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STUDENT'S NAME: Nayeli Alejandra Torre De León
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DISSERTATION

Impact of Free Trade Agreements on Labour Rights: A Study of NAFTA and the New United States-Mexico-Canada Agreement (USMCA)

Name: Nayeli Alejandra Torre De León
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I. Introduction

Since the end of the last century, the process of globalization has been increasing, markets have started to open, and gradually a greater and faster trade between companies in different countries has been promoted.[1] This has influenced for many trade barriers to be removed and caused trade liberalization to emerge. Within this context, many States have found themselves getting involved into all types of commercial agreements, including free trade agreements. [2]

But globalization has also had adverse effects, specifically social, on an essential part of commerce, which is labour. Many trade agreements have placed greater emphasis on the rights of companies and have neglected workers rights. International norms have been created with the purpose of protecting companies and investments, but labour rights have been left as the responsibility of national legislations.[3]

Given that national law is not enough to protect labour rights when international trade is involved, in recent years, labour standards have been progressively integrated into trade agreements 'as part of trying to ensure that trade liberalization upholds or improves labour standards, rather than puts them at risk'.[4]

One of the most relevant recent free trade agreements is the one between the United States, Mexico, and Canada, the three countries that compose the North American continent. The North American Free Trade Agreement (NAFTA) through its parallel accord, the North American Agreement on Labor Cooperation (NAALC) was the first explicit incorporation of labour rights in a free trade agreement.

Currently, a process of renewal and updating is taking place with respect to NAFTA, with a new agreement, the United States-Mexico-Canada Agreement (USMCA). USMCA is waiting to be ratified by the United States and Canada, given that Mexico has already ratified the treaty.

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[1] Marlon M. Meza-Salas, 'Aspectos Laborales en los Tratados de Libre Comercio y Acuerdos de Integracion Regional: Entre Normas Internacionales del Trabajo y Clausulas Sociales en el Derecho Estatal, Inter-Estatal y Transnacional. Del NAFTA al TPP', (2017) 24 Miami International and Comparative Law Review 661, 665.
[2] Ibid.
[3] Marlon M. Meza-Salas (n 1) 673.
[4] ILO, 'Studies on Growth with Equity – Social Dimensions of Free Trade Agreements' (2013).

Regardless of the status of ratification of USMCA, the main focus of this investigation will be NAFTA, an analysis of it and how it should improve, and if the new agreement will follow these recommended changes. It should be taken into consideration that at the moment of this analysis there is a duality: NAFTA is currently in force, but USMCA has been ratified by one of the parties, and consequently, already has taken effect to such an extent that its repercussions can be analysed from the perspective of Mexican labour law. It should be noted that by the time a definite answer about the commercial relationship between these three States is announced, several scenarios should be in play. Either the United States and Canada do not ratify and USMCA is not enforced, USMCA gets ratified by the three parties and therefore replaces NAFTA completely, or, finally, no agreement is reached and the negotiations reach a state of limbo in which USMCA is not enforced but NAFTA is no longer active. If this last scenario were to happen, the commercial relations between the three North American countries would be at a crossroads. Given all of this, for the purpose of this research, both agreements will be analysed in parallel. NAFTA will not be discarded completely because it is what currently governs the commercial relation between these States, and neither will the USMCA since it might become the acting ruling treaty.

Since the purpose of this study is to evaluate the influence NAFTA has had on Mexican labour law, it will be an evaluation of one of the indirect effects of NAFTA. So, given that NAFTA's effects in this area (labour) are indirect, and because the data is inconclusive since NAFTA is still in force, conclusions are made with consideration and caution.[5] The analysis is independent of the possible outcomes that might come to happen, it will be geared towards the substance of both agreements.

The structure of the study will be as follows: Chapter 2 focuses on globalization, commercial agreements and the neglecting of the labour rights within these agreements, emphasizing on what is the base that international treaties should have with regards to labour rights, and the necessity of having a social dimension. Chapter 3 touches the topic of the International Labour Organization (ILO), the role it has as it is the main global organism that deals with labour rights, and its control mechanisms, their effectiveness, and how this impacts the need to have a social clause in free trade

[5] Ranko Shiraki Oliver, 'In the Twelve Years of NAFTA, the Treaty Gave to Me..What, Exactly: An Assessment of Economic, Social, and Political Developments in Mexico since 1994 and Their Impact on Mexican Immigration into the United States' (2007) 10 Harvard Latino Law Review 53.

agreements. Chapter 4 deals with the behaviour of commercial agreements with labour law and labour standards. NAFTA and NAALC are discussed in this chapter. Chapter 5 will talk about the influence of NAFTA on Mexican labour law before, during, and after NAFTA. An analysis of NAALC's influence will be provided in this chapter as well. Chapter 6 discussed the new North American trade agreement, its description, the impact it has had on Mexican labour law, a comparison between NAFTA and USMCA, and an analysis of whether the USMCA is a step back or forward from NAFTA. Finally, Chapter 7 will present the concluding thoughts.

II. Globalization and commercial agreements: Free Trade Agreements and Regional Trade Agreements

We often hear the term ‘globalization’ as one of the main influences in our political, economic and social life, therefore making an impact in law and industrial relations. According to Harry Arthurs, it has a different connotation. He establishes that when making reference to the term, you could be talking about an integrated system of business arrangements across international borders that focuses on the movement of a vast quantity of goods, services, information and capital between international borders, ‘with low friction and high velocity’. But it can also be considered as a technological, political (often referred to neo-liberalism) and/or legal system.[6]

From the 1980's onwards, the globalization process has been accelerating due to great changes in the world as well as technological development.[7] As mentioned by Anam Ullah, globalization has had such an impact that the ‘dominant nation state-based economic model’ has begun to crumble due to its effect and advances.[8] Markets have been opened, and gradually a greater and faster trade between companies in different countries has been promoted. As a consequence of this and the expansion of large multinational companies, an environment of greater competitiveness has been generated. This puts pressure on less advanced or localized companies in less developed countries to try to catch up with these large companies, subjecting themselves many times to 're-industrialization' processes as described by Marlon Meza-Salas.[9] The ‘re-industrialization’ process requires for companies to adapt to modern production processes and reorganize their production structure, including retraining their workforce.[10] This is considering that, in the end, the objective is to produce goods or offer services at the lowest possible cost to be considered competitive. In Anam

[6] Harry Arthurs, 'Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture' (2001) 22 Berkeley Journal of Employment & Labor Law 271, 274.
[7] Robert Howse and Makau Mutua, ‘Protecting Human Rights in a Global Economy - Challenges for the World Trade Organization’ (1999) 1999 Human Rights in Development Yearbook 51, 53.
[8] Anam Ullah, ‘Garment Industry in Bangladesh: An Era of Globalization and Neo –Liberalization’ (2015) 10 Middle East Journal of Business 14, 15.
[9] Marlon M. Meza-Salas (n 1) 665.
[10] Ibid.

Ullah (2015) it was cited that globalization drives large companies to seek great performance at a low cost.[11]

Alongside these effects of globalization, many trade barriers have also been removed and trade liberalization has emerged.[12] It is within this context that many States have been pushed to sign and get involved into all types of commercial agreements, bilateral and multilateral, to make international commerce easier.[13]Despite the fact that transnational investment and technology are considered crucial for globalization, free trade agreements are the ones that represent 'the terms under which globalization is to be accomplished'.[14]

The responsible body for certain of the aforementioned international commercial agreements is the World Trade Organization (WTO), whose main purpose is to regulate trade barriers and 'help liberalize trade'. The WTO does this by providing a forum for the negotiation of binding trade agreements and settling any disputes, as well as providing the necessary mechanisms to help enforce the previous mentioned agreements.[15] As established before, globalization's main impact has been the construction of commercial blocs within nations. As part of the WTO, a classification of different commercial agreements exists, but for the purpose of this study, the focus will be on Preferential Trade Agreements.

The WTO establishes, as one of its principles, the Most-Favourable Nation (MFN) clause, which means that in agreements submitted under the WTO, normally, there should be no discrimination between trading partners. If a States is granted a special favour, the rest of the WTO members should be treated the same.[16] When it comes to the MFN clause, the WTO permits some exceptions. For example, Members can create a free trade agreement, in which case there is discrimination to products that come from the outside given that the free trade is in relation to the

[11] Anam Ullah (n 8) 15.
[12] Marlon M. Meza-Salas (n 1).
[13] Ibid 666.
[14] Ranko Shiraki Oliver (n 5).
[15] 'What is the World Trade Organization?' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm>.
[16] WTO, 'Principles of the trading system' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm>.

goods that are traded within the group.[17] Preferential Trade Agreements (PTAs) are also an exception to the MFN principles, by which all WTO Members are committed to impose on the same non-discriminatory tariff one another.[18] It is important to differentiate the two Preferential Trade Agreements: Free Trade Areas (FTAs) and Customs Unions (CUs). FTAs have free trade between the members. In addition to having the same things as the FTAs, Customs Unions (CUs) have a 'common external tariff or, strictly, common trade policy toward excluded countries'.[19]

However, in the last decades, due to globalization and the ongoing evolution the WTO, international trade and investment law have gone through, a new aspect impacting them has become paramount in their respective trade agendas: human rights. The WTO has had more international pressure to incorporate human rights into its agenda, including into its PTA's.

Even though human rights violations have been an issue in the global agenda way before this period of rapid economic integration, 'the growing number of sectors covered by multilateral trade and investment agreements' have caused new human rights abuses that have not been properly addressed.[20] Although it may seem as international trade and human rights are unrelated, the reality is different. Given that, during the last decades, awareness towards globalization arose, concern regarding the need for 'fair trade' and social justice at an international commercial level also began to emerge. This brought up as a consequence the necessity to deal with the 'social dimension' of international trade.[21]

a. Necessity of having a social dimension

The rise of free trade and universal human rights regimes comes as an aftermath of war. Yet, these two phenomena have developed 'on parallel, separate, and sometimes inconsistent tracks'.[22]

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[17] Ibid.
[18] WTO, 'The WTO and preferential trade agreements: From co-existence to coherence' (2011) <https://www.wto.org/english/res_e/booksp_e/anrep_e/wtr11-2a_e.pdf>.
[19] L. Alan Winters, 'Preferential Trade Agreements: Friend or Foe?' in Kyle W. Bagwell and Petros C. Mavroidis (eds), *Preferential Trade Agreements: A Law and Economics Analysis* (Cambridge University Press 2011) 11.
[20] Robert Howse and Makau Mutua (n 7).
[21] Marlon M. Meza-Salas (n 1).
[22] Robert Howse and Makau Mutua (n 7).

The French iuslaboralist, Alain Supiot, mentions that 'the elimination of trade frontiers has led to a [...] transformation of the forms of work organization on a world scale. [...] The elimination of trade borders also affects the balance of forces on which social justice is based.'[23]

Current challenges involve how to bring harmony between trade and human rights regimes since they need not to be conflicted. After all, with the continuous globalization it is important to eliminate human rights violations such as exploitation, exclusion and discrimination. Since, as said before, trade is the key factor that drives globalization, it is crucial that at least the rules that govern it promote and protect human rights and not oppose them.[24]

The International Court of Justice has recognised human rights "not only individual rights but also, in case of universally recognised human rights, *erga omnes* obligations of governments based on treaty law and general international law" [25]. The problem has not been solely from the WTO and it being deficient on the conceptualisation and application on human rights, but similarly, "in most worldwide organisations, human rights have not yet been effectively integrated into multilateral rulemaking and policies are not effectively protected through worldwide adjudication", as States also find interest in pushing back a humanitarian agenda.[26]

It is necessary to 'attack' the adverse effects that globalization has brought and put globalization at the service of society and not at the service of specific interests of certain groups with economic or political power. Indeed, there have been collateral effects, specifically social, that have affected an essential part of commerce, which is labour. Trade agreements, especially free trade agreements, have placed greater emphasis on the rights of companies and have treated workers' rights as residual, meaning that they are not always included in FTA's. That is to say, international norms have been created with the purpose of protecting companies and investments, but labour rights have been left as the responsibility of national legislations.[27]

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[23] Alain Supiot, 'Conferencia de Apertura del XXI Congreso de la Sociedad Internacional de Derecho del Trabajo y la Seguridad Social: ¿Qué Justicia Social Internacional en el Sigo XXI?' (Ciudad del Cabo, 15 september 2015).

[24] Robert Howse and Makau Mutua (n 7) 56.

[25] Ernst-Ulrich Petersmann, "Constitutional Economics, Human Rights and the Future of the WTO", Aussenwirtschaft 2003 < https://ideas.repec.org/a/usg/auswrt/2003580147-92.html > 32.

[26] ibid, 33

[27] Marlon M. Meza-Salas (n 1) 673.

