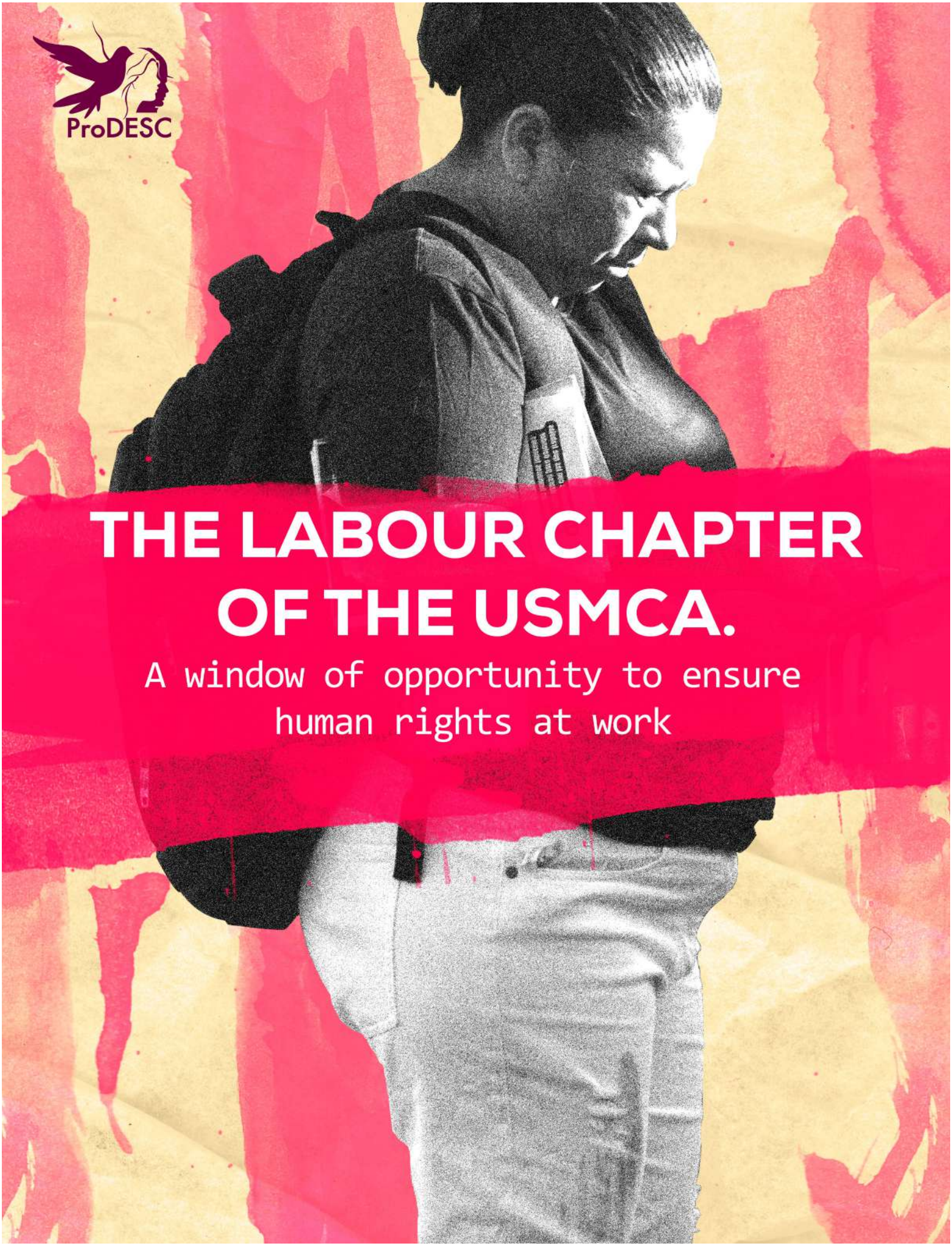
ProDESC
THE LABOUR CHAPTER OF THE USMCA.
A window of opportunity to ensure human rights at work

THE LABOUR CHAPTER OF THE USMCA.
A WINDOW OF OPPORTUNITY TO ENSURE HUMAN RIGHTS AT WORK

Authors
Alejandra Ancheita Pagaza
Stephanie Cabello Cano
Isabel Espinosa Moguel
Eduardo Villarreal Cantú

Proyecto de Derechos Económicos, Sociales y Culturales A.C. (ProDESC)
Zamora 169-A. Col. Condesa
Alcaldía Cuauhtémoc
C.P. 06140
Mexico City

Alejandra Ancheita
Executive Director ProDESC

Eduardo Villarreal
Analysis and Advocacy Coordinator

Alan Pastén
Strategic Communication Coordinator

Estefanía Díaz de la Barrera
Broadcasting of Strategic Communication

Lautaro L. Marcionni Paviolo
Graphic Designer

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The objective of this paper is to analyse, in a general way, the labour chapter of the Mexico-United States-Canada Agreement - USMCA (also known in Mexico as the T-MEC). As a novel legal tool, and given that it has the potential to be used in broader labour human rights strategies and litigation, it is our conviction is that it should be known in more detail by various actors involved, such as workers' collectives, social organisations, academia, government bodies, companies, and others.

We hope that the disclosure of the labour chapter will contribute to strengthening clear corporate accountability mechanisms in the supply chains of products and in labour chains in the three countries, which are so lacking and so necessary at present.

Introduction

Between Mexico, The United States of America (US) and Canada there is a very extensive relationship in several areas: on the one hand, geographical proximity has allowed the three states to collaborate on different issues; and on the other, the economic sphere has influenced the cooperation that has taken place throughout history, leaving aside other equally important issues, such as labour migration.

Despite being states with different political, economic and social characteristics, the globalised and interdependent world context has allowed for the emergence of new channels of cooperation, including economic or trade agreements.

It was within this framework that the General Agreement on Tariffs and Trade (GATT) was established, which later became the World Trade Organisation (WHO) with 164 signatory states, including Canada, the United States and Mexico (1). With this precedent, negotiations began on the Canada-United States-Mexico Free Trade Agreement (NAFTA), which came into force in January 1994.

