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The U.S.–Mexico–Canada Agreement: Labor Rights and Environmental Protection

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The USMCA parties have resolved to:

> PROMOTE high levels of environmental protection, including through effective enforcement by each Party of its environmental laws, as well as through enhanced environmental cooperation, and further the aims of sustainable development, including through mutually supportive trade and environmental policies and practices; PROMOTE the protection and enforcement of labor rights, the improvement of working conditions, the strengthening of cooperation and the Parties' capacity on labor issues . . .[1]

INTRODUCTION

The evolution of labor and environmental rights in U.S. free trade agreements (FTAs) has been a nonlinear process over the last 25 years, beginning with the North American Free Trade Agreement (NAFTA) negotiations in 1991.[2] At that time, the inclusion of labor and environmental provisions in U.S. FTAs was not a foregone conclusion; in fact, it was mostly an afterthought. Furthermore, no such provisions are found in the pre-NAFTA agreements with Israel and Canada. However, the relationship between trade and labor was well established in the United States prior to NAFTA through nonreciprocal programs such as the Generalized System of Preferences,[3] the Caribbean Basin Initiative,[4] and the African Growth and Opportunity Act.[5] The time, therefore, was ripe for addressing labor and environmental issues in U.S. FTAs in 1991.

The two NAFTA "side" agreements on labor and the environment were considered necessary when President Bill Clinton succeeded President George H.W. Bush in January 1993 after NAFTA had been negotiated and signed by President Bush in December 1992, but before it had been submitted to Congress for approval. As a presidential candidate in October 1992, Clinton boldly endorsed NAFTA, but only on the condition that NAFTA's environmental and labor provisions be strengthened.[6] Clinton's decision was driven in part by the concerns of Congress and other U.S. officials that without labor and environmental provisions, working and living conditions on both sides of the border would deteriorate.[7]

Following NAFTA, labor and environmental provisions in U.S. trade agreements evolved considerably due to strong congressional pressure reflected in various versions of Trade Promotion Authority (TPA) legislation. This is particularly apparent in the inclusion of labor provisions in the body of subsequent free trade agreements, as well as in the submission of labor and environmental disputes to the same state-to-state mechanism used for trade disputes.[8] Given how trade agreements are ratified in the United States—where passage in the House

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of Representatives typically requires at least 30–40 votes from the Democratic Party, which emphasizes labor rights and environmental protection issues—no president since Clinton has sought to conclude a regional trade agreement without including labor rights and environmental protection chapters.

LABOR RIGHTS

NAFTA's NAALC and Subsequent FTAs

Many observers believe that NAFTA's poor coverage of labor was one of the agreement's most glaring weaknesses. NAFTA itself incorporates little coverage of labor issues except for references in the preamble to creating new employment opportunities, improving working conditions, and enhancing and enforcing basic workers' rights. NAFTA provides for temporary visitors for business purposes,[9] but it does not further deal with immigration-related matters.

When addressing NAFTA's perceived labor shortcomings, and given the timing and the reluctance of all parties to reopening the discussions for a highly complex agreement that had already been negotiated and signed, the most practical solution was to negotiate parallel agreements. Thus, the Clinton administration's desire for broader labor coverage resulted in the North American Agreement on Labor Cooperation (NAALC).

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In the NAALC, each party retains the right to set and apply its own labor standards. Each party is also required to provide in its laws for unspecified "high labor standards"[11] and to enforce labor rights through specified procedures, including citizen access to authorities.[12] Such public access to the authorities was apparently intended to shed light on poor labor practices that otherwise would not have received much public attention. The NAALC parties also committed to encouraging the freedom of association; the right to organize; the right to collective bargaining and to strike; the prohibition of forced labor; the protection for child labor; minimum employment standards; the elimination of discrimination in employment; equal pay for men and women; the prevention of and compensation for occupational injuries and illnesses; and the protection of migrant workers.[13]

The NAALC initially provided for a Commission for Labor Cooperation (CLC) consisting of a council of ministers and a secretariat.[14] Each NAFTA party established its own National Administrative Office (NAO), which is now the Office of Trade and Labor Affairs (OTLA) in the United States. These offices monitor the labor rights issues in North America. The primary functions of the NAO/OTLA include "receiving complaints about non-enforcement of labor laws" by a NAFTA government.[15]

