

# North American Energy in the Crossfire

Guillermo J. Garcia Sanchez & James W. Coleman†

North America is the beating heart of global energy markets undergoing a terrible energy crisis that threatens to upend both the economy and global security. The clearest path out of this global crisis is increasing energy supplies from North America, which can restore energy security and drive a transition to cleaner energy sources. The U.S., Mexico, and Canada have abundant and varied resources to surmount this challenge but are in dire need of stronger cooperation across borders, and between private and public actors to achieve this goal. This Article shows how energy law changes in the U.S. and Mexico present under-studied dangers to cross-border energy trade and sets an agenda for legal reform to enable mutually beneficial fuel and power trade.

The United States has recently emerged from history's biggest oil boom, and along with its neighbors, is becoming the crossroads for an increasingly global two-way trade in oil and gas. The U.S., Mexico, and Canada are major global energy producers and consumers, and their different balance of products creates important trading opportunities. The United States and Mexico, in particular, have much to gain from expanded energy trade. Yet there is an increasing danger that this potential will be squandered. Growing movements against eminent domain, infrastructure permits, and energy exports in the United States, and moves to re-nationalize the energy sector in Mexico are making energy companies increasingly wary of investing in the future of U.S.-Mexico energy trade. Ironically, politicians on both sides of the border accuse each other of being the source of uncertainty for the future of the North American energy industry. This Article uncovers the fault lines undermining North America's energy potential and proposes principles for an energy agreement that could be adopted either by the United States Mexico Canada Agreement (USMCA) partners or by direct negotiations between the U.S. and Mexico to secure the benefits of increased energy trade and increase cooperation in energy and climate policy.

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† Guillermo J. Garcia Sanchez is an Associate Professor at Texas A&M University School of Law & James W. Coleman is Professor of Law at SMU Dedman School of Law. This Article was the result of a two-year research grant supported by the Mission Foods Texas-Mexico Center. With the help of the grant, we were able to interview policy makers, practitioners, and stakeholders involved in U.S.-Mexico energy relations. The findings of our research and the interviews set the grounds for the key recommendations proposed in the report and in this Article.

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## Introduction

As the world looks to increased North American energy supplies to help it through the global energy crisis, the potential for a U.S.-Mexico energy trade war looms on the horizon. On July 20, 2022, the United States Trade Representative, Ambassador Katherine Tai, sent a strong public message to the Mexican government: “We have serious concerns about changes in Mexico’s energy policies and their consistencies under the USMCA. We have tried to work with the Mexican government to address these concerns— unfortunately U.S. companies continue to face unfair treatment in Mexico.”<sup>1</sup>

The public complaint by Ambassador Tai was accompanied by a request for official government consultations that triggered the first step in the dispute resolution mechanism of the United States Mexico Canada Agreement [USMCA].<sup>2</sup> The same day, the Canadian government announced that it was

1. Ambassador Katherine Tai (@AmbassadorTai), *We have serious concerns about changes in Mexico’s energy policies and their consistency with commitments under the USMCA. We have tried to work with the Mexican government to address these concerns— unfortunately U.S. companies continue to face unfair treatment in Mexico.*, TWITTER (July 20, 2022, 11:13 AM), <https://twitter.com/AmbassadorTai/status/1549774510903238656> [<https://perma.cc/X8W2-FDAW>].

2. See United States Trade Representative (@USTradeRep), TWITTER (July 20, 2022, 11:11 AM), <https://twitter.com/USTradeRep/status/1549773966193082368> [<https://perma.cc/R93T-7XDC>]; United States-Mexico-Canada Agreement, Nov. 30, 2018, 116 H.R. 5430 [hereinafter USMCA].

supporting the U.S. request and shared the U.S. “concerns regarding Mexico’s change in energy policy.”<sup>3</sup> The start of official consultations marks the first time foreign governments have initiated official proceedings against Mexico for its energy policies since the Mexican expropriation of oil and gas companies in 1938. It also marks the beginning of a regional trade conflict in the midst of a global pandemic and the Russia-Ukraine conflict that have rattled the energy markets to the point of raising global inflation to its highest levels in fifty years.<sup>4</sup>

Why would the U.S. and Canada initiate a trade war in the energy sector against Mexico just when the world is most in need of North American energy supplies? The answer is simple: the future of the economic growth of the region and of policies to combat the climate crisis depend on an integrated North American energy market.<sup>5</sup> Mexico’s latest policies might have been the boldest in preventing the regional goal, but unfortunately it is just the latest of many steps by policymakers in the three countries that are undercutting hopes for a reliable, continent-wide energy partnership.

For the last two decades, market developments have encouraged an increasingly integrated regional energy powerhouse. The United States has moved to the center of global energy markets as the world’s biggest producer of both oil and natural gas.<sup>6</sup> At the same time, the United States lies at the nexus of North American energy markets, bordering two important global energy powers in Canada and Mexico. The United States and Canada have long had the world’s most important bilateral energy relationship, with two-way flows of oil, gas, and electricity.<sup>7</sup> Further, there is a new opportunity to construct an equally important relationship between the United States and Mexico.<sup>8</sup> New oil and

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3. Dave Graham & Brendan O’Boyle, *Mexico Denies Energy Policies Unfair After Canada Joins U.S. Demand*, REUTERS (July 21, 2022), <https://www.reuters.com/business/energy/mexico-stands-firm-energy-policy-after-canada-joins-us-demand-2022-07-21/> [<https://perma.cc/NU4V-7YNY>].

4. WORLD BANK, *Global Economic Prospects June 2022*, (June 7, 2022), <https://www.worldbank.org/en/news/press-release/2022/06/07/stagflation-risk-rises-amid-sharp-slow-down-in-growth-energy-markets> [<https://perma.cc/C7J6-H2J9>].

5. In the words of the USTR representative “Mexico’s policies have largely cut off U.S. and other investment in the country’s clean energy infrastructure, including significant steps to roll back reforms Mexico previously made to meet its climate goals under the Paris Agreement. Mexico’s policy changes threaten to push private sector innovation out of the Mexican energy market. To reach our shared regional economic and development goals and climate goals, current and future supply chains need clean, reliable, and affordable energy.” Press Release, United States Trade Representative, United States Requests Consultations Under the USMCA Over Mexico’s Energy Policies (July 20, 2022), <http://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/july/united-states-requests-consultations-under-usmca-over-mexicos-energy-policies-0> [<https://perma.cc/8U49-Q9J4>].

6. See U.S. ENERGY INFO. ADMIN., *The U.S. Leads Global Petroleum and Natural Gas Production with Record Growth in 2018* (Aug. 20, 2019), <https://www.eia.gov/todayinenergy/detail.php?id=40973> [<https://perma.cc/9QJH-8BVN>].

7. See AM. PETROLEUM INST., *North American Energy*, <https://www.api.org/-/media/Files/Policy/Trade/North-American-Energy-Onepager.pdf?la=en&hash=855A31713B8CB8FD-FAFAA50E24467F4F72E06B18> [<https://perma.cc/P4ND-DT7U>] (last visited Mar. 29, 2021); U.S. DEP’T OF STATE, BUREAU OF WESTERN HEMISPHERE AFFAIRS, *Bilateral Relations Fact Sheet* (Aug. 19, 2022), <https://www.state.gov/u-s-relations-with-canada/> [<https://perma.cc/9EJC-GAVE>].

8. See Duncan Wood & Montserrat Ramiro, *U.S.-Mexico Energy Relations*, WILSON CTR., <https://www.wilsoncenter.org/publication/us-mexico-energy-relations> [<https://perma.cc/D3AJ-LE7T>] (describing the interdependence of energy markets and recommending further interinstitutional dialogues to enhance the region’s potential).

gas production in the United States is reaching growing markets in Mexico and Mexico has the potential for new production of oil, gas, and renewable energy that would be most valuable if it could be exported to the United States.

Together, these three countries have the potential to be the preeminent source of global energy supplies. The current global energy crisis, which is impacting fuel, food, and consumer prices across the globe; strengthening Russia's imperial ambitions; and driving rising political unrest demands growing global supplies of North American oil and natural gas. During the decade before the pandemic, the United States alone contributed two-thirds of the world's oil supply growth to fuel economic growth in the developing world, while Canada's exports also rapidly expanded.<sup>9</sup> Then the United States expanded its natural gas exports, investing hundreds of billions of dollars in liquefaction facilities that helped the country go from zero liquefied natural gas exports to the world's largest exporter in a matter of years.<sup>10</sup> Without American gas exports, Europe would be at the mercy of Russia's gas exports to avoid the collapse of their economy, heating, and food industry. To bolster unity in the face of Russia's aggression, President Biden promised massive increases in liquefied natural gas exports to Europe.<sup>11</sup> Growing North American natural gas exports will also be crucial to the global transition to cleaner energy because gas is particularly well suited to replace dirtier sources of electricity, such as coal power, which is the world's largest source of electricity. Natural gas is also well suited to back up renewable energy sources, which are a growing part of the global electricity mix but require a back-up source of electricity when they are not available.<sup>12</sup>

Yet, as the latest complaint by the U.S. and Canada against Mexico shows, there is an increasing danger that North America's unique potential to lead the world into a cleaner and more secure energy future will be squandered. Officials on both sides of the border are neglecting the potential of integrated North American energy markets.<sup>13</sup> Energy policy and its regional legal archi-

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9. See Rory Johnston, *Shale Struggles*, COMMODITY CONTEXT (May 10, 2022), <https://www.commoditycontext.com/p/shale-struggles> [<https://perma.cc/H9EH-VUTG>]; NAT. RES. CANADA, *Canadian Crude Oil Exports: A 30 Year Review* (June 23, 2022), <https://www.cer-rec.gc.ca/en/data-analysis/energy-commodities/crude-oil-petroleum-products/report/canadian-crude-oil-exports-30-year-review/> [<https://perma.cc/5HMT-UCQL>].

10. See U.S. ENERGY INFO. ADMIN., *The United States Became the World's Largest LNG Exporter in the First Half of 2022* (July 25, 2022), <https://www.eia.gov/todayinenergy/detail.php?id=53159> [<https://perma.cc/KU96-GJ3T>]; Marcy de Luna, *Rising calls for U.S. LNG revive stalled export projects, but at higher costs*, REUTERS (Apr. 21, 2022), <https://www.reuters.com/business/energy/rising-calls-us-lng-revive-stalled-export-projects-higher-costs-2022-04-21/> [<https://perma.cc/S9R4-GBJ8>].

11. See Sara Schonhardt & Scott Waldman, *The U.S. Will Increase Natural Gas Exports to Europe to Replace Russian Fuel*, SCI. AM. (Mar. 25, 2022), <https://www.scientificamerican.com/article/the-u-s-will-increase-natural-gas-exports-to-europe-to-replace-russian-fuel/> [<https://perma.cc/W66X-ZWA9>].

12. See James W. Coleman, *Pipelines & Power-Lines: Building the Energy Transport Future*, 80 OHIO ST. L.J. 263, 270–72 (2019); INT'L ENERGY AGENCY, *Coal*, <https://www.iea.org/fuels-and-technologies/coal> [<https://perma.cc/ZW8Q-LWKK>] (last visited Sept. 7, 2023).

13. For example, Texas Governor, Greg Abbott, wrote directly to President Lopez Obrador complaining about the impact that his new energy policies are having on Texas producers. Robbie Whelan, *Legal Tussle Prevents \$2.5 Billion Gas Pipeline to Mexico From Opening*, WALL STREET J. (Aug. 19, 2019), <https://www.wsj.com/articles/>

ture have been frequently hijacked for political purposes. For example, in 2019, after the Mexican President, Lopez Obrador, forced a renegotiation of the pipeline contracts that export Texas natural gas to Mexico, Texas Governor Greg Abbott wrote, “[I]ngering questions about Mexico-U.S.-Canada project delays and longstanding contracts and business commitments could negatively impact our economies for years to come.”<sup>14</sup> A year later, the tables turned: Mexico was forced to officially complain about Gov. Abbott’s order to halt the same natural gas exports to Mexico during the Texas blackout that left millions of Mexican households without power.<sup>15</sup>

The common argument on both sides is clear: the neighboring jurisdiction is being a poor energy policy partner and its interference in energy markets breaches the spirit of the recently approved U.S.-Mexico-Canada Agreement (USMCA).<sup>16</sup> With each new energy squabble it is becoming clearer that U.S. and Mexican leaders have not built a sustainable legal framework that puts energy integration and the protection of energy investments at the center.

Energy trade has flourished between Canada and the United States partly due to the existence of clear international trade rules between the two partners.<sup>17</sup> The 1994 North American Free Trade Agreement (NAFTA) contemplated an energy chapter that allowed for investment and trade in the sector to flow.<sup>18</sup> Trade and foreign direct investment protections of the 1990s NAFTA; however, did not contemplate integration with the energy sector in Mexico, which had been nationalized for over half a century.<sup>19</sup> On the con-

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legal-tussle-prevents-2-5-billion-gas-pipeline-to-mexico-from-opening-11566229406 [https://perma.cc/6WRY-7V8B]. On the Mexican side, President Lopez Obrador’s administration officially complained about Gov. Abbott’s executive emergency order to halt natural gas exports outside of the state during the Texas black out of February 2021. Marianna Parraga & Diego Oré, *Mexico Presses U.S. to Guarantee Natural Gas Supplies After Texas Export Ban*, REUTERS (Feb. 18, 2021), <https://www.reuters.com/article/us-mexico-lng-supply-idUSKBN2AI05C> [https://perma.cc/R9JF-EMA9].

14. See Whelan, *supra* note 13. The U.S. Congress has also publicly complained to the last two U.S. Presidents, Donald J. Trump and Joe Biden, for Mexico’s reluctance to respect its USMCA commitments to energy investors. Anthony Esposito, *U.S. Lawmakers Complain to Trump over Mexican Energy Policy*, REUTERS (Oct. 23, 2020), <https://www.reuters.com/article/us-usa-mexico-energy-idUSKBN2782BH> [https://perma.cc/LP7C-M585]; Sheky Espejo, *Lawmakers urge Biden to address concerns of US energy companies in Mexico*, S&P GLOB. (July 21, 2021), <https://www.spglobal.com/platts/en/market-insights/latest-news/oil/072121-lawmakers-urge-biden-to-address-concerns-of-us-energy-companies-in-mexico> [https://perma.cc/V9NQ-JVD9].

15. Parraga & Oré, *supra* note 13.

16. USMCA *supra* note 2, art. 32.5.

17. In addition to NAFTA’s Chapter 6 on Energy Trade, the U.S. and Canada also signed in 1977 the Transit Pipeline Agreement, see The Agreement between the Government of the United States of America and the Government of Canada concerning Transit Pipelines, signed at Washington on Jan. 28, 1977, available at <https://www.congress.gov/treaty-document/95th-congress/6?s=1&r=84> [https://perma.cc/28N6-7SSV].

18. Roberto Rios Herran & Pietro Poretti, *Energy Trade and Investment under the North American Free Trade Agreement*, 34 in REGULATION OF ENERGY IN INTERNATIONAL TRADE LAW, WTO, NAFTA AND ENERGY CHARTER 335–372 (2011); Bradley J. Condon, *Mexican Energy Reform and NAFTA Chapter 11: Articles 20 and 21 of the Hydrocarbons Law and Access to Investment Arbitration*, 9 J. WORLD ENERGY L. & BUS. 203–218 (2016).some of which may qualify as investments under North American Free Trade Agreement (NAFTA)

19. Guillermo J. Garcia Sanchez, *The Mexican Petroleum License of 2013: A Step to the Past to Bring Mexico into the Present and the Grounds for an Uncertain Future*, in THE

trary, NAFTA excluded the Mexican energy sector from the application of the trade deal.<sup>20</sup>

In 1938, Mexico nationalized its energy industry, expropriating millions of dollars of investment from foreign oil and gas companies.<sup>21</sup> From then until the 2013 energy reform, the extraction of hydrocarbons; the refining of petroleum products; the retail sale of gasoline; and the generation, transmission, distribution and sale of energy were all in the exclusive control of state-owned companies.<sup>22</sup> Foreign businesses were allowed to provide services, not partnerships, to Mexican state enterprises, but these energy deals were excluded from the investor protections set up in Chapter 11 of NAFTA.<sup>23</sup> In those days, Mexico's energy sector was focused primarily on supplying electricity to the domestic market and selling hydrocarbons internationally to receive revenues to finance the government's budget.

The system worked until the major oil fields in the coast of Campeche, primarily Cantarell, reached peak production.<sup>24</sup> The Mexican state-owned company, Petroleos Mexicanos (PEMEX), was highly taxed by the government and had oriented most of its investments into existing production rather than exploring new fields or expanding its proven reserves.<sup>25</sup> By the late 1990s, PEMEX was highly in debt and inefficient in bringing new fields into production.

