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THE NORTH AMERICAN FREE TRADE AGREEMENT: ECONOMIC INTEGRATION AND EMPLOYMENT DISLOCATION*

In a global economy where goods can be sourced in low-wage Third World countries, the effective supply of unskilled workers has expanded enormously. As a consequence, wages must fall for the unskilled who live in rich countries. Quite simply, supply and demand require it. In a global economy a worker has two things to offer— skills or the willingness to work for low wages.¹

On February 26, 1993, President Bill Clinton gave the first major international trade policy address of his administration. The President argued in favor of expanding foreign trade through the reduction of trade barriers,² and dramatically labelled the current period of United States history as the “third great moment of decision in the 20th Century.”³ Although his position is fundamentally in step with the objectives of the Bush Administration, President Clinton distinguished his policy on an issue that has long divided Democrats and Republicans⁴ on free trade: what provisions should be made to assist those workers who will inevitably be displaced as our economy becomes more internationally integrated.⁵ The President voiced his support for the North American Free Trade Agreement,⁶ but that support has been conditioned on, among other things, the development of a mechanism that will dull the blow to American workers who stand to lose their jobs as a result of the freer trade created by the NAFTA.

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1. LESTER C. THUROW, *HEAD TO HEAD: THE COMING ECONOMIC BATTLE AMONG JAPAN, EUROPE, AND AMERICA* 52 (1992).

2. WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, U.S. Gov't Printing Office, Vol. 29 No.8, Remarks on the Global Economy at American University, 320 (1993) [hereinafter WEEKLY COMPILATION]. “[Our trade policy] will say to our trading partners that we value their business, but none of us should expect something for nothing. We will continue to welcome foreign products and services into our markets, but insist that our products and services be able to enter theirs on equal terms.” *Id.*

3. *Id.* at 321. The President never explicitly identified the other two great moments of decision of this century. He did allude to the post-World War I period as the first (“Will we repeat the mistakes of the 1920’s and 1930’s by turning inward?”), and the post-World War II period as the second (“Or will we repeat the successes of the 1940’s and 1950’s by reaching outward and improving ourselves as well?”). *Id.*

4. In a precursor to the current Canada-United States Free Trade Agreement, Congress drafted The Omnibus Trade and Competitiveness Act of 1987. President Ronald Reagan vetoed the legislation on the basis of a provision that would require employers that met certain size criteria to give 60 days notice of a plant closing. The irony is that Congress, while foiled on the trade bill, enacted in separate legislation the Worker Adjustment and Retraining Notification Act, Pub. L. No. 100-379, 102 Stat. 890 (1988) (codified at 29 U.S.C. §§ 2101-2109 (Aug. 4, 1988)) [hereinafter WARN]. This was the aspect of the trade legislation to which the President objected.

5. WEEKLY COMPILATION, *supra* note 2, at 324. “We have got to focus on how to help people adapt to these changes, how to maintain a high wage economy in the United States without ourselves adding to the protectionist direction that so many of the developed nations have taken in the last few years.” *Id.*

6. The North American Free Trade Agreement, 32 I.L.M. 296 [hereinafter NAFTA].

This Note addresses those factors which differentiate the NAFTA from the United States-Canada Free Trade Agreement⁷ in terms of its impact on U.S. employment. Specifically, the inclusion of Mexico in the free trade agreement introduces a potential for the loss of labor-intensive jobs in the U.S. This Note explores this possibility and analyzes the methods of coping with the dislocation of U.S. workers due to the NAFTA. Part II of this Note outlines the Canada Free Trade Agreement as a foundation for understanding the effects of free trade with our North American neighbors. The history, nature of the agreement, and its distinguishable employment effects provide an empirical model of free trade between two similarly situated countries. Part III examines the past and present policies of Mexico which prompted the proposal of the NAFTA. This section also examines the maquiladora industry as a small scale model of what free trade with Mexico might entail. Part IV establishes the need for measures which deal with the dislocation of U.S. workers regardless of whether there is a net gain or loss of jobs as a result of the NAFTA. It further outlines the various programs already in effect which might serve to lessen the impact of job dislocation. Finally, this section contains a series of recommendations which could help transform that portion of the U.S. workforce which receives low wages for labor-intensive work into higher skilled, knowledge-intensive workers. This would enable the U.S. to better compete in the global economy. The U.S. can achieve this through a combination of application of existing laws and by alerting workers in sectors that will likely be impacted by the NAFTA of the forthcoming changes in employment opportunity.

I. THE CANADA FREE TRADE AGREEMENT⁸

Trade between Canada and the United States is the greatest of any two nations in the world.⁹ As stated in its preamble, the goals of the CFTA include increased productivity and employment, increased market access for goods and services of each country, and strengthened standing for Canada and the United States in global trade.¹⁰ This section will begin by charting the history of the two

7. United States-Canada Free Trade Agreement, Jan. 1, 1988, 27 I.L.M. 293 [hereinafter CFTA].

8. The CFTA was signed by President Ronald Reagan and Canadian Prime Minister Brian Mulroney on January 1, 1988, ratified by the United States Congress in the fall of that year, and became effective on January 1, 1989. P.L. No. 100-449, 102 Stat. 1851 (Sept. 28, 1988).

9. In 1991 the total trade between the U.S. and Canada amounted to over \$176 billion; Japan-U.S. trade amounted to nearly \$140 billion; Mexico was the third largest trading partner at over \$64 billion; Germany and Great Britain round out the top five U.S. trading partners, at \$47.5 billion and \$40.6 billion, respectively. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1992* (112th edition) 1992.

10. *Id.* The full text is as follows:

PREAMBLE

The Government of Canada and the Government of the United States of America, resolved:

TO STRENGTHEN the unique and enduring friendship between their two nations;

TO PROMOTE productivity, full employment, and a steady improvement of living standards in their respective countries;

TO CREATE an expanded and secure market for their goods and services produced in their territories;

TO ADOPT clear and mutually advantageous rules governing their trade;

TO ENSURE a predictable commercial environment for business planning and invest-

nations as trading partners and then will examine the role the employment debate played during negotiation of the agreement. This is done to set the foundation for analysis of the NAFTA.¹¹

A. History of Canada - United States Trade

There is a long record of trade competition and limited cooperation between Canada and the United States as a result of shared history and common roots. One example of this link was the "Loyalist" settlements of the three "Maritime Provinces,"¹² in which an estimated 40,000 colonist troops, aligned with the British in the American revolution, took refuge in Canada after the British defeat.¹³ Throughout the first one hundred years of the United States, "migrants ebbed and flowed [between the United States and Canada] as opportunity dictated."¹⁴ But this freedom of exchange of culture was not matched by free trade in commerce.

Throughout this period, formal cooperation did not exist. Tariffs imposed by both sides prevented Canadian-American trade from flourishing. The catalyst for the first trade agreement between these two nations¹⁵ was a global depression in the 1840's. There is evidence, however, that the two nations reacted differently to this economic environment; Canada realized it needed greater market access while the trend in America was to preserve advantageous demographics by closing out foreign competitors.¹⁶ Therefore, it was the Canadians who pursued the first formal agreement on trade in the latter part of the decade.

The result of this effort was the Elgin-Marcy Treaty of 1854.¹⁷ This agreement was short lived. It created duty free status mainly for natural products while

ment;

TO STRENGTHEN the competitiveness of Canadian and United States firms in global markets;

TO REDUCE government-created trade distortions while preserving the Parties' flexibility to safeguard the public welfare;

TO BUILD on their mutual rights and obligations under the *General Agreement on Tariffs and Trade* and other multilateral and bilateral instruments of cooperation; and
TO CONTRIBUTE to the harmonious development and expansion of world trade and to provide a catalyst to broader international cooperation;

HAVE AGREED as follows

Id.

11. There is an obvious distinction between Canada and Mexico. Therefore, it is difficult to project results from the former agreement to forecast the potential effects of the latter. But because the NAFTA is fundamentally equivalent to the CFTA, and because no closer analogy is available, the CFTA will be used as basis by which measurement of the NAFTA and its effect on the United States will be made.

