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LABOR ISSUES IN THE NAFTA RENEGOTIATION: POTENTIAL PROPOSALS FOR THE LABOR SIDE ACCORD AND THEIR SIGNIFICANCE FOR MEXICAN INTERESTS

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Introduction

On August 16, 2017, the first rounds began to renegotiate the North American Free Trade Agreement (NAFTA), the trade accord between Mexico, the United States and Canada that has been in force to govern trade relations in North America since January 1, 1994. The impetus to reopen the accord comes in large part from the initiative of the United States, and in particular, stems from the electoral campaign promises of now-President Donald J. Trump, who in attempting to gain political support from the working class of the Midwest, capitalized on economic anxiety around the loss of manufacturing employment and stagnating wages in his campaign discourse. He promised to remove the United States from trade agreements that did not favor U.S. economic positions, or renegotiate such accords on terms that best suited U.S. economic interests, including NAFTA.¹ In Mexico, we then find ourselves responding to the overtures from the U.S. in part from a defensive position, drawn into the renegotiation of an accord that has worked well for Mexican growth,² amid studies that show that NAFTA alone neither contributed to the loss of U.S. global competitiveness, nor for the loss of U.S. manufacturing jobs (Bailey and Bosworth 2014, Hicks and Srikant 2015, Goodman 2016).

The modernization of the labor side accord of NAFTA, the North American Agreement on Labor Cooperation (NAALC), forms part of the renegotiation agenda. A reconsideration of the institutions and processes that guide tri-national cooperation on the protection of labor rights standards and their enforcement in North America is taking place against the backdrop of sharp criticism of Mexico's labor relations regime. The reconsideration of the NAALC panels has opened Mexico to criticism from the U.S., where Mexico is being accused of using low labor costs, low minimum wage rates, and limits on the rights to association and collective bargaining as comparative advantages in trade (UNIFOR and UAW, 2017). Limited progress on the 2016 labor reform to date has also come into the public debate, and some U.S. Senators are concerned about more progress from Mexico here (Levin, 2017; *Inside Trade* 2017). In turn, criticisms from Canada against the U.S. have surfaced around state-level right to work laws and limits on freedom of association (Morrow, 2017). Given this politicized context, there is early public debate from the U.S. and Canada that proposals for a new labor accord should amplify the sanctioning power of the panels charged with determining labor rights violations, increase the types of violations that are open for sanctions, and open all violations to fines and trade sanctions.

This report will give first a general account of the NAALC labor clause, the processes and institutions that make up its structure, and describe how the panel functions in practice to receive cases of labor rights violations as part of the NAFTA accord. It then gives a descriptive account of the cases submitted over the life of the accord, from 1994 to 2016, that provides a general overview of the cases submitted for review by national panels, discusses the violations that are included, and explains how the cases are resolved, with special emphasis on the Mexican experience. After establishing how the panel has functioned to date, and where the panel has interceded in cases against Mexico, the report's second section describes possible proposals for a new NAFTA labor chapter. In the U.S., the content of a new NAFTA -- and as part of the accord, the labor clause -- are bounded by the terms of the 2015 Trade Promotion Authority (TPA), the trade law that gives legal authority by the U.S. Congress to the

¹ Campaign speech at Spokane, Washington, May 7, 2016. ABC News. "Donald Trump promise tracker: Where his pledges stand at the 100-day mark," <http://abcnews.go.com/Politics/donald-trump-promise-tracker-pledges-stand/story?id=44902688>, accessed August 10, 2017.

² Office of the USTR, "U.S.-Mexico Trade Facts," <https://ustr.gov/countries-regions/americas/mexico>, accessed August 10, 2017.

executive branch to enter negotiations. Since the 2007 Bipartisan Agreement (known as the May 10th Agreement), all U.S. trade law must include labor rights enforcement language, and so the 2015 TPA provides basic guidelines on the minimum content of a labor chapter that should be included in a renegotiated NAFTA, if Congress is to consider the ratification of the Agreement under expedited voting rules known as *fast track*.

The labor chapter of the Trans-Pacific Partnership (TPP), which was negotiated under the terms of the 2015 TPA, and therefore meets these Congressional guidelines, provides one possible framework of reference for a new NAALC.³ Both Canada and Mexico favor the TPP approach to labor, and media reports after the second round suggested that indeed the TPP template, which was nominally acceptable to all parties in the TPP round at one time, was indeed the starting point for tabled text in the NAFTA renegotiation at the Ottawa round (*Inside Trade*, 2017). Meanwhile, the Office of the United States Trade Representative (USTR) released its own proposal for a new NAFTA on July 17, 2017, which includes additional guidelines for a labor clause for the U.S. position.⁴

This report will consider these documents in identifying first, the outlines of a new labor accord, and second, evaluate how these proposals differ from the processes and institutions of the current NAALC. In a third section, the report develops strategic recommendations relevant for the Senate that identify areas where the proposals fall short in responding to Mexico's national interests, and makes innovative counterproposals that speak to Mexico's interests in promoting labor rights protections.

³ The TransPacific Partnership Agreement. 2015. <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>, accessed May 10, 2017.

⁴ Office of the USTR. 2017. *Summary of the Objectives for the NAFTA Renegotiation*. <https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf>, accessed July 18, 2017.

1. The North American Agreement on Labor Cooperation

The North American Agreement on Labor Cooperation (NAALC) is the side agreement on labor issues of the North American Free Trade agreement (NAFTA). Once NAFTA was negotiated by the three states at the end of 1992, new talks began over environmental and labor rights guarantees once it became clear that the agreement as written faced obstacles to ratification in the United States Congress.⁵ Without addressing concerns about labor and environmental protections that had surfaced from civil society during the negotiation phase, members of the Democratic Party would not vote in favor of the agreement. Rather than reopen the accord after multiple rounds of controversial negotiation, the states agreed to reserve labor and environmental protections to supplemental agreements outside of the main text. The side accord for labor that was ultimately endorsed establishes a separate dispute panel process for the investigation and enforcement of a set of labor rights standards listed in the accord. The NAALC does not create specific new minimum labor standards that each state party is to uphold, but obliges the parties to enforce the application of its national labor laws, around a set of common labor principles listed in Annex 1.⁶ The Agreement also creates a new institutional framework that manages the enforcement of labor commitments and their adjudication, as well as trilateral cooperative labor activities. There are no provisions in the NAALC to grant power to the NAALC institutions, or the other state parties, to undertake labor enforcement processes directly in the territories of the other NAFTA member states.⁷

1.1. NAALC Labor Principles

Where the NAALC obliges states to uphold their own national labor laws, the term labor laws is further defined by the agreement to refer to eleven principles that are specified in Annex 1. These include::

- Freedom of association and protection of the right to organize
- The right to bargain collectively
- The right to strike
- Prohibition of forced labor
- Labor protections for children and young persons
- Minimum standards of employment
- Elimination of employment discrimination
- Equal pay for women and men
- Prevention of occupational injuries and illnesses
- Compensation in cases of occupational injuries and illnesses
- Protection of the rights of migrant workers

Guarantees of minimum standards of employment refer to minimum wage guarantees, established hours of work per day and week, and payment for overtime work. Given the primacy of domestic labor legislation, this means that the NAALC obliges states to establish these minimum standards in domestic labor regulations, and enforce them in practice.

