

## The institutional design of *CUSMA*: Improvement or reversal vis-à-vis *NAFTA*?

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### Article abstract

In this article we comparatively analyze the institutional design of the 2020 *Canada-United States-Mexico Agreement (CUSMA)* vis-à-vis the 1994 *North American Free Trade Agreement (NAFTA)*. In the modernization of *NAFTA* into *CUSMA*, three strategies were employed: updating, upgrading, and adjusting the institutional design. We explore whether the implementation of these strategies provide a better governance of free trade and investment in the region compared to *NAFTA*. To do so, we conduct an in-depth evaluation of both agreements. Our central argument is that there were both progress and reversals in several areas: for example, the strength and powers of dispute settlement mechanisms, an improvement in the implementation of the working groups, changes in the flexibility or rigidity of its architecture depending on the sector analyzed, among many others. The article is comprised of three sections, each of them dealing with one of the three strategies under scrutiny. Finally, based on the central findings, we provide some public policy recommendations to strengthen the governance of free trade and investment in North America through the *CUSMA*.

# THE INSTITUTIONAL DESIGN OF *CUSMA*: IMPROVEMENT OR REVERSAL VIS-À-VIS *NAFTA*?

*Antonio Ortiz Mena L. N.\* and Jorge A. Schiavon\*\**

In this article we comparatively analyze the institutional design of the 2020 *Canada-United States-Mexico Agreement (CUSMA)* vis-à-vis the 1994 *North American Free Trade Agreement (NAFTA)*. In the modernization of *NAFTA* into *CUSMA*, three strategies were employed: updating, upgrading, and adjusting the institutional design. We explore whether the implementation of these strategies provide a better governance of free trade and investment in the region compared to *NAFTA*. To do so, we conduct an in-depth evaluation of both agreements. Our central argument is that there were both progress and reversals in several areas: for example, the strength and powers of dispute settlement mechanisms, an improvement in the implementation of the working groups, changes in the flexibility or rigidity of its architecture depending on the sector analyzed, among many others. The article is comprised of three sections, each of them dealing with one of the three strategies under scrutiny. Finally, based on the central findings, we provide some public policy recommendations to strengthen the governance of free trade and investment in North America through the *CUSMA*.

Dans cet article, nous analysons de manière comparative la conception institutionnelle de l'*Accord Canada-États-Unis-Mexique (ACÉUM)* de 2020 par rapport à l'*Accord de libre-échange nord-américain (ALÉNA)* de 1994. Lors de la modernisation de l'*ALÉNA* en *ACÉUM*, trois stratégies ont été employées : mise à jour, mise à niveau et ajustement de la conception institutionnelle. Nous examinons si la mise en œuvre de ces stratégies offre une meilleure gouvernance du libre-échange et des investissements dans la région par rapport à l'*ALÉNA*. Pour ce faire, nous procédons à une évaluation approfondie des deux accords. Notre argument central est qu'il y a eu à la fois des progrès et des reculs dans plusieurs domaines, par exemple : la force et les pouvoirs des mécanismes de règlement des différends, une amélioration de la mise en œuvre des groupes de travail, des changements dans la flexibilité ou la rigidité de son architecture selon le secteur analysé, parmi tant d'autres. L'article est composé de trois sections, chacune d'entre elles traitant de l'une des trois stratégies examinées. Enfin, sur la base des principaux constats, nous fournissons des recommandations de politique publique pour renforcer la gouvernance du libre-échange et de l'investissement en Amérique du Nord par le biais de l'*ACÉUM*.

En este artículo analizamos comparativamente el diseño institucional del *Tratado México-Estados Unidos-Canadá (T-MEC)* del año 2020 vis-à-vis el *Tratado de Libre Comercio de América del Norte (TLCAN)* de 1994. En la modernización del *TLCAN* transformado en *T-MEC* se utilizaron tres estrategias: actualización, mejora y ajuste del diseño institucional. Exploramos si la implementación de estas estrategias provee una mejor gobernanza del libre comercio e inversiones en la región en comparación con el *TLCAN*. Con este fin, llevamos a cabo una evaluación profunda de ambos tratados. Nuestro argumento central es que se observan tanto avances como retrocesos en diversas áreas: por ejemplo, en la fortaleza y poderes de los mecanismos

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de solución de controversias, una mejora en la implementación de los grupos de trabajo, cambios en la flexibilidad o rigidez de la arquitectura dependiendo del sector analizado, entre muchos otros. Este artículo está integrado por tres secciones, cada una de ellas dedicada a analizar cada una de las tres estrategias bajo escrutinio. Finalmente, con base en nuestros principales hallazgos, proveemos algunas recomendaciones de política pública para fortalecer la gobernanza del libre comercio e inversiones en América del Norte a través del *T-MEC*.

