

LABOUR AND SOCIAL JUSTICE

THE USMCA BETWEEN THE US AND MEXICO

A Step Towards More Sustainable Trade?

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Foreign trade and especially exports to the US are essential for Mexico. For this reason, Mexico signed the USMCA, despite the conditions imposed. Amongst these conditions is a differential treatment in labour regulation with an enforcement mechanism of economic and trade sanctions.



The negotiations on labour issues in the USMCA were facilitated by a domestic political change in Mexico. They led to a convergence of interests with Mexico's trading partners but did not prevent unequal treatment.



The provisions on freedom of association and collective bargaining only apply to Mexico. They are reflected by the reforms in the Federal Labour Law of 2019 and they initiate a structural transformation of the former labour model's deficits.

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INTRODUCTION

This paper includes six sections analysing the most important aspects of the USMCA labour rules. The interest is to highlight its uniqueness and the need to assess it in context. To this end, the first section locates Mexico's place in the world in terms of its trade relations. The section shows that, regardless of its participation in numerous trade agreements, it is characterised by its dependence on exports to the US. The following section analyses the main labour rules of the USMCA and its peremptory Rapid Response Labour Mechanism (RRLM), regarding Freedom of Association and Collective Bargaining obligations, with asymmetrical rules for Mexico in comparison to its trading partners. This is followed by the labour situation in the automotive industry and the first case of a US complaint against Mexico under the RRLM (Annex 31 A), regarding the denial of rights. This proves the importance of creating visibility and a sense of urgency to dispute resolution. The fourth section includes a brief analysis of Mexico's first complaint against the United States for violation of its non-discrimination obligation in the administration of the H2 Migrant Work Visa Program under chapter 31 of the USMCA on dispute settlement. This has already been accepted by the US but was not concluded, however, it reveals the potential of this process to provide symmetrical treatment to the three countries in cases where non-compliance with chapter 23 of the agreement is claimed. The fifth section deals in a complementary manner with the environmental rules of the USMCA and the following section offers, by way of conclusion, a critical assessment of this instrument. This is particularly relevant for its labour dimension, which can only be seen in the specific context of Mexico's situation in the integration of North America, and therefore does not allow for absolute judgements in favour or against it, nor can it be considered as a model to be followed in other countries.

1

THE USMCA AND THE IMPORTANCE OF GLOBAL TRADE RELATIONS

Nobody these days denies the importance of international trade and its positive impact on the growth of nations. However, in many cases, it has also been associated with widening economic inequalities between and within countries.

Mexico expresses these effects with its high degree of dependence on foreign trade, which accounts for almost 80 % of its GDP (World Bank, 2021, latest available data). This has been possible due to the opening up of the economy that began in 1994 with NAFTA, and today it has become one of the countries with the most trade agreements and treaties. In this context, it was of the utmost importance for the country to avoid President Trump's threats regarding the end of NAFTA and to have been able to renegotiate it, once again securing the country's trade and economic policy as of 1 July 2020.

According to the Ministry of Economy (2020), Mexico currently has 14 trade agreements signed with 50 countries: 30 Agreements for the Promotion and Reciprocal Protection of Investments (APRPIs) with 31 countries or administrative regions and 9 agreements of limited scope (Economic Com-

plementation Agreements and Partial Scope Agreements) within the framework of the Latin American Integration Association (ALADI)¹.

This trade dynamic enabled foreign trade levels to remain relatively constant in 2020 despite the COVID pandemic. Mexican exports reached 40 % of the country's gross domestic product, together with imports accounting for 78 % of GDP, equivalent to a value of USD 418 billion (Statista Research Department, 2021). This progress can be seen at a glance by comparing the value of total exports in 1994, which represented 16 % of Mexico's real GDP, and doubled in 2000 to 35.1 % (Moreno-Brid, Rivas and Santamaría, 2005). In this way, Mexico consolidated its relationship with its northern neighbours on the one hand, and opened the way to the international community on the other (Rouquié and Ramos 2015). Table 1 summarises Mexico's most recent foreign trade activity.

¹ In order of importance, the most relevant agreements for Mexico, followed by the USMCA, include the Asia-Pacific Economic Cooperation (APEC), the Free Trade Agreement between Mexico and the European Union (FTA EU-MX) and the Trans-Pacific Partnership (TPP).

Table 1
Foreign trade data (exports and imports of Mexico, 2020)

	Exports	Imports
Share of export value in GDP (2020)	40.1 % (\$416,999.40 million)	37.9 % (\$382,985.90 million)
Countries with highest transactions	United States (77.85 %) Canada (3.10 %) Germany (1.54 %) China (1.50 %)	United States (45.28 %) China (18.24 %) Japan (3.94 %) Germany (3.89 %) Korea (3.88 %)
Most traded goods/trade value	<ul style="list-style-type: none"> – Passenger cars (\$31 million) – Numerical or digital processing units (\$27.3 million) – Crude oils from petroleum or bituminous minerals (\$22.4 million) – Goods vehicles (\$17.6 million) – Television receivers (\$12.8 million) 	<ul style="list-style-type: none"> – Oils from petroleum or bituminous minerals (\$29.6 million) – Other monolithic integrated circuits (\$21.2 million) – Machine parts and accessories (\$9.0 million) – Other telegraphic equipment (\$6.1 million) – Memory drives (USB) (\$5.5 million)

Source: Prepared by author with data from Statista Research Department (2021) and INEGI (2021)

The data presented in Table 1 confirm the importance of Mexico's foreign trade, primarily with the USA. As will be seen below and has been shown in other research (Bensusán and Middlebrook, 2021, Bensusán, 2021) the role played by Mexico and its competitive strategy based on the artificial lowering of wages, with very positive results in the automotive industry thanks to NAFTA, placed it at the centre of critique by its trading partners. Thus, within the framework of the negotiations, it had to accept the special treatment given to the labour agenda, first as a condition for its participation in the CPTPP in 2016-2017 and, subsequently, in order to reach the USMCA. This agenda did not only include unilateral rules contained in this instrument involving the obligation to make prior reforms to its legislation as a condition for the approval of the USMCA. It also included strong external oversight of the reform implementation process along with enforcement mechanisms with peremptory procedures and heavy sanctions. Below is an analysis of the labour agenda of the most regulated trade agreement in this area.