⁵ See Mayer 1998; Hafner-Burton 2009.

⁶ Article 2 of the NAALC recognizes “the right of each Party to establish its own domestic labor standards,” and commits parties to “ensure that its labor laws and regulations provide for high labor standards” (NAALC, 1993).

⁷ Article 42 of the NAALC.

1.2. The NAALC Institutions and the Case Filing Process

The NAALC agreement provides for a complaint-driven enforcement mechanism to adjudicate claims of labor rights violations among NAFTA parties, and creates a series of institutions that oversee the enforcement process. The Commission for Labor Cooperation (CLC), since closed in 2010, served as the trilateral office for coordination for all work on labor cooperation, and supported the work of the Secretariat, the NAALC body that is comprised of the three Ministers of Labor (the Secretary of Labor in the case of the U.S.), and their staff. The Secretariat, once housed at the CLC, still plays an important role in meeting to discuss aspects of labor rights concerns and proposals under the auspices of Ministerial Consultations between states as part of case resolutions. National Administrative Offices (NAO) are the third sets of institutions of the labor dispute system. Under the NAALC, each of the three states established and maintains an office within their federal government that serves as the contact point for any matter regarding the NAALC, and it is these offices that receive and manage the cases filed for labor dispute settlement in each country.⁸

Any *interested party* is permitted to submit a complaint to an NAO relating to any labor issue in any NAALC partner, meaning that the process is open not just to states, but to individuals, non-governmental organizations, trade unions, and employers. Complaints must be filed at NAOs in states other than where the alleged violations have taken place. Once a complaint is filed, the NAO of the state that receives it determines whether or not the petition meets procedural requirements for a formal review, and whether a review will further the overall objectives of the agreement, which among others, is to promote the labor principles of Annex 1.⁹

1.3. Petition Filing, Content and Case Acceptance Rates

Since 1994, the first year the NAALC came into force, through 2016, the last year for which data is available, 47 petitions have been filed alleging violations of labor rights across the three states. Eight of these petitions were filed simultaneous at two NAOs for separate reviews, and are not considered in this data, leaving a total of 39 cases for analysis. Of these 39 cases, two are still pending decisions on whether to pursue a formal review, and six cases have yet to move through the process to the formal resolution stage.¹⁰ From this data we can draw the overall patterns of case submission, understand which types of labor violations are most often included in claims, estimate case acceptance rates, and extrapolate how the case process has been used against Mexico in particular over time.

Figure 1 illustrates the complete set of petitions filed at any NAO since 1994. It shows that 59% of cases, 23 of the total, were filed against Mexico, while 13 cases were filed against the U.S., or 34%. The remaining 3 cases were filed against Canada. Canada participates much less in the NAALC process in terms of case filings because of its provincial level labor regulations system. NAALC only has legal authority for case hearings where it has been ratified at the local level, in four provinces. The

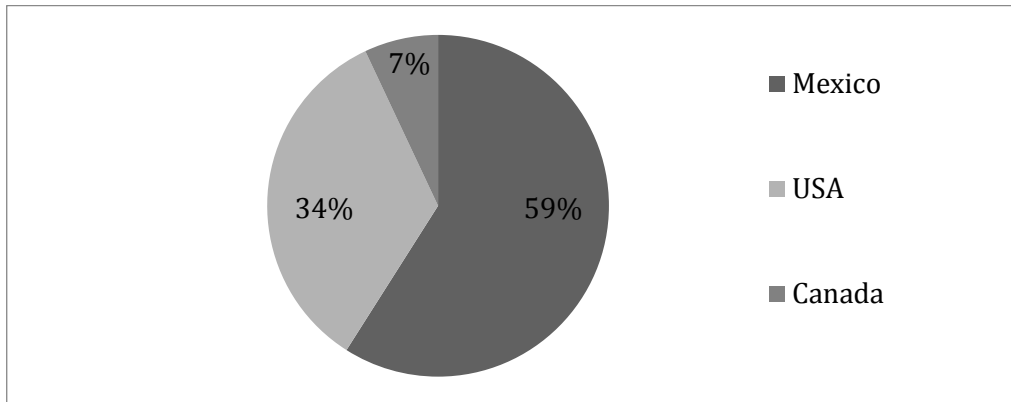
⁸ See Article 15 of the NAALC. The Office in the United States Department of Labor is called the Office of Trade and Labor Affairs (OTLA), and now manages all trade-based social clauses, not only the NAALC accord. The Office in Mexico is housed at the Secretaría de Trabajo y Previsión Social, and the Canadian office at Employment and Social Development Canada.

⁹ See Article 1 of the NAALC.

¹⁰ A publicly available version of this data, through 2013, is available through the Banco de Información para la Investigación Aplicada de Ciencia Sociales (BIIACS) at CIDE, <http://biiacs-dspace.cide.edu/xmlui/handle/10089/17312>

Canadian federal government participates fully in adjudicating cases filed at the Canadian NAO against the U.S. and Mexico.

Figure 1: Cases Filed Against each State



Source: Author's data and analysis, <http://biacs-dspace.cide.edu/xmlui/handle/10089/17312>

The data shows that the case process in the NAALC is largely driven by cases filed against Mexico, which accounts for two thirds of all cases filed over the life of the accord.

