

Fundamentals of Labor Issues and NAFTA

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With the North American Free Trade Agreement¹ now in effect, it is appropriate to look forward to the new programs and opportunities that the Agreement has to offer, rather than backward to the debate on the pros and cons of the Agreement itself. In looking to the future, however, one should remain cognizant of the concerns that were raised in that debate. While both environmental and labor issues were prominent, this discussion will focus mainly on the labor issues and the labor-related perspective. The discussion also will focus mainly on the U.S. perspective, given that the Mexican and Canadian perspectives are presented in other articles in this Symposium.

BACKGROUND OF NAFTA NEGOTIATIONS

NAFTA was originally negotiated and signed by President George Bush for the United States, President Carlos Salinas de Gortari for Mexico, and Prime Minister Brian Mulroney for Canada in August of 1992. Because it had been negotiated for the United States under the "fast-track authority," NAFTA was to be presented to Congress for an up or down vote without the option of considering any amendments.² It was a groundbreaking agreement that was

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¹ North American Free Trade Agreement, Dec. 17, 1992, U.S.- Can.- Mex., 32 I.L.M. 296-456, 605-799 [hereafter NAFTA].

² The "fast-track authority" is derived from the Trade Agreements Act of 1979, as amended in 1988. See 19 U.S.C. §§ 2501-2582 (1988). In 1991, Congress voted to extend the fast-track authority, which was due to expire in June, 1991. See H.R. 146, 102d Cong., 1st Sess., 137 CONG. REC. H3589 (May 23, 1991) (enacted). This extension made it possible to continue NAFTA negotiations under the fast-track authority throughout 1991 and most of 1992.

intended to create the largest free trade area in the world by adding Mexico to the existing free trade agreement between the United States and Canada.

During the 1992 U.S. Presidential campaign, various environmental groups and organized labor pressured the Democratic candidate, then-Governor Bill Clinton, to oppose the Agreement. After extensive deliberations with his closest advisors, the Democratic candidate gave a major campaign speech expressing support for the Agreement, with the caveat that he would negotiate supplemental agreements on labor, the environment, and import surges.³ Thus, Clinton acknowledged that the agreement negotiated by President Bush needed to be "amended" and that, if he were elected, he would carry out that responsibility.

After President Clinton took office in January of 1993, he in fact launched negotiations on these supplementary matters. These discussions dominated the Administration's NAFTA strategy until the supplemental agreements were completed in September of 1993.⁴ At that time, it appeared that the President would have a difficult time convincing Congress that he had "amended" the agreement enough to overcome the opposition among key interest groups and to get the necessary majority of votes in both houses to have the agreement go into effect. The achievements in the environmental area indeed appeared to be quite substantial and led to endorsements from several major environmental organizations. However, the supplemental North American Agreement on Labor Cooperation (labor agreement) was neither as substantial nor as successful in winning over the critics of the overall agreement.

During the fall, Congressional deliberations officially began under the fast-track authority, culminating in a dramatic vote approving NAFTA in the House and a less dramatic but solid vote for NAFTA in the Senate.⁵ Even so, many members of both houses

³ Governor Bill Clinton, Address Before North Carolina State University (Oct. 4, 1992). In the same speech, President Clinton also expressed strong support for a comprehensive dislocated worker assistance program to protect U.S. workers from job losses attributable to NAFTA. *Id.*; see also Gwen Ifill, *The 1992 Campaign: The Democrats; With Reservations, Clinton Endorses Free-Trade Pact*, N.Y. TIMES, Oct. 5, 1992, at A1 (indicating that Bill Clinton endorsed NAFTA, but refused to sign it in its October 1992 form).

⁴ See Gwen Ifill, *Clinton Recruits 3 Presidents to Promote Trade Pact*, N.Y. TIMES, Sept. 15, 1993, at B12 (reporting that President Clinton signed three supplemental agreements to NAFTA at elaborate White House ceremony).

⁵ The vote in the House of Representatives, on the evening of November 17, 1993, was 234 to 200. H.R. 3450, 103d Cong., 1st Sess., 139 CONG. REC.

of Congress clearly believed that the side agreements on labor inadequately addressed the basic problem of NAFTA's effect on U.S. workers, or Mexican and Canadian workers, for that matter. Symbolically, the prominent environmental advocate, Senator Tim Wirth, ultimately endorsed NAFTA, while the prominent advocate of labor concerns, Representative Dick Gephardt, voted against NAFTA.

More important, perhaps, than the perceived inadequacy of the labor agreement was the basic but purely domestic concern that eliminating trade barriers with Mexico would cause severe worker dislocations in the United States. This was not something that the United States could correct through negotiations with Mexico and Canada. Correction of the problem required some kind of acknowledgment that NAFTA would in fact cause workers to lose jobs, even if the net effect were an aggregate increase in the number of jobs, and that something had to be done to help the workers who lost jobs.

While the supplemental agreements were intended primarily to address the U.S. concerns about Mexican labor and environmental practices, the agreements clearly had to be negotiated to apply to all three signatories. Therefore, the agreements constitute a significant, albeit limited, trilateral application of common principles. Members of Congress criticized the agreements as being too limited in their potential impact. The agreements, however, do constitute a first step in creating this new trilateral system.

