

LABOUR RIGHTS ENFORCEMENT IN THE USMCA



Maquila Solidarity Network

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On July 1, 2020, the United States-Mexico-Canada Agreement (USMCA) went into effect, replacing the North American Free Trade Agreement (NAFTA)*. There continues to be considerable debate in all three countries about whether the labour provisions of the new agreement will be more enforceable than those of NAFTA. In this briefing paper, MSN examines the strengths and limitations of the labour provisions of the new trade agreement and the mechanisms created for their enforcement.

*The agreement was ratified by Mexico on June 20, 2019, signed into law by the United States on January 29, 2020, and adopted by Canada on March 13, 2020. Each of the three countries has adopted a different name and acronym for the trade agreement, USMCA in the US, CUSMA in Canada, and T-MEC in Mexico. We use USMCA throughout this paper.

BRIEFING PAPER

LABOUR RIGHTS ENFORCEMENT IN THE USMCA

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The Maquila Solidarity Network (MSN) is a labour and women's right organization based in Toronto, Canada that supports the efforts of workers in global supply chains to win improved wages and working conditions and greater respect for their rights.

For more information on MSN's work on labour rights, freedom of association and labour justice reform in Mexico, visit:

<http://www.maquilasolidarity.org/supporting-freedom-association-foa-mexico>.



CHANGES TO LABOUR DISPUTE MECHANISMS



The USMCA includes two mechanisms to enforce the labour rights obligations of the agreement. The first, set out in Chapter 23,¹ seeks to improve the effectiveness of the existing state-to-state labour dispute settlement mechanism that was in the labour side agreement of NAFTA. The renegotiated Labour Chapter modifies the labour rights included in the agreement, explicitly adding protection for workers against violence, and includes a ban on forced labour. It also opens the dispute resolution mechanism to cases on freedom of association and the right to bargain collectively, which now qualify for fines and trade sanctions under Chapter 31.

In response to pressure from US labour unions to modify parts of the agreement in exchange for their support, Democrats bargained further changes to the USMCA after the agreement was signed in December 2018.² The new features appear in the Protocol of Amendment to the Agreement between the United States of America, the United Mexican States and Canada that was finalized in December 2019.³ Annex 31-A and 31-B of the Protocol, the Facility-Specific Rapid Response Labour Mechanism (RRLM), details an entirely new procedure for filing complaints and investigating cases of violations of freedom of association and the right to collective bargaining.⁴

One crucial difference between this new mechanism (the RRLM) and that of the Labour Chapter is the line of responsibility for solving labour rights violations. In Chapter 23, the labour dispute process focuses on government actions or lack of enforcement that has led to labour rights violations, which are to be resolved through state-to-state negotiation, and ultimately through changes by governments to labour policies and enforcement. The rapid response mechanism instead sets the standard of labour rights violations as a denial of rights on the part of employers, rather than governments. It establishes a procedure to verify claims of a denial of rights at the workplace. In such cases, trade sanctions could be applied to exported goods made at the facility under review, and last until the dispute is resolved.

The addition of this rapid response mechanism to the USMCA has been highly controversial in Mexico, in part because it includes the factory-level verification of claims. Media in Mexico have characterized the on-site verification as *inspections* that violate Mexico's sovereignty, and decried US supervision over Mexican labour practices.⁵ The confusion lies in misconceptions that the US government would *inspect* factories under the rapid response mechanism. Rather, the law that implements the USMCA in the US (H.R. 5430) details the procedures planned by the US to decide how and when to use the RRLM, and how to choose which cases would be recommended for a review.

The US law establishes two new oversight bodies – the Independent Mexico Labor Expert Board, and the Interagency Labor Committee for Monitoring and Enforcement – that will monitor the implementation of the Mexican labour reform.⁶ The Interagency Labor Committee for Monitoring and Enforcement is charged with reviewing and recommending potential cases to the Office of the US Trade Representative (USTR). The US law also calls for the deployment of additional labour attachés to the US Embassy in Mexico to provide information to these bodies and to Congress for those purposes.

Reports in late 2019 that the US would begin to send inspectors to Mexico to monitor Mexican actions caused a swift and negative reaction by the Mexican authorities, who insisted that Mexico had not agreed to any such arrangement in the USMCA.⁷ Of special concern was the assignment of additional labour attachés to the US Embassy to monitor and report on labour rights events in Mexico, for the purpose of bringing complaints to the RRLM.⁸

The backlash in Mexico on the US taking an aggressive role to assess labour rights cases in that country led to an exchange of letters in December 2019 and January of this year between the Mexican negotiator, Jesús Seade, and USTR Robert Lighthizer. In a December 16 letter, Lighthizer emphasized that verifications are to be conducted by independent panelists, not the labour attachés, and that labour attachés are not inspectors.⁹ The USTR maintained that since the monitoring of labour rights events in Mexico is part of US law, and not included in the USMCA, such monitoring does not need to be approved by Mexico.

COMPARING NAALC AND THE USMCA LABOUR CHAPTER



The labour dispute mechanism of the original NAFTA was a side agreement known as the North American Agreement on Labour Cooperation (NAALC). In the USMCA, the labour provisions are now integrated into the main text of the agreement, in Chapter 23. This change not only symbolically elevates the protection of labour rights equal to that of the enforcement of commercial and investment rights, but now means that all disputes on labour matters are open to formal dispute resolution as per Chapter 31 dispute resolution mechanisms.

Under the previous NAALC labour panels, access to dispute resolution was limited to a failure by governments to enforce domestic labour laws, and in only a few areas: child labour, minimum wage, and occupational safety and health. Issues regarding freedom of association and the right to collective bargaining were not eligible for trade sanctions. Under the USMCA, all labour rights violations included in the agreement are eligible for sanctions, though only after additional negotiations and remedies are attempted first.

The USMCA is like all US trade agreements in that it requires countries to enforce their own domestic labour laws. USMCA is different than NAFTA, but similar to other more recent trade agreements, in that the countries must also adopt and maintain the fundamental rights promoted by the International Labour Organization's (ILO) 1998 *Declaration on Fundamental Principles and Rights at Work*.¹⁰ The NAALC, signed prior to the adoption of the ILO Declaration, instead made reference to 11 labour principles that the NAFTA countries were supposed to uphold.

The NAALC did, however, list some labour rights in the NAFTA Annex on Labour Principles that are not explicitly listed in the USMCA, such as minimum employment standards, equal pay for women and men, and workers compensation. Since these rights are not explicitly referenced in the USMCA, it is up to governments to interpret whether violations of these rights will qualify as a complaint for a formal review.

