Novel Labour-related Clauses in a Trade Agreement: From NAFTA to USMCA

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ABSTRACT

The renegotiated North American Free Trade Agreement (NAFTA), now called the United States–Mexico–Canada Agreement (USMCA), contains two interesting innovations: the requirement of a minimum average wage in the manufacturing of motor vehicles (the Labour Value Content clause) and a detailed prescription for the reform of Mexican labour law. Both could serve as models for future labour chapters in trade agreements. The assessment contained in this article is based on the views of those who demanded renegotiation of the labour-related provisions of NAFTA, experts on labour rights in free trade agreements (FTAs) and ethics criteria. The assessment results in a split picture. The labour-related provisions came about under ethically problematic circumstances and their complexity leaves much room for criticism. Yet, the idea of inserting a wage floor in an FTA, as well as monitoring and sanctioning mechanisms for ensuring internationally recognised labour rights, merits further consideration for future trade agreements.

KEYWORDS

globalisation; industrial relations; competitiveness; trade agreements; outsourcing

Given the anti-labour track record of the Trump administration (Greenhouse, 2019), it is surprising to learn that the renegotiated North American Free Trade Agreement (NAFTA) – now called the United States–Mexico–Canada Agreement (USMCA) – contains several provisions that to some extent mirror the demands of trade unions in the United States of America (US) and Canada (AFL-CIO, 2017; Unifor, 2017). Among these provisions, two stand out as novelties: the requirement for an average wage level of US$16 for production workers in the automobile industry (the so-called Labour Value Content clause [LVC]); and a very detailed prescription for a labour law reform plus an elaborate monitoring and sanctioning procedure for one of the signatory states, Mexico.

Both the LVC and the rules concerning the labour law reform could serve as models for future labour chapters in trade agreements. After all, trade liberalisation has led to the decoupling of wage levels from productivity gains in many areas of manufacturing in high-income countries, without any wage increases in most low-wage countries in so-called world market factories (Anner, 2019). The latter also applies to the manufacturing sector in Mexico (Blecker, Moreno-Brid and Salat, 2017). For decades, trade unions have called for the trade regime to be linked to the labour regime based on the conventions of the International Labour Organization (ILO) by means of enforceable social chapters (Greven, 2012). Within the World Trade Organization (WTO), such a social chapter has found no support thus far, but since the free trade agreement with the Caribbean states negotiated under President Reagan (the Caribbean Basin Initiative), many preferential agreements as well as bilateral and multilateral free trade agreements (FTAs) include social chapters – from twenty-one in 2005 to eighty-five in 2019 (ILO, 2019). In a few cases, trade unions were able to

make use of these chapters through creative cross-border campaigns (Kay, 2011), but in the main they have thus far largely failed as instruments for enforcing core labour rights (Moore, 2017; Harrison, 2019).

The assessment of labour-related clauses in FTAs is a matter of standpoint. For a long time, trade negotiators and mainstream trade economists have resisted the integration of labour issues in trade agreements. Even though trade is the result of the international division of labour (without such a division there is no need for trade) and is, therefore, intimately connected to labour, issues of labour rights and especially of labour standards were kept out of the post World War 2 trade negotiations until the early 1980s. With reference to the Ricardian comparative advantage theory, attempts to enforce labour rights through the sanctioning mechanisms of trade agreements were rejected as disguised protectionism (Grossmann and Michaelis, 2007). Accordingly, authors in the Ricardian tradition consider the labour-related clauses in the renegotiated NAFTA as a major mistake (Manak, 2020).

As labour-related clauses became more accepted in FTAs, the debate among proponents of such clauses shifted from providing justifications for the inclusion of labour clauses to discussing the merits of their various forms (Moore, 2017; ILO, 2019). I will draw on this debate of the specifics of labour clauses for an assessment of the labour-related clauses in the USMCA (Scherrer and Hänlein, 2012).

As I have written elsewhere, FTAs favour corporate interests and are therefore to be opposed (Scherrer, 2016). Labour rights chapters usually serve as fig leaves (Moore, 2017; Harrison, 2019). The question of whether the USMCA labour chapters outweigh the negative aspects of trade agreements is beyond this article. My focus here is solely on the merits of the USMCA's key new labour-related provisions.

