Global Workplace Law & Policy

Exploring a Multilateral Framework for Facility-Specific Labour Mechanisms

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1. Introduction

Trade between the United States and Mexico has surged dramatically in recent decades. As reported by *The New York Times* in February 2024, the U.S. now imports more goods from Mexico than from China. In this environment, access to the U.S. market has become essential for Mexican companies, fostering a political climate conducive to establishing new mechanisms that address labour rights in cross-border commerce.

The United States-Mexico and Canada-Mexico Facility-Specific Rapid Response Labour Mechanism (FSRRLM), outlined in Chapter 31 of the 2018 United-States-Mexico-Canada Agreement (USMCA), is predominantly designed to address collective labour rights violations in Mexican facilities. While the Canadian counterpart of this mechanism has only been used once, the U.S. version has been employed dozens of times, targeting Mexican facilities of major corporations

like General Motors, Panasonic, Goodyear, Caterpillar, Volkswagen, and Pirelli.

The U.S. authorities can use the FSRRLM, on a "good faith basis," when they believe workers in Mexican covered facilities are being denied the rights to free association and collective bargaining in violation of Mexican labour law. Once such a belief is established, U.S. authorities request Mexican authorities to investigate the matter. Although Mexican authorities can refuse the request, this does not prevent U.S. authorities from taking further action. Firstly, they may impose interim trade measures targeting the facility's exports, which more specifically delay the final settlement of customs accounts. These measures can impose significant financial pressure, leading companies to often agree to remedial measures before a panel is convened. Secondly, U.S. authorities may also request the formation of an independent Rapid Response Labour Panel to objectively determine whether workers' rights are being violated.

The FSRRLM's focus on ensuring compliance with domestic law at a facility rather than changing the content of Mexican law is considered an innovative approach from a trade law perspective. It allows the U.S. authorities to influence company behaviour in Mexico and, in principle, places the blame on the facility rather than on Mexican authorities. Therefore, some commentators wonder whether similar "factory-specific" tools could be adopted more broadly in international (trade) agreements.[1] Some U.S. officials have even expressed interest in replicating the FSRRLM in future agreements.

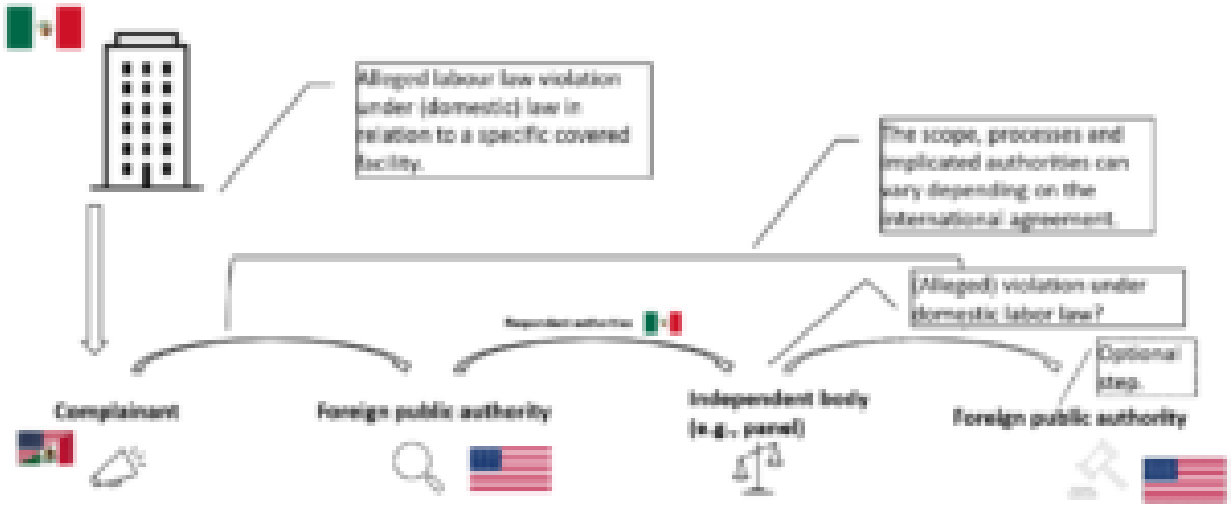
In this vein, the 2023 Indo-Pacific Economic Framework (IPEF) for Prosperity Agreement Relating to Supply Chain Resilience includes a Facility-Specific Labour Rights Inconsistencies Mechanism (FSLRIM). Although far less stringent than the FSRRLM, this mechanism nevertheless mirrors the facility-specific focus and shows that the facility-specific labour mechanism-concept (FSLM) is adaptable to different contexts.

