Chapter 4.8
A Closer Look at NAFTA and the USMCA

by April Barnard

A. INTRODUCTION

For two and a half decades, the United States, Canada, and Mexico enjoyed the collective advantages and endured the inevitable pitfalls of the North American Free Trade Agreement (NAFTA). At the dawn of the Trump era, however, the stable but not uncontroversial trade agreement appeared to be in peril. Campaigning on a decidedly nationalistic platform, Trump vowed to pull the U.S. out of NAFTA if he was elected president.[1]

Contrary to Trump's characteristic populist rhetoric,[2] however, even a cursory review of the effects of the NAFTA agreement over the last few decades would indicate that the United States has largely been a winner. The United States did lose some manufacturing jobs to NAFTA,[3] and incurred a trade deficit with Mexico.[4] Unsurprisingly though, the tangible effects of NAFTA on the U.S. economy are far more complex and nuanced than Trump made it seem. For example, while saving high paying jobs in the U.S., NAFTA undoubtedly increased global competition for the American auto industry by helping with the creation of a large and diverse auto industry in Mexico. At the same time, NAFTA had nothing to do with growing competitive pressures from Japanese and Korean auto makers.

While it is difficult to isolate the impact of NAFTA on wages and working standards in Mexico from political and other factors, NAFTA created the environment for massive investments – both foreign and domestic – in the Mexican manufacturing sector.[5] This, in turn, created millions of jobs for

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1 Even before he was elected, Donald Trump threatened to pull out of NAFTA and did so after becoming president, replacing the longstanding agreement with the USMCA. *See e.g.* The White House Archive: *President Trump. President Donald J. Trump is Keeping His Promise to Renegotiate NAFTA*, Economy & Jobs (August 27, 2018) ("America has … finally turned the page on decades of unfair trade deals that sacrificed our prosperity and shipped away our companies, our jobs, and our Nation's wealth.") Available at https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-keeping-promise-renegotiate-nafta/.

2 Since beginning his presidential campaign in 2015, former president Trump repeatedly called for the repeal or renegotiation of NAFTA, referring to it as the "worst trade deal in history." *See, inter alia*, Clark Packard, *The New U.S.-Mexico-Canada Trade Deal Can Work for Everyone*, Foreign Policy, 15 July 2019, available at https://perma.cc/VXS6-U6TY.

3 The Congressional Budget Office in 2004 found that "NAFTA had no discernible effects on aggregate employment." *See*, Congressional Budget Office, *The Effects of NAFTA on U.S. Mexican Trade and GDP* (2003) available at www.cbo.gov/sites/default/files/108th-congress-2003-2004/reports/report_0.pdf.

4 In 2019, U.S.-Mexico trade in goods amounted to US$614 billion. The U.S. exported goods for US$257 billion and imported goods from Mexico for US$358 billion. Therefore, the trade deficit amounted to about US$101 billion.

5 The World Bank reports an expansion of foreign direct investment going into Mexico from US$2.6 billion in 1990 to US$33.5 billion in 2020 (in current US$). See World Bank, https://databank.worldbank.org/views/re-

Mexican workers and laid the foundation for a rapid expansion of the middle class,[6] which, in turn, reduced migratory pressure on the U.S. border.[7]

Regardless of the fact that a scientific assessment of NAFTA would have been positive overall, Trump and his administration had to undertake at least a token effort at delivering on his promise to kill or at least revise the deal. In the end, they did manage to re-negotiate the longstanding agreement. Taking effect on 1 July 2020,[8] NAFTA was refurbished and repackaged as the United States-Mexico-Canada-Agreement (USMCA).[9] Upon closer inspection, the similarities between the two agreements far outweigh the differences, and this justifies spending some time on an analysis of the investment provisions under NAFTA before we turn to the USMCA.

The new agreement was supposed to rebuild consensus on how to advance economic integration consistent with good jobs, growing wages, strong labor standards, and environmental protection.[10] After years of negotiations, the resulting USMCA includes modern provisions and important new chapters on digital trade, good regulatory practices, small and medium-sized enterprises, environment, and labor. Like NAFTA, the USMCA continues the opposition to trade barriers between the North American countries by preserving the near absence of tariffs, including tariff free U.S.-Mexico trade, while also updating the rules to accommodate changes in the world since

ports/reportwidget.aspx?Report_Name=CountryProfile&Id=b450fd57&tbar=y&dd=y&inf=n&zm=n&country=MEX.

6 According to the World Bank, in the year 2000, around 9% of the Mexican population or almost 9 million citizens were still living in extreme poverty. This number had dropped to 3.1% of the population or some 4 million citizens by 2020. During the same period, Mexico's GDP expanded at an annual rate of over 5%. See World Bank, fn. 5.

7 During the negotiations for NAFTA, Mexican President Carlos Salinas de Gortari coined the phrase that NAFTA would help with the modernization of the Mexican economy so that Mexico would "export goods, not people." See Andrew Chatzky, James McBride, and Mohammed Aly Sergie, NAFTA and the USMCA: Weighing the Impact of North American Trade, Council on Foreign Relations 1 July 2020, https://www.cfr.org/backgrounder/naftas-economic-impact.

In recent years, migrants apprehended at the U.S.-Mexican border are mostly from countries like Ecuador, Nicaragua, Venezuela, Haiti, and Cuba, where they are facing extreme poverty, as well as political oppression, violence, and lack of opportunity. Indeed, the Pew Research Center reports more Mexicans returning from the U.S. to Mexico than newly arriving in the U.S. (https://www.pewresearch.org/short-reads/2021/11/09/whats-happening-at-the-u-s-mexico-border-in-7-charts/) and there are now almost 1.5 million fewer Mexicans living in the U.S. than in 2007 (https://www.pewresearch.org/short-reads/2021-/07/09/before-covid-19-more-mexicans-came-to-the-u-s-than-left-for-mexico-for-the-first-time-in-years/).

8 See generally the Agreement Between the United States of America, the United Mexican States, and Canada of 1 July 2020, available at https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement [hereinafter USMCA].

9 Although the U.S. typically refers to the agreement as the USMCA, each country party to the USMCA generally refers to it as beginning with that country's name; *i.e.* Canada refers to the USMCA as CUSMA, and Mexico commonly refers to the USMCA as T-MEC.

10 Joshua P. Meltzer, *The Importance of USMCA for the Biden Administration's Economic and Foreign Policy*, Brookins Institute (2021) available at https://www.brookings.edu/blog/up-front/2021/04/28/the-importance-of-usmca-for-the-biden-administrations-economic-and-foreign-policy/.

NAFTA went into effect in 1994. In its infancy, the usurpation of NAFTA and replacement with USMCA has yet to bear fruit but the future outlook on North American trade relations is hopeful. For example, the USMCA was the first free trade agreement backed by the AFL-CIO labor union and passed with overwhelming bipartisan support in both the U.S. House of Representatives and the Senate.[11]

Among notable revisions to NAFTA are changes in the investment chapter (NAFTA Chapter 11 is now USMCA Chapter 14). Specifically, the USMCA implemented substantial changes to the Investor-State Dispute Settlement (ISDS) provisions. As with NAFTA, the USMCA provides certain protections that the contracting states must afford to nationals of the other contracting states investing in their territory. In addition, both agreements provide for arbitration as a forum to recover losses from breaches of those protections. Differing from its predecessor, however, the ISDS provisions in Chapter 14 of the USMCA provide fewer investor protections. For instance, excepting certain industries,[12] under the USMCA investors will be forced to engage in a 30-month litigation period in Mexican courts before being able to bring an arbitration claim against the Mexican government. Under Annex 14-C of the USMCA, investors may still raise claims involving "Legacy Investments" to arbitration under NAFTA Chapter 11 for up to three years.[13]

The biggest change between the two agreements, however, is that Canada declined to sign on to the ISDS provisions of the USMCA.[14]

This chapter will address the USMCA's potential impacts on dispute resolution between the North American countries by evaluating the key differences between the USMCA and NAFTA agreements. In particular, this chapter will assess how USMCA's Chapter 14 reduced investor protections

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11 The USMCA was passed in the U.S. House of Representatives in an overwhelming 385-41 vote and it passed the Senate with similar support in a 89-10 vote. *See, inter alia*, Ellyn Ferguson, *Senate Passes USMCA Bill, Giving Trump a Win on Trade*, Roll Call 16 January 2020, available at https://rollcall.com/2020/01/16/senate-passes-usmca-bill-giving-trump-a-win-on-trade/ ("The changes won the endorsement of the AFL-CIO, but other unions such as the International Association of Machinists and Aerospace Workers oppose it.")

12 Exemptions apply to certain industries in the oil and gas, power generation, telecommunications, transportation, and infrastructure sectors that have signed government contracts with Mexico.

13 "Legacy Investments" are those investments that were made between NAFTA's entry into force on 1 January 1994 and its termination, that were still in existence when the USMCA entered into force. The transition period ends on 1 July 2023. *See, inter alia*, Martin J. Valasek, Alison G. FitzGerald, and Jenna Anne de Jong, *Major Changes for Investor-State Dispute Settlement in New United States-Mexico-Canada Agreement*, Norton Rose Fulbright (October 2018) available at https://www.nortonrosefulbright.com/en/knowledge/publications/91d41adf/major-changes-for-investor-state-dispute-settlement-in-new-united-states-mexico-canada-agreement.

14 Canada will have a full exemption from the ISDS provisions beginning on 1 July 2023, three years after the USMCA entered into force and the original NAFTA agreement was superseded. *See e.g*. Government of Canada, *Investment Chapter Summary*, 10 July 2019, available at https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/investment-investissement.aspx?lang=eng.

and how the notable withdrawal of Canada from the ISDS provisions will likely affect the ultimate outcomes of cases brought under the USMCA.

B. GENERAL OVERVIEW OF NAFTA

First and foremost, NAFTA envisioned a united North American trading alliance, consistent with Article XXIV of the General Agreement on Tariffs and Trade ("GATT"), that operated with limited barriers on trade between the three member countries. [15] NAFTA promised to deliver a new emerging market, increased trading opportunities, and the creation of new jobs for American workers.[16] By gradually eliminating tariff and non-tariff barriers to trade, [17] leaders of the three nations believed that the movement of goods and services across the borders of the member nations would increase naturally.[18] In 1992, the historic agreement was signed by Canadian Prime Minister Brian Mulroney, Mexican President Carlos Salinas, and U.S. President George H.W. Bush,[19] and upon its entrance into force in 1994, created the world's largest free trade zone.

Although officially ratified and signed into law under the Clinton administration, NAFTA was a product of negotiations instigated by the former presidential administrations of Ronald Reagan and George H.W. Bush. [20] Resisting protectionist instincts[21] in the United States and embracing the opportunity to engage in free trade,[22] former President Reagan facilitated the implementation of NAFTA's predecessor, the U.S.-Canada Free Trade Agreement. Subsequently, the U.S.-Canada Free Trade Agreement negotiations would serve as the foundation for NAFTA negotiations.

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15 Chad D. Hansen, *Mondev International Ltd. v. United States: A Case Study of the Potential Risks of NAFTA's Ever-Expanding Arbitration Provisions*, 29 N.C. J. Intl'l L. 351 (2003).

16 Justyna Wieloch, *Trade Creation and Trade Diversion under NAFTA – Mexican Perspective,* Łódź University Press 2020, at 43.

17 *See, e.g.* Gary Clyde Hufbauer, et al., *NAFTA at 20: Misleading Charges and Positive Achievements*, Peterson Institute for International Economics PB 14-13 (May 2014): "NAFTA committed the United States and Mexico to eliminate all US and Mexican tariffs over a ten-year period, except on a handful of agricultural exports that were to be phased out over 15 years."

18 Gustavo A. Flores-Macías and Mariano Sánchez-Talanquer, *The Political Economy of NAFTA/USMCA,* Oxford Research Encyclopedia, Politics, Oxford University Press 2019.

19 NAFTA entered into force on 1 January 1994. The agreement was signed by President George H. W. Bush on 17 December 1992, and approved by Congress on 20 November 1993. The NAFTA Implementation Act was signed into law by President William J. Clinton on 8 December 1993 (P.L. 103-182).

20 Tahira Manji, *NAFTA in a Nutshell*, 42 LawNow 36 (2018).

21 President Reagan played a major role in overcoming protectionist impulses in the United States, denouncing protectionism as a "cheap form of nationalism." *See e.g.* Gustavo A. Flores-Macías and Mariano Sánchez-Talanquer, *The Political Economy of NAFTA/USMCA*, Oxford Research Encyclopedia, Politics, Oxford University Press 2019.

22 The agreement, which included provisions about the reduction of tariff and non-tariff barriers to trade, was also among the first to include trade in services. *See id.*

In addition to bolstering the North American continent's standing on the international stage and transforming the region into a global trading powerhouse,[23] the elimination of trade barriers was also designed to boost economic growth by lowering taxes, making goods cheaper, attracting foreign investment, expanding Mexican exports into the U.S. market, and raising standards of living for people in all three countries. [24] In order to reap such benefits, NAFTA provided a framework to facilitate cooperation among the United States of America, the United Mexican States, and the Government of Canada in two directions, by laying down functional (horizontal and sectoral) rules of trade. In accordance with these stated goals, NAFTA codified agreements for a number of industries and issues, including agriculture, automobiles, intellectual property, textiles, visa categories for labor mobility, and environmental regulations.[25] NAFTA also prioritized the protection of property rights thereby promoting fair competition and improved investment conditions.[26] Moreover, the agreement was the first to offer liberalized conditions to trade in services and also included provisions on rules guiding the location of international investment.[27]

Whether NAFTA has lived up to its promise is the subject of much debate. On the one hand, despite the region representing only 7% of the world's population, following the implementation of NAFTA, the share of the world's gross domestic product contributed by the NAFTA partners ballooned to 28% in 2016.[28] In fact, it was estimated that the agreement resulted in the tripling of regional trade as cross-border investment among the three countries grew significantly.[29]

On the other hand, detractors of NAFTA argue that although prices in some areas were reduced and U.S. agriculture flourished, it also incentivized companies to outsource to low-wage regions in Mexico thereby contributing to the decline of U.S. manufacturing.[30] [31] Another complaint lobbied by

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23 *See e.g.* Gustavo A. Flores-Macías and Mariano Sánchez-Talanquer, *The Political Economy of NAFTA/USMCA*, supra note 18: "When the North American Free Trade Agreement (NAFTA) came into force on January 1st, 1994, it created the largest free trade area in the world, and the one with the largest gaps in development between member countries."