With regard to labor issues, the formal dispute settlement mechanism—which is solely available to the NAFTA governments—may be utilized only where there is a "persistent pattern of failure . . . to effectively enforce enumerated labor standards."[16] Standards enforceable by arbitration are limited to occupational safety, health, child labor, or minimum wage technical labor standards.[17] In other words, denying the right to organize a union alone would not be subject to arbitration. After intergovernmental consultations are conducted, fact-finding and/or mediation by the CLC may occur. If issues are not resolved at this point, a party may request arbitration, a step requiring a two-thirds vote of the CLC for approval;[18] because of the two-thirds requirement, no arbitration has ever occurred under the NAALC. Moreover, the secretariat that was originally intended to pursue citizen complaints (which had some success in the early years), had for all practical purposes disappeared entirely by 2009, with its responsibilities absorbed by the three national labor offices, which were largely ineffective.[19]

Major innovations in U.S. trade agreements concluded since NAFTA, including in the Trans-Pacific Partnership Agreement (TPP) and now the USMCA, have accepted the International Labor Organization's (ILO) Declaration on Fundamental Principles and Rights at Work,[20] the elimination of sex-based

discrimination,[21] and a mechanism for accepting citizen submissions regarding labor complaints through the establishment of contact points.[22]

Trump and López Obrador's Mutual Interest in Mexican Labor Law Reform

The USMCA obligations relating to labor rights in Mexico support one of President Andrés Manuel López Obrador's (AMLO) major campaign promises, which is to reduce income inequality in Mexico. The USMCA provisions are also consistent with the Trump administration's desire to make the production of goods in Mexico relatively less inexpensive, in this case by reducing the large differential between U.S. and Mexican wage rates. As discussed in my previous report on the rules of origin and customs,[23] the USMCA includes a requirement that a significant percentage of automobile and light truck content be produced in facilities where workers are paid at least $16 per hour. Taken together, these factors assisted Mexican and U.S. negotiators in fashioning strong, mutually acceptable labor reform provisions for Mexico.

USMCA Labor Provisions and Changes in Mexican Law

Many of the labor chapter's provisions reflect those of the TPP and other FTAs negotiated by the U.S., including the NAALC side agreement discussed earlier. However, the major innovation of the USMCA is the Mexico-specific requirements in an annex to the labor rights chapter that are designed to facilitate the activities of independent unions and collective bargaining.[24] A key annex included in the USMCA addresses "Worker Representation in Collective Bargaining in Mexico." It is evident from the language that AMLO endorsed this set of obligations during the negotiations:

> Mexico shall adopt and maintain the following provisions covered in this Annex, necessary for the effective recognition of the right to collective bargaining, given that *the incoming Mexican government has confirmed that each of these provisions is within the scope of the mandate provided to the incoming government by the people of Mexico in the recent elections.*[25]

The most significant labor obligations for Mexico are to guarantee the:

> right of workers to engage in concerted activities for collective bargaining or protection and to organize, form, and join the union of their choice, and prohibit employer domination or interference in union activities, discrimination or coercion against workers for union activity or support, and refusal to bargain collectively with the duly recognized union.[26]

Mexico's labor laws were modified and expanded in May 2019 to facilitate the implementation of the right to unionization through independent administrative bodies. In addition, the modified labor laws facilitate the registration of union elections and resolution of disputes, with a variety of safeguards for union organizing including the use of secret ballot votes subject to clear time limits and independent verification. Transparency obligations also exist, including a requirement that collective bargaining agreements be made available to affected workers.[27] Significantly, Mexico agreed to adopt the USMCA legislation by January 1, 2019, with the option for other parties to delay the enforcement of the USMCA "until such legislation became effective."[28] The new labor laws were finally approved by Mexico's Congress at the end of April 2019,[29] although the Confederation of Mexican Workers objected, presumably because of opposition to a new Federal Conciliation and Labor Registry.[30] The USMCA will not likely be introduced in the U.S. Congress until Democrats in both houses have had an opportunity to review the law thoroughly and assess whether it meets the USMCA requirements,[31] a process that may well be completed by early June 2019.

