

USMCA's Labor Dispute Tool Raises Hurdles For Mexican Cos.

By **Brian Patterson, Bob Lian and Sarah Kirwin** (June 26, 2020)

The U.S.-Mexico-Canada Agreement will take effect on July 1. It comes with an entirely new approach to labor dispute settlement — the facility-specific rapid response labor mechanism, or RRLM — under which an ad hoc international dispute settlement panel can make a determination as to whether a specific facility is in compliance with Mexico's new labor reforms.

The focus of the inquiry is far more specific than traditional labor enforcement mechanisms as it looks to see if workers at a specific facility in question were denied rights, as opposed to whether Mexico, as a country, breached the USMCA.

Under the RRLM's streamlined dispute process, the U.S. and Canada could quickly suspend preferential tariff treatment, suspend liquidation and/or block the entry of goods from noncompliant facilities in as little as 120 days after initiating the dispute process.

The RRLM was developed late in the USMCA negotiations after Democrats in the U.S. Congress and prominent U.S. labor groups expressed concern that Mexico would fail to adequately implement its labor law reforms.

While the USMCA contains an RRLM between Mexico and each of the other USMCA parties, this article focuses on the implementation of the RRLM between the U.S. and Mexico and the resulting implications for Mexican companies.

The RRLM allows the U.S. to request the remediation of a specific denial of rights occurring at a covered facility in Mexico.[1] A denial of rights occurs when workers at a covered facility are being denied the rights of free association and collective bargaining as defined in Mexico's reformed labor laws.[2]

A "covered facility" is defined as a facility within the territory of a party that either: (1) "produces a good or supplies a service traded between the Parties"; or (2) "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.

Priority sectors include those that produce manufactured goods — including aerospace products and components, autos and auto parts, cosmetic products, industrial baked goods, steel and aluminum, glass, pottery, plastic, forgings, and cement — supply services or involve mining.

Mexico may also request remediation of a denial of rights occurring at a U.S. facility; however, the RRLM applies to a much broader set of businesses in Mexico than it does in the U.S. In Mexico, the RRLM applies to every facility in the priority sectors.

In the U.S., it applies only to the extremely limited number of facilities in the priority sectors that are already subject to an enforced order of the National Labor Relations Board,