At the same time, Mexico's state-owned electric company, Comisión Federal de Electricidad (CFE), also lacked sufficient investments to keep up with the growing demand for electric power.<sup>26</sup> In the 1990s, the government tried to expand investment in the power sector by creating long-term contracts with CFE for electricity generation by private parties.<sup>27</sup> However, CFE maintained its monopoly over transmission and distribution, and maintained its role of manager of electricity generation.<sup>28</sup> In addition to underinvestment in capital stock, the government subsidized energy prices and most of CFE's electricity generation plants were highly dependent on fossil fuels.<sup>29</sup> By early 2000,

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NATURE OF PETROLEUM LICENSES 27 (Tina Hunter, Jorn Oyrehagen Sunde, & Ernst Nordtveit eds., 2020).2020

20. Rios Herran & Poretti, *supra* note 18. In addition to the rules set up in the energy chapter of the 1994 NAFTA, the U.S. and Canada also signed in 1977 the Transit Pipeline Treaty that, according to Kristen van de Biezenbos and James Coleman, has proved "crucial to preserving these energy links by providing an unexpected bulwark against changing US environmental priorities at the state and federal level." Kristen van de Biezenbos & James Coleman, *A 40-year-old Treaty Could Save Line 5*, C.D. HOWE INST. (Feb. 17, 2021) <https://www.cdhowe.org/intelligence-memos/van-de-biezenbos-coleman-%E2%80%9340-year-old-treaty-could-save-line-5> [<https://perma.cc/VF2L-NSD3>].

21. DANIEL YERGIN, *THE PRIZE* 271–79 (1991).

22. Garcia Sanchez, *supra* note 19, at 5–6.

23. *Id.*

24. Garcia Sanchez, *supra* note 19, at 11.

25. *Id.*

26. Peter Nance, *Initial Results from the Mexico Electricity Reform*, WILSON CTR. MEXICO INST. 1 (2018).

27. *Id.*

28. GUILLERMO J. GARCIA SANCHEZ, *THE FINE PRINT OF THE MEXICAN ENERGY REFORM*, IN *MEXICO'S NEW ENERGY REFORM* 36, 49 (Duncan Wood ed. 2018);

29. MEXICO BUSINESS, *CFE Increases Use of Fuel Oil for Power Generation*, <https://mexicobusiness.news/energy/news/cfe-increases-use-fuel-oil-power-generation> [<https://perma.cc/G7VE-E8W3>] (last visited Sept. 19, 2023).

Mexico's underinvestment across the energy sector was beginning to add up.<sup>30</sup> PEMEX's oil wells began to dry up, and CFE's costs of electricity generation increased.<sup>31</sup> As it began counting the cost of its lack of investment in energy, the government was forced to contemplate a new push to open the whole energy sector up for foreign investment.<sup>32</sup>

Mexican President Enrique Peña Nieto's 2013 energy reform attempted to forge tighter energy links within North America, with the prospect that the U.S. and Mexico might have an energy relationship as close and mutually beneficial as that between the U.S. and Canada.<sup>33</sup> The reform for the first time allowed private companies to invest in the electricity and hydrocarbons.<sup>34</sup> The opening of the sectors included the generation of electricity by private parties, with an emphasis on private participation in development of renewable energy, production and exploration of hydrocarbons, and the sale of gasoline to consumers.<sup>35</sup> In the view of the drafters of the reform, State-owned companies would become more efficient as they focused on their strengths, such as shallow waters and inland conventional fields for PEMEX and transmission and distribution of energy for CFE, as well as competing with private actors in an open bidding market and partnering with expert companies in those areas where their technological or financial capacities are weaker.<sup>36</sup> In other words, CFE and PEMEX were to keep strategic privileges in their sectors but increasingly compete or partner with other private actors in a more dynamic market. The government gave assurances to the private companies that their new investments would be protected under international treaties, giving the impression that Mexico had, as a practical matter, unilaterally amended NAFTA's exclusions that had left these investors outside of its protections.<sup>37</sup> As Subsection IV.C will show, the USMCA failed to update NAFTA with an energy chapter that would support the growing energy integration promised by the 2013 energy reform. That failure has proven disastrous as the current Mexican government moves to unravel the new threads of infrastructure and trade that had begun to knit together, coordinate, and strengthen the U.S. and Mexican energy industries.

This Article shows how the backlash to the reform and other energy law changes in the United States and Mexico present under-studied dangers to cross-border energy trade and sets an agenda for legal reform to enable mutually beneficial fuel and power trade. This Article further proposes new principles that can be the foundation for a new energy agreement that could be adopted either by all three North American USMCA partners or by direct bilateral negotiations between the U.S. and Mexico to secure the benefits of increased energy trade.

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30. Duncan Wood & Jeremy Martin, *Of Paradigm Shifts and Political Conflict: The History of Mexico's Second Energy Revolution*, in MEXICO'S NEW ENERGY REFORM 20-23 (2018).

31. *Id.*

32. *Id.* at 27

33. *Id.*

34. *Id.*

35. *See id.* at 17-35

36. *See id.* at 20-21, 31-33.

37. *See* GARCIA SANCHEZ, *supra* note 28, at 42-47; Garcia Sanchez, *supra* note 19, at 18; Condon, *supra* note 18, at 218.

The Article unfolds as follows: Part I explains the theory of market integration between independent sovereigns—the benefits of different levels of integration, and the physical and legal infrastructure necessary to achieve them. Part II explains some of the market opportunities for increased United States-Mexico energy trade and illustrates these opportunities by explaining important ways that energy producers and consumers are already taking advantage of these opportunities. Part III explains some of the emerging obstacles to increased North American energy trade, highlighting local and national challenges to cross-border supply chains from both sides of the border. Part IV lays out a reform agenda to harness the benefits of integrated energy markets and proposes bilateral energy principles to foster this integration.

## I. Defining and Creating Energy Integrated Markets

Over the past 120 years, North America has often reaped the benefits of integrated energy markets.<sup>38</sup> In times of plentiful energy, oil producers in each country have relied on consumers in their continental neighbors.<sup>39</sup> When demand has outstripped domestic supply—as it sometimes has in each country—imports from these neighbors have prevented price spikes.<sup>40</sup> And Canada, the United States, and Mexico have been important, if sometimes inconstant, energy allies through geopolitical energy crises.<sup>41</sup> Despite these longstanding benefits, energy integration is under-theorized as a concept and encompasses different levels of market entanglement—from mere export and import of products, to common companies and cross-border supply chains, to common energy policy.<sup>42</sup> This section explains the benefits of each level of integration and the legal means necessary and sufficient to achieve them.

### A. Why Energy Differs from Other Commodities in Trade and Investment Agreements

Energy plays a complex role in international economic law.<sup>43</sup> At times, energy is regulated by agreements involving the trade of natural resources that

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38. An American Petroleum Institute report issues during the NAFTA renegotiations argued that the existing framework already achieve a good level of market integration. Mark Green, *NAFTA Works – For the U.S. and U.S. Energy*, AM. PETROLEUM INST. (Mar 2, 2018), <https://www.api.org:443/news-policy-and-issues/blog/2018/03/02/nafta-works-for-the-us-and-us-energy> [https://perma.cc/8BLQ-CYW3].

39. See DANIEL YERGIN, *THE NEW MAP* 57–63 (2020) (describing the historical changes in North American energy production and the relationships built among Canada, Mexico and the U.S.).

40. *Id.*; see also Christopher Helman, *Rolling Blackouts Force Texas To Import Power From Mexico*, FORBES, <https://www.forbes.com/sites/christopherhelman/2011/02/03/rolling-blackouts-force-texas-to-import-power-from-mexico/> [https://perma.cc/YM8E-NS25] (last visited Sept. 13, 2021).

41. See *id.* at 59–60, 63–64.

42. A few exceptions of legal scholars who have theorized about the integration of international energy markets can be found in the works of ANNA-ALEXANDRA MARHOLD, *ENERGY IN INTERNATIONAL TRADE LAW* (2021); JULIA SELIVANOVA ED., *REGULATION OF ENERGY IN INTERNATIONAL TRADE LAW* 2. WTO, *NAFTA AND ENERGY CHARTER* xxvi (2011).

43. See ANNA-ALEXANDRA MARHOLD, *ENERGY IN INTERNATIONAL TRADE LAW*. 7–8 (2021) (describing the different uses of the term “energy” in international trade law).



are employed in the production of heat or electricity, primarily fossil fuels such as hydrocarbons, or the trade of electricity across borderlines.<sup>44</sup> At times, energy is regulated in agreements by protecting the investments done in construction of extraction sites involving energy sources or in power facilities that generate heat or electricity.<sup>45</sup> Energy has complexities that differentiate it from other commodities and it requires a distinctive approach if a region is to be integrated.<sup>46</sup> For example, the starting point of any international trade agreement is facilitating the access of foreign suppliers to the domestic market.<sup>47</sup> The General Agreement on Tariffs and Trade of 1947 (GATT) and the World Trade Organization (WTO) primarily aim to reduce import tariffs so that foreign companies can access local markets.<sup>48</sup> In contrast, for energy markets to be fully integrated, countries must allow foreign suppliers of energy commodities, including state-controlled suppliers, to access their export infrastructure (i.e. production sites, storage units, and transportation infrastructure, such as railroads or pipelines).<sup>49</sup> For the energy sector to be integrated, export barriers are just as important as import barriers. In fact, “import restrictions are not particularly problematic in the energy sector—on the contrary, states have been more concerned with securing access to energy suppliers at affordable prices.”<sup>50</sup>

Regional integration may be even more important for energy products. First, many energy products, particularly hydrocarbons, are finite non-renewable resources.<sup>51</sup> Moreover, these products are unevenly distributed around the globe.<sup>52</sup> The same could be said of certain renewables, such as solar and wind

44. *See id.*

45. *See generally* PETER D. CAMERON, *INTERNATIONAL ENERGY INVESTMENT LAW THE PURSUIT OF STABILITY* (2010).

46. *See* Yulia Selivanova, *Managing the Patchwork of Agreement in Trade and Investment, in* GLOBAL ENERGY GOVERNANCE. THE NEW RULES OF THE GAME 49, 49–50 (Andreas Goldthau & Jean Martin Witte eds., 2010); *see also* Alan Yanovich, *WTO Rules and the Energy Sector, in* REGULATION OF ENERGY IN INTERNATIONAL TRADE LAW 1, 1–2 (2011) (describing how the WTO system does not deal specifically with energy, but rather touches on energy commodities in a way that generates inefficiencies and challenges); Sophie Nappert & Federico Ortino, *International Resolution of Energy Trade and Investment Disputes, in* REGULATION OF ENERGY IN INTERNATIONAL TRADE LAW. WTO, NAFTA AND ENERGY CHARTER 302–316 (2011) (describing how the WTO dispute resolution mechanism is inefficient in dealing with energy disputes, and finding that the arbitration system recognized in the investment protection sections of trade agreements have a higher level of effectiveness, at least when it comes to investment in energy services but not for trade of energy commodities); Rios Herran & Poretti, *supra* note 18 (arguing that NAFTA was an advancement, compared to the WTO rules, in regulating the trade of energy products among the Northern American partners but that it felt short of fully integrating the region due to Mexico’s five exclusions/exceptions).

47. *See* Selivanova, *supra* note 46, at 50; Yanovich, *supra* note 46, at 4–5; Nappert & Ortino, *supra* note 46, at 315; Rios Herran & Poretti, *supra* note 18, at 36 (describing how all of the authors mention the market access bias of the GATT/WTO system that serves as a basis of international trade agreements).

48. *See* Selivanova, *supra* note 46, at 53; Yanovich, *supra* note 46, at 4; Nappert & Ortino, *supra* note 46, at 315; Rios Herran & Poretti, *supra* note 18, at 349–50.

49. By energy commodities here we mean energy sources such as gas, oil, coal, and nuclear material.

50. Yulia Selivanova, *International Energy Governance: The Role of the Energy Charter*, 106 AM. SOC. INT’L L. PROC. 394–395 (2012).

51. *Id.*

52. *Id.*

power; even if they are more widespread, their theoretical and practical potential is often very dependent on geographic location. In theory, the stronger the wind and sun in a region, the more power is available from these sources. In practice, wind and sunlight are most valuable where they are relatively consistent and where transmission infrastructure is readily available. Most manufactured products are not so dependent on geological or physical characteristics for their production sites, but rather on competitive advantages brought by technological and economical agglomerations in certain cities or regions.<sup>53</sup> Thus, the economic fundamentals of energy are often driven by the feasibility of regional integration.

Second, many energy commodities, particularly those that require extraction from the subsoil, are controlled, and in certain jurisdictions owned, by the government (in the U.S. both offshore and on onshore federal lands, in Mexico in all the territory, and in Canada, generally by the provinces).<sup>54</sup> As an important source of revenue for the States, there is an eagerness to capture as much rent as possible from oil and gas extraction.<sup>55</sup> The theory is that the rents serve the broader public purpose of financing important government programs and policies. Moreover, the fact that these are finite forces the State to derive maximum rent for their depletion. A series of policies arise out of these facts. For example: export taxes become an important source for extracting the rents; special windfall taxes are attached to the projects; high national content requirements are forced into the investments; exploration and production contracts impose associations with state-owned companies; domestic production quotas are required from private producers. In trade agreements, such as the GATT/WTO, export restrictions are poorly addressed and export duties are unbound; moreover, the trade regime ignores issues involving ownership of national resources or access to energy supply.<sup>56</sup>

Third, energy trade takes place through fixed infrastructure.<sup>57</sup> This is both for the purpose of moving hydrocarbons and for carrying electricity from production sites to processing plants and consumers.<sup>58</sup> Commodities in general share infrastructure and are interchangeable, depending on market prices. Energy infrastructure, once built, is not interchangeable; natural gas pipelines, electricity transmission lines, and oil platforms are capital-intensive

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53. *Id.* at 395.

54. For the case of the U.S., see John S. Lowe, *The legal character of petroleum licenses in the United States of America*, in *THE CHARACTER OF PETROLEUM LICENSES: A LEGAL CULTURE ANALYSIS* 53–56 (Tina Soliman Hunter, Jørn Øyrehagen Sunde, & Ernst Nordtveit eds., 1st ed. 2020); For the case of Mexico, see Guillermo J. Garcia Sanchez, *The Mexican Petroleum License of 2013*, in *THE CHARACTER OF PETROLEUM LICENSES: A LEGAL CULTURE ANALYSIS* 207–233 (Tina Soliman Hunter, Jørn Øyrehagen Sunde, & Ernst Nordtveit eds., 1st ed. 2020); For the case of Canada, see Nigel Bankes, *The Legal Character of Petroleum Licenses in Canada*, in *THE CHARACTER OF PETROLEUM LICENSES: A LEGAL CULTURE ANALYSIS* 73 (Tina Soliman Hunter, Jørn Øyrehagen Sunde, & Ernst Nordtveit eds., 1st ed. 2020).

55. See James W. Coleman, *The Third Age of Oil and Gas Law*, 95 *IND. L.J.* 389, 425 (2020).

56. See Alan Yanovich, *WTO Rules and the Energy Sector*, in *REGULATION OF ENERGY IN INTERNATIONAL TRADE LAW. WTO, NAFTA AND ENERGY CHARTER* 1, 1–3 (Yulia Selivanova ed., 2011).

57. See Selivanova, *supra* note 50, at 395.

58. *Id.*

infrastructures that once in place have a single purpose.<sup>59</sup> One exception is the use of trains to transport crude oil, but even their oil transport depends on rail routes made to connect producing fields with oil refineries, as well as long term investment in tanker car loading and unloading facilities.<sup>60</sup>

Connected to the last point, the energy sector requires huge investment—it is highly capital-intensive in all its stages: exploration, production, and transportation. Infrastructure is essential for the sector. Without long-term stable grids to transport electricity, it would not make economic sense to produce electricity; without pipeline capacity to transport natural gas, it is hard to make a long-term profit, and the product would end up being flared; offshore deep-water platforms have very low reuse rate and require specific onshore supply centers and ports.<sup>61</sup> Most particularly, electricity and gas are costly and difficult to store.<sup>62</sup> Without adequate infrastructure to transport them, the economic fundamentals would not make sense. This is not the case with most commodities traded internationally. Most of the infrastructure built for other commodities can be shared, transformed, or moved to another location.

In many jurisdictions, the existing energy transportation and distribution infrastructure is controlled by a handful of actors, including state-owned companies in Mexico. These actors prevent outside companies from accessing the infrastructure, claiming lack of capacity and/or charging fees that raise the cost of the investment to an uncompetitive level.<sup>63</sup>

Hence, international agreements that seek to ensure a long-standing energy integration must contemplate rules that allow access to energy transportation and distribution infrastructure. An energy integration treaty must, for example, contemplate principles that prioritize transit flows. The costs of disruption in transit flows could jeopardize energy projects. For many projects, the availability of capacity at the contracted time is essential for the success of the project. For example, it could be disastrous for a company to build a grid or a pipeline and be unable to deliver the products at the agreed time and moment. Projects consider programmed volumes and expandable capacity when financing and building infrastructure. Long-term supply contracts back these projects.<sup>64</sup> Energy infrastructure contracts rely on those conditions for financing, otherwise the companies would be unable to guarantee repayment.<sup>65</sup> Hence, when facing any dispute, a principle that ensures transit flows regardless of the outcome is essential.<sup>66</sup> In other words, treaties must include a

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59. *Id.* at 395-96.

