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The Labour Side Agreement in NAFTA: an example to follow?

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1 Introduction

In 1994, when it came into effect, North American Free Trade Agreement (NAFTA) presented a specificity that has attracted much attention. It was a commercial agreement that created a free trade area between three disparate countries: USA, Canada and Mexico. The heterogeneous nature of the agreement obviously came from the introduction of this third country, and it is on this last point that we will focus. The Purchasing Power Parity Gross National Income (PPP-GNI) of Mexico was estimated in 2004 around 9640 dollars per capita, and the GNI per capita in current US dollars (converted using the World Bank Atlas Method) is around 6790 dollars. These figures are comparable to Poland's, which has a PPP-GNI per capita of 12730 dollars and a GNI per capita in US dollars of approximately 6100¹. As a consequence, new European Union with 25 members presents at least the same kind of heterogeneity as NAFTA in 1994, and the same interrogation appears: shall we worry about the possibility of an unfair competition coming from the less developed members of the Union? After Ross Perot's fear of a "giant sucking sound" that could cause Nafta as jobs go south², the French referendum campaign on the European Constitutional Treaty has shown that voters were worried about the "polish plumber" competition. The aim of this article is to study how this question was treated in the case of Nafta to see whether the European Union could take as a starting point this example.

The idea of an integration of Mexico in the Canada- USA bilateral agreement (ratified in December 1988) seems to have been a Mexican initiative in the beginning of the 90's. During May 1991, American congress allowed President Bush to negotiate the agreement using fast track procedure. The negotiations ended in august 1992 when the agreement was signed by the representatives of the three countries, but the agreement was still to ratify by national legislatures. At the end of 1992, President Clinton succeeded G. Bush. The appropriateness of the ratification of Nafta was a major point in the electoral campaign as it was criticized by Ross Perot, by the AFL-CIO (a coalition of Unions) and by environmentalist groups. In order to allow ratification of the agreement, President Clinton was induced to negotiate side agreements on Labour and Environment issues. In August 1993 those side agreements were signed and introduced into the Nafta text. On the second half of 1993, the Houses ratified the agreement that came into effect in January 1994. In this paper we will show that the Labor

¹ These data come from World Bank: World Development Indicators 2005.

² See Perot and Choates (1993) or a summary at:
http://www.issues2000.org/Archive/Save_Your_Job_Ross_Perot.htm

side agreement is a compromise between Nafta supporters and American unions. Those last ones were afraid that the social dumping exerted by Mexico ended up in delocalization of thousands and even millions of American jobs, and in the downturn of the unskilled job's wage. We will examine if in the Mexican case this suspicion of social dumping was justified (section 1). Then we will expose the claims and recommendations of the American Unions on the social clause, and the content of the Labour side agreement which is a compromise between the partisans and opponents' points of view (section 2). At last, we will assess the Labor side agreement's first years of existence (section 3).

2 Mexico and Social Dumping

In a first point of this section, we will show that Mexico has an advanced labour law. A second section will moderate this assertion, underlining that labour law is not enforced and explaining the reasons of this non-enforcement. A third point will try to answer the question of whether Mexico was exercising a social dumping when Nafta has been signed.

2.1 Labour law in Mexico: an advanced law³

The originality of Mexican labour law is to have its founding principles in the Constitution itself of the Country. The sixth part of the Constitution dating from 1917 is actually called "Of Work and Social prevision" and it is composed of only one article, the 123rd article divided in two sections, dealing with private work contracts and civil servants contracts. Section A establishes certain rights, all the more revolutionary as they were granted at the beginning of the century:

- The working day is limited to 8 hours.
- Workers under 16 years old cannot be employed for unhealthy or dangerous tasks, they cannot work after 10 PM and their working day must be limited to 6 hours.
- Minors under 14 are not allowed to work.
- A day-off must be allowed for six days of work.
- Pregnant women benefit from a 6 weeks maternity leave before birth and another 6 weeks after. They must be paid during this period a 100% of their normal salary and must keep their jobs after the maternity leave.

³ For further information on this section, see "Constitucion Politica de los Estados Unidos Mexicanos", several editions, and Anna Torriente (1995).

- Minimum wages must be established. They must be high enough to satisfy the basic needs of a family, from the material, social and cultural point of view, and they will be fixed by a national commission where employers, workers and government have representatives⁴.
- Equal work for an equal salary, without taking in consideration sex or nationality.
- Minimum wage cannot be seized.
- Workers have the right to profit sharing from the firm where they work.
- Overtime hours are paid twice and cannot exceed three hours a day, they cannot be put three times in a row, and minors under 16 years old cannot be concerned by overtime.
- Employers must give a financial compensation to their workers in case of a work accident.
- Workers are allowed to create trade unions.
- Workers have the right to strike.

Furthermore, section B gives additional rights to civil servants, like 20 days-off a year and the access to a system of low rent or improved interest rate for mortgage loans.

This recall leads us to some remarks:

- a) As R. Pastor (1992) wrote: "Mexico has one of the most advanced labour laws on the continent, largely as a result of the Mexican revolution. Indeed, Mexico's social legislation has more in common with Europe's than with the United States (...) A comparison of Mexican, Canadian and USA labour laws suggests that US labour unions would benefit the most from a harmonization of standards" (p. 187).
- b) We can compare Mexican law to most usual propositions regarding the "social clause" like the Memorandum presented by Michel Giraud to the European Community Council in March 1995⁵. This memorandum presented four conditions to be satisfied when importing from a non-European country, which are freedom of association, freedom of negotiation, banning of forced labour and banning of children's work. We notice that Mexico follows and goes beyond the memorandum, if however we consider the nature of Mexican law and not the social practice⁶.

⁴ At the date of the ratification of NAFTA, the minimum wage was around 3 US dollars a day in Mexico City.

⁵ See "La Tribune Desfossés", March 27 and 28, 1995.

⁶ Note that forced labour is dealt with in the second article of the Mexican constitution which forbids slavery in the national territory and also the 5th article that holds that "nobody can be forced to work without fair payment and without his own agreement, except as a punishment given by judicial authority"? The case of enslavement by debt is also treated by the article 123, section A, § 24, which establish that the worker's debt toward the

2.2 Mexican labour law: a fictitious world?

If Mexican labour laws are exemplary, their application is much less. On this subject, Pastor quotes a Mexican lawyer, Arturo Alcalde, who, after a review of Mexican workers' rights, states: "You are in a world of science fiction. The theory is different from the practice" (Pastor, 1992, p. 188). This idea is confirmed by Moreau et alii (1994) who write: "in Mexico, the application of labour laws, presented by the authority as very protector, completely lacks effectivity" (p.10).