In his inaugural address on 1 December 1988, Mexican President Carlos Salinas de Gortari (1988–1994) emphasized the need for a new relationship between Mexico and the United States; he stated that his administration would seek “new balances with the United States of America, a field of opportunities and delicate differences”, and that the challenges that would arise from this new relationship would be solved “with the most determined effort of concerted action and respectful collaboration”.<sup>1</sup> For Salinas’ government, deepening trade and investment liberalization, and locking them in via international agreements, were his top foreign policy priorities, especially with North America, due to the concentration of capital and trade flows in the region: more than two thirds of Mexico’s trade (both imports and exports) and capital movements (both inflows and outflows) took place with North America in the early nineties.<sup>2</sup>

For this reason, the negotiation and implementation of a free trade agreement in the region, the *North American Free Trade Agreement (NAFTA)* was seen as a strategy to promote economic growth, technological flexibility, economies of scale, specialization and efficient operation of markets, all priorities of the economic reforms implemented by the Salinas administration.<sup>3</sup> The negotiation and implementation of *NAFTA*, both to achieve trade liberalization and encourage the flow of foreign direct investment (FDI) to Mexico, was the most important project in the administration’s foreign policy agenda, as Salinas recognized in his second, fifth and sixth government reports to Congress and to the Nation.<sup>4</sup>

For more than two decades after *NAFTA*’s entry into force in 1994, economic relations between Canada, Mexico and the United States were stable, as the agreement facilitated the creation of a free trade area in the region, with increasing volumes of trade, investment and regional production between the three countries. For example, U.S. trade with its *NAFTA* partners went from USD\$292.7 billion in 1993 to USD\$1.2 trillion in 2019, a 319% increase.<sup>5</sup> The United States remains the largest foreign investor in Canada and Mexico, and from 1997 to 2019, the stock of U.S. investment increased by 315% and 360%, respectively.<sup>6</sup> More importantly, growing trade and investment led to shared production, as shown by the 2015 Grubel-Lloyd intra-industry trade index, where it was 63% for the United States and Canada, and 53% for Mexico and the United States, compared with a much lower 20% for the U.S.

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<sup>1</sup> Carlos Salinas de Gortari, “Mensaje de Toma de Posesión del Presidente Carlos Salinas de Gortari” in Carlos Arriola, ed, *Documentos Básicos (Tratado de Libre Comercio de América del Norte)* (Mexico: SECOFI, 1994) 3 at 13.

<sup>2</sup> OECD, *Estudios Económicos de la OCDE: México*, (Paris: OECD, 1992) at 284.

<sup>3</sup> José Córdoba, “Mexico” in John Williamson, ed, *The Political Economy of Policy Reform* (Washington: Institute for International Economics, 1994) 232 at 262.

<sup>4</sup> Francisco Gil Villegas, “Las Relaciones México-Estados Unidos en 1988-1989: Del Conflicto a la Cordialidad Pragmática” in Lorenzo Meyer, ed, *México-Estados Unidos, 1988–1989* (Mexico, El Colegio de México, 1990) 125 at 125-29.

<sup>5</sup> Trade and investment figures calculated by the authors based on M. Angeles Villarreal and Ian F. Fergusson, “The United States-Mexico-Canada Agreement (USMCA)” (27 July 2020) at 7, online (pdf): *Congressional Research Service* <fas.org/sgp/crs/row/R44981.pdf>.

<sup>6</sup> *Ibid* at 10.

and China trade.<sup>7</sup> However, regional economic relations underwent one of the most complex and contentious phases in decades during and after the 2016 presidential elections in the United States, when Donald Trump labelled *NAFTA* as “perhaps the greatest disaster trade deal in the history of the world”<sup>8</sup> and claimed it was an “unfair” agreement due to the United States’ trade deficit with Mexico, promising to renegotiate it or withdraw from it if the new agreement was unsatisfactory.<sup>9</sup>

Once in office, in April 2017, Trump was close to announcing the United States’ withdrawal from *NAFTA* without even attempting to renegotiate it.<sup>10</sup> However, on May 18, U.S. Trade Representative Robert Lighthizer informed Congress that President Trump wanted to renegotiate the agreement. Mexico and Canada had no option: bilateral consultations between the United States and Canada, and then with Mexico, started just a few weeks after this announcement.<sup>11</sup>

Compared to the original *NAFTA* negotiations, where Mexico had the initiative, in the renegotiations leading to *CUSMA*, Mexico and Canada were responding to a U.S. request. On 23 January 2017, Mexican President Enrique Peña Nieto (2012–2018) presented five principles and 10 objectives to guide the renegotiations. The five negotiating principles were: 1) national sovereignty (Mexico would defend its national interests, while recognizing the centrality of its relations with North America); 2) respect for the rule of law (which should be the basis of regional interaction); 3) constructive vision (a win-win focus, with novel and pragmatic solutions to regional issues); 4) deepening North American integration (considering that dynamism and competitiveness in the region depended on the three countries); and, 5) comprehensive negotiations (not only addressing trade and investment issues, but also immigration and security).<sup>12</sup>

The 10 negotiation objectives detailed the five principles set out above: 1) obtaining a commitment from the U.S. government to respect the rights of Mexican migrants; 2) guaranteeing that any deportation of undocumented Mexican migrants by

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<sup>7</sup> Christopher Wilson, “Growing Together: Economic Ties between the United States and Mexico: A Regional Manufacturing Platform” (October 2016) at 3, online (pdf): *Wilson Center*, <[www.wilsoncenter.org/sites/default/files/media/documents/publication/growing\\_together\\_a\\_regional\\_manufacturing\\_platform.pdf](http://www.wilsoncenter.org/sites/default/files/media/documents/publication/growing_together_a_regional_manufacturing_platform.pdf)>.