In contrast, the U.S. concern about worker dislocation was completely focused on expected dislocation among U.S. workers, not Mexican or Canadian workers. U.S. public perception was dominated by fear of U.S. job loss, despite past dislocations of Canadian workers and the likelihood that dislocations may occur in Mexico as well, especially in agriculture. Furthermore, while the U.S. government could offer no specific solutions to worker dislocations elsewhere, it could, and did, offer proposals regarding domestic worker dislocations. Creating and funding a special program for NAFTA-related worker dislocations was thus a unilateral act of the United States and involves issues relating exclusively to U.S. domestic pol-

H10,048 (Nov. 17, 1993) (enacted). The Senate voted three days later and approved NAFTA by a vote of 61 to 38. H.R. 3450, 103d Cong., 1st Sess., 139 CONG. REC. S16,712-13 (Nov. 20, 1993) (enacted) (indicating that the Senate passed H.R. 3450 without amendment).

icy.⁶ In particular, it has stimulated a new domestic initiative to reform *all* of the federal dislocated worker programs.

This discussion will address both the labor supplemental agreement and the recent deliberations about comprehensive reform and expansion of existing programs to assist dislocated workers in the United States.⁷ The discussion will approach the labor agreement and deliberations on reform of dislocated worker assistance programs from the perspective of their responsiveness to the problems identified during the NAFTA debate. Although both have been criticized as inadequate solutions, they are notable advancements that merit attention and support.

THE SUPPLEMENTAL NORTH AMERICAN AGREEMENT ON LABOR COOPERATION

The trilateral framework of the Supplemental North American Agreement on Labor Cooperation belies the fact that it was induced largely by U.S. concerns about Mexican labor practices. This concern was directed mainly at the significantly lower wages for Mexican workers, compared to U.S. or Canadian workers. The average Mexican manufacturing wage in 1992 was \$2.35 per hour, while the U.S. average was \$16.17 per hour, almost seven times as much.⁸ The Canadian average was even higher.

⁶ Although the Clinton Administration considered proposing a comprehensive reform of dislocated worker assistance programs in the fall of 1993, the NAFTA package ultimately included only a transitional "bridge" program of \$90 million to cover specific NAFTA-related dislocations over an 18-month period. See Peter T. Kilborn, *After the Jobs Went South: A Town Finds Pitfalls in a Retraining Effort*, N.Y. TIMES, Nov. 6, 1993, § 1, at 10 (indicating that Clinton Administration was eager to reassure Americans that money for retraining would be available if NAFTA passed). The "bridge" program was Title V of HR 3450, introduced to the House of Representatives on November 4, 1993. See 139 CONG. REC. H8872-73 (daily ed. Nov. 4, 1993) (message of Pres. Clinton formally transmitting NAFTA-implementing legislation to Congress).

⁷ The Administration proposed the Reemployment Act of 1994, formerly called the Workforce Security Act of 1994. See, e.g., *Labor Department Focuses on Encouraging "New Economy,"* DAILY LAB. REP. (BNA), Feb. 23, 1994, at D18 ("[The Act] would revamp the unemployment system by creating a [sic] employment and training system that would help American workers build skills and find jobs.").

⁸ See Gary C. Hufbauer, *NAFTA: Friend or Foe?; More Exports, More Jobs*, N.Y. TIMES, Nov. 15, 1993, at A17 [hereafter Hufbauer, *Friend or Foe?*] (detailing Mexican and American wages); see also GARY C. HUFBAUER & JEFFREY J. SCHOTT,

This differential, however, was not the only issue that came forward in the NAFTA debate. There was, in addition, considerable attention directed at the monolithic structure of Mexican organized labor and its close relationship to the government.⁹ Another concern was the extensive informal sector, or underground economy, in Mexico.¹⁰ Finally, although Mexican labor law conforms with international labor standards far more than either U.S. or Canadian labor law, critics were quick to point out the inadequacies in the application of that law.¹¹ The supplemental labor agreement had to address these issues.

A. *The Wage Differential*

In the early stages of the negotiations for a supplemental agreement, negotiators realized that they could do little to address the wage differential. Wages have long been more structured in Mexico than in the United States or Canada. The Mexican government annually promulgates the minimum wage, according to industrial or service sector and occupation.¹² Furthermore, in response to expectations from world financial institutions, the Mexican government has restrained the growth of wages over the past several years.

Some studies claim that Mexican wages actually fell in purchasing value in the mid-1980s. These studies compare mid-80s Mexican wages to the early 80s, when severe oil market price fluctuations significantly affected the Mexican economy.¹³ Such a comparison

INST. FOR INT'L ECON., NAFTA: AN ASSESSMENT 11 (1993) (describing wage discrepancies between Mexico and the United States).

⁹ See Anthony DePalma, *Law Protects Mexico's Workers But Its Enforcement Is Often Lax*, N.Y. TIMES, Aug. 15, 1993, § 1, at 1 (indicating that workers' rights violations abound in Mexico despite Mexican labor laws).

¹⁰ Mexico's informal sector is a significant part of the workforce, constituting small enterprises, such as street vendors, not subject to Mexican labor law. See *Report Says Child Labor Extensive in Mexico's Informal Economy*, INT'L TRADE DAILY (BNA), Feb. 3, 1994, available in LEXIS, World Library, Allwld file (describing informal sector).