The reasons for the gap between the law and the practice are, on one hand, the importance of informal sector, and on the other hand, the extent of corruption. The informal sector, by its nature, escapes the authority vigilance, and so the more important is the informal sector and the less effective are the labour laws. In the 80's, informal sector in Mexico was estimated between 25 to 40% of the official GDP, according to a collective work made by the "Centro de Estudios Economicos del Sector Privado" (see the reference in bibliography). But the principal reason of the lack of enforcement of the law is the practice of corruption. As a matter of fact, Mexico seems to be a country in which corruption remains high. The Corruption Perceptions Index, calculated by Transparency International (see www.transparency.org), and which relates to perceptions of the degree of corruption as seen by business people and country analysts, gives the following value for Mexico (the index ranges between 10 - highly clean - and 0 - highly corrupt -):

Year	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
CPI	3.18	3.3	2.66	3.3	3.4	3.3	3.7	3.6	3.6	3.6	3.5

Table 1: CPI Index for Mexico, by year, source: www.transparency.org

In comparison, 2005 CPI scores for some Europeans and South Mediterranean countries are indicated below:

Country	UK	Germany	France	Spain	Italy	Tunisia	Turkey	Egypt	Morocco
CPI	8.6	8.2	7.5	7	5	4.9	3.5	3.4	3.2

Table 2: CPI Index for various countries, year 2005, source: www.transparency.org

There is another measure of corruption in Mexico realized by "Transparencia Mexicana", which is affiliated to International Transparency. This measure is the "Indice Nacional de Corrupción y Buen Gobierno" (National index of corruption and good governance) or

employers cannot be handed down to the members of his family and cannot exceed a month of salary of the indebted worker.

INCBG. This index gives the percentage of times a bribe has been used to obtain a service. It is calculated for each State of the Mexican federal republic and for each kind of service. The highest values are obtained in the federal district of Mexico (22.6% in 2001 survey and 13.2% in 2003 survey) and the State of Mexico (respectively 17% and 12.7%). The mean value of the index is 10.5% in the 2001 survey and 8.5% in 2003, which signifies that one tenth of the services obtained in Mexico are obtained with a bribe. Obviously, those levels of corruption are not compatible with a good enforcement of the Law, and in particular the Labour Laws which are supposed to protect the poorest. Furthermore, the corruption phenomenon seems to be prevalent in the trade unions, according to K. Ready (1993) who writes: "The Mexican labour hierarchy has a history of corrupt practices. They commonly receive higher wages or kickbacks, while union rank-and-file workers are forced to accept wages set by government and business development strategies" (p. 15). This is largely due to the predominance of the CTM ("Confederacion de los Trabajadores Mexicanos", i.e. Confederation of Mexican Workers), which is accused of being widely corrupt. A study made in 1996 (see *Migrant News*, May 1996) shows that the "independent" unions, i.e., those which are not affiliated to CTM, were in 1995 at the origin of 25% of the strikes that occurred in Mexico, while they represent only 10% of the unionized labour force (500,000 members against 5 millions for the CTM).

As a result of those combined phenomena, and despite the fact that it is illegal in Mexico to hire children under 14 years old, it is estimated that 5 to 10 millions children are employed in Mexico, often in hazardous jobs (K. Ready, 1993, p. 39).

2.3. Mexico and the "social dumping" accusation.

The main reason for adopting a Labour side agreement was the fear of a social dumping from Mexico in Nafta. In this section we will try to analyze this accusation and its fundamentals. As a matter of fact, there are two aspects in "social dumping", one is related with the notion of intentionality and the other one is related with the low level of salary. We study hereafter these two aspects of the problem.

2.3.1. The "Oligarchy thesis"

In accordance with a first interpretation, "social dumping" supposes a deliberate action from the government to lower the cost of labour, by authorizing forced labour and/or work for

children, and by forbidding collective bargaining in order to keep wages down. This would be done with a view to capture foreign markets and obtain foreign currencies. This idea, applied to the case of Mexico in Nafta, has taken the form of what have been called the "Oligarchy Thesis". This thesis has been formulated by Ross Perot in Perot and Choate (1993) but it also appears in the argument against Nafta by trade union representatives. The basic idea is that Mexican wages would be held down by an oligarchy of Mexican and US firms working together with the government of Mexico, the P.R.I., and the most important Mexican labour union, the CTM.

In order to understand this point of view, it is necessary to remember that at the time Nafta was signed, Mexico was still ruled by the P.R.I ("Partido de la Revolucion institucionalizada", i.e. "Institutionalized Revolution Party"). The P.R.I. has been ruling Mexico since Mexican revolution and most particularly since 1929, with different names (PNR, or National Revolutionary Party, between 1929 and 1938, PRM, or Party of Mexican Revolution, between 1938 and 1946, PRI since 1946⁷), until 2000 when Vicente Fox, of the PAN (Partido Accion Nacional, created in 1939, catholic right-wing party) was elected President. The PRI has controlled in some ways the CTM since its creation in 1936, and CTM has maintained in its turn a certain kind of deal with the government, as Pastor (1992) wrote: "The enormous Confederation of Mexican Workers (...) is ostensibly stronger than US Unions, but in fact, the CTM power is more limited because of the nature of its bargain with the state. The latter has prevented any rival unions from competing with the CTM, which, in turn, has moderated demands for wage hikes and kept strikes to a minimum" (p. 187). Before 2000, it was natural to consider that Mexico was ruled by an oligarchy constituted by the PRI, the CTM and the government.

When Nafta was signed, the idea of its opponents was that this oligarchy, together with Major Mexican firms (Ross Perot spoke of "36 businessmen who (...) control 54% of Mexico's GNP" – see Perot and Choate, 1993, p.2) and with the US firms that moved to Mexico (according to Perot and Choate, p. 12: "more than 1300 US companies (which) are operating more than 2200 factories in Mexico") would use Nafta to move US jobs to Mexico, which in turn would maintain wages as low as possible.