<sup>8</sup> Meera Jagannathan, “Here Are All the Terrible Things President Trump Has Said about NAFTA— Before Deciding to Stick with It”, *New York Daily News* (27 April 2017), online: <[www.nydailynews.com/news/politics/terrible-president-trump-nafta-article-1.3107104](http://www.nydailynews.com/news/politics/terrible-president-trump-nafta-article-1.3107104)>.

<sup>9</sup> *Ibid.*

<sup>10</sup> Binyamin Appelbaum and Glenn Thrush, “Trump’s Day of Hardball and Confusion on Nafta”, *The New York Times*, (27 April 2017), online: <[www.nytimes.com/2017/04/27/us/politics/trump-says-he-will-renegotiate-nafta-or-terminate-it.html](http://www.nytimes.com/2017/04/27/us/politics/trump-says-he-will-renegotiate-nafta-or-terminate-it.html)>.

<sup>11</sup> The original intent was to modernize *NAFTA* through the Trans-Pacific Partnership (*TPP*), since the three North American countries participated in the negotiations. While negotiations concluded successfully near the end of the second Obama administration, Trump decided not to present the *TPP* for ratification by the U.S. House and Senate. The renamed Comprehensive and Progressive Trans-Pacific Partnership (*CPTPP*) entered into force on 29 December 2018, with Canada and Mexico as members and the United States excluded.

<sup>12</sup> See (in Spanish): Presidencia de la República EPN, “5 Principios que guiarán la negociación con el gobierno de los EUA” (23 January 2017), online: *Gobierno de México* <[www.gob.mx/epn/es/articulos/5-principios-que-guiaran-la-negociacion-con-el-gobierno-de-los-eua](http://www.gob.mx/epn/es/articulos/5-principios-que-guiaran-la-negociacion-con-el-gobierno-de-los-eua)>.

the United States was carried out in an orderly and coordinated way; 3) working jointly with the U.S. government to promote the development of Central American countries to reduce irregular migration flows to the United States via Mexico; 4) ensuring the free flow of remittances from Mexicans in the United States, avoiding any taxes on them; 5) working with the U.S. government to stop the illegal flow of weapons and cash from illicit sources; 6) maintaining free trade between Canada, the United States and Mexico, free from all tariffs and quotas; 7) including new sectors, such as telecommunications, energy, and e-commerce, in the modernized agreement; 8) promoting better wages for Mexican workers; 9) protecting the free flow of foreign direct investment; and, 10) working together towards creating borders that unite rather than divide the countries.<sup>13</sup>

In the modernization of *NAFTA* into *CUSMA*, three strategies were employed: 1) updating (doing what should have been done during *NAFTA*'s operation); 2) upgrading (incorporating new issues); and 3) adjusting institutional design (having an agreement that evolves with future needs, as technology affects trade and investment). In this article we comparatively analyze the institutional design of *CUSMA* vis-à-vis *NAFTA*. We explore whether the updating, upgrading, and institutional design of T-MEC provides a better governance of free trade and investment in the region compared to *NAFTA*. To do so, we conduct an in-depth evaluation of both agreements. Our central argument is that there were both progress and reversals in several areas: for example, the strength and powers of dispute settlement mechanisms (DSMs), an improvement in the implementation of the working groups, changes in the flexibility or rigidity of its architecture depending on the sector analyzed, among many others discussed in detail in the article.

This article is comprised of three sections, each of them dealing with one of the three strategies (updating, upgrading, and adjusting the institutional design) under scrutiny. We present the empirical information to sustain our central argument in each of them. Finally, the conclusions present the central findings of the article and provide public policy recommendations to strengthen the governance of trade and investment in North America through *CUSMA*.

## I. Updating *NAFTA* into *CUSMA*

There are several brief yet reliable comparisons of *CUSMA* with the original *NAFTA*, which included a series of commitments to improve the agreement and deepen regional economic cooperation.<sup>14</sup> The *Trans-Pacific Partnership* (*TPP*) served as an

<sup>13</sup> See (in Spanish): Secretaría de Economía, "10 Objetivos del Gobierno de la República en la negociación con EUA" (23 January 2017), online: *Gobierno de México* <[www.gob.mx/se/articulos/10-objetivos-del-gobierno-de-la-republica-en-la-negociacion-con-eua-91974?idiom=es](http://www.gob.mx/se/articulos/10-objetivos-del-gobierno-de-la-republica-en-la-negociacion-con-eua-91974?idiom=es)>.

<sup>14</sup> Summaries of changes and an initial assessment are available at: Gary Hufbauer & Steven Globerman, "The United States—Mexico—Canada Agreement: Overview and Outlook" (November 2018), online (pdf): *Fraser Research Bulletin* <[www.piie.com/system/files/documents/hufbauer201811-usmca.pdf](http://www.piie.com/system/files/documents/hufbauer201811-usmca.pdf)>; Antonio Ortiz-Mena & Earl Anthony Wayne, "From NAFTA to the USMCA as Seen From the Southern Partnership" (2019) Winter 2019 Turkish Policy Q 25. Additional material is available at: "USMCA /

excellent starting point for both approaches. It was neither a floor nor a ceiling but a template, given the different tradeoffs in plurilateral versus regional negotiations. Some issues that were modernized using the *TPP* as reference point included services, government procurement, competition policy, labour and the environment, administrative and institutional provisions, dispute settlement, e-commerce, state-owned enterprises, cooperation and capacity building, small and medium-size enterprises, and regulatory coherence.

