USMCA: Legal Enforcement of the Labor and Environment Provisions

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SUMMARY

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Some Members of Congress have expressed concern about the effectiveness of dispute settlement mechanisms in the United States' free trade agreements (FTAs), especially in the context of the former North American Free Trade Agreement (NAFTA), which entered into force in 1994. NAFTA was the first U.S. FTA to include significant labor and environmental provisions. To enforce these provisions, found in two side agreements to NAFTA, the Agreement included several cooperative and formal dispute settlement mechanisms. These mechanisms were distinct from others that applied to most of NAFTA's provisions. Since 2002, Congress's trade negotiating objectives have stated that the U.S. Trade Representative must seek to ensure that an FTA's generally applicable dispute settlement mechanism covers labor and environmental provisions, and must also improve the effectiveness of all dispute settlement mechanisms.

The United States-Mexico-Canada Agreement (USMCA), which replaced NAFTA when it entered into force on July 1, 2020, builds on NAFTA and more recent FTA practice, subjecting the Agreement's labor and environment obligations to the general state-to-state dispute settlement mechanism that governs most of the other provisions. This mechanism, found in USMCA's Chapter 31, creates a system through which a USMCA party can request that a panel hear a dispute and issue nonbinding recommendations as to how the parties should resolve it. Chapter 31 draws significantly on the NAFTA model, but also attempts to resolve some issues that arose in NAFTA and other U.S. FTA disputes. First, it attempts to eliminate a substantive hurdle to enforcing labor and environmental obligations by creating a rebuttable presumption that a failure to enforce certain labor or environmental laws is done "in a manner affecting trade or investment between" the USMCA parties. Second, it provides for more detailed procedural rules to prevent parties from blocking the formation of a panel. USMCA is the first U.S. FTA to specify panels must have three or five members, and creates specific rules for each scenario; it remains to be seen how well they will work in practice. As drafted, some of the rules create ambiguities that arise with panels of three and when there are multiple vacancies on a panel but the parties cannot agree on whom to appoint. The USMCA parties could opt to amend the relevant procedural rules to address these issues if problems arise in future disputes.

USMCA also contains several mechanisms designed to enforce only the labor and environmental obligations. To enforce the labor provisions, the Agreement includes a cooperative labor dialogue and facility-specific rapid response mechanism. The dialogue process provides a relatively informal way to settle a potential dispute. By contrast, the rapid response mechanism, a new dispute settlement tool in U.S. FTAs, functions similarly to the Chapter 31 process by permitting the parties to request a panel to resolve disputes. Unlike the Chapter 31 process created to address a country's failure to respect USMCA obligations, however, the rapid response mechanism addresses individual facilities' failures to respect the right of free association and collective bargaining. An innovative feature are the penalties set out in the Agreement to address situations in which a USMCA party fails to act in good faith with regard to the rapid response mechanism. Although USMCA countries might attempt to raise failure to act in good faith claims with regard to other dispute settlement mechanisms, the Agreement does not expressly allow such a claim, so dispute panels might reach different conclusions as to whether they may consider such claims.

USMCA takes a similar approach to enforcement of environmental obligations, although it does not create a panel-based dispute resolution system in addition to the Chapter 31 mechanism. The Environment Chapter instead provides for two cooperation-based mechanisms. First, it encourages dispute resolution via cooperative activities to address situations when a party fails to enforce its environmental laws "through a sustained or recurring course of action or inaction in a manner affecting trade or investment." Second, USMCA includes a U.S.-Mexico customs verification mechanism to address concerns that one of these countries is not fulfilling its obligations to promote sustainability and conservation, and to take steps to combat the illegal take or trade in wild flora and fauna, fish, and forest products.

As of this writing, one complaint involving U.S. labor obligations has been filed that could potentially lead to formal dispute settlement proceedings under Chapter 31 between the United States and Mexico, and two potential claims involving the right to free association and collective bargaining at facilities in Mexico have been made public, which could lead to formal proceedings under the U.S.-Mexico rapid response mechanism. In addition, the United States and Canada have initiated two Chapter 31 disputes against each other involving other obligations. Although all of these disputes are in early stages, the manner in which they proceed may shed light on the effectiveness of the dispute settlement mechanisms involved. No dispute proceedings involving the environment provisions have yet been initiated.

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Introduction

The effectiveness of dispute settlement mechanisms in trade agreements, including their functionality and scope of application, is an issue of long-standing interest to Members of Congress. Some of this interest stems from experiences with the former North American Free Trade Agreement's (NAFTA's) general state-to-state dispute settlement mechanism and the Agreement's separate dispute settlement mechanisms for labor and environmental obligations specified in side agreements. The NAFTA side agreements on labor and environment focused mainly on cooperative mechanisms to resolve disputes, and limited disputes that could lead to trade countermeasures (e.g., higher tariffs) to a single type of claim—a "persistent pattern of failure" to "effectively enforce" specified types of domestic laws.[1] Although many observers and policymakers credit NAFTA for raising labor and environmental standards, others contend that the Agreement's provisions were weak and largely unenforceable.[2]

Building on these early experiences, Congress included more detailed negotiating objectives on dispute settlement mechanisms in subsequent trade promotion authority (TPA) legislation. In the Trade Act of 2002, Congress asked the U.S. Trade Representative (USTR) to ensure that the United States' "principal negotiating objectives," which included labor and environment issues,[3] were treated "equally with respect to," among other things, "the ability to resort to dispute settlement under the applicable agreement."[4] Following an agreement reached between congressional leaders and the George W. Bush Administration on May 10, 2007 (known as the "May 10th Agreement"),[5] U.S. free trade agreements (FTAs), including USMCA, adopted this approach, applying the general state-to-state dispute settlement mechanisms to labor and environment provisions, albeit in modified forms.[6]

Reflecting continued congressional interest in dispute settlement mechanisms, the most recent form of TPA, the Bipartisan Congressional Trade Priorities and Accountability Act of 2015,[7] also includes detailed negotiating objectives on the subject. It asks the USTR "to ensure that

[1] *See* North American Agreement on Environmental Cooperation arts. 27–41 (Jan. 1, 1994), http://www.sice.oas.org/trade/nafta/Environ.asp [hereinafter NAAEC]; North American Agreement on Labor Cooperation arts. 27–41 (Jan. 1, 1994), http://www.sice.oas.org/trade/nafta/Labor1.asp [hereinafter NAALC]; *see generally* North American Free Trade Agreement, Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 [hereinafter NAFTA].

[2] For more information, see CRS Report R42965, *The North American Free Trade Agreement (NAFTA)*, by M. Angeles Villarreal and Ian F. Fergusson; CRS Report R44981, *The United States-Mexico-Canada Agreement (USMCA)*, by M. Angeles Villarreal and Ian F. Fergusson; Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treatymaking*, 8 TEMP. INT'L & COMP. L.J. 257, 258 (1994) (discussing the negotiation of the labor and environmental side agreements).

[3] Pub. L. No. 107-210 (codified at 19 U.S.C. § 3802(b)(11)). Congress also asked USTR to ensure that dispute settlement mechanisms in trade agreements resolve disputes "in an effective, timely, transparent, equitable, and reasoned manner, requiring determinations based on facts and the principles of the agreements, with the goal of increasing compliance with the agreements." *Id*. § 3802(b)(12)(A).

[4] *Id*. § 3802(b)(12)(G)(i).

[5] Off. of the U.S. Trade Representative, *Bipartisan Trade Deal* (May 2007), https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf; *Trade Resource Center: May 10th Agreement*, HOUSE WAYS & MEANS COMM., https://waysandmeans.house.gov/media-center/tpp-focus.

[6] *See, e.g.*, U.S.-Panama Trade Promotion Agreement arts. 16.7.6, 17.11.6, U.S.-Pan., June 28, 2007, 125 Stat. 427; U.S.-Peru Trade Promotion Agreement arts. 17.7.6, 18.12.6, U.S.-Peru, Apr. 12, 2006, 121 Stat. 1455 [hereinafter U.S.-Peru TPA]; Free Trade Agreement between the United States of America and the Republic of Korea arts. 19.7.4, 20.9.4, U.S.-S. Kor., June 30, 2007, 125 Stat. 428 [hereinafter KORUS].

[7] Pub. L. No. 114-26 (codified at 19 U.S.C. § 4201 *et seq*.).

enforceable labor and environment obligations are subject to the same dispute settlement and remedies as other enforceable obligations under" any FTA entered into using TPA authority.[8]

USMCA entered into force on July 1, 2020,[9] with updated dispute settlement mechanisms. This report first describes the general dispute settlement mechanism that applies to a majority of USMCA obligations, including the labor and environment obligations. It then discusses how the Agreement builds on or modifies the general mechanism to address enforcement of the labor and environment provisions. Third, the report describes other mechanisms created to resolve labor and environmental disputes.

Chapter 31 Dispute Settlement

The primary means through which the USMCA parties (i.e., Canada, Mexico, and the United States) may formally resolve potential issues is through the state-to-state dispute settlement mechanism established in Chapter 31 of the Agreement. Chapter 31 envisions two forms of disputes—one party brings a claim against another party *or* two parties bring a claim against the third party—and establishes procedures to address both scenarios.

When May a State Invoke Chapter 31?

To bring a claim against another USMCA party, the complaining party must satisfy two conditions. First, the contested measure (i.e., the actual or proposed domestic law, regulation, or practice) or conduct must implicate a provision that is subject to the Chapter 31 dispute settlement framework. Although most USMCA provisions fall within Chapter 31's scope, there are exceptions. In some cases, the Agreement excludes an entire chapter from dispute settlement, as with the Small and Medium-Sized Enterprises Chapter.[10] In other cases, a chapter falls outside the Chapter 31 process, but alternative dispute settlement mechanisms apply. For instance, the Competition Chapter provides for consultations between the parties as the exclusive means for addressing disputes involving that Chapter.[11] Furthermore, sometimes Chapter 31 applies, but on a restricted basis, as with the Good Regulatory Practices Chapter, which permits use of Chapter 31 only to address a "sustained or recurring course of action or inaction that is inconsistent" with a party's obligations.[12]

Second, the complaining party or parties must be able to frame the conduct or measure in dispute in one of the following ways:

[8] *Id.* § 4201(b)(10)(H). In language identical to that in the Trade Act of 2002, one objective seeks to ensure that dispute settlement mechanisms resolve issues "in an effective, timely, transparent, equitable, and reasoned manner, requiring determinations based on facts and the principles of the agreements, with the goal of increasing compliance with the agreements." *Id.* § 4201(b)(16)(A).