2

THE LABOUR CONTENT OF THE USMCA AND THE RRLM²

Overcoming the shortcomings of the North American Agreement on Labour Cooperation (NAALC) was undoubtedly the central concern to be addressed through the new labour rules of the USMCA. The eleven NAALC principles included freedom of association and collective bargaining, though without reference to ILO Conventions 87 and 98; nor were they binding or had mechanisms to enforce them. Only the so-called »technical standards« (minimum wages, occupational health and safety and the prohibition of child labour) could lead, after a long and uncertain procedure in various stages, to the application of sanctions to the country that did not comply with its own standards, provided that there was a repeated violation and equivalent provisions in all three countries. In its 25 years of existence, only ministerial meetings were held on the grievances raised, with no substantive results, least of all in the area that most concerned trade unions in the US and Canada: combating simulation in collective bargaining and its effect on wages. However, the NAALC achieved its main objective of securing the necessary votes in the US Congress to get NAFTA approved in 1993 (Bensusán, 1994; Bensusán and Middlebrook, 2013 and Compa and Brook, 2015).

Chapter 23 of the USMCA, which applies to all three countries, refers to the ILO Declaration on Fundamental Principles and Rights at Work and promotes compliance with it. It also included the obligations under the ILO Declaration on Social Justice for Fair Globalisation (Article 23.2, USMCA). It states that each party is free to adopt and maintain its laws, regulations and practices, within the framework of the aforementioned declaration and its well-known principles (freedom of association and recognition of the right to collective bargaining; elimination of forced labour; effective abolition of child labour and elimination of discrimination regarding employment and occupation). In addition, each party undertakes to adopt or maintain »laws, regulations and practices [...] governing acceptable conditions of work with respect to minimum wages, hours of work as well as health and safety at work«. It also lists the government action to be taken to effectively implement its labour legislation (Article 23.5, USM-

CA). Finally, it includes commitments on public awareness of labour laws and procedures, as well as procedural safeguards and forms of cooperation for the implementation of the Labour Chapter (Article 23).

For its part, Annex 23 A, exclusively relevant for Mexico, strengthens the new constitutional principles on freedom of association and collective bargaining derived from the 2017 reform, through the regulation of these freedoms, as well as the bodies and procedures to make them effective. These rules were faithfully followed in the reform of the Mexican Federal Labour Law (MFL) (2019). The most relevant commitment, provided for in Annex 23 A, requires that the regulation of the new principles included in Article 123 of the Constitution (reformed on 24 February 2017) in the MFL, which was then being processed in the legislature, should contain the obligation to review all existing collective bargaining agreements at least once within four years of their entry into force. In this way, a bridge was created between the old and the new labour models and the way to agreements negotiated behind workers' backs was closed, instituting the process of legitimisation of collective bargaining agreements that was finally included in Transitory Article 11 of the MFL Reform Decree, which came into force on 1 May 2019 (Bensusán, 2021).

Annex 23 A of the USMCA was strengthened by the reopening of negotiations leading to its approval in the US (January 2020) and Canada (March 2020). To culminate this process, a new protocol amending Chapter 31 of the USMCA was signed on 11 December 2019, adding two annexes (A, for Mexico-US and B, Mexico-Canada).

The RRLM established therein, seeks to ensure compliance with the freedom of association and collective bargaining obligations in covered facilities of any party³. However, in the case of Mexico, it is sufficient that a denial of rights is presumed for the mechanism to be activated against it, which is not the case in the US and Canada, where it is necessary

² This and the following section builds on previous contributions by one of the authors of this paper: Bensusán 2020 (ILO); Bensusán and Middlebrook, 2020 (Woodrow Wilson Center) and Bensusán, 2021. Labour reforms in Mexico and trade negotiations from NAFTA to the USMCA, ILO, Geneva, book chapter in preparation.

³ A covered facility in the territory of a party is one that »produces goods or provides services traded between the parties; or produces goods or provides services that compete in the territory of a party with goods or services of another party, and is a facility in a Priority Sector«. A Priority Sector is defined as one that produces manufactured goods, provides services, or involves mining. Article 31 A, 15 of the USMCA.

for the covered facility to have received a compulsory order from their respective National Labour Relations Boards, thus giving them unequal treatment⁴.

Under certain conditions (e.g. where redress is not accepted, achieved or complied with), the setting up of independent panels of experts would be triggered, provided that the complaint of alleged violations of trade union freedom and democracy in covered facilities in priority sectors of the US-MCA did not find a solution. The arbitrators could carry out on-site inspection visits with the presence of observers and, if violations are found, they could lead to three types of sanctions: suspension of preferential tariffs, imposition of fines on goods or services and, in the event of a repeated offence, a trade embargo on the exports of the companies involved. According to Chapter 23 of the USMCA, it is understood that the non-compliance must be »in a manner affecting trade or investment between the parties«, and the time when such breach occurs is to be defined. It should be noted that, for all three countries, the burden of proof is reversed and it is established that it is up to the responding party to demonstrate that the non-compliance does not affect trade or investment between the parties. A significant feature is the short time available to the government for responding to a complaint of denial of rights and for proposing, if necessary, a remedy (a total of 45 days) and the speed of the entire arbitration procedure, which should be completed within four months. The final section will present the fate of the first two complaints brought against Mexico under the RRLM and their outcomes.