According to Harry Arthurs, there have been several ways in which globalization has had an effect on labour law. First, globalization has changed the world's perspective towards labour law and labour policy. Governments have accepted that better benefits will come to those countries whose labour policies are perceived as 'business friendly'.[28] Arthurs describes two models that are mainly adopted by governments to pursue, that can be seen as welcoming for investors: one whose main target is, through economic structural alterations, to reduce 'wage-driven inflation' that will decrease returns on investment, and the other intends to protect workers' rights but has difficulties renovating labour laws that intend to do so.[29]

Second, now there is more competition, internationally, between workers. It is easier for employers to decide between producing locally with local workers, abroad with foreign workers or seeking outsourcing altogether, thus creating more competition for jobs. This way there is a higher temptation for corporations to search for jurisdictions with low labour standards to lower production costs.[30] The issue is that this competing group of workers contains workers from different sovereign nations, which do not form part of a federal union; therefore it is more difficult to have them under the same legal labour regime.

Third, globalization has debilitated the relationship between employees and employers and, as a result, weakened the 'whole notion of community of interest' between workers. It has become more difficult for workers to identify with common adversaries, expectations, and strategies, among other things.[31] Lastly, even though workers manage to confront the previous difficulties, sometimes they have to face systematic difficulties due to inconsistent rules in the labour law system. Even in countries and companies that have common or similar legal protections, these systematic difficulties are terrible, for example when dealing with companies that operate in different jurisdictions.[32]

In summary, globalization has made national law not enough to target and satisfy all the needs of the great amount of labour activities, weakening 'the political legitimacy and practical effect

[28] Harry Arthurs (n 6) 281.
[29] Ibid.
[30] Harry Arthurs (n 6) 282.
[31] Bob Hepple, 'A Race to the Top - International Investment Guidelines and Corporate Codes of Conduct' (1999) 20 Comparative Labor Law & Policy Journal 347, 351.
[32] Harry Arthurs (n 6) 283.

of national labour law'. With this, it has frustrated the development of new labour law systems that would answer the needs of transnational economic activity.[33] For these reasons it is considered a necessity to deal with the social dimension of international trade, especially in free trade agreements, to set a basis for national labour law.

b. Minimum base for trade agreements

The WTO has some standard set of obligations that are adopted by its members that do not allow them to take any discriminatory approach and treatment of products between each other's markets.[34] Yet, as previously mentioned, there are some provisions that are exceptions to this general rule, such as the Most Favourable Nation and National Treatment clauses.[35] Moreover, it is forbidden for members to 'impose restrictions, other than those permitted under GATT, on imports or exports'.[36] Still, the text of the GATT does not explicitly mention human rights as basis to impose these restrictions or exclude products. Nonetheless, Article XX sets up exceptions by which it authorizes WTO members to take measures against States that violate human rights. In other words it promotes and protects them.[37] These special circumstances include, within others, measures to protect public morals, human, animal, plant life or health as well as measures relating to the products of prison labour, and the implementation of any of these will not constitute 'arbitrary or unjustifiable discrimination […] or a disguised restriction on international trade'.[38]

Although these measures allow States to substantiate their arguments, in certain cases, under human rights violations, it does not mean that all universal rights are included; it is something that needs to be established directly in each FTA. International treaties and conventions have a direct judicial effect solely on the States that are part of it, that sign it.[39]

[33] Ibid 284.
[34] Robert Howse and Makau Mutua (n 7) 66.
[35] General Agreement on Tariffs and Trade (GATT) 1994, Art. I (1) and Art. III.
[36] Robert Howse and Makau Mutua (n 7) 66.
[37] GATT (n 35), Art. XX.
[38] Ibid.
[39] Harry Arthurs (n 6) 286.

Regarding international labour rights, there is conflict on whether those States that do not comply with 'core labour standards' should remain as WTO members. The issue is, ironically, that some of these members that seek to remain as part of the WTO have not ratified the International Labour Organization's compendium of Conventions that are the basis or are where 'core labour standards' are taken from.[40]

The International Labour Organization (ILO) is a tripartite organization formed by trade unions, governments and companies, and part of the United Nations. Since 1919, the ILO 'has maintained and developed a system of core labour standards' to promote opportunities for women and men to obtain a decent work, in an environment of 'freedom, equity, security and dignity'. This, following that in the current globalized economy, international labour standards are a key component in the international arena to ensure that the growth of the global economy brings with it positive consequences for all.[41]

The ILO, in 1998, adopted the Declaration on Fundamental Principles and Rights at Work (ILO's Declaration). It entrust Members to 'respect and promote principles and rights in four categories, whether or not they have ratified the relevant Convention'.[42] These core labour standards categories are laid out in eight different Conventions: freedom of association and the effective recognition of the right to collective bargaining (Conventions 87 and 98), prohibition of forms of forced and compulsory labour (Conventions 29 and 105), abolition of child labour or the establishment of minimum age of employment (Convention 138 and 182), and equal remuneration and elimination of discrimination respect employment (Conventions 100 and 111).[43]

The above are considered the core labour standards that every government, company and trade union should look for, respect and fight for. Therefore, these are considered to be the minimum base that trade agreements should include, given that they are already included and accepted within the WTO.

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[40] Ibid.
[41] ILO, 'Introduction to International Labour Standards', <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/lang--en/index.htm>.
[42] ILO, 'ILO Declaration on Fundamental Principles and Rights at Work', <https://www.ilo.org/declaration/lang--en/index.htm>.
[43] 'ILO Declaration…' (n 42); see also Harry Arthurs (n 6) 286.

c. States' Sovereignty conflict

The principle of national sovereignty states that every individual State is free and has the right to 'enact and enforce' its own laws without the intervention of any foreign nation.[44] Usually, there are two types of sovereignty recognized: internal and external. The internal points out that each State has the main power within its borders, meaning there is no higher authority that can perform any action inside its limits. Externally, each State is considered as equal to other States, despite their differences. Both types relate because none of them allow intervention, it is their 'guiding principle'.[45]

Nowadays there are numerous treaties and institutions regarding universal and regional human rights. Without differentiating between those whose mandate is simply to monitor, promote compliance or enforce human rights, this set of norms and institutions has drastically changed the previously held international concept of state sovereignty, which came to grant the States the impunity regarding internal misconduct.[46]

In international law, the term sovereignty has been transformed. Within Kurt Mills' research (1997) he cited a publication of W. Michael Reisman. He identified that although the term is in use in international legal practices, in modern international law it means something different. Although international law still defends sovereignty, its main concern and prime thing to defend is the 'people's sovereignty rather than the sovereign's sovereignty'.[47] So, there has been a reconceptualization of the term were States are now incorporating human rights and are, as well, willing to respond to protect these rights within a global framework.[48]

Human rights do not negate nor should threaten States' sovereignty, but they do limit sovereignty in important aspects. National law is not replaced by international law, instead,

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[44] Harry Arthurs (n 6) 283.
[45] Kurt Mills, 'Reconstructing Sovereignty: A Human Rights Perspective' (1997) 15 Netherlands Quarterly of Human Rights 267, 268.
[46] Robert Howse and Makau Mutua (n 7) 57.
[47] Kurt Mills (n 45) 278.
[48] Ibid.

international law guides sovereign States over the internationally accepted human rights. Yet, in many cases it is up to the States to implement the aforementioned norms into their domestic law.[49]

As established in several constitutions and political processes, the will of the people is guaranteed by sovereignty, which eventually leads to the creation of national law. However, this principle interferes with the harmonization of different States' labour laws, in other words with the creation of an international or trans-border labour law.[50]

There is currently a process of internationalization of labour rights promoted by States, international organizations and multinational companies through minimum rights. There has been a need to address the 'social dimension' of international trade by giving this dimension to free trade agreements and trade integration agreements.[51] When dealing with these issues, one enters into the conflict of States' sovereignty (with the exception of the European Union that does have labour rights for the community). There is a difficulty in harmonizing the substantive labour law between countries. [52] When States are faced with a problem involving different national jurisdictions, sovereignty heightens that conflict; it is a source of the systematic difficulties previously mentioned.[53]

Mills concludes that 'the State as a sovereign entity is not going to disappear anytime soon.' Nevertheless, there are a number of different types of sovereignties that are moving the world.[54] The State has stopped to be the sole entity that claims authorities over citizens, citizens and humans in general have power towards the State too. The human rights issue will continue to raise questions regarding to what extent can international organizations or other States intervene?

III. Need for a Social Clause in Trade Agreements

a. ILO's Role

[49] Robert Howse and Makau Mutua (n 7) 57.
[50] Morley Gunderson, 'Harmonization of Labour Policies Under Trade Liberalization', (1998) 53 Industrial Relations 24, 35.
[51] Marlon M. Meza-Salas (n 1).
[52] Ibid.
[53] Harry Arthurs (n 6) 283.
[54] Kurt Mills (n 45) 289.

Placing responsibility and protection of workers' rights has had its resistance within some countries as well as within the WTO framework. The organism responsible for developing agreements regarding labour rights concerns is the International Labour Organization (ILO). The ILO has promulgated over 177 conventions on labour standards that address general labour rights issues as well as 'detailed standards in particular industries'.[55] Founded in 1919, ILO is the only tripartite U.N. agency which aims to bring together the three factors of labour relations: government, employers and workers of the 187 member States. The purpose of bringing them together is to 'set labour standards, develop policies and devise programmes promoting decent work for all women and men'.[56]

The ILO achieves its goal through three main bodies where governments', employers' and workers' representatives are part of: (i) the International labour Conference which is 'often called an international parliament of labour' given that it is responsible of setting the international labour standards and policies, and also is a forum for discussion of key questions; (ii) the Governing body, which is the executive council that establishes ILO policy, programme and budget, for later submission to the Conference; and (iii) the International Labour Office 'is the permanent secretariat', it is the focal point for the general activities of ILO.[57]

The ILO's most important assignment is to develop, promote and monitor international labour standards. Currently, they have created 189 Conventions that are legally binding and globally applicable, as well as 206 non-binding Recommendations with the aim to regulate labour conditions.[58]

Representatives of governments, employers and workers, formulate Conventions and Recommendations, and once they are considered possible International Labour Standards, they are adopted at the ILO Conference.[59] For the purpose of this paper, the focus will be mostly on Conventions, which are those that would have mandatory application when the following conditions

[55] Robert Howse and Makau Mutua (n 7) 68.
[56] ILO, 'About the ILO', < https://www.ilo.org/global/about-the-ilo/lang--en/index.htm> accessed 16 August 2019.
[57] ILO, 'How the ILO works', < https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang--en/index.htm> accessed 16 August 2019.
[58] Werner Sengenberger, 'The International Labour Organization: Goals, Functions and Political Impact' Friedrich Ebert Stiftung, 9.
[59] ILO, 'Conventions and Recommendations', <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> accessed 16 August 2019.

are also met: (i) it has been ratified by the country in question; (ii) that such ratification has been deposited with the International Labour Office, and 12 months have elapsed since the deposit; and (iii) that the Convention has entered into force.[60]

Sergio López Bohle and Sebastián Ugarte Gómez's research describes the 'three stages in developing labour regulation' applicable to ILO.[61] First, ILO has to develop and promote universal labour standards with the objective of ensuring that appropriate work is created, and with it, economic growth and development. It is difficult to achieve consensus from all Member States, yet the majority of them have ratified most of the core labour standards (CLS). Second, the ILO monitors compliance of the standards 'by developing reports, supervising and securing conformity of their application with the ILO's committees.'[62] The last role of ILO is, when there is lack of compliance of the standards, to apply sanctions and remedies. According to the research, this is the 'most polemic step' since there is no general agreement on the nature of the sanctions that are to be applied.[63]

b. ILO's Supervisory Mechanisms

International labour standards are supported by a supervisory system or mechanism, which is considered unique on an international level.[64] This system helps promote and verify the application of the Conventions and Recommendations, following their adoption by the International Labour Conference and ratification of Member States.[65] If there are any problems in the application of standards by Member States, the ILO attempts social dialogue and technical assistance.[66]

There are two kinds of supervisory mechanisms. The first called 'Regular system of supervision' and 'Special procedures'. The first, also called periodic or routine supervision,[67] consists

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[60] Marlon M. Meza-Salas (n 1) 717.
[61] Sergio López Bohle and Sebastián Ugarte Gómez, 'Analysis and Critical Assessment of the Role Played by the International Labour Organisation (ILO) in Developing and Securing Core Labour Standards' (August 2015) 10 Horizontes Empresariales 65, 66.
[62] Ibid.
[63] Ibid.
[64] ILO, 'ILO supervisory system/mechanism', < https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm> accessed 8 July 2019.
[65] Marlon M. Meza-Salas (n 1) 717; see also Ibid.
[66] ILO, 'ILO Supervisory…' (n 64).
[67] Marlon M. Meza-Salas (n 1) 717.

of reports that are made on ratified conventions, non-ratified conventions and recommendations (on compliance with the obligation to submit to the competent national authorities and the difficulties that prevent or delay the ratification of certain Conventions), which the ILO requests ex officio their member states and the latter respond using forms.[68]

The regular system of supervision is based on the examination by two ILO bodies, the Committee of Experts on the Application of Conventions and Recommendations, and the International Labour Conference's Tripartite Committee on the Application of Conventions and Recommendations.[69] The role of the first is to 'provide an impartial and technical evaluation of the application of international labour standards in ILO Member States'.[70] This evaluation is of the report provided by governments every three years on the measures they have taken regarding their national law and practice to implement any of the eight fundamental and four governance Conventions that they have ratified.[71]

On the other hand, the Special, unlike the Regular system of supervision, involves the submission of a representation or a complaint (in either of the three procedures that exist).[72] The procedures related to the also called 'Non-Regular supervision' may be urged by a Member State or derive from the action of third parties against a Member State, and may be Representations, Complaints in general or a special procedure for complaints regarding freedom of association (under that respective Committee).[73] Representation procedure pursuant to Articles 24 and 25 of the Constitution of the ILO, is exercised by an industrial association of workers or employers against a

[68] Ibid.
[69] ILO, 'Applying and promoting International Labour Standards', <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang--en/index.htm> accessed 8 July 2019.
[70] Ibid.
[71] ILO, 'Committee of Experts on the Application of Conventions and Recommendations', <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm> accessed 8 July 2019.
[72] ILO, 'ILO supervisory system/mechanism' (n 64).
[73] Marlon M. Meza-Salas (n 1) 718.