24 Tahira Manji, *NAFTA in a Nutshell*, 42 LawNow 36 (2018).

25 *See e.g.* Andréa Ford, *A Brief History of NAFTA*. Time Magazine Online, 30 December 2008.

26 *See id*.

27 Justyna Wieloch, *Trade Creation and Trade Diversion under NAFTA – Mexican Perspective, supra* note 16.

28 *See,* Tahira Manji, *NAFTA in a Nutshell*, 42 LawNow 36 (2018): "To put it in context, this trade has resulted in the NAFTA partners representing 28% of the world's gross domestic product in 2016, even though the three countries form only 7% of the world's population."

29 *See,* Andrew Chatzky, James McBride, and Mohammed Aly Sergie, *NAFTA and the USMCA: Weighing the Impact of North American Trade*, Council on Foreign Relations, 1 July 2020, https://www.cfr.org/backgrounder/naftas-economic-impact.

30 *See e.g.* Gary Clyde Hufbauer, et al., *NAFTA at 20: Misleading Charges and Positive Achievements*, Peterson Institute for International Economics PB 14-13 (May 2014).

31 The Economic Policy Institute estimates that NAFTA caused 700,000 jobs to move south. However, it is important to note that these kind of manufacturing jobs have been in decline since the 1950's for many reasons that include automation and globalization. Furthermore, many jobs lost in the U.S. moved to Asia. Therefore, it is highly doubtful that the U.S. would still have these 700,000 manufacturing jobs – or even just

opponents of the trade agreement was that the provisions of NAFTA quickly became outdated. Since the agreement was penned in the early 1990's, NAFTA failed to provide guidance in key areas of technology and did not fairly account for looming environmental concerns. In any event, due to the vast complexity of international trade, proponents and opponents alike found it difficult to delineate the actual costs and benefits of NAFTA.

C. CHAPTER 11 – THE NAFTA INVESTMENT CHAPTER

Among the goals of NAFTA was the implementation of a predictable and impartial dispute-resolution mechanism to settle disputes between the parties to the agreement. As an important contribution, NAFTA Chapter 11 was intended to protect U.S. investors and their investments in Canada and Mexico, Canadian investors and their investments in the U.S. and Mexico, and Mexican investors and their investments in the U.S. and Canada. The investment chapter of NAFTA (Chapter 11), therefore, set out to provide foreign investors – corporate investors and natural persons alike – a framework to ensure a relatively stable, transparent and rules-based investment climate.[32] Echoing the overall sentiment of NAFTA, Chapter 11 outlined expectations of equal treatment among various foreign investors and created mechanisms for NAFTA-based investors to bring investment claims against host-countries other than their own.[33]

Section A of Chapter 11 enumerated the rights of foreign investors which included a guarantee to (1) national treatment,[34] (2) most-favored-nation treatment (Article 1103),[35] and (3) transparency.[36] In addition, NAFTA-based investors could also bring claims alleging direct or indirect expropriation,

the better part of them – if there never had been a NAFTA.

32 See Government of Canada, *Investment Chapter Summary*, 10 July 2019, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/investment-investissement.aspx?lang=eng.

33 Article 102(1) of NAFTA provides in pertinent part: The stated purpose of the arbitration provisions is to create "a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal."

34 Article 1102 of NAFTA provides that the "national treatment" standard requires host States to accord foreign investors and investments treatment no less favorable than they accord to domestic investors and their investments. *See, e.g., South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Award of 22 November 2018; *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction of 29 June 2018; *Olin Holdings Limited v. State of Libya*, ICC Case No. 20355/MCP, Award of 25 May 2018.

35 Article 1103 of NAFTA stipulates that the "most favored nation" or "MFN" standard requires that States party to the investment treaty accord investors and their investments a treatment no less favorable than the treatment they accord to the investors and investments of any other States. See, e.g., *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (I)*, ICSID Case No. ARB/03/29, Award of 27 August 2009; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award of 11 September 2007.

36 "Article 102: Objectives 1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most favored-nation treatment and transparency…" North American Free Trade Agreement, 17 December 1992, Can.-Mex.-U.S., 32 I.L.M. 297.

and/or violations of fair and equitable treatment,[37] full protection and security,[38] and arbitrary, unreasonable, or discriminatory measures. In addition, Chapter 11 Section B provided procedures for resolving disputes arising out of alleged breaches of the investment provisions included in Section A. In other words, Chapter 11 provided NAFTA-based investors a means to claim monetary compensation for harms caused by government authorities of U.S., Canada, or Mexico to their foreign investments via international arbitration. In other words, a foreign investor from Canada, the United Mexican States, or the United States, could compel the government of the NAFTA party in which the investment was located into binding arbitration for compensation to undo harm caused by expropriation, a violation of fair and equitable treatment, and/or discriminatory treatment in breach of national treatment and most-favored nation obligations.[39]

As in other regional and international settings, Chapter 11 addresses the concerns of foreign investors about national remedies available in host states, in particular with regard to fairness and efficiency. Can an American investor always be confident to be treated without bias in courts in Canada and Mexico, even if large amounts of money and potentially thousands of jobs are at stake? Can a Canadian investor always be confident that proceedings before courts in the U.S. or Mexico will be swift, cost-effective, and provide real and enforceable remedies? Will a Mexican investor always easily find legal representation to provide qualified support in highly complex trade matters in front of Canadian or U.S. courts at reasonable cost? These are among the questions addressed by investor-state dispute settlement mechanisms, by providing investors with substantive and procedural protections beyond those provided by national legal frameworks.[40] Under Chapter 11 Section B of NAFTA, individual foreign investors could file complaints before in international arbitral tribunal against host state governments alleging that any level of public authority of the host state caused them harm by directly or indirectly expropriating their assets,

[37] The “fair and equitable treatment” or “FET” standard may include denial of due process, denial of justice, non-observance or frustration of investors’ legitimate expectations, coercion and harassment by the organs of a host State, failure to offer a stable and predictable legal framework, absence of transparency, and arbitrary and discriminatory treatment. The precise nature and scope of the standard has been the subject of abundant international investment case law. See, inter alia, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003; *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum of 11 February 2022; *Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award of 1 November 2021.

[38] The “full protection and security” standard protects against the host State’s failure to provide for the safety and protection of an investment, which may result through acts of State organs or acts otherwise attributable to the State under international law, or through the host State’s failure to protect investors and investments against actions of third parties within its jurisdiction. *See, inter alia*, *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum of 9 March 2020; *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Award of 22 November 2018; *Mamidoil Jetoil Greek Petroleum Products Société Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award of 30 March 2015.

[39] https://www.jdsupra.com/legalnews/investors-must-act-quickly-or-forfeit-8695258/

[40] Lucian Ilie, *Shareholders’ Claims in Investment Treaty Arbitration: No Piece of Cake!*, 13 Rom. Arb. J. 13 (2019).

discriminating against them, or otherwise treating them unfairly.[41] Moreover, the investors had the right to choose among several sets of procedural rules, including the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules"), or the Arbitration (Additional Facility) Rules of the International Centre for Settlement of Investment Disputes ("ICSID Additional Facility Rules")."[42] [43]

Over the years, NAFTA jurisprudence provided significant insights and precedential guidance to international arbitral institutions far beyond the North American and free trade context, and fostered greater access and openness to contributions by third parties to proceedings.[44] In fact, provisions of NAFTA have influenced and have been incorporated into the revised ICSID Arbitration Rules. As of 2023, over 76 claims have been brought under NAFTA Chapter 11, with 40 resulting in decisions by a tribunal.[45]

Notably, of the claims decided by arbitral tribunals under NAFTA, the United States stands alone as the only State among the three partners to never lose a case to a foreign investor. This held true whether ICSID, AF, or UNCITRAL rules were applied, and notwithstanding the setting of the arbitral tribunal, although the vast majority of arbitrations brought against the U.S. were administered by ICSID.

In the case of *Canadian Cattlemen v. USA* (2005), for example, the U.S. faced claims arising out of the U.S. Government's decision to ban Canadian cattle and beef imports after a cow in Alberta, Canada, was found to have bovine spongiform encephalopathy (also referred to as BSE, or mad cow disease). Consequently, several Canadian claimants submitted notices of arbitration under the UNCITRAL Arbitration Rules alleging that the United States was in violation of Chapter 11 Article

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41 James McBride and Andrew Chatzky, *How Are Trade Disputes Resolved?*, Council on Foreign Relations, 6 January 2020, https://www.cfr.org/backgrounder/how-are-trade-disputes-resolved.

42 *See e.g.* U.S. Department of State, *NAFTA Investor-State Arbitrations*, https://www.state.gov/nafta-investor-state-arbitrations/.

43 A number of multilateral institutions adjudicate investor-state disputes, such as the Permanent Court of Arbitration in the Netherlands, or the London Court of International Arbitration. However, the most important of them is the International Center for Settlement of Investment Disputes (ICSID). Created in 1965 as part of the World Bank, ICSID has 165 member states, all of whom have agreed to recognize the legitimacy of its arbitration system. *See generally*, James McBride and Andrew Chatzky, *How Are Trade Disputes Resolved?*, Council on Foreign Relations, 6 January 2020, https://www.cfr.org/backgrounder/how-are-trade-disputes-resolved: "Unlike the WTO, the ICSID has no permanent tribunals and does not directly rule on cases. Rather, it administers the process by which disputants choose an independent, ad hoc panel of arbitrators to hear their case. The arbitrators are generally legal experts, including professors, practicing lawyers, and former judges."

44 Collins C. Ajibo, *The Role of Regional Courts in the Development of International Investment Law: The Case of NAFTA Chapter 11 Dispute Settlement Framework and ECtHR*, 11 Law & Dev. Rev. 77 (2018).

45 As of this writing, 30 requests for arbitration have been lodged against the Government of Canada, 27 against the United Mexican States, and 19 against the United States. Furthermore, 9 disputes were settled among the parties, 14 arbitration proceedings are still pending, and 11 arbitrations have been discontinued. *See* Investment Policy Hub, *Investment Dispute Settlement Navigator – Treaties with Investment Protections – NAFTA*, available at https://investmentpolicy.unctad.org/investment-disputesettlement.

1102 (national treatment). Ultimately, the tribunal dismissed the claims against the United States in their entirety.

Although U.S.-based investors have lost their fair share of cases brought against both Canada and Mexico, a close analysis of cases decided under Chapter 11 clearly indicates that U.S. investors have done better than Canadian and Mexican investors under NAFTA. A U.S.-based investor was the prevailing party in 10 out of the 11 cases decided in favor of a foreign investor. In other words, in the several decades in which NAFTA was in effect, not a single foreign investor originating in either Canada or Mexico succeeded in showing a violation by the United States, even where the alleged breach seemed arguably self-evident. In 1995, Loewen Group International (Loewen) was ordered by a Mississippi jury to pay $100 million in compensatory damages and $400 million in punitive damages on claims that included fraud and violations of Mississippi antitrust law, stemming out of a dispute with a rival funeral home operation helmed by Jerry O'Keefe. During the trial, O'Keefe was repeatedly portrayed as a war hero and "fighter for his country," who epitomized local business interests, and the hopeless victim of a ruthless foreign (Canadian) corporate predator. Further, throughout the proceedings, O'Keefe's counsel and witnesses made several references to the Canadian nationality of Loewen. Witnesses for O'Keefe also accused Loewen of being financed by Asian money. Because a losing defendant in Mississippi who wishes to stay execution of a judgment pending appeal has to post a bond for 125% of the judgment, Loewen instead opted to settle the suit for $175 million.[46] Loewen then filed a claim against the United States under NAFTA Chapter 11, claiming, among other things, that the U.S. was liable for Mississippi's NAFTA breaches under Article 1105. In the Loewen award decision, the tribunal reached the "firm conclusion that the conduct of the trial by the trial judge was so flawed that it constituted a miscarriage of justice amounting to a manifest injustice as that expression is understood in international law." In addition, the tribunal acknowledged that the trial judge allowed several different kinds of prejudicial behavior including repeated references to Loewen's nationality, suggestions that Loewen did business only with white people, and appeals to class-based prejudice.[47] Despite this, the tribunal rejected the Article 1105 claim, concluding that it lacked jurisdiction since the claims had ultimately been brought by a Canadian corporation owned and controlled by a U.S. corporation. [48]

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[46] Financial difficulties that began around the time of the verdict ultimately forced Loewen into bankruptcy in June 1999.

[47] "[T]hese statements being based on the fact that Loewen was partly financed by the Hong Kong and Shanghai Bank, an English and Hong Kong bank which was erroneously described by Jerry O'Keefe in evidence as the 'Shanghai Bank.' Indeed, Jerry O'Keefe . . . depicted ... [his] business under American and Mississippi flags and Loewen under Canadian and Japanese flags, stat[ing] that the Japanese may well control both the 'Shanghai Bank' and Loewen but he did not know that [when entering into a business association with Loewen]." See, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, 42 Int'l Legal Materials 811 (2003).

[48] *See* id., https://www.italaw.com/sites/default/files/case-documents/ita0470.pdf. See also, *Mondev International Ltd. v. United States of America.* Mondev International Ltd., a Canadian real-estate development corporation, submitted a claim under the ICSID AF Rules on its own behalf for losses allegedly suffered by Lafayette Place Associates ('LPA'), a Massachusetts limited partnership it owns and controls. Mondev alleged that these losses arose from a decision by the Supreme Judicial Court of Massachusetts

Glaringly, in the history of NAFTA, no Mexico-based investor ever prevailed in a complaint against either one of the other two NAFTA countries. In fact, only two complaints in total have been filed against the U.S. by Mexico-based investors. In 2009, CANACAR, a trade association representing individual carriers within the Mexican trucking industry, filed a claim against the U.S. alleging that the U.S. Department of Transportation restricted Mexican carrier operations in the United States and Mexican investment in U.S. carriers thus violating the national treatment and most-favored-nation treatment provisions of Chapter 11. In addition, CANACAR also claimed that the U.S. violated minimum standard of treatment under international law by failing to comply with a 2001 NAFTA Chapter 20 arbitral decision, *In the Matter of Cross-Border Trucking Services*. The case was ultimately discontinued.