In broad terms, NAFTA aimed at eliminating customs barriers between the three states, as well as eradicating trade restrictions on some products. On the labour front, it addressed some measures relating to the protection of workers. However, it did not have a labour chapter. Unlike other treaties, NAFTA did not result in the creation of governmental or cooperative bodies, but focused only on addressing trade demands and needs and was governed by WTO rules. Some of its shortcomings were the imbalance of benefits, as some specialists point out that "it favoured the commercial interests of the United States and, in the case of Mexico, aggravated poverty and social inequality" (2).

In 2018, with the arrival of Donald Trump to the US presidency, the renegotiation of NAFTA was announced and, after two years, it was replaced by the Agreement between Mexico, the United States and Canada (known in Mexico as the T-MEC and in USA and Canada as the USMCA), which came into force in 2020.

(1) See https://www.wto.org/spanish/thewto_s/history_s/history_s.htm

(2) Arreola Miranda Ahtziri, "Tratado de Libre Comercio México-Estados Unidos", Centro Universitario del Sur (CESUR). Available at http://www.cusur.udg.mx/es/sites/default/files/adjuntos/ahtziri_arreola_miranda_02.pdf

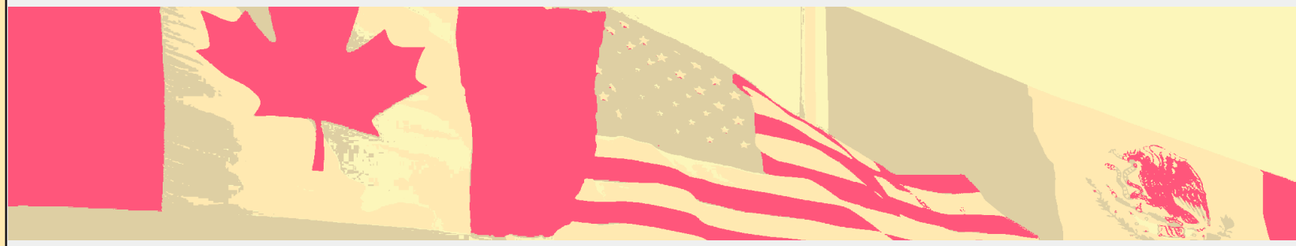
Among the new additions is chapter 23 on labour issues, which includes a series of elements to protect workers, for example: the prohibition of forced labour and discrimination in the workplace, the right to organise trade unions, the abolition of child labour, as well as a series of labour conditions such as fair wages, regulation of working hours, holiday pay and health care (3).

An issue of great importance between the three states throughout history has been migration, in particular motivated by work opportunities. In the case of Mexico and the US, there are few instruments on this issue, but the H-2 visa system for temporary migrant workers stands out, which, although it accepts people from more than 80 countries, hires mostly Mexican citizens, given the neighbourhood of the two countries. The H-2 system also has several shortcomings in terms of labour rights protection, mainly because it is a unilateral programme and because of the lack of effective regulation that allows the existence of intermediaries.

In this sense, we consider that Chapter 23 of the USMCA can contribute to improving compliance with and guaranteeing Human Labour Rights (HRL), and this document therefore constitutes an analysis of this chapter, with the intention of identifying mechanisms that could allow the enforceability of migrant workers' rights.

This analysis responds to a documentary research in which various sources were consulted, including: research documents, electronic books, hemerography, brochures, institutional documents, websites, institutional videos, as well as the consultation of international instruments (Covenants, Recommendations, Treaties and Declarations) and, of course, the document that constitutes the USMCA.

We, Mexican NGO Proyecto de Derechos Económicos, Sociales y Culturales (**ProDESC**) recognize that there are still many questions to be answered, but we believe that this analysis is a good starting point to trigger the discussion and leave some clues on this matter (little studied), because it represents another tool, concrete and with potential, to demand the fulfillment of the Labour Human Rights.



(3) Mexico-United States-Canada Agreement (T-MEC), Chapter 23. Available at http://www.sice.oas.org/Trade/USMCA/Spanish/23Laboral.pdf.

The origins of NAFTA

“ The USMCA adheres closely to the principles of NAFTA, which means that for the most part, it is an update ”

NAFTA signing
North American integration.

Ratified in 2020, the United States-Mexico-Canada Agreement (USMCA) is the successor to the North American Free Trade Agreement (NAFTA) - an agreement whose main objective was to facilitate trade through reduced and special tariffs on certain goods and services.

In terms of its structure and general provisions, the USMCA adheres closely to the principles of NAFTA, which means that for the most part, it is an update. However, in the area of labour and environmental rights, it contains specific and innovative provisions and enforcement mechanisms that go far beyond the labour protections it included (4). Arriving at the USMCA has been a major political, economic and social effort in the region and the world. Its renewal involved a series of events that date back to the signing of NAFTA.

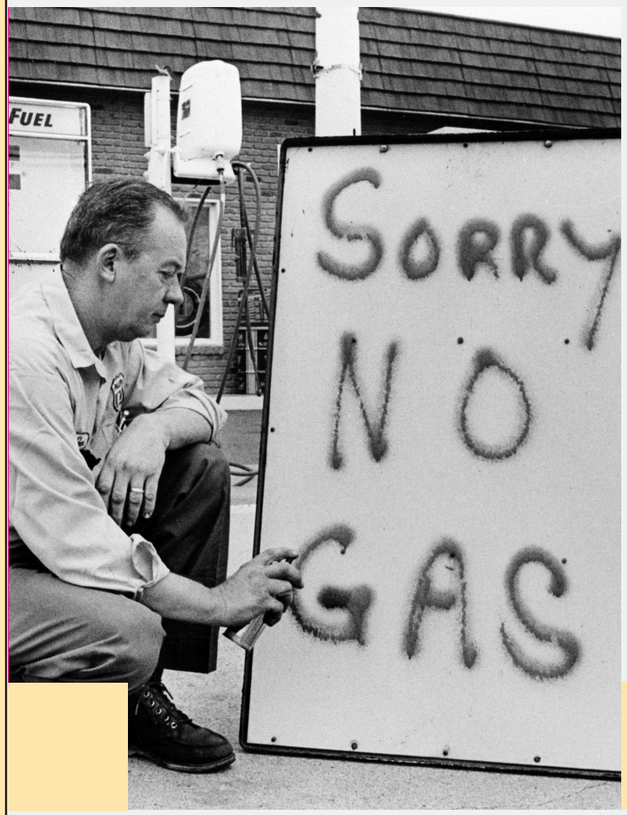
After the Second World War, a long period of economic expansion began throughout the international system, marking the end of a depressive cycle. Against this backdrop, the United States established itself as the world leader. In the economic sphere, the Bretton Woods Conference was held in 1944, at which the foundations were laid for an international economic model capable of ensuring a new monetary and financial system. As a result of the Conference agreements, the World Bank (WB) and the International Monetary Fund (IMF) came into being, and in 1948, the General Agreement on Tariffs and Trade (GATT).