However, this "oligarchy thesis" is not consistent with Mexican history and is not sustained by the recent evolution of Mexican politics. As a matter of fact, the "complicity" between the

⁷ See Luis Javier Garrido (1986).

PRI and the CTM appeared in the 30's, in a period where international trade was not growing fast, and after the Second World War, Mexico oriented itself to an import substitution development strategy, and not to an export-led growth. It is thus difficult to sustain the thesis of an oligarchy whose main goal is to attract foreign investment by maintaining low wages. Additionally, we can remark that until the 90's, foreign investment was limited and controlled by the Law⁸ and in some cases by the Constitution; some activities were reserved to the Mexican State and others only to Mexican private interests. Furthermore, in 2000 the PRI has lost its leadership on Mexico, and some analysts think that it was made possible by an improvement of democratic functioning, which in turn was the consequence of Nafta⁹. So Nafta seems to have had an opposite effect to the one described and dreaded by Nafta opponents.

2.3.2. Wage costs and labour productivity

According to Faux and Lee (1993): "Contrary to the assertions in former President Bush's May 1 submission to Congress, the wage differentials between the United States and Mexico are not due to productivity differentials between the two countries. Harley Shaiken, of the University of California at San Diego, found that though a Mexican Ford engine plant was 80 percent as efficient as a US plant, workers were paid only 6 percent of US wages" (p. 103). In response to this argument, Nafta supporters like Hufbauer and Schott argue that "on average, high US labour productivity pays for high US wages. The US worker earns high wages because of his high output, which in turn reflects his work skills, his complement of sophisticated capital equipment, and the highly articulated infrastructure of the US economy" (Hufbauer and Schott, 1993, p. 13). These authors illustrate their argument by a study realized on Mexican maquiladoras:

⁸ See for example N. Lustig (1992). The 1973 Law "for the promotion of Mexican investment and regulation of foreign investments" was reserving certain activities to Mexicans (radio, TV, and all kind of internal transportation) and was limiting for most other activities the share of foreigners to 49%.

⁹ It was the thesis of Schott and Hufbauer (1992), eight years before the change of the ruling party, when they were writing: "economic pluralism obviously plays in favour of political pluralism (...) even if democratic tradition is not yet deeply rooted in Mexico, it seems that it is taking root" (p. 283). The argument was previously made by a former president of Singapore who said that "economic development leads inexorably to political opening". About the links between economic modernization and political opening in Mexico see Grayson (1993).

Years	Mexico (maquiladoras)		USA (industry)		Comparative ratio	
	Value added per employee in \$ (1)	Average hourly compensation per worker in \$ (2)	Value added per employee in \$ (3)	Average hourly compensation per worker in \$ (4)	(1)/(3)	(2)/(4)
1975	4940	1.44	24177	6.36	20.4%	22.6%
1982	6698	1.9	43164	11.68	15.5%	16.3%
1984	5784	1.54	51415	12.55	11.25%	12.3%
1986	5183	1.10	56366	13.25	9.2%	8.3%
1988	6323	1.25	65928	13.91	9.6%	9%
1991	8818	1.95	72740	15.6	12.1%	12.5%

Table 3: wage costs and labour productivity USA/Mexico, source: Hufbauer and Schott (1993), p. 172 and our calculations.

The proximity between the figures in the two last columns seems to demonstrate that the differences between salaries in Mexico and in the USA are essentially due to differences in productivity. So, if we try to draw a conclusion from what we have seen in subsection 1.3, we could say that no proof has been brought that Mexico was exerting a "social dumping" in its relation with the United States. Nonetheless, the demands of the labour unions have led the government of Bill Clinton to sign a labour side agreement, as we will see in the next section.

3 The claims of labour unions and the content of Labour Side Agreement

(North American Agreement on Labor Cooperation, or NAALC)

During Nafta negotiations, and even more during the year between the signature of August 1992 and the ratifications by American Congress (November 17, 1993), lobbies have enunciated claims about environmental and social aspects of Nafta. The Conference held in Minneapolis on November 19-20, 1991, and entitled "NAFTA: Labor, industry and government perspectives" (see the book edited by Bognanno and Ready (1993) based on the contributions to this conference), and articles published in *Challenge*¹⁰, are some expressions of these claims. Essentially, these lobbying groups represented ecologists and labour unions, and they were concerned by the possibility of social and environmental dumping. They were generally opposed to the ratification of the global Agreement, and most of them did not believe that it was possible to amend the Treaty so that it could be acceptable. So, they were generally not in favour of the elaboration of "side agreements" in order to compensate the defects of the text, they were generally in favour of rejecting the agreement. Their opinion

¹⁰ See S. Friedman: "Nafta as social dumping", *Challenge*, September – October 1992, J. Faux: "The Nafta illusion", *Challenge*, July – August 1993, and Koechlin and Larudee: "The High Cost of Nafta", *Challenge*, sept.-oct. 1992.

can be summarized by the assertion of J. Faux: "Finally, can we fix Nafta with side agreements? I am sceptical, but the President wants to try. At the very minimum, fixing it is going to require tough enforcement standards on labor and the environment – including a path to harmonization of minimum wages in the export sectors. It's also going to require an independent trilateral commission to enforce those standards." (Faux, 1993, p. 8).

As far as labour is concerned, the propositions formulated by the AFL-CIO and the MODTLE (Mobilization on Development, Trade, Labour and the Environment) were to incorporate in the Agreement the following points:

- enforcement of the rights of free association and collective bargaining
- the right to strike
- non discrimination against unionized workers
- equal remuneration for work of equal value
- a mechanism whereby infractions of labour rights in production for export can be challenged by trade union or individuals of *any country* of the free trade area
- existence of a "decent" minimum wage in the countries which belong to the area
- a program to eradicate child labour
- a mechanism whereby companies that invest in other countries contribute to support social infrastructure in the country in which they operate, including in areas such as medical care or education.
- The possibility of sanctions against the countries that do not respect the point previously exposed

