

Developments in the Compliance Mechanisms of Free Trade Agreements— Implications from the Labor and the Environment Chapters in the United States-Mexico-Canada Agreement (USMCA) — **

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Abstract

Three years have passed since the United States-Mexico-Canada Agreement (USMCA) entered into force. USMCA is considered the most important tool to achieve a “worker-centered trade policy” advanced by the Biden administration and includes a “Facility-Specific Rapid-Response Labor Mechanism (RRM)” to ensure compliance with obligations under the labor chapter, which had never been included in trade agreements. RRM has already built up a track record of 14 cases and is exerting widespread influence over corporate behavior within the covered areas. Similarly, regarding the environment, continuous efforts can be seen to ensure compliance with environmental obligations through an improvement to a previous mechanism of the North American Free Trade Agreement (NAFTA).

The labor and the environment are increasingly being emphasized not only for the protection of their fundamental values, but also from the perspectives of ensuring a level playing field, as well as building a resilient supply chain. The important feature of USMCA labor and environment chapters is having strengthened compliance procedures with the involvement of non-state actors such as trade unions, environmental organizations, and the civil society, in addition to conventional state-to-state dispute settlement mechanism.

Through the consideration of the current status of the compliance mechanisms for the labor and the environment chapters in USMCA, this article shows some developments in the compliance mechanisms included in the labor and the environment chapters of free trade agreements and considers their implication on new U.S.-led negotiations such as the Indo-Pacific Economic Framework for Prosperity (IPEF).

Keywords: United States-Mexico-Canada Agreement (USMCA), Indo-Pacific Economic

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* The opinions presented in this paper are the authors' own, and do not represent the official views of their affiliated organizations.

Framework for Prosperity (IPEF), Americas Partnership for Economic Prosperity (APEP), trade and labor, trade and environment, dispute settlement mechanism, compliance mechanism

JEL Classification: F13, F16, F18, K33

I. Introduction

When a state acts inconsistently with its treaty obligations, there are two mechanisms to seek correction of such behavior: dispute settlement mechanism and compliance mechanism.

The United States-Mexico-Canada Agreement (USMCA) incorporates a compliance mechanism that has never been included in conventional free trade agreements (FTAs) or economic partnership agreements (EPAs) (hereafter referred to collectively as “FTAs”), and this compliance mechanism has already been used extensively in the three years since the entry into force of USMCA.

As of October 2023, the United States is driving new negotiations on the Indo-Pacific Economic Framework (IPEF) and the Americas Partnership for Economic Prosperity (APEP), and the high standards and rules of the labor and the environment chapters in the USMCA, as well as the track record of compliance with these standards and rules, could have a significant impact on these negotiations.

This paper examines the status of compliance in the three years’ experience of the USMCA, and by revealing some developments in the compliance mechanisms related to the labor and the environment chapters in U.S. FTAs, will provide some implications for future international trade negotiations.

II. Background of USMCA

II-1. Deepening vertical division of labor due to NAFTA

USMCA is an FTA between the U.S., Canada, and Mexico that entered into force on July 1, 2020. Its predecessor is the North American Free Trade Agreement (NAFTA), which entered into force in 1994. NAFTA was the first FTA that sought to facilitate trade and investment between developed and developing economies, while at the same time address labor and environmental issues. While Mexico already had a strong presence as a manufacturing base for exports to the U.S. due to the Maquiladora (an in-bond consignment processing system) that began in 1965, the vertical division of labor brought about by NAFTA led to dramatic growth in the supply chain in the North American region. Particularly with regard to the automotive industry, a concentration of automotive and auto parts factories, including those of

Japanese automotive manufacturers, developed in Mexico.¹ Table 1 shows the intra-regional trade between the U.S., Mexico, and Canada from 1994 when NAFTA entered into force, until 2020 when USMCA entered into force. While this overlaps with a period of growing Chinese presence in the international trade sector, we can see that the dominance of intra-regional trade in the North American region has been maintained with a focus on exports from Mexico and Canada to the U.S.

On the one hand, although automobile production volume across the three countries increased by 18.4% between 1994 and 2019, it decreased from 11.07 million to 10.8 million units in the U.S. and 2.13 million to 1.9 million units in Canada respectively, and jumped from 900,000 to 3.9 million units in Mexico.² On the other hand, with the increasing concentration of automotive and auto parts factories in Mexico, dissatisfaction grew within the U.S. over the trade deficit and loss of employment that were attributed to NAFTA.

Table 1 Import and export ratios for the three USMCA parties (% , 2020 and 1994)

	Export	Import	Trade
U.S.	Mexico: 14.87% (9.92% in 1994) Canada: 17.83% (22.30% in 1994)	Mexico: 13.67% (7.30% in 1994) Canada: 11.48% (19.15% in 1994)	Mexico: 14.27% (8.61% in 1994) Canada: 14.66% (20.88% in 1994)
Mexico	U.S.: 79.24% (84.46% in 1994) Canada: 2.67% (2.53% in 1994)	U.S.: 43.92% (69.09% in 1994) Canada: 2.17% (2.04% in 1994)	U.S.: 61.58% (76.78% in 1994) Canada: 2.42% (2.29% in 1994)
Canada	U.S.: 73.25% (81.73% in 1994) Mexico: 1.18% (0.46% in 1994)	U.S.: 49.19% (67.64% in 1994) Mexico: 5.56% (2.21% in 1994)	U.S.: 61.22% (74.69% in 1994) Mexico: 3.37% (1.34% in 1994)

Source: Prepared by the author based on the World Bank's Country Analysis (<http://wits.worldbank.org/visualization/country-analysis-visualization.html>)

II-2. NAFTA renegotiations and conclusion of USMCA by former President Trump

Against this backdrop, Donald Trump, who assumed office as the 45th President of the United States on January 20, 2017, announced renegotiations on NAFTA with a view to withdrawing from the same treaty.³ This was 23 years after the entry into force of NAFTA. On May 18, 2017, when then U.S. Trade Representative,⁴ Robert Lighthizer, notified the Con-

¹ Kakihara (2021).

² María de Lourdes Álvarez Medina (2021).

³ Mori (2019)

⁴ "U.S. Trade Representative" when referring to an individual, and "USTR" when referring to the organization.

gress of the President's intentions to renegotiate NAFTA, he cited the need to "modernize" the contents of the agreement. Many of the contents of the agreement signed 25 years ago were outdated, so the policy was to update the contents in areas such as labor, environment, digital trade, and intellectual property.⁵

In November 2018, negotiations on USMCA were concluded and the agreement was signed by the leaders of the three countries at the G20 Buenos Aires Summit. At this point, however, the Facility-Specific Rapid Response Labor Mechanism (RRM) and mechanisms for Labor and Environment Attaches had not yet been incorporated. After that, as the U.S. Congress (particularly members of the Democratic Party) argued that demands toward Mexico in areas such as labor, environment, and intellectual property had been insufficient, the agreement was renegotiated.⁶ As a result of renegotiations, the U.S. administration and members of the Democratic Party reached an agreement on the amendments, and the amended protocol was signed by the three countries in December 2019.⁷ As this amended protocol was ratified with an overwhelming majority in both the U.S. Senate and House of Representatives, USMCA was able to gain bipartisan support even after the transition from Trump's Republican administration to Biden's Democratic administration.

During the early stages of the negotiations on the amendments, the Democratic Party, which occupied the majority in the House of Representatives, had called for the dispatch of labor inspectors to Mexico and the application of criminal penalties in case of any breach of labor laws. Mexico opposed strongly to these demands, citing infringement of its national sovereignty. Eventually, RRM was devised and prescribed in USMCA to resolve the issue. At the same time, USMCA Implementation Act stipulated the assignment of Labor Attaches to U.S. embassies and consulates in Mexico to support the enforcement of RRM.⁸

On December 19, 2019, the House of Representatives passed USMCA Implementation Act, which was enforced on January 29, 2020.⁹ The USMCA Implementation Act of the U.S. prescribed in detail the domestic measures required for the implementation of the RRM in particular (See III-4).

Similarly, with the environment, as of November 2018, the provisions did not extend beyond confirming commitment to the Multilateral Environmental Agreements (MEAs). However, as a result of the renegotiations, the provisions were amended to include obligations for the parties to adopt, maintain, and implement domestic laws and regulations in order to

⁵ Japan External Trade Organization (JETRO) (2017).

⁶ JETRO (2019).

⁷ Protocol of Amendment to the Agreement between the United States of America, the United Mexican States, and Canada.

⁸ Reuters (2019). In regard to the statement of opposition issued by trade associations of Mexico during the amendment negotiations, See TLC asociados (2019).