(4) Sometimes also referred to as NAFTA 2.0.

Broadly speaking, the emergence of these bodies responded to a process of institutionalisation aimed at ensuring political stability, economic growth and and social justice.

During the Cold War (5), the economic sphere was determined by developmentalist or economic dependency theories that based growth through industrialisation. However, with countries dependent on the export of primary products and the lack of such industrialisation, poverty and inequality in the world worsened (6).

By the 1970s, Europe and Japan were growing increasingly competitive with the US, and the US economy went into recession, aggravated by the economic decline of the Vietnam War. In this context, economic and trade links with states in the Americas region began to be strengthened, but towards the end of the decade, the economic crisis spread to countries all over the world, particularly affecting Africa and Latin America.



The economic crisis spread to countries all over the world, particularly affecting Africa and Latin America.

US oil crisis
Dark period for Latin America.

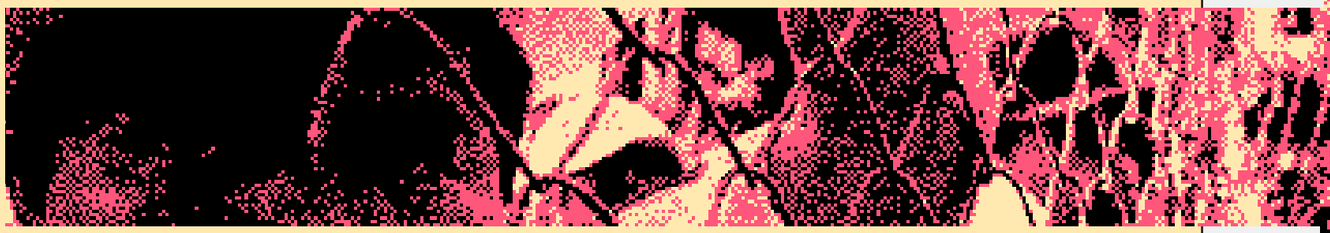
(5) So called because of the tension between the two superpowers of the time: the Soviet Union and the USA, which engaged in a power struggle based on the imposition of one of the economic systems they each advocated: free market or socialism.
(6) Calabuig Tormo Carola and Gómez Torres María de los Llanos (Coordinators), “La cooperación internacional para el desarrollo”, Centro de Cooperación para el desarrollo, cuadernos de cooperación para el desarrollo, Núm. 1 edición 2010, Editorial de la Universitat Politècnica de València.

During the 1990's, an important milestone in the history of the world economy was the Washington Consensus. The Consensus, included the adoption of ten aspects of economic policy that would help states to recover (7). Broadly speaking, the Consensus was a US- driven economic policy model that extended a free market model throughout the international system (8). During this stage, in the case of the US, the trade agreement with Canada was ratified in 1989 (9).

In Mexico, the crisis caused by the foreign debt had hit all sectors and, as a consequence, inequality and poverty gaps widened. The famous Mexican miracle (10) - experienced during the 1950s throughout the 1970s - was long gone and the general population faced profound inequalities. Some of the measures to mitigate the effects of the crisis included, for example, that in 1990, Carlos Salinas de Gortari and George H. W. Bush announced the beginning of negotiations (later joined by Canada) for the North American Free Trade Agreement. This agreement made the region one of the largest free trade zones in the world at that time (11).

NAFTA entered into force in 1994, but the months leading up to its ratification were marked by strong criticism, especially in the US, because of the implications of trade liberalisation between states with different economic characteristics (12). In particular, fears centered on the possibility of lower wages for US workers, as well as a worsening of labour conditions in both Mexico and the US. (13)

For their part, advocates argued that trade liberalisation would lead to higher wages in Mexico, labour rights would be guaranteed and, in general, productivity would increase among the three signatory states. Some of the most ambitious labour bets were that the supposed wage increase would also improve working conditions and prevent companies from relocating jobs in the US.



(7) These aspects were: '1 - balancing the public budget, 2- reduction and restructuring of public expenditure, eliminating unproductive expenditures, 3- fiscal reform by increasing indirect taxation, 4- interest rate liberalisation, 5- exchange rate liberalisation, 6- trade liberalisation, eliminating protectionism and adherence to GATT-WTO rules, 7- promotion of foreign investment, 8- privatisation of state enterprises, 9- deregulation of markets and 10- legal security for property rights.

(8) From a commercial, economic, financial and technological point of view, the dissolution of the socialist camp leaves the world scene under the influence of three blocs highly interpenetrated by the internationalisation of capital: The United States together with Canada and with hegemony over Latin America; the European Union, with a process of expansion towards Central and Eastern Europe, and the former USSR, also extending its hegemony towards Africa, the Middle East and the Mediterranean countries; and Japan, whose expansion would take place in Southeast Asia and the Pacific, with China as a military pillar and supplier of raw materials to this bloc.

(9) Hufbauer and Schott, Nafta Revisited: Achievements and Challenges, Columbia University Press, 2005

(10) It consisted of the elimination of economic buffers such as inflation, devaluations and balance of payments deficits. Thus, macroeconomic stability and continued economic growth were achieved.

(11) Ibíd

(12) Ibid, p. 79.

(13) Oliver Thomas, "Die NAFTA. North American Free Trade Agreement, Grin Verlag., 2007 p. 58.

In this regard, some concerns were voiced by powerful groups, including the Mexican agricultural sector, which feared the possible relocation of companies. In the end, and despite the criticism, the agreement was signed, ratified and entered into force with the expectation that the economic and labour impact would be favourable and that the effects would translate into greater economic and social prosperity as a result of having a market that compared favourably with the European Union.

