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LABOR IN THE INTERNATIONAL ECONOMY

John S. McKennirey*

I. INTRODUCTION

The purpose of this article is to offer some reflections on recent experience within North America of the internationalization of labor issues and particularly the response to this development expressed in the North American Agreement for Labor Cooperation, the parallel Agreement to the NAFTA. Why was this Agreement considered necessary and how is it an outgrowth of the international economy? How did it emerge as what it is? What has been the experience with it? The answer to the first of these questions is found in the expanding scope of international trade and trade agreements and the internationalization of the labor field. The answer to the second question is found in the dynamics and parameters that conditioned the negotiation of the labor agreement. The answer to the last question is found in the experience with the Agreement over the past two years.

II. CHANGING TRADE AND TRADE AGREEMENTS: NEW FORMS OF INTERNATIONAL COOPERATION

Year after year over the past thirty years, the value of goods traded internationally has grown almost twice as fast as the value of goods produced. This ratio extended over such a long trajectory has reached the point where international trade is a predominant preoccupation of virtually every major national economy.

We know as well that what is happening here is not just the growth of trade in the sense of the volume of goods and services exchanged, but it is the internationalization of the production process itself, and of business services, of investment, of corporate structures, of research and development, and so on. Trade has been transformed into the more complex phenomenon of globalization. This includes a technological dimension with great implications for labor, because trade and international business spread new technologies so rapidly around the world causing major labor adjustments.

As trade has been transformed, trade agreements have also been transformed. No longer do these agreements simply deal with tariffs, national treatment, antidumping measures, and other "pure" trade is-

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sues, but they now bring an international order into an expanding range of trade-related areas of economic activity: non-trade barriers, investment policies, services which include financial services, product and health and safety standards, government procurement policies, the movement of business personnel, intellectual property rights; and, to facilitate the working of these complex agreements, as is so central in the NAFTA, they also include sophisticated international dispute resolution mechanisms, which are themselves a considerable development in international relations.

The rationale for the expanding scope of trade agreements is a thesis with a major corollary. The thesis: trade affects us more and more and so we need to be more concerned about the structures of trade. And the corollary: whatever affects trade also affects us more and more, and so we need to be more concerned about the factors of international competition. Labor and environment were identified early on in the NAFTA process as fitting both thesis and corollary. Increased trade is likely to impact on the labor market and the environment; and, at the same time, the way the labor market or the environment is managed may impact on competition.

III. THE INTERNATIONALIZATION OF LABOR ISSUES

An aspect of the overall growth of the international economy through trade and globalization is the internationalization of labor issues. Labor markets have been traditionally defined as essentially local; people looked locally for work and employers looked locally to hire. But they were also national, in the sense that workers were legally able to move anywhere within their own nation to seek employment. But with growing internationalization of economies, this local structure of the labor market has been changing. While the vast majority of workers still look locally or at most nationally for work, companies have begun much more frequently to look globally at where they will locate worksites, and they will then situate worksites where economic conditions are most favorable. Thus, from the worker’s perspective, the labor market retains its traditional local or national definition, being confined to his or her area of labor mobility (with some exceptions for the highly skilled); but from the employer’s perspective, the labor market has become international.

The effect of this development can be seen in heightened attention to the international dimensions of labor issues, especially among advanced economies where the population has been most concerned about what is called the “delocalization” of work. In the 1980s, the United States began attaching conditions regarding international labor standards to its system of trade preferences for developing nations. During the same period, the European Community (in response to the entrance of Greece and Portugal) adopted first the Charter of Basic Workers
Rights, and later, the Social Chapter in the Maastricht Treaty. Both were efforts in different ways and contexts to address the potential effects of the international economy on labor conditions.

In the 1990s, the NAFTA countries added a parallel agreement on labor to their trade agreement, which was intended to deal with labor issues internally to the free trade zone, while the European Union (E.U.) adopted the U.S. idea of labor standards as conditions for trade preferences as a way of dealing with labor issues external to the E.U. Apparently, North America and Europe were watching what the other was doing in the previous decade. Also in this decade the question of the treatment of labor issues within the global trading system was made the subject of working groups and studies in the International Labor Organization and the OECD. There is discussion of a similar working group within the World Trade Organization. There are other manifestations, such as the recent and increasingly substantive discussions of labor issues among the labor ministers of the G-7 countries and countries of the Western Hemisphere.

