**Conveniently Forgotten: Potential for Agricultural Worker Exclusion in the USMCA and the Importance of the Right to Strike under the ILO No. 87 Convention**

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The United States-Mexico-Canada Agreement (USMCA) replaced the North American Free Trade Agreement (NAFTA) in 2020,[[1]](#endnote-1) gaining popularity for its “strongest and most far-reaching”[[2]](#endnote-2) labor rights protective mechanism out of any international trade deal. Although the USMCA’s Labor section presents a more progressive and concrete approach to upholding worker rights, especially in Mexico, a subsect of workers continues to fall through the cracks. Agricultural laborers are the ultimate essential workers yet the USMCA fails to distinctly protect this group in its Labor chapter language. Though domestic remedies safeguard some aspects of farmworker life, the most powerful tool at their disposal – the right to strike – is left off the table. Even on the international stage, the right to strike has not yet been solidified; yet its recognition by the International Labor Organization and International Court of Justice could help level the playing field for overlooked workers.

**USMCA Labor Chapter & Rapid Response Labor Mechanism**

In Chapter 23 of the USMCA, the US, Canada, and Mexico all affirmed their obligations as members of the International Labor Organization (ILO), specifically under the ILO Declaration on Rights at Work (the Declaration);[[3]](#endnote-3) all three countries state they will “adopt and maintain its statutes and regulations” under the Declaration which includes “a) freedom of association and effective recognition of the right to collective bargaining.”[[4]](#endnote-4) However, Chapter 23 goes even further than the Declaration, with an asterisk above “freedom of association” stating “the risk to strike is linked to the right to freedom of association, which cannot be realized without protecting the right to strike.”[[5]](#endnote-5)

Due to Mexico’s prevalence of union-busting,[[6]](#endnote-6) the USMCA also includes Annex-23A which requires Mexico to adopt legislative amendments to formally recognize the right to collective bargaining in order to avoid trade sanctions.[[7]](#endnote-7) The most notable protective mechanism of the USMCA is the novel Rapid Response Labor Mechanism (RRLM) which allows unions to file a petition for the Office of the US Trade Representative (USTR) to launch an inquiry into an allegedly abusive employer.[[8]](#endnote-8) After the USTR sends Mexico a request for review, Mexico has ten days to decide whether to conduct a formal review and 45 days to investigate any claims.[[9]](#endnote-9) This mechanism is not meant to hold governments accountable, but more so private companies. The RRLM has been successful in awarding workers with backpay, strengthening union representation, providing union training, and protecting workers through public health measurers.[[10]](#endnote-10) Some notable examples include investigations into Tridonex,[[11]](#endnote-11) GM Silao,[[12]](#endnote-12) Panasonic,[[13]](#endnote-13) and most recently Asiaway[[14]](#endnote-14) and Tecnologia Modificada.[[15]](#endnote-15)

**RRLM’s Agricultural Worker Exclusion**

The USMCA is undoubtedly one of the most progressive trade deals in U.S. history. However, though the protective mechanisms are effective in keeping unfair employees accountable, the deal still fails to protect a massive workforce of the deal: migrant agricultural workers.

Agriculture is a core trade area between the US, Canada, and Mexico.[[16]](#endnote-16) In 2021, Mexico was the US’s second-largest export market for agricultural products such as corn, soybeans, dairy products;[[17]](#endnote-17) Canada was the US’s third-largest export market for agricultural products such as cereal, vegetable and fruits.[[18]](#endnote-18) In 2023, Canada’s agricultural exports surpassed US imports.[[19]](#endnote-19) The backbone behind all of these massive feats? Migrant workers.[[20]](#endnote-20) Eighty-six percent of U.S. agricultural workers are immigrants, with 45 percent being undocumented;[[21]](#endnote-21) in Canada, more than 200,000 agricultural positions are filled under the Temporary Foreign Worker Program.[[22]](#endnote-22)

Annex 31-A of the USMCA states the RRLM is for “workers at a Covered Facility.”[[23]](#endnote-23) A “covered facility” requires the facility in question to be in a “Priority Sector;” a “Priority Sector” is defined as “a sector that produces manufactured goods, supplies services, or involves mining.” It is in the definition of “manufactured goods” that things get tricky.[[24]](#endnote-24) “Manufactured goods” are defined as ***including, but not limited to****,* “aerospace products and components, autos and auto parts, cosmetic products, industrial baked goods, and aluminum, glass, pottery, forgings, and cement.”[[25]](#endnote-25) On one hand, the open-ended nature of the list can potentially include migrant agricultural workers in the mix. On the other, the specific carved out language of a “Priority Sector,” along with the United States’ and Canada’s longstanding history of excluding migrant agricultural workers’ rights from their domestic labor laws suggest a conscious decision to not protect this vulnerable group.[[26]](#endnote-26) While the RRLM tends to focus on Mexico’s violations in the USMCA, the lack of explicit language relating to agricultural workers overlooks the improper conditions in the US and Canada, two countries with massive migrant populations.[[27]](#endnote-27)