⁹ USMCA Implementation Act, Pub. L. 116-113, 134 STAT. 79.

achieve the seven MEAs listed in the agreement¹⁰. In addition, the USMCA Implementation Act stipulated the establishment of an inter-agency committee (Article 811 et. seq) to monitor the implementation of the environment chapter, as well as the assignment of Environment Attaches to U.S. embassies and consulates in Mexico (Article 813), similar to the labor chapter.

After these negotiations and developments of domestic laws, USMCA entered into force on July 1, 2020.

II-3. President Biden's support for USMCA

President Joseph Biden, who assumed office on January 20, 2021, has aimed to utilize trade policies to protect workers' rights and achieve sustainable development, based on the belief that "trade can and should be a force for good."¹¹ He focuses on middle-class workers and has rejected the trickle-down economics theory. He has also made it clear that addressing the climate change crisis and realizing sustainable growth are the priorities of his administration. Furthermore, President Biden has described his economic policies as "a blue-collar blueprint to rebuild America," viewing them as policies that inextricably link the granting of incentives to domestic industries, and the provision of fair labor conditions to American workers by realizing labor reforms in Mexico, which the U.S. has the closest trade and investment relationship with, through USMCA.¹² Against this backdrop, there were expectations that RRM would fulfill an important role in securing labor reform in Mexico. Compliance with labor and environmental standards was not limited to support from the government, trade unions, and environmental protection groups. The idea of sustainable corporate management that takes into consideration the environment, society, and governance, as well as the concept of stakeholder capitalism,¹³ was becoming more widespread especially among American and Canadian companies, alongside a greater understanding of the need to fulfill accountability. As shown in III-3, the companies subjected to RRM have much foreign capital and are being criticized for violation of workers' rights in Mexico, where they have business interests, concerning the reputational risks for the entire corporate group.

¹⁰ The applicable agreements are: (1) The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); (2) The Montreal Protocol on Substances That Deplete the Ozone Layer; (3) The International Convention for the Prevention of Pollution from Ships (MARPOL); (4) The Ramsar Convention on Wetlands; (5) The Convention on the Conservation of Antarctic Marine Living Resources; (6) The International Convention for the Regulation of Whaling; (7) The Inter-American Tropical Tuna Commission.

¹¹ USTR (2023a).

¹² April 19, 2023, Remarks by President Biden on his Vision for the Economy, White House (2023a).

¹³ World Economic Forum (2020).

III. Labor

USMCA's labor chapter sets out four basic mechanisms for addressing non-compliance. The first is public submissions, prescribed in Article 23.11; the second is cooperative labor dialogue,¹⁴ prescribed in Article 23.13; the third is the dispute settlement mechanism¹⁵ set out in Chapter 31 based on the premise of labor consultations, prescribed in Article 23.17; the fourth is RRM. The state-to-state dispute settlement mechanism is based on the premise of multiple stages of consultations prescribed in the labor chapter, and, on one hand, there is no precedent for their use under USMCA as of October 2023. On the other hand, as RRM has been used frequently, the following parts will shed light on this mechanism.

III-1. Objectives of RRM

RRM is a rapid-response mechanism targeted at individual facilities that have violated workers' "free association and collective bargaining rights," and is a mechanism that has never been incorporated into previous FTAs in the sense that it targets non-compliance by specific facilities, unlike state-to-state dispute settlement mechanisms, which seek to address non-compliance by states. Moreover, while typical dispute settlement mechanisms usually take one year to one-and-a-half years to achieve a resolution, RRM aims for a "rapid response" within six months.

III-2. Overview of the mechanism

RRM is a mechanism that triggers a review by the respondent when there is alleged Denial of Rights at the "covered facility," where it is believed that free association and collective bargaining rights are not guaranteed. If the respondent does not conduct the review, the respondent does not acknowledge any Denial of Rights but the complainant does not agree with this conclusion, or the Denial of Rights is acknowledged but the concerned parties cannot agree on "remediation" to be implemented, a Rapid-Response Labor Mechanism Panel (hereafter referred to simply as the "panel") is established, allowing for the eventual adoption of "remedies". This mechanism exists only between the U.S. and Mexico, as well as between Canada and Mexico, but does not exist between the U.S. and Canada (USMCA Annex 31-A,

¹⁴ Cooperative labor dialogue and labor consultations (Article 23.17 of USMCA) share many procedural similarities, but they differ in that the final outcomes of the former are made public in principle, while there are no requirements to make public the outcomes for the latter (Paragraph 5, Article 23.13 of the USMCA).

¹⁵ The dispute settlement mechanism for disputes arising under the labor chapter requires panelists other than the chair to have expertise in labor law or practice (Paragraph 3(a), Article 31.8 of USMCA). Similarly for the environment chapter, panelists are required to have expertise in environmental law or practice (Paragraph 3(b), Article 31.8 of USMCA).

31-B; hereafter referred to simply as “Annex 31-A” and “Annex 31-B”).

RRM can be initiated when a party believes in good faith that free association and collective bargaining rights of workers are being denied at a covered facility,¹⁶ and a USMCA party may also activate the mechanism in response to requests from trade unions or individuals.¹⁷ Regarding the scope of coverage of the cases, while Mexico’s coverage is broad, coverage for the U.S. and Canada is limited to labor disputes involving the National Labor Relations Board¹⁸ and the Canada Industrial Relations Board, respectively. The resulting structure is asymmetrical.¹⁹

The scope of RRM is limited to “the right of free association and collective bargaining”²⁰ and does not cover prohibitions on forced labor and child labor, minimum wage, working hours, safety and health standards, and other such aspects. Furthermore, not all facilities are covered; “covered facilities” are limited to facilities that produce a good or supply a service traded between USMCA parties, or facilities that produce a good or supply a service in competition with the goods or services of a certain USMCA party, and which are in designated “priority sectors.” Priority sectors are manufacturing, services, and mining sectors including aerospace, automotive and automotive parts, cosmetics, industrial baked goods, steel and aluminum, glass, pottery, plastic, forgings, and cement. These sectors are not listed exhaustively and are subject to an annual review.²¹

When a USMCA party initiates domestic procedures for RRM, it is required to notify the other party within five days of initiation. The respondent, upon receiving a request for a review of Denial of Rights, is then required to notify the complainant within 10 days of the request whether it will conduct the review.²² Once the complainant delivers the request for review to the respondent, it may delay the final settlement of customs accounts related to entries of goods from the covered facility.²³

If the respondent does not choose to conduct a review, the complainant may request the formation of a panel;²⁴ if the respondent chooses to conduct its review, the respondent is required to report the review and any remediation to the complainant, within 45 days.²⁵ If the

¹⁶ Paragraph 2 Annex 31-A (hereinafter, unless otherwise specified, article numbers from Annex 31-A onward also apply to Annex 31-B).

¹⁷ USTR, Frequently Asked Questions (FAQs) on ways to raise United States-Mexico-Canada Agreement (USMCA) Labor Issues with the U.S. Government. <<https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/fta-dispute-settlement/usmca/frequently-asked-questions-faqs-ways-raise-united-states-mexico-canada-agreement-usmca-labor-issues>>.

¹⁸ An independent federal administrative agency that enforces major labor-related laws, such as the right to organize, the right to collective bargaining, and the prohibition of unfair labor practices.

¹⁹ Annex 31-A, footnote 2; Annex 31-B, footnote 5.

²⁰ Annex 31-A.2.

²¹ Annex 31-A. 13 and Annex 31-A, footnote 4; Annex 31-B.13 and Annex 31B, footnote 8.

²² Annex 31-A.4, paragraph 1.

²³ Ibid. paragraph 3. See also USMCA Implementation Act, Article 752 (a).

²⁴ Annex 31-A.4, paragraph 2.

²⁵ Ibid. paragraph 4.

respondent has determined that there is no Denial of Rights, and if the complainant communicates its reasons for disagreement, they may request a panel verification and determination.²⁶

If the respondent has determined there is Denial of Rights, both parties shall consult in good faith and shall endeavor to agree upon a course of remediation within 10 days of such acknowledgment. If they agree on a course of remediation, the respondent must undertake the remediation by the date agreed to by the parties, and the complainant must not impose remedies until the expiration of the agreed upon period.²⁷ If after the agreed upon date for remediation, the parties disagree as to whether Denial of Rights has been remediated, the complainant may notify the respondent of its intention to impose remedies at least 15 days before imposing remedies. The respondent may, within 10 days of receiving such notice, request a determination from a panel as to whether Denial of Rights persists.²⁸ The complainant may not impose remedies until a decision is made by the panel.

If the parties cannot reach an agreement on the remediation within 10 days, the complainant may request for the establishment of a panel to verify the existence of Denial of Rights.²⁹ Upon confirming the contents of the request, the panel invokes a verification request to the respondent.³⁰ The request for verification requires the submission of documents and explanations corresponding to the following situations.