Member State for failure to comply with any Convention ratified by it. Representations are presented to the ILO Governing Body.[74]

Differently, Complaints in accordance with articles 26 to 34 of the ILO Constitution are exercised by one Member State against another, for the lack of compliance with a Convention that both have ratified, also can be exercised by a delegate to the International Labour Conference or the Governing Body on its own initiative.[75] After the complaint is received, the Body establishes a Commission of Inquiry responsible for executing a full investigation, verifying the facts and issuing 'recommendations on measures to be taken to address the problems raised by the complaint'.[76] It is important to note that a Commission of Inquiry is contemplated to be the 'highest-level investigative procedure' and therefore is set up in very specific occasions such as when a Member State is 'accused of committing persistent and serious violations and has repeatedly refused to address them'.[77] The Governing Body intervenes when a country ignores or fails to fulfil the recommendations from the Commission of Inquiry. Article 33 of the ILO Constitution states

> [i]n the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.[78]

According to the ILO, this Article was enforced for the first time in 2000 in the Myanmar case where the Governing Body, in order to end the use of forced labour, asked the International Labour Conference to take action towards that country.[79] This case will be further addressed in the next section.

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[74] ILO, 'Representations', < https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/representations/lang--en/index.htm> accessed 8 July 2019; see also Meza-Salas (n 1) 718.
[75] ILO, 'Complaints', <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/complaints/lang--en/index.htm> accessed 8 July 2019.
[76] Ibid.
[77] Ibid.
[78] ILO Constitution, Article 33 <https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#A33> accessed 8 July 2019.
[79] ILO, 'Complaints' (n 75).

Furthermore, and taking into account the importance of issues related to freedom of association, there is a special procedure for Complaints on the violation of freedom of association, of which there is a special body called the Committee on Freedom of Association (CFA), under the Governing Body. Like ILO, it is also a tripartite body. The CFA was created in 1951 and its main function is "examining complaints of violations of freedom of association, whether or not the country concerned had ratified the relevant Conventions"[80], which are presented mainly by national and international trade union organizations.[81]

A common element to all ILO control mechanisms, whether regular or non-regular, is that generally they resolve with the issuance of a report or conclusions where the measures that should be taken are stated. This can range from setting a later date to examine the matter, or asking the government in question for explanations, to transferring the issue for the study of a Commission of Inquiry that will end with the submission of a report, among other measures.[82] A Commission of Inquiry is usually set up when a member State persistently commits serious labour violations to the ratified Conventions which are binding for them, and has not addressed them, meaning there is a clear reluctance to assume the complaints.[83] It is perhaps the highest level of investigation procedure in the ILO.[84]

In the final report issued by the control body in question, after following the applicable procedure, in general, the sanction (if any) ends up being of a moral nature, using excessively diplomatic, subtle and excessively polite language.[85] This may lead for example, to making a claim public or making the response sent by a government public, and in the best case the conclusive reports that are issued will contain recommendations addressed to the denounced country's

[80] ILO, 'Committee on Freedom of Association', <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm> accessed 8 July 2019.
[81] Meza-Salas (n 1) 719.
[82] Ibid.
[83] ILO, 'ILO Governing Body decides to appoint Commission of Inquiry for Venezuela', < https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_622567/lang--en/index.htm> accessed 16 August 2019.
[84] Meza-Salas (n 1) 719.
[85] Fabrizio Onida, 'Labour standards and ILO's effectiveness in the governance of globalization' (July 2008) 218 Centro di Ricerca sui Processi di Innovazione e Internazionalizzazione, 12.

government, where they are "invited", "requested", or in extreme cases "urged" to take certain measures.[86]

In case of non-compliance there are no sanctions, neither economic nor of any other type, since the sanctioning system of the ILO is persuasive or dissuasive, not punitive or repressive. No ILO body has a jurisdictional character and therefore it is not possible to enforce its decisions coercively.[87]The aforementioned claims and complaints can only be attempted against States that have ratified the Convention that has been violated, except when it concerns complaints about violations of freedom of association, which can be known independently that the State has ratified.[88]

c. Effectiveness of ILO's Norms and Controls

There have been, however, several critics towards the ILO. First, the broadness and diversity of the activities it manages has raised questions regarding the lack of focus on the workers' essential human rights in a globalized economy. Secondly, the Labour Organization requires formal, effective mechanisms for dispute settlement and enforcement.[89] Analysts claim that given the fact that the recommendations mentioned above are not legally binding, it is left at the discretion of the governments of Member States to decide to follow them or not, and are left 'unpunished' for their violations.[90]

When evaluating the applicability of ILO's CLS it is important to consider that these are part of a soft law instrument. Therefore, there is criticism towards the ILO for 'not being more effective in re-enforcing the standards'.[91] Yet, the CLS are not the only soft law instruments. Other instruments are similar such as the U.N. Global Compact, the OECD guidelines for multinational companies and codes of conduct.[92]

[86] Meza-Salas (n 1) 721.
[87] Ibid.
[88] Ibid.
[89] Robert Howse and Makau Mutua (n 7) 68.
[90] Sergio López Bohle and Sebastián Ugarte Gómez (n 61) 69.
[91] Ibid 67.
[92] Ibid.

The authors enlist several elements to consider for the evaluation of the effectiveness of ILO's supervisory mechanisms. Since the majority of Member States have ratified the eight core conventions, it is easier to apply the 'methods of public exposure' that ILO uses to enforce compliance of this ratifications. [93] Given that ILO's sanctioning system is persuasive or dissuasive, relying on a participative decentralized system, they confide on 'moral suasion' dialogue, with conciliation and co-operation as last resource to enforce labour standards.[94] Yet, as for the monitoring aspect, there is some criticism around the exact definition of CLS, reliable sources of information, and international mechanisms to monitor standards. Nevertheless, they estimate the actions and performance of the CFA have made major improvements to social justice, particularly in developing countries' trade unionists' persecutions.[95]

In general terms, it is important to distinguish between the effectiveness of possible sanctions and incentives, which in both cases the ILO cannot directly impose since they are beyond its direct capacity. However, the Organization can take measures to pressure governments.[96]

As established before, ILO does not have 'direct sanctioning powers', therefore it can only ask the respective governments to enforce the Recommendations they give, by 'making special reference to specific clauses in bilateral or regional free trade Agreements (e.g. NAFTA, Mercosur)' or towards programs that were enacted by international organizations such as the IMF, the World Bank or even the WTO.[97] The settlement instruments and recommendations vary from administrative sanctions such as fines, to other with major economical repercussions such as trade and/or financial sanctions. The aim of these is to discourage the government lacking proper compliance with essential labour standards from tolerating and/or supporting labour rights reported abuses.[98]

One of the most significant cases was that of Myanmar (Burma). A Commission of Inquiry had been assembled to determine whether Myanmar complied with the obligations under Convention 29. They found that 'there was "abundant evidence" that the Myanmar authorities made "pervasive

[93] Fabrizio Onida (n 85) 11.
[94] Ibid.
[95] Sergio López Bohle and Sebastián Ugarte Gómez (n 61) 75.
[96] Fabrizio Onida (n 85) 11.
[97] Ibid 12.
[98] Ibid.

use" of forced labour'.[99] For that reason, the Commission issued some recommendations that the country fail to act upon. Therefore, given that Myanmar failed to act and follow the given recommendations, restrictions were applied to the country in 1999 and 2000. The restrictions were based on article 33 of ILO's Constitution and it was the first time in history this article was invoked.[100] The recommendations included Myanmar's legislation to be modified (particularly the Village and Town Acts) to comply with Convention 29 (ratified by the country); stop the imposition of forced labour by the authorities (military); and for penalties to be appointed, for the contribution to forced labour, to those found responsible after a thorough investigation and prosecution.[101] It was not until 2013 that the ILO voted to lift all remaining restrictions on Myanmar after analysing the progress the country has made. It also tells other ILO members to help by contributing with financial support for elimination of forced labour. Likewise, the Conference proposes the Governing Body to examine Myanmar's situation regarding other ILO activities such as 'the impact of foreign investment on decent working conditions in the country'.[102] This has been a successful case in which ILO's recommendations have been actually applied and have improved the labour quality of a country.

On the contrary, there are some who conclude that there is no 'truly general and acceptable conclusion' with respect to the effectiveness of sanctions given that ILO does not have foreign policy instruments, and the impact that the Organization really has is only identifiable case by case.[103] However, the active role ILO has in terms of 'monitoring and technical assistance' that promotes collaboration between governments and employer organizations is considered as one of the most effective conditions that are found in trade agreements to reach improvement of labour conditions.[104]

Additionally, and considering everything previously exposed, for López Bohle and Ugarte Gómez, ILO's actions have been good in securing and developing core labour standards, yet they

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[99] ILO, 'ILO lifts remaining restrictions on Myanmar' (June 2013), <https://www.ilo.org/ilc/ILCSessions/previous-sessions/102/media-centre/news/WCMS_216355/lang--en/index.htm> accessed 16 August 2019.
[100] Ibid.
[101] ILO, 'ILO Governing Body opens the way for unprecedented action against forced labour in Myanmar' (November 2000), < https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_007918/lang--en/index.htm> accessed 16 August 2019.
[102] ILO, 'ILO lifts remaining…' (n 99).
[103] Fabrizio Onida (n 85) 13.
[104] Ibid 14.

consider that the system could improve through cooperation of all social actors involved.[105]They give several recommendations in which the system could improve. First, they suggest involving employers and social actors more actively, for they can have influence in incorporating CLS into corporate codes of conduct. Secondly, address the matters involving international labour principles in national debate, for it is more probable to generate change if the public, social stakeholders and media are involved. Third, they consider the incorporation of a social clause in trade agreements as extremely important. But they recognize that this has been a topic that has aroused discussion, yet they acknowledge 'humans and institutions need enforcement through penalties to react upon non-compliant behaviours'. Additionally the WTO should take a bigger involvement, including social justice in their agreements. Fourth, improve the reach of ILO's actions and methods regarding new forms of working like subcontracting, and finally also increase the coverage of the increasing informal sector workers.[106]

d. A Social Clause

As a result of trade growth, there has been, for several years, a continuing debate as to whether or not labour right and international trade should be linked. This interest originated due to the existence of certain countries with cheap labour, with low levels of labour protection and social security, or with both. The specifics of each country's development or economic conditions are considered to be the cause of this labour rights violations. If these are not considered the originators, another probable cause would be the 'deregulatory and flexible measure' that were brought up to the labour market by many countries with the 'intention' of helping local companies confront the challenges of globalization or authorize them to be more competitive in that environment.[107]

Trade and labour are linked in different ways. There are two main approaches that support the linkage argument: human rights-based approach and a competition-based approach. Those who are advocates of the competition-based idea make their arguments around unfair competition and a

[105] Sergio López Bohle and Sebastián Ugarte Gómez (n 61) 75.
[106] Ibid.
[107] Meza-Salas (n 1) 679.

race to the bottom theory.[108] It states that countries with lower labour standards have lower production costs, and consequently they have a competitive advantage. In this manner, potentially, other countries will race to also lower their standards with the purpose of reducing their production costs 'allowing them to remain competitive and attract foreign investment'.[109]

One of the main reasons core labour standards were established was, according to Christine Kaufmann, 'the fear that low labour standards might reduce the cost of labour and subsequently lead to what some scholars call a "race to the bottom".'[110] This view defends that companies favour lower protection for labour environments, therefore, if they find it necessary, they change production locations abroad where they find lower labour costs.[111]

The race to the bottom also promotes what is known as 'social dumping', which is an economic crime. It involves unfair competition based on exploitation and low wages of workers, to lower production costs and offer more competitive prices.[112] Harald Grossmann and Georg Koopmann provide a general definition of social dumping:

> Unlike conventional dumping which means selling abroad below cost or at lower prices than charged in the home market, 'social dumping' refers to costs that are for their part depressed below a 'natural' level by means of 'social oppression' facilitating unfair pricing strategies against foreign competitors. Remedial action would either consist of the offending firms consenting to raise their prices accordingly or failing that, imposing equivalent import restrictions.[113]

Excessive social dumping would be considered the solution and a relief since it would cut down important pressure for change in the company. With the dumping, companies intend to, and

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[108] Junlin Ho, 'The International Labour Organization's Role in Nationalizing the International Movement to Abolish Child Labor' (2006) 7 Chicago Journal of International Law 337, 343.
[109] Ibid.
[110] Christine Kaufmann, *Globalisation and Labour Rights: The Conflict Between Core Labour Rights and International Economic Law* (Hart Publishing 2007). *Accessed 18 August 2019*, <search.ebscohost.com/login.aspx?direct=true&db=nlebk&AN=216492&site=ehost-live>, 169.
[111] Ibid.
[112] Marlon M. Meza-Salas (n 1) .
[113] Harald Grossmann and Georg Koopmann, 'Social Standards in International Trade: A New Protectionist Wave?' in Andras Inotai and Harald Sander (eds), *World Trade after the Uruguay Round* (1996) 115, 116.

sometimes are able to, 'keep their profits high without structural, skill or technological advance'. In a short period, this could undermine a competitive economy and encourage inefficient organisation.[114]

The continuous social dumping and race to the bottom between companies in the same sector, could lead to a downward spiral of development which would threaten not only the economy, with the already noticed competitive composition, but also 'the positive values on which welfare states are based'.[115] This race to the bottom of labour protections is one of the reasons for 'organized labour's objections to further trade liberalization'.[116] Therefore it is important those trade unions and their movements (and with the help of society), adopt a principled attitude to social dumping in order to fight it on several levels.