USMCA RULES AND WAGES IN THE MEXICAN AUTOMOTIVE INDUSTRY (MAI)

The case of the MAI and its export success, based on union control and low wages with productivity growth, attracted all the attention, because even in NAFTA's most successful sector, Mexican workers did not see their working conditions improve. The US Secretary of Commerce was highly critical of this. He stated that the average Mexican worker was, in terms of purchasing power, »much worse off now than five or ten years ago« and added that »that was not the original intent of NAFTA« (Isodore, 2017).⁵

⁴ Article 31 A 2, Note 1: »With respect to the United States, a complaint may only be filed with respect to an alleged Denial of Rights owed to workers at a Covered Facility under an enforcement order of the National Labor Relations Board. The same criterion is laid down in favour of Canada in Article 31 B 2, Note 1. With respect to Mexico, a complaint may only be filed with respect to an alleged Denial of Rights under legislation that complies with Annex 23-A (Worker Representation in Collective Bargaining in Mexico)«. Protocol Amending the Agreement between Mexico, the United States and Canada. https://www.gob.mx/cms/uploads/attachment/file/560548/Protocolo_Esp_Verificaci_n_CLEAN__2020_06_02_.pdf

⁵ The conflict at Honda, Alto Jalisco, in 2015, in which the ownership of a collective bargaining agreement was disputed by an independent union in a struggle that began seven years earlier, generated significant solidarity from US trade unionism. It was even an indisputable test of the way in which auto plants prevented genuine worker representation in this sector, which is almost entirely controlled by CTM-affiliated unions (Bensusán and Covarrubias, 2016).

A few facts illustrate why President Trump drastically tightened his demands in this area. According to Covarrubias (2020, p. 9), after the 2008-2009 crisis, with the elimination of tariff restrictions, the MAI received investments that surpassed those of China in 2013, making it »one of the two most dynamic export hubs in the world« and the fourth largest exporter in the world. Of total exports (82.5 % of its production), 68 % went to the US and 8 % to Canada (Proméxico data, 2018, Covarrubias, 2020). Thus, in a context of the poor results of the USMCA, the MAI was the main beneficiary, with an increase in production of 400 %, generating 23 % of regional production in 2018, when it was 6 % in 1990. At the same time, the US trade deficit with Mexico increased twenty-fold and that of Canada five-fold (Ibid, p. 5). However, the export success of the MAI, and its contribution as an exporter of more added value than it imports, was not matched by improvements in the quality of jobs and wages, to the extent that precarious employment tripled between 1996 and 2019. Moreover, employment growth was lower than in other manufacturing areas, such as the textile industry (Moreno Brid et al, 2021, p. 32).

In terms of employment developments in the three countries, there was an improvement in the US and Mexico between 2009-2019, with a slight fall in Canada, but most significant was the widening of the wage gap. While the average hourly wage in the US automotive manufacturing industry was more than five times that of Mexico in 1994, the gap grew to more than seven times in 2019, with the same trend for Canada. In the case of the auto-parts industry, it went from six times larger in the US to almost eight times larger in the same period. In addition, there was a negative convergence in wages in the three countries between 1994-2019. For example, in Mexico's automotive manufacturing industry, the average hourly wage fell from USD 6.3 to USD 4⁶; in the US it fell from USD 34.2 to USD 30 and in Canada from USD 32.5 to USD 28.1. The difference between automotive manufacturing and auto-parts industry wages in Mexico was around 60 % (4 USD vs. 2.5 USD).⁷ In turn, the remuneration of MAI wage earners within the value-added structure fell from 22.4 % to 14.3 % (Covarrubias, 2020, p. 7). Differences in productivity do not explain the wage gap: while in 2018, manufacturers in Mexico produced 47 cars per worker, in the US it was 48, with a wage gap between the two countries of 94 % (Ibid, 8).

As a result of the above, and to correct what President Trump considered a disaster for the US due to the trade

⁶ Between 2016 and 2018, as a result of the devaluation of the peso, the wages of production line workers – excluding employees and managers – fell to 2.3 dollars per hour, which is less than a tenth of that in the US. If total compensation in both countries is included, it can be seen that while in Mexico it was equivalent to USD 2.99 per hour, in the US it reached USD 47, with data from collective bargaining agreements for Mexico and The Conference Board International Labor Comparisons of 2017 for the US, cited by Covarrubias, 2020, p. 7.

⁷ Data from official sources taken from Bensusán and Florez, 2021. See Graph 2, 2000-2019 and Table 7.

deficit with Mexico⁸, the rules of origin for the automotive industry went from a 62.5 % to a 75 % regional component. In addition, labour-related commitments include the unprecedented adoption, in a trade agreement, of an incipient regional wage policy linked to manufacturing costs in the automotive industry. This policy conditioned the tariff-free circulation of vehicles in the region when at least 40 % of the total cost of manufacturing passenger vehicles and 45 % of pick-up trucks was produced by workers earning at least 16 dollars per hour (Appendix to Annex 4-B, Article 4-B.7. USMCA). The possible effects of this policy are uncertain given the complexity of the wage rules, and the fact that it is not strictly about minimums for the automotive industry but about averages that could be reached if part of the workforce is highly paid, such as in management or R&D-related positions (Scherrer, 2020, 299). However, some estimates suggest that even if there were to be a significant change in the Mexican union structure and a gradual wage recovery due to domestic policies, given the size of the gap, it would take many years before the MAI loses its traditional competitive advantage and its ability to attract investment.⁹

⁸ García Marco, 18 May 2016, https://www.bbc.com/mundo/noticias/2016/05/160516_economia_comercio_estados_unidos_mexico_.