The article starts out with a brief overview of the negotiation and ratification of the USMCA. It goes on to highlight the weaknesses of NAFTA's labour-side agreement which the new agreement is supposed to overcome. After a brief overview of the USMCA's remedies for some of NAFTA's deficits, the remainder of this article focuses on the two major labour-related novelties. It first covers the Labour Value Content clause, and then the Annex to the agreement which addresses the labour law deficits in Mexico. The assessment of these novel approaches to labour rights in FTAs is based on desk research, especially on a close reading of the relevant chapters of the agreement, supplemented by consulting legal blogs. On the one hand, the assessment of the labor-related clauses uses criteria developed in previous research on the effectiveness and legitimacy of labour-rights clauses in trade agreements; on the other hand, it presents the positions of US trade unions found on the Internet as well as the opinions of experts writing legal blogs.

The assessment results in a split picture. The labour-related provisions came about under ethically problematic circumstances and their complexity leaves much room for criticism. Yet, the idea of inserting a wage floor in an FTA, as well as monitoring and sanctioning mechanisms for ensuring internationally recognised labour rights, merits further consideration for future trade agreements.

A Brief Overview of the Negotiation and Ratification of the USMCA

Shortly after taking office, US President Trump began negotiations with the government of Mexico, threatening to terminate NAFTA with the goal of updating it. These negotiations concluded in October 2018 with the three heads of state signing the USMCA. The text of the agreement submitted to the US Congress already contained several rules that would provide better

protection for workers in the free trade zone than did NAFTA. Among them were the already-mentioned Labour Value Content clause and an annex committing Mexico to labour law reform.

However, there were considerable concerns on the part of US trade unions about the extent to which the planned reforms of Mexican labour law would effectively be implemented and enforced (see below). The possibility of attending to the concerns of US trade unions in the agreement was then made possible by the Democratic Party's election victory in the November 2018 midterm congressional elections. The Democrats' new majority in the House of Representatives compelled the Trump administration to negotiate further amendments to the original USMCA text. In December 2019, the three countries' trade representatives signed a Protocol of Amendments.

The changes to the Agreement led the trade union federation AFL-CIO and most, although not all, of the US trade unions to support the adoption of the USMCA Implementation Act. On 19 December 2019, the Act passed the House of Representatives, with 381 votes in favour and 41 against. On 16 January 2020, the Senate followed suit with 89 favourable votes to 10 against. The USMCA entered into force on 1 July 2020.

The Weaknesses of the NAFTA Labour Side Agreement

The renegotiation of NAFTA was a long-standing demand by US trade unions. They were very frustrated with the North American Agreement on Labour Cooperation (NAALC), the so-called NAFTA Side Agreement, which had been in effect since 1994. It contained no reference to international labour standards, but merely obliged the contracting states to comply with their respective national labour laws (NAALC, 1993). The NAALC only permitted the introduction of measures in the event of a lack of enforcement of national labour law, and in such a case fines and trade sanctions were limited to the areas of child labour, minimum wages, and occupational health and safety. In addition, the agreement provided for the creation of extended cooperative measures and communication forums (Art. 1d and 1e). Although the parties wanted to achieve high labour standards (Art. 1f and 2), there was no provision preventing the effective deterioration of such standards. Priority was given to national resolutions of labour conflicts (Art. 5:8).

Sanctions available under the NAALC were very limited and involved cumbersome procedures. Complainants had to demonstrate that the government in question was failing to ensure continuous compliance with national laws. A single response by the respective government to a labour law violation was enough to invalidate the claim of "continuous" non-compliance. In addition, appeals procedures took up to 1 230 days before trade sanctions could be imposed. By way of comparison, a NAFTA arbitration procedure on trade disputes took a maximum of 240 days. The implementing authority for the NAALC was not only underfunded, but also lacked the rights of inspection and subpoena. (For detailed accounts see Compa and Brooks, 2019: Ch. 3; IILS, 2015: 43–57.)

The Clinton administration had advertised this side agreement as:

> [a] way to ensure that Mexican workers would have a fair chance to bargain for a greater share of productivity gains, thus narrowing, over time, the wage gap with American workers, and deepening the Mexican domestic market for goods and services, including, potentially, those from the United States (Harvey, 1996: 4).