Under the sunset provisions (explored in the USMCA section below), Mexico still has a shot at prevailing in the case of *North American Investors Victimized by the Stanford Ponzi Scheme v. United States*. Both partners countries, Canada and Mexico, have filed a complaint under NAFTA, alleging "egregious failures" by U.S. authorities to timely initiate enforcement actions in response to the Stanford Ponzi scheme. As a result, the NAFTA countries argue that the U.S. breached the minimum standard of treatment. Additionally, because the delay in bringing enforcement actions appeared to be motivated by the fact that most of Stanford's victims were not US citizens, the parties also argue that the U.S. breached the national treatment provisions of Chapter 11. The claimants seek $50 million in damages as a result of the treaty breaches in addition to pre- and post-award interest, as well and legal fees. Interestingly, Mexico and Canada are among several other Latin American counties to file a complaint against the U.S. on this issue.[49]

Claims levied by Canada-based investors against the United Mexican States have generally faired better.[50]

Disputes decided under NAFTA have encompassed a variety of industries. The most heavily disputed areas encompassed the manufacturing industry (*e.g.* manufacture of basic pharmaceutical products, tobacco products, chemicals and chemical products, food products, or motor vehicles,

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and from Massachusetts state law. On 11 October 2002, the tribunal issued an award dismissing all claims against the United States.

[49] Lisa Bohmer, *US Is Facing Three UNCITRAL Arbitrations Arising out of its Alleged Failure to Curtail Long-running Ponzi Scheme*, Investment Arbitration Reporter, 31 August 2020, https://www.iareporter.com/articles/us-is-facing-three-uncitral-arbitrations-arising-out-of-its-alleged-failure-to-curtail-long-running-ponzi-scheme/. See also U.S. Department of State, https://www.state.gov/north-american-investors-victimized-by-the-stanford-ponzi-scheme-v-united-states-of-america/. The claims by Peruvian and other Latin American investors can be found at https://www.italaw.com/search/site?query=Stanford+Ponzi+Scheme.

[50] In *Lion v. Mexico (2015)*, the Quebec registered company, Lion Mexico Consolidated LP (LMC) filed claims arising out of Mexican authorities' cancellation of promissory notes held by the claimant and mortgages to which the claimant was a beneficiary. The Canadian based corporation alleged indirect expropriation, and violations of the fair and equitable treatment/minimum standard of treatment, including denial of justice. The ICSID administered tribunal applying ICSID AF rules found breaches of the FET and minimum standards of treatment, including denial of justice. *See*, *Lion Mexico Consolidated LP v. United Mexican States*, ICSID Case No. ARB(AF)/15/2), Decision on Jurisdiction of 30 July 2018.

trailers and semi-trailers). In a case related to the manufacture of basic pharmaceutical products, *Eli Lilly v. Canada* (2013),[51] the pharmaceutical giant filed a claim against the Government of Canada alleging violations stemming from Canadian courts' invalidation of patents for two pharmaceutical products, Strattera and Zyprexa. Lilly argued that Canada engaged in expropriation and violated minimum standard of treatment. On 17 March 2017 the Tribunal unanimously dismissed Eli Lilly's claims and confirmed that Canada was in compliance with its NAFTA obligations. The tribunal issued another blow to Lilly in deciding that the pharmaceutical company should bear 75% of Canada's costs of legal representation and assistance, in addition to Canada's full share of arbitration costs, totaling $4.8 million CAD.[52]

Among disputes decided in favor of foreign investors, the most common breach alleged and therefore the most commonly found violations were fair and equitable treatment/minimum standard of treatment claims. Interestingly, every case between foreign investors and the United Mexican States involved ICSID AF rules as applied under ICSID. In contrast, cases brought against the U.S. or Canada encompassed a mix of ICSID AF and UNCITRAL rules and proceeded under the administration of ICSID, the Permanent Court of Arbitration (PCA) or no institutional body at all. As of this writing, 14 cases are still pending under Chapter 11 of NAFTA.

D. THE RENEGOTIATION OF NAFTA

I. The Trump Administration's Role in Reforming NAFTA

In 2016, Donald Trump was elected president of the United States on a platform of economic nationalism. One of his key campaign promises was to renegotiate the North American Free Trade Agreement (NAFTA), which he repeatedly argued had been a bad deal for the United States. After taking office in 2017, Trump wasted little time in making good on his promise and promptly announced that he would be withdrawing the United States from NAFTA unless Mexico and Canada agreed to renegotiate the agreement.

Although NAFTA had been widely credited with boosting trade and economic growth in North America, former President Trump adamantly argued that it was a bad deal for the United States. [53] Among his complaints, Trump alleged that the agreement resulted in job losses in the United States and a trade deficit with Mexico. Ever the nationalist, Trump claimed that NAFTA benefited Mexico and Canada at the expense of the United States, and opined that NAFTA had not done enough to protect American workers from unfair competition from Mexico.[54] Using his political

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51 *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2.

52 *See id.*

53 See *e.g.* Kiran Nasir Gore, *An Introduction to the Trump Effect on the Future of Global Dispute Resolution*, 51 Geo. Wash. Int'l L. Rev. 633 (2019). Gore argues that the Trump administration's approach to international relations, which is characterized by an emphasis on unilateralism and a disregard for international law, could have a significant impact on the future of global dispute resolution.

54 See Lance Compa, *Trump, Trade, and Trabajo: Renegotiating NAFTA's Labor Accord in a Fraught Political Climate*, 26 Ind. J. Global Legal Stud. 263 (2019). Compa argues that the Trump administration's approach to labor issues in the renegotiations has been largely focused on reducing labor costs, rather than on im-

capital to pressure Mexico and Canada, Trump insisted on a number of changes to the agreement that the administration believed would benefit the United States.[55]

The three NAFTA countries eventually agreed to come to the table and engage in the renegotiation of NAFTA. Like much of his presidency, Trump's negotiation tactics were controversial. The Trump administration refused to compromise on certain positions and repeatedly threatened to withdraw the United States from the agreement altogether.[56] Trump's initial approach to renegotiating NAFTA was to use tariffs as leverage. In early 2018, Trump imposed tariffs on steel and aluminum imports from Canada and Mexico. He threatened to impose tariffs on automobile imports from Mexico if the three countries could not reach a new agreement.[57] Adamant that they would not be bullied, Mexico imposed its own tariffs on the United States in an attempt to pressure the U.S. to relent and compromise.[58]

Among his demands, Trump made labor protections in Mexico a central focus of his negotiations. He argued that NAFTA had led to a decline in U.S. manufacturing jobs, as companies had moved their operations to Mexico to take advantage of lower wages and weaker labor protections.[59] The USMCA includes new labor provisions that are designed to improve working conditions in Mexico. Trump also sought to increase access for U.S. dairy farmers to the Canadian market. Canada has a heavily protected dairy market, which has made it difficult for U.S. dairy farmers to sell their products in Canada. The USMCA includes new rules that will make it easier for U.S. dairy farmers to sell their products in Canada.

After years of contentious negotiations, the countries reached a new agreement known as the United States-Mexico-Canada Agreement (USMCA). The Trump administration hailed the USMCA as a "great victory" for the United States and argued that the resulting agreement was a much

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proving labor standards.

[55] See Simon Lester & Inu Manak, *The Rise of Populist Nationalism and the Renegotiation of NAFTA*, 21 J. Int'l Econ. L. 151 (2018).

[56] *See generally*, Thomas J. Schoenbaum, *The Art of the Deal and North American Free Trade: Advantage for the United States?*, 14 Ohio St. Bus. L.J. 100 (2020).

[57] According to the New York Times, the "Trump administration hit Mexico and Canada with 25 percent steel tariffs and 10 percent aluminum tariffs on June 1 as part of a campaign to pressure the countries to agree to America's demands on a revised Nafta." Ana Swanson and Jim Tankersley, *Mexico, Hitting Back, Imposes Tariffs on $3 Billion Worth of U.S. Goods*, The New York Times, 5 June 2018, available at https://www.nytimes.com/2018/06/05/us/politics/trump-trade-canada-mexico-nafta.html

[58] *See id.* Mexico hit back at the United States, imposing tariffs on around $3 billion worth of American pork, steel, cheese and other goods, in response to the Trump administration's steel and aluminum levies, further straining relations between the two countries as they struggle to rewrite the North American Free Trade Agreement.

[59] *See* Simon Lester & Inu Manak, *supra* note 55, arguing that the Trump administration's approach to NAFTA is driven by a desire to protect domestic industries and workers, and that this approach is in line with the broader trend of populist nationalism in the US.

better deal for the United States than NAFTA. Former president Trump claimed that the new agreement would create jobs, boost economic growth, and protect American workers.[60]

The USMCA is a significant departure from NAFTA in a number of ways. It includes new provisions on labor, environment, and intellectual property. It also changes the rules of origin for automobiles, which will require more parts to be made in North America in order to qualify for tariff-free trade. This addresses the concern that Chinese companies may be seeking backdoor access to the U.S. market via assembly or “screwdriver” factories in Mexico. The new agreement also requires that all three countries treat digital products and services fairly, and it establishes a new dispute resolution mechanism for digital trade disputes.

The USMCA has been praised by some for its potential to create jobs and boost economic growth. On the other hand, critics argue that the changes are not significant enough and that the USMCA will not lead to significant job gains in the United States.[61]

Regardless of which side of the political spectrum one may fall, Trump undoubtedly played a significant role in the renegotiation of NAFTA. As the driving force behind the negotiations, Trump essentially set the terms of the final agreement. The USMCA made several changes to NAFTA, including increasing the percentage of value-added to cars that must be made in North America to qualify for duty-free treatment, requiring Mexico to make changes to its labor laws to protect workers' rights, and imposing new rules on the automotive industry to prevent companies from moving jobs to Mexico. Overall, the renegotiation of NAFTA can be called a major accomplishment for Trump.

II. Canada’s Perspective

Canada was a strong supporter of NAFTA since its inception in 1994. Canada argued that NAFTA was responsible for creating millions of jobs, improving the standard of living for Canadians, and boosting economic growth in all three countries. Consequently, when the Trump administration announced its intention to renegotiate NAFTA in 2017, Canada was concerned that a renegotiated agreement would be less beneficial to the country to the North.

Canada was willing to renegotiate NAFTA, but it was not willing to make major changes to the agreement. From Canada’s point of view, NAFTA facilitated an increase in trade between Canada and its two neighbors, which in turn kept prices down, making it easier for Canadians to buy goods and services from the United States and Mexico.[62] Thus, Canada was concerned that the Trump

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60 *See id.*

61 Many economists and other observers believed that after the USMCA was approved by Congress and entered into force, it would not have a measurable effect on U.S. trade and investment with other NAFTA parties, jobs, wages, or overall economic growth, and that it would probably not have a measurable effect on the U.S. trade deficit. *See, e.g.* M. Angeles Villarreal and Ian F. Fergusson, *NAFTA Renegotiation and the Proposed United States-Mexico-Canada Agreement (USMCA)*, Congressional Research Service Report, 26 February 2019, available at www.crs.gov (hereafter referred to as the “2019 CRS Report”).

62 *See e.g.* Davit Sahakyan, *Canada's Trade Policy Developments after NAFTA: Sources and Implications*, 57 J. Common Mkt. Stud. 1292 (2019).

administration's plans to renegotiate NAFTA would harm Canada and fracture relations between the North American countries.

The Canadian government was concerned about several aspects of the agreement, including the investor-state dispute settlement (ISDS) provisions, the rules of origin for automobiles, and the lack of a cultural exemption. Canada was particularly concerned about protecting its dairy industry, which is heavily subsidized by the government.[63] In addition, Canada also worried about protecting its cultural industries, such as its film and television industry.[64] Consequently, Canada focused its negotiation efforts on the need to protect Canadian jobs and industries in these sectors, the desire to maintain a strong relationship with the United States, and the impact the new agreement would have on workers and the environment.

1. Canada's Economic Interests

Throughout the negotiations, Canada was concerned about the impact a new agreement would have on Canadian jobs and industries. Given the Trump administration's focus on protecting American jobs, Canada feared that many of the changes that the Trump administration proposed would harm the Canadian economy and lead to job losses. Canada argued that it was important to maintain a level playing field for all three countries.

Over the decades in which NAFTA was in force, the agreement functioned as a major driver of trade between Canada and the United States. As a result, the two countries enjoyed a strong economic relationship. In 2017, for example, Canada accounted for 16.5% of U.S. exports and 28.2% of U.S. imports.[65] Canada is also a major exporter of agricultural products to the United States, and NAFTA has helped to open up new markets for Canadian farmers.[66] NAFTA has also been beneficial to the Canadian economy in other ways. The agreement has led to increased investment in Canada, and it has helped to create jobs, although there are negative effects as well.[67]

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63 M. Angeles Villarreal and Ian F. Fergusson, *NAFTA Renegotiation and the Proposed United States-Mexico-Canada Agreement (USMCA)*, 2019 CRS Report, *supra*, note 61.

64 *See*, Patricia M. Goff, *NAFTA 2.0: Whither the Cultural Exemption*, 72 Int'l J. 563 (2017).

65 *See* 2019 CRS Report, *supra* note 61. U.S. total merchandise imports from NAFTA partners increased from $151 billion in 1993 to $614 billion in 2017 (307%), while merchandise exports increased from $142 billion to $525 billion (270%).

66 *See id*. at 6.