60. *Id.* at 396.

61. CAMERON, *supra* note 45, at 4-7.

62. See generally James W. Coleman, *Pipelines & Power-Lines: Building the Energy Transport Future*, 80 OHIO ST. L.J. 263, 307 (2019).

63. Jacqueline L. Weaver, *Overview of the International Petroleum Industry*, in INTERNATIONAL PETROLEUM LAW AND TRANSACTIONS 1, 33-38 (2020) (describing the size and importance of national oil companies in petroleum markets); see also generally Guillermo J. Garcia Sanchez, *The Footprint of the Chinese Petro-Dragon: The Future of Investment Law in transboundary Resources*, 94 TUL. L. REV. 313 (2020).

64. Weaver, *supra* note 63, at 44-45.

65. Selivanova, *supra* note 50, at 396.

66. For example, the Energy Charter Treaty lays down the principle of freedom of energy transit and non-discrimination on the basis of origin, destination, ownership, or pricing of energy materials and products, see *The Energy Charter Treaty*, 34 I.L.M. 360, 385 (1995).

freedom of energy transit principle that includes not only the non-discriminatory use of existing infrastructure, but the possibility of expanding the transit capacity if needed.<sup>67</sup>

In addition to a treaty recognition of these principles, the energy sector needs an effective framework for investment protections and the resolution of disputes. This framework is a cornerstone for any regional integration to take place. Foreign investors will hesitate to make huge capital investments in neighboring countries unless they are offered some assurances against expropriation or forced renegotiation of contracts.<sup>68</sup>

## B. Import and Export Integration

The lowest level of integration would be a market where there is a free flow of energy related products to both sides of the border. This includes not only the actual fuels, such as gas and oil, or the transmission of electricity, but also the components connected to the operation of the industry (petrochemicals, light crude for the refineries, technology, and equipment to build energy infrastructure – from drills to wind turbine components or solar panels, etc.). The next level of integration would involve rules that foster the transfer of products in a region with nonrestrictive rules. For example, rules that allow parties to consider the energy resource from the region for purposes of export. This is particularly important in the case of certain products that require the use of imported lighter fuels for their processing – think about lighter crude that gets mixed with heavier crudes in order for it to be refined and then exported. Other restrictive rules could be import and export permits that are restrictive to the capacity of the companies to trade among partners.

## C. Common Company and Supply Chain Integration

The next level of integration is the reduction of barriers that prevent integrated supply chains both for the purpose of trade among partners, but also to allow companies to plan to operate as a regional block that could export products to other jurisdictions. For example, in the case of the USMCA region, it would be necessary to reduce barriers to allow Texas producers to use Mexico as a platform to export to Asian markets, or Canadian tar sands being brought to Houston to be refined and then exported elsewhere.<sup>69</sup>

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67. Selivanova, *supra* note 50, at 396. Selivanova calls them, non-interruption of transit flow and non-impediment for building new infrastructure if available capacity is insufficient principles.

68. CAMERON, *supra* note 45, at 68–69.

69. For example, Sempra energy required the approval of re-export permits from the U.S. government to build pipelines and a terminal in Mexico to bring LNG from the U.S. and export it to Asia. Additionally, the company required permits from Mexico to import the LNG and re-export it in its Pacific coast. Sempra built the first terminal off the Pacific in 2008 but received the final re-export permit approval from the U.S. in 2022. See *Sempra's subsidiary in Mexico still awaiting final LNG export permit*, THE SAN DIEGO UNION-TRIBUNE, <https://www.sandiegouniontribune.com/business/energy-green/story/2020-10-22/sempras-subsidiary-in-mexico-still-waiting-for-lng-permit> [https://perma.cc/KKH9-WZB9] (last visited Sept. 26, 2023); *Sempra Infrastructure Receives Export Licenses for Two LNG Projects*, SEMPR (Dec. 22, 2022), <https://www.sempra.com/sempra-infrastructure-receives-export-licenses-two-lng-projects> [https://perma.cc/ZG9V-W35R].

Some of the rules that would be required for this level of integration are clear protection for foreign direct investments that mitigate long term risks, non-discriminatory regulatory agencies, access to markets, and export permits that allow regional partnerships to associate.

#### D. Common Energy Policy Integration

The final level of integration is a common governmental approach to energy challenges in the region and coordination among government actors to address them. This level of integration would involve having executive powers, regulatory agencies, and local actors coordinating as a block to address challenges such as carbon reduction, energy security, government dependency on oil revenues, etc. For example, if the governments agreed that as a block they would focus on the production of less polluting oil fields, or the construction of energy infrastructure in areas that would have a lower social and environmental impact, but at the same time secure the flow of energy products to ensure energy security, you could have a truly integrated region.

This level of integration can help to solve some of the local challenges in regions that are not integrated even in their domestic market. This is particularly clear in the case of the U.S., which is not in itself an integrated energy market. Each U.S. state has a number of barriers that prevent the national market from being integrated fully. Integration with Mexico and Canada in a way helps the U.S. solve its local integration challenges, but for this to happen, there must be a clear goal of integrating the regional market. For example, Texans can by-pass regulatory and permit barriers in New Mexico, Arizona, and California by building on or tapping into Mexican energy infrastructure, which is regulated at a national level, and access the Pacific markets. And vice versa: Mexico can tap into existing energy infrastructure built for U.S. producers in the Gulf of Mexico, such as pipelines and cargo platforms, in order to send its oil to refineries in the Houston area, as opposed to having to build new infrastructure to transport the products to the Mexican shore and refine them locally.

## II. Opportunities for U.S.-Mexico Energy Trade

The U.S. is the heart of North American energy markets: it is the center of the biggest oil boom the world has ever seen and the crossroads for an increasingly two-way trade in oil and gas.<sup>70</sup> The U.S. and Mexico, in particular, have much to gain from expanded energy trade in both oil and gas and electricity.

#### A. Increased Oil & Gas Trade

The United States has vast supplies of natural gas, particularly in Texas— it usually produces more than enough gas to provide power to its national growing population, and sometimes so much that producers must pay to have

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70. Coleman, *supra* note 62, at 391 (“This Article unearths these histories and defines these two ages of oil and gas law that have built the modern legal world. It shows that we are now entering a third age of oil and gas law, which will be defined by the legal challenges posed by fracking and climate change. And it shows how landowners can ensure that they receive the full benefit of this decade’s oil boom—the biggest that the world has ever seen.”).

it taken away.<sup>71</sup> Mexico, by contrast, is looking to provide more power to its residents and industries, making Texas gas a low-cost option.<sup>72</sup>

Mexico is also hoping to provide more reliable power to eliminate the need for diesel backups.<sup>73</sup> Gas consumption for power generation has tripled since 2000.<sup>74</sup> Mexico is the second-largest electricity market in Latin America.<sup>75</sup> Falling natural gas costs, conversion efficiencies, and new environmental considerations have sparked a growing shift from oil-fired to natural gas-fired power generation in Mexico.<sup>76</sup> Since 2000, demand for natural gas in Mexico has increased by more than 70%.<sup>77</sup> Mexico has allowed private investment in gas storage and pipelines since 1995.<sup>78</sup> Pipeline infrastructure has been expanding in Mexico since that time.<sup>79</sup>

U.S. natural gas exports to Mexico are crucial for both countries. About half of U.S. gas exports go to Mexico,<sup>80</sup> and 94% of Mexico's natural gas

71. See Emily Pickell, *Texas' Addiction To Flaring Could Inflict Unexpected Economic And Environmental Costs*, FORBES (Feb. 25, 2021), <https://www.forbes.com/sites/uhenergy/2021/02/25/texas-addiction-to-flaring-could-inflict-unexpected-economic-and-environmental-costs/> [https://perma.cc/XAN4-CBM2] (explaining how companies engaged in the flaring of natural gas because "initially, one of the limitations in selling the associated gas was that pipeline infrastructure was missing to take this gas to where it could be sold.").

72. Ryan C. Berg, Emiliano Polo & Henry Ziemer, *For North American Energy Security, Go Local: Examining the Role of Natural Gas and Mexico's Energy Sector* (2023), CSIS (Aug. 24, 2023), <https://www.csis.org/analysis/north-american-energy-security-go-local-examining-role-natural-gas-and-mexicos-energy> [https://perma.cc/8RCQ-4Ds6].

73. International Energy Agency, *Mexico Energy Outlook*, PARIS: ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT [OECD]/IEA 129, 12, 19 (2016). Coleman, *supra* note 62, at 273 ("As a result, fracking and new gas production have opened up wide natural gas price differentials around the world. Even markets in close proximity can have very different gas prices if there is not enough transport capacity to serve the demand in the high-cost market: for example, while Pennsylvania and Texas have the cheapest natural gas in the world, nearby markets in Massachusetts and Mexico at times pay the world's highest prices for natural gas.").

74. International Energy Agency, *supra* note 73, at 21.

75. Nance, *supra* note 26, at 1 ("Mexico is currently the second-largest power market in Latin America and appears poised for continued growth.").

76. See *id.* at 16 ("Due to falling costs for gas, more attractive conversion efficiencies, and environmental considerations, the fuel mix has shifted from oil-fired to gas-fired generation. Between 2012 and 2017, CFE has had a goal of reducing oil consumption by more than 80 percent. Although reaching this goal has proven elusive for fuel reliability reasons, progress has been made and can be expected to continue as gas pipeline expansions currently in progress are completed.").

77. International Energy Agency, *supra* note 73, at 18 ("Demand for natural gas has increased by more than 70% since 2000, with its share in the primary energy mix increasing from 24% in 2000 to 32% in 2014. Fuel switching in the power sector, rising industrial demand and, more recently, the import opportunity that opened up for Mexico by the shale gas boom in the United States (and facilitated by Mexico's policy of constructing new gas import pipelines) have accelerated the use of gas. The overall share of renewable energy has fallen slightly, to 8.5% of total primary energy, reflecting in part the declining use of solid biomass, mainly fuelwood used by poorer households.").

78. See José Alberto Hernández Ibarzábal, *Examining governability of Mexico's natural gas transmission pipelines under the energy reform*, 35 J. ENERGY & NAT. RES. L. 271, 271–291 (2017).

79. See *id.* at 278; BRIAN ARTHUR, *INCREASING RETURNS AND PATH DEPENDENCE IN THE ECONOMY* (University of Michigan Press 1994).

80. See Robert Rapier, *Mexico Is Our Most Important Natural Gas Export Market*, FORBES (June 2, 2019), <https://www.forbes.com/sites/trapier/2019/06/02/mexico-is-our-most-important-natural-gas-export-market/> [https://perma.cc/4373-PM69].

imports come from the United States.<sup>81</sup> With Mexico's increased dependence on gas imports, 40% of natural gas used in Mexico now comes from the United States.<sup>82</sup>

The U.S. is also producing unprecedented amounts of light crude oil that are a better match for Mexico's refineries than for refineries in Texas, because most Texas refineries are optimized for heavy crude.<sup>83</sup> As a result, both Texas and Mexico are exporting more and more oil to each other's refineries.<sup>84</sup> These two-way trades started even in the early days of shale before Congress repealed the U.S. oil export ban—companies took advantage of an exception to the ban that allowed swapping crude oil.<sup>85</sup> When Congress repealed the oil export ban in 2015,<sup>86</sup> two-way trade in crude oil quickly ramped up.<sup>87</sup> Alongside the long-standing U.S.-Canada energy partnership, cooperation between the United

81. See *Mexico Regulator Forecasts 25% Increase in U.S. Natural Gas Imports by 2024*, NAT. GAS INTELL. (Aug. 29, 2019), <https://www.naturalgasintel.com/mexico-regulator-forecasts-25-increase-in-u-s-natural-gas-imports-by-2024/> [<https://perma.cc/K9F2-T7W9>].

82. See International Energy Agency, *supra* note 73, at 24 (“However, the incentive to develop Mexico's gas resources at scale has been weakened by the ready availability of gas for import, at very competitive prices, from southern US states. Gas imports from the United States have been increasing at an average annual rate of 26% over the past five years and now meet around 40% of Mexico's natural gas demand.”).

83. See James W. Coleman, *Beyond the Pipeline Wars: Reforming Environmental Assessment of Energy Transport Infrastructure*, 2018 UTAH L. REV. 119, 161 (2018); See International Energy Agency, *supra* note 73, at 23 (“A partial fix for some of Mexico's refinery limitations has taken the form of joint ventures with US refiners, such as the Deer Park Shell-PEMEX refinery at the Houston Shipping Channel in Texas, which processes heavy Maya crude imported from Mexico and exports products back to the Mexican market.”); Laura Blewitt, *Runnin' Down a Dream, Part 3 - Mexico's Plan to Revive their Crude Oil Refining Sector* RBN ENERGY (Dec. 29, 2018), <https://rbnenergy.com/runnin-down-a-dream-part-3-mexicos-plan-to-revive-their-crude-oil-refining-sector> [<https://perma.cc/L4HB-DF9G>] (“Mexico's refineries are relatively simple — that is, not complex — and configured to process lighter, sweeter crudes, the exact quality that's getting harder and harder to come by in Mexico.”); *Mexico to tender new refinery by March*, AMLO (Dec. 10, 2018), <https://www.argusmedia.com/en/news/1808463-mexico-to-tender-new-refinery-by-march-amlo> [<https://perma.cc/CS55-B67L>] (“Mexico's existing refineries are designed to refine mostly light crude.”).

84. See International Energy Agency, *supra* note 73, at 23 (“The falling trajectory of oil production and the steady rise in demand in the domestic market have squeezed the volumes of crude oil available for export: shipments fell to 1.2 mb/d in 2015 from a peak of 1.9 mb/d in 2004. Mexico's dependence on imports of refined products has also risen substantially: since 2000, net imports of gasoline and diesel have almost tripled, most of which are furnished by refineries in the United States.”).

85. See Christian Berthelsen & Lynn Cook, *U.S. Loosens Longtime Ban on Oil Exports*, WALL STREET J., (Aug. 14, 2015), <https://www.wsj.com/articles/u-s-approves-limited-crude-oil-trade-to-mexico-1439570613> [<https://perma.cc/4N2H-BBRD>] (“The U.S. Commerce Department told members of Congress it intends to approve an application by the national oil company of Mexico to exchange heavy oil pumped there for light crude pumped in the U.S. . . . The swap deal with Mexico doesn't need congressional approval. Such oil trades—which aren't considered true exports because the U.S. is getting oil in return—were contemplated under the original ban legislation, but haven't taken place before.”).

86. Consolidated Appropriations Act, 2016, Pub. L. 114–13, § 101, 129 Stat. 2242, 2987 (2015).

87. International Energy Agency, *supra* note 73, at 23 (“Mexico's dependence on imports of refined products has also risen substantially: since 2000, net imports of gasoline and diesel have almost tripled, most of which are furnished by refineries in the United States Mexico's own refinery capacity has not kept pace with the increase in domestic product demand and, in addition, some of the existing capacity is not well adapted to process Mexico's increasingly heavy crude slate.”).

States and Mexico is poised to make North America a leading supplier of oil and gas.<sup>88</sup>

Mexico could also benefit from increased import of U.S. shale technology and investment from fracking companies. Mexico has significant geological potential for increased oil and gas production in deepwater oil, unconventional oil, and gas plays.<sup>89</sup> The Burgos Basin extends to the U.S. border and is very similar to the adjacent Eagle Ford formation in the United States, which has been an important part of the Texas oil boom.<sup>90</sup> Mexico's oil rig count, which reflects active oil drilling crews, began to rise in 2018.<sup>91</sup> Mexico has 21 billion barrels of recoverable onshore oil and an additional 20 billion barrels offshore.<sup>92</sup>

The United States' oil industry in and around the Gulf of Mexico has some of the world's most advanced, extensive, and developed transport and processing infrastructure. As a result, Texas oil processing facilities and pipelines in the Gulf of Mexico are in a better position to process the crude oil that will soon be produced in the Mexican deepwater fields.<sup>93</sup> Gulf of Mexico crude oil tends to be heavy, which U.S. Gulf Coast refineries are optimized for processing.<sup>94</sup>

88. Clare Ribando Seelke, *Mexico: Background and U.S. Relations*, CONG. RSCH. SERV. 1, 25, 28 (2020) ("Because of the [2013] reforms, Mexico has received more than \$160 billion in promised investment. . . . Private sector trade, innovation, and investment have created a North American energy market that is interdependent and multidirectional, with cross-border gas pipelines and liquefied natural gas (LNG) shipments from the United States to Mexico surging.").

89. Wood & Martin, *supra* note 30, at 20 ("As the IEAs recent assessment of Mexican oil confirms, the problem is not one of resource availability. There is no questioning Mexico's geological potential, particularly in its underexplored deepwater and unconventional oil and gas plays.").

90. Matthew Fry et al., *What Happened to Mexico's Burgos Shale?, Developments, Strategies, and Policy Option*, SMU MISSION FOODS TEXAS-MEXICO CTR. 1, 2 (2020) ("As a coterminous geologic region, the Eagle Ford Shale and the Burgos Basin share similar development histories").