However, it did not prevent the outsourcing of US manufacturing tasks to Mexico. While the volume of trade between Mexico and the United States has tripled since the ratification of NAFTA

in 1994 and foreign direct investment in Mexico has more than doubled in terms of gross national product, Mexican hourly wages in relation to the US have decreased since 1994. Real wages in the Mexican manufacturing sector were lower in 2016 than in 1994 (Blecker et al., 2017: 98f.). The hourly wages of employees in Mexican automobile production in 2017 averaged $7.30 in final assembly and $3.40 in supply companies; in the United States and Canada, on the other hand, they averaged over $20 (INEGI, 2017).

Especially the US auto companies took advantage of NAFTA. The Mexican share of total North American motor vehicle production increased from 2.5 per cent in 1986 to 20 per cent in 2018 (CRS, 2019: 15).

The low effectiveness of the side agreement on labour in terms of strengthening the enforcement of labour rights and increasing manufacturing wages in Mexico provides the ex-post empirical evidence for the critical claims at the time of its enactment – that is, that its main purpose was to provide cover for some labour-friendly Congresspersons to vote for NAFTA and, thereby, assure passage of NAFTA (Smith, 1993; Mayer, 1998: 205–18).

USMCA Remedies some NAFTA Deficits

The United States–Mexico–Canada Agreement went a long way to meet the demands of the AFL-CIO (2017) and Unifor (2017), Canada's largest private-sector union. It included:

- a chapter on labour relations in the main contract (USMCA Chapter 23) and no longer in a side agreement;
- the reference to ILO core labour standards (ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up 1998), but without mentioning the number of the relevant ILO conventions (USMCA Chapter 23.1);
- an annex to the reform of labour laws in Mexico (USMCA Annex 23-A);
- special protection for the North American auto, steel and aluminium industries through higher local content requirements for cars (from 62.5 per cent to 75 per cent), and the requirement that 70 per cent of all steel and aluminium used in the production of vehicles is sourced within North America (USMCA Appendix to Annex 4-B);
- a Labour Value Content clause (USMCA Appendix to Annex 4-B, Art. 4-B.7).

As the annex to the reform of the labour laws in Mexico and the LVC are indeed novelties in FTAs, they will be described in detail in the following sections. Their assessment follows afterwards.

The Labour Value Content Clause[1]

The LVC requires that a portion of production wages in the automotive industry must be at least $16 per hour; otherwise a duty of 2.5 per cent is payable on import into one of the other USMCA countries (USMCA Appendix to Annex 4-B, Art. 4-B.7). It is the first clause in an FTA that

[1] Much research for this section has been done by Emilie Segura, with the financial support of the Labour Chamber of Vienna (AK Wien).

stipulates a specific wage level. The specifics of the clause have been developed by the United States Trade Representative (USTR), but reflect demands such as "floor wages to ensure level playing field" of the AFL-CIO (2017: 34) and "higher labour and wage standards" of Unifor (2017: 1). According to insiders interviewed by the trade journalist Jenny Leonard, US Trade Representative Robert Lighthizer is said to have often blamed low wages in Mexico for outsourcing US manufacturing tasks to Mexico. A clause on a minimum wage would incentivise sourcing from US plants and, therefore, would make it easier for Lighthizer to win Democratic support for the renegotiated NAFTA in Congress. Mexico and Canada accepted this LVC after Lighthizer dropped his original demand for 50 per cent US local content (Leonard, 2018; Lamp, 2019: 28–9).

The LVC clause only affects manufacturers of passenger cars, light trucks (including the so-called Sport Utility Vehicles) and heavy trucks operating in North America. The clause is very complex and somewhat ambiguous. It does not prescribe a minimum wage, but a minimum average wage for a certain part of the manufacturing costs (USMCA, Chapter 4, Appendix, Art. 7.). The LVC is meant to be phased in over three years after USMCA ratification (USMCA, Chapter 4, Appendix, paragraph 1(a) to 1(d)), but also allows for an alternative staging of up to five years (Art. 4-B.8).

The LVC requires automakers to demonstrate that at least 40 per cent of the content of a car (45 per cent for a truck) must be sourced from high-wage facilities. These facilities located in one of the three USMCA countries can be owned by the final manufacturer or by a third party, and must pay an average of $16 per hour or more (not including benefits) to their direct production workers.