The importance of such reforms to Mexican workers is difficult to overemphasize. Data suggests that workers in Mexico receive a smaller share of the country's total economic output than workers in most other countries.[32] What

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passes for collective bargaining in Mexico is considered by many to be simply rubber-stamping, with workers under "protection contracts" often receiving little more than the minimum wages they would earn without labor contracts, and with union dues transferred directly from wage deductions to unions. In many instances, workers do not even know that such union contracts exist. In practice, workers in Mexico have not had the right to vote on unions, union representation, or labor contacts.[33] This should change under the new labor laws with the support of the AMLO administration, despite opposition by some business groups that prize Mexico's low wages as a boon to exports. However, U.S. unions and their supporters in Congress are deeply suspicious that Mexico's labor situation will not change without strong enforcement mechanisms invoked by the U.S. government.

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Labor Law Enforcement Concerns in the U.S. Congress

Due to the weakness of NAFTA's labor provisions and many subsequent labor chapters in U.S. trade agreements, Democratic members of Congress have suggested that better enforcement mechanisms are needed to ensure that Mexico's government enforces the improved labor laws. The Democratic Party has indicated that such mechanisms are required if the USMCA is to receive their support. Such improved enforcement mechanisms, according to one leading House Democrat, might be addressed as part of the legislation to implement the USMCA, which wouldn't require reopening the agreement.[34] However, House Speaker Nancy Pelosi has argued that these enforcement issues cannot effectively be addressed in the implementing legislation and will instead require renegotiating the USMCA.[35] Presumably, the Democratic Party's concerns could more easily be resolved through an appropriate side letter that could be considered part of the overall agreement in conjunction with the numerous other side letters. These parts would then be approved by the legislative bodies in all three participant nations.

Currently, neither the U.S. nor the Mexican governments appear to have any interest in reopening the text of the USMCA to improve the enforceability of Mexican labor laws. Officials in Mexico have suggested (perhaps through hope rather than conviction) that the state-to-state dispute settlement provisions of the USMCA are less likely to generate long delays (typically by the United States) in the appointment of panelists, or in the commencement of dispute proceedings, compared to the provisions under NAFTA.[36] However, there is resistance in Mexico to any additional measures on labor enforcement. Mexico's Secretary of Foreign Affairs, Marcelo Ebrard, has asserted that Mexico "can't offer anything more because we don't consider that a law in Mexico approved by its Congress needs someone from the outside to validate it."[37]

It is possible that once Mexico's new labor legislation has been reviewed in the United States, the two parties will move promptly to determine and implement any additional steps. This is not the only issue that has delayed such submission. The Trump administration's disinclination to terminate the section 232 "national security" tariffs on steel and aluminum imports from Canada and Mexico was also a barrier to approval.[38] That stumbling block was finally resolved on May 17, 2019, with the U.S. government's decision to lift those tariffs.[39] Hopefully, this action reduces the still substantial risk that if submission of the USMCA to Congress is delayed beyond the August congressional recess, the intensifying 2020 presidential elections will make consideration of the agreement politically impossible before 2021.

Differences in the Treatment of Labor and LGBTQ Rights

While the USMCA labor provisions are designed to affect labor rights in Mexico, one provision in the chapter has a much broader focus:

> The Parties recognize the goal of eliminating discrimination in employment and occupation and support the goal of promoting

> equality of women in the workplace. Accordingly, each Party shall implement policies that it considers appropriate to protect workers against employment discrimination on the basis of sex (including with regard to sexual harassment), pregnancy, sexual orientation, gender identity, and caregiving responsibilities; provide job protected leave for birth or adoption of a child and care of family members; and protect against wage discrimination.[40]

This provision appeared in the October 1, 2018, initial draft of USMCA, apparently at the suggestion of Canada because the protection of LGBTQ rights in the view of Prime Minister Trudeau "represents Canadian Values."[41] However, this obligation was essentially eliminated with respect to the United States in the final text signed on November 30. In that version, a footnote was added:

> The United States' existing federal agency policies regarding the hiring of federal workers are sufficient to fulfill the obligations set forth in this Article. The Article thus requires no additional action on the part of the United States, including any amendments to Title VII of the Civil Rights Act of 1964, in order for the United States to be in compliance with the obligations set forth in this Article.[42]

Given that there is no U.S. federal statute that protects workers from discrimination based on sexual orientation or gender identity, the statement in this footnote is patently false. The change was added on the request of the U.S. trade representative in response to the complaints of some Republican lawmakers who urged that "a trade agreement is not the place to set social policy and that the language conflicts with the administrations agency on sexual orientation and gender identity."[43] Still, the footnote likely protects the U.S. from any actions by Canada or Mexico challenging U.S. compliance with the provision, and thus preserves the ability of the U.S. federal government and the states to continue to allow employment discrimination based on LGBTQ status.