12. New Brunswick, Prince Edward Island and Nova Scotia.

13. ROBERT BOTHWELL, *CANADA AND THE UNITED STATES: THE POLITICS OF PARTNERSHIP* 3 (1992).

14. *Id.* at 5. "The flow was assisted by the fact that aspects of basic life were essentially the same on either side of the border." *Id.*

15. At this time Canada was still a colony of Great Britain.

16. GILBERT R. WINHAM, *TRADING WITH CANADA: THE CANADA-U.S. FREE TRADE AGREEMENT* 5 (1988). This can be explained by the difference in population; the United States market was, and still is, much larger than the Canadian market. The Americans believed that they could thrive by selling within their borders and it was advantageous to shut out foreign competition. The Canadians, on the other hand, realized that their population was too small to support a prosperous economy. To a certain extent, these feelings still prevail.

17. Reciprocity Treaty with Great Britain, June 5, 1854, U.S.-U.K., Vol. X Statutes at Large and Treaties of the U.S. at 1089 (1855).

manufactured goods remained heavily tariffed. Thus, because the United States was more industrialized, the agreement favored the Canadians. Indeed, it is estimated that under the accord only 55% of American exports arrived in Canada duty free while fully 90% of Canadian goods reached American markets that way.¹⁸ The death knell of the accord was its uneven terms and the American Civil War.¹⁹ In 1866 the United States abrogated the Treaty. This period was fondly remembered by Canadians for its economic rejuvenation.²⁰

The next stage of interaction was prompted by the withdrawal of the United States from the Reciprocity Treaty. The Canadians responded with a policy of heightened tariffs. The theory behind this approach was to protect Canadian manufacturing in order to allow growth. This posture towards the United States was embodied in the National Policy of 1879, and its effect was to create a manufacturing sector that became dependent on the protection. Because of this dependence, and the nationalistic feelings it generated, it became politically difficult to oppose the tariffs.²¹ This period of cold trade relations prevailed until 1934,²² despite sporadic efforts at reconciliation in the interim.²³

The opening of negotiations on a trade pact came with the passage of the Reciprocal Trade Agreements Act of 1934. Aside from the important expression of good will, the 1934 Act had minimal impact. It resulted in only two limited bilateral agreements, one in 1935 and another in 1938.²⁴ The final foray of note in this area prior to the CFTA was the Canada-U.S. Automotive Products Trade Agreement of 1965.²⁵ This was an effort to protect the young Canadian automobile industry, which was based primarily on American corporate subsidiaries. While the pact seemed more favorable to the Canadians, it is alleged that the concession was made in order for the United States to gain a foot-hold on free trade with the goal of expanding market by market.²⁶

18. WINHAM, *supra* note 16, at 4.

19. The impact of the American Civil War was a wave of nationalism, protectionism and ill will towards Great Britain for their support of the south. Ann Carlsen, Note, *The Canada United States Free Trade Agreement: A Bilateral Approach to the Reduction of Trade Barriers*, 12 SUFFOLK TRANSNAT'L L.J. 299 (1989).

20. BOTHWELL, *supra* note 13, at 6. "[T]he 1850's and 1860's seemed an era of prosperity and abundance: to later generations of Canadians, reciprocity with the United States was a prescription for affluence." *Id.*

21. On the other side of the border, feelings were mutual. As a result, half of all Canadian exports were shipped to the United States in 1888; that figure fell to 27% in ten years. *Id.* at 7.

22. One extreme manifestation of this period of poor relations was the Tariff Act of 1930, known as the Smoot-Hawley Act. This legislation raised tariffs on most articles imported into the United States. Smoot-Hawley is now synonymous with protectionism and is largely frowned upon as an over-reactionary measure. This policy was met with matching protectionism by the Canadians. DEBRA P. STEGER, *A CONCISE GUIDE TO THE CANADA-UNITED STATES FREE TRADE AGREEMENT* 125 (1988).

23. One such invitation came from the Americans in 1911, and another, in 1922, by the Canadians. WINHAM, *supra* note 16, at 5. Relations had deteriorated in 1911 to the point that then Prime Minister Sir Wilfrid Laurier was defeated in an election held pursuant to a reciprocity treaty he had negotiated with President William Howard Taft. BOTHWELL, *supra* note 13, at 8.

24. WINHAM, *supra* note 16, at 5.

25. Canada-U.S. Automotive Products Trade Agreement of 1965, Sept. 16, 1966, T.I.A.S. No. 6093, at 1372. This agreement is also referred to as "Autopact."

26. BOTHWELL, *supra* note 13, at 93. "The auto agreement was generally regarded as successful; trade in this sector has increased by twenty-four times [between 1965 and 1988], and [in 1988] account[ed] for more than one-third of all U.S.-Canadian trade." WINHAM, *supra* note 16, at 6.

B. Negotiation of the CFTA

The starting point for the CFTA was March 17, 1985.²⁷ On that date President Reagan met Prime Minister Brian Mulroney in Ottawa and agreed to explore the possibility of a trade agreement.²⁸ In the early stages, the Canadians pushed for the negotiations;²⁹ on September 26, 1985 Mulroney announced to the Canadian Parliament that his administration would pursue negotiation of a free trade agreement.

From the United States' perspective, the agreement would have to be negotiated pursuant to section 151 of the Trade Act of 1974.³⁰ This act was designed to alleviate the constitutional tension that accrued when international trade agreements were negotiated. Under the constitutional scheme, the legislative branch has authority to regulate commerce³¹ while the executive branch, with the advice and consent of the Senate, has authority to negotiate treaties.³² The result of the 1974 Trade Act was a hybrid of authority; a "fast track" procedure was designed which permits the president to negotiate trade agreements, under certain constraints, while the Congress has the authority to approve or veto the agreement as it stands and may not change the document.

The first formal step for both countries was the appointment of chief negotiators. President Reagan named Peter Murphy, the United States ambassador to the General Agreement on Tariffs and Trade,³³ and Prime Minister Mulroney picked Simon Reisman, a former member of the Department of Finance.³⁴ The negotiators' first meeting took place on May 21, 1986, and the remaining negotiation can be broken down into four stages. During the first stage, working groups were formed and general discussions were held over the scope of the agreement.³⁵ The second stage consisted of seventeen formal bargaining sessions, which ended in discord as the Canadian team announced the end of the talks on September 23, 1987. Reisman argued that the United States was not responding

27. This is the first date that the two nations met to discuss trade relations with the end result of the CFTA. Another important early development was the election of Mulroney in September 1984. While the liberal government his administration displaced had explored the possibility of trade negotiations only one year earlier, it decided not to pursue the issue. Mulroney found trade talks a legitimate goal and initiated the dialogue early in his tenure. *Id.* at 24.

28. BOTHWELL, *supra* note 13, at 145. This meeting in Ottawa is known as the "Shamrock Summit." WINHAM, *supra* note 16, at 24. The understanding reached at Ottawa was the Declaration on Trade in Goods and Services, a declaration by both countries to pursue a trade agreement. *Id.*

29. Evidence, again, of which party had more at stake.

30. Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975).

31. U.S. CONST. art. I, § 8.

32. U.S. CONST. art. II, § 2.

33. The General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

34. WINHAM, *supra* note 16, at 25. These appointments created early tension as the Canadians believed that the United States representative was not senior enough. To the Canadians, this was evidence that the U.S. was not taking the trade talks seriously. BOTHWELL, *supra* note 13, at 146.

35. WINHAM, *supra* note 16, at 26. At this early stage it was apparent that the two sides had different objectives.

Canada based its approach on the principle of 'national treatment.' which would have meant the Canadian goods would receive the same treatment in the United States as goods produced there

The U.S. government had no equivalent grand plan for negotiation. It viewed the deal more as an addition to the GATT than as a new economic constitution between the two North American partners.

Id. at 26-27.

to the concerns raised by Canada.³⁶ This led to the third stage, during which the United States was prompted to appoint Secretary of the Treasury James Baker and Trade Representative Clayton Yeutter as negotiators. Baker invited the Canadians to meet to restart negotiations. While there were still points of contention, the two parties were able to agree on the broader issues and negotiations resumed. The final stage started on October 5, 1987 and ended on December 11; during that period the document was drafted.³⁷ The agreement was signed by Reagan and Mulroney on January 1, 1988.