¹¹ See DePalma, *supra* note 9, § 1, at 1 ("The sixteen percent who are street vendors or who otherwise work in Mexico's informal economy are unprotected by labor laws.").

¹² Mexican labor and constitutional law have a well-established minimum wage system. DR. JOSE DAVALOS MORALES, CENTRO INTERNACIONAL DE ESTUDIOS DE SEGURIDAD SOCIAL, NORMAS CONSTITUCIONALES EN MATERIA DE TRABAJO, PROCEEDINGS: FIRST ANNUAL UNITED STATES-MEXICO INTERNATIONAL LABOR LAW CONFERENCE 117 (Oct. 1992) (held in Mexico City, Mexico).

¹³ RICHARD ROTHSTEIN, ECONOMIC POLICY INSTITUTE, BRIEFING PAPER: SETTING THE STANDARD: INTERNATIONAL LABOR RIGHTS AND U.S. TRADE POLICY

is misleading since there was rampant inflation during the oil boom that preceded the fall in prices. Recent wage levels show a rough equivalence in purchasing power to the level prior to the fall in oil prices. Arguably, the Mexican worker has gradually recovered from the disruptions of the Mexican presence as an oil producer in the global market.¹⁴

The wage differential, of course, does have a parallel in a productivity differential. Gary Hufbauer, economist with the Institute for International Economics, noted that the average annual output in 1992 for a U.S. manufacturing worker was \$75,000, while the average output for the Mexican manufacturing worker of products competing in the U.S. market was \$9,500. This translates into a productivity ratio between the United States and Mexico of 7.9 to one.¹⁵ Accepting a wage ratio of one to seven and a productivity ratio of 7.9 to one, one could expect that wage differences are not likely to be a big factor in where an employer decides to go, unless the employer is not particularly interested in productivity.

Critics have challenged this by comparing U.S. output and Mexican output of workers in modern new facilities operated by U.S. multinational companies, like Ford or General Motors.¹⁶ These critics claimed that in such instances Mexican workers' productivity was close to the U.S. level, while their wages remained significantly lower. Thus, the potential for jobs moving south to Mexico in response to the draw of low wages is deemed by these critics not to be greatly affected by the aggregate productivity differentials.

On the other hand, overall productivity does affect the ability of businesses to draw those highly productive workers from the available workforce. Businesses establishing facilities in Mexico may need targeted training or other additional steps to achieve high productivity. Productivity is related to other factors as well, such as transportation, supply sources, distribution systems, and targeted

(1993), *cited in* JEFF FAUX, ECONOMIC POLICY INSTITUTE, BRIEFING PAPER: THE FAILED CASE FOR NAFTA: THE TEN MOST COMMON CLAIMS FOR THE NORTH AMERICAN FREE TRADE AGREEMENT AND WHY THEY DON'T MAKE SENSE 16 (1993).

¹⁴ U.S. DEP'T OF LABOR, INTERNATIONAL COMPARISONS OF HOURLY COMPENSATION COSTS FOR PRODUCTION WORKERS IN MANUFACTURING, 1975-89 8 (1990).

¹⁵ Hufbauer, *Friend or Foe?*, *supra* note 8, at A17.

¹⁶ See, e.g., Lane Kirkland, *A Backward-Looking Deal*, WASH. POST, Nov. 12, 1993, at A25 ("[T]he wages paid in the high-productivity, American-dominated maquiladora sector are, on average, 30 percent lower than Mexico's average overall manufacturing wage.").

markets. These factors influence the business planning of where investments should be placed.

Both the wage and productivity differential remain sensitive subjects, no matter how the statistics are compared. Wage controls are part of the Mexican system of governance, and critics will continue to perceive a significant wage differential as a magnet for moving jobs away from the United States or Canada to Mexico. The Clinton negotiators attempted to cope with this perception by enhancing the protections against import surges. Further, President Clinton asserted that President Salinas had committed to assuring that future wage increases approved by the Mexican government would take into account productivity increases.¹⁷ But the main impetus for improvement in Mexican wages will come from fundamental economic growth. Such growth involves, among other things, a steady flow of foreign investment, which is expected to run about \$15 billion a year for the next ten years.¹⁸

An important measure of NAFTA's success will be whether increasing foreign investment will contribute to the growth in total jobs and wages, or simply shift jobs from the United States and Canada to Mexico. Mexican wages should certainly benefit from an increase in foreign investment if, as expected, it leads to further economic growth and that growth translates into both improved productivity *and* improved wages. That set of expectations seems to be the main impetus behind Mexico's drive for a trade agreement with the United States and Mexico. Mexico thus balanced the risk of opening up its markets to an increased flow of U.S. and Canadian goods against the expectation of economic growth for all three countries.

B. Issues of Basic Labor Law and Practice

Mexican workers have the right to organize and bargain collectively. Further, Mexico, unlike the United States, has ratified the relevant conventions of the International Labor Organization (I.L.O.) on collective bargaining. In other respects, Mexican labor law assures a full panoply of worker rights, arguably more rights

¹⁷ See Anthony DePalma, *Mexico's Unions, Frail Now, Face Trade Pact Blows*, N.Y. TIMES, Dec. 14, 1993, at A3 (stating that President Salinas announced that Mexican government would encourage open-ended raises based on productivity gains).