PROTECTION OF THE ENVIRONMENT

The USMCA environmental chapter also incorporates major improvements over the North American Agreement on Environmental Cooperation (NAAEC)[44] approved by the Congress in 1993. Most of these were reflected in post–NAFTA FTA environmental chapters, including the TPP.[45] Innovations since NAFTA include the environmental provisions in the body of the USMCA, which state that the trade dispute settlement provisions are also applicable to environmental (and labor) disputes. The USMCA also affirms the parties' commitments to their previous multilateral environmental agreements (but no obligation to ratify any additional ones). The USMCA also affirms existing and makes new commitments in the areas of ozone layer protection, ship pollution, air quality, and marine litter.[46] The relationship between trade and biodiversity is recognized along with the problem of invasive alien species, protection of marine wild capture fisheries, need for effective sustainable fisheries management, conservation of marine species, and addressing fishers subsidies that lead to overfishing.[47] One of the most important aspects of the USMCA is the decision to preserve the major aspects of the NAAEC's Commission on Environmental Cooperation (CEC), its secretariat, and the Joint Public Advisory Committee (JPAC)[48] established under the NAAEC but not replicated under any subsequent U.S. FTA prior to the USMCA.

Background: The NAAEC

The NAAEC's objectives include protecting and improving the environment; promoting sustainable development; and increasing party cooperation for conserving, protecting, and enhancing the environment. Other objectives are supporting NAFTA's environmental goals; avoiding trade distortions or new trade barriers; strengthening cooperation to develop and improve environmental rules and regulations; and enhancing compliance with environmental laws and regulations.

Finally, the long list of aspirations has a major focus on promoting transparency and public participation in the development of environmental laws and regulations; promoting economically efficient environmental measures; and promoting pollution prevention policies and practices.[49] These objectives were intended to be accomplished in part through each party's obligation to enforce its environmental laws and regulations, to provide private citizen access to procedures for publicizing and examining alleged violations of the agreement, and to encourage procedural due process for national administrative and judicial proceedings.[50]

The NAAEC was also designed to provide a mechanism for requiring the NAFTA parties to enforce their internal environmental laws and regulations. Each party, while maintaining the right to establish its "own levels of environmental protection," is to "ensure that its laws and regulations provide for high levels of environmental protection and . . . strive to continue to improve those laws and regulations."[51] The latter commitment is not realistically enforceable, because the NAAEC sets no substantive environmental standards other than to call upon each party to create laws to protect the environmental.[52] Thus, nothing prevents a party from weakening its environmental laws and then neglecting to strongly enforce them.

The NAAEC also created the Commission for Environmental Cooperation (CEC), consisting of a Council on Environmental Cooperation and a semi-autonomous secretariat,[53] as well as a Joint Public Advisory Committee (JPAC) with four public members for each party.[54] The secretariat continues to perform a useful function in public outreach and conducts research on such matters as climate change, ecosystems, and pollutants, with reports issued on each.[55]

Located in Montreal, Canada, the CEC is authorized to review private citizen complaints about the failure to enforce environmental laws, and it has the investigatory powers and authority to seek expert advice and issue reports.[56] The secretariat has the authority to develop a "factual record" relating to the alleged violations of the agreement when the submission so warrants.[57] Where the investigation demonstrates that a NAFTA party has a "persistent pattern of failure . . . to effectively enforce its environmental laws," a process of binding consultation and dispute resolution through an arbitral process is in theory made available.[58] This process is open only to the government parties.[59] For the U.S. and Mexico, an adverse arbitral decision that the party does not comply with could result in trade sanctions. For Canada, in lieu of a trade benefit suspension, a fine may be assessed and enforced in the federal court.[60] The process is clearly designed to encourage voluntary compliance; suspension of trade benefits is the last resort, occurring only after a complex and lengthy procedure that can be initiated only with the agreement of two of the three national representatives on the CEC.

Post-NAFTA environmental provisions reflecting the dissatisfaction with the NAAEC, particularly among Democrats in Congress, were almost immediate. The significant post-NAFTA FTAs fall into several groups: the 2003-04 agreements with Australia, Chile, and Singapore, the United States-Central America-Dominican Republic Free Trade Agreement, and several others[61]; the 2006-07 FTAs with Colombia, Panama, Peru, and South Korea; and the 2016 12-nation TPP. The first two groups were guided by the 2002 TPA, while the finalization of the TPP in 2016 reflected the 2015 TPA. The most significant changes with environmental provisions in the post-NAFTA FTAs, all now reflected in the USMCA, were to ensure that a) the environmental provisions would be included in the body of the agreement, and b) that alleged violations would be subject to the same procedures and sanctions as violations of trade-related provisions of the free trade agreements.

