

ORIGINAL ARTICLE

Labour Rights Protection and Its Enforcement under the USMCA: Insights from a Comparative Legal Analysis

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Abstract

Chapter 23, exclusively dedicated to labor protection, has been widely described as one of the most distinctive features of the new US–Mexico–Canada Agreement (USMCA). This paper challenges the current narrative surrounding the USMCA by critically analysing Chapter 23 of the agreement, looking at the legal innovative design of its substantive commitments of labour protection and their enforceability. In light of this objective, a comparative analysis will be conducted. The provisions of Chapter 23 USMCA will be compared with labour provisions in previous US Preferential Trade Agreements (PTAs), namely, the NAFTA side agreement on labour rights and the TPP. Second, a comparative analysis will be conducted comparing USMCA Chapter 23 with labour provisions in EU Trade Agreements negotiated with USMCA parties. The paper demonstrates that although the USMCA does not radically innovate from the level of substantive labour protection reached in recent US and EU PTAs, the enforcement mechanism in the USMCA is significantly strengthened, with controversial and innovative features.

Keywords: Trade agreements; labour rights; US Trade Policy

‘Each new agreement is another opportunity to innovate.’

Morin, Pauwelyn and Hollway, 2017

1. Introduction

One of the most striking differences between the new US–Mexico–Canada Agreement (USMCA) and the original North American Free Trade Agreement (NAFTA) consists of the inclusion of a specific ‘Labor Chapter’ (USMCA Chapter 23). USMCA Chapter 23 sets ambitious goals and binding commitments to respect international instruments of labour rights protection and to not lower labour standards to attract trade and investments. Moreover, USMCA Chapter 23 offers various enforcement mechanisms for its labour commitments, significantly strengthened in the ‘Protocol of Amendment to the Agreement’ signed in December 2019. After its ratification in the US Senate, former President Trump described the USMCA as ‘the largest, fairest, most balanced, and modern trade agreement ever achieved’, while US Trade Representative Robert Lighthizer praised it as ‘the first agreement that contains strong, enforceable labor ... standards that will help to level the playing field for American workers’. During the 2020 US Presidential Elections campaign, then Democratic Presidential candidate Biden also supported the signing of the USMCA because of its innovation in terms of labour provisions.¹ This paper takes a closer look at the rhetoric around the USMCA and asks itself the following

¹www.bloomberg.com/news/articles/2019-12-20/biden-says-he-supports-usmca-citing-provisions-for-labor.

question: Are we indeed recording in this agreement the most innovative and advanced system of labour protection established in a Preferential Trade Agreement (PTA), as described by the previous US administration? It will answer this question by critically analysing the USMCA, looking at its contribution in terms of legal innovation in the adoption of labour rights obligations in comparison to other PTAs.

As the USMCA was only signed a little over a year ago, there has obviously been little legal scholarship so far on the labour provisions in this agreement. Having said that, a few short pieces on the USMCA by lawyers have been published, and these positively welcome the inclusion of an entire chapter fully focused on the adoption of labour commitments in the body of the agreement. Santos, for instance, states that even though much more needs to be done to ‘rebalance the power between capital and labor in trade agreements’, the USMCA ‘may signal a pivot to a new model requiring reforms of domestic labor law and other issues important to workers’,² while Ganz concludes that ‘[the USMCA] can be expected to bring about significant changes to labor in Mexico’,³ Notwithstanding the interesting insights that these contributions provide, their main focus is on labour law reform in Mexico and the obstacles related to the enforcement of labour provisions in the US. On the other hand, the primary focus of this paper is on the legal innovation and the design of labour provisions in the USMCA from a comparative perspective. That is, this paper will provide a detailed comparative analysis of the content of the labour provisions in the USMCA and a select number of other PTAs as an essential step to further developing the debate on the innovative design of the USMCA.⁴

There is, of course, a wider body of scholarly work on the trade–labour nexus, including on labour provisions in PTAs. This research is mostly conducted by economists and political scientists and has focused on issues such as states’ motives behind the inclusion of labour provisions in PTAs,⁵ the influence of and role played by trade unions and political parties in putting labour issues on the PTA negotiating agenda,⁶ as well as the tension that exists between the choice to include labour provisions in PTAs versus dealing with them at the multilateral (WTO, ILO) level.⁷ There is also a growing body of legal work that has looked at the impact and the implementation of these labour provisions in PTAs, with some arguing that such provisions in PTAs (in particular those signed by the EU) could be effective in improving labour conditions,⁸ while others are more skeptical and find little evidence of such improvements in labour standards and conditions.⁹ As important as this work on the drivers behind and the impact of the inclusion of

²Santos, Á. (2019) ‘Reimagining Trade Agreements for Workers: Lessons from the USMCA’, *AJIL Unbound* 113, 407–412.

³Ganz, D.A. (2019) ‘The United States–Mexico–Canada Agreement: Labor Rights and Environmental Protection’, Mexico Center, Rice University’s Baker Institute for Public Policy, 13 June 2019), 19–13.

⁴For a discussion on environmental provisions in the USMCA, see Laurens, N., Z. Dove, J-F. Morin, and S. Jinnah (2019) ‘NAFTA 2.0: The Greenest Trade Agreement Ever?’, *World Trade Review* 18(4), 659.

⁵Milewicz, K., J. Hollway, C. Peacock, and D. Snidal (2018) ‘Beyond Trade: The Expanding Scope of the Nontrade Agenda in Trade Agreements’, *Journal of Conflict Resolution* 62(4), 743–773.

⁶Raess, D., A. Dür, and D. Sari (2018) ‘Protecting Labor Rights in Preferential Trade Agreements: The Role of Trade Unions, Left Governments, and Skilled Labor’, *The Review of International Organizations*, 143–162.

⁷Brown, D.K. (2001) ‘Labor Standards: Where Do They Belong on the International Trade Agenda?’, *Journal of Economic Perspectives* 15(3), 89–112.

⁸Postnikov, E. and I. Bastiaens (2014) ‘Does dialogue work? The Effectiveness of Labor Standards in EU Preferential Trade Agreements’, *Journal of European Public Policy* 21(6), 923–940. Campling, L., J. Harrison, B. Richardson, and A. Smith (2016) ‘Can Labour Provisions Work beyond the Border? Evaluating the Effects of EU Free Trade Agreements’, *International Labour Review* 155(3), 357–382. Velluti, S. (2016) ‘The Promotion and Integration of Human Rights in EU External Trade Relations’, *Utrecht Journal International & European Law* 32, 41.

⁹Van den Putte, L. and J. Orbie (2015) ‘EU Bilateral Trade Agreements and the Surprising Rise of Labor Provisions’, *International Journal Comparative Labour Law & Industrial Relations* 31, 263. Marx, A. and J. Soares (2015) ‘Does Integrating Labour Provisions in Free Trade Agreements Make a Difference? An Exploratory Analysis of Freedom of Association and Collective Bargaining Rights in 13 EU Trade Partners’, in J. Wouters, A. Marx, D. Geraets, and B. Natens (eds.), *Global Governance through Trade: EU Policies and Approaches*. Cheltenham: Edward Elgar Publishing, 158–184. Kamata, I. (2016) ‘Labor Clauses in Regional Trade Agreements and Effects on Labor Conditions: An Empirical

labour provisions in PTAs is, that is not what this paper is interested in. As indicated earlier, this paper undertakes a detailed comparative legal analysis to assess the legal innovation of the design of labour provisions in the USMCA. This is not to say that there is no other legal scholarship on labour rights and PTAs, yet most existing legal accounts were written quite some time ago¹⁰ and hence do not account for more recent developments, or they analyse the topic mainly from a human rights law perspective.¹¹

In other words, the existing work summarized above has greatly enhanced our understanding of various aspects of labour provisions in PTAs, yet the issue of legal innovation and the exact design of labour provisions in PTAs from a comparative legal perspective has not received much attention. To be sure, there is other work on the design of norms in PTAs,¹² including some excellent recent mapping exercises and databases on labour provisions in PTAs,¹³ yet this work does not provide the kind of detailed analysis of the legal innovation of the design of labour obligations in PTAs that is provided in this paper. Moreover, the existing work by lawyers on conceptualizing and framing innovative legal solutions in PTAs, which this paper is interested in, has so far mainly looked at environmental commitments.¹⁴ One particularly interesting finding of this latter body of work for the purpose of this paper is that USMCA countries are those that most value and cultivate legal innovation in the negotiation of their PTAs, especially as regards the inclusion of sustainable development and environmental concerns.¹⁵

Building on the methodology developed by Horn, Mavroidis, and Sapir,¹⁶ this paper's analysis is also supported by the recent mapping efforts developed in the World Bank's Deep Integration project.¹⁷ Within the WTO-X policy areas not covered by WTO Agreements, this paper analyses the labour provisions in the USMCA and its legal innovation profile by looking at two important components of this agreement: its substantive labour protection commitments and their enforceability. As such, this paper aims to create a first step toward exploring the research for a more comprehensive study of legal innovation in the inclusion of labour commitments in PTAs.

In terms of the scope of this analysis, the level of legal innovation in the USMCA labour chapter will be tested in the North American context. That is, the paper compares the labour

Analysis', Institute of Developing Economies (IDE). Tran, A.N., J. Bair, and M. Werner (2017) 'Forcing Change from the Outside? The Role of Trade-Labour Linkages in Transforming Vietnam's Labour Regime', *Competition and Change* 21 (5), 397–416.