The 'race to the bottom' does not only affect and is not only unfair to the companies that do not engage into these practices, but it also has great repercussions on workers since it promotes a violation of their labour rights. For this reason, the inclusion of a 'social clause' into international trade agreements is proposed, to address this dangerous price competition which has been controversial, imposing minimum standards within the framework of liberalization of trade.[117] A social clause is considered to be any rule, legally binding or not, that tends to set social protection minimums at international level, and may impose sanctions if any of the parties involved fail to follow them.[118]

As accepted in the United Nations' Guiding Principles on Business and Human Rights, when talking about the responsibility that companies have in relation to respecting human rights, it refers to those that are internationally recognized.[119] These last are, at least, those human rights in international documents like the ones expressed in ILO's Declaration and the International bill of Human Rights.[120]

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[114] Bo Rönngren, Malte Segerdahl and Martin Viredius, 'The Worth of Work – the fight against social dumping in the transport industry' (2008) Nordic Transport Workers' Federation, 9.
[115] Ibid.
[116] Christine Kaufmann (n 110) 237.
[117] Haoqian Chen, 'Social Clause in Trade Agreements and China's Experience' (2015), 6 Beijing Law Review.
[118] Marlon M. Meza-Salas (n 1) .
[119] United Nations Office of the High Commissioner, 'Guiding Principles on Business and Human Rights' (2011) 13.
[120] Ibid.

Stephen Joseph Powell and Trisha Low discuss an ongoing argument about the relationship of human rights, specifically labour rights, and international trade, where some human rights and labour lawyers argue that certain labour laws are essential to 'human dignity'. The reaction of the WTO was to renew its commitment to 'the observance of internationally recognized core labour standards'.[121] Yet it was declared that the task of identifying the core labour standards corresponded to the ILO and not to the WTO.[122]

Labour rights may be divided into two: procedural and substantive rights. Substantive rights consist of rights regarding minimum wages, maximum limit for working hours, and health and safety regulations. In the other hand, procedural rights consist of, mainly, the right to collective bargain and union formation.[123]

As previously described, the ILO's Declaration establishes four categories for core standards through eight conventions. Some of these core standards fit into substantive rights, as well as the procedural rights. The ILO considers these standards to be universal and therefore applicable to all people and member countries, 'regardless of the level of economic development'.[124] Although ILO's (1998) core labour standards are considered universal, they are taken into practice very differently across countries.[125]

The countries with the highest income and economic situation are the ones who fulfil them the most. Even so, the causality between labour standards and economic growth is disputed. This means that the fact that better labour standards exist and are supported does not necessarily cause economic growth. [126] Strategies that rely on exports to have economic growth encourage developing countries to stop the process of improving labour standards. Following this idea, these developing countries opt for low labour standards through cheap labour (with child and/or forced labour) generating with it a competitive advantage over other countries that do meet labour standards, since

[121] Stephen Joseph Powell and Trisha Low, 'Beyond Labor Rights: Which Core Human Rights Must Regional Trade Agreements Protect' (2012) 12 Richmond Journal of Global Law and Business 91, 153.
[122] ibid.
[123] Ibid 152.
[124] Jean-Marc Siroën, 'Core labour standards and exports' (2012) Université Paris Dauphine, 3, *Accessed 18 July 2019* <https://hal.archives-ouvertes.fr/hal-01488570>.
[125] Christine Kaufmann (n 110) 171.
[126] Jean-Marc Siroën (n 124) 2.

by having lower production costs, they can offer lower prices.[127] This has been one of the biggest problems in trying to implement a social clause.

According to Erika de Wet, most employers and developing countries' governments consider a social clause as protectionism in disguise that would have the goal of cost equalization.[128] Opposite and equally important, several industrialized countries like the United States, certain European countries, and some trade unions, among others, claim that this is not the case. They have defended that a labour or social dimension (clause) included in trade agreements would help globalization continue without causing any negative impact or at the costs of worker's rights, on the contrary, it would help eradicate 'the most flagrant violations of working'[129] and enforce international labour standards.[130]

The protectionist point of view contemplates that a social clause could have protectionist aims to prevent countries with low production costs from obtaining a competitive advantage that comes from their low wage costs. They believe this clause would push developing countries to artificially increase their production labour costs, 'leading toward an increasing emphasis on capital intensive investments, an aggravation of the dualism of their economies, and a reduction of their employment growth-rate'.[131] However, protectionism would be counterproductive because it does not save many jobs but it is an expensive process, and it is considered a devastating action for the economy.

For the social clause to be effective, the type of labour standards is the aspect to take into consideration, not necessarily the number of norms included. That is, standards have to be accessible enough that there would be no need to force unaffordable standards onto countries.[132] Considering this, the standards that are most often mentioned are those included in the ILO's Work Declaration. Most of the Conventions that are included in the Declaration 1998 could be considered of having certain universality, 'a necessary element of an international social clause', given the fact that those

[127] Ibid.
[128] Erika de Wet, 'Labor Standards in the Globalized Economy: The Inclusion of a Social Clause in the General Agreement on Tariff and Trade/World Trade Organization' (1995) 17 Human Rights Quarterly 443, 444.
[129] Ibid.
[130] ILO, 'Studies on…' (n 4).
[131] Erika de Wet (n 128) 449.
[132] Ibid.

Conventions have been ratified by a great number of countries, and could therefore be used as minimum standards for the clause.[133] Although declarations are not subject to ratification, they are intended to have a wide application and contain symbolic and political undertakings by the member States.[134] Moreover, the Declaration commits ILO Member States to protect these standards regardless of whether they have ratified the conventions.[135]

Nonetheless, those who oppose the social clause may argue that because an international declaration with its conventions, that has had good recognition, is already handling labour rights, there is no necessity for the WTO to address them as well.[136] Erika de Wet describes an answer with two aspects, the first being the Declaration and Conventions are subject to 'moral pressure', meaning the ILO does not impose economic sanctions or of any other kind that are not moral.[137] Therefore, a clause in the WTO that does provide for sanctions, would 'complement and strengthen the pressure' of the Conventions.[138]Second, international labour standards should be considered much more than human rights issues that in consequence must be dealt by human rights instruments. These standards are also labour and trade matters, thus are ILO and WTO concerns and should cooperate in this regard.[139]

Several laws have been passed, in different states, with the purpose of granting preferences to certain countries, considering for example the degree to which their workers enjoyed acceptable working conditions or not, the right to organize and collective bargaining, within others. This is not exactly a social clause, but it is a beginning towards the establishment of one. For instance, in Europe, the protection of labour rights is highly important, to the point that one of the requirements for membership in the Council of Europe is respect for core labour rights.[140] The main focus will be on the Generalized System of Preferences.

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[133] Ibid 453.
[134] ILO, 'ILO Declarations', <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/jur/legal-instruments/WCMS_428589/lang--en/index.htm>.
[135] ILO, 'Introduction…' (n 41).
[136] Erika de Wet (n 128) 455.
[137] Marlon M. Meza-Salas (n 1) .
[138] Erika de Wet (n 128) 455.
[139] Ibid.
[140] Christine Kaufmann (n 110) 194.

The GSP gives market access on a preferential basis to developing countries. It has, as established by the European Commission, three main objectives. First, assist in the eradication of poverty by exporting more from developing countries. Second, 'promote sustainable development and goods governance', and third, guarantee that the EU's economic and financial interests are protected.[141] In addition, the European Union expects beneficiary countries to practice the United Nations human rights and the ILO conventions.[142] It is crucial, for the promotion of core labour rights, that social initiatives are created under the GSP.

Since the GSP adopted in 1994 was not as successful as it was thought it would be, in 2002 a new GSP scheme entered into force. The special incentive arrangements were not giving the results that were predicted at the time of the creation in 1994, so the new scheme aimed to make these arrangements more attractive.[143] The aim of the new GSP was to double the general preferences, but specifically in relationship to the definition of core labour standards, the new scheme made reference to the ILO's 1998 Declaration. Therefore, those beneficiary countries that commit 'serious and systematic' violations could encounter the risk of losing their status.[144]

[141] 'Generalised Scheme of Preferences' (*European Commission,* 28 March 2019) <http://ec.europa.eu/trade/policy/countries-and-regions/development/generalised-scheme-of-preferences/index_en.htm> accessed 28 April 2019.
[142] Ibid.
[143] Christine Kaufmann (n 110) 197.
[144] European Commission, IP/01/828, accessed 20 July 2019 < https://europa.eu/rapid/press-release_IP-01-828_en.htm>.

IV. NAFTA and Mexico

a. Investment and commercial agreements, behaviour with labour law and standards

The relationship between trade liberalization and human rights is something that has been in the international agenda, mainly by order of NGOs. Developing countries, when dealing with core labour rights, discuss that if they adhere to higher labour standards, they risk losing their competitive advantage.[145] As an opposite argument, NGOs and some developed countries insist that trade liberalization is not a controversy that should take into consideration solely the economic aspects, but also, fundamental human rights, including core labour rights, should be taken into account, for they are deeply important.[146]

Due to globalization, there has been an increase of emerging transnational corporations (TNCs) leading to competition in the international market where free movements of goods and cultural communication are significantly common and are becoming increasingly strong.[147] Many of those TNCs seek to move their manufacturing factories offshore to some developing countries, such as India, Vietnam, China or Bangladesh, drawn by the much cheaper labour and less strict labour policies. This, in order to enjoy the cost advantage in global competition due to the gradually opening policies and the reduced transportation cost. This phenomenon leads to a 'race to the bottom', which means that countless TNCs pursue the maximum profits by hiring low-wage employees.[148]

The relationship between trade and labour is undeniable. 'Unfair labour practices' can deteriorate free trade, which is opposite to the goal of free trade, as it was recognized by the WTO and ILO in the Work Declaration. Free trade incites all nations to produce those goods and services in which they have a 'comparative advantage', so that the production of those goods and services turns out to be efficiently. In this way free trade maximizes the wealth of all states. The comparative advantage can be due to external factor such as climate or natural resources, as well as internal factors like it being the result of accumulated expertise and investment.[149]

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[145] Christine Kaufmann (n 110) 232.
[146] Ibid.
[147] Haoqian Chen (n 117).
[148] Ibid.
[149] Stephen Joseph Powell and Trisha Low (n 121) 152.