67 Researchers at the Council on Foreign Relations found that "Canada saw strong gains in cross-border investment in the NAFTA era: Since 1993, U.S. and Mexican investments in Canada have tripled. U.S. investment, which accounts for more than half of Canada's FDI stock, grew from $70 billion in 1993 to more than $368 billion in 2013." Of course, the big question is whether some or even much of this would have happened anyways, even without NAFTA. The same report continues, "the most consequential aspect for Canada—opening its economy to the United States, by far Canada's largest trading partner—predated NAFTA, with 1989 entry into force of the Canada-U.S. Free Trade Agreement (CUSFTA)." As is so often the case, the results of a particular intervention or treaty are hard to isolate and may well be somewhat mixed. According to the same report, "[n]either the worst fears of Canada's trade opponents—that opening to trade would gut the country's manufacturing sector—nor the highest hopes of NAFTA's advocates—that it would spark a rapid increase in productivity—came to pass. Canadian manufacturing employment held steady, but

One of the key issues in the negotiations were the rules of origin. Rules of origin specify what percentage of a product must be made in North America in order to qualify for duty-free treatment.[68] The Trump administration proposed raising the rules of origin for some products, and Canada opposed this proposal. Canada argued that raising the rules of origin would make it more difficult for Canadian companies to compete in the North American market.

In particular, Canada was concerned that these rules would make it more difficult for Canadian companies to compete in the North American automotive market. Chief among Canada's goals during negotiation was protecting the auto industry, a major employer in Canada.[69] The rules of origin for automobiles require that a certain percentage of the value of an automobile be made in North America in order to qualify for duty-free treatment. As a corollary, only a certain percentage of the value of an automobile, i.e. a certain number of parts, can be imported from third countries like China, if duty free access to the entire North American market is to be retained.

Another key issue in the negotiations were intellectual property protections. The Trump administration proposed strengthening intellectual property protections, with Canada again pushing back against the proposal, arguing that strengthening intellectual property protections would make it more difficult for generic drug companies to bring new drugs to market.

2. Canada's Relationship with the United States

In addition to economic relations, Canada was concerned about the broader impact of the Trump administration's plans to renegotiate NAFTA on the special relationship enjoyed between Canada and the United States. Canada argued that it was important to maintain this strong relationship and that NAFTA was an important part of the relationship between Canada and the United States. Beyond economic and trade relations, Canada's relationship with the United States is complex and important for both partners. The two countries share a long border, and they have a long history of cooperation. The relationship has also been marked by tensions, however, and Canada was anxious about the overall tone of the renegotiation process. The Trump administration had taken a very aggressive approach to the negotiations, and Canada was concerned that the outcome of the negotiations would be an agreement that weighed heavily in the United States' favor. The Trump administration's decision to renegotiate NAFTA was a major test of the Canadian-American

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the productivity gap between the Canadian and U.S. economies wasn't closed: by 2017, Canada's labor productivity remained at 72 percent of U.S. levels. Overall, Canada became more dependent on trade with the United States, relying on its southern neighbor for 75 percent of its exports. Other high-income countries tend to be much more diversified, rarely relying on a single partner for more than 20 percent." See Andrew Chatzky, James McBride, and Mohammed Aly Sergie, *NAFTA and the USMCA: Weighing the Impact of North American Trade*, Council on Foreign Relations 1 July 2020, https://www.cfr.org/backgrounder/naftas-economic-impact.

68 *See,* Davit Sahakyan, *Canada's Trade Policy Developments after NAFTA: Sources and Implications*, 57 J. Common Mkt. Stud. 1292 (2019).

69 "USMCA Agreement: Addendum to the Earlier (28 September 2018) Report of the Industry Trade Advisory Committee on Automotive Equipment and Capital Goods, October 2018," https://ustr.gov/trade-agreements/free-tradeagreements/united-states-mexico-canada-agreement/advisory-committee.

relationship. The negotiations were contentious, and there were times when it seemed that the agreement might collapse. In the end though, the relationship between Canada and the United States endured the test, not least because the Trump administration did not only score victories in the renegotiations.

3. Canada's Concerns about the Impact of NAFTA on Workers and the Environment

Canada had several concerns about the impact of NAFTA on workers and the environment. Critics of NAFTA argued that the agreement had led to job losses in the United States and Mexico, and that it had contributed to environmental degradation. Canada was concerned about these issues, and it sought to address them in the new agreement. As such, Canada focused its negotiation efforts on including provisions designed to strengthen the protection of workers and the environment.[70] Importantly, Canada was particularly interested in the investor-state dispute settlement (ISDS) provisions. Because ISDS allows companies to sue governments for damages if they believe that their investments have been harmed by government policies, Canada was concerned that ISDS could be used to challenge its increasingly stronger environmental regulations and labor laws.

As a direct result of Canada's negotiations, the new agreement includes provisions that are designed to protect workers and the environment. For example, the agreement includes a new chapter on labor that sets out minimum standards for wages, working hours, and occupational health and safety.[71] The agreement also includes a new chapter on the environment that commits the three countries to working together to protect the environment.

In the end, Canada succeeded in the negotiations and achieved several of its goals. The ISDS provisions were reformed to make it more difficult for companies to sue governments. The USMCA includes strong protections for the auto industry, and it does not undermine Canada's environmental and labor standards. The cultural exemption was also maintained.[72] Overall, Canada was satisfied that not all of the major changes that Trump had demanded were incorporated. The agreement maintains the benefits of NAFTA while also addressing some of the concerns that Canada had about the original agreement. Ultimately, the agreement is expected to have a positive impact on both the Canadian economy and its environment.

III. Mexico's Perspective

When the Trump administration announced its intention to renegotiate NAFTA in 2017, Mexico was surprised and suddenly found itself facing a difficult challenge. On the one hand, Mexico had

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70 *See*, CRS Report 2019, supra note 61, at 35

71 Id.

72 Under Article 32.6, Canada is allowed to maintain "Canadian content ('Cancon') requirements on radio and television broadcasts, cable and satellite diffusion, the production of audio-visual material, film or video recording, and on various print media. The U.S. entertainment industry, in particular, has long sought to have this provision eliminated." See Congressional Research Service (CRS) Report R44981, *The United States-Mexico-Canada Agreement (USMCA)*, 29 May 2024, https://crsreports.congress.gov/product/pdf/R/R44981.

benefited greatly from NAFTA, which had helped to boost its economy and create jobs.[73] On the other hand, the Trump administration was making a number of demands that Mexico found unacceptable, such as increasing the country's contributions to the U.S.-Mexico border wall and weakening labor and environmental protections. The country had long viewed NAFTA as a success, and it was not clear what the Trump administration hoped to achieve by reopening the agreement.

Considering the rhetoric coming from the United States, Mexico was concerned that any new deal would not be nearly as economically favorable as NAFTA had been over the years and, like Canada, Mexico was reluctant to make any changes that could jeopardize those gains. Further, Mexico had concerns about the Trump administration's stated goals for the negotiations. The Trump administration had said that it wanted to renegotiate NAFTA in order to reduce the trade deficit with Mexico, increase American manufacturing jobs, and protect American intellectual property. Mexico was worried that these goals would lead to changes that would harm its economy.

Although reluctant to engage in renegotiations, Mexico eventually agreed to do so to avoid a trade war with the United States. As discussed above, the negotiations were difficult and protracted. In the early stages of the negotiations, Mexico took a cautious approach. It sought to preserve the core elements of NAFTA, such as the free flow of goods and services, while also addressing some of the concerns raised by the United States.[74] Mexico's perspective on the negotiations was shaped by its strong economic ties to the United States. Mexico is the United States' third-largest trading partner, and the USMCA is expected to boost trade between the two countries even further.[75] Mexico also has a large trade surplus with the United States, and it was concerned that the Trump administration would use the negotiations to reduce that surplus, which is a trade deficit from the U.S. perspective.[76]

As the negotiations progressed, Mexico became more assertive. It argued that NAFTA had been a boon to the Mexican economy, and it warned that any changes to the agreement could have negative consequences for all three countries.[77] Mexico also made it clear that it would not agree to any changes that would undermine its sovereignty.

In addition to its economic concerns, Mexico was concerned about the Trump administration's focus on immigration. The Trump administration had promised to build a wall on the US-Mexico border

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[73] Aliza Chelminsky, Bernadette G. Vega Sánchez and Jorge O. Armijo de la Garza (eds). *Implementing the USMCA: A Test for North America*. Mexico City: Senado de la República, January 2021: 45-66.

[74] For example, Mexico agreed to increase its purchases of American agricultural products, and it made some concessions on intellectual property rights.

[75] *See, e.g.* CRS Report 2019, *supra* note 61.

[76] For trade data see, e.g., Office of the United States Trade Representative, *Mexico Trade & Investment Summary*, https://ustr.gov/countries-regions/americas/mexico.

[77] *See generally*, Eduardo Sanchez Madrigal, *NAFTA Renegotiation and the Mexican Economy*, 46 Int'l L. News 19 (2017).

and to crack down on illegal immigration.[78] Mexico was worried that these policies would damage the relationship between the two countries and make it more difficult to do business together.

In the end, Mexico was able to secure a number of important concessions from the United States. The USMCA includes stronger labor and environmental protections, and it provides Mexico with greater access to the American market for agricultural products. The USMCA also includes a dispute settlement mechanism that is more favorable to Mexico. This is important in the present context and will be discussed further below.

Overall, the USMCA is likely a positive development for Mexico. It will help to protect the gains that Mexico has made under NAFTA and create new opportunities for economic growth.

Since the USMCA has already been evaluated with cautious optimism by Canada and the U.S. as well, it is likely a positive development for the entire North American continent due to its significant potential to strengthen the North American economies and create a more competitive region.

E. The North American Free Trade Agreement (NAFTA) and the United States-Mexico-Canada Agreement (USMCA) Compared

Signed on 30 November 2018, the USMCA entered into force on 1 July 2020. Despite the years of negotiations and the surrounding political rhetoric, the new agreement is noticeably similar to its predecessor (NAFTA). In fact, the USMCA is more apt to be viewed as an updated version of NAFTA, rather than a different agreement altogether. Although the new agreement does contain several updates, many argue that any substantive differences between the two agreements are minimal and will fail to accomplish the ambitious goals sought by the parties involved.[79] Others argue, however, that the USMCA is a more comprehensive and ambitious trade agreement, designed to address a number of the challenges and criticisms that have arisen since NAFTA was signed into law.[80] For instance, one of the oft repeated criticisms of NAFTA, supported by former president Trump and others, was that it led to job losses in the United States.[81] Another criticism of NAFTA was that it did not do enough to protect the environment, the labor market, or human rights.[82] Moreover, because the boom of the digital age did not explode until well after the formation

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[78] *See*, Emily A. Welch*, NAFTA and Immigration Intertwined: The Impact of the Trump Era on Mexican-U.S. Migration*, 33 TEMP. INT'L & COMP. L.J. 89 (2018).

[79] Pierre Lemieux argues that the USMCA is “better than nothing,” but that the USMCA does not address the underlying problems with the original agreement (NAFTA). Lemieux argues that the new agreement does not go far enough in protecting the interests of the United States, and that it fails to address the issues of currency manipulation and labor standards. *See*, Pierre Lemieux, *Is NAFTA 2.0 Better Than Nothing?*, 41 Regulation 12 (2018).

[80] *See, e.g.* Robert Hudson, *The USMCA: An Ideal “New NAFTA?”*, University of Kentucky J. David Rosenberg College of Law (2021). Hudson argues that the USMCA addresses some of the concerns that were raised about NAFTA and that it has the potential to boost the North American economy. He praises the agreement’s increased labor and environmental protections, as well as its new rules on digital trade.

[81] *See* Lance Compa, *supra* note 54.

[82] Sarah Anderson and Scott Clair, *The Impact of NAFTA Chapter 11 on the Environment*, Public Citizen

of NAFTA, the old agreement includes few, if any, meaningful provisions for the regulation of trade in the era of the internet. And finally, the investor-state dispute settlement (ISDS) mechanism under Chapter 11 of NAFTA, has been a controversial feature of the agreement, with critics arguing that it gives foreign investors too much power and allows them to challenge government regulations that are in the public interest.[83]

The USMCA is a complex and comprehensive trade agreement that affects many aspects of and industries in the economies of the three countries. The updated agreement covers a wide range of issues, including trade in goods, services, investment, intellectual property, the environment, and labor. Some proponents of the new agreement opine that the USMCA will have a positive impact on the economies of the United States, Mexico, and Canada. The initial version of the deal, for example, was estimated to create more than 176,000 U.S. jobs and increase GDP by up to 0.35% during its first six years.[84] Further, the U.S. Department of Labor in 2019 reported that the USMCA is expected to increase trade between the three countries by up to 2.5%.[85]

Importantly, the new agreement retains the competitive advantage the U.S. enjoyed under NAFTA. The USMCA, for example, favors the U.S. in such areas as the digital economy, patents, and financial services, while also leveling the playing field for companies manufacturing products in the United States.[86] Implementation of the USMCA has proceeded in phases. The final phase of implementation began on 1 January 2023.[87] Discussed below are some of the most consequential differences between the USMCA and NAFTA.

I. Labor and Environmental Protections

1. Labor under NAFTA

Although NAFTA included a handful of labor provisions, these provisions have been criticized as being unenforceable and ineffective. The labor provisions of NAFTA are actually included in a side agreement called the North American Agreement on Labor Cooperation (NAALC), which was designed to promote labor rights and improve working conditions in North America.[88] The NAALC

(2004).

[83] *See e.g.* Lawrence Herman, *Trend Spotting: NAFTA Disputes after Fifteen Years*, C.D. Howe Institute, 22 July 2010, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1706256.

[84] Robert E. Scott, *Meet the New NAFTA - Same as the Old NAFTA*, The Hill, 29 April 2019, https://thehill.com/opinion/finance/441057-meet-the-new-nafta-same-as-the-old-nafta.

[85] U.S. Department of Labor, *Report on the U.S. Employment Impact of the United States-Mexico-Canada Agreement,* 11 December 2019, www.dol.gov/sites/dolgov/files/ILAB/reports/FINAL-USMCA-Employment-Impact-Review.pdf.