Table 1 provides the breakdown of the content of all cases filed at any NAO office from 1994 to 2016. While there are 39 petitions filed in total in this data, petitions can mention more than one the 11 labor rights principles in the allegations presented, so columns do not add to 39. The number of cases filed refers to the number of petitions filed at an NAO office that listed the labor rights violation in the column. Frequency refers to the total percentage of cases that report the labor rights violation. It is a measure of how often the violation appears at the panel.

Table 1: Cases Filed at NAO offices, 1994 to 2016

<i>Labor rights</i>	<i>number of cases filed</i>	<i>frequency</i>
freedom of association and right to organize, right to bargain collectively	26	67%
minimum standards of employment	18	46%
prevention of occupational injuries and illnesses	17	44%
<i>foster transparency in access to labor law</i>	16	41%
elimination of employment discrimination	12	31%
rights of migrant workers	9	23%
wage violations	6	15%
right to strike	5	13%
workers compensation	3	8%
child labor	2	5%
forced labor	0	0%

Source: Author's data and analysis, <http://biacs-dspace.cide.edu/xmlui/handle/10089/17312>

As this table makes clear, the most important labor rights violations in North America are the freedom of association and right to organize and right to bargain collectively.¹¹ Two-thirds, or 67% of all NAALC petitions mention violations of these rights, either alone or in tandem with other rights violations. Beyond these collective rights, two individual rights stand out. Nearly half of cases mention violations of minimum standards of employment, or the violations of health and safety regulations. Special mention should be made of the violation of *transparency in access to labor law*, which is mentioned in 16 cases, or 41% of the total. This right is not listed in the labor laws of Annex 1, but appears in Article 1 of the NAALC as a general principle that the parties agree to uphold. Beyond cases on employment discrimination, which generally are cases about the rights of women workers and gender-based discrimination, there are few cases filed on the other labor rights principles.

Turning to Table 2, the cases filed on Mexico, we can see that in part these general patterns are due to the fact that most of the cases in the NAALC have been filed about Mexican practices.

¹¹ In this data, these two rights were counted together, and not treated as separate labor principles. These are both collective rights, and they function in tandem: without the right to freedom of association, the right to collective bargaining is moot; without the right to negotiate the terms of a collective contract, the right to association is meaningless.

Table 2: Cases filed against Mexico

<i>Labor rights</i>	<i>number of cases filed</i>	<i>frequency</i>
freedom of association and right to organize, right to bargain collectively	18	79%
<i>foster transparency in access to labor law</i>	12	52%
minimum standards of employment	11	48%
prevention of occupational injuries and illnesses	11	48%
right to strike	5	22%
elimination of employment discrimination	3	13%
wage violations	2	9%
child labor	2	9%

Source: Author's data and analysis, <http://biacs-dspace.cide.edu/xmlui/handle/10089/17312>

In this table, we can note that again, violations of the right to association and collective bargaining rights are the violations most reported in the case set, which is comprised of 23 total cases. Of those cases, 18, or nearly 80 percent of all cases filed against Mexico report a violation of these collective rights. Given the weight of the Mexican cases in the total case set, it is clear that while freedom of association issues are important to all of North America, the preponderance of Mexican cases make these issues stand out as even more critical to resolve in the NAALC. In comparison to the Mexican cases for example, of the 15 cases filed against the U.S., only 7 include freedom of association or collective bargaining violations.¹² We must add to this figure the twelve cases that mention violations of the Article 1 principle of the right to transparency in access to labor law. A comparison with Table 1 shows that cases of this type have only been filed against Mexico. The case materials for these petitions note serious allegations of interference with labor registration procedures, the conduct of union elections, irregularities in the administration of union related paperwork by labor authorities of the Juntas de Conciliación y Arbitraje (JCAs) at local levels across the Mexican Republic. These cases too then reflect limits on the right to freedom of association through the manipulation of the responsibilities of the JCAs in ways that prevent union recognition or the exercise of union rights guaranteed in the Ley Federal de Trabajo (Giménez Cacho, 2007). Taken together, these two indicators establish that the right to association, the related right to bargain a collective contract, and interference by agents and employees in protecting those rights through the JCA system are the rights violations most in question in Mexico in the NAALC.

¹² U.S. cases are not shown in the table, but can be derived from the raw data.

Like in the general case set, violations of minimum standards of employment regarding hours and wages, and health and safety violations are also recurrent issues in the case files, as nearly half of all cases mention these violations. There are relatively few cases against Mexico on the right to strike, the elimination of employment discrimination, wage violations specifically, or child labor.

Once an NAO receives a petition, that office determines whether the case is admissible for a formal review of the allegations presented in the complaint. A review determines the complaint's merits, assesses whether they occurred, and whether the events were violations of domestic labor law, often in consultation with the other NAOs. Cases must be oriented around the actions of governments in allowing for violations to occur through action or nonaction in the enforcement of labor rights laws: since NAFTA is a treaty between states, the NAALC also evaluates the conduct of governments, not private actors, individual firms or other non-state actors in establishing responsibility for labor rights violations within states. NAO offices must decide within 60 days on whether to conduct a formal review, and 120 days to complete a review and issue a Public Report of Review, which includes suggestions on how to resolve the case.¹³

Table 3 gives estimations of the acceptance rates for cases filed against all three states:

Table 3: Case Acceptance Rates

Cases filed against NAFTA states			
	<i>Cases filed</i>	<i>Cases accepted</i>	<i>Acceptance rate</i>
<i>Mexican cases</i>	23	17	74%
<i>USA cases</i>	13	11	84%
<i>Canadian cases</i>	3	1	33%
Total Cases	39	29	74%

Source: Author's data and analysis, <http://biiacs-dspace.cide.edu/xmlui/handle/10089/17312>

As this table shows, the general acceptance rate for all cases is 74%, meaning it is rather likely that once a case is filed that it will be accepted for review. Cases filed against the U.S. are accepted at a higher rate, at 84%, and Mexico probably sets the median rate, given the high number of Mexican cases in the total case set. Cases are almost never accepted against Canada due to the provincial level ratification discussed above. Rather, these cases, once filed, are resolved at provincial level tribunals.

¹³ The 120 days can be extended and additional 60 days, meaning that from submission to resolution, the maximum number of days that NAOs can use to process a case is 240 days. In practice, these time periods are routinely violated, especially in later years as case submissions became more complex.

