



Asia-Pacific Economic Cooperation

APEC Human Resources Development Working Group

Strengthening Governmental
Conciliation Institutions:

A Practitioner's Handbook



David Thaler
Ariella Bernstein
July 2003

Prepared by the U.S. Federal Mediation & Conciliation Service,
with the support of the U.S. Department of Labor



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This Handbook is also available on the World Wide Web at www.apecimg.org

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STRENGTHENING GOVERNMENTAL CONCILIATION INSTITUTIONS: A PRACTITIONER'S HANDBOOK

Introduction

The purpose of this Handbook is to describe the multitude of functions that a Governmental Conciliation Institution can perform for an economy. Our hope is that it will spark local adaptation and innovation on the part of governmental policy makers and practitioners as well as public and private sector Labor and Management practitioners. This Introduction discusses why it is important for an economy to have a thriving Governmental Conciliation Institution.

Why is it Important to Strengthen Governmental Conciliation Institutions Within the APEC Region?

The world is getting smaller, as walls between nations continue to come down. To be sure, there have been setbacks to economic integration based on both political and economic factors. However, the forces of globalization continue apace, with new multilateral (i.e., the WTO), regional¹ and bilateral² free trade agreements signed on a monthly basis. The APEC region is at the forefront of free trade, with

¹ A total of approximately 162 regional trade agreements recognized by the WTO and its predecessor, the General Agreement on Tariffs and Trade, are in force at the time of this writing. Between 100 and 200 new regional trade formations are anticipated by 2005. *See*, *Regional Trade Agreements and the Multilateral Trading System*, International Chamber of Commerce's Commission on Trade and Investment Policy, at http://www.iccwbo.org/home/statements_rules/statements/2002/Regional%20trade%20agreements_multilateral%20trading%20system.asp. (Nov. 2002)

² According to the United Nations Conference on Trade and Development, the number of Bilateral Investment Treaties (BITs) *quadrupled* during the 1990s, from 385 to 1,857, *cited in* The Business Roundtable, *The Case for U.S. Trade Leadership: the United States is Falling Behind*, at <http://www.brtable.org/pdf/498.pdf>, at p. 7. (February 2001).

an ever-increasing number of sub-regional and bilateral Preferential Trade Agreements signed each year.³

In view of the ever-increasing economic integration within the Asia Pacific region, APEC has allotted resources to address the social impact of such integration. Through this project, "Training for the Prevention and Resolution of Labor & Employment Conflict," the APEC Human Resources Development Working Group (HRD Working Group) has recognized the importance of providing a *holding environment* for the inevitable short-term dislocations that integration entails in individual APEC economies. A holding environment is defined as a space formed by a network of relationships where people can tackle tough, sometimes divisive, questions without destructive conflict.⁴

On a practical level, this means that, in order for societies to endure the short-term pain that economic integration and market liberalization often brings, their leaders must provide a voice for the disenfranchised. This voice must be not just a token mechanism in which people are made to *feel* that their concerns are being heard, but rather one in which true dialogue and mutual learning and problem solving takes place.

³ See, the Asian Development Bank's *Asian Development Outlook 2002*, Chapter III - "Preferential Trade Agreements in Asia and the Pacific," at <http://www.adb.org/documents/books/ado/2002/default.asp>. (Figure 3.2)

⁴ See, e.g., Ronald A. Heffetz and Martin Linsky, *Leadership on the Line* (Boston, MA: The Harvard Business School Press, 2002), Chapter 5); See also, Ronald A. Heffetz, *Leadership without Easy Answers* (Cambridge, MA: The Belknap Press of Harvard University Press, 1994), Chapter 5). The term "holding environment" originated in the field of psychoanalysis to describe the relationship between the therapist and the patient, within which the therapist "holds" the patient in a process of developmental learning in which the patient can examine and make progress on hard problems. See, Donald Winnicott, *The Maturation Process* (New York: International Universities Press, 1965; Arnold H. Modell, "The Holding Environment and the Therapeutic Action of Psychoanalysis," *Journal of the American Psychological Association*, vol. 24, 1976, pp. 285-307.

Most dramatically, we have seen the alternatives to true dialogue embodied in the passionate and sometimes violent protests that now routinely accompany high-level meetings of organizations dedicated to market liberalization and economic integration – *e.g.*, the International Financial Institutions (IFIs) such as the International Monetary Fund (IMF) and World Bank, as well as the World Trade Organization (WTO). Even APEC Leaders’ meetings routinely attract protesters representing diverse interests. The most notable APEC-related protest occurred in Vancouver in 1997.⁵

The current project seeks to help individual APEC economies provide a forum in which workers and managers can meet to address the challenges and take advantage of the great opportunities provided by economic integration. While the focus is clearly on labor relations – at the collective and individual levels – it is hoped that the capacity building this project achieves will one day lead to alternative methods of dispute resolution beyond the sphere of labor relations.⁶

Smoothing the process of economic integration and trade facilitation is not the only reason for strengthening the APEC economies’ institutional capacity to prevent and resolve labor and employment disputes. Rather there are other reasons for an economy to support an institution that prevents and resolves conflict: (1) the

⁵ *See, e.g.*, the Canadian Labor Congress website at <http://www.clc-ctc.ca/news/nov27.html>; and *The Peak*, the newspaper of Simon Fraser University in Burnaby, British Columbia, Canada, Volume 95, Issue 2 January 13, 1997, at <http://www.peak.sfu.ca/the-peak/97-1/issue2/apec.html>.

⁵ *See, e.g.*, the multi-faceted alternative dispute resolution newspaper of Simon Fraser University in Burnaby, British Columbia, Canada, Volume 95, Issue 2 January 13, 1997, at <http://www.peak.sfu.ca/the-peak/97-1/issue2/apec.html>.

⁶ *See, e.g.*, the multi-faceted alternative dispute resolution services offered by the U.S. FMCS, at <http://www.fmcs.gov/internet/categoryList.asp?categoryID=16>.

universally accepted fundamental human right to Freedom of Association and to bargain collectively, as embodied in the core labor standards recognized in the ILO's 1998 *Declaration on Fundamental Principles and Rights at Work*⁷; (2) the role of workplace democracy in strengthening democratic values and institutions⁸; (3) the virtue of giving workers a greater say in how they spend at least one-third of their adult lives, so that they may have more fulfilling, self-actualizing work experiences⁹; and (4) the fact that it makes good business sense to consult with and provide incentives to the workers who do the enterprise's work on a daily basis.¹⁰

Why Should Conciliation Institutions be Governmental in Nature?

They do not have to be. In fact, a thriving private sector market for conciliation services is healthy for an economy. However, in view of the public interest in ensuring labor peace, a strong case can be made for an economy's support of a Governmental Conciliation Institution. In order to see why it is important for the government have such an institution, as opposed to leaving conciliation services to

⁷ See, <http://www.ilo.org/public/english/standards/decl/declaration/text/index.htm>.

⁸ According to the U.S. State Department's Advisory Committee on Labor Diplomacy, "Trade unions play an important role in addressing poverty and building up democratic participation. The primary goal of unions is to promote the economic well being of their members, but unions also engage in the democratic process in order to achieve their goals and thus are natural promoters of democracy in society. Trade unions protect human rights and promote public accountability. Where free unions are allowed to operate, political extremism is less likely to flourish. In the developing world, free trade unions help to provide the underpinning for economic growth and democracy by contributing to the emergence of a stable, fairly paid, working middle-class." The full report is located at <http://www.state.gov/g/drl/rls/10043.htm>.

⁹ See, e.g., David Thaler, David Glines, and Jennifer Ortiz, the *APEC Best Practices Toolkit* from the 2001 HRD Working Group project, "Responding to Change in the Workplace: Innovations in Labor-Management-Government Cooperation", at www.gnzlz.com under the "Best Practices Tool Kit" tab, at pp. 2-9.

¹⁰ *Id.*, at Chapter 4, pp. 30-37.

the whims of the market, let's examine the role that such services play in an economy.

Labor Peace is a Public Good

Despite millennia of debate, in 2003, there is still little agreement on appropriate role of government in society. Throughout the 1980s up through the turn of the century, the minimalist, *laissez faire*, view predominated. More specifically, the prevailing viewpoint among the IFIs, and an ever-increasing number of governments throughout the world, was that government should reduce its presence in the economy as much as possible. This meant, among other things, that government should privatize as many functions as possible and provide only what economists call "public goods."

A "public good" can be defined as a good that no other person in the economy has an incentive to provide: its public nature means that even those who do not pay for the public good are nevertheless entitled to consume it. That is, consumers of the (often very expensive) public good will act as free riders and choose not to help pay for its provision. Classic examples of public goods include national defense, police services, environmental preservation, non-toll roads, and universal retirement income security. According to Dr. Paul M. Johnson of Auburn University in the United States, "As a consequence of this inability to control consumption of these goods, private production of the good or service may prove unprofitable, and the good or service thus may not be provided at all by the free market --

even though everyone might concede they would be better off with some positive level of production of the good in question.”¹¹

The ultimate good produced by labor conciliation institutions is *labor peace*. Labor peace certainly has the “public good” characteristic of impossibility of exclusion from consumption: it helps to ensure a smooth running, efficient and growing economy, to be enjoyed by all of society, not just those who invest their money in the conciliation services that help maintain labor peace.

A. Since Private Parties Do Not Have a Direct Incentive to Take Societal Costs Into Account, Private Parties May Not Be Willing to Use Conciliation to Achieve Labor Peace

In response to the proposition that labor peace is a public good, one could argue that even though it is impossible to exclude any member of society from enjoying labor peace, labor peace is not a true public good because there is a private sector incentive to provide it: namely, the parties to the dispute and other interested stakeholders have a lot to lose from a work stoppage and therefore have an incentive to provide labor peace. This might be true in certain defined circumstances – i.e., where (1) parties are making informed, economically rational (not political, emotional) decisions, and (2) both parties perceive that they do not have a Better Alternative to a Negotiated Agreement. (called a BATNA in the parlance of Alternative Dispute Resolution)

In practice, however, and especially in the absence of a conciliation process, parties are often motivated by factors other than

¹¹ Dr. Paul M. Johnson, *Glossary of Political Economy Terms*.
<http://www.auburn.edu/~johnspm/gloss/index.html?http://www.auburn.edu/~johnspm/gloss>

pure economic calculations – e.g., the desire to use power to “win” by falling back on their BATNA, to set legal precedent, or to react to political exigencies. In addition, parties often have a falsely inflated view of their BATNA. In such circumstances, they are likely to be loath to spend money and other resources on conciliation and will instead revert to a power-based method of dispute resolution (e.g., a strike, a lock-out, a slowdown, a “work to rule” policy, or even threats and harassment). If a rights-based method of dispute resolution is available, such as a court system, they may revert to that as well. It is well accepted that power-based and rights-based methods of dispute resolution are more time-consuming, more expensive and more likely to lead to social strife and other negative externalities than are interest-based methods that Conciliation Institutions can employ.¹²

As a result of these motivations – i.e., emotionalism, an inflated view of a BATNA, and a desire to “win” economically -- in the all too frequent situation in which the societal costs of their actions are greater than their private costs, parties will act in a way that creates a net loss for society. By “societal costs” we are referring to both direct costs to the enterprise, resulting from lost productivity of the people who are not working, and indirect costs flowing from lost economic activity such as reduced purchases and savings and investment on the part of both the employer and the workers. In addition, businesses and consumers that depend on a company that is stalled by a strike cannot add productivity to the economy, further multiplying the economic consequences of a work stoppage.