¹⁸ See *Demythologizing the Trade Pact*, N.Y. TIMES, July 25, 1993, § 4, at 16 ("Most studies predict foreign investment in Mexico . . . would rise by no more than about \$15 billion a year.").

than those accorded to U.S. or Canadian workers. Even so, several concerns about the inadequacy of Mexican labor law *in practice* were raised frequently during the NAFTA debate. These concerns included the close relationship of the dominant confederation of labor unions to the government, the extensiveness of the informal sector, which has no significant labor law protection, and the inadequate enforcement of basic worker rights, especially in the areas of occupational safety and health, child labor, and the minimum wage.

The Clinton Administration apparently started its discussions with the Mexicans and Canadians with a draft proposal setting up a trilateral commission that would have had fairly strong enforcement authority over non-compliance with certain "internationally-recognized labor rights and standards."¹⁹ Because the only "internationally-recognized" labor principles are I.L.O. conventions, and because most of the major I.L.O. conventions have not been ratified by the United States, there was resistance to this indirect application of I.L.O. standards to U.S. labor law, at least from the U.S. business community. The proposal was changed in subsequent drafts, although probably not so much because of U.S. business resistance as because of the three countries' respective concerns regarding their domestic labor law jurisdiction. The final labor agreement emphasized the right of each party to the agreement to establish and enforce its own domestic labor standards.²⁰ This had the effect of protecting the Mexican government from trilateral challenges to its relationship with organized labor and to the presence of an extensive informal sector. In the worker rights area, at least with regard to the enforcement of occupational safety and health, child labor, and minimum wage laws, the labor agreement did establish a trilateral framework.

C. *The Scope of the Labor Agreement*

One of the key objectives of the labor agreement is "to promote, to the maximum extent possible," certain labor principles. These principles are not embodied in the labor agreement itself but are identified in an annex to the labor agreement. These principles, furthermore, are only "guiding principles" which, the annex states,

¹⁹ *Special Report: U.S. Draft Legal Text for NAFTA Labor Accord*, INSIDE U.S. TRADE, May 21, 1993, at S2.

²⁰ North American Agreement on Labor Cooperation, *done* Sept. 9, 1993, U.S.- Mex.- Can., art. 2, 32 I.L.M. 1499, 1503.

"the Parties are committed to promote, subject to each Party's domestic law, but do not establish common minimum standards for their domestic law."²¹ These are important qualifiers. The principles are not only subject to being promoted in the context of domestic law, they are also not intended to serve as a minimum standard. The annex goes on to state that the principles "indicate broad areas of concern where the Parties have developed, each in its own way, laws, regulations, procedures and practices that protect the rights and interests of their respective workforces."²² Again, the emphasis has been placed on domestic interpretation, rather than trilateral standards.

The principles, then, are not even intended to create an acknowledgment of common minimum standards. There is recognition elsewhere in the Agreement that each Party "shall ensure that its labor laws and regulations provide for high labor standards . . . and shall continue to strive to improve those standards. . . ."²³ Nonetheless, it appears to be very carefully stated that the principles themselves are not deemed to be these standards. Therefore, domestic labor law was retained for the definition of common standards, and the enunciation of "guiding principles" was deliberately kept separate from the identification of standards for implementation in the agreement.

Throughout the spring and summer, the discussions among the three governments led gradually but steadily to a modest, multi-tiered approach. This multi-tiered approach encompassed both cooperative activity and limited investigative and enforcement authority regarding these guiding principles. The labor agreement establishes a Commission for Labor Cooperation which shall consist of a ministerial Council and a small Secretariat, headquartered in Dallas, Texas. A National Administrative Office (N.A.O.) in each of the three countries will also assist the Commission.²⁴ The Council, the Secretariat, and the N.A.O.'s constitute the new structure for trilateral activities.

Each government has the obligation to promote compliance and effectively enforce its respective labor laws. Each government must also ensure appropriate access to enforcement mechanisms to "persons with a legally recognized interest under its law in a particular

²¹ *Id.*, annex 1, at 1515.

²² *Id.*

²³ *Id.*, art. 2, at 1503.

²⁴ *Id.*, art. 8, at 1504.

matter” Finally, each must ensure certain procedural guarantees that are “fair, equitable and transparent” before tribunals that are “impartial and independent and do not have any substantial interest in the outcome of the matter” and with available remedies to “ensure enforcement of [each country’s] labor rights.”²⁵ These domestic remedies must be addressed before any enforcement can be considered at the trilateral level, but the agreement does not appear to require that these remedies be exhausted.

The ministerial Council is the governing body of the Commission for Labor Cooperation. In terms of cooperative activities, the Council can get involved in a comprehensive list of subjects:

- (a) occupational safety and health;
- (b) child labor;
- (c) migrant workers of the Parties;
- (d) human resource development;
- (e) labor statistics;
- (f) work benefits;
- (g) social programs for workers and their families;
- (h) programs, methodologies, and experiences regarding productivity improvement;
- (i) labor-management relations and collective bargaining procedures;
- (j) employment standards and their implementation;
- (k) compensation for work-related injury or illness;
- (l) legislation relating to the formation and operation of unions, collective bargaining, and the resolution of labor disputes, and its implementation;
- (m) the equality of women and men in the workplace;
- (n) forms of cooperation among workers, management and government;
- (o) the provision of technical assistance, at the request of a Party for the development of its labor standards; and
- (p) such other matters as the Parties may agree.²⁶

This is a far-reaching list and should stimulate quite a bit of trilateral information-sharing and technical assistance. The labor agreement anticipates that cooperative activities will include seminars and conferences, training programs, joint research projects, and technical assistance.