[9] *See* Letter from Robert E. Lighthizer, U.S. Trade Representative, to Richard Neal, Chairman of the House Comm. on Ways & Means (Apr. 24, 2020), https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/USMCA%20Notification%20Neal.pdf; Statement by the Deputy Prime Minister on the Entry-into-Force of the New NAFTA (June 30, 2020), https://pm.gc.ca/en/news/statements/2020/06/30/statement-deputy-prime-minister-entry-force-new-nafta.

[10] United States-Mexico-Canada Agreement arts. 25.7, 26.3, Dec.10, 2019, 134 Stat. 11 [hereinafter USMCA].

[11] *Id.* arts. 21.6, 21.7. Similarly, matters involving antidumping and countervailing duty determinations and practices fall outside the scope of Chapter 31, but a separate state-to-state dispute settlement procedure exists to address these matters. *Id.* arts. 10.5.3, 10.8–10.18.

[12] *Id.* art. 28.20.

1. it "is or would be inconsistent with an obligation of this Agreement";
2. it demonstrates a party has "failed to carry out an obligation of this Agreement";
3. it is not inconsistent with the Agreement, but it nullifies or impairs a benefit that the complaining party "could reasonably have expected to accrue to it under" the following chapters: 2 through 7, 9, 11, 13, 15, and 20;[13] or
4. it involves a disagreement with regard to the interpretation or application of the Agreement.[14]

Measures and conduct that might meet both conditions include a party's failure to enact domestic laws to implement an obligation or introduction of a domestic law that creates an inconsistency with an obligation. For instance, parties must "maintain a legal framework governing electronic transactions consistent with the principles of the [*United Nations Commission on International Trade Law (UNCITRAL)*] *Model Law on Electronic Commerce 1996*."[15] Failure to establish or maintain laws implementing this obligation might expose a party to an allegation that it has not satisfied its USMCA obligations. Similarly, the parties may not "require as a condition for determining that a trademark is well-known that the trademark has been registered in the Party or in another jurisdiction, included on a list of well-known trademarks, or given prior recognition as a well-known trademark."[16] Thus, if a party's domestic law on protection of trademarks required registration of a trademark in another jurisdiction to qualify as a "well-known trademark," then another party could potentially initiate a dispute alleging the domestic law is inconsistent with USMCA obligations.

Whether the application of a measure or conduct may nullify or impair a benefit that a party may have reasonably expected to obtain by entering into the Agreement is often difficult to assess, particularly when the measure or conduct does not violate a trade obligation on its face. Perhaps reflecting the difficulty of proving nullification or impairment claims, parties raise these claims infrequently. For example, under NAFTA and the preceding Canada-U.S. FTA (CUSFTA),[17] one such case was brought.[18] This CUSFTA case illustrates how such a claim might be framed. In *Puerto Rico—UHT Milk*, Canada alleged that Puerto Rico nullified or impaired a benefit under CUSFTA by adopting a new standard for producing ultra-high temperature processing milk (UHT milk) to align its sanitary standards with those of the rest of the United States, thereby effectively excluding Canadian UHT milk from the Puerto Rican market.[19] The panel agreed, holding that Canada had a reasonable expectation under CUSFTA that its UHT milk would be allowed into U.S. markets if it was produced to standards equivalent to those used by the United States. Thus, the panel found that Canada could reasonably expect that the United States would conduct an

[13] These chapters cover the following subjects: National Treatment and Market Access for Goods; Agriculture; Rules of Origin; Origin Procedures; Textiles and Apparel; Customs Administration and Trade Facilitation; Sanitary and Phytosanitary Measures; Technical Barriers to Trade; Government Procurement; Cross-border Trade in Services; and Intellectual Property.

[14] USMCA, *supra* note 10, art. 31.2.

[15] *Id.* art. 19.5.1.

[16] *Id.* art. 20.21.1.

[17] The CUSFTA is a trade agreement negotiated between the United States and Canada that entered into force on January 1, 1989. *See generally* Canada–United States Free Trade Agreement, Can.-U.S., Jan. 2, 1988, 102 Stat. 1851 [hereinafter CUSFTA]. It was subsequently suspended when NAFTA entered into force. *See* Villarreal & Fergusson, *supra* note 2.

[18] Graham Cook, *The Legalization of the Non-violation Concept in the GATT/WTO System* 10 (Oct. 24, 2018), *available at* http://dx.doi.org/10.2139/ssrn.3272165.

[19] Panel report, *Puerto Rico – UHT Milk*, USA-93-1807-01, ¶ 5.53 (1993).

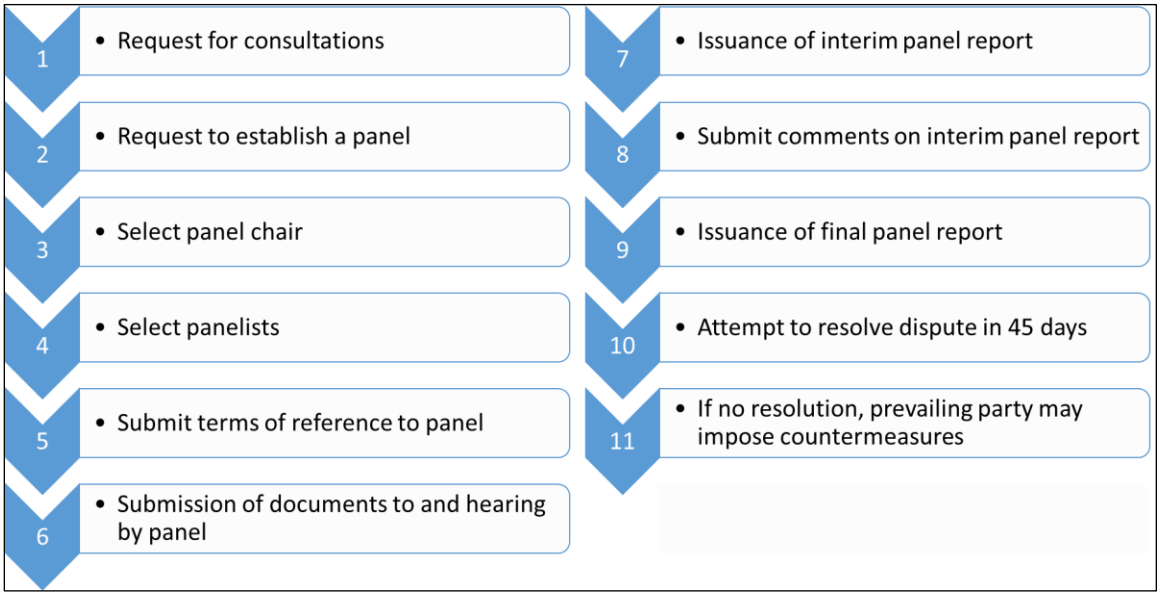
equivalency study (i.e., decide whether Canadian production standards for UHT milk were equivalent to U.S. standards) before excluding Canadian milk products from the market. The United States did not perform such a study, and thereby nullified or impaired a benefit that Canada could reasonably believe it would receive under CUSFTA.[20]

As is evident, there are a variety of ways in which a USMCA party may frame a dispute. In any case, however, the contested conduct must be classifiable as within the scope of a provision subject to the Chapter 31 dispute settlement process and characterized as a breach of a binding obligation, conduct that nullifies or impairs a benefit owed to another USMCA party, or involves the interpretation of a USMCA provision.

USMCA's Chapter 31 Process

The Chapter 31 dispute settlement process is designed to encourage parties to resolve issues cooperatively, while acknowledging that some cases may require formal dispute resolution proceedings. Thus, before a party may trigger the most formal step—establishment of a panel—that party must engage in discussions, known as consultations, with the responding party, and is encouraged to use alternative dispute resolution methods (e.g., mediation) at any time during the process.[21] This section explains the Chapter 31 process in detail.

Figure 1. Chapter 31 Process



Source: Created by CRS using information from USMCA Chapter 31.

Consultations

The first step is for a USMCA party to submit a written request for consultations to another party.[22] This document must detail the reason for the request, describe the measure or conduct at

[20] *Id.* ¶¶ 5.60–5.63.

[21] USMCA, *supra* note 10, arts. 31.4–31.6.

[22] *Id.* art. 31.4.1.

issue, and list the potential USMCA provisions involved.[23] Consultations may occur by means and in a location selected by the parties,[24] and must begin within a specified time (unless the parties agree on another timeline): within 15 days after the request for consultations is delivered for disputes involving perishable goods or within 30 days for all other requests.[25] A party that is not involved in the dispute (i.e., a third party) may participate in the consultations if it "considers it has a substantial interest in the matter."[26] To exercise this right, the third party must send a written notice with an explanation of its "substantial interest" to the other parties.[27]

To illustrate this process, consider the first consultation requested under USMCA, sent on December 9, 2020, in which the United States asked Canada to participate in consultations about "measures of Canada through which Canada allocates its dairy tariff-rate quotas (TRQs)."[28] The request lists the specific TRQ notices at issue and states they "appear to be inconsistent" with USMCA because they are not fairly or appropriately administered or create new conditions for importers that apply for a share of the TRQ, among other things.[29] Because the request involves perishable goods, consultations should have begun by December 26, 2020. To date, there has not been public confirmation as to when consultations began or how the parties intend to proceed.[30]

Establishing a Panel

If the parties do not reach an agreement during consultations, then the complaining party or parties may request establishment of a panel. The request must identify any measure or other matter at issue and a summary of the legal basis for the complaint.[31] Such a request may not generally be made until 30 days after delivery of the request for consultations if the matter involves perishable goods or until 75 days after delivery for all other matters.[32] For instance, as the United States and Canada did not resolve the dairy TRQ dispute by consultations within 30 days after the United States requested consultations (i.e., January 8, 2021), the United States could request a panel.