[/public_goods.html](#).

¹² See, William Ury, Jeanne Brett, and Stephen Goldberg, *Getting Disputes Resolved; Designing Systems to Cut the Costs of Conflict*, 1988, Chapter 1, pp. 13-19.

Benedicto Ernesto Bitonio, Jr., Assistant Secretary of Labor and Employment of the Philippines, refers to this disparity between private and societal costs, and the concomitant lack of incentive in many circumstances to reduce labor conflict at an early stage through the conciliation process, as a “market failure,” requiring correction by a governmental intervention in the form of a Conciliation Institution.¹³

B. Conciliation Services Are Public Goods Because They Yield Long Term Private and Public Benefits For Which Short Sighted Organizations Might Not Want to Spend Resources.

As we will see later in this Handbook, modern Conciliation Institutions provide much more than just dispute resolution services. They also provide conflict *prevention* services such as: (1) setting up and facilitating labor-management committees; (2) training parties in Interest Based Problem Solving techniques to resolve problems on an ongoing basis; (3) helping parties recover from a traumatic event such as a lock-out or strike or to generally improve a historically bad relationship; and (4) helping parties navigate the process of change and to jointly strategize how to create and take advantage of new opportunities.

If parties learn these conflict prevention skills, society benefits because there tend to be far fewer adverse job actions, with their associated economic consequences. Also to society’s benefit, enterprises are more productive if communication skills improve, and they also tend to experience enhanced efficiency, creativity, and a

¹³ Mr. Bitonio’s presentation at the training component of this project is available on the world wide web at <http://www.apecimg.org/Program%20Materials/Philippines/Philipp.Public.Policies.ppt>.

reduction in distractions caused by poor labor-management relationships.

Viewed in this way, the services provided by Conciliation Institutions are akin to one of the most important public goods of all: free and universal education.¹⁴ Parties often do not see the immediate benefit of conflict prevention programs and, in any event, are likely to think that limited resources should be spent on more immediate needs such as wages, benefits, more workers, generating more short-term profits, not to mention compliance with various legal and regulatory requirements. They often will overlook education efforts designed to prevent conflict, thereby foregoing benefits for the organization such as, among others, early resolution of conflicts and improved communication.

In this sense, conciliation services and the labor peace that they enable are clearly “public goods.” If the government does not pay for them, it is possible that no one will. All of society benefits from this public good. This is especially true with the increasing flexibilization of the workforce in many economies.

¹⁴ Many prominent individuals from a variety of fields have called for the incorporation of conflict management training into economies’ basic education systems. See, e.g., Daniel Goleman, *Emotional Intelligence*, Bantam Books (1997). *See also*, Jeanne Asherman, *Decreasing Violence Through Conflict Resolution Education in Schools*, at <http://www.mediate.com/articles/asherman.cfm> (2000); American News Service (author anonymous), *Conflict Resolution Presented to Children as Bullyproofing*, at <http://www.mediate.com/articles/bully.cfm> (1998); Mediation Network of North Carolina, *Conflict Resolution Curricula for Youth*, at <http://mnnnc.org/pg3.cfm>; Ohio Commission on Dispute Resolution and Conflict Management and the Ohio Department of Education, *Conflict Management Programs in Ohio Elementary Schools: Case Studies and Evaluation*, at <http://www.state.oh.us/cdr/schools/elementaryeval.htm> (February, 1997); Indiana Commission on Dispute Resolution and Conflict Management, *Conflict Management in Schools: Sowing Seeds for a Safer Society*, at http://www.indiana.edu/~safeschl/resources_mediation.html (1999). In fact, in 2002 the U.S. Congress gave the Federal Mediation & Conciliation Service (FMCS) a grant of \$500,000 (U.S.) to develop a series of conflict management training programs aimed at U.S. schools. *See also*, the FMCS Youth Initiative web page at <http://www.fmcs.gov/internet/itemDetail.asp?categoryID=25&itemID=15896>.

For the above reasons, this project has focused on strengthening governmental Conciliation Institutions. In the pages to follow you will see different ideas that policy makers and governmental institution builders can consider as they seek to improve their Conciliation Institutions. These ideas represent the learnings from the project. They have been gleaned from both the submissions of material found at the project's website at www.apecimg.org¹⁵ as well as the experiences shared at the training component of the project, which took place in Bangkok in July 2002.¹⁶ We hope that you find them useful, and are certainly eager to hear from you if you do.

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¹⁵ See, the website's "Program Materials" link.

¹⁶ The training agenda, and the accompanying instructional materials, can also be found at the project's website.

AUTHORS' NOTE: THE LEVELS OF ANALYSIS IN THIS HANDBOOK

This Handbook will focus on three levels at which Conciliation Institutions can improve their services: the *enterprise level*, the *institutional level*, and the *economy level*. By **enterprise level**, we are referring to a single organization, whether it is a private business, an NGO or a governmental organization. The enterprise level is synonymous with the "firm level." In more colloquial terms, interventions at this level are sometimes referred to as impacting the "shop floor." Examples of enterprise level interventions include providing dispute resolution services and providing conflict prevention services.

In contrast, by **institutional level** we are referring to innovations that a governmental Conciliation Institution can make within its own organization itself. While society as a whole may be the downstream beneficiary of such innovations, the immediate focus at the institutional level is on the governmental Conciliation Institution itself. Examples of institutional level innovations include developing a meaningful and measurable mission statement, establishing high credentials for conciliators, and setting up a formal training program for conciliators.

Finally, the **economy level** refers to impacts the governmental Conciliation Institution can make in the economy in general, in terms of promoting the use of alternative methods to resolve labor disputes, ensuring the quality and integrity of the conciliation process, and promoting broad based approaches and mechanisms for tripartite

cooperation. Labor-Management-Government cooperation at the economy level is the closest that Conciliation Institutions get to making public policy and, by definition, initiatives at this level are designed to ultimately benefit enterprises throughout the economy. Examples of initiatives at the economy level include mechanisms for economy-wide tripartite dialogue, establishing a system for notification of potential conflicts before they arise, and promoting economy-wide sharing of best practices in Labor-Management-Government cooperation.

I. THE FUNCTIONS OF A CONCILIATION INSTITUTION AT THE ENTERPRISE LEVEL

A. Provide Dispute Resolution Services at the Enterprise Level

The classic and most obvious function of a Conciliation Institution is to provide services for the resolution of disputes, in this case, labor disputes. In this chapter, we first describe the role that Conciliation Institutions play in dispute resolution. However, Conciliation Institutions perform a wide variety of functions designed to promote labor peace, among them teaching techniques to prevent labor conflict in order to help the enterprise face the challenges wrought by globalization. This second group of functions, preventive techniques to resolve conflict at the outset, will be the focus of the second section in this chapter. (See Section I(B), *infra*.)

It should be noted that, within the rubric of “dispute resolution” are processes designed to facilitate negotiations over matters that are not necessarily “in dispute.” In fact, when these services are provided in tandem with preventive services, the parties often begin to work together proactively to strategize areas in where the enterprise can be strengthened to both labor’s and management’s benefit. For example, labor and management may form a strategic planning committee designed to solicit input from front-line workers regarding ways to increase efficiency and devolve certain decision-making functions to

those workers.¹⁷ While the parties might call in a conciliator¹⁸ to provide a forum for this type of discussion, it would not be dispute resolution *per se*. However, for ease of reference we will refer to as “dispute resolution” any process in which a conciliator serves as a facilitator of negotiations, whether proactive or reactive.

1. *Establish Personal Relationships with Labor-Management Partners*

The bedrock principle that a Conciliation Institution must uphold in order to be most effective is maintaining its *acceptability* among the parties it serves. While it is ultimately the parties themselves that enter into an agreement, and not the conciliator, the Conciliation Institution provides a forum for negotiations. If the parties do not perceive the Institution to be neutral, or at least neutral in providing a fair process,¹⁹ they will be loath to use the Institution. If they are required to do so by law, they will do so only half-heartedly, as simply a *pro-forma* step before the rights-based process that is required.

¹⁷ See, e.g., the Kaiser-Permanente Labor-Management Partnership, highlighted at the June 1999 APEC Victoria Colloquium on Successful Human Resources Practices in the Workplace: Contributions from Labor, Management and Government, at <http://www.apecsec.org.sg/> and clicking on the “Publications & Library” and “Free Downloads” links, or by contacting the Centre for Asia-Pacific Initiatives at the University of Victoria, Canada. (1-250-721-7020)

¹⁸ In some economies, the terms “mediator” and “conciliator” are used interchangeably, while in other economies the two terms take on different meanings. This Tool Kit will treat the terms as synonymous but use “conciliator”, which is the more common term in the APEC region. For a more formal definition of the term see Chapter 7 of the *APEC Best Practices Tool Kit* at http://www.gnzlz.com/best_practices_tool_kit_x.htm.

¹⁹ It is important to note that, in many APEC economies, the conciliator is not neutral as to the substance of the dispute because he or she is required to ensure that the rights of the worker under the economy’s labor law are upheld. In this sense, the conciliator enters the realm of adjudication and the process is more similar to arbitration. However, even in this situation, the conciliator still has a very important obligation to be neutral as to *process*. That is, to ensure that all procedural rules are scrupulously upheld, that they are not unfairly applied to one side at the expense of the other, and that both parties have every opportunity to communicate their positions and interests so as to reach a self-determined agreement with the other side. The only constraint is that the agreement not violate any side’s (usually the worker’s) rights.

Neutrality can be mandated by law and supported by an Ethical Code that has consequences for violations (See Section II(I), *infra.*, on Codes of Ethics). However, more important than *de jure* neutrality is *de facto* neutrality. The law can mandate the highest level of neutrality on the part of conciliators but, if the conciliators themselves are not perceived by the parties as neutral, the parties will not trust them and the Institution will not be able to serve as the important forum for negotiations that it is expected to be.

If an economy permits labor negotiations to take place at the enterprise level²⁰, the Conciliation Institution can structure its case assignment system to assign individual conciliators the responsibility of working with specific enterprises within a defined geographic, sectoral or jurisdictional area. In this way, the labor and management representatives have a reliable, trustworthy party to contact when a dispute is on the horizon.