There is an important and positive change in the “trade-related” standard of the USMCA. The agreement sets new criteria for demonstrating the effect of labour rights violations on trade, a central requirement in US trade policy. Rather than ask filing groups to demonstrate both the relationship to trade and the economic impact violations have had on trade, the USMCA relaxes this standard. Instead, now all violations are assumed to automatically be “*in a manner affecting trade and investment,*” unless the responding party demonstrates otherwise.¹¹

Focus on tradeable sectors

While adjustments to the definitions of the “trade-related” standard are important improvements, in that they lower the barriers for groups hoping to assure that their case is reviewed, limiting cases to tradeable sectors effectively excludes other sectors.¹² Because the USMCA is a trade agreement, it would seem logical that labour violations would have to be related to tradeable sectors, but in fact that was not the standard in the NAFTA labour side agreement. There were a number of cases filed in non-tradeable sectors, which were ultimately reviewed by the NAO offices.¹³ Those that were not reviewed were rejected for reasons other than the sector they represented, or the trade-related standard.

Because the USMCA is limited to traded sectors, violations of the rights of public sector employees, for example, are excluded from the agreement. Of note, there were important cases on violations of collective bargaining rights of public sector employees filed under the NAALC, including the two North Carolina Public Employees cases filed in 2006 and 2008, the Mexican Fishery Ministry case in 1996, the 2011 SME case, and the Rural Mail Carriers case against Canada in 1998.

Filing and reviewing complaints

The provisions and steps for filing and reviewing a complaint under the Labour Chapter of the USMCA are somewhat similar to those under the NAALC, including that “the public” can submit complaints. In practice, complaints have generally been filed by trade union, worker rights and other civil society organizations.

As in the NAALC, national trade or labour agencies decide whether complaints are taken up for formal investigation and review by governments. One major change is that in the US, responsibility for determining whether a petition should be reviewed falls to the Interagency Labor Committee for Monitoring and Enforcement, and enforcement of the trade accord to the USTR. In the NAALC, both functions fell to the Department of Labor’s Bureau of International Labor Affairs (ILAB). It is important to note that in the NAALC process, the majority of complaints – 75 percent – were accepted for further review and investigation. As in the NAALC, governments can initiate and pursue cases without first receiving a public complaint, however they never chose to do so in the NAALC.

Timelines for the review of complaints in the USMCA have been added to prevent unnecessary delays in cases along the way.¹⁴ Stages for dialogue and cooperation between states to solve issues, both before the formal investigation of a case is undertaken, and after, are included.

Ministerial Consultations, once the *de facto* end to NAALC complaints, are now the designated end of the state-to-state consultation stage in the USMCA. There are no additional stages as in NAALC, such as the call for an Evaluation by Committee of Experts (ECE) panel, in part because when cases cannot be resolved through dialogue or Ministerial Consultations, cases enter dispute resolution under Chapter 31.¹⁵

The requirement that violations are to be sustained or recurring to qualify for a review, as in labour chapters of other US and Canadian trade agreements, has been narrowed but not closed. Filers must show that lack of government enforcement is either ongoing or periodic, except in the case of violence against workers, where no pattern of violation is required. While the course of action or inaction must include more than one instance or case, the standard of just how many instances constitutes a pattern is relaxed.¹⁶

The procedures that would have allowed one country to stall the formation of a panel indefinitely by refusing to nominate or approve panelists have been removed.

The inclusion of the Labour Chapter in the text means that all cases are ultimately open to dispute resolution under Chapter 31. This removes the barrier to resolutions for collective rights that plagued the NAALC system. It should be noted that the Rapid Response Mechanism, discussed below, provides another, new avenue for dispute resolution, as it is part of Chapter 31.

THE FACILITY-SPECIFIC RAPID RESPONSE LABOUR MECHANISM (RRLM)



The Rapid Response Mechanism is a special procedure that addresses violations of the right to freedom of association and the right to collectively bargain.¹⁷ In the case of Mexico, a claim is limited to violations of domestic laws covered under USMCA Annex 23-A, *Worker Representation in Collective Bargaining in Mexico*, the provision of the agreement that conditions Mexico's participation in the USMCA on implementation of the country's labour law reform.¹⁸ The domestic laws listed in Annex 23-A include new prohibitions, new institutions, and new guarantees around specific processes that implement the principles on freedom of association and collective bargaining that were adopted in Mexico's Constitutional Reform of 2017.¹⁹

The reference to Annex 23-A means that only certain denial of rights cases are admissible. In the case of employer actions, violations include intimidation, coercion, or violence against workers for union activity, or the refusal to engage in negotiation of a collective bargaining agreement (CBA).²⁰ In the case of union activity, irregularities in holding union elections might be challenged through the RRLM. A coalition of workers could likely file a complaint to challenge the failure of the union at their workplace to allow a vote to authenticate the existing CBA within the four-year period established by the USMCA, or continue to operate as if they still represent workers at the facility even after that CBA expires.

Under the RRLM procedure, the public may file complaints with their government alleging a denial of rights, and it is up to the respective government agencies and commissions to determine whether to then pursue such cases.²¹ While it is governments that must respond to the denial of rights allegations, it is employers that are affected by the remedies, as the RRLM is a review at the plant level. (See "Trade-related remedies" on page 13.)

It is not clear how the panels will manage applying remedies at those facilities where unions, rather than employers, are directly responsible for the denial of rights violations. Annex 23-A, with its emphasis on union actions, lists very few

areas where employers play a direct role in the new procedures in which workers exercise their freedom of association and collective bargaining rights.

Uneven application to the US and Canada

The Protocol for the RRLM is essentially two bilateral agreements between the US and Mexico, and Canada and Mexico. In the case of a denial of rights occurring in the United States, the application of the panel is limited. Cases against the US are limited to facilities that have previously proven to have violated US law. Specifically, a complaint can only be filed when a company has failed to comply with the ruling of the National Labor Relations Board (NLRB), the agency that investigates alleged unfair labour practices and violations of collective bargaining agreements, and enforces remedies in the US.²² However, NLRB orders are not self-enforcing. They require that US federal appeals courts issue final enforcement orders, a process that normally takes years to run its course. Far from providing a “rapid” response to rights violations as they occur, the RRLM in effect shields companies from cases being filed against them on the denial of worker rights in the United States.

A similar limitation is included in the section on Canadian-Mexican procedures, where claims can be made against Canada only in the case of the enforcement of an order of the Canada Industrial Relations Board, the agency that enforces the Canada Labour Code. It is not clear how useful the RRLM will be in addressing labour violations in Canada, where provincial level labour board decisions are not included in the agreement, and where there are few, if any, cases of non-compliance with the orders of the federal board.