Our intent below is to review some *CUSMA* examples from *NAFTA* Chapters 3, 4, 7, 9, 10, 11, 15, 19 and 20, which required important upgrades.<sup>15</sup>

Under *NAFTA*'s Chapter 3, "Trade in Goods", Article 316(3), the three countries had to meet at least annually to address issues related to problems with the movement of goods across borders, while Article 317(2) provided for consultations on third-country dumping. Although trade disputes are inevitable in a relationship as intense as that in North America, concerns over unfair trade have many times been misdirected against its regional partners instead of large exporters from outside North America.<sup>16</sup> Given that the North American countries not only trade with each other, but also increasingly produce jointly, it might be better to gradually treat the region as a single market and focus on competition policy to address market distortions, instead of using and occasionally abusing anti-dumping and countervailing duties to deal with

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*NAFTA*", online: *Peterson Institute for International Economics* <[www.piie.com/research/trade-investment/usmca-nafta](http://www.piie.com/research/trade-investment/usmca-nafta)>.

<sup>15</sup> One of the most contentious issues regarding the *NAFTA* to *CUSMA* changes involves energy. *NAFTA* Chapter 6 (Energy and Basic Petrochemicals) is sometimes mistaken with *CUSMA* Chapter 8 (Recognition of the United Mexican States' Direct, Inalienable, and Imprescriptible Ownership of Hydrocarbons). In fact, energy liberalization by Mexico was grandfathered under *CUSMA* Article 32:11. See Antonio Ortiz Mena, "Punto de Inflexión en las Relaciones Económicas" in Hazel Blackmore and Olga Pellicer, eds, *Relaciones México Estados Unidos en 2021: ¿un punto de transición?* (Mexico: ITAM, 2021), online: *Foreign Affairs Latinoamérica* <<https://revistafal.com/relaciones-mexico-estados-unidos-en-2021-un-punto-de-transicion/>>. In addition, the scope and coverage of *NAFTA* commitments regarding trade in services, financial services and telecommunications was significantly modernized and further liberalized. The scope and coverage of *NAFTA* on financial services and telecommunications was very limited, largely because Mexico was in the process of privatizing its banks and its public telephone monopoly (TELMEX). For political and historical reasons, Mexico also decided to leave energy largely out of *NAFTA* negotiations (see Ortiz-Mena 2006). Since *NAFTA* was signed, Mexican banks have been privatized, and reforms to further liberalize the financial services, telecommunications and energy sectors have been incorporated into the Mexican Constitution. A good summary of *CUSMA* services provisions is available at: Global Affairs Canada, *A new Canada-United States-Mexico Agreement*, online: *Government of Canada* <[www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx?lang=eng](http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx?lang=eng)> (see agreement fact sheets).

<sup>16</sup> For example, although the three North American countries worked together at the Organization for Economic Cooperation and Development (OECD) on steel issues affecting them, including both regional production and imports from outside the region ("Steel", online: *Office of the United States Trade Representative* <[ustr.gov/issue-areas/industry-manufacturing/industry-initiatives/steel](http://ustr.gov/issue-areas/industry-manufacturing/industry-initiatives/steel)>), an investigation under Section 232 of the 1962 Trade Expansion Act generated uncertainty for aluminum and steel producers in Canada and Mexico. Canadian and Mexican producers have also been the object of numerous antidumping/countervailing duties investigations on a wide variety of steel products, and Mexican cement and cement clinker producers faced a barrage of antidumping actions for years. Although it was not the case when *NAFTA* entered into force, China is now the world's top steel and cement producer.

intra-regional trade disputes. It would also be useful to strengthen cooperation against unfair trade practices from outside the region. This would provide greater certainty for intraregional trade and investment, as well as the strengthening of regional supply chains, while protecting against extra-regional unfair trade practices.

Chapter 4, on “Rules of Origin”, was one of the main topics of the renegotiation. The objective was to set them at the right level, avoiding being so low to generate few incentives to invest in the region, or too high so existing supply chains were disrupted, and companies prefer to trade under the World Trade Organization (WTO) rules and pay most favoured nation (MFN) tariffs, bypassing *CUSMA*’s rules of origin and preferences. Though striking the right balance is technically difficult to determine and politically difficult to achieve, given the power of vested interests, preliminary research suggests that, at least for the automotive industry, *CUSMA*’s rules of origin may be too high and complex, generating unnecessary costs for producers and consumers in the region.<sup>17</sup>

Some of the most intractable disputes in the region have been over agricultural trade (*NAFTA* Chapter 7): tomatoes and sugar between Mexico and the United States; dairy and wheat between the United States and Canada. The Advisory Committee on Private Commercial Disputes regarding Agricultural Goods was to play an active role in fostering greater technical cooperation on sanitary and phytosanitary issues and facilitating dialogue to resolve agricultural disputes. However, in reality, it fell far short of that goal as ongoing disputes patently show.