As FSLMs may continue gaining traction, there is a growing interest in thinking about a multilateral framework that could standardize their use and improve their effectiveness. While the FSRRLM is innovative, it has faced criticism, for instance, for allowing foreign authorities to enforce domestic labour laws in another country in a one-sided manner, i.e. only/predominantly against Mexican facilities. A multilateral framework could address some of these concerns, potentially making such mechanisms more acceptable to all parties.

This contribution explores the possibility of developing a multilateral framework for FSLMs, examining criticisms of the FSRRLM and how such a framework could resolve these issues. By drawing inspiration from existing models, like the International Labour Organization's (ILO) Fact-Finding and Conciliation Commission on Freedom of Association, the contribution attempts to show that designing a multilateral structure for FSLMs may be feasible. Ultimately, this discussion serves as a thought experiment to start broader reflections on a possible future for facility-based labour mechanisms – it should not be read as a concrete recommendation.

2. The Characteristics of Facility-Specific Labour Mechanisms

Although the USMCA FSRRLM is the only genuinely effective mechanism to date, it introduced a new type of mechanism in international economic law, a FSLM, that can be adapted to various international agreements. At its core, the mechanism functions as follows:



Source: Mathias Wouters

An alleged labour law violation occurs in a “covered facility” (USMCA) or “subject facility” (IPEF) of a treaty party. After a complaint is submitted via a dedicated mechanism, or based on other information received by a foreign authority, the complainant/notifying party (e.g., the U.S.) requests the respondent/host party (e.g., Mexico) to review the alleged violation. The treaty outlines procedures and deadlines for the respondent to investigate and reply. The respondent may either agree that the violation occurred and take remedial measures or deny the alleged violation based on its findings. In some cases, respondents may even refuse to investigate if they deem the request unfounded/abusive.

To ensure the mechanism’s effectiveness, the respondent’s refusal to address the violation should not prevent the complainant from taking further action. For instance, the complainant can unilaterally involve an independent body, like the USMCA Rapid Response Labour Panel, and impose interim measures, such as delaying customs account settlements. This allows the complainant to exert pressure on the respondent to engage with the allegation at the facility level.

In contrast, the IPEF’s approach is less forceful. The complainant cannot impose sanctions, nor establish a fact-finding body. Instead, unresolved labour rights inconsistencies are simply listed on the IPEF Subcommittee’s public record, without even naming the specific facility involved, and further action, like referring the matter to the ILO or offering technical assistance, can only happen if two-thirds of Subcommittee members agree. Therefore, while the USMCA Panel serves as a fact-finding body, verifying alleged violations and enabling the imposition of harsher sanctions, the IPEF Subcommittee does not verify allegations or enable direct pressure on facilities. This lighter approach raises doubts about whether civil society will have as much incentive to file complaints under the IPEF mechanism, given its weaker enforcement capabilities.

Nevertheless, IPEF’s “light touch” mechanism does offer certain advantages. Its scope is broader than the USMCA’s, covering labour rights issues such as freedom of association, forced and child labour, discrimination, workplace safety, and even minimum wage and working hours.[2] The FSRRLM’s forceful but narrow focus on collective rights thus contrasts with IPEF’s more diplomatic and comprehensive mechanism.

3. Criticisms on the USMCA Facility-Specific Rapid Response Labour Mechanism

The USCMA FSRRLM has garnered significant attention and criticism, particularly regarding its structural implications. One major critique is that Mexico made considerable, one-sided sovereignty concessions by allowing U.S. and Canadian authorities to enforce its domestic collective labour law in covered facilities, potentially conflicting with the principle of sovereign equality between states.

Kevin Middlebrook points out that Mexico accepted the FSRRLM on the suggestion of U.S. lawmakers. The López Obrador government "*was compelled to accept the rapid response mechanism because it was the necessary price to bring the USMCA negotiations to conclusion and secure U.S. congressional approval of the continental free-trade agreement on which Mexico depended so heavily.*"[3] Based on Ian Hurd's framework of power in international relations – coercion, self-interest and legitimacy – Mexico's concessions were driven by coercion (asymmetrical market power) and self-interest (domestic interest in labour reforms), with legitimacy playing a lesser role.

