

## New Labor Trade Fights May Rest On Diplomacy, Not Legalese

By **Alex Lawson**

*Law360 (May 18, 2021, 8:34 PM EDT)* -- Two landmark labor cases filed last week will test the strength of a new enforcement tool in the North American trade pact, even if the most likely outcome is a diplomatic resolution that will leave its full legal heft uncertain.

The new labor enforcement rules that helped propel the U.S.-Mexico-Canada Agreement to sweeping bipartisan support were always intended to ride the line between diplomacy and arbitration. Broadly speaking, the mechanism offers the chance for the U.S. and Mexico to either resolve issues bilaterally or kick the dispute to a panel.

Experts agree that the cases filed last week — one by the government, another by union leaders — will hew toward a bilateral understanding, with Mexico unlikely to take an adversarial stance in the early days of the USMCA, according to Arturo Sarukhan, Mexico's former U.S. ambassador.

"The Mexican government will try to ensure that those labor cases that do pop up ... be handled as cooperatively as possible so that a success story can develop not only regarding the dispute resolution mechanisms but Mexico's willingness to comply with both USMCA and domestic labor practices," Sarukhan told Law360.

In the run-up to the USMCA's ratification, congressional Democrats appended the deal with the so-called rapid response mechanism, a dispute settlement provision devoted solely to labor issues.

The mechanism allows for trade sanctions against specific companies if workers there "are being denied the right of free association and collective bargaining." While it allows for the U.S. and Mexico to work together if they agree those rights are being denied, it also allows for a panel of arbitrators to make a call if the parties are not aligned.

At the opening of the USMCA's Free Trade Commission meeting Tuesday, U.S. Trade Representative Katherine Tai referred to these tools as "state of the art" replacements for the "toothless" side letters on labor and environmental issues in past agreements.

After the meeting wrapped, a senior U.S. trade official said the trade ministers from all three countries did discuss labor issues, and made a point of framing enforcement as a cooperative effort.

"We talked about a number of things, including the importance of using all the tools in the agreement

and in particular using those tools in a collaborative way," the official said on a conference call with reporters Tuesday.

Attorneys are eager to see how a panel will interpret the agreement's legal language for the first time. But former Mexican trade official Carlos Vejar, now a partner with Holland & Knight LLP, stressed that the point of the mechanism is to improve labor conditions and that elevating the case to an adversarial proceeding should be a last resort.

"Success in my mind could only be obtained if the Mexican authorities guarantee compliance with their labor obligations in favor of the Mexican workers' rights," Vejar said. "Suspending benefits or enforcing adversely against Mexican exports may prove the system works but is not effective to resolve the most relevant question, which are the workers' rights."

Both petitions filed last week alleged serious anti-union violations at two Mexican factories owned by U.S. companies.

Monday saw the AFL-CIO and other unions allege a massive union-busting effort at an auto parts factory run by Mexican manufacturer Tridonex, a subsidiary of Philadelphia-based Cardone Industries. The unions' allegations included the retaliatory firing of hundreds of workers and the imprisonment of Mexican labor lawyer Susana Prieto Terrazas for aiding the union drive. Two days later, the Office of the U.S. Trade Representative brought a case of its own, targeting "irregularities" in a recent union vote at a General Motors Co. plant in the northern city of Silao.

Technically, the two cases are at different stages of the rapid response mechanism process. The USTR has found evidence of a denial of rights at the GM plant and asked Mexico to conduct its own review. Mexico's Labor Ministry had already intervened to stop the vote at the plant on suspicions of tampering and is currently in the process of arranging another vote that the government will monitor.

In the Tridonex case, the USTR is examining the unions' petition and will make a similar request to Mexico if it finds the petition to be on solid ground.

Most observers agree that Mexico will similarly play ball on the Tridonex case, nodding to the fact that the AFL-CIO has likely prepared a very strong case for the first test of the new system, which would make Mexico less inclined to move it to a panel.

"It's kind of anti-climactic, because everyone wants to see this mechanism really start, but keep in mind that the purpose of the mechanism is not to sanction — it's to deter," said Cornell University labor law professor Desiree LeClercq, who formerly served as the USTR's director for labor affairs.

Even if a full legal review of the USMCA labor rules is a long shot, early stages of the process will not be without some level of intrigue for lawyers.

One potential inflection point is the extent to which U.S. officials seek and obtain access to Mexican facilities as part of their efforts to verify the allegations of the unions' claims at the Tridonex factory.

The extent of that oversight caused some discomfort on the Mexican side as the USMCA was surging toward a congressional vote. The two sides were able to come to an understanding about the role of U.S. labor attachés posted in Mexico, but Sarukhan said that tensions could rise again.

"That could become a contentious issue, particularly if there is a perception that the Mexican government is dragging its feet or not enforcing its laws," the former diplomat said.

Another element of the proceeding that will draw close attention from the bar is the speed with which it proceeds. The mechanism imposes strict deadlines on the governments to review allegations they receive and generally requires panels to decide cases within 150 days.

But the mechanism is fuzzier on timing if the dispute is handled bilaterally, as appears likely for both the new claims.

"It will be the first chance to examine how the timeline plays out and just how 'rapid' — and how transparent — the early steps of the mechanism are within the U.S. interagency system," University of Miami law professor and former USTR lawyer Kathleen Claussen said.

The tendency to resolve USMCA labor disputes through diplomacy rather than litigation could shift if the sheer volume of complaints demands a more robust legal review. For now, negotiation appears to be the preferred path, but the early-stage cases still have some lessons for the bar.

Many observers noted that in the government-initiated case, Tai suspended liquidation of tariffs for shipments coming from the GM factory, essentially allowing her to apply sanctions retroactively on the remote chances the case should reach a panel.

The USMCA allows Tai to take that step, but many were surprised she did so, given that the Mexican government had already taken steps to review the GM election. That development was "quite an alarm bell" for U.S. companies with operations south of the border, according to Crowell & Moring LLP trade attorney Jackson Pai.

"For a lot of companies, that might be a wakeup call that they need to be looking at their own Mexican facilities," Pai said. "That will be a big takeaway for a lot of U.S. companies."

--Editing by Gemma Horowitz.