The Labour Side Agreement, officially called "North American Agreement on Labour Cooperation" (NAALC) does not satisfy these claims. Hufbauer and Schott (1993) quote (p. 159) on this subject M. Lane Kirkland, President of AFL-CIO, who qualifies this text of "bad joke" and who says that it is a "structure of committees all leading nowhere" (declaration made in The Washington Post, 1 September 1993). That's why the side agreement negotiated by government Clinton did not disarm the opponents to the Treaty. On November, 7, 1993, ten days before the vote of the Treaty, President Clinton denounced the pressure made by the trade unions against NAFTA ratification and recognizes that he needs 30 more votes to have majority in the Congress. It is only after the debate between Al Gore and Ross Perot that the victory seems attainable for the partisans of the Agreement. On November 14, US

Ambassador in Mexico forecasts that the treaty will be adopted by a lead of two votes. At last, on November 17, the Agreement is adopted by 234 votes in favour and 200 votes against the Treaty. Among the democrats, there are 102 "yes" and 156 "no" and in the Republican party 132 "yes" and 43 "no".¹¹

3.1 What is the content of the Labour Side Agreement?¹²

Essentially, the goal of the Labour Side Agreement is to ensure the effective enforcement by each country (and especially Mexico) of its own national legislation. It is by no means to impose to the countries minimal norms of worker's protection. The side Agreement defines in Annex 1 "labour principles" that constitute "guiding principles that the Parties are committed to promote, subject to each Party's domestic law, but do not establish common minimum standards for their domestic law". Those general principles are the following:

1. Freedom of association and protection of the right to organize
2. The right to bargain collectively
3. The right to strike
4. Prohibition of forced labour
5. Labor protections for children and young persons
6. Minimum employment standards (such as minimum wages and overtime pay)
7. Elimination of employment discrimination
8. Equal pay for women and men
9. Prevention of occupational injuries and illnesses
10. Compensation in cases of occupational injuries and illnesses
11. Protection of migrant workers

The questions related to principles 4 through 11 are qualified of "technical labour standards".

The agreement establishes a Commission on Labour Cooperation, which is constituted by a ministerial Council and a Secretariat, and a National Administrative Office structure. The ministerial Council is constituted by the Labour Ministers of the Parties or their designees. Each country must establish a National Administrative Office (NAO), which is a point of contact with other governmental agencies of the country, the NAO of other two Parties of the

¹¹ See "Cronologia economica y TLC", Supplement in Mexican newspaper "Excelsior", 19 December 1993.

¹² For the text of the NAALC, see <http://www.worldtradelaw.net/nafta/naalc.pdf> or on the web site of the NAALC: <http://www.naalc.org/>.

Agreement, and the Secretariat of the Commission. The NAO has the important role of receiving the complaints related to violations of labour rights and to transmit them to the trinational structure. Each country determines its own domestic procedures¹³ but the NAALC establishes in article 16 that "each NAO shall provide for the submission and receipt (...) of public communications on labor law matters *arising in the territory of another Party*". All the points defined supra can be the subject of consultations at the ministerial level. However, only the "technical labour standards" which are moreover "trade related"¹⁴ can be the subject of a request transmitted to the Evaluation Committee of Experts (ECE). No ECE can be convened if the matter is not trade related, if it is not related to a violation of "technical labour standards" or if it is not a lack of enforcement of an existing labour law.

Table 4. Stages in NAALC process for each principles

Fines or Suspension of NAFTA Benefits ----- Arbitral Panel ----- Post-ECE Ministerial Consultations	11. Safety and Health 10. Minimum employment standards (minimum wage) 9. Child labour protection
Council Review of ECE Report ----- Evaluation Committee of Experts	8. Migrant worker protection 7. Workers' compensation 6. Equal pay 5. Non-discrimination 4. Prohibition of forced labour
Ministerial Consultations ----- NAO Review & Report	3. Right to strike 2. Right to bargain collectively 1. Freedom of association / right to organize a union

After the presentation of the final Report by the Committee and only in questions related to the enforcement of a Party's occupational safety and health, child labour or minimum wage technical labour standards, the fifth part of the agreement provides a procedure which can lead to fines and trade sanctions. As a matter of facts, if it is not possible to find a mutually satisfactory resolution of the matter, the ministerial Council can decide, by a two-thirds vote, to convene an arbitrary panel composed of independent experts in labour law, resolution of disputes arising under international treaties, or any other relevant speciality. The arbitrary panel must determine if there has been a "persistent pattern of failure" in the enforcement of the labour law. The labour law considered must be a national existing law of the country

¹³ For the procedure of the NAO in the United States of America, see the website: <http://www.dol.gov/ilab/programs/nao/procguide.htm>. The U.S. NAO states that "any person may file a submission with the Office regarding labor law matters arising in the territory of another Party".
¹⁴ By "trade related", article 49 means "related to a situation involving workplaces, firms, companies or sectors that produce goods or provide services traded between the territories of the Parties; or that compete, in the territory of (a) Party (...) with goods or services produced or provided by persons of another Party".

which is complained against, it must be a "trade related" matter and it must be related to occupational safety and health, child labour or minimum wage. The arbitrary panel must, when appropriate, formulate recommendations, which are normally that the country adopt and implement an action plan sufficient to remedy the pattern of non-enforcement. Then, the disputing Parties may agree on a mutually satisfactory action plan, which normally is in accordance with the recommendations of the panel. If the disputing Parties have not agreed on an action plan (case a) or if they cannot agree on whether the Party complained against is fully implementing the action plan (case b), any disputing Party may request that the panel be reconvened by the Council. In the case a, the arbitrary panel must establish an action plan consistent with the law of the Party complained against. In the case b, the panel must determine whether the Party complained against is fully implementing the action plan. When the country complained against is not implementing the action plan, the panel can impose a monetary fine. The fine cannot exceed 20 million dollars the first year and in subsequent years it cannot exceed 0.007% of total merchandise trade between the parties the preceding year. As a final step, if a Party fails to pay a monetary enforcement assessment, the complaining Party may suspend the application of the NAFTA to the country complained against. The trade sanctions that could be applied in this case are limited to the withdrawal of Nafta benefits and cannot exceed the original fine¹⁵.

As observed by Hufbauer and Schott (1993), this mechanism is equivalent to distinguish three kinds of labour issues:

- a) the areas that can be the subject of fines and trade sanctions, which are occupational health and safety, child labour and minimum wage;
- b) the areas that can only be the subject of official consultations and review by the Evaluation Committee of Experts (which are all other "technical labour standard" matters);
- c) the matters that can only be examined at the ministerial level: the right to strike, to bargain collectively and to freely associate and organize.