In terms of coercion, Mexico's concessions were not equally reciprocated. A USMCA footnote limits the application of the FSRRLM against U.S. or Canadian facilities to those already subject to enforced orders from the U.S. NLRB or Canadian CIRB. Consequently, it has been estimated that in 2020, only 12-13 U.S. employers were potentially exposed to the mechanism, compared to all covered facilities in Mexico, creating a serious imbalance in the potential of the FSRRLM to enforce collective labour law in the two countries.

From a legitimacy standpoint, the FSRRLM does not aim to align Mexican labour laws with broader international standards, such as the ILO's fundamental principles or Conventions.[4] Instead, the USMCA, including the FSRRLM, shapes Mexican labour relations based on a North American framework, as set out in Annex 23-A of the USMCA.[5]Desirée LeClercq notes that this approach could decouple Mexican laws from international commitments, as the U.S. itself has faced criticism from the ILO for failing to fully implement international labour standards (i.e., the North American framework may not align with international labour standards).

A second major criticism is therefore that a proliferation of FSLMs may undermine the coherence of the international legal order. Agreements like the USMCA or IPEF may include provisions that conflict with ILO standards, for example regarding collective rights.

Furthermore, the USMCA FSRRLM, being a plurilateral treaty without broader international involvement, has additional structural weaknesses.

- The mechanism could be exploited by domestic public authorities. For instance, a future U.S. administration might reduce or intensify cross-border labour law enforcement in Mexico, depending on its agenda. Kathleen Claussenwarns that expanded interference could be seen as infringing on Mexican sovereignty, potentially threatening North American economic integration. Janice Bellace questions more broadly why the U.S. would take on monitoring labour rights in other countries when the ILO already performs this function and could arguably provide valid alternatives for U.S. monitoring schemes.[6]
- The FSRRLM's sole focus on individual facilities, often subsidiaries of foreign multinationals, restricts its effectiveness. As Kathleen Claussen and Chad Brown point out, these parent companies tend not to be involved in the remediation process, which takes place between the U.S. and Mexican authorities in relation to the facility. Their exclusion limits the potential impact of the mechanism, as multinational corporations could potentially reassess their practices

globally if they were engaged in these conversations. The FSRRLM's narrow focus may miss an opportunity to influence broader corporate behaviour across global supply chains.

- Simon Lester raises another key structural issue by questioning why mechanisms like the FSRRLM are embedded in trade agreements. He remarks, "*Why not have this be an international labor agreement negotiated and primarily enforced by labor departments? I understand the politics of how trade policy-adjacent issues such as intellectual property or labor rights made their way into trade agreements, but I think there is still room for thinking about the appropriate scope of trade policy and where IP, labor and other issues best fit into domestic and international governance.*" The inclusion of the USMCA FSRRLM and IPEF FSLRIM within trade or broader economic agreements may not necessarily be the most appropriate or desirable approach.