91. Duncan Wood, *Introduction: A reform years in the making*, in MEXICO'S NEW ENERGY REFORM 1-4 ("And yet the reforms have brought about an extraordinary, rapid and profound liberalization. In the oil sector, we have witnessed the signing of more than 100 contracts for [oil and gas exploration and production], with a total future investment value of more than \$160bn. In mid-2018, the rig count in Mexico began to rise for the first time in years. Pemex is now partnering with private and foreign firms in oil exploration and production, and has been allowed to farm out certain blocks entirely to private firms for a share of the profits.").

92. International Energy Agency, *supra* note 73, at 63 (stating that onshore reserves are mostly in the Tampico-Misantla Basin, including the Chicontepec field, and offshore reserves are in the Sureste Basin, including the Cantarell and Ku-Maloob-Zaap complexes).

93. Guillermo J. Garcia Sanchez, *Mexico's Energy Reform and the 2012 U.S.-Mexico Transboundary Agreement: An Opportunity for Efficient, Effective and Safe Exploitation of the Gulf of Mexico*, 9 SEA GRANT L. & POL'Y J. 1, 6-7 (2018) ("Finding answers to all of these challenges will not be an easy task for Mexico and the United States, particularly now that the industry is already operating in the region. On the U.S. side of the Gulf, operations have already begun in fields that could contain transboundary resources. On the Mexican side, last December, the Ministry of Energy announced the fourth phase of the Energy Reforms. This new development consists of the tendering process of ten deep and ultra-deep water blocks in the Gulf. Four of them are located in the Perdido Foldbelt, a geological area shared by both countries.").

94. International Energy Agency, *supra* note 73, at 23 ("Mexico's own refinery capacity has not kept pace with the increase in domestic product demand and, in addition, some of the existing capacity is not well adapted to process Mexico's increasingly heavy crude slate.").



## B. Electricity and Joint Export Capacity

Turning to electricity generation, Mexico has enormous potential for growth in both wind and solar energy.<sup>95</sup> Future efforts to expand production of wind power in the state of Tamaulipas, the center of Mexico's wind resources, would be most valuable if that power could be shipped north to centers of industrial and urban demand in Texas.<sup>96</sup> Moreover, Mexico is building battery storage capacity for renewable energy in Mexicali, Baja California that can serve as a backup power source for California's electrical grid.<sup>97</sup>

Finally, together Mexico and the U.S. could become major exporters of liquefied natural gas to Asian markets.<sup>98</sup> Rather than building a new pipeline through potentially hostile states, such as California, it could be easier for Texas producers to use the existing infrastructure south of the border, including pipelines and terminals, to transport the excess oil in Texas fields and sell it in Asia.<sup>99</sup> Ironically, as mentioned before, Texas producers might find less regulatory and logistical barriers in Mexico, compared to the U.S. Pacific coast through New Mexico, Arizona, and California. Mexico's energy infrastructure is regulated at the federal level and Mexico's government might be eager for new infrastructure that could boost Mexico's energy exports, which have faltered along with stagnant domestic oil production.

## III. Obstacles to U.S.-Mexico Energy Integration

The advantages for an energy-integrated region are clear. Yet there is a growing danger that new energy laws and a missed opportunity to update

95. *Id.* at 25 ("Mexico's solar power potential is based on average daily irradiation of around 5.5 kilowatt-hours per square metre (kWh/m<sup>2</sup>)(SENER, 2012), roughly double the levels seen in Germany.").

96. Texas has a far greater population than Tamaulipas or any of its bordering states. TEXAS COMM. ENVIRON. QUALITY, *Binational Population Data in Sister Cities along the Rio Grande*, <https://www.tceq.texas.gov/border/population.html> [<https://perma.cc/39T4-TNGX>] (last visited Aug. 10, 2020). There is growing industrial capacity along the border. Jesus Cañas, Roberto Coronado & Robert W Gilmer, *Employment and Maquiladora Growth*, TEXAS BORDER 27, 32 (2005). ("Mexico's maquiladora jobs are growing once more, beginning with the resumption of U.S. industrial expansion in mid-2003."). Also, wind power generally peaks in the hours before dawn, so it is rarely shipped West, where it would still be the middle of the night, the time of day with lowest power consumption. See Coleman, *supra* note 12, at 270.

97. IEnova already owns a cross-border transmission line that provides energy to California Independent System Operator (CAISO). Cas Biekman, *IEnova, IFC Develop Large Battery Storage Project in Mexicali*, MEXICO BUS. NEWS (June 6, 2021), <https://mexicobusiness.news/energy/news/ienova-ifc-develop-large-battery-storage-project-mexicali> [<https://perma.cc/GSW5-22FX>].

98. AGENCIA EFE, *México plantea exportar gas a Asia para resolver conflictos de ductos*, YAHOO NEWS (Aug. 10 2020), <https://es-us.finanzas.yahoo.com/noticias/m%C3%A9xico-plantea-exportar-gas-asia-155053958.html> [<https://perma.cc/QRL7-HNUS>].

99. California's Sempra Energy is the first company to explore this possibility. The projects have gone through different stages and initially the Mexican government was reluctant to provide export permits to the company. See Caroline Evans, *Sempra Looking to Add Second LNG Project on Mexico's West Coast*, NAT. GAS INTELL. (June 1, 2021), <https://www.naturalgasintel.com/sempra-looking-to-add-second-lng-project-on-mexicos-west-coast/> [<https://perma.cc/4GEE-MCKG>].

regional energy trade will frustrate these trade policies by cutting growing Texas energy production off from growing energy demand in Mexico. Mexico is taking steps to reverse its energy reform, close the country off to foreign investment, and reduce its energy imports.<sup>100</sup> And in the United States, new movements against the use of eminent domain for export projects and against all fossil fuel infrastructure threaten to strand U.S. energy producers and choke off Mexican consumers access to new fuel supplies. Finally, NAFTA and the USMCA now appear to be failed opportunities to update regional laws to protect international energy trade.

#### A. Growing Barriers to Energy Investment in Mexico

President Lopez Obrador's moves to re-nationalize the energy sector are making U.S. energy companies increasingly skeptical of investing in the future of U.S.-Mexico energy trade.<sup>101</sup> Notwithstanding the reforms of 2013, President Lopez Obrador has substantial control over the energy sector.<sup>102</sup> Under the Mexican constitution, the Executive power appoints the energy regulators, the National Hydrocarbon Commission and the Energy Commission.<sup>103</sup> The Ministry of Energy can halt future public auctions for the oil and gas exploration and production sector and has control over energy export permits.<sup>104</sup> Finally, the state-owned companies, PEMEX and CFE, have representatives appointed by the President in the board of directors and the heads of the companies.<sup>105</sup> President Obrador has not been shy in exercising his constitutional powers to impact the implementation of energy reform, and in some circumstances, backtrack the advancements initiated by previous administrations.<sup>106</sup>

Examples of President Obrador's efforts to negatively impact the implementation of the energy reform include new policies in the electricity sector forcing U.S. contractors to renegotiate transboundary pipeline deals signed during the Energy Reform.<sup>107</sup> This was followed in 2019 by other regulatory actions, such as granting PEMEX an extension of five years to comply with

100. Megan Rollag, *Future of cross-border pipeline projects in AMLO's Mexico: what's the risk?*, 58 J WORLD ENERGY L. BUS. (2020).

101. See GARCIA SANCHEZ, *supra* note 28, at 36.

102. *Id.* ("The second and perhaps the biggest weakness of the reform was the designers' inability to surpass the legal culture that surrounds Mexico's tradition of hyper-presidentialism. Mexican presidentialism tends to consolidate state power in the president as the central figure in determining public policy, as opposed to relying on independent agencies to control the key policy decisions in their assigned areas of oversight.").

103. See GARCIA SANCHEZ, *supra* note 28, at 49.

104. *Id.* at 41–42.

105. *Id.*

106. Duncan Wood, *An Uncertain Future: The Energy Sector under AMLO*, in MEXICO'S NEW ENERGY REFORM 164–68, 164 (2018). GARCIA SANCHEZ, *supra* note 28, at 42. ("If the Peña Nieto administration had included everything in the text of the constitution, the available alternative for the detractors would be to fight for a constitutional amendment. However, with the adopted legal architecture, a new president could argue that the existing contracts violate the spirit of the constitution because, as he or she understands it, the terms are closer to the ones of a concession. Hence, the new president would not need to amend the constitution to challenge the existing contractual architecture of the reform.").

107. Rollag, *supra* note 100.

maximum sulfur content requirements under national fuel standards and denying the same extension to private foreign companies.<sup>108</sup> In May 2020, Mexico's energy ministry enacted new rules that limit private participation in the power generation market, particularly those in the renewable sector, in an effort to increase the amount state utility generation.<sup>109</sup> In 2022, President Obrador's new Electricity Bill entered into force, prioritizing the distribution of CFE's generated power over private producers, primarily those private producers generating from cleaner sources of energy, such as, wind and solar.<sup>110</sup> In the summer of 2022, Mexican regulators, CRE and CENEGAS, under pressure from the government, required private users to demonstrate that they increased their purchase of natural gas from PEMEX or CFE in order to access the national gas transportation network.<sup>111</sup>

In the oil and gas exploration and production sector, President Lopez Obrador cancelled all planned new auctions for the development of shale fields in the north of Mexico and of deepwater fields in the Gulf.<sup>112</sup> Moreover, the Ministry of Energy modified the rules applicable to the export permits granted under the energy reform, restricting the ports of export of hydrocarbon products for private companies.<sup>113</sup> The rule provides a strategic advantage to PEMEX, since private parties are limited now to a number of exporting points as opposed to using the most cost and time efficient one.<sup>114</sup> Moreover, the Ministry of Energy issued determinations favoring PEMEX in unitization processes in the Zama field off the Gulf coast over the technical and financial advantages of private actors.<sup>115</sup> The precedent of the Zama field shows that the

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108. Sheky Espejo, *Pemex Allowed to Keep Selling High Sulfur Diesel in Southern Mexico*, S&P GLOB. COMMODITY INSIGHTS (Sept. 1, 2020), <https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/oil/090120-pemex-allowed-to-keep-selling-high-sulfur-diesel-in-southern-mexico> [https://perma.cc/2JSS-LTQ7]; U.S. TRADE REPRESENTATIVE, *United States Requests Consultations Under the USMCA Over Mexico's Energy Policies* (July 20, 2022), <http://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/july/united-states-requests-consultations-under-usmca-over-mexicos-energy-policies-0> [https://perma.cc/9V4A-MBTS]. This policy was explicitly mentioned in the USTR request of consultations as a policy affecting the USMCA and the integration of the markets.

109. Jude Webber, *Mexico Rams Through Electricity Market Overhaul*, FIN. TIMES, (May 15, 2020), <https://www.ft.com/content/da6e5abd-b1b5-497f-9fff-f7c131c81b27> [https://perma.cc/P4NL-SUES].

110. Alejandra Ibarra Chaoul & Kevin Sieff, *Mexico's Electricity Reform Draws Opposition from Investors*, U.S. WASHINGTON POST (Apr. 16, 2022), <https://www.washingtonpost.com/world/2022/04/16/mexico-electricity-reform-amlo/> [https://perma.cc/H9K6-GEWA].

111. Adam Williams, *Sener Mandate on Mexico NatGas Purchases 'Serious Strategic Error,' Industry Veteran Says*, NAT. GAS INTELL. (July 8, 2022), <https://www.naturalgasintel.com/sener-mandate-on-mexico-natgas-purchases-serious-strategic-error-industry-veteran-says/> [https://perma.cc/5UYJ-GAJ3].

112. Michael Cowart, *Mexico enters an uncertain period of regulation and activity*, WORLD OIL (Mar. 2019), <https://www.worldoil.com/magazine/2019/march-2019/features/mexico-enters-an-uncertain-period-of-regulation-and-activity/> [https://perma.cc/2MB9-SEKZ].

113. Jude Webber, *Is Third Time the Charm for AMLO's Energy Reforms?*, MEXICO NEWS DAILY (June 24, 2021), <https://mexiconewsdaily.com/news/analysis/is-third-time-the-charm-for-amlos-energy-reforms/> [https://perma.cc/PPT8-L5MH].

114. *Id.*

115. Mary Anastasia O'Grady, *Opinion, Showdown in Mexico's Zama Oil Field*, WALL STREET J. (June 27, 2021), <https://www.wsj.com/articles/showdown-in-mexicos-zama-oil-field-11624823865> [https://perma.cc/VCR4-TJSR].

Ministry is willing to discriminate against private companies and provide the state-owned company an unfair advantage.<sup>116</sup>

Now, the fact that Mexico is undergoing a process of re-centralization of its energy policies, as opposed to prioritizing competition and maximizing state-rents, does not necessarily mean that integration opportunities with the U.S. are out of the question.<sup>117</sup> To the contrary, as long as the government's priorities are met, reaching a politically respectable level of energy sovereignty, there are strategies by which U.S. companies could reach agreements with the state-owned companies. As this Article shows, the North American energy sectors are already interdependent, but under the new Mexican energy policies, the state-owned companies and the Ministry of Energy, rather than the market, must be at the center of the interdependence.<sup>118</sup>

## B. Growing Barriers to Energy Investment in the United States

The United States is seeing growing movements against energy transport infrastructure and especially against the use of eminent domain, which could prevent construction of new pipelines & powerlines between the U.S. and Mexico.<sup>119</sup> New energy sources require new energy transport, so, the simultaneous booms in oil, gas, and renewable energy production requires more pipelines and power-lines. But cleaner energy sources are particularly dependent on new linear infrastructure.<sup>120</sup> Coal and oil built the modern world—in part because they are relatively easy to transport and store—can be moved by truck, ship, or rail.<sup>121</sup> By contrast, cleaner burning natural gas can only be moved by expensive pipelines or by even more expensive liquefied natural gas

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116. Under the energy reform, when a unitization negotiation fails among operators, the Ministry of Energy has the power to decide who the operator of the field will be. However, the decision has to be based on the financial and technical capability of the licensees that maximizes the recovery in an economically sustainable way.

117. Under the energy reform, the government has to maximize long-run state-rents. We argue that providing advantages to CFE or PEMEX does not translate into a maximization of state-rents. In fact, by allowing the government to pick the best partner for each project, as stipulated by the energy reform, the government can efficiently maximize the rents. Forcing the state to award fields or buy electricity from state-owned companies can create losses because state-owned companies lack efficiency, technical and financial capabilities. In other words, it is not clear that in every circumstance the state will maximize rents by providing advantages to the state-owned entities.

118. For a review on different visions on how the different visions on the role that energy should play in the economy, safety and exercise of sovereignty *see generally* Guillermo J. Garcia Sanchez, *In the Name of Energy Sovereignty*, 63.8 B. C. L. REV., 2475 (2022).

119. James W. Coleman & Alexandra B. Klass, *Energy and Eminent Domain*, 104 MINN. L. REV. 660, 665, 716 (2019). (“This Part then suggests ways that policymakers can use eminent domain laws to either support or prevent different types of energy transport projects . . . . The owner may attempt to hold out for the entire economic surplus from the infrastructure proposal, so this bilateral monopoly raises transaction costs and may entirely prevent construction of efficient projects.”).

120. *Id.* at 678. (“For years, oil companies focused on energy production: if oil could be produced, there would be a market for it. Of course, increased production has always required increased transport capacity to take new product to market. But in the past, this new production could often use the same pipelines and shipping routes used by previous producers.”).

121. *Id.*

facilities.<sup>122</sup> Electricity from cleaner sources, such as, wind, solar, and geothermal, can only reach customers through powerlines.<sup>123</sup> The “financial fate” of new energy production depends on “affordable paths to market.”<sup>124</sup>

But new legal challenges are emerging to this energy transport infrastructure just when it is most needed. First, both states and the federal governments are increasingly asserting the right to block projects that have traditionally been approved by the other level of government. On one hand, the federal government and the courts are insisting on wider federal environmental reviews of oil pipelines and powerlines, which have been traditionally approved by the states.<sup>125</sup> Any substantial utility project will technically require federal permits for routine activities, such as, crossing federal waters, which include any tributaries of navigable waters.<sup>126</sup> The federal government historically has not required an individualized process for the innumerable permits required to cross every anonymous backyard creek. But in recent years, the federal government, sometimes at the insistence of the federal courts, has been imposing more and more environmental review on these water-crossings.<sup>127</sup> For example, since 2016 the Dakota Access pipeline has been stuck in litigation concerning the adequacy of the federal government’s review of its crossing of the Missouri River in North Dakota—in 2020 a federal court finally determined that these years of review had been inadequate and that the government would have to go back and do a full environmental impact statement.<sup>128</sup>

Almost all states grant eminent domain powers for energy infrastructure because linear infrastructure is so difficult to build if it can be killed by any holdout landowner along an approved route.<sup>129</sup> Gas pipelines that obtain a certificate from the national energy regulator, the Federal Energy Regulatory Commission (FERC), are also granted eminent domain authority.<sup>130</sup> The United States has a bifurcated system for approving pipelines.<sup>131</sup> U.S. Senators

122. *Id.* at 671. (“Virtually all states grant eminent domain authority to oil and gas companies by statute to build oil and gas pipelines and associated infrastructure and to electric utilities to build electric transmission lines.”).