In light of the history of relations between the two nations and particularly in light of the recent emphasis on the virtue of a free market by the Reagan-Bush and Mulroney platforms, it is no surprise that the most fundamental objective of a free trade agreement is market access.³⁸ Because of their heavy reliance on exports to the United States for economic security, eliminating trade barriers is essential to Canada.³⁹ Keeping markets open is a goal for the United States as well, though not at the same level of urgency.⁴⁰ In addition, the CFTA is perceived as the mechanism by which investments can overcome protectionist policies of the past.⁴¹

The CFTA is a comprehensive free trade area agreement that was developed in compliance with Article XXIV of GATT, a convention to which both nations belong. A free trade area is generally inconsistent with the policy of GATT which is, generally stated, to reduce trade barriers unilaterally as opposed to the formation of bilateral trade agreements with preferential treatment among select partners.⁴² GATT Article XXIV allows for such trade agreements provided certain conditions are met.⁴³ Many of the provisions of GATT are incorporated by reference into the CFTA.⁴⁴ In addition to incorporation by reference, some of the GATT principles have been included by "affirmation"; in this situation, the GATT provision is not within the CFTA but the reader must look to GATT for the rules and implications of any affirmation. The basic rule regarding the CFTA

36. The impasse was arbitration remedies that the Canadians wanted as part of the agreement. The United States would not allow existing trade law to be superseded by the CFTA. *Id.* at 32.

37. *Id.* at 34-35.

38. Even Democrats in Congress agreed with this policy: "[A] key beneficiary of this agreement is the consumer on both sides of the border. Increased openness of United States and Canadian markets means increased competition for an expanded customer base. Both United States and Canadian businesses had better be ready to compete for a consumer who will have more choices. Those that succeed, will grow and, in turn, strengthen the economies of both nations." 134 CONG. REC. S12,885 (daily ed. Sept. 20, 1988) (statement of Sen. Kerry).

39. The attraction of reconciliation with the United States becomes even more understandable in light of the fact that the American marketplace is more than ten times larger than Canada's. JEFFREY J. SCHOTT, UNITED STATES-CANADA FREE TRADE: AN EVALUATION OF THE AGREEMENT 6 (1988).

40. Again, this is due to the vast population disparity. *Id.*

41. CFTA, *supra* note 7, at § 1602.

42. JON R. JOHNSON & JOEL S. SCHACHTER, THE FREE TRADE AGREEMENT: A COMPREHENSIVE GUIDE 3 (1988).

43. The conditions of GATT Article XXIV are: first, substantially all trade barriers between the members of the agreement are removed, second, that new and higher trade restrictions cannot be promulgated for nations outside the agreement, and third, that the contracting parties must notify other GATT member nations. *Id.* at 4. The CFTA met these guidelines.

44. For example, CFTA, *supra* note 7, at § 501 (incorporating Article III of GATT); *Id.* at § 602 (incorporating the GATT "Technical Barriers Code"); *Id.* at § 1303 (incorporating the GATT "Procurement Code"). JOHNSON & SCHACHTER, *supra* note 42, at 7.

and its relation to any other trade convention or agreement, including the GATT, is that the CFTA prevails in cases of inconsistency, unless the CFTA prescribes otherwise.

Three basic principles form the foundation of the CFTA. First is the notion of national treatment, meaning that trade in investments, goods and services between the two nations are to be treated as if they are domestic.⁴⁵ There are certain exceptions, but this notion provides the framework for the reduction of barriers to trade. The second principle is reciprocity, a recognition of and respect for the fact that each partner has its own rules for regulating trade. Therefore, the concept is to treat trade in foreign goods by the rules of the country of origin. The third concept is harmonization, which is the effort by the CFTA to standardize certain trade practices of the two nations.⁴⁶

The document addresses a broad range of goods, services and investments. Because of its broad sweep, and in order to allow a smooth transition to the more competitive and integrated market, there is a phase-in period of up to ten years for many products.⁴⁷ While most tariffs were not particularly high before the effective date of the CFTA, some industries did have high tariffs.⁴⁸ Once the CFTA becomes fully effective, it will create greater market access and force businesses to be more competitive with firms from the other side of the border, and should create greater efficiency. The net result will be greater productivity and trade, with some displacement for those that cannot compete in the new environment.⁴⁹

C. The CFTA Employment Debate

One of the most divisive issues facing the NAFTA in the United States is the prospect that jobs will flow to the country with the cheapest labor as manufacturers seek to reduce costs of production. The greatest disparity exists in Mexico where labor standards are significantly lower than in either Canada or the United States.⁵⁰ The jobs debate prevailed in the negotiation of the CFTA as well, although the conflict was along different lines. Because the labor standards of Canada and the United States were significantly more in line than is the case with Mexico, the fear was not a flight of industry to either country for cheap

45. CFTA, *supra* note 7, at § 105.

46. JOHNSON & SCHACHTER, *supra* note 42, at 6.

47. Carlsen, *supra* note 19, at 311. For example, computers, vending machines, aluminum, fur, animal feed and motor cycles were made duty free at the outset on January 1, 1989. Other products, such as paper, auto parts, chemicals, textiles, plywood and steel will not become fully duty free until January 1, 1998. CFTA, *supra* note 7, at § 401.2.

48. SCHOTT, *supra* note 39, at 20. Those industries with protective tariffs will generally have the longer phase in period. *Id.* One example of an industry with high tariffs prior to the agreement was the "printed materials" industry. In 1987, it was a \$3 billion industry, and more than half of its total export, \$750 million, went to Canada. The duty on printed materials prior to the agreement was up to 10%, and stood to be phased out in five years. 134 CONG. REC. S12,885 (daily ed. Sept. 7, 1988). Another example of a sector with high tariffs was the telecommunications equipment industry which, prior to the CFTA, faced duties of up to 17.8%. *Id.* at S12,884.

49. SCHOTT, *supra* note 39, at 5. In addition to increased trade among Canada and the United States, trade with third party countries should, over time, also increase because of the increase in efficiency.

50. GARY C. HUFBAUER & JEFFREY J. SCHOTT, NORTH AMERICAN FREE TRADE: ISSUES AND RECOMMENDATIONS 107 (1992).

labor. The concern was over the very goal of the accord, freer competition. Therefore, opponents argued that the risk was not simply over potential harm to the worker but the fear of closure of entire industries that relied on protection from Canadian competition.

During the debate over the CFTA in Congress, this conflict between greater efficiency and job loss surfaced. While no one is on the record against the prospect of increased competition and efficiency,⁵¹ lawmakers must always be aware of the potential job loss in their districts.⁵²

The employment debate started well before the CFTA was introduced to the Congress. In an effort to "dispel trade myths," Representative Richard Armev cited an economist's analysis of the free trade issue. This perspective was applied not only to potential free trade with Canada, but also as a rebuttal to those members of Congress who advocated becoming more protectionist.⁵³ The Representative outlined six reasons why the United States should not become more protective, four of which directly addressed the employment issue.⁵⁴ The most pertinent point to this discussion was the fifth: "Myth No. 5 — Protectionism is the way to save jobs." The rebuttal was that because protectionism increases the cost of producing goods, many ancillary industries will not be able to compete because their costs will be increased. The net effect is to save jobs in the beginning of the chain, for example steel manufacturing jobs, but lose jobs downstream due to the higher costs of materials, like in the automotive industry.⁵⁵

As the potential for trade negotiations with the Canadians grew closer, the debate became more focused. The impact of an agreement with Canada, as opposed to free trade generally, surfaced. One concern expressed in the early dialogue was that since the Canadians were taking the initiative in pushing for an agreement, it was to their advantage to have the CFTA.⁵⁶ Citing Prime

51. One Senator, Lloyd Bentsen, tried to play down the gain in efficiency. "This agreement will increase our exports to Canada, but, quite frankly, opening a market one-fifth the size of Japan, about one-tenth the size of our market, and about one-fourteenth the size of the European Common Market is not really big bucks." 134 CONG. REC. S12,782 (daily ed. Sept. 19, 1988).

52. Senator Kerry of Massachusetts, a state heavily reliant on the manufacturing sector, projected a gain of 14,000 jobs in that sector in the first five years of the agreement. 134 CONG. REC. S12,885 (daily ed. Sept. 20, 1988).

53. Representative Armev cited Murray Weidenbaum's analysis, printed in the *Washington Times*, December 31, 1985. 132 CONG. REC. E274 (daily ed. Feb. 6, 1986).

54. Myth number one was that Japan was the problem for the trade deficit; myth number two was that the U.S. was an island in a world of protectionism; myth number three was that imports were dragging the economy down and depressing employment; myth number four was that imports were the main reason for unemployment in key industries; myth number five was that protectionism was a way to save jobs; and myth number six was that workers in import affected industries should receive preferential treatment. 132 CONG. REC. E274 (daily ed. Feb. 6, 1986).

55. *Id.* at E275.