The human rights-based approach of the linkage between labour and trade perceives violations to the core labour standards, which were established by the ILO and the 1998 Declaration as fundamental human rights violations.[150] By imposing a trade-labour linkage, nations are protecting those that are exploited in countries that infringe the core labour standards, including the protection of children that are forced into labour. When dealing with child labour, the human rights-based argument seems to have more importance, 'particularly with regard to the worst forms of child labour'.[151]

The prevailing controversy over the relationship between trade and labour rights, and the fact that there is no such thing as a global labour law (since it is considered 'local, plain and simple')[152] are reasons for which there are many and varied approaches to the issue of regulation.[153] Consequently, each country adopts in a different manner the transnational labour regulations to which each State had committed.[154]

Some countries and/or economically integrated regions have created provisions that unilaterally link their trade and investment policy with respect for minimum or internationally recognized labour rights. This kind of measure is often criticized because they do not derive from consensual obligations, from a negotiation between two or more countries, but are imposed unilaterally, usually by stronger industrialized countries on weaker countries who, in order to export products or services must assume the conditions imposed on them.[155]

Likewise, it is frequently denounced that these measures are dictated by the most advanced countries with a hidden protectionist intention, disguised under an apparent concern for the social problems of third world countries. For some, the fact that the measures are accompanied by sanctions would confirm their protectionist purposes.[156] The importing country is internally obliged to protect its own workers as a consequence of the increase in exports from countries that have a comparative

[150]Ibid 152.
[151] Haoqian Chen (n 117) .
[152] Harry Arthurs (n 6) 274.
[153] Christine Kaufmann (n 110).
[154] Ibid.
[155] Marlon M. Meza-Salas (n 1) 685.
[156] Ibid.

advantage of owning a cheaper labour force. That is why importing countries implement positive and negative measures: in the first case, providing a benefit to the country that complies by allowing access to its products and services to their local market, and in the second case, through the application of sanctions which include the loss or suspension of privileges or preferences, or even the prohibition of importing goods from that country.[157]

b. The North American Free Trade Agreement

In 1984, a concern to structure an international agreement between the North American countries (United States, Mexico and Canada) arose in the United States, due to the passing of the Trade and Tariff Act under President Ronald Reagan.[158] Five years after the Trade and Tariff Act was passed, the United States and Canada consolidated their commercial relationship, entering into the Canada – U.S. Free Trade Agreement. It was the first North American agreement that dealt with free trade between two countries, aiming at the 'elimination of barriers to trade in goods and services'.[159] Nonetheless, the Canada-U.S. Agreement got suspended in order to create a new treaty, this time including Mexico. The Presidents of the United States and Mexico George H.W. Bush (U.S.) and Carlos Salinas de Gortari respectively, with the Canadian Prime Minister Brian Mulroney signed the North American Free Trade Agreement (NAFTA) on the 17 of December 1992.[160] But, it was until the 1st of January 1994 that NAFTA entered into force.[161]

According to NAFTA's Article 102 there are six declared objectives for the treaty. These objectives were elaborated taking into consideration National Treatment and Most – Favoured Nation principle.[162] They include:

> (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties; (b) promote

[157] Ibid 686; see also Erika de Wet (n 128) 455.
[158] Nicole Downey Moss, 'Labor Violations in Mexico: Can New Trade Agreements Effectuate Change' (2017) 48 University of Miami Inter-American Law Review 98, 112.
[159] Ibid.
[160] Foreign Trade Information System, 'Canada-Mexico-United States (NAFTA)', <http://www.sice.oas.org/TPD/NAFTA/NAFTA_e.ASP> accessed 10 August 2019.
[161] Ibid.
[162] North American Free Trade Agreement (NAFTA) 1994, Art 102.

> conditions of fair competition in the free trade area; (c) increase substantially investment opportunities in the territories of the Parties; (d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory; (e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and (f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.[163]

In simple words, NAFTA's purpose was to stimulate economic growth and create an alliance between the North American countries. It was planned for it to encourage job growth, promote the three Parties' economies, and increase imports.[164]

NAFTA has fulfilled one of its initial purposes, increasing free trade between countries in the trilateral relationship.[165] It is estimated that 'trade among the NAFTA countries has tripled since the agreement's signing', therefore Mexican trade has been considerably expanded.[166]

Despite this, NAFTA failed to address and provide provisions that focused on protecting labour and environmental rights, as most other trade agreements at the time of the creation of NAFTA failed to do as well.[167] To change this need, the member countries signed two cooperation agreements, one labour and the other environmental in order to ensure compliance with labour standards as environmental.[168] The two parallel accords that where included as part of NAFTA were: the North American Agreement on Labor Cooperation (NAALC) and the North American Agreement

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[163] Ibid.
[164] Anne Sraders, TheStreet, 'What is NAFTA? History, Purpose and What It Means in 2019', < https://www.thestreet.com/politics/nafta-north-american-free-trade-agreement-14651970> accessed 10 August 2019.
[165] Nicole Downey Moss (n 158).
[166] Ibid.
[167] Ibid.
[168] Pablo Lazo Grandi, 'Los acuerdos comerciales y su relación con las normas laborales' (February 2010) 5 International Centre for Trade and Sustainable Development, 8.

on Environmental Cooperation (NAAEC).[169] For the purpose of this research, NAALC will be the agreement for study.

c. North American Agreement on Labor Cooperation

As briefly mentioned before, the NAALC was incorporated into NAFTA at the last moment.[170] This was due to the public concern towards NAFTA during President Bill Clinton's campaign, regarding the absence of labour provisions.[171] To deal with the public's concern, the United States suggested the NAALC. It was also proposed in pursuance of NAFTA's aim to protect and enforce labour rights, but the U.S. required, as a condition, for Mexico and Canada to comply with the proposed labour agreement.[172] It was the first explicit incorporation of social rights into an FTA or Regional Integration Agreements (RIA), long before it was done in the Andean Community (CAN) and the Southern Common Market (MERCOSUR), which are much older trade agreements.[173] Through NAALC, each of the three signatory countries committed to protect, improve and strengthen the basic rights of workers.[174]

The NAALC makes the three North American countries commit on 'subjects that go well beyond the Core Labour Standards (CLS)', for instance: the right to strike (but not specifically union rights), equal pay for all men and women, social security protection and benefits regarding job accidents and illnesses, protection for immigrant workers, among others.[175] The labour agreement prevented noncompliance with these standards or commitments through the imposition of fines. Amongst the first and most common controversies that have risen since the implementation of NAALC have been complaints filed by U.S. unions claiming violations of union organization rights from Mexican companies.[176] Another example was the accusation from a Mexican unions coalition,

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[169] Foreign Trade Information System (n 160).
[170] Fabrizio Onida (n 85) 7.
[171] Nicole Downey Moss (n 158) 113.
[172] Ibid.
[173] Marlon M. Meza-Salas (n 1) 759.
[174] Ibid.
[175] Fabrizio Onida (n 85) 7.
[176] Patrick Grady and Kathleen Macmillan, *Seattle and Beyond: The WTO Millenium Round* (Global Economics Ltd. and International Trade Policy Consultants, Inc. 1999), 115, *Accessed 18 September 2019*, < https://ideas.repec.org/p/pra/mprapa/2989.html >.

supported by some American unions that accused 'the Washington state apple industry of violating the rights of Mexican apple pickers and threatening their health and safety'.[177]

Furthermore, certain authorities and agencies were established to be able to monitor compliance with what was agreed upon, as well as to lead with some controversy, if any, between the nations, their organizations or between corporations. This includes a Commission for Labor Cooperation, a dispute settlement mechanism and a National Administrative Offices in each of NAFTA's countries.[178]

Additionally, Annex 1 of the NAALC sets as labour principles, guidelines that the Parties agree to promote, under the conditions established by their respective national legislation. [179]

i. Principles

The following principles only express general areas of concern that the Parties agreed upon, and where each Party has developed its own legal framework (laws, regulations, procedures and practices) to protect their respective workforce:[180]

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

[177] Ibid.
[178] Ibid.
[179] Pablo Lazo Grandi (n 168) 9.
[180] North American Agreement on Labor Cooperation (NAALC) 1994, Annex 1.

11. Protection of migrant workers[181]

Primarily, the first three principles can fit into a general category of collective social rights. NAALC promotes the right workers have, without any obstacle, to form and/or join any organization they choose. The purpose of these groups would be to defend the workers' common interests.[182] Following this, the protection of organized workers to freely intervening in collective bargaining, regarding their working conditions, and to strike to defend their collective interests is also sought.[183]

Moreover, the Parties agreed on prohibiting and abolishing any type of forced labour, except for those that they (internally) consider as compulsory such as 'military service, certain civic obligations, prison labour not for private purposes', as well as any imposed work aimed at fighting emergencies.[184] They also agree on establishing restrictions to the employment of children, contemplating factors that could endanger the young persons in their physical, mental and moral development. Therefore, requirements include schooling and safety conditions.[185] Complementing the previous information, Annex 1 contemplates in general the establishment of 'minimum employment standards'. For instance, whether or not minimum wages and overtime pay for all wage earners without distinction belong to collective agreements.[186]

Principles seven and eight focus mainly on the abolishment of employment discrimination and the respect for equal pay for men and women. Elimination of discrimination on the basis of race, religion, sex, age, or other grounds, yet with some understandable exceptions like 'bona fide occupational requirements…or rules governing retirement ages', among others.[187] With regards to equal pay, Annex 1 establishes the principle of equal pay for equal work to be applied.[188]

Lastly, the final three principles focus on occupational injuries and illnesses, and migrant workers. The Parties should define and enforce standards and compensations to decrease

[181] Ibid.
[182] Ibid, Annex 1 (1).
[183] Ibid (2) and (3).
[184] Ibid (4).
[185] Ibid (5).
[186] Ibid (6).
[187] Ibid (7).
[188] Ibid (8).

occupational injuries and illnesses, and if necessary, compensate workers or their dependants if an accident or fatality occurs within the workplace.[189] With respect to migrant workers in a Party's territory, provide them the same legal protection as if they were nationals from the Party, concerning working conditions.[190]

The Parties agreed to form, each, a National Administrative Office (NAO) in order to guarantee the compliance with the eleven principles. The intention was for the Office to 'serve as a point of contact between the national governments'.[191] Each NAO has, between other functions, that of reviewing each country's labour law and judge whether the Party has complied or not with the obligations with which it committed to under NAFTA.[192] Additionally, each NAO has the power to bring complaints to NAALC's Commission on Labor Cooperation.[193]

ii. Three Levels of Protection

Within the particular guidelines of the NAALC, mechanisms and procedures are provided for complaint processing and control that differ, in application, depending on the labour rights involved.[194] Depending on the complaint, the NAO offices can suggest three ways, three levels of protection, to address the issues.

In the first level of protection, there is the already mentioned NAO that forms part of each Ministry or Secretary of Labour in each of the three countries.[195] Its main function, complementing what was previously described, is to receive national complaints against another NAFTA member, [196] which can request consultation with another NAO and may proceed to submit the matter to a ministerial review.[197] This implies the obligation of the consulted government to respond to the consultant to clarify the problem posed.[198]

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[189] Ibid (9) and (10).
[190] Ibid (11).
[191] Nicole Downey Moss (n 158) 115.
[192] Ibid.
[193] Ibid.
[194] Marlon M. Meza-Salas (n 1) 761.
[195] NAALC 1994, (n 180) Art 15.
[196] Ibid Art 16.
[197] Ibid Art 22.
[198] Marlon M. Meza-Salas (n 1) 761.

In the second protection level, if an issue has not been resolved through the aforementioned consultations, the matter is submitted to an evaluation by a Committee of Experts, also known as the Evaluation Committee of Experts (ECE), created for this purpose.[199] The ECE is composed of persons who are outside NAALC's mechanisms, and are selected from a list drawn up in consultation with the ILO and/or from a list drawn up by the Parties.[200] The Committee is in charge of analysing, taking into account the Agreement objectives, 'patterns of practice by each Party in the enforcement of its occupational safety and health or other technical labor standards', and afterwards, formulating conclusions and recommendations on the issues in question. [201]

Finally, the last protection level has specific subjects that it is allowed to cover. It only deals with violations of rights connecting to child labour, minimum wages, and health and safety in the workplace.[202] In addition to ministerial review and consultation or evaluation by an independent Committee of Experts (ECE), which the two previous levels settle, in case of non-compliance with the agreed action plans, the matters can be submitted to arbitration where an arbitration panel could order possible sanctions.[203] In this process, it is the only case in which sanctions can be applied under the NAALC.[204]

With respect to sanctions, under the Monetary Enforcement Assessment (Annex 39), they cannot be greater than twenty million dollars or 'its equivalent in the currency of the Party complained against'.[205] This money would go to a common fund intended to finance an action plan to improve the labour law enforcement and/or solve the lack of compliance with labour regulation the denounced country faces.[206] Another sanction would be the suspension of tariff benefits derived from the Agreement, meaning a commercial sanction.[207] The suspension would be, if the monetary contributions have not been paid, equivalent to this limited amount. Also, the complaining Party 'may

[199] NAALC 1994, (n 180) Art 23.
[200] Ibid Art 24; see also Marlon M. Meza-Salas (n 1) 761.
[201] Ibid Art 23.
[202] Ibid Art 27.
[203] Ibid.
[204] Meza-Salas (n 1) 761.
[205] NAALC 1994, (n 180) Annex 39.
[206] Ibid.
[207] Meza-Salas (n 1) 762.

increase the rates of duty on originating goods of the Party complained against'.[208] This possibility of tax collection is only applicable between the U.S. and Mexico.[209]

Two important commitments of the NAALC should be noted: each Party should constantly strive to improve its labour laws so as to guarantee high labour standards, in relation to jobs with high quality and productivity coefficients[210] and, on the other hand, to promote compliance with said legislation and ensure its effective application.[211]

NAALC focused on the implementation of national labour laws and had an initial poor reception from major U.S. and Canadian unions.[212] The disagreement was because NAALC did not provide a permanent central body to repair the breaches of obligations and sanctions only guaranteed with respect to the laws relating to child labour, health and safety at work and minimum wage, since only these principles were subject to an eventual arbitration panel.[213] Collective rights issues, on the other hand, were only subject to ministerial consultations because deadlines contemplated in the agreement were very long. The Confederation of Mexican Workers (one of the most important Mexican unions), contrarily, did express its satisfaction for the Agreement and for the respect of national sovereignty.[214]

[208] NAALC 1994, (n 180) Annex 41b.
[209] Pablo Lazo Grandi (n 168) 9.
[210] Ibid; see also NAALC 1994, (n 180) Art 2.
[211] Ibid.
[212] Pablo Lazo Grandi (n 168) 9.
[213] Ibid.
[214] Ibid

V. Influence of NAFTA on Mexican Law

a. Labour law before NAFTA, during and after

The Mexican Revolution 1910 caused the creation of a new Constitution in 1917 ("the Constitution"), which included articles that established and protected workers' rights.[215] This Constitution is currently in force. It was one of the first Constitutions in the world to establish the right of labour to organize, strike, receive compensation for workplace accidents, as well as give details about workers' rights. Therefore it would later on serve as a model for progressive constitutions around the world.[216]

In general, Article 123 of the Constitution has included, since its origins in 1917, details about the protection of employees with respect to employment agreements, rights after termination, severance pay, wages, working hours, working ages and employee safety, within others.[217] In compliance with the rights of the workers detailed in the Constitution, the Mexican legislative branch established the first Federal Labour Law in 1931.[218] These laws that were enacted after the Revolution where 'intended to be worker friendly'.[219]

The laws must be amended according to the changes that arise in society, such as custom, economic conditions, industrial development, etc., in order to adapt this law to the prevailing needs.[220] Following this, the Federal Labour Law of 1931 underwent various reforms and as a consequence the new Federal Labour Law of 1970 was created, which currently governs.[221]

In 1994, as mentioned earlier, Mexico entered NAFTA, as well as NAALC. The NAALC's main function is to help engage NAFTA countries to enforce their own labour laws, but the NAALC

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[215] Pedro Cisneros, 'Free Trade's Effect on Mexican and Brazilian Labor Law: Mexico's Reluctance to Relinquish Power Debilitates Workers' Access to Remedy' (2013) 5 Creighton International & Comparative Law Journal 76, 77.