Regarding Chapter 9, “Standards-Related Measures”, greater cooperation on standards, with a view to mutual recognition at a minimum and harmonization where possible was the goal, with representatives from states and provinces to participate in such deliberations. More than two decades of *NAFTA*’s entry into force, nontariff barriers and especially standards still imposed significant transaction costs on intraregional trade and investment, and little if any inroads were achieved in reducing subnational trade and investment barriers.<sup>18</sup>

In terms of government procurement (*NAFTA* Chapter 10), gaining access to subnational procurement would have been beneficial for regional providers of goods

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<sup>17</sup> William Powers and Ricky Ubee, “A Comprehensive Comparison of Rules of Origin in U.S. Trade Agreements” (2020) U.S. International Trade Commission Working Paper No 2020-05-D at 15, online (pdf): *U.S. International Trade Commission* <[www.usitc.gov/publications/332/working\\_papers/powers\\_ubeecomprehensive\\_analysis\\_of\\_us\\_roo\\_2020-05-20\\_compliant.pdf](http://www.usitc.gov/publications/332/working_papers/powers_ubeecomprehensive_analysis_of_us_roo_2020-05-20_compliant.pdf)>; Daniel Chiquiar et al, “Mexico’s Higher Costs Under USMCA May Potentially Offset Gains from China-Related Trade Spurt with U.S.” (2020), online: *Federal Reserve Bank of Dallas* <[www.dallasfed.org/research/swe/2020/swe2001/swe2001b.aspx](http://www.dallasfed.org/research/swe/2020/swe2001/swe2001b.aspx)>.

<sup>18</sup> The World Trade Organization (WTO) trade policy reviews of Canada, Mexico and the United States provide detailed information on nontariff barriers. See WTO, Secretariat, *Trade Policy Review – Canada* (17 April 2019), WTO Doc WT/TPR/S/389, online (pdf): WTO <[https://www.wto.org/english/tratop\\_e/tpr\\_e/s389\\_e.pdf](https://www.wto.org/english/tratop_e/tpr_e/s389_e.pdf)> for Canada; WTO, Secretariat, *Trade Policy Review – Mexico* (15 February 2017), WTO Doc WT/TPR/S/352, online (pdf): WTO <[www.wto.org/english/tratop\\_e/tpr\\_e/s352\\_e.pdf](http://www.wto.org/english/tratop_e/tpr_e/s352_e.pdf)> for Mexico; WTO, Secretariat, *Trade Policy Review – United States* (12 November 2018), WTO Doc WT/TPR/S/382, online (pdf): WTO <[https://www.wto.org/english/tratop\\_e/tpr\\_e/s382\\_e.pdf](https://www.wto.org/english/tratop_e/tpr_e/s382_e.pdf)> for the United States.



and services, especially small businesses; granting subnational access to North American companies would provide new business opportunities for these companies and increase transparency, which would help combat corruption at the subnational level. Even if the *Buy American* Provisions of the 2009 *American Recovery and Reinvestment Act* included exceptions for *NAFTA*,<sup>19</sup> complex regulations still represented significant barriers to access to certain tenders, while small business procurement programs had meager advances, and many subnational barriers remained. The goals of Chapter 10 were never fully achieved; public procurement by subnational governments was never dealt with seriously. *CUSMA* improved access for small businesses, creating more employment opportunities, but subnational barriers to procurement remain. Also, on January 25, President Biden issued an executive degree to foster U.S. government purchases of U.S. goods and services and provided no exceptions or preferences for its *CUSMA* partners.<sup>20</sup>

In competition policy, *NAFTA* Chapter 15 served as a template for *CUSMA*. As intra-industry and intra-firm trade increased in the region, the three countries should have gradually focused more on competition policy to deal with trade distortions, instead of antidumping/countervailing duty measures, perhaps moving gradually toward a common external tariff (CET) in highly integrated industries, but that was not the case.<sup>21</sup> Article 1504 established a Working Group on Trade and Competition to address issues regarding the link between competition laws and trade in the region, but was a missed opportunity.

Dispute settlement was covered in Chapter 11, Section B, “Settlement of Disputes between a Party and an Investor of Another Party”, Chapter 19, “Review and Dispute Settlement in Antidumping/Countervailing Duty Matters”, and Chapter 20 “Institutional Arrangements and Dispute Settlement Procedures,” in addition to specialized procedures for labour and environmental disputes. Rules on investor-State disputes (ISDS) became one of the most contentious issues under *NAFTA*<sup>22</sup> and the Trump administration wanted to eliminate or significantly weaken protections, seeing them as an unfair incentive to outsource production from the United States into lower-cost Mexico. A compromise solution was reached by retaining ISDS but limiting its scope to extractive industries and infrastructure, doing away with it for Canada-U.S. investment

<sup>19</sup> See “Buy American Provisions in the American Recovery and Reinvestment Act (ARRA)” (3 April 2009), online (pdf): *National Conference of State Legislatures* <[www.ncsl.org/print/statefed/BuyAmericanGuidanceSummary.pdf](http://www.ncsl.org/print/statefed/BuyAmericanGuidanceSummary.pdf)> and Canada, Trade Commissioner Service, “The Buy American Act and Buy America Provisions”, online: *Trade Commissioner Service* <[trade commissioner.gc.ca/sell2usgov-vendreaugouusa/procurement-marches/buyamerica.aspx?lang=eng](http://trade commissioner.gc.ca/sell2usgov-vendreaugouusa/procurement-marches/buyamerica.aspx?lang=eng)>.

