A Socially Responsible NAFTA 2.0: Transnational Challenge or Oxymoron

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1) “Free Trade Agreements” (‘FTAs”) are mis-named. Although they began as agreements on cross-border movement primarily of goods, they have evolved into something different. Their growing emphasis on movement of services, and expansion into areas such as competition (anti-trust), intellectual property, regulatory cooperation, labor and environment highlight that these are really better labeled “regional integration agreements” or alternatively, “multinational enterprise (“MNE”) supply chain facilitation agreements.

2) NAFTA laid the foundation for this, and it intensified in later US-, Canadian- and EU-FTAs. NAFTA 2.0 (a/k/a CUSMA or USMCA) exemplifies this, rather than being an exception.
Premises: Rodrik’s Trilemma and FTAs

- Dani Rodrik* has posited a trilemma: we can attain/preserve at most two out of the following three values:

1) Nation-state sovereignty;
2) Deep globalization;
3) Democracy

Mega-FTAs intensify globalization at the expense of nation-state sovereignty and especially democracy.

Premises: FTA as MNE Supply-Chain Facilitator

The mega-FTA trend is best understood as an MNE supply-chain facilitator. There is a symbiotic relationship between MNEs and FTAs. Many of the non-trade provisions in modern, enhanced FTAs function to smooth the way for multiple cross-border mobilities in the course of production of a single good, or increasingly, service.

Few gains are projected under these agreements from increased trade in goods, since duties are already at or near zero in the developed country markets on most goods; the main “efficiency” gains are projected to result from reduction in “non-trade barriers,” especially “regulatory coherence” and to a lesser extent, from the aggregation of several countries participating in, e.g., a supply chain manufacturing process.
Investor Protection chapters and Regulatory Coherence chapters are particularly significant for this purpose. Concomitantly, such chapters diminish “regulatory space” for national governments, hence democratic control for citizens.

FTAs may have started as the economists’ dream of frictionless global trade, conceived of as individual-to-individual, but today the global supply chains contain internal governance with its own barriers. FTAs have diminished nation-to-nation rules barriers but displaced them with MNE-established barriers instead.
Premises: Democracy Only Within the Nation-State

- Democracy requires borders and some degree of social cohesion. The cross-national power of MNEs is fundamentally undemocratic.

- FTAs shift economic power from nation-states to MNEs. Indirectly, they shift political power, as well, from elected governments to MNEs and their network of affiliates.
The FTA system permits governments to impose “circuit-breakers” to buffer the national economy against unduly great “shocks” from the opening of a sector to trade. No similar buffer is established within FTAs to protect workers individually, and communities in the aggregate, when capital mobility economically hollows out localities.

Wages have been stagnant or worse for workers in nearly all developed economies since the advent of FTAs.

If we take account of deterioration of the stable employment relationship into various non-standard or contingent forms of work, the downward cycle is even more apparent.
Premises: Leveling Up v. Down and Democracy

• Leveling up for workers in economically developing countries, while slowing the rate of improvement or holding it constant as to pay, standards of work and living in more developed economies, is consistent with continued democracy and social progress.

• The net effect of economic globalization and FTAs, however, has been to level up workers in selected developing countries at the expense of leveling down for workers and their communities in economically developed countries. In democracies, this is unsustainable over the long term.
Premises: Disruption Hurts Workers Most of All

- Abrupt dis-integration of existing MNE supply chains hurts workers most of all, in whichever country they live, because it disrupts their employment or working relationship and income stability. Reverting to economic nationalism is not a solution for socially responsible trade.

- Slowing the pace of future cross-border economic integration, however, is essential.
Labor Chapters

- Labor chapters have improved tremendously since NAFTA/NAALC. Nevertheless,

- Effective enforcement of labor chapter provisions remains illusory.

- Freedom of association and collective bargaining for trans-border workers and trans-border representation of employers is omitted.