More recently, first with the treatment of tropical hardwoods in the FTA with Peru in 2006[62] and the treatment of environmental and fishery issues in the TPP, environmental provisions effectively became a necessary part of any U.S. regional trade agreement requiring congressional approval.

In addition, the negotiating objectives of the 2015 Trade Promotion Authority included similar environmental provisions with which the Trump administration has sought to comply.[63]

The USMCA's Treatment of Environmental Issues

The general negotiating guidelines for the USMCA's environmental chapter also included rules that eliminate the weakening of environmental laws; incorporate environmental obligations accepted by the parties under the multilateral agreement; commit to public advisory committees; create a senior-level environmental committee, presumably referring to the Council for Environmental Cooperation created under the NAAEC; incorporate measures to combat illegal fishing, prohibit fisheries subsidies, and promote sustainable fisheries management and conservation;[64] protect and conserve indigenous ecosystems (including measures to combat wildlife and timber tracking); and encourage cooperative activities designed to facilitate implementation of environmental commitments.[65]

The simplest way for the USMCA negotiators to incorporate these obligations, as the U.S. Summary of Objectives suggests, was to copy them from the recently negotiated TPP's chapter 20. Otherwise, objections by Democrats in Congress would have been strident. The many advantages of this approach included 1) broader coverage of environmental issues such as fisheries and wildlife trafficking compared to NAFTA and subsequent U.S. FTAs; 2) provisions to make environmental violations subject to the state-to-state dispute settlement mechanism; 3) incorporation of the basic approach to environmental obligations found in earlier U.S. FTAs; and 4) a committee of high-level representatives that, if implemented, could provide a useful oversight function for compliance with the environmental obligations.

Insofar as the actual text of the USMCA is concerned, the environmental coverage also addresses respect for sustainable development; an obligation for each party to effectively enforce its own environmental laws (but without any obligations as to the content of those laws); transparency and opportunities for individuals to ask questions or request the investigation of alleged violations of environmental laws; fair, equitable, and transparent judicial or administrative procedures for the enforcement of environmental laws; protection of the ozone layer; and additional marine pollution and air quality issues.[66] In addition, the USMCA text covers corporate social responsibility, voluntary mechanisms to enhance environmental performance, biodiversity protections, sustainable forest management, and trade in environmental goods and services (the latter subject to unsuccessful multilateral efforts to reduce tariffs on trade in environmental goods).[67] The general satisfaction with the environment chapter in the USMCA is reflected in the conclusion of the Trade and Environmental Policy Advisory Committee Report, which states that the September 30, 2018, draft of the agreement:

> Largely meets the environmental objectives established by Congress in the Bipartisan Trade Act of 2015. It also includes several welcome new environmental initiatives e.g., to reduce marine litter, a prohibition on commercial whaling, enhanced language on IUU and sustainable fisheries management, and sustainable forest management, that will contribute to better environmental management in North America and beyond.[68]

Like many observers, the TPA advisory committee strongly supported provisions of the chapter designed to eliminate fishery subsidies that distort trade, as well as provisions requiring transparency for such programs. The committee also supported provisions that address illegal, unreported, and unregulated fisheries; discuss marine wild capture fisheries; support sustainable fisheries management; promote the conservation of marine species; and act on marine litter (an addition that goes beyond the TPP).[69] As with many earlier post-NAFTA agreements, provisions to restrict plant,

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The USMCA environmental advisory committee was, however, disappointed with the environmental chapter's failure to address climate change and global warming, particularly in the lack of "provisions that incentivize trade and investment in areas like infrastructure investment and support for renewable energy supplies that promote constructive climate policies.

animal, and illegally logged wood product trade, and to address invasive species, were also welcomed.[70] The USMCA environmental advisory committee was, however, disappointed with the environmental chapter's failure to address climate change and global warming, particularly in the lack of "provisions that incentivize trade and investment in areas like infrastructure investment and support for renewable energy supplies that promote constructive climate policies."[71]