¹⁵ Trade sanctions do not apply to Canada. If Canada is the Party complained against, the decision of the arbitrary panel will be presented by the Commission to a Canadian Court, which will convert the panel decision into an order of the Canadian Court, without any modification. Canadian Court will thus ensure that the action plan is implemented or that the fine is paid.

Article 49 emphasizes the following point with respect to the first group of matters: "For greater certainty and consistent with the provisions of this Agreement, the setting of all standards and levels in respect of minimum wages and labour protections for children and young persons by each Party shall not be subject to obligations under this Agreement. Each Party's obligations under this Agreement pertain to enforcing the level of the general minimum wage and child labour age limits established by that Party".

Moreover, the Labour side agreement contains a commitment from the three countries of ensuring public information related to their labour laws and promoting public education regarding its labour law. The three countries commit themselves taking measures that ensure the enforcement of their labour laws, such as:

- appointing and training inspectors,
- monitoring compliance and investigating suspected violations, including through on-site inspections,
- encouraging the establishment of worker-management committees to address labour regulation of the workplace.

In summary, the goal of the labour side agreement is to ensure the effective enforcement of each country's labour law. This can be interpreted as an implicit recognition of the quality of each country's laws, or as the expression of the will not to intervene in questions that are the concern of national sovereignty. The Preamble of the NAALC insists on the "continuing respect for each Party's Constitution and Law" of the three governments that are contracting the Agreement. This kind of agreement is therefore not applicable to countries that do not have already an advanced labour law, since it is based on the idea that it is sufficient to ensure the enforcement of existing laws and that it is not necessary to impose international labour standards. This Agreement is interesting because it shows respect for the sovereignty of all Parties, but the American trade unions would have wished to impose minimal social norms and they would have desired a broader recourse to sanctions (fines and trade sanctions) while this recourse is limited to three areas out of eleven in the existing agreement.

4 An assessment of Labour Side Agreement's first decade

4.1. NAALC Ten Years Later: An Assessment

Ten years have passed since NAALC entered into force and it is still complicated to provide an accurate assessment of its outcome. Opinions on the issue are contradictory although they clearly tend to highlight the failure of the agreement.

In order to assess the results, it is essential to study the reasons that propelled the NAALC approval and its incorporation into NAFTA. Briefly discussed above, the roots of this labor cooperation agreement principally lie in:

- The improvement of labor conditions.
- The expansion of workers' rights.
- The increase in tri-national cooperation and the quality and productivity of labor.

Nevertheless, behind these arguments lies American and Canadian anxiety about a considerable portion of their multinational business using NAFTA as an exit toward a country with lower salaries and less stringent labor laws, with the resulting loss of employment and investment in their own countries.

There is also concern that NAFTA will lead to a "least common denominator" effect with regard to labor laws, which would constitute a serious problem especially for Mexican workers who would not improve their situation. In addition, labor standards in the United States and Canada would be jeopardized were they to fight to maintain the companies at the cost of losing ground on labor rights or if contracting Mexican immigrant workers were the solution to this conundrum.

In practice, it has effectively been Mexican workers, specifically, those that work in MAQUILADORAS and the immigrants in the United States which have made the most demands before the NAALC. Indeed, they have borne witness to the shortcomings of the agreement resulting from the failure of the consultation and arbitration processes provided for by NAFTA.

Notwithstanding the aforementioned assessment, there are winners and losers from NAFTA and the NAALC as in any other multilateral agreement. So-called North-South Agreements¹⁶ generate costs and benefits arising from the fact that the exchange of goods and services is ultimately an exchange of production factors, including labor. Table 5 introduces winners and losers according to the sector under analysis:

Table 5. Winners and Losers in a Developed Country under three conditions of trade with developing country

	WINNERS	LOSERS
I. Potential Effects of Trade Liberalization (Example : NAFTA)	Higher-skill, higher-tech businesses could benefit from reduced trade barriers. Labor intensive businesses that relocate to the country of the trading partner could benefit by reducing production costs. Domestic businesses which use imports as components into the production process may save on production costs	Labor-intensive lower age import-competing businesses could lose from reduced protections (tariffs) on competing imports. Workers in import competing businesses could lose if their businesses close or relocate.
II. Potential Effects of Trade Liberalization Modified by Worker Rights Adherence	Adherence to worker rights requirements could raise foreign labor costs slightly, making U.S. imports more competitive. Consequently, workers in import-competing businesses could be under less pressure to either give back wages or have their worker rights protections threatened	On the other hand, some multinational corporations wanting to relocate to the developing country to save on labor costs could be discouraged from doing so because worker rights adherence could increase their production costs.
III. Real-Life Example : Effects of Trade Liberalization (i.e., NAFTA) Modified by Worker Rights Adherence Under NAALC	NAALC’s worker rights effects so far have been sufficiently mild. In the end, it is more like winners and losers from trade liberalization than trade liberalization modified by worker rights adherence.	

Source: Bolle (2002), p. 14.

¹⁶ The North-South label has been used to identify agreements between developed and developing countries. It is worth pointing out that this label nowadays does not follow a geographical line but it is rather used to distinguish agreements signed by economies that enjoy different degrees of economic development.

It is crucial to highlight that conditioning the free exchange of goods, services and capital to the protection of labor rights could be used to mask protectionist policies by both the developed country (positive and negative conditionalities¹⁷) and the developing economy (maintenance of comparative advantages). It is obvious, therefore, that the reasons that propel the incorporation of a labor clause into a trade agreement are far from clear.

4.2. Some reasons for the failure

The lack of common labor rules among the three signatory states is the ground for the vast majority of criticisms. Even though the NAALC contains eleven general principles that compile minimum mandatory standards for the three countries; the regulations are heterogeneous depending on each national legislation. In fact, of the three countries Mexico enjoys the most complete labor legislation while it is the one that enforces it the least.

NAAL critiques can be classified under two general categories: those that refer to the structure of the agreement and those that point to the specific situation of the countries involved.

4.2.1. Critiques Based on the Structure of the Agreement.

The North American Agreement on Labor Cooperation is the result of the development of a complex system of complaints resolution (see Table 4). The procedure must complete the seven steps defined in the previous section. Moreover, all complaints should be originated on the persistent non-compliance with any of the general principles defined in the Agreement. However, not all the principles violation cases run through the seven steps. To be sure, only the violations related to safety and health at the workplace, minimum employment standards and child labor protection can result in fines or suspensions. During the first years of NAALC, most of the complaints were related to restrictions on the right to freedom of association¹⁸. Given that these claims could only reach the Ministerial Consultations, complaints on safety issues and health and employment discrimination were added. These claims are subject to the Evaluation Committee of Experts and Arbitral Panels and could result in trade sanctions.