⁹ On the scenarios that the new USMCA rules, coupled with the domestic reform of the union regime, will bring to the automotive industry, see Covarrubias 2020 and Bensusán and Covarrubias, 2021.

3

THE RAPID RESPONSE LABOUR MECHANISM IN THE MAI: THE CASE OF GM, SILAO, GUANAJUATO, AND THE DENIAL OF FREEDOM AND COLLECTIVE BARGAINING RIGHTS

The RRLM, referred to earlier, can have deterrent and remedial effects, even without reaching the punitive phase, as shown by the first complaint filed by the US Trade Representative and accepted by Mexico under the RRLM, concerning the legitimisation process of the collective bargaining agreement (CBA) for General Motors (GM) in Mexico, based in Silao, Guanajuato. Moreover, the complaint filed by the United States in the case of TRIDONEX, an auto parts company based in Matamoros, Tamaulipas, which could not be accepted by Mexico because the denial of rights predated the entry into force of the USMCA¹⁰, produced very positive results for the affected workers through direct negotiations between the US Trade Representative and TRIDONEX's headquarters in the United States¹¹. What is important is that, although the scope of this instrument is limited in principle to the priority sectors of the USMCA, it can be expected that these cases will create an enabling environment for freedom of association and collective bargaining, as well as democracy within organisations, to be extended further, as has been the case in other areas.¹²

In the case of GM, Silao, the complaint filed by the US Trade Representative gave high visibility and a sense of urgency to redress the violations of freedom of association and collective bargaining detected in the process of legitimising the CBA, whose owner since 2005 was the union Sindicato Miguel López Trujillo (abbreviated name), affiliated to the confederation of workers of Mexico (CTM). The complaint arose from the process of voting by free, direct and secret ballot that was to take place on 20 and 21 April 2021. However, this process had to be interrupted midway through the first day due to a manoeuvre by the union and irregularities observed by the labour authority. All indications are that the partial recount of the vote warned the union that the majority of workers were voting against the CBA (51.94% vs. 47.39%). When the voting process was to be resumed, it was found that the voting equipment had been damaged and the union suspended it on that pretext. For its part, the Liaison Unit for the Reform of the Labour Justice System of the Secretariat of Labor and Social Welfare (STPS) in Mexico made public on 11 May the cancellation of the GM election partially held on 20 April and set a deadline of thirty days to reinstate the legitimisation procedure, with new guarantees, which was not met.

One day after the cancellation of the process, on 12 May 2021, the US complaint was filed by the United States Trade Representative, arguing denial of rights during that process, under Article 31-A 4.2 of the USMCA. For its part, the Mexican government accepted it without delay and, after a period of binational consultations, a very detailed redress agreement was quickly reached on 13 July 2021. It set a new deadline for the vote, which expired on 20 August, with commitments for all parties, including GM's obligation to distribute the CBA to its workers in a timely manner and STPS supervision of the process, as well as the participation of observers from the ILO and the INE (National Electoral Institute). Voting took place on 17 and 18 August 2021, over

through electronic means in PEMEX, for the first time in its history <https://www.bloomberglinea.com.mx/2021/10/29/sindicato-de-pemex-elegira-secretario-general-con-voto-electronico-en-enero-de-2022/> Another example of an unprecedented democratic election is that of the Mexico City Workers' Union, with more than 100,000 workers <https://www.jornada.com.mx/2021/10/30/opinion/017a2pol#texto>.

¹⁰ On the Tridonex case, see IMCO. (2021, 11 August). *The United States makes use of the Rapid Response Labour Mechanism for the second time*. <https://imco.org.mx/estados-unidos-hace-uso-del-mecanismo-laboral-de-respuesta-rapida-por-segunda-vez/>. Forbes. (2021, 10 August). *US reaches agreement with Mexican auto parts subsidiary Tridonex*. Forbes Mexico. <https://www.forbes.com.mx/eu-llega-a-acuerdo-con-filial-mexicana-de-autopartes-tridonex/>. Flores, Z. (2021, 11 August). *U.S. and Mexico deactivate complaint over USMCA violation at Tridonex plant*. Bloomberg Linea. <https://www.bloomberglinea.com.mx/2021/08/10/eeuu-y-mexico-desactivan-queja-por-violacion-al-t-mec-en-planta-de-tridonex/>.

¹¹ Unrelated to the RRLM but also in the automotive industry, it should be mentioned that the CTM union lost the case for the ownership of the CBA of the three Nissan plants in Aguascalientes, with conditions far inferior to those of Nissan Cuernavaca, whose owner is an independent union. The new owner in Aguascalientes is the Sindicato de Trabajadores, Choferes en Transportes de Productos Manufacturados, Semi Facturados, Similares y Conexos, who won 2,044 votes out of 3,382 valid votes in the three plants. For its part, the CTM union took 1,318 and the rest were null and void. The winner belongs to CATEM (Confederación Autónoma de Trabajadores y Empleados de México), see Gascón, 23 September 2021, https://www.reforma.com/aplicacioneslibre/preacceso/articulo/default.aspx?__rval=1&urlredirect=/sacan-a-la-ctm-tambien-de-nissan-aguascalientes/ar2264126.

¹² However, there are disagreements with the result that can lead to the reinstatement of the process due to reasonable doubt, with the intervention of the CFCyRL (Federal Centre for Conciliation and Labour Registration). The case of the election by free and direct vote

a period of thirty hours, and was the most closely monitored labour election process in the country's history. It ended with a total of 3,214 votes against the CBA (54.7 %) and 2,623 votes in favour (44.6 %), a greater difference than in the first vote, amidst a large turnout that reached almost 92 % of the workers.¹³ Finally, in September 2021, the STPS resolved the termination of the CBA between the «Miguel Trujillo López» Union and General Motors de México at its Silao, Guanajuato plant, effective 3 November 2021. At the same time, the intervention of PROFEDET and the Federal Labour Inspectorate was requested to ensure that there are no reprisals or threats to workers (STPS, 2021).