It is important to note that there are no channels under the RRLM for the US to bring cases against Canada, nor Canada against the US, as the panel procedure is not tri-national: there is one provision for US-Mexico cases, and another for Canada-Mexico cases, with no provisions for Canada-US disputes.

In effect, the recourse to domestic procedures in the US and Canada maintains a distinction on which freedom of association violations can be remedied under RRLM, based chiefly on where they occurred. For example, a recent organizing drive at a Columbia Sportswear warehouse in Oregon was marked by employer interference in union activity, anti-union harassment, and union motivated dismissals.²³ Any of these violations, had they occurred in a facility in Mexico, would be grounds for an RRLM request for verification. However, since the NLRB board refused to hear the case on a union motivated dismissal – on bureaucratic technicalities, not on merit – the case has no NLRB orders, and so would not be reviewed under the RRLM.

While these exceptions from RRLM procedures may benefit companies operating in the US and/or Canada, they remove a point of leverage that could have benefited workers and unions in those countries.²⁴ Whatever the weaknesses of the NAFTA labour side agreement, the NAALC complaint process did encourage cross-border collaboration among unions and labour rights organizations on cases in all three countries. The fact that the text of the new agreement makes it virtually impossible for Mexico to bring a complaint against either the US or Canada under the RRLM not only disadvantages Mexico, but also Canadian and US workers whose rights are being violated. It means that both the US and Canada are shielded from being targeted with cases under the RRLM unless and until domestic procedures are completed.

The language on when claims can be made through this mechanism regarding rights violations in Mexico is different in that they do not require the completion of a domestic judicial process before a claim can be made, likely because of a traditional problem of lack of enforcement of judicial rulings in that country. As a result, Mexico will be the main subject of review under the RRLM procedures.

One outstanding question has been how soon cases can be brought against Mexico. While the RRLM took effect when the USMCA agreement entered into force on July 1, 2020, some aspects of the Mexican labour reform, including those listed in Annex 23, will not be fully implemented for four years, with the reform being carried out in three stages across the Mexican states through 2023.²⁵ In June 2020, the Mexican Secretariat of Labour and Social Welfare (STPS) clarified that if denial of rights claims are made in states that have not yet implemented the labour reform, the STPS will collaborate with the existing Local and Federal Conciliation and Arbitration Boards (juntas) on the internal investigation of these claims until the new Federal Centre for Conciliation and Labour Registration is in place.²⁶ One possible exception is the process for legitimizing existing collective bargaining agreements in Mexico, which can be completed over four years. While irregularities in the voting process itself could likely be challenged immediately after a vote takes place, failure to hold a vote could not be challenged before the completion of the four-year period.

Limitations by facility type and sector

The application of the panel procedure is limited by the types of facilities that are included, and by industrial sectors. The agreement stipulates that the panel procedure only applies to Covered Facilities, defined as places of work that produce a good or supplies a service that is traded between the USMCA countries, or a place of work that produces a good or supplies a service for domestic markets, that competes in the territory of another country with goods or services produced by that country.²⁷ To be considered a Covered Facility, the facility must also operate in a designated Priority Sector.²⁸ Priority sectors are defined as those sectors that produce manufactured goods or supply services, including (but are not limited to) aerospace products and components, autos and auto parts, cosmetic products, industrial baked goods, steel and aluminum, glass, pottery, plastic, forgings, and cement, and mining.

In the Case Study on pages 17–19, we explore a possible RRLM case in the autoparts sector, profiling freedom of association violations at a Goodyear tire plant in San Luis Potosí and describing the verification process and possible outcomes.

The inclusion of the “not limited to” language opens up the possibility of filing cases about a denial of rights in facilities in sectors other than those listed here, such as the garment sector, as long as those facilities are also engaged in trade.²⁹ How expansive or limiting the Covered Facility and Priority Sector definitions prove to be for admitting cases for review will depend largely on the willingness of the US and/or Canadian governments to pursue complaints in additional sectors.

The fact that the garment and textile sectors are missing from the list suggests that these sectors are less important to the US and Canada as other sectors in which facilities compete more directly with US and/or Canadian industries, like the autoparts sector. Adding the garment and textile sector to the list would remove any doubt about the applicability of the panel to one sector that is marked by its historically poor record on freedom of association and collective bargaining.

Agriculture is another sector that has been plagued by numerous cases of confirmed labour rights violations, but which is not included in the list of priority sectors. Because the RRLM definition of Priority Sectors refers to sectors that produce manufactured goods, the mechanism likely excludes the agricultural sector, except for processing of agricultural products. This means that it is possible that cases regarding violations of the labour rights of migrant farm workers in Mexico, the US or Canada would not be reviewed through the rapid response mechanism.³⁰ It is

worth noting that under the NAFTA labour side agreement, a number of cases were filed with the Mexican NAO on the agricultural sector in the US, including the Washington Apples case and the DeCoster Egg case in 1998, and the H2A visas cases of 2016, and the Seasonal Agricultural Workers Program (SAWP) case filed against Canada in 2016.

The text of the Annex calls for the review of the list of Priority Sectors on an annual basis, which allows for the possibility of changing the list in the future. The text of the US H.R. 5430 also requires this review.³¹

Obligations on Mexico under different terms than for the US and Canada, and the limited application of the RRLM to certain facilities in specific sectors, underline the narrow application of the RRLM process. However, it is important to remember that cases on violations of the freedom of association or the right to collective bargaining that do not qualify for rapid action could still be resolved under the labour cooperation or dispute settlement mechanism procedures in Chapter 23. It will therefore be important for labour rights advocates to carefully assess the usefulness of either panel process for resolving particular cases of labour rights violations, using different strategies for different types of cases.

The Rapid Response panel process

The Facility-Specific Rapid Response Labour Mechanism (RRLM) includes a complex, multi-stage process to evaluate denial of rights cases, and negotiate their resolution in state-to-state exchanges, before convening an expert panel to verify claims and recommend remedies. Each stage is time bound, with set out consequences for not meeting timeframes or refusing to participate in or comply with the different steps of the evaluation process. (See Timeline for the panel process on page 12.)

It is possible that the established timeframes for some stages in the process will not be adequate, and extensions will be needed. For example, panel verifications might need to be extended beyond 30 days in order to fully assess the allegations, or if many requests are filed at the same time, governments may need more than 10 days to respond to each claim, or more than 45 days to investigate and report on specific facilities.

It is important to note that the RRLM process is led by governments. While unions, civil society actors and other stakeholders can file complaints, and pressure their governments to request reviews under the RRLM, it is ultimately governments that decide whether to initiate a case under this procedure, and whether or not to invoke the panel verification process at some point in the proceedings.