A party's decision to request panel establishment has certain legal consequences. Foremost among these is that such a request precludes the complaining party or parties from filing formal claims under any other treaty or in any other forum, such as the World Trade Organization (WTO).[33] For example, if Canada requested a panel under USMCA in a dispute against Mexico, it

[23] *Id.* art. 31.4.2.

[24] *Id.* art. 31.4.7. If the parties disagree about the location, the meeting will occur in the capital city of the party whose conduct is at issue. *Id*.

[25] *Id.* art. 31.4.5.

[26] *Id.* art. 31.4.4. Third-party participation may be more likely to occur if a statute, regulation, or other measure in dispute, such as a country-of-origin labeling rule or licensing rule, affects a product or service traded among all USMCA parties.

[27] *Id.*

[28] Request for Consultations by the United States (Dec. 9, 2020), https://ustr.gov/sites/default/files/files/Press/Releases/CdaDairyTRQConsultationsReq.pdf.

[29] *Id.*

[30] Canada has filed a separate request for consultations with the United States, alleging that safeguards on certain crystalline silicon photovoltaic cells may violate the obligation to generally exclude these Canadian products from safeguard actions. United States Solar Products Safeguard Consultations Request (Jan. 7, 2021), https://can-mex-usa-sec.org/secretariat/pubs/consult/2020-12-22.aspx?lang=eng.

[31] USMCA, *supra* note 10, art. 31.6.3.

[32] *Id.* art. 31.6.1. The parties may agree to a different time period. *Id.*

[33] *Id.* art. 31.3.2.

could not also begin dispute proceedings at the WTO or under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).[34] Requesting a panel does not, however, lock the parties into panel-driven resolution. At all times, the parties may pursue alternative methods of dispute resolution (e.g., mediation) and may decide to suspend (for up to one year) or terminate panel proceedings.[35]

Panel Selection

Once a panel is established, the parties must select a chair and the other panelists. As with many FTAs, USMCA allows the disputing parties to choose, subject to some limitations, whom they would like to serve in these positions. To facilitate the panel selection process, USMCA requires the parties to create a standing roster of individuals eligible to serve as panelists,[36] which the USMCA parties released after the Agreement entered into force.[37] This roster may play a significant role in creating future panels, as parties should "normally" select panelists from the roster.[38] Moreover, the roster may resolve situations in which a disputing party refuses or fails to participate in the panel selection process, as discussed below.[39]

Table 1. Summary of Chair and Panel Selection Process

Rule	Two Disputing Parties	Three Disputing Parties
Selection of the chair	By consensus within 15 days.	Same.
Consequence of failure to select a chair	If the parties cannot agree on a chair, a disputing party will be chosen by lot to select a chair within 5 days. The chair may not be a citizen of the selecting party.	Same, but the disputing party or parties chosen by lot must select the chair within 10 days.
Special rule applicable to responding party for failure to select a chair	If the responding party fails to participate in the drawing of lots, the complaining party may select the chair from the roster. The chair may not be a citizen of the complaining party.	Same, except the chair cannot be a citizen of either complaining party.

[34] The CPTPP is a trade agreement among Canada, Mexico, and nine other countries that developed out of the negotiations for the Trans-Pacific Partnership (TPP) after the United States withdrew from the TPP. *See Origins of the CPTPP*, N.Z. FOREIGN AFFS. & TRADE, https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/cptpp-overview/.

[35] USMCA, *supra* note 10, arts. 31.5.1, 31.5.4, 31.16.

[36] *Id.* art. 31.8.1.

[37] Decision No. 1 of the Free Trade Commission of the CUSMA, T-MEC, USMCA ("Agreement"), Annex IV (Roster of Panelists for Chapter 31 Dispute Settlement Panels) (July 2, 2020) [hereinafter July 2, 2020 Decision]. Each party may designate up to 10 individuals for a complete roster of 30. USMCA, *supra* note 10, art. 31.8.1.

[38] USMCA, *supra* note 10, art. 31.9.3. Whether the panel chair should normally be selected from the roster is unclear, as detailed below in the discussion on chair selection.

[39] For subsequent appointments to the roster (i.e., to replace roster members or otherwise fill vacancies), the parties must attempt to designate individuals by consensus. However, if they fail to agree one month after an individual is proposed, the nominee will be added to the roster. *Id.* art. 31.8.1.

Rule	Two Disputing Parties	Three Disputing Parties
Selection of other panelists	Within 15 days of selection of the chair, each party selects 2 individuals if a panel of 5, and 1 if a panel of 3. Panelists must be citizens of the other disputing party.	Same, except the responding party must, for panels of 5, select 2 individuals, 1 of whom is a citizen of the first complaining party and 1 who is a citizen of the other complaining party. There is no provision specifying which complaining party's citizenship a panelist must have if the panel has 3 members.
Consequence of failure to select panelists	If a disputing party fails to select panelists within the 15-day period, then panelists will be selected by lot and must be citizens of the other disputing party.	Same.
Special rule applicable to responding party for failure to select panelists	If the responding party fails to participate in the selection by lot procedure, then the complaining party may select the panelists, who must be citizens of the complaining party.	Same, except, for panels of 5, 1 panelist must be a citizen of 1 complaining party and the second a citizen of the other complaining party. There is no provision describing which complaining party's citizenship a panelist must have if the panel has 3 members.

Source: Created by CRS using information from USMCA Article 31.9.

Selection of the Chair

Disputing parties must attempt to select a chair for a panel within 15 days of delivery of a request for establishment of a panel. If there is no agreement, then a disputing party "chosen by lot shall select" a chair within 5 days.[40] The chair may not be a citizen of the selecting party.[41]

This provision is substantially the same as its NAFTA predecessor,[42] and provides little detail about the process. This lack of detail may reflect a preference for allowing the parties maximum latitude in selecting a chair, but it also generates several procedural ambiguities. For example, although the rules stipulate that a disputing party chosen by lot to select a chair may not choose one of its own citizens, the consequence of this limitation is unclear. One interpretation is that the chair must be a citizen of another USMCA party, and another is that the chair may be a citizen of any country. The NAFTA Secretariat's description of the chair selection process adopted the latter of these interpretations.[43] By replicating much of the NAFTA selection process, the parties may have intended to adopt this interpretation. However, if the parties would prefer to require that the chair be a citizen of a USMCA country, they could amend the Rules of Procedure or even the Agreement's text.

[40] *Id.* arts. 31.9.1(b), 31.9.2(b).

[41] *Id.*

[42] NAFTA, *supra* note 1, arts. 2011(1)(b), 2011(2)(b).

[43] "*Overview of the Dispute Settlement Provisions*," NAFTA SECRETARIAT, https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Overview-of-the-Dispute-Settlement-Provisions#chap20 ("The chair of the panel is selected by the disputing Parties and may be a citizen of a NAFTA Party or any other country.").

Selection of the Panelists

Panels generally consist of five individuals, including the chair, but the parties may agree on panels of three.[44] This is the first U.S. FTA to expressly limit the panel size to two choices. NAFTA and its U.S.-Canada predecessor provided only for panels of five. Other FTAs have limited panels to three members or indicated that panels shall have three members unless the disputing parties agree to panels of unspecified sizes, as shown in **Table 2**.

Table 2. Dispute Settlement Panels in U.S. FTAs

FTA	Panel Size	Article	Discretion on Panel Size?
Australia	3	21.7	Yes
Bahrain	3	19.7	Yes
CAFTA-DR	3	20.9	No
Chile	3	22.9	No
Colombia	3	21.9	No
Canada (CUSFTA)	5	1807	No
Israel	3	19.1	No
Jordan	n/a	n/a	n/a
Korea	3	22.9	Yes
Morocco	3	20.7	Yes
NAFTA	5	2011	No
Oman	3	20.7	Yes
Panama	3	20.9	No
Peru	3	21.9	No
Singapore	3	20.4	Yes
USMCA	3 or 5	31.9	Yes, but 3 or 5 only

Source: Created by CRS with information from U.S. free trade agreements.

Due to the shift away from NAFTA's five-member panel requirement, USMCA has created rules to address potential issues that may arise when appointing five- and three-member panels. As noted in **Table 1**, the disputing parties may generally select panelists subject to certain citizenship requirements within 15 days after the chair is selected.[45] These panelists should "normally" come from the roster, although the parties may select from outside the roster. To encourage parties to

[44] USMCA, *supra* note 10, arts. 31.9.1(a), 31.9.2(a). If the parties cannot agree on a panel size, the panel will consist of five members. July 2, 2020 Decision, *supra* note 37, Annex III (Rules of Procedure for Chapter 31 (Dispute Settlement)), art. 16.

[45] USMCA, *supra* note 10, arts. 31.9.1(d), 31.9.2(d).

select from roster members, a party may reject a nonrostered individual without giving a reason.[46] By contrast, a party cannot reject a rostered individual without giving a reason.[47]

In addition, USMCA has rules for when the parties fail to agree on panelists. Should a disputing party fail to select panelists within the 15-day timeline, that party's panelists will be selected by lot from the roster of individuals who are citizens of the other disputing party.[48] A special rule also applies for when a responding party fails to participate in the selection by lot for panelists. The complaining party or parties may select one or two panelists, as relevant, from the roster of citizens of the complaining party or parties.[49] In disputes involving two complaining parties and one responding party, there is some uncertainty as to how these provisions apply to three-member panels, as the rule stipulates that the selected panelist must be a citizen of the complaining parties, but does not indicate which of the two complainants will have a citizen on the panel. The complaining parties may be able to resolve the issue between them, but future dispute proceedings may lead the USMCA parties to revisit this and consider creating a more specific rule for such cases. For example, if the complaining parties cannot agree on a panelist, the Secretariat could randomly select a panelist from the rosters of citizens of those parties.