It should be noted that the defeat of the powerful «Miguel Trujillo López» union, affiliated to the CTM (with more than 200 CBAs signed in various business sectors, triumphant in similar processes and holder of the agreements with GM in the Coahuila plant), in its effort to legitimise the CBA of the Silao plant, would not have been possible without the prior organisation of dissatisfied workers. A conflict arising from the dismissal of some co-workers two years before the legitimisation process, the implications of which seem to have been neglected by a trade union leadership distanced from its rank and file, led to the formation of «Generando Movimiento» (Generating Movement). Organisers had been holding informal meetings with unions in Canada (UNIFOR) and the USA, as well as the Federation of Independent Unions in the Automotive, Auto Parts, Aerospace and Tyre Industries (FESIIAAN), formed in 2018, and had broad solidarity for the movement, which was evident when the initial vote on the CBA was held in April 2020. Thanks to this support, the information work required to overcome the workers' fears of confronting a trade union representation with considerable power resources and the obvious blessing of the company could be carried out. The workers' dissatisfaction was due to the lack of genuine representation of their interests and the lack of democracy in the union, as well as the neglect they experienced in the pandemic, coupled with the nature of their collective bargaining agreement, which was less advantageous than that of other automotive plants. For these reasons, they took advantage of the legitimisation process to express their disapproval to the union holding the CBA.

Once they had succeeded in having it terminated, the dissidents of the «Sindicato Miguel Trujillo López» managed to register a new union, the SNTTIA (Sindicato Nacional de Trabajadoras y Trabajadores de la Industria Automotriz), which was quickly recognised by the registration authority. What comes next in this process is still uncertain, as this new union will have to obtain a certificate of representation to negotiate a new collective bargaining agreement, for which it will surely have to compete with the Sindicato Miguel Trujillo Lopez (since according to the results of the vote both could be in a position to get the required 30 % of the workers' support), among others. This critical phase of the nego-

tiation process of a new CBA will require rigorous vigilance on the part of the authority to ensure equal opportunities for all contenders, avoiding any interfering behaviour by the company that affects the workers' freedom to choose who should represent them. However, this case shows that the conjunction of a new domestic institutional framework and the USMCA, the internal and external monitoring of the voting process and the organisation of the dissatisfied workers created an unprecedented scenario in which the voice of the workers was finally heard and respected.

Undoubtedly, as shown in the previous section explaining the USMCA rules in the automotive industry, both US and Canadian unions and their respective governments have an interest in preventing the absence of freedom of association and the simulation in collective bargaining, with its consequences in artificially depressing wages, from creating an undue competitive advantage. But it must be said that this legitimate interest fully coincides with that of the workers and the Mexican government, since it is about promoting a type of integration in North America in which all those involved benefit and not just the multinational companies. Moreover, the new rules of the game of the USMCA and the domestic regulations (Article 123 of the Constitution and the Federal Labour Law) will act in a very favourable environment for workers, as a minimum wage policy aimed at recovering purchasing power has been adopted and the subcontracting of personnel has been prohibited, limiting this practice to specialised work that does not coincide with the main activity and the corporate purpose of the contracting company. It is worth noting that in 2019 about a quarter of the workers in the automotive manufacturing and auto-parts industries in Mexico were outsourced (Bensusán and Florez, 2021).

¹³ It was attended by numerous officials from the STPS, 15 observers from the ILO and 30 from the INE, in addition to representatives of the union holding the CBA, (Giménez Cacho, 2021, p. 31).

4

SYMMETRIES AND ASYMMETRIES IN LABOUR RIGHTS ENFORCEMENT: A COMPLAINT AGAINST THE USA

Under what conditions can Mexico take the US to court in the event of violations of workers' rights in the US? As explained above, the protection of workers' labour rights is addressed in the region through two types of regulations included in the USMCA. On the one hand, those contained in Chapter 23, enforceable through the Chapter 31 Disputes procedure, applicable to all three countries on an equal footing. On the other hand, the rules of Annex 23 A, on freedom of association and collective bargaining, enforceable only for Mexico. In addition, the RRLM, also associated with these freedoms, imposes different requirements for claiming a denial of rights. While in the case of Mexico a complaint can be filed without further ado when a denial of rights is alleged, in the case of the US and Canada, the covered facility is required to have previously received an enforceable order from the National Labor Relations Boards as a condition for Mexico to file a complaint. Moreover, given the greater volume of Mexico's exports to the US, it is clear that in either of the two mechanisms, the impact of the adoption of trade sanctions would affect Mexico unequally and to a much greater extent.

With regard to the filing of disputes under Chapter 31, Mexico has only filed one petition for events in the US in March 2021, concerning »migrant workers travelling to the US to perform essential work in agricultural and non-agricultural industries on H-2A and H-2B non-immigrant visas«, which serves to illustrate how this instrument can be used to protect migrant workers, among others, in the US and to improve the enforcement of labour laws. However, this is a process filed with the STPS on 23 March 2021 and has not yet led to a resolution of the complaint.

