ENHANCING NORTH AMERICAN TRADE

by

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I. INTRODUCTION

There is a call to renegotiate NAFTA, a twenty-three year old outdated agreement, to ensure its *fairness* since trade deficits have exploded and manufacturing jobs have been lost and transferred throughout the years between the parties. Though these consequences are, to some extent, natural in a highly integrated regional economy and between countries with different developments levels, it is undeniable that there is a real and present rhetoric in economic relations that needs to be unraveled and properly addressed regarding fairness. But first, is the reduction of trade deficits and the like a road to *fairness* or is there another path?

Despite being a vague and abstract notion, fairness is not always about strict equality. If that were the case, King Solomon would have cut the infant in half instead of preserving his life, by seeking a way to reveal the true mother. Indeed, fairness is finding

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the correct solution in light of the relevant circumstances and values. Like the outcome of King Solomon's decision, NAFTA parties must work together not only to keep alive their current and vigorous economic ties, but also to enhance *North American trade* rather than reversing the regional integration for the benefit of all, companies, workers, and consumers of the region.

NAFTA is outdated and its imminent renegotiation must aim at creating a striving North American region. Much has happened in the last two decades both at a regional and global level. For instance, communications costs decreased exponentially due to technological innovations, electronic commerce was born and is booming, China became a party to the World Trade Organization in 2001 and is currently a major trading party of the North American Region. At a regional level, trade and foreign direct investment flows exploded, a widespread of industries have integrated to a great extent creating regional value chains from livestock to auto manufacturing, and Mexico has adopted free-market policies in different economic sectors throughout the years that provide new opportunities for further integration.

Not all NAFTA promises were delivered and certain sectors face serious challenges. In Mexico, for instance, manufacturing wages have not raised accordingly, despite that productivity has increased, thus creating an alleged unbalanced playing field for American workers, who have seen jobs flown over the border while companies increased their profits. Carrier workers exemplified this during the previous US presidential campaign. Certain rules of origin, like those applicable to the textile sector,

have become increasingly burdensome and difficult to fulfill as a result of international competition, which is why certain jobs have been lost in the region.[2]

Fairer and efficient rules can and must be introduced in order to level the playing field and ensure a strong, sustainable region. Much has been discussed about reducing trade-deficits and increasing investments by strengthening rules of origin, but that is not necessarily a correct approach as it would not address the underlying challenges and tensions that the region is facing or might face in the future. Our trade relations are not predominantly selling our domestically produced goods to each other, but rather manufacturing goods together.

Mexican and US negotiators must build a comprehensive, inclusive, and enforceable NAFTA in many areas. Though much can be said and has been already said about improving NAFTA, this article will address two specific concerns, in an innovative manner that have been raised by US government officials and its citizens regarding fairness in the trade relations between the US and Mexico; in particular, whether Mexico is a back door to the US for Chinese products and whether there is an unbalanced playing field for American workers. Based on empirical evidence and academic findings, the article will submit proposals that aim at ensuring fairness in the North American trade. It then concludes.

II. DUTY DEFERRAL RULES: IS MEXICO A BACK-DOOR TO US?

US Secretary of Commerce, Wilbur Ross, has accused Mexico of taking advantage of NAFTA's rules of origin rules with China, claiming that Mexico is being used as a

[2] Enrique Dussel Peters and Kevin P. Gallagher, "NAFTA's uninvited guest: China and the disintegration of North American Trade", CEPAL, N° 110 (August 2013) at p 95

"back-door" to the US.[3] Mexico Minister of Economy denied such claim and stressed that most imports from China to Mexico consist of intermediate goods that have not been produced in the North American region for at least 25 years.[4] Negotiators should not overlook the fact that both US and Mexican intermediate products of the same economic sectors are losing market share in the NAFTA region to Chinese imports, mainly because they are cheaper;[5] in other words, the North American region is losing competitiveness to China.

Though the criticism was grounded on the rules of origin, US Secretary of Commerce's concerns may be adjusted to duty deferral rules introduced in article 303 NAFTA. In particular, one may question why should a NAFTA party collect customs duties of non-originating materials that are used in the production process of goods that are subsequently exported to the territory of another NAFTA party?