If the respondent denies the existence of Denial of Rights and the complainant disagrees with the conclusion of the respondent, the panel will request the respondent to submit a document establishing the results of the respondent Party's investigation, conclusions, and any efforts it took as a result of the request for review and remediation.³¹

If the covered facility has allegedly not taken the necessary measures to comply with the remediation, the Panel may request the respondent to submit a document establishing the results of the respondent Party's investigation, conclusions, and the actions and sanctions it took against the covered facility.³²

Although the respondent alleges that the covered facility has taken the necessary measures to remediate Denial of Rights, but the complainant disagrees with that, the Panel may request the respondent to submit a document explaining the actions it took against the covered facility.³³

The respondent is required to reply within seven days whether it contents to the verifica-

²⁶ Ibid. paragraph 5.

²⁷ Ibid. paragraphs 6-7.

²⁸ Ibid. paragraph 8.

²⁹ Annex 31-A.4, paragraph 10.

³⁰ Annex 31-A.7.

³¹ Ibid. paragraph 2.

³² Ibid. paragraph 3.

³³ Ibid. paragraph 4.

tion request. If the respondent agrees to the verification, the panel shall conduct the verification within 30 days after receipt of the respondent's request.³⁴ If the respondent refuses the request for a verification, the complainant may request that the Panel make a determination as to whether there is Denial of Rights.³⁵

The Panel will make a determination within 30 days after conducting a verification, or 30 days after it is constituted if there has not been a verification.³⁶ Both parties will have the opportunity to be heard before the panel makes its determination.³⁷

If the Panel determines that Denial of Rights exists, the complainant may undertake remedies on the covered facility, including the suspension of preferential tariff treatment for goods manufactured at the covered facility, or the suspension of imports or imposition of penalties on goods manufactured at or services provided by the covered facility.³⁸

While state-to-state dispute settlement mechanism adopts the suspension of preferential tariff treatment for specific goods as a means of sanction, the sanctions for facilities found to have Denial of Rights are wide-ranging which include the suspension of tariff concessions (preferential tariff treatment) on goods exported from the facility in question, imposition of monetary sanctions (fines), and import restriction measures in the case of repeated violation.³⁹

If any abuse of the initiation of RRM and the use of procedures, including the imposition of remedies, are identified through the dispute settlement mechanism, one party may suspend the use of RRM by the other for a period of two years, or another remedy permitted under the dispute settlement chapter.⁴⁰

III-3. Track record of implementation

As of August 31, 2023, there have been 14 cases based on RRM (Two cases against the same factory have been counted as one case; all are listed in order from the latest case).⁴¹

(1) [Ongoing] U.S. - Mas Air (August 30, 2023 - , Mexico City, Mexico)

On August 30, 2023, the U.S. has asked Mexico to review whether pilots, who belong to a labor union, at Mas Air, a Mexico City-based cargo airline, are being denied the right to

³⁴ Ibid. paragraph 7.

³⁵ Ibid. paragraph 9.

³⁶ Annex 31-A.8, paragraph 1.

³⁷ Ibid. paragraph 2.

³⁸ Annex 31-A.10, paragraph 2.

³⁹ In addition to the above, Annex 31-A.10, paragraphs 3-4.

⁴⁰ Annex 31-A.11.

⁴¹ Prepared based on the Brookings Institution USMCA Tracker <<https://www.brookings.edu/articles/usmca-trade-tracker/#/disputes>>, U.S. Department of Labor website <<https://www.dol.gov/agencies/ilab/our-work/trade/labor-rights-usmca-cases>>, and USTR (2023b).

freedom of association and collective bargaining. This is the first case related to a company in the service sector.

(2) [Ongoing] U.S. - Yazaki Corporation (August 7, 2023 - , Guanajuato, Mexico)

On August 7, 2023, the U.S. has asked Mexico to review whether workers at the Yazaki Group facility (automotive parts, headquartered in Japan) are being denied the rights to freedom of association and collective bargaining⁴². This is the second complaint lodged against a Japanese company. According to reports, the Mexican government announced that it will not be investigating the complaint by U.S. due to a lack of evidence of Denial of Rights. This was the first case in which the Mexican government refused to conduct a review.

(3) [Ongoing] U.S. - Grupo Mexico (June 16, 2023 - , Zacatecas, Mexico)

On June 16, 2023, the U.S. has asked Mexico to review whether workers at the San Martin Mine in the state of Zacatecas are being denied the right to freedom of association and collective bargaining. The San Martin mine is a lead, zinc, and copper mine, owned and operated by Grupo Mexico.⁴³ Grupo Mexico is a Mexican conglomerate that primarily engages in mine development and the railway business, and its mines have previously been the subject of labor disputes, such as large-scale strikes in 2006.⁴⁴ On August 22, 2023, USTR have been unable to reach agreement with Mexico with regard to whether Denial of Rights has occurred. As such, the United States has determined that it is appropriate to request a panel. This is the first time that a Panel may be established in an RRM case.⁴⁵

(4) [Closed] U.S. - Industrias del Interior (INISA) (June 12 - August 9, 2023, Aguascalientes, Mexico)

On June 12, 2023, the U.S. has asked Mexico to review whether workers at the Mexican company INISA, are being denied the right to freedom of association and collective bargaining at its denim and other apparel manufacturing plants. This request was made in response to a submission filed by a labor organization.

INISA only has a Spanish Facebook page,⁴⁶ and does not disclose basic information such as net sales and number of employees. In this respect, its circumstances differ from foreign automotive and automotive parts factories. According to a USTR press release, INISA

⁴² USTR (2023c).

⁴³ U.S. Request for Review (2023).

⁴⁴ Japan Organization for Metals and Energy Security (JOGMEC) (2006).

⁴⁵ USTR (2023d).

⁴⁶ <https://www.facebook.com/IndustriasDelInteriorINISA?locale=es_LA>.

had committed acts of employee interference by coercing workers to accept its proposed revisions to the collective bargaining agreement and interfering with the autonomy of the union.⁴⁷ On August 9, 2023, the company announced that it would implement remediation measures, such as confirming neutrality in workers' union selection and publishing transparency guidelines. The case was closed thereafter.⁴⁸

(5) [Closed] U.S. - Draxton (May 31 - July 31, 2023, Guanajuato, Mexico)

On May 31, 2023, the U.S. has asked Mexico to review whether workers at a Draxton facility in Irapuato (automotive parts, headquartered in the U.S.) are being denied the rights to freedom of association and collective bargaining. According to a USTR press release, laborers' rights were denied through termination of employment, surveillance, and intimidation when they attempted to organize a new union. Furthermore, workers did not receive their collective bargaining agreements before voting on it in 2022.⁴⁹ On July 31, 2023, the company announced a course of remediation, including the reinstatement of terminated workers. The case was closed thereafter.⁵⁰

(6) [Closed] U.S. - Goodyear SLP (May 22 - July 19, 2023, San Luis Potosi, Mexico)

On May 22, 2023, the U.S. has asked Mexico to review whether workers at a tire factory of Goodyear SLP (headquartered in the U.S.) are being denied the rights to freedom of association and collective bargaining. According to a USTR press release, Goodyear has not abided by the provisions in the sectoral collective bargaining agreement and further, committed irregularities in a legitimization vote on a collective bargaining agreement.⁵¹ It announced that it would adopt remediation measures such as compensating workers for their losses. On July 19, 2023, USTR announced that the case was closed.⁵²

(7) [Closed] Canada - Fraenkische Industrial Pipes (March 11 - July 25, 2023, Guanajuato, Mexico)

On March 11, 2023, Canada has asked Mexico to review whether workers at Fraenkische Industrial Pipes (headquartered in Germany) are being denied the rights to freedom of association and collective bargaining. On March 13, 2023, the Canadian National Administrative Office gave notification that the request had been accepted for an initial examination. If processed, it would be the first case brought by Canada against Mexico. It was confirmed

⁴⁷ USTR (2023e).

⁴⁸ USTR (2023f).

⁴⁹ USTR (2023g).

⁵⁰ USTR (2023h).

⁵¹ USTR (2023i).