While some observers, including myself, feared that the negotiators would fail to incorporate major structural and administrative features of the NAAEC, this fortunately did not happen. Rather, the USMCA preserves most of the best features, including: 1) a quasi-independent secretariat to receive citizen complaints and undertake valuable research and reports; 2) an internationalized citizen complaint procedure; and 3) a joint public advisory committee.[72] The "Agreement on Environmental Cooperation" explicitly continues the NAAEC's CEC, including its council, secretariat, and JPAC.[73] Also, as with NAFTA, "any person of a Party may file a submission asserting that a Party is failing to effectively enforce its environmental laws. Such submissions shall be filed with the Secretariat of the Commission for Environmental Cooperation (CEC Secretariat)" with procedures like those in the NAAEC up to and including ministerial level consultations.[74]

While environmental disputes are now subject to the same state-to-state mechanism that applies to trade disputes,[75] one may question the practical significance of such jurisdiction. Under NAFTA, the state-to-state dispute settlement has not worked well due to mechanisms that permitted any of the three parties to delay the proceedings through chronic failure to appoint standing rosters of panelists.[76] The similar treatment in the USMCA[77] makes state-to-state disputes subject to potentially extensive delays or the outright blockage of panel formation, as has occurred under NAFTA.

One of the shortcomings of many post-NAFTA U.S. FTAs was the absence of an environmental secretariat and a commission for environmental cooperation. For example, the continuation of the NAFTA Commission on Environmental Cooperation and secretariat in the USMCA is a significant improvement over the sparse use of secretariats in other post-NAFTA agreements. Of course, these administrative mechanisms will be useful only if the three USMCA parties together make a good faith effort to support the USMCA secretariat and its investigations, both financially and otherwise, a result that will be made more likely if interested members of Congress and environmental NGOs encourage such efforts through provisions in the USMCA implementing legislation.

The preservation of the JPAC concept is also particularly important. For example, in November 2017, JPAC recommended that the Council on Environmental Cooperation focus its limited resources on "environmental cooperation instead of punitive actions;" reaffirming the parties' commitment to the secretariat; continuing to encourage public participation in the CEC's activities; and continuing to support the secretariat's research on trade and the environment.[78]

> The JPAC gently urged continuation of the citizen complaint procedures: The CEC should continue to provide opportunities for the public to raise concerns about enforcement of environmental laws while providing a mechanism to ensure that issues and concerns are addressed by federal, state or provincial governments, as appropriate.[79]

The fact that the USMCA negotiators and the advisory committee appear to have paid attention to these recommendations gives cause for some optimism. It may be hoped that the USMCA environmental provisions and the provisions of the Agreement on Environmental Cooperation will be more successful than those of NAFTA and the NAAEC in meeting the objectives of the TPA, as well as those in Congress and the public who are concerned with environmental protection. The prospect of success in these respects could also encourage some members of Congress who otherwise would not support the USMCA to do so.

CONCLUSIONS

Given that the improved labor and environmental provisions are among the most significant changes in the USMCA compared to NAFTA, it is fortunate that the negotiators incorporated provisions in both chapters that go beyond those found in most earlier FTAs. In the labor area, the most significant addition is the USMCA annex requiring Mexico to enact new labor legislation designed to facilitate the formation of independent unions and effective collective bargaining in Mexico for the first time in history. If the new legislation is enforced by Mexico, with or without pressure from the United States, it can be expected to bring about significant changes to labor in Mexico.

The environmental provisions are less radical for the most part since they incorporate many innovations negotiated in the TPP, such as coverage of wildlife trafficking, illegal logging, illegal fishing, fisheries subsidies, and marine pollution. However, these provisions exceed the level of environmental protection under NAFTA and the NAAEC. Significantly, the USMCA, unlike the TPP, incorporates the Council on Environmental Cooperation, its secretariat, and its advisory committee, along with the procedures permitting citizen complaints.

If the USMCA is approved by the three governments and enters into force, it will also provide mechanisms for improving the status of labor rights and levels of environmental protection in North America.

ENDNOTES

1. Agreement between the United States of America, the United Mexican States, and Canada, Nov. 30, 2018 (not yet in force), http://bit.ly/2YSXFL9.

2. The first U.S. FTA, negotiated with Israel in 1985, was a relatively short document that contained no labor or environmental provisions; See David A. Gantz, *Regional Trade Agreements: Law Policy and Practice* (Durham, NC: Carolina Academic Press, 2009), 208–18.