NAFTA operated for 25 years, creating one of the largest free trade areas on the continent and in the world. Assessing its actual effects on the three states is complex, given that the social, political and economic changes that followed the Agreement cannot be attributed entirely to one single cause, but some of them are described below. (14).

(14) Ibíd.

The effects of NAFTA

From the perspective of regional economic growth, NAFTA allowed the expansion of productivity in the region. It also generated 28% of the world's Gross Domestic Product (GDP) and 16% of global trade (15).

As a result of trade links, supply chains of products for competitiveness in North America multiplied, increasing Mexico's productive industry capacity in the automotive, electrical, agricultural and food sectors.

Although it succeeded in stimulating the region's economy, NAFTA has been associated with negative socio-political effects in Mexico, especially in the agricultural sector, where farmers experienced a significant decline in income and employment opportunities. This was particularly devastating, encouraging them to migrate to the US to join the agricultural sector there, where their working conditions were even more precarious, as large companies took advantage of their needs and hired them as "cheap labour force".

Another negative effect was the absence of a protection mechanism for workers and temporary work programmes to stop undocumented migration. To counteract these effects, two parallel agreements were added: the North American Agreement on Labour Cooperation (NAALC) and the North American Agreement on Environmental Cooperation (NAAEC). The existence of these agreements was not a guarantee of rights, but a procedure to comply with "high labour standards".

Despite the possible negative effects, trade agreements in the framework of globalisation became an integral part of international trade, helping states to establish norms, mechanisms and rules necessary to manage their relations. In the case of NAFTA it did not involve its elimination, but rather a renegotiation that culminated in its renewal and some additions.

(15) Ibíd.

Renegotiation of the Agreement

In January 2017, Donald Trump took office as US president amid strong criticism and a campaign that emphasised the stigmatisation and exclusion of the migrant population, as well as controversial statements on NAFTA.

Since his arrival, Trump expressed his intention to eliminate the treaty, using rhetorical arguments such as seeking an agreement that "benefits the US and not just its partners" or that "US imports were a threat to national security". These tensions were compounded by tariffs of 25% and 10% on steel and aluminium imports from Mexico, Canada and the European Union, as well as protectionist measures (17).

With this, the renegotiation of NAFTA became not only evident, but urgent, so bilateral discussions took place between Mexico and the US. Finally, Donald Trump and Enrique Peña Nieto announced a preliminary bilateral agreement composed by 30 chapters on 27 August 2018.

Canada joined the discussions, and on 31 August of the same year, the Office of the United States Trade Representative (USTR) issued a statement notifying Congress of the formal renegotiation of NAFTA with Mexico and Canada. In this communication, Trump stipulated a 90-day deadline for the signing of the agreement, as set by the Trade Promotion Authority (TPA).

For Mexico, the political, social and economic situation during this process was marked by uncertainty and tension. On the political front, presidential elections were looming, heralding a transition and the arrival of a government that called itself "left-wing".

On the economic front, the tariff restrictions imposed by the Trump administration had affected trade and the social climate towards the possible transition was encouraging, but with strong criticism from the opposition who argued that, the candidate Andrés Manuel López Obrador had no intention of continuing the agreement negotiations and that, on the contrary, he would defend local trade, without commercial interests with the neighbouring country and Mexico's main historical trading partner.

(16) Centro de Estudios Internacionales Gilberto Bosques, analysis and research, "NAFTA: resumption of negotiations, elections in Mexico and the prelude to a possible new tripartite agreement". Conjuncture note. 31 July 2018.
(17) Ídem.

Trump-López Obrador meeting
Uncomfortable but necessary alliance.

The result was the opposite, on July 1st 2018, López Obrador won the election with more than 50% of the votes and becoming the first Mexican president to emerge from the National Regeneration Movement (Morena) party. During his first days as president-elect, AMLO appointed a team to attend to the renegotiation of NAFTA, which was headed by Jesús Seade Kuri who later became undersecretary for North America in the Ministry of Foreign Affairs.

With the resumption of the discussions and the incorporation of Canada, through the notification sent by Donald Trump to the US Congress, the date was set for the sending of the final text, as well as the translation of the document into Spanish and French. In November of the same year, the final document, now called the Mexico-United States-Canada Agreement (USMCA), was completed.
However, it still needed to be ratified which, in the case of Mexico, consisted of the following steps:

1. Sending the final document for the president's signature on the basis of the Law on the Approval of International Treaties in Economic Matters.

2. Sending the final text signed by the president to the Senate for discussion and approval (first in the commissions and then in plenary session).

3. Initiation of the legislative approval process through a simple majority vote (which refers to the highest sum of the votes cast by those present).

4. Return of the text to the president by the Senate.

5. Sing of a Decree of approval, which must be published in the Official Journal of the Federation (DOF).

6. Initiation by the Ministry of Foreign Affairs (SRE) of the ratification process, sending the document to the interested parties with the signature of the president and the endorsement of the head of the SRE. (18)

As a result of this process, in December 2019, Mexico formally ratified the Treaty, which entered into force on July 2020. Some of the most important changes were the following:

- Goods markets: Provisions for transparency in export and import licensing were added.

- Rules of origin: Adjustments were made in the chemical, glass articles, titanium products, steel and optical fibre and electrical articles sectors.

- Automotive sector: New values were set and it was agreed that 70% of steel for vehicle production must come from the North American region.

- Energy sector: The commitment to the sovereignty of national energy laws was reaffirmed.

- Agricultural sector: The possibility of adopting trade restrictions in this sector was eliminated. A dispute settlement mechanism was also created.

- Textile sector: The use of inputs from countries outside the region was limited, among other issues.

- Sectoral annexes: Regulatory agreements on Information and Communication Technologies (ICTs), pharmaceuticals, medical devices, cosmetics and chemicals, etc. were annexed.

- Trade facilitation: Processes on border crossings, among others, were modernized. (20)

- Intellectual property: Patent periods were extended and regulations were established for regional designations.

- Labour and environmental issues: A commitment was made to ensure that each state complies with and respects the laws in this area. An annex on labour reform in Mexico and its application was included, and a dispute resolution mechanism was added in the event of violations of labour rights.

- Investment: Investment protection was granted to investments from the signatory states.