Overall, what had been a local and national issue for so long, bounded by the legal limits of labor mobility, has now taken on a much more substantial international dimension due to the evolution of the international economy.

The question is, how can national governments establish a degree of influence regarding the labor dimensions of an economy which is so clearly transnational in nature? Without such governmental influence, the growing international dimension of the labor market would be without the structures of political or public accountability. At the end of the day, if the new international economy appears to evolve without such structures, if it seems to be ruled only by the laws of Darwin subjecting labor laws or other important standards to enormous new competitive pressures, it is possible that public antipathy toward it will grow. Most importantly, it may not be possible to ensure that the public good, which is expressed in these laws, is equally protected within the international economy as it is domestically.

While the answer to the question ‘how’ is far from clear, it seems likely to demand new forms of international cooperation. And, in fact, are not trade agreements with their expanding agenda becoming extensive new forms of international cooperation?

The NAFTA supplementary agreement on labor is one of the first concrete expressions of nations attempting to come to grips with the labor dimension of the new international economy. It is, in fact, the first international agreement on labor standards to be linked to an international agreement on trade.

IV. THE CASE OF LABOR IN NORTH AMERICA

Before examining the negotiation of the NAFTA agreement on la-
bor, it is worth considering briefly the labor context in North America, in terms of labor markets and the different systems of labor law, within which it was developed.

A. The Labor Markets

The labor market landscapes in the three NAFTA countries have some important distinctions. The Canadian and U.S. labor markets are characterized by slowing labor force growth and strong service sector employment (over seventy-four percent of total employment in 1994), while in Mexico the labor force is growing very rapidly and the workforce is relatively much younger. In Mexico, a relatively high proportion of employment, twenty-five percent, is in the primary sector, wages overall are much lower, and there is more low-skilled employment than in the other North American countries. However, education and skill levels in Mexico have improved considerably over the past decade.

Another important distinction is in the types of workers in each country. Mexico has significantly fewer employees, fifty-seven percent, than Canada which has eighty-four percent, and the United States, which has ninety-one percent, but substantially more self-employment (twenty-five percent of total employment in Mexico in 1995, compared with nine percent in Canada and seven percent in the United States in 1994). And, there is more unpaid work: thirteen percent in Mexico in 1995 compared with 0.4% in Canada, and 0.2% in the United States.

Unionization rates in Canada and Mexico are roughly twice as high as rates in the United States. While unemployment in Canada is much higher than in the United States and Mexico, the United States and Mexico have higher levels of low-wage employment.

These observations serve to illustrate that the NAFTA was bringing widely diverse economies and labor markets together in a new economic partnership. In this sense, it was a microcosm of what was happening in labor markets globally as a result of the General Agreement on Tariffs and Trade (GATT).

B. The Labor Laws

Although in the NAFTA context, labor and the environment are often mentioned in the same breath, yet the two are obviously distinct fields, even in terms of international treatment. For instance, whereas there have been at least fifty-six international treaties and agreements on the environment concluded in the decade of the ‘80s alone, and there are some twenty international environmental agreements which include trade provisions, the NAFTA labor agreement is the first international agreement on labor to be linked with an international agreement on trade.
This contrast illustrates how jurisdiction has been relatively guarded over labor matters. While the International Labor Organization (I.L.O.) (of the United Nations) has existed since 1919, subscription to its international conventions is voluntary, as is compliance, even if a country has ratified a particular convention.

The fact is, labor policy touches directly the social values and economic philosophy of a country, and is universally a politically sensitive domain. It is a subject which in many areas, especially concerning the balance of rights between unions and management, employers and employees, contains different and often conflicting points of view within a single country, let alone between nations. On the other hand, basic labor rights are close to human rights and in that sense transcend national and local politics.