<sup>20</sup> The White House, Briefing Room—Presidential Actions, “Executive Order on Ensuring the Future Is Made in All of America by All of America’s Workers” (25 January 2021), online: *The White House* <[www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/executive-order-on-ensuring-the-future-is-made-in-all-of-america-by-all-of-americas-workers/](http://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/executive-order-on-ensuring-the-future-is-made-in-all-of-america-by-all-of-americas-workers/)>.

<sup>21</sup> For a recent discussion of intra-industry and intra-firm trade in North America, see Christopher Wilson, “Growing Together: Economic Ties between the United States and Mexico” (March 2017), online (pdf): *Wilson Center—Mexico Institute* <[www.wilsoncenter.org/sites/default/files/media/documents/publication/growing\\_together\\_economic\\_ties\\_between\\_the\\_united\\_states\\_and\\_mexico.pdf](http://www.wilsoncenter.org/sites/default/files/media/documents/publication/growing_together_economic_ties_between_the_united_states_and_mexico.pdf)>.

<sup>22</sup> Public Citizen, “Ending the corporate power grab of Investor-State Dispute Settlement”, online: *Public Citizen* <[www.citizen.org/article/more-information-on-investor-state-dispute-settlement/](http://www.citizen.org/article/more-information-on-investor-state-dispute-settlement/)>.

disputes, and retaining an additional ISDS mechanism for Canada-Mexico disputes via the *Comprehensive and Progressive Trans-Pacific Partnership CPTPP*.<sup>23</sup> Thus, there are three sets of rules governing ISDS in North America, which creates unnecessary complexity and uncertainty, and hinders a North American investment strategy for corporations.

Some U.S. congressional leaders called for the elimination of Chapter 19,<sup>24</sup> on “Review and Dispute Settlement in Antidumping and Countervailing Duty Matters”, but for Canada, its elimination was a deal breaker, and it was retained. This provides a unique advantage for Canada and Mexico, for the U.S. has not granted equivalent rights to other countries.

*NAFTA*’s Chapter 20, on “Institutional Arrangements and Dispute Settlement Procedures”, was almost left with a critical design flaw which allowed any of the three parties to block the establishment of a panel. The inter-state dispute settlement mechanism in *NAFTA*, over interpretation and application of the agreement, did not function well in part because of difficulties in panellist selection.<sup>25</sup> In *CUSMA*, the problem was fixed with the new *CPTPP* template, placing greater emphasis on consultations, good offices, conciliation, mediation, and alternative dispute resolution over arbitration, and avoiding the ability to block the establishment of a panel. It is in all three countries’ interest to ensure prompt and effective redress and to forestall potentially frivolous actions. The *CUSMA* text that was signed in November 2018 did not include the fix,<sup>26</sup> and it was only under the *Protocol of Amendment to the CUSMA* that the issue was resolved. Now, it is no longer possible for Canada, Mexico, or the United States to block the establishment of a panel regarding the interpretation or application of the agreement by refusing to accept specific panellists.<sup>27</sup>

In the areas of labour and the environment, *NAFTA*’s side agreements were cutting edge when they were signed, but they had been frozen in time. Since the *status quo* was unsustainable, not only for the United States but also for more vibrant Mexican and Canadian civil societies, Mexico undertook a constitutional reform to make labour laws more flexible and democratizing union representation and labour dispute resolutions.<sup>28</sup> The *CPTPP* template was as inspiration used for both labour and the

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<sup>23</sup> Antonio Ortiz-Mena and Earl Anthony Wayne, *supra* note 14.

<sup>24</sup> See, for example, U.S., Senate Committee on Finance, *Wyden Statement on NAFTA Renegotiation Notice* (18 May 2017), online: *United States Senate Committee on Finance* <[www.finance.senate.gov/ranking-members-news/wyden-statement-on-nafta-renegotiation-notice](http://www.finance.senate.gov/ranking-members-news/wyden-statement-on-nafta-renegotiation-notice)>.

<sup>25</sup> Gary C. Hufbauer and Jeffrey J. Schott, “NAFTA Revisited” (1 October 2007), online: *Peterson Institute for International Economics* <[www.piie.com/commentary/speeches-papers/nafta-revisited](http://www.piie.com/commentary/speeches-papers/nafta-revisited)>.

<sup>26</sup> Bill Chappell, “USMCA: Trump Signs New Trade Agreement With Mexico And Canada To Replace NAFTA”, *npr* (30 November 2018), online: <[www.npr.org/2018/11/30/672150010/usmca-trump-signs-new-trade-agreement-with-mexico-and-canada](http://www.npr.org/2018/11/30/672150010/usmca-trump-signs-new-trade-agreement-with-mexico-and-canada)>.