If a manufacturer already achieves an LVC of 40 to 45 per cent based on this calculation, there is no need for further calculations. If this is not the case, the manufacturer may, under certain conditions, claim the wage costs for research and development (R&D), information technology (IT) and for engine, transmission and/or battery plants to meet the 40 or 45 per cent quota: for R&D and IT up to 10 per cent of their total North American wage costs, and 5 per cent if they own an engine, transmission or battery plant (or long-term supply contracts) in North America that pays an average hourly wage of at least $16.

The LVC may be calculated for a model line, vehicle class or production site for passenger cars or light trucks. In addition, the companies can choose whether they want to include their entire production or only those vehicles intended for export to the North American neighbouring country in the LVC calculation. However, the calculations must be carried out separately for the locations in the respective countries of the USMCA. The audit must be provided annually (USMCA, Appendix to Annex 4-B).[2]

It can safely be assumed that the LVC affects manufacturers to varying degrees (Fortnam, 2018). Traditional US manufacturers are more likely to reap benefits of R&D and IT wage credits as well as through the 5 per cent rule for existing engine, transmission and battery plants, than are European or Japanese manufacturers whose R&D and IT departments are mostly based outside of North America and their engine plants in low-wage Mexico rather than in the United States (USTR, 2019b: FN 133).

[2] The interim instructions of the US Customs and Border Protection for the LVC cover ten pages (CBP, 2020: Annex A & B).

The Agreement on Mexican Labour Law Reform and Implementation

Another first in an FTA are very specific labour law requirements for one signatory party of the agreement, namely Mexico. These are contained in the annex to the USMCA's labour chapter (Annex 23-A "Worker Representation in Collective Bargaining in Mexico"), in the Protocol of Amendment to the USMCA (USTR, 2019a) signed by the heads of the three North American states, and in the USMCA Implementation Act of 2020.

The Annex, the Protocol and the Act address three major concerns about the failings of NAFTA's side agreement, namely (a) gaps in Mexican labour law, especially the lack of worker representation in collective bargaining;[3] (b) insufficient labour inspections and redress through courts; and (c) absence of timely and effective response mechanisms in case of labour rights violations by a Mexican firm exporting to the United States.

The (a) and (b) concerns are covered by Annex 23-A to the labour chapter in the USMCA of 2018. It specifies Mexican labour law reforms as follows:

> 1. Provide in its labor laws 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.
>
> 2. Establish and maintain independent and impartial bodies to register union elections and resolve disputes relating to collective bargaining agreements and the recognition of unions, through legislation establishing (i) an independent entity for conciliation and union collective bargaining agreement registration and (ii) independent Labor Courts for the adjudication of labor disputes. … The legislation also shall provide that all decisions of the independent entity are subject to appeal to independent Courts ….
>
> 3. Provide in its labor laws, through legislation in accordance with Mexico's Constitution for an effective system to verify that elections of union leaders are carried out through a personal, free, and secret vote of union members.
>
> 4. Provide in its labor laws that union representation challenges are carried out by the Labor Courts through a secret ballot vote ….
>
> 5. Adopt legislation in accordance with Mexico's Constitution, requiring:
> (a) verification by the independent entity that collective bargaining agreements meet legal requirements related to worker support …; and
> (b) for the registration of an initial collective bargaining agreement, majority support, through exercise of a personal, free, and secret vote, of workers covered …
>
> 6. … all existing collective bargaining agreements shall include a requirement for majority support…. That legislation shall also provide that all existing collective bargaining agreements shall be revised at least once during the four years after the legislation goes into effect.
>
> 7. Provide … that a collective bargaining agreement … [is] made available in a readily accessible form to all workers ….

[3] For the development and state of Mexican labour relations, see Cook (2007: 182–92), Bensusán and Middlebrook (2012), and Compa and Brooks (2019: Chpt. 2 §42 + 43). Concerning Mexican violations of ILO conventions, see ILO (2017: 146–9).

Andrés Manuel López Obrador, elected president in 2018, and the MORENA Party he founded entered the elections with a programme that promised a progressive labour law reform.[4] This promise was largely fulfilled on 2 May 2019 in accordance with Appendix 23-A of the USMCA (Sadka, 2019). However, the extent to which the newly created labour institutions will be able to fulfil their intended tasks depends on state budget allocations. Both the AFL-CIO and the USMCA commission, composed of Democratic senators and members of the House Representatives, have voiced doubts that there is enough funding for such reforms (Curi, 2019). They have, therefore, pressed for a renegotiation of the labour chapter in 2019.