The RRLM has also been consistently used by the United States against Mexico. Canada’s, and much more so the United States’, massive economic and political power makes it virtually impossible for Mexico to hold these countries accountable under this mechanism.[[28]](#endnote-28) Mexico can only bring claims against U.S. companies that do not abide by National Labor Relations Board standards.[[29]](#endnote-29) Technically, the USMCA’s Article 23.8[[30]](#endnote-30) requires all Parties to recognize migrant workers’ rights and make sure all are protected under the Party’s labor laws. However, in the United States, the National Labor Relations Act (NLRA) infamously does not include agricultural workers.[[31]](#endnote-31) While states have implemented farmworker rights, through housing and wage protections, most states still tend to follow the NLRA’s lead in not granting farmworkers the right to strike.[[32]](#endnote-32) The NLRA does not prohibit replacement workers during strikes either.[[33]](#endnote-33) Similarly, in Canada, agricultural workers have the right to association but not the right to strike.[[34]](#endnote-34)

**The Right to Strike**

The right to strike is imperative to strengthening workers’ rights as it brings attention to unfair working conditions through direct action.[[35]](#endnote-35) Not only does workplace production stop, but more outsiders become aware of employer misconduct. Though the RRLM is a step in the right direction, more accountability mechanisms for Canada and the United States are necessary to protect all workers involved in USMCA trade.

One way of strengthening migrant rights under the USMCA would be to solidify the international right to strike under the ILO Freedom of Association and Protection of the Right to Organise Convention (No. 87) (the Convention), as currently seen in the news. Ratified in 1948, the Convention was created by the ILO as one of eight conventions that outline core international labor rights and obligations.[[36]](#endnote-36) However, whether the Convention includes the right to strike has been disputed since its conception.[[37]](#endnote-37) On November 10, 2023, the International Labour Organization’s (ILO) Governing Body referred this dispute to the International Court of Justice, as per Article 37(1) of the ILO Constitution.[[38]](#endnote-38)

While the Employers’ Group argues the right to strike is nowhere to be found within the Convention, the Workers’ Group claims the right is innate to the Constitution’s Preamble and Article 3 of the Convention, which states, “workers' and employers' organizations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programs.”[[39]](#endnote-39) Article 10 of the Convention clarified organization to mean “any organization of works or of employers for furthering and defending the interests of workers or of employers.[[40]](#endnote-40) The Workers’ Group argues that taking Article 3 and 10 together leads to a natural deduction of the right to strike.[[41]](#endnote-41) The International Court of Justice’s interpretation has the power to legitimize the right to strike around the world, in turn strengthening workers’ protections, especially for those not currently protected by domestic law, such as North American agricultural workers under the USMCA.

Of course, as with any aspect of international law, enforcement continues to be an issue. The closest thing resembling an international labor court is the ILO’s Committee on the Application of Standards (CAS); CAS hears complaints against governments, not companies, and has no sanctioning power.[[42]](#endnote-42) However, if the ILO recognizes the right to strike, this will further emphasize USMCA Chapter 23’s commitment of adhering to ILO core values. The right to strike as customary international law can also have an effect on US and Canadian courts. Though cynics will argue the argument is more so grounded in hope than reality, domestic courts have turned to international law to reconsider strike restrictions.[[43]](#endnote-43)

Another, albeit idealistic, potential effect of an internationally recognized right to strike would be greater cultural acceptance of unions. The RRLM has been able to dissolve anti-labor actions, especially amidst pro-business unions, but what happens after is rarely explored. As Mexico tries to crack down on pro-employer unions, these unions take all their materials with them, such as chairs, computers, and even treasury funds.[[44]](#endnote-44) New labor associations are forced to start from scratch in a country that has been dominated by charro unions for decades.[[45]](#endnote-45) As new leaders emerge fighting for better wages and working conditions, the spirit of old, pro-employer unions continues to linger. As of 2023, 85% of Mexican union contracts were not voted on by workers – yet another example of Mexico’s long-standing history of employers refusing to include workers in their contract negotiations.[[46]](#endnote-46) Though President López Obrador’s administration is attempting to create a new wave of anti-corruption legislation,[[47]](#endnote-47) fear of union participation, and more so, striking, continues.[[48]](#endnote-48) Similarly, fear of retaliation for American and Canadian agricultural workers keeps workers in abusive conditions to avoid further employer abuse, and in some cases, deportation.[[49]](#endnote-49)

The USMCA is a relatively progressive feat but for it truly embody the values it boasts about, agricultural workers need to be included. It’s easy and convenient for Canada, and especially, the United States, to hold Mexican companies accountable for their union busting, but avoid any proper criticism on its own innerworkings. The ICJ right to strike decision could recognize the importance of the right to strike and underline Canada’s and the United States’ commitment to fair labor protections through the USMCA. While the ICJ’s decision is in no way a slam dunk for workers around the world, it can be a desperately needed step in the right direction. Through the pressure of customary norms, more legislative action may be taken to secure further protections for agricultural workers in domestic law, future renditions of the USMCA, or new trade deals.

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