USMCA Is Ready to Take Effect with the Publication of Labor Enforcement Procedures

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US labor organizations have consistently asserted that the net benefits of free trade agreements ("FTAs") are not as promised and, in addition, that inadequate governmental support has been given to those U.S. workers negatively affected by FTAs. For these reasons, among others, US labor organizations have consistently opposed FTAs, especially those with developing economies such as Mexico where wage disparities are most pronounced and thus the potential for US job losses is most severe.

As initially negotiated, the United States-Mexico-Canada Agreement ("USMCA") attempted to address some of these concerns by mandating reforms to bring Mexican labor conditions in line with Mexico's obligations under the International Labor Organization 1998 Declaration on Fundamental Principles and Rights at Work. The USMCA also prohibits importations of goods made by forced labor or produced under conditions without adequate protections for worker safety and rights. Consistent with these obligations, on May 1, 2019 Mexican President Lopez Obrador signed a labor reform law guaranteeing a long list of worker rights, including a prohibition of employer domination or interference in union activities and a requirement for verification that collective bargaining agreements meet the legal standard of workers' support in order for them to be registered and have legal effect.[1] In addition, copies of collective bargaining agreements are required to be provided to employees under the new regulations.

Nevertheless, several US labor unions and their supporters in Congress expressed concern as to the sufficiency of these provisions and pointed to inadequate capacity and resources in Mexico to enforce the newly enacted labor reforms. They also doubted the effectiveness of the USMCA dispute resolution system to address violations by Mexican government or industry.

Accordingly, before the US Congress would take up the legislation implementing the USMCA, Congressional Democrats, led by House Ways and Means Committee Chair Richard Neal of Massachusetts, negotiated amendments to the USMCA with US Trade Representative Robert Lighthizer to address these concerns. Trade Representative Lighthizer subsequently obtained approval from both Mexico and Canada, and on December 10, 2019, a Protocol of Amendment to the USMCA was signed. This Protocol of Amendment was sufficient to garner broader congressional support for the USMCA, which subsequently easily passed both houses of the US Congress.

Most significantly, the Protocol of Amendment includes a labor enforcement mechanism that has the potential to give rise to complaints and remedies against perceived inadequacies in Mexican behavior vis-à-vis its labor obligations. This mechanism covers allegations of a "denial of rights" of free association and collective bargaining and is available with regard to certain priority sectors of Mexican industry, though not yet including agriculture. The plan is to provide a hybrid between a private right of action and a government-to-government consultation mechanism after a US complainant identifies a denial of rights at a Mexican company. This is somewhat similar to the procedures under the US antidumping and countervailing duty laws whereby a petition filed in

accordance with regulations can give rise to a government investigation of competitors and possibly imposition of trade relief including the establishment of targeted custom duties.

Under the new mechanism, a US company or union is able to file a complaint alleging that a Mexican company is in violation of Mexico's labor reform obligations under USMCA, for example by denying workers' rights to collective bargaining. To facilitate enforcement, by executive order on April 28, 2020 President Trump established a new Interagency Labor Committee for Monitoring and Enforcement ("ILC") co-chaired by the US Trade Representative and the Secretary of Labor and including representatives from several other agencies such as the Departments of Agriculture, Commerce, Homeland Security, State and Treasury.

On June 30, 2020, the day before the USMCA was to take effect, the ILC issued interim regulations outlining enforcement petition procedures.[2] The regulations require a US petitioner to provide facts available to it in support of its claim, including the identity of the covered facility in Mexico, a description of the alleged denial of labor rights, a recitation of steps that have previously been taken to address the issue under Mexican law or through international organizations, a discussion of whether the problem is recurring and an indication of whether the alleged violation has harmed the US petitioner, any other person, or overall trade and investment. If, after review, the ILC determines that there is "sufficient credible evidence of a denial of rights at the covered facility," the ILC will notify the USTR, which in turn will be able to invoke a "Rapid Response Labor Mechanism," or RRLM, to request that Mexico investigate the complaint. (Canada may invoke a similar RRLM procedure against Mexico, and Mexico can do so against the United States, although only in the limited instances where the National Labor Relations Board has an enforced order in place against the US company.)

Consultations to resolve the issue bilaterally will then take up the results of Mexico's investigation as to the alleged violation or any agreed remediation, but if no resolution is reached within the time set forth in the Protocol of Amendment, which, depending on the issue may require approximately 45 days, the US may request that an investigating team of three experts be empaneled. One panel member will be from a list of names provided by Mexico, one from the US list and one from a list of neutral candidates established by prior consensus between Mexico and the United States. The US has already placed on its diplomatic staff in Mexico labor experts prepared to participate in these panels.

Final settlement of customs duties can be suspended pending the RRLM process of consultations and also during the panel's investigation, verification and report, which, again depending on circumstances and the nature of procedural and substantive disagreements, may take from three to six months. If the RRLM panel deems the company has not corrected the problem(s), the US can then impose sanctions, including denial of the reduced tariff benefits of the USMCA, either upon the offending facility or on all output of the ownership group. In cases of multiple denials of rights by the same party, remedies can include denial of entry or other penalties. In the event, however, no denial of rights is found, the petitioning party is forbidden to raise another complaint on the same issue for 180 days.

Once a remedy is put in place, if the denial of labor benefits by the Mexican entity is corrected, consultations will ensue to consider rescission of the remedies. Should the parties be unable to agree as to whether the violation has been rectified sufficiently to justify revocation of any outstanding remedies, another investigating panel can be established to opine on the situation.

It remains to be seen whether the RRLM will prove to be actively utilized. Much will depend on how effective is the Mexican labor reform pursuant to the USMCA and how rapidly and effectively

Mexico responds to allegations of denial of rights.[3] From the US point of view, the decision by a company or trade union to avail itself of the RRLM will depend in large measure on whether ongoing or increasing imports of goods or outsourcing of work is seen as caused by low wages or poor working conditions in Mexico.

Mexican companies, for their part, should be aware of the RRLM process and give serious and immediate attention the conformance of their labor practices with USMCA standards and the recent Mexican labor law reforms.

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[1] See May 7, 2019 Haynes Boone report published by Alberto de la Peña for a more detailed discussion of these Mexican labor law reforms.

[2] Interagency Labor Committee for Monitoring and Enforcement, Procedural Guidelines for Petitions Pursuant to the USMCA, 85 Fed. Reg. 39,257 (June 30, 2020).

[3] Given the potential political controversy of such a complaint, there is some skepticism that Mexico will allow egregious complaints to go unresolved, not only because of its trading relationship with the United States and Canada under the USMCA, but also in light of its other bilateral and multilateral trading relationships. For example, the recently updated trade agreement between the European Union and Mexico also contains provisions to enhance enforcement of environmental and labor commitments: https://trade.ec.europa.eu/doclib/press/index.cfm?id=1833 See, e.g., Chapter [XX], Trade and Sustainable Development, Article 3, Multilateral Labour Standards and Agreements.