3. See U.S. legislation authorizing the Generalized System of Preferences program: 19 U.S.C. §§ 2461 et seq.

4. 19 U.S.C. §§ 2701–2707.

5. 19 U.S.C. §§ 3701–3739 (2006).

6. Gerald F. Seib, "Clinton Backs the North American Trade Pact, But Candidates' Stances on the Issue Aren't Clear," *The Wall Street Journal*, October 5, 2002, A14.

7. For discussion on various claims regarding the environmental effects of NAFTA, see Mark Spalding and Marc Stern, *NAFTA Effects: Claims and Arguments 1991–1994, 1996 (Ottawa, CA: Commission for Environmental Cooperation, 1996*), https://bit.ly/2WnTRnl.

8. See David A. Gantz, "Labor Rights and Environmental Protection under NAFTA and Other U.S. Free Trade Agreements," *University of Miami Inter-American Law Review* 42 (2011): 297.

9. North American Free Trade Agreement (NAFTA), U.S.–Can.–Mex., December 15, 1992, ch. 16.

10. North American Agreement on Labor Cooperation (NAALC), U.S.–Can.–Mex., September 14, 1993, https://bit.ly/2ESfl0G.

11. NAALC, art. 2.

12. Ibid., art. 42.

13. Ibid., annex 1.

14. Ibid., arts. 8–14.

15. NAALC, arts. 15–16, esp. 16.3.

16. Ibid., art. 27.1.

17. Ibid., art. 27.1.

18. Ibid., arts. 28–29.

19. Ruth Buchanan and Rusby Chaparro, "International Institutions and Transnational Advocacy: The Case of the North American Agreement on Labor Cooperation," *UCLA Journal of International and Foreign Affairs* 13 (2008): 129, 157.

20. USMCA, art. 23. Such rights include the freedom of association and the right to collective bargaining; elimination of forced or compulsory labor; abolition of child labor; and elimination of discrimination in employment. The declaration is referenced in place of the various ILO agreements since the U.S. is not a party to any of them.

21. USMCA, art. 23.9.

22. USMCA, arts. 23.11, 23.15; see TPP, ch. 19.

23. David A. Gantz, *The United States–Mexico–Canada Agreement: Tariffs, Customs and Rules of Origin*, Baker Institute Report no.02.21.19, Rice University's Baker Institute for Public Policy, Houston, Texas, https://bit.ly/2logLRU.

24. USMCA, annex 23-A.

25. USMCA, annex 23-A, para. 1 (emphasis added).

26. USMCA, annex 23-A, para. 1.

27. USMCA, annex 23-A, paras. 3-7.

28. USMCA, annex 23-A, para. 8.

29. Eric Martin, "Mexican Congress Passes Labor Law Tied to USMCA Trade Agreement," *Bloomberg Law*, April 29, 2019, https://bloom.bg/2GTz15W; see also "Mexican Official: Labor Reform Legislation Slated to Pass by the End of April," *World Trade Online*, February 19, 2019, https://bit.ly/2WoJ9gu.

30. See "Mexico's Biggest Union to Challenge a Key Part of Labor Reform," *Bloomberg Law*, April 24, 2019, https://bit.ly/2XlynUB.

31. For description of the conditional support offered by key Democratic lawmakers, see "Sources: Mexican Labor Legislation Unlikely to Pass by USMCA Deadline," December 13, 2018, World Trade Online, https://bit.ly/3180APd.

32. Nacha Cattan, "Labor Reform is Coming to Mexico, Where Low Pay Fuels Imports," Bloomberg Law, April 26, 2019, https://bloom.bg/2QLhbFm.

33. Ibid.

34. See Erik Wasson and Andrew Mayeda, "Key Democrat Demands Changes to New North American Trade Deal," *Bloomberg*, November 14, 2018, https://bloom.bg/2Psm5Kc.

35. "Pelosi: USMCA Enforcement Issues Cannot be Fixed in Implementing Bill," *World Trade Online*, April 2, 2019, https://bit.ly/2WahJ9b.

36. "Mexican Ambassador: U.S. Must be clearer About USMCA Enforcement Requests," April 22, 2019, *World Trade Online*, https://bit.ly/2K2ZG3d. On a few occasions, NAFTA panelist rosters were designated but not replaced when they expired after three years. The USMCA provides in Article 31.8(1) that roster members once appointed remain in place until their successors are appointed, and that the initial roster of 30 persons must be in place when the USMCA enters into force. However, similar language in NAFTA (Article 2009.1) that provides for the appointment of roster members by January 1, 1994 (the date NAFTA entered into force) was apparently not complied with.