Monitoring and Enforcement of Mexican Labour Law Reforms

The AFL-CIO[5] together with the Democratic majority in the House of Representatives succeeded in obtaining very comprehensive monitoring and enforcement mechanisms for labour rights in Mexico. The USMCA Implementation Act of 2020 contains the following paragraphs in Title VII:

> (1) The creation of an **Interagency Labour Committee for Monitoring and Enforcement** (ILCME). This committee, under the joint direction of the Trade Representative and the Secretary of Labour (USMCA Implementation Act, Sec. 711), is to conduct an assessment every six months on the extent to which Mexico fulfils its commitments to the agreed labour law reforms and 'whether Mexico has provided funds in accordance with its commitment' (Sec. 714). According to the Executive Order establishing this Committee, it shall decide by consensus.
>
> The Committee is supported by an Independent Mexican Labour Expert Committee (Sec. 714), whose twelve members are appointed by both parties in Congress and the union-dominated Labour Advisory Committee in the Office of the Trade Representative (Sec. 732). If, following a multi-stage procedure with prescribed deadlines for each stage, the Committee determines that Mexico has not fulfilled its obligations, the Interagency Committee should recommend that the Trade Representative initiates enforcement action. Such action may include the opening of consultations, the initiation of dispute settlement proceedings, or measures with respect to the Rapid Response Labour Panel [see below]. In addition, a hotline for Mexican workers will be established (Sec. 717). Furthermore, the Secretary of Labour will appoint five labour attachés at the U.S. Embassy and Consulates in Mexico to assist the Interagency Committee in monitoring and enforcing Mexico's labour obligations (Sec. 721-23). Finally, a task force under the Department of Homeland Security will deal with child and forced labour (Sec. 741-44). The Interagency Committee will report to relevant committees of Congress at specified intervals.
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> (2) A **Rapid Response Labour Mechanism** - RRLM (Annex 31-A) aims to provide rapid relief when a factory or call centre (facility) violates the right to freedom of association and collective bargaining enshrined in the new Mexican labour law.

The focus on a specific workplace is unprecedented. Whereas previous labour rights clauses in FTAs addressed the failure of a government to effectively enforce labour laws, concrete violations

[4] Key elements of the reform were in line with the demands of progressive Mexican trade unionists, such as Napoleón Gómez Urrutia, the current president of Los Mineros, the National Union of Mine, Metal, Steel and Related Workers (Gómez, 2018).

[5] On the role of the AFL-CIO's president, Richard Trumka, see Cassella (2019).

in a factory were outside the scope of these agreements. In Mexico, however, this mechanism can only be used within the framework of the existing right to freedom of association and collective bargaining (Title VII (2)).

The amendment provides for the establishment of a Rapid Response Labour Panel as part of the RRLM. It is composed of a pre-agreed list of labour experts, of which one-third will be appointed by consensus of both governments. The individuals on the joint list may not be nationals of either country (Protocol Article 31-A.3.2). Originally, some Democratic senators suggested that US labour inspectors should investigate allegations on the ground. The Mexican government, however, resisted this as a violation of their sovereignty, and agreed, as a compromise, to jointly form a committee of experts (Curi, 2019). The establishment of such a committee should not depend on whether a country has nominated such experts in advance, as this prevents the country in which a violation of labour rights is suspected from blocking the establishment of the arbitration tribunal by omission (Curi, 2019).

Complaints about a rights violation can be made directly by a group of workers. The Interagency Labour Committee would determine where such a complaint could be filed (Sec. 716(a)). Upon receipt of a complaint, the country concerned shall first be asked to examine the facts to determine "if a complainant Party has a good faith basis to believe that a Denial of Rights is occurring at a Covered Facility" (Protocol Article 31-A.4.2). If the defendant country does not act, the plaintiff country can initiate an investigation through the Rapid Response Labour Panel. If the denial of rights is not remedied within approximately 120 days, the US Trade Representative may order the Secretary of the Treasury (who is responsible for US Customs) to impose duty on the goods of the factory implicated, or to refuse to import them altogether (Sec. 753). From the beginning of the process, the goods from a suspected factory can be "not liquidated" (Sec. 752) – that is, penalties can still be imposed on the goods later. Throughout the process, the Trade Representative consults relevant congressional committees (Sec. 611 (2), Sec. 714 (b), Sec. 715 (b)(2), Sec. 716 (b) (3), etc.) to ensure that the process is not solely in the hands of the executive, which may be less concerned with the interests of the workers.