Aside from rules that govern disagreements about appointing panelists, USMCA also attempts to address situations in which one or more parties do not designate individuals to the roster, stating that such failure may not prevent another party from requesting establishment of a panel.[50] This provision seeks to prohibit a party from disrupting the dispute settlement process by blocking the formation of a panel.[51] Although USMCA does not clarify how the disputing parties may constitute panels in the absence of a full roster, the USMCA Free Trade Commission has created Rules of Procedure to address this situation.[52] If a party fails to create a full roster, each disputing party must propose panelists (but not the chair of the panel): for five-member panels, a party must propose four candidates, at least two of whom cannot be citizens of that country; for three-member panels, a party must propose two candidates, at least one of whom cannot be a citizen of that country.[53] Once these candidates have been proposed, each disputing party may then select from the other party's nominations, but must select individuals who are citizens of the other country.[54] If a disputing party fails to propose individuals for the panel, then the other party's

[46] This opportunity to reject another party's proposed panelist is subject to two limitations. The rejection must be filed within 15 days of a party proposing an individual and cannot be made if no one on the roster possesses the requisite expertise and qualifications to serve as a panelist for the dispute. *Id.* art. 31.9.3.

[47] The party seeking to reject a proposed panelist may only "raise concerns that" an individual does not meet the requirements of USMCA Article 31.8.2. *Id*.; *see also id.* art. 31.9.3 nn. 44, 47, 49.

[48] *Id*. art. 31.9.1(e).

[49] *Id.* arts. 31.9.1(f), 31.9.2(f).

[50] *Id.* art. 31.8.1.

[51] Experience with NAFTA's general state-to-state enforcement system (Chapter 20), which applied to most of the parties' treaty obligations (although not the environment or labor obligations), highlighted this potential issue with NAFTA. Specifically, in 2000, the United States successfully blocked formation of a panel; following this, no NAFTA panel was formed. Simon Lester, Inu Manak, & Andrej Arpas, *Access to Trade Justice: Fixing NAFTA's Flawed State-to-State Dispute Settlement Process*, 18(1) WORLD TRADE REV. 63, 66–68 (2019).

[52] USMCA, *supra* note 10, art. 31.8.1. The Commission is a body composed of ministers, or officials of equal status, that performs a number of administrative and substantive duties to monitor the implementation and functioning of USMCA. USMCA, *supra* note 10, art. 30.

[53] July 2, 2020 Decision, *supra* note 37, Annex III (Rules of Procedure), art. 17(d). This rule assumes that the chair has been agreed to by the parties or otherwise selected in accordance with USMCA rules, and thus only four or two panel slots, for five- or three-member panels, respectively, remain to be filled.

[54] *Id*. art. 17(f). This provision functions differently based on the number of vacancies. For example, if a five-member panel has two vacancies, each party may select one panelist from the proposed slates. This means if the United States

proposed slate serves as the panel.[55] However, if a disputing party submits names but then refuses to participate in selecting panelists, the panel will be selected by lot from the candidates who are citizens of the other party.[56] If a disputing party refuses to participate in the "selected by lot" process, then the other disputing party may choose two panelists of its own citizenship for five-member panels and one panelist of its own citizenship for three-member panels.[57]

These rules may be difficult to apply in some circumstances. For instance, if there are three vacancies for a five-member panel in a dispute between Canada and Mexico and Canada refuses to participate in panelist selection, then the rules require the panel be selected by lot from the proposed panelists of Mexican citizenship. However, under these rules, Mexico may propose only a maximum of two Mexican citizens in its slate of four proposed panelists. It is unclear if Mexico may then submit an additional panelist for consideration or if another process should apply. NAFTA and CUSFTA provide little guidance for how the parties might address these issues, as these agreements allowed only five-member panels.[58] If problems arise in future disputes, the parties may seek to address them in the Rules of Procedure.

Eligibility to Serve as a Panelist

Anyone a party may select for the panel must meet certain eligibility criteria. All panelists must "have expertise or experience in international law, international trade, other matters covered by this Agreement, or the resolution of disputes arising under international trade agreements."[59] For disputes involving labor or environmental issues, "panelists other than the chair" must have expertise or experience in labor or environmental law or practice, as relevant.[60] Additionally, for any dispute involving "specialized areas of law . . . , the disputing Parties should select panelists to ensure that the necessary expertise is available on the panel."[61] USMCA also imposes limitations on the conduct and affiliations of proposed roster and panel members. Members must "be independent of, and not be affiliated with or take instructions from, a Party," and must adhere to the Code of Conduct created by the USMCA Free Trade Commission.[62] In addition, an individual may not serve as a panelist for a specific dispute if he or she participated in consultations or other attempts to resolve the dispute.[63] Finally, the selection of individuals must be "on the basis of objectivity, reliability, and sound judgment."[64]

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proposes four persons, two of whom are not U.S. citizens and two who are, the other party—say, Canada—may select between only two of those four candidates. By contrast, if a five-member panel has four vacancies, then Canada must accept both of the U.S.-proposed panelists who are not U.S. citizens.

[55] *Id*. art. 17(e).

[56] *Id*. art. 17(g).

[57] *Id*. art. 17(h). The Rules of Procedure have a similar process for selection of the panel chair if the parties seek to select the chair from the roster. *Id.* art. 17(a)–(c).

[58] *See* NAFTA, *supra* note 1, art. 2011; CUSFTA, *supra* note 17, art. 1807.3.

[59] USMCA, *supra* note 10, art. 31.8.2(a).

[60] *Id.* art. 31.8.3.

[61] *Id.* art. 31.8.4.

[62] *Id.* arts. 31.8.2(c)–(d); July 2, 2020 Decision, *supra* note 37, Annex III (Code of Conduct).

[63] USMCA art. 31.8.5.

[64] *Id.* art. 31.8.2(b).

The Panel Process

Once panel selection is complete and the panel receives the terms of reference from the parties, a panel may commence its process for writing a report.[65] During the process, a panel may receive written and oral submissions, and the disputing parties may request a hearing.[66] If a hearing occurs, the public may normally attend unless the parties decide otherwise,[67] and any USMCA party that is not a disputing party may attend hearings and receive written submissions.[68] A panel must create an initial report and present it to the parties generally within 150 days of the last panelist's appointment.[69] Once the parties receive this report, they may submit comments to the panel.[70] The panel must then prepare a final report within 30 days, unless the disputing parties agree otherwise.[71] During this time, a panel may request additional views, reconsider its initial report, or undertake any "further examination that it considers appropriate."[72] Within 15 days of receiving the final report, the parties must review it, take steps to protect confidential information, and release it to the public.[73]

Resolving a Dispute After Issuance of a Final Panel Report

A final panel report may determine that a responding party's measure or conduct is inconsistent with USMCA or nullifies or impairs a benefit that the complaining party or parties expected to receive. In that case, the disputing parties must seek to resolve the issue within 45 days of receiving the report.[74] They may construct the terms of resolution even if a panel report contains recommendations about how to resolve the dispute, as the panel reports are not legally binding.[75] Although panel reports are not binding, responding parties may face consequences for failing to resolve a dispute. If the parties fail to reach a resolution within 45 days, then the complaining party or parties may suspend benefits to the responding party, but only to a degree "equivalent" to the injury suffered by the complaining party or parties. Generally, the suspended benefit should be in the same sector as the measure or subject of the dispute, but may be in a different sector when a suspension in the same sector would not be effective or practicable.[76]

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[65] *Id.* art. 31.13.5.

[66] *Id.* arts. 31.11, 31.14, 31.15. For more details, see July 2, 2020 Decision, *supra* note 37, Annex III (Rules of Procedure for Chapter 31 (Dispute Settlement)), art. 23. *See also* USMCA, *supra* note 10, art. 31.11(e).

[67] USMCA, *supra* note 10, art. 31.11(b). The public may also access all written submissions, written versions of oral statements, and written responses to requests or questions from the panel, except information redacted or protected as confidential. *Id*. art. 31.11(d).

[68] A nondisputing party must submit written notice of its intent to exercise this right within 10 days after delivery of the request to establish a panel. *Id.* art. 31.14.

[69] *Id.* arts. 31.13(6), 31.17.1. "In cases of urgency related to perishable goods, the panel shall endeavour to present" the draft within 120 days. *Id*. Further, if a panel needs more time, it may inform the parties in writing of the reason for the delay and include the date it intends to release the report. An extension may not exceed 30 days unless the disputing parties agree otherwise. *Id.* art. 31.17.2.

[70] *Id.* art. 31.17.3.

[71] *Id.* art. 31.17.5.

[72] *Id.* arts. 31.17.4-31.17.5.

[73] *Id.* art. 31.17.6.

[74] *Id.* art. 31.18.1.

[75] A resolution may include eliminating a USMCA-inconsistent measure, providing compensation, or agreeing to any other appropriate remedy. *Id*. art. 31.18.2. Compare this to reports issued by binational panels hearing challenges to antidumping or countervailing duty (AD/CVD) determinations, which are binding on the parties. *Id*. art. 10.12.9.

[76] USMCA, *supra* note 10, art. 31.19.

A responding party may challenge the suspension of benefits in two circumstances: (1) if it believes the level of suspension is "manifestly excessive"; or (2) if it believes that it has eliminated the disputed measure.[77] In such a case, the responding party may request the panel that heard the merits of the dispute reconvene to reconsider the challenge.[78] A panel must "reconvene as soon as possible after the date of delivery of the request" and issue a determination within 90 days if it is considering one of the two circumstances above, or within 120 days if considering whether both circumstances exist.[79] Should the panel determine the suspension of benefits is manifestly excessive, it must provide its views as to an appropriate level.[80] If a panel finds the responding party has not eliminated the measure or conduct in dispute, the complaining party or parties may then suspend benefits but only up to the level determined by the panel.[81]

Enforcement of Labor Provisions

USMCA establishes several mechanisms that parties may use to address issues involving the Labor Chapter (Chapter 23). This section discusses the formal and informal ways in which parties may try to enforce this Chapter.[82] As of this writing, no USMCA party has initiated a dispute against another party to enforce labor provisions. However, a number of Mexican migrant workers lodged a complaint with Mexico, alleging that the United States violated a number of Chapter 23 obligations.