If a USMCA signatory country believes a denial of rights is occurring at a facility in the other country, the complainant can file a formal request to its counterpart to investigate the allegations.³² If an alleged denial of rights is confirmed, both countries can agree on an action plan for the facility involved, and determine a timeline for its completion. When the action plan is completed, but the countries disagree on whether the denial of rights has been fully resolved, the country that made the request can apply trade remedies.

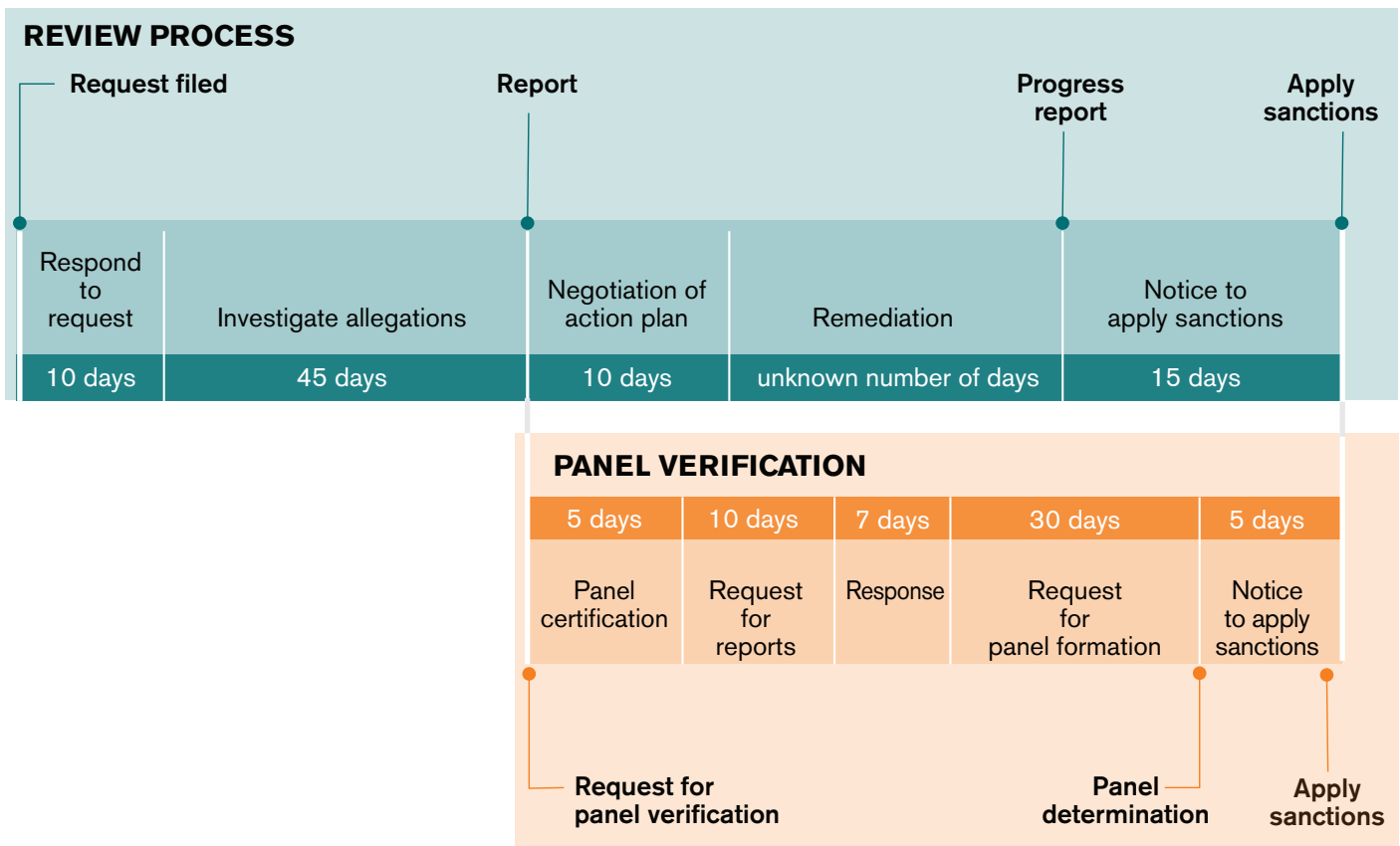
There are multiple points in the process where the government agencies involved can disagree on outcomes, thus moving the case to panel verification. First, cases can be transferred to panel verification if the country that is the subject of the complaint refuses to respond to the initial request, does not respond within five days, or refuses to carry out the initial investigation. Second, once the process is underway, if agencies disagree that a denial of rights occurred, disagree on a plan for remediation, or disagree on whether the denial of rights has been remedied at the facility, the case can be transferred to a panel for verification.

Panel verification

If a country finds reason to call for panel verification, under the conditions described above in the review stage, a panel must be formed within three days from the list of Rapid Response Labour Panelists that has been supplied earlier by each government.³³

Panels are charged with carrying out independent investigations into the alleged violations – including on-site verifications, confirmation of progress on resolving violations at the facility, and the application of remedies and trade penalties. The verification process can take as long as 52 days. (See Timeline, below.)

Timeline for facility specific Rapid Response Labour Mechanism (RRLM)



Panels are composed by lot (random draw) of one individual from the country making the request, one from the country where the alleged violation took place, and a third from a joint list of panelists from other countries. If countries cannot agree on panelists, or do not appoint national lists, panels are formed without that country's input, which puts an end to a common problem encountered in the NAALC of countries stalling cases through delays over panel appointments.

Once a panel is formed, it has five days to confirm whether the facility involved qualifies for a review. At that point, the panel can request of the country that is the subject of the complaint to submit reports on the situation that the panel will investigate. After the reports are received and reviewed, the panel may request authorization from that country to carry out a verification of the claims, which could include an on-site visit.³⁴ The responding country can refuse to permit

a verification to take place, at which point the panel will make a determination without the input from that facility or government.

Details on how on-site verifications will take place are not spelled out in the Protocol, and will have to be resolved in practice. These include the specific evidence of denial of rights that panelists will be looking for, how long they will be allowed on-site, what kind of access they will have to facilities and to interview workers, managers and/or union representatives in the course of a verification, all of which foreshadows additional questions and potential conflicts over the verification process.

Of note, observers chosen by each party may accompany the panel on the on-site verification *if the parties agree*. This suggests that labour unions and other stakeholders could be able to participate in the verification process, but only as observers.

Panel determinations must be made within 30 days of the verification.

Trade-related remedies

The panel process ends with consultations between countries, and the development of a plan to address violations at the facility level. If the plan is not fully implemented, the application of penalties or trade sanctions then follows. Remedies include the suspension of preferential tariffs on goods manufactured at the Covered Facility, or the imposition of penalties (new tariffs) on these goods.