¹⁰Polaski, S. (2003) 'Protecting Labor Rights through Trade Agreements: An Analytical Guide', *U.C. Davis Journal International Law and Policy* 10, 13–25.

¹¹Bartels, L. (2013) 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements', *Legal Issues of Economic Integration* 40, 297–314. Bartels, L. (2016) 'Social Issues: Labour, Environment and Human Rights', in B. Mercurio and L. Bartels (eds.), *Bilateral and Regional Trade Agreements: Commentary and Analysis*, Vol. 1 (2nd edn.). Cambridge: Cambridge University Press, 364–384.

¹²Dür, A. and E. Manfred (eds.) (2015) *Trade Cooperation*. Cambridge: Cambridge University Press. Baccini, L., A. Dür, and M. Elsig (2016) 'The Politics of Trade Agreement Design: Revisiting the Depth-Flexibility Nexus', *International Studies Quarterly* 59(4), 765–775. Acharya, R. (ed.), *Regional Trade Agreements and the Multilateral Trading System*. Cambridge: Cambridge University Press.

¹³Ebert, F.C. and A. Posthuma (2011) 'Labour Provisions in Trade Arrangements: Current Trends and Perspectives', ILS Discussion Paper Series 205/2011, ILO, Geneva, www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_192807.pdf, 11. Raess, D. and D. Sari (2018) 'Labor Provisions in Trade agreements (LABPTA): Introducing a New Dataset', *Global Policy* 9(4), 451–466.

¹⁴Pauwelyn, J. (2014) 'At the Edge of Chaos?: Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed', *ICSID Review* 29(2), 372–418. Morin, J.F., J. Pauwelyn, and J. Hollway (2017) 'The Trade Regime as a Complex Adaptive System: Exploration and Exploitation of Environmental Norms in Trade Agreements', *Journal of International Economic Law* 20, 365–390.

¹⁵Morin, Pauwelyn, and Hollway (2017) 'The Trade Regime as a Complex Adaptive System', 365–390. 377.

¹⁶Horn, H., P.C. Mavroidis, and A. Sapir (2010) 'Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements', *The World Economy* 33(11), 1565–1588.

¹⁷Raess, D. and D. Sari (2020) 'Labor Market Regulations', in A. Mattoo, N. Rocha, and M. Ruta (eds.), *Handbook of Deep Trade Agreements*, World Bank, 583–605.

provisions in the USMCA with those in a select number of other PTAs signed by the North American countries. Two types of agreements will be used for the legal comparison.

First, the provisions of USMCA Chapter 23 will be compared with labour provisions in key previous US PTAs. More precisely, the USMCA will be compared with the NAFTA side agreement of the 'North American Agreement on Labor Cooperation' (NAALC) to study how the labour protection system evolved between the North American Parties. Even if bearing evident shortcomings, the literature has agreed on the centrality of NAFTA as an influential and innovative model of labour protection,¹⁸ as many subsequent US PTAs have mirrored some of the NAALC's regulatory features and its mechanisms of institutional cooperation.¹⁹ Aside from NAFTA, USMCA Chapter 23 will also be compared to Chapter 19 of the Trans-Pacific Partnership (TPP) (presently known as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership or CPTPP). Even though the US subsequently decided to withdraw from the agreement, the original text of TPP Chapter 19 has been described in the literature so far as 'the culmination of a progressive trajectory of linkage between trade and labor in trade agreements'.²⁰ Moreover, the more recent literature has also argued that the USMCA extensively borrowed from the text of the TPP, albeit including significant regulatory differences.²¹ The similarities between the two agreements will be tested in the specific context of labour rights protection in this paper.

Second, a comparison will be made between USMCA Chapter 23 and the results achieved in terms of the level of protection and enforcement in those chapters dedicated to labour protection in the EU trade agreement with the USMCA Parties.²² More precisely, the 'Trade and Labour' chapter in the Comprehensive and Economic Trade Agreement (CETA), which provisionally entered into force on 21 September 2017 between the EU and Canada, will represent a focal point in the comparison, together with the chapter on 'Trade and Sustainable Development' of the EU–Mexico Agreement agreed in principle on 21 April 2018.²³ The rationale for including an analysis of EU PTAs with USMCA partners is that it will allow to further test the claim that labour provisions in the USMCA are as innovative as asserted. The comparison shows that, apart from the presence of the dispute settlement mechanism in the US model of PTAs, the substantive commitments

¹⁸Weiss, M.S. (2002) 'Two Steps Forward, One Step Back – Or Vice Versa: Labor Rights under Free Trade Agreements from NAFTA, through Jordan, via Chile, to Latin America, and Beyond', *University of San Francisco Law Review* 37, 689. Bieszcza, F.H. (2008) 'Labor Provisions in Trade Agreements: From the NAALC to Now', *Chicago-Kent Law Review* 83, 1387, <https://scholarship.kentlaw.iit.edu/cklawreview/vol83/iss3/11>.

¹⁹Rogowsky, R.A. and E. Chyn (2007) 'US Trade Law and FTAs: A Survey of Labor Requirements', *Journal of International Commerce and Economics* 1, 24, www.locarib.org/it/trade/documents/other_agreements/trade_law_ftas.pdf.

²⁰Santos, Á. (2018) 'The Lessons of TPP and the Future of Labor Chapters in Trade Agreements', in B. Kingsbury, D.M. Malone, P. Mertenskötter, R.B. Stewart, T. Streinz, and A. Sunami (eds.), *Megaregulation Contested: Global Economic Ordering after TPP*. Oxford: Oxford University Press, 140.

²¹An impressive 57% of similarities has been found between the USMCA and the TPP texts. Alschner, W. and R. Panford-Walsh (2019) 'How Much of the Transpacific Partnership is in the United States–Mexico–Canada Agreement?', Ottawa Faculty of Law Working Paper No. 2019-28, <https://ssrn.com/abstract=3410658> or <http://dx.doi.org/10.2139/ssrn.3410658>.

²²There are at least three types of EU agreements: free trade agreements, economic partnership agreements, and association agreements. The CETA is a comprehensive free trade agreement while the EU–Mexico is technically an association agreement; however, for the purpose of this paper we will simply refer to 'EU Preferential Trade Agreements' as referring to the entirety of those. For more information, see Kuijper, P.J., J. Wouters, F. Hoffmeister, G. de Baere, and T. Ramopoulos (2013) *The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Actor*. Oxford: Oxford University Press.

²³In 2016, the EU and Mexico began the re-negotiation process for the modernization of the EU–Mexico Global Agreement, the comprehensive agreement that entered into force in 2000 for goods and 2001 for services. A political agreement in principle for the modernization was reached on 21 April 2018, where only the list of public procurement covered is missing. More information is available at: https://ec.europa.eu/trade/policy/in-focus/eu-mexico-trade-agreement/agreement-explained/index_en.htm.

of labour right protections in the USMCA text do not innovate or differ from the substantive labour commitments guaranteed in the EU–Mexico and EU–Canada Agreements.

Grounded on the comparative analysis presented here, this article will argue, first, that USMCA Chapter 23 does not radically innovate on the level of labour protection reached in the NAALC and consolidated in subsequent US PTAs, like the TPP. Moreover, the level of labour protection offered in the USMCA is not unlike the standards reached in the latest EU PTAs with Canada and Mexico. Second, the paper will demonstrate that the most innovative aspect of the USMCA consists of the enforcement mechanism of its labour commitments, significantly strengthened in the USMCA Protocol of Amendment. Not only are the possibilities of challenging a violation of labour rights via a formal dispute settlement system improved but specific bilateral mechanisms are also included to ensure the enforcement of the right of free association and to collective bargaining in US–Mexico and Canada–Mexico bilateral relations. However, the strengthening of the enforcement of the labour rights commitments in the USMCA is not immune to criticisms and significant implications, as highlighted in the final part of the paper.

2. Substantive Labour Commitments in the USMCA: Following a Consolidated Path

As a first step of the comparative analysis, the USMCA's substantive commitments of labour protection will be studied under different aspects. First, the coverage of USMCA Chapter 23 will be analysed, looking at the specific labour rights and the standards of working conditions guaranteed in the text. Second, the level of the commitments will be studied, analysing the depth of the core substantive commitments imposed on the signatory Parties. An important aspect of the comparative analysis will be the reference to ILO Core obligations, mainly the labour rights commitments covered in the ILO 1998 Declaration on Fundamental Principles and Right to Work. Moreover, the presence of additional substantive commitments will be taken into consideration, referring to clauses on corporate social responsibility, gender equality in the workplace, and the protection of migrant workers. Afterward, the analysis will move on to the mechanisms available for enforcing the labour commitments in the agreement, precisely the design of the dispute settlement systems and its channels for institutional cooperation among the Parties.

2.1 USMCA Coverage and the Reference to ILO Core Conventions

With a view to deepening the knowledge of the USMCA's regulatory design of labour protection, the first step of this paper's analysis will focus on the coverage of USMCA Chapter 23. Five main areas of labour considerations define the coverage of the USMCA provisions, as introduced in the 'Definitions' of Article 23.1 and reaffirmed in the commitments set forth in Article 23.3 on 'Labor Rights'. The core areas of labour protection explicitly guaranteed are the following: (1) the protection of freedom of association and the right to collective bargaining; (2) the elimination of all forms of forced or compulsory labour; (3) the abolition of child labour, and labour protections for children and minors; (4) the elimination of discrimination in respect of employment and occupation; and (5) the protection of acceptable conditions of work with respect to minimum wages, and occupational safety and health.

