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Promoting Women's and LGBTQ Rights Through Labor Provisions

Promoción de los derechos de las mujeres y LGBTQ a través de disposiciones laborales

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Abstract

Art. 23.9 USMCA has attracted a great deal of attention among trade experts and LGBTQ scholars during the renegotiation of NAFTA. This text examines the provision's genesis, with an emphasis on the US-negotiators' last-minute changes and their impact on the scope and implementation of Art. 23.9. It finds a serious reduction of commitment in contrast to the initial draft. However, the text argues that even the footnote –allegedly excluding any new US domestic policy changes– still provides a new level of LGBTQ employment protection. Lastly, it emphasizes a possible expressive function of Art. 23.9 in light of the entire USMCA.

Keywords: United States - Mexico - Canada Trade Agreement (USMCA); Free Trade.

Resumen

El Art. 23.9 del T-MEC ha suscitado una gran atención entre los expertos en comercio y los estudiosos del colectivo LGBTQ durante la renegociación del TLCAN. Este texto examina la génesis de la disposición y enfatiza los cambios de última hora de los negociadores estadounidenses y su impacto en el alcance y la aplicación del Art. 23.9. Se constata una grave reducción del compromiso en contraste con el proyecto inicial. Sin embargo, el texto argumenta que incluso la nota a pie de página –que supuestamente excluye cualquier nuevo cambio en la política nacional de los EE.UU.– sigue proporcionando un nuevo nivel de protección del empleo LGBTQ. Por último, destaca una posible función expresiva del art. 23.9 a la luz de todo el USMCA

Palabras clave: Acuerdo Comercial México - Estados Unidos - Canadá (T-MEC); tratados de libre comercio (TLC); normas sobre género; derechos LGBTQ.

Introduction

An increasing number of newly negotiated Free Trade Agreements (FTA) embark on new territories and include WTO+ chapters, such as labor or environmental provisions. Their aim is to incentivize States to enhance their human and environmental rights, especially by incorporating enforceable hard law provisions. While the trade and gender nexus has received considerable attention in the last decade, considerations on LGBTQ rights are a fairly new phenomenon.

So far, explicit FTA provisions supporting gender equality and protecting sexual orientation are scarce. Progressive examples can be found in the gender chapters of certain FTAs between Chile, Uruguay, Canada or Israel (Cohen, 2021, pp. 83-85).

The United States on the other hand, had long been reluctant to include comparable provisions in its FTAs. Commentators therefore celebrated the introduction of Art. 23.9 in the United States-Mexico-Canada Agreement (USMCA),[1] which seemed to have it all: explicit language regarding employment discrimination based on sex, sexual orientation and gender identity, and enforceability before a Dispute Settlement. In this text, I examine the genesis and content of the provision, its problems and its significance.

Genesis of the Provision

To contextualize Art. 23.9 USMCA, one must examine its complex evolution during the NAFTA renegotiation. Its predecessor, Annex 1 of the North American Agreement on Labor Cooperation (NAALC), already included substantive gender-specific labor commitments (principles 7 and 8). Yet, it rather served as a declaration of intent between the parties and profoundly lacked enforceability (Zakaria, 2018, pp. 251-252; Corvaglia, 2021, p. 652).

When the initial draft of the USMCA was published on September 30, 2018, it included a far-reaching Art. 23.9 with very progressive wording:

> Sex-Based Discrimination in the Workplace
>
> The Parties recognize the goal of eliminating sex-based discrimination in employment and occupation and support the goal of promoting equality of women in the workplace. Accordingly, each Party shall implement policies that protect workers against employment discrimination on the basis of sex, including with regard to pregnancy, sexual harassment, sexual orientation, gender identity, and caregiving responsibilities, provide job- protected leave for birth or adoption of a child and care of family members, and protect against wage discrimination.

The renegotiation process was mainly driven by the Trump administration. Considering their purported reluctancy against progressive gender and sexual identity policies (Reed, 2020, p. 14), it was therefore puzzling that such a provision was included now of all times in a US-FTA.

Scholars have provided several explanations. During the renegotiation, Canada intended to include a whole gender chapter (Cohen, 2021, p. 85; Reed, 2020, p. 11; Gantz, 2019, p. 5). Following a progressive trade agenda, President Trudeau's government prioritized gender equality clauses in various FTA renegotiations. Its USCMA proposal was modeled after the Canadian-Chilean FTA's gender chapter (Zakaria, 2018, p. 252). There is limited data on Mexico's position during the negotiations (Galbraith & Lu, 2019, p. 49), other than it allegedly supported Canada's proposal (Zakaria, 2018, p. 252). Instead of incorporating an entire gender chapter, the three

[1] Office of U.S. Trade Rep. (2018) Agreement Between the United States of America, the United Mexican States, and Canada. `https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/23%20Labor.pdf` (last visited 12/10/22).

countries agreed on Art. 23.9. According to Galbraith and Lu (2019, pp. 60-61), however, the inclusion of at least this one gender-related labor norm is proof that Canada was able to "to pressure the United States into accepting human-rights provisions that stand in sharp tension with the Trump Administration's own domestic agenda".