- Even a substantively excellent labor chapter, however, and an imaginary effective enforcement regime, would still inadequate to buffer the impact on domestic labor of unduly rapid shifts in local labor markets caused by intensified trans-national trade in goods and now, especially, in services.
Trade in Services and Government Procurement

- Transnational economic integration has largely occurred until now been concentrated in the manufacture and distribution of goods. This has intensified, and the proportion of the work sold as incorporated services has increased, as IT has made remote design, control, and management possible.

- Cross-border trade in services has been limited until now. The advent of web-based service provision platforms is disrupting the barrier national borders have presented until now. Trade in services chapters in NAFTA 2.0 and the other recent mega-FTAs threaten to accelerate this technological change-based disruption, rather than constraining it to a manageable pace. They provide a broadened range of covered cross-border services with a negative instead of a positive list.

- Government procurement of goods and services has for the most part been sheltered until now. Chapters in NAFTA 2.0 and other mega-FTAs opening up this sector will intensify the adverse impact on workers.
NAFTA 2.0 and Other FTAs Are Not Socially Trans-National

- The EU is the only regional integration agreement to significantly regulate the actual trans-border aspects of the economically integration system it establishes.

- NAFTA/NAALC made no provision for cross-border mobility of workers, except a narrow provision for high level worker moved at the behest of, and under the control of the MNE employer. This pattern continues in the CUSMA, as well as CPTPP and other FTAs. These provisions are not placed in the labor chapter and not conceptualized as workers, but as MNE rights.

- The traditional choice of law principle that the law of where the work is performed is the labor/employment law that controls is omitted from these FTAs. Nor is there anything assuring workers sent across borders temporarily to perform work of retaining the higher of their home or host country wages, hours, and working conditions. Workers’ compensation for occupational injuries and illness is not assured, either. Web-based provision of services will exacerbate the problem by permitting even local employers to readily utilize labor for production of services as well as goods from other countries.
Looking Forwards, Not Backwards

NAFTA 2.0 and other FTAs have been negotiated with the current economy implicitly in mind, focusing heavily on goods production.

The economies of the future, however, rely mainly on provision of services.

The labor component of service provision is predicted to come under heavy pressure, both from internet platforms that will facilitate global delivery of services, putting national labor into global competition in much of the service sector, while automation, roboticization, and artificial intelligence threaten to reduce the human labor proportion in services. Instead of facilitating service sector trade and enhancing these shocks, a socially responsible trade agreement must regulate and manage this transition, lest it swamp democracies.
A Brief Assessment of NAFTA 2.0 and Other Mega-FTAs
NAFTA 2.0, CPTPP, and CETA: The Negatives for Workers

1. Many more (12 for TPP; EU 27? + Canada) countries covered; megalateral means **supply chains can cross many more borders barrier-free.** NAFTA 2.0, on the other hand, simply preserves the existing NAFTA-based integration.

2. Government procurement coverage is broadened. This is especially important re services.
NAFTA 2.0, CPTPP, CETA – Negatives (2)

3. “Regulatory coherence” as major (but very uncertain) part of program – “eliminate unnecessary barriers and make member state regulatory systems compatible and transparent.”

How much is “regulatory coherence” a re-seizing of government control away from MNEs, how much is it a deregulation program, how much is it a program to put control in the hands of the MNEs?
Negatives As To Services

- A broadened range of covered services are covered, with a negative instead of positive list. Future services, not yet even conceived, are thus covered with unknown consequences.

- Expanded coverage of services means decreased ability of governments to regulate services without causing prohibited discriminatory impact under MFN and/or NT, importantly narrowing regulatory space.

- “Mutual recognition” of professional qualifications would have a huge impact on professional occupational labor markets within Party countries, but unlikely to be realized.
Improvements: ISDS

Investor-State Dispute System (ISDS) may be passing away.

The CPTPP has retained the system, but attempts to constrain arbitral interpretive discretion.

The CETA has provided for a standing investment tribunal.