⁵² USTR (2023j).

that a union election vote conducted on June 26, 2023, was done so in a fair manner, and it was announced on July 25 that the case was closed.⁵³

(8) [Closed] U.S. - Unique Fabricating, Inc. (March 6 - April 24, 2023, Queretaro, Mexico)

On March 6, 2023, the U.S. has asked Mexico to review whether workers at a Unique Fabricating facility (automotive parts, headquartered in the U.S.) are being denied the rights of free association and collective bargaining. Mexico accepted the request and conducted a review on the facility. During the review period, it was confirmed that training was conducted for management and workers, and the workers were allowed to select a union of their choice. Measures were also taken including the issuance of a statement clearly setting out respect for unions and a zero-tolerance policy against discrimination. Additionally, Mexico monitored a union representation vote held at the same facility and implemented measures to ensure the election of an independent union to represent the workers. The company accepted the measures imposed by the Mexican government and promised to conclude an agreement with the newly established labor union, provide equal access to facilities by new and existing unions, and take steps to prevent any potential breach of freedom of association. On April 24, 2023, USTR announced that the case has been resolved.⁵⁴

(9) [Closed] U.S. - Manufacturas VU (Second round, January 30 - March 31, 2023, Coahuila, Mexico)

On January 30, 2023, the U.S. initiated a second round of proceedings against Manufacturas VU (headquartered in the U.S.) for non-compliance with remediation measures agreed upon in September 2022. On March 16, 2023, Mexico accepted the request and confirmed Denial of Rights at the same facility. On March 31, 2023, the U.S. and Mexico announced a remediation plan for VU. The U.S. announced detailed measures including visits to the facility by senior management from VU's U.S. headquarters, and remediation measures to be taken by the Mexican government.⁵⁵ The parties agreed on September 30, 2023, as the deadline for improvements.

(10) [Closed] U.S. - Saint Gobain (September 27 - October 27, 2022, Morelos, Mexico)

On September 27, 2022, the U.S. initiated proceedings concerning an alleged Denial of Rights by Saint Gobain (headquartered in France). According to the request, freedom of association and the right to collective bargaining were denied during the vote held on July

⁵³ Government of Canada (2023).

⁵⁴ USTR (2023k).

⁵⁵ See below for the course of remediation.

<<https://ustr.gov/sites/default/files/2023-03/Manufacturas%20VU%20Course%20of%20Remediation.pdf>>.

2022 for approving collective bargaining agreements and deciding on the union to represent employees, as well as during collective agreement negotiations. While the U.S. deliberated on the case, the case was closed as the issue was resolved after the Mexican union petitioner won the representation vote for the facility.

- (11) [Closed] U.S. - Manufacturas VU (First round, July 21 - September 14, 2022, Coahuila, Mexico)

On July 21, 2022, the U.S. initiated proceedings concerning an alleged Denial of Rights by Manufacturas VU (headquartered in the U.S.). On September 14, 2022, the U.S. announced that the case had been resolved with the establishment of a labor union through voting under the supervision and guidance by the Mexican government, and upon confirmation that the same union shall hold collective bargaining rights in the future.

- (12) [Closed] U.S. - Teksid Hierro de Mexico (June 6 - August 16, 2022, Coahuila, Mexico)

On June 6, 2022, the U.S. initiated proceedings concerning an alleged Denial of Rights by Teksid Hierro de Mexico (under Italian company, FIAT, automotive parts). On August 16, 2022, the U.S. and Mexico announced that the case was resolved upon an agreement by the company to reinstate 36 employees and pay unpaid salaries to employees, among other remediation measures.

- (13) [Closed] U.S. - Panasonic (May 18 - July 14, 2022, Tamaulipas, Mexico)

On May 18, 2022, the U.S. initiated proceedings concerning an alleged Denial of Rights by Panasonic (headquartered in Japan, automotive parts factory). Prior to an election to elect a union that would negotiate a collective bargaining agreement with the company, the company had allegedly secretly given preferential treatment to a large labor union of one candidate. Employees supporting the labor union of the other candidate had protested against this, and the company is alleged to have dismissed more than 10 of these employees.

On July 14, 2022, the U.S. and Mexico announced that this case had been addressed successfully, with the company agreeing to raise wages by 9.5%, reinstate 19 employees, and pay unpaid salaries, among other remediation measures.

- (14) [Closed] U.S. - Tridonex (June 9 - August 10, 2021, Tamaulipas, Mexico)

On June 9, 2021, the U.S. initiated proceedings concerning an alleged Denial of Rights by Tridonex (headquartered in the U.S.). On August 10, 2021, the U.S. announced that the case had been resolved with the implementation of remediation measures by Tridonex to pay retroactively for the wages owing to 154 terminated employees, and to accept training

by the Mexican Secretariat of Labor and Social Welfare.

(15) [Closed] U.S. - General Motors (May 12 - July 8, 2021, Guanajuato, Mexico)

On May 12, 2021, the U.S. initiated proceedings concerning an alleged Denial of Rights by General Motors (headquartered in the U.S.). On the same day, the Mexican government announced the start of investigations, and on July 8, 2021, the U.S. government announced that it had reached an agreement with the Mexican government on the following remediation plan: (1) ensure that a new legitimization vote is held; (2) have federal inspectors from the Secretariat of Labor and Social Welfare dispatched to the facility to prevent any interference with the vote, etc.; (3) permit monitoring of the vote by staff from the International Labor Organization and the Mexican National Electoral Institute; (4) provide accurate information on workers' rights at the facility; (5) investigate and, as appropriate, sanction anyone responsible for the conduct that led to the suspension of the April vote; (6) establish a hotline to receive and respond to complaints from workers about the voting process.

III-4. USMCA Implementation Act

The USMCA Implementation Act of the United States contains detailed provisions related to the labor chapter.

First, the USMCA Implementation Act provides for the establishment of an Interagency Labor Committee (ILC) for monitoring and enforcement, chaired jointly by the US Trade Representative and the Secretary of Labor. The ILC shall monitor Mexico's labor reform,⁵⁶ among other duties (Sec. 711 onward).

Second, it stipulates the dispatch of up to five Labor Attaches to US embassies and consulates in Mexico, who shall monitor the implementation status of provisions related to the USMCA labor chapter in Mexico and engage in bilateral cooperation (Sec. 721 onward).

Third, the USMCA Implementation Act stipulates the establishment of an Independent Mexico Labor Expert Board. This Board, comprising 12 labor experts (serving a six-year term) appointed by the Labor Advisory Committee of USTR, Speaker of the House of Representatives, President of the Senate, etc., shall monitor the status of compliance with labor-related provisions in Mexico, determine violation of obligations, and submit an annual report to the ILC (Sec. 731 onward).

Fourth, a Forced Labor Enforcement Task Force shall be established in relation to forced

⁵⁶ USMCA Chapter 23 Annex A provides details on Mexico's labor reforms. The Mexican government promulgated amendments to the Federal Labor Law on May 1, 2019 (enforced from the following day) and is promoting labor reforms that include improving the labor tribunal system and trade union system.

labor, to ensure the enforcement⁵⁷ of Section 307 of the US Tariff Act of 1930.⁵⁸ This Task Force is comprised of representatives from USTR, the Department of Labor, and other appropriate agencies, and is chaired by the Secretary of Homeland Security. It shall submit, biannually, a report on the enforcement status of Section 307 to the appropriate congressional committees (Sec. 743), and report to the ILC on concerns related to the enforcement of the same (Sec. 744).

Fifth, the USMCA Implementation Act provides for temporary suspension of liquidation. This allows the U.S. Trade Representative to instruct the Secretary of the Treasury to suspend liquidation of goods from covered facilities in Mexico upon requesting for confirmation of the facts based on under the RRM (Sec. 752). According to the explanation by the U.S. Chamber of Commerce,⁵⁹ liquidation is an administrative procedure in which U.S. Customs and Border Protection (CBP) officially closes customs clearance; once liquidation is suspended, the record of a product's entry into the country is treated as "open," and customs clearance can be taken after the product enters the country. As a result, if the panel confirms Denial of Rights at the covered facility, preferential tariffs can be suspended even for products that have already entered the country. In other words, it is a system that ensures the suspension of preferential treatment for products exported from the covered facility at the time of the commencement of the RRM. Although the suspension of liquidation in itself does not necessarily prevent the import of goods, it creates the possibility of increased export costs for covered facilities from the start of the RRM.

III-5. Summary of the labor

In the three years since USMCA entered into force, RRM has been invoked in 14 cases (Two cases against the same factory were counted as one case), three of which are ongoing. Of the 14 cases, 11 involved the factories of foreign-owned automotive and automotive parts manufacturers operating in Mexico. In addition, 13 cases were invoked by the U.S. against facilities located in Mexico, while one case was invoked by Canada against a facility located in Mexico.

While facilities covered under RRM in Mexico include the priority areas mentioned in III-2, we can see that there is strong interest in the automotive and automotive parts industries. In addition, the areas where the Mexican automotive industry is concentrated include the northern region that borders with the U.S. and the central plateau region, but it has been proposed in nine states and cities, indicating a regional spread (See Figure 1).