A. The Context: Duty Deferral Rules and Collection of Customs Duties

Long before NAFTA came into existence, Mexico had into effect duty deferral policies that allowed *maquiladoras* to import goods, such as raw materials, parts, components, containers, machinery, instruments, tools and equipment used for research and development, without paying import duties, provided that they were used in the production of exported manufactured goods; [6] maquiladoras differed said customs duties

[3]CNBC, "Commerce's Wilbur Ross accuses Mexico of taking advantage of NAFTA rules in trade with China" (27 April 2017) <https://www.cnbc.com/2017/04/27/it-appears-canada-and-mexico-are-ready-to-start-renegotiating-nafta-says-commerce-secretary-wilbur-ross.html> (visited 7 August 2017)

[4] David Lawder, Mexico not a NAFTA 'back door' for Chinese goods: economy minister <http://www.reuters.com/article/us-usa-trade-nafta-idUSKBN18X1NB> (visited 7 August 2017)

[5] fn 2 at p 91

[6] E.g. *Decreto para el fomento y operación de la industria maquiladora de exportación,* Federal Official Gazette (August 15, 1983)

by temporally importing said goods. It is well known that these customs, trade and tax policies were successful and created a powerful export oriented industry, the famous *maquiladora* industry. For clarity purposes, a maquiladora is a firm, foreign or domestically owned, whose main activity is export-related and relies on manpower heavily. As of July 2017 about 6,000 companies are registered as a maquiladora (i.e. IMMEX), making it clear that this industry is a fundamental pillar for the development of northern Mexican cities and a primary source of jobs.[7] Accordingly, more than 60% of Mexico's exports and 50.5% of its imports were attributable to firms benefiting from the IMMEX program during the period 2012-2015.[8]

NAFTA introduced drawback provisions to promote the use of regional goods and "to reduce the incentive for third countries to use a NAFTA Country as an 'export platform'."[9] They did so by introducing, in article 303, a general prohibition on refunding or exempting customs duties owed on non-originating goods imported into its territory. Said article, in its paragraph 3, also has the effect of avoiding double 'taxation' on non-originating materials that are used as material or input in the production of a finished good subsequently exported to another NAFTA party, because the exporting NAFTA party is obliged to considered said materials as if it had been destined for domestic consumption.[10]

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[7] CEFP, El Nuevo Régimen de las IMMEX, Nota CEFP 13/15 (March 2015) at p 1 <http://www.cefp.gob.mx/publicaciones/nota/2015/marzo/notacefp0132015.pdf>; see INEGI, Indicadores de Establecimientos con Programa IMMEX, (30 March 2017) at p 4-5<http://www.inegi.org.mx/saladeprensa/notasinformativas/2017/est_immex/est_immex2017_03.pdf> (visited 7 August 2017)

[8] WTO, Mexico – Trade Policy Review (WT/TPR/S/352), 15 February 2017 at p 75

[9] Jimmie V. Reyna, Passport to North American Trade: Rules of Origin and Customs Procedures Under NAFTA, Shepard's (1995) at 270

[10] NAFTA, Article 303, paragraphs 1 and 3

In essence, an importer-manufacturer located, for instance in Mexico, must either pay the customs duties of non-originating goods in an amount that exceeds the lesser of the total amount of customs duties applicable in the importing territory or the duties that would be paid to another NAFTA party (e.g. US) on the finished good that is subsequently exported. In particular, a company that imports non-NAFTA materials pursuant a duty deferral program will have the option to pay the resulting duties to the exporting or importing NAFTA party,[11] however, one may logically presume that firms normally pay the duties to the exporting NAFTA party, which may be done at the time of their import or when the finished good is exported to the other NAFTA party.

Notwithstanding that these rules were crafted to prevent Mexico from becoming a 'back door' for Non-NAFTA materials to the US market and avoid double taxation, Mexican policy makers were creative enough to implement trade instruments that made it possible to circumvent article 303. Today, maquiladoras generally operate under the IMMEX scheme,[12] which allows these firms to import goods temporally and differ customs duties provided that said goods are exported; nevertheless, when exporting products to another NAFTA party, maquiladoras have to pay the resulting duties pursuant article 303 NAFTA, if any, since non-NAFTA material cannot benefit from duty deferral rules as noted above. This is why maquiladoras are eligible to access other trade instruments, such as the Eight Rule (*Regla Octava*) and Sectoral Promotion Programs (PROSEC), which allow firms to import definitively inputs and machinery at preferential tariffs rates, ranging from 0% to 5%, for the purposes of manufacturing specific goods.