37. "Foreign Affairs Minister: Mexico Unwilling to Give More on Labor Reform," *World Trade Online*, May 8, 2019, https://bit.ly/2Wml6i5.

38. See "Brady: Congress Not Willing to Consider USMCA Until Steel, Aluminum Issues Resolved," *World Trade Online*, January 29, 2019, https://bit.ly/31aiKS3.

39. "United States Announces Deal with Canada and Mexico to Lift Retaliatory Tariffs," Office of the United States Trade Representative, May 17, 2019, https://bit.ly/2VRMPXF.

40. USMCA, art. 23.9.

41. "Trudeau Defends Keeping LGBTQ Rights in USMCA as APEC Summit Wraps Up," Head Topics, November 18, 2018, https://bit.ly/2Xqz5zP.

42. USMCA, art. 23.9, fn. 13.

43. Rosella Brevetti, Brenna Goth, and Amy Guthrie, "NAFTA 2.0 Gender, Labor Provisions at Issue Before Signing," *Bloomberg Law*, November 27, 2018, https://bit.ly/2HWOGlz.

44. North American Agreement on Environmental Cooperation (NAAEC), Can-U.S.-Mex, September 14, 1993, https://bit.ly/2IhG9IW.

45. See Comprehensive and Progressive Agreement for Trans-Pacific Partnership (Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam), March 8, 2018, https://bit.ly/2DkyM0A; TPP, ch. 20.

46. USMCA, arts. 24.8-12.

47. USMCA, arts. 24.15-24.19.

48. Agreement on Environmental Cooperation among the Governments of Canada, the United States of America, and

the United Mexican States, Can.-U.S.-Mex., December 18, 2018, https://bit.ly/2Xs2No3.

49. NAAEC, art. 1.
50. NAAEC, arts. 5–7.
51. NAAEC, art. 3.
52. Ibid.
53. NAAEC, arts. 8–9.
54. NAAEC, art. 16.
55. See Commission for Environmental Cooperation, "Our Work," accessed May 22, 2019, https://bit.ly/2vQ8lPm.
56. NAAEC, arts. 14–15.
57. NAAEC, art. 15.
58. NAAAEC, art. 36.
59. NAAEC, art. 24.
60. NAAEC, art. 36A.
61. Bahrain, Morocco, and Oman.
62. See Peru Environmental Cooperation Agreement, U.S.-Peru, July 26, 2006, https://bit.ly/2wzhbiC.
63. Bipartisan Congressional Trade Priorities and Accountability Act of 2015, P.L.114–26, 114th Cong., section 102(b)(10), 129 Stat. 319 (June 29, 2015), https://bit.ly/2HX1qbT.
64. TPP, arts. 20.13–20.17.
65. Office of the U.S. Trade Representative, "Summary of Objectives for the NAFTA Renegotiation," July 17, 2017, https://bit.ly/2u2bQhD.
66. USMCA, arts. 24.2–24.11.
67. USMCA, arts. 24–12–24.24.
68. "North American Free Trade Agreement 2018: Report of the Trade and Environmental Advisory Committee," September 27, 2018, https://bit.ly/2JSP7iQ.
69. Ibid., 7–9.
70. Ibid., 9–10.
71. bid., 10–11.
72. 2018 Agreement on Environmental Cooperation among the Governments of the United States of America, the United Mexican States, and Canada, U.S-Mex.-Can., December 2018, https://bit.ly/2Z6omes.
73. Ibid., art. 2.
74. USMCA, arts. 24.27–27.31.
75. USMCA, art. 24.32.
76. NAFTA, ch. 20, art. 2009. The most recent NAFTA chapter 20 panel report was issued on February 6, 2001. See *In the Matter of Cross-Border Trucking Services*, USA-MEX-1998-2008-1, February 6, 2001, NAFTA Decisions and Reports, https://bit.ly/2InE3qH.
77. See USMCA, ch. 31, art. 31.8. See also note 38.
78. "JPAC Expert Forum on the North American Agreement on Environmental Cooperation (NAAEC): Assessing the Past, Looking Towards the Future," Commission for Environmental Cooperation, November 21, 2017, https://bit.ly/2W0W0rs.
79. Ibid., 5.

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