Fortunately, largely due to the historical efforts of the I.L.O., there has gradually emerged a substantial international consensus over basic labor rights and principles. Several of the most fundamental I.L.O. Conventions have been ratified by over one hundred nations. There is an increasingly strong international awareness of the universality of such basic rights as the freedom of association, or the prohibition of forced labor, or the protection of child labor. In addition, in many technical matters, such as occupational safety, many national legislative codes have become quite comparable.

Yet, despite this historical progress on international labor rights, the way fundamental labor rights are expressed in domestic law remains a political hot potato. This is as true in the North American context as it would be anywhere. Any significant change to labor legislation is a major political issue. It is not surprising, therefore, that the negotiation of what came to be the North American Agreement on Labor Cooperation was both urged by powerful forces yet bounded by powerful constraints.

While the labor laws in Canada, the United States, and Mexico reflect a common set of basic principles, and in technical areas were found to be quite comparable, the fact remains that they are substantially different systems. A few examples: all three countries are federal states, but the jurisdictional division over labor matters varies enormously. The United States has a single set of laws and a single enforcement agency (either the National Labor Relations Board (NLRB) or the Department of Labor, depending on the legislative area) which extends throughout the entire national territory. Mexico also has a single set of national labor laws, but enforcement power lies substantially with the thirty-one states. Both federal and state labor agencies and over 100 federal and state “Conciliation and Arbitration Boards” enforce the laws. In Canada, the ten provinces enjoy sovereignty in regard to labor law matters along with the federal government for federally regulated industries. There are, thus, eleven separate labor law
systems with eleven labor departments and labor boards (or, in Quebec, a judicial tribunal) to enforce the laws. (And this does not mention the system in the Canadian territories.)

Or we might consider the basic employment relationship. In the United States, the "employment at-will doctrine" still prevails for many workers unless constrained by a union contract (which applies to only about twelve percent in the private sector) or by laws against discrimination. In Canada, due to the greater extent of unionization, in addition to broader statutory protections on discrimination and broader judicial rulings, the "at-will" doctrine has almost disappeared. But in Mexico, the concept itself is anathema. Every employee works under a contract of employment with just cause for termination required by law.

Just as at the international level in general, North America demonstrates both common recognition of general labor principles, but also substantial variation in legislative and administrative application of these principles.

C. Parameters of an Agreement

Within this context of labor markets and labor regulation, the NAFTA labor negotiators worked within certain parameters of both constraints and imperatives.

The supplementary agreements could not defeat the purpose of the originating agreement, the NAFTA. The side agreements could not become themselves barriers to trade. The fundamental objective was the establishment of more order, broader benefits, and more certainty in the trading relationship. The E.U. took similar care not to make its labor policies a potential constraint on trade, which would have run counter to the entire project of an economic union. The trade linkage in the supplementary agreements to the NAFTA was carefully designed to incorporate an effective monetary discipline, but not to create a trade barrier.

Second, there was clearly no intent to establish a political union among Canada, the United States, and Mexico. A trade agreement may make some concessions to absolute sovereignty, but it does not involve creating a common legislature to make multinational laws nor common courts to enforce them. Voluntary international standards, as in the I.L.O., are one thing, but international standards which could in effect supersede domestic law is something entirely different. The model of the E.U. did not apply in North America.

Third, again in keeping with the notion that the NAFTA did not involve the establishment of a supra-national government, there was a logical and practical constraint not to attempt to create a super regulatory agency empowered to investigate specific cases in a labor force of over 180 million workers. The task of regulating the labor market must
remain with the labor agencies of the various governments at the national and subnational level, together with their relevant administrative tribunals and courts.

The acceptance of these constraints is clearly expressed in the labor agreement, which refers to full respect for domestic sovereignty in the making of labor laws, as well as similar respect for domestic adjudicative proceedings, and recognizes that responsibility for enforcement rests with domestic agencies.