Labor Disputes Under Chapter 31

USMCA countries may rely on the general state-to-state dispute settlement mechanism in Chapter 31 to resolve matters involving the Labor Chapter. However, the party or parties seeking to bring a claim under the Labor Chapter must complete the consultation process set out in USMCA Article 23.17, rather than the consultation process in Chapter 31, before requesting a Chapter 31 panel. The request and process for consultations in Article 23.17 largely track the Chapter 31 consultation provisions.[83] However, if initial consultations fail to resolve the issue, a party may not immediately request establishment of a panel. Instead, a party must request ministerial consultations. During these consultations, the parties' relevant ministers or their designees must attempt to address the relevant issues.[84] Only after these two rounds of consultations may a party request a Chapter 31 panel.[85] Once such a request is made, the Chapter 31 provisions govern the dispute.

This approach generally adopts the design for enforcing labor obligations in FTAs completed (or amended) after the May 10th Agreement, which departed from the approach taken in NAFTA's Labor Side Agreement. The NAFTA Labor Side Agreement, in a never-used provision, permitted

[77] *Id.* art. 31.19.3.

[78] *Id.*

[79] *Id.* If the original panelists are not available, the parties may select new panelists. *See* July 2, 2020 Decision, *supra* note 37, Annex III (Rules of Procedure for Chapter 31 (Dispute Settlement)), art. 25.

[80] USMCA, *supra* note 10, art. 31.19.3.

[81] *Id.* art. 31.19.4.

[82] For more information on USMCA's labor provisions, see CRS In Focus IF11308, *USMCA: Labor Provisions*, by M. Angeles Villarreal and Cathleen D. Cimino-Isaacs.

[83] USMCA, *supra* note 10, art. 23.17.

[84] *Id.* art. 23.17.6.

[85] *Id.* arts. 23.17.8, 23.17.12.

the parties to request panels to hear disputes involving "a persistent pattern of failure" by a country to "effectively enforce" occupational safety and health, child labor, or minimum wage technical labor standards.[86] By contrast, the USMCA dispute mechanism covers all of the labor obligations, and not just one type of claim. Further, USMCA's "failure to enforce" provision is broader in scope, reaching all labor laws,[87] and also addresses a challenge to bringing "failure to enforce" claims that arose in FTAs.[88] These later FTAs required the complaining party in "failure to enforce" claims to prove that the failure to enforce a labor law was done "in a manner affecting trade or investment between the Parties."[89] USMCA imposes the same requirement, but it includes a rebuttable presumption that such a failure to enforce does so in a manner affecting trade or investment between the parties.[90] This inclusion means that the complaining party need not provide evidence of this in its initial claim but must do so subsequently if the responding party provides sufficient evidence to suggest that its failure to enforce does not affect trade or investment.

Although Chapter 31 has yet to be used for labor disputes, there is one potential complaint that may lead to its use. On March 23, 2021, a group of female migrant workers filed a complaint with Mexico, alleging that the United States has violated several USMCA obligations.[91] Specifically, the complaint alleges violations of Article 23.3 (elimination of discrimination in respect of employment) and Article 23.8 (ensuring migrant workers are protected under labor laws) by allowing sex-based discrimination in recruitment and hiring practices of migrant workers, and thereby also failing to enforce U.S. labor laws.[92] If the Ministry of Labor in Mexico decides to proceed with the complaint and raise the issue with the United States, the complaint might serve as a basis for future Chapter 31 proceedings.

Cooperative Labor Dialogue

In addition to the Chapter 31 dispute settlement process, a USMCA party may use the cooperative labor dialogue procedure established in USMCA Article 23.13 to address issues involving the Labor Chapter. This dialogue may serve as a more informal alternative to the Chapter 31 dispute settlement process, although a party may pursue a dialogue in conjunction with the labor consultations discussed above.[93]

In many ways, the cooperative dialogue procedure is much like that for consultations. The country requesting a dialogue must submit a written request to the receiving party.[94] Furthermore, any request should begin "within 30 days of a party's receipt of a request for dialogue" and may

[86] NAALC, *supra* note 1, art. 27.1.

[87] USMCA, *supra* note 10, art. 23.5.1.

[88] *See* Panel report, *In the Matter of Guatemala – Issues Relating to the Obligations under Article 16.2.1(a) of the CAFTA-DR* (June 14, 2017) (addressing, among other issues, whether the alleged failures to enforce labor laws were done "in a manner affecting trade between the parties" – i.e., whether the failure to enforce conferred a competitive advantage in trade).

[89] *See, e.g.*, KORUS, *supra* note 6, art. 19.3.1(a); U.S.-Peru TPA, *supra* note 6, art. 17.3.1(a).

[90] USMCA art. 23.5.1 n.12.

[91] *Mexican Migrant Women File First USMCA Labor Complaint against U.S.*, INSIDE TRADE (Mar. 24, 2021), https://insidetrade.com/daily-news/mexican-migrant-women-file-first-usmca-labor-complaint-against-us.

[92] *Id.*

[93] USMCA, *supra* note 10, art. 23.17.13.

[94] *Id.* arts. 23.13.1-23.13.2.

be held in person or by other means.[95] A third party does not have a right to participate in the dialogue as it would in consultations, but the parties involved in the dialogue must permit "interested persons," which could include a third party, to submit their views on the matter.[96]

The cooperative labor dialogue differs more from consultations with respect to resolution of a matter. Consulting parties need not record or publish the outcome of their consultations, even when they resolve the issue in dispute during consultations. By contrast, the parties engaging in a cooperative labor dialogue must publish the outcome, including the time frame and steps for implementing the mutually accepted resolution, unless all parties disapprove such publication.[97]

Facility-Specific, Rapid Response Labor Mechanism

USMCA includes two facility-specific, rapid response labor mechanisms to resolve claims involving a "Denial of Rights," defined as the right of free association and collective bargaining, at "Covered Facilities" (defined below).[98] These rapid response mechanisms apply only to potential disputes between the United States and Mexico (USMCA Annex 31-A) and between Canada and Mexico (USMCA Annex 31-B), with provisions that appear identical except for changes in the footnotes to identify and address each country's relevant domestic laws and processes. In mid-May 2021, the AFL-CIO filed a petition against several facilities in Mexico with the U.S. Department of Labor, and the United States raised concerns about labor practices at automotive facilities in Mexico, marking the first uses of the rapid response mechanism.[99]

Denial of Rights claims involve enforcement by the USMCA parties, but address situations in which individual entities within a country allegedly infringe workers' rights, as opposed to the Chapter 31 and cooperative labor dialogue mechanisms, which address governmental failures to uphold USMCA obligations. These claims do not include all potential infringements of the right of free association or collective bargaining. Rather, such claims may arise from only the following three situations:

- for the United States, "Denial of Rights owed to workers at a covered facility under an enforced order of the National Labor Relations Board";[100]
- for Mexico, "Denial of Rights owed to workers under legislation that complies with Annex 23-A" of USMCA;[101] and
- for Canada, "Denial of Rights owed to workers at a covered facility under an enforced order of the Canada Industrial Relations Board."[102]

[95] *Id.* arts. 23.13.3-23.13.4.

[96] *Id.* art. 23.13.3.

[97] *Id.* art. 23.13.5.

[98] *Id.* arts. 31-A.1-2, 31-B.1-2.

[99] Thomas Kaplan, *Complaint Accuses Mexican Factories of Labor Abuses, Testing New Trade Pact*, N.Y. TIMES (May 10, 2021), https://www.nytimes.com/2021/05/10/business/economy/mexico-trade-deal-labor-complaint.html; David Lawder, Daina Solomon, and David Shepardson, *U.S. and Mexico Target GM Labor 'Violations,' Testing New Trade Deal*, Reuters (May 12, 2021), https://www.reuters.com/business/autos-transportation/us-asks-mexico-review-gm-plant-labor-allegations-test-new-trade-deal-2021-05-12/.

[100] The National Labor Relations Board (NLRB) is an independent agency of the U.S. Government that may, among other things, issue orders to prevent any person from engaging in an unfair labor practice, including interference with the right to collective bargaining. 29 U.S.C. § 153 *et seq.*

[101] Annex 23-A requires Mexico to adopt several laws to protect the right to collective bargaining and union activity, and to establish independent entities and Labor Courts for resolving labor disputes.

[102] USMCA, *supra* note 10, arts. 31-A.2 n.2, 31-B.2 n.5. The Canada Industrial Relations Board is a federal entity

Furthermore, the entities within the scope of this mechanism (i.e., the "Covered Facilities") include only facilities "in the territory of a Party" that meet the following criteria:

- the facility involves a "priority sector," defined as "a sector that produces manufactured goods, supplies services, or involves mining";[103] and
- the facility produces goods or supplies services traded between the parties or that compete in the territory of the other party.[104]

Table 3. Rapid Response Mechanism Claims

Requirements to File a Claim

Criterion	Definition
Denial of Rights	The covered facility must have infringed the right to free association or collective bargaining.
Covered Facility	The facility must involve involves a "priority sector," defined as "a sector that produces manufactured goods, supplies services, or involves mining" and The facility must produce goods or services traded between the parties or compete in the territory of the other party.
Country-Specific Limitations	**United States**: The covered facility must be subject to an order involving a denial of rights imposed by the National Labor Relations Board. **Canada**: The covered facility must be subject to an order imposed involving a denial of rights by the Canada Industrial Relations Board. **Mexico**: The covered facility must be subject to the legislation, in Annex 23-A, that Mexico must adopt to protect the right to collective bargaining and union activity.

Source: Created by CRS using information from USMCA Articles 31-A.2, 31-A.15, 31-B.2, 31-B.15.

In some respects, the rapid response mechanism mirrors the Chapter 31 process. A party must engage in collaborative efforts to resolve the dispute before requesting establishment of a panel and potentially imposing remedies (e.g., higher tariffs). The rapid response mechanism also differs from the Chapter 31 process in some significant respects, as described below.

State Requests for Review and Remediation

If a USMCA party has a "good faith basis" to believe that a facility is infringing workers' right of free association or collective bargaining, it may request that the government of the country in

created to enforce the Canada Labour Code, which applies to employees and employers connected to the federal government, by investigating and issuing orders to protect the right to collective bargaining and prevent other unfair labor practices. Canada Labour Code, R.S.C. 1985, c. L-2.