<sup>27</sup> Office of the United States Trade Representative, “Protocol of Amendment to the United States-Mexico-Canada Agreement” at 9–12, online (pdf): *Office of the United States Trade Representative* <[ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Protocol-of-Amendments-to-the-United-States-Mexico-Canada-Agreement.pdf](http://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Protocol-of-Amendments-to-the-United-States-Mexico-Canada-Agreement.pdf)>.

<sup>28</sup> Secretaría del Trabajo y Previsión Social, “Reforma en materia de Justicia Laboral” (27 June 2017), online: *Gobierno de México* <[www.gob.mx/stps/documentos/reforma-en-materia-de-justicia-laboral?idiom=es](http://www.gob.mx/stps/documentos/reforma-en-materia-de-justicia-laboral?idiom=es)>.

environment. The aim was to increase the range and depth of labour and environmental commitments without opening the door to unwarranted new trade barriers.<sup>29</sup> In addition, some Mexican companies were concerned about unfair competition if U.S. environmental regulations became increasingly lax under the Trump administration, generating unfair competition. The Trump administration did reverse commitments on carbon emission reductions required by the Obama administration's *Clean Power Plan* and withdrew the U.S. from the *Paris Agreement on Climate Change*. In contrast, the Peña Nieto administration stated its commitment to the *Paris Agreement* and to continued implementation of its *Intended Nationally Determined Contributions* (INDC) and its *National Climate Change Strategy*. It is not clear if the López Obrador (2018–2024) will maintain this commitment.

Under the *CUSMA*, labour and environmental disputes are brought under the purview of this general DSM, instead of retaining their own very weak provisions, and for labour disputes an additional expedited DSM process was established.<sup>30</sup> While having more ambitious environmental commitments, *CUSMA* was a missed opportunity given Trump's climate skepticism agenda. Having enforceable environmental and labour commitments is a positive development, for *CUSMA* will be more shielded than *NAFTA* was against criticism of a "race to the bottom" in labour and environmental standards. Regarding labour, only time will tell if the novel expedited labour DSM is correctly used or abused, given the incentive for disgruntled unions or business competitors to file anonymous complaints via a U.S. Department of Labor hotline.<sup>31</sup> In addition, the expedited mechanism will not apply for U.S.-Canada labour disputes.

## II. How *CUSMA* upgraded *NAFTA*

While updating *NAFTA* entailed bringing it up to date with topics that had been originally covered, upgrading meant the inclusion of new topics, something that was badly needed as the original negotiations concluded in 1993, when trade in services were not so relevant and the fourth industrial revolution was difficult to foresee.<sup>32</sup>

E-commerce was a new issue included in *CUSMA*, and the negotiations focused on the digital economy entirely, not only on e-commerce (*CUSMA* Chapter 19). Commitments on regulatory cooperation on norms affecting e-commerce are a more effective way to deal with nontariff barriers in this area. Also, creating new trade and investment opportunities for small and medium-size enterprises in North America (*CUSMA* Chapter 25) can have a positive effect on employment and garner greater

<sup>29</sup> One issue that could remain controversial is an insistence on specific wage levels in Mexico, devoid of any links to productivity increases.

<sup>30</sup> "United States—Mexico—Canada Trade Fact Sheet—Modernizing NAFTA into a 21st-century Trade Agreement", online: *Office of the United States Trade Representative* <[ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/modernizing](http://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/modernizing)>.

<sup>31</sup> Bureau of International Labor Affairs, "USMCA Web-Based Hotline", online: *U.S. Department of Labor* <[www.dol.gov/agencies/ilab/our-work/trade/labor-rights-usmca/hotline](http://www.dol.gov/agencies/ilab/our-work/trade/labor-rights-usmca/hotline)>.

<sup>32</sup> Klaus Schwab, "The Fourth Industrial Revolution: What it Means, How to Respond" (14 January 2016), online: *World Economic Forum* <[www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/](http://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/)>.

political support for the agreement going forward.<sup>33</sup> It also creates more stakeholders with an interest in maintaining a constructive economic agenda between Canada, Mexico and the United States.

On administrative issues, regulatory coherence was covered in *NAFTA*, but only to a limited extent; most political capital was spent on negotiations over tariffs and rules of origin. The deep integration that now exists in North America translates into high opportunity costs from inconsistent or incompatible regulations. Both Mexico and the United States have recognized it. In 2010, they launched the High-Level Regulatory Cooperation Council, and in 2013, they established the High-Level Economic Dialogue, which included regulatory cooperation. Advances have been modest, however. In *CUSMA* Chapter 28 (Good Regulatory Practices), there are more ambitious and specific commitments on regulatory coherence.

The three countries also worked on stronger commitments on transparency and anticorruption in *CUSMA*'s Chapter 27. The Mexican Competitiveness Council (IMCO), one of the leading think tanks in Mexico, has made fighting corruption and promoting transparency the thrust of its work on competitiveness.<sup>34</sup>

In short, starting from a premise of no new tariffs or quotas, *CUSMA* increased the certainty of access to the three national markets with updated rules on pre-existing coverage while including new issues, including digital trade, SMEs, competitiveness, anticorruption, and good regulatory practice, among others. *CUSMA* is both an upgrade and an update of *NAFTA*.