Not all the conditions for the negotiations were negative; there were also positive imperatives. The eventual Agreement would have to address what had emerged in public debate as the real issues, the effective enforcement of domestic law, and safeguarding basic standards from competitive pressures. Long in advance of opening the side agreement negotiations, all three countries had examined the labor laws of each other; and the common conclusion, which was not seriously questioned during the ensuing NAFTA process, was that the laws of the other parties provided sufficient common ground on which a labor agreement could be built. This is not to say that there was uniform satisfaction with existing labor laws, but neither was there a demand for major legal reform as a realistic or necessary condition for the NAFTA.

Instead attention shifted to perceived problems with enforcement, as well as the possibility of further deterioration of enforcement in the face of intense competitive pressure for investment, and the potential for relaxation of basic standards, again to attract or retain investment. The Agreement would have to address these issues.

It did so by defining the basic elements of "effective enforcement" in a series of central obligations, and by providing mechanisms by which the Parties could hold each other accountable to these obligations. The Agreement also defined a set of basic labor principles and included strong commitments to promote these to the maximum extent possible, as well as to maintain high labor standards. While not subject to the same accountability mechanisms as the obligations for domestic enforcement procedures, the labor principles are important political commitments for which domestic and international political accountability must be assumed.

There were other positive requirements. The three nations during the NAFTA negotiations had developed bilateral cooperative memorandums on labor (Mexico with the United States and with Canada). However, these agreements had been considered insufficient on two grounds: first, they were strictly government-to-government arrangements providing no direct access for the public to raise issues or complaints; and, second, they contained no binding, enforceable obligations on the Parties. What was wanted for the trilateral agreement on labor was an agreement that contained significant, enforceable obligations,
and which provided meaningful public access.

The eventual Agreement met these conditions by including binding obligations regarding effective enforcement of domestic law tied to a sophisticated dispute resolution process. Public access was assured by providing for “public communications” which would be directed to a special office in each country responsible to the Minister of Labor. In addition, the Agreement contemplated the establishment of private sector and subnational government advisory panels.

However, incorporating these requirements also created a demand for flexibility. The major political and constitutional differences between the countries, the sensitive nature of labor policy in all three nations, the different traditions involved in public participation, and the fact that labor law administration frequently involves independent administrative tribunals, all argued for as much domestic tailoring of the Agreement as possible. So, each country is able to establish its own process for handling public communications and deciding how to pursue them, and its own approach to private sector and governmental advisory panels.

Finally, the Agreement needed to define its scope: what would be meant by “labor”; what were the labor laws that would be covered by the obligations; and what would be the overall scope of the Agreement’s objectives? A great deal could be covered by the word “labor,” ranging from safety regulations to union formation to unemployment insurance systems or training, or even basic education or employment-related health care or housing. And what if certain labor subjects were to be treated differently from others, as was in fact the case, how would these specific areas be delineated? The solution was to rely on the set of labor principles, only those laws related to the principles were labor laws for the purposes of the Agreement.

Important additional definitions were needed to connect the countries’ obligations to trade. The obligations needed to be linked to trade because it was the prospect of free trade which in the first instance opened the door to what otherwise would have been an intrusion into the domestic sphere. Thus, the disciplines of the Agreement are confined to industries that are trade-related.

The obligations also needed to be balanced because otherwise, a country with the most labor protections would be opened to the most obligations, and the country with the least protections would have the least obligations. Obviously this would have contradicted common sense and could have discouraged countries from adopting high standards or even encouraged lowering standards. Thus, to correct this potential problem, the right to challenge another country regarding its obligations is limited to countries which themselves offer the same level of protection, referred to as having “mutually recognized” labor laws. This, in fact, provides a benefit for adopting high standards, and elimi-
nates any possible disincentive from raising levels of protection.

V. THE MODEL OF A TRADE AGREEMENT

As mentioned, neither the model of the E.U., a political union, nor the model of the I.L.O., with voluntary obligations and enforcement, was suitable for the NAFTA context.

So, possibly more by lack of an obvious alternative than by design, the NAFTA itself came to serve as the model for the new Agreement. Perhaps the most interesting aspect of this model is that, unlike the U.N./I.L.O. model or the E.U. model, it places the governments not in a vertical relationship to an international body, but in a horizontal relationship to each other.