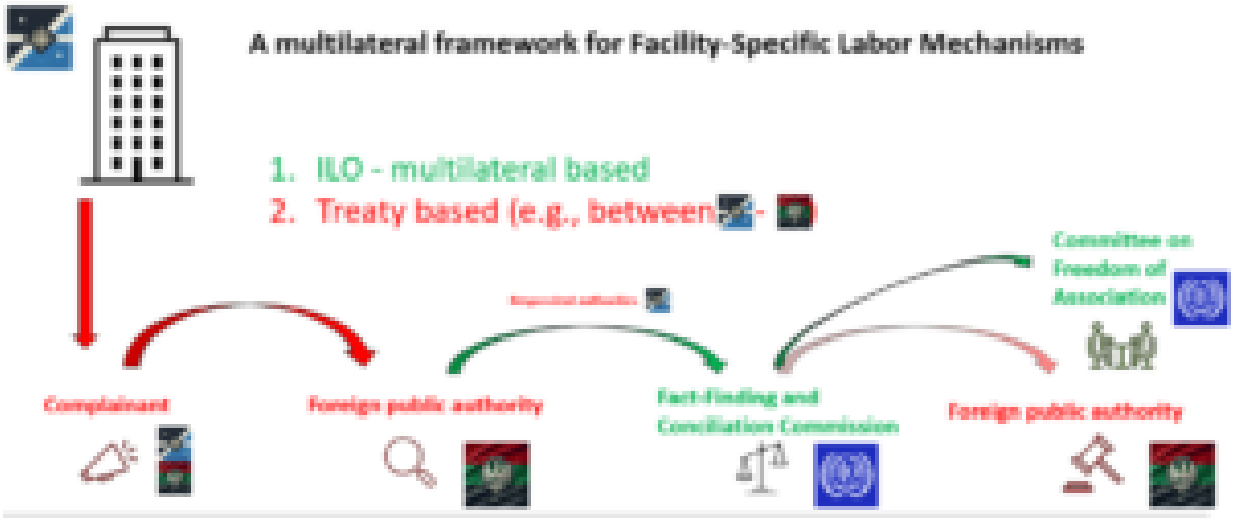
Additionally, there are also more specific procedural issues of a less structural nature. One significant challenge is for rapid response labour panellists to conduct on-site verifications of labour rights violations in Mexican facilities. Observers have also noted that the FSRRLM may lack sufficient due process guarantees. Such procedural shortcomings, though potentially addressable through treaty amendments, remain significant problems within the current framework and weaken the mechanism's legitimacy and functionality.

4. A Multilateral Framework for Facility-Specific Labour Mechanisms

The criticisms highlighted above could arguably be addressed through a multilateral framework. The ILO Fact-Finding and Conciliation Commission on Freedom of Association (FFCC), which dates back to the 1950s, may serve as a potential source of inspiration. While the ILO Committee on Freedom of Association (CFA) plays a pivotal role in overseeing collective labour rights, the FFCC has been far less effective. Of the 3,412 cases reviewed by the CFA, only six have been referred to the FFCC, which has developed into a higher body to conduct thorough investigations, including on-site visits, if deemed desirable by the CFA.[7]

Some ILO officials have acknowledged the FFCC's failure, with the CFA, which was established after the FFCC, expanding its role and overshadowing the FFCC.[8] Moreover, considering that some of the original reasons for the FFCC's establishment have diminished (e.g., Conventions no. 87 and 98 have obtained many ratifications, enabling supervision by the regular supervisory bodies), reconfiguring the FFCC might be worth considering. Emphasis could be put on its original investigative function; as the ILO Director-General communicated in 1950 that the FFCC is "essentially a fact-finding body".[9]

If a reconfiguration of the FFCC were to be considered, a multilateral framework modelled along the lines below could become conceivable. The FFCC is used here as a concrete example but could be replaced by another standing body at the international level.



Source: Mathias Wouters

The proposed model framework consists of two legal sources. The first source comprises plurilateral treaties (highlighted in red) between states, to which the ILO is not a party, such as the USMCA and the IPEF Agreement. These treaties create distinct FSLMs that oversee labour rights violations in the treaty parties' territory. Each treaty outlines key aspects with notable relevance before the FFCC assumes responsibility for the case, such as:

1. The identification of covered/subject facilities;
2. The areas of labour law covered (e.g., only collective labour rights, all fundamental rights and principles or more);
3. The (civil society) actors authorized to file complaints;
4. The features of the reporting mechanism;
5. The possibility for authorities to take proactive action (without the need for a complaint);
6. The competent foreign investigating authority (e.g., the trade representative office or labour department) that verifies the alleged labour rights violation before referral to the host state;
7. The competent responding authority (e.g., the host state's trade representative office or department of labour) that reply to the allegations;
8. The conditions, including deadlines, that govern the proceedings until, to the extent the ILO agrees to this, the FFCC assumes responsibility for the case;

Each treaty also determines the following:

9. Any potential interim measures that can be taken before or while the FFCC treats the case;
10. Any potential consequences for the facility, parent company or treaty party if the FFCC finds that a labour rights violation occurred.