The RRLM includes a system for remediation that progressively increases the penalties for denials of rights according to whether the company has a pattern of violations, and the number of company facilities that are involved in violations over time. The suspension of preferential tariffs is possible at the first violation or denial of rights at a facility.

When a facility has been found to deny labour rights on at least one previous occasion, the complaining country could also increase tariffs on those goods. In the case that a different facility – owned or controlled by the same person (i.e. company) and producing similar goods – is found to have denied rights, the complaining country could also increase tariffs on goods from all of the company's facilities in Mexico.

In cases of three or more violations, including across multiple facilities owned by the same company and producing similar goods, the complaining country has the right to deny the entry of goods from all of the company's Mexican facilities.³⁵ Trade-based penalties continue in place until ongoing consultations between governments, the facility, and the panel determines that the violations have ended, and that all parties agree.

It is worth noting that the point at which exports are flagged for potential tariff adjustment, as a result of a panel ruling, is at the beginning of the evaluation process, rather than after the ruling has been made.³⁶ When a government receives an initial request for a review of an alleged denial of rights case in a facility in another signatory country, it has the option of delaying the final settlement of customs payments on shipments from that facility, until the responding country determines there is no denial of rights (which could amount to 55 days), or until a panel determines there is no denial of rights through verification (at least 98 days).

H.R. 5430, the Congressional bill that implements the USMCA in the US, also includes such language.³⁷ This identifies the facility in the customs system, so that if tariff penalties are applied retroactively, they start as of the beginning of the review process, rather than at the end. The retroactive application of tariff penalties raises costs, and introduces uncertainty about the ultimate price of the product.

CONCLUSIONS



In this briefing paper, we examined the strengths and limitations of the labour provisions of the USMCA, including Labour Chapter 23, Annex 23-A, and the Protocol of Amendment to the Agreement, and identified outstanding questions and issues that will likely be clarified as implementation of the trade agreement moves forward. We also compared the enforcement provisions of this agreement with those of the NAFTA labour side agreement and other trade agreements. Below is a brief summary of what we see as advances, limitations and outstanding questions concerning the implementation of the labour provisions of the USMCA.

Advances and limitations

Together, the labour provisions and enforcement mechanisms of the USMCA represent an advance over those of previous free trade agreements. These provisions at least partially address weaknesses in NAFTA and other multilateral and bilateral trade agreements. For example, they reverse the onus on which party must prove that labour rights violations negatively affect trade and investment, expand the kinds of labour rights violations that can qualify for fines and trade sanctions, narrow the requirement that all violations must be sustained and recurring, and limit the ability of a signatory country to stall indefinitely the formation of labour panels that investigate cases.

Possibly the most significant advance in the new trade agreement is the creation of a second mechanism for filing complaints – the Facility-Specific Rapid Response Labour Mechanism (RRLM). The RRLM makes it possible for complaints to be filed regarding violations of freedom of association and collective bargaining rights in specific covered facilities and sectors. Employers of such facilities are directly affected if violations are not remediated, and will face the real possibility of trade sanctions and product bans being imposed.

The fact that complaints regarding freedom of association violations can be filed under either or both of the two mechanisms makes it possible for complainants to hold employers accountable for violations at the workplace level, while holding governments accountable for the failure to enforce labour laws and regulations. Effective use of these dual complaint mechanisms could contribute to the effective implementation of Mexico's labour law reform, and have a positive impact on workers' associational rights in Mexico.

Other changes in the USMCA labour provisions could represent a step backward, for example, the exclusion of non-traded sectors from either of the two complaint mechanisms, and the unequal application of the Rapid Response Labour Mechanism (RRLM) to Mexico, the US and Canada. Although the exclusion from the RRLM of denial of rights cases for most of the agricultural sector is not a strictly speaking a step backward, since such cases can still be filed under the state-to-state complaint mechanism, it is a missed opportunity to more effectively address common violations of the rights of agricultural workers.

Outstanding questions

There are a number of ambiguities in the text of the Protocol that raise new questions on how the rules will be interpreted by government agencies and the panelists. Test cases on rights violations will be needed in order to clarify not only how the rules will be interpreted, but also how they may be applied differently to different countries.

For example, it is not clear how employers will react to cases filed regarding labour practices in their facilities, and whether governments can compel employers to cooperate with their agencies to resolve violations. Nor is it clear whether either governments or employers will fully cooperate in review processes, or allow panel verifications in their facilities.

Cases that do not qualify for review under the RRLM could be filed under the labour complaint mechanism in Chapter 23, which is still available for claims of violation of freedom of association and collective bargaining, and for other labour rights violations. However, it is too soon to know how the labour agencies of the three governments will apply the new rules and procedures of Chapter 23, or if state-to-state negotiation under the new and tightened rules of the USMCA will have greater impact on labour rights for workers than the NAALC process that preceded it.

Under the NAALC, states often did not enforce labour rights when it was in their power to do so, including through the decision whether to formally review cases, stalling on the formation of panels, and failure to submit public reviews. It is not clear that the Rapid Response Mechanism, even with its detailed procedural rules, can overcome the fact that it is governments that choose how and when to enforce the rules on labour rights.

In the next few years, the resolution of specific cases will provide evidence as to where and how each of these mechanisms is an improvement over the prior NAFTA system in terms of their usefulness for resolving labour rights violations. We will also learn through practice whether and how workers, unions, and other stakeholders in the three countries work together to file submissions, monitor progress, and raise awareness of specific cases. The ways that governments and employers engage with the process, and the kinds of resolutions that are possible for workers, will demonstrate whether the USMCA approach should serve as the template for the US, Canada or Mexico for future trade-based labour rights enforcement agreements.

Reinforcing state regulation

Finally, we should not lose sight of the fact that USMCA replaces NAFTA under a different context in Mexico, where the new mechanisms and procedures included in the Mexican labour reform could help facilitate improved labour rights protections and enforcement in that country. The USMCA labour chapter, the Protocol, and Annex 23-A all reinforce Mexico's obligations to establish domestic legislation in line with the 2017 Constitutional Reform and create mechanisms that guarantee collective rights for Mexican workers.

With the implementation of an independent and centralized institution for the registration of unions and collective bargaining agreements, an independent labour court, and new regulations on the procedures that guarantee the right of workers to be represented by a union of their free choice and to ratify their collective bargaining agreements, Mexican workers will be better positioned to defend their rights beyond the bounds of the USMCA.