1.4. Case Resolution Processes

Once petitions are prepared and filed, and cases reviewed, the last step in the NAALC process is to decide on a resolution to for the violation, but more importantly for states, is to find ways to resolve recurrent types of labor rights violations. As the NAALC firmly protects the rights of states to determine their domestic labor laws, and no part of NAALC allows other states to perform labor enforcement activities in the territory of another, all steps to resolution remain at the level of state-to-state dialogue and cooperation. That also means there are no areas by which workers who faced violations will have them resolved on a case by case basis by the NAALC panels.

In practice, there are four levels of resolution that can be invoked to resolve labor rights issues. At the end of the set of avenues for resolution, monetary fines and trade sanctions remain a possibility for only a small set of labor rights principles. The first step of resolution is recourse to Ministerial Consultations. These are high-level meetings between two or more Ministers of Labor that are meant to provide a venue for the government that allowed labor violations and the state that reviewed the petition to meet and discuss them, and explore avenues to address them. Ministerial Consultations often lead to Ministerial Agreements or Joint Declarations that recommend specific actions or commitments states agree to take to resolve the issues raised in the complaint. All NAALC cases to date have been resolved through Ministerial Consultations, and none have moved beyond this stage to additional levels of redress. This is due in part to a tiered system of resolutions that stipulates that while all labor violations are eligible for resolution through Ministerial Consultations, the sanctions are open only for specific categories of rights, which will be discussed below.¹⁴

Beyond Ministerial Consultations, there are additional levels of resolution that can be invoked if one or another party believes that the issues have not been addressed fully through Ministerial Consultations. The next step includes an Evaluation Committee of Experts (ECE), an ad hoc panel selected from three members of a pre-selected roster of labor experts from each country.¹⁵ Members of ECE panels are usually labor lawyers, and the ECE panel is charged with preparing an evaluation report that reviews the case a second time, and makes recommendations on how to address the remaining labor law violations not resolved by Ministerial Consultations.¹⁶

If parties are unsatisfied with the outcome of an ECE panel, states may request the formation of an Arbitral Panel for certain cases, as discussed below.¹⁷ Arbitral panels are formed from five members of each state's Labor Roster, and beyond investigating the case, are charged with developing an action plan for the state in question that includes concrete measures that must be taken improving the enforcement of labor law around the issues presented in the original submission.¹⁸ The panel can reconvene at a later time to then make an assessment on progress of the implementation of the action plan, which is where fines and trade sanctions come into play for labor rights violations in NAFTA. Arbitral panels may impose fines on states up to 0.007 per cent of the total trade in goods in the region

¹⁴Article 29 of the NAALC.

¹⁵ Article 23(2) of the NAALC.

¹⁶ Articles 25 and 26 of the NAALC.

¹⁷ Article 27-29 of the NAALC.

¹⁸ Article 36(2) of the NAALC states that if the arbitral panel finds a persistent pattern of failure in the enforcement of a party's labor law, the parties may agree on a mutually satisfactory action plan. Article 39(4) allows for the panel to reconvene if the parties fail to agree on the action plan.

if they rule that states are not making sufficient progress here.¹⁹ If fines are not paid, trade sanctions may then be applied against that state for the amount for the fine.²⁰

As noted above, the NAALC incorporates a three-tiered system for the resolution of cases that limits the levels of adjudication by types of rights violations. Standards related to collective rights, such as freedom of association, the right to collective bargaining, and the right to strike, are afforded the least redress, as they are subject only to Ministerial Consultations. Submissions concerning “technical labor standards,” such as minimum employment standards, discrimination, workers’ compensation, the protection of migrants, and forced labor, are limited to Ministerial Consultations and ECE panels. Only submissions that include allegations of child labor, minimum wage disputes, or health and safety violations are eligible for the full range of remedies, including Ministerial Consultations, ECE panels, and arbitral panels, and if still unresolved, fines and trade sanctions (NAALC 1993, 15–24).

The preceding analysis made clear that the most important labor rights violation in North America by far is the violation of freedom of association. The tiered system in the current NAFTA means in effect that the violations of these rights are restricted from moving beyond Ministerial Consultations to any other level of resolution. Table 4 provides an overview of the levels of resolution afforded under the three-tiered enforcement procedure of the NAALC, by type of labor rights violation.

¹⁹ Paragraph 1 of Annex 39 of the NAALC.

²⁰ Article 39(5) and 41 of the NAALC.

Table 4: Limits on Case Resolution by Type of Labor Violation

Labor Principle	Levels of resolution			
	Ministerial Consultation	ECE	Arbitral Panel	Fines and Sanctions
Freedom of association	X			
Right to bargain collectively	X			
The right to strike	X			
Prohibition of forced labor	X	X		
Elimination of employment discrimination	X	X		
Equal pay for women and men	X	X		
Compensation in cases of occupational injuries and illnesses	X	X		
Protection of the rights of migrant workers	X	X		
Child Labor	X	X	X	X
Minimum standards of employment	X	X	X	X
Prevention of occupational injuries and illnesses	X	X	X	X

Source: Author's data and analysis, <http://biacs-dspace.cide.edu/xmlui/handle/10089/17312>

In effect, the most important labor rights violations also have the most limited avenue for its redress. The analysis of the NAALC in this section also demonstrated that beyond collective rights issues, the NAALC process has targeted the collusion of labor officials in Mexico in the exercise of collective bargaining rights. Minimum standards of employment and health and safety issues continue to be important areas of interest in labor regulation in Mexico where case submissions allege that Mexico is not meeting its domestic commitments to enforce labor laws.

All of these criticisms are important to the extent that the majority of the cases filed at the NAFTA panels, almost two-thirds of all cases, have been filed on Mexico's practices to date. This means that the NAALC process has served to expose in large part Mexico's domestic challenges in promoting and protecting labor regulations, moreso than for the United States or Canada. To the extent that the proposed changes to the NAALC accord will serve to rescind the tiered resolution system, subject all labor violations to formal dispute resolution and possible trade sanctions, and potentially generate new rounds of case filings that target Mexican practices --especially around collective rights claims not previously open to dispute settlement—Mexico should be prepared to face new rounds of scrutiny of

its labor relations system under a new labor clause. This report analyzes the proposed changes to the NAALC, and what they portend for Mexico's interests, in the next section.