[86] Office of the U.S. Trade Representative, *United-States-Mexico-Canada Trade Fact Sheet: Modernizing NAFTA into a 21st Century Trade Agreement*, available at https://ustr.gov/trade-agreements/ free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/modernizing.

[87] Legacy NAFTA investments were still allowed submit disputes under the ISDS provisions of NAFTA until 1 July 2023.

[88] Mary Jane Bolle, *Overview of Labor Enforcement Issues in Free Trade Agreements*, Congressional

established three institutions: the Commission for Labor Cooperation (CLC), the National Administrative Offices (NAOs), and the Labor Secretariat. The CLC is a trilateral body made up of cabinet-level officials from each country.[89] The NAOs are national offices that are responsible for investigating complaints about labor violations. The Labor Secretariat is an international organization that provides technical assistance and training on labor issues.

The labor provisions of NAFTA have been criticized for a number of reasons. First, the NAALC does not establish any binding obligations on the three countries. The CLC can only make recommendations, and the NAOs cannot impose sanctions. Second, the NAALC's definition of labor rights is very narrow. It only covers four areas: freedom of association, the right to organize and bargain collectively, the elimination of child labor, and the elimination of forced labor. Third, the NAALC's enforcement mechanisms are weak. The NAOs can only make recommendations to the governments of the three countries, and the governments are not required to take any action.[90]

Despite these criticisms, the NAALC has had some positive effects. It has helped to raise awareness of labor issues in North America, and it has led to some improvements in labor standards in Mexico. The NAALC has also been praised for its innovative approach to labor rights enforcement.[91] The agreement uses a cooperative approach that emphasizes dialogue and cooperation between governments and businesses. This approach has been successful in some cases, but it has also been criticized for being too slow and ineffective in other cases.

2. Labor under the USMCA

According to proponents of the USMCA, the new agreement represents a win for labor unions due to the stronger labor provisions.[92] As such, the USMCA includes a number of labor provisions designed to improve working conditions and protect workers' rights in all three countries. The USMCA requires the three countries to adopt and maintain labor laws that are consistent with the International Labor Organization (ILO)'s core labor standards. Further, the USMCA also establishes a new labor enforcement mechanism that allows for the imposition of sanctions for labor violations.

The labor provisions of the USMCA are based on the principles of the ILO which is the United Nations agency that sets international standards for labor rights.[93] The USMCA requires all three countries to adopt and maintain labor laws that meet or exceed ILO standards.[94] Further, the

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Research Service (CRS), 22 February 2016, available at www.crs.gov.

89 U.S. Department of Labor, *North American Agreement on Labor Cooperation: A Guide*, October 2005, available at https://www.dol.gov/agencies/ilab/trade/agreements/naalcgd.

90 See, Frank H. Bieszczat, *Labor Provisions in Trade Agreements: From the NAALC to Now*, 83 CHI.-KENT L. REV. 1387 (2008).

91 *See id*.

92 *See e.g.* David Evans, *The United States-Mexico-Canada Agreement: How NAFTA 2.0 Represents a New Era in North American Trade*, 71 DEPAUL L. REV. 831 (2022).

93 *See* 2019 CRS Report, *supra* note 61, at 34.

94 *See id.*

USMCA also includes a number of general provisions that are designed to promote good labor practices such as providing workers with access to information about their rights and providing opportunities to participate in the development and enforcement of labor laws.[95] The agreement also requires all three countries to promote training and education for workers.

Importantly, the USMCA requires the countries to effectively enforce their labor laws and to prohibit the importation of goods produced by forced labor. This means that the countries must have a system in place to investigate and prosecute violations of labor laws. The countries must also provide workers with access to effective remedies, including reinstatement of workers.[96]

In addition to requiring the three countries to adopt and enforce labor laws, the USMCA includes a number of provisions that are designed to address specific labor issues. Similar to NAFTA, the agreement prohibits the use of forced labor and child labor.[97] The new agreement goes further, however, and requires all three countries to take steps to prevent violence and discrimination in the workplace, including discrimination based on race, gender, religion, or nationality.[98] Moreover, the agreement requires Mexico to reform its labor laws to ensure that workers can freely choose their union representatives and to establish an independent labor court system.

Although it may be too soon to tell, the labor provisions of the USMCA should be an improvement over the labor provisions of NAFTA, as the old agreement failed to include enforceable provisions on forced labor or child labor. NAFTA also did not include any provisions on discrimination in the workplace. Therefore, the new labor provisions are expected to have a positive impact on working conditions and workers' rights in the North American region. The agreement is expected to lead to increased enforcement of labor laws, which will help to protect workers from exploitation.[99] The agreement is also expected to lead to increased transparency in the workplace, which will help to ensure that workers are aware of their rights.

As mentioned above, the labor provisions of the USMCA have been praised by labor unions and human rights groups. Some businesses, however, have expressed concerns about the cost of complying with the labor provisions.

3. Environmental Protection under NAFTA

The environmental provisions of NAFTA are contained in Chapter 11 of the agreement. These provisions were designed to ensure that trade does not lead to a decrease in environmental protection in the three countries.[100] Many of the environmental provisions provided in NAFTA have

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95 See USMCA, Ch. 23, Art 23.12 Cooperation.

96 *See, id.* USMCA Art 23.5 2(h) implementing remedies and sanctions imposed for noncompliance with its labor laws, including timely collection of fines and reinstatement of workers.

97 *See id*. Art 23.6.

98 *See id*. Art 23.7.

99 *See, e.g.* M. Angeles Villarreal and Ian F. Fergusson, *NAFTA and the United States- Mexico-Canada Agreement (USMCA)*, Congressional Research Service, R44981, *supra* note 72.

100 *See e.g.* Gustavo Vega-Canovas*, NAFTA and the Environment*, 30 DENV. J. INT'L L. & POL'Y 55 (2001).

been criticized by environmental groups for being weak and ineffective. These groups argued that the NAFTA provisions were not enforceable and did not go far enough to prevent trade from leading to environmental degradation. Since the implementation of NAFTA, for example, environmental degradation in Mexico has worsened as trade has increased.[101]

Furthermore, NAFTA's environmental provisions were criticized for being difficult to enforce by private parties. NAFTA's dispute settlement mechanism was designed to resolve disputes between governments, not between environmental groups and corporations. At the same time, the NAFTA Agreement was not considered "self-executing" and, therefore, did not of itself provide rules to be taken into consideration by national courts. Without specific implementing legislation at the national level, NAFTA did not create rights or obligations for private parties, which ultimately made it difficult for environmental groups to challenge companies that are violating environmental laws.

In addition to the environmental provisions included in NAFTA itself, there were also a number of environmental side agreements enacted alongside NAFTA. These side agreements included the North American Agreement on Environmental Cooperation (NAAEC) and the Border Environmental Cooperation Commission (BECC). The NAAEC is a trilateral environmental agreement that was negotiated alongside NAFTA. The NAAEC establishes a number of environmental institutions and programs, including the Commission for Environmental Cooperation (CEC).[102] The CEC is an independent organization that is responsible for monitoring the implementation of the NAAEC and promoting cooperation on environmental issues in the region. The BECC is a binational organization that was established to promote environmental cooperation between the United States and Mexico. The BECC provides financial assistance for environmental projects along the U.S.-Mexico border. The environmental consequences of NAFTA are discussed in more depth in case law below.

4. Environmental Provisions of the USMCA

The USMCA includes a number of environmental provisions that are designed to protect the environment and promote sustainable development in North America.[103] In stark contrast to NAFTA, for example, the USMCA devotes an entire chapter to the "Environment."[104] These provisions require the three countries to work together to combat the effects of climate change by reducing air pollution, water pollution, and protecting endangered species. Significantly, the USMCA allocates $300 million to address environmental problems and makes regulations easier to enforce by eliminating NAFTA's requirement that a plaintiff must prove that a violation "affect[s] trade"

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101 Cameron Parsons, *NAFTA and the Environment in Mexico*, Modern Latin America web supplement for 8th ed. Available at https://library.brown.edu/create/modernlatinamerica/chapters/chapter-12-strategies-for-economic-developmen/nafta-free-trade-and-the-environment-in-mexico/

102 Linda J. Allen, *The North American Agreement on Environmental Cooperation: Has It Fulfilled Its Promises and Potential - An Empirical Study of Policy Effectiveness*, 23 COLO. J. INT'L ENVTL. L. & POL'Y 121 (2012).

103 *See e.g.* Jean Galbraith, *NAFTA Is Renegotiated and Signed by the United States*, 113 AM. J. INT'L L. 150 (2019).

104 *See* USMCA, *supra* note 8, Ch. 24

before they are allowed to pursue relief.[105] Like the improvements in labor standards, the USMCA requires the three countries to enforce environmental laws that are consistent with internationally recognized environmental standards.

The new agreement features a new dispute settlement mechanism that allows environmental groups to participate in cases involving alleged violations of the environmental provisions of the agreement. Accordingly, under the USMCA, environmental groups will be permitted to file complaints with a new environmental commission if they believe that environmental rights or commitments have been violated.[106] Further, the USMCA also strengthens environmental protections by increasing the penalties for environmental violations, expanding the scope of the environmental provisions to cover new areas, such as air quality and marine litter, and providing more funding for environmental enforcement and protection activities.

Notably, the USMCA also includes a number of provisions that are designed to promote sustainable development. For example, the agreement requires each country to develop a national sustainable development strategy. This strategy must include a number of elements, such as a commitment to reduce greenhouse gas emissions, a commitment to protect biodiversity, and a commitment to promote sustainable agriculture.[107]

As already stated, the environmental provisions of the USMCA are designed to be more comprehensive and enforceable than those under NAFTA.[108] For instance, the USMCA includes a commitment to implement key multilateral environmental agreements, such as the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES), and the Montreal Protocol on Substances that Deplete the Ozone Layer.[109] In addition, the USMCA requires each country to

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105 *See*, Evans, *supra* note 92, at 839.

106 *See*, Lemieux, *supra* note 79.

107 Eugene Beaulieu and Dylan Klemen, *You Say USMCA or T-MEC and I Say CUSMA: The New NAFTA – Let's Call the Whole Thing On*, 13:7 Univ. of Calgary, The School of Public Policy Publications (2020).

108 *See*, Clark Packard, *The New U.S.-Mexico-Canada Trade Deal Can Work for Everyone*, Foreign Policy, 15 July 2019, available at https://perma.cc/VXS6-U6TY.

109 *See* USMCA *supra* note 8, Art. 24.8: Multilateral Environmental Agreements. While Art. 24.8 starts out with a soft commitment that "[e]ach Party affirms its commitment to implement the multilateral environmental agreements *to which it is a party*" (para. 2, emphasis added), there is more interesting language in para. 4: "Each Party shall adopt, maintain, and implement laws, regulations, and all other measures necessary to fulfill its respective obligations under the following multilateral environmental agreements ('covered agreements'):8 (a) the Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973, as amended; (b) the Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal, September 16, 1987, as adjusted and amended; (c) the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, done at London, February 17, 1978, as amended; (d) the Convention on Wetlands of International Importance Especially as Waterfowl Habitat, done at Ramsar, February 2, 1971, as amended; (e) the Convention on the Conservation of Antarctic Marine Living Resources, done at Canberra, May 20, 1980; (f) the International Convention for the Regulation of Whaling, done at Washington, December 2, 1946; and (g) the Convention for the Establishment of an Inter-American Tropical Tuna Commission, done at Washington, May 31, 1949." Art. 24.9 continues with provisions on protection of the ozone layer and the Montreal Protocol. Art. 24.10 addresses

ensure that its laws and regulations are “not inconsistent with” the USMCA’s environmental provisions. This provision could be used to challenge laws and regulations that are seen as being harmful to the environment.

Some environmental groups such as the Sierra Club, have criticized the agreement, however, for not doing enough to address climate change and for espousing environmental goals that are far too vague to purposefully implement.[110] In addition, the Sierra Club contends that the Chapter 24 of the USMCA is weak because it “fails to even mention climate change” despite calls for uniform climate standards.[111] They have also criticized the agreement for not including a provision that would have required each country to achieve a certain level of environmental protection. Despite these criticisms, the USMCA is likely an improvement over NAFTA and therefore represents a step in the right direction in terms of protecting the environment in North America.

II. Trade in Goods and Services

1. NAFTA: Trade in Goods and Services

Over the decades since its implementation, NAFTA has had a significant impact on trade between the three countries. One of the most important provisions of NAFTA was the elimination of tariffs on most goods traded within the North American region. This has led to a sharp increase in trade in the area. In 1993, for example, the United States exported $121 billion worth of goods to Canada and Mexico. By 2017, that number had grown to $632 billion. Trade in goods between the United States and Mexico increased by more than 200% between 1993 and 2017.[112] As measured by some metrics, therefore, NAFTA has clearly had a positive impact on economic growth in the three countries. Further, a study by the Peterson Institute for International Economics found that NAFTA has increased the GDP of the three countries by an average of 0.5% per year.[113] The study also found that NAFTA has created millions of jobs in the three countries.

While NAFTA has been successful in increasing trade and economic growth, it has also been criticized for its impact on jobs and wages in the United States. Some critics argue that NAFTA has led to job losses in the United States, as companies have moved production to Mexico to take advantage of lower wages. Others argue that NAFTA has led to lower wages for workers in the

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protection of the marine environment from ship pollution in greater detail. Art. 24.11 deals with air quality monitoring. Art. 24.12 is about marine litter. However, since the U.S. is one of only a handful of states that did not ratify the Paris Agreement on climate change, that agreement is not mentioned in the USMCA either.

[110] *See* Heather Smith, “Should We Fear a New NAFTA? Spoiler: Yes, it could be terrible for the climate.” Sierra. 20 April 2018, https://www.sierraclub.org/sierra/should-we-fear-new-nafta.

[111] Trumps NAFTA 2.0: An Environmental Failure.” sierraclub.org. https://www.sierraclub.org/160 sites/www.sierraclub.org/files/Trump-NAFTA-Environment-Failure.pdf

[112] *See* 2019 CRS Report, *supra* note 61.