- Cross-border trade in services: Provisions were annexed to ensure the participation of service suppliers of the signatory states in domestic markets.

- Revision clauses: The Treaty was established for a period of 16 years, which can be extended.

(18) Centro de Estudios Internacionales Gilberto Bosques, analysis and research, "Preguntas frecuentes sobre el proceso de aprobación legislativa para un tratado internacional relativo a la renegociación del TLCAN". Conjuncture note. 3 September 2018.
(19) Gutiérrez Ana, 1 July 2021, "Un año del T-MEC y mucho por delante", Centro de Investigación en Política Pública (IMCO). Available at https://imco.org.mx/un-ano-del-t-mec-y-muchos-por delante #:~:text=El %20nuevo%20tr atado%20entr%20e ntr%C3%B3%20en, interrupci%C3%B3n%20de%20las %20cadenas%20productivas.
(20) Such modernisation is ongoing and further commitments were signed at the July 12, 2022 meeting between Biden and AMLO.

- Dispute settlement: The same mechanisms are maintained with some modifications (21).

On dispute settlement, three main provisions stand out:
1) In Chapter 23 for labour disputes,
2) a general dispute settlement mechanism in Chapter 31 and,
3) the facility-specific rapid response mechanism in Annex 31-A, which is divided into two discrete provisions (one for Mexico-US disputes and one for Mexico-Canada disputes).

Despite being an instrument that lays the foundations for trade exchanges between the three states, the USMCA stands out for its labour chapter, which has the highest expectations in terms of guaranteeing and enforcing rights.

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(21) Centro de Estudios Internacionales Gilberto Bosques, análisis e investigación, “México y Estados Unidos avanzan en la renegociación del TLCAN y establecen las bases para un acuerdo trilateral”. Conjuncture note. 13 September 2018.

Labour chapter

The chapter consists of 17 points and an annex on worker representation in collective bargaining in Mexico. It is mainly based on international principles, standards and guidelines, e.g. the 1998 International Labour Organisation (ILO) Declaration on Rights at Work and its Follow-up (taking into account that all three states are members of the ILO) (22).

In this regard, and in accordance with the Declaration, the following labour rights are addressed in the section:

(a) Freedom of association and the effective recognition of the right to collective bargaining.
(b) The elimination of all forms of forced or compulsory labour.
(c) The effective abolition of child labour, the prohibition of the worst forms of child labour and other labour protections for children and minors.
(d) The elimination of discrimination in respect of employment and occupation.
(e) Acceptable working conditions with respect to minimum wages,1 hours of work, and occupational safety and health (23).

Local instruments are also taken into account, for Mexico: Acts of Congress, regulations, provisions and the Political Constitution of the United Mexican States. For the USA: Acts of Congress, regulations enacted pursuant to Acts of Congress and the Constitution of the United States.

One particularity is that emphasis is placed on the cancellation of trade in the event of a “weakening or reduction of the protections afforded by the labor laws of each party”, a situation whereby each State undertakes to promote the enforcement of its labor laws through appropriate governmental measures, such as:

a) appoint and train inspectors;
b) monitor compliance and investigate alleged violations, including through unannounced on- site inspection visits, and give due consideration to requests to investigate an alleged violation of their labour laws;
c) seek assurances of voluntary compliance;
d) require reports and record keeping;

(22) See Declaration at https://www.ilo.org/declaration/lang--es/index.htm
(23) Mexico-United States-Canada Agreement (T-MEC), Chapter 23, Article 23. 1

e) encourage the establishment of worker-management commissions to address labour regulation at the workplace;

f) provide or encourage mediation, conciliation and arbitration services;

g) initiate, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labour laws; and

h) implement remedies and sanctions imposed for non-compliance with its labour laws, including timely collection of fines and reinstatement of workers. (24)

On this point, it is important to stress that each state must comply with the proper implementation of its laws, but without the power to carry out labour law enforcement activities in the territory of another. In a spirit of transparency and accountability, the chapter also states that labour laws and legal mechanisms should be made public, as well as access to courts for their enforcement. To this end, each state must also have adequate resources - material, budgetary and human.

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Another important feature of the chapter is the recognition of the existence of forced labour and the commitment to eliminate it.

Therefore, trade should only take place when no form of forced labour exist in the supply chain (of labour and products). If it were found, this is sufficient reason to cancel such transactions:

Sinaloan temporary migrant workers. In the center of the USMCA.
photo: ProDESC

(24) Mexico-United States-Canada Agreement (T-MEC), Chapter 23, Article 23.5

2. To assist in the implementation of paragraph 1, the Parties shall establish cooperation for the identification and movement of goods produced by forced labor, as provided in Article 23.12.5(c) (Cooperation). (25)

Also, for the first time, the agreement stipulates the right to organise trade unions without violence, threats and intimidation to workers and leaders, and governments should address such cases to avoid the cancellation of trade.

Regarding migrant workers, it is made clear that they are people in vulnerable conditions (being outside their territory of origin), Therefore, the States, undertake to protect them in accordance with labour laws. It should be noted that the treaty states that citizenship status should not matter. This means, for example, that a Mexican worker in the US should have the same rights as a worker with US citizenship and be protected by local laws in accordance with international instruments.

(25) Mexico-United States-Canada Agreement (T-MEC), Chapter 23, Article 23.6

In the same vein, the Chapter stipulates a prohibition of discrimination in employment (whether based on nationality, ethnicity, skin colour, gender, etc.), as well as the promotion of women's equality in the workplace. States should therefore work to eradicate sex-based discrimination in the workplace (including sexual harassment, pregnancy, sexual orientation, gender identity and caring responsibilities, etc.), given that historically, it is women who suffer the most gender-based abuses.