2. Proposals for a Labor Rights Clause in a Renegotiated NAFTA

Media accounts report that initial negotiations of the labor clause were discussed in the third round of meetings in Ottawa, Canada, from September 23 to 27, and that the U.S. team suggested an initial proposal that largely followed the labor chapter of the Trans Pacific Partnership (Patiño, 2017). This is not surprising, given that at one point all three states nominally accepted the labor proposal of that earlier accord, and that the eventual TPP text already met the standard for Congressional guidelines for labor enumerated in the Trade Promotion Authority bill of 2015 (TPA), under which NAFTA is also being negotiated.²¹ This TPA legislation guides the Office of the United States Trade Representative as to the minimum content and objectives that any trade accord must include to qualify for guaranteed consideration from the U.S. Congress (Beth, 2016). As such, it includes the outline for content on the U.S. proposal for the labor accord for NAFTA as well. The USTR publicized its set of negotiation objectives for NAFTA on July 17, 2017, which includes language on labor rights. The content of the proposals remain confidential until the full negotiation is completed, but because the final text of the labor clause must follow the requirements of the U.S. TPA to pass ratification, we can consult the TPA of 2015, the USTR objectives from July and the TPP text to create an accurate snapshot of what a renegotiated NAALC clause will include at minimum. This section presents the most important changes proposed to the NAALC based on those documents, discusses how a new proposal differs from the current labor clause and reviews some similarities, and discusses how the proposed changes will impact Mexico's interests and experience with the NAALC.

2.1. Labor Guarantees will be Incorporated into the Main Text

The first main institutional change, which is not controversial, is the proposal to incorporate the labor clause into the main text of the trade agreement itself. The source of this proposal is the USTR July 17 letter. As discussed above, that the labor and environmental guarantees of NAFTA were included as side agreements is an artifact of the negotiations process and its timing, not an indication of the status of labor rights in the agreement. However, by moving the labor rights guarantees into the text of the accord as a stand-alone chapter, as was done for all other labor clauses in U.S. trade agreements after NAFTA, the governments send a signal to actors within states that labor rights guarantees are of equal importance as investors' rights and commercial issues, and so is and their enforcement. When combined with the proposal to merge all dispute panels to a single panel, as discussed below, the importance of labor rights protections in the accord becomes clearer as these rights, like investors' rights and the commercial aspects of trade, will also be subject to dispute resolution. In sum, incorporating labor rights into the text of NAFTA sends a strong signal to domestic actors that labor rights enforcement now has an important consequence for trade, and may help Mexico reign in domestic opposition to labor rights enforcement efforts.

²¹ United States. Cong. Senate. 2015. *Bipartisan Congressional Trade Priorities and Accountability Act of 2015*. 114th Congress, S. 995.

2.2. From Eleven NAALC Labor Principles to ILO 1998 Labor Standards

The 2015 TPA states that all trade accords negotiated under its timeframe should promote respect for the internationally recognized core labor standards stated in the *1998 Declaration on Fundamental Principles and Rights and Work and its Follow Up of the International Labor Organization* (ILO, 1998). These include:

- Freedom of association and the effective recognition of the right to collective bargaining
- The elimination of all forms of forced or compulsory labor
- The effective abolition of child labor
- A prohibition on the worst forms of child labor
- The elimination of discrimination in respect of employment and occupation

The U.S. has resorted to using language on the ILO's 1998 Declaration to establish which rights are included in labor chapters for all trade accords since 2007. The TPA also requires trade partners to establish laws that protect and enforce these rights, as well as those that establish acceptable conditions of work with respect to minimum wages, hours of work, and occupational health and safety. What is important to note is that while most of the important labor principles of the NAALC are also included in the ILO core and the TPA additional rights, the rights of migrant workers by themselves as a separate category are omitted.

Nevertheless, the protection of the labor rights of migrants remains an important aspect of the NAALC process, particularly for Mexican migrant workers. Table 1 shows that to date, nine cases have been filed at the NAALC regarding the rights of migrant workers. Of these, 8 were filed against the U.S., and 1 against Canada, each about the rights of Mexican workers in those countries. While some of the cases were filed regarding whether labor rights guarantees extend to migrants that do not have the legal right to work, more recent cases were filed regarding abuses in the recruitment procedures of temporary work visa programs of both countries, that is, in legal work programs.

For example, the types of violations of worker's rights reported in the H2A/H2B visa cases filed against the U.S. include illegal payments of contracting fees by recruiters for visas, the withholding of passports and other documents by employers, payments of breach of contract fees in retaliation for leaving places of work because of poor working conditions, and blacklisting of employees for registering violations of terms of contracts. These types of violations are symptomatic of the specific vulnerabilities that migrant workers face in host countries because of their status as temporary workers.

While the labor rights violations that migrants most often face, such as violations of minimum standards, or discrimination, are included among the rights that will be included in a new labor clause, the resolution of issues specific to the labor migration programs currently in place in North America would be left without recourse under the new NAALC proposal. It is clear that removing specific language on the rights of migrant workers from the NAALC does not afford sufficient protection for the specific needs of the rights of migrant workers.

The NAALC process remains one area in which Mexico has leverage to use the case process as one tool to protect the rights of Mexicans working in North America. Clearly, maintaining an avenue to

continue to challenge the treatment of migrant laborers is in Mexico's best interest, but also in the interest of the U.S. and Canada, who should seek to improve labor conditions in their temporary employment programs.

Finally, the TPA also includes language around a *derogation clause*, which requires that states recognize that it is inappropriate to reduce levels of labor rights protections in order to promote exports or attract foreign direct investment.²² The TPA also includes language that states that all trade partners agree that a state's level of development does not substitute for appropriate levels of labor rights protection.²³ Taken together, these are additional, new areas that would be open for petition filings, as NAALC opens the complaints system up to any labor issue contained in the agreement. Finally, regarding forced labor, the TPP suggests that states refuse to import any goods produced with forced labor, which is again a new area for the NAALC.²⁴

2.3. Single Dispute Panels that will include all Labor Violations

In the current NAFTA dispute resolution structure, there are five separate panels for dispute resolution, of which the labor dispute process described in section one is but one (Hussain and Dominguez, 2015). The TPA of 2015 requires that the U.S. seek that labor obligations are subject to the same dispute settlement processes and remedies as other enforceable obligations in trade accords.²⁵ That means that in effect, labor rights disputes will be open to the same dispute resolution procedures as commercial disputes, and that the tiered system now in place would end.

The widening of the application of dispute settlement to include all labor violations, and the increase in enforcement measures by opening all violations to fines and trade sanctions, represents an important strengthening of the enforcement mechanisms of the labor accord, but presents serious additional risks to Mexico.