⁵⁷ Section 307 of the US Tariff Act of 1930 prohibits importing any product that was mined, produced, or manufactured wholly or in part by forced labor, including forced or indentured child labor.

⁵⁸ 19 U.S.C. 1307 - Convict-made goods; importation prohibited.

⁵⁹ U.S. Chamber of Commerce (2022).

The foreign companies for which RRM was invoked came from various countries, including the U.S., Europe, and Japan. At the start of June 2023, the cases taken up that involved Mexican factories and companies were in the fields of textile products, mining, and services (pilots), that is non-automotive sectors. On July 6, 2023, the day before the third conference of the T-MEC/USMCA/CUSMA FTC in Cancún, Quintana Roo, Mexico, the Mexican Ministry of Economy, on the one hand, issued a press release stating that labor was the most successful agenda item in the USMCA, and it emphasized that RRM should be a last resort, that it is important to use it rationally and in good faith, and that it is not a substitute for domestic mechanisms.⁶⁰ At the start of August 2023, there were two cases in which Mexico rejected requests by the U.S. and there will be interest in whether these cases will move forward with the establishment of Panels.

In the U.S., on the other hand, RRM has been highly appraised by the Biden administration, Congress, labor unions, and civil society, and in June 2023, USTR announced efforts toward further utilization by publishing FAQs covering RRM on its website.⁶¹ Cases that were closed as of August 31, 2023 had been resolved when the Mexican government and the covered facilities compiled the remediation measures, and there were no cases that proceeded to the stage of panel establishment. However, it will be interesting to see if the number of such cases will increase in the future, and whether there will be cases that proceed to the stage of panel establishment.

While there is frequent utilization of the RRM by states, there have been few press releases from companies requested to implement remediation measures, and their responses have been in a reserved manner. USTR instructs the suspension of the liquidation of unliquidated products manufactured at the covered facility when proceedings are initiated, which will lead to significant impact as product shipments will be halted, even if temporarily. Therefore, it appears that companies are likely to have strong incentive to seek support from the Mexican government to present a remediation course and close the case, rather than bringing the issue to a panel in order to minimize the impact.

Furthermore, even for cases that have been closed, if no improvements are observed through remediation measures, there is a possibility of a renewed request to invoke proceedings. In example (9) above, a detailed remediation plan with a deadline was announced in view that it was the second round. U.S. Trade Representative Katherine Tai expressed anticipation of its normative effect on other companies, noting that this was not the only case involving comprehensive remediation measures but will become a widespread trend.

On March 13, 2023, the Mexican National Independent Union for Workers in the Auto-

⁶⁰ Gobierno de México (2023).

⁶¹ USTR, Frequently Asked Questions (FAQs) on ways to raise United States-Mexico-Canada Agreement (USMCA) Labor Issues with the U.S. Government.

Figure 1: List of “Facility-Specific Rapid-Response Labor Mechanism” (RRM) cases (as of August 31, 2023)



Prepared by the author based on the following website, https://en.wikipedia.org/wiki/File:Blank_map_of_Mexico_with_states_names.svg

motive Industry announced that it had reached an agreement to raise 2023 wages by 10% for the first time at General Motors’ Silao plant in Guanajuato, which was the subject of the first RRM case, and the impact of being targeted by RRM have been pointed out.⁶² Additionally, on May 18, 2023, Deputy U.S. Trade Representative Jayme White stated that USMCA has been proven infectious as the U.S. pushes for higher labor standards during talks with other trading partners. He also stated that enforceable labor and environmental standards would also become a part of negotiations in APEP and IPEF.⁶³ It is noteworthy that the RRM system and its actual operation have an impact on corporate behavior and national trade negotiations.

IV. Environment

The environment is also an important agenda in the Biden administration’s trade policy. The 2023 report by USTR⁶⁴ sets out a policy of prioritizing efforts to address climate change,

⁶² Excélsior (Mexico) (2023).

⁶³ Inside US Trade (2023); Japan External Trade Organization (2023a)

⁶⁴ USTR (2023a)

building resilient supply chains through the elimination of environmental goods produced by forced labor, and the adoption of an innovative approach that contributes to the attainment of environmental goals through the enforcement of existing FTAs.

The following considers the status of development of the compliance mechanism for the environment chapter of USMCA, differences with previous mechanisms, and actual implementation.

IV-1. Features of the environmental provisions included in U.S. FTAs

The number of environmental provisions has increased since their incorporation into trade agreements under the North American Agreement on Environmental Cooperation (NAAEC), a side agreement to NAFTA.⁶⁵

The U.S. has been leading the inclusion of environmental provisions, and its provisions mainly prescribe the following: (1) the effective enforcement of environmental laws by the parties; (2) the prohibition of waiver or otherwise derogation from environmental laws in a manner affecting trade and investment between the parties; (3) the implementation of certain MEAs; (4) ensuring public involvement; (5) environmental cooperation; (6) monitoring of agreement implementation by the Environment Committee; and (7) environmental consultations and dispute settlement.⁶⁶ The environmental provisions are characterized by the inclusion of mechanisms to promote dialogue and cooperation between the parties, as well as organizational provisions to ensure public involvement, in addition to the conventional state-to-state dispute settlement mechanism.

IV-2. Features of USMCA environment chapter

USTR highly evaluates the USMCA environment chapter as the strongest, most advanced, comprehensive, and enforceable environmental obligations.⁶⁷ USMCA is the successor to NAFTA, and has inherited the foundation of its system.

IV-2-1. Criticisms to NAFTA/NAAEC

Despite strong demands from Congress, NAFTA contained only limited environmental provisions.⁶⁸ To address this situation, Bill Clinton was elected⁶⁹ in the 1992 presidential elec-

⁶⁵ See below for the data asset of FTA that contain environment provisions. <<https://www.idos-research.de/en/trend/>>

⁶⁶ CRS (2022) with regard to environmental provisions contained in U.S. FTAs.

⁶⁷ USTR, Benefits for the Environment in the United States-Mexico-Canada Agreement, <<https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/benefits-environment-united-states-mexico-canada-agreement>>.

⁶⁸ Nakagawa (1997), p.15.

⁶⁹ Fujiki (2017), p.46.

tion on his pledge to conclude side agreements on labor and environmental issues, which led to the conclusion of the NAAEC.

NAAEC is composed of the following sections: Part One: Objectives, Part Two: Obligations, Part Three: Commission for Environmental Cooperation, Part Four: Cooperation and Provision of Information, and Part Five: Consultation and Resolution of Disputes.

Part Two includes the legal obligations that demand the effective enforcement of domestic environmental laws, etc. In the event of non-compliance with obligations for effective enforcement, the dispute settlement mechanism sets out in Part Five are applied separately from NAFTA.

Additionally, NAFTA itself contains the provision that prohibit waiver or derogation from environmental laws for the purpose of promoting trade and investment (Article 1114.2), but this is a non-legally binding provision, and the dispute settlement mechanism is not applicable. Furthermore, the NAAEC calls for provisions of high standards in domestic environmental laws, but these are not based on any international standards. Moreover, NAAEC does not reference MEAs. These shortcomings resulted in its failure to satisfy advocates insisting on environmental protection and fair trade.

IV-2-2. Features of USMCA environmental chapter

Since NAAEC, the U.S. has developed its environmental provisions through its own FTAs, and USMCA further advances that development.

USMCA also includes new areas such as marine litter (Article 24.12) and sustainable forest management (Article 24.23), and also prescribes the maintenance of appropriate mechanisms for environmental impact assessment (Article 24.7). Furthermore, in key provisions such as the effective enforcement of environmental laws (Article 24.4),⁷⁰ a violation of these obligations is deemed to be “in a manner affecting trade or investment between the Parties,” and notable footnotes that shift the burden of proof to the respondent are included.

Moreover, according to interviews conducted by the authors with the Secretariat of the Commission for Environmental Cooperation (CEC), streamlining the procedures for the publication of Factual Records (as described later in IV-3) is also a significant feature of USMCA.⁷¹ Under NAAEC, the publication of Factual Records required the approval of the Council and would be published with at least a two-thirds vote in favor; under USMCA, however, they are automatically published within 30 days unless at least two members of the Council

⁷⁰ There are also other articles, including Articles 24.8-24.10.

⁷¹ The authors interviewed Paolo Solano, Director of Legal Affairs and Submissions on Enforcement Matters (SEM), and Nathalie Daoust, Director of Government Relations, Strategy and Performance, online on March 31, 2023, on the implementation of USMCA, operation of the CEC Secretariat, and other matters.

oppose publication.⁷² According to the CEC Secretariat, no party had opposed the publication of any Factual Records under NAAEC, and this amendment reflects that practice. Additionally, while the parties can comment on the contents of Factual Records,⁷³ according to the CEC Secretariat, only the comments related to the accuracy of information with a scientific basis must be incorporated into the final draft; comments related to tone or appropriateness of information may not necessarily be reflected. Such practices have been respected in exchange for CEC's authority, which adheres to issuing objective Factual Records without delving into recommendations.