Do the Labour-related Clauses meet Criteria for Good Labour Clauses?

As mentioned in the introduction, the assessment of labour clauses depends on one's standpoint. From my standpoint as a labour educator, I am a proponent of labour clauses in trade agreements (Scherrer, 2017). Therefore, I will present the assessments by the proponents of the labour-related NAFTA renegotiation and by experts friendly to labour clauses. In addition, I will assess these clauses using the criteria for good labour clauses developed by authors from various disciplines (cf. Scherrer and Hänlein, 2012).

While over-all US trade unions remain critical of the USMCA (Knight, 2020), the two US trade union federations, the AFL-CIO and the coalition Change to Win, supported its ratification since their demands for strong monitoring and enforcement mechanisms of Mexican labour law reform were met (Curi, 2020). Among the AFL-CIO's members, the United Auto Workers (UAW) and the United Steelworkers (USW) provided only restrained support (Gamble, 2019; Conway, 2020). A comparison with the position of the International Association of Machinists and Aerospace Workers (IAM) suggests that one reason for the UAW's and USW's support lies in the stricter rules of origin and the higher North American local content requirements in comparison to NAFTA. The IAM had seen massive outsourcing of aerospace tasks to Mexico but had not been able to secure either rules of origin or local content requirements. Even though the USMCA labour

rights chapters and annexes contain language in line with previous IAM demands (Herrnstadt, 2018), the IAM continued to oppose it (Herrnstadt, 2020).

Assessment of the Labour Value Content Clause

Interestingly, none of the US unions were celebrating the LVC. One reason might be that while they called for a wage floor, they were not involved in devising the specifics of the LVC. The other reason is that they deem the LVC to be insufficient on several counts:

- The prescribed average hourly wage of $16 is too low to prevent car manufacturers from outsourcing further production to Mexico.
- As there is no provision for adjustment due to inflation, the $16 per hour could lose value in the medium term.
- The $16 hourly wage is not a minimum wage, but only an average wage, so wages may remain low, especially if other workers receive a higher wage.
- The clause does not provide a minimum average wage for R&D and IT workers, some of whom are paid less than $16 per hour. Moreover, including those sectors in the LVC calculation may provide further incentive to relocate R&D and IT functions to Mexico, because relocating these high-wage activities technically contributes to raising the average wage without increasing production wages.
- The clause is restricted to the automotive industry, although workers in many other sectors such as electronic components and business process outsourcing (BPO) are also negatively affected by outsourcing (Drake, 2018; Gruenberg, 2018; Hart, 2018; LAC, 2018).

Of these statements, the criticisms regarding an average wage and the complicated crediting of the LVC quota, which makes checking compliance with the requirements more difficult, are especially valid. In addition, the $16 average hourly wage's real value is dependent on the exchange rate. The Interim Implementing Instructions of the US Customs and Border Protection determine the wage rate at MX$304.31 (CBP, 2020: 14), which is $13.66 at the exchange rate of 24 July 2020.

Assessment of Enforcement Mechanisms for Mexican Labour Reforms

The trade unions welcome the enforcement mechanisms for the Mexican labour reforms but remain sceptical as to whether they will strengthen the voice of Mexican workers in collective bargaining, and whether the Rapid Response Labour Mechanism will lead to quick responses to labour rights violations. Accordingly, they call for vigilance (Gamble, 2019; Conway, 2020). One way to practise this vigilance is to participate in the monitoring process. Cathy Feingold, International Department director of the AFL-CIO, has been appointed to the Independent Mexico Labour Expert Board, as have representatives from the UAW, USW, IAM and Communication Workers of America. The House Ways and Means Committee has hired former AFL-CIO staff member Kelly Fay Rodríguez to help oversee the Trump administration's implementation of the USMCA (Inside U.S. Trade 2020a,b,c).