In this new national context, the Labour Chapter of the USMCA and the new enforcement mechanisms spelled out in the Protocol could play a positive role by reinforcing Mexico's stated commitment to implement genuine labour justice reforms and, if used strategically, could provide Mexican workers and their allies additional tools to defend their rights to freedom of association and authentic collective bargaining when those rights are violated.

CASE STUDY:

DENIAL OF RIGHTS AT GOODYEAR RL DE CV, SAN LUIS POTOSI, MEXICO



The 2018 strike and subsequent worker dismissals at the Goodyear tire plant in San Luis Potosí provides the setting to examine how the criteria for filing cases might be applied under the Facility-Specific Rapid Response Labour Mechanism (RRLM) of the USMCA.

The Goodyear plant in San Luis Potosí opened in November 2017 to manufacture rubber tires for vehicles for North American and Latin American automotive assembly clusters. The first phase of production was destined for the Mexican auto assembly sector, with expansion to exports to Brazil and Argentina, and to the US and Canada as production capacity improved. The plant is built to manufacture at least 6 million tires per year, and employ 1,000 workers directly and 5,000 workers indirectly.³⁸

Labour unrest

In April 2018, workers at the plant held a wildcat strike over low wages and unsafe working conditions.³⁹ An end to the strike was achieved through mediation by representatives of Mexico's Secretariat for Labour and Social Welfare (Secretaría de Trabajo y Previsión Social, STPS). The settlement included a signed agreement in which Goodyear promised to refrain from retaliating against workers that took part in the action.⁴⁰

Two months later, 57 workers who had participated in the strike were dismissed without warning. A company representative visited them in their homes to deliver the news and pressure them to sign severance agreements.⁴¹

While some workers believed that the dismissals were in retaliation for the wildcat strike,⁴² the dismissals very likely were also related to their efforts to form an independent union. They had formed a worker organization in the weeks before the mass firing, and were planning to apply for formal registration as a union, in order to challenge representation of the CTM-affiliated union that held the title to the collective bargaining agreement at the plant.⁴³

When Goodyear began construction on the plant in 2015 – two years before the plant opened and long before any worker was hired – management signed a collective bargaining agreement with an autoparts union affiliated with the CTM, the Sindicato Nacional de Trabajadores de la Industria Metal-Mecánica, Sidero-Metalúrgica, Automotriz y Proveedores de Autopartes en General, de la Energía, sus Derivados y Similares de la República Mexicana.⁴⁴ However, a *contrato-ley* was already in place for all plants in the rubber manufacturing industry.⁴⁵ The *Contrato-Ley* of the Industry for the Transformation of Rubber into Manufactured Products applies to every facility and every union in Mexico dedicated to rubber manufacturing, including tires.⁴⁶ In effect, a collective bargaining agreement existed for this factory at the time of its opening. However, Goodyear and the CTM misrepresented the plant as an autoparts facility, rather than a tire manufacturer, to sidestep the *contrato-ley*, thus allowing the union to sign a protection contract instead, with a different union.

Two years after their illegal dismissal, the workers had not yet accepted severance offers, and are still demanding reinstatement.⁴⁷

Application of RRLM criteria?

In order to qualify for a review under the RRLM, cases must meet certain criteria:

Covered facilities. The panel procedure only applies to Covered Facilities, defined as first, facilities that produce a good or supply a service that is traded between the USMCA partners, or second, those that produce a good or supply a service that competes in the territory of a Party with a good or service of another Party.⁴⁸ The Goodyear plant produces for the domestic Mexican auto assembly clusters, and exports tires to Brazil and Argentina. Some production is reserved for the US and Canadian markets. Even if the Goodyear plant never exported tires to the US or Canada, the facility still qualifies under the second criteria, as it engages in trade, and its product competes with tires made in the US that are exported to Mexico.

Priority sectors. The facility must also operate in a designated Priority Sector. Autos and auto parts are listed as priority sectors, making it clear that the RRLM applies in this case.

Denial of rights claims. A case targeting Goodyear could focus on three violations: the unjust dismissal of workers in retaliation for organizing a rival union, repression of the right to strike, and the use of the protection contract in the plant.

On labour rights violations in Mexico, the RRLM specifically reviews violations of legislation that complies with Annex 23-A of the USMCA. Mexican labour law Article 357 reflects the USMCA principle on the right of workers to engage in concerted activities for collective bargaining and to organize, form, and join the union of their free choice. The use of a protection contract – signed before workers were hired and the plant opened – contradicts this principle. The awarding of a plant-level collective bargaining agreement at a plant that manufactures rubber tires, which is a sector that has a *contrato-ley* in place, violates Mexican law.

With regards to the unjust dismissal of workers for union organizing, Article 357 protects the right to organize, and prohibits employer domination or interference in union activities. Firing workers for union activity is a violation of Mexican law.

The right to strike is not mentioned in Annex 23-A, or in the RRLM, but appears in the main text of the Labour Chapter. The USMCA text recognizes that the right to strike is part of the right to freedom of association.⁴⁹ It is unknown whether a panel would adopt strict criteria on the inclusion of the right to strike as a central component of freedom of association in the course of evaluating a case in the absence of specific text. However, neglecting to consider the right to strike as part of the exercise of freedom of association would contradict both the ILO's interpretation of freedom of association as including the right to strike, and the intent of the Labour Chapter. The fact that it was a wildcat strike, undertaken without previous authorization from Mexico's labour authorities as the law requires, further complicates the issue.

Finally, a case on Goodyear could be brought to the RRLM once the USMCA takes effect. Fired workers continue to appeal their dismissal, and are still asking for reinstatement. As such, the case is ongoing at the time of the entry into force of the USMCA and the RRLM.

Case resolution and remedy scenarios

A Goodyear case could be resolved through the review process, where the US could request that Mexico review the case and submit a report within 45 days. If Mexico complies with the request, and if a denial of rights is found, a resolution could be mediated at the plant level -- if the workers, the union and Goodyear all agree to mediation, and also can find a solution that satisfies all actors. In the course of mediation, workers could ask for reinstatement.

To resolve the question of the use of the protection contract, if STPS determined this plant is a rubber industry factory, the plant would have to adopt the sector-wide *contrato-ley* – held by a different union. An alternative resolution is that STPS maintains the sector classification, mandates that the plant hold a *recuento* (union representation election), and monitor the procedures, which would establish which of the unions holds the right to represent workers for the purpose of collective bargaining.

If Mexico does not agree to review the case, or disagrees that there is a denial of rights, or if the actors cannot agree on a resolution, or if the resolution is not implemented at the plant, panel verification could be requested by the US.