First, as noted above, in the current NAALC system cases on collective rights constitute the bulk of cases against Mexico, but these currently are closed to all types of resolution except Ministerial Consultations. In the new framework, violations of the right to association and collective bargaining would be open to formal dispute resolution mechanisms that can be resolved through fines and trade sanctions. This new scenario opens Mexico up to potential market disruptions through the filing of new cases against Mexico. One of the major critiques of the NAALC system has always been that the dispute panels do not go far enough in addressing the recurrent violation of collective rights in Mexico, because of this tiered design of case resolutions (Buchanan and Chaparro 2008). As a result, many unions turned away from the NAALC process, and this accounts for part of the decline of case filings over time (Hovis 1994). If the NAALC had improved enforcement powers, as portends with the new dispute process, it is probable that unions and non-governmental associations would return to the NAALC to file new cases on Mexico, with the intent of pushing Mexico towards greater respect for these rights, given the new recourse to trade sanctions. In effect, this change means that labor rights violations now pose a potentially serious disruption to Mexico's trade relationships.

²² TPA 2015, Section 10 (I).

²³ TPA 2015 Section 10 (II)B (ii).

²⁴ TPP, Article 19.6.

²⁵ Section II (H).

Second, the issue of fines incurred for labor rights violations is potentially costly to Mexico. While in 1994 the 7 percentage point fine on total trade mandated in NAFTA might have been insignificant, over the 24 years that NAFTA has been in effect, trade between Mexico and the United States specifically has grown exponentially, from 290 billion in 1993 to 1.6 trillion in 2016 (Mc Bride and Aly Sergie, 2017). In 2016, for example, total regional trade including Canada was valued at 4.5 trillion USD (World Bank, 2017). A fine of .007% then is no longer insignificant, but would represent at least 314 millions of dollars *per case*, should a panel find that Mexico was not enforcing its labor laws.

Third, sanctions, at least as envisioned in the TPP, are not targeted against the firms or even sectors of the economy where labor rights violations take place, again because the focus of the labor clause is on government actions, not the actions of individual firms. Trade sanctions would be levied across the total exports of a country in terms of assessing countervailing duties on a range of products, equal to the value of trade diversion of labor violations. While labor violations petitions must now also show the relationship to trade to qualify for a review, as discussed in more detail below, in effect, sanctions are applied to an economy overall, not sectors where labor violations occur, causing damage even to sectors and firms that enforce labor rights regulations, laws and standards. For example, if in the case of the violation of freedom of association rights in the garment export sector fines were levied at the end of a labor case, and then remained unpaid by the Mexican government, compensatory trade sanctions could be levied against Mexico’s best performing export sectors, which include automobiles, electronics and energy, which were not involved in the original case, and where labor rights violations may not have occurred.

Because it is the state that is ultimately responsible under the NAALC for allowing labor rights violations to continue to occur through the inability to enforce domestic laws, the political costs to a government from the private sector for allowing the labor violations actions that make threats of trade sanctions possible is high. This places the burden on governments and agencies to make a genuine effort to improve labor rights enforcement and advance the labor reform agenda to avoid these political and economic costs.

2. 4 Case Filings Must meet a “Trade Related” Threshold for Review

The 2015 TPA includes specific language around the standards that must be met in order that a case can be accepted for review by the NAALC panels. This language is:

“The principal negotiating objectives of the United States with respect to labor and the environment are—

to ensure that a party to a trade agreement with the United States...

does not fail to effectively enforce its environmental or labor laws, *through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the United States and that party* after entry into force of a trade agreement between those countries;²⁶”

²⁶ TPA 2015 Section 10 (A), and A II (iii).

While the norm that petitioners should show that the rights violations form a pattern of recurring violations to qualify for a review is not new to the NAALC, the trade related standard is not part of the NAALC today. It means that in order for a petition to enter into the dispute process, the case sponsors must demonstrate that the labor rights violations in the petition have had some demonstrated effect on trade itself.²⁷ This provision exists in other post-NAFTA labor clauses, most notably the CAFTA-DR labor chapter, where the interpretation of the trade-related standard by the USTR set a low threshold: in practice, petitioners only mentioned that labor rights violations were associated with the export sectors, and that was sufficient to qualify for a review (Nolan García and OConnor, 2017). However, after eight years of working with Guatemala to improve its labor court system under the CAFTA-DR clause, the USTR finally requested an Arbitral Panel. That panel ruled recently that the USTR had not met the trade-related threshold required by the accord, and ruled in favor of Guatemala, even though the panel also found that the Guatemalan government was complicit in severe violations of trade unions rights (Banks, Posner, and Ramírez Hernández, 2017). In effect, the technical standard overruled the substance of the case. This also suggests that the USTR is moving to a higher standard on the interpretation of the trade-related provision. Following this case, much criticism has surfaced on the inclusion of this language from U.S. Senators and others, and the need to leave it out (*Inside Trade*, 2017; Dias, 2017).

A larger issue that Mexico faces in the context of the renegotiation has been serious criticism on Mexico's low minimum wages, which is a potential area for applying the trade related standard. Mexico has faced serious criticism from unions in all three countries around the enormous wage differential between workers in the US and Canada on one hand, and Mexico on the other, often working in the same sector. For unionists, the charge is that Mexico's system of labor regulation, with its limits on freedom of association and collective bargaining, holds serious limits to authentic workers' representation, through which Mexican workers could bargain with employers for a decent wage equal to worker productivity even if that wage was still less than that of a Canadian worker. The issue for unions is not homologation of wages, but that Mexico complies with its own labor legislation, and puts an end to restrictive labor practices that limit the ability of Mexican workers to bargain for wage increases (Alcalde, 2017). To this end, the AFL-CIO and Mexico's Union Nacional de Trabajadores (UNT) recently signed a pact to work together to promote changes to the labor chapter that promotes compliance with collective rights, and includes minimum wage language that reduces the wage gap between NAFTA countries, where Mexican minimum wage stands at 7% of the minimum wage of the USA (Flores, 2017.)