Another way to encourage professional relationships between conciliators and labor and management representatives at specific companies is for a Conciliation Institution to provide services to prevent labor conflict in addition to resolving it. As we will see in Section I(B), *infra.*, labor conflict prevention programs involve conciliators conducting on-site enterprise-level visits and working directly with the parties to enhance their communication and joint-problem solving skills. In this way, the conciliators develop professional relationships with the parties, which carry over to their dispute resolution work with the enterprises. As a result, they go into negotiations enjoying a high level of credibility with the parties.

2. *Encourage Incorporation of Conciliation into Collective Bargaining Agreements*

To the extent that a Labor Ministry or a Conciliation Institution is able to influence the content of a collective bargaining agreement, either through a legally mandated role or through a conciliator's informal and unbinding suggestion at the negotiation table, it would be wise to encourage the incorporation of conciliation into parties' collective agreements. This can take several forms.

One form is to have the parties agree that conciliation should be a mandatory step in cases when one party (usually the union) files a *grievance*, which is a complaint lodged against the other party claiming a contractual violation. The *grievance procedure* is usually spelled out in detail in the text of the collective bargaining agreement. Generally, it specifies that grievances should first be resolved in the organizational unit where the alleged violation took place. The next *step* of the grievance process is usually a meeting among the union's chief steward in the organization and his management counterpart. Third, the parties might involve the president of the union confederation within a defined geographic area. If that fails, the agreement usually provides for a lengthy and expensive arbitration procedure. By that point, the grievance has expended a significant amount of labor's and management's resources and soured the parties' relationship.

An alternative is to have the parties agree, in the text of their collective bargaining agreement, to use conciliation as the third or the fourth step of the grievance procedure, before the parties become entrenched in an arbitration battle. This preserves resources of both

²⁰ *See*, Section I(A)(4), *infra*.

parties, and also provides the conciliator with an opportunity to suggest that the parties participate in programs aimed at labor dispute prevention. With preventive programs, the number of grievances filed is often drastically reduced in the long term.²¹

The grievance procedure is not the only area of the collective bargaining agreement in which the parties can provide for conciliation. Unless an economy's law provides otherwise, the parties are free to provide for it anywhere in the agreement they wish. For example, the parties can draft language providing for the use of a conciliator at the expiration of the agreement, when it is time to renegotiate the next agreement. Likewise, if the collective agreement allows for the reopening of terms, the parties can provide in their agreement for conciliation at that juncture. In addition, the parties' agreement can provide for use of the Conciliation Institution's preventive programs to teach the labor and management representatives techniques of communication, problem-solving, and the development of processes to resolve disputes and otherwise work collaboratively.

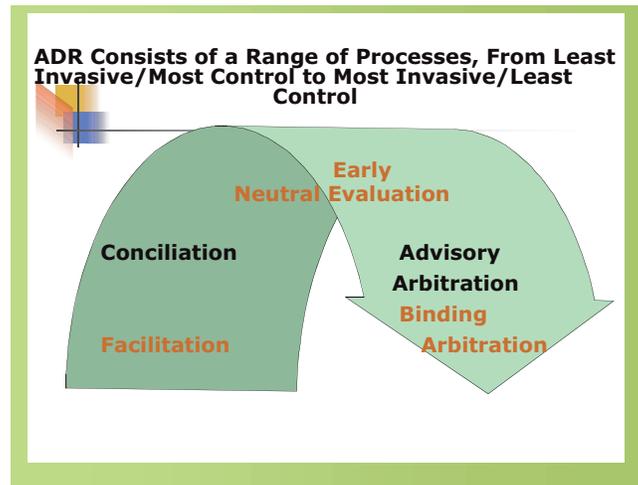
3. Offer a Variety of ADR Processes

In the world of Alternative Dispute Resolution, "one size does not fit all." In order to provide the most value for its direct customers and for the economy at large, the Conciliation Institution should provide Alternative Dispute Resolution (ADR) services above and beyond conciliation. A variety of ADR processes are necessary because some parties have highly contentious relationships and are convinced of the correctness of their legal positions (hence the need

²¹ See Section B (2)(d), *infra*, on Steward-Supervisor training.

for more interventionist and rights-based processes such as Early Neutral Evaluation and Arbitration), while others have better relationships and perceive more room to negotiate new legal contractual rights to satisfy their mutually understood interests (hence the need for less interventionist and interest-based processes such as Facilitation and Conciliation).

To get an idea of the possible types of ADR services that a Conciliation Institution might offer, it is helpful to understand the following illustration.



While there are many processes that third-party neutrals conduct that are classified as different forms of ADR, the five we have identified here are sufficient to give the reader an intuition as to what an economy-wide Conciliation Institution can provide. More important than the name of each process is the underlying nature of the process itself. In particular, processes differ according to the degree of intervention on the part of the third-party neutral and, relatedly,

whether the process is more *interest based* or *rights based*.²² With these distinctions in mind, let's take a look at the definition of these terms as indicated in the APEC Best Practices Tool Kit.²³

- (a) Facilitation: In facilitation, the third-party neutral provides logistical support, helps parties "break the ice" to get down to substantive discussions, stay on track, and record the discussions. Facilitation is generally performed in groups greater than six people, so the techniques of a facilitator apply mainly to large-group dynamics.
- (b) Conciliation: In contrast to a facilitator, a conciliator takes her intervention one step further and actively works with the parties to jointly problem solve and reach a concrete agreement. This active intervention is harder to sustain as the number of people at the table rises. With higher numbers of people, a conciliator may have to employ the techniques of a facilitator, or break the group up into smaller committees in order to work at the level of detail required.
- (c) Early Neutral Evaluation: An Early Neutral Evaluator is a conciliator who is also an expert in the subject matter at hand. The Evaluator gives his opinion as to which party is more likely to legally prevail on the issues in dispute, and uses this information as pressure points to encourage parties to reach an agreement using conciliation techniques.
- (d) Non-binding Arbitration: In a non-binding arbitration, the arbitrator listens to the legal arguments of both sides, examines evidence, and then renders an opinion that the parties are not obligated to follow, but which they can use in negotiations.
- (e) Binding Arbitration: In binding arbitration, the parties present their case to a subject matter expert who renders an opinion that the parties contractually agree to abide by. An arbitrator's opinion is enforceable in a court of law except in

²² For a discussion of the difference between power, rights and interests, [see](http://www.apeclmq.org/program_materials.htm) http://www.apeclmq.org/program_materials.htm and go to the "Manual on Interest Based Negotiations" link at p. 25.

²³ See, <http://www.gnzlz.com/Tool%20Kit/Toolkit.Link%201%20Final%20ILAB%20Final.doc>.

the rare circumstance in which an arbitrator has somehow violated the law, abused her discretion, or acted arbitrarily or capriciously.²⁴

Since ADR is (at least formally) a relatively new field, the terminology remains under development and, as a result, the terms described above are often used interchangeably. For example, facilitation, mediation, conciliation and early neutral evaluation are sometimes used to describe, in some cases, what we have referred to as “conciliation” and in other cases referred to as “early neutral evaluation.” Likewise, fact-finding, mini-trial, and arbitration are sometimes used to describe what we have referred to as non-binding and binding arbitration.²⁵ The effect of this confusion of terminology is that the name of a particular process can, in reality, mean several different things. Conversely, when one designs a process other people may subsequently refer it to in several different ways.

Notwithstanding the confusion in terminology, in order to understand the underlying ADR process at issue, it is most important is to ask exactly what the third-party neutral is doing: (1) is she providing a controlled forum for discussion? (facilitation here); (2) is she trying to get the parties to reach an agreement but is focused solely on process and not on who is legally right? (conciliation here); (3) is she trying to get the parties to reach an agreement but, in addition to process, also uses legal knowledge to convince the parties

²⁴ It is also worthwhile to mention Conciliation/Arbitration or “con-arb.” In con-arb, the parties present their case to a conciliator, who works with them to reach an agreement using conciliation techniques. If no agreement is reached, then the conciliator renders a non-binding or binding opinion. The advantage of con-arb is that the parties must be as forthright as possible, and not hold any arguments or evidence “in their pocket” because they are working with the conciliator to reach an agreement while simultaneously trying to influence the outcome of an arbitration.

that they do not have a better alternative to a negotiated agreement? (early neutral evaluation here); (4) is she hearing parties' legal arguments as well as evidence in support of their positions, but not rendering a legally binding decision? (non-binding arbitration here); (5) is she hearing parties' legal arguments as well as evidence in support of their positions, and also rendering a legally binding decision? (binding arbitration here) In sum, the two significant questions are (a) "to what degree does the neutral intervene in the parties' discussions and the outcome of those discussions?" and (b) "to what degree does the neutral take the parties' legal positions into account?"

The ADR services provided by a Conciliation Institution are based on an assessment at the outset of negotiations. Do the parties need a forum for an informal discussion for brainstorming, or to formulate a general action plan? (facilitation) Do they need a neutral to help them structure their discussions and maintain their relationship so that they may reach an agreement? (conciliation) Do they have a relatively good relationship, and are able to discuss their interests and accordingly negotiate new legal contractual rights to satisfy these interests? (also conciliation) Are the parties capable of some dialogue, but are convinced of the correctness of their legal positions and need a contrary legal opinion in order to possibly change their position? (early neutral evaluation) Have the parties' positions hardened to the point where they need someone else to decide the matter for them, but still want to preserve some room to fashion their own accord afterward? (non-binding arbitration) Have the parties' positions hardened to the

²⁵ For a discussion of the terminology describing the various ADR processes, *see* Eileen Barkas Hoffman, *The Impact of the ADR Act of 1998*, Trial Magazine, June 1999, at pp. 13-17.

point where they need someone else to decide the matter for them, and they just want to be rid of the matter? (binding arbitration)

If a Conciliation Institution wants to offer all of these ADR services, it must have the human capital available to provide them. Occasionally, there are a few conciliators that have all of the skills necessary (i.e., relationship-building and legal skills and knowledge) to perform all ADR functions well. However, more often, the Conciliation Institution will have to maintain separate staffs for facilitation and conciliation on the one hand, and non-binding and binding arbitration on the other. The individuals with a whole package of skills may be your best early neutral evaluators, who utilize conciliation skills as well as knowledge of the law. If it were not possible to maintain such a variety of skill sets on the staff of the Conciliation Institution, it would be wise to maintain a *roster* of neutrals, who could be available to provide services on an as-needed basis. In some cases the Conciliation Institution would pay the fee of the neutrals on the roster. In other cases the parties would pay the fee, while in other cases there would be cost sharing between the two.

4. Promote Conciliation at the Enterprise Level as a Supplement to Rights-Based Processes

In several economies in the APEC region, by law, most collective bargaining takes place not at the enterprise level but rather at the economy-wide level and sometimes at the sectoral level. Recognizing that the level of negotiations (whether it is economy-wide, sectoral, or at the enterprise level) reflects the underlying values and desired social policy of an economy, it is not the purpose of this Handbook to promote any change in that regard. However, even in those

economies that have opted for negotiations at the highest (economy-wide) level, there is room for smaller scale dispute resolution at the enterprise level, without affecting any economy-wide arrangements.