¹⁷ Positive conditionalities refer to an easier access to the developed country market if there is compliance with labor regulations. On the other hand, negative conditionalities refer to the punishment inflicted on the export sector of the country that does not comply with the aforementioned regulations.

¹⁸ Two thirds of the claims were related to the violation of general principle number one.

Table 6 shows the NAALC principles violation brought before each of the national NAOs. The numbers in square brackets correspond to the following principles: [1] Freedom of association and protection of the right to organize; [2] the right to bargain collectively; [3] the right to strike; [4] prohibition of forced labor; [5] labor protections for children and young persons; [6] minimum employment standards; [7] elimination of employment discrimination; [8] equal pay for women and men; [9] prevention of occupational injuries and illnesses; [10] compensation in cases of occupational injuries and illnesses; and [11] protection of migrant workers.

Table 6. Summary NAO’s Public Communication

Against ... Public Communications	CANADA	MEXICO	UNITED STATES
NAO Canada		Canadian 98-1 [1; 9] Canadian 2003-1 [1; 2; 6; 9] Canadian 2005-1 [1; 2]	Canadian 98-2 [11; 6] Canadian 99-1 [1]
NAO Mexico			Mexican 9501 [1] Mexican 9801 [1; 2; 6; 9] Mexican 9802 [1; 6; 9; 11] Mexican 9803 [11; 9; 6] Mexican 9804 [11; 6] Mexican 2001-1 [10] Mexican 2003-1 [11; 6; 10] Mexican 2005-1 [4; 6; 7; 8; 9; 10]
NAO United States	US 9803 [1] US 9804 [1; 2; 9; 10]	US 940001 y 940002 [1] US 940003 [1] US 940004 [1] US 9601 [1] US 9602 [1] US 9701 [8] US 9702 [1; 9; 6] US 9703 [1; 2; 9] US 9801 [3] US 9802 [5] US 9901 [1; 2; 6; 9] US 2000-01 [9; 10] US 2001-01 [1; 2] US 2003-01 [1; 2; 6] US 2004-01 [6; 9] US 2005-01 [1;2; 3] US 2005-02 [1; 2] US 2005-03 [1; 2; 4; 5; 6; 7; 9]	

Source: US DEPARTMENT OF LABOR, BUREAU OF INTERNATIONAL LABOR AFFAIRS; Status of submissions under the North American Agreement on Labor Cooperation (NAALC); in web <http://www.dol.gov/ILAB/programs/nao/status.htm#iia20> (updated May, 2006).

Once plaintiffs have filed their complaint before the corresponding NAO, they lack access to the NAALC set up mechanisms resulting in another common criticism of the agreement; its lack of transparency. Both workers and their representatives have expressed their dissatisfaction with their inability to openly participate in the process. At any given moment, the plaintiffs are not informed about the complaint status, nor are they consulted about

particular questions related to the situation that propelled the claim. Moreover, the process is long and barely systematic regarding due dates for each of the steps. As a result, the workers involved are desencouraged to file new claims. In fact, up to now none of the filed complaints have reached a final resolution that involves with trade sanctions.

Also, some multinationals' actions have exhibited non-compliance with workers' rights such as illegal dismissals, lack of freedom of association, infringements that endanger workers' health and safety, and lack of interest to develop collective bargaining. None of the procedures in place have restored the rights violated by businesses. This fact stands out clearly if we compare it with the enforcement of the investors' defense clauses included in NAFTA's chapter 11.¹⁹

Workers whose labor rights have been violated have criticized the lack of government action against those firms that have not complied with the general principles contained in the NAALC.

3.2.2. Critiques Based on the Specific Situation of each of the Signatory States

An assessment of the specific situation of each of the three signatory states requires a macroeconomic analysis.

Table 7 shows the uneven situation of Mexico vis-à-vis its partners. The investment needs of this economy together with the lack of qualified labor and the high level of external debt have resulted in Mexico's opening to foreign capital. Specifically, foreign direct investment has enabled the country to fulfill its external debt payments on interests and principal. The flexibility of the Mexican labor laws has encouraged the arrival of a large number of multinationals and maquilas that hire cheaper labor and take advantage of tariff-free imports of intermediate products and capital goods.

¹⁹ NAFTA signatories are binded by the general principle of non-discrimination for investors and investments. This principle is two-folded including the national treatment clause (each party agrees to accord the other parties treatment no less favourable than it accords to its nationals) and the most-favored- nation clause (each party accords to the other parties treatment no less favorable than it accords to third parties under favorable circumstances, articles 1102 and 1103). Also, article 1106 includes specific measures that forbid restrictions to foreign direct investment as well as performance requirements.

This situation creates a dilemma for Mexican authorities who have to decide between a stricter application of its labor laws and allowing the entrance of multinationals that enable the economy to grow in a context of high levels of external debt.

The quandary is aggravated by the high levels of corruption that govern the country. No government has allocated enough resources to fight fraud and bribes. There has been a persistent lack of political will to emerge from an institutional crisis that hinders Mexico's adjustment to international standards.

Table 7. Macroeconomic Indicators

	1994			2004		
	Canada	Mexico	US	Canada	Mexico	US
GDP ¹	555.860	420.780	7.017.500	977.968	676.497	11.711.834
GNI per capita ²	19.960	4.590	26.630	28.310	6.790	41.440
Inflation, GDP deflator ³	1,2	8,3	2,1	3,0	6,1	2,6
Unemployment rate ⁴	10,5	4,4	6,2	7,3	3,1	6,2
Employment ⁵	67,0	58,7	72,0	72,5	60,8	71,2
Gross capital formation ⁶	19,2	21,7	18,1	17,9	21,3	16,9
Trade ⁶	67,6	38,5	21,9	72,7	62,0	23,7
Exports of goods and services ⁶	34,4	16,8	10,3	38,3	30,1	9,6
FDI, net inflows(BoP) ¹	8.224	10.973	46.130	6.284	17.377	106.831
External debt, total (DOD) ¹	..	138.550	138.689	..
Total debt service ⁷	..	4,9	7,7	..
Total debt service ⁸	..	25,7	23,0	..