The criticism of Mexico's wage policy is not misplaced: the official minimum salary registers below the national poverty line, (*Economist*, 2014) and only covers 84% of the basic basket of basic goods (*Sin Embargo*, 2017). It is this situation that prompted COPARMEX to file a formal letter with CONASAMI in October to raise the minimum wage by 19%, to 92.54 pesos per day, which would cover the basic basket of goods according to calculations by Consejo Nacional de Evaluación de la Política de Desarrollo Social (Coneval), but still do little to resolve the NAFTA wage gap (*Sin Embargo*, 2017). That the official minimum wage is set below the national poverty line (*Economist*, 2014), and minimum wages are still set by CONASAMI and other institutions, gives critics here and abroad plenty of ammunition to argue that it is government wage policy, not worker productivity, that keeps Mexican wages low (Porter, 2017; Elton, 2017; *Animal Político*, 2017). It is a short step to then convince a panel

²⁷ In the NAALC today, petitioners can file a claim on any aspect of labor rights in any of the three states, regardless of whether the labor issue is related to trade relations.

that these policies, combined with a labor regulations system recognized internationally as limiting the right to association, indeed have a major impact on the ability of workers to win wage increases (ILO CEACR, 2017). That is, critics will likely claim that Mexico’s comparative advantage in trade may be based in part on labor rights violations.

2.5. Institutional Similarities

A renegotiated labor clause should contain a number of similarities to the current NAALC process and institutions, in part because the TPA requires citizen participation, stakeholder inclusion, and arenas for cooperative activities in any trade-based labor clause. The USTR document notes some of these objectives, and includes language on creating “public advisory committees, as well as a process for the public to raise concerns directly with NAFTA governments” (USTR 2017, pp 12). These processes would most likely follow the current NAO system, though it is unclear how a public advisory committee would be introduced into the NAALC process, what its role would be, how it would be formed, and who would serve on such a committee. The NAFTA side accord for the environment provides some potential answers. Unlike the labor clause, the environmental clause includes a Joint Public Advisory Committee (JPAC), which serves to formally incorporate public views into the environmental agenda of that accord. Among its roles is to advise the trinational Commission for Environmental Cooperation (the counterpart to NAALC’s CLC) and the Council of Ministers (the counterpart of the Labor Secretariat) on aspects of environmental cooperation. It acts as a strategic partner to the Council, and works on behalf of the public to monitor the work of the council on implementing recommendations made in cases (Aspinwall 2013). Including a public advisory committee for labor would then strengthen the roles for the public in NAFTA beyond filing cases, to include consultative and oversight capacities.

In terms of a process for the public to raise concerns directly with NAFTA governments, this could refer to a new channel, like that included in the TPP, by which governments must open a channel for stakeholder concerns directly with their governments through a national labor advisory body.²⁸ This channel could be a separate institution than the NAO office currently included in the NAALC, as a new venue to raise concerns with the government where labor rights violations are taking place, and not in the NAO of a third party, as in the current agreement. This would allow national governments to investigate labor violations that contradict the terms of the NAFTA before cases are filed or come into the dispute system.

The USTR document also mentions the intention to establish a senior-level Labor Committee, which would most likely replicate the functions of the current Labor Secretariat in terms of oversight of the implementation of NAFTA labor commitments, and the coordination of cooperation on labor issues.

²⁸ TPP, Article 19.14, part 2.

3. Mexican Interests in a Renegotiated Labor Accord

It is important to identify where Mexico's interests lie in light of these proposed changes to the current NAALC processes and institutions. The last section of this report discusses how the proposals open Mexico to new risks, and offers recommendations on how Mexican policymakers can best protect Mexico's interests in the new system.

3. 1. Include the Labor Rights of Migrants in the Accord

The shift to include the list of rights in accordance with the ILO 1998 Declaration, and supplement that list with additional language on minimum standards of employment and health and safety guarantees is fully in line with the evolution of other post-NAFTA labor accords in U.S. trade, such as the U.S.-Korea, U.S.-Peru, U.S.-Panama and the CAFTA-DR trade accords.²⁹ Because reference to the ILO standard is included in the 2015 TPA, this standard will not change. Comparing the more inclusive NAFTA 11 principles to the ILO 1998 standard, only three areas remain outside a new accord: the right to strike, compensation in cases of occupational injuries and illnesses, and the protection of migrant workers. Setting aside the first two, the third is of most importance to Mexico.

The rights of Mexican migrants working in the U.S., and less so in Canada, have been an important concern under the NAALC. Half of the cases filed against the U.S. in the system have been filed on the rights of Mexican migrant workers. Of these 7, three concern violations of the terms of contracting under U.S. temporary visa programs, that is, the rights of migrants under legal work programs, while the others challenge wages, working conditions and other minimum standards issues of Mexican workers without legal status, and one case challenges directly whether workers enjoy equal protection under the law when working without legal migration status.³⁰

While the shift to the ILO 1998 standard would still allow for challenges on the violation of minimum standards issues faced by Mexican workers in North America -- whether they work with legal migration status or not-- the omission of specific language in the labor clause on the protection of migrant workers leaves out avenues of recourse to other types of violations not included in the ILO standards. They are violations of labor rights that are specific to programs for migrant labor, and would not fit into any other category of violation currently envisioned for the NAALC, thus leaving these key violations without recourse to dispute resolution.

There is no barrier to reinserting the migrants' rights language into the labor clause. Just as language on minimum standards of employment and health and safety will be included in separate language because these too are not part of the eight fundamental conventions that comprise the ILO 1998 Declaration, so to Mexico could suggest the reinsertion of rights of migrants into the accord in separate language. The TPA itself provides only a minimum content standard for the Congress, not the ceiling on what a labor clause could include, and as such there should be no limit to the inclusion of this language as parties establish the content of the chapter.

²⁹ Those accords were modeled in part from an earlier TPA that mandated a labor clause that was also based along the ILO 1998 guidelines.

³⁰ This is the 1998 Yale/INS case.

As demonstrated in section I, the NAALC process has largely been used against Mexico to challenge the shortcomings of the Mexican labor relations system and its agencies in enforcing what are nominally strong labor guarantees in the Ley Federal de Trabajo. The migrants' rights principle is important here in allowing Mexico and its allies to use the process to its advantage to find ways to better promote migrants' rights and protect our citizens and our workers when they are in U.S. territory.

3. 2. The Risks of the Single Dispute Settlement for Freedom of Association

The shift to include labor disputes into the main framework of dispute resolution on par with commercial disputes opens Mexico to serious new trade risks based on labor rights performance. While an additional new "trade related" standard will also be implemented as a threshold for accepting cases, Mexico should not count on deflecting charges here as cover to avoid the adjudication of new labor cases.