For example, the economy-wide agreement may itself provide for local adaptations. In other cases, there may be implicit room for interpretation of an economy-wide agreement's provisions. Finally, an economy-wide agreement may not have contemplated, or may not be concerned about, certain aspects of work life that can be enhanced through further negotiations at the enterprise level.²⁶

There exists no labor relations system in the world that prevents workers and managers from communicating with one another to improve competitiveness, enhance the quality of work life and build a better relationship. As long as that is true, the Conciliation Institution can play a role as a forum for negotiations at the enterprise level.

B. Provision of Conflict Prevention Services at the Enterprise Level

It stands to reason that the best time to deal with a conflict is before it happens. With that principle in mind, several Conciliation Institutions within the APEC region have developed extensive programs aimed at labor conflict prevention. In general, these programs involve a conciliator or a team of conciliators working directly with not only labor and management representatives at an enterprise, but also the "rank and file" or constituent members of their

²⁶ The Interest Based Problem Solving model presupposes the ability to negotiate even in the most legally based labor relations system through the parties' identification of their respective interests that are implicated by those legal rights and obligations. Once those interests are identified, the law often leaves sufficient space to negotiate how the legal provisions are put into practice. See, http://www.apecimg.org/Program%20Materials/BEST_PRACTICE_NUMBER_1.

organizations. The conciliator designs the program in conjunction with the representatives and then delivers the program to union members and managers within the relevant organizational unit. This chapter will begin by discussing the process of diagnosing the problem, i.e., determining what is damaging an organization's labor-management relationship. We then continue with a discussion of the various preventive programs that that might be recommended based on the diagnosis.

1. Diagnose the Problem

Since a preventive program involves a significant commitment of company time and other resources on the part of both the enterprise as well as the Conciliation Institution, it behooves both parties to work together to correctly diagnose the problem so they may expend these resources efficiently. Following the identification of a relationship issue, either by the conciliator during negotiations or by the parties themselves on their own initiative,²⁷ the conciliator meets with labor and management leaders. The conciliator may also personally interview or conduct surveys of the managers and rank and file workers in the organization.²⁸ It is important to keep in mind that what the parties' desire might not represent their actual needs. Accordingly, a conciliator should pay close attention to the parties and

²⁷ At the U.S. Federal Mediation & Conciliation Service (FMCS), conciliators are expected to contact labor and management representatives at their client companies and conduct presentations. This is referred to as "Education, Advocacy & Outreach" (EAO). EAO presentations involve a thorough explanation of one or more of the various preventive programs that the FMCS offers and the benefits that one or more of them may bring to the organization.

²⁸ For an example of diagnosing an organization's needs to determine the propriety of a particular preventive program, in the case of an existing labor-management committee, *see* the *Atlantic Baking Company* case study at <http://www.gnzlz.com/Case%20Studie%20Docs/US%20-%20ABG%20-%20CP%20Final%20Final.doc> and, in particular, the appendix.

focus on the diagnosis of the problem and not necessarily the parties' wishes.

Following the initial assessment, the conciliator decides which program(s) are most appropriate for the organization based on the following criteria:

- (a) Does the organization have relatively sophisticated parties who have a poor relationship and a collective agreement that is soon to expire? If yes, the conciliator may recommend *Interest Based Bargaining Training*. See Section 2(a) below.
- (b) Has the organization completed negotiations and is now faced with the task of working together to meet the ongoing challenges of the organization? If yes, the conciliator may recommend the formation of a *Labor-Management Committee*. See Section 2(b) below.²⁹
- (c) Has the organization recently undergone a strike and is now faced with the task of rebuilding a severely strained relationship? If yes, the conciliator may recommend a *Relationship By Objectives* program. See Section 2(c) below.
- (d) Does the organization's problem come from a failure on the part of supervisors and union stewards to understand their rights and obligations under the law, and how to communicate with one another to resolve problems on an ongoing basis? If yes, the conciliator may recommend *Steward and Supervisor* training for the organization. See Section 2(d) below.
- (e) Is the organization already committed to a collaborative labor-management relationship, and now needs help in incorporating the input of both labor and management into its strategic planning? If yes, the conciliator may recommend a *Partners in Change (PIC)* program. See Section 2(e) below.

²⁹ Another program, called *Committee Effectiveness Training*, is geared toward existing Labor-Management Committees that are having relationship problems after they have been operating for some time. That is the program discussed in the *Atlantic Baking Company* case study. (See previous footnote.)

All of the above programs have been delivered and consistently modified over a period of many years by FMCS conciliators. In 2002, over 35% of an FMCS conciliator's workload was related to the delivery of these programs. The following pages will give the reader a flavor of each program. For those interested, more information can be obtained from the FMCS at www.fmcs.gov.

2. Recommend a Program to Solve the Problem

(a). The Core Competency for Effective Labor-Management Cooperation: Interest Based Problem Solving

Interest Based Bargaining (IBB), or Interest Based Problem Solving (IBPS), refers to a process by which the parties openly exchange information concerning the *interests* that they need to satisfy (i.e., "We need an effective absentee policy in order to keep production high enough to meet increased market demand") and then engage in joint problem solving to develop several means of satisfying those interests. Contrast that with traditional negotiations, according to which parties demand inflexible, absolute *positions* (i.e., "We must have a 'three absences and you're out' policy") and then use power-based or rights-based threats based on those demands. (i.e., "We will unilaterally replace employees that we deem to be persistent violators of the absentee policy if you do not agree to the 'three absences and you're out' absentee policy.")

The formal Interest Based Bargaining process involves five steps: identification of issues, exchange of interests, brainstorming of options, evaluation of options according to objective criteria, and development of a plan of implementation. All have been treated extensively in chapter 6 of the APEC Best Practices Tool Kit. We refer

the reader there for an explanation of the nuts and bolts of the process and an illustration of how organizations have put it into practice.

In terms of where IBB training can fit within a Conciliation Institution's preventive program, IBB training is generally delivered a short time prior to the commencement of collective contract negotiations. In addition, many organizations teach Interest Based Problem Solving because the underlying core competencies – i.e., active listening, interest based communication, brainstorming, consensus decision making – are very useful for improving the climate of the workplace as well as communication in furtherance of the enterprise's mission.

In the context of IBB negotiations, based on the experience of the U.S. FMCS, some of the necessary components that increase the likelihood of successful negotiations are:

- (i) Evidence of labor-management cooperation during the past contract term;
- (ii) Sufficient time remaining prior to contract expiration to complete the sequence of decision-making about IBB, training and application of the process;
- (iii) Willingness of the parties to fully share relevant bargaining information;
- (iv) Willingness to forgo power as the sole method of "winning;" and
- (v) Understanding and acceptance of the process by all participants and their constituents.³⁰

³⁰ For a broader discussion of this topic, see http://www.apecimg.org/program_materials.htm and go to the "Manual on Interest Based Negotiations" link at p. 29.

Accordingly, effective IBB begins with an orientation by the conciliator. If participants cannot accept the principles and assumptions that underlie the process, it is highly unlikely that they will be able to follow the steps and use the techniques during negotiations, and the conciliator consequently does not recommend IBB. If the parties and conciliator determine that IBB is appropriate, training is the next step. The training program includes exercises that test participants' ability to work through the process to completion – which is an indicator of how well the parties will handle the process in actual negotiations. IBB training is usually delivered relatively close in time to the negotiations, by the same conciliators who will facilitate the negotiations.

With a decision to proceed, prior to the commencement of negotiations, conciliators facilitate a joint meeting of the participants to reach agreement on ground rules and protocols under which the bargaining will be conducted, exchange and discuss the issues to be negotiated, and outline steps for a transition to traditional bargaining if the IBB process breaks down.

(b) Assisting Labor and Management to Build and Take Responsibility for Their Own Relationship: The Labor Management Committee.

A conciliator cannot be, nor should be, present to resolve every issue that arises between the parties during the term of their collective bargaining agreement. For this reason, conciliators have trained many enterprises and their labor partners in the development and maintenance of a Labor-Management Committee (LMC).

The formation and operation of LMCs has been treated extensively in chapter 2 of the APEC Best Practices Tool Kit. In essence, conciliators work with labor and management to form joint committees that are designed to bring the parties into regular communication. LMCs can be extended from the leadership level to the worksite level, and can include the formation of worksite committees to deal with ongoing issues as they arise – before they become disputes.

Training modules should include techniques to develop the parties' interpersonal skills: e.g., effective planning, group problem solving, brainstorming, consensus decision-making, effective communication with each other and with constituents, an understanding of group dynamics, and acceptance of the principle of shared leadership. The training should also develop the skills required to get the Committee off the ground: e.g., to develop the Committee's mission and structure and monitor its work and overall effectiveness.

Finally, it should be emphasized that a LMC is not a substitute for collective bargaining. A LMC's focus is on maintaining and strengthening the labor-management relationship as well as the enterprise, but is not designed for handling the ultimate distributive questions that are the traditional focus of collective bargaining. While it is certainly possible for the parties to develop behaviors and negotiating practices in a LMC that make collective bargaining run more smoothly, the fundamental right to collective bargaining, as recognized by the ILO, implies a degree of independence of the trade union that may not be possible in the institutional collaboration that is implicit in a LMC.

(c) *Repairing the Most Strained Relationships: Relationship by Objectives Program*

Severely strained labor-management relationships, such as those following a strike or a lockout, or suffering from other short or long-term problems, require rebuilding immediately or they suffer long term and perhaps irreparable consequences. A Relationship by Objectives (RBO) training program aims to improve the parties' relationship, particularly where the relationship has worsened after a contentious situation, such as a representation election, initial contract negotiation, or a strike.

An RBO is structured in the following way. Following some skill building at the outset of the program, usually in non-defensive communications and active listening, the parties identify what they can do to improve the labor-management relationship as well as what the other party can do. The parties engage in this initial exercise in separate rooms. Once these needs are identified, the parties then exchange their respective lists in a session that requires delicate facilitation skills on the part of the conciliator. In general, no defensive or "loaded" questions are permitted. The parties may ask only clarification questions.

From that discussion, the parties jointly identify various objectives that they should pursue in order to improve their relationship. Objectives may be consolidated, and in the end there will be small labor-management committees formed which correspond to each objective that remains. In addition, there will be a higher level RBO Coordination Committee formed that will be empowered to supervise the implementation and measure the success of all of the

objectives. For each objective there will be agreed-upon action steps and timetables. Following the RBO, the conciliator will meet periodically with the RBO Coordination Committee, but generally will not meet with all of the specific “objectives” committees.

