



# USMCA's Rapid-Response Labor Mechanism

7 February 2020

The United States-Mexico-Canada Trade Agreement (USMCA) is noteworthy for its novel “facility-specific rapid response labor mechanism” (the Rapid Response Mechanism or Mechanism). The Mechanism permits the United States or Mexico<sup>1</sup> to request an expedited review by an independent panel of an alleged “Denial of Rights” of free association and collective bargaining at specific facilities in Mexico or the United States. It provides a new tool in U.S. and Mexican labor disputes and represents a new potential component of U.S. free trade agreements (FTAs). Unlike the labor rights provisions in previous U.S. FTAs, which focused on broader country-wide or industry-wide labor practices, it is targeted at labor disputes involving specific U.S. and Mexican factories and work places.

Under the Rapid Response Mechanism, an independent, three-person panel of U.S., Mexican, and third country experts could be tasked with conducting an inquiry into alleged violations. As part of the process, the Panel can request an opportunity to inspect the individual factory in question. If a violation is found by a Panel and is not remedied, the United States or Mexico can revoke preferential tariff treatment for goods from that facility and in extreme cases involving repeated violations impose additional “penalties” until the concerns are remedied.

The Rapid Response Mechanism was a last-minute addition to the USMCA as part of the back-and-forth bargaining between the Trump Administration and House Democrats to secure necessary support for passage of the USMCA Implementation Act in the U.S. House of Representatives. The House ultimately passed the USMCA Implementation Act on 19 December 2019. The Act passed the Senate on 16 January 2020, and was signed into law by President Trump on 29 January. The Mechanism will become effective when USMCA enters into force.<sup>2</sup>

## When can the mechanism be invoked

The Mechanism applies when the United States or Mexico in good faith believes that a “Covered Facility” is denying its workers their rights of free association and collective bargaining (referred to as a Denial of Rights). A “Covered Facility” is defined as a facility that (1) produces a good or supplies a service traded between the United States and Mexico or (2) produces a good or supplies a service in the United States or Mexico that competes in that country with the other Party’s good or service in the other Party’s domestic market.

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<sup>1</sup> A separate rapid response applies between Mexico and Canada. See Annex 31-B.

<sup>2</sup> Under U.S. practice, the U.S. Trade Representative (USTR) conducts a detailed review of the laws and regulations of other FTA parties to ensure that they have complied with their FTA commitments. Once the Parties to an FTA are found to be in compliance, the President issues a Presidential Proclamation declaring that the agreement has entered into force. This process typically takes six months, but can go on much longer if there are questions about whether a Party is in compliance.

The Mechanism is limited to certain “Priority Sectors” – ones that manufacture goods, supply services, or involve mining.<sup>3</sup> Notably, while the list of covered Priority Sectors is expansive, agriculture is not included, although the Parties can agree to expand the list of Priority Sectors at some point in the future.<sup>4</sup>

While in theory the Mechanism applies to the United States, USMCA further stipulates that a Denial of Rights claim can only be brought with respect to the United States if the facility is covered by a National Labor Relations Board enforced order. This significantly limits the availability of the Rapid Response Mechanism in U.S. labor disputes. This same limitation does not apply to claims brought against Mexican facilities. Rather, a claim can be brought for a Denial of Rights under legislation that is “necessary” to comply with Mexico’s obligations under USMCA Article 23. USMCA’s Annex 23-A lists certain types of legislation which Mexico must implement to protect collective bargaining rights. As a result of this different language, claims against Mexican facilities may be more expansive in nature.

### **The Response Mechanism in practice<sup>5</sup>**

#### Filing of a petition

Under the U.S. implementing legislation<sup>6</sup>, the Rapid Response Mechanism can be triggered by a public petition regarding an alleged Denial of Rights. In the U.S. process, petitions alleging violations of Mexico’s laws regarding unionization and rights to collective bargaining must be submitted to a new U.S. “Interagency Labor Committee for Monitoring and Enforcement.” The Committee will establish a process through which the public stakeholders, e.g. U.S. labor unions, can submit such petitions in an effort to persuade the U.S. Government to invoke the Mechanism.