The petition was filed with the Labour Policy and Institutional Relations Unit of the STPS – which is the point of contact under Chapter 23 with the ability to propose a communication and investigate the petitioners' allegations – by workers in the agricultural, shrimp and chocolate processing industries, which are traded in all three countries, so the violations would affect regional trade. The petitioners were supported by the Centro de los Derechos del Migrante, Inc (CDM), the Alianza Nacional de Campesinas and the American Federation of Teachers, the AFL-CIO and other Mexican organisations such as the Centro de Apoyo al Trabajador, the Centro de Apoyo y Capacitación para Empleadas del Hogar and the Centro de Derechos Humanos de las Mujeres and the Red de

Mujeres Sindicalistas, among many others. In this regard, it questioned »the failure of the US government to effectively enforce labour laws and promote the elimination of employment discrimination in the H-2 Program in violation of Chapter 23 of the United States–Mexico–Canada Agreement«. Discrimination would disproportionately affect women through exclusion, the allocation of H-2B visas, lower pay and working conditions, and being relegated by employers to jobs that are more unfavourable than those of men, even if they have the same qualifications. Non-compliance with Chapter 23 commitments is reported to consist of discriminatory conduct and restriction of workers' ability to obtain free legal support to file complaints of violations of US labour laws, among others. It is argued that the US has not complied with domestic regulations prohibiting discrimination and segregation in employment on the basis of sex and that US enforcers have the resources to enforce them, and avoid the filing of disputes. In support of this petition, testimonies of those affected were presented as well as statistical evidence on the distribution of visas and the adverse impact by gender. In addition to compliance with Chapter 23, this petition calls for cooperation activities between the two countries on the discrimination issues invoked in Article 23.12. (5). The Labour Policy and Inter-Institutional Relations Unit is requested to investigate the allegations and, if warranted, to recommend that a Consultation be held, in accordance with Article 23.17 of the USMCA¹⁴.

On 12 May 2021, a public communication took place between Mexico and the US and on 4 June 2021, a further amended petition was filed with the STPS by a large group of US professors, lawyers, academics and human rights experts, reiterating the violations of the rights enshrined in Chapter 23 of the USMCA and specifying the obligations of the United States to eliminate discrimination under the H2 Temporary Visa Program.

If no agreement is reached between the parties, the complaint would be left to the Free Trade Commission, which may resort to various means of settlement such as good of-

¹⁴ It expressly mentions non-compliance with Article 23 (1) (d) on Labour Rights; 23.5 (1) and (2) on Enforcement of Labour Laws; 23.7, on Violence Against Workers; Art-23-8 on Migrant Workers; 23.9 on Discrimination in the Workplace; and 23.10 on Public Awareness and Due Process.

fices, conciliation, mediation and other alternative means and, only if the dispute cannot be resolved, one of the parties may request the setting up of an arbitration panel. In this case, the deadline for resolution is in principle five months, and if the decision issued in the final report is not accepted, the affected party may request the suspension of benefits, in the sector concerned, in principle.

However, in this case, the United States accepted the complaint and expressed its willingness to agree with Mexico on remedies for the alleged violations. This petition is currently in that process and there is no public information on the specific points that could be addressed.

What is notable is that these rules, presented here in a very simplified form, give Mexico the opportunity to file complaints on an equal footing on a wide range of issues related to labour rights included in Chapter 23, which are not covered by the RRLM, on freedom of association and collective bargaining.

5

SOCIAL AND ENVIRONMENTAL SUSTAINABILITY

Once again, the USMCA proved to be groundbreaking on environmental issues. The first time was in 1994 when environmental groups in the United States pressured the government to sign the North American Agreement on Environmental Cooperation (NAAEC) alongside NAFTA, which at the time was considered the »greenest agreement« ever signed (Prado, 2005). Now, more than two decades later, it is once again breaking new ground by including a comprehensive chapter on the environment in the main body of the agreement.

Chapter 24 of the USMCA is composed of 32 articles whose antecedents are the aforementioned agreement (NAAEC) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), so the spirit of the old NAFTA is still present in the new document. In an assessment made by various specialists in environmental matters, it is pointed out that although the new chapter should be celebrated bringing this field on a par with trade and investment and raising it to an international level, it is very ambiguous, lax and discretionary for the parties (Alanís, 2020), in addition to the fact that its content is, for the most part, barely an invitation to be adopted by the parties. The scope of Chapter 24 of the USMCA is set out below, with emphasis on the provisions that are new.

The chapter begins with the standard provisions: general definitions, scope, objectives and the guarantee of the parties to establish their regulations, design their policies and define their priorities in this area. Notable among the chapter's novelties is the increased focus on the involvement of society and the possibility for any person in each party to request an investigation into an alleged violation of its environmental laws (Article 24.6). The chapter encourages Corporate Social Responsibility and responsible business conduct without specifying its scope. Likewise, Article 24.14 on Voluntary Mechanisms for environmental improvement is innocuous as it lacks concrete guidelines for their implementation. It is worth mentioning that the document contains specific issues such as the ozone layer and air quality (which indirectly refers to climate change, although it is not recognised by the Trump administration). Similarly, there are the provisions on Trade and Biodiversity (Article 24.15), which reflect Mexico's commitment to the Convention on Biological Diversity to which the United States is not a party, and which will have important implications for pharma-

ceutical industries. This is also reflected in Article 24.22 Conservation and Trade, which establishes a commitment to combat illegal trade in wild flora and fauna, a measure that was further strengthened by the now Environmental Cooperation Agreement (ECA)¹⁵, (TradeTankMx, 2020). Other issues include the protection of the marine environment and the reduction of pollution from ships, sustainable management of fisheries, protection and restoration of marine habitats, prevention of overfishing through the elimination of fishing subsidies, and protection of other marine species (birds, sharks, marine mammals), among others. For the promotion of coordination and collaboration on environmental issues, there are contact points and the Environment Committee and its Secretariat, which existed under NAFTA, are kept in place. The enforcement mechanisms include five instances: a) petitions that can be filed by any person and non-governmental organisation from any of the three countries for alleged violations of environmental legislation before the Committee's Secretariat; b) Opening of the factual file, which is an investigation to find out if there is a violation of the provisions of this chapter (it does not include sanctions, nor recommendations, it only considers the possibility of opening the investigation), the three countries vote whether or not to open the file, being that a conflict of interest arises because at the same time one of them is accused of not complying with environmental laws (Alanís, 2020); c) Environmental consultations between the parties that are held to agree on the interpretation and application of this chapter and may include cooperative activities to reach satisfactory solutions; d) Consultations of High Level Representatives; e) Ministerial consultations. Finally, when there is no agreement between the parties in the above-mentioned instances, the Consulting Party may request a meeting of the Commission, Good Offices, Conciliation and Mediation and subsequently request the establishment of a panel under Article 31.6, which, in the event