In terms of areas of coverage, the USMCA does not seem to deviate from the scope of labour protection previously established in the NAFTA framework and in more recent US PTAs. First, there is a strong similarity between the labour issues explicitly covered in USMCA Chapter 23 and the list of 11 'Labor Principles' as clarified in NAALC Annex 1. NAALC Annex 1 includes a specific reference to freedom of association and the protection of the right to collective bargaining, prohibition of forced labour and child labour, along with the elimination of employment discrimination on the basis of race, religion, age, sex, or other grounds, and the guarantee of equal pay for

men and women.²⁴ Second, even more evident similarities can be observed in the case of the TPP agreement. The coverage in the labour protection reached under USMCA Chapter 23 appears to be a precise transposition of the definition of the scope of TPP Chapter 19, entirely dedicated to the protection of workers' rights. TPP Article 19.3 identifies the exact same five areas of labour rights as stated in USMCA Article 23.3 as the main content of its labour commitments.

It is interesting to note that these five core areas of labour rights included in the definition of the coverage in the USMCA (in Articles 23.1 and 23.3) and the TPP (in Articles 19.1 and 19.3) agreements refer to the fundamental principles and rights at work officially recognized in the ILO Declaration on Fundamental Principles and Rights at Work (1998).²⁵ Both the USMCA and TPP agreements explicitly include a reference in the text to the 1998 ILO Declaration on Rights at Work.

However, the reference to international instruments of labour rights and, in particular, to the 1998 ILO Declaration on Rights at Work represent one of the major differences with the NAFTA framework and the less recent US PTAs. It was only after the signature of the 2009 US–Chile PTA that international standards of labour rights protections began to be explicitly included in US PTAs.²⁶ Previous agreements were modelled around the commitment to 'enforce your own domestic laws', a cornerstone in the NAALC's labour rights commitments. The lack of any reference to international labour standards was due to the omission of the United States' ratification of many ILO Core Conventions and other international standards of workers' rights.²⁷

In the USMCA text, the importance of international standards of labour rights is also reaffirmed in Article 23.2 on 'Statement of Shared Commitments', referring to the 2008 ILO Declaration on Social Justice for a Fair Globalization, something that represents an innovation if compared to the TPP.²⁸ However, USMCA Article 23.3 makes it clear that the binding commitments imposed on the USMCA Parties only refer to the 1998 ILO Declaration on Rights at Work. It is interesting to note that the scope of the 2008 ILO Declaration on Social Justice is

²⁴More precisely, the NAALC already included gender-specific labour commitments aimed at the elimination of employment discrimination based on sex (in NAALC Article 7) and with the objective of ensuring equal pay for women and men (in NAALC Article 8).

²⁵The ILO Declaration on Fundamental Principles and Rights at Work (1998) advocates the protection of the following core principles (Article 2): freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation. These fundamental principles are embodied in eight core ILO Conventions, as identified by the ILO Governing Body: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Right to Organise and Collective Bargaining Convention, 1949 (No. 98), Forced Labour Convention, 1930 (No. 29) (and its 2014 Protocol), Abolition of Forced Labour Convention, 1957 (No. 105), Minimum Age Convention, 1973 (No. 138), Worst Forms of Child Labour Convention, 1999 (No. 182), Equal Remuneration Convention, 1951 (No. 100), and Discrimination (Employment and Occupation) Convention, 1958 (No. 111). The text of the 1998 ILO Declaration is available at www.ilo.org/declaration/thedeclaration/textdeclaration/lang-en/index.htm. For a more extensive analysis of the 1998 ILO Declaration, see Kaufmann, C. (2007) *Globalisation and Labour Rights: The Conflict between Core Labour Rights and International Economic Law*. Hart Publishing.

²⁶All the PTAs signed during the Obama Administration (namely the PTAs with Colombia, the Republic of Korea, Panama, and Peru) have highlighted the binding requirement to adopt and to respect the labour rights in the 1998 ILO Declaration on Fundamental Principles and Rights at Work. For more information, see Elliott, K.A. (2011) 'Labor Rights', in J.P. Chauf and J.C. Maur (eds.), *Preferential Trade Agreement Policies for Development: A Handbook*. Washington DC: World Bank, 431.

²⁷Elliott, K.A. (2012) 'Labour Standards and the TPP', in C.L. Lim, D.K. Elms, and P. Low (eds.), *The Trans-Pacific Partnership: A Quest for a Twenty-first Century Trade Agreement*. Cambridge: Cambridge University Press, 204. Weissbrodt, D. and M. Mason (2013) 'Compliance of the United States with International Labor Law', *Minnesota Law Review* 98, 1842.

²⁸The 2008 ILO Declaration on Social Justice for a Fair Globalization reaffirms the values included in the 1998 Declaration and advocates for the promotion of a fair globalization based on the concept of 'Decent Work'. More precisely, it encourages ILO Member states to develop their own economic policies based on four strategic objectives, "employment, social protection, social dialogue, and rights at work" in an integrated manner (Article I). The text of the 2008 ILO Declaration is available at www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_371208.pdf. See Maupain, F. (2009) 'New Foundation or New Façade? The ILO and the 2008 Declaration on Social Justice for a Fair Globalization', *European Journal of International Law* 20, 823–852.

considerably broader if compared to the 1998 Declaration.²⁹ Compared to the 1998 ILO Declaration on Rights at Work, the 2008 ILO Declaration on Social Justice embraces a wider range of ILO Core Conventions, not all ratified by the United States. The 2008 ILO Declaration on Social Justice emphasizes the importance of the following additional ILO Conventions as a governance priority for the Signatory Parties: the Labour Inspection Convention, 1947 (No. 81), the Employment Policy Convention, 1964 (No. 122), the Labour Inspection (Agriculture) Convention, 1969 (No. 129), and the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144). Of those ILO Conventions, the US is a Signatory Party only of ILO No. 144 Convention, having yet to express the intention to ratify any of the others.³⁰

In terms of coverage of substantive standards, the EU trade agreements also seem to generally converge their system of labour protection around the core principles included in the 1998 Declaration on Fundamental Principles and Rights at Work, and beyond the ILO Conventions covered by the Declaration.³¹ Together with the 1998 ILO Declaration, CETA binds its Parties to the promotion of the objectives set out in the ILO Decent Work Agenda, in accordance with the 2008 ILO Declaration on Social Justice for a Fair Globalization (CETA Article 23.3). Moreover, the EU–Mexico Agreement pays particular attention to the implementation of the 2008 ILO Declaration on Social Justice for a Fair Globalization, requiring the Parties to promote its compliance (Article 3.8) and not to derogate from its fundamental principles for protectionist purposes (Article 3.7).³² Moreover, both the agreements push their commitments to respect the ILO labour standard even further by requiring their Parties ‘to make continued and sustained efforts to ratify the fundamental ILO Conventions if they have not yet done so’ (CETA Article 23.3.4 and EU–Mexico Article 3.4). For an overview, see [Figure 1](#).

Moreover, in addition to these five core areas of labour commitments, additional labour concerns are included within the scope of the USMCA, such as the guarantee of acceptable working conditions and minimum wages, the acknowledgement of the vulnerability of migrant workers (in Article 23.8), the importance of eliminating discrimination on the basis of sex, the promotion of gender equality in the workplace in Article 23.9, and the protection of migrant workers.³³ These additional labour concerns were already included in the extensive list of ‘Labor Principles’ guaranteed in the NAALC. The only area of labour concern highlighted in the USMCA provisions but not expressly mentioned in the NAALC text appears to be violence against workers, as later reaffirmed in the USMCA commitments.

These additional labour concerns included in the USMCA’s coverage were also present in the TPP context: the goal of eliminating forced and compulsory labour (in TPP Article 19.6), and the elimination of discrimination in respect of employment and occupation for migrant workers (in

²⁹For more information, see www.ilo.org/global/about-the-ilo/mission-and-objectives/WCMS_099766/lang--en/index.htm.

³⁰For an overview of the ILO Conventions ratified by the United States, see www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102871.

³¹The first EU agreement making explicit reference to the ILO core labour standards is the 1999 FTA signed with South Africa, introducing an approach consistently followed in the subsequent PTAs. Harrison J., M. Barbu, L. Campling, F.C. Ebert, D. Martens, A. Marx, J. Orbie, B. Richardson, and A. Smith (2019) ‘Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission’s Reform Agenda’, *World Trade Review* 18, 635, 638–39.

³²Article 3.7 of the EU–Mexico Agreement states that ‘Recalling the ILO Declaration on Social Justice for a Fair Globalisation of 2008, the Parties note that the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage and that labour standards should not be used for protectionist trade purposes.’