RBOs are most likely to be successful if they are held off site, as parties tend to be in a better mood and more focused on the task at hand if they are out of their familiar surroundings and away from workplace distractions such as phones, faxes and e-mails. The multitude of facilitation tasks and the administrative complexity of RBOs require that a team of conciliators (3-4) deliver the program.³¹

(d) Understanding Conflict Resolution at the Plant Level: Steward Supervisor Training

Front line managers or supervisors deal with employees on a day-to-day basis. The willingness of the front-line supervisor and the union shop steward to work together effectively is the foundation of a sound and productive labor-management relationship. If the labor-management relationship can improve at that core level, then the larger labor-management relationship can improve by resolving disputes that arise before they develop into explosive disputes. Steward-supervisor training provides front line supervisors and shop stewards with basic information on their roles and responsibilities regarding contract administration, grievance processing, the arbitration procedure, and interpersonal communications for building cooperative relationships. Such a program emphasizes relationship-building, definition of leadership roles, and teaches interpersonal and

³¹ For an extensive discussion of the Relationship-by-Objectives program, see Chapter 8 of the *APEC Best Practices Tool Kit* at http://www.qnzlz.com/best_practices_tool_kit_x.htm.

communication skills necessary for a cooperative working relationship. The training should include modules dealing with collective bargaining as a process, the responsibilities of the parties in administering the terms of the contract, how to handle grievances when they first arise, and what can happen to an unresolved grievance. Joint training is recommended in this kind of program and emphasis is placed on communication and consensus building skills.

(e) *Teaching Strategic Planning and Devolution of Decision Making: Partners in Change Program*

If labor and management remain committed to a collaborative effort, they can incorporate the input of labor and management into the enterprise's strategic planning. Partners-in-Change (PIC) is a program for organizations already committed to building or expanding a cooperative labor-management relationship. A PIC workshop explores the organization's current culture, identifies perceptions within the organization, creates a vision for the future, and designs a system that effectuates change. A PIC training program is designed for labor and management *leadership*, and it is essential to have the organization's top labor and management decision makers participate in the entire program. The PIC program is based on three principles: (1) the change must involve proactive management; (2) people must be treated in a fair and positive manner; (3) and new skills are required to manage change. Participants must analyze their organization's current cultural, political, and technical systems, explore elements of a high performance workplace, identify separate and jointly-held perceptions of the organization, create a joint vision of the future, initiate a joint change process, develop necessary skills to bring about the desired change, and look toward the future.

II. BUILDING THE CAPACITY OF THE CONCILIATION INSTITUTION ITSELF

A. Developing a Meaningful and Measurable Mission Statement

Successful implementation of a government-run Conciliation Institution requires dedication to a well-defined mission that has measurable results. A mission statement identifies, in general terms, the overarching purpose of the institution. In general, a Conciliation Institution should promote sound and stable industrial peace by the settlement of issues between employers and employees through the processes of conference and collective bargaining.

At the website for this project, www.apecimg.org, you will find links to surveys that contain the mission statements for many of the APEC member economies. In some cases the survey responses reference websites that contain the mission statement of the Institution. Reviewing the various mission statements, the following themes emerge:

- (1) Advancing a fair and safe working environment leading to social and economic well being;³²
- (2) Promoting agreements between enterprises, employees and/or their unions covering terms and conditions of employment;³³

³² For example, FMCS Canada's mission statement includes promotion of "fair, healthy, safe, and cooperative work environment that contributes to the social and economic well-being of all Canadians." New Zealand Mediation Service's mission statement states that its purpose is "to link social and economic issues to enable people to develop and use their potential for the advantage of themselves."

³³ For example, Australia's Industrial Relations Commission's mission statement says that it is to provide assistance to "employers and employees, or organizations of employees, to make agreements regarding wages and conditions of employment." Similarly, Hong Kong, China's Labor Relations Division of its Labor Department says that its mission is to provide "in-

(3) Preventing conflict at the outset and resolving it when it occurs;³⁴ and

(4) Providing arbitration services as a means of resolving workplace disputes.³⁵

In contrast to a simple Statement of Purpose or the text of enabling legislation, the mission statement tends to contain lofty principles couched in somewhat idealistic language. That is appropriate, as the mission statement should represent the Institution's highest aspirations.

In the context of a Conciliation Institution, among the most important goals of a mission statement are the neutrality, confidentiality and general acceptability of the Institution in the public's eye. These elements are critical to the mission of Institution. In the absence of all three elements, the Institution will not gain acceptability by the public and conflict will develop undeterred. Conciliators should be required to accept these elements as part of their core obligation to the resolution of conflict and should be part of the Conciliation Institution's central mission.³⁶

In addition to representing the most important goals of the

person consultation service to employers and employees on matters relating to conditions of employment and their rights and obligations under the Employment Ordinance."

³⁴ Papua New Guinea's mission states "The Office of Industrial Conciliation and Arbitration and Minimum Wages Board exists to create and maintain sustainable industrial relations harmony by playing a leading role in industrial dispute *prevention* and dispute resolution."

³⁵ The mission of the mediation section of the Vietnam Ministry of Labor, War Invalids and Social Affairs says that it is to provide "Arbitration councils: giving conciliation and resolution to collective labor disputes and conflicts occurri[ng] in enterprises."

³⁶ See Section I, *infra*, regarding Codes of Ethics.

Institution, the mission statement has a more practical function: all of the Institution's activities are based on it – i.e., human resource decisions, policy initiatives, budgetary allocations, and organizational structure. Thus, when the Institution undertakes a new initiative it should ask itself, "does this further our mission?" Or, at a minimum, "does this conflict with our mission?" Many organizations, if not mindful of their missions, can fall pray to "mission creep," effectively losing their focus and diluting their overall ability to achieve any meaningful impact. In addition, as we shall see in the next section, an Institution can measure its performance according to the degree to which it is fulfilling its mission statement.

B. Track Performance with Statistics and Be Accountable

A mission statement alone will not accomplish the tasks required of a Conciliation Institution. In addition to a mission statement, there must be specific goals and objectives of the Institution, strategies to achieve those goals, and a system of measuring success. Basic objectives can include:

- The necessity of meeting the needs of the labor management community in a timely fashion;
- Providing innovative and quality approaches to conflict resolution and prevention;
- Ensuring absolute neutrality, confidentiality and acceptability to the public; and
- Dedication to effective, honest, and open communication.

The Conciliation Institution must determine what strategies it will employ to achieve each of its goals. For instance, if the goal is to

meet the needs of the labor and management community in a timely fashion, the Institution must establish specific time deadlines when a conciliator should attempt intervention in a dispute, particularly in situations where a work stoppage is involved and tensions rise to a higher level. To determine whether the conflict resolution tactics were innovative and of high quality, the Institution should be prepared to survey the parties about the services of the Institution's conciliators, evaluate the responses of the public, and be prepared to alter its services if the parties are not satisfied.

Equally important is the development of a centrally controlled information technology system that tracks the work the Institution performs. Such a system should be able to identify when services were provided by a conciliator, how often, what was accomplished during conciliation sessions, and the end-result of the conflict. The system should allow the Institution to record the location of the dispute within the economy and the sector of the economy in which the conciliation services were provided. Such an information technology system allows the Institution to reply to public inquiries regarding the number of cases it handles, in which enterprises, and in which sectors of the economy.

C. Establish High Credentials for the Institution's Conciliators

A Conciliation Institution is only as good as the individuals that work for it. The Institution should have specific criteria for hiring conciliators, such as demonstration of certain **knowledge, skills and abilities (KSAs)**. To give the reader an idea of some KSAs that

might be appropriate for conciliators, we quote from those that apply to the U.S. FMCS:

- Ability or potential to assess, design, deliver, and evaluate processes aimed at improving relationships;
- Knowledge of conflict resolution;
- Faculty for sound presentation and facilitation skills which include effective communication skills;
- Ability to chair meetings and lead discussions;
- Ability to use personal computers; and
- Knowledge of design and implementation of conflict resolution systems³⁷

In deciding whether to hire a particular conciliator, a Conciliation Institution should not require any one single credential or combination of credentials. For example, it should avoid formulas such as a combination of a particular educational degree and/or a number of years of experience in mediation, ADR or labor-management relations. Such inflexible rules are inefficient because they exclude many well-qualified people. Instead, the Institution should adopt a more holistic approach that also takes into account more subtle, but perhaps more important, traits such as the following:

- Ability to listen
- Ability to analyze problems and frame issues;
- Ability to use clear, neutral language;
- Sensitivity to strongly held values;
- Presence and persistence;

³⁷ *See*, Society of Professionals in Dispute Resolution (SPIDR), *Report on the Commission of Qualifications* (1989), and the FMCS Recruitment Bulletin Med-03 at <http://admin.fmcs.gov/assets/files/HumanResources/MediatorRecruitmentBulletin.pdf>.

- Ability to identify and separate the neutrals' personal values from issues under consideration;
- Ability to understand power imbalances;
- Ability to deal with complex facts³⁸

In an empirical study to identify the attributes of skilled mediators, Christopher Honeyman found that the following traits were particularly important:

- Investigation
- Empathy
- Inventiveness and Problem Solving
- Persuasion and Presentation Skills
- Distraction
- Managing Interaction
- Substantive Knowledge³⁹

To this end, the conciliator hiring process should provide an opportunity to assess whether a candidate possesses these more subtle traits that are essential for effective conciliation. This could involve:

- (i) Engaging applicants in role plays and hypothetical scenarios that will force them to display the types of traits required for effective mediation;
- (ii) In a more traditional job interview, posing questions designed to assess whether an applicant possesses the

³⁸ Gary Hattal and Cynthia Hattal, *Battling School Violence with Mediation Technology*, Pepperdine Law Review, Volume 2, No. 3 (2002), at p. 380, at <http://admin.fmcs.gov/assets/files/Articles/Pepperdine/battlingschoolviolence.pdf> *citing*, Society of Professionals in Dispute Resolution (SPIDR), *Report on the Commission of Qualifications* (1989).

³⁹ *Id.*, *citing*, Chris Honeyman, *On Evaluating Mediators*, 23 Negotiation Journal, at 26-30 (1990).

above types of personality traits and can likely apply them well in a conciliation context; and

- (iii) Utilizing a survey instrument, such as a personality inventory, designed to assess the degree to which a candidate possesses those personality traits and can likely apply them well in a conciliation context.

This emphasis on personality traits is not to downplay the importance of relevant education and training, or experience in conciliation, ADR, labor-management relations and other related fields. Those are also very important for a conciliator's understanding of the context in which he or she operates and will likely enhance a conciliator's intuition and ability to empathize with the parties. However, education and experience are not enough. They help a conciliator with the requisite inherent traits to improve at the profession, but do not, in and of themselves, make a quality conciliator. Therefore, education and experience should be considered as important factors, but should not be dispositive in a hiring decision.

Finally, it is important to remember in the APEC context that the specific nature of the KSAs for a particular economy's Conciliation Institution depends upon, among other things, the cultural context, the type of ADR process that the conciliator intends to use, and any logistical or economic constraints that make some of the above KSAs inapplicable.