123. *Id.* at 665.

124. *Id.* at 679.

125. See *id.*; James W. Coleman, *Policymaking by Proposal: How Agencies Are Transforming Industry Investment Long Before Rules Can Be Tested in Court*, 24 GEO. MASON L. REV. 497, 512–14 (2017).

126. *Id.* at 512.

127. *Id.* at 512–15.

128. *Id.* at 514.

129. James W. Coleman, *The Jurisdictional Anticommons*, in GETTING TO YES ON LINEAR INFRASTRUCTURE PROJECTS, (Macdonald-Laurier Institute (2021); Coleman & Klass, *supra* note 119, at 716–18.

130. *Id.* at 8. (“Likewise, nearly a century ago, Congress granted nationwide eminent domain authority to interstate natural gas pipelines that obtain a Certificate of Public Convenience and Necessity from the Federal Energy Regulatory Commission (‘FERC’).”). States have tried to use conservation easements plus their sovereign immunity to resist federally authorized eminent domain but that gambit was rejected in a controversial 5-4 Supreme Court decision in 2021. *Penneast Pipeline Company, LLC v. New Jersey et al.*, 594 U.S. 1 (2021).

131. Coleman, *supra* note 129, at 716.

recently introduced a bill to ban the use of eminent domain for export projects.<sup>132</sup> And pipeline and power-line opponents have increasingly brought challenges to projects designed to export energy from the state, arguing that if the project is meant to serve consumers in other states it must not be serving the exporting state's interest.<sup>133</sup>

The U.S. is also seeing a raft of proposals to ban future federal permits for U.S. oil and gas projects which could, if adopted, prevent new pipelines between the U.S. and Mexico. Anti-fossil fuel advocates are increasingly asking for government intervention to limit the ability to produce, move, and burn fossil fuels.<sup>134</sup> Pipelines between the U.S. and Mexico will have to go through the National Environmental Policy Act (NEPA) process.<sup>135</sup> Pipelines may be rejected if they are "perceived as enabling further emissions globally."<sup>136</sup>

There is also a widespread and growing movement to challenge energy transport projects within individual U.S. states.<sup>137</sup> Many argue that transport projects should be rejected if they will increase oil production up or down stream.<sup>138</sup> California recently passed a bill to forbid new oil and gas pipelines on state property, making it virtually impossible to build new pipelines across the state.<sup>139</sup>

132. Erik Neuman, *Oregon's US Senators Seek to Restrict Eminent Domain for Gas Pipelines*, OPB (Aug. 17, 2020), <https://www.opb.org/article/2020/08/17/oregons-us-senators-seek-to-restrict-eminent-domain-for-gas-pipelines/> [<https://perma.cc/G7V7-E2KQ>].

133. James W. Coleman, *Eminent Domain for Exporting Energy*, ENERGY L. PROFESSOR BLOG (June 3, 2019), <https://www.energylawprof.com/?p=1025> [<https://perma.cc/N777-4XBNI>].

134. Coleman & Klass, *supra* note 119, at 682. ("By contrast, the primary advocacy groups opposing fossil fuel energy projects come from the other end of the political spectrum. They advocate broad government intervention in the energy economy to protect the environment by (among other things) limiting the ability to burn fossil fuels. The energy project opponents generally favor government action on behalf of the public interest over private rights . . . . As energy companies have rushed to build new natural gas pipelines, some plaintiffs have argued that, as private companies, pipeline companies should have to make a stronger showing that their proposals are in the public interest.")

135. National Environmental Policy Act, 42 U.S.C. § 4332 (B)-(C) (2017).

136. United States Department of State, *Record of Decisions and National Interest Determination 1*, 29, ENERGY L. PROFESSOR BLOG, <http://www.energylawprof.com/wpcontent/uploads/2016/01/KeystoneXL.Record-of-Decision.pdf> [<https://perma.cc/VC2S-T965>] (last visited Nov 3, 2015) ("While the proposed Project by itself is unlikely to significantly impact the level of GHG-intensive extraction of oil sands crude or the continued demand for heavy crude oil at refineries in the United States to prioritize actions that are not perceived as enabling further GHG emissions globally.")

137. Coleman, *supra* note 83, at 122 ("Despite the delays and contradictions surrounding the State Department's rejection of Keystone XL, an increasingly powerful global movement is taking it as a model, looking to expand it to all state and federal environmental assessments and to export this Keystone XL precedent to other projects and countries. Some of these cases, such as the Dakota Access Pipeline, have attracted widespread and sustained attention. But the movement is much broader, raising challenges to a wide range of energy transport projects across the nation: gas pipelines, coal export terminals, and liquefied natural gas facilities.")

138. *Id.* at 123 ("Scholars and environmental organizations argue that, from this point forward, all state and federal environmental reviews of new fossil fuel transport projects must consider whether they could increase fuel production upstream of the project or increase fuel consumption downstream of the project.")

139. Associated Press, *Gov. Newsom Signs Law to Prevent Building Pipelines on State Property*, KTLA (Oct. 12, 2019), <https://ktla.com/news/local-news/gov-newsom-signs-law-to-prevent-building-pipelines-on-state-property/> [<https://perma.cc/S24X-FWM5>].

### C. Missed Opportunities for International Agreements on Energy Integration

When formal negotiations for a new regional trade agreement began in the spring of 2017, many observers believed that the 1994 NAFTA required an update.<sup>140</sup> The emergence of new technologies, the need to include new labor and environmental regulations, the ringfencing of the North American partners from Chinese competition, and the new realities of the energy sector were factors that the three nations were looking to address.<sup>141</sup> Many of these needed updates were already in the text of the Trans Pacific Partnership (TPP), negotiated by the Obama administration a year earlier with eleven other partners.<sup>142</sup> However, President Donald Trump's campaign promise to abandon the TPP and renegotiate NAFTA forced the partners to update their trade relationship through a trilateral negotiation as opposed to benefiting from the multilateral trade agreement negotiated a year earlier.<sup>143</sup> Canada and Mexico remained partners in the TPP.<sup>144</sup>

From the outset, the NAFTA renegotiation used the TPP as a template.<sup>145</sup> Hence many of the "new" articles in the USMCA resemble the TPP, and in the protection of foreign investments, complement each other.<sup>146</sup> In the USMCA, however, the energy sector is treated distinctively. As opposed to including a chapter that would foster a deeper North American integration, the USMCA adopted a series of provisions that reinforce Mexican nationalism, give some limited protection to existing investments, and push Canada and the U.S. to agree to side letters to regulate their energy trade.<sup>147</sup> Without a doubt, it was a failed opportunity to recognize the potential of North America as an energy integrated region.

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140. *Renegotiating NAFTA: What should the priorities be?*, ECON. POL'Y INST. (Dec. 7, 2017), <https://www.epi.org/publication/renegotiating-nafta-what-should-the-priorities-be/> [<https://perma.cc/444R-Z9BX>]; *What the U.S., Canada and Mexico Want From a New NAFTA*, US NEWS & WORLD REPORT (Aug. 16, 2017), <https://www.usnews.com/news/articles/2017-08-16/what-the-us-canada-and-mexico-want-from-a-new-nafta> [<https://perma.cc/444R-Z9BX>]; AM. PETROLEUM INST., *supra* note 38.

141. Geraldo Vidigal, *A Really Big Button that Doesn't Do Anything? The 'Anti-China Clause' in US Trade Agreements*, SOC. SCI. RSCH. NETWORK (Apr. 24, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3377492](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3377492) [<https://perma.cc/SM5E-EYK6>].

142. David A. Gantz, *The USMCA: Updating NAFTA by Drawing on the Trans-Pacific Partnership*, BAKER INST. PUBLIC POL'Y RICE UNIV. (Feb., 2020), <https://www.bakerinstitute.org/media/files/files/ab609023/bi-report-022120-mex-usmca-8.pdf> [<https://perma.cc/GG46-R4NH>].

143. Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obama's Signature Trade Deal*, N.Y. TIMES (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html> [<https://perma.cc/9UWZ-2FQH>].

144. Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 1, Mar. 8, 2018, <https://www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership> [hereinafter CTPP/TPP].

145. David A Gantz, *The United States-Mexico-Canada Agreement: Energy Production and Policies*, BAKER INST. PUBLIC POL'Y RICE UNIV. (Sept. 17, 2019), <https://www.bakerinstitute.org/research/united-states-mexico-canada-agreement-energy-production-and-policies> [<https://perma.cc/BD6E-NRL6>].

146. *Id.*

147. Canada-U.S. Side Letter on Energy, available at [https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/CA-US\\_Side\\_Letter\\_on\\_Energy.pdf](https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/CA-US_Side_Letter_on_Energy.pdf) [<https://perma.cc/4VZE-AMWS>].

### 1. USMCA Hydrocarbons Chapter

USMCA's Chapter 8 title is called "Recognition of the United Mexican State's Direct, Inalienable, and Imprescriptible Ownership of Hydrocarbons."<sup>148</sup> The chapter begins by recognizing that the parties fully respect the "sovereignty and their sovereign right to regulate" the energy sector "in accordance with their respective Constitutions and domestic laws, in the full exercise of their democratic processes."<sup>149</sup> It did, however, maintain the promise to respect the investor protections for energy companies that had invested during the energy reform.<sup>150</sup>

Chapter 8 did not recognize anything new in terms of Mexico's sovereign rights to regulate the extraction of its natural resources.<sup>151</sup> In fact, Chapter 8 reaffirms recognized customary international law on the sovereign power of any State to extract and regulate its resources.<sup>152</sup> One only needs to look at Resolution 1803 of the United Nations General Assembly, voted 87 to 2, with twelve abstentions, declaring "the right of peoples and nations to permanent sovereignty over their natural wealth and resources" to be "exercised in the interest of their national development and of the well-being of the people of the State concerned."<sup>153</sup> Moreover, Resolution 1803 clarified that the exploration, development and disposition of the resources "as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable."<sup>154</sup> This widely accepted resolution, however, also recognized that if nationalization, expropriation, or requisitioning of the foreign investment in the sector takes place, it "shall be based on grounds or reasons of public utility, security or the national interests which are recognized as overriding purely individual or private interests [and] the owner shall be paid appropriate compensation."<sup>155</sup> In sum, Chapter 8 of the USMCA only reaffirmed a recognized right of the State by international customary law.

148. USMCA, *supra* note 2, ch. 8.

149. *Id.*

150. The Chapter states that the sovereign control over their natural resources is done "without prejudice to their [U.S. and Canada's] rights and remedies available under this Agreement [USMCA]." USMCA, *supra* note 2, ch. 8.

151. Gantz, *supra* note 145 ("The United States view is that Chapter 8 language essentially states the obvious: any sovereign state retains the rights to change its constitution and laws, even if such changes may incur international responsibility to treaty partners.").

152. United Nations resolution on Permanent Sovereignty over Natural Resources, U.N.G.A. Res. 1803 (XVII), 21.L.M./223 (1963) [hereinafter UN General Assembly Resolution 1803]; *see also* for resources located in the continental shelf and the seabed, UN Convention on the Laws of the Sea arts. 55-57, Dec. 10, 1982, 1883 U.N.T.S. 397; Convention on the Continental Shelf art. 1. Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311.; *see also* Energy Charter Treaty, *supra* note 66, art. 18 (depicting that the same principle reflected in Chapter 8 of the USMCA is integrated in Article 18 of the Energy Charter Treaty entitles "Sovereignty over Energy Resources" where it states that "the contracting Parties recognize state sovereignty and sovereign right over energy resources. They reaffirm that these must be exercised in accordance with and subject to the rule of international law.").

153. *Id.* UN General Assembly Resolution 1803, *supra* note 152.

154. *Id.*

155. *Id.*



Chapter 8 cannot be construed as a general exception to Mexico's treaty obligations.<sup>156</sup> Exceptions in investment treaties can either have the intention of limiting the scope of the substantive treaty obligations or be available defenses invoked to justify an unlawful conduct.<sup>157</sup> The text in Chapter 8 has neither of those effects. By stipulating that Canada and the U.S. recognize Mexico's sovereign right to reform its constitution and the domestic legislation "without prejudice to their rights and remedies available under this Agreement," the USMCA does not limit the scope of the rights recognized in the treaty.<sup>158</sup> To the contrary, the agreement reaffirms the scope of the substantive treaty obligations regardless of Mexico's "sovereign right." General exceptions in other treaties specifically use language such as "nothing in this Agreement shall be construed to prevent the adoption of . . ." <sup>159</sup> Other treaties use carve-outs to exempt certain sectors or policy areas from the treaty (such as NAFTA 1994 did), or specifically carve out the application of investment rights, such as national treatment or most-favored nation treatment, by saying that such treatment "do not apply to . . . procurement by a Party or a state enterprise. . .," (NAFTA 1108(7)).<sup>160</sup> Finally, other treaties have specific reservations stipulating that certain obligations, such as establishment or non-discriminatory treatment of investments "do not apply to a measure with respect to [X service or industries]." <sup>161</sup>

Chapter 8's recognition of the sovereign right to develop natural resources served more as a political statement to conciliate the incoming Mexican administration's views on the need to achieve "energy sovereignty."<sup>162</sup> In that unique view of the energy sector, the State-owned companies should receive priority privileges over private actors in order to ensure the capacity of the State to exercise control over the extraction, production, and transformation of energy resources.<sup>163</sup>

## 2. *The USMCA and the Protection of Energy Investments*

One of the most striking changes in North American investment protection was the erosion of the investment protection chapter in the USMCA.<sup>164</sup>

156. For analysis of how exception clauses are drafted in investment and trade agreements, see Caroline Henckels, *Should Investment Treaties Contain Public Policy Exceptions*, 59 B.C. L. REV. 2825, 2825 (2018).

157. *Id.*

158. USMCA, *supra* note 2, ch. 8.

159. *Id.* at 282.

160. See generally North American Free Trade Agreement, art. 1108(7), Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA]. Another example is Article 22 of chapter 8 of the Australia Singapore FTA that provides "[n]o claim may be brought . . . in respect to a tobacco control measure of a Party."

161. Comprehensive Economic and Trade Agreement, Can.-European Union, arts. 8.2(3) and 9.2(2)(b) and (C), Oct. 30, 2016, 2017 O.J. (L 11) 23 [hereinafter CETA].

162. See *infra* Section IV.A.

163. See generally Guillermo J. Garcia Sanchez, *In the Name of Energy Sovereignty*, 63 B.C. L. REV. 2475 (2022) (discussing how the different visions of the role of energy in achieving sovereign goals impact the way states negotiate economic agreements).

164. See Isaac Olson, *New Challenges to Transboundary Unitization in the Gulf of Mexico*, 6 TEX. A&M J. PROP. L. 85, 109–111 (2020).

NAFTA's Chapter 11 provided for a series of protections to North American investors against adverse government interference and for national and "non-discriminatory treatment" (with the exception of the energy sector in Mexico as explained below).<sup>165</sup> If those protections were ignored, American, Canadian, and Mexican investors had a right to bring specific claims against the governments to international investment arbitral tribunals.<sup>166</sup> The USMCA modified the basic structure of the system.<sup>167</sup>

The USMCA first eliminated the arbitration proceedings from the Canada-U.S. relationship.<sup>168</sup> Under the USMCA, Canadian or U.S. investors affected by actions taken by the respective governments of their neighboring nation do not have access to an international dispute resolution mechanism.<sup>169</sup> They are left with only two options: convince their governments to initiate a State-State proceeding under Chapter 31, or bring a claim under U.S. domestic courts to resolve any dispute against the host governments.<sup>170</sup> The exclusion of the investor-state dispute resolution mechanism was a clear consequence from the Trump Presidency's view that the U.S. government should not be in the "business" of promoting and protecting American investments abroad.<sup>171</sup> If American companies wanted to build plants outside of the U.S., they had to assume a risk. To the Trump Administration the goal of the government should be to bring investments back to the U.S. instead of making it easier for them to take their capital abroad.<sup>172</sup> In the Administration's view, one of the catastrophic consequences of the established U.S. trade policies was the promotion of American investment abroad instead of the safeguarding of existing

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165. See generally NAFTA, *supra* note 160, ch.11. Mexico reserved in the NAFTA 1994 Energy Chapter a set of energy related activities. *Id.* ch. 6 annex 602.3. Reservations and Special Provisions: 1. The Mexican State reserves to itself the following strategic activities, including investment in such activities and the provision of services in such activities: a) exploration and exploitation of crude oil and natural gas; refining or processing of crude oil and natural gas; and production of artificial gas, basic petrochemicals and their feedstocks and pipelines; b) foreign trade; transportation, storage and distribution, up to and including the first hand sales of the following goods: (i) crude oil, (ii) natural gas and artificial gas; (iii) goods covered by this Chapter obtained from the refining or processing of crude oil and natural gas; and (iv) basic petrochemicals; c) the supply of electricity as a public service in Mexico, including, except as provided in paragraph 5, the generation, transmission, transformation, distribution and sale of electricity; and d) exploration, exploitation and processing of radioactive minerals, the nuclear fuel cycle, the generation of nuclear energy, the transportation and storage of nuclear waste, the use and reprocessing of nuclear fuel and the regulation of their applications for other purposes and the production of heavy water.