The second legal source creates a body (e.g., a reconfigured FFCC), controlled by the ILO (highlighted in green), that can replace the fact-finding or allegation-finding bodies established by plurilateral treaties, such as the USMCA's Rapid Response Labour Panel or IPEF's Subcommittee. In consultation with the ILO, the plurilateral treaty (in red) will allow the treaty parties to refer an alleged labour rights violation to the ILO's FFCC (in green). If agreed to, the FFCC, acting as a neutral fact-finding body, determines whether a labour rights violation occurred, but does not impose sanctions – a matter to be determined by the treaty parties (see points 9. and 10. above). These sanctions (in pale red) could take the form of trade measures, as seen in the USMCA following a panel ruling, or other types of penalties. The FFCC may have the option to refer labour

rights violations (or a pattern thereof) to another ILO body, such as the CFA (in green).

Assuming the ILO succeeds in conceiving of an effective fact-finding body, which is interesting for treaty parties to use as the independent investigative body at the core of their FSLM, the ILO would also play a crucial role in determining whether the plurilateral treaty's FSLM meets the necessary conditions for access to the ILO fact-finding body (arrow in green). These access conditions could directly address some of the criticisms previously raised; for instance, an imbalance in the application of the FSLM, similar to the USMCA FSRRLM's one-sided application to Mexico, could prevent access to the FFCC. Similarly, the foreign public authority investigating the alleged labour rights violation could be required to demonstrate objectivity, ensuring that the investigation is based on rule of law rather than political motivations.

Other criticisms could also be addressed by this dual-structure framework:

- The FFCC could not only address whether a labour rights violation occurred under domestic law, resulting in the consequences the treaty parties have agreed upon (in pale red), but also evaluate the violation in light of ILO principles and standards. The FFCC may also have the option to refer the violation to another ILO body, like the CFA. Such a multilateral procedure could help preserve the coherence of the international legal order.
- Simon Lester's observations point to another potential benefit of this setup: FLSMs could become more independent of (international) economic law by "outsourcing" investigations to an international body. This would also prevent labour rights investigations from being influenced by the economic interests embedded in trade (and economic) agreements.
- A multilateral framework could build strength through collective action. For instance, suppose the FFCC finds a labour rights violation in the U.S., and a revised USMCA allows Mexican authorities to impose trade sanctions against the facility, while the IPEF might only permit for IPEF states to request technical assistance. If Mexico does not act based on the established violation, IPEF states may be eligible to intervene using the "sanctions" allowed by their respective agreements, while the ILO works toward reconciliation.
- As FSLMs become more widespread, a multilateral framework may be better suited to oversee and investigate labour violations across entire global value chains. For example, a Mexican subsidiary of an Asian multinational with similar labour issues in other countries could be comprehensively examined by the FFCC, provided the implicated countries are bound by FSLMs (in plurilateral agreements).
- On-site verifications would be facilitated under a reconfigured FFCC, potentially leveraging the ILO's experience and established procedures, such as the "direct contact" method used by the CFA.[10] ILO representatives, perhaps benefiting from international privileges and immunities, may be able to conduct fact-finding missions more effectivelythan panellists. The ILO's global network of 40 field offices may further enhance its capacity to assess labour rights violations under domestic law.

5. Conclusion

Starting from the assumption that FSLMs may become increasingly common in future treaties, this contribution has aimed to demonstrate that designing a multilateral framework around such mechanisms is not entirely implausible. In doing so, some of the criticisms directed at the USMCA FFRRLM can be addressed.

Ultimately, whether the ILO's Fact-Finding and Conciliation Commission is restructured or a new

body is created is of secondary importance. What matters is the ILO's potential to position itself as a central authority overseeing FSLMs. The United Nations or another international organization could also establish a body capable of conducting facility-specific investigations, perhaps doing so across various legal areas, such as environmental law, in addition to labour law.

Therefore, the central suggestion of this contribution is to explore whether some form of interplay between plurilateral treaties containing FSLMs and a standing international body, as illustrated in the scheme above, could enhance the legitimacy, functioning, and effectiveness of FSLMs. For proponents of FSLMs, one could even ask whether the creation of such a standing international body – capable of conducting rapid investigations – might encourage the inclusion of FSLMs in future plurilateral treaties.

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[10] T. Teramoto, “The Committee on Freedom of Association (CFA): Origin and goals – Protecting the principles of workers’ and employers’ freedom of association and their right to collective bargaining as an enabling basis for sustainable, democratic and productive industrial relations” in K. Curtis and O. Wolfson (eds.), *70 Years of the ILO Committee on Freedom of Association*, ILO, 2022, p. 62.

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