A recent study shows that if the United States had imposed a 15 per cent import quota on steel in 1984, as the steel industry sought, 26,000 steel worker jobs could have been saved — but at a cost of 93,000 jobs in steel-using industries. Higher prices for steel would have made American automobiles and durable goods less competitive.

Id.

56. "Unlike our two principal trading partners, Japan and the United States, Canada does not possess a large internal market. Unlike European countries Canada does not have preferred access to a larger market through regional trading blocks." 132 CONG. REC. S3054 (daily ed. Mar. 19, 1986) (statement of Senator Chafee citing the Canadian Ambassador to the United States, Allen E. Gotlieb).

Minister Mulroney's address to Canada on the eve of the trade talks, Representative Bereuter noted that Mulroney would only sign an agreement that led to more jobs and greater prosperity for all Canadians. The Representative did not see any commitment on behalf of President Reagan to such concerns.⁵⁷

The other perspective was that protectionism may save jobs in the short run, but that the lower efficiency leads to reduced prosperity for all Americans. This was the argument of Representative Leach, analogizing the policy of prohibiting internal trade barriers of the Founding Fathers to the potential agreement with Canada. Our economy would be half as strong, the argument went, if we had "domestic protectionism."⁵⁸ By opening the border to free trade, both nations' economies would blossom. These sentiments were shared by members of both parties in the United States Congress.⁵⁹ Although it had to be politically hedged, most members of Congress supported a trade agreement with Canada. While there was a good chance of job displacement, the economics argued persuasively in favor of the CFTA.

II. THE MEXICAN ECONOMIC LANDSCAPE

Implementation of the NAFTA requires taking into account many factors which were not at issue in the drafting of the CFTA. The CFTA provides a glimpse of what free trade with our North American neighbors entails; and yet because the U.S. and Canada are economically similarly situated, it is necessary to gain insight into Mexico's economic agenda to assess the potential impact of the NAFTA. This section will examine the dramatic policy changes Mexico has embraced which have led to the proposal of the NAFTA. This section will also analyze the historical and current role of the maquiladora program in attracting U.S. business operations to Mexico.

A. Import Substitution And The Move Towards Free Trade

Beginning in the 1930's and continuing through the early 1980's, Mexico employed a policy of import substitution which focused on internal development. The government fostered internal development in large part through a program of industrial protectionism which restricted foreign investment and manipulated the exchange rate in an effort to advance domestic growth.⁶⁰ Mexico's protectionism took the form of tariff and non-tariff barriers including import licensing, quotas, domestic subsidies, and tax relief. Unfortunately, protectionism did not help nurture domestic industry. Instead, these programs created a Mexican industry which was inefficient and uncompetitive.⁶¹

57. 132 CONG. REC. H4652 (daily ed. July 17, 1986).

58. 133 CONG. REC. H2839 (daily ed. Apr. 29, 1987).

59. For example, Representative Kemp, the New York Republican, cited an article written by Senator Bill Bradley, the New Jersey Democrat, which argued for the trade agreement: "As Senator Bradley points out, a free-trade agreement with Canada would provide tremendous benefits to American workers and consumers." 132 CONG. REC. E1308 (daily ed. Apr. 29, 1986).

60. U.S. LIBR. OF CONG. RES. SERVICES, REPORT NO. 91-282E, NORTH AMERICAN FREE TRADE AGREEMENT: ISSUES FOR CONGRESS 12 (Mar. 25, 1991, updated Aug. 12, 1991) [hereinafter NAFTA: ISSUES FOR CONGRESS]. Import licensing proved to be Mexico's primary protectionist tool. Most products could not be legally imported into Mexico without obtaining a *permiso previo*. Denial of this license amounted to the levying of an infinite tariff. Sidney Weintraub, *The Promise of United States-Mexican Free Trade*, 27 TEX. INT'L L.J. 551, 555 (1992).

61. Jesus Silva & Richard K. Dunn, *A Free Trade Agreement Between the United States and Mexico: The Right Choice?*, 27 SAN DIEGO L. REV. 937, 951-52 (1990).

In the 1970's Mexico's inefficient domestic industry, which was predominantly owned and controlled by the state, found itself unable to export its manufactured goods. Additionally, during this period foreign investment in Mexico was almost non-existent.⁶² Against this bleak backdrop, substantial oil reserves were discovered in Mexico. While this discovery might have seemed a panacea for Mexico's faltering domestic industry, it led to an unhealthy dependence on oil. As world oil prices steadily climbed, Mexico adopted ambitious developmental programs which were funded through government spending. Oil revenues alone, however, could not support these programs,⁶³ and the inefficiency of domestic industry prevented it from narrowing this gap. As a result, Mexico borrowed heavily from international banks which focused on its oil reserves and anticipated future prosperity. By 1982, Mexico was on the verge of default on its loans to commercial banks due to falling oil prices, economic mismanagement, a worldwide recession, and rising interest rates.⁶⁴ The severity of this problem can be appreciated when one observes that Mexico's foreign debt rose from \$6.1 billion in 1970 to \$81 billion in 1982.⁶⁵ The Mexican Debt Crisis of 1982 signaled the beginning of a change in policy and practice which has culminated in the proposal of the NAFTA.

Initial analysis of Mexico's financial difficulties suggested a short-term or liquidity crisis, and that the solution lay in fiscal, monetary, and exchange rate policies in conjunction with short-term financing. This program focused on the reduction of Mexico's fiscal deficit, which had reached 16.5 percent of its Gross Domestic Product.⁶⁶ While these steps met with early success, by 1985 the fiscal deficit was once again on the rise and Mexico was unable to remain on schedule. As a result, there was a shift in strategy towards adopting the rationale of the 1985 Baker Plan. It addressed Mexico's debt crisis as a long-term or solvency problem, and focused on structural reforms. Later the 1989 Brady Plan was implemented, which focused on debt reduction.⁶⁷ These structural reforms signified a major departure from the protectionist practices of the past, and included privatization, deregulation, tax reform, and acceptance of foreign products⁶⁸ and investment into Mexico. Under this new agenda, Mexico joined the GATT in June 1986.⁶⁹

The adoption of free-market policies began under President Miguel de la Madrid (1982-1988) and flourished under President Carlos Salinas de Gortari

62. 138 CONG. REC. E2192 (daily ed. July 21, 1992).

63. K. LARRY STORRS, U.S. LIBR. OF CONG., CONG. RES. SERVICES, REPORT NO. IB91061, MEXICO-U.S. RELATIONS IN THE SALINAS PERIOD (1988-1994): ISSUES FOR CONGRESS 4-5 (May 29, 1991).

64. NAFTA: ISSUES FOR CONGRESS, *supra* note 60, at 15.

65. STORRS, *supra* note 63, at 5. An example of economic mismanagement was the failure of Mexico to lower the value of the peso to compensate for inflation. This increased Mexico's need to borrow, since the dollar-dominated loans were repaid with inflated pesos. *Id.*

66. The U.S. fiscal deficit that year was 3.4 percent of Gross Domestic Product. 138 CONG. REC. E2192 (daily ed. Jul. 21, 1992).

67. NAFTA: ISSUES FOR CONGRESS, *supra* note 60, at 17-18.

68. The use of import licensing has been phased out with the exception of the automotive industry and agriculture products. Weintraub, *supra* note 60, at 559.

69. Prior to the agreement, the maximum Mexican tariff rate on imports was 100 percent. Just as Mexico has unilaterally lowered its import tariffs below the GATT requirement, so too could it unilaterally raise them to the prescribed tariff ceiling. 138 CONG. REC. E2192-01 (daily ed. July 21, 1992).

(1988-present). These structural reforms could not have been implemented, however, had Mexico's budget deficit and inflation not been brought under control. The rate of inflation was reduced from 132 percent per annum in 1987 to 20 percent in 1989,⁷⁰ and currently to 14 percent in 1992.⁷¹ This was accomplished by implementing strict monetary and fiscal policies coupled with an extraordinary agreement between the government, business, and organized labor. Under the Pact for Economic Solidarity, or the *pacto* as it is known in Mexico, limitations were imposed on public sector prices and a freeze was placed on wages with government price control of certain consumer staples.⁷² This pact has been modified and adopted by the Salinas administration as the Pact for Economic Stability and Growth.⁷³ Mexico addressed its growing budget deficit by cutting the share of government spending in Gross National Product from 30 percent to less than 20 percent.⁷⁴ Much of the spending cuts were made in conjunction with the newly initiated privatization program, which reduced the distribution of subsidies to uncompetitive private firms and increased competitiveness in state-owned businesses.⁷⁵ Having success in reducing the deficit and inflation, bold structural change was free to proceed.