D. Set Up a Formal Training Program for Conciliators

Once conciliators are employed by the Institution, there should be a commitment to training these individuals so that they are prepared to commence their work as conciliators. The overall goal

should be to develop a training program that identifies, acquires and integrates information that is important for the successful delivery of conciliation services. A training program should disseminate existing knowledge based on best practices in the industry and encourage dialogue and sharing of experiences. At a minimum, training should include specific instruction in the resolution and prevention of disputes, as well as the various alternative forms of dispute resolution. (See Section I(A)(3), *supra*.) Well-trained and experienced conciliators should deliver the program.

Some of the topics that would be appropriate for the training of new conciliators include:

- Fundamentals of labor dispute resolution (individual and collective)
- Fundamentals of labor conflict prevention
- Interest Based Problem Solving and Negotiations
- Facilitation and Group Dynamics
- Ethics and Professional Standards for Mediators

Although training can be in a lecture format, it is strongly suggested that newly hired conciliators have the opportunity to role-play and engage in simulated or mock conflicts, with constructive criticism by other participants and by instructors. Engaging in hands-on role-playing is a well-tested and accepted method of imparting the tools of the trade in a most realistic environment.

E. Supplement Formal Training with Mentoring

Structured classroom training, coupled with simulated role-play techniques, is only the beginning of the training process. New

conciliators can be uncertain of their techniques and their efforts at dispute resolution. To ease the transition in the early stages of a conciliation career, a “mentoring system” is suggested. A mentor is an experienced, but non-supervisory, colleague to whom a new conciliator may turn to for guidance and assistance without fear of retribution. Thus, a mentor is akin to a “buddy system,” someone to call when a new conciliator feels that he or she could use the help and wisdom of a more experienced conciliator that can guide the resolution of the conflict.

F. Develop Mechanisms to Make the Public Aware of the Services Institution Provides

We live in an “information age” in which the public can access information on the Internet within minutes, when obtaining that same information previously required days of research. Taking advantage of this technology, a Conciliation Institution, and the services it provides, should be made publicly known to the labor and management communities through a number of vehicles:

- Websites;
- Brochures that are mailed to the labor-management community;
- Efforts by the Institution’s conciliators to reach-out to the labor management community, encouraging the use of the Institution’s resources and services;⁴⁰ and
- Hosting conferences, with attendance by government officials, academicians in the field of conflict resolution and prevention, and members of the labor-management community.

⁴⁰ This is reflected in the Education, Advocacy and Outreach Requirement for U.S. FMCS mediators discussed in Section II(F), *supra*.

If the public is unaware of the services provided by the Conciliation Institution, there is a greater likelihood that the conflict will continue without the assistance of the Institution. At the U.S. FMCS, the conciliators are required to promote awareness of the agency through what is known as "Education, Advocacy and Outreach" (EAO) programs. Examples of EAOs include an address to a labor-management conference, a talk at a university, a visit to an employer and its unions, or a meeting with government officials that may need FMCS' services.

The following is a description of the duties of FMCS mediators with respect to promoting awareness of the Institution:

Critical Element: Marketing: This single element consists of three interrelated components: (1) education; (2) advocacy; and (3) outreach. **Education** is aimed at teaching about the collective bargaining process, its value in a democratic society, the benefits of conflict resolution, and the positive role of FMCS. **Advocacy** is directed towards promotion of collective bargaining, mediation and arbitration as preferred methods of dispute resolution. The primary focus of **Outreach** is to increase customer awareness of FMCS to promote the utilization of its services. These three components sufficiently overlap, so that it is possible to address one, two, or all three in the same activity.

Requirements to Meet Standard:

- (1) Seeks opportunities in each of the three component areas;
- (2) Participates in activities in each of the three component areas;
- (3) Apart from assignments, maintains current knowledge of activities and developments in the labor management community; and
- (4) Adequately performs as spokesperson in informing the collective bargaining community and the public about the mission of FMCS and its work.

The ability of a Conciliation Institution to use its conciliators to promote awareness of the Institution and its mission depends, to some extent, upon the availability of personnel and resources. However, Institutions would be wise to formalize the expectation that conciliators develop opportunities to interact with the public.

G. Highlight Best Practices

Highlighting “best practices” is identifying, cataloguing and reporting on successful practices or procedures employed by organizations and disseminating that information to others for the purpose of replication. When a Conciliation Institution identifies best practices, it reports on how the labor-management successfully resolved conflict and achieved mutually satisfying results. This can include publication of case studies that provide in-depth analysis of important labor-management joint actions, and publication of summary descriptions of business cases involving conciliation and dispute resolution solutions. A catalogue of best practices should be made available to the entire economy so that individual enterprises and sectors of the economy can draw on the successful experiences of others.

Some examples of best practice cases can be found on the U.S. FMCS website at <http://www.fmcs.gov/internet/categoryList.asp?categoryID=61>. In addition, every year the two principal Philippine Labor-Management organizations – the Philippine Association of Labor-Management Councils (PALMCO) and the Philippine League of Labor-Management Cooperation Practitioners (PHILAMCOP) – sponsor best practice conferences. Similarly, the U.S. FMCS sponsors a National Labor-Management

Conference in Chicago that features hundreds of successful labor-management cooperative programs. (See <https://www.nlmc2002.org/>.)

1. In Identifying Best Practices, Draw on International Expertise

The sharing of best practices includes drawing on the experiences of the international community. Through interacting with the APEC HRD Working Group, the International Labor Organization (ILO), visiting Conciliation Institutions in other economies, attending other organizations' conferences, jointly sponsoring conferences, and participating in exchange programs to shadow another Institution's conciliators to see how others work, Conciliation Institutions can learn and adapt successful practices from other economies.

In the United States, conciliators from several economies, including APEC members Canada and Korea, have come to the U.S. to attend FMCS training programs and also shadowed FMCS conciliators throughout the economy in order to learn the United States' dispute resolution and conflict prevention techniques. The June 2001 APEC HRD Symposium, "Responding to Change in the Workplace: Innovations in Labor-Management-Government Cooperation," and the related *APEC Best Practices Tool Kit*, posted at www.gnzlz.com have provided a multitude of experiences in the APEC context. In addition, each year the **Asia Pacific Mediation Forum** sponsors an annual conference featuring many international best practices. (See <http://www.unisa.edu.au/cmrg/apmf/conference2003.htm>) As a further example, in the Philippines, the PALMCO and PHILAMCOP annual conventions regularly feature best practices from other economies.

H. Establish Partnerships with Educational Institutions

As the premier providers of conflict resolution services in an economy, the Conciliation Institution should continue to educate its conciliators in the art and science of conflict resolution. Conciliators' conflict resolution skills remain sharp when they continue to broaden their knowledge in their discipline. Partnering with high-level academic institutions allows the Conciliation Institution to share research, curricula, internships, and mentoring opportunities and allows conciliators to gain knowledge from those institutions. Researchers at academic institutions continue to develop theories of dispute resolution techniques and new approaches to collaborative systems. In order to benefit from the ongoing knowledge that the academic world can provide, Conciliation Institutions should develop longstanding relationships with academic institutions. Such a relationship is likely to further the interests of both the academic and conciliation institutions, and the art and science of conflict resolution as a whole. Information on the academic partnerships that the U.S. FMCS has established with various universities can be found at <http://www.fmcs.gov/internet/itemDetail.asp?categoryID=32&itemID=15906>.

I. Develop a Code of Ethics and a Mechanism to Ensure the Integrity of the Conciliation Process

As indicated above, the overarching mission of a conciliation institution is to be accepted by the public as a neutral, with no preconceived notions of the dispute or conflict. To this end, it is imperative that a Conciliation Institution develop a Code of Ethics. It is also strongly recommended that all conciliators execute written agreements to be bound by the Code of Ethics, which should also

include an agreement to be bound by a complaint review process, described more fully below. The Code of Ethics should be, in essence, a set of rules embodying the moral and professional duties and responsibilities of conciliators. At a minimum, the Code of Ethics should outline the responsibility of the conciliator toward:

- (1) The parties;
- (2) Fellow conciliators;
- (3) The conciliation institution;
- (4) The public; and
- (5) The process of conciliation.

With respect to item 1 above, the conciliator's **relationship to the parties**, the conciliator should:

- In an economy in which the conciliation process is confidential, make clear to the parties its confidential nature and refrain from taking any actions that could jeopardize it;
- Ensure fairness and objectivity by making oneself free from any real conflicts of interest and also avoiding an appearance of impropriety;
- Be dedicated to the principles of conflict and dispute resolution;
- Understand that the process of conflict resolution is voluntary and belongs to the parties and that the conciliator's role is to assist the parties in reaching settlement; and
- Be prepared to intercede only by invitation of the parties.

Regarding item 2 above, the **relationship of conciliators toward one another**, the Code of Conduct should clearly identify that:

- When one conciliator is involved, a conciliator should not intercede in the dispute without permission of the primary conciliator;
- In the event that two or more conciliators jointly work on a particular conflict, they should ensure that each keeps the other informed about developments; and
- At all times, conciliators should avoid any appearance of disagreement or criticism of a colleague in the presence of the parties.

A conciliator should also be held to certain standards regarding their **relationship with the Conciliation Institution**, item 3 above.

Those standards can include:

- Recognition that a conciliator's work is not judged solely on an individual basis, but as a representative of the Institution and that individual conduct reflects on the entire Institution; and
- Agreement not to use a conciliator's position for private gain or advantage, nor engage in any employment, activity or enterprise which will conflict with their work as a conciliator, nor should they accept any money or anything of value for the performance of their duties.

Regarding item 4 above, the **responsibilities of the conciliator toward the public**, the Code of Ethics should explain:

- The right of a conciliator to strongly suggest that a particular dispute be settled in the interest of the public, and to release information consistent with the public interest⁴¹;
- The right of a conciliator to withdraw from negotiations if it is clear that the parties have an intent to use the presence of a conciliator for an agreement that is contrary to public policy or that otherwise severely harms the public good; and

⁴¹ In availing herself of this right, absent extraordinary circumstances the conciliator is not required to violate her duty of confidentiality to the parties.

Finally, regarding item 5, conciliators' **commitment to the process of conciliation and conflict resolution**, this commitment includes:

- An agreement to maintain, in confidence, any information communicated by the parties;
- Accepting a continuing responsibility to study the practice of industrial relations and conflict resolution techniques; and
- Making efforts to improve their conciliation and conflict resolution skills.

J. Establish a Complaint Process

The best way to ensure the integrity of the conciliation process is to provide a mechanism by which the public may file complaints against a conciliator for violating any part of the Code of Ethics. Thus, it is highly recommended that the Conciliation Institution create a complaint process, allowing parties to file complaints regarding the neutral's conduct. The Conciliation Institution should establish a board whose purpose is to investigate those complaints.