[113] *See id. See also,* Justyna Wieloch, *Trade Creation and Trade Diversion under NAFTA - Mexican Perspective,* Łódź University Press 2020, DOI 10.18778/8220-193-2, at 43.

United States, as companies sought to limit wage increases to be able to compete with lower-cost Mexican companies.[114]

Chapter 12 of NAFTA established rules governing trade in services between the United States, Canada, and Mexico. The chapter covers a wide range of services, including accounting, advertising, architecture, broadcasting, commercial education, construction, consulting, engineering, environmental services, health care management, legal services, land transportation, publishing, telecommunications, and tourism.[115]

Among the chapter's main goals was to ensure that service providers from each NAFTA country were treated no less favorably than service providers from any other countries. Generally, this was accomplished through a number of provisions, including national treatment, most-favored-nation treatment, transparency, and settlement of disputes. Under these provisions, each NAFTA country must treat services providers from the other countries no less favorably than its own services providers, as well as services providers from any third country. Signatories also have to ensure that they publish all laws, regulations, and other measures that affect trade in services. In essence, each NAFTA country must be granted access to the same markets, be subject to the same regulations, and be given the same opportunities to compete.

The provisions of Chapter 12 have had a significant impact on trade in services between the United States, Canada, and Mexico. Since the agreement was implemented in 1994, trade in services between the three countries has increased significantly. In 2019, the value of trade in services between the United States and Canada was $1.2 trillion, and the value of trade in services between the United States and Mexico was $600 billion. Further, Chapter 12 helped to create jobs in the services sector. In the United States, for example, the services sector employs over 120 million people, and it accounts for about 80% of the country's GDP. NAFTA has helped to create jobs in the services sector by making it easier for service providers from the United States to access markets in Canada and Mexico.

The provisions of Chapter 12 have also been credited with helping to improve the quality of services in the NAFTA region. By increasing competition, the Chapter has forced service providers to improve their products and services in order to compete, benefiting consumers in all three countries.

2. USMCA: Trade in Goods and Services

The USMCA includes a number of provisions that deal with the trade in goods. These provisions are designed to promote trade between the three countries, while also protecting workers' rights

114 Mary E. Burfisher, Sherman Robinson and Karen Thierfelder, *The Impact of NAFTA on the United States*, 15:1 Journal of Economic Perspectives 125-144 (2001). The authors argue that NAFTA has had a negative impact on some sectors of the US economy, such as manufacturing, and that it has led to job losses in certain industries.

115 NAFTA, Chapter 12: Cross-Border Trade in Services, Article 1201: Scope and Coverage.

and the environment.[116] The USMCA maintains the tariff-free trade in goods that was established under NAFTA. The agreement, however, also includes new rules of origin that require more of the content of goods to be made in North America in order to qualify for tariff-free treatment. The USMCA establishes new rules of origin for a number of products, including, among others, textiles and apparel. The new rules of origin are designed to ensure that more of the value of these products is produced in North America.

One of the most potentially impactful changes created by the USMCA may be the new rules of origin for automobiles.[117] The automobile industry is one of the most important segments of the U.S. economy, contributing 3.5% to overall U.S. GDP.[118] The new provisions of the USMCA require that 75% of the content of an automobile must be made in North America in order for it to qualify for duty-free treatment. This is up from the 62.5% requirement under NAFTA. Moreover, 70% of a vehicle's steel and aluminum must originate in North America.[119] This will force automakers who want to sell in all three countries to source more components from the region and lower their imports of parts from outside of North America. The new rules of origin, therefore, have the potential create additional jobs in the North American auto industry, but also to drive up the cost of manufacturing, hence the sticker price of cars.

The USMCA includes provisions that regulate trade in services, which are defined as the performance of a service by a service supplier. Services can be provided in a variety of ways, including through cross-border supply, consumption abroad, commercial presence, and presence of natural persons. The USMCA provides for more comprehensive and robust protections for services and service suppliers than NAFTA. The USMCA is also expected to have a greater impact on trade and investment in services than NAFTA.

The USMCA's provisions on trade in services are designed to promote trade in services by eliminating barriers to trade and investment, and by providing a framework for resolving disputes. The agreement includes provisions on most-favored-nation treatment, national treatment, market access, and transparency.

As mentioned above, MFN dictates that each party must treat services and service suppliers of the other parties no less favorably than it treats services and service suppliers of any other country. In other words, no party is permitted to discriminate against services or service suppliers from the other Parties. Further, increased market access under the USMCA includes the right to establish a commercial presence in the Party's market, the right to provide services across borders, and the right to provide services through the temporary entry of natural persons. Finally, like NAFTA the

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116 Joshua P. Meltzer, *The Importance of USMCA for the Biden Administration's Economic and Foreign Policy*, Brookins Institute (2021), available at https://www.brookings.edu/blog/up-front/2021/04/28/the-importance-of-usmca-for-the- biden-administrations-economic-and-foreign-policy/.

117 *See* Evans, *supra* note 92, at 837.

118 *See* Hudson, *supra* note 80, at 14.

119 *See* 2019 CRS Report, *supra* note 61.

USMCA maintains a commitment to transparency. This allows services and service suppliers to know what the rules are and how to comply with them.

In addition to these general provisions, the USMCA includes specific provisions on certain sectors of the services industry such as financial services, telecommunications, and professional services. These provisions are designed to address the specific challenges faced by service providers in these sectors.

The USMCA's provisions on trade in services are significant because they will help to reduce barriers to trade and investment in these important sectors of the economy. The agreement is expected to promote trade and investment in services, which will create jobs and boost economic growth within the North American continent.

III. Digital Trade and Intellectual Property

In 1994, the internet was barely born and, as a result, NAFTA could not possibly consider the digital realities of 2023. Consequently, the new agreement makes significant strides in the digital realm. The USMCA expands market access for services providers in all three countries, and it includes new provisions on financial services, telecommunications, and professional services. The USMCA includes a new chapter on digital trade that establishes rules for the cross-border flow of digital goods and services. For example, provisions of the USMCA include a prohibition on tariffs on digital goods and services, a requirement that countries allow the free flow of data across borders, as well as a requirement that countries protect intellectual property rights in digital goods and services.[120] Specifically, all tariffs, fees, and other charges in connection with digital, electronic trade between the parties, including music, e-books, and podcasts, are eliminated under the new agreement.[121]

In addition, the USMCA strengthens protection for intellectual property rights (IPRs), such as patents, copyrights, and trademarks, and provides protection for privacy and cybersecurity. IPR trade agreement provisions were first included in NAFTA and, subsequently, in the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[122] The USMCA strengthens the current rules and includes new provisions that seek to crack down on counterfeiting and piracy.[123] New provisions on trade secrets and geographical indications are also part of the agreement.[124] Last but not least, the USMCA includes a new dispute settlement mechanism that allows businesses to file complaints if they believe their intellectual property rights have been violated

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[120] *See generally*, Eugene Beaulieu and Dylan Klemen, *You Say USMCA or T-MEC and I Say CUSMA: The New NAFTA – Let's Call the Whole Thing On*, 13:7 Univ. of Calgary, The School of Public Policy Publications (2020).

[121] *See* USMCA, *supra* note 8, at Art. 19.3.

[122] USMCA: Intellectual Property Rights (IPR), Congressional Research Service (updated 6 January 2020) available at https://crsreports.congress.gov/product/pdf/IF/IF11314.

[123] Morena Altieri, *New Historical Chapter for North American Trade United States, Mexico, Canada Agreement – USMCA*, 5 Soc. & Soc. WORK REV. 29 (2021).

[124] *See* USMCA: Intellectual Property Rights (IPR), *supra* note 122.

IV. The Investor-State Dispute Settlement (ISDS) Mechanism

As discussed in more detail below, the USMCA includes a new dispute settlement mechanism.[125] NAFTA's dispute settlement system was criticized for being arduous and ineffective. The USMCA includes a new dispute settlement mechanism that was supposed to be more efficient and effective than the dispute settlement mechanism under NAFTA. However, the new dispute settlement mechanism contained in the USMCA includes a number of new features that make this unlikely, in particular the complete absence of Canada as a party to this part of the agreement.

1. NAFTA's Investment Chapter

One of the most important and perhaps most maligned aspects of NAFTA was its investment chapter, Chapter 11. This chapter provided an investor-state dispute settlement (ISDS) mechanism to ensure protections for investors from the three countries. The ISDS allowed investors to bring claims against host state governments if they believed their investments had been harmed by government actions.[126]

a. Criticisms of Chapter 11

Chapter 11 has been controversial since its inception, and the ISDS provisions have been criticized by a number of groups, including environmental groups, labor unions, and consumer groups. The main criticisms advocated by these groups were that Chapter 11 gave foreign investors too much power, that it undermined national sovereignty, and that it could be used to challenge governmental policies put in place to protect the public interest.

The environmental advocacy organization The Sierra Group argued that the ISDS provisions under NAFTA bestowed foreign investors with "broad new rights that are fundamentally at odds with reining in the power of corporate polluters and transitioning to renewable energy."[127] Under Chapter 11, foreign investors were able to sue governments for damages if they believed that their investments had been harmed by almost any kind of government actions. Opponents of the ISDS contended that the tribunals construed the relevant terms too broadly (such as the definition of "investment") and consequently, corporations could simply go to private ISDS tribunals to challenge democratically-enacted climate, air, and water protections.[128] In addition to weakening environmental policies, investors have also challenged labor laws and tax policies. The investors can bring these cases directly to an international tribunal, which is not bound by the laws of the country where

[125] U.S. Dep't of State, *NAFTA Investor-State Arbitrations*, https://www.state.gov/nafta-investorstate-arbitrations/.

[126] Freedom-Kai Phillips, *Promise Utility Doctrine and Compatibility under NAFTA: Expropriation and Chapter 11 Considerations*, 40 Can.-U.S. L.J. 84 (2016).

[127] SIERRA CLUB, *NAFTA's Corporate Rights vs. People and Planet: How Corporations Use Trade Deals to Challenge Our Protections in Private Tribunals*, https://www.sierraclub.org/sites/www.sierraclub.org/files/ISDS-summary.pdf.

[128] Patrick Dumberry, *The NAFTA Investment Dispute Settlement Mechanism*, The Journal of World Investment & Trade, 2(1), 151-195 (2001).

the investment is located.[129] This gives foreign investors a significant advantage over domestic investors, who cannot sue their governments in the same way.

Furthermore, several groups have alleged that the ISDS mechanisms were biased in favor of investors while undermining national sovereignty, arguing that party-appointed arbitrators are not only permitted to subject host-state laws and regulations to scrutiny,[130] they may actually be more likely to favor the investor positions since they want to be appointed again in another dispute. Moreover, when State parties are forced to defend investment claims, the result is often an adverse financial outcome for the taxpayers, while the investors do not run the same risk and – should a tribunal hold against them – only have to pay attorney fees and costs. Furthermore, the arbitration process is cloaked in secrecy and generally closed to public interest groups.[131] As explored in more detail below, this means that governments may be less able to make decisions that are in the best interests of their citizens, such as enacting stricter environmental regulations or raising taxes on corporations. A public statement signed by more than 70 academics summarizes as follows: "Investment treaty arbitration as currently constituted is not a fair, independent, and balanced method for the resolution of investment disputes and therefore should not be relied on for this purpose."[132]

b. Proposals for Reforming Chapter 11

In 2017, when the United States, Mexico, and Canada began negotiating the new trade agreement, one of the key objectives of the negotiations was to reform Chapter 11.[133] The participating countries made a number of proposals to reform Chapter 11, and several of these proposals were ultimately incorporated into the USMCA. These reforms were designed to address the concerns that had been raised about the ISDS provisions. Reform proposals included the following:

- Creation of a new appellate body: The participating countries proposed the creation of an appellate body to review decisions made by ISDS tribunals. This would provide a mechanism for overturning awards that are seen as being unfair or inconsistent with the law. This

[129] *See id.*

[130] Barnali Choudhury, *Democratic Implications Arising from the Intersection of Investment Arbitration and Human Rights*, 46 ALTA. L. REV. 863, 983–1008, (2009); Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, VAND. J. TRANSNAT'L L. 775, 786–87 (2008).

[131] Avidan Kent and Valentine Kunuji, *The Investment-Sustainability Conundrum Under the USMCA: An Evolution?*, Vermont Law Rev. 46, 291 (2021).

[132] Gus Van Harten et al., *Public Statement on the International Investment Regime*, 31 August 2010, available at https://www.bilaterals.org/?public-statement-on-the.

[133] *See e.g.,* William L. Owen, *Investment Arbitration under NAFTA Chapter 11: A Threat to Sovereignty of Member States?*, 39 Can.-U.S. L.J. 55 (2015), available at https://scholarlycommons.law.case.edu/cuslj/vol39/iss/4.

was intended to ensure that ISDS decisions are consistent and that they are based on sound legal principles.

- Limitation of the types of claims that can be brought under ISDS: Under NAFTA, investors could bring claims for a wide range of alleged breaches of the agreement, including expropriation, unfair treatment, and denial of justice. The participating countries proposed to restrict the types of claims that can be brought under Chapter 11, such as by limiting claims to direct expropriation. This would prevent investors from bringing many claims for alleged breaches of government regulations that are designed to protect public health, safety, or the environment.

- Increased transparency of ISDS proceedings: The participating countries proposed increasing the transparency of ISDS proceedings. This would allow the public to better understand how ISDS decisions are made.

- Creation of a standing committee to oversee ISDS: The participating countries proposed creating a standing committee to oversee ISDS. This committee would be responsible for reviewing ISDS decisions and making recommendations for reform.

Like many aspects of the renegotiation of NAFTA, the reform proposals to the investment chapter were controversial. Some critics argued that the reforms did not go far enough, while others argued that they would make it too difficult for investors to get justice. Ultimately, the three countries agreed to a compromise that they believed would strike a balance between the interests of investors and governments. Many of the reforms proposed by the participating countries in the negotiations of the USMCA have been incorporated under the new agreement and would seem go a long way to address the concerns that have been raised about the ISDS provisions under NAFTA. These reforms aim to make the ISDS more transparent, more accountable, and more consistent with international law.