[11] NAFTA, Article 303, paragraphs 4 and 5
[12] *Decreto para el Fomento de la Industria Manufacturera, Maquiladora y de Servicios de Exportación*, Federal Official Gazette (1 November 2006)

For the purposes of clarity, a maquiladora may still have to apply article 303 NAFTA since a preferential tariff rates (e.g. 1%) may result in an outstanding customs duty balance. Hence, it is reasonable to assume that a significant number of maquiladoras are able to export finished goods that qualify as originating goods to another NAFTA party, benefiting from a low customs-tax environment, paying less or zero customs duties applicable to non-NAFTA good that would have been due under normal circumstances.

It is clear that article 303 NAFTA has loops, limits and unfair rules. Mexico, on the one hand, is able to collect customs duties of non-NAFTA materials that are subsequently used in an exported good to another NAFTA party. And, on the other hand, Mexico has been able to circumvent article 303 because it waives or reduces its right to collect customs duties to those maquiladoras with trade instruments that import non-NAFTA goods at preferential tariff rates, albeit the export of said non-NAFTA material is not conditioned. In light of the above, one may rightly point out whether NAFTA rules address the issue concerning the trade of non-originating goods and customs duty collection in a fair manner.

B. Correcting for a Common Trade Policy

Mexico is clearly treating firms differently within its territory and unfairly its NAFTA trading partners. It Mexico is giving benefits to specific firms, i.e. IMMEX firms with trade instruments, by waving or reducing the collection of customs duties that would have been otherwise due under normal circumstances, i.e. firms without said trade instruments. By discriminating among firms, Mexico not only attracts foreign investment and creates jobs, but also positions itself as an export platform for finished goods with non-NAFTA

materials, contrary to the function of article 303 NAFTA. In that sense, Mexico should not be allowed to discriminate among firms, rather it should establish a single customs duty policy applicable to all firms. In other words, Mexico should either apply a 0% tariff or the MFN rate to all relevant goods that are covered in the aforementioned trade instruments. Needless to say, Mexico already applies a zero rate to 58.1% of its tariff headlines, meanwhile the average rate for non-agricultural products is a low 4.6%.[13]

If MFN duties to non-NAFTA materials are applied by Mexico, additional rules regarding the collection and use of customs duties should also be introduced as part of a comprehensive common trade and industrial policy. The rules, as they are currently written, would continue to allow Mexico to collect the customs duties of non-NAFTA materials and export an originating good that benefits of preferential tariff rates, leaving the US without their "faire share" of customs duties. In response to this unfair or unbalanced situation, custom duties of non-NAFTA materials collected by a NAFTA party that are subsequently exported in the form of an exported good to another NAFTA party should not remain in the treasuries of the exporting party. Instead, NAFTA parties should seek to implement a comprehensive and ambitious regional policy by expanding the scope of the North American Development Bank (NADB) and transferring a proportion of the custom duties collected of the non-NAFTA materials. In fact, Mexico has recognized the need of expanding the role of NADB in its "*Notice regarding the Initiation of the Negotiations regarding NAFTA's modernization"* that was recently provided to Congress.

[13] fn 8 at p 9

Ideally, the North American Development Bank scope would entail improving the region's competitiveness, integration and sustainable development. The first pillar would be identifying those non-NAFTA materials, assessing whether they can be produced at a competitive level and supporting regional firms for their development. A second and fundamental pillar would be promoting and supporting firms that are involved in regional value chains as well as funding regional R&D projects that may improve region's competitiveness. Finally, NADB would also be asked to support blue-collar workers who have lost their jobs due the displacement of production lines within the region by funding their training. In addition, NADB should also assist environment and socially friendly projects.