To realise these rights, the paragraph reinforces the idea of a more cooperative world and stipulates that states may, "in accordance with the availability of resources, cooperate, as well as develop activities in the following areas:

a) labour laws and practices, including the promotion and effective implementation of the principles and rights set out in the ILO Declaration on Rights at Work;

b) labour laws and practices related to compliance with ILO Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour;

c) identification and movement of goods produced by forced labour;

d) combating forced labour and human trafficking, including on fishing vessels;

e) ddressing violence against workers, including for trade union activities;

f) occupational safety and health, including the prevention of occupational injuries and diseases;

g) institutional capacity of administrative and judicial labour bodies;

h) labour inspectors and labour inspection systems, including methods and training to improve the level and efficiency of labour law enforcement, strengthen labour inspection systems and help ensure compliance with labour laws;

i) remuneration systems and mechanisms for the enforcement of labour laws concerning working hours, minimum wages and overtime and working conditions;

j) addressing gender-related issues in the field of work and employment;

k) promotion of productivity, innovation, competitiveness, training and the development of human capital in the workplace, particularly with regard to SMEs;

l) addressing the opportunities of a diverse workforce. (26)

(26) Mexico-United States-Canada Agreement (MEFTA), Chapter 23, Article 23.12 although each country has specific internal processes for filing a complaint and determining whether to pursue a claim against the other government or the "Party complained against".

Enforceability mechanisms

On the other hand, a major breakthrough in enforceability is the establishment of a Labour Council composed of high-level government representatives, as designated by each party. This Council will meet every two years and may consider any matter within the scope of the Chapter.

In addition, contact points and work consultations should be appointed in order to maintain effective communication. That is, in case of disputes, through cooperation and dialogue, a mutually satisfactory solution will be sought. Such labour consultations constitute the Rapid Response Mechanism (RRM), which provides an avenue for citizens, trade unions, civil society organisations and governments to file a complaint in case of labour rights abuses or violations. To make it effective, the first step is to file a petition. Currently, in the US, anyone can file a petition, whether they are citizens or governments (27).

If the government where the petition was filed (the "complaining party") determines in good faith that there was a violation of rights at the worksite, it can request that it be reviewed, upheld or denied. If the responding party agrees that there is a violation of rights, then the two parties can work together and find an appropriate remedy for damages.

If the responding party determines that there was no such violation, a series of petitions and reviews ensue, during which no damages can be established until a third-party panel, composed of representatives from each country, makes a final decision (28).

The complaining party may not impose damage repair during the process without a panel determination unless the responding party determine, during the review process, that a violation of rights has occurred. If confirmed, possible damage repair measures include the suspension of preferential tariff treatment or the imposition of penalties on goods or services provided by the company or worksite in question. In case of repeated determinations, penalties may be imposed on goods manufactured by the company (29).

(27) Mexico-UnitedStates-CanadaAgreement(T-MEC),Chapter23,Annex31-A.
(28) Mexico-United States-Canada Agreement (T-MEC), Chapter 23, Annex 31-A.7.
(29) Mexico-UnitedStates-CanadaAgreement(T-MEC),Chapter23,Annex31-A.10(1-2).

Some notable aspects of the Rapid Response Mechanism (hereafter RRM) are described below:

- The MRR streamlines the resolution of labour disputes. For example, a government must respond to a petition within 30 days and determine whether it can claim that a rights violation has occurred. After that, depending on the level of cooperation between the two governments, redress can be established within 10 days. If a panel is convened, the process is extended, although at its longest, it should be reached within 50 days.

- Petitions can only be made for violations of rights in “covered facilities”. In the U.S., this is a limitation, as covered facilities are only those under the orders of the National Labor Relations Board (NLRB). By contrast, most facilities in Mexico automatically fall within the definition of a “covered facility.” (30)

As can be seen, Chapter 23 is a major breakthrough that lays the legal foundations for LHR. The fact of having an exclusive section on the subject opens up windows of opportunity for the administration and procurement of labour justice. Another advance is that in the event of any violation, trade can be cancelled through the stipulated mechanisms, which translates into fair trade based on the respect and guarantee of rights.

In the North American region, it is not only trade links that stand out, but a - so far unresolved - point on the agendas between the three states has been the regulation of labour migration, an issue that is addressed in the following section.

(30) Mexico-United States-Canada Agreement (T-MEC), Chapter 23, Annex 31-A.

Labour Migration and Labour Human Rights.
The H-2 visa system

Migration between Mexico and the United States is a particular dynamic with a long tradition that has been at the top of the bilateral agenda. Currently, the main reason for Mexican migration to the US is the search for work, although other factors can be observed, such as the feminisation of migration, expulsions due to violence, or disasters caused by climate change, among others.

Over the years, both countries have collaborated on trade issues, resulting in concrete agreements such as the USMCA, but very little has been done on labour migration, as most of the actions or programmes are palliative, i.e. they do not address the structural causes and are short-lived.

In the US, following the departure of Donald Trump and the arrival of Joe Biden, expectations increased for a more open and fair vision of migration (as they benefit from migrant labour, but do not secure LHR), but the result has been the opposite: the tightening and reactivation of containment programs and the activation of Title 42.

In the Mexican case, since the beginning of Andrés Manuel López Obrador’s administration in 2018, special emphasis has been placed on addressing migration from a human rights perspective; however, the results so far have been: the tightening of borders, greater coercion by the National Guard, and few bilateral programmes on labour migration.

However, the H-2 visa system, a unilateral programme undertaken by the US government, which is divided into the H-2A visa for agricultural work and the H-2B visa for non-agricultural or service work, stands out. From its inception until now, the system has had weaknesses that affect workers. **One of the most important problems is that it is designed to favour business, but does not have a labor rights focus.**

In that sense, the labour chapter 23 of the T-MEC serves as a basis for issuing a series of recommendations to improve existing programmes, such as the H-2 system, and to facilitate labour migration while protecting workers.

This chapter establishes that migrant workers shall have the same rights as citizens of the country in which they are staying.

In the case of the H-2 visa system, it is important that this precedent exists, because despite the fact that a series of rights are stipulated (31) and its establishment in a legal framework, such as Chapter 23, it allows that in the event of any violation, people can resort to a reparation mechanism that establishes sanctions, for example, the cessation of commercial actions.

In this sense, companies and all actors involved in supply chains (labour and product) will be subject to a legal framework that goes beyond national laws. This may mean that they will have to be more responsible and vigilant in guaranteeing rights, otherwise sanctions may result in the cancellation of important business transactions.

The chapter promotes fair trials and, above all, that the necessary resources are available to carry them out and to support people, for example, with the provision of lawyers who can assist them, among others research suggests that the abuses that occur during the recruitment process in the H-2 visa system correspond to forms of modern slavery or forced labour.