The USMCA/CUSMA eliminates the separate investor dispute resolution process entirely, either requiring investors to use domestic courts (Canada-US) or reverting to the regular state-to-state method used for other types of disputes (Mexico), preceded by a requirement of exhausting Mexican domestic judicial remedies.
Improvements: Investor Protections Narrowed

- NAFTA 2.0 makes major improvements in substantive investor protection language, although not effective immediately. Annex 14-D, regarding Mexico-US disputes, explicitly constrains arbitrators by limiting most claims to direct expropriation or post-establishment NT or MFN discrimination. Substantive investor protection language in CPTPP, however, is only somewhat different from that contained in NAFTA, which has led to many problems in investor-state arbitration. The texts manifest efforts to retain interpretative control among the combined Party governments and to constrain arbitral or judicial interpreters, but these provisions include internally contradictory language.
Improvements: Labor Chapters

- The labor chapter in NAFTA 2.0 is a major improvement over its predecessors.

- It is incorporated in the main agreement, unlike the original NAFTA.

- Although it does not cover the 11 principles of the original NAFTA, which later US FTAs reduced to the core ILO fundamental principles plus minimum labor standards, NAFTA 2.0 re-inserts protections for migrant workers, obligating Parties to treat them equally with domestic workers. It adds language on employment benefits and the right to strike as well as violence against workers exercising their rights. It also includes stronger provisions about goods made with forced or child labor.

- However, it does nothing to address the trans-national worker supply chain itself, including well-documented abuses in cross-border recruitment of guest workers.
Improvements: Labor Chapters

- Recent US FTAs have recognized that one or more Party countries at the time of negotiation may be in non-compliance with the international labor norms incorporated into the agreement. Negotiation of pre-ratification domestic labor law or practice changes has begun.

- This was attempted under DR-CAFTA, intensified in the original TPP negotiations.

- It has reached a new level in NAFTA 2.0, with Mexico agreeing to adopt major changes in its domestic labor laws to ensure true freedom of association and the right to organize and bargain collectively for workers in Mexico.
Improvements: Labor Chapters

- The CUSMA/USMCA labor chapter also includes an innovative provision regarding wages in the automobile industry. This provision goes hand-in-hand with stronger rules of origin requiring 75% North American content to qualify for NAFTA benefits for goods.

- A Labor Value Content (LVC) provision requires that workers would have to earn an average of $16 or more in the production of at least 40% of the value of automobiles and 45% of the value of light trucks for the finished vehicle to gain duty-free trans-border shipment. This would reverse the historic cycle in Mexico of holding down wage gains to encourage FDI and broader spread of employment, and would start to assure that the agreement would meet the proclaimed objective of improving living standards in all three Party countries.
Lack of Improvement In NAFTA 2.0 Labor Chapter

However, efforts at improving enforcement remain inadequate. The US Guatemala fiasco highlights the limitations of the current language, which still requires proof that the violation of labor obligations involve “a sustained or recurring course of action or inaction” and that it operate “in a manner affecting trade.” Given that domestic national labor markets and labor law regimes draw no lines based on the affected firms or industry’s integration with foreign trade with FTA partner countries, this is a major barrier to making labor obligations effective.
In the NAFTA 2.0 government procurement chapter (not the labor chapter), the language pertaining to labor standards has been weakened compared to other recent US FTAs. Although technical specifications for goods and services intended to ensure environmental protection are permitted, Parties may only “promote” rather than “require” compliance with labor-related technical specifications in their government procurement.
The Future or
What Is To Be Done?
Solutions For The Future

- The omelet cannot be unscrambled. Although changes from mass production to artisanal 3-D production may bring back some work to Canada and the US, fewer and fewer workers (as opposed to robots) will be involved in mass production. These jobs cannot come back regardless of FTAs.

- Socially-responsible trade, however, requires more than just improvements in labor chapters, even were they better than the partial and inadequately enforced provisions in NAFTA 2.0 and other FTAs.

- Accelerating job displacement in services is the horizon of the future. These agreements do nothing to constrain the potentially unabsorbable pace of such change and its impact on workers. Although some is purely technological and domestic (e.g., AI), the use of cross-border platforms to render services transnationally mobile requires an approach radically different from the mobility-enhancing provisions of current NAFTA 2.0 and other services chapters in FTAs.