Mexico could keep in mind two forms of action:

All post-NAFTA labor clauses, including the TPP, include extensive channels for cooperative dialogue to resolve disputes prior to resorting to dispute mechanisms. Article 19.11 of the TPP, for example, sets out the steps by which governments may request Cooperative Labour Consultations on any aspect of the agreement, which are separate from the process of Labour Consultations by which cases may be adjudicated once filed. These two articles are meant to be used in conjunction to find cooperative solutions to labor rights issues as they arise, before any party resorts to dispute panels. Under the terms of Labor Consultations, parties must also submit to intermediate steps under the labor chapter, including the formation of a Labor Council, before requesting that the matter be removed to Chapter 28 Dispute Settlement. In short, the TPP expects prior steps and cooperative dialogue between parties before labor disputes become trade disputes.

Mexico could support the design of a new labor clause that includes these types of intermediate steps. Doing so would open channels for cooperative dialogue among North American partners that could potentially find solutions for the most important and recurrent labor rights violations. More importantly, the dialogue channels would afford Mexico time to complete domestic changes in implementation and enforcement that caused the violations to come to light in the first place. This would demonstrate to its North American partners the efforts Mexico is making to reform the industrial relations system, and award Mexico for progress rather than punish Mexico for violations, as long as progress is indeed made during those time periods. However, this solution is only a temporary solution.

A second, more permanent form of action that better protects Mexico's long-term interests here is to move forward on the 2016 labor reform. The reform that was presented on April 28, 2016, was aimed at modernizing Mexico's system of labor justice. Having passed both houses of Congress later that year, and a majority of state legislatures by 12 January 2017, the reform became law on 24 February 2017. Yet, the reform remains stalled while State and Federal institutions to replace the conciliation and arbitration boards are created, the Director of the decentralized registration agency that replaces the Federal CAB is nominated to the Senate, and implementing legislation is introduced at the Federal and State levels. While the deadline to complete these tasks is February of 2018, there is criticism from the U.S. that the reform process is moving too slow. Representative Sander Levin, member of the House Ways and Means Committee, recently stated that he believes that there will be little support for NAFTA from the Democratic Party if Mexico doesn't first make dramatic changes on

labor reform (*Inside Trade*, 2017). In the context of the labor accord renegotiation, many critics see the root of Mexico's low wages in relationship to violations of freedom of association and lack of collective bargaining. Progress on the 2016 labor reform, which has the intent of replacing the conciliation and arbitration system responsible for many of the limits on freedom of association – according to the ILO and other international observers--, would deflect criticism in this area and reduce the risk to Mexico of facing trade cases under the dispute panels for freedom of association violations.

Conclusions

This report has provided insight on three areas important for Mexico in considering the renegotiated labor clause of the NAFTA accord. It has first presented data on the case filing patterns over the life of the clause, with special attention to Mexico's experiences at the labor panels, to illustrate which cases have been filed, around which types of labor rights violations, from 1994 to 2016. The data analysis emphasized that over the time that the labor clause has been in force, the majority of all cases presented for labor disputes have been filed against Mexico. Moreover, these cases are largely concentrated around the right to freedom of association and collective bargaining, and a sufficient number of cases allege collusion by agents of the labor authorities, in particular by local representatives of the Juntas de Conciliación y Arbitraje, in limiting the exercise of these rights in Mexico.

A second section discussed a series of proposed changes that are most likely to be included in a renegotiated labor clause given the exigencies of U.S. trade law, which establish guidelines for USTR negotiating objectives in exchange for guaranteed consideration of a negotiated trade accord under expedited Congressional rules. The Trade Promotion Authority of 2015, under which the Trans Pacific Partnership was negotiated, and now NAFTA, establishes clear guidelines for the minimum content and institutions that any labor clause must include, and these guidelines formed the basis for the current analysis. Of these, the report discusses changes to the labor standards that should now be protected in a new NAFTA accord, the mandate to include the labor accord into the text of the final trade agreement rather than a side text, the adoption of a "trade related" standard for the review of labor cases, and similarities across the old and potential NAALC in terms of institutions and process.

The most important change that is discussed here in terms of Mexico's national interest however is the anticipated modification to aggregate the current dispute resolution panels into a single dispute system, including for labor disputes. As argued above, this change means that labor rights violations will be subject to the same dispute settlement panels as commercial disputes, which is not the case today under the tiered labor dispute system. This change will leave Mexico open to facing additional labor cases at the NAALC panels, and risks dispute settlement with real consequences for trade sanctions for labor rights violations for the first time for the violation of freedom of association and collective bargaining.

The last section provides guidance around three areas where Mexico's interests could be protected in the negotiation process. First, the discussion of the adoption of ILO fundamental labor standards plus language on minimum standards of employment and health and safety guarantees leaves out some specific protections for the rights of migrant workers. While the violations most often faced by Mexican migrants that emigrate and work without authorization in the U.S. and Canada would continue to be covered under the terms of a new clause, like wages and hours violations, health and

safety issues, or issues of conditions of work, violations of the rights of legal migrant workers would not be covered without specific rights of migrants' language attached to the accord. The rights violations of Mexican migrant workers that have participated in the temporary visa programs of the U.S. and Canada, including abuses in the recruitment system, illegal payments and fees, and blacklisting, would not be covered by the labor clause without the insertion of this language.

This report suggests that the risks to Mexico posed by the shift to the single dispute panel system are serious, and that a "trade-based" standard for case acceptance will not protect Mexico from avoiding trade dispute procedures for labor rights violations. While Mexico should support the inclusion of cooperative mechanisms prior to recourse to dispute panels as one way to promote domestic level compliance, the key issue is promoting compliance with the right to freedom of association and collective bargaining. The suggestion made here is to move forward with the processes left to complete with the 2016 labor reform at the State and Federal level. Key U.S. Senators have suggested that support for NAFTA from the Democratic Party is lacking in part because the labor clause still does too little to promote a fair wage in Mexico, and rightly criticize that Mexico's system of labor regulation limits collective rights, and is part of the reason for Mexico's low wages. Mexico should show progress on the labor reform prior to ratification to signal to its trade partners that it is making progress in both areas, not just to deflect criticism of its labor regulations regime, but to resolve some of the underlying reasons as to why the NAALC case process has singled out Mexico, thus reducing the risk of facing costly trade disputes for labor rights violations.

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