Privatization is one aspect of structural change which has progressed steadily and with beneficial results. In 1982, there were 1,155 state-owned or controlled businesses. By September 30, 1992, there were only 221.⁷⁶ This relieved the Mexican government of the economic burden tied to these unproductive and highly subsidized state-owned or controlled businesses. Privatization focused on both small and large businesses. The sale of Mexicana and Aeromexico airlines as well as the national telecommunications company Telemex are examples of the privatization of large businesses. By May 1992, the Mexican government had raised \$18 billion through these and similar sales, and used the revenue to help reduce internal and external debts.⁷⁷ An exception to this practice of privatization is the Mexican oil industry, for which the Constitution requires complete Mexican ownership.⁷⁸ Nonetheless, privatization has allowed Mexican industry to grow stronger and more efficient, while further introducing foreign investment into Mexico.

President Salinas has been given much of the credit for the recent policy changes embraced by Mexico. The new Foreign Investment Regulations issued by President Salinas on May 16, 1989, set forth more liberal foreign investment rules and served as further evidence of his commitment to a new agenda.

70. NAFTA: ISSUES FOR CONGRESS, *supra* note 60, at 18.

71. 139 CONG. REC. E367-03 (daily ed. Feb. 18, 1993). A State Department dispatch reports inflation figures which differ from the above. According to the dispatch, Mexico's inflation was reduced from 170 percent in 1989 to 19 percent in 1991. *Fact Sheet: Mexico*, U.S. Department of State Dispatch (Mar. 2, 1992).

72. 138 CONG. REC. E2192-01 (daily ed. Jul. 21, 1992).

73. NAFTA: ISSUES FOR CONGRESS, *supra* note 60, at 18.

74. While Mexico's budget deficit in 1982 was 16.5 percent of its GDP, today the deficit has been eliminated. Weintraub, *supra* note 60, at 559.

75. 138 CONG. REC. E2192-01 (daily ed. Jul. 21, 1992).

76. UNITED STATES INTERNATIONAL TRADE COMMISSION PUB. 2596, POTENTIAL IMPACT ON THE U.S. ECONOMY AND SELECTED INDUSTRIES OF THE NORTH AMERICAN FREE-TRADE AGREEMENT 1-10 (1993) [hereinafter POTENTIAL IMPACT].

77. *Id.* at 1-12.

78. 138 CONG. REC. E2192-01 (daily ed. Jul. 21, 1992).

Essentially, the regulations permit complete foreign ownership of certain industries, in addition to current maquiladora arrangements. Later that same year, President Salinas issued the Maquiladora Law of 1989, which replaced the Maquiladora Law of 1983. This new law provides incentives to foreign investment and, in most instances, allows up to 50 percent of the products produced by the maquiladora to be sold in the Mexican market. The issuance of this law embodies the changes in Mexican policy which have led to the proposal of the NAFTA. When the maquiladora programs were developed, the Mexican government supported them solely as a means of providing its citizens with employment opportunities. Foreign investment was merely a necessary evil to be endured. In contrast, the Maquiladora Law of 1989 openly courts foreign investors.⁷⁹ In an address before the Economic Club of New York President Salinas stated that:

For many years Mexico followed the path of protectionism and was inward-looking, depending on the domestic market. The crisis of the eighties showed that this model was outworn. In order to grow it is necessary to export and that demands competitiveness, technology and access to markets. If a protectionist view is taken, this does not occur and any drop in economic activity becomes a collapse, and recession becomes depression. For Mexico it took extraordinary efforts to open up the economy but it would have been far more serious to insist on carrying on along the old path.⁸⁰

President Salinas has encouraged foreign investment⁸¹ and opened Mexican markets in an effort to reverse the backward policy his government once embraced.

B. The Maquiladora Industry

The Mexican maquiladora program involves foreign-owned businesses creating manufacturing stations in Mexico which assemble foreign made components for export. The Mexican government created the maquiladora program in 1965 as part of the Mexican Border Industrialization Program in an attempt to avoid the potentially high unemployment caused by the cancellation of the U.S. Bracero Program in 1964.⁸² Typically, maquiladoras are arranged in a twin-plant configuration whereby a business establishes a production base in Mexico while the rest of the company resides in the U.S.⁸³ In part, the significantly lower wages paid to Mexican workers, when compared to their U.S. counterparts, has enabled

79. Silva & Dunn, *supra* note 61, at 959.

80. 138 CONG. REC. E1-01 (daily ed. Jan. 3, 1992).

81. According to a report released on November 3, 1992, by the General Accounting Office, the U.S. is the largest foreign direct investor in Mexico having invested \$21.5 billion, or 63 percent of total foreign direct investment in Mexico, by the end of 1991. Compare this to Mexico's foreign direct investment in the U.S. of \$608 million, or less than 0.2 percent of total foreign direct investment in the U.S. *NAFTA: U.S. Had Trade Surplus with Mexico in 1991 for First Time Since 1981*, GAO Says, 9 Int'l. Trade Rep. (BNA) 1932 (Nov. 11, 1992) [hereinafter *NAFTA: U.S. Trade Surplus*].

82. The U.S. Bracero Program provided Mexican workers with seasonal farm work within the U.S. In the early 1960's the maquiladora program had its origins in private agreements between U.S. businesses and Mexican landowners. *NAFTA: ISSUES FOR CONGRESS*, *supra* note 60, at 19.

83. Silva & Dunn, *supra* note 61, at 956. It is projected that in the late 1980's at least 300 of the "Fortune 500" companies operated maquiladoras. Many of the top manufacturing firms in the U.S., including General Motors, Ford, Chrysler, Rockwell International, General Electric, Lockheed, Gulfstream Aerospace, Honeywell, Johnson and Johnson, Mattel, and 3M, have maquiladoras. M. ANGELES VILLARREAL, U.S. LIBR. OF CONG., CONG. RES. SERVICES, REPORT NO. 91-706E, MEXICO'S MAQUILADORA INDUSTRY 9 (Sept. 27, 1991).

those U.S. businesses with maquiladoras to decrease their production costs. The favorable tariff and non-tariff treatment given to maquiladoras makes this program a model for the effects of free trade on U.S. employment.

The maquiladora program was a forerunner of free trade, and it attracted foreign business in large part because of the unique rules which governed this sector of the Mexican work force. Maquiladoras were not required to comply with Mexican majority ownership laws. Nor were they charged a duty on imported intermediate materials, so long as all of the assembled products were exported. The Maquiladora Law of 1989 suspends duty on these materials provided 50 percent of the manufactured products are exported.⁸⁴ Restrictions on foreign ownership of real estate near borders and coastlines were also relaxed under the maquiladora regulations. Finally, subject to minor restrictions, equipment could be imported duty free into Mexico for use in maquiladoras. While maquiladoras were originally required to operate within the border area, today there are plants throughout Mexico.⁸⁵

U.S. businesses engaging in the maquiladora industry also benefit from favorable U.S. tariff treatment of maquiladora produced imports. Under provisions 9802.00.60 and 9802.00.80 of the Harmonized Tariff Schedule of the United States,⁸⁶ products manufactured in maquiladoras and shipped to the U.S. are only assessed duties on value added through the maquiladora process.⁸⁷ Other benefits are realized through the Generalized System of Preferences,⁸⁸ which allows various goods which would otherwise be subject to import duties to be exempt provided the goods were produced in a developing country. Mexico qualifies as a developing country under the definition in the GSP.⁸⁹ Consequently, within the context of the maquiladora industry, both the U.S. and Mexico have already embraced a form of limited free trade.

The maquiladora industry experienced dramatic growth throughout the 1980's due in part to a reduction in Mexican wages in terms of the dollar caused by a devaluation of the peso.⁹⁰ The number of maquiladoras grew from 620 in 1980

84. VILLARREAL, *supra* note 83, at 2. On two separate occasions the Mexican government has relaxed the regulations which govern the maquiladoras. While initially all manufactured products had to be exported in order to avoid an intermediate material import duty, the 1983 Maquiladora Decree permitted 20 percent of the finished product to be sold in the domestic market. The second liberalization of regulations occurred when President Salinas issued the 1989 Maquiladora Decree. This decree provided that up to 50 percent of the goods manufactured in maquiladoras could be sold in the domestic market. It also simplified administrative procedures in hopes of expanding the maquiladora program. Finally, the 1989 decree made maquiladora licenses valid for an indefinite period, versus the two-year period previously imposed. The policy behind this change was to create a more stable setting which would encourage long-term investment. *Id.*

85. VILLARREAL, *supra* note 83, at 1. Only 17 percent of all maquiladoras are located in Mexico's interior. *Id.*

86. Harmonized Tariff Schedule, Pub. L. No. 101-508, Nov. 5, 1990, 104 Stat. 1388 (Nov. 5, 1990) (codified at 26 U.S.C. § 40 (Supp. 1992)) [hereinafter HTS].