IV-3. Cooperation and Implementation under the U.S. environmental provisions

IV-3-1. Cooperative activities

The CEC, established by NAAEC, plays a central role in the cooperative activities under the environmental provisions. The CEC is comprised of a Council, a Secretariat, and a Joint Public Advisory Committee.⁷⁴

The Council comprises Minister-level officials who supervise the implementation of cooperative activities and other matters.⁷⁵ However, it convenes once a year, and usual operations are carried out by the permanent Secretariat.⁷⁶

According to the CEC Secretariat, the Secretariat has more than 40 full-time staff members, and cooperates with external experts and lawyers to address individual submissions. Responses to submissions often require descriptions of scientific evidence as well as legal information, this necessitates the preparation of highly technical documents. Therefore, it is beneficial to centralize expertise within a permanent Secretariat. Furthermore, it works to promote regional cooperation including by organizing seminars and sharing various case studies under USMCA with the parties of the Central America-Dominican Republic Free Trade Agreement (CAFTA-DR), as well as other FTA partners such as Peru, Colombia, and Panama.

IV-3-2. Public submission

The public submission mechanism accepts submissions related to the enforcement of environmental laws from private individuals or organizations in the FTA parties.⁷⁷ The primary function of the public submission is to determine objective facts; it is not a system for settling

⁷² USMCA Article 24.28, paragraph 6.

⁷³ Ibid. paragraph 5.

⁷⁴ NAAEC Article 8.

⁷⁵ Ibid. Article 10, paragraph 1.

⁷⁶ Ibid. Article 11, paragraph 5.

⁷⁷ Ibid. Article 14, paragraph 1 (f), and USMCA Article 24.27.

disputes between the public and states.⁷⁸ As the public submission mechanism of USMCA succeeds and strengthens that of the NAAEC, and as many practices have also been accumulated under NAAEC, the following will first provide a brief review of the public submission process under NAAEC.

(1) NAAEC

Articles 14 and 15 are the provisions related to public submissions. Article 14, paragraph 1 sets out the six formal criteria for determining if the submission is admissible.⁷⁹ From the perspective of comparison with USMCA, it is important that NAAEC includes the requirement that submissions are from individuals or organizations who are residents or established within the territory of a party.

If the criteria in Article 14, paragraph 1 are fulfilled, the Secretariat substantively determines whether to request a response from the party in question (Article 14, paragraph 2). In such cases, the considerations include matters such as the determining whether there is harm and pursuing domestic remedies.

If the CEC Secretariat determines that development of a Factual Record is warranted,⁸⁰ and has the support of at least two-thirds of the Council,⁸¹ it will begin preparing the Factual Record.⁸² In the process of preparing the Factual Record, the Secretariat must take into account the information submitted by the parties and may take into consideration all relevant technical and scientific information.⁸³ The Secretariat will submit a draft Factual Record to the Council, and the parties may comment on its accuracy.

Matters that have been perceived as problematic in past instances that led to the issuance of a Factual Record include the following examples: for the U.S., non-enforcement of the Migratory Bird Treaty Act due to failure to apply the law to logging companies, and non-enforcement of the Clean Water Act on the discharge of mercury from coal-fired power plants; for Mexico, non-enforcement of environmental laws on the demolition of pigment manufacturing plants, development of liquefied natural gas, and limestone mining sites, and non-enforcement of the air quality law on the burning of agricultural waste; for Canada, non-enforcement of the Fisheries Act on industrial wastewater, non-enforcement of the Migratory Birds Convention Act, non-enforcement of air quality provisions of the Quebec Environmental Quality Act, and non-enforcement of the Fisheries Act for oil and sand leaks.

⁷⁸ CEC (2012), pp. 2-3.

⁷⁹ Even if compliance with Article 14, paragraph 1 is denied here, the submitter can amend its submission, and the revised submission is reviewed again under the same article.

⁸⁰ Under the guidelines, this shall be determined within 120 days after the provision of information by the parties. CEC (2012), p.13.

⁸¹ Under the guidelines, the proceedings within the Council shall take place within 60 days (Ibid.).

⁸² NAAEC Article 15, paragraphs 1 and 2.

⁸³ Ibid. paragraph 4.

A Factual Record does not include the determination of non-compliance with obligations under domestic law or the environmental chapter, nor recommendations. Rather, it contains the results of analyses conducted using objective indicators such as soil, water quality, and noise inspection findings. For example, the Factual Record of the Sumidero Canyon II case,⁸⁴ which raised the problem of the adverse effects that limestone mining in a national park has on the surrounding environment and residents, contained information on the park's boundaries, species found within the park, the relationship between the park and surrounding communities, population changes in the relevant communities, changes in the boundaries of mining sites as well as the operational methods and procedures employed, noise generation, and measures taken by the Mexican government in response.

(2) USMCA

NAAEC's public submission system has been succeeded by Articles 24.27 and 24.28 of the USMCA. USMCA allows public submissions from citizens and permanent residents of the parties or legal entities established under the laws of a party. The review process upon acceptance of a submission is prescribed in paragraphs 1 and 2 of Article 24.27. Compared to NAAEC, USMCA removes the residency criteria, thereby allowing submissions from citizens of a party even if they reside outside the country. Once the criteria are met under USMCA Article 24.27 paragraphs 1 and 2, the Secretariat decides whether to request a response from the party "within 30 days," in accordance with the criteria in paragraph 3, unlike in NAAEC where this timeframe was not specifically prescribed. Furthermore, regarding the recommendation to develop a Factual Record, USMCA requires the Secretariat to make a decision "within 60 days" from the receipt of response from the party. Additionally, the Secretariat is required to submit a draft Factual Record "within 120 days" from the date of instruction from the Council members, and the period for the parties to comment on the draft has been reduced from 45 to 30 days. These time frames are meant to prevent unwarranted delays in the proceedings.

While proceedings are closed with the issuance of a Factual Record under NAAEC, two new provisions have been added to USMCA. According to paragraph 7 of Article 24.28, following the issuance of a Factual Record, the Environment Committee⁸⁵ must consider the Factual Record, and paragraph 8 requires the parties to provide updates to the Council and the Environment Committee. Thus, the establishment of a duty of consideration within the Environment Committee triggered by the issuance of a Factual Record, along with the imposition of accountability to the parties, is a distinctive feature of USMCA.

⁸⁴ Sumidero Canyon II, SEM-11-002, November 29, 2011.

⁸⁵ USMCA Article 24.26.

The strengthening of the domestic implementation framework in the U.S. in relation to the environmental chapter of USMCA is as set out in II-2. The Interagency Environment Committee reviews the Factual Record after its issuance, and if it determines that there is non-compliance with the obligations set out in the environment chapter, may request for enforcement action.⁸⁶ Conversely, even if non-compliance is not found, the Committee must submit a written explanation of its assessment to the appropriate committee of the Congress.⁸⁷

As of August 15, 2023, 10 public submissions have been reviewed under USMCA, bringing the cumulative total to 111 submissions including those concluded under NAAEC. The breakdown is as follows: 16 submissions related to the U.S., 35 related to Canada, and 62 related to Mexico.⁸⁸ Among these, Factual Records were prepared for 26 cases, of which two were related to the U.S., eight were related to Canada, and 16 were related to Mexico.⁸⁹

As of October 2023, there is one submission involving the U.S. This submission raises the problem of the inadequate regulation of vessel speeds and inadequate enforcement of fishery regulations by the U.S., in relation to the situation in which endangered North Atlantic right whales are dying due to collisions with ships and entanglement in fishing gear.⁹⁰ This submission was deemed to warrant development of a Factual Record in June 2022.

Furthermore, considerations are also ongoing on a submission concerning the impact of avocado production in Michoacan, Mexico, on forest ecosystems and water quality, which has sparked controversy over guacamole consumption in the U.S.,⁹¹ as well as a submission alleging the inadequacy of environmental impact assessments conducted by the Mexican government for the high-profile infrastructure project of the Tren Maya railway project in Quintana Roo, Mexico.⁹²

IV-3-3. State-to-state dispute settlement mechanism

The state-to-state dispute settlement mechanism also apply to the environmental provi-

⁸⁶ As part of enforcement actions, the Interagency Environment Committee may request the Trade Representative to conduct consultations under Article 24.29 of the USMCA (Environment Consultations), as well as consultations under the dispute settlement chapter provided in Articles 31.4 and 31.6 (USMCA Implementation Act, Sec. 814 (1) (A)). Additionally, the heads of federal agencies may be requested to initiate monitoring or enforcement action in areas prescribed by Sec. 815 of the USMCA Implementation Act, (Sec. 814 (1) (B)). Sec. 815 of the USMCA Implementation Act grants authority to the heads of federal agencies to carry out appropriate monitoring or enforcement action based on U.S. domestic laws, in areas that include marine mammal protection, fishery resources management, prevention of IUU fishing, prevention of trade in endangered species, and protection of migratory birds.