If the panel finds that there is a denial of rights at the Goodyear plant, remedies follow. Even if a resolution is negotiated by the state Parties with workers, Goodyear, the Mexican government, or the CTM union, the US can begin to apply trade sanctions, which can continue until the agreed settlement is implemented. Among these, the US could remove the tariff benefit on tires exported to the US from the facility, applying the default 4% tariff applied to other trading partners, increasing the cost of Goodyear tires for consumers, and potentially affecting the company's profits. The remedy would be removed when the panel decides that Goodyear has resolved the labour rights violations, and that the parties agree.

If Goodyear did not comply with a negotiated solution, or if there are new violations in the future at the plant, in the course of a second case, tire exports from the plant to the US could face a punitive tariff. If there is a third violation, the US could decide to refuse exports from the plant until the denial of rights was resolved.

ENDNOTES

- ¹ This document references the USMCA Labour Chapter published on the US government website: <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/23-Labor.pdf>. As of July 1, 2020, both the Canadian and Mexican governments have posted the Labour Chapter and Protocol separately on their websites, but have not yet integrated the two documents.
- ² See AFL-CIO, *Without Fixes, We Must Oppose the New NAFTA*, September 2019. <https://aflcio.org/aboutleadershipstatements/without-fixes-we-must-oppose-new-nafta>.
- ³ The full text is available at: <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Protocol-of-Amendments-to-the-United-States-Mexico-Canada-Agreement.pdf>.
- ⁴ Annex 31-A applies to Mexico and the United States. Annex 31-B applies to Mexico and Canada. The language and procedures in both are identical.
- ⁵ García, Carina, “Inaceptable, el tema de supervisión, dice Monreal,” *El Universal*, December 12, 2019. <https://www.eluniversal.com.mx/cartera/inaceptable-el-tema-de-supervision-dice-monreal>.
- ⁶ The Independent Mexico Labor Expert Board is a 12-member commission, appointed by members of Congress, with four seats chosen by US unions, through the Labor Advisory Committee for Trade. On June 15, 2020, US House of Representatives Speaker, Nancy Pelosi, named Cathy Feingold, Director of the AFL-CIO International Department, and community organizer Fred Ross, Jr. to the Independent Mexico Labor Expert Board. The Interagency Labor Committee for Monitoring and Enforcement is formed among government agencies.
- ⁷ Miranda, Perla, and Diana Lastiri, “Vigilancia de EU en el T-MEC no se acordó: AMLO,” *El Universal*, December 12, 2019. <https://www.eluniversal.com.mx/nacion/la-mananera-vigilancia-de-eu-en-el-t-mec-no-se-acordo-amlo> and “México no autorizará supervisores de EU por T-MEC, asegura Ebrard,” *El Universal*, December 12, 2019. <https://www.eluniversal.com.mx/nacion/la-mananera-mexico-no-autorizara-supervisores-de-eu-por-t-mec-asegura-ebrard>.
- ⁸ Dresser, Denise, “T-MEC: Negociar de Rodillas,” *Proceso*, December 27, 2019. <https://www.proceso.com.mx/612291/t-mec-negociar-de-rodillas>.
- ⁹ See USTR 2019 (December), *USTR Responds to Mexico on USMCA Implementation*, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/december/ustr-responds-mexico-usmca>.
- ¹⁰ These are the right to freedom of association, the right to collective bargaining, the abolition of child labour and the prohibition of the worst forms of child labour, the elimination of forced or compulsory labour, and elimination of discrimination in respect of employment and occupation. With the exception of Convention 182 on the worst forms of child labour, the USMCA does not reference any of the specific core conventions of the ILO on freedom of association, collective bargaining, discrimination or forced labour, in part because the US has not ratified most of these conventions.
- ¹¹ A “*manner affecting trade or investment between the Parties*” is defined as involving: (i) a person or industry that produces a good or supplies a service traded between the Parties or has an investment in the territory of the Party that has failed to comply with this obligation; or (ii) a person or industry that produces a good or supplies a service that competes in the territory of a Party with a good or a service of another Party, USMCA, Article 23.3, p 23-2, fn. 4.
- ¹² The change in the standard and definition in the USMCA was made in order to close the loophole presented by the Guatemala case under CAFTA, which tested the trade related standard in ways that were devastating for labour rights enforcement. See Gottwald, Eric, Jeffrey Vogt, and Lance Compa, *Wrong Turn for Workers’ Rights: The US-Guatemala CAFTA Labor Arbitration Ruling – And What To Do About It*, March 2018. <https://laborrights.org/publications/wrong-turn-workers%E2%80%99-rights-us-guatemala-cafta-labor-arbitration-ruling-%E2%80%93-and-what-do>.
- ¹³ These cases include the New York workers’ compensation board case in 2001, the Chedraui supermarket case in 2015, and the Taesa Airlines case in 1999. The 1998 McDonald’s restaurant case against Canada was accepted for review by the US NAO, but later withdrawn by the Quebec union complainants. The flight attendants case (1998), the ASPA airlines case (2005), and the Pasta de Conchos mine case (2006) were not reviewed.