³³The protection of migrant workers was already highlighted in the NAFTA system of labour protection, in Annex 1.11, invoking the Parties to provide ‘migrant workers in a Party’s territory with the same legal protection as the Party’s nationals in respect of working conditions’, contrary to its characterization as a completely new provision in the USMCA’s evaluation by the USTR in April 2019. US International Trade Commission, ‘US–Mexico–Canada Trade Agreement: Likely Impact on the US Economy and on Specific Industry Sectors’, April 2019, Publication Number 4889, Investigation Number TPA 105-003, www.usitc.gov/publications/332/pub4889.pdf.

| ILO CONVENTIONS AND RIGHTS RECOGNISED | COVERAGE IN PTAs |
|---|---|
| <p>The 1998 ILO Declaration of Rights to Work recognises:</p> <ul style="list-style-type: none"> - Freedom of association and right to collective bargain; - Elimination of forced or compulsory labour; - Abolition of child labour; - Elimination of discrimination in respect to employment and occupation. | <p><u>NAFTA Annex 1 Labour Principles = NO reference to the 1998 ILO Declaration but recognition of:</u></p> <ul style="list-style-type: none"> - 4 fundamental principles on right to work; - Equal pay for man and women; - Minimum employment standards; - Prevention of occupational injuries and illness; - Protection of migrant workers. <p><u>TPP and USMCA Agreements = Explicit reference to the 1998 ILO Declaration:</u></p> <ul style="list-style-type: none"> - 4 fundamental principles on right to work; - Acceptable working conditions with minimum wages and occupational safety and health. <p><u>CETA and the EU-Mexico Agreement = Explicit reference to the 1998 ILO Declaration.</u></p> |
| <p>The 2008 ILO Declaration on Social Justice for a Fair Globalization:</p> <ul style="list-style-type: none"> - Reaffirms the values included in the 1998 Declaration; - Encourages to develop their own economic policies based on four strategic objectives: 1. employment, 2. social protection, 3. social dialogue, and 4. the right to work in an integrated manner. | <p><u>NO Explicit Reference in the TPP.</u></p> <p><u>Reference in the USMCA text but excluded from the binding commitments.</u></p> <p><u>Implementation of the 2008 ILO Declaration required in both CETA and EU-Mexico Agreement.</u></p> |

Figure 1. Substantive coverage and the ILO declarations

TPP Article 19.10). A few discrepancies, however, are noted in the coverage of the USMCA and the TPP. On the one hand, no reference is made to violence against workers under TPP Chapter 19, and the concerns over gender equality in the workplace are only briefly mentioned as an area of future cooperation between the TPP Parties (in TPP Article 19.10.6(n)(ii)). On the other hand, an increasingly important concern of labour protection included in the TPP appears to be missing from the USMCA: the reference to corporate social responsibility (CSR), as will be explained further below.

2.2 Core Substantive Commitments and the Level of Labour Protection Guaranteed in the USMCA

In terms of its substantive commitments, the text of the USMCA seems to depart from the standards of labour protection set in NAFTA and embraces the regulatory achievements of labour protection reached in the more recent US PTAs.

There are two binding provisions in the USMCA that define the core commitments of labour protection: namely USMCA Article 23.3 and Article 23.4. Article 23.3 requires that each USMCA Party not only adopts and maintains their respective national regulations of labour protection, but also ensures compliance with the 1998 ILO Declaration on Rights at Work.³⁴ As analysed

³⁴The standards of labour protection linked to international standards of labour rights extends to all areas of labour rights covered by the USMCA provision, apart from the respect of minimum wages. Article 23.3 paragraph 2 reserves the right to ‘adopt and maintain status and regulations ... governing with respect to minimum wages, hours of work, and occupational safety and health’ without making any reference to international instruments of labour protection.

before, Article 23.3 establishes an explicit link between the USMCA and international instruments of labour rights, incorporating them into the core of the USMCA commitments.³⁵ Together with Article 23.3, the second binding core commitment is a non-derogation obligation. Article 23.4 binds the Parties to refrain from either weakening or derogating from the enforcement of their domestic or international labour regulations within the scope of encouraging trade and investment.

Now let us compare this to the NAALC. The NAALC simply required the Parties to ‘ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light’, as stated in NAALC Article 2. The wording of the NAALC commitment did not define the meaning of ‘high labor standards’, referring only to the respect of domestic labour regulations without mentioning international conventions. As specified in Annex 1, the guiding principles included in the NAALC are ‘subject to each Party’s domestic law, but do not establish common minimum standards for their domestic law’. Moreover, a non-derogation obligation was not included in the NAALC text. The wording of the core NAALC provisions confirmed its main objectives as to monitor the implementation of the domestic labour law and to prevent abuse, refraining from establishing new regulatory standards or advocating for a harmonization of the labour regulations among the Parties.³⁶

If the two main USMCA commitments of Articles 23.3 and 23.4 represent a significant evolution when compared to the NAFTA standards, these provisions do not depart from the regulatory standards reached in recent US PTAs and they literally replicate the wording of the TPP. TPP Article 19.3 and Article 19.4 establish the exact same standards of protection with identical language. In other words, the legal innovation of these provisions is quite limited.

However, aside from the striking similarities with the most recent US PTAs, the USMCA text introduces important innovations in the regulatory standard of labour protection by providing important clarifications of these crucial commitments. More precisely, the footnotes added to Articles 23.3 and 23.4 clarify the scope and the standards needed to prove a violation of these provisions. It is interesting to note that the inclusion of these clarifications is something that has emerged only later in the USMCA negotiating history and in the Protocol of Amendment signed by the US, Canada, and Mexico on 10 December 2019, stemming from the discussion on the ratification process in the US Congress.³⁷

More precisely, two are the most relevant clarifications introduced in the Protocol of Amendment. First, the revised USMCA text commits the Parties to not violate and to not derogate from enforcing domestic and international labour protection regulations ‘in a manner affecting trade or investment between the Parties’. Footnote 4 of Article 23.3 and footnote 8 of Article 23.4 clarify that the impact on cross-border trade and investment for failing to comply with the labour provisions can be attributed to two separate circumstances: (1) a person or industry producing goods or supplying services across USMCA Parties, together with a person and industry conducting investments in the territory of the USMCA Parties; and (2) a person or an industry that produces goods or supplies services in competition with the goods and services of another Party.

The second significant improvement consists of shifts in the burden of proof of the core labour protection provisions. According to the footnotes of Article 23.3 and Article 23.4, a violation of Articles 23.3 and 23.4 and its effects on trade and investment are always presumed unless proven

³⁵Even if the Declaration itself does not impose binding commitments, the provision in Article 23.3 USMCA requires that the Parties ‘shall adopt and maintain in its statutes and regulations, and practices thereunder’ in conformity with the ILO Declaration on Rights at Work and making the rights covered fully enforceable.

³⁶Hufbauer, G.C. and J.J. Schott (2005) *NAFTA Revisited: Achievements and Challenges* (PIIE), 120.

³⁷US Congressional Research Service, *SMCA: Amendment and Key Changes*, 30 January 2020, <https://crsreports.congress.gov/product/pdf/IF/IF11391>. accessed 3 March 2020

otherwise by the responding Party. Moreover, the footnotes of Articles 23.3 and 23.4 should be read in conjunction with the text of USMCA Article 23.5 devoted to the ‘Enforcement of Labor Laws’, having footnotes with identical text, which further explained below in this article.

In terms of similarities in their core commitments, the respect of international instruments of workers’ rights protection and the non-derogation obligation also represent the two cornerstones of the level of labour protection in EU PTAs, particularly in those agreements concluded with USMCA countries. However, it is interesting to note the difference with the formulation of the non-derogation obligation between the EU and the US model of PTAs. While the CETA (Article 23.4) and the EU–Mexico Agreement (Article 2 XY)³⁸ clarify that the commitment of non-derogation has three distinctive dimensions. Broader than the obligation in the USMCA which only commits the Parties to not weaken the level of labour protection, the EU agreements also require refraining from waiving or derogating from labour standards and requires that no Party shall fail to enforce labour laws ‘in order to encourage trade or investment’.

2.3 Additional Substantive Commitments and Their Clarifications in the USMCA Text

In addition to the standards of protection established in the core provisions of Articles 23.3 and 23.4, the regulatory content of the USMCA includes additional labour obligations, which have no similar reference in the EU PTAs considered.

The strongest of these additional commitments is stated in USMCA Article 23.6: it imposes a ban on the import of goods that have been wholly or partly produced using forced or compulsory labour. The provision asks the USMCA Parties to also establish mechanisms of cooperation between them to identify such goods. In its wording, USMCA Article 23.6, as revised in the December 2019 Protocol of Amendment, pushes forward the commitments already included in the TPP but framed in a much softer language.³⁹ The Protocol of Amendment strengthens the obligation to block access to imported goods produced using forced or compulsory labour and imposes a stronger obligation of results. The revised Article 23.6 removes the original text that reads ‘through measures it considers appropriate’ as also appearing in the TPP, reducing the margin of discretion left for the Parties.

Together with the efforts to eradicate forced labour, the importance of establishing between the Parties an environment free from violence, threat, and intimidation against workers is stressed in USMCA Article 23.7. USMCA Article 23.7 appears to be a genuinely new provision requiring the Parties to address violence, together with threats of violence, against workers that could have a potentially negative impact on trade and investment. Violence against workers is not a labour concern that frequently appears in US PTAs: neither the NAALC text nor more recent US PTAs like the US–CAFTA or the TPP mention any concern about violence against workers, and the only precedent can be found in the text of the US PTAs with Colombia and Guatemala. Moreover, it is worth noting that this provision has also been modified in the Protocol of Amendment in order to strengthen its enforcement (as shown in [Figure 2](#) below). The original language that required a Party to prove ‘a sustained or recurring’ pattern of violation has been removed and the burden of proof is also shifted, presuming that a violation of this provision always affects trade unless proven otherwise by the responding Party.