2. Chapter 14 of the USMCA as the Repurposed Chapter 11 of NAFTA

Chapter 11 of NAFTA and Chapter 14 of the USMCA are both investment protection chapters that establish rules for how foreign investors can bring claims against host governments for alleged breaches of investment treaties. The negotiations for the USMCA focused heavily on improving the investor dispute resolution mechanisms, and as such, Chapter 14 of the USMCA and Chapter 11 of NAFTA include a number of important differences. Notably, the investor protections offered by USMCA Chapter 14 are more limited and less accessible than their NAFTA predecessors.[134]

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[134] Jerry L. Lai, *A Tale of Two Treaties: A Study of NAFTA and the USMCA's Investor-State Dispute Settlement Mechanisms*, 35 Emory Int'l L. Rev. 259 (2021), available at: https://scholarlycommons.law.emory.edu/eilr/vol35/iss2/3.

One of the most glaring differences between ISDS under NAFTA and under the USMCA is the complete absence of Canada.[135] In other words, Canadian investors, in addition to U.S./Mexican investors in Canada, have no longer the ability to submit disputes to ISDS under the USMCA, excepting legacy investments which were still able to access ISDS under NAFTA until July 2023.[136] Although Canadian investors cannot access ISDS via the USMCA, Canada and Mexico remain parties to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and therefore, Canada and Mexico will still be subject to ISDS under that agreement.[137] Moreover, Canada has BITs in force with more than 30 countries,[138] and treaties with investment provisions (TIPs) with several more, including trading blocks like the Andean Community, EFTA, Mercosur, and the Trans-Pacific Partner countries.[139] It will remain to be seen whether U.S. and Mexican investors in Canada can use other agreements, as well as most-favored-nation provisions, to achieve similar results as if Canada were still subject to USMCA ISDS.

It should hardly be surprising that Canada wanted to opt out of the new ISDS mechanism under the USMCA. Over the nearly three decades NAFTA was in force, Canada was by far the country most subjected to ISDS claims. Under NAFTA Chapter 11, Canada had procedures initiated against it 41 times, more than Mexico and the United States combined. More importantly, Canada also lost more cases than the two other countries, having to pay compensation in eight of the 17 settled or adjudicated cases.[140]

Under the old system, NAFTA investors could bring claims against the government of another NAFTA country directly before a neutral international tribunal. Although Article 1118 required that "disputing parties should first attempt to settle a claim through consultation or negotiation", there was no requirement of exhaustion of local remedies in domestic courts or otherwise. This system was intended, inter alia, to avoid the risk of diplomatic escalation, and any reservations of foreign investors against potentially biased or unfair domestic courts.[141] Substantive investor protections under this scheme included national treatment (NT), most-favored-nation (MFN) treatment, the general minimum standard of treatment, a ban on performance requirements, free transfer of funds, and a safeguard against expropriation. In addition, NAFTA investors could submit their claims to arbitration via a number of mechanisms, including procedures administered by the International Centre for the Settlement of Investment Disputes (ICSID), and ad hoc procedures under the rules of the United Nations Commission on International Trade Law (UNCITRAL Rules). Of course, there

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135 *See id*.

136 *See*, USMCA, *supra* note 8, Art. 14 Annex 14-C (noting legacy claims will survive three years after the termination of NAFTA on 1 July 2020).

137 See *id.*

138 *See* https://investmentpolicy.unctad.org/international-investment-agreements/countries/35/canada.

139 *See* id.

140 See Lai, *supra* note 134, at 274.

141 Riyaz Dattu & Sonja Pavic, *Canada Seeks to Reform NAFTA's Investor-State Dispute Settlement Chapter*, OSLER (23 August 2017).

was also the choice of appealing to the domestic courts of the host NAFTA country.[142] Since all three NAFTA members were also signatories of the *New York Convention on Recognition and Enforcement of Foreign Arbitral Awards*,[143] any arbitral award obtained under NAFTA was enforceable via domestic courts, if necessary.

Chapter 14 of the USMCA covers investment and investor-state dispute settlement. It contains fairly good definitions for “investment” and “investor,” consistent with modern ISDS practice.[144] Pursuant to Article 14.2, the Chapter applies “to measures adopted or maintained by: (a) the central, regional, or local governments or authorities of that Party; and (b) a person, including a state enterprise or another body, when it exercises any governmental authority delegated to it by central, regional, or local governments or authorities of that Party” related “covered investments” by “investors of another Party.”[145] So far, this is all good and expected. Similarly, the substantive rights are generally in line with modern ISDS practice. Article 14.4 grants national treatment, Article 14.5 provides for most-favored-nation treatment, Article 14.6 provides the minimum standard, namely that “[e]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.” Article 14.9

[142] *See* Lai, *supra* note 134, at 261.

[143] *See* https://www.newyorkconvention.org/english.

[144] Pursuant to Art. 14.1, “investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. An investment may include: (a) an enterprise; (b) shares, stock and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to a Party’s law; and (h) other tangible or intangible, movable or immovable property, and related property rights, such as liens, mortgages, pledges, and leases, but investment does not mean: (i) an order or judgment entered in a judicial or administrative action; (j) claims to money that arise solely from: (i) commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to an enterprise in the territory of another Party, or (ii) the extension of credit in connection with a commercial contract referred to in subparagraph (j)(I)”.

For “investor of a Party,” Art. 14.1 provides that “(a) a natural person who is a dual citizen is deemed to be exclusively a national of the State of his or her dominant and effective citizenship; and (b) a natural person who is a citizen of a Party and a permanent resident of another Party is deemed to be exclusively a national of the Party of which that natural person is a citizen.”

[145] Art. 14.14 Denial of Benefits provides that “1. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of that other Party and to investments of that investor if the enterprise: (a) is owned or controlled by a person of a non-Party or of the denying Party; and (b) has no substantial business activities in the territory of any Party other than the denying Party. 2. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of that other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.”

safeguards the right to freely transfer payments, proceeds, profits, and capital, and Article 14.10 prohibits performance requirements.

Article 14.8 provides the usual standard for direct or indirect expropriation. The details are elaborated in Annex 14-B with one important and unexpected but sensible clarification, namely that "[n]on-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances."

A much more serious limitation is included – rather inconspicuously – at the end of Article 14.2 Scope:

> "4. For greater certainty, an investor may only submit a claim to arbitration under this Chapter as provided under Annex 14-C (Legacy Investment Claims and Pending Claims), Annex 14-D (Mexico-United States Investment Disputes), or Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts).

Annex 14-C is the least problematic since it merely extended NAFTA ISDS options for pre-existing investments for another three years, i.e. to July 2023.

Annex 14-D Mexico-United States Investment Disputes reflects the fact that Canada chose to opt out of ISDS under the USMCA. Thus, it excludes any "investor that is owned or controlled by a person of a non-Annex Party"[146] or, in plain English, any investor from Canada. In parallel, under Article 14.D.4: Consent to Arbitration, only "[e]ach Annex Party consents to the submission of a claim to arbitration under this Annex...", which does not include Canada. Thus, Canadian investors in the U.S. or Mexico do no longer have access to ISDS, and U.S. and Mexican investors in Canada are also no longer able to bring investor-state arbitration under the USMCA against their host country. Otherwise, the terms of Annex 14-D seem to largely continue the NAFTA rules, including the choice between ICSID Rules, ICSID Additional Facility Rules, and UNCITRAL Arbitration Rules, or "if the claimant and respondent agree, any other arbitral institution or any other arbitration rules."[147] However, there are some new and important limitations here as well. Pursuant to Article 14.D.5: Conditions and Limitations on Consent,

> "1. No claim shall be submitted to arbitration under this Annex unless: (a) the claimant [...] first initiated a proceeding before a competent court or administrative tribunal of the respondent with respect to the measures alleged to constitute a breach referred to in Article 14.D.3; [and]

146 Art. 14.D.1: Definitions.

147 Art. 14.D.3: Submission of Claim to Arbitration, in particular para. (3).

> (b) the claimant or the enterprise obtained a final decision from a court of last resort of the respondent or 30 months have elapsed from the date the proceeding in subparagraph (a) was initiated;"

In other words, an investor from Mexico seeking compensation from the U.S., or an investor from the U.S. claiming a breach of investor protections by Mexico, will now have to exhaust local remedies all the way to the court of last resort for at least 30 months before being entitled to pursue ISDS under the USMCA. In various ways, this is a compromise, since the 30 month time limit provides some relief to investors who are concerned about remedies in the public courts. However, we may safely assume that investors will have to make a good faith effort at obtaining relief from local courts, rather than just trying to run out the clock. But there is another landmine buried deep in the USMCA. Appendix 3 to Annex D provides that American investors cannot bring claims in arbitration at all, if they already raised them before Mexican courts. The exact language is as follows:

> "An investor of the United States may not submit to arbitration a claim that Mexico has breached an obligation under this Chapter [...] if the investor or the enterprise, respectively, has alleged that breach of an obligation under this Chapter, as distinguished from breach of other obligations under Mexican law, in proceedings before a court or administrative tribunal of Mexico."

It would at least seem that U.S. investors have to use local remedies in Mexican courts for at least 30 months before they can bring a claim to arbitration, but if they do use those local remedies in Mexican courts, they are then barred from bringing the same claims in arbitration.[148] Notably, the same restriction does not apply to Mexican investors in the U.S.

The next point is transparency versus confidentiality. Abitration proceedings are characterized and appreciated for many things, including their confidentiality. Of course, a requirement of exhaustion of local remedies available from public courts already does away with confidentiality. In that respect, the new Article 14.D.8 on transparency barely adds very much when it requires that the notice of intent to arbitrate, the notice of arbitration, the pleadings, memorials, and briefs, the minutes or transcripts of hearings, and any orders, awards, and decisions of the tribunal all be made available to the public, and that hearings shall be conducted open to the public. However, the provision is useful and sets a clear signal toward a more general distinction between commercial arbitration between private parties, where confidentiality is a legitimate interest of the parties, and investor-state arbitration about public money, where it is not.

Finally, Annex 14-E contains another set of narrow but important exceptions. It covers investment disputes in very specific "covered sectors," namely

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[148] Daniel Garcia-Barragan, Alexandra Mitretodis, & Andrew Tuck, *The New NAFTA: Scaled-Back Arbitration in the USMCA*, Journal of International Arbitration 36, no. 6 (2019):739–754.

(i) activities with respect to oil and natural gas that a national authority of an Annex Party controls, such as exploration, extraction, refining, transportation, distribution, or sale,

(ii) the supply of power generation services to the public on behalf of an Annex Party,

(iii) the supply of telecommunications services to the public on behalf of an Annex Party,

(iv) the supply of transportation services to the public on behalf of an Annex Party, or

(v) the ownership or management of roads, railways, bridges, or canals that are not for the exclusive or predominant use and benefit of the government of an Annex Party;"

and, if the claimant is party to a government contract, the dispute can go directly to arbitration, without the need to exhaust local remedies in host country courts.

On the one hand, Annex 14-E addresses concerns of investors about getting a fair trial in host country courts when the defendant is the host country government in a matter that is of obvious public interest and probably involves significant amounts of money. On the other hand, when read in conjunction with Article 14.D.8 on transparency, the new rules also ensure that these significant arbitrations will no longer be conducted behind closed doors.[149]

The revisions to NAFTA Chapter 11 have been met with mixed reactions. Some observers have praised the changes, arguing that they are necessary to protect the sovereignty of host governments and to ensure that ISDS is used fairly. Some experts believe that the changes are a positive step that will help to protect the environment and public health. Others have criticized the changes, arguing that they will make it more difficult for investors to protect their investments and that they will discourage foreign investment in North America.

Although reforms were pushing, inter alia, for more transparency in ISDS, the new rules are anything but a model of clarity and transparency. Yet, these changes, resulting in the new Chapter 14 of the USMCA, and clearly scaling back the ISDS options of investors in North America, were made in response to concerns that the ISDS system was being abused by investors. These concerns were triggered by a number of high-profile cases brought under Chapter 11 of NAFTA, in which investors were awarded billions of dollars in damages and/or managed to oppose regulatory measures supposedly made in the public interest. In the final section of this analysis, therefore, some of these high profile cases shall be examined a bit more closely to see whether they were indeed frivolous claims that caused unreasonable restrictions on public policy and undue threats to government sovereignty.

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[149] See M. Angeles Villarreal and Ian F. Fergusson, *NAFTA and the United States-Mexico-Canada Agreement (USMCA)*, Congressional Research Service, R44981, *supra* note 61.

F. CASE LAW UNDER NAFTA CHAPTER 11 AND CHAPTER 14 OF THE USMCA

I. NAFTA Chapter 11: Investor Protection and Government Sovereignty

As discussed above, a major criticism of the ISDS mechanism under Chapter 11 was its primary concern with protecting investors, even at the expense of weakening NAFTA countries' ability to legislate or regulate in the public or national interest. Indeed, Chapter 11 has been used by investors to challenge a wide range of government policies, including environmental regulations, tax laws, and public health measures. Such cases have had a significant impact on the interpretation and application of international investment law and have functioned to broaden the scope of NAFTA's investment protections. As such, cases brought under Chapter 11 have raised important questions about the balance between investor rights, government sovereignty and public interest.

The most common claims brought under Chapter 11 have been for violations of the fair and equitable treatment standard, the national treatment standard, and the expropriation standard. As applied under Chapter 11, the fair and equitable treatment standard is a vague standard that has been interpreted to include a wide range of rights, such as the right to due process, the right to be free from corruption, and the right to be treated fairly and in good faith. The national treatment standard, on the other hand, requires that foreign investors be treated no less favorably than domestic investors. And finally, the expropriation standard prohibits governments from taking foreign investments without compensation. Given the fact that Chapter 11 covered both direct expropriations (taking of title), and indirect expropriations (taking of value), the provisions were suitable for a variety of claims in opposition to stricter regulations or higher fees and taxes.