⁸⁷ USMCA Implementation Act, Sec. 813 (b).

⁸⁸ There are two cases of submissions against both the U.S. and Canada.

⁸⁹ CEC, Registry of Submissions, <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/>>.

⁹⁰ North Atlantic right whale, SEM-21-003 (October 4, 2021).

⁹¹ Avocado Production in Michoacán, SEM-23-0002 (February 2, 2023).

⁹² Tren Maya, SEM-22-002 (July 21, 2022).

sions under the U.S. FTA. USMCA environment chapter prescribes multiple consultations, including party-to-party, between senior representatives, and at the ministerial levels. If disputes are not resolved after these consultations, the parties may request for the establishment of a panel under the dispute settlement chapter.⁹³

In February 2022, USTR requested the first state-to-state consultation with Mexico under USMCA environment chapter.⁹⁴ The consultation focused on concerns over the poaching and illegal trade of the endangered “totoaba” which in turn affects the endangered “vaquita” (a porpoise species named *Phocoena sinus*). The totoaba, which inhabits Mexico’s Gulf of California, is a highly prized fish with a drastically reduced population, as its air bladder is traded at high prices as a delicacy or traditional medicine in some countries. According to the U.S., the use of gill nets to capture the totoaba has led to the bycatch of vaquitas, contributing significantly to their decline in numbers. Both governments agreed to work together to address and improve this situation. Furthermore, this case also involved a submission which has been recommended for development of a Factual Record,⁹⁵ and on March 27, 2023, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) Secretariat issued a recommendation to the parties to halt commercial trade in species registered under CITES, in view of failure by Mexico to formulate appropriate compliance plans for the protection of vaquita and totoaba.⁹⁶

In April 2022, sanction measures under the CITES were lifted.⁹⁷ However, this case serves as an example of efforts to ensure compliance with treaty obligations, as well as domestic laws, through the multilayered forums and mechanisms of both environmental and trade agreements. As of October 2023, the dispute settlement process under USMCA, or more accurately, the consultation under the environment chapter, is still ongoing, and future developments will be watched closely.

IV-4. Summary of the environment

Concerning the environment, the U.S., Mexico, and Canada have a track record of about 30 years of cooperation based on NAAEC. There is a certain level of understanding regarding ensuring compliance with the environmental chapter not only among the governments of the parties, but also among environmental organizations, companies, and individuals. While the primary responsibility for enforcing environmental laws lies with the parties, there is wide-

⁹³ USMCA Articles 24.29-24.32.

⁹⁴ USTR (2022).

⁹⁵ Vaquita Porpoise, SEM-21-0002 (August 11, 2021).

⁹⁶ CITES (2023a).

⁹⁷ CITES (2023b).

spread consensus on the idea of ensuring compliance with USMCA environment chapter on a regional basis, with the involvement of the general public and environmental organizations and through confirmation of facts from a neutral position by the permanent secretariat. In this respect, similar to RRM for the labor chapter, it is noteworthy that involvement of non-state actors plays an important role.

In particular, the continued interest shown by USTR in the faithful enforcement of the environment chapter with the transition to the Biden administration, has provided a strong support. Regarding the U.S., in accordance with the USMCA Implementation Act, USTR is obligated to report to the U.S. Congress⁹⁸ on the enforcement status of environment-related matters, and there are institutional mechanisms in place to ensure compliance.

Looking at the track record of NAFTA, Part Five of NAAEC “Consultation and Resolution of Disputes” was never utilized, and efforts to ensure compliance with environmental provisions have been achieved through the issuance of Factual Records and cooperation activities. Drawing from the experience of NAAEC, amendments have been made in USMCA to make the proceedings more effective. It has been proven, to a certain extent, in the implementation of environmental provisions in the U.S. in the past, that methods focusing on step-by-step procedures and resolving issues based on cooperation among the parties function better than immediately resorting to dispute settlement mechanism when matters related to compliance with environmental obligations are raised. Furthermore, it should be emphasized that not all submissions lead to the issuance of Factual Records, as there are cases where improvements in the situation are achieved by the submission stages of the process. According to the interview with the CEC Secretariat, changes in the situation occurred solely through the initiation of public submission process. This happened, for example, in the case of the Monterrey aqueduct,⁹⁹ in which it was alleged that water transfer via aqueducts have adverse environmental impacts, in the case of Sumidero Canyon II as mentioned earlier, and in the case of the Coronado Islands,¹⁰⁰ in which the construction of a liquefied natural gas terminal was alleged to have adverse impacts on the ecosystem of seabirds.

The CEC’s activities also extend to activities to raise awareness, such as environmental education. While it is difficult to quantitatively present achievements in the environmental field with objective indicators, addressing issues faced by the parties under the environment chapter through neutral the CEC proceedings is likely to have a positive impact on compliance with environment chapter obligations, as those issues are dealt with not only between the parties but also as regional matters.

⁹⁸ USMCA Implementation Act, Sec. 816.

⁹⁹ Monterrey VI Aqueduct, SEM-16-002, July 11, 2016.

¹⁰⁰ Coronado Islands, SEM-05-0002, May 3, 2005.

V. U.S. initiatives after USMCA

Finally, this paper examines the impact that the implementation of USMCA has on other frameworks. While USMCA is an agreement between three contiguous countries that already have tariffs reduced to close to zero on most items under NAFTA, and which have established a robust trade and investment relationship, new negotiations led by the Biden administration involve discussions with countries that do not fulfill such prerequisites. Under these circumstances, attention will be given to how far compliance mechanisms aligned with USMCA will be incorporated.

V-1. IPEF

On May 23, 2022, President Biden announced the launch of IPEF with 13 countries (U.S., Japan, Republic of Korea, India, Australia, New Zealand, Brunei, Indonesia, Malaysia, the Philippines, Singapore, Thailand, and Vietnam) and initiated discussions for future negotiations. Fiji's participation was announced on May 30, 2022.

On September 8-9, 2022, the IPEF ministerial meeting, co-hosted by the U.S. Trade Representative Katherine Tai and the U.S. Secretary of Commerce Gina Raimondo, was convened in Los Angeles. Discussions were centered on the following four “pillars”: (1) Pillar 1 (Trade), (2) Pillar 2 (Supply Chain), (3) Pillar 3 (Clean Economy), and (4) Pillar 4 (Fair Economy). The discussions culminated in the issuance of a ministerial statement.¹⁰¹ There were independent items for both labor and the environment under Pillar 1 (Trade). Both mention cooperation among members as well as the business activities of corporations in the form of “corporate accountability” for labor and “responsible business conduct” for environment. Additionally, Pillar 2 also dedicates one paragraph to “enhancing the role of workers,” and mentions improving supply chain transparency in relation to the environment. Labor is mentioned in Pillars 3 and 4, while the environment is mentioned in Pillar 3. It is noteworthy that considerations for labor and the environment cut across different sectors.

On April 20, 2023, U.S. Trade Representative Katherine Tai held a press conference in Tokyo, during which she stated, in relation to IPEF negotiations, that trade should work for the common good and promote fair and healthy cooperation. She expressed desire to move forward on an ambitious negotiation schedule by the end of the year to pursue high standard commitments with regard to labor and the environment.¹⁰² Furthermore, on April 25 during an online press conference, she responded to a question from a Vietnamese journalist about how

¹⁰¹ Ministry of Foreign Affairs of Japan (2022).

¹⁰² JETRO (2023b); USTR (2023I).

to guarantee inclusiveness in IPEF negotiations among participating countries at different stages of development. She responded that after the conclusion of general trade negotiations, we consider how the partner is going to be able to implement the agreement, and whether or not capacity building and technical assistance is going to be required. However, in the IPEF, these questions are addressed during the negotiations. Therefore, it is important to ensure that the contents of the negotiations can be translated into practice.¹⁰³ This is an interesting challenge to change the typical flow that moves from “entry into force to implementation” in conventional FTAs, by considering the possibility of ensuring compliance from the negotiation stage.

In April 2023, the trade pillar announced by USTR was published on the website. While there was no mention of enforcement mechanisms similar to the RRM, the proposed text included “encouraging corporate accountability in cases where an entity violates local labor laws.”¹⁰⁴

With regard to the environment, the following proposals should be highlighted: the establishment of a process to ensure participation opportunities, the establishment of an Environment Committee to oversee the implementation of the environment chapter, and a mechanism to support consultations.