¹⁵ The ECA replaces the North American Agreement on Environmental Cooperation (NAAEC) that was created under NAFTA, which proved to be a good mechanism for dialogue and cooperation between environmental authorities at ministerial level and the participation of civil society and experts. Between 1996 and 2016, a total of 245 cooperation projects were developed in different areas of the environmental agenda. Moreover, in the Mexican case, a key contribution of the cooperation agenda promoted by the NAAEC is reflected in the fact that from 1994 to 2017, 10 laws and around 104 technical regulations (NOM) linked to environmental protection were published (Ministry for Economic Affairs, 2020, p. 86).

of non-compliance, may lead to economic sanctions. Also new, as in the labour chapter, is that the burden of proof is on the party accused of non-compliance to demonstrate to the panel that its actions do not contravene this chapter, and that in the absence of resolution of issues through consultations, the Complaining Party may proceed directly to request the setting up of a dispute settlement panel.

With regard to the commitments made by the parties on environmental cooperation, they are similar for Canada, the United Mexican States and the United States of America, since, as established in the Protocol Amending the Treaty signed by the three governments, they are obliged to take all necessary measures to comply with their respective obligations under seven Multilateral Environmental Agreements (MEAs)¹⁶

The Protocol is also accompanied by a Parallel Agreement between Mexico and the United States on Environmental Cooperation and Customs Verification, through which both Parties adopt a mechanism to exchange information and inspection visits to verify the legality of shipments containing wild flora and fauna, fishery products or forestry products (Ministry for Economic Affairs, 2020, p. 108).

For the countries, compliance with the provisions of Chapter 24 on the environment will involve amendments to their respective domestic legislation. For example, the United States in the USMCA Implementation Act determines various actions to improve environmental standards and transboundary cooperation and, for this purpose, it creates an Inter-Ministerial Environmental Monitoring and Compliance Committee, which will be responsible for evaluating the environmental laws and policies of the Parties and monitoring the implementation and compliance with the obligations of the countries of the Treaty (TradeTankMx, 2020). Mexico is currently preparing a package of environmental law reforms to meet its commitments under the USMCA. Finally, the advantages and disadvantages of this renewed trade agreement in relation to other treaties, especially in the areas reviewed above, are discussed below.

16 Multilateral Environmental Agreements are on: Multilateral Environmental Agreements are on: 1) Endangered Species of Wild Fauna and Flora, (CITES); 2) Ozone Layer (Montreal Protocol); 3) Pollution from Ships; 4) Wetlands especially as Waterfowl Habitat, (RAMSAR); 5) Antarctic Marine Living Resources; 6) Regulation of Whaling; and 7) Tropical Tuna.

6

ADVANTAGES AND DISADVANTAGES OF THE USMCA COMPARED TO OTHER TRADE AGREEMENTS

As this paper has discussed, environmental and labour content in trade agreements is already common practice internationally, but the USMCA is also the global benchmark for the world's largest market, providing certainty for investment and, now, employment. Thus, North America consolidates its position as the region with the largest economy in the world, with a Gross Domestic Product of more than 22.2 trillion dollars and more than 490 million inhabitants, according to the Ministries for Economic Affairs (SE) and Foreign Affairs (SRE) (Forbes, 2020). Precisely in order for Mexico to be attractive for regional and international trade and investment and to remain in this league, it had to agree to numerous labour-related conditionalities that are worth studying but would not necessarily be acceptable to other countries.

The presence of labour content in international trade agreements is an issue that has been widely analysed at international level. In Latin America, there are also important papers, such as those by López (2006), Mosquera (2008), Lazo (2009), Pérez del Prado (2017), Witker (2007) and Guamán (2016) to mention a few, which discuss the relevance of the inclusion of minimum labour standards, their scope and viability when they are included in a trade and investment agreement or treaty.

Since the United States and Canada first pushed for the incorporation of labour rights in the North American Agreement on Labour Cooperation (NAALC) in 1994, this practice has proliferated relatively quickly. In 1995, only four instruments contained such provisions, 21 in 2005, and by 2016 there were 77 trade agreements with such clauses, involving 136 economies (ILO, 2016, p. 2).

According to the ILO (2015), about 40 percent of trade agreements include labour provisions with a conditional dimension (such as those negotiated by the United States and Canada) that involve either economic benefits for compliance or sanctions for violation of the agreements. The remaining treaties are more collaborative in nature, encouraging and promoting the parties to respect minimum labour standards, without economic consequences in the event of non-compliance (the main feature of agreements negotiated by the European Union).