[103] Although USMCA currently limits priority sectors to those listed, the Agreement imposes an obligation on the parties to review such sectors to determine whether to add other sectors to the list. USMCA, *supra* note 10, arts. 31-A.13, 31-B.13. Thus, the types of issues that a country may raise with another country within this mechanism may expand over time.

[104] *Id.* arts. 31-A.15, 31-B.15.

which that facility is located review the situation.[105] The country receiving a request may decide whether to conduct the review and must notify the requesting party of its decision within 10 days.[106] If the country declines to conduct a review, the complainant "may request the formation of a Rapid Response Labor Panel."[107] Should the country agree to conduct a review, it must submit a written report within 45 days.[108]

Any next steps turn on the report's findings. If the report finds no Denial of Rights, then the complainant may agree or submit a written notice of its disagreement and request the formation of a panel.[109] By contrast, if the report finds a Denial of Rights, the parties must consult for at least 10 days to resolve the issue.[110] If the parties do not reach an agreement, the complaining party may request formation of a panel.[111] If the parties reach an agreement, that agreement must include a time for the respondent party to correct the Denial of Rights. This provision acts to encourage prompt remediation while preserving the complainant's ability to take further action if the situation is not resolved. Once the time for the respondent to take remedial measures expires, and if the parties disagree as to whether the Denial of Rights has been remedied, then the complainant may give notice to the respondent of its intent to impose remedies.[112] These remedies may include the suspension of preferential tariff treatment for or imposition of penalties on goods manufactured at or services supplied by the relevant facility.[113] A respondent may contest any remedies imposed by the complainant by requesting that a panel assess whether a Denial of Rights persists.[114]

Establishing and Selecting a Panel

To establish a panel, a party must submit a petition with its request. It may ask the panel to conduct one of two inquiries:

1. "[V]erify the Covered Facility's compliance with the law in question and determine whether there has been a Denial of Rights"; or
2. "[D]etermine whether there has been a Denial of Rights."[115]

[105] *Id.* arts. 31-A.4.2, 31-B.4.2. Before submitting a request, a party may decide whether to invoke the mechanism through its domestic process. *Id.* arts. 31-A.4.1 n.3, 31-B.4.1 n.6. The United States has proposed a process for reviewing all petitions alleging a Denial of Rights, through which the Interagency Labor Committee assesses whether there is a good faith basis to request a review and then makes a recommendation to the U.S. Trade Representative. Interagency Labor Committee for Monitoring and Enforcement Procedural Guidelines for Petitions Pursuant to the USMCA, 85 Fed. Reg. 39,257 (June 30, 2020).

[106] USMCA, *supra* note 10, arts. 31-A.4.2, 31-B.4.2.

[107] *Id*.

[108] *Id.* arts. 31-A.4.4, 31-B.4.4.

[109] *Id.* arts. 31-A.4.5, 31-B.4.5.

[110] *Id.* arts. 31-A.4.6, 31-B.4.6.

[111] *Id.* arts. 31-A.4.9, 31-B.4.9. Panel formation is discussed further below.

[112] *Id.* arts. 31-A.4.7-8, 31-B.4.7-8.

[113] *Id.* arts. 31-A.10.2, 31-B.10.2.

[114] *Id.* arts. 31-A.4.8, 31-B.4.8.

[115] *Id.* arts. 31-A.5.1, 31-B.5.1.

Once the USMCA Secretariat receives a request for a panel,[116] it must transmit the request to the other party and then select a panel within three business days of the request's date.[117]

Creating Lists of Eligible Panelists

Much like the Chapter 31 panel procedure, the rapid response mechanism calls for the parties to create lists of individuals eligible to serve as panelists. However, the rapid response mechanism specifies that the parties create three lists: one list per party of nationals of the parties, and one joint list of individuals who are not nationals of either party.[118] The U.S.-Mexico mechanism, for example, requires Mexico to appoint its nationals to one list, the United States to appoint its nationals to another list, and both parties to create jointly a list of individuals who do not share either's nationality. The parties released their lists of panelists on July 2, 2020.[119]

Should a party fail to "designate its individuals, the Parties may still request establishment of panels."[120] The Rules of Procedure provide procedures to address these situations. First, if there is no joint list but the parties have submitted their individual lists, each party may propose two candidates who are not nationals of either disputing party to serve as chair. The Secretariat will select a chair from among the names submitted by lot and select the other panelists by lot from the individual lists.[121] Second, if the party requesting a panel has failed to submit names for its individual list, it must propose three candidates at the time it requests a panel or no panel may be established.[122] Third, if the nonrequesting party has not completed its individual list, then it must submit three candidates, from which the Secretariat may select one. Should that party fail to submit candidates, the other party may propose candidates for consideration.[123]

Qualifications for Panelists

The qualifications for panelists mirror those in Chapter 31 except for the expertise criterion. Chapter 31 panelists generally must have "expertise or experience in international law, international trade, other matters covered by this Agreement, or the resolution of disputes arising under international trade agreements."[124] Those panelists who hear disputes involving the Labor Chapter (Chapter 23) must also have "expertise or experience in labor law or practice."[125] The rapid response mechanism builds further on these requirements and specifies that its panelists must possess "expertise or experience in labor law and practice, and with the application of standards and rights as recognized by the International Labor Organization."[126]

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[116] The Secretariat is an entity organized by the USMCA Free Trade Commission to assist the Commission and provide administrative support for panels and other committees established in the Agreement. *Id.* art. 30.6.

[117] *Id.* arts. 31-A.5.2-3, 31-B.5.2-3.

[118] *Id.* arts. 31-A.3, 31-B.3.

[119] July 2, 2020 Decision, *supra* note 37, Annex V (United States-Mexico Lists of Rapid Response Labor Panelists), Annex VI (Canada-Mexico Lists of Rapid Response Labor Panelists).

[120] USMCA, *supra* note 10, art. 31A-3.2.

[121] July 2, 2020 Decision, *supra* note 37, Annex III (Rules of Procedure), arts. 26.10(a)(i), (c), 27.10(a)(i).

[122] *Id*. arts. 26.10(a)(ii), 27.10(a)(ii).

[123] *Id*. arts. 26.10(iii), 27.10(iii).

[124] USMCA, *supra* note 10, art. 31.8.2(a).

[125] *Id.* art. 31.8.3(a).

[126] *Id.* art. 31-A.3.4(a), 31-B.3.4(a).

Selecting the Panel

The Secretariat selects the panel's members, with one member drawn by lot from each list, and the member from the joint list to serve as chair of the panel.[127] If any of the lists are incomplete, then the Secretariat may select the chair or panelists by lot according to the Rules of Procedure described above.

The Panel Process

Confirmation of Petition

After the Secretariat selects the panelists, it must send the petition for a panel determination to the panelists. The panel must convene within five business days to "confirm the petition," or, in other words, to ascertain whether the petition meets the criteria for consideration. Specifically, the panel must ensure that the petition (1) identifies a "Covered Facility"; (2) identifies the domestic laws "relevant to the alleged Denial of Rights"; and (3) "states the basis for the complainant Party's good faith belief that there is a Denial of Rights."[128] If the petition lacks some or all of this information, it is unclear how a panel may proceed, but USMCA permits panels to adopt procedures to address procedural questions not addressed elsewhere.[129]

If the party requesting a panel has asked for a Denial of Rights determination and verification, then the panel must send a request for verification to the respondent party, as explained below. If the party requested a panel determination only of whether a Denial of Rights occurred, the panel may proceed to that determination, also described below.

Verification of a Denial of Rights

If a party requests that a panel verify a covered facility's compliance with a labor law, then after a panel confirms a petition, the panel must "issue a request for verification to the respondent Party."[130] This request must be tailored to address the "circumstances and the nature of the allegations" in the petition and "any other submissions from the Parties."[131] The respondent party must reply to the verification request within seven business days as to whether it consents to a verification.[132] Failure to respond on time is deemed equivalent to a refusal, and permits the complaining party to request that the panel decide whether a Denial of Rights occurred even without a verification.[133] For cases in which a respondent party conducted an initial review of whether a Denial of Rights occurred, a panel must also request that the respondent party submit a document, within 10 business days, with details of any investigation or action taken against the facility at issue.[134] The complainant party may submit a response to such document.[135]

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[127] *Id.* art. 31-A.5.3, 31-B.5.3. July 2, 2020 Decision, *supra* note 37, Annex III (Rules of Procedure), arts. 26.6, 27.6.

[128] USMCA, *supra* note 10, arts. 31-A.6, 31-B.6.

[129] July 2, 2020 Decision, *supra* note 37, Annex III (Rules of Procedure), art. 9.4.

[130] USMCA, *supra* note 10, arts. 31-A.7.1, 31-B.7.1.

[131] *Id*.

[132] *Id.* arts. 31-A.7.6, 31-B.7.6.

[133] *Id*. arts. 31-A.7.6, 31-A.7.9, 31-B.7.9.

[134] *Id.* arts. 31-A.7.2-4, 31-B.7.2-4.

[135] *Id*.

If a respondent party consents to a verification request, then the panel "shall conduct the verification within 30 days after receipt of the request by the respondent Party."[136] The agreement does not detail the content or steps taken as part of a verification, although it suggests that an on-site verification may occur in some cases.[137] If an on-site verification occurs, observers from both parties may accompany the panel.[138] USMCA's general lack of detail may reflect a sensitivity to the fact that the circumstances of each case may differ and therefore require different steps be taken as part of a verification. The Agreement's instruction that a request for verification be "appropriate" for the "circumstances and the nature of the allegations" suggests just such an awareness.[139] Thus, it gives panels broad discretion to determine what constitutes a "verification," although they must explain what actions they intend to take as part of a verification.[140]

If a respondent party's conduct causes "interference with the verification or the panel is otherwise unable to conduct the verification in a manner that it believes is most appropriate . . . the panel may take the Party's conduct into account" in determining whether a Denial of Rights has occurred.[141] The level or type of conduct that may constitute "interference" is undefined, and whether conduct qualifies as interference likely depends on the steps that a panel decides to take to verify a facility's compliance with the relevant law.