³⁸In April 2018, the EU and Mexico reached an ‘agreement in principle’ on the agreement that will replace the existing EU–Mexico Global Agreement. The published text may be subject to further modification and negotiations, and it does not provide the exact numbering of the provisions. The text of the Agreement in principle can be accessed at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1833>.

³⁹Instead of a ban, as imposed in USMCA Article 23.6, TPP Article 19.6 merely invites the Party to ‘discourage, through initiatives that it considers appropriate, the importation of goods from other sources produced in whole or in part by forced or compulsory labour’.

| USMCA ARTICLES AMENDED | CHANGES INTRODUCED |
|--|---|
| Articles 23.3 “ <i>Labor Rights</i> ” and 23.4 “ <i>Non-Derogation</i> ” | Clarification of “ <i>in a manner affecting trade and investment</i> ”. + Shift in the burden of proof, presuming that a violation of these provisions always affects trade unless proven otherwise. |
| Article 23.5 “ <i>Enforcement of Labor Law</i> ” | Shift in the burden of proof, presuming that a violation of these provisions always affects trade unless proven otherwise. |
| Article 23.6 “ <i>Forced or Compulsory Labor</i> ” | Removes the language “ <i>through measures it considers appropriate</i> ”, reducing discretion in the enforcement of the ban on the import of goods produced with forced labour. |
| Article 23.7 “ <i>Violence Against Workers</i> ” | Removes the language that required that a Party should prove “ <i>a sustained or recurring</i> ” pattern of violation; + Shift in the burden of proof, presuming that a violation of this provision always affects trade unless proven otherwise. |
| Article 23.17 “ <i>Labor Consultations</i> ” | Minor text deletion. |
| Annex 31.A and 31.B to Chapter 31 on Dispute Settlement | Establishment of a “ <i>Facility-Specific Rapid Response Labor Mechanism</i> ” between the US and Mexico and between Canada and Mexico. |

Figure 2. Key Changes Introduced in the Protocol of Amendment of December 2019

Finally, USMCA Article 23.9 includes a commitment of non-discrimination in the workplace within the USMCA regulatory framework. Article 23.9 encourages the Parties to implement specific policies to protect female workers against employment discrimination and wage discrimination ‘on the basis of sex (including with regard to sexual harassment), pregnancy, sexual orientation, gender identity, and caregiving responsibilities’.⁴⁰ Promoting gender equality has become a core priority in most recent EU trade agreements and in Economic Partnership Agreements on the basis of the EU’s commitments undertaken within the ILO framework to eradicate gender discrimination.⁴¹ It is worth noting that the EU Commission regularly conducts sustainability impact assessments (SIA) on trade negotiations, taking into serious consideration the impact of EU PTAs on gender issues.⁴²

However, an increasingly important additional substantive labour concern, traditionally present in the EU PTAs but lacking in the text of the USMCA, is the reference to CSR commitments. Provisions encouraging the Parties to adopt CSR initiatives aimed at strengthening the respect of labour rights by corporations (as stated in TPP Article 19.7) are not found frequently in the

⁴⁰The inclusion of provisions on gender equality represents an emerging trend in the negotiation of modern PTAs, particularly evident in PTAs signed by the EU. Monteiro, J.A. (2018) ‘Gender-Related Provisions in Regional Trade Agreements’, WTO Staff Working Paper ERSD-2018-15, 18 December 2018, www.wto.org/english/res_e/reser_e/ersd201815_e.pdf.

⁴¹EU Directorate General for Internal Policies, *Gender Equality in Trade Agreements*, 2016, www.europarl.europa.eu/supporting-analyses.

⁴²The SIA report related to the CETA found positive improvements in the working conditions of women in the sectors of agriculture and textiles as a result of the agreement, while the SIA related to the previous EU–Mexico Agreement found in the long run a positive link between trade liberalization and the decrease of gender discrimination in various industries. Ibid.

labour chapters of US trade agreements.⁴³ The EU and Canada have traditionally been proponents of the inclusion of CSR clauses in their PTAs, and the reference to CSR and the sustainable management of the supply chain has been a constant of the EU model of PTAs since the 2008 EU–CARIFORUM Economic Partnership Agreement.⁴⁴ In particular, the EU–Mexico Agreement dedicates Article 9 of its ‘Trade and Sustainable Development’ chapter to the management of responsibility in the supply chain, in order to support the promotion of international CSR instruments, such as the OECD Due Diligence Guidance. However, the US approach to the inclusion of CSR clauses has been inconsistent over time, overall preferring to include CSR obligations only in the environmental chapters of its PTAs.⁴⁵ The text of the USMCA confirm this tendency (including a reference to CSR only in Article 24.13), marking a significant change with the TPP text.⁴⁶

3. Enforcement under the USMCA and Its Innovative Dimension

In the literature thus far, different approaches have been developed to study and categories the enforcement mechanisms in PTAs.⁴⁷ This article directs attention to three dimensions of the implementation of labour protection in PTAs, particularly evident in the US model of trade agreements: a judicial dimension, an institutional dimension, and a conditional dimension.

An institutional framework of cooperation among the signatory Parties could be strengthened by a judicial dimension, with the possibility of recourse to a formal dispute settlement mechanism for the violation of the labour commitments. The enforceability of the labour obligations via a formal dispute settlement mechanism is one of the most distinct characteristics of the US PTAs, described as a ‘conditional approach’ to labour enforcement, representing a major departure from the EU’s ‘promotional approach’ to the protection of labour rights, mainly focused on building mechanisms of state-to-state cooperation.⁴⁸ In addition, the practice of requiring additional conditions of labour protection during the negotiating phase of its PTAs as a condition for the US ratification of the trade agreement has been developed in the TPP.⁴⁹ This additional dimension of enforcement has been also included in the USMCA, imposing a pre-ratification conditionality and a post-ratification enforcement to implement specific domestic reform of labour protection in Mexico in different Annexes.

The USMCA’s regulatory design embraces all three dimensions in a complex enforcement architecture of labour protection. Moreover, the enforcement of USMCA Chapter 23 has assumed a central importance in both the negotiation and ratification processes of the USMCA, subjected to significant reform in the Protocol of Amendment.

⁴³Ariyaratne, N. (2016) ‘The Trans-Pacific Partnership – A Bane or Boon to Corporate Social Responsibility?’, Victoria University of Wellington Legal Research Paper, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875152.

⁴⁴Borlini, L.S. ‘The EU’s Promotion of Human Rights and Sustainable Development through PTAs As a Tool to Influence Business Regulation in Third Countries’, *Transnational Law and Governance*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3287442.

⁴⁵Together with the TPP, CSR clauses are included in the annexes of labour cooperation observed in the US agreements with Chile (2004), Peru (2009), and Colombia (2012). Peels, R., M.E. Echeverria, J. Aissi, and A. Schneide (2016) ‘Corporate Social Responsibility in International Trade and Investment Agreements: Implications for States, Business and Workers’, ILO Research Paper RP/013, 29 April 2016, www.ilo.org/global/research/publications/papers/WCMS_476193/lang-en/index.htm.

⁴⁶The CSR clause in the TPP, even if still a soft law provision, strengthens the language from ‘should encourage’ to ‘shall endeavour to encourage’ the adoption of labour CSR initiatives by firms among the Signatory Parties. Ibid.

⁴⁷Claussen, K. (2020) ‘Reimagining Trade-Plus Compliance: The Labor Story’, *Journal of International Economic Law* 23, 25–43.

⁴⁸Harrison, J., M. Barbu, L. Campling, F.C. Ebert, D. Martens, A. Marx, J. Orbie, B. Richardson, and A. Smith (2019) ‘Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission’s Reform Agenda’, *World Trade Review* 18(4), 641.

⁴⁹Vogt, J.S. (2015) ‘The Evolution of Labor Rights and Trade – A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership’, *Journal of International Economic Law* 18, 827.

3.1 Lessons from the CAFTA Dispute and the Innovation in the USMCA Protocol of Amendment

USMCA Article 23.5 is the key provision defining the legal grounds for the judicial enforceability of the provisions in USMCA Chapter 23. USMCA Article 23.5 requires that no Party shall fail to ‘effectively enforce its labor laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties’. Overall, USMCA Article 23.5 mostly replicates the wording of TPP Article 19.5. However, the improvements reached in the Protocol of Amendment considerably increase the clarity of its wording. More precisely, three footnotes considerably improve the enforceability of Article 23.5. First, footnote 10 of Article 23.5 clarifies that a ‘sustained or recurring course of action or inaction’ is “sustained” if the course of action or inaction is consistent or ongoing, and is “recurring” if the course of action or inaction occurs periodically or repeatedly’, but it excludes isolated instances or cases. Second, footnote 11 of USMCA Article 23.5 provides much-needed guidance in the interpretation of the link between action and inaction in the enforcement of labour provisions and its impact ‘in a manner affecting trade and investment between the Parties’.⁵⁰ Finally, footnote 12 is added to the Protocol of Amendment, shifting the burden of proof and presuming that a violation of Article 23.5 always affects trade unless proven otherwise by the responding Party.⁵¹

So far, neither a previous US PTA nor any EU PTA has ever provided any guidance on how to determine the effect on trade of a failure to implement labour standards. The difficulties in interpreting and proving this standard have long undermined the concrete possibility of challenging violations of labour commitments and proving the negative impact on trade dynamics.⁵² It has been argued that these genuinely innovative introductions and clarifications build on the conclusions reached in the dispute that arose between the US and Guatemala under the US–Central America (CAFTA) agreement, the only dispute thus far addressing a labour right violation under a US PTA dispute settlement mechanism.⁵³ This confirms the theorization of the introduction of legal innovation in trade agreements that postulates that learning and innovative legal solutions can result from feedback from various mechanisms, in particular dispute rulings.⁵⁴ The US has been described as a leading example of a country that turned learning from trade disputes into legal innovation in its PTAs, and the innovative features of the USCMA confirm that.