III. LABOR IN NORTH AMERICA: AN UNBALANCED PLAYING FIELD?

Labor unions in the developed countries and NGOs have repeatedly accused FTAs as a mean to shift manufacturing production lines to low wage countries and, thus, increasing corporate profits at the expense of workers. NAFTA is no exception. Due to the fear of 'jobs going south' and that Mexico would have raced to the bottom in labor standards in order to attract investment, the North American countries agreed to include labor matters as a side agreement to NAFTA, i.e. the North American Agreement on Labor Cooperation (NAALC).[14]

This kind of rhetoric has returned with a great force as a result of the US 2016 Presidential Campaign, but it is not support by empirical evidence. Accordingly, the

[14] Pharis J. Harvey, The North American Agreement on Labor Cooperation: A Non-Governmental View, Conference on Social Clauses and Environmental Standards in International Trade Agreements (31 May 1996) at p 2-3 < http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1474&context=globaldocs> (visited 7 August 2017)

consensus among economist is that "the impact of NAFTA on real wages has been close to zero, with concentrated effects on a few industries that were highly protected prior to NAFTA."[15] This reason, however, should not be considered as an impediment to agree on common labor rights and standards.

Turning to NAALC, this agreement provides, in essence, that the parties would strive to maintain high labor standards, effectively enforce their respective laws, and includes a recognition of eleven labor principles, e.g. freedom of association and protection to the right to organize, to bargain collectively, to strike, among other rights.[16] In addition, a high-level Cooperation Commission was set up, and a consultation process was designed in which citizens and NGOs were also able to file complaints against a party who is allegedly not respecting and applying its labor laws; in limited cases, namely safety and health, child labor or minimum wage technical standards, sanctions may be imposed by a panel.[17] It is argued that result of the NAALC was a complete failure, since governments were hostile when facing a claim and the offices in charge of processing the

[15] Simon Lester and Inu Manak, A framework for Rethinking NAFTA for the 21st Century: Policies, Institutions, and Regionalism, CETI Working Papers, at p 2 < http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/working_papers/CTEI-2017-10-Lester-Manak.pdf>; M. Angeles Villareal and Ian F. Fergusson, The NAFTA (CRS Report R42965), Congressional Research Service (2017) at p 2 <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2939&context=key_workplace> (visited 7 August 2017)

[16] The remaining principles included in "***Annex 1: Labor Principles***" NAALC are: prohibition of forced labor, labor protections for children and young persons, minimum employment standards, such as minimum wages and overtime pay, covering wage earners, including those not covered by collective agreements, elimination of employment discrimination on the basis of grounds such as race, religion, age, sex, or other grounds as determined by each Party's domestic laws, equal pay for men and women, prevention of occupational injuries and illnesses, compensation in cases of occupational injuries and illnesses, and protection of migrant workers.

[17] fn 14 at p 8

claims were partially abandoned.[18] In that sense, how should NAFTA address labor matters in these modern days?

A. The Context: An unfriendly labor environment for Mexican workers

Though Mexico has ratified most of the ILO's conventions and has a legal framework that, in theory, favors extensively workers and unions, it is emphasized that Mexico has as inadequate 'minimum wage' and that laws are inadequately applied to deterioration of the rights to the freedom of association and collective bargain. In light of the criticism described above and NAALC failure, it is important to assess where Mexico currently stands in labor matters and whether there is a fair playing field for American workers and companies engaged in trade.

i. The Mexican Wages Controversy

Looking at numbers, first, it is important to note that about 46% of the Mexican population live under poverty conditions,[19] the Mexican minimum wage has reduced its real value 19.3% since 1994 to 2015,[20] about 13% of the economically active population or six million people earn the minimum wage (i.e. 2,191 pesos per month or about 120 USD).[21] Even before NAFTA's entry into force it was noted that the minimum wage in Mexico was insufficient,[22] so one may conclude that there has not been a real or substantial improvement in poverty since NAFTA.