From a labour-friendly legal point of view, the outcome of the renegotiations is assessed

positively. Labour experts expect the strengthening of labour rights in Mexico and an effective response to concrete labour rights violations among Mexican producers exporting to the United States (Charnovitz, 2019; Claussen, 2019; Posner, 2019). However, these legal scholars identify the following gaps and ambiguities in the contractual texts:

- The concrete procedure of the Rapid Response Labour Mechanism requires further concretisation. This applies to the review procedure in the case of a suspected violation of the right to freedom of association and collective bargaining at a workplace, as it is particularly difficult to verify compliance with these rights or the possibilities of circumventing them (Icso, 2020). It is also unclear how responsibilities for possible obstructions could be identified during the review process (Claussen, 2019).
- There are gaps in the deadlines for the individual stages of the RRLM. For example, the maximum duration of the procedure could not yet be precisely determined (Claussen, 2019).
- The nature of penalties in the case of cross-border services is also unclear; similarly, the question of how goods produced by a non-compliant factory can be identified by the US customs authorities remains unresolved (Posner, 2019).

The concerns of these legal scholars are a matter of concrete implementation. Therefore, a final assessment must wait until the mechanisms are set in place and used. From observations of the administrative handling of labour complaints in other US FTAs (Scherrer and Greven, 2001: 62–7; USGAO, 2009: 52), my concern is that several departments not known for labour-friendliness even under Democratic presidents, such as the Department of the Treasury (Bhagwati, 1998), take part in the various interagency committees set up to monitor the agreement. Their participation might lead to light-handed monitoring.

Do USMCA Labour-related Clauses Establish a New Standard for Trade Agreements?

While the previous section identified a marked improvement compared to NAFTA, the question remains whether the novel clauses in the USMCA *should* and *can* serve as models for future trade agreements. An answer to *should* requires two considerations. First, normative criteria must be established. Second, in a different setting the same clauses might have different outcomes. An answer to *can* requires an assessment of the power constellations.

Let me start with the normative criteria for procedural and substantive issues. Concerning procedure, in a widely acclaimed volume business ethicists Christian Barry and Sanjay G. Reddy elaborated the following conditions for a morally justified and effective link between trade and social standards:

> … the system of linkage [between trade and labour rights] must be unimposed, transparent, and rule-based, applied in a manner that reflects a country's level of development, that it must involve adequate international burden sharing, and that it must incorporate measures ensuring that appropriate account is taken of different viewpoints within each country (Barry and Reddy, 2008: x–xi).

If these yardsticks are employed, the clauses fail on the first criterion – "unimposed". The clauses were clearly imposed on the Mexican government by an aggressive, strong neighbour imposing

tariffs on steel and aluminium imports on spurious grounds, as well as threatening to cancel the previous agreement (Bahri and Lugo, 2020). However, the clauses on the Mexican labour reform do entail some reciprocity. For example, Steve Charnovitz, a pre-eminent expert on labour rights in trade agreements, highlights the fact that Article 23.3 (1)(a) of the USMCA explicitly mentions ILO core conventions. According to him, while ratification of ILO conventions would be the best approach, "the inclusion of labour commitments in U.S. trade agreements constitute a second-best approach" for committing the United States to ILO conventions (Charnovitz, 2019). Furthermore, Article 23.8 (Migrant Workers) requires the US to "ensure that migrant workers are protected under its labour laws …" (Charnowitz, 2019). In addition, the Rapid Response Labour Mechanism of on-site verification pertains not only to Mexican facilities but also to US facilities, though limited to those operating under a National Labour Relations Board's order to rectify their labour relations violations. This latter limitation is certainly "a big loophole" (Kimberly Elliot cited by Icso, 2019).

To what extent the clauses "reflect a country's level of development" is debatable. As stipulated by the ILO, its core labour conventions are valid independent of economic development. However, the average wage required for meeting the LVC is, at $16, at least twice as much as the current wage for production workers in the Mexican automobile industry. At first sight, this seems to be beyond the economic development level of Mexico. At second sight, one might consider the high productivity levels in the Mexican automobile industry which would justify higher wages. In addition, as only 40 (45) per cent of the labour value content must meet the $16 requirement, the LVC might not translate into raising Mexican automobile production workers' wages to this level.

On the criterion "transparency", both clauses partially fail. On the one hand, they are in writing and will come along with implementation manuals. On the other hand, as has been shown above, they are very complex and contain ambiguities. They are, therefore, not accessible to laypersons. Both clauses are "rule-based" yet they leave room for discretion: the LVC by providing the automobile manufacturers many options to fulfil the requirement, and the Mexican labour reform clauses by leaving the ultimate decision in the hands of US interagency committees.

