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22 Immigration and Naturalization Service Operating Instruction 287.3a. Available at http://uscis.gov/lpBin/lpext.dll/inserts/slb/slb-1/slb-44912/slb-52414?f=templates&fn=document-frame.htm#slb-o12873a (The INS no longer exists, but the operating instructions are maintained by the Department of Homeland Security’s U.S. Citizenship and Immigration Services Bureau.).

23 Forums on March 10-12, 2003, in El Paso, Texas and Ciudad Juarez, Mexico, and on June 16-17 in Mexico City.
Successful NAALC cooperative activities also include seminars focusing on job skills and education. For example, the 1998 and 2003 seminars studying worker training programs and placement services carried out by NAALC countries focused attention on human resource development in the three countries including trends in job training and education. Such programs are a key to ensuring that, after entering into a free trade agreement, workforces are trained and prepared for relevant jobs in the Twenty-first Century.

Cooperative Activities in Response to Public Submissions

While the Chamber has been supportive of much of the cooperative initiatives of the Office, we have concerns regarding some cooperative activities entered into as a response to public submissions. For example, in the public submission discussed earlier related to a plant closing at a California telecommunications company, the Ministerial Consultations included an agreement for the United States to host a public forum to allow interested parties an opportunity to convey their concerns about the effects of sudden plant closings. The agreement also called for the Secretariat to conduct a study on “the effects of the sudden closing of a plant on the principle of freedom of association and the right of workers to organize in the three countries.”24

Unfortunately, the study ultimately published relied on biased and highly unreliable data. In particular, in preparing the report the Secretariat commissioned a study by Kate Bronfenbrenner of Cornell University focusing on “the effects of plant closings or threat of plan closing on the right of workers to organize in the United States.”25 The Bronfenbrenner report concluded “plant closing threats and plant closings have become an integral part of employer anti-union campaigns” and “the majority of private sector employers threaten a full or partial shutdown of the facility after a union wins election.”26 Yet, these conclusions are unreliable for a number of important reasons. First of all, they come from a survey of lead union organizers in union organizing campaigns—hardly an unbiased source. Even if the source were neutral, the data pool is biased against employers with good relations with their unions—for example, it completely ignores all those organizing campaigns in which the employer voluntarily decided to recognize the union without an NLRB election. In addition, determining whether an employer made a “threat” was not measured by any legal or objective standard, but on the union organizer’s subjective view of what employer speech was threatening—again, hardly an unbiased way to collect data.

Unfortunately, in this case, the NAALC Secretariat funded a project heavily biased in the favor of those with an agenda of demonizing private sector employers. Perhaps recognizing this after the fact, the Secretariat’s report did contain language clarifying that the term “threats” was not a legal term, but was based on perceptions of union organizers.27 Unfortunately, the data was nevertheless included in the report. In addition, the Bronfenbrenner report exists outside of the context of the Secretariat. Indeed, organized labor now routinely relies on this report and a more recent update of it. For example, the AFL-CIO web site relies on its data in propaganda it uses to justify its legislative agenda in the United States, in particular its proposal to abolish secret ballot elections for union representation elections.28

25 Kate Bronfenbrenner, Final Report: The Effects of Plant Closing or Threat of Plant Closing on the Right of Workers to Organize, 1 (Sept. 30, 1996).
26 Id. at 26.
Certainly organized labor and other groups should be free to fund whatever research projects they deem appropriate. However, it is not the Office’s responsibility to fund such research. The Office should take great care when commissioning research to ensure that the research is impartial or, at a minimum, ensure that both sides are presented.

Summary

The Chamber appreciates the opportunity to comment on the Department’s proposed procedural guidelines for the Office of Trade Agreement Implementation. We encourage the Office, in the spirit of the labor provisions of recent free trade agreements, to increase its cooperative efforts, in particular as it relates to educating employers about labor and employment regimes that our trading partners employ and in providing technical assistance to our trading partners. As to the submission process, we urge the Department to amend the guidelines to include a number of additional provisions to help strengthen the integrity of the process and to reduce the chance that the process will be used by those with ulterior motives.

Thank you for your consideration of these comments.

Sincerely yours,

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