87. VILLARREAL, *supra* note 83, at 3.

88. Generalized System of Preferences Renewal Act of 1984, Pub. L. No. 98-573, Oct. 30, 1984, 98 Stat. 3018 (1984) (codified as amended in scattered sections of 19 U.S.C.) [hereinafter GSP].

89. NAFTA: ISSUES FOR CONGRESS, *supra* note 60, at 20. Under the GSP, the second largest category of products which Mexico exports to the U.S. is machinery. Most of Mexico's manufacturing of machinery is performed by the maquiladoras. *Id.*

90. The average hourly Mexican wage in 1988 was \$0.98 for the maquiladora industry and \$1.99 for the non-maquiladora industries. This is in sharp contrast to the average U.S. hourly manufacturing wage of \$13.85. VILLARREAL, *supra* note 83, at 4.

to 1,396 in 1988.⁹¹ The maquiladoras employed 3,000 in 1965, and today this industry employs approximately 500,000.⁹² It is important to note that the U.S. is Mexico's primary trading partner in both imports to the United States and exports from the United States. Mexico ranks third in imports to the U.S. as well as being the United States' third largest export market.⁹³ Trade from the maquiladoras accounted for 36.9 percent of total Mexican exports and 23.4 percent of total Mexican imports in 1991.⁹⁴ The history of the maquiladora reveals the potential for free trade between Mexico and the U.S. Ironically, while the maquiladoras provide us with an idea of what free trade between Mexico and the U.S. might entail, if the NAFTA is enacted it could mark the demise of the maquiladora industry. This is because free trade would eliminate import duties and possibly further liberalize foreign investment restrictions and local content requirements.⁹⁵ Consequently, the same rules would apply to the maquiladora as well as non-maquiladora industries.

III. PREPARING FOR THE PROBABLE DISLOCATION OF WORKERS

A. The Problem of Worker Dislocation

A combination of lower Mexican wages, less restrictive Mexican labor practices and Mexico's close proximity to the U.S. has many worried that the NAFTA will result in U.S. jobs lost to Mexican labor. As illustrated on a smaller scale with the maquiladora industry, these factors, in conjunction with a further reduction of Mexican tariff and non-tariff barriers, will result in a stream of U.S. jobs being sent south of the border. Therefore, regardless of whether economists predict a projected net gain or loss in U.S. employment, job dislocation is a serious matter which must be addressed.

In response to the debt crisis of 1982, the Mexican government imposed restrictions on wages, prices and the rate of exchange between the dollar and the peso. During this same period, a steady appreciation of the dollar also occurred in relation to other currencies. In terms of the U.S. dollar, the result was a 40 percent decline in Mexican wages between 1981 and 1989.⁹⁶ Perhaps not by coincidence, the number of maquiladoras doubled between 1981 and 1989. The vast disparity between wages paid to U.S. workers and their Mexican counterparts as well as the steady expansion of the maquiladora industry has caused many, especially U.S. labor leaders,⁹⁷ to predict that the NAFTA will drive U.S. jobs south of the border.

91. VILLARREAL, *supra* note 83, at 4. In 1965 there were 12 maquiladoras, whereas today there are over 2,000. *Id.*

92. NAFTA: ISSUES FOR CONGRESS, *supra* note 60, at 20.

93. NAFTA: U.S. Trade Surplus, *supra* note 81, at 2.

94. *Id.*

95. VILLARREAL, *supra* note 83, at 15.

96. NAFTA: ISSUES FOR CONGRESS, *supra* note 60, at 33.

97. Meeting before the Senate Finance Committee on September 22, 1992, AFL-CIO Secretary-Treasurer Thomas Donahue stated that the version of NAFTA drafted by the Bush administration "would lead to the destruction and the export to Mexico of hundreds of thousands of jobs." Donahue also chairs a labor advisory committee on trade that was established by Congress in 1988. NAFTA: Labor Urges Congress to Reject Bush Trade Agreement with Mexico, 9 Int'l. Trade Rep. (BNA) 1644 (Sept. 23, 1992).

The average hourly wage, including government benefits, paid to Mexican production workers was \$2.17 in 1991, and \$1.25 for those working for the maquiladoras in 1990. When compared with the \$15.45 per hour that a U.S. production worker is paid, the motivation for a business to move its labor-intensive work to Mexico is apparent.⁹⁸ Mexico's work force of over 27 million serves as a vast supply of inexpensive low-skilled labor. Some will argue that the wage differential is due to the superior productivity of the U.S. worker and therefore the NAFTA will not provide an incentive for U.S. businesses to engage the cheaper Mexican work force.⁹⁹ Although it is true that businesses take many factors other than average worker wages into account in deciding whether or not to establish plants in Mexico, it is simply not correct to attribute the disparity between U.S. and Mexican wages to a difference in productivity.

In fact, the U.S. International Trade Commission's January, 1993 report to the Committee on Ways and Means and the Committee on Finance cited studies which concluded that in several key industries Mexican productivity was "converging" on U.S. productivity. For example, the Blomstrom and Wolff analysis determined that in producing electronic equipment the Mexican worker's productivity was 83 percent of the productivity of his U.S. counterpart.¹⁰⁰ In a separate study performed by Walter Mead for the Economic Policy Institute, it was similarly determined that workers in a Mexican Ford plant proved to be 80 percent as productive as their U.S. counterparts. The Mexican workers at that plant were paid 6 percent of the salary that their U.S. counterparts received.¹⁰¹ It therefore would seem that at least in several key industries, U.S. businesses can pay Mexican workers substantially less than U.S. workers for relatively equivalent work. Clearly, the growth of the maquiladora industry provides significant evidence that U.S. jobs are sent to Mexico when U.S. businesses are given access to cheap labor and are allowed to operate in a free trade setting.

Lax enforcement of labor laws is another factor which prompts U.S. businesses to establish plants in Mexico. Although Mexican labor standards are similar to those in the U.S., in practice there are substantial differences. The Federal Labor Law of 1 May 1970 is the central piece of legislation which regulates labor contracts, minimum wage, number of hours worked, labor unions, and a wide variety of other labor related issues.¹⁰² Enforcement is minimal, however, and disregard of these laws is the norm. Some urge that the free trade agreement with Mexico should be contingent upon significant changes in its labor practices. President Clinton mirrored these concerns in a meeting with Mexican President Salinas, stating: "I don't believe the agreement needs to be reopened, I do believe there need to be some other agreements. I have made it clear to

98. POTENTIAL IMPACT, *supra* note 76, at 1-28.

99. U.S. Trade Representative general counsel, Gary Edson, claimed that with implementation of a NAFTA U.S. firms would not relocate to Mexico due to lower wages. He said that factors other than wages, specifically worker productivity, are important to companies considering the move. *NAFTA: USTR's Edson Says NAFTA Will Not Provide Incentive for Firm's Relocation to Mexico*, 9 Int'l. Trade Rep. (BNA) 1900 (Nov. 4, 1992).

100. POTENTIAL IMPACT, *supra* note 76, at 1-28.

101. JEFF FAUX & WILLIAM SPRIGGS, ECONOMIC POLICY INSTITUTE BRIEFING PAPER, U.S. JOBS AND THE MEXICAN TRADE PROPOSAL 6 (1991).

102. HUFBAUER & SCHOTT, *supra* note 50, at 119.

President Salinas that there are labor and environmental issues to be dealt with. I want these other issues addressed."¹⁰³ Until substantial changes are made, Mexican labor practices will serve as an incentive for U.S. businesses to seek cheaper labor.