Furthermore, scholars suspect a lack of interagency communication between the US Trade Representatives responsible for the negotiation and the US Department of Justice (Galbraith & Lu, 2019, p. 47). The latter publicly opposed the inclusion of anti-LGBTQ employment bias to be actionable under federal civil rights law (Reed, 2020, p. 14). It is likely that consultations between the two organs had failed. Galbraith and Lu (2019, p. 47) also hold responsible the "tight timeline surrounding the initial version" and the fact that Trump prioritized reaching the deal.

While these three factors seemed to have contributed to the initial wording, Canada's strong public stance on gender clauses and negotiation efforts seems to have served as both an initial spark and driving factor in the naissance of Art. 23.9 in its draft version.

Content and Enforcement

After its publication, several US legislators criticized the Article's wording and lobbied for a redraft (Reed, 2020, p. 13). In its final version of November 30, 2018, Art. 23.9 reads as follows:

> *Discrimination* in the Workplace
>
> The Parties recognize the goal of eliminating discrimination in employment and occupation, and support the goal of promoting equality of women in the workplace. Accordingly, each Party shall implement policies *that it considers appropriate* to protect workers against employment discrimination on the basis *of sex (including with regard to sexual harassment)*, pregnancy, sexual orientation, gender identity, and caregiving responsibilities; provide job- protected leave for birth or adoption of a child and care of family members; and protect against wage discrimination.[2]

This new version ultimately attenuates the initial draft (Galbraith & Lu, 2019, pp. 60-61) – but still, the gender provision was kept in the agreement. The reductions in the final version have implications for several aspects of the norm: its commitment, definition of sex discrimination and enforceability.

First of all, the commitment is substantially lowered. The shift from "policies to protect workers" to "policies that it considers appropriate to protect workers" renders the provision almost "so subjective as to be meaningless", claim Galbraith and Lu (2019, p. 59). Indeed, it may be difficult to prove that a policy was not considered appropriate for the implementing country.

Furthermore, Bhala and Wood (2019, pp. 335, 338, 344) conclude that, given the vague language of Art. 23.9, it would textually fall under their category of "soft law". While this ambiguity may preserve the "parties' sovereignty", it is to the detriment of LGBTQ and women's economic rights (Bhala & Wood, 2019, p. 338). They suggest that the parties should have "hardened" the language of their commitment in order to increase its effectiveness (Bhala & Wood, 2019, p. 307).

Fundamentally, the draft's gender sensitive language was amended. The final version redefines the meaning of the word "sex": by using the word "including" in the draft version, all of the mentioned reasons for discrimination fall under the definition of sex as subcategories. In the final version, only sexual harassment is a form of sex discrimination, while all other aspects are independent grounds of discrimination (Galbraith & Lu,

[2] Emphasis added by the author, footnote omitted.

2019, p. 51). This is also related to the change of the title from "sex-based discrimination" to "discrimination".

Bhala and Wood (2019, pp. 339-344) argue that the lack of clear definition leaves options for conflicting interpretations of LGBTQ inclusion. Galbraith and Lu (2019, p. 52) contend "that U.S. trade negotiators did not initially realize the tensions between the definition of discrimination based on 'sex' in the USMCA as originally negotiated and the far less progressive definition of 'sex' used by the current Department of Justice for Title VII [of the Civil Rights Act of 1964] purposes", again pointing to flawed interagency communication. In the view of the Department of Justice, Title VII, which prohibits employment discrimination in the United States, does not explicitly take gender identities into account. To avoid an actual change in domestic policy, the United States decided to limit the provision's scope.

Certainly, the limited content of the provision also affects its enforceability. The progression from the NAALC enforcement measures to the USMCA provisions meant an improvement. Art. 23.17.12 USMCA states that

> No Party shall have recourse to dispute settlement under Chapter 31 (Dispute Settlement) for a matter arising under this Chapter without first seeking to resolve the matter in accordance with this Article.

By implication, this means that Art. 23.9 can be subject to dispute settlement once all other measures under Chapter 23, such as consultations, are exhausted. Generally, the USCMA labor enforcement is comparatively strong, as it has a single dispute settlement mechanism (Corvaglia, 2021, pp. 666-667).

Bhala and Wood also acknowledge this. They argue that while the provision's wording may not be "hard law", its structure at least is (Bhala & Wood, 2019, p. 335). Besides the possibility of adjudication, they point out that the provision is within the core of the FTA, as it intends to regulate both State and private conduct and provides monitoring and enforcement (pp. 334-335).