166. NAFTA, *supra* note 160, ch. 11.

167. See generally M. ANGELES VILLARREAL, CONG. RSCH. SERV., R44981, THE UNITED STATES-MEXICO-CANADA AGREEMENT (USMCA), DEC. 28, 2021, <https://fas.org/sgp/crs/row/R44981.pdf> [<https://perma.cc/SLK8-WA4L>].

168. See generally USMCA, *supra* note 2, at 14-C-1.

169. See generally *id.*

170. *Id.* at 31-1, 31-13.

171. See Robert Lighthizer, *Offshore Jobs to Mexico at Your Own Risk*, WALL STREET J. (July 18, 2021), [https://www.wsj.com/articles/offshoring-isds-usmca-nafta-key-stone-11626460641?mod=article\\_inline](https://www.wsj.com/articles/offshoring-isds-usmca-nafta-key-stone-11626460641?mod=article_inline) [<https://perma.cc/8B32-KUM7>].

172. See Chris Prentice & Frank Jack Daniel, *New trade pact leaves most U.S. industry at mercy of Mexico's courts*, REUTERS (Oct. 21, 2018) <https://www.reuters.com/article/us-trade-nafta-investments-analysis/new-trade-pact-leaves-most-u-s-industry-at-mercy-of-mexicos-courts-idUSKCN1MWODZ> [<https://perma.cc/Y8KT-AUW4>].

investment in the U.S.<sup>173</sup> The exclusion of the dispute resolution mechanisms for Canadian investment was also consistent with the “anti-global judges” sentiment of some conservative groups in the U.S. In their conception, world judges/courts should not be in a position to tell the U.S. government what it can or cannot do in terms of its national interest.<sup>174</sup>

In a surprising turn of events, Mexico held its ground in favor of providing investors with an international dispute resolution mechanism.<sup>175</sup> Faith in international tribunals did not come from a fear that Mexican investors could be affected in the U.S., but out of Peña Nieto’s advisor’s views that investors were afraid that the “structural reforms” in Mexico could be amended if a more left oriented government could take office. Accordingly the Peña Nieto Administration negotiated specific mechanisms to redress investors’ complaints against actions taken by future governments, foreign investors would not invest in the recently opened sectors, primarily in energy and telecommunications.<sup>176</sup> The fears were confirmed by a series of comments from the industry, specifically the American Petroleum Institute, that publicly requested the U.S. to include some type of investor-state dispute settlement mechanism because eliminating it would “undermine U.S. energy security, investment protections and our global energy leadership.”<sup>177</sup> As such, Mexico was willing to have a chapter to allow claims between U.S. investors and the Mexican government, and a specific annex that would cover certain government contracts in covered sectors. In other words, they were willing to submit themselves to international tribunals in order to guarantee energy investors that they would be protected by international forums in case the government changed its energy or telecommunications policies. The result was the adoption of annexes 14 D and 14 E of the USMCA.<sup>178</sup>

Chapter 14 initially recovered most of the text of NAFTA’s Chapter 11, except for a couple of clarifications on substantive rights to the investors. For example, the USMCA has specific clarifications on what national treatment

173. *See id.*

174. *See generally* ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* (2003) One of the oldest published views from the American conservative establishment against international courts and tribunals is present in Robert H. Bork’s book “Coercing Virtue: The Worldwide Rule of Judges” where he critiques international courts’ “activism” and characterizes them as a threat to national sovereignty.

175. Lightzinger, *supra* note 171 (describing how the USTR representative did not want to include a ISDS mechanism); *see also* *RPT-INSIGHT-Don’t shoot yourself in the foot: Inside Mexico’s campaign to save NAFTA*, REUTERS (Apr. 25, 2019), <https://www.reuters.com/article/trade-nafta/rpt-insight-dont-shoot-yourself-in-the-foot-inside-mexicos-campaign-to-save-nafta-idUKL1N2270KC> [<https://perma.cc/C8SQ-VMUA>] (describing how Mexico offered the dispute resolution mechanisms to enhance economic cooperation and the U.S. counterparts were reluctant to even maintain the treaty); *see generally* Gantz, *supra* notes 142 and 145 (explaining how Mexico included provisions in the CPTPP to protect the structural reforms in the energy, telecommunications and oil and gas sectors).

176. *Id.*

177. *API Supports NAFTA Modernization that Retains Strong Protections for U.S. Investors*, AM. PETROLEUM INST. (Feb. 20, 2018), <http://www.api.org/news-policy-and-issues/news/2018/02/20/api-supports-nafta-modernization-that-protect-us-investors> [<https://perma.cc/9KTK-T5E6>].

178. Gantz, *supra* note 145.

and most-favored national treatment mean.<sup>179</sup> According to the USMCA, when determining expropriation claims and whether national treatment was afforded, a “like circumstances” test is required. According to Article 14.4.4, a “like circumstances . . . depends on the totality of the circumstances including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.”<sup>180</sup> Another standard that was clarified in the treaty was the “minimum standard of treatment” to foreign investors. The USMCA defined the standard as the “customary international law minimum standard of treatment of aliens” which includes fair and equitable treatment and the full protection of security.<sup>181</sup> The standard, however, does not require treatment in addition to or beyond that which is required under customary international law nor does it create “additional substantive rights.”<sup>182</sup> For further clarification, the USMCA specifies that fair and equitable treatment “includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.”<sup>183</sup> The treaty also clarifies that full protection and security “requires each party to provide the level of police protection required under customary international law.”<sup>184</sup>

In addition, Article 14.6(4) clarifies that an action taken by the government that “may be inconsistent with an investor’s expectations does not constitute a breach.”<sup>185</sup> In the same spirit, Article 14.16 states that “[n]othing” in the investment Chapter of the USMCA shall be construed as preventing the governments from adopting environmental, health, safety, or other regulatory actions that they “consider appropriate.”<sup>186</sup> These clarifications are a game-changer in general when it comes to challenges from investors that might argue in courts for the recovery of damages for governmental actions, which could affect their legitimate expectations.

Now, when it comes to general U.S.-Mexico claims, Article 14-D narrows the types of claims that can be brought to international arbitration. Under the USMCA, indirect expropriation and breach of fair and equitable treatment are excluded from the mechanism.<sup>187</sup> In contrast with NAFTA’s fork-in-the-road provision, in the USMCA, U.S.-Mexico local remedies must be exhausted as a precondition to bringing claims to international arbitral panels.<sup>188</sup> These exclusions, however, are not included in the dispute resolution mechanism available for investors who signed contracts with government entities.

According to Annex 14-E on Mexico-United States Investment Disputes Related to Government Contracts, claimants who fall under the category of “covered sectors” do maintain a series of grounds against the Mexican government.<sup>189</sup>

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179. USMCA, *supra* note 2, at 14-4.

180. *Id.*

181. *Id.* at 14-5

182. *Id.*

183. *Id.*

184. *Id.* art. 14.6.2(b).

185. *Id.* art. 14.6.4.

186. *Id.* art. 14.16.

187. *Id.* art. 14-D-2.

188. *Id.* art. 14-D-5.

189. *Id.* art. 5(b) annex 14-E.

Covered sectors include specifically “activities with respect to oil and gas . . . such as exploration, extraction, refining, transportation, distribution, or sale,” and the supply to the public on behalf of the State of power generation, telecommunication, and transportation services.<sup>190</sup> For these sectors, the USMCA expands the ground available for the investors to bring a claim, including national treatment; most favored nation treatment minimum standard of treatment (including fair and equitable and full protection and security); non-discriminatory treatment in case of armed conflict or civil strife; and direct and indirect or regulatory expropriation.<sup>191</sup> The treaty, however, does clarify that any “unilateral act of an administrative or judicial authority, such as a permit, license, certificate, approval, or similar instrument” issued by the government in its “regulatory capacity” shall not be considered an agreement signed with the government subject to the protection of Chapter 14-E.<sup>192</sup> Only those written agreements between a national authority and a covered investor that grants rights to develop the investment shall be considered as “covered government contracts.”<sup>193</sup>

Now, by recognizing the most favored nation treatment to investors in the energy sector, Mexico pledges to afford U.S. investors treatment that is no more restrictive than the treatment it grants to nationals of other trade or investment agreements. That is, Mexico must grant U.S. energy companies the same protections it gives to its other energy investment partners. This is further clarified in USMCA Article 32.11 (“Specific Provisions on Cross-Border Trade in Services, Investment, and State-Owned Enterprises and Designated Monopolies for Mexico”).<sup>194</sup> The article specifically states that Mexico reserves the right to adopt or maintain a measure in the energy sector:

only to the extent consistent with the least restrictive measure that Mexico may adopt or maintain under the terms of applicable reservations and exceptions to parallel obligations in other trade and investment agreements that Mexico has ratified prior to the entry into force of this agreement, including the WTO agreement, without regard to whether those other agreements have entered into force.”<sup>195</sup>

Here is where the Comprehensive and Progressive Agreement for Trans-Pacific Partnership Transpacific (CPTPP/TPP) text becomes relevant for purposes of energy investment protections under the USMCA.<sup>196</sup> What article 32.11 did was integrate the investment protections afforded to that sector from the CPTPP/TPP into the USMCA.<sup>197</sup>

If the CPTPP/TPP had included a similar provision as Chapter 8 of the USMCA, Article 32.11 would have been irrelevant. In the CPTPP/TPP, however, Mexico included a list of reservations connected to the energy sector.<sup>198</sup>

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190. *Id.*

191. *Id.* art. 2(a)(i) annex 14-E (stating that the investor in the covered sector can bring claims involving “any obligation under this Chapter [14]”).

192. *Id.* art. 14-E-3(d), n-34.

193. *Id.* art. 14-E-3(a).

194. *Id.* art. 32.11

195. *Id.*

196. See generally CPTPP/TPP, *supra* note 144.

197. See Gantz, *supra* note 142.

198. CPTPP/TPP, *supra* note 144, at Annexes I, II and IV.

In Annex I-Mexico-17 to 26, Mexico specified that it would not impose restrictions to the sector other than the ones afforded under the Mexican energy reform of 2013.<sup>199</sup> In other words, the Pena Nieto administration pledged to maintain the regulatory and legislative framework in place when it signed and ratified the CTPP/TPP, making sure that future governments could not take more restrictive rules. As such, the CTPP/TPP internationalized the energy reform of 2013, and then the USMCA included it by reference to the CTPP/TPP most favored nation clause.

Hence, under a comprehensive construction of Chapter 8, Mexico set the energy reform of 2013 as the ground floor for its relations with hydrocarbon-related investors. Mexico did specify that it reserves its right to regulate its hydrocarbons according to the Mexican constitution, but it did so without prejudice to the rights afforded to investors in the USMCA.<sup>200</sup> And, through Article 32.11, Mexico recognized that any changes that might be considered more restrictive than the ones in the energy reform of 2013 would infringe on the investor's rights. Mexico did not give away its rights to regulate the sector, but it did pledge to not enact a more restrictive framework than the one passed in 2013.<sup>201</sup>

### 3. State-State Dispute Resolution

The primary procedure for resolving state-to-state disputes among the signatory parties of the USMCA is outlined in Chapter 31 of the agreement.<sup>202</sup> Under this chapter, a party can initiate a claim in three specific scenarios:

1. When its trading partners propose or adopt a trade-related measure that contradicts the provisions of the USMCA or when they fail to fulfill their obligations as stipulated by the agreement;<sup>203</sup>
2. When there is a disagreement regarding the interpretation or application of the USMCA's terms;<sup>204</sup>
3. When one of the USMCA partners has taken actions that effectively negate or undermine a benefit that another member could reasonably have anticipated receiving under the terms of the agreement.<sup>205</sup>

199. *Id.*

200. USMCA, *supra* note 2, art. 8.1(2) (stating that “in the case of Mexico, and without prejudice to their [the U.S. and Canada] rights and remedies available under this Agreement [. . .] Mexico reserves its sovereign right to reform its Constitution and its domestic legislation.”).

201. *Id.* art. 32.11.

202. *See generally* USMCA, *supra* note 2, ch. 31.

203. USMCA, *supra* note 2, art. 31.2(b) (“[W]hen a Party considers that an actual or proposed measure of another Part is or would be inconsistent with an obligation of this Agreement or that another Party has otherwise failed to carry out an obligation of this Agreement.”).

204. USMCA, *supra* note 2, art. 31.2(a) (“[W]ith respect to the avoidance or settlement of disputes between the regarding the interpretation or application of this Agreement.”).

205. USMCA, *supra* note 2, art. 31.2(c) (“[W]hen a Party considers that a benefit it could reasonably have expected to accrue to it under Chapter 2 (National Treatment and Market Access for Goods), Chapter 3 (Agriculture), Chapter 4 (Rules of Origin), Chapter 5 (Origin Procedures), Chapter 6 (Textile and Apparel Goods), Chapter 7 (Customs Administration

Under NAFTA, treaty partners activated this mechanism to bring cases concerning the adoption of agricultural tariffs, or the failure to authorize cross-border services.<sup>206</sup> Additionally, it is important to note that while the signing parties can potentially bring a trade-related claim for the same measure under multiple trade agreements, such as the WTO or the CPTPP, once a specific forum is chosen for dispute resolution, a party is not allowed to simultaneously initiate parallel or subsequent proceedings in multiple forums.<sup>207</sup> This ensures a more structured and efficient resolution process for trade disputes.

The process, as laid out in Chapter 31, begins with an initial consultation step. This phase includes inviting other signatory parties to the agreement, as well as third parties with significant interests in the matter, to participate.<sup>208</sup> The party requesting the consultation is required to formally notify the party being challenged.<sup>209</sup> For most disputes, the consultation must occur within 30 days after notice is given.<sup>210</sup> However, in cases involving perishable goods, this timeframe is reduced to 15 days.<sup>211</sup> Through the consultation process, any information shared is treated as confidential.<sup>212</sup> The primary aim of any resolution sought during this phase is to prevent any adverse impact on the interests of another signatory party to the USMCA.<sup>213</sup> At any stage of the consultation process, the parties involved have the option to voluntarily engage in conciliation or mediation procedures.<sup>214</sup> These mediation processes can be suspended or terminated at any point.<sup>215</sup> Importantly, they may also proceed concurrently with the establishment of a panel under Article 31.6.<sup>216</sup>

If the dispute continues beyond 75 days after the initiation of the consultation process, the involved parties can formally request the establishment of a panel.<sup>217</sup> The chair of the panel is selected first, and then parties appoint the

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and Trade Facilitation), Chapter 9 (Sanitary and Phytosanitary Measures), Chapter 11 (Technical Barriers to Trade), Chapter 13 (Government Procurement), Chapter 15 (Cross-Border Trade in Services), or Chapter 20 (Intellectual Property Rights), is being nullified or impaired as a result of the application of a measure of another Party that is not inconsistent with this Agreement.”).

206. Under the NAFTA 1994, Mexico brought a case against the U.S. for the failure to authorize permits for Mexican truckers to deliver cross-border services (cross-border trucking services dispute). See *Cross-Border Trucking Services, USA-MEX-98-2008-01*, Final Report of the Panel ¶21, ¶23 (Feb. 6, 2001). The U.S. also triggered this mechanism against Canadian tariffs applied to certain U.S.-origin agricultural products; see also *Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products, CDA-95-2008-01*, Final Report of the Panel ¶2-3. (Dec. 2, 1996).

207. USMCA, *supra* note 2, art. 31.3.

208. *Id.* art. 31.4.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* art. 31.5.

215. *Id.*

216. *Id.*

217. *Id.* art. 31.6. The mechanism established in Article 31.4 is an advancement from NAFTA because it becomes harder for a party to block the establishment of a panel. Under the USMCA, panelists are selected from a roster created by the parties. Panelists outside of the roster can be selected, but they are subject to a “peremptory challenge” and may be rejected without justification from one of the parties. The only exception is if no panelist on

remaining two to four members (parties may agree to a three-member panel by consensus).<sup>218</sup> Each party chooses panelists who are citizens of the other party.<sup>219</sup> If a party fails to make a selection, panelists are chosen by lot from the other party's roster.<sup>220</sup> Importantly, if the responding party is reluctant to participate in the selection process, the initiating party can select panelists who are its own citizens.<sup>221</sup> This mechanism prevents parties from obstructing the panel's establishment, as was sometimes possible in the previous NA FTA 1994 state to state dispute resolution process.<sup>222</sup>

The panel members are responsible for issuing a final report that outlines their findings of fact and determines whether the responding party breached its obligations under the USMCA.<sup>223</sup> Additionally, at the request of the parties, the panel can provide nonbinding recommendations for resolving disputes.<sup>224</sup> Once a final report is issued, the parties have 45 days to seek a resolution.<sup>225</sup> Importantly, the parties have the autonomy to determine the terms of resolving the dispute according to their preferences.<sup>226</sup> They might agree that the party found at fault must repeal a specific act or legislation, or they could decide on a particular form of compensation.<sup>227</sup>

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the roster possesses the necessary qualifications to serve in the specific dispute. To officially constitute the panel, the parties must select the chair by consensus. If they fail to reach an agreement after a set period of time, then a party is chosen by a lot to designate the chair.