Regardless of which employment study you deem valid, dislocation of workers is an inevitable consequence of the NAFTA.¹⁰⁴ This has been demonstrated on a relatively small scale with the maquiladora program, and is true whether we realize a net gain or loss in U.S. employment from the NAFTA. A U.S. Department of Labor study assessed the potential impact of the NAFTA on U.S. employment by surveying the repeal of 807.00 of the Tariff Schedules of the United States. This section created duty-free status for products manufactured by the maquiladoras prior to HTS 9802.00.80. The result of the study was a change in U.S. employment somewhere between a gain of 18,000 jobs and a loss of 16,000 jobs. Assuming that the changes brought about by the NAFTA would have four times the impact as the above change to the maquiladora program, we would experience change somewhere between a loss of 69,000 jobs and a gain of 72,000 jobs.¹⁰⁵ According to another analysis performed by Hufbauer and Schott, approximately 112,000 U.S. workers will be dislocated over several years as a result of the NAFTA. This is in spite of the study's conclusion that the NAFTA will create a net gain in employment.¹⁰⁶ Utilizing a modified Hinojosa-McCleery model, the Economic Policy Institute predicts severe employment consequences of the NAFTA, and cites that over ten years there will be 550,000 U.S. job dislocations.¹⁰⁷ In light of the increased competition from Mexico that the NAFTA would place on labor-intensive U.S. jobs, it is imprudent not to address worker dislocation programs. This should not be viewed as a step backward for the U.S. workforce, but as an opportunity to increase its high skill, knowledge-intensive base.¹⁰⁸ The U.S. should compete with the industrial powers of the world which boast an educated and highly skilled work force, and not with countries such as Mexico which focus on low wage, labor-intensive work.¹⁰⁹

B. Existing Employment Assistance Programs

Lawmakers have already made numerous attempts to help the American worker adjust to job dislocation.¹¹⁰ With the influence of labor unions, employ-

103. *Clinton Rules Out Reopening NAFTA, But Cites Labor, Environmental Changes*, 10 Int'l. Trade Rep. (BNA) 38 (Jan. 13, 1993).

104. Economist Peter Morici told a Capitol Hill forum sponsored by the Center for Strategic and International Studies' Congressional Study Group on Mexico that while there may only be minor changes in overall net U.S. employment, this fact would be of no apparent help to the southern textile worker who is out of work because of workforce adjustments due to the NAFTA. *Economist Argues Free Trade with Mexico Will Cause Adjustments in U.S. Workforce*, 8 Int'l. Trade Rep. (BNA) 784 (May 22, 1991).

105. HUFBAUER & SCHOTT, *supra* note 50, at 109-10.

106. *Id.* at 110.

107. FAUS & SPRIGGS, *supra* note 101, at 7.

108. Economist Peter Morici told a Capitol Hill forum sponsored by CSIS' Congressional Study Group on Mexico that free trade with Mexico will allow the U.S. to begin to specialize, and therefore shift its labor force to higher-skilled jobs. But, such a shift would require that certain resources be moved. *Economist Argues Free Trade With Mexico Will Cause Adjustments in U.S. Workforce*, 8 Int'l. Trade Rep. (BNA) 784 (May 22, 1991).

109. Weintraub, *supra* note 60, at 570.

110. For example, The Trade Worker Adjustment Assistance Act of 1992, proposed by Representative Pease (D-Ohio). 138 CONG. REC. H8125 (daily ed. Aug. 12, 1992).

ment issues have been pushed to the front of the NAFTA debate.¹¹¹ Legislators may look at this history as well as existing programs as they attempt to pacify unemployment concerns.

There are a broad range of assistance programs already in place in the United States that could be applied to help those workers who may become unemployed as a result of a free trade agreement with Canada and Mexico. The largest is unemployment insurance.¹¹² This program is not targeted to alleviate unemployment from any specific source, but to assist any unemployed worker for a limited time. It is a massive program and because it is temporary, it could not, standing alone, cure the type of dislocation that is anticipated if the NAFTA becomes effective.¹¹³

A second existing program that may help alleviate the pressure on the labor market created by the NAFTA is the Job Training Partnership Act.¹¹⁴ The JTPA provides training along with aid in the search for new employment for any displaced worker.¹¹⁵ The program is well utilized and effective; over 234,000 laborers participated in 1989,¹¹⁶ and an estimated 70 percent found new employment.

Another program is Trade Adjustment Assistance¹¹⁷ which was designed specifically to help laborers displaced by the effects of foreign competition.¹¹⁸ In its early years, the program was of little consequence due to strict eligibility requirements. Those requirements were relaxed as part of trade legislation in 1974. Currently, to be entitled to benefits from the program workers must first show that increased imports created the unemployment and then the worker must be found eligible for aid.¹¹⁹ From 1974, when the program was expanded, until the early 1980's it was well utilized.¹²⁰ In 1980, over 684,000 workers qualified for assistance and over 530,000 received it. By 1989, the numbers were cut back significantly by the two Republican administrations, to over 89,000 and 23,000, respectively.¹²¹ The average outlay to those that received assistance was \$5,300.

A fourth program that may be used to temper the negative employment effects of the NAFTA is Economic Dislocation and Worker Adjustment Assistance.¹²² EDWAA has been effective since 1989 and provides five forms of relief.

111. See, for example, *ALF-CIO Leadership Calls for Major Changes in NAFTA*, 10 Int'l. Trade Rep. (BNA) 311 (Feb. 24, 1993). "[AFL-CIO President] Kirkland said the current proposed trade agreement would be a 'disaster' for millions of working people. It would destroy jobs, do nothing to lift the wages of Mexican workers, and ignore the rights of working people" *Id.*

112. HUFBAUER & SCHOTT, *supra* note 50, at 114.

113. *Id.* In 1988, the government paid \$13.2 billion in benefits; in 1990, it reached 37% of unemployed workers, a total of 2.5 million people. *Id.*

114. Job Training Partnership Act, Pub. L. No. 97-300, 96 Stat. 1322 (1982) (codified as amended in scattered sections of 18 & 29 U.S.C.) [hereinafter JTPA].

115. HUFBAUER & SCHOTT, *supra* note 50, at 115.

116. The average allotment per worker was \$1,308. *Id.*

117. Trade Adjustment Assistance Reform and Extension Act of 1986, Pub. L. No. 99-272, 110 Stat. 300, 304 (1986) (codified as amended in scattered sections of 19 U.S.C.) [hereinafter TAA].

118. *Id.* This program was created nearly three decades ago but is topical today in light of the NAFTA.

119. NATIONAL COMMISSION FOR EMPLOYMENT POLICY, *THE EMPLOYMENT EFFECTS OF THE NORTH AMERICAN FREE TRADE AGREEMENT: RECOMMENDATIONS AND BACKGROUND STUDIES* 66 (1992) [hereinafter *THE EMPLOYMENT EFFECTS OF THE NAFTA*].

120. HUFBAUER & SCHOTT, *supra* note 50, at 117.

121. This amounted to over \$3 billion of expenditures in 1980, reduced to a range of \$35 million to \$208 million for the balance of the decade. *Id.*

122. Economic Dislocation and Worker Adjustment Assistance Act, Pub. L. No. 100-418, 102 Stat. 1524 (1988) (codified as amended in scattered sections of 29 U.S.C.) [hereinafter EDWAA].

First is rapid relief for plant closings and mass lay-offs. Second, it provides job readjustment, including job counselling and placement. Third, it provides for the establishment of committees to administer community wide assistance programs. Fourth, it offers retraining services. Finally, EDWAA provides funds to workers who have exhausted their access to unemployment insurance or are participating in retraining programs.¹²³ EDWAA reached an estimated 500,000 workers in its first two years and averaged over 67 percent job placement in that period.¹²⁴

A final source of relief for displaced workers is WARN.¹²⁵ The law requires large employers to give sixty days notice of their intention to close a plant to three parties, the factory bargaining representative (or, if the workers are not unionized, to each affected worker), the state dislocated worker assistance program created by JTPA, and the local government.¹²⁶ WARN is not an entitlement program; there are four possible sanctions that may be used against the employer if the sixty day notice period is violated. First, each employee is entitled to back pay for each day of the violation. Second, an employer may be forced to pay certain employee benefits.¹²⁷ Third, the violating employer can be subject to civil penalties of up to \$500 per day that the local government was not notified. And finally the employer may be liable for attorney's fees if a plaintiff succeeds in an action under WARN.¹²⁸

C. A Proposal for Reform to Address the Employment Issue

The means of protecting the low wage laborer in the United States is not to foreclose competition in that sector of the labor market. Instead the goal should be to adapt the American work force to the inevitable change that will occur when free trade with Mexico is realized. Specifically, the U.S. needs to retrain its unskilled labor.¹²⁹ Retraining, however, cannot be considered a panacea;¹³⁰ the

123. THE EMPLOYMENT EFFECTS OF THE NAFTA, *supra* note 119, at 67.

124. *Id.*

125. See *supra* note 4.

126. John O'Connor, *Employers Be Forewarned: An Employer's Guide to Plant Closing and Layoff Decisions After the Enactment of the Worker Adjustment and Retraining Notification Act*, 16 OHIO N.U. L. REV. 19, 45 (1989).