This is clearly seen in the recently modernised FTA EU-MX (Free Trade Agreement between Mexico and the European

Union) of 2020, whose labour content appears – hand in hand with the environmental provisions (the famous social clauses) – in Article 26 »Trade and sustainable development«. These provisions recognise the importance of these issues for trade and investment, subject to the right of each party to determine its labour policies and priorities. The labour content of Chapter 26 of the FTA EU-MX refers to the ILO Declaration on social justice for fair globalisation of 2008, the fundamental principles and rights at work and its follow-up of 1998. It commits each party to guarantee the core conventions of the International Labour Organisation¹⁷. In addition, to ensure multilateral governance, each Party shall effectively implement the ILO conventions and protocols it has ratified and promote decent work as defined in the 2008 ILO Declaration on Social Justice for Fair Globalization¹⁸ and undertake to ensure that each country's administrative, judicial and labour court procedures for the application of its labour laws are fair, accessible and transparent. The chapter provides that, in the event of disagreement between any of the parties in the fulfilment of this article, it can only be resolved through consultations and before a panel of experts, where priority is given to dispute resolution through mediation and, as a last resort, referral to panels of experts who issue their recommendations without binding force (Articles 26.18 and 26.19). The Sub-Committee on Trade and Sustainable Development shall monitor the follow-up to the report of the panel of experts and its recommendations.

Criticism of the lack of teeth of non-binding labour clauses or their uselessness due to the lack of effective and timely enforcement mechanisms or actors capable of enforcing them has been widespread among scholars of trade agreements. Therefore, one of the most important differences between the USMCA and the FTA EU-MX on this issue is its binding nature and its capacity to influence precisely the strengths of the old Mexican labour model, to transform it and democratise trade unions.

¹⁷ Freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; effective abolition of child labour; elimination of discrimination in respect of employment and occupation.

¹⁸ This includes improving occupational health and safety measures, decent working conditions for all, in terms of wages and incomes, working hours and other working conditions; maintaining an effective labour inspection system.

Another notable labour-related innovation in the USMCA is the establishment of a rule on average wages that must be included in a share of the value of production generated in the automotive industry in order to benefit from tariff liberalisation. However, it is argued that the complexity of these rules will make it difficult to assess compliance with them and the effects they may have on Mexican industry and workers (Scherrer, 2020).

What is often questioned is the strong demands and oversight imposed by the United States and Canada on Mexico's prior adoption of domestic labour reforms and on compliance with obligations related to freedom of association and collective bargaining. In addition, there is the unequal treatment that underlies the RRLM. In both cases, the context explains both the reasons for the imposition from the North and Mexico's acceptance of the conditions. Mexico and especially the automotive industry came under the spotlight of trading partners because of strong union and wage controls in assembly plants and the expansion of employer protection contracts in the auto parts industry. Although important constitutional reforms were previously made under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), voluntarily recognising that this was not a fair form of trade competition and abandoning old trade union practices was not initially on the agenda of the Mexican negotiators of the USMCA, which made agreements difficult for months. The situation changed with the arrival in the Mexican government of a president committed to transforming trade unionism, as had been demanded for decades by various sectors of Mexican society. Thus, the binding characteristics and the peremptory enforcement of the labour clauses of the USMCA, especially on the issue of freedom of association and collective bargaining, as well as the conditioning of the negotiations on domestic reforms, cannot be evaluated outside this specific context, in which there was an unexpected convergence of interests in favour of changing the labour model and the minimum wage policy, which as we have seen did not prevent unequal treatment among the three trading partners (Bensusán and Middlebrook, 2020).

This chapter showed examples of the importance of external monitoring as a way of making visible and resolving labour disputes, which previously might have taken many years without reaching a satisfactory outcome for workers, but which, while being the same, might operate differently in other contexts. Nevertheless, however adequate the mechanisms and procedures of the USMCA may be, experience shows that the achievement of the objectives in terms of the successful implementation of the Mexican labour reform will depend mainly on the organisational capacity of Mexican workers, for which the solidarity of trade unions in the other countries will be essential, something that has been greatly favoured by the integration of North America.

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THE USMCA BETWEEN THE US AND MEXICO

A Step Towards More Sustainable Trade?



Foreign trade and especially exports to the US are essential for Mexico. For this reason, Mexico signed the USMCA in 2020, despite the conditions imposed by the US and Canadian governments. Amongst these conditions is also a differential treatment in labour regulation with a peremptory enforcement mechanisms that can lead to economic and trade sanctions.

The negotiations on labour issues included in Chapter 23 of the USMCA were facilitated by a domestic political change in Mexico. They led to a convergence of interests with Mexico's trading partners but did not prevent unequal treatment.

The new provisions on freedom of association and collective bargaining (Annex 23 A of the USMCA) are unilateral and only apply to Mexico. They are reflected by the corresponding reforms in the Federal Labour Law of 2019 regulating the Constitution and they initiate a structural transformation of the old labour model with its known deficits.



The Rapid Response Labour Mechanism (RRLM) was the last concession Mexico had to make to assure its trading partners of its commitment to the labour obligations of the USMCA.

It is still too early to assess the effect of the new rules of origin for the automotive industry and the establishment of an average wage as a percentage of the total cost of manufacturing in the automotive industry, but it sets a good precedent for a possible gradual wage recovery, supported by better quality representation and a new minimum wage policy.

The first US complaint against Mexico for denial of freedom of association and collective bargaining rights under the RRLM showed its value by making it possible to redress the violation of these freedoms without the need to reach the punitive stage. At the same time, it showed its potential to have an impact not only on the priority economic sectors of the USMCA but on the economy as a whole.



Chapter 24 on the environment is innovative for its broad content on biodiversity, fisheries, air care and protection of the marine environment, among others. The enforcement mechanisms are the same for all three countries and provide various instruments for the parties to complain about violations of the chapter, in addition to the general dispute settlement mechanism.

The most important differences between the USMCA and the FTA EU-MX are its binding nature and its capacity to influence precisely the strengths of the old Mexican labour model, to transform it and democratise trade unions.

The experience of the USMCA indicates that the achievement of social, environmental and labour objectives will depend primarily on the organisational capacity of workers and the solidarity of trade unions in other countries.

Further information on the topic can be found here:

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