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[18] Armand de Mestral, NAFTA: The Unfilfilled Promise of the FTA, *European Law Journal*, Vol. 17, No. 5, September 2011 at p 656

[19] 2014 figures *see* CONEVAL, Medición de Pobreza (2014) <http://www.coneval.org.mx/Medicion/MP/Paginas/Pobreza_2014.aspx> (visited 7 August 2017)

[20] Mark Weisbrot, et al.¿El TLCAN ayudó a México? Una actualización 23 años después, Center for Economic and Policy Research at p 12

[21] Patricia Muñoz, Creció el número de mexicanos que ganan un salario mínimo, La Jornada (5 Septiembre 2017) <http://www.jornada.unam.mx/2016/09/05/politica/003n1pol> (visited 7 August 2017)

[22] fn 14 at p 4

Notwithstanding these depressing figures, one must analyze separately the manufacturing sector. This sector, which includes maquiladoras, employs about 3.7 million persons, who earn approximately 11,296 pesos per month (or about 630 USD).[23] Also, manufacturing wages have increased only 4.8% from 2007 to 2017, while productivity has risen allegedly 83.5% in the period 1993-2008, a trend that has continued, particularly, in the auto sector.[24]

Given the above, it is no surprise that academics, NGO's and foreign government officials have claimed or implied that Mexico is "depressing" its wages, albeit that productivity has risen in certain sectors. In fact, the US Minister of Commerce has also chipped into the Mexican wage controversy by stating that there has not been a gradual convergence of living standards between Mexico and the United States and that "the minimum wage... has barely gone up in peso terms."[25]

Indeed, the Mexican minimum wage is extremely low and it has lost substantially its value in the last two decades.[26] However, it is frequently overlooked that the vast majority of Mexican workers in the manufacturing sector do not earn the minimum wage and their wages are far superior, but they are still significantly below US wages; for instance, a *Carrier* worker in Indianapolis earns 21 USD per hour while a worker in

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[23] INEGI 'Industria Manufacturera'<http://www.beta.inegi.org.mx/temas/manufacturas/> (visited 7 August 2017)

[24] Harley Shaiken, In Whose interest? Inclusive Trade vs. Corporate Protectionism, Berkeley Review of Latin American Studies at p 17at p 17

[25] Chris Isidore, "Wilbur Ross wants a higher minimum wage -- in Mexico", CNN Money, (3 March 2017) <http://money.cnn.com/2017/03/03/news/economy/wilbur-ross-minimum-wage-mexico/index.html> (visited 7 August 2017)

[26] Gerardo Esquivel Gutierrez, Extreme Inequality in Mexico: Concentration of Economic and Political Power, Oxfam (2017) at p 9 <http://www.socialprotectionet.org/sites/default/files/inequality_oxfam.pdf> (visited 7 August 2017)

Monterrey, Mexico 19 USD per day.[27] Furthermore, Mexico's manufacturing wages are getting further competitive at an international level, since it has been recorded that China's wages have increased in the last decade, surpassing even Mexican wages.[28] In that sense, raising the minimum wage would only have a marginal impact in reducing the wage gap between manufacturing wages between US and Mexican workers without any substantial effects.

ii. Impairment of Freedom of Association and Collective Bargain Rights in Mexico

As for the enforcement of labor rights in Mexico, it has been stressed that there is a systemic issue regarding union associations, bargains, and strikes. In first instance, it is argued that Mexican workers have faced serious challenges to create truly independent labor union given how Mexican institutions are built and the collusion between government officials, companies and government-related supported union. In fact, the two thirds of NAALC cases dealt with the rights of association and collective bargaining in Mexico, whereby workers were prevented from transferring collective bargaining rights to new unions from the existing government party related union, e.g. the Confederation of Mexican Workers (CTM).[29]

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[27] Nelson D. Schwartz, 'Carrier Workers See Costs, Not Benefits, of Global Trade' New York Times (19 March 2016) <https://www.nytimes.com/2016/03/20/business/economy/carrier-workers-see-costs-not-benefits-of-global-trade.html> (visited 7 August 2017)

[28] Salarios del sector industrial, mayores en China que en Brasil y México, El Economista (27 February 2017)<http://eleconomista.com.mx/industrias/2017/02/27/salarios-sector-industrial-mayores-china-que-brasil-mexico> (visited 7 August 2017)

[29] Cathleen Cimino-Isaacs, Labor Standards in the TPP, in Assessing the Transpacific Partnership, Jeffry J. Scott and Cathleen Cimino-Isaacs, Peterson Institute for International Economics (March 2016) at p 273-274 < http://www20.iadb.org/intal/catalogo/PE/2016/16103.pdf>; see also fn 14 at p 10