Under Chapter 11 of NAFTA, the U.S. tends to reign victorious. Although the U.S. has been sued at least 21 times, it has yet to lose a single case, prompting bias concerns. In many cases, the tribunals have found in favor of the investors. This has led to concerns that Chapter 11 is being used to undermine public policy and to protect the interests of foreign investors at the expense of the public good. In a handful of cases, governments were forced to change or repeal laws that were challenged under Chapter 11. In other cases, governments were forced to pay large sums of money to investors who won their cases.

II. Cases Under Chapter 11 of NAFTA

From a point of view of statistical analysis, since the signing of NAFTA in 1994, there have been relatively few cases that were successfully brought under Chapter 11. However, in many of the cases that did proceed, the tribunals found in favor of the investors, awarding them large sums of money in damages. Importantly, several cases in which investors won involved government policy and more specifically, environmental policy. This has led to concerns that Chapter 11 was being used to undermine public policy and to protect the interests of foreign investors at the expense of the public good.

In 1997, for example, in one of the first case filed under NAFTA's Chapter 11, *Ethyl Corporation v. The Government of Canada,*[150] Canada lost its first ISDS case to an American investor. Ethyl Corporation was an American corporation that manufactured and sold methylcyclopentadienyl manganese tricarbonyl (MMT), an additive that is used to improve the octane rating of gasoline. The additive, MMT, has the ability to cause airborne manganese poisoning and may also interfere with on-board emissions monitoring and diagnostic systems. Thus, the Canadian Parliament, concerned about public health and environmental risks, introduced the Manganese-based Fuel Additives Act ("MMT Act") in 1997, banning the commercial importation and intra-provincial transport of the chemical. Ethyl Corp. promptly alleged that Canada had violated Chapter 11 of NAFTA by banning the use of the additive. Further, Ethyl alleged that the ban had the effect of protecting the Canadian market for other octane-boosting additives.

Despite interesting questions regarding the merits of the claim, the tribunal focused narrowly on the issue of jurisdiction. The Canadian government argued that Ethyl Corp. violated the requirement of Article 1120 because filed a Notice of Arbitration prior to the expiration of the mandatory waiting period. The arbitral tribunal ruled against the Canadian government, explaining that the 6-month waiting period was of little use in this case as there was no indication that Canada intended to repeal the law banning MMT. Following the decision from the tribunal, Canada settled with Ethyl Corp. for over $13 million and gave a public apology.[151] Eventually, Canada also withdrew its partial ban on MTT.

The tribunal's decision was a major victory for Ethyl Corp. and other companies that produce or use potentially harmful substances. It also sent a strong signal to governments that they could not ban or restrict the use of products simply because they were newly considered to be harmful to the environment. Moreover, the case also raised concerns about the power of multinational corporations, and it led to calls for reforms to ISDS provisions in trade agreements. The decision also highlighted the incongruity of enforcement because the tribunal intentionally looked the other way, despite Ethyl Corp. clearly, and likely intentionally, having ignored the procedural requirements of Article 1120. Arguably, the ruling undermined the rule of law the ISDS was meant to promote, and sent a message that circumventing procedural requirements would not necessarily result in any meaningful consequences. In this way, the tribunal subtly conveyed that the NAFTA ISDS mechanism would likely afford far-reaching protections to investors and not nearly as far-reaching protection for host states, casting doubt on Chapter 11 itself.[152]

Because Canada is no longer subject to ISDS, this case would not make it to an arbitral tribunal under the USMCA. If Canada was still a party, however, it is likely that the procedural violation

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150 *Ethyl Corporation v. The Government of Canada*, ICSID Case No. ARB(AF)/97/1 (1997).

151 Debbie Barker, *2018 Trade Policy Assessment*, ME. CITIZEN TRADE POL'Y COMM'N (Sept. 2018), https://legislature.maine.gov/doc/3160.

152 Honi soit qui mal y pense and suggests that the arbitrators wanted to find a way of deciding the case on the merits, rather than throwing it out on procedural grounds, and handing over the much more lucrative decision on the merits to a different group of arbitrators a few months later.

would have been resolved differently under Chapter 14. Under the USMCA, if a party violated the provision requiring the exhaustion of domestic recourse or the passage of 30 months, an impartial tribunal would likely have to deny jurisdiction.

In the case of *Metalclad Corp. v. United Mexican States*,[153] the ability to enforce an environmental or public policy that adversely affected foreign investors was lent another blow by an American investor. The American company, Metalclad Corporation (Metalclad) sued Mexico for the alleged interference of the Mexican local governments of San Luis Potosí and Guadalcázar with the investor's development and operation of a hazardous waste landfill. Metalclad argued that Mexico violated the minimum standard of treatment (Articles 1105) and the safeguard against (indirect) expropriation (Article 1110) provisions of the ISDS under NAFTA for preventing the company from opening and operating an already-built hazardous waste facility after it became apparent that contaminants might leak into the local water supply.

The ad hoc arbitral tribunal found in favor of Metalclad, awarding the company $16.7 million in damages. The tribunal held that Mexico was responsible for a violation of both Articles 1105 and 1110 for failing to provide a transparent and predictable business environment; making false representations which Metalclad relied upon; and improperly refusing to grant a construction permit and refusal to promulgate an ecological decree over the landfill site. In denying the construction permit, the tribunal explained that the municipality had acted outside its authority and effectively and unlawfully prevented Metalclad's operation of the landfill, and that together with the representations of the Mexican federal authorities and the absence of a timely, orderly, or substantive basis for the denial of the construction permit, such acts amounted to indirect expropriation.

The outcome in *Metalclad* is notable for a number of reasons. To begin with, requiring a government party to preemptively determine its regulatory positions and clarify any potential points of misunderstanding set an unusually high standard for transparency and legal certainty under NAFTA. Another controversial aspect of the decision was its definition of "expropriation," which was construed more broadly than prevailing international customs. Lastly, like the decision in *Ethyl*, the outcome curtailed the ability of NAFTA host countries to enact or update environmental regulations.

The Metalclad arbitration was maligned as an abuse of the ISDS mechanism, an attack against domestic environmental legislation, and an infringement of national sovereignty, by a myriad of national- and international organizations and advocacy groups, as well as government agencies.[154] While this reaction was understandable given the confrontation between a for-profit multinational on the one side, and the water supply of the local population and a nature reserve for rare and endangered cacti on the other, it is not nearly as obvious that the Mexican authorities did not create false expectations before changing their tune once the investor had expended considerable sums.

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[153] *Metalclad Corp. v. United Mexican States*, 11 Arb. Trib. North American Free Trade Agreement (2000).

[154] See Lai, *supra* note 134, at 263.

Nevertheless, the case became one of the drivers of the reforms in the transition from NAFTA Chapter 11 to USMCA Chapter 14. Post 2023, the outcome of Metalclad would no doubt be different, mainly because Annex 14-B of the USMCA largely eliminated the possibility to claim indirect expropriation claims,[155] the basis for Metalclad's claim is no longer available. As such, an USMCA investor wields less power to review the environmental policies of a host government.

In terms of cases with outsized consequences for environmental policy filed under NAFTA Chapter 11, the most prominent may be *Clayton and Bilcon of Delaware Inc. v. Government of Canada*.[156] In the 2008 case, an American company, Bilcon of Delaware, in conjunction with the American Clayton family, sued the Canadian government for rejecting the company's proposal to build a quarry and marine terminal in Digby Neck, Nova Scotia. The American claimants argued that the Canadian government breached Articles 1102 (national treatment), 1103 (most-favored-nation treatment), and 1105 (minimum standard of treatment) of NAFTA. The governments of Canada and Nova Scotia rejected the project proposal due to recommendations of a Joint Review Panel (JRP) which the investors claimed was legally unnecessary, unfair, politically biased, and discriminatory. Among other considerations, the JRP had referred to "community core values" in the project assessment process.

The arbitral tribunal ruled in favor of Clayton and Bilcon, finding that the government had breached Article 1105 by failing to provide the company with fair and equitable treatment. Although the decision was viewed as a "remarkable step backward in environmental protection,"[157] perhaps the more pressing issue was that the tribunal decided on whether a domestic government agency's actions breached domestic law, without any input from a domestic court or deference to domestic agencies and administrative procedures. The decision again raised the question to what extent an international tribunal should have the power to review domestic legislation and domestic policy decisions. The decision by the tribunal would have consequential implications regarding the judicial sovereignty of NAFTA members.

Several critics hailed the *Clayton/Bilcon* case as an embodiment of everything that was wrong with the ISDS under NAFTA. As such, it is not surprising that the outcome would be less likely under the USMCA. First, the tribunal would find it difficult to impossible to obviate domestic law. Because Annex 14- D dictates that a domestic court must have the opportunity to rule on questions involving domestic law before the case is passed to a tribunal, arbitration under the USMCA would likely not be able to decide that the "community core values" approach was not in conformity with Canadian law. In addition, the USMCA was designed to dispel notions of impropriety by requiring that all

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155 *See* Annex 14-B(3)(b), and *supra*.

156 *Clayton and Bilcon of Delaware Inc. v. Government of Canada*, (PCA Case No. 2009-04).

157 *Bilcon of Del. et al. v. Gov't of Can.*, Dissenting Opinion of Professor Donald McRae, Case No. 2009-04, ¶ 25 (Perm. Ct. Arb. 2015). Prof. McRae also opined that the tribunal's decision failed to respect the discretionary powers of domestic environmental review processes and could potentially lead to "regulatory chill,' deterring governments from enforcing environmental regulations due to fear of international arbitration claims.

arbitrators to comply with the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration. Consequently, it is unlikely that a tribunal under Chapter 14 would have reached a similar conclusion to that of the NAFTA tribunal.

Finally, Chapter 11 has been criticized for weakening the government's ability to implement public health policy. In *Cargill, Incorporated v. United Mexican States,*[158] for example, the large American food company Cargill sued the Mexican government after the 2002 adoption of a tax on beverages containing high fructose corn syrup (HFCS). Cargill argued that the tax allegedly affected the claimants' investments in the high fructose corn syrup industry in Mexico. Cargill argued the government of Mexico engaged in indirect expropriation, and violated the fair and equitable treatment/minimum standard of treatment (including denial of justice claims), national treatment, MFN treatment, and performance obligations under Chapter 11 of NAFTA for imposing trade barriers targeting the importation and use of HFCS.

Once again, the tribunal ruled in favor of the investor, finding that the measures imposed by the Mexican government violated the national treatment, fair and equitable treatment and performance requirements of NAFTA. The decision was controversial because the tribunal not only awarded Cargill what they termed "downstream losses," but also awarded for "upstream losses" incurred by Cargill as a result of the Mexican measures. Downstream losses were related to the direct lost sales and associated costs suffered by Cargill's subsidiary in Mexico, which was responsible for selling and distributing HFCS within Mexico. Upstream losses, on the other hand, referred to the lost sales of HFCS produced in the United States by Cargill that were intended for export to Mexico. The arbitral tribunal awarded damages for both types of losses, recognizing the interconnected impact of Mexico's measures on Cargill's operations across the supply chain. Mexico challenged the upstream losses, arguing that Chapter 11 only permitted the tribunal to assess and award Cargill's damages as an investor and not for damages sustained as a producer and exporter of HFCS. The tribunal disagreed and maintained both the downstream and upstream damages, effectively chilling implementation of any future public health related regulations or policies.

Again, like the previously discussed decisions, Cargill too has been criticized for making it more difficult for governments to regulate unhealthy products and challenging national sovereignty. Because the USMCA dictates that a case commenced in Mexico is barred from proceeding to an international tribunal, this case would likely never have made it out of Mexico.

III. ISDS Cases under the USMCA

Chapter 14 of the USMCA establishes a new investment dispute settlement system for the three countries. The system is designed to be more restrictive than the system under NAFTA, and it includes a number of new features, such as a requirement for investors to exhaust local remedies before filing a claim, and limitations of the types and scope of claims that can be brought. Therefore, there was "an expectation that investors of the three countries would use the transition

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[158] *Cargill, Incorporated v. United Mexican States*, (ICSID Case No. ARB(AF)/05/2)

period to file ISDS cases under the NAFTA rules to the extent possible instead of using the new ISDS rules under the USMCA during the first three years of its existence."[159] Nevertheless, by the end of 2023, 19 cases had been registered under the USMCA and only 9 under the legacy or sunset rules of NAFTA.[160] The large majority of the new cases were brought by U.S. investors against Mexico.

To date, no case has been decided under Chapter 14 of the USMCA and the first case decided will undoubtedly be closely analyzed and compared to Chapter 11 of NAFTA. The cases could have a significant impact on the investment climate in North America, and they will be closely watched by investors and businesses. If the host government is successful in more than a few of the new cases, it could make investors more hesitant to invest in Mexico, as they would be more concerned about the risk of having to pursue their claims in domestic courts. On the other hand, if the investors continue to be victorious, host governments may view the USMCA as the same old NAFTA and find that in the end, the refurbishment of Chapter 11 was an abject failure.

In the latter case, the state parties to the USMCA might take another bite at the apple rather sooner than later. NAFTA never had a sunset clause, meaning that the agreement had no expiration date. At the behest of the U.S., the USMCA, in contrast, dictates that the agreement expires after 16 years, i.e. in 2036, "unless each Party confirms it wishes to continue this Agreement for a new 16-year term."[161] Moreover, the USMCA requires a "joint review" every 6 years.[162] This sunset clause was included in an effort to ensure that the agreement remains up-to-date with the changing economic and political landscape in North America. Critics might argue, however, that the sunset mechanism was mainly designed to give the U.S. new opportunities of trying to renegotiate its rights and obligations and force its partners to make ever new concessions.

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159 *See* Aristeo Lopez, *ISDS Under the USMCA: The First Three Years at a Glance*, Kluwer Arbitration Blog 25 November 2023, https://arbitrationblog.kluwerarbitration.com/2023/11/25/isds-under-the-us-mca-the-first-three-years-at-a-glance/.

160 Id.

161 *See* Art. 34.7(1).

162 Id., Art. 34.7(2)-(5).