EN LAS FRONTERAS DEL DERECHO
UNIVERSIDAD DE LA FRONTERA

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"Labor Provisions in USMCA Chapter 23"
En las Fronteras del Derecho 1.2865 (2022)
DOI: 10.56754/2735-7236.2022.2865
ISSN: 2735-7236
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Sección: Notas y ensayos
Fecha de recepción: 30-11-2021
Fecha de aceptación: 23-12-2021

Labor Provisions in USMCA Chapter 23

Disposiciones laborales en el capítulo 23 del T-MEC

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Abstract

On July 1, 2020, the United States-Mexico-Canada Agreement (USMCA) entered into force, replacing the North American Free Trade Agreement (NAFTA). This new treaty introduced innovations in several areas, including its labor chapter. This essay aims at outlining the current academic debate about the shortcomings of the USMCA in relation to its labor provisions.

Keywords: United States-Mexico-Canada Agreement (USMCA); North American Free Trade Agreement (NAFTA); Labor provisions; Free Trade Agreement (FTA)

Resumen

El 1 de julio de 2020 entró en vigor el Tratado entre México, Estados Unidos y Canadá (T-MEC), que sustituye al Tratado de Libre Comercio de América del Norte (TLCAN). Este nuevo tratado introdujo innovaciones en varias áreas, incluyendo su capítulo laboral. Este ensayo pretende esbozar el actual debate académico sobre las deficiencias del USMCA en relación con sus disposiciones laborales.

Palabras clave: Tratado entre México, Estados Unidos y Canadá (T-MEC); Tratado de Libre Comercio de América del Norte (TLCAN); Disposiciones laborales; Tratados de libre comercio (TLC)

1 Introduction

On July 1, 2020, the United States-Mexico-Canada Agreement (hereinafter USMCA), which replaces the North American Free Trade Agreement (NAFTA), entered into force. While much of the USMCA remains consistent with NAFTA, we cannot ignore the fact that it introduced certain improvements, which some authors consider substantial, including the incorporation of a labor chapter. Despite the undoubted importance of the topic, the number of studies disseminated through scientific journals on the labor provisions of the USMCA in general, and the analysis of its weaknesses in particular, seems to be small, probably due to the relative novelty of this agreement. The objective of the present essay is to outline the current academic debate about the labor provisions in the USMCA.

2 The USMCA labor chapter

The study of the labor chapter of the USMCA has been addressed by some authors, albeit from different perspectives. Scherrer begins his analysis with an evaluation of the labor clauses in general and then of the labor provisions contained in the USMCA, focusing on the merits of the new labor provisions that he considers key to the agreement. He then highlights the weaknesses of the NAFTA labor agreement, succinctly reviews the USMCA's solutions to the NAFTA deficits and finally focuses on what he considers to be the two main labor innovations: the establishment of an average wage (labor value

content clause or LVC) and a detailed prescription for reform of Mexican labor law. He goes on to highlight the importance of the LVC and its merit as the first to stipulate a specific wage level in a trade agreement, although he notes as a shortcoming that it only affects passenger car, light truck and heavy truck manufacturers operating in North America. In addition, he criticizes its complex and ambiguous wording on the grounds that it does not prescribe a minimum wage but an average minimum wage for a certain portion of manufacturing costs. These observations were not noted by the other authors reviewed.

This author also considers that the mechanisms for control and enforcement of labor rights in Mexico are "very comprehensive" (Scherrer 297), limiting himself to paraphrasing the regulation of these rights in the agreement, which detracts from the scientific rigor of his assertion. As a supporter of labor clauses in trade agreements, he evaluates them using the criteria of good labor clauses developed by other authors. He should have included that analysis that should after the study of this type of clauses for the sake of a logical order of his exposition, and not after analyzing the labor modifications in the Mexican legislation. According to this view, the main criticisms of the LVC are; a) that the amount is too low to comply with the purpose of preventing automakers from continuing to subcontract in Mexico, b) that it does not provide for an adjustment in the event of inflation, and c) that it speaks of an average wage and not a minimum wage, which could mean that wages will continue to be low. Furthermore, this wage regulation does not apply to all sectors, but only to the automobile industry. He also draws attention to the difficulty of proving the LVC quota, which in turn undermines the control of compliance with this requirement. He concludes by stating that the labor standards contained in the USMCA could serve as a model for future labor chapters of trade agreements in light of everything addressed in his article.

Corvaglia also makes a critical analysis of the design of the substantive provisions contained in the labor chapter of the USMCA and their applicability, but based on a comparison with the labor provisions of the TPP, the NAFTA side agreement (North American Agreement on Labor Cooperation) and the EU agreements with the State parties to the USMCA. The author identifies the substantive labor protection commitments and their applicability as central topics. It is a broader scope of analysis than the one addressed by Scherrer. Contrary to Scherrer's position, Corvaglia argues that the labor provisions are not as innovative as claimed since the substantive labor protection commitments of the USMCA do not differ substantially from those contained in the NAFTA side agreement, in the CPTPP and in the agreements concluded between the European Union and the USMCA State parties. It adds that neither do they include radically novel aspects, beyond the dispute settlement mechanism contemplated in the U.S. model and the inclusion of a rapid response mechanism. This shows that there are also divergences as to where the novelty of the labor provisions of the USMCA lies, to the point that for some it is a historic chapter and for others it is a reproduction of rules from previous trade agreements.

The author focuses on the improvements incorporated by the USMCA and not on a truly critical analysis of its labor provisions, despite the fact that in her introductory notes, she makes some criticisms of the agreement. She limits herself to mentioning that:

> *"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"* (Corvaglia 20)

But does not elaborate on why, nor does she provide arguments or factual or legal support. Santos also refers to the importance of the labor provisions contained in the USMCA, highlighting that they indicate a break with the NAFTA pattern and also improve on the TPP in certain areas. In his opinion, the most significant feature of the labor chapter is Mexico's commitment to review its laws and legal institutions, partially agreeing with Scherrer on this point. For this reason, he delves into Mexico's labor reform, highlighting the main changes.

Both authors also agree that the USMCA is useful for the development of labor provisions in future trade agreements, although Santos adds that much remains to be done to "rebalance the asymmetries in trade agreements to benefit workers" (Santos 412), meaning that the agreement is a floor and not an ideal model.

3 Conclusions

In general, the authors consulted refer to the USMCA as a landmark agreement, focusing mainly on describing its content and highlighting improvements over

its predecessor, leaving aside a truly critical analysis of the shortcomings and weaknesses in the labor provisions, except for Scherrer although with a scope limited to the LVCs. All agree that the USMCA provisions could serve for future labor chapters in trade agreements, but differ on the extent. For some it is the base model and it is innovative, for others it is a compilation of pre-existing trade agreements, so its contribution is limited to specific issues or provisions.

To date there are only a small number of articles that address issues related to labor rights in the USMCA. Most of these emphasize the novelty of this agreement, focusing on specific provisions without critically analyzing the labor chapter in its entirety, going beyond the improvements and addressing the weak or perfectible points.

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