[216] Library of Congress, 'The Mexican Revolution and the United States in the Collections of the Library of Congress: The Constitution of 1917', <https://www.loc.gov/exhibits/mexican-revolution-and-the-united-states/constitution-of-1917.html>, accessed 10 August 2019.

[217] Constitución Política de los Estados Unidos Mexicanos (CPEUM) 1997, Art 123.

[218] Pedro Cisneros (n 215).

[219] Ibid 78.

[220] Patricia Kurczyn Villalobos, Derechos humanos en el trabajo y la seguridad social. Liber Amicorum: en homenaje al doctor Jorge Carpizo McGregor (UNAM, Instituto de Investigaciones Jurídicas 2016) Accessed 18 September 2019, <https://archivos.juridicas.unam.mx/www/bjv/libros/8/3684/12.pdf> 267.

[221] Ibid.

does not require a change in the labour standards of the respective Party nor does it interfere with the labour laws of that country.[222]

In the twenty-five years of the existence of NAFTA, there is controversy around how positive the effects of this trade agreement have been in Mexico. Official statements, given by the NAFTA's parties, tend to analyse and view the agreement in a very positive way.[223] The official reports do not give a 'balanced consideration of NAFTA's effects'; instead, they concentrate on NAFTA's successes.[224] Therefore, this study attempts to make a more unbiased analysis, concentrating on the more indirect effects, primarily the social and political effects of the trade agreement, specifically on Mexican labour law. Considering that NAFTA's effect in this area (labour) is indirect, and because the agreement is still in force, conclusions will be made with caution.

Although the Federal Labour Law is where the fundamental labour rights are written in, and Mexico has signed the majority of the International Labour Organization's (ILO) fundamental labour agreements, its application is perpetually weak.[225] But, with NAFTA, the NAALC process provided a potential second phase of labour rights commitment in the three countries. Under the arbitration process of the labour agreement, any citizen or group can file a complaint with the National Administrative Office (NAO), offices that the FTA established in each state to administer the arbitration processes, as previously explained.[226] Transnational networks used the arbitration process as a potential area to be applied and to pressure Mexico into compliance with labour standards. Until 2015, about forty petitions had been submitted to NAALC, mostly against Mexico, and mainly before the U.S.'s NAO. Most cases have been delivered by NGOs, labour rights defenders, human rights groups and unions that led the movement to stop the trade agreement.[227]

With regard to political changes, the effect of NAFTA has been positive given that the economic and social problems that Mexicans have had to face, since NAFTA came into effect, have resulted in a level of government response and responsibility that has rarely been seen in the history

[222] Pedro Cisneros (n 215) 79.
[223] Ranko Shiraki Oliver (n 5) 72.
[224] Ibid.
[225] Kimberly Nolan García, 'Internalización de las normas laborales internacionales en el marco del TLCAN: el caso mexicano' (2014) 9 Norteamérica 111, 123.
[226] Ibid
[227] Ibid 124.

of Mexico.[228] Of all petitions, freedom of association emerged as the main complaint registered in most of the cases accepted by the NAO, twenty in total, but especially among those filed against Mexico.[229] As part of some case resolutions, the governments of the United States and Mexico, and sometimes Canada, have agreed on detailed action plans to discuss those labour issues presented in the cases that come through the NAALC process.[230] Since 1995, the Mexican and U.S. governments have signed several agreements that reiterate their commitment to freedom of association. For instance, as part of the Sony case resolution, in 1996 for the Sprint case, in 1997 the SUTSP case, and in 2000 for the cases of ITAPSA and Han Young.[231]

Specifically, the case of ITAPSA Company had a major impact on the development of Mexican labour regulation. As a result of this case, the Ministry of Labour and Social Welfare (STPS for its acronym in Spanish) developed two websites for registering contracts: one allows public access to union registration documents, and the other is a database of collective contracts with information on who owns the negotiation rights within the individual factories and, in some cases, there is access to copies of the registration documents and statutes of each organization.[232]

The result, after having received and resolved many cases on this issue, was improvements in the right of free association in Mexico. In addition to establishing the public registry of unions mentioned above, there was progress in the use of secret voting in union elections.[233] Many cases, including Maxi-Switch (1996), Han Young (1997), and TAESA (1999), revealed that during the election of the directors of a union organization, workers were intimidated. This later became one of the main reasons why independent unions could not win the aforementioned elections.[234] Citing the

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[228] Ranko Shiraki Oliver (n 5) 72.
[229] Bureau of International Labor Affairs, 'Submissions under the North American Agreement on Labor Cooperation (NAALC)', < https://www.dol.gov/agencies/ilab/submissions-under-north-american-agreement-labor-cooperation-naalc-print?combine=&field_naalc_office_target_id=All&field_status_target_id=All&field_issue_target_id=All&order=field_year_naalc&sort=asc> accessed 10 September 2019.
[230] Kimberly Nolan García (n 225) 127.
[231] Ibid.
[232] Ibid 128; see also Bureau of International Labor Affairs (n 229).
[233] Ibid.
[234] Mark Aspinwall, 'The NAFTA Side Agreements and Governance in Mexico' in Laszlo Bruszt and Gerald A McDermott (eds), *Leveling the Playing Field: Transnational Regulatory Integration and Development* (Oxford Scholarship 2014), 10. <https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198703143.001.0001/acprof-9780198703143-chapter-5?print=pdf> accessed 10 September 2019.

1997 Ministerial Agreement and Mexico's stated intention to promote the secret vote, labour lawyers were able to achieve a commitment from the government to include freedom of association in any political agenda concerning a labour reform.[235] While the issue of a national labour reform was not yet discussed, the Federal Conciliation and Arbitration Board in Mexico City (state CABs can function as tribunals and as the place where unions are registered, while at federal level the STPS registers unions and disputes are resolved at CABs)[236] began to exercise the secret vote consistently after 2002.[237] Finally, the National Supreme Court of Justice declared, in 2008, that all union elections must be held by secret ballot. This electoral procedure is now a standard practice.[238]

The NAALC process made the unequal treatment independent unions were facing indisputable, which caught the attention of the Local Conciliation and Arbitration Boards (CABs) officials.[239] This caused the Mexican federal government to become more aware of the pressure emanating from the arbitration process, and started the way to democratize trade union regulation policies. [240] Occasionally, Mexican authorities went beyond the NAALC's provisions to solve violations. For example, the officials demanded new union elections, or recognized the victories of the opposition even before the NAO hearings ended and issued its pronouncements.[241]

The Maxi-Switch case is an example of the above. Workers who tried to form an independent union were denied registration at the local Sonora CAB. When the case reached NAALC and a public hearing was requested, the Mexican government intervened to resolve the complaint, and granted the registration to the independent union to avoid holding the public hearing.[242] On April 16, two days before the public hearing was held, the U.S. NAO approved the request to withdraw the petition, given that the labour dispute had 'concluded favourably' with the recognition of the independent union.[243]

In Kimberly Nolan's opinion, these examples are considered exceptions since they had resolutions that are not representative of the NAALC cases as a whole, which often end in ministerial

[235] Kimberly Nolan García (n 225) 128.
[236] Mark Aspinwall (n 234) 7.
[237] Kimberly Nolan García (n 225) 128.
[238] Mark Aspinwall (n 234); see also Kimberly Nolan (n 225) 128.
[239] Kimberly Nolan (n 225) 128.
[240] Ibid.
[241] Ibid.
[242] Ibid
[243] Ibid 128; see also Bureau of International Labor Affairs (n 229).

consultations that fail to generate changes in labour policies or practices that improve working conditions in the local or national level.[244] However, these resolutions are important as they show that the Mexican authorities were sensitive to the resolutions issued by the NAALC process, and they also implemented actions outside the official channels to resolve the cases[245], showing that NAFTA has had impact on Mexican labour law and policies.

Over time, and as these political dynamics were being extended throughout Mexico, labour advocates started to contribute to political dialogue and lobby for other important changes, even after NAALC's process of revision had finished. An example of this is that in 1998, while NAALC reviewed a case on the use of pregnancy tests as part of the hiring of female workers in the maquiladora sector, this practice began to change in Mexico.[246] Once the United States and Mexico began bilateral negotiations on the subject within the framework of the ministerial consultations, the Mexican government made public its commitment to eliminate gender discrimination, in line with the international agreements it has signed in this regard. [247] Afterwards, "Offices for special matters" were created under the STPS to investigate cases of child labour, women in the workforce and needs of workers with disabilities. An independent office was also created to address gender equality issues.[248]

The pregnancy case supported the efforts and pressures of groups towards the government to ban the practice. During the following years, the Mexican government signed various agreements to end this procedure.[249] Finally, in 2003, the Federal Prevention and Elimination of Discrimination Act entered into force, a law that prohibits discrimination on the basis of pregnancy. With this Act, the practice was forbidden, formally, for the first time.[250]

Despite the fact that NAFTA, through its parallel agreement, NAALC, tried to put pressure on the Mexican government to promote, respect, and try to ensure compliance with labour rights, some precedents and laws were created, as previously established. Yet, there was no real change at constitutional level, nor in the most important labour law in the country, the Federal Labour Law (FLL).

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[244] Kimberly Nolan (n 225) 129.
[245] Ibid.
[246] Bureau of International Labor Affairs (n 229).
[247] Kimberly Nolan (n 225) 130.
[248] Mark Aspinwall (n 234).
[249] Kimberly Nolan (n 225) 130.
[250] Mark Aspinwall (n 234).

Due to the debt crisis in the early eighties and the drastic adjustment suffered by Mexico, and then, with more force, following the signing of NAFTA, national governments promoted the easing of labour relations.[251] For more than thirty years, despite the pressures of employers' groups and international organizations such as the International Monetary Fund (IMF), the law was not amended. But this was not an obstacle for the easiness and flexibility to be extended into the real life of companies and labour relations.[252] To remedy this inconsistency, an important amendment to the FLL was carried out in 2012, which sought to legalize what was already a widespread practice, particularly in the so-called hourly wage and labour intermediation.[253]

While it is true that one of the biggest amendments to the LFT came into effect in 2012, which implied the modification (either reform, addition or repeal) of more than three hundred articles, it is also true that these changes did not imply aspects that have been derived from the complaints made with support in the NAALC and through the NAO.[254] That is, the modifications were not in reason and based on the recommendations of the NAO. Therefore, this reform has failed to bring the order to labour relations that NAALC expected.[255]

b. Criticism towards NAFTA's mechanisms

General conclusions are difficult to make, '[o]ne cannot say that NAFTA has been unquestionably "good" or "bad" for Mexico' for several reasons, according to Ranko Oliver.[256] First, important developments of NAFTA can bring both favourable and unfavourable consequences.[257] Moreover, it is difficult to identify the changes caused specifically by NAFTA, where there was no influence from other factors. That is, it is impossible for any country to remain immune to changes

[251] Saúl Escobar Toledo, 'Crecimiento, Empleo y Salarios: México en los años del Tratado de Libre Comercio de América del Norte (TLCAN)' (August 2017) 9 Revista Estado y Políticas Públicas 21, 37.
[252] Ibid.
[253] Ibid.
[254] Secretaría de Trabajo y Previsión Social, 'Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley Federal del Trabajo' (2012) <http://www.diputados.gob.mx/LeyesBiblio/ref/lft/LFT_ref26_30nov12.pdf> accessed 10 September 2019.
[255] Saúl Escobar Toledo (n 251).
[256] Ranko Shiraki Oliver (n 5) 70.
[257] Ibid.

over the years, thus it becomes more complicated to isolate the effects of the agreement.[258] Lastly, data, most of the time, is not completely reliable, especially in a country like Mexico where much of the workforce and economic sectors come from an informal economy.[259]

As noticed, the NAALC, 'as a labor side-agreement, was the first of its kind'.[260] Even though it intended to 'improve working conditions and living standards' in the parties' respective territories[261], it did not specify as to how to meet this goal. Downey Moss establishes as an example that the agreement did not specify a minimum wage for the parties to submit to.[262] Instead NAALC left it to each country to establish the minimum wage, as well as other labour standards, in their own domestic law.[263] It generally specifies that 'each Party shall ensure that its labor laws and regulations provide for high labor standards (…)', [264] and '[e]ach Party shall promote compliance with and effectively enforce its labor law(…).[265] Being so general, it did not give much guidance as to what each member had to do in order to satisfy NAALC.