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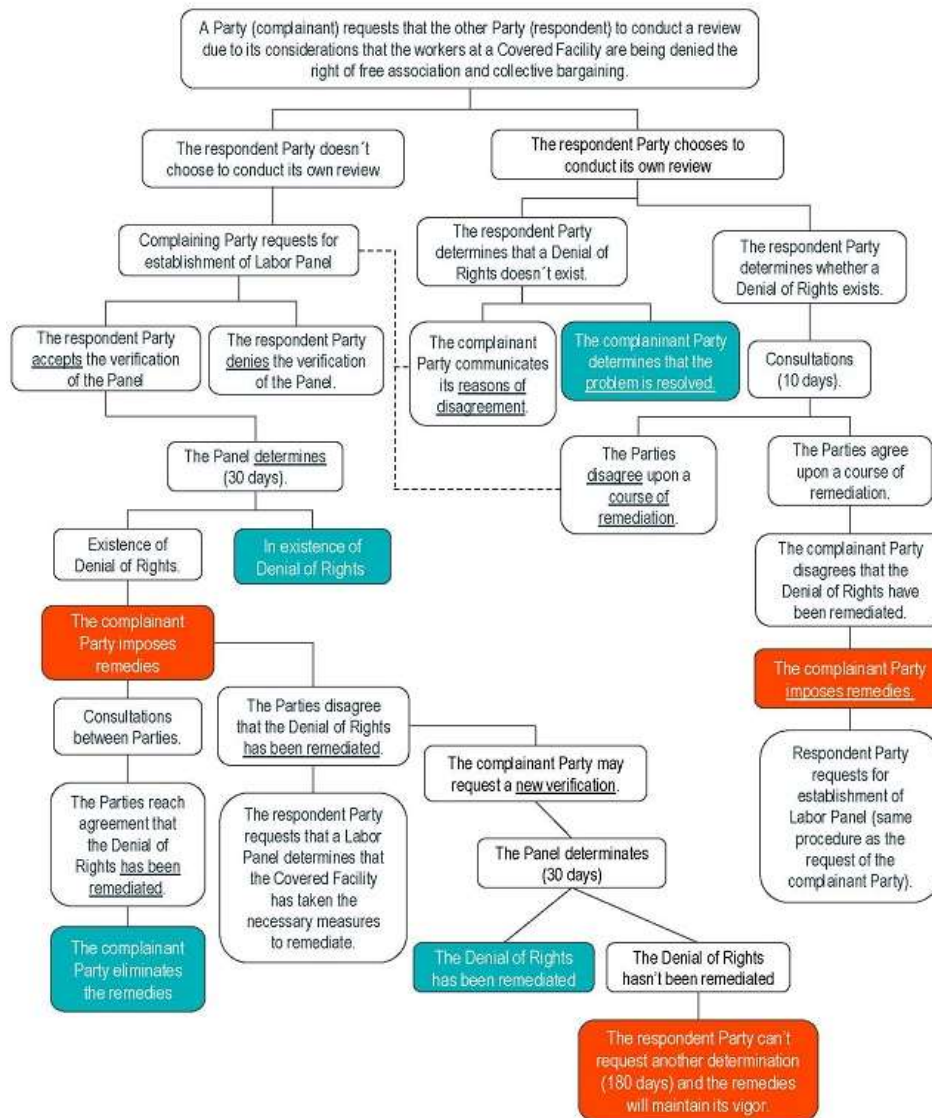
which is typically less than 50 facilities in any given year.

How does the RRLM work?

The RRLM streamlines the dispute process by allowing U.S. Customs and Border Protection to impose remedies on a noncompliant facility within 125 days of the initiation of a complaint. Once the U.S. has initiated a complaint, there are two mechanisms under the RRLM to determine whether a denial of rights exists at a specific covered facility.

First, a review of the covered facility by the Mexican authority, and second, if applicable, a verification and determination by a rapid response labor panel that a denial of rights exists. A more detailed overview of the basic process of the RRLM is depicted in the chart below.

High-Level Overview of the RRLM Process



The RRLM first requires the U.S. to have a good faith basis to believe that a denial of rights to workers exists at a covered facility in order to request that Mexico conduct its own review of the facility within 45 days. If Mexico concludes that there is a denial of rights, the parties may consult for up to 10 days to agree on remediation measures and a timeline for their implementation.

If no agreement on remediation can be reached, or if Mexico's review does not find a denial of rights, the U.S. may request that the USMCA secretariat establish a panel for verification and determination. Thus, the U.S. may request the formation of a panel when Mexico:

- Does not conduct a review in response to a U.S. request;
- Determines there was no denial of rights, but the U.S. disagrees; and
- Determines there was a denial of rights, but cannot agree with the U.S. upon a course of remediation.

When a panel is to be formed, panelists are drawn from lists of appointed candidates that are to be established and maintained by each party. The panel would then issue a verification request to Mexico. The RRLM does not define the precise content, structure or method of verification, and we understand that it may vary based on the nature of the allegations and the determination of Mexico's own initial review.

Mexico has only seven days to accept or reject the verification request. If Mexico accepts, the panel must conduct its verification within 30 days.

The panel may take into account any interference with the verification process in making its determination. During the verification, observers from both parties may accompany the panel for any on-site verification if both parties so request.

It therefore appears that U.S. observers could accompany the independent panel to Mexico for an on-site verification in those limited circumstances. If Mexico rejects the verification, the U.S. may request that the panel simply make a determination within 30 days.