In this framework, Chapter 23 demands the elimination of these forms of slavery, and with this, both companies and institutions are obliged to redesign the programme to correct these flaws and eliminate intermediaries in the recruitment process, with government institutions being the ones to monitor and sanction this process (32).

Also, in the framework of the chapter, it should be removed from the H-2 visa regulations that workers cannot change employers, as this means that they have complete control over their lives (where they live, how they move, etc.), a situation that can be interpreted as forms of exploitation.

On the other hand, Chapter 23 establishes the need for labour inspections, which can improve the conditions of workers, not only those incorporated into the H-2 visa system, but any foreign worker in any of the three States. In that sense, inspections should be carried out from the receiving country and in the country of origin. It is desirable that, to the extent of institutional capacities, they be carried out on a regular and permanent basis.

Similarly, the chapter is a great step forward in terms of guaranteeing DHL, but it is also important that other rights beyond labour rights are recognised. For example, people with H-2A and B visas should be able to access residency or citizenship, have more forms of social protection, access to housing, education, recreation, socio-economic integration, among others.

With these premises, it is necessary for the federal public administration of each state to contemplate a budget line to address this issue and to ensure sufficient resources for its effective implementation, since the legal framework is one thing and making it operable is another.

Finally, on cooperation and in the framework of the agreements between Joe Biden and Andrés Manuel López Obrador signed on 12 July 2022 (33), it is important to demand the redesign of the H-2 visa system, at least in terms of recruitment.

(31) See DOL brochure at https://travel.state.gov/content/dam/visas/LegalRightsandProtections/Wilberforce/Wilberforce-SPA-DS-1242017.pdf

(32) Below are a number of recommendations.

The chapter is a great step forward in terms of guaranteeing DHL, but it is also important that other rights beyond labour rights are recognised.

From **ProDESC**, we propose a series of recommendations framed in the USMCA:

1. The so-called H2 visa programme is in reality a one-sided system used by the US government and US employers to obtain workers from other countries on unequal terms with US workers. This has meant a vacuum of regulations that clearly establishes the responsibilities of the actors involved, keeping workers vulnerable with respect to their human labour rights. To ensure a better framework of rights and in accordance with the labour chapter of the TMEC, it is recommended that a memorandum of understanding be signed between the US government, the Mexican government and employers applying for visas, as exists with Canada through the Mexico-Canada Seasonal Agricultural Worker Program (PTAT).

2. There are also other options to improve hiring conditions for workers applying for H2 visas. For example, despite being a unilateral programme, the Mexican government needs to intervene in the recruitment process through the National Employment System (SNE) in conjunction with the US Department of Labor (DOL), which should be responsible for regulating the process and for creating a transparency and accountability mechanism with public access and clear information on the rules of the programme, available in Spanish and easily accessible through its websites.

3. Intermediaries, recruitment agencies and private recruiters should be regulated, monitored and sanctioned by both governments.

4. In this regard, the creation of a certification system for recruiters is suggested in order to verify the legitimacy of recruitment agencies and offers.

5. It is also suggested the creation of a job bank where real and current job offers for the H-2 visa system can be consulted and which is available on the SNE website. Job offers should not be exclusive information for intermediaries, but should be accessible to the public at large.

(33) See agreements at https://www.gob.mx/presidencia/prensa/comunicado-conjunto entre-el-presidente-lopez- obrador-y-el-presidente-biden?state=published

6. The entire recruitment process should be disclosed on the website: steps, fees, required documentation, deadlines, penalties, etc.

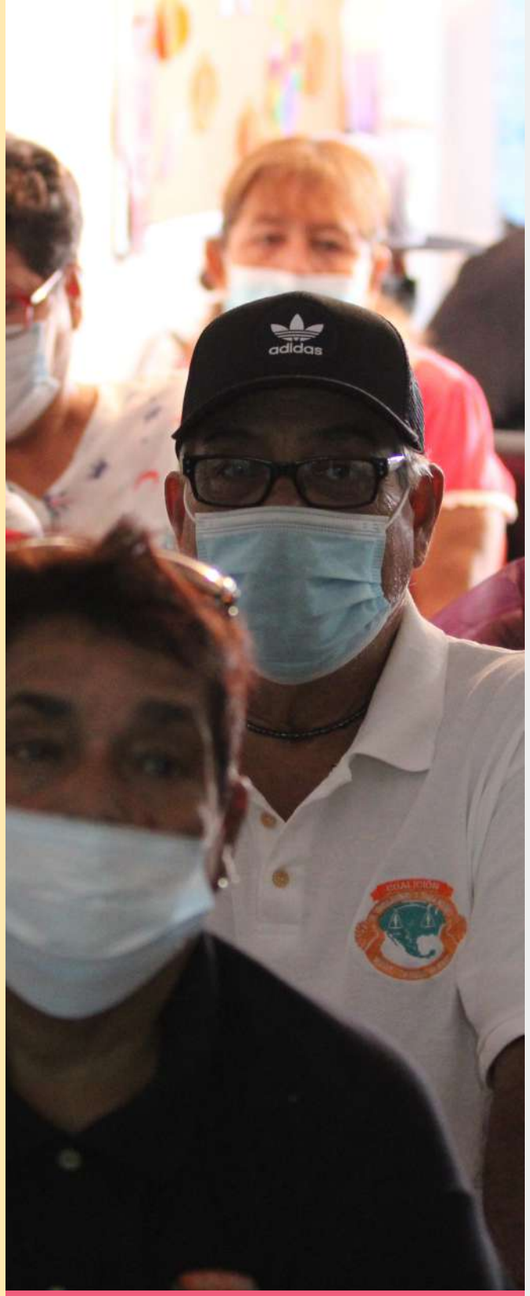
7. It is also ideal to design sanctions for intermediaries, recruitment agencies and individuals who abuse or violate the rights of applicants. We emphasise that all actors in the supply chain must be held accountable for abuses committed in the recruitment process.

8. Any intermediaries committing fraud: cheating, charging, exclusion and discrimination, blacklisting, visa conditionality, among others, should be immediately excluded.

9. Conduct labour inspections to ensure that recruitment agencies, recruitment companies or private recruiters located in Mexico are operating correctly.