In contrast, the Secretariat, which supports the Council, has a shorter list of subject categories on which it must “periodically prepare background reports.” These are:

- (a) labor law and administrative procedures;

²⁵ *Id.*, art. 5, at 1503.

²⁶ *Id.*, art. 11, at 1504.

- (b) trends and administrative strategies related to the implementation and enforcement of labor law;
- (c) labor market conditions such as employment rates, average wages and labor productivity; and
- (d) human resource development issues, such as training and adjustment programs.²⁷

The Secretariat is also expected to prepare studies on any matters that the Council may request, subject to the Council's review. The Secretariat is therefore fully accountable to the ministerial Council. The Secretariat is also intended to be quite small, with five staff members from each of the three countries plus an executive director, for a total of sixteen people.

The N.A.O.'s are intended to be the point of contact with the governmental agencies of each party to the labor agreement (party), the N.A.O.'s of the other parties, and the Secretariat. Largely transmitters of information, the N.A.O.'s could play a fairly active role. Each party also has the option to convene a national advisory committee including representatives of labor and business organizations, as well as a governmental committee of federal and state or provincial officials with a similar advisory role. The labor agreement anticipates that the N.A.O.'s will facilitate mostly cooperative activity, but there is likely to be quite a bit of variety in how each country operates its N.A.O.

With regard to enforcement, the scope of the Commission's authority is far more limited than it is with cooperative activities. To start with, any party can request consultations with any other party "regarding *any* matter within the scope of [the Labor] Agreement."²⁸ This statement is all-encompassing, but consultations must occur at the ministerial level and are expected to occur through the exchange of publicly available information.

If bilateral ministerial consultations do not resolve the matter, the requesting party may then take the next step. The requesting party can go to the Council with a written request to establish an "Evaluation Committee of Experts" (E.C.E.). The Council appears bound to grant the request unless the issue was the subject of a prior E.C.E. report and no new information has arisen to warrant a further report. The Council may also deny the request if one of the parties obtains a ruling that the matter is "not trade-related" or not covered by "mutually recognized labor laws."²⁹

²⁷ *Id.*, art. 14, at 1504.

²⁸ *Id.*, art. 22, at 1507 (emphasis added).

²⁹ *Id.*, art. 23, at 1507.

Subject to these limitations, an E.C.E. can analyze patterns of practice in the enforcement of each party's standards, but only regarding "occupational safety and health or other technical labor standards" and only as long as they apply to a matter that has not already been considered in bilateral ministerial consultations.³⁰ It is fairly clear what "occupational safety and health" standards means, but not so clear what "other technical labor standards" means. The definition of "technical labor standards" in the labor agreement includes "prevention of occupational injuries and illnesses" and "compensation in cases of occupational injuries and illnesses."³¹ The definition does *not* include the basic "industrial relations" standards: the freedom of association and right to organize, the right to bargain collectively, or the right to strike. However, it *does* include child labor protections, minimum employment standards, employment discrimination prohibitions, equal pay, and protection for migrant workers.³²

The E.C.E., then, could evaluate a pattern of practice in a wide (but not comprehensive) range of areas with regard to enforcement, as long as the issue is "trade related" and based on "mutually recognized labor laws." (Both of these terms are also defined in the labor agreement.)³³ The E.C.E. cannot, however, interfere with basic collective bargaining or labor relations issues. Although it appears that bilateral ministerial consultations can occur in these matters, these are limited to the exchange of publicly available information at the ministerial level. Therefore, the trilateral actions of the Commission, starting with the formation of an Evaluation Committee of Experts, are not expected to cover sensitive collective bargaining or labor relations issues.

³⁰ *Id.*

³¹ *Id.*, art. 49, at 1513.

³² *Id.*

³³ The labor agreement defines "trade related" as:

related to a situation involving workplaces, firms, companies or sectors that produce goods or provide services: (a) traded between the territories of the Parties; or (b) that compete, in the territory of the Party whose labor law was the subject of ministerial consultations under Article 22, with goods or services produced or provided by persons of another Party.

Id., art. 22, at 1507. The labor agreement defines "mutually recognized labor laws" as: "laws of both a requesting Party and the Party whose laws were the subject of ministerial consultations under Article 22 that address the same general subject matter in a manner that provides enforceable rights, protections or standards." *Id.*

On any of the subjects that pass the threshold test, an E.C.E. can engage in a comparative assessment of the matter, draw conclusions, and make practical recommendations within a specified time frame. While this is expected to be non-adversarial, the labor agreement provides for written responses from each Party. Furthermore, if an E.C.E. report involves the enforcement of a Party's "occupational safety and health, child labor or minimum wage technical labor standards," then a party can request consultations to determine "whether there has been a persistent pattern of failure . . . to effectively enforce such standards" ³⁴ These are formal Council-level consultations. This is where the potential for a sanction arises.

