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E S G A R T I C L E S

RRM as an effective mechanism to enforce collective labor standards

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Investment decisions taken by companies worldwide are increasingly based on (if not driven by) Environmental, Social and Governance (ESG) criteria. Even though these criteria are a tool to evaluate the sustainability of companies, they are not comprehensively supported by Mexican legal provisions and therefore, are not linked to legal compliance.

Nevertheless, certain countries and trading blocs have begun discussing alternatives for enforcing ESG criteria in both their own jurisdictions and those with which they have points of contact, such as trading partners. For example, Europe is considering imposing import duties on goods manufactured in countries that disregard climate change. In any event, the adoption of these kinds of measures should first be analyzed in detail to avoid the violation of any international treaty.

Social Responsibility Standards under USMCA

Meeting Social Responsibility standards contained within the ESG criteria would require, among other things, effectively balancing the creation of jobs and

the generation of income alongside the protection of basic employee rights and labor standards.¹ However, the complexities of globalized supply chains make the scrutiny of labor relations a difficult task indeed in each jurisdiction.

Notwithstanding the above, the United States and Mexico took a huge step forward when they included in Annex 31-A of the United States-Mexico-Canada Agreement (USMCA) a labor mechanism designed to enforce collective bargaining standards incorporated in Chapter 23 of said agreement, in addition to certain labor rights under specific circumstances.²

The so-called Facility-Specific Rapid Response Labor Mechanism (RRM) is intended to ultimately ensure that businesses that have a physical presence in Mexico guarantee workers their Free Association and Collective Bargaining rights at Mexican “covered facilities”.³ Entities impacted by RRM are those manu-

¹ As defined in international conventions such as those under the auspices of the International Labor Organization (ILO) and the United Nations (UN).

² USMCA's Annex 31-B establishes a similar mechanism only applicable between Mexico and Canada which we omitted for the sake of brevity.

³ It is worth mentioning that such protection would have been

facturing goods or rendering services within a list of “priority” sectors at a Mexican “covered facility”.

Failing to meet said standards may result, after an expedited arbitral procedure, in the USA adopting measures to restrict or discourage exports from such covered facilities or from others controlled by the company in question.⁴

RRM overview under the USMCA

Any person may file a complaint before the US Office of Trade and Labor Affairs. If a denial of collective bargaining rights is deemed to exist, the US trade representative should file the request for RRM. The sole presumption of a denial of rights will be sufficient to activate the RRM, and Mexico will bear the burden of providing evidence to the contrary.

The RRM was designed to be handled directly by the USA and Mexico only. However, Mexico will focus on working with the company in question and the union to ensure that a timely and robust response is provided. A response may consist of refuting the supposed denial or accepting it while proposing and implementing a corrective measure. Any dispute pertaining to said issues should be presented before a board of arbitration whose ruling should be considered by the USA for the purpose of levying sanctions.

Potential sanctions and restrictions

Any sanction or restriction will be imposed on the company in question alone, not on the entire productive sector. The USA will be entitled, as a precautionary measure, to delay the liquidation of the customs account once the goods are imported into the USA.

The USA may also impose fines on the company's

available even before Mexican Labor provisions encouraging such rights protections entered into full force and effect.

4 Theoretically, Mexico would also be entitled to impose sanctions and restrictions on American goods; however, this is not expected to happen any time soon.

goods at their point of entry into the USA -the amount and terms of which will be determined according to local customs provisions-. Alternatively, it may deny the imported good the applicable USMCA preferential import duty treatment, which would result in the payment of the Most Favored Nation (MFN) import duty applicable to that good under the World Trade Organization.

Finding a company responsible for denial of rights for a second time would entitle the USA to impose fines and to deny the USMCA preferential import duty treatment on additional goods manufactured at other covered facilities. If a company is responsible for a denial of rights for a third time, the USA would be entitled to block the import of any relevant goods.

The RRM has started to operate and has already shown results. For instance, two companies operating in Mexico have been involved in RRM petitions, leading them to rapidly propose corrective measures to ensure compliance.⁵ One company was accused of allowing “irregularities” during the legitimation voting procedure of its collective bargaining agreement, an essential process in ensuring compliance with the Federal Labor Act and the provisions of the USMCA pertaining to Freedom of Association and Collective Bargaining; while the another one was accused of preventing employees from organizing in a different union.

Conclusions

ESG criteria as a sustainability evaluation tool are becoming increasingly significant in the business world on a global scale; however, the development of ESG criteria and their use by investors, financial institutions, companies, and the business community as a whole is growing much faster than nations' legal frameworks and enforcement mechanisms.

5 It is important to highlight that, before May 2023, all collective bargaining agreements must be legitimated through the applicable legitimation protocol. If the union does not undertake said process or the collective bargaining agreement does not receive the support of the majority of the workers, it will be considered terminated; however, workers will keep the benefits and conditions established therein.

In this context, the USA has found in the RRM an effective way of encouraging Mexican companies to abide by certain collective labor standards under the USMCA.

By including the RRM and associated sanctions and restrictions in the USMCA, the parties successfully cancelled the ability of any one of them to allege that any sanction and/or restriction imposed under the RRM constitutes a trade violation in terms of other international trade instruments. Having other countries accepting this kind of provision in upcoming Free Trade Agreements appears to be an unlikely scenario right now, but that may change in the near future as ESG criteria become part of a broader and stronger trend.

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