In this scenario, the panel must afford both parties an opportunity to be heard and then will issue a written, public decision with its determination on the denial of rights, its severity, those responsible and, if requested by Mexico, remediation recommendations.

After the imposition of remedies, the parties must continue to consult to ensure prompt remediation. Upon agreement that the denial of rights has been remediated, the U.S. would be required to immediately withdraw any remedies.

If the parties continue to disagree about remediation, Mexico could request a new determination from the panel regarding its compliance, which the panel must make within 30 days. If the panel were to find that remediation has not occurred, Mexico would be unable to request another compliance determination for 180 days.

Who can trigger a request under the RRLM?

According to U.S. implementing legislation, the RRLM can be triggered by a public petition submitted before the Interagency Labor Committee for Monitoring and Enforcement, or ILC.[3] The ILC will establish a process through which the public stakeholders, e.g., labor

unions, nongovernmental organizations, affected workers and other interested parties, can submit such petitions in an effort to persuade the U.S. government to invoke the RRLM.

The ILC will also likely need to develop procedural rules to evaluate the credibility complaints and determine which complaints should be used as a basis to further proceed. This could be complicated by factors including the volume of petitions and their overall quality or source.

We expect stakeholders to begin submitting petitions very soon after entry into force of the agreement, as early as July 2, though it is anticipated that the ILC will be strategic in selecting the first cases that go forward.

What remedies might be imposed under the RRLM?

U.S. implementing legislation authorizes the U.S. to suspend liquidation of the goods at issue during the pendency of panel proceedings. If the panel determines that a denial of rights exists, the U.S. may impose further remedies after providing only five days' notice to Mexico.

Remedies may include the suspension of tariff preferences, the imposition of penalties on goods manufactured at or services provided by the covered facility, or even the denial of entry of goods. Regardless of the remedy applied, it must relate to goods or services provided at the covered facility subject to the complaint, must be proportional to the denial of rights and must account for any views expressed by the panel.

It remains unclear what remedies would apply to nontraded goods or services. It also remains unclear how remedies might be applied to products that are intermediate inputs or how broadly CBP would interpret the scope of affected goods.

What sectors are affected?

As noted above, the RRLM defines "covered facilities" as those in certain priority sectors that produce manufactured goods — including aerospace products and components, autos and auto parts, cosmetic products, industrial baked goods, steel and aluminum, glass, pottery, plastic, forgings and cement — supply services or involve mining.

The RRLM also contemplates that the parties will maintain a list of priority sectors that will be reviewed on an annual basis. Therefore, the list is not static, and other sectors could be added. Analysts have noted that the agricultural sector is a notable omission from the current list of sectors.

U.S. implementing legislation also lists several enforcement priorities for the ILC, including auto assembly, auto parts, aerospace, industrial bakeries, electronics, call centers, mining, and steel and aluminum. While these enforcement priorities do not overlap perfectly with the RRLM's priority sectors, the areas that do overlap are strong candidates for the first targets of the RRLM.

What are the effects of the implementation of the RRLM in Mexico?

The Mexican government published on May 1, 2019, an advanced and comprehensive labor reform that integrates obligations to which Mexico agreed through the USMCA and other international agreements.

The combination of the USMCA and these reforms represents important challenges for Mexican companies, which will now bear the burden of demonstrating that workers' rights are effectively protected at their facilities, in order to avoid the initiation of the RRLM. In the event of a challenge under the RRLM, the Mexican company would have to demonstrate, either to the Secretariat of Labor and Social Welfare of Mexico or to the panel within a verification visit procedure, that there is no such a denial of rights.

The U.S. has already issued two executive orders establishing the ILC and the Forced Labor Enforcement Task Force in connection with the implementation of the USMCA's labor provisions.[4] These orders aim to coordinate efforts of U.S. authorities to monitor Mexico's implementation and adherence to its USMCA labor obligations.