If the responding party is reluctant to participate in the selection-by-lot process, the complaining parties may appoint the chair. The only exception, in that case, is that the chair cannot be a citizen of the selecting parties. USMCA, *supra* note 2, art. 31.8-31.9. For a review of the faults in the NAFTA dispute resolution system see David A. Gantz, 'The United States and NAFTA Dispute Settlement: Ambivalence, Frustration and Occasional Defiance,' ARIZ LEGAL STUD. DISCUSSION PAPER NO. 06-26 356, 362-64 (June 22, 2009), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=918542](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=918542) [<https://perma.cc/EZ7T-798P>]; Joost Pauwelyn, *Adding Sweeteners to Softwood Lumber: The WTO-NAFTA "Spaghetti Bowl" Is Cooking*, 9 J. INT'L ECON. L. 197, 204-05 (2006); as well as procedural delays: David A. Gantz, *Government-to-Government Dispute Resolution Under NAFTA's Chapter 20: A Commentary on the Process*, 11 AM. REV. INT'L ARB. 481, 493 (2000); Gary C. Hufbauer & Jeffrey J. Schott, *NAFTA Revisited: Achievements and Challenges*, INST. INT'L ECON. (2005); for the lack of a complete roster of potential panelists: Sidney Picker Jr., *The NAFTA Chapter 20 Dispute Resolution Process: A View from the Inside*, 55 CAN-US L. J. 525, 529 (1997).

218. USMCA, *supra* note 2, art. 31.9.1.

219. *Id.*

220. *Id.* art. 31.9.1(c).

221. *Id.*

222. Gantz, *supra* note 217, at 387; Pauwelyn, *supra* note 217, at 1-10; for procedural delays, see Gantz, *supra*, note 217, at 481; see also Hufbauer, *supra* note 217; for the lack of a complete roster of potential panelists: Picker, *supra* note 217, at 525-40.

223. USMCA, *supra* note 2, art. 31.7. Before issuing its report, the panel receives written and oral submissions from the parties and may receive these from any nonparticipating State-Party and experts as well. *Id.* The panel must also offer the parties the opportunity to be heard in at least one oral hearing. *Id.* A draft report is voted by consensus or majority vote, and it is issued within 150 days after the appointment of the final panelist (it can be extended by 30 days by the panel or for a different period if the parties agree). *Id.* The parties may comment on the draft report, and the panel may request additional submissions, consider the comments, or order further examination, before issuing the final report. *Id.*

224. USMCA, *supra* note 2, at 31.13.1(b)(c).

225. *Id.* art. 31.18.1

226. *Id.*

227. *Id.* art. 31.18.2



If, within the 45 days period, the parties fail to reach an agreement on how to resolve the dispute, the complaining party has the option to suspend trade benefits to the responding party.<sup>228</sup> The suspension must have an “equivalent effect” as the measure or conduct the panel found inconsistent with the USMCA.<sup>229</sup> Moreover, the suspended benefit must relate to the same sector that is subject to the dispute, unless suspending benefits in that sector proves ineffective or impracticable.<sup>230</sup> In cases where the suspension appears manifestly excessive or has cured the violation, the responding party has the rights to request the original panel to reconsider the matter. The panel is tasked with providing “its views as to the level of benefits it considers to be of equivalent effect.”<sup>231</sup> If the panel confirms that the USMCA violation persists, the complaining party can continue the suspension of benefits up to the level determined by the panel.<sup>232</sup>

In the energy sector, the possible suspension of benefits has several complications. Investment in the energy sector is considered a service under the trade agreements. As such, a State would have to impose restriction to energy investments in its own jurisdiction as part of the suspension of benefits to the other party. Take for example the case of Mexico and the energy reform of 2022, and the complaints filed by the U.S. and Canada against it.<sup>233</sup> If the U.S. or Canadian government obtained a favorable report that found that Mexico discriminated against their nationals in the energy sector, Canada and the U.S. could impose restrictions to Mexican energy investment in their territories. If their claims were successful in the proceedings, the U.S. and Canada could restrict the operation of PEMEX or CFE on their territory. This action, however, could have trickle down effects on U.S. partners that provide services to these companies, or that have long term contracts with them, leading to financial losses on the U.S. side or to a negative impact on energy commodity prices.

Another possibility would be to suspend benefits in other service sectors if the sanctions in the same sector are “impractical” or “ineffective.”<sup>234</sup> For example, in 2007, a WTO panel authorized Antigua to suspend intellectual property rights to U.S. companies as retaliation for the U.S.’ failure to comply with a panel report finding American legislation on online gambling laws in breach of the commitment to free trade in recreational services.<sup>235</sup> If the U.S. and Canada successfully request the “impractical or ineffective” exception, they could also impose trade tariffs on Mexican export goods, such as tomatoes, avocados, or tequila, with the aim of affecting key sectors of the Mexican economy.

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228. *Id.* art. 31.19.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* art. 39.19.4

233. U.S. TRADE REPRESENTATIVE, *United States Requests Consultations Under the USMCA Over Mexico’s Energy Policies* (July 20, 2022), <http://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/july/united-states-requests-consultations-under-usmca-over-mexicos-energy-policies-0> [<https://perma.cc/YC8G-D9AR>].

234. USMCA, *supra* note 2, art. 31.19.

235. See generally Isaac Wohl, *The Antigua-United States Online Gambling Dispute*, J. INT’L COM. & ECON. 1 (July 2009), [https://www.usitc.gov/publications/332/journals/online\\_gambling\\_dispute.pdf](https://www.usitc.gov/publications/332/journals/online_gambling_dispute.pdf) [<https://perma.cc/4BFE-LT68>].

Note, however, that these types of actions could also lead to higher prices in the U.S. and Canada for these products—a scenario that in the current global economic crisis could lead to protests in the countries suspending the benefits. As such, trade conflict in the energy sector, if taken to its last stages, could lead to a lose-lose situation for all trading partners.

#### IV. Building U.S.-Mexico Energy Trade

Energy law changes in the United States and Mexico too often ignore the impact that they may have on energy trade. Thus far, there has been almost no academic or policy discussion on how changes to eminent domain or federal permitting could divide the U.S. and Mexico—in part because press coverage and test cases have tended to focus on energy trade between the United States and Canada.<sup>236</sup>

It is high time to set an agenda for legal reform to realize the full potential of the U.S.-Mexico energy trade. The USMCA was a missed opportunity to force governments to integrate further and restrain some of the restrictive local U.S. policies. But this is not the end of the story. First, whatever the new regulatory barriers, the economic gravity of these two crucial energy markets will keep pulling them together—when disparate policies and trade barriers mean different prices on each side of the border, that will simply increase the rewards for companies able to surmount the barriers to cross-border trade. Second, now is the moment to lay out the terms of a new energy treaty that could gain the full potential benefit of cross-border trade. NAFTA and its renegotiation have made plain that opportunities for cross-border trade agreements are both precious and fleeting. When the next opportunity emerges, it is crucial that there are policy proposals already on the shelf to provide the backbone of a new energy agreement.

##### A. Roadblocks to Cross-Border Energy Trade Will Merely Create Different Cross-Border Trade Opportunities

Even in the face of new regulatory roadblocks and nationalistic policies, there are still avenues to mutually beneficial energy trade because the economic fundamentals and the geological and geographic characteristics are present in the region. First, roadblocks in one country are opportunities for the neighbor. You can use your trading partner to avoid regulatory issues on your side of the border (e.g. pipelines in Mexico to export natural gas to Asia; climate change pledges on the U.S. side and renewable energy built on the Mexican side).

Second, distances matter. Energy commodities, infrastructure, and resources on one side of the border might be closer to high demand urban areas or adequate exports points across the border than the ones in your own territory. For example, gas fields in Texas can feed combined cycle natural gas power

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236. The most recent example was the Keystone XL pipeline case involving Canada and the U.S., see Coleman, *supra* note 125, at 512–15.

plants in North Mexico.<sup>237</sup> Renewable energy storage capacity in Baja California is available to serve the power-hungry California market.<sup>238</sup> And U.S. refineries in Houston and Gulf of Mexico are natural destinations for growing production in Mexican offshore oil fields.<sup>239</sup>

Third, different sectors of the energy market can still do business under nationalistic views, as long as they are willing to play under new rules. For example, Mexico's policy changes giving advantage to PEMEX and CFE are opportunities for services providers willing to work with the companies under their terms; another example is Shell's sale of the Deer Park refinery to PEMEX to strengthen Mexico's "energy sovereignty."<sup>240</sup>

International treaties serve as mechanisms to force states to blame international commitments on policies that are politically complicated to implement domestically.<sup>241</sup> This treaty mechanism is particularly indispensable because the barriers to strengthening U.S.-Mexico energy trade are not solely the result of energy nationalism or autarkic political instincts. In many ways they are driven by important domestic concerns that will naturally dominate if the importance of international trade is not prioritized.

## B. An Agenda for North American Energy Integration

As noted, there are different levels and instruments for integrating energy markets. Some require formal treaty formation, others could be integrated into side trade letters and would demand joint policymaking through high level dialogue or commissions. Using the Energy Charter Treaty, the U.S.-Canada Side Letters on Energy, NAFTA's Energy Chapter, the U.S.-Canada Transit Pipeline Treaty, and the U.S.-Mexico Agreement for the Exploitation of Transboundary Hydrocarbons as references, we propose the following energy integration principles to set an agenda for future U.S.-Mexico negotiations toward North American energy cooperation:<sup>242</sup>

237. Christopher Lenton, *CFE Increases Use of Fuel Oil for Power Generation*, NATURAL GAS INTELL. (Apr. 5, 2023), <https://mexicobusiness.news/energy/news/cfe-increases-use-fuel-oil-power-generation> [https://perma.cc/YQ5R-2GYL] (explaining how the Mexican state-owned entity, CFE, is acquiring natural gas plants in the state of Baja California, Durango, Nuevo Leon, San Luis Potosi, Sinaloa and Tamaulipas, and how the natural gas used for its electric power plants is mainly imported from the U.S.).

238. MEXICO BUS. NEWS, *supra* note 97.

239. *Crude oil inputs to Mexico's petroleum refineries continued to decline in 2018* - TODAY IN ENERGY - U.S. ENERGY INFO. ADMIN. (June 25, 2019), <https://www.eia.gov/todayinenergy/detail.php?id=39972> [https://perma.cc/23PT-UQ4B] ("U.S. refineries along the Gulf Coast are able to process heavy Mexican crude oil blends with a higher yield of finished, low-sulfur motor gasoline.").

240. Robert Brelsford, *Pemex Completes Purchase of Deer Park Refinery*, OIL & GAS J. (2022), <https://www.ogj.com/refining-processing/article/14224049/pemex-completes-purchase-of-deer-park-refinery> [https://perma.cc/8ZYH-A9SE].

241. Beth Simmons, *Compliance with International Agreements*, 1 ANN. RE. POLI. SCI. 75, 82 (1998) (explaining how "international agreements placed a desired constraint on policy where domestic politics alone has proven socially suboptimal").

242. Agreement Concerning Transboundary Hydrocarbon Reservoirs in the Gulf of Mexico, U.S.-Mex., Feb. 20, 2012, T.I.A.S. No. 14-718 [hereinafter the U.S.-Mexico Hydrocarbons Transboundary Agreement] available at <https://www.boem.gov/sites/default/files/regulations/Treaties/US-Mexico-Transboundary-Reservoirs-Agreement.pdf> [https://perma.cc/T86K-ALR8].

*Non-discriminatory access to energy infrastructure and freedom of energy transit.* Both countries should adopt clear rules that give the partner country companies access to existing infrastructure, including transit-related infrastructure, and should not prevent companies from building new capacity.<sup>243</sup> The guiding principles should be freedom of transit and a duty not to impose unreasonable restrictions or charges. Energy transit flows should not be not disrupted even during disputes among nations.<sup>244</sup> These principles could build upon the 1977 Pipeline Transit Treaty between the United States and Canada, but apply more broadly to all three countries, to the transport of electricity and other energy products, and to the import and export of energy products.<sup>245</sup> In the same vein, any fees, charges, or permits set up to allow the access to existing energy infrastructure should be set up in a non-discriminatory and transparent way.<sup>246</sup> At a minimum, governments should not prevent or impede the cooperation among energy companies to allow access to and use of existing infrastructure.<sup>247</sup>

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243. Selivanova, *supra* note 50, at 397 (explaining the importance of energy transit under the ECT). The Energy Charter Treaty regulates the principle of freedom of transit in Article 7 (“Each Contracting Party shall take the necessary measures to facilitate the Transit of Energy Materials and Products consistent with the principle of freedom of transit and without distinction as to the origin, destination or ownership of such Energy materials and Products or discrimination as to pricing on the basis of such distinctions, and without imposing any unreasonable, delays, restrictions or charges.”). The Canada-U.S. Side Letter on Energy also contemplated access to electric transmission facilities and pipeline networks, see Canada-U.S. Side Letter on Energy, *supra* note 147, art. 5 (specifying that the measures governing access to or the use of these facilities shall be “neither unduly discriminatory nor unduly preferential” and that any tolls, rates, or charges connected to the access are “just, reasonable, and neither unduly discriminatory nor unduly preferential.”); Energy Charter Treaty, *supra* note 66, art. 7.

244. Selivanova *supra* note 50, at 397; see also Energy Charter Treaty, *supra* note 66, art. 7.

245. Agreement concerning transit pipelines, Jan. 28, 1977, 344 U.N.T.S. 1978.

246. The Inter-governmental Agreement (IGA), the model treaty drafted by the Energy Charter Treaty Secretariat for states involved in transit cross border infrastructure, also contemplated principles involving “freedom of transit” and non-discriminatory, transparent regulations, see MODEL INTERGOVERNMENTAL AND HOST GOVERNMENT AGREEMENT FOR CROSS-BORDER PIPELINES, SECOND EDITION, art. 6, 7 available at <https://www.energycharter.org/what-we-do/trade-and-transit/model-agreements/> [<https://perma.cc/ZQ3Z-7ESQ>]. The same principles are contemplated in the Energy Charter Treaty Secretariat Model Agreements for Cross-Border Electricity Projects, *Id.* at secs. on Land rights, Transport of Electricity, Ownership of Transmission Rights With respect to Electricity in the Electricity Transmission Facility, and Non-Interruption of Project Activities; see also PETER D. CAMERON, INTERNATIONAL ENERGY INVESTMENT LAW THE PURSUIT OF STABILITY 94–97 (2010) (discussing the different stability mechanisms available for cross-border infrastructure).

247. This principle for example was established in Article 12 of the U.S. Mexico Hydrocarbons Transboundary Agreement for facilities near the delimitation line, see U.S.-Mexico Hydrocarbons Transboundary Agreements, *supra* note 242, art. 12 (“1. The Parties shall use their best efforts to facilitate cooperation between Licensees in activities related to the Exploration and Exploitation of a Transboundary Unit, including the facilitation of access to and use of Facilities near the Delimitation Line, and shall not prevent or impede such cooperation by unreasonable withholding necessary Permits. 2. The use of Facilities near the Delimitation Line may include, inter alia, access to and interconnection with a Pipeline and physical access to Pipeline capacity and, where appropriate, to Facilities supplying technical services incidental to such access. 3. The Parties shall facilitate, subject to their respective national law, access to Facilities for workers engaged in any activities related to a Transboundary Unit.”).

*Investment protection principles for North American energy companies.* Both countries should adopt clear rules on expropriation and nationalization, including formulas for compensation that contemplate market values, rates of return, and estimated future prices.<sup>248</sup> Moreover, there should be compensation mechanisms beyond monetary compensation—for example, priority access to future developments or projects. Both nations should recognize the importance of Mexican state-controlled entities and their investments in the U.S. The principles that protect foreign investment should also be available for Mexican state-owned enterprises, which are currently subject to different regulatory standards in the U.S. Additionally, both governments should specify the level of civil liability and immunity that the state-owned companies from Mexico will have in U.S. territory. These state-controlled entities, as central actors in Mexico's energy sovereignty and the development of North American energy resources, should have unique rules, as opposed to generic standards applicable to State-owned enterprises from other nations.

*Principles for regulators' decision-making processes and coordination on energy data.*<sup>249</sup> Energy regulators should be independent and have clear, transparent rules that do not discriminate against foreign entities. Regardless of the type of authority, policies that impact the energy sector should balance their goals with the goal of further integrating energy markets to strengthen North American energy interdependence, resilience, self-sufficiency, and transition.<sup>250</sup> In other words, any government entity under these principles must consider these elements as part of its domestic energy decision-making process, and be transparent about how it reaches a particular decision.<sup>251</sup> In the same vein, for energy markets to be properly integrated and face common challenges, states must coordinate and share energy data.<sup>252</sup> By exchanging and

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248. CAMERON, *supra* note 45, at 26–35 (describing the different layers of legal instruments employed by investors to protect their investments, including long-term contracts with stabilization clauses, international treaties, foreign investment laws, and dispute resolution mechanisms, including international arbitration). For a critical view of the impact of arbitration in the hydrocarbon sector, see generally Guillermo J. Garcia Sanchez, *A Critical Approach to International Investment Law, the Hydrocarbons Industry, and Its Relation to Domestic Institutions*, 57 HARV. INT'L L. J. 475 (2016).