If, based on the Committee’s review, the United States has a good faith basis to believe that a Denial of Rights has occurred, it must request that Mexico conduct its own review. If Mexico chooses to conduct a review, it must report within 45 days of the review request whether it has found a Denial of Rights. During this period, the United States is entitled to suspend liquidation of duties for the goods at issue. If Mexico finds a Denial of Rights, the Parties must try to agree on a course of remediation within a specific period. If they can agree on a course of remediation, no additional duties can be imposed during that period.

#### Formation of a Rapid Response Panel

However, if Mexico (1) chooses not to conduct a review, (2) determines there was no Denial of Rights but the United States disagrees, or (3) determines there was a Denial of Rights but the countries cannot agree upon a course of remediation, the United States is entitled to request formation of a Rapid Response Labor Panel (Panel). Mexico may also request a Panel if, after an agreed-upon date for remediation, the United States does not think the Denial of Rights has been remediated and notifies Mexico it is imposing remedies.<sup>7</sup> Within three business days of receiving the request, the USMCA Secretariat will establish a three person Panel by selecting a qualified individual from each of the following: (a) a list jointly created by the United States and Mexico containing individuals who are non-nationals of those countries, (b) a list created by the United States, and (c) a list created by Mexico.

<sup>3</sup> The United States has signaled that it will focus enforcement efforts on auto assembly, auto parts, aerospace, industrial bakeries, electronics, call centers, mining, and steel and aluminum. See Section 713 of the USMCA Implementation Act (P.L. 116-113).

<sup>4</sup> It is unclear whether any future expansion of the covered sectors would require Congressional approval.

<sup>5</sup> This section describes the Mechanism’s process for an alleged Denial of Rights that the United States brings against a Covered Facility in Mexico. A similar process would apply if Mexico instead alleged a Denial of Rights at a U.S. Covered Facility.

<sup>6</sup> Sec. 716 of the USMCA Implementation Act (P.L. 116-113).

<sup>7</sup> It is unclear whether the pre-Panel remedies the United States may announce are limited to the same list of post-Panel remedies, which are discussed in the following “Remedies” section.

The Panel's role is to conduct a "verification" and determine whether there is a Denial of Rights. If Mexico agrees, the Panel can conduct an on-site verification at the Covered Facility. U.S. and Mexican "observers"<sup>8</sup> may accompany the Panel in this verification. If Mexico refuses an on-site verification, the Panel can take this into account in making its determination.

The Panel must then make a determination as to whether there has been a Denial of Rights. Both Parties will have an opportunity to be heard before the final determination is made. A Denial of Rights must involve rights of free association and collective bargaining under laws "necessary" to fulfill the obligations of the respondent Party under the USMCA. Paragraph 2 of Annex 23-A lists certain measures which are "necessary" to fulfill Mexico's commitment in Article 23.3.1(a) to protect freedom of association and the effective recognition of the right to collective bargaining.<sup>9</sup>

### Remedies

If the Panel determines that there has been a Denial of Rights, the United States may impose remedies, including (1) the suspension of preferential tariff treatment for goods manufactured at the Covered Facility (i.e. duty-free access under the USMCA), or (2) the imposition of unspecified "penalties"<sup>10</sup> on goods manufactured at or services provided by the Covered Facility if it has a previous violation. In extreme cases, if the Covered Facility has received at least two prior Denial of Rights determinations, remedies may also include (3) the denial of entry for such goods.

Both Parties must continue consultations during the time remedies are imposed. The remedies will only be removed once the Parties agree that the Denial of Rights has been remediated. If the Parties disagree regarding remediation, Mexico can request an opportunity to demonstrate to the Panel that there has been remediation.