I agree that it is the textual weakness that will determine the effectiveness of labor dispute settlement. The wording of the provision is flexible at best, and it does not provide any policy guidance or clear objectives for USMCA States to achieve. I believe the redefinition of the discrimination based on "sex" exemplifies how US domestic policy limited the FTA's innovation, contrary to Canada's ambitious trade and gender policy. Furthermore, it is indicative of how Art. 23.9 is predominantly aimed at US compliance.

However, the existence of a strong enforcement measure increases the likelihood that such a case will be brought to dispute settlement in the first place. This would raise public awareness for LGBTQ and women's labor rights, regardless of the outcome of a potential case.

The Footnote

What is striking is that most labor provisions of the USMCA and its predecessor would aim at the lesser developed State, Mexico (see for example Annex 23 A). According to Gantz (2019, p. 4), Art. 23.9 has a broader focus. All three countries have adopted substantive labor obligations in their FTAs. Canada has included comparable gender provisions in its 1985 Human Rights Act and has also regulated gender provisions at the provincial and territorial level (Galbraith & Lu, 2019, pp. 58-59). Mexico has progressive labor standards, like provisions for maternal rest, and adopted provisions to comply with Art.23.9 before ratifying the USMCA (Cohen, 2021, p. 86; Galbraith & Lu, 2019, p. 49). However, when it comes to employment discrimination on the basis of sexual orientation and

gender identity, it is the United States that could not provide the same national standard of protection at the moment of the USMCA ratification. Therefore, I contend that the provision predominantly targets the United States.

Thus, the real crux of the provision lays in another change just before the final negotiation: the footnote Nr. 15 to the word "policies":

> The United States' existing federal agency policies regarding the hiring of federal workers are sufficient to fulfill the obligations set forth in this Article. The Article thus requires no additional action on the part of the United States, including any amendments to Title VII of the Civil Rights Act of 1964, in order for the United States to be in compliance with the obligations set forth in this Article.

The footnote caused an outrage among trade experts, LGTBQ activists and all scholars. What seems to be largely uncontested is that using the term "federal policies" limits the scope of US application of Art. 23.9 to federal workers (Galbraith & Lu, 2019, p. 51). This excludes non-federal workers from its protection.

The remaining effect is quite disputed and requires a closer look into US domestic law. An abundance of scholars has stated that this footnote nullifies US commitment. Reed considers it a "transparent attempt to evade LGTBQ rights", quoting trade experts who consider it "ridiculous" to simply declare non-compliance as compliance (Reed, 2020, p. 6).

Gantz (2019, p. 5) even insists "that there is no US federal statute that protects workers from discrimination based on sexual orientation or gender identity" and that the statement was "patently false". He asserts that the footnote will prevent any dispute settlement actions and allow the US administration to remain inactive in the face of labor discrimination on the basis of gender and sexual orientation.

Experts had hoped that the USMCA would be the incentive to finally reform the aforementioned Title VII (Galbraith & Lu, 2019, pp. 58-59), which covers most grounds of discrimination, but does not explicitly include sexual orientation or gender identity. Now, considering the footnote, this seemed improbable.

In sum, these scholars argue that

1) Title VII does not include LGBTQ workers and will not be amended; and that

2) There are no federal policies that protect LGBTQ and women against employment discrimination.

0.1. Application of Title VII?

At the time of the renegotiation, it was disputed whether Title VII would include the marginalized groups referred to by Art. 23.9 USMCA, as previously argued by the US Department of Justice under the Obama administration (Reed, 2020, p. 15). In 2019, the U.S. Supreme Court decided in *Bostock v. Clayton County, Georgia* that Title VII also protects against discrimination on the basis of gender identity and sexual orientation. It states that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second".[3]

As of today, there is limited literature on the implications of this decision for the footnote and Art. 23.9. LeClercq (2021, p. 53) concludes that should the United States fail to apply Title VII to protect LGTBQ workers in the future and if all other prerequisites are fulfilled, it would be in violation of its USMCA'S commitments and could be subject to dispute settlement. Applying a broad interpretation, Reed (2020, p. 44) also contends that

[3] 40 S.Ct. 1731 (2020), 1747.

any amendment to Title VII that excludes gender and sexual orientation would constitute a violation of the USMCA.

Considering that no amendments to Art. 23.9 were made since then, LeClercq (2021, p. 53) asks whether the administration accepted *Bostock*'s implications or assumed it would simply not impact Art. 23.