249. By regulators, we mean any government official that has the power to affect energy markets through rule- or norm-making processes. As such, these include formal regulatory agencies, but also executive branch officials at the Ministry of Energy in Mexico and the Energy Department in the U.S.

250. The Canada-U.S. Side Letter on Energy establishes a cooperation principle that enhances “the integration of North American energy markets based on market principles” and where the parties pledge to promote “North American energy cooperation, including with respect to energy security and efficiency, standards, joint analysis, and the development of common approaches.” Canada-U.S. Side Letter on Energy, *supra* note 147, art. 3.

251. The Canada-U.S. Side Letter on Energy is an example of such a principle. According to Article 4.2 state that the government “shall endeavor to ensure that in the application of an energy regulatory measure, an energy regulatory authority within its territory avoid disruption of contractual relationships to the maximum extent possible, supports North American energy market integration, and provides for orderly and equitable implementation appropriate to those measures.” The Side letter also clarifies in footnote 3 that such a principle “does not apply to a measure related exclusively to the protection of human health or the environment.” Canada-U.S. Side Letter on Energy, *supra* note 147, art. 4.

252. See generally Timothy Meyer, *Global Public Goods, Governance Risk, and International Energy*, 22 DUKE J. COMPAR. & INT'L L. 319 (2012) (arguing that many of the

evaluating information, business and scientific uncertainty is reduced and regulators can engage in substantive discussions and negotiations.<sup>253</sup> Mexico and the U.S. should harmonize and improve the availability of energy data across the region.<sup>254</sup>

*Principles on cooperation in security and energy supply.* Considering the interdependence of energy markets and the emergency situations faced by the region in the past decades, energy partners should adopt protocols that recognize the principle of cooperating in emergency situations.<sup>255</sup> Examples of these cooperation mechanisms include the expansion of cross-border interconnections, pipelines, and the share of storage capacity for border towns.<sup>256</sup>

*Joint decision-making bodies.* Energy partners should work to create a North American commission that serves as a connection point for coordinating energy policies to further integrate the region. The commission should also serve as a platform for discussing government decisions that might negatively impact the energy principles.<sup>257</sup> Such a commission could receive several key charges. For one, this board could serve to resolve emergency issues such as the

challenges faced by public good institutions can be attended by the exchange and evaluation of information).

253. *Id.* at 320 (arguing in favor of the exchange and evaluation of information but also warning that “[i]nstitutions that emerge the knowledge-exchange and development process with the ability to negotiate and impose binding legal regulations thus run the risk that states that oppose the imposition of substantive regulations will use epistemic processes as a way to try to block the adoption of substantive regulation.”).

254. The U.S.-Mexico Hydrocarbons Transboundary Agreement already contemplated a duty to share data concerning transboundary field and operations around the border, see U.S.-Mexico Hydrocarbons Transboundary Agreement, *supra* note 242, art. 4. The U.S. Department of Interior and the Mexican Ministry of Energy also signed an MoU in 2016 to enhance cooperation, sharing of best practices and information involving the energy resources on both sides of the border. Sect 2 Memorandum of Understanding between the Department of Interior of the United States of America and the Ministry of Energy of the United Mexican States, Feb. 2016, available at [https://www.doi.gov/sites/doi.gov/files/uploads/2016\\_doi-sener\\_mou\\_2016\\_signed\\_eng.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/2016_doi-sener_mou_2016_signed_eng.pdf) [<https://perma.cc/TD5V-ZNHM>] [hereinafter the U.S.-Mexico MoU on Energy Cooperation] (Section 2 of the agreement enlists all of the exchanges of information, procedures and best practices among the parties).

255. An example of such a principle can be found in Article 6 of the Agreement on ASEAN Energy Cooperation: see Agreement on ASEAN Energy Cooperation, art. 6 June 24, 1986 available at <http://agreement.asean.org/media/download/20170606100932.pdf> [<https://perma.cc/CV4L-JRGS>] (“Cooperation in security of energy supply. Recognizing the need to alleviate emergency situations relating to the shortage and/or oversupply of renewable and/or non-renewable energy products, the Member Countries shall endeavor to cooperate in drawing up and concluding: i. emergency agreements for different energy forms as may be desirable from time to time; and ii. appropriate measures to cope with these emergency situations.”).

256. Successful examples of cross-border transmission lines helping the region to overcome blackouts includes Mexico’s transmission of 300 mw into the Texas grid in 2011; see Christopher Helman, *Rolling Blackouts Force Texas To Import Power From Mexico*, FORBES (Feb. 3, 2011), <https://www.forbes.com/sites/christopherhelman/2011/02/03/rolling-blackouts-force-texas-to-import-power-from-mexico/> [<https://perma.cc/4KYY-B3SH>].

257. WILSON CTR. *supra* note 8, at 1. This principle is also consistent with the key recommendations from Wood and Ramiro, but it seeks to institutionalize further the relationship. Wood and Ramiro recommend a “return to regular meetings of the North America’s energy ministers” and to “reinvigorate the U.S.-Mexico Energy Business Council, with a renewed focus not just on hydrocarbons but also on renewable energy.” *Id.*

one faced in February 2020.<sup>258</sup> They could approve or recommend emergency responses and help the relevant parties coordinate the response. The U.S. and Mexico have used this type of mechanism before to address challenges on joint natural resources located at the border.<sup>259</sup> This commission could also play an important role as an informal forum for dispute resolution when new circumstances or policies threaten North American energy trade.

Even if these energy neighbors decide to forgo a commission, at a minimum they could play a larger role in each other's energy councils. For example, the U.S. and Mexico should consider allowing each other's agencies to be observers in energy-related national commissions. Mexico should participate, at least as an observer, in the U.S. Interstate Oil & Gas Compact Commission. As a historical oil exporter, Mexico has historically cooperated more closely with the Organization of Petroleum Exporting Countries, whose interests have often been opposed to the United States.<sup>260</sup> Now that both Mexico and the United States have moved toward net zero energy exports—with important interests both as importers and as exporters—it would make more sense for them to align their policies.<sup>261</sup> Certainly, to the extent that the Interstate Oil & Gas Compact Commission will be taking a larger role in avoiding oil and gas price spikes, Mexico could participate in these discussions.<sup>262</sup>

Another minimum effort would be to reinvigorate the U.S.-Mexico Energy Business Council that was created in 2016 with the purpose of improving institutional relations among Mexican and U.S. agencies with the participation of energy companies.<sup>263</sup> The Council is tasked with providing non-binding recommendations on actionable items to strengthen U.S.-Mexico energy relations.<sup>264</sup> An expanded and empowered council could be given a more prominent role in policymaking on both sides of the border.

258. Parraga & Oré, *supra* note 13 (describing the uncoordinated way in which the Texas government halted the exports of natural gas to Mexico during the Winter storm).

259. Most notably, Mexico and the U.S. have a water commission set up for the joint rivers at the border that has power to issue binding decisions on both sides of the border and that has the character of an international organization, giving its members diplomatic protection. See Treaty on the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, U.S.-Mex., art. 2, 3, Feb. 3, 1944, 59 Stat. 1219 [hereinafter 1944 U.S. Mexico Rivers Treaty]; see also Guillermo J. Garcia Sanchez & Richard J. McLaughlin, *The 2012 Agreement on the Exploitation of Transboundary Hydrocarbon Resources in the Gulf of Mexico: Confirmation of the Rule or Emergence of a New Practice*, 37 Hous. J. Int'l L. 681, 726–734, 761–767 (2015) (arguing that Mexico and the U.S. have a longstanding practice of creating joint commissions for the development of transboundary resources, but that they failed to create a strong commission for hydrocarbon resources in the Gulf of Mexico.).

260. *Mexico Reaches Deal with U.S. to Cut Oil Production Allowing for OPEC+ Output Cuts*, TIME (Apr. 9, 2020), <https://time.com/5818938/opec-oil-deal-coronavirus-mexico/> [<https://perma.cc/ZK79-W8N5>]. See generally James W. Coleman, *State Energy Cartels*, 42 CARDOZO L. REV. 2223 (2021).

261. *Id.*

262. *Id.*

263. Terms of reference of the United States-Mexico Energy Business Council, 2016, available at [https://legacy.trade.gov/hled/documents/Signed%20US-MEX%20Energy%20Business%20Council%20Terms%20\(May%20202016%20-%20English\).pdf](https://legacy.trade.gov/hled/documents/Signed%20US-MEX%20Energy%20Business%20Council%20Terms%20(May%20202016%20-%20English).pdf) [<https://perma.cc/3XPS-284H>]. The Energy Business Council was created as part of the commitments made in January 2015 during the U.S.-Mexico High Level Economic Dialogue.

264. *Id.* According to Section II of the Terms of reference “The Council’s objectives are to 1) facilitate the exchange of information between representatives of the energy industries

*Cooperation for joint environmental and safety standards.* Both nations should cooperate in setting joint environmental and safety standards for the industry.<sup>265</sup> A transparent and consistent regulatory framework for the North American industry will make the region more competitive at the global level. The costs of differentiated standards are eventually translated into inefficient practices and prices to the consumer.<sup>266</sup> The North American partners could build these principles through high level dialogues among agencies, or by setting up joint commissions under recommendations above.

*Transboundary resources related principles.* The U.S. and Mexico should integrate existing transboundary agreements on the joint development of resources at the borderline into their energy relationship.<sup>267</sup> The existing Transboundary Agreement on hydrocarbon resources located in the Gulf of Mexico should be used as the base for other resources located inland, such as the Burgos Basin in the Tamaulipas-Texas border, and for the resources located in the nine nautical miles under Texas' jurisdiction.<sup>268</sup> The guiding principles should continue to be the efficient, effective, and joint development of the resources, with a focus on long-term economic rewards for both nations. Moreover, in applicable hydrocarbon fields, a principle of unitization should guide any decision or policy on both sides of the border. This includes making it mandatory in any license, concession, or contract assign by the states.

*Community engagement principles.* The construction of energy-related infrastructure in the region has direct impacts on different communities, many of them historically disenfranchised.<sup>269</sup> Both the Canadian-U.S. border and

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from the United States and Mexico; and 2) encourage the development of actionable, non-binding recommendations for the benefit of the Participant's governments."

265. The U.S and Mexico already have a duty to adopt common safety and environmental standards for transboundary fields in the Gulf of Mexico. However, they have not enacted any since the signing of the Treaty. See U.S.-Mexico Hydrocarbons Transboundary Agreement, *supra* note 242, art. 19 ("1. The Parties shall adopt, where appropriate, common safety and environmental standards and requirements applicable to activity contemplated under this Agreement. In any event, the Parties shall strive to ensure that their respective standards and requirements are compatible where necessary for the safe, effective, and environmentally responsible implementation of this Agreement."); see also U.S.-Mexico MoU on Energy Cooperation, *supra* note 254, at sec. 3 that enlists the modalities of cooperation including "mutually beneficial exchanges and sharing of scientific and technical practices, knowledge and publicly available information; exchange visits of staff; meetings (including workshops, video-conferences, or webinars); cooperative research projects; joint studies; joint training; evaluation of effectiveness of activities; or other modalities of cooperation").

266. The USMCA does contemplate a duty to enact best regulatory practices and improve regulatory cooperation among the trade partners in order to "prevent, reduce or eliminate unnecessary regulatory differences to facilitate trade and promote economic growth, while maintaining or enhancing standards of public health and safety and environmental protection." See USMCA, *supra* note 2, art. 28.1.

267. Sanchez & McLaughlin, *supra* note 259 (describing in general how the Mexico agreement deviated from international practice and could be improved, particularly in its dispute resolution mechanisms and the decision-making processes of the joint commission).

268. Jorge Vargas, *The 2012 US Mexico Agreement on Transboundary Hydrocarbon Reservoirs in the Gulf of Mexico, A Blueprint for Progress or a Recipe for Conflict*, 14 SAN DIEGO INT'L L.J. 3, 39 (2012) (describing the potential for joint gas developments in the Tamaulipas and Texas borderline).

269. See generally Guillermo Garcia Sanchez, *When Drills and Pipelines Cross Indigenous Lands in the Americas*, 51 SETON HALL L. REV. 1121 (2021) (discussing the conflicting principles that arise from investment arbitration law and international law on indigenous



the Mexican-U.S. border are home to indigenous communities and ancestral lands that have historical and spiritual value.<sup>270</sup> An efficient longstanding energy-integrated region requires the consent of these communities, and policies that reduce the negative impact of the investment on their lands. The new principles should go beyond the required duty to consult communities and include consensus-building with them. These communities should also receive the protection of their cultural and religious sites, and a share of benefits from the projects.<sup>271</sup> The rapid expansion of North America as an energy exporting region should come side-by-side with decision-making processes that avoid building infrastructure that will impact disenfranchised communities. For example, the passing of a pipeline through indigenous lands might seem like the only solution to bring communities from one coast to the other, but if regulators are able to route through a neighboring state, alternative routes that were impossible before are viable to decisionmakers and companies. If states coordinate their energy policies, they could expand alternatives that do not involving the negative impact of energy infrastructure over disenfranchised communities.

## Conclusion

Official borderlines between states can get in the way of solving contemporary energy challenges. The entire world is suffering from high fuel and electricity prices that contribute to higher prices of food and consumer goods as well as growing political unrest. At the same time, citizens and investors are demanding cleaner energy sources as their impatience with the environmental and climate cost of traditional energy systems grows.<sup>272</sup> Storms that destroy energy infrastructure, excessive electricity demand during heat and cold waves, oil spills, and wildfires all flow unchecked across borders.<sup>273</sup> These are common challenges that require joint approaches. When governments jump into their “jurisdictional” trenches and avoid addressing regional energy challenges, the most common results are binational blackouts, inefficient allocation of investment and production capacity, and at the minimum, energy is wasted on both sides of the border.<sup>274</sup> The winter storm that hit Texas and North Mexico in 2021 is just one example of these problems.<sup>275</sup> Joint efforts and cooperation

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rights in the context of energy related projects in the American continent. Prof. Garcia Sanchez concludes that the system tends to monetize the value of indigenous lands as a solution to continue with the construction of energy related projects, leaving the communities on the wrong side of the cost benefit analysis).

270. *Id.*

271. *Id.*

272. Michael O'Dwyer, *Sustainable Investing Boom and Net Zero Pledges Drive ESG Talent War*, FIN. TIMES (June 5, 2021), <https://www.ft.com/content/6c59ed7a-170b-4898-81a2-7420f0c28888> [<https://perma.cc/736Y-Q43D>].

273. Christopher Flavelle, *Record Number of Billion-Dollar Disasters Shows the Limits of America's Defenses*, N.Y. TIMES (Sept. 12, 2023), <https://www.nytimes.com/2023/09/12/climate/billion-dollar-disasters.html> [<https://perma.cc/75AJ-7J8F>].

274. Parraga & Oré, *supra* note 13.

275. *Id.*

mechanisms are needed to meet these common energy challenges and harness the full power of the continent's shared resources.

As the center of the United States' energy industry—the world's biggest producer of both oil and natural gas—Texas is the crossroads for global energy. But it is also the center of the cross-border energy trade with Mexico, a linchpin of the energy future in both countries. Mexico is the principal source for Texas' growing natural gas exports and Texas is a likely consumer of the oil and renewable energy that Mexico hopes to produce in coming years.<sup>276</sup> At the same time, new challenges have emerged to international energy trade and investment on both sides of the border. The war in Ukraine and the weaponization of Russian oil and gas exports are reminders that the stronger the North American energy markets are, the better positioned the U.S., Canada and Mexico will be to face geopolitical challenges. The strength of the market, however, depends on a closer integration among trade partners. Together, they can be a reliable source of energy exports for countries hoping to avoid dependence on unstable energy trading partners such as Russia.

It is high time that North American policymakers developed an agenda to ensure that the U.S. and Mexico gain the full benefit promised by their potential collaboration. One lesson of the past decades is that the windows for furthering cross-border cooperation are often brief, and it is crucial to use them to set the stage for market integration driven by shifting energy markets. The agenda set forth in this Article provides a roadmap for policymakers to take advantage of the next opportunity to take full advantage of North America's energy resources.

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276. According to the U.S. Energy information Administration for the past ten years, Mexico has been a net importer of U.S. Natural gas and petroleum products, whereas the U.S. has been a net importer of Mexico's crude oil. See *Energy trade between Mexico and the United States reached a record \$81.9 billion in 2022*, ENERGY INFO. ADMIN. (June 28, 2023), <https://www.eia.gov/todayinenergy/detail.php?id=56960> [<https://perma.cc/4M89-KRND>]. For increase in electricity trade see Orlando Federico Cabrera-Colorado, *Increasing U.S.-Mexico Cross-Border Trade in Electricity by NAFTA's Renegotiation*, 39 ENERGY L.J. 79 (2018).