Source: WORLD BANK, World Development Indicators database, 2005. OECD, Employment Outlook, Statistical Annex, 2006.

¹ Current US \$, millions

⁴ % of total labor force

⁶ % of GDP

² Current US \$, Atlas method

⁵ Employment/population ratio, persons aged 15-64 years (%)

⁷ % of GNI

³ Annual %

⁸ % of exports of goods and services

On the other hand, the US government has been absorbed by the fast-track debate that took place after NAALC entered into force. While the reach of the Trade Promotion Authority (TPA) is not vital, it is clear that the approval of such authorization has an impact on any trade agreement that involves the United States. The NAALC was negotiated through a fast-track procedure (former TPA) that expired in 1994.

The use of fast-track may have an impact on several issues related to the negotiation of an agreement between the United States and third parties. To be sure, the US President could decide to widen or to trim down the protection of workers' rights incorporated into any trade

agreement. The relevance of this decision has a long-term impact on the multinationals' protection of labor rights.

The key of this process is that TPA suppresses Congress' right to amend agreements limiting its decision making power to pass or reject the trade agreement already negotiated by the executive branch. This procedure enables a much faster approval of the agreement.

A 1988 law authorized the President to include workers' rights provisions into trade agreements negotiated under fast-track. Both the House and the Senate partially restricted the fast-track by including different types of objectives for the negotiations. In this sense, only the main objectives could be included in a trade agreement negotiated under fast-track. The arguments used in favor of such restriction were:

- Trade agreements enjoy a more rational framework since they focus exclusively on the traditional trade aspects.
- The use of labor standards as disguised barriers to trade is prevented.
- It enables economies to develop according to their comparative advantages.

It is in this sense that it becomes relevant that the NAALC was negotiated under fast-track leaving no room for the introduction of amendments or for the debate regarding the limitation of the super-powers in trade issues of the President of the US.

4.3. The Positive Aspects of the Agreement

Not every aspect of the Agreement and its application has been adverse. A large number of those involved agreed on the progress made especially on what has been labeled as the "sunshine effect" that refers to improved dialogue between the three signatories. Border cooperation has also been boosted as a result of the Agreement.

The "sunshine effect" reveals NAALC's ability, through the complaints filed, to make public certain situations that would have been otherwise unknown. In fact, each of the claims have clearly shown the shortcomings of several Mexican maquilas and some US firms that hire Mexican illegal immigrants to perform jobs that jeopardize their health (use of chemical products without security procedures in place, electrical security problems in the equipment

used, excessively long work-days performing repetitive tasks that require extreme physical effort resulting in injuries)²⁰. The role played by NGOs, trade union representatives, the media, and, in general, civil society allows society to be aware of the multinational corporations' serious actions.

At the same time, the NAFTA signatory governments are forced to strengthen the political dialogue due to pressure exerted by the aforementioned groups. In this sense, the tri-national political dialogue will enable each government to enjoy more accurate information about the violations and the measures to be implemented in response. The public availability of information about particular infringements and labor law violations allows for pressure to be put on the firms that break the law. As a result, governments, civil society, and NAALC's mechanisms become efficient intermediaries between workers and their representatives, and the firms. However, the effectiveness of the dialogue among the different social sectors will depend on the financial and human resources allocated to the compliance with the NAALC basic principles. Moreover, the individual countries attitude towards the agreement is also crucial for the positive results of dialogue enhancement. We should not forget that each country is free to assign the resources that deems appropriate for the protection of its workers' rights.

Finally, the third positive outcome associated with the labor agreement is border cooperation. Solidarity across borders has improved as a result of the peculiar features of the complaints' procedure; a claim by one country's workers must be filed in the country that has infringed labor rights. As a result, an organized cross-border network that would enable information exchange and communication between transnational unions of firms accused of non-compliance and each country's NAO could be created.

4.4. The NAALC: Lessons learned

The analysis undertaken enables us to reflect on the lessons learned from the NAALC that could be applied to trade agreements, especially for those between countries with different degrees of economic development. It is certainly in these cases when the problems associated to the agreements are more pressing.

²⁰ Delp, L., M. Arriaga, G. Palma, H. Urita, and A. Valenzuela: *Nafta's Labour Side Agreement. Fading into Oblivion?* UCLA Center for Labor Research and Education. March 2004. (available at <http://www.labor.ucla.edu/publications/nafta.pdf>)

Agreements that incorporate labor clauses or rules should not originate in the core countries aiming to extend the guidelines through the periphery. The interest of the more developed countries cannot be based in the acceptance of low labor standards that, at times, do not even comply with the International Labor Organization rules. At any rate, rule harmonization must be based on a bottom-up approach, which is grounded on an initial agreement on “good conduct or good government” that prohibits that capital flows are associated to the exploitation of social comparative advantages born out of the lack of supervision by the less developed countries’ governments.

Moreover, developing countries should not look at foreign investment as the panacea that will solve their macroeconomic unbalances. More specifically, those economies that suffer from high levels of external debt should not count on foreign capital to cover for their interest and principal payments on their debt. To be sure, this approach could result in a lax discipline regarding the enforcement of labor rules seeking to keep the multinationals within the country. In fact, it is convenient for developed countries to undertake “compliance assistance” with the developing economies. Compliance assistance should include not only financial resources, but also technological, technical, and cross-border resources that enable host economies to take advantage of foreign capital from both the social and the economic perspective. Regarding speculative capital inflows (that flow to particular countries attracted by relatively flexible social and environmental protection rules), some authors have suggested the adoption of a “Tobin Tax.” A “Tobin Tax” would guarantee the protection of those workers employed by corporations that are willing to move to emerging markets when labor regulations become stricter.

What is clear is that any trade agreement that incorporates labor clauses should include the opinion of the agents involved. Both workers and trade unions should play a key role in the development and functioning of the agreement. Any violation of the guiding principles of the agreement should be the object of debates, monitoring, examination, and sanctions that, if needed, should be supervised by a supranational Committee. The guidelines and recommendations of such Committee should be mandatory for firms and governments depending on who the offender is.