So, the agreement lacks specification as to how to improve labour conditions, it only mentions that each Party is responsible for ensuring that their labour laws and regulations were in compliance with high labour standards.[266] Although the Mexican Constitution recognizes basic labour rights, the Mexican government has proven unable or unwilling to strictly enforce them all, coupled with the fact that there is in the NAALC no strict mechanism that implements or sanctions violations of labour rights. [267] In other words, NAFTA, with its complementary part NAALC, lacks sufficient enforcement mechanism.

In a different manner, and complementing the statement that NAFTA cannot be described as completely good or bad, it is safe to say that, at least in Mexico, the experience with the NAALC agreement and processes within it changed the political dynamic.[268] Because of the cases presented

[258] Ibid.
[259] Ibid.
[260] Nicole Downey Moss (n 158) 114.
[261] NAALC 1994, (n 180) preamble.
[262] Nicole Downey Moss (n 158) 114.
[263] Ibid.
[264] NAALC 1994, (n 180) Art 2.
[265] Ibid, Art 3.
[266] Nicole Downey Moss (n 158) 114.
[267] Ibid 101.
[268] Kimberly Nolan (n 225) 132.

to the NAO, the Mexican government could no longer ignore the national group efforts to get their attention and discuss their disagreements especially when, while reviewing the cases, the NAO legitimized both their complaints and their participation in the process.[269] That is, these groups became actors with political weight within Mexico.

As can be seen from the previous section, since the NAALC process began, the Mexican government has made significant progress in the application of labour rights, in what Nolan (mentioned in Jesús Rubio's research) describe as a spiral that goes from the outside to the inside.[270] That is, the Mexican government has found itself pressed by commitments within the framework of the NAFTA in the NAO, both by national groups and the United States and Canada.[271] So, this parallel agreement created opportunities for transnational defence networks in Mexico to establish a path to improve the application of labour rights.

As described above and as some Mexican cases show, improvements in some labour practices were made possible, in part, thanks to the work of transnational actors, who pressured Mexico (through NAALC) to make changes in this regard. At first they were superficial, but the consistent efforts during the NAALC process pushed the government towards deeper reforms and, in some cases, autonomous efforts[272]. However, the discussion about the labour rights situation in Mexico during the NAALC years analysed here, suggests that the country has not internalized, in it's entirety, international labour rights standards or that its acceptance has been irregular in terms of practices that have improved (those that have been readily accepted), as well as in the different governance levels.[273]

Finally, one of the main criticisms of the social agreements that are written into free trade agreements, such as NAALC, is that they are only as good as their enforcement mechanisms.[274] The NAALC experience has led to changes in labour practices in Mexico, not so much at the legislative level, which could translate into greater protection for long-term Mexican workers.

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[269] Ibid.
[270] Jesús Rubio, 'Propuesta de un modelo de análisis de estrategias de colaboración sindical transfronteriza' (2017) 18(37) Estudios Fronterizos 103, 116.
[271] Ibid.
[272] Kimberly Nolan (n 225) 134.
[273] Ibid.
[274] Ibid 135.

Indeed, the NAFTA parallel agreement created opportunities for transnational defence networks to establish in Mexico a way to improve the application of labour rights, regardless of how strong or effective the agreement was per se, in terms of sanctioning compliance in a slighter manner.[275] It is due to these side effects generated by international pressure that labour rights defenders can continue to seek labour rights protection through trade agreements as an additional way to improve compliance with those rights.

[275] Ibid.

VI. The New Free Trade Agreement (USMCA)

In the 2016 presidential campaign, the U.S. exit of the North American Free Trade Agreement (NAFTA) was a constant in President Trump's speeches. Despite opposition from various associations and even Congress, President Trump was close to announcing the U.S. withdrawal from the treaty.[276] In this context, on May 18, 2017, the President of the United States publicly requested the renegotiation of the trade agreement between the United States, Mexico and Canada. In August of that same year the negotiations began.[277]

The negotiations that began in 2017, ended on September 30, 2018 when the U.S., Mexico and Canada reached an agreement to modify NAFTA. This was made official on November 30 of the same year at the Buenos Aires summit, where U.S. President Trump, Canadian Prime Minister Trudeau and Mexican President Peña Nieto signed the USMCA agreement (United States–Mexico–Canada Agreement, also known as CUSMA in its Canadian version and as T-MEC in its Mexican version).[278]

After this ceremony, three obstacles were presented to the USMCA, which were the ratification by the legislative power of each of the three countries.[279] On June 2019, Mexico became the first country to ratify the new free trade agreement, when the Senate voted 114 to 4 in favour of it.[280]

a. NAFTA vs USMCA

While the USMCA follows the same objective as NAFTA, which is to reduce trade restrictions between the three countries by opening the markets and with it stimulate investment, it is also true

[276] Elisa García Grande and José Luis Echevarría Lasaga, 'USMCA: Una Primera Aproximación al Nuevo NAFTA' (2019) 3110 boletín Económico de ICE 59.
[277] Ibid.
[278] Ibid 62.
[279] Center for Strategic & International Studies (CSIS), 'Road to USMCA Ratification: Is the End in Sight?' (2019) < https://www.csis.org/analysis/road-usmca-ratification-end-sight> accessed 25 September 2019.
[280] Mary Beth Sheridan, 'Mexico becomes first country to ratify new North American trade deal' *The Washington Post* (Mexico City, 19 June 2019) <https://www.washingtonpost.com/world/the_americas/mexico-becomes-first-country-to-ratify-usmca-north-american-trade-deal/2019/06/19/500dd8c0-92b3-11e9-956a-88c291ab5c38_story.html> accessed 25 September 2019.

that the new agreement has some unique characteristics different to its predecessor. In general, and superficially, the differences can be seen through the division of chapters within them. NAFTA has twenty-two chapters while USMCA has thirty-four.[281] Three chapters were eliminated from NAFTA dealing with: energy and basic petrochemicals, emergency action, and standards related measures (corresponding to technical barriers to trade).[282] On the other hand, ten chapters were added to the new agreement, involving, among other topics: electronic commerce, labour, environment, small and medium-sized enterprises, anti-corruption, competitiveness, etc.[283] The most important thing is to notice that this agreement deals with labour and environmental issues as part of it, not as parallel agreements as with NAFTA.

As part of the new agreement, a chapter solely focused on labour issues was included into USMCA (chapter 23). It is said to include 'more ambitious labour provisions than those established in the North American Labor Cooperation Agreement (NAALC)'[284].[285]

Some of the main provisions, somewhat different from NAALC, included in the chapter are the following: first, internationally recognized rights under each Party's legislation should be implemented, and should consider 'acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health'.[286]Second, a commitment against the imports produced with forced or compulsory labour, or child labour, no matter if it was forced or compulsory.[287] Also, the first binding provision regarding resistance towards violence against workers when they exercise their rights.[288] Another commitment to the protection of migrant workers and for the adoption of policies that contribute to the protection of workers due to discrimination in the workplace on the basis of sex.[289] Furthermore, the incorporation of a public communications mechanism, available to

[281] NAFTA 1994 (n 162) ; see also Tratado entre México, Estados Unidos y Canadá (T-MEC) 2019.
[282] Forbes Staff, 'Así son de diferentes el T-MEC y el TLCAN: México ¿Cómo vamos?' *Forbes México* (19 June 2019) < https://www.forbes.com.mx/asi-son-de-diferentes-el-t-mec-y-el-tlcan-mexico-como-vamos/> accessed 25 September 2019.
[283] Ibid.
[284] '[…] disposiciones laborales más ambiciosas que las establecidas en el Acuerdo de Cooperación Laboral de América del Norte (ACLAN).' (translation by Nayeli Torre)
[285] 'Reporte T-MEC' (August 2019) 10 Secretaría de Economía.
[286] United States–Mexico–Canada Agreement (USMCA), 2018 Chapter 23 Labor, 23.3.
[287] Ibid 23.6.
[288] Ibid 23.7.
[289] Ibid 23.8 and 23.9.

people from all Parties, concerning matters related to the application of these provisions.[290] Lastly and most importantly for this study's purpose, the commitment to ensure, in Mexican legislation, the effective implementation of the rights the workers have to freedom of association and to collective bargaining.[291] This chapter would be submitted into the same dispute resolutions mechanisms that apply for the rest of the USMCA, unlike NAALC which had its own mechanisms.[292]

b. Impact of USMCA on Mexican Labour Law

Following the ratification of Mexico with respect to the USMCA, a reform of the Federal Labour Law (FLL) was made. This reform has been one of the most important changes in recent years that have been presented to the labour system. The Labour Reform published in the Federal Official Gazette on May 1, 2019, guarantees the implementation of article 123 of the Mexican Constitution, as well as the fulfilment of the commitments assumed by Mexico in the USMCA negotiations and in the framework of the International Labour Organization.[293]

The approval of this amendment is part of the commitments acquired after the renegotiation of NAFTA.[294] The labour chapter included an annex on the representation of workers in collective bargaining in Mexico, whereby the country pledged to undertake specific legislative actions to guarantee the effective recognition of the right to collective bargaining. Likewise, a part of Mexico's commitments was to make it easier for workers to establish and join unions.[295]

The U.S. House of Representatives had conditioned their ratification of the trade agreement in exchange for the Mexican Congress to first comply with the changes to the law, aligned with the settlement reached between the three countries in 2018.[296] The U.S. demanded, within other things, the end of 'protection' labour contracts, which bind approximately three-quarters of the unionized

[290] Ibid 23.11.
[291] Ibid Annex 23-A.
[292] 'Reporte T-MEC' (n 285).
[293] 'Reporte T-MEC' (n 285).
[294] PWC México, 'Reforma Laboral 2019' (2019) <https://www.pwc.com/mx/es/reformalaboral2019.html> accessed 25 September 2019.
[295] Elisa García Grande and José Luis Echevarría Lasaga (n 276) 69.
[296] PWC México (n 294).

Mexican labour force.[297] Therefore, to encourage the ratification of the United States, around 500 articles of the FLL were amended, mostly related to strengthening democracy and accountability in trade unions and labour justice, as well as additional requirements that individual employment contracts must contain.[298]

To understand the necessity for this reform, it is important to mention that for more than half a century, in Mexico, a group of 'established, conservative ("charro") unions' have had very closed relationships with the government and the political party that ruled for most of the time, PRI.[299] The leaders of these unions held their position for very long periods of time as consequence of the political support they gave. Also, '[l]abor boards made up of representatives of conservative unions, employers, and a pro-employer government made it extremely difficult for workers to form independent organizations', supported by the fact that in many cases 'charro' unions and employers formed 'protection contracts'.[300] Generally, workers are not even aware that they are part of a union, since it is a common practice for a company union to sign a contract with the employer of a new plant before any workers are hired.[301] And, when workers tried to organize independently in order to obtain better working conditions such as higher wages and benefits, these would be denied since they were already "represented" by a "protection" union.[302] Therefore, demands for improvements of working conditions were never met and workers had to face greater obstacles in order to make their own union.