A crucial aspect of the US–CAFTA–DR–Guatemala dispute consisted in the interpretation of the expression ‘in a matter affecting trade between the Parties’.⁵⁵ The Panel required a three-step analysis to prove that a violation of labour rights was ‘in a manner affecting trade’, based on the

⁵⁰According to footnote 11 of USMCA Article 23.5, the impact on cross-border trade and investment for failing to comply with the labour provisions can be attributed to two separate circumstances: 1) a person or industry producing goods or supplying services across USMCA Parties, together with a person or industry conducting investments in the territory of the USMCA Parties; and 2) a person or an industry that produces goods or supplies services in competition with the goods and services of another Party.

⁵¹As resulting from the Protocol of Amendment, footnote 12 of Article 23.5 mirrors the similarly introduced footnotes in Article 23.3 and 23.4 and specifies that ‘for purposes of dispute settlement, a panel shall presume that a failure is in a manner affecting trade or investment between the Parties, unless the responding Party demonstrates otherwise’.

⁵²Araujo, B.M. (2018) ‘Labour Provisions in EU and US Mega-Regional Trade Agreements: Rhetoric and Reality’, *International and Comparative Law Quarterly* 67(1), 238.

⁵³The dispute was initiated by the US against Guatemala on the grounds of lack of enforcement of labour rights and widespread violence against workers. The Arbitration Panel concluded that even though Guatemala failed to effectively enforce its labour laws, the failure was not ‘in a manner affecting trade’ and thus not in violation of CAFTA obligations. Compa, L. (2019) ‘Trump, Trade, and Trabajo: Renegotiating NAFTA’s Labor Accord in a Fraught Political Climate’, *Indiana Journal of Global Legal Studies* 26, 263.

⁵⁴Gómez-Mera, L. and A. Molinari (2013) ‘Overlapping Institutions, Learning, and Dispute Initiation in Regional Trade Agreements: Evidence from South America’, *International Studies Quarterly* 58(2), 269. See also Morin, J.F., J. Pauwelyn, and J. Hollway ‘The Trade Regime as a Complex Adaptive System’, 370.

⁵⁵In the dispute, the US was requesting that the impact of the violation or the non-enforcement of labour rights on the competitive advantage should be based on an econometric analysis of the cost of non-compliance and the resulting effect on the comparative advantage, while Guatemala was supporting the introduction of a cause–effect test. Gyanchandani, V. (2018) ‘Soft vs Hard Governance for Labour and Environmental Commitments in Trade Agreements: Comparing the

competitive relation in the market, on the effect of the non-enforcement of the rights on the relevant market, and on the competitive advantage resulting from it for a single company. Thanks to the shift in the burden of proof in footnote 12 of USMCA Article 23.5, the complainant Party is no longer required to prove that the violation of the labour provisions had an impact on the competitive conditions of the market. This radically increases the chances to effectively challenge a violation of labour rights, reducing the legal barriers to bring a claim against a government omission, as it has been convincingly argued that ‘substantiating a comparative advantage to a single foreign company on the basis of a set of highly discrete government omission is practically impossible’.⁵⁶ However, the shift in the burden of proof simply does not eliminate the evidentiary and legal barriers implied in these types of labour claims under a trade-related dispute settlement mechanism, but rather simply imposes them on to the responding Party, rendering it difficult to build a convincing defence.

In cases of a violation of the USMCA provisions on labour protection ‘in a manner affecting trade’ in the light of Article 23.5, the Parties have recourse to the dispute settlement detailed in USMCA Chapter 31. Following the approach established in the May 10th Agreement and then included in the TPP, Chapter 23 is subject to the same dispute settlement mechanism applicable to all other commercial disputes arising from the wording of the USMCA.⁵⁷ The May 10th Agreement was a bipartisan accord reached in 2007 between the G.W. Bush administration and Democrats in Congress that introduced influential innovation in the model of labour protection in US PTAs, and was implemented in the US PTAs with Panama, Peru, and South Korea, and culminated in TPP Chapter 19.⁵⁸ The May 10th Agreement asks for the addition of references to ILO standards and the prohibition from lowering labour protection, and it requires the same dispute settlement mechanisms to be available for other FTA obligations regarding violations of labour provisions.⁵⁹ Closely similar to the TPP, the USMCA provides a mix of ‘consultations at the ministerial level, national contact points for each country, and a standing council to facilitate a cooperation agenda’.⁶⁰ In the event of the failure to hold consultations within 30 days (set forth in Article 23.17),⁶¹ the Parties can resort to USMCA Chapter 31, which establishes a binding mechanism of state-to-state dispute settlement applicable to all disputes concerning the interpretation and application of the USMCA provisions and violations thereof. USMCA Chapter 31 includes specific provisions to address the peculiarity of disputes involving labour protection arising from Chapter 23.⁶² According to Article 31.8 para. 3, for a dispute arising under Chapter 23 each disputing Party shall select a panellist ensuring that ‘panelists other than the chair shall have expertise or experience in labor law or practice’. The formation of

US and EU Approaches’, CTEI Working Papers CTEI-2018-08, 21–22, <https://repository.graduateinstitute.ch/record/296837?ln=en>.

⁵⁶Claussen ‘Reimagining Trade-Plus Compliance’, 12.

⁵⁷Similarly to the USMCA Chapter 24 on Environmental Protection.

⁵⁸Destler, I.M. (2007) ‘American Trade Politics in 2007: Building Bipartisan Compromise’, PIIE Policy Brief 07-5 (May 2007), Peterson Institute for International Economics, Washington, DC, www.piie.com/sites/default/files/publications/pb/pb07-5.pdf.

⁵⁹Bolle, B.J. (2016) ‘Overview Of Labor Enforcement Issues in Free Trade Agreements’, Congressional Research Service, CRS Report RS22823, Report for Congress, Washington, DC, http://digitalcommons.ilr.cornell.edu/key_workplace/492/.

⁶⁰Cimino-Isaacs, C. (2016) ‘Labor Standards in the TPP’, in J.J. Schott and C. Cimino-Isaacs (eds.), *Trans-Pacific Partnership: An Assessment*. Washington, DC: Peterson Institute for International Economics, 276.

⁶¹Confidential labour consultations should be initiated no later than 30 days (Article 23.17 para. 3) after the delivery of a written request to the responding Party’s contact point (Article 23.17 para. 2). The consultations can involve independent experts (Article 23.17 para. 4) or a request for the intervention of the relevant Ministers of the consulting Parties (Article 23.17 para. 5).

⁶²According to USMCA Article 31.8, to address the disputes arising from a violation of the USMCA agreement, the Parties shall appoint by consensus a “roster of up to 30 individuals who are willing to serve as panelists”. For further information on the discussion on the roster in the USMCA dispute settlement mechanism, see <https://worldtradelaw.typepad.com/ielpblog/2019/03/usmca-article-318-roster.html>.

the panellist roster under the USMCA has been described as an attempt to reform the judicial enforcement of labour rights in the CAFTA dispute adjudicated by a panel comprising only trade lawyers without any expertise in labour law.⁶³

The mechanism of judicial enforcement available to penalize violations of the labour commitments in the USMCA represents a major improvement compared to the dispute settlement mechanism established in the NAALC, described in the literature as one of the weaknesses in the NAALC's architecture of labour protection.⁶⁴ Wanted by the US Clinton Presidency but shaped by the political compromise at the time,⁶⁵ enforcement of the NAALC relied heavily on the Parties' responsibility to enforce their own labour laws and regulations.⁶⁶ The original scope of the NAFTA side agreement was 'to resolve issues in a cooperative manner; thus, it provides numerous opportunities for formal and informal cooperative consultations',⁶⁷ even including the possibility to trigger a NAALC dispute settlement process, requesting an Arbitration Panel, in case of the failure to hold consultations (NAALC Articles 29–41).

Moreover, the most significant achievement compared to the NAALC's design consisted of the USMCA's full enforceability under a single dispute settlement mechanism of all the labour provisions in the agreement, in line with the achievements of the May 10th Agreement and as embodied in the TPP text.