The substantive normative question concerns the effectiveness of the clauses. Whether the LVC effectively raises the wages of Mexican automobile workers without a concurrent decrease in employment cannot be assessed *ex ante* due to its complexity. The Mexican labour reform clauses hold promises of effectiveness because they conform to two key conditions for success mentioned in the literature: *ex ante* conditionality and workers' direct access to complaint procedures (Gött, 2018; Harrison, 2019). Concerning the *ex ante* conditionality, the Mexican government had to commit to the labour law reform before the USMCA went into force. Furthermore, a group of workers can directly file a complaint to which the concerned country has to respond (Protocol Article 31-A.4.2).

The literature on policy diffusion has pointed out that one type of institution does not create a system, "but the simultaneous existence and the pattern of interaction of a series of institutions" (Niosi et al., 1993: 218; cf. Scherrer, 2005). In other words, a specific clause in a trade agreement might have different effects once it is transplanted into another trade agreement with other trade partners. One example from the European Union (EU) may illustrate this insight. Unlike the US, the EU does not source substantial volumes of automobiles from one neighbouring country and, therefore, it would have to negotiate such a clause with many countries. Even if these countries would agree to a US-style LVC, its complexity would overwhelm the EU's monitoring capacity in the face of the involvement of many countries. Thus, before a one-to-one copying of USMCA's clauses is contemplated, contextual differences should be assessed. (For the downsides of textual borrowing of labour clauses, see also Claussen, 2020: 8.)

To what extent *can* other countries emulate the innovative USMCA clause? It seems that

specific circumstances have made the labour-related clauses in the USMCA possible. First, there is a path-dependency argument: three decades of developing ever more detailed labour-related clauses in US FTAs (Compa & Brooks, 2019). Second, there are domestic actors' constellation arguments: trade unions that are quite united on trade issues; a right-wing president who won office by winning over workers in industrial states; and a legislative chamber in the hands of the opposition. Third, there is an inter-nation constellation: a developing country heavily dependent on its economically and militarily vastly superior neighbour. And fourth, there is again the domestic actors' constellation argument, though this time for the addressee, Mexico: a government coming into power on a labour-friendly platform as external pressure needs local actors pursuing a similar agenda (Cook, 2004: 247). To obtain similarly labour-friendly clauses, perhaps not all these circumstances have to be present, but if many are missing, their realisation will be highly unlikely.

Conclusion

To reiterate, my assessment here pertains only to the novel labour-related clauses in the USMCA, not the whole free trade agreement. The concrete impact of the LVC cannot be assessed *ex ante* because of its complexity. What can be said is that precisely this complexity will be a great challenge for monitoring adherence to the clause. Furthermore, its scope is limited to one industry. Nevertheless, this LVC sets an interesting precedent by naming a concrete average wage level. Since the powerful United States has proposed it, such a naming of a wage level may become a point of reference for campaigns such as the Asia Floor Wage Alliance (asia.floorwage.org). It would not be the first time that a requirement in a United States FTA finds its ways into other FTAs (Claussen, 2020).

The likely effectiveness of the USMCA's Annex and Appendix, as they relate to Mexican labour law, is enhanced by its *ex ante* conditionality, workers' direct access to a complaint procedure and an Independent Mexican Labour Expert Committee. Whether all the measures against labour law violations and in support of a greater voice of workers in collective bargaining will lead to real improvements for Mexico's wage earners will have to be seen. While the current Democratic majority in the House of Representatives is committed to monitoring the implementation of the agreement, decision-making power concerning the handling of labour law violations ultimately lies in the hands of the executive. Observations of previous labour law clauses in US trade agreements have shown that the use of such clauses, and especially the use of sanctions, are ultimately subject to the political calculations of the executive branch (Greven, 2012).

From an ethical point of view, these worthwhile clauses, which are intended to safeguard the rights of Mexican workers and to increase the wages of Mexican production workers in the automobile industry, are tainted by the way they were imposed on Mexico. For the USMCA rules on Mexican labour law, the blemish may be less severe because of their support by actors within Mexico. Nevertheless, it would be preferable if the consensus behind the ILO labour rights core conventions would translate into general rules for international trade administered by the World Trade Organization.

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