10. Payment for visa processing should be responsibility of the employer and it should be ensured that intermediaries do not charge applicants. Regulations and rules should establish the obligation of employers to pay processing fees, as well as penalties for agencies or other bodies that collect money for such fees. Applicants will only have to pay the visa fee, which is currently 190 USD and should be reimbursed by the employer.

11. Finally, the H-2 visa system needs to be formally inscribed in the USMCA.



The USMCA as a tool to obtain labor justice in Mexico.
Photo: ProDESC

Final reflections

In the international system, Treaties and Agreements are a tool for the exercise of government. They are public policy instruments that imply commitments and responsibilities on the part of the authority. We are developing in an interconnected world where there is a diversity of actors - in addition to states - who share problems, for example, in the economic sphere and in the field of migration.

Global governance implies that actors of diverse nature (governments, social organisations, businesses, etc.) coordinate to achieve social benefits in countries and also in transnational issues such as migration.

Since the creation of the GATT and after the Second World War, the need to consolidate cooperation on the basis of a series of rules and legal instruments became evident. In this dynamic, the US positioned itself as the leader of the international system, promoting the liberalisation of markets and the signing of trade agreements. However, a major omission that remains to this day is to ensure the exercise of the right to free trade and transnational exercise of human labour rights.

As a measure to mitigate the economic crises that hit the world and several Latin American nations (including Mexico), NAFTA was a remedy that operated for 25 years, bringing some trade benefits. However, corporate dynamics led to the hiring of more labour; for example, in the US, the need for migrant workers, who have historically been made precarious without the guarantee of their LTRs, increased.

In 2017, with the arrival of Donald Trump to the US presidency, NAFTA renegotiations began and culminated in the signing of the USMCA which, after a process of discussions and subsequent ratification, came into force in 2020.

Although for many specialists it was an update of NAFTA, the new agreement added a specific chapter to address labour situations that, based on international standards such as ILO Declarations and Recommendations, recognises a series of labour rights and incorporates an enforceability mechanism: the Rapid Response Mechanism.

In addition, these legal bases provide the tools to redesign some labour migration regulation programmes, such as the H-2 visa system. In this sense, the labour chapter is not only important to demand LHR, but also to claim the importance of the issue, because fair trade must also respond to the fulfillment and guarantee of workers' rights.

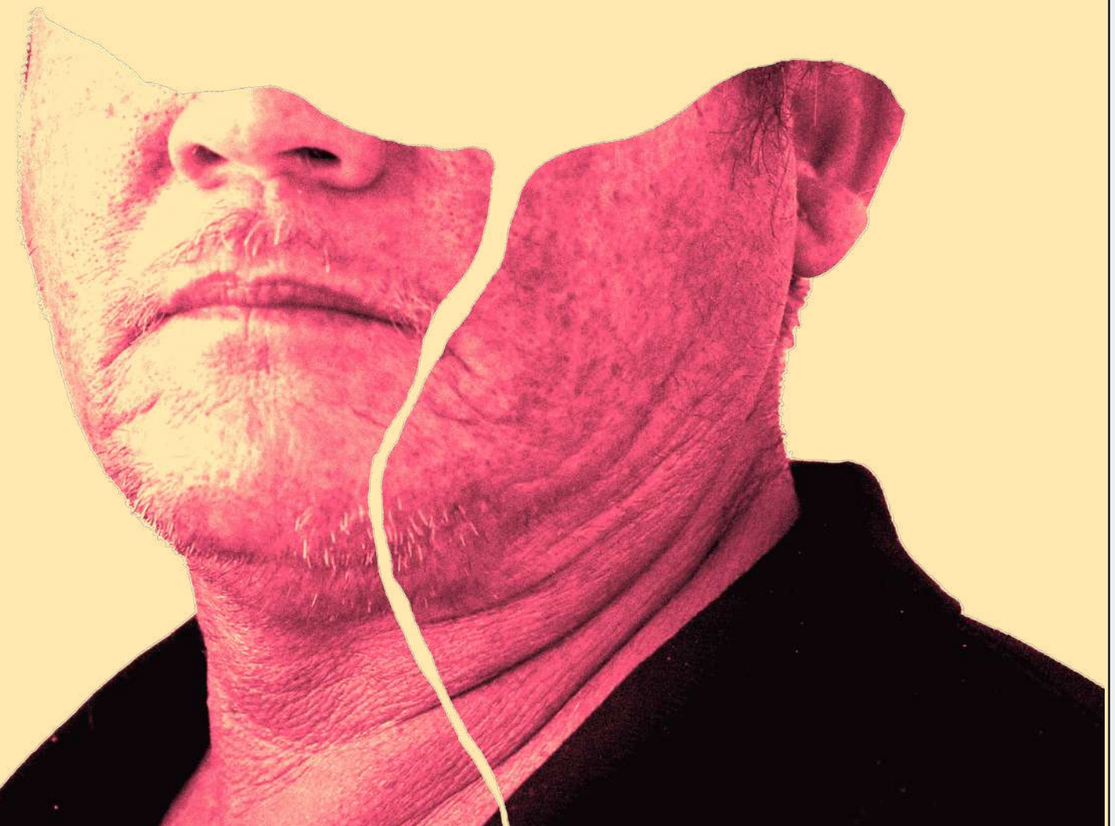
Undoubtedly, there are still gaps and challenges, such as, for example, making such a legal mechanism operational and reflecting it in the redesign of instruments, but it is a window of opportunity that lays the groundwork and puts the issue at the centre of the discussion.

However, the existence of the labour chapter in the USMCA, as well as the MRR, do not in any way ensure full access to labour justice, let alone does it means that Mexican workers will be treated equally with respect to the working conditions of workers in Canada and the United States. In Mexico, it is even more important that the current administration actually completes the transition from the system of conciliation and arbitration boards to labour tribunals.

However, the effort so far has been reduced to a few states in the Mexican Republic, with a frankly reduced budget.

From **ProDESC**'s experience, we can affirm that this is one more tool to be used in broader labour human rights strategies and litigation. However, neither the labour chapter of the T-MEC nor other regulatory efforts to mitigate inequalities for workers in the three countries involved have focused efforts to establish clear corporate accountability mechanisms in both product and labour supply chains.

Much remains to be done to make the latter, corporate accountability, a reality.



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