The most distinctive feature of the NAALC was the identification of different enforcement procedures for various categories of labour provisions. The NAALC's 11 labour principles were divided into three tiers: the first group (freedom of association, collective bargaining, and the right to strike) was only open for review by the National Administrative Offices and ministerial monitoring; the second group (covering forced labour, employment discrimination, and the protection of migrant workers) also allowed the review by a committee of experts, without the possibility of resorting to arbitration or penalties. Only the third group of labour principles could benefit from a dispute settlement mechanism in the form of an arbitration panel and the possibility of monetary retaliations. As a result, a formal dispute settlement subject to the application of sanctions was only allowed in the case of a Party's 'persistent pattern of failure ... to effectively enforce its occupational safety and health, child labor or minimum wage technical standards', as stated in NAALC Article 29. The unification of all the labour commitments under one dispute settlement mechanism definitively improved clarity, consistency, and transparency in the overall enforcement of the USMCA provisions.

As emerged in the literature, the enforcement of labour rights in a formal dispute settlement is probably the most remarkable difference between the US's 'conditional' approach, often described as a more stringent and coercive approach,⁶⁸ if compared to the 'promotional' approach followed by the EU in its preferential agreements.⁶⁹ EU PTAs do not subject

⁶³Compa, L. (2019) 'Trump, Trade, and Trabajo: Renegotiating NAFTA's Labor Accord in a Fraught Political Climate', *Indiana Journal of Global Legal Studies* 26, 263.

⁶⁴Smith, J.F., L.A. Compa, R.E. Herzstein, M.J. O'Neill, and J.F. Pérez-López (1995) 'Panel Discussion: The Challenges and Opportunities under the NAFTA Labor Cooperation Agreement', *US-Mexico Law Journal* 3, 149. <https://digitalrepository.unm.edu/usmexlj/vol3/iss1/16>.

⁶⁵Compa, L. (1994) 'Enforcing Worker Rights under the NAFTA Labor Side Accord', *Proceedings of the Annual Meeting American Society of International Law* 88, 535–540.

⁶⁶Bolle, M.J. (2016) 'Overview of Labor Enforcement Issues in Free Trade Agreements, Congressional Research Service', CRS Report RS22823, Report for Congress, Washington, DC, http://digitalcommons.ilr.cornell.edu/key_workplace/492/.

⁶⁷US National Administrative Office, 'North American Agreement on Labor Cooperation: A Guide', Bureau of International Labor Affairs, US Department of Labor, Washington, DC, October 2005, www.dol.gov/agencies/ilab/trade/agreements/naalcgd

⁶⁸Postnikov, E. and I. Bastiaens, 'Does Dialogue Work? The Effectiveness of Labor Standards in EU Preferential Trade Agreements', 923–940.

⁶⁹Ebert, F.C. and A. Posthuma (2011) 'Labour Provisions in Trade Arrangements: Current Trends and Perspectives', ILO International Institute for Labour Studies Working Paper, www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_192807.pdf.

sustainable and labour commitments to any form of dispute settlement, while providing a very strong emphasis on the cooperation between the Parties to enhance labour rights and sustainable development commitments. EU trade agreements generally rely on different types of institutional cooperation mechanisms, frequently involving civil society platforms and governmental experts.⁷⁰ The possibility of introducing a formal dispute settlement process has been discussed in the ongoing reform process of the EU model of Trade and Sustainable Development Agreements and started with the 2017 non-paper of the EU Commission.⁷¹ The idea of including sanctions and a more coercive enforcement of these provisions was excluded in the 2018 non-paper in the absence of a consensus.⁷² Regarding the specific dispute settlement mechanisms available, both the CETA and the EU–Mexico Agreement provide for only two types of dispute resolution mechanisms: consultations and the establishment of a panel of experts. Consultations should aim at achieving a mutually satisfactory resolution of the matter (according to CETA Article 23.9 and EU–Mexico Agreement Article 16.XY), but if this is not achieved within 90 days, both agreements allow for the possibility of establishing a panel of experts, which would issue a final report and suggest appropriate measures (according to CETA Article 23.10 and EU–Mexico Agreement Article 17.XY).

3.2 Pre-Ratification Conditionality in the USMCA of Mexico's Specific Commitments and Their Enforcement

In addition to judicial enforcement, the USMCA's labour protection design adds a conditional dimension, shaped around the TPP model of separate annexes addressing the reality of labour conditions in specific countries. One of the most distinctive features in the TPP was, in fact, the inclusion of annexes with special bilateral labour plans between the US and Vietnam, Brunei and Malaysia.⁷³ The TPP Annexes, requiring the contracting Parties to implement domestic reform of labour protection as a condition for the US ratification of the agreement, have been praised in the literature so far as important factors for the implementation of domestic legal reforms across countries with poor labour rights records, even before the agreement's formal entry into force.⁷⁴ Due to the significant domestic impact on the Parties involved, the US model of pre-ratification conditionality has also been taken into consideration in the reform process of the EU model of Trade and Sustainable Development Chapters.⁷⁵

Following a similar design to the TPP, the USMCA introduces Annex (23.A), specifically focused on the requirements of a domestic reform of the implementation of the right to collective bargaining in Mexico. The political relevance of the Annex has taken centre stage in the discussion for the ratification of the USMCA in the US Congress.⁷⁶ Setting up specific legal

⁷⁰Gyanchandanib, V., 'Soft vs Hard Governance for Labour and Environmental Commitments in Trade Agreements: Comparing the US and EU Approaches', 14–15.

⁷¹EU Commission, 'Non-paper of the Commission Services Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)', 11 July 2017, http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf, as reported in Harrison, J., M. Barbu, L. Campling, F.C. Ebert, D. Martens, A. Marx, J. Orbie, B. Richardson, and A. Smith (2019) 'Labour Standards Provisions in EU Free Trade Agreements', 647–648.

⁷²European Commission, 'Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements', 26 February, 2018, available at: http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf

⁷³After the US withdrew from the TPP, these countries refused to include these bilateral plans in the new CPTTP, as they were no longer under the US diplomatic pressure to proceed with their domestic labour law reforms.

⁷⁴Vogt, J.S., 'The Evolution of Labor Rights and Trade', 827.

⁷⁵Harrison, Barbu, Campling, Ebert, Martens, Marx, Orbie, Richardson, and Smith (2019) 'Labour Standards Provisions in EU Free Trade Agreements', 649.

⁷⁶In particular, the effective implementation of the high labor standards by Mexico and the possibility of their enforcement represented one of the most concerning aspects of the agreement for the US Democratic Party. Behsudi, A. and S. Rodríguez, 03/13/2019, www.politico.com/story/2019/03/13/trump-nafta-democrats-1268480

requirements, Annex 23.A prescribes a detailed reform of Mexican labour regulations to ensure the rights of workers to collective bargaining and the freedom of organization in labour unions (Article 2(a) Annex 23.A) in accordance with Mexico's Constitution. According to the outlined reforms, the Mexican government is required to have an efficient and transparent system for electing union leaders (Article 2(c)); the establishment of independent and impartial bodies for the election of union leaders and for the resolution of labour disputes (Article 2(b)); the revision of collective bargain agreements (Article 2(f)); and full transparency and publicity of these agreements (Article 2(g)). Moreover, this is made clear in Article 3 of Annex 23.A (b)), which provides that 'it is further understood that entry into force of this Agreement may be delayed until such legislation becomes effective'.

To address the concerns raised in the US Congress regarding the effective enforcement of Annex 23.A,⁷⁷ the Protocol of Amendment introduced two additional Annexes (namely 31.A and 31.B) at the end of USMCA Chapter 31 dedicated to its dispute settlement mechanism. These Annexes establish two bilateral 'Facility-Specific Rapid Response Labor Mechanism[s]', applicable only to the relations between Mexico and the US (in Annex 31.A) and between Mexico and Canada (in Annex 31.B). The Annexes set up a progressive series of responses and enforcement mechanisms to address a 'Denial of Rights' for workers employed in a 'Covered Facility' as defined in Article 31-A.15.⁷⁸ According to the definitions under Articles 31-A.2 and 31-B.2, the violation of the rights of free association and to collective bargaining can qualify as a 'Denial of Rights', triggering this additional enforcement mechanism. For this reason, if the inclusion of the obligations in Annex 23.A can be described as setting up the pre-ratification conditionality requirements imposed on Mexico, then the Rapid Response Mechanisms in Annexes 31.A and 31.B represent the additional post-ratification enforcement systems available for these obligations imposed on Mexico.

The inclusion of these two enforcement mechanisms, designed on the basis of progressive levels of responses, represents a significant innovation in the regulatory design of US PTAs. The first step of the Rapid Response Mechanism consists of the request to the respondent Party to conduct a domestic review and an on-site verification providing sufficient information (Articles 31-A.4 and 31-B.4). If the respondent Party refuses to conduct a domestic review or if there is no agreement between the respondent and the complainant Parties on their findings or the remediation, there is the possibility of requesting the establishment of a Panel (Articles 31-A.5 and 31-B.5). After having requested and conducted a verification in the respondent Party's Covered Facility, the Panel is expected to issue a decision within 30 days, also providing a recommendation on a course of remediation, if requested (Articles 31-A.8 and 31-B.8). The third and final stage of the Rapid Response Mechanism involves the possibility to impose remedies, following the determination of a Denial of Rights by the Panel. According to Articles 31-A.10 and 31-B.10, the remedies that could be imposed are a suspension of a preferential tariff treatment and the imposition of penalties on the goods and services provided in the Covered Facility.