On May 27, 2023, the U.S. Department of Commerce announced the substantive conclusion of the IPEF Supply Chain Agreement.¹⁰⁵ On September 7, 2023, the text of the agreement was published on the website of the U.S. Department of Commerce. It included the establishment of an IPEF Labor Rights Advisory Board comprising representatives from the three parties (government, employers, and workers). This Advisory Board shall (1) help identify areas that pose risks to competitiveness while strengthening resilient supply chains of IPEF partners for which there are concerns over labor rights; (2) establish a process for the IPEF partners to work together to address allegations of labor right inconsistencies at individual facilities. It shall advance work toward the entry into force of the IPEF. While it is unclear at this stage if this Advisory Board will resemble RRM in USMCA, the strong will of the Biden administration to proceed based on USMCA framework is observed.

V-2. APEP

On June 8, 2022, President Biden announced APEP initiative at the 9th Summit of the Americas held in Los Angeles.¹⁰⁶ At this time, President Biden emphasized, “together, we

¹⁰³ USTR (2023m).

¹⁰⁴ USTR (2023n).

¹⁰⁵ U.S. Department of Commerce (2023).

¹⁰⁶ White House (2022a).

have to invest in making sure trade is sustainable and responsible, and creating supply chains that are more resilient, more secure, and more sustainable.” At the time of the announcement, the participating countries were not disclosed, and the fact sheet on the areas of negotiation released by the White House on the same day only outlined the following highly abstract objectives: (1) reinvigorating regional economic institutions and mobilizing investment; (2) making more resilient supply chains; (3) improving public investment; (4) creating clean energy jobs and advancing decarbonization and biodiversity; and (5) ensuring sustainable and inclusive trade.¹⁰⁷

On January 27, 2023, U.S. Secretary of State Antony Blinken and U.S. Trade Representative Katherine Tai hosted an online ministerial meeting with the trade ministers of 11 countries that had declared their participation in APEP (Barbados, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Mexico, Panama, Peru, and Uruguay), during which they declared the launch of APEP. While IPEF is led by U.S. Trade Representative Katherine Tai and U.S. Secretary of Commerce Gina Raimondo, APEP is spearheaded by U.S. Trade Representative Katherine Tai and U.S. Secretary of State Antony Blinken. In addition to USMCA, the U.S. has CAFTA-DR and bilateral FTAs with countries in the Western Hemisphere (Panama, Chile, Peru, and Colombia), and already have FTAs in place with countries except for Uruguay. This is in contrast with IPEF, which has a narrower scope of countries covered by existing FTAs. A fact sheet released by the White House on January 27, 2023, makes references to worker and environmental protection in areas related to the importance and resilience of efforts to tackle the climate crisis, and mentions labor standards in the areas of worker and environmental protection as well as shared prosperity.¹⁰⁸ The extent to which the rules established align with the labor and environmental rules of USMCA will be a point of interest in future negotiations.

VI. Conclusion

Examination of the status of compliance with the labor and environment chapters in USMCA shows that there are 14 RRM cases in relation to labor, and 10 cases under public submissions in relation to the environment (including ongoing cases as of August 31, 2023 for both chapters). This indicates that compliance has been pursued through concrete actions to address individual cases. This contrasts significantly with the conventional enforcement of compliance with labor and environment chapters in FTAs, which mainly rely on general cooperative activities such as dialogues with parties after the entry into force of the FTA, ex-

¹⁰⁷ White House (2022b).

¹⁰⁸ White House (2023b).

changes of views on compliance with domestic laws through committees.

The labor and the environment chapters of USMCA do not exclude the invocation of economic measures through the application of the dispute settlement mechanisms. However, based on previous cases of implementation, it can be seen that the parties do not necessarily prefer a hostile approach, and cooperative approaches involving trade unions and citizen groups have been more commonly utilized. The utilization of such cooperative approaches offers some insights into the institutional design of compliance mechanisms in FTAs and other frameworks, based on the assumption of the participation of diverse countries with varying degrees of economic development. Moreover, the specific violations in each case are publicly disclosed, which could potentially impact corporate behavior.

Developments after the entry into force of USMCA are also being closely watched from the perspective of the importance of achieving compliance with labor and environmental rules toward building sustainable and resilient supply chains. Moreover, from the viewpoint of corporate accountability, the protection of labor rights and the environmental standards are factors behind consumer and investor judgments, and therefore serve as incentives for companies to cooperate. Particularly with regard to RRM, there have been no cases where remedies such as suspension of preferential tariffs, fines, or import bans from the relevant facilities have been taken; however, as liquidation is suspended once the U.S. files a case against Mexico, companies become vigilant about reputational risks while also being acutely aware that if they do not agree to remediation, coercive measures will eventually be invoked. On April 27, 2023, Jake Sullivan, U.S. National Security Advisor, stated, “In today’s world, trade policy needs to be about more than tariff reduction, and trade policy needs to be fully integrated into our economic strategy, at home and abroad,” and described RRM as “a win-win for Mexican workers and American competitiveness.”¹⁰⁹ Furthermore, on June 15, 2023, U.S. Trade Representative Katherine Tai emphasized the need to comprehensively handle competition policies including rules on supply chains, labor, and the environment, alongside trade policies for people and the Earth, in view of the highly vulnerable and risky supply chains that have developed as a result of the pursuit for efficiency and low costs.¹¹⁰ She further highlighted the effects of RRM, including new collective bargaining agreements, major salary increases, safer working conditions, and backpay, as evidence of real change and success for workers and independent unions in Mexico.

Through the implementation of agreements from NAFTA to USMCA, the U.S. has led the trend of FTAs in relation to labor and environmental standards. During FTA negotiations, when developed countries demand the same levels of labor and environmental protection,

¹⁰⁹ Remarks by Jake Sullivan at the Brookings Institution (White House (2023c)).

¹¹⁰ USTR (2023o).

developing countries have often raised concerns of a loss of comparative advantage due to an increase in labor and environmental costs, and alleging that developed countries are motivated by the real objective of protecting their domestic industries. Furthermore, concerns have been voiced about inadequate administrative capacity for the development and enforcement of domestic laws, making it difficult to respond without capacity-building support, as well as concerns about infringement on national sovereignty. While addressing these concerns, many FTAs have to date included independent chapters on labor and the environment, and committees have been established to conduct reviews and promote cooperation.

In USMCA, drawing on nearly 30 years of experience from NAFTA, compliance mechanisms for labor have been significantly strengthened, and improvements have been made to environmental mechanisms. Within approximately three years of its entry into force, numerous cases have accumulated in both areas. In the field of labor, efforts are aimed at the steady implementation of labor reforms in Mexico, and the response to individual RRM cases plays a role in accelerating labor law reforms. Addressing specific individual cases related to labor and the environment, previously secured through domestic procedures, as a part of FTA compliance obligations, is also expected to have broad spillover effects. Establishing compliance mechanisms in treaties in such ways and discussing domestic issues at the international level is a mechanism that incurs human and financial costs for governments and may potentially generate sensitive controversies related to domestic jurisdiction. The extent of international support that efforts under USMCA already implemented on the premise of a long-standing cooperative relationship established under NAFTA will garner in the future, remains a point of interest.

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Addendum

After the completion of this manuscript, the following developments regarding RRM took place. USTR announced the successful resolution of the case against Yazaki Corporation on October 4, 2023, and the case of Mas Air on October 30, 2023. Additionally, new proceedings were initiated against: (1) AsiaWay Automotive Components (San Luis Potosi, Mexico), a Chinese (Ningbo) automotive parts company; (2) Tecnología Modificada (Tamaulipas, Mexico), a subsidiary of U.S. company Caterpillar; (3) Factory of Teklas Automotive (Aguascalientes, Mexico), a Turkish company; (4) Autoliv (Queretaro, Mexico), a Swedish automotive parts company; and (5) Fujikura Automotive Mexico (Coahuila, Mexico), a Japanese automotive parts company. As a result, the total number of RRM cases as of December 15, 2023, reached 19, with the abovementioned five new cases and the Grupo Mexico case making a total of six ongoing cases. It is noteworthy that among the new cases, proceedings have been initiated against companies from China and Turkey in addition to those from the U.S., Japan, and Europe where there have been previous cases. Furthermore, on October 10, 2023, the U.S. Department of Labor announced “the regrettable decision” made in the case of Manufacturas VU, with the company choosing to close the factory. The attention should be placed on whether there will be more of such cases, where companies choose to close factories instead of complying with remediation measures as prescribed by RRM.