In the same vein, the US Department of State Bureau of Democracy, Human Rights, and Labor has made similar findings in a recent report, and one may note that workers in *maquiladoras* continue to face significant challenges. First of all, it is noted that the Conciliation and Arbitration Board (CAB), a quasi-judicial labor body that still operates under a tripartite system with government, worker, and employer, representatives, were biased as they did not adequately provide for inclusive worker representation and protection was prevalent to (unrepresentative, corporatist) unions.[30]

Secondly, the report also points out that it is common practice for employers and corporatist unions to enter "protection contracts" in order to prevent meaningful negotiations and ensure labor peace. These contracts are often developed before the company hired any worker.[31] Interestingly, many workers are subject to working conditions established in these 'protection' contracts, preventing workers to fully exercise their labor rights, and when independent groups of workers have tried to pursue their collective rights they face serious difficulties ranging from legal technicalities to violence.[32]

Finally, one must highlight that the aforementioned report mentions that labor authorities rarely enforced penalties, ranging form 16,160 pesos to 161,600 pesos ($960 to $9,640 USD) regarding violations of the aforementioned collective rights, and that administrative and/or judicial procedures were subject to lengthy delays and appeals.[33]

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[30] US Department of State Bureau of Democracy, Human Rights, and Labor, Mexico 2016 Human Rights Report (4 April 2017) < https://www.state.gov/documents/organization/265812.pdf> at p 29-30 (visited 7 August 2017)

[31] ibid p 30; see also fn 29 at p 273-274 and Export Gov, Mexico Labor (10 April 2016) <https://www.export.gov/article?id=Mexico-Labor> (visited 7 August 2017)

[32] fn 30 at p 31

[33] ibid at p 30

This systemic or widespread failure to enforce and protect labor rights as well as the practice adopted by firms and corporatist union may effectively hinder Mexican workers to enter collective bargains and to maintain low wages. In turn, one may infer that firms, domestic or foreign, established in Mexico may have a competitive advantage against US firms, by maintaining low labor costs.

Mexican labor institutions will be subject to a major overhaul since a constitutional amendment was recently approved in February 2017. Accordingly, this amendment was developed to make Mexico's labor laws consistent with TPP's labor chapter, addressing, in particular, concerns about organized labor. The overhaul entails, in essence, that the infamous CAB's will cease to exist and, thus, their functions will be transferred to the judicial state and federal branches, which will review labor disputes, and to decentralized bodies of Federal and State governments, both having conciliation powers while that pertaining to the Federal level will also be in charge of registering collective contracts and unions.

Although Mexico is currently and allegedly undertaking significant steps in labor legal framework, the Federal Labor Law is yet to be amended and nobody can predict how effective this overhaul will be. Also, it must not be overlooked that Mexico, in 2015, signed the ILO 98 Convention (Right to Organize and Collective Bargaining Convention) but the Mexican Senate has not ratified it yet. This situation may be explained due to resistance of the Business Sector, who claim that the ILO convention will affect the 'labor stability' and reduce Mexico's competitiveness.[34] In light of the above, the

[34] Julio Reyna Quiroz, Ratificación de convenio 98 de OIT será "nociva" para México: Coparmex, La Jornada (19 January 2016)

question, therefore, is whether the hurtful labor practices will be corrected with the labor overhaul.

The failure to ratify ILO 98 Convention may shed light regarding Mexico's political will to maintain parts of the broken system. The inclusion of a NAFTA Labor Chapter is amply justified. It is therefore no surprise that the USTR's *NAFTA Negotiating Objectives,* released this July, include the need to bring the labor provisions into the core of the Agreement.

B. Building NAFTA's Labor Chapter with past experiences

Labor matters have been addressed more thoroughly in other FTAs. Unlike NAFTA, the US has already included labor chapters of this nature in its modern FTAs, for instance, in the Transpacific Partnership Agreement (TPP). TPP required a party to recognize and effectively enforce the following rights that have been recognized in the *Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998):* freedom of association, elimination of forced labor, abolition of child labor, and elimination of discrimination. Furthermore, TPP also required its members to establish in its laws minimum wages, limits to hours of work, and occupational safety and health, as well as discourage force labor, but Members have the right to set their own level and standards of labor protection.