A panel must determine whether a Denial of Rights occurred within 30 days of a verification or, if one did not occur, within 30 days after constitution of the panel.[142] A determination must address the severity of any such Denial of Rights and identify, when possible, the responsible person or persons. It may also include recommendations for how to resolve the issue, but only if the parties request such recommendations.[143] During this process, the panel must permit the parties "an opportunity to be heard."[144]

Resolving a Dispute After a Panel Determination

If a panel finds that a Denial of Rights exists, the complainant may impose remedies after "providing written notice to the respondent Party at least 5 business days in advance."[145] There is no rehearing or appeal process to challenge a Denial of Rights finding. Remedies may include the imposition of higher tariffs on goods manufactured at the covered facility where the Denial of Rights exists, or the imposition of penalties on goods manufactured at or services provided by the covered facility.[146] Additionally, if a covered facility "owned or controlled by the same person producing the same or related goods or providing the same or related services has received" at

[136] *Id.* arts. 31-A.7.7, 31-B.7.7.

[137] *Id*.

[138] *Id*.

[139] *Id*. arts. 31-A.7.1, 31-B.7.1.

[140] July 2, 2020 Decision, *supra* note 37, Annex III (Rules of Procedure), arts. 26.11, 27.11.

[141] USMCA, *supra* note 10, arts. 31-A.7.8, 31-B.7.8.

[142] *Id.* arts. 31-A.8.1, 31-B.8.2.

[143] *Id.* arts. 31-A.8.4, 31-B.8.4.

[144] *Id.* arts. 31-A-8.2, 31-B.8.2. According to the Rules of Procedure, the parties may request a hearing and make written submissions to the panel. July 2, 2020 Decision, *supra* note 37, Annex III (Rules of Procedure), arts. 26.13, 27.13.

[145] USMCA, *supra* note 10, arts. 31-A.9, 31-B.9.

[146] *Id.* arts. 31-A.10.2, 31-B.10.2.

least two prior adverse Denial of Rights determinations, then a complainant may also consider whether to deny entry of the goods manufactured at that facility.[147]

A party's selected remedy must be the "most appropriate to remedy the Denial of Rights" and must be proportionate to the severity of the Denial of Rights.[148] The complainant party must take the panel's view of severity "into account"[149] when deciding on what remedy to impose, but this does not appear to require the party to follow a panel's view of the severity when constructing an appropriate remedy. In other words, a party may impose its own view of the severity of the Denial of Rights, which may be more or less severe than a panel's view. To address disagreements that the parties may have regarding severity, USMCA permits a respondent to request that a typical Chapter 31 panel review the remedy if it believes the complainant did "not act in good faith" in imposing an excessive remedy.[150]

After a complainant imposes remedies, the parties must "continue to consult on an ongoing basis in order to ensure the prompt remediation of the Denial of Rights and the removal of remedies."[151] Should they agree that the issue is resolved, the complainant party must remove all remedies.[152] If they disagree, then the respondent party may request that the rapid response panel reconvene to consider whether the Denial of Rights continues, and the complainant party may request a new verification.[153] The panel must perform any new verification and make a determination within 30 days after receiving the request.[154] A panel determination that a Denial of Rights continues to exist leads to three consequences. First, the parties must continue consultations. Second, the respondent party may not request a new determination for at least 180 days. Third, the remedies selected by the complainant party will remain in place until the parties resolve the matter.[155]

Failure to "Act in Good Faith" in Use of the Rapid Response Mechanism

If a party considers that another party "has not acted in good faith in its use of this Mechanism, either with regard to an invocation of the Mechanism itself or an imposition of remedies that are excessive in light of the severity of the Denial of Rights found by the panel," then that party may request establishment of a Chapter 31 panel.[156] A Chapter 31 panel established to consider a "good faith" claim is governed by the Chapter 31 rules described above. If a panel finds that a party did not act in good faith in using the rapid response mechanism, the parties must seek to resolve the dispute within 45 days after receiving the final panel report. The party that raised the issue may suspend benefits in accordance with Chapter 31 as a remedy for the other party's

[147] *Id.* arts. 31-A.10.4, 31-B.10.4. There is no corresponding more severe remedy for facilities that provide services and have received two or more adverse Denial of Rights determinations (e.g., option to deny a facility the right to provide services).

[148] *Id.* arts. 31-A.10.1, 31-B.10.1.

[149] *Id*.

[150] *Id.* arts. 31-A.11, 31-B.11. The concept of "good faith" is discussed further below with regard to failure to act in good faith in the use of the rapid response mechanism.

[151] *Id.* arts. 31-A.10.5, 31-B.10.5.

[152] *Id.* arts. 31-A.10.6, 31-B.10.6.

[153] *Id*.

[154] *Id*.

[155] *Id.* arts. 31-A.10.7, 31-B.10.7.

[156] *Id.* arts. 31-A.11, 31-B.11.

failure to act in good faith or may choose to prohibit the other party from using the rapid response mechanism for a period of two years.[157]

USMCA does not define "good faith," but the concept is recognized as a general principle of international law.[158] Of relevance here is the concept's role in imposing limits on how the USMCA parties may invoke the procedures for resolving disputes, and how they impose remedies on their trade partners. In relation to procedure, good faith may address situations in which a party might initiate a dispute for an inappropriate purpose or might seek to change its position to harm another party despite knowing the other party has relied on the prior position.[159] For example, it may be contrary to good faith for a party to agree that conduct at a particular facility does not constitute a Denial of Rights, but then request a review of the facility, especially if the request is designed to help a company that competes with the relevant facility. As to the substance of a dispute—here, the imposition of remedies—good faith, which is linked closely to notions of equity and justice, may be understood as a prohibition on abuse of rights. In other words, when exercising a right, a party must do so "reasonably."[160] Thus, if a party imposed tariffs at a level far higher than proportionate to compensate for the Denial of Rights with intent to harm the affected facility or drive it out of business, this conduct might breach that party's obligation to use the mechanism in good faith.

Enforcement of Environmental Provisions

Like the USMCA's Labor Chapter, its Environment Chapter provides several ways in which the USMCA parties may seek to hold their trade partners accountable for measures or conduct that is potentially inconsistent with the Agreement. This section describes both the formal and cooperative mechanisms applicable to environmental obligations under USMCA.

Environmental Disputes Using Chapter 31

USMCA's Environment Chapter falls within the scope of the Chapter 31 dispute settlement mechanism. However, a party that believes it may eventually need to seek establishment of a panel must undertake a more extensive process before requesting a panel.[161] First, a party must request consultations in essentially the same manner as that applicable to Chapter 31 consultations.[162] If initial consultations do not resolve the issue, the parties must undertake two additional levels of consultations before requesting establishment of a panel. The second level of consultations involves discussions between the parties' representatives on the USMCA Environment Committee.[163] This Committee is a body established under USMCA that performs several negotiating and consultative functions, among others, and consists of senior government representatives, or their designees, of the trade and environment authorities of each USMCA

[157] *Id*.

[158] ROBERT KOLB, GOOD FAITH IN INTERNATIONAL LAW 23 (2017).

[159] Markus Kotzur, *Good Faith (Bona Fide)*, *in* OXFORD PUBLIC INTERNATIONAL LAW (Jan. 2009), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1412#law-9780199231690-e1412-div2-8.

[160] Appellate Body Report, *United States-Import Prohibitions of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, para. 158 (adopted Nov. 6, 1998).

[161] USMCA, *supra* note 10, art. 24.32.

[162] *Id.* art. 24.29.

[163] *Id.* art. 24.30.

party.[164] If the second level of consultations fail, then a party must request ministerial consultations in which the consulting parties' relevant ministers must seek to address the relevant issue.[165]

Once consultations are complete, a party may request establishment of a panel.[166] After a party makes such a request, the Chapter 31 provisions for dispute settlement govern the matter. That said, the Environment Chapter supplements the Chapter 31 provision that allows a panel to seek expert opinions with guidance, stating a panel may "seek technical advice or assistance, if appropriate, from an entity authorised under the relevant multilateral environmental agreement," and must allow the parties to comment on any such advice or assistance received.[167]

This approach parallels developments in dispute settlement for labor obligations between the time of NAFTA's entry into force and USMCA's drafting. That is, it generally adopts the design for enforcing environmental obligations in FTAs adopted after the May 10th Agreement, and departs from NAFTA's side agreement on the environment. The NAFTA side agreement focused on cooperative resolution of disputes and included Chapter 31-style dispute resolution only for claims involving "a persistent pattern of failure" by a country to "effectively enforce" its environmental laws.[168] By contrast, USMCA's Chapter 31 provisions cover all of the Agreement's environmental obligations. Also paralleling the approach to enforcement taken in the Labor Chapter, USMCA includes a rebuttable presumption that a failure to enforce certain environmental laws does so in a manner affecting trade or investment between the parties, rather than requiring a complaining party to provide evidence of this in its initial claim.[169]

Voluntary Resolution Through Cooperative Activities

USMCA's Environment Chapter also creates a cooperative method, set forth in Articles 24.27 and 24.28, for addressing situations in which "a person" of one of the USMCA countries complains that a party is "failing to effectively enforce its environmental laws."[170] Although USMCA lacks a general obligation to enforce environmental laws, the method might still be used to enforce one specific obligation, contained in Article 24.4.1, which states the following:

> No Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties, after the date of entry into force of this Agreement.[171]

USMCA defines action or inaction as "sustained" if it "is consistent or ongoing," and "recurring" if it "occurs periodically or repeatedly and when the occurrences are related or the same in nature."[172] Due to the conditions that must be satisfied before a party may potentially violate Article 24.4.1, not all failures to enforce an environmental law breach that Article. However, for

[164] *Id.* art. 24.26.

[165] *Id.* art. 24.31.

[166] *Id.* art. 24.32.1.

[167] *Id.* art. 24.32.2(a).

[168] NAAEC, *supra* note 1, art. 22.1.

[169] USMCA, *supra* note 10, art. 24.4.1 n.5.

[170] *Id.* art. 24.27.1.

[171] *Id.* art. 24.4.1.