I too agree with LeClercq that *Bostock* settles some of the aforementioned interpretative questions. Therefore, I disagree with Gantz and others insofar that Title VII does not need to be amended to protect LGBTQ and women federal employees according to Art. 23.9. After the US Supreme Court's ruling, it seems that not only LGBTQ employment discrimination is actionable under US domestic law, it is also actionable under the FTA's Dispute Settlement.

0.2. Existing Federal Policies?

Regarding the existence of further federal policies, I side with the authors who disagree with Gantz. In their interpretation, mentioning "existing federal agency policies" is only coherent if such policies exist. They perceive the footnote as a reference to Obama's Executive Orders 11478, 11246 and 13672, that contain certain LBGTQ protection (Reed, 2020, p. 35; Galbraith & Lu, 2019, p. 59). Hence, the footnote would –even in the narrowest interpretation– imply that these Executive Orders cannot be revoked without violating the USMCA. Therefore, the footnote provides even more protection than the original article (Reed, 2020, p. 21). Even if this passage was added to avoid any change in US domestic labor policy, it can now be read as a safeguard clause.

Why would this be relevant after the US Supreme Court ruling? Reed (2020) points out that Title VII only has a narrow definition of "employers", namely only persons having fifteen or more employees (pp. 36, 43-44). One of the aforementioned Executive Orders, for example, applies to businesses "receiving federal contracts in excess of $10,000" regardless of the number of employees (p. 36).

Therefore, by including these executive orders in the USMCA interpretation, the footnote increases the standard of protection and prevents any future administrations from lowering it (Reed, 2020, p. 59).

0.3. Conclusions on the Footnote

Reed "rejects the notion that the Footnote nullifies America's obligations per the Provision" and states that the agreement –"even if unintended"– still benefits LGBTQ workers' legal position (2020, p. 11). Indeed, the US Supreme Court decision and the inclusion of the Executive Orders as "federal policies" have shown that, ironically, the US footnote made Anti-LGBTQ employment an actionable form of discrimination that can be challenged under international law.

Significance of Art. 23.9 USMCA

Apart from the interpretative ambiguities, Art. 23.9 could still advance LGBTQ and women's labor protection. Some authors objected the inclusion of Art. 23.9 for unnecessarily politicizing the FTA, claiming that the inclusion of LGTBQ protection would insert social ideologies, thereby even diminishing women's labor protection (Reed, 2020, p. 14). Many scholars criticize the inclusion of gender provisions for lacking legitimacy, for covert protectionism by developed States or for their questionable practical effect (LeClercq, 2021, p. 57).

However, Cohen states that Art. 23.9 is "still a significant step" (2021, pp. 85-86) as the first FTA where the United States, as an influential G7 country, explicitly mentions both women's and LGBTQ rights (Bhala & Wood, 2019, p. 304). Given its low rank among the nations concerning gender gap and

female political empowerment, Cohen (2021, p. 87) states that "even the smallest provision in the USMCA is a step towards improving gender equality" in the United States.

Likewise, Galbraith and Lu (2019, p. 57) argue that, despite rather poor substantive content, the provision "sends a powerful expressive signal". This expressive function is part of the symbolic value of labor provisions in FTAs. Of course, it can be critically assessed whether FTAs "have become vehicles by which more powerful Western economies push changes upon less-developed countries" (Galbraith & Lu, 2019, p. 46). Nevertheless, the provision reflects policymaker's awareness of the implications of trade for gender and sexual identity.

I would add that the USMCA incorporates multiple other stipulations that explicitly mention LGBTQ and women's economic interests, like Art. 23.12 or Art. 25.2. These provisions can provide guidance when interpreting other norms in the context of the agreement. Hence, the USMCA carries a strong symbolic value. Multiplier effects can be expected in further FTA negotiations, especially for the United States.

Conclusion

Including gender and LGBTQ provisions in FTAs is a rather new and generally undisputed development. However, Art. 23.9 USCMA has a strong expressive value as one of the first LGBTQ provisions in a major trade agreement. Still, it could not meet commentators' expectations as it accounts for certain deficits in its scope of application and language in its current edition. Its enforcement measures, on the other hand, are quite promising. Especially the implications of Footnote Nr. 15 and its future are still contested.

What is most striking is that, although this provision is applicable to all three nations, it mostly impacts US domestic policies. This also explains the US interventions on the draft and the respective considerations in US legal literature. Its genesis provides a remarkable study of both US and international trade negotiations.

So far, the provision itself seems to have received little attention in Mexican and Canadian scholarship in relation to their own national system. Given that the practical enforcement of Mexico's progressive labor laws and constitutional provision has been subject to the criticism (Cohen, 2021, p. 86), Art. 23.9 could also have a positive impact on women and LGBTQ workers in Mexico.

Generally, I contend that it will be crucial for the future of gender provisions in FTAs to determine how Art. 23.9 affects all three treaty partners.

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