Similar to NAALC, TPP also included a mechanism to monitor and address labor concerns through a Labor Affairs Council, national contact points, labor cooperation, consultations, but its dispute settlement mechanism is much more robust. There seems to

<http://www.jornada.unam.mx/ultimas/2016/01/19/ratificacion-de-convenio-98-de-oit-sera-nociva-para-mexico-coparmex-3419.html>

be a consensus that TPP's labor provisions are the most ambitious ever made in all recent FTA's.[35] Moreover, USTR's NAFTA Negotiating Objectives regarding labor matters appears to be based on the disciplines introduced in the TPP's framework, including its dispute settlement mechanism.[36]

Although considered the most ambitious labor chapter in FTAs, one may still question whether TPP's disciplines will have a tangible effect to create a fairer playing field between Mexican and US workers. Mexico has already ratified most ILO's fundamental conventions, and has incorporated into Mexican law the basic or fundamental worker rights, the problem is, as always, an effective and unbiased enforcement of labor rights. Would a like-TPP text sufficiently address the systemic failures in Mexican labor environment in order to avoid firms located in Mexico to have a competitive advantage?

An effective monitor and labor dispute settlement mechanism is definitively needed to ensure a fair playing field for US workers. Pursuant TPP's labor chapter, a party is able to claim that another party is failing to comply with its labor obligations and eventually suspend treaty benefits, prior consultations. The wording of article 16.2(1.(a)) requires the complaining party to prove that such failure or behavior is present during a reasonable amount of time or repetitive, and that it "affects" trade or investment between the parties, in other words, conferring a competitive advantage to an employer that is

[35] fn 29 at p 261 and fn 15 (Lester) at p 14
[36] United States Trade Representative, Summary of Objectives for the NAFTA renegotiation (17 July 2017) at p12-13

allegedly not complying with the labor laws.[37] Interestingly, the US has already made use of a provision with a similar wording by challenging Guatemala's labor law enforcement unsuccessfully, in accordance with the Dominican Republic, Central America, and United States Free Trade Agreement.[38] This was the first dispute of this kind, and there are many lessons to be learned from it.

In said dispute, one of the claim's of the US was based on a series of seven labor cases related to right of association and collective bargain in three economic sectors (port services, garment, and rubber), rather than on a systemic or widespread failure that could have been supported with 'reports' of international organizations or the like. This dispute highlights the difficulties for a complaining Party to gather sufficient evidence, among other related issues, to challenge effectively a labor violation as well as the Panel's fact-finding powers and ability to make inferences. Needless to say, one may argue that the Panel adopted a 'flexible' and 'reasonable' approach to find a violation. Although it managed to prove a line of conduct of Guatemalan authorities not to effectively enforce its labor laws, the US claim eventually failed because only in one out of seven cases or events the Panel found that the lack of compliance conferred a competitive advantage to the employer in the garment sector that had engaged in international trade, who had dismissed 9 workers that constituted the entire provisional committee union that sought to bargain. Therefore, the US did not met its burden of proof to establish that Guatemala's

[37] TPP, **Article 16.2: Enforcement of Labor Laws** 1. (a) A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.[…]
[38] CAFTA-DR, **Article 19.5 Enforcement of Labour Laws** (1.) No Party shall fail to effectively enforce its labour laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties after the date of entry into force of this Agreement.[…]

recurring failure to effectively enforce its labor laws had an adverse effect on trade, since only one instance was simply insufficient to meet the legal standard.[39]

Given the US past experience, it is clear that a robust dispute settlement with trade sanctions is simply not enough. In order to have a functional NAFTA Labor Chapter for the benefit of all workers, NAFTA parties must establish an effective and periodic monitoring system as well as a Cooperation Committee that meets periodically, unlike TPP or NAALC that are member driven. NAFTA parties, through their National Contact Points or any other relevant authority, should periodically present "Labor Policy Reports" to the NAFTA Secretariat or an independent body of experts informing actions, policies undertaken by the government regarding labor rights in sectors (e.g. IMMEX, auto, etc.) or zones (e.g. northern Mexico, Mexico's Special Economic Zones) that engage predominantly in trade, as well as a list of relevant labor disputes that might have had an adverse impact on trade or investment, including those raised by any NAFTA party. NGO's and labor unions should be allowed to participate in the process. A final report shall be issued by the relevant body, whereby the reviewing party must respond to any queries and, if applicable and appropriate, inform any remedial actions that have been or will be taken.