[172] *Id.* art. 24.4.1 n.3.

conduct that satisfies those conditions, it may be possible to use the cooperative method to resolve the situation.

The cooperative method, while relying on a complaint from a person rather than a country, may ultimately lead to recommendations for the USMCA countries to engage in cooperative activities to improve enforcement of environmental laws, thereby serving indirectly as a "soft" method of state-to-state dispute resolution (i.e., nonbinding and no suspension of benefits permitted).[173] This method relies on procedures and entities created in USMCA as well as entities established in the Environmental Cooperation Agreement (ECA).[174] The ECA retains and builds on the North American Agreement on Environmental Cooperation (NAAEC), a side agreement negotiated in tandem with NAFTA.[175]

Submission of Complaints

A person from a USMCA country may submit a complaint alleging that a party is failing to enforce its environmental laws to the Secretariat of the Commission for Environmental Cooperation (CEC).[176] The Secretariat is one of three bodies that comprise the Commission, which oversees administrative, enforcement, or other implementation issues relating to the NAAEC, and which will continue in a similar role under USMCA.[177]

Review of Submissions

Once the CEC Secretariat receives a submission, it must determine whether it meets the following criteria:

- is in writing in English, French, or Spanish;
- clearly identifies the person making the submission;
- provides sufficient information to allow for the review of the submission, including any documentary evidence on which the submission may be based and identification of the environmental law of which the failure to enforce is based;
- appears to be aimed at promoting enforcement rather than at harassing industry; and
- indicates whether the matter has been communicated in writing to the relevant authorities of the party and the party's response, if any.[178]

If the submission meets those criteria, then the CEC Secretariat must perform a substantive review within 30 days of receiving the submission to determine whether a party must respond. In making this determination, the CEC should consider the following factors:

- whether the submission alleges harm to the person making the submission;

[173] *Id.* art. 24.28.7.

[174] *See* Agreement on Environmental Cooperation among the Governments of the United States of America, the United Mexican States, and Canada (2018), https://www.international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/cusma-ECA.pdf [hereinafter ECA].

[175] *See* NAAEC, *supra* note 1.

[176] USMCA, *supra* note 10, art. 24.27.1.

[177] NAAEC, *supra* note 1, art. 8; ECA, *supra* note 174, art. 2.

[178] USMCA, *supra* note 10, art. 24.27.2.

- whether the submission, alone or combined with other submissions, raises matters about which further study would advance the goals of the Environment Chapter;
- whether private remedies available under the party's law have been pursued; and
- whether the submission is or is not drawn exclusively from media reports.[179]

Should the Secretariat determine that these factors weigh in favor of requiring a party's response to the submission, it must transmit the submission with a request for a response to the relevant party.[180] Once a party receives a request for a response, it must answer within 60 days after receiving the request.[181] If the party notifies the CEC Secretariat that the matter is already subject to judicial or administrative proceedings, then the Secretariat may not proceed with the submission.[182] In either case, the party can provide additional information relevant to the submission, such as enforcement practices or actions involving the environmental law at issue.[183]

Development of a Factual Record

After receiving a party's response, the CEC Secretariat must determine whether the submission merits development of a factual record.[184] If it believes the response warrants such action, then it must submit a proposal to the Council of the CEC, a body of Cabinet or equivalent-level representatives of the USMCA countries.[185] The Council may approve any such proposal with the affirmative vote of two Council members.[186]

While preparing a factual record, the CEC Secretariat may consider and include information from several sources, including the party whose law is at issue, interested persons, national advisory or consultative committees, independent experts, and the Joint Public Advisory Committee, which is another body of the CEC.[187] It may also consider information "developed under the ECA" and from publicly available sources.[188]

The CEC Secretariat must submit a draft record to the Council within 120 days, and any party may offer comments on the draft.[189] After reviewing the comments, the Secretariat must incorporate them into, and make any appropriate revisions to, the final record, and submit that record to the Council.[190] Generally, the Secretariat must make a final record available to the public, but the Council may prevent its release if two or more members agree to do so.[191]

[179] *Id.* art. 24.27.3.

[180] *Id.*

[181] *Id.* art. 24.27.4.

[182] *Id.* art. 24.27.4(a).

[183] *Id.* art. 24.27.4(b).

[184] *Id.* art. 24.28.1.

[185] ECA, *supra* note 174, art. 3.1; NAAEC, *supra* note 1, art. 9.1.

[186] USMCA, *supra* note 10, art. 24.28.2.

[187] *Id.* art. 24.28.4; ECA, *supra* note 174, art. 2.2; NAAEC, *supra* note 1, art. 8.2.

[188] USMCA, *supra* note 10, art. 24.28.4.

[189] *Id.* art. 24.28.5.

[190] *Id.*

[191] *Id.* art. 24.28.6.

Recommendations for Cooperative Activities

The Secretariat must also submit the record to the USMCA Environment Committee, a body of senior government representatives from the USMCA countries' trade and environment authorities.[192] This Committee may review the record and "provide recommendations to the [CEC] Council on whether the matter raised in the record could benefit from cooperative activities."[193] Although USMCA does not require the parties to implement any recommendations for cooperative activities designed to improve enforcement of environmental laws, the parties must "provide updates" to the CEC Council and Environmental Committee "on final factual records."[194] The contours of this duty remain undefined, but the updates may potentially include information about any cooperative activities undertaken or about future enforcement actions taken by the party whose law was the subject of the record.

United States-Mexico Environment and Customs Verification

USMCA also includes a side agreement between the United States and Mexico to address situations when questions arise as to whether shipments of certain products comply with the parties' USMCA obligations.[195] The customs verification mechanism applies only to the parties' obligations to promote sustainability and conservation, and obligations to take steps to combat the illegal take or trade in wild flora and fauna, fish, and forest products.[196]

For each of these products, the mechanism functions in the same manner. First, a party that questions a shipment's legality may submit a written request to the other party for information so that the requesting party may "determine whether an importer has provided adequate and accurate information" and then decide on the shipment's legality.[197] The party receiving the request must respond within 20 days. If the party intends to share the information, it must state the time by which it will do so, and transmit the information within 90 days of receiving the request.[198] If it intends not to share the relevant information, then it must provide a reason for refusing.[199]

After reviewing any information shared by the other party, the requesting party may submit another request for information or ask the other party to take additional verification steps.[200] If the request includes a potential site visit, the other party may prohibit it, but must provide reasons for doing so.[201] If the party allows a site visit, officials of that party must lead the visit, and officials from the requesting party may accompany them.[202]

[192] *Id.* arts. 24.26.2-24.26.3, 24.28.7.

[193] *Id.* art. 24.28.7.

[194] *Id.* art. 24.28.8.

[195] Environment Cooperation and Customs Verification Agreement between the United States and Mexico (Dec. 10, 2019).

[196] *Id.* §§ II.1, III.1, IV.1 (referencing USMCA Articles 24.17, 24.19, 24.21, 24.22, 24.23).

[197] *Id.*

[198] *Id.* §§ II.2-3, III.2-3, IV.2-3.

[199] *Id.* §§ II.2, III.2, IV.2.

[200] *Id.* §§ II.4, III.4, IV.4.

[201] *Id.* §§ II.5, III.5, IV.5.

[202] *Id.*

Considerations for Congress

USMCA's general state-to-state dispute settlement mechanism (Chapter 31), as well as the labor and environment enforcement mechanisms, represent a shift from the approach to dispute settlement taken in NAFTA, and raise several possible issues for Congress.

First, some Members of Congress and other stakeholders criticized the NAFTA dispute settlement system as ineffective because one disputing party could block the appointment of panelists, thereby rendering it difficult to use the NAFTA dispute settlement process. USMCA sets forth procedures that may resolve the panel-blocking issue, but these new rules have not yet been tested. When the USMCA parties apply these rules in future disputes, Congress may consider whether they effectively resolve concerns about panel blocking. In addition, Congress may consider more broadly whether the process for appointing panelists should be replicated in future FTAs, and whether to address the appointment process, as given or as modified, in the negotiating objectives of any future TPA legislation.

Second, USMCA subjects the labor and environment provisions to the general Chapter 31 dispute settlement process. Congress's list of "trade negotiating objectives" in current TPA legislation (located at 19 U.S.C. § 4201(10)(H)) includes that "enforceable labor and environment obligations [be] subject to the same dispute settlement and remedies as other enforceable obligations under the agreement." Once Chapter 31 has been applied to labor and environmental disputes, Congress may evaluate how effectively the process resolves these disputes. Ultimately, dispute settlement mechanisms should serve to promote adherence to or implementation of substantive objectives in the FTAs. In other words, a fundamental design question is whether the purpose of the obligation is best served by the chosen means for resolving disputes involving that obligation.

If Congress determines that Chapter 31 is not resolving disputes involving the labor or environment obligations effectively (however Congress may choose to define and measure effectiveness), Congress may consider modifying the negotiating objectives in any future TPA legislation. Alternatively, if some of the difficulty in using Chapter 31 arises from the substantive prerequisites to bringing a claim (e.g., the threshold for proving a legal claim is too demanding), Congress could consider whether to encourage USTR to negotiate different substantive obligations, rather than change the dispute settlement procedures. These same considerations apply to use of the new facility-specific rapid response mechanisms. Once these rapid response mechanisms have been used, Congress may consider whether to encourage the executive branch to modify the mechanisms or the substantive labor obligations addressed by the mechanisms.

Finally, USMCA does not include a provision that makes reports issued by Chapter 31 panels or as part of the facility-specific rapid response mechanisms binding on the parties. In other words, even if a panel report determines that a party's measure or conduct is inconsistent with a USMCA obligation, the relevant party is not required to alter its measure or conduct. Similarly, U.S. legislation states that panel reports have "no binding effect on the law of the United States," and therefore do not require changes in U.S. law or practice.[203] Nonetheless, a party's failure to rescind or eliminate a contested measure may ultimately lead the complaining party or parties to suspend the Agreement's benefits or impose other remedies on the responding party. If this situation arises, Congress may consider whether it prefers to amend or rescind a law or potentially face negative consequences from the United States' trading partners.

[203] 19 U.S.C. § 4207(c).

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