127. *Id.* at 49. The formula for this penalty is prescribed in section 3(3) of the Employee Retirement Income Security Act of 1974, codified at 29 U.S.C. § 2104(1)(a)(B)(1988).

128. *Id.* at 49.

129. Weintraub, *supra* note 60, at 570.

The United States' objective should not be to protect its low-wage, low-competitive activities, but rather foster those that are skill-intensive, knowledge-intensive, and technology intensive. These are also high wage-industries.

When looked at in this light, the debate on free trade with Mexico is a side show on the main arena of United States policy: how to increase the skill capacity of the nation's labor force and increase its productivity.

Id.

What methods of retraining and re-education would best address the changes brought about by the NAFTA is a separate topic. See, e.g., HUFBAUER & SCHOTT, *supra* note 50, which claims that the U.S. should budget at least \$900 million over the next five years to assist potentially an additional 112,000 workers displaced by NAFTA. A large portion of these funds should be allocated to worker retraining. A step in the right direction is the worker training bill (S. 1790, H.R. 3470) which was introduced in Congress in 1991 and sponsored by Senators Kennedy and Hatfield, House Majority Leader Gephardt, and Congressman Regula. See also THE EMPLOYMENT EFFECTS OF THE NAFTA, *supra* note 119, recommending a combination of the Trade Adjustment Assistance program and the

dislocation created by the NAFTA will require more than entitlements.¹³¹ This is especially true in light of the federal budget deficit and its current constraints. What the authors propose is a hybrid of the existing programs designed to retroactively provide economic security for displaced workers as well as a proactive mechanism to give advance notice of change in employment caused by the NAFTA.

Assuming that laborers will be able to avail themselves to the programs outlined in the preceding section,¹³² mandatory disclosure is an additional necessary element of worker protection. Mandatory disclosure will allow the diligent worker enough time to react and prepare for the forthcoming changes.¹³³

There are at least two ways that disclosure can be implemented. First, a phase-in period could be applied to labor intensive industries. For example, legislation could be fashioned to commission a study¹³⁴ of "NAFTA-sensitive" industries. The agency conducting these studies would then inform labor in those sectors prone to job loss. This would trigger the reporting department to implement a phase-in period for those industries. The phase-in period would grant workers temporary protection during which time they could prepare for the

Economic Dislocation and Worker Adjustment Assistance program to best cope with worker dislocation brought about by the NAFTA.

130. "If good work is hard to find for [defense] workers, most of them skilled in modern technologies, what does that portend for the economy of the next decades?" Peter T. Kilborn, *Military Cuts: A Millstone for Ex-Workers*, N.Y. TIMES, April 5, 1993, at A1. High skills do not guarantee employment. For example, highly skilled workers in industries that rely on military contracts are facing wide scale unemployment; an estimated 400,000 jobs have been lost since the military contraction began in 1989 and an additional 450,000 workers are expected to lose their jobs by 1996. "Rather than shift from one good job to another, as conversion implies, most [defense industry] workers find themselves in the same boat as steel and automobile workers, facing month upon month of unemployment, unstable jobs and sharp cuts in pay." *Id.*

131. While no one should be asked to assume an inordinate amount of the burden when new programs create displacement, it is important to note that job displacement as a result of the NAFTA will not be overwhelming. See *supra* notes 96 - 109 and accompanying text.

It is also important to note that job displacement will likely occur even in the absence of the NAFTA. The flow of low wage jobs has already begun and will continue even if Canada, Mexico and the United States do not complete the agreement. The United States glass industry, for example, is having trouble competing with their Mexican counterparts even in light of high tariffs in that sector: "Even with tariffs that currently add up to 38 cents to the cost of each dollar's worth of imported glass, half the local industry [in West Virginia] has already gone bankrupt in the last decade, partly because of Mexican competition." Keith Bradsher, *An Industry's Winners and Losers Once a Free-Trade Pact Is Signed*, N.Y. TIMES, July 21, 1992, at A1.

The potential harm attributed to the NAFTA should not be overstated. Weintraub, *supra* note 60, at 570.

132. Unemployment insurance, JTPA, TAA, and EDWAA. See *supra* notes 110 - 128 and accompanying text.

133. Senator Byrd gave a different example:

The President of the United States knows that after January 20 of next year [1989] he will not be on the public payroll. So he has ample notice and, if he were a first-term President and running for reelection to be President, on the night of the general election in November, if he— any President, Democrat or Republican— were unsuccessful in being reelected, he at least would know that he has until the following January to remain on the payroll, and I mean public payroll.

Why then should we all not be willing to give that same notice to the steelworkers, to the coal miners, to the glass workers, to those who work in leather goods plants, textile workers

134 CONG. REC. S8374 (daily ed. Jun. 22, 1988).

134. The Commerce Department and the Department of Labor are two candidates for this function.

change. Since the phase-in concept is already a part of the NAFTA, this program would not appear to be difficult to effectuate.

An alternative, and perhaps a companion program to the phase-in mechanism, is application of WARN¹³⁵ or analogous legislation. Under the current scheme of WARN, a worker is given up to sixty days notice of a plant closing. The purpose is to provide enough time for the employee to make alternative provisions for work. Two months may be adequate for random closures, but for the scale of change that may result from the NAFTA, more time is needed. The case with the NAFTA differs from an intra-corporate consolidation of manufacturing which might occur when a company shuts down certain facilities, since entire companies and perhaps entire industries may relocate plants to Mexico. To address the special circumstance of the NAFTA, the provisions of WARN need to be changed to grant labor at least six months or perhaps one year of notice prior to international plant relocation.¹³⁶

The extended notice provision could be enforced through the same mechanism used by WARN. For example, if the six month or one year notice provision is violated, a company could be required to pay penalties to those displaced workers for the duration of the violation. This would encourage long-term corporate planning, as well as create an incentive for companies to maintain their United States manufacturing facilities for the statutory period.

Under the prescribed scenario, labor in low-skilled sectors would receive notice from two sources. First, it would come from the governmental agency that conducted the study to determine which industries were at risk from free trade with Mexico. This agency would inform labor of the potential job loss once the phase-in period had expired.¹³⁷ Second, notice would come from employers who would be required to give extended notice of their intention to close plants in the United States. Neither of these programs are entitlements and should therefore meet with minimal resistance in the law making process.

IV. CONCLUSION

Both the history of the maquiladora industry and current economic analysis reveal that U.S. workers will be displaced by a free trade agreement with Mexico. The U.S. must prepare for this impact in such a manner as to help create a higher-skilled, higher-paid work force. One part of the solution is to provide sufficient retraining and reeducation to displaced workers. The other necessary ingredient is to require disclosure from a reporting agency of the United States

135. See *supra* notes 4, 125-28 and accompanying text. It is clear from the legislative history of the law that WARN was designed to assist labor that is displaced as a result of foreign competition. Therefore, there should be little resistance for its application in the present situation. For example, Senator Byrd stated during the debate: "Mr. President, this adversarial relationship [between management and labor] does not help America compete in the world. Once we could afford to elbow each other without worrying about our foreign competition. America dominated the markets of the free world in the post-World War II era. But that time is passed. America is being out hustled and out traded by our foreign competition." 134 CONG. REC. S8374 (daily ed. Jun. 22, 1988).

136. Legislation of this sort should be specifically tailored to address plant lay-offs caused by plant relocation to Canada or Mexico as opposed to lay-offs created by other factors such as intra-corporate factory consolidation.

137. The same study that recommends industries that qualify for the phase-in could be required to supply the notice to the workers of those industries.

government and from those businesses intending to shift operations to Canada or Mexico. Use of a phase-in period and the application of WARN-type legislation are two means of accomplishing this much needed disclosure. The U.S. worker must be provided with the tools to cope with dislocation brought about by the NAFTA, and the U.S. must use this as an opportunity to upgrade its labor base to better compete in the global market.

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