### **Important questions left unanswered**

The USMCA's Mechanism in Annex 31-A leaves a host of unanswered questions. Specifically:

- **Effective date** – This Mechanism takes immediate effect upon the USMCA's entry into force. While the date of U.S. entry into force depends on when USTR finds that Mexico and Canada have fully implemented their USMCA commitments, the Parties reportedly are aiming for entry into force in Summer 2020. Covered facilities would only be subject to the Mechanism post-entry into force.<sup>11</sup>
- **U.S. Interagency Labor Committee for Monitoring and Enforcement** – This Committee will be processing Denial of Rights petitions and deciding whether the United States should invoke the Rapid Response Mechanism. Consequently, the Committee is likely to significantly impact how aggressively the Mechanism is used. The Committee will be co-chaired by the U.S. Trade Representative and Secretary of Labor and include other federal government representatives, as determined by the President. Given the politically charged nature of many labor law issues, the Committee's willingness to move forward with Panel requests may depend in part on which political party controls the White House.
- **Appointment of Panelists** – As discussed, the Parties will create three lists of individuals whom the USMCA Secretariat may appoint to the three-person Rapid Response Labor Panel. The individuals appointed must meet various qualifications,

<sup>8</sup> It is unclear if the observers must be government officials or if other individuals, e.g. representatives from a labor union or non-governmental organization would be permitted if designated by a Party.

<sup>9</sup> There is no corresponding list of "necessary" measures for the United States.

<sup>10</sup> The term "penalties" is not defined, so it is unclear whether it covers some type of fine or is limited to some other loss of market access privileges.

<sup>11</sup> This reportedly is one reason some Democrats are eager to see USMCA enter into force as quickly as possible.

including expertise and experience in labor law and practice. The panelists will have a major impact on the operation of the mechanism.

- **What's a "Denial of Rights"?** Article 31-A.2 of the Protocol defines as "Denial of Rights" as a finding that workers in a Covered Facility are being denied their rights of free association and collective bargaining under laws "necessary to fulfill the obligations of the other Party...under this Agreement..." Thus, Panel verifications are likely to raise issues as to whether a law is one that is "necessary" to fulfill a Party's obligations or represents statutory legal filler. Article 23.1 defines the term "labor laws" to cover statutes and regulations, or provisions of statutes and regulations, of a Party that are "directly related" to internationally recognized worker rights under the ILO Declaration, but the term "directly related" is not defined.
- **On-site verification specifics** – One of the novel components of this Mechanism is that it is facility-specific and allows for on-site inspections of the facility by the Panel. However, it is unclear what potential on-site site visits might entail and what they will be used for, e.g. interviews with workers and management. The on-site verifications also raise questions about whether the verifiers will have subpoena power for documents and whether the verification will be subject to the laws of the host country. There may be forthcoming, joint guidelines to address these ambiguities.
- **Potential expansion of claims** – Normally the Rapid Response Mechanism can only be invoked for alleged denials of the right of free association and collective bargaining. The USMCA, however, opens the door to a broader array of potential violations if a general dispute settlement panel finds that a Party has violated other obligations in USMCA's Labor Chapter.
- **Abuse of the Mechanism** – One potential concern is that the Rapid Response Mechanism could be abused for the purpose of restricting trade or for pursuing frivolous or unjustified complaints, rather than being used as intended in good faith to address violations of USMCA's labor rights. Annex 31-A states that if a Party believes the other has not acted in good faith, the Party may have recourse under the Chapter 31 dispute settlement mechanism. Ultimately, if a Chapter 31 dispute settlement panel finds that a Party has been abusing the mechanism, the Party can lose its right to invoke the Rapid Response Mechanism for two years. This appears designed to operate as a check on political pressures to abuse the mechanism or pursue weak or frivolous cases in an effort to humor domestic stakeholders.

Warren Maruyama was one of the primary authors of the May 10th Agreement, which established the enforceability of labor provisions in U.S. trade agreements. In addition, Jared Wessel was one of the lawyers who supervised the trade and labor portfolio while Assistant General Counsel at USTR. Our Hogan Lovells team brings a unique and experienced perspective to such issues.

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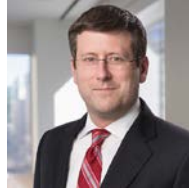
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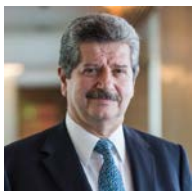
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