Moreover, our own opinion is that no labor agreement incorporated into a trade agreement should be signed as a parallel annex, but rather it should be integrated as a whole. In this

sense, the trade agreement should guarantee the protection of the workers' fundamental rights for both national and immigrant workers. The feasibility of such agreement is grounded on the existence of enough political will to adopt a set of minimum immigration standards common for all the signatory parties.

It is necessary, therefore, that the free movement of goods is accompanied by a free movement of workers that guarantees homogeneous labor standards and a common immigration policy, the free provision of services and the free movement of capital, especially that of long-term capital that encourages economic development. This is not the case in NAFTA. It is obvious that our proposal embraces the creation of a common market that would result in the loss of national sovereignty in certain issues. This approach is related to the geographical distance between the countries that would form the common market. For example, within the context of the US-Chile and US-Jordan FTAs²¹ the incorporation of labor agreements would exhibit different reasons than those that propelled the NAALC given the differences in geographical distance between the countries that form the three agreements. In the later case, the closeness between the signatory countries magnifies the aspects of the labor agreement.

In conclusion, globalization has created a "fictitious opening" of borders for firms that seek to exploit comparative advantages. In this sense, multinationals could be attracted by economies with lax labor rules or could thrust workers to migrate.²² Both issues could generate risks. In the former case, countries that attract investment propitiated by low labor rule enforcement could jeopardize the adoption of stricter labor rules and enforcement. In the later case, advanced economies could see as an advantage to hire immigrant workers who are willing to work for lower salaries and under precarious labor conditions. Both cases could result in a geographical movement of comparative advantages. To be sure, countries that have traditionally been recipients of foreign capital flows could lose ground to other emerging economies. This could be Mexico's case if US capitals were more attracted by the comparative advantages offered by hosts such as China.

²¹ The US agreements with Chile and Jordan are more recent than NAFTA and, therefore, difficult to compare. Not only these agreements incorporate liberalization measures and procedures more relevant to the current needs of these economies, but the differences in geographical distance widens the difference regarding the economic and social disparities between the signatories involved. Moreover, the agreements' objectives are also divergent.

²² This is especially the case of resource-seeking investment. The objective of this type of capital is to enjoy lower costs therefore obtaining competitive advantages. The Mexican maquilas serves as an example of such investment.

Table 8. NAALC critiques and proposals for improvement

CRITIQUES	PROPOSALS FOR IMPROVEMENT
It is parallel to the trade agreement and not incorporated within it while is not mandatory for the signatory countries	<ul style="list-style-type: none"> • Incorporate both the labor and the environmental agreements to NAFTA • Set up monitoring and supervising mechanisms
There is no common set of labor rules for the signatory countries. Each country maintains its own labor rules	<ul style="list-style-type: none"> • Creation of common union regulations for the three countries • Set up a supranational entity that regulates and monitors the enforcement of labor rules. These labor rules should be harmonized by a bottom up approach
Trade and investment clauses have supranational features while the labor and environmental agreements are exclusively national and without harmonization	<ul style="list-style-type: none"> • Labor and environmental issues should have the same treatment as intellectual property and trade in goods issues • Encourage the creation of a North American common market that ensures the free movement of goods, services, workers and capital
The eleven general principles contained in NAALC are just minimum standards	<ul style="list-style-type: none"> • The eleven general principles should be mandatory and based on: <ul style="list-style-type: none"> * “Declaration on the Fundamental Principles and Rights at Work”, ILO * “Declaration of Principles Concerning Multinational Enterprise and Social Policy”, ILO * “Declaration and Decisions on International Investment and Multinational Enterprises”, OECD
Only three principles are subject to trade sanctions and penalties (safety and health; minimum wage; child labor protection)	<ul style="list-style-type: none"> • The eleven principles should be subject to the evaluation of ECE. Violations should be subject to trade sanctions
Lack of labor standards harmonization	<ul style="list-style-type: none"> • Create a code of good conduct • Strengthen the enforcement of labor codes through annual auditings that include periodical inspections of labor conditions and salaries
Long and opaque procedure (low degree of workers’ involvement in the process)	<ul style="list-style-type: none"> • Shorten the communications and arbitrage deadlines • Establish deadlines for each of the stages of the process • Allow workers and trade unions to engage in the process so as to ensure transparency • Develop mechanisms that enable workers’ to protect their labor rights
There are no sanctions for governments and/or firms that violate labor rules	<ul style="list-style-type: none"> • Both governments and firms should be subject to sanctions if they violate any of the general principles • If sanctions are adopted, the following options should be considered:

	<ul style="list-style-type: none"> * Increase the sanctions already contained in NAALC * Increase the limits imposed on firms who are accused of violating the general principles * Limit the ability of firms that violate labor laws to sell their products
There are no permanence requirements for FDI	<ul style="list-style-type: none"> • Adoption of a “Tobin Tax” that enables economies to discriminate between speculative and productive capitals and to monitor potential abuses of the comparative advantages of the host economies regarding labor issues
The parallel labor agreement does not include an immigration clause. Each of the signatory countries maintains sovereignty over the immigration policies	<ul style="list-style-type: none"> • Set up of a Trinational Immigration Policy that respects national identity
The use of the TPA by the US government in the design and approval of labor cooperation agreements	<ul style="list-style-type: none"> • Harmonization of approval procedures for these type of agreements • Specify the body of government that is authorized to negotiate the agreement • Approval and ratification by the national parliaments

5 Final Remarks and Insights for Future Trade Agreements

Is it reasonable to incorporate a labor agreement to a trade agreement when there is a significant gap in the development levels of the signatory countries?

The answer is positive. We believe that a labor agreement could be a vehicle for reducing that gap if, and only if, the special conditions of the less developed economy are taking into account. Regional integration schemes exclusively designed by the North should be avoided.

Should the NAALC be reformulated given its dubious results?

Since the NAALC is already in place, our advice is to learn from the mistakes and to strengthen the role of the agreement.

How can the role of the NAALC be strengthened?

To strengthen the role of this agreement it is necessary to improve its dispositions. Such improvement could be undertaken from a double approach. First, the agreement could become a mechanism for the resolution of labor disputes. In this sense, the agreement would become a tool to monitor the compliance with labor standards and it would include all the affected

agents. Secondly, it could become a vehicle to improve cross-border cooperation. Both approaches should be accompanied by the political will of the involved governments to advance towards more rational and better labor standards.

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