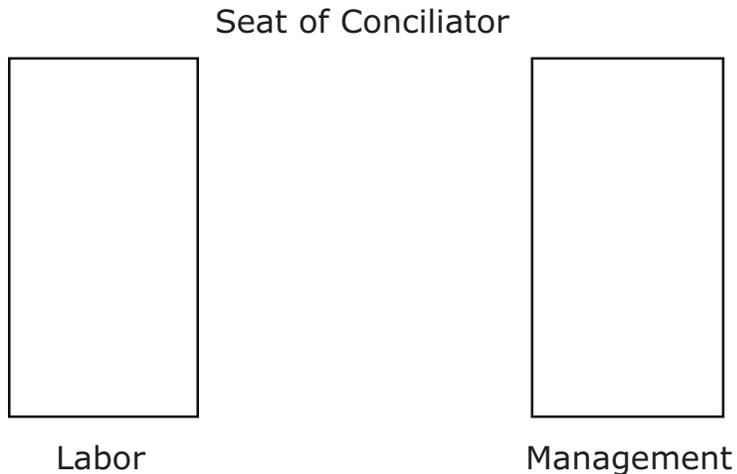
The board should have the right to inquire into a complaint, including interviewing all the parties involved, and providing the conciliator a reasonable opportunity to respond to the complaint filed against him or her. The board should be granted full authority to investigate the complaint, including prior complaints filed against the same individual and inquiring into other cases handled by the conciliator. Finally, the board should be given the right to take any disciplinary action against the conciliator, up to and including suspension or discharge from the Institution, although a progressive

system of discipline is recommended, i.e., first a warning, second a suspension and third discharge.

In order to ensure the fairness of the process, the conciliator should have the right to appeal to a body that oversees the board – either internal or external to the Institution – to seek a reversal of findings of fact and/or disciplinary action.

K. Have the Appropriate “Architecture” for Conciliation

The “architecture” for conciliation, in this case, means the physical structural design of a location where conciliation meetings take place. In the first instance, holding a conciliation meeting on neutral territory is desirable. If the Conciliation Institution has sufficient meeting space within its own building, that too is desirable. However, any meeting place can be satisfactory provided it is agreeable to the parties. The conciliator should be alert to the sound proofing quality of the meeting place to ensure that other parties cannot hear separate caucuses (meetings). In addition, the conciliator should be sensitive to his/her placement at the table. If the parties are facing each other, the conciliator should sit at the head of the table, between both parties. In essence, the set-up should look something like this:



The purpose of this arrangement is twofold: (1) it demonstrates the neutrality of the conciliator because the seat places him or her between both parties, and not on one side or another, and (2) it demonstrates that the conciliator has the capacity to control the meeting and maintain orderly negotiations throughout the process.

As in many other contexts described in this Handbook, the positioning of the parties and their manner of communicating is culturally specific, thus some of the advice in this section may have to be adapted appropriately.

L. Use the Latest Technology

Liker many other fields, Alternative Dispute Resolution should take advantage of the benefits afforded by technology – e.g., the ability to engage in negotiations from different locations different points in time, to preserve creativity through anonymity, and to sort and evaluate options for the resolution of a conflict. In the United States, the FMCS has adopted such technology to its processes and has created new opportunities for the public it serves. The TAGS

system (Technology Assisted Group Solutions) is a network of computers and customized software adapted as a tool to improve group processes.

Linking participants electronically, TAGS adds speed, efficiency and focus to brainstorming sessions, group problem solving and decision-making. Group sessions can take place at the same location, or by linking computers through the Internet, allowing participants to join a virtual conference from anywhere. TAGS has been integrated into the United States' collective bargaining process by using its brainstorming tools for dispute resolution and for its preventive mediation programs. In particular, the use of collaborative software, allowing participants to anonymously contribute ideas or concepts in a negotiation session, increases the participant rate and the quality of ideas. FMCS customers report that this system helps them prepare for negotiations, retain better records, communicate better with constituents, minimize the impact of geographic separation, and save time, travel and money.⁴² (For more information on the TAGS system, see <http://tags.fmcs.gov/Guest3.shtml>.)

M. Develop a Roster of Highly Credentialed Mediators to Preside Over Cases to Which the Institution is Unable to Attend

As a governmental body, a Conciliation Institution is limited in terms of the flexibility it enjoys with respect to human resources. If demand for its services increases, in the short-run it cannot simply hire more staff to meet the demand. In addition, there are certain

⁴² Michael J. Wolf, John Numair and Jack Yoedt, *Essential Collaborative Technology Tools for the 21st Century: FMCS TAGS System*, Pepperdine Law Review, Volume 2, No. 3 (2002), at p. 327, at <http://admin.fmcs.gov/assets/files/Articles/Pepperdine/TechnologyTools.pdf>.

classes of cases that are not appropriate for the Institution to handle because it lacks the requisite expertise or would otherwise be improper. In such situations the Conciliation Institution is doing the public a service if it established a Roster of third-party neutrals to handle that it does not or cannot assign to its regular staff.

In many economies, there are little or no barriers to becoming a “professional conciliator.” In many cases, it is simply a matter of putting a sign on your door that says “conciliator” and you are in business! Experienced conciliators know, however, that our work is difficult. A good conciliator must think on his or her feet and, at a moment’s notice, synthesize learnings from the fields of, among others, law, economics, management consulting, accounting, organizational development, and psychology. In addition, there are respected individuals who claim that “good conciliators are born, not taught.” While this assertion may be extreme, to the extent that a good conciliator is an *empathetic* conciliator, it just might be true: while a trainer can point someone in the direction of being understanding and empathetic, it is very hard, if not impossible, to make someone empathetic who simply does not have that personality trait.

With the above caveats in mind, in creating its Roster of third-party neutrals the U.S. FMCS believes that the skill set required for success in conciliation is sufficiently subtle and demanding that there should be some way for the public to discern who possesses the skill set and who does not. Thus, At the time of this writing, it has submitted for public comment a set of credentials required to receive the U.S. FMCS “seal of approval” for inclusion on its Roster. The public

comment period will close in early July 2003, and a few months later the credentials, in some form, will likely become federal regulations.

This initiative, dubbed the "Access to Neutrals" Initiative, will establish a Registry of Neutrals designed to meet the anticipated rise in demand for conciliation services while offering the widest possible market-based selection of neutrals. The Registry will consist of individual dispute resolution providers who agree to document their qualifications on an FMCS list according to pre-determined standard categories.

Neutrals who wish to participate on the registry will submit education and experience background information. Consistent with FMCS policy on neutrals, individuals who are included on the Registry of Neutrals cannot be currently engaged in work as an advocate in the area of labor relations. For inclusion on the Registry, neutrals would have to agree to abide by the informational, ethical and continuing education requirements established by the FMCS, and to participate in a consumer complaint process.

Applicants who submit their educational and experience backgrounds will be awarded points based on established standards. A minimum of ten points must be awarded for an applicant to be included on the Registry. Points will be awarded in the following categories:

1. ADR experience (0-9 points, at least 1 point is required in this area) ADR experience may include acting as a third party neutral in any dispute procedure that is used in lieu of adjudication to resolve issues in controversy including, but not limited to, settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials or any

combination thereof. For the purpose of this application arbitration is specifically excluded from the definition of alternative dispute resolution.

2. ADR education/training (0-5 points, at least 1 point is required in this area).
3. Substantive education in the roster content area (e.g., pensions, health & safety, labor law) (0-2 points, at least one point must be received in either this area or the area of substantive experience in the roster area)

It should be emphasized that this initiative is not intended to certify any particular mediator as being any better than any other; rather it is designed to give the public a means to distinguish those who have formal training and experience from those who are simply "putting a sign on the door."

III. THE FUNCTIONS OF A CONCILIATION INSTITUTION AT THE ECONOMY LEVEL

A. Establish Mechanisms for Economy-Wide Tripartite Dialogue

As has been mentioned in many places, the *APEC Best Practices Tool Kit* among them,⁴³ cooperative Industrial Relations are essential for an economy's maintenance of economic competitiveness as well as social and political stability. Thus, it is good public policy for an economy's Conciliation Institution to play a role in establishing a mechanism for tripartite or bipartite dialogue at the highest levels. By "highest levels," we are referring to the heads of major labor unions in the economy, the heads of the relevant business associations and major companies, and high officials from the relevant ministries whose policies most directly affect labor and management interests.⁴⁴ By "mechanisms for tripartite dialogue," we are referring not to the negotiation of labor agreements but to more informal exchanges of interests and resolution of differences concerning broad public policy issues that affect industrial relations.

For example, in Peru, the Ministry of Labor and Employment Promotion sponsors the **National Council on Labor and Employment Promotion**, which meets monthly to ensure that there is, at a minimum, an exchange of interests and agreement on the

⁴³ See, the Introduction to the Tool Kit at www.gnzlz.com.

⁴⁴ The names of the relevant ministries vary from economy to economy. For example, the equivalent of the United States Department of Labor in Malaysia and Singapore is called the Ministry of *Manpower*. In Peru, it is called the Ministry of *Employment Promotion*. In Mexico, it is called the Ministry of *Labor and Social Protection*. In Chinese Taipei, the relevant institution is called *Council on Labor Affairs*. In Vietnam, the Ministry's portfolio is combined with other related functions and is called the Ministry of *Labor, War Invalids and Social Affairs*. Similarly, the United States' equivalent of its Department of Commerce is called the Ministry of *Trade and Investment* in Japan and Indonesia, the Ministry of *Economic Development and Trade* in Russia, and the Ministry of *Commerce and Tourism* in Peru.

broad parameters of policy initiatives, legislative changes, and economic events. In Singapore, the **National Wages Council** provides a forum for high-level tripartite dialogue concerning changes in wages and wage classifications in the economy, and advises the government on the adoption of measures to promote labor market efficiency, higher productivity, and the development of the economy's human resources.⁴⁵ As a final example, in the Philippines a **National Labor Management Cooperation Council** encourages the bipartite social partners to discuss and resolve their concerns "in a win-win manner." The government merely serves as the facilitator in the process.⁴⁶

There are several reasons why it is important to promote such mechanisms for high-level tripartite dialogue. First, even if there is not much progress made on substantive issues, it is important for labor, management and government leaders to set an example for the rest of society. If the leaders meet to discuss the most far-reaching issues in the economy, certainly representatives at lower levels can follow this example and meet to resolve issues at their level.

Second, in economies where many of the labor agreements are negotiated at the economy-wide level, an informal mechanism for high-level tripartite dialogue can help build a good relationship among the parties prior to negotiations. An informal mechanism provides an

⁴⁵ Please see the discussion paper on the National Wages Board written by Teo-Seng-Meng at www.apecimg.org, specifically at http://www.apecimg.org/ProgramMaterials/Singapore/NWC_write_up_2.doc.

⁴⁶ See, <http://www.apecimg.org/ProgramMaterials/Philippines/Philipp.Public.Policies.ppt>.

opportunity to iron out misunderstandings and exchange information on an ongoing basis so that, when negotiations begin, the issues can fall into place somewhat easier than they might have had no dialogue taken place.