- ¹⁴ It is important to note that for various reasons there are currently a number of cases pending under the NAALC system, including the 2012 SEIU case on Alabama's immigration law, the 2016 case on migrants' labour rights filed by the Centre for Migrants Rights (CDM), and the 2016 case filed by the UFCW on gender discrimination in the recruiting of temporary workers.
- ¹⁵ USMCA Chapter 23, Article 23.17, number 7, p. 23-14.
- ¹⁶ USMCA Chapter 23, Section 23.25, number 1, fn. 10, p. 23-4.
- ¹⁷ The RRLM procedures are listed in two Annexes of the Protocol of Amendment, Annex 31-A for US-Mexico complaints, and 31-B for Canada-Mexico complaints. The Annexes are identical in language.
- ¹⁸ Protocol, Article 31-A2, p. 13, fn. 1: "With respect to Mexico, a claim can be brought only with respect to an alleged Denial of Rights under legislation that complies with Annex 23-A (Worker Representation in Collective Bargaining in Mexico)." For information on the legislation specified in USMCA Labour Chapter Annex 23-A, see: <https://www.maquillasolidarity.org/en/do-mexicos-labour-law-reforms-commitments-usmca>.
- ¹⁹ MSN has followed the labour reform closely. Our reports are available at: <https://www.maquillasolidarity.org/en/msn-publications-analyzing-mexicos-ongoing-constitutional-reform-labour-justice>.
- ²⁰ Employers have a few responsibilities in the authentication of existing collective bargaining agreements, and the process is led largely by labour unions. See: [https://www.maquillasolidarity.org/sites/default/files/resource/Protocol for Authentication of CBAs Unions Employer Obligations AG November%202019.pdf](https://www.maquillasolidarity.org/sites/default/files/resource/Protocol%20for%20Authentication%20of%20CBAs%20Unions%20Employer%20Obligations%20AG%20November%202019.pdf).
- ²¹ For the US, see H.R. 5430, Section 716, part a, p. 194. The procedure to submit or review cases for the RRLM is left up to each country to determine. The guidelines for filing denial of rights claims with the Canadian National Administrative Office (NAO) is available at: <https://www.canada.ca/en/employment-social-development/services/labour-relations/international/agreements/guidelines-denial-rights-claims.html>. Mexico's procedures are less relevant given the limitations on cases that could be filed against the US or Canada.
- ²² Protocol, Article 31-A2, fn. 1, p. 13.
- ²³ Brown, Alleen, "Columbia Sportswear Sought to Crush a Warehouse union Drive as the Pandemic Approached, *The Intercept*, May 2020. <https://theintercept.com/2020/05/20/columbia-sportswear-warehouse-workers-union-teamsters>.
- ²⁴ For an example of a denial of rights case in the US that could have benefited from an RRLM complaint, see: Compa, Lance, "A Mexican Oligarch Is Undermining the New NAFTA," *The America Prospect*, December 2019. <https://prospect.org/world/a-mexican-oligarch-is-undermining-the-new-nafta>.
- ²⁵ See MSN, *Timeline for the Implementation of the Labour Reform*, 2019. <https://www.maquillasolidarity.org/en/timeline-implementation-labour-reform-mexico>.
- ²⁶ The STPS webinar was held on June 8, and can be seen here: <https://www.youtube.com/watch?v=RT27Of7E35k>.
- ²⁷ Protocol, Article 31-A.15, p. 19.
- ²⁸ *Ibid.*
- ²⁹ *Ibid.*
- ³⁰ A case could be still be filed under the mechanism in Labour Chapter 23, if the agricultural product is traded.
- ³¹ Protocol, Article 31-A.13, p. 19; H.R. 5430, Section 713, p. 191.
- ³² Under the US-Mexico Annex, requests to investigate denial of rights cases in Mexico are submitted by the USTR on the recommendation of the Interagency Labor Committee for Monitoring and Enforcement. That body can receive complaints filed by the public (H.R. 5430, Section 716, p. 194), through reports by the Independent Mexico Labor Expert Board (Section 715, p. 193), directly from Mexican workers, through a new US Department of Labor hotline established for this purpose (Section 717, p. 197), or from information provided by labor attachés at the US Embassy (Section 722, p. 201).

- ³³ Each state must create a roster of five individuals to serve as panelists for four years. New lists can be made after those four years, and panelists can be reappointed. For lists of panelists for the Rapid Response Mechanism, see: <https://www.gob.mx/t-mec/acciones-y-programas/comision-de-libre-comercio-247174?state=published>. See Annex V for the United States/Mexico list, and Annex VI for the Canada/Mexico list.
- ³⁴ Protocol, Article 31-A.7, number 7, pp. 16-17.
- ³⁵ Protocol, Article 31-A.10, numbers 3 and 4, p. 18.
- ³⁶ Protocol, Article 31-A.4, number 3, p. 14.
- ³⁷ The US text is “to suspend liquidation for unliquidated entries of goods from such covered facility.” H.R. 5430, Section 754, p. 208. Liquidation refers to applying the final costs of duties to goods after they have entered, due to discrepancies over tax rates or import codes.
- ³⁸ Lara, Ivonne, “Invierte Goodyear 550 mdd,” *Somos Inindustria*, April 2015. <https://www.somosindustria.com/articulo/invierte-goodyear-550-mdd>; *Goodyear to Build Tire Factory in San Luis Potosi, Mexico*, April 24, 2015. <https://corporate.goodyear.com/en-US/media/news/goodyear-to-build-tire-factory-in-san-luis-potosi-mexico.html>.
- ³⁹ IndustriALL, *Goodyear Fires Workers for Setting up Their Own Union, July 12, 2018*. <http://www.industrialunion.org/goodyear-mexico-fires-workers-for-setting-up-their-own-union>.
- ⁴⁰ Hernández, Nancy Lizet, “Trabajadores acusan despidos ilegales en Goodyear-México,” *El Universal*. September 7, 2018. <https://sanluis.eluniversal.com.mx/cartera/09-07-2018/trabajadores-acusan-despidos-ilegales-en-goodyear-mexico>.
- ⁴¹ Ramírez, Erika. “Goodyear: Abuso laboral en Mexico.” *Contralinea*, August 6, 2018. <https://www.contralinea.com.mx/archivo-revista/2018/08/06/goodyear-abuso-laboral-en-mexico>.
- ⁴² Zaragoza, Martha, “Trabajadores de Goodyear en SLP denuncian despidos injustificados,” *El Financiero*, October 7, 2018. <https://www.elfinanciero.com.mx/bajio/trabajadores-de-goodyear-en-slp-denuncian-despidos-injustificados>.
- ⁴³ El Heraldo de SLP, “Despido masivo en Goodyear de SLP por conformar sindicato,” *El Heraldo de San Luis Potosí*, July 11, 2018. <http://elheraldoslp.com.mx/2018/07/11/despido-masivo-en-goodyear-de-slp-por-conformar-sindicato>; IndustriAll, *op. cit.*
- ⁴⁴ Hernández, Nancy Lizet, *op.cit.*; Stevenson, Mark, “Mexico-US trade deal unlikely to boost low Mexican wages,” *AP News*, August 30, 2018. <https://apnews.com/fff256b89fc24e3faee97a5b05f3cca3/Mexico-US-trade-deal-unlikely-to-boost-low-Mexican-wages>; Ramírez, Erika, *op.cit.*
- ⁴⁵ A *contrato-ley* is a specific type of collective bargaining agreement that covers all facilities and all unions in a given sector, either within certain regions or the whole country (Mexican Federal Labour Law, Article 404). In effect, Mexican labour law establishes that in sectors where a *contrato-ley* is in effect, any previous plant-level collective bargaining agreement is suspended, and no new plant-level collective bargaining agreement is allowed (Article 416).
- ⁴⁶ See *contrato-ley* at: https://www.dof.gob.mx/nota_detalle.php?codigo=5388310&fecha=09/04/2015.
- ⁴⁷ Osorio, Alex, “A un año del paro en Goodyear San Luis Potosi, los obreros siguen luchando,” *La Izquierda Diario*, April 25, 2019. <http://www.laizquierdadiario.mx/A-un-ano-del-paro-en-Goodyear-San-Luis-Potosi-los-obreros-siguen-luchando>.
- ⁴⁸ Protocol Article 31-A.15, p. 19.
- ⁴⁹ USMCA Chapter 23, Article 23.3, fn. 5, p. 23-2.