The labor agreement is built on the principle of domestic law, as is, for example, the NAFTA’s Chapter 19 on trade law. Again, like the NAFTA, the labor agreement permits the implementation of domestic law, as in the NAFTA treatment of intellectual property law, to be open to international review.

As in the NAFTA, the objectives of the labor agreement include public information, greater certainty, transparency, and rule of law, in order to improve the economic partnership. Like the NAFTA, it provides channels for private parties to raise issues across borders that affect their interests. Like the NAFTA, it is fundamentally a partnership model, concerned with mutual gain, rather than an adversarial or juridical model. It aims first to avoid disputes through information and cooperation, second to facilitate consultations and joint examinations of matters of concern, and only if necessary to formally resolve disputes through recourse to a third party. Even its formal dispute resolution process, patterned on Chapter 20 of the NAFTA, is designed to focus on problem-solving recommendations.

A number of the labor agreement’s principle objectives were first expressed in the preamble to the NAFTA, specifically: “to improve living standards and working conditions in all three countries.” The labor agreement aims to enhance the overall value of the trade agreement by pursuing these objectives directly, and not just as a by-product of increased trade. It envisages international cooperation and mutual development focused on these common economic goals.

Following the model of the NAFTA Trade Commission, the labor agreement creates a Labor Commission formed of the Cabinet members responsible for labor in the three countries. This Council of Ministers gives the three nations a new international institution established at the highest level of national political office. It thus extends political accountability for labor matters into the international realm in a special new way. The national offices created under the Agreement and the international Secretariat which serves the Council of Ministers, provide an institutional framework for the three countries to work
together.

VI. LIVING WITH THE INTERNATIONAL ECONOMY

Experience under the NAALC so far has obviously been limited. Less than three years have passed since it came into force. There have been a number of public complaints concerning the enforcement of labor laws. These complaints have been submitted to domestic governments, as the Agreement prescribes, and in two of five cases the domestic governments have decided to raise the complaints with the other implicated government. This alone is a significant indication of the governments' joint determination to give life to the Agreement.

Moreover, in these two cases, the issue was related to the freedom of association and the right to form a union and therefore could proceed only to the stage of Ministerial Consultations, and not to further stages of evaluation and dispute resolution. Nonetheless, the governments have responded to these issues by adopting extensive programs which have involved a high degree of public participation as well as private sector and academic participation. It could be argued that through these extensive responses, the governments involved have by choice given Ministerial Consultations as much weight and public attention as would be achieved under the Evaluation Committee process. Again this shows commitment to the Agreement and willingness to accept political responsibility for dealing seriously with issues raised through the Agreement's new channels.

In addition to these "public communications," there has been a wide-ranging program of cooperative activities between the three countries organized by the National Administrative Offices; and the international Secretariat is now also engaged in a new program of its own, including a special study on the topic of sudden plant closures as a potential blockage to the right to organize a union which resulted from a Ministerial Consultation. All three countries are forming private sector advisory bodies to provide direct input to governments on national participation in the Agreement.

VII. CONCLUSION

International trade is seen by almost every country in the world today (as we can see by the growing size of the W.T.O.) as a means of improving living standards, job opportunities, and working conditions for its workforce no matter what economic level a country may be starting from. But competition is not an automatic or unalloyed panacea (as the history of countries drawn into single product dependency has shown). Intensified international competition needs to be balanced and complemented by increased international cooperation so that the
international marketplace can contain the safeguards and stability provided by basic laws and rights. This is obviously important in the commercial sphere, such as in regard to intellectual property rights, but it is also important in other economic spheres as well, such as labor rights. The rule of law needs strong international support.

In the NAFTA labor agreement, the trading partners make explicit their determination that increased trade should be accompanied by the recognition and promotion of the rights and interests of the workforce. The labor agreement is an international discipline respecting the application of domestic labor law, and in this it is an important innovation in the new international economy. It is also a commitment and a vehicle for three countries to work together on the increasing range of labor matters that are international in nature.