Under USMCA this type of contracts are considered illegal. In compliance, the Mexican labour reform implies, among other things, the transition to effective union democracy, through the introduction of transparency in the election of union leaders and accountability on the activities of trade unions.[303] Therefore, this eradicates the "protection contracts", signed without the consent of

[297] James M Cypher and Mateo Crossa, 'Beyond the Myth and Through the Mexican Labyrinth: Labor under the "New NAFTA", the U.S.-Mexico-Canada Agreement' (2019) Dollars & Sense 20, 24.
[298] PWC México (n 294).
[299] David Bacon, 'In Mexico, a New Dawn for Independent Unions?' (2019) 51 NACLA Report on the Americas 268.
[300] Ibid.
[301] James M Cypher and Mateo Crossa (n 297).
[302] David Bacon (n 299).
[303] 'Reporte T-MEC' (n 285) 2.

the workers and, at the same time, guarantees an effective collective bargaining, in which the collective agreements and their revisions will be approved by the majority of the workers, to through a personal, free, direct and secret vote.[304]

Lastly, the amendment also includes the establishment of an effective, transparent and independent labour justice system, through: '(a) the establishment of autonomous entities for labour conciliation, and (b) the transfer of functions from the Executive Power to the Judiciary, through the establishment of labour courts'.[305] This changes the authority responsible for making decisions about labour conflicts from CABs to labour courts and new conciliation centres.

c. Criticism towards it

In Mexico there has been little opposition, in terms of the governing powers, to the new agreement, to the point that Congress and the Senate passed a reform bill to the FLL without hesitation, for the federal law to comply with USMCA.[306]

However, there has been disagreement among the union leaders of the most important unions in the country. While the leaders of the 'Confederación de Trabajadores de México' (Confederation of Mexican Workers, CTM) and the 'Confederación Regional Obrera Mexicana' (Regional Confederation of Mexican Workers, CROM) threaten by saying that the new labour reform will "fragment" the labour movement, the leader of another important union, 'Confederación Revolucionaria de Obreros y Campesinos' (Revolutionary Confederation of Workers and Peasants, CROC), admitted that "times have changed" and that unions can no longer oppose free elections.[307]

Some 'progressive unions', on the other hand, although they support the changes this reform establishes, they feel it doesn't 'go far enough'. They want to reverse some fundamental changes the 2012 amendment of the FLL made in terms of allowing companies to outsource or subcontract jobs,

[304] Ibid.
[305] Ibid.; '(a) el establecimiento de entidades autónomas para la conciliación laboral, y (b) la transferencia de funciones del Poder Ejecutivo al Poder Judicial, a través del establecimiento de tribunales laborales.' (translation by Nayeli Torre)
[306] Mary Beth Sheridan (n 280).
[307] David Bacon (n 299) 269.

which had been previously banned.[308] Despite the fact that the 2012 reform was not due to NAFTA (as mentioned in the previous chapter), these independent unions were expecting the new free trade agreement to deal with the outsourcing issue. These unions support the changes that the new agreement brought about in terms of collective rights of workers, but criticize that in terms of individual rights, workers' rights continue to be violated.

So, there is a mix of ideas of what the new agreement, especially regarding labour, would bring as a result. But in the end, it is thought that the current reform will have a big impact: 'charro' unions will be democratized and more independent unions will emerge along with greater decision making power invested in them.[309] Yet, it is safe to say that, as what happens with any fundamental change, new struggles will emerge.

d. Is USMCA a step back or forward from NAFTA?

First, it is important to notice that this agreement is expected to replace NAFTA in 2020, but in the meanwhile, NAFTA remains in force even though the USMCA is already ratified and having effects in Mexico.

The USMCA addresses more recent and emerging issues such as e-commerce and intellectual property, so it can be said to be a modernized NAFTA. Also, the USMCA, different from NAFTA, has a labour chapter within the agreement, while NAFTA has a parallel agreement (NAALC) that deals with labour related issues. By including the labour provisions into the main trade agreement, it gives the impression that labour rights have the same level of importance as any other subject in the agreement.

The new trade agreement has a very hard labour section, forcing Mexico (that is why the May reform happened) to have all its collective contracts opened, that is, there can no longer be "protection" contracts. Now, at least thirty per cent of the workers have to ratify the collective contract before the new conciliation centres; if it is not ratified, anyone can reject it.[310] This is a central change

[308] Ibid.
[309] Ibid 271.
[310] Secretaría de Trabajo y Previsión Social, 'Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley Federal del Trabajo' (2019)

that NAFTA did not have but now the USMCA does. This is important because you force a real collective bargaining in Mexico and with that social dumping is fought. So, companies are forced to become competitive on salary issues, for example, by demanding it with the union, through collective bargaining. This means that now the free market, through the unions that workers choose, will be the ones setting labour standards such as wages.

For example, the recently retired U.S. Congressman Sandy Levin and labour analyst Harely Shaiken when visiting Mexico, noticed the difference that independent unions will probably make, 'by contrasting a Goodyear Tire plant where workers are paid about $1.50 per hour under a "protection" contract with the nearby Continental Tire plant where independent union workers made $ 6 per hour (with better benefits)'.[311]

When judging the success of the new agreement, both from the Mexican and Canadian side, it is agreed that the results of the agreement should not be compared with the expectations that were had at the beginning of the negotiation, but rather with the alternative that seemed to be detached from the different gestures of the Trump Administration, that is, a trade war with the U.S. and, with it, the loss of market, of a favourable business climate as well as the loss of opportunities for growth and employment, that had cost so much to build in the past.[312]

<http://www.diputados.gob.mx/LeyesBiblio/ref/lft/LFT_ref30_01may19.pdf> accessed 25 September 2019.

[311] James M Cypher and Mateo Crossa (n 297) 25.

[312] Elisa García Grande and José Luis Echevarría Lasaga (n 276) 72.

VII. Conclusion

'Globalization' is one of the main influences in our political, economic and social life, therefore making an impact in law and industrial relations. From the 1980's onwards, the globalization process has been accelerating due to great changes in the world as well as technological developments.[313] Markets have been opened, and gradually a greater and faster trade between companies in different countries has been promoted. As a consequence of this and the expansion of large multinational companies, an environment of greater competitiveness has been generated. This puts pressure on less advanced or localized companies in less developed countries to try to catch up with these large companies, subjecting themselves many times to 're-industrialization' processes.[314]

Alongside these effects of globalization, many trade barriers have also been removed and trade liberalization has emerged, forcing States to sign and get involved into all types of commercial agreements, bilateral and multilateral, to make international commerce easier, specifically free trade agreements.[315] The WTO is one of the main responsible bodies for the aforementioned international commercial agreements by regulating trade barriers and help liberalize trade in the process. However, in the last decades, due to globalization and the on-going evolution the WTO, international trade and investment law have gone through, human rights has become paramount in their respective trade agendas. There has been more international pressure to incorporate human rights into its trade agreements.

It is necessary to 'attack' the adverse effects that globalization has brought and put globalization at the service of society and not at the service of specific interests of certain groups with economic or political power. Indeed, there have been collateral effects, specifically social, that have affected an essential part of commerce, which is labour. Trade agreements, especially free trade agreements, have placed greater emphasis on the rights of companies and have treated workers' rights as residual, meaning that they are not always included in FTA's, labour rights have been left

[313] Robert Howse and Makau Mutua (n 7).
[314] Marlon M. Meza-Salas (n 1) 665.
[315] Ibid 666.

as the responsibility of national legislations.[316] For these reasons it is considered a necessity to deal with the social dimension of international trade, especially in free trade agreements, to set a basis for national labour law.

In order for the labor standards to be included in agreements at an international level, institutionalization must first be reached. There are two main institutions that should take responsibility with regards to the implementation of these clauses in international agreements: the WTO and the ILO.

The fact that the WTO is the main authority in charge of the regulation of international trade, the importance of the ILO in the addition of a clause of this type should be taken for granted. The ILO could be of great help. However, for this to happen the ILO should establish the contents of such a clause by setting the rights at the labour standards that are considered universal. These include 'freedom of association and the right to strike, equality at the workplace, and protection against forced labor'.[317] There have been, however, several critics towards the ILO. First, the broadness and diversity of the activities it manages has raised questions regarding the lack of focus on the workers' essential human rights in a globalized economy. Secondly, the Labour Organization requires formal, effective mechanisms for dispute settlement and enforcement.[318]

For Sergio López Bohle and Sebastián Ugarte Gómez ILO's actions have been good in securing and developing core labour standards, yet they consider that the system could improve through cooperation of all social actors involved. [319] They give several recommendations in which the system could improve. First, they suggest to involve more actively employers and social actor for they can have influence in incorporating CLS into corporate codes of conduct. Secondly, address in national debate the matters involving international labour principles, for it is more probable to generate change if the public, social stakeholders and media are involve. Third, they consider the incorporation of a social clause in trade agreements as extremely important. But they recognize that this has been a topic that has arouse discussion, yet they acknowledge 'humans and institutions need enforcement

[316] Marlon M. Meza-Salas (n 1) 673.
[317] Erika de Wet (n 128) 462.
[318] Robert Howse and Makau Mutua (n 7) 68.
[319] Sergio López Bohle and Sebastián Ugarte Gómez (n 61) 75.

through penalties to react upon non-compliant behaviours'. Additionally the WTO should take a bigger involvement, including social justice in their agreements. Fourth, improve the reach of ILO's actions and methods regarding new forms of working like subcontracting, and finally also increase the coverage of the increasing informal sector workers.[320]

In conclusion, the implementation of a social clause would need two steps: moral persuasion following ILO procedures, and afterwards an economic sanction by WTO contracting parties. Yet, for this to function, the parties have to be members of both, the ILO and WTO. If it were not the case, it would be more difficult for a social clause to be enforced through coordination between these Organizations because the procedures the ILO and WTO have can only be enforced towards their respective members.[321]

Specifically, in North America, the North American Free Trade Agreement (NAFTA) entered into force in 1994 , with the purpose to stimulate economic growth and create an alliance between the North American countries. It was planned for it to encourage job growth, promote the three Parties' economies, and increase imports.[322] A parallel accord was included to deal with labour issues: the North American Agreement on Labor Cooperation (NAALC). Its principles only express general areas of concern that the Parties agreed upon, and where each Party has developed its own legal framework (laws, regulations, procedures and practices) to protect their respective workforce. As well it established three levels of protection to deal with complaints.

In the twenty-five years of the existence of NAFTA, there is controversy around how positive the effects of this trade agreement have been in Mexico. Although the Federal Labour Law is where the fundamental labour rights are written in, and Mexico has signed the majority of the International Labour Organization's (ILO) fundamental labour agreements, its application is perpetually weak.[323] But, with NAFTA, the NAALC process provided a potential second phase of labour rights commitment in the three countries. Until 2015, about forty petitions had been submitted to NAALC, mostly against Mexico, and mainly before the U.S.'s NAO.

[320] Ibid.
[321] Erika de Wet (n 128).
[322] Anne Sraders (n 164)
[323] Kimberly Nolan García (n 225).

With regard to political changes, the effect of NAFTA has been positive given that the economic and social problems that Mexicans have had to face, since NAFTA came into effect, have resulted in a level of government response and responsibility that has rarely been seen in the history of Mexico.[324] Of all petitions, freedom of association emerged as the main complaint registered in most of the cases accepted by the NAO.

The NAALC process made the unequal treatment independent unions were facing indisputable, which caught the attention of the Local Conciliation and Arbitration Boards (CABs) officials.[325] This caused the Mexican federal government to become more aware of the pressure emanating from the arbitration process, and started the way to democratize trade union regulation policies. [326] Occasionally, Mexican authorities went beyond the NAALC's provisions to solve violations. For example, the officials demanded new union elections, or recognized the victories of the opposition even before the NAO hearings ended and issued its pronouncements.[327]

Despite the fact that NAFTA, through its parallel agreement, NAALC, tried to put pressure on the Mexican government to promote, respect, and try to ensure compliance with labour rights, some precedents and laws were created, as previously established. Yet, there was no real change at constitutional level, nor in the most important labour law in the country, the Federal Labour Law (FLL). While it is true that one of the biggest amendments to the LFT came into effect in 2012, these changes did not imply aspects that have been derived from the complaints made with support in the NAALC and through the NAO.[328]

To complement, the agreement lacks specification as to how to improve labour conditions, it only mentions that each Party is responsible for ensuring that their labour laws and regulations were in compliance with high labour standards.[329] Although the Mexican Constitution recognizes basic labour rights, the Mexican government has proven unable or unwilling to strictly enforce them all, coupled with the fact that there is in the NAALC no strict mechanism that implements or sanctions

[324] Ranko Shiraki Oliver (n 5) 72.
[325] Kimberly Nolan (n 225) 128.
[326] Ibid.
[327] Ibid.
[328] Secretaría de Trabajo y Previsión Social (n 254).
[329] Nicole Downey Moss (n 158) 114.

violations of labour rights.[330] In other words, NAFTA, with its complementary part NAALC, lacks sufficient enforcement mechanism. Yet, the Mexican government has found itself pressed by commitments within the framework of the NAFTA in the NAO, both by national groups and the United States and Canada.[331] So, this parallel agreement created opportunities for transnational defence networks in Mexico to establish a path to improve the application of labour rights.

On the other hand, in late 2018 the three NAFTA Parties signed a new trade agreement, USMCA, which only Mexico has ratified (at the beginning of 2019). Following the ratification of Mexico with respect to the USMCA, a reform of the Federal Labour Law (FLL) was made. This reform has been one of the most important changes in recent years that have been presented to the labour system.

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In conclusion, free trade agreements, specifically NAFTA has had little impact on Mexican labour law, yet the new trade agreement, USMCA, with only a few months that Mexico has ratified it, has already had a very transcendental impact in federal labour law. It has been a positive development from NAFTA to this new agreement where crucial changes are starting to take place.

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[330] Ibid 101.
[331] Ibid.
[332] 'Reporte T-MEC' (n 285) 2.
[333] Ibid.
[334] Ibid 271.

However, it is important to notice that the future of both agreements and the commercial relationship between the North American Parties is still uncertain.

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