Under these circumstances, the ministerial Council would likely meet to try to resolve the issue. This procedure, however, is limited to the threshold occupational safety and health, child labor and minimum wage issues. Presumably, other issues like employment discrimination or migrant worker protection, which could be the subject of an E.C.E. report, cannot be challenged for a persistent pattern of failure to enforce the government's standard. With regard to occupational safety and health, child labor and minimum wage technical standards, however, it appears that consultations can proceed even if the matter has not been shown to be trade related or covered by mutually recognized labor laws. To avoid consultations, the responding party must get an affirmative ruling that the matter is not trade related or based on mutually recognized labor laws. One would, of course, expect a responding Party to use these defenses where they applied.

If the Council fails to resolve the matter through consultation, it may establish an arbitral panel, but only with a two-thirds vote of the Council's members. At this stage, the issue must be affirmatively determined to be trade related and based on mutually recognized labor laws. The issue must also deal with a persistent pattern of failure to effectively enforce only those standards applying to occupational safety and health, or to the technical aspects of child labor or minimum wage. ³⁵ Therefore, two of the three parties must agree to arbitration and must agree that the issue is both trade related and based on mutually recognized labor laws. Further, the issue must be limited to the three threshold subject areas. This excludes the "other" technical standards of minimum employment

³⁴ *Id.*, art. 27, at 1509.

³⁵ *Id.*, art. 29-33, at 1509.

rules, employment discrimination prohibitions, equal pay, and protection for migrant workers that an E.C.E. is allowed to consider. This also excludes the other industrial relations issues, like collective bargaining, that presumably may be addressed in bilateral consultations but not by an E.C.E.

The arbitral panel ultimately can impose a monetary enforcement assessment on the party complained against. However, the panel must first exhaust efforts to implement a "mutually satisfactory action plan" before it can do so.³⁶ The monetary assessment is capped at \$20 million in the first year of the Agreement and .007% of total trade in goods between the Parties in subsequent years.³⁷ All of this envisions a very extended time period before an assessment can ever be imposed—and considerable additional time before any trade sanctions can be imposed.

With regard to the concerns that critics of NAFTA raise, very little was actually resolved—or could have been resolved—in the supplemental labor agreement. The key areas for trilateral enforcement ultimately were limited to labor laws affecting occupational safety and health, child labor, and minimum wages, where such laws are mutually recognized and trade-related, and where there is a persistent pattern of failure by the government to enforce its laws in these areas. Wage differentials, the interaction between unions and governments, and the applicability of labor laws generally to the informal sector were not included in this framework, although there was accommodation to the issue of inadequate enforcement of basic worker rights in the threshold areas. The narrow scope of the enforcement mechanisms reflects the difficulties of truly establishing transnational labor standards as a criterion of domestic labor policy, but the fact that some consensus does exist is encouraging. The agreement is in fact a very innovative new way of cooperating across national boundaries on labor matters.

D. Cooperative Programs Under the Supplemental Labor Agreement

Although this multi-tiered approach ultimately limits imposition of sanctions to a fairly narrow set of labor issues, the most important features of the labor agreement are not dependent on sanctions. In fact, the sanctions are difficult to impose, especially because they are directed to the persistent pattern of failure by a government to enforce its standards. The most important features

³⁶ *Id.*, art. 37-39, at 1511.

³⁷ *Id.*, annex 39, at 1516.

of the labor agreement are the broad areas for cooperative activities and the potential benefit of the "sunshine effect."

When NAFTA was being negotiated in 1992, the U.S. Labor Department engaged in its first ever official exchanges with the Mexican Secretariat of Labor and Social Welfare. This dialogue led to a series of programs to facilitate information exchange and technical assistance in specific areas and specific sectors of the economy. In 1993, the focus was on negotiating the side agreements and getting NAFTA itself approved. Therefore, less attention was given in 1993 to specific cooperative programs, but the groundwork had already been laid for future cooperative efforts.

In fact, many cooperative activities are planned for 1994, especially in the area of occupational safety and health. Seminars have been proposed for the high-hazard electronics, petrochemicals, and construction industries, and a series of "train the trainer" sessions have also been planned. In addition, plans provide for workshops on case studies in cooperative labor-management relations, negotiating collective bargaining agreements, and aspects of dispute resolution. A comprehensive labor law conference is being planned, and exchanges of information are underway on training, employment services, vocational training, productivity measurement, and making labor statistics more comparable. Joint research, studies, and meetings of experts are also occurring on child labor, the informal sector, and conditions of migrant workers.

The supplemental labor agreement calls for the parties to give due regard to the "economic, social, cultural and legislative differences between them."³⁸ It also calls for mutual efforts to "improve working conditions and living standards in each Party's territory."³⁹ These efforts depend on knowledge and appreciation of each party's culture and history as well as acceptance of certain basic standards, an acceptance best achieved through these cooperative efforts.

III. DISLOCATED WORKER ASSISTANCE

Although the supplemental labor agreement is a modest beginning for trilateral cooperation in the promotion of mutually recognized labor law, there are certain worker concerns that are not conducive to trilateral efforts and must be addressed unilaterally.

³⁸ *Id.*, art. 11, at 1504.

³⁹ *Id.*, art. 1, at 1503.