These actions, combined with the endorsement of the USMCA's labor provisions by U.S. labor unions like the American Federation of Labor and Congress of Industrial Organizations,[5] make clear that interested associations in the U.S. are heavily evaluating potential cases of denials of rights to bring against facilities in Mexico at the first opportunity.[6]

A number of procedural issues also remain open regarding the RRLM, further increasing the legal risk for Mexican companies. For example, the scope of a panel's verification activities and the extent to which they will request access to the facilities and records of Mexican companies remains unclear.

As noted above, the RRLM also appears to allow observers from both parties, to accompany the panel at on-site verifications, which will likely raise additional legal and political concerns from Mexican companies opposed to allowing U.S. observers into their facilities.

The ability of the U.S. to implement certain remedies upon the initiation of a panel — as opposed to only after a finding that a denial of rights has occurred — may also incentivize frivolous cases, especially with the heightened political pressures in the U.S. preceding the November presidential election, where organized labor will likely play a significant role.

The parties are expected to issue additional rules and procedures for the panel proceedings in the upcoming weeks, as well as lists of panelist candidates.

How should Mexican covered facilities prepare?

Even though Mexico has approved, or is in the course of approving, significant labor reforms to implement its USMCA obligations, many concerns remain regarding the capability of the Mexican government and Mexican companies to fully implement those commitments by the time of USMCA's entry into force,[7] especially after the disruption caused by COVID-19.

Nonetheless, upon the USMCA's entry into force on July 1, Mexico is expected to have fully implemented its commitments under the agreement.

Mexican companies must therefore be prepared to confront the United States' active use of the RRLM after July 1. To reduce the risk of possible labor rights violations and use of the RRLM by the U.S., Mexican covered facilities should:

- Ensure the collective structure of the union is according to the legal labor framework — e.g., democratic processes for the election of union leaders, governance of unions, etc.

- Perform a legal analysis of the collective labor terms and conditions of existing collective bargaining agreements.
- Review existing policies to address employees concerns on collective matters.
- Implement preventative audits to verify compliance with labor obligations arising from the recent amendments to the Mexican labor law and labor provisions of the USMCA.

Correction: A previous version of this article misidentified the third author. The error has been corrected.

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[1] The RRLM is found in Annexes 31-A (between Mexico and the United States) and 31-B (between Mexico and Canada) of the USMCA. The two annexes appear to be the same with only the smallest of adjustments in the footnotes to accommodate the different domestic processes in Canada and the United States.

[2] A Denial of Rights encompasses violations of Mexico's recently enacted labor reforms which 1) protect the right of workers to organize, form and join the union of their choice; 2) prohibit employer interference with union activities, discrimination or coercion against workers; 3) provide for secret ballot elections for union elections and agreements; and 4) eliminate all forms of forced or compulsory labor.

[3] (H.R.5430) United States-Mexico-Canada Agreement Implementation Act contained "Interagency Labor Committee for Monitoring and Enforcement."

[4] Establishment of the Interagency Labor Committee for Monitoring and Enforcement Under Section 711 of the United States-Mexico-Canada Agreement Implementation Act, Executive Order 13918 (April 28, 2020); Establishment of the Forced Labor Enforcement Task Force Under Section 741 of the United States-Mexico-Canada Agreement Implementation Act, Executive Order 13923 (May 15, 2020).

[5] See, AFL-CIO Endorses USMCA After Successfully Negotiating Improvements (December 10, 2019), <https://aflcio.org/press/releases/afl-cio-endorses-usmca-after-successfully-negotiating-improvements>.

[6] See, I. Ico, Analysts predict early flurry of activity under USMCA rapid-response tool, Inside U.S. Trade (May 11, 2020), <https://insidetrade.com/daily-news/analysts-predict->

early-flurry-activity-under-usmca-rapid-response-tool.

[7] Among the provisions that were just implemented after the approval of the law reform are: the rights of freedom of organization, freedom of association, and collective bargaining, and also it built a new labor justice system to expedite all procedures under the enacted law.