Third, the high-level tripartite body can serve as an intra-governmental resource to research and comment on executive branch public policy initiatives as well as proposed or existing legislation. In this role the tripartite body is serving two simultaneous purposes: (1) to educate public policy makers as to labor and management's respective interests on important public policy issues; and (2) at the same time, through the discussion of interests necessitated by this joint consultative role, the parties can develop their own relationship and hopefully even begin to identify some of their joint interests.

Finally, the high-level tripartite body can serve as the pressure valve if traumatic economic events threaten to destabilize labor relations. In that role, it can provide a last ditch effort to save jobs and avoid mutually destructive social strife.

B. Establish Mechanisms for Industrial Sector-Wide Tripartite Dialogue

In some economies it is much more common for collective negotiations to take place at the level of industrial sectors – e.g., transportation, education, oil & gas. In response, some governments have established permanent tripartite mechanisms to deal with ongoing issues impacting labor relations. For example, in Canada, the *Canadian Congress for Steel Workers* works with local and international unions, the steel industry, and the Canadian government

to develop its **Worker Adjustment Program** to help both parties in that vulnerable and volatile sector. The Worker Adjustment Program addresses worker dislocation issues created by industrial level decline by preparing workers with job skills training to either transfer to another location or to another industry. At the local level, various *Local Adjustment Committees* carry out implementation of the national Worker Adjustment Program.⁴⁷

The sectoral approach is not limited to just the steel sector in Canada. Several other sectors, including seafood and textiles, have also undertaken sectoral initiatives. In all sectors, the guiding principles are that:

- All activities are driven and owned by the industry. The industry is the expert and in the best position to determine its needs and appropriate solutions. The industry's involvement and commitment is critical for success.
- The government acts as a catalyst and facilitates the process by: providing a forum for creating alliances between stakeholders; providing expertise and advice on a range of topics such as the labor market and careers; and promoting and co-funding specific activities with sector groups.
- Solutions are determined by consensus and collaboration among the various stakeholders.
- Each industry may be different, and unique intervention will result in unique solutions.

Once the partners within the initial sectors agree to embark on a sectoral initiative, they undertake an extensive joint study to determine the industry's most pressing needs and then recommend

⁴⁷ See, the case study on the Canadian *Steel Industry Worker Adjustment Program*, at <http://www.gnzlz.com/Case%20Studie%20Docs/Canada%20-%20Zeinab%20-%20CP%20Final%20Final.doc>, at pages 4-9.

promising approaches to addressing them. At the end of the process, a **sectoral council** is formed to implement the recommendations and make modifications on an ongoing basis.⁴⁸

C. Establish a System of Notification of Conflicts Before They Arrive

In order for an economy to prevent or avoid conflict before it arises, there must be a system that allows for notification to the Conciliation Institution that a conflict has the potential to escalate. All enterprises and labor organizations within the economy should have the obligation to inform the Conciliation Institution that a conflict has arisen or that a dispute might rise to the point where commerce would be adversely affected. In the United States, conflict between an enterprise and a labor organization is most common when the parties' contract expires. As a result, either party to the contract, by law, must notify the FMCS that the collective bargaining agreement is expected to expire on a date-certain.

In the case of a renewal of a current collective bargaining agreement, the parties are obligated to give each other 60 days notice of intention to bargain as well as 30 days notice to FMCS and any state mediation agency that may exist. In the case of a new collective bargaining agreement, the parties are obligated to provide 30 days notice to FMCS and any state mediation agency that may exist. In the health care industry, the parties are obligated to give each other 90

⁴⁸ A case study describing the Canadian sectoral approach entitled *The Sectoral Approach: The Sectoral Partnerships Initiative*, together with other case studies from the *APEC HRD Colloquium on Successful Practices in Human Resources Development in the Workplace: Contributions from Labor, Management and Government*, is available on the world wide web at <http://www.apecsec.org.sg/> and clicking on the "Publications & Library" and "Free Downloads" links, or by contacting the Centre for Asia-Pacific Initiatives at the University of Victoria, Canada. (1-250-721-7020)

days notice of intention to bargain as well as 60 days notice to FMCS and any state mediation agency that may exist. The penalty for failing to provide such notice falls on the union, which suffers at least a temporary loss of protection as a recognized labor organization under the Labor Law of 1947 (known commonly as the "Taft-Hartley Act").

The advance notice required by law provides some time for a conciliator to intervene should the parties desire assistance in reaching a successor contract without conflict and without resorting to economic actions. (i.e., strikes or lock-outs) It is important to note that, once proper notice is provided to FMCS, the parties are under no obligation to accept FMCS' assistance.

D. Provide Grant Money to Encourage Innovative Labor-Management Cooperative Programs

Resources permitting, given the great benefits to labor-management cooperation in the workplace discussed previously, it is a wise use of public funds to provide grant money to encourage innovative labor-management cooperative programs. At the U.S. FMCS, grants are given to support the establishment and operation of joint labor-management committees comprised of employees and employers covered by a formal collective bargaining agreement in the private and public sectors. In general, 12-15 applications are funded each year. Grantees may receive up to \$125,000 for area, industry and public sector categories, and up to \$65,000 for plant/company categories. Approximately, \$1,000,000 of the funds is disbursed through a competitive application process.

Labor-Management Committees funded under this program are not limited to any particular activity. In the past, grants have been awarded in a variety of areas. They include: improving communication between labor and management, innovative joint approaches to improve organizational effectiveness, increasing productivity and competitiveness, employment opportunity and job security, resolving problems of mutual concern outside the collective bargaining process, improving the economic development of the area, enhancing workers' involvement in the decisions that affect their everyday working lives, establishing methods of communication for free collective bargaining, and other methods of improving working relationships.

All applicants must submit a detailed budget narrative. Grantees must also submit timely reports of their progress. To ensure that the grants are adding value beyond what is normally available to the enterprises, grant funds may not be used to supplant private or local/state government funds currently spent for committee purposes. A professional grant writer is not necessary to complete the application. In the application review process, initial scoring is completed by one or more Grant Review Boards made up of three members of the labor-management community and FMCS mediators who rank each application in a particular category.

Through the grants process, the Conciliation Institution sends a signal that Labor-Management cooperation is valuable enough to be encouraged and rewarded by the government. The initiative also encourages the grant recipients' competitors to develop their own labor-management cooperation programs in order to retain their own

workers and for the public relations benefits it may bring, not to mention that it makes the firm more competitive.

E. Promote Sharing of Best Practices to Encourage a Change in the Culture of Labor Relations in an Economy

The importance of using the Conciliation Institution to promote the sharing of Best Practices to help its own customers, and for internal training, was discussed in Section II, G, *supra*. We refer back to that section here and add a third reason for the Conciliation Institution to work to disseminate best practices: to effect a change in the culture of labor relations in the economy. To achieve this, all conciliators should be required to educate current and prospective clients about the Institution's work and promote innovative labor management cooperation. (*See*, Section II(F), *supra*.)

F. Support Legal Reform to Ensure the Integrity of the Conciliation Process

At the economy level, the Conciliation Institution should consider contributing its knowledge and experience to inform efforts to promote legal reform and the passage of a dispute resolution statutory scheme that ensures, above all, the integrity of the conciliation process.⁴⁹ Any such law should emphasize that neutrals should not discuss confidential communications, comment on the merits of the case outside the ADR process, or make recommendations about the case. It should be clear to enterprise-level management and labor representatives that they should not ask neutrals to reveal confidential communications and that there should be specific policies that provide for the protection of privacy of complainants, respondents, witnesses, and complaint handlers.

In addition, legal reform involving ADR should also have the following components:

- **Neutrality:** Neutrals should fully disclose any conflicts of interest, should not have any stake in the outcome of the dispute, and should not be involved in the administrative processing or litigation of the dispute. Participants in an ADR process should have the right to reject a specific neutral and have another selected who is acceptable to all parties.
- **Preservation of rights:** Participants in a conciliation process should retain their right to have their claim adjudicated if a mutually acceptable resolution is not achieved.
- **Self-determination:** Conciliation processes should provide participants an opportunity to make informed, uncoerced, and voluntary decisions.
- **Voluntariness:** Employees' participation in the process should be voluntary. In order for participants to make an informed choice, they should be given appropriate information and guidance to decide whether to use conciliation processes and how to use them.
- **Representation:** All parties to a dispute in a conciliation process should have a right to be accompanied by a representative of their choice, in accordance with relevant collective bargaining agreements, statutes, and regulations.
- **Timing:** Use of conciliation processes should be encouraged at the earliest possible time and at the lowest possible level in the organization.
- **Coordination:** Coordination of conciliation processes is essential among all offices with responsibility for resolution of disputes, such as human resources departments, equal employment opportunity offices, enterprise dispute resolution specialists, unions, ombuds, labor and employee

⁴⁹ Alternate Dispute Resolution Act of 1996, 5 U.S.C. 571, *et. seq.*

relations groups, inspectors general, administrative grievance organizations, legal counsel, and employee assistance programs.

- **Quality:** Establish standards for training neutrals and maintaining professional capabilities. Agencies should conduct regular evaluations of the efficiency and effectiveness of their conciliation programs.
- **Ethics:** Neutrals should follow the professional guidelines applicable to the type of ADR process they are practicing.

G. Keep Statistics on Industrial Relations Occurrences and Serve as an Economy-Wide Resource

To keep track of the trends in the economy, it is useful for a Conciliation Institution to maintain statistics that present a picture of the economy as it relates to labor relations issues. Thus, on the economy level, the Institution should maintain the following types of statistics:

- Number of collective agreements signed
- Number of collective agreements expired
- Number of individual disputes, and percentage settled without further proceedings
- Number of strikes and lockouts
- The above data, by industry sector
- Nature and frequency of the issues negotiated
- Nature and frequency of conflict prevention programs employed

It should be recalled that, in most economies, the governmental Conciliation Institution is not, nor should it be, the only provider of

services for labor dispute resolution and prevention. Therefore, in the absence of complementary data, the above statistics should not be used to draw hard quantitative conclusions. However, the data set could be quite useful in tracking trends in the economy's labor relations, especially the data concerning the nature and frequency of the issues negotiated.

IV. SUMMARY

This Handbook was designed to give practitioners and policy makers a broad framework for strengthening their economy's institution for conciliation. As was the case with the *APEC Best Practices Tool Kit*, and in every APEC context for that matter, the goal is not to encourage replication of practices. Instead, it is intended to spark creative ideas for readers. We hope that you will review the experiences and practices in other economic, social, legal, cultural and political contexts, and see what works for your economy.

Our collective goal is to learn from one another and create the most useful Handbook possible. Accordingly, the authors encourage all APEC participants to submit innovative practices that we have not covered in this edition of the Handbook. Upon receipt of appropriate submissions, we fully intend to incorporate them into a second edition.

In the interest of continuous learning and information sharing, the authors would very much appreciate your comments concerning the adaptability of the practices that we have discussed in this Handbook. We would like to hear about your experiences in implementing these and other innovations for your Conciliation Institution. Please send us your comments via the project website at www.apecimg.org. We will be happy to post the ones that we find valuable.

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