The major concern, of course, is job security—or, more to the point, the *loss* of job security.

Not much can be done about specific job security in a free trade agreement, where the effect of eliminating trade barriers is necessarily a reallocation of resources in at least some sectors of the respective economies. Most economists project a net expansion in the production of goods and services resulting from free trade and, therefore, a net expansion of jobs. This is certainly the case with regard to NAFTA. Indeed, most economists project a net increase in jobs for all three countries.⁴⁰ Nonetheless, they also all agree that some reallocations will occur, resulting in some job loss.⁴¹

For the United States, the Labor Department's projection of job losses is an estimated 150,000 over five years, or about 90,000 over the next 18 months.⁴² Given the fact that the U.S. economy experiences a job growth rate of approximately 150,000 jobs per month, this should not severely disrupt the economy as a whole. It is, how-

⁴⁰ See, e.g., CONGRESSIONAL BUDGET OFFICE, A BUDGETARY AND ECONOMIC ANALYSIS OF THE NORTH AMERICAN FREE TRADE AGREEMENT xi (1993) [hereafter C.B.O.] (stating that each NAFTA participant should realize economic gains). The Clinton Administration consistently claimed that 200,000 new U.S. jobs would be created by 1995 if NAFTA were approved and implemented. See, e.g., U.S. GENERAL PRINTING OFFICE, THE NAFTA: EXPANDING U.S. EXPORTS, JOBS AND GROWTH, CLINTON ADMINISTRATION STATEMENT ON THE NORTH AMERICAN FREE TRADE AGREEMENT 3 (June 1993).

For several studies on job gains and losses, see U.S. INTERNATIONAL TRADE COMMISSION, PUB. NO. 2596, POTENTIAL IMPACT ON THE U.S. ECONOMY OF THE NAFTA 2-1 - 2-7 (Jan. 1993) and NORTH AMERICAN FREE TRADE: ASSESSING THE IMPACT (N. Lustig et al. eds., 1992) (detailing studies done by Clopper Almon for the U.S. Department of Labor, DRI/McGraw Hill, and the Economic Strategy Institute, and by Gary C. Hufbauer & Jeffrey J. Schott for the Institute for International Economics, Stanford University, and the U.S. International Trade Commission).

⁴¹ See, e.g., C.B.O., *supra* note 40, at xv ("Even though NAFTA would increase total employment in the United States, some U.S. workers would lose their jobs."); see also CLOPPER ALMON INTERINDUSTRY ECONOMIC RESEARCH FUND, INC., INDUSTRIAL EFFECTS OF A FREE TRADE AGREEMENT BETWEEN MEXICO AND THE USA (1990). For example, Professor Clopper Almon projected net job gains in certain industrial sectors, such as agriculture, nonelectrical machinery, communications machinery and metal products. *Id.* He also predicted net job losses in certain other industrial sectors, such as apparel, construction, medicine and hotels. *Id.*

⁴² The Labor Department relied on the CBO study cited above and used the CBO figure, 150,000 jobs lost over the next ten years, as the basis for the estimate of NAFTA-dislocated workers needing assistance over the next 18 months. *Administration Officials Scale Back Cost of NAFTA "Bridge" Plan to \$90 Million*, 10 INT'L TRADE REP. 1762 (Oct. 20, 1993).

ever, a severe disruption for the people who lose the actual jobs. New jobs in some other sector or location do not translate into immediate employment for those who have lost jobs.

Although much is said about the steady loss of high-wage, low-skill jobs in the United States as these jobs have moved to other low-wage countries, including Mexico, there is also the phenomenon of structural dislocation of jobs for other reasons. For example, industrial economies like the United States have undergone tremendous technological changes, resulting in the permanent loss of an increasing number of jobs. This is true even of high-wage, high-skill jobs. This trend toward structural dislocation calls for more comprehensive retraining programs for all kinds of dislocated workers, whatever the cause.

Traditionally, the federal government has focused support for dislocated workers on transitional relief (temporary supplements to state unemployment compensation programs during times of economic recession) and more comprehensive assistance to the "economically disadvantaged."⁴³ The major current program for the economically disadvantaged is Title III of the Joint Training and Partnership Act (J.T.P.A.), also known as the Economically Dislocated Worker Adjustment Assistance Act (E.D.W.A.A.).

For thirty years, a program has also existed under the Trade Adjustment Assistance Act (T.A.A.). This has been a targeted program with income maintenance for up to a year beyond the expiration of unemployment compensation benefits for those dislocated workers who are able to show a loss of employment that is directly trade related. Recent studies criticize the program because of its limited criterion for eligibility and because it has not been effective in retraining permanently dislocated workers.⁴⁴

E.D.W.A.A., on the other hand, also has garnered criticism for poor results in permanently placing people in new jobs, and for the

⁴³ UNITED STATES GENERAL ACCOUNTING OFFICE, BRIEFING REPORT TO CONGRESSIONAL REQUESTERS, DISLOCATED WORKERS: COMPARISON OF ASSISTANCE PROGRAMS (GAO/HRD-92-153BR) (September 10, 1992) (providing information regarding federal programs created to help dislocated workers).