In addition, Annexes 31.A and 31.B provide the possibility of linking an action under the Rapid Response Mechanism with the adjudication of a violation of labour commitments under the Chapter 31 Dispute Settlement Mechanism. The two mechanisms are not mutually exclusive, and they can follow and enforce one another. According to Articles 31-A.12 and 31-B.12, there is the possibility of an 'expansion of claims'. If one Party is found in violation of Articles 23.3 and 23.5 by a Panel established under Article 31.6, the complainant has two years to pursue the additional claims of a Denial of Rights following the procedures of the Rapid Response Mechanism,

⁷⁷US Congressional Research Service, 'USMCA: Labor Provisions' (10 January 2020), <https://fas.org/sgp/crs/row/IF11308.pdf>

⁷⁸According to Article 31-A.15 'Definitions', a Covered Facility is quite a broad concept, as it is intended as a 'facility in the territory of a Party that: (i) produces a good or supplies a service traded between the Parties; or (ii) produces a good or supplies a service that competes in the territory of a Party with a good or a service of the other Party, and is a facility in a Priority Sector'.

opening the possibility to broaden the challenges to labour rights violations under USMCA Chapter 23.

If the additional enforcement mechanisms introduce the possibility to effectively tackle specific violations of the labour commitments agreed in Annex 23.A, the design of the Rapid Response Mechanism is surrounded by many uncertainties. First, the verifications of the facilities that eventually could be required by the Panel under this mechanism could be described as ‘intrusive’. From a legal point of view, it is unclear whether these verifications will be subject to domestic law and if they would have subpoena powers over relevant documentation,⁷⁹ and Mexico has already voiced its refusal to be subject to these additional labour enforcement inspectors from other USMCA countries.⁸⁰ Very recently, Mexico has expressed serious concerns regarding the US legislation implementing the USMCA requiring five additional US Labor Department officials as attachés to the US Embassy in Mexico City, fearing that this implementation could be used for the sole purpose of activating the Rapid Response Mechanism.⁸¹

More concerns have been raised on the clarity of the concept of ‘Denial of Rights’, in particular in light of the interpretation of the expression ‘under law necessary to fulfill the obligations of the other Party ... under this Agreement ...’ as required in Article 31-A.2 and Article 31-B.2.⁸² Finally, the definition of a ‘Covered Facility’ is even more controversial, as it leaves doubts of possible double standards applicable to the Parties of the Annexes. The application of the mechanism to the US is limited to the possibility of claims only with respect to the US facility covered by a National Labor Relations Board-enforced order, while the same limitation does not apply to Mexican facilities. This clearly creates a double standard between the Parties, providing a considerable advantage for the US as it takes between 5 and 10 years for the US National Labor Relations Board to enforce an order through a US court of appeals not having independent power of enforcement.⁸³

Finally, it is interesting to note that the system of institutional cooperation for monitoring compliance with labour protection has been significantly simplified in the USMCA, if compared to the complex institutional architecture established under the NAALC. The institutional dimension of labour protection enforcement under the USMCA is developed around a system of Cooperative Labor Dialogue (defined in Article 23.13), a Labor Council (Article 23.14), and the central role of national contact points (Article 23.11). National contact points are responsible for evaluating written submissions from individuals, initiating the State-to-State communication of the Labor Dialogue, and assisting with the Labor Council’s work. The USMCA’s national contact points replace the National Administrative Offices (NAOs) at the core of the NAALC mechanisms of institutional cooperation and the implementation of labour provisions at a domestic level. However, contrary to the USMCA, which establishes a more unified system, each NAFTA Party had the autonomy to define the functions and the role of the NAOs, and this resulted in considerable differences between the functions of NAOs in Canada, the US, and Mexico.⁸⁴ The institutional system of State-to-State cooperation established in the USMCA significantly simplifies the NAALC architectural design of the Commission of Labor Cooperation and the functions of NAOs and of the NAALC Secretariat, which is no longer envisaged in the USMCA. Moreover, according to the ‘Protocol Replacing the North American Free

⁷⁹Hogan Lovells Publications, ‘USMCA’s Rapid-Response Labor Mechanism’, 7 February 2020, www.hoganlovells.com/en/publications/usmcas-rapid-response-labor-mechanism.

⁸⁰As reported in www.reuters.com/article/us-usa-trade-usmca-seade/mexico-will-never-accept-disguised-labor-inspectors-under-usmca-foreign-minister-idUSKBN1YJ0MJ.

⁸¹However, as clarified in the USTR Responds to Mexico on USMCA Implementation, the verifications required by the rapid response mechanism will only be conducted by the independent panelists, not by the labor attachés, <https://mx.usembassy.gov/ustr-responds-to-mexico-on-usmca-implementation/>.

⁸²Hogan Lovells Publications, ‘USMCA’s rapid-response labor mechanism’, 3.

⁸³www.nlr.gov/about-nlr/what-we-do/enforce-orders.

⁸⁴Hufbauer, G.C. and J.J. Schott, *NAFTA Revisited*, 143.

Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada', the NAALC Secretariat will be dissolved upon the USMCA's entry into force. Article 3 of the Protocol states that the Parties agreed that 'upon entry into force of this Protocol, the North American Agreement on Labor Cooperation, done at Mexico, Washington, and Ottawa on September 8, 9, 12, and 14, 1993 shall be terminated.

4. Conclusions and Insights from the Comparative Legal Analysis

As stated at the beginning of this article, the scope of this work was to explore the architecture of labour protection established in the USMCA, analysing its innovative legal features under the perspective of its substantive labour commitments but also the enforcement mechanisms available. From the comparative legal analysis conducted in the paper, it emerges that the architecture of the USMCA's system of labour protection represents a significant legal innovation to monitor labour rights among the North American trading Parties compared to NAFTA's architecture. However, the USMCA does not radically innovate from the regulatory achievements reached in more recent US PTAs, particularly the TPP. Moreover, the US approach to the inclusion of labour rights in PTAs does not seem to substantially deviate from the EU core labour commitments achieved with the USMCA Parties.

The most significant innovative feature compared to the US PTAs ratified so far consists in the refinement of the formal state-to-state dispute settlement system and the inclusion of a new rapid response mechanism. This also represents the most significant departure from the 'promotional' approach adopted in the EU model of the labour chapter in PTAs, characterized by the lack of a binding dispute settlement and by an enforcement mechanism only relying on state-to-state consultations.

More precisely, the considerations that can be drawn from the comparative legal analysis conducted between the USMCA and previously signed US PTAs and the EU agreements signed with USMCA partners are the following:

1. The coverage of labour protection established in the USMCA does not substantially innovate from the scope of protection already established in other US PTAs. There is a strong similarity between the labour rights covered in USMCA Chapter 23 and the NAALC's 'Labor Principles', and the definition of the coverage in the USMCA perfectly corresponds to the scope of the TPP. It is the reference to the area of labour rights recognized in the 1998 ILO Declaration on Fundamental Principles and Rights at Work that ensures the convergence between the USMCA and the most recent US PTAs, as well as with EU trade agreements.
2. In terms of its core and additional substantive commitments, the wording of the USMCA seems to depart from the standards of labour protection set forth in NAFTA but does not innovate if compared to the regulatory achievements reached in the more recent US PTAs and in the considered EU agreements with USMCA Parties.
3. The Protocol of Amendment introduces the most significant legal innovations in the USMCA text, significantly strengthening the possibilities of accessing the dispute settlement mechanism in case of violations of the labour commitments. More precisely, the enforceability of the USMCA labour provisions is improved thanks to the shift in the burden of proof, as it clarifies that the action or inaction in the implementation of labour provisions will always result in an impact 'affecting trade and investment between the Parties' unless proven otherwise by the responding Party. Moreover, the Protocol of Amendment imposes a stronger obligation to ban imported goods produced using forced or compulsory labour, considerably clarifying the USMCA substantive labour commitments.
4. The dimension of judicial enforcement achieved in USMCA represents a major improvement compared to the NAALC dispute settlement mechanism, grounded in the May 10th

Agreement and the TPP design. The main departure from the NAFTA system consists of the full enforceability under a single dispute settlement mechanism of all labour provisions, widely celebrated as a significant improvement. However, contrary to what is commonly believed, the USMCA still establishes a difference between different labour provisions, subjected to different dispute settlement mechanisms. In particular, a difference is established between the labour commitments set forth in USMCA Chapter 23 and the provisions detailed in its Annex 23.A imposed on Mexico. If due to a violation of the provisions of USMCA Chapter 23 the recourse under USMCA Chapter 31 is triggered, the Rapid Response Mechanism is established to specifically enforce the obligations set forth in Annex 23.A.

5. The conditional dimension of the enforcement of labour protection rights in the USMCA represents a particularly innovative aspect of the agreements. Following a similar design to the TPP's, the USMCA introduces Annex (23.A), specifically focused on the requirements of a domestic reform of the implementation of the right to collective bargaining in Mexico, with its own enforcement mechanism, the rapid response mechanism. However, even if highly innovative, the establishment of this new additional enforcement mechanism in Annex 23.A appears to be particularly controversial, as it establishes an imbalance of rights between the USMCA Parties and it is perceived as a punitive instrument by Mexico.

Outside the scope of the research conducted in this paper, it will be interesting to follow the development of future EU–US trade negotiations, in order to see if a new transatlantic agreement could bring an innovative dimension to the regulatory architecture of labour rights in PTAs. The labour dimension will definitely see the clash of the two approaches towards the enforcement of the labour commitments and it will open up new possibilities for achieving legal innovation in the design of PTAs.