Transparency must be at the core of the system, failure to disclose information may result in adverse findings by a Panel in a labor dispute. At a local level, it is essential for courts and government authorities to disclose and make available to the public judicial decisions as well as administrative acts that register unions, collective contracts,

[39] Final Report of the Panel, *In the Matter of Guatemala – Issues Relating to the Obligations under Article 16.2.1(a) of the CAFTA-DR*, Arbitral Panel Established Pursuant to Chapter Twenty (14 June 2017) at para 504

among other activities. By doing so, it should be possible to identify, for instance, in labor disputes, *inter alia*, defendant (economic sector), matter(s), date of submission, date of decision, date of compliance, date of enforcement, place, etc. Authorities should also process said information so that it could be possible to view statistics and trends, which in turn could assist NAFTA parties for making a case before labor dispute panels. At an international level, NAFTA parties should set up a National Contact Point which may receive communications from NGO's or citizens that must be addressed, provided that they are related to trade-labor affairs. Also, if parties are undertaking consultations or have failed to resolve the matter through thereof, and where evidence and facts are limited or disputed, an enquiry or fact-finding independent committee may be requested by the consulting party prior requesting a Panel; the request of an enquiry or fact-finding independent committee shall in no way undermine the right of a Party to request the establishment of a Panel, who will have to render its decision after the committee's report has been issued, nor shall it allow a defending Party to refuse to cooperate and produce evidence that has been specifically requested.

Finally, NAFTA parties should not only sanction with fines or criminal penalties employers that violate the protected labor rights, but also consider prohibiting or discouraging trade that violate labor rights. If a firm, such as a maquiladora, fails to comply with labor laws, and depending of the seriousness and nature of the violations as well as the circumstances of the case, Mexican authorities may consider suspending the firm's registration to the importers and/or exporters register that is maintain by the

customs authorities (SAT), thereby impeding the firm to perform trade operation. The suspension should be lifted provided that compliance has been attained.

Having a robust and effective NAFTA Labor Chapter, is in the interest and benefit of all NAFTA parties. If NAFTA can enhance the rule of law in Mexico regarding labor rights, it may be possible to raise the standard of living of the Mexicans, and with that hopefully wages as well. In turn, not only US low-medium skilled workers may benefit from a fairer level playing field, but also the North American region as whole since the general welfare would improve, as the purchasing power would increase.

IV. CONCLUSION

Though the bar set by the US president for a 'massive' renegotiation' and the approach "to ensure truly fair trade[…]" appears to be high and unrealistic, [40] NAFTA rules can be fairer for the benefit of both Parties. As noted above, custom duties concerning non-NAFTA material may, in certain circumstances, be used for the development of the region, benefiting US and Mexican companies, workers and societies. Also, by including effective labor provisions to the core of the Agreement, the playing field for Mexican and US workers may be balanced and benefit both groups of workers. Hence, not only fair rules may be introduced, but also it is possible to create rules that may be accepted by NGO's and the public, reducing its criticism and increasing the possibility of its ratification.

Unfortunately, US and Mexico have not subjected their negotiating differences to a wise and fair judge like King Solomon. Nevertheless, they will have to work together in

[40] fn 36 at p 4

order to reach a mutual and satisfactory agreement. Parties must understand that reversing regional integration endangers not only jobs and regional value chains, but it may also aggravate and have negative spill-over effects to extra-trade matters, such as migration flows, border security, and regional cooperation. Expanding trade and services between the parties is, therefore, essential. Indeed, NAFTA has to be updated in order to be a XXI century agreement and though this article touched upon two specific matters, it is impossible to ignore that NAFTA parties must also simplify rules of origins, adopt disciplines relating to e-commerce, competition, SOEs, and regulatory coherence & cooperation, further increase trade facilitation, maintain and improve NAFTA's dispute settlements, and strengthen the NAFTA secretariat. By doing so, NAFTA parties would strengthen the regions, provide more opportunities to SMEs, and avoid unjustifiable discrimination among economic agents. In sum, NAFTA would be fairer.

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