⁴⁴ UNITED STATES GENERAL ACCOUNTING OFFICE, TESTIMONY BEFORE THE SUBCOMM. ON EMPLOYMENT, HOUSING AND AVIATION COMM. ON GOVERNMENT OPERATIONS, HOUSE OF REPRESENTATIVES, DISLOCATED WORKERS: TRADE ADJUSTMENT ASSISTANCE PROGRAM FLAWED (testimony of Linda G. Morra, Director of Education and Employment Issues, Human Resources Division) (GAO/T-HRD-94-4) (October 19, 1993).

limited proportion of its funds that are actually made available for income maintenance. For these reasons, neither of these major programs is a popular option for dealing with NAFTA dislocations.

The NAFTA debate triggered a recognition that dislocated worker assistance programs need to be substantially revised. NAFTA dislocations are symptomatic of certain systemic changes in job security and the need for workforce preparedness through ongoing skills training.

Congress recently enacted even more targeted assistance programs to deal with dislocations attributable to defense conversions, the Clean Water Act, or even changes resulting from the protection of the spotted owl. With NAFTA dislocations as another specific disruption requiring assistance, there has been growing recognition of the need to provide more comprehensive assistance, regardless of the disruption's cause. Permanent dislocations are more and more common, and federal training programs are too disparate and inefficient to meet the needs.⁴⁵

The Clinton Administration worked on developing a comprehensive reform of dislocated worker assistance programs during the NAFTA debate in the latter part of 1993. It was clear, however, that such a reform effort went well beyond the needs of NAFTA-related disruptions. While the importance of comprehensive reform was acknowledged, the NAFTA package only included a temporary 18-month program, with a commitment to pursue permanent reform in 1994.

One of the dilemmas of the permanent reform of dislocated worker assistance programs is the cost of "doing it right." Consolidation of existing targeted programs, while necessary in any reform effort, can only produce a reshuffling of funds. Reform advocates in the U.S. Labor Department note that most of these funds are directed at covering the costs of actual training and related programs, not to the provision of income maintenance while receiving training. Only in T.A.A. is there a significant component for income maintenance, and the Labor Department is currently proposing the inclusion of income maintenance on a more comprehensive basis. This costs more, and strong resistance exists,

⁴⁵ UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, SUBCOMM. ON EMPLOYMENT, HOUSING AND AVIATION, COMM. ON GOVERNMENT OPERATIONS, HOUSE OF REPRESENTATIVES, DISLOCATED WORKERS: PROPOSED RE-EMPLOYMENT ASSISTANCE PROGRAM (GAO/HRD-94-61) (November 12, 1993).

especially in the business community, to any kind of tax increase to pay for it.

Both organized labor and other groups involved in delivering services to dislocated workers believe there needs to be a reasonable level of income security during retraining efforts. The business community, on the other hand, has a problem with creating another "entitlement program." Overall deficit reduction objectives for the federal budget have been difficult to accomplish because of existing entitlement programs, like Social Security and Medicare, and the business community is uncomfortable about the financing of another open-ended entitlement program. Where income maintenance has been part of dislocated worker assistance for targeted groups, as in T.A.A., it has operated as an open-ended entitlement, and the business community would prefer to phase out these entitlements rather than to extend them.

The solution to this open-ended problem is to create a "capped" entitlement to income maintenance, and this appears to be the direction that the reform initiative is taking. Nonetheless, even a capped income maintenance provision has a substantial ongoing cost. Consequently, it will be a challenge for the Clinton Administration to survive congressional review of proposed budget cuts elsewhere to provide funds for this element of the reform initiative without raising taxes.

Business groups have been active in supporting overall reform of dislocated worker assistance programs. The efforts of the Business Roundtable, the National Association of Manufacturers, and the National Alliance of Business are most notable. The Roundtable, in fact, issued a statement of principles, "Workforce Training and Development for U.S. Competitiveness," that included support for a "a single publicly-funded program available to provide training for all workers permanently dislocated from their jobs who need new skills to secure productive employment."⁴⁶

There is widespread agreement that programs should be consolidated, that dislocated workers should have access to the full panoply of retraining assistance regardless of the reason for their dislocation, and that training programs should be held accountable on the basis of actual job placements. These reforms are perceived to require broadened business involvement, especially in helping to

⁴⁶ THE BUSINESS ROUNDTABLE, *WORKFORCE TRAINING AND DEVELOPMENT FOR U.S. COMPETITIVENESS* 9 (1993).

identify where the jobs actually are and which training programs actually work to qualify dislocated workers for these jobs.

CONCLUSION

As the job training reform effort unfolds in 1994, the NAFTA-related dislocations become somewhat overshadowed by structural dislocations of large numbers of workers for whatever cause. This is, however, a good sign because there are and will be far more workers whose jobs have permanently gone away than are attributable to NAFTA, and they should all have access to retraining opportunities. Even so, it is significant that the NAFTA debate brought this problem to the forefront of the public policy agenda and helped to set the stage for comprehensive reform.

As the NAFTA implementation efforts also start to take place in 1994, the trilateral system of enhancing a trade agreement with a recognition of transnational worker rights, even where they are defined in terms of domestic labor standards, may well serve as a prototype for other agreements. It is a limited system, at least in terms of its enforcement authority, but it is most likely to succeed if the cooperative opportunities envisioned in the agreement are emphasized. Many such activities are starting to happen, and should be encouraged.