### III. The Evolution of *NAFTA*'s institutional Design into *CUSMA*

*NAFTA* was a quarter-century old when its renegotiation started. Even its strongest supporters recognized that it was dated and due for an upgrade.<sup>35</sup> Two possible ways to modernize *NAFTA* were not fully used. The first was using provisions in *NAFTA* to deepen commitments and further cooperation (as described in the section on updating *NAFTA*). That channel would have addressed some challenges, but the changes would have been relatively modest. The second was using the *TPP* to modernize *NAFTA*. That channel closed when the Trump administration decided not to submit the *TPP* for legislative ratification.

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<sup>33</sup> The three North American governments committed to review *CUSMA* every six years, and to comply with a 16-year so-called sunset clause whereby the agreement would terminate after 16 years unless the parties agree otherwise. See *Canada-United States-Mexico Agreement*, Canada, United States and Mexico, 30 November 2018, art 34.7 (entered into force 1 July 2020).

<sup>34</sup> See, for example, Juan E. Pardini, "Impunidad, corrupción y competitividad", in Instituto Mexicano para la Competitividad A.C., *La corrupción en México: Transamos y no avanzamos*, (Mexico: IMCO, 2015) 15, online: *IMCO* <[imco.org.mx/indices/la-corrupcion-en-mexico/capitulos/analisis/impunidad-corrupcion-y-competitividad](http://imco.org.mx/indices/la-corrupcion-en-mexico/capitulos/analisis/impunidad-corrupcion-y-competitividad)>.

<sup>35</sup> Andrew Chatzky, James McBride & Mohammed Aly Sergie, "NAFTA and the USMCA: Weighing the Impact of North American Trade" (1 July 2020), online: *Council on Foreign Relations* <[www.cfr.org/backgrounder/naftas-economic-impact](http://www.cfr.org/backgrounder/naftas-economic-impact)>.

The negotiations of *CUSMA* were a third way to modernize *NAFTA* to take advantage of the convergence of physical, biological and digital technologies, which some have labelled the “fourth industrial revolution”.<sup>36</sup> The McKinsey Global Institute identified 12 technologies that could change production and trade and include the mobile Internet, the automation of knowledge work, the Internet of things, the cloud, advanced robotics, autonomous vehicles, genomics, energy storage, 3-D printing, advanced materials, advanced oil and gas exploration and recovery, and renewable energy.<sup>37</sup> No one knows how the North American economy will look a quarter-century from now, but it is a safe bet that the transformation will be greater than the one that took place during the past quarter-century. Unless *CUSMA* is more flexible than *NAFTA*, many provisions could become obsolete. The *TPP* did not fully consider the potential of vertiginous technological change and *CUSMA* offered a second opportunity to do so.

The main objective of *CUSMA* is the same as in *NAFTA*: to create a set of stable, predictable, and clear rules on trade, investment, and related issues to foster greater economic interaction and prosperity in North America. This sounds simple enough, but aside from the sheer number and complexity of issues involved in a modern trade agreement,<sup>38</sup> there remains the question about how the agreement should evolve considering technological, economic, regional, or global political geopolitical circumstances.

If an agreement is, to use a well-worn expression “set in stone”, then it may be too rigid to accommodate necessary upgrades. *NAFTA* was a case in point, and the amount of political capital spent within each country and then between the three countries on upgrading it through the *CPTPP* and, once the Trump administration decided not to submit it to ratification, via the *CUSMA*, was enormous. There is no appetite to go through that painful process again. At the other extreme, if an agreement is “writ in water”<sup>39</sup> and evanescent, it will not create enough predictability and stability of rules to foster regional trade and investment, especially in fixed assets.<sup>40</sup> It is difficult to determine the right balance, and perhaps more so to achieve it.

As we mentioned, *NAFTA* did have several commitments for upgrade, many of which came to naught. Specifically, it also established about twenty working groups and committees to assist in the implementation, functioning and updating of the agreement.

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<sup>36</sup> Doug Gates and Michael Bremicker, “Beyond the Hype: Separating Ambition from Reality in i4.0” (2017) at 2, online (pdf): *KPMG International* <assets.kpmg.com/content/dam/kpmg/xx/pdf/2017/05/beyond-the-hype-separating-ambition-from-reality-in-i4.0.pdf>.

<sup>37</sup> James Manyika et al., “Disruptive Technologies: Advances that Will Transform Life, Business, and the Global Economy” (1 May 2013), online: *McKinsey Global Institute* <www.mckinsey.com/business-functions/digital-mckinsey/our-insights/disruptive-technologies>.

<sup>38</sup> *NAFTA* has 22 chapters and two so-called side agreements on labour and the environmental, whereas *CUSMA* has 34 chapters and 16 side letters, in addition to a protocol amending *CUSMA*.

<sup>39</sup> Ian Reynolds, “The Gravestone of John Keats: Romancing the Stone” (16 April 2018), online: *Wordsworth* <wordsworth.org.uk/blog/2018/04/16/the-gravestone-of-john-keats-romancing-the-stone/>.

<sup>40</sup> Antonio Ortiz Mena L. N., *The Politics of Institutional Choice International Trade and Dispute Settlement Mechanisms* (International Law, University of California, 2001) [unpublished].

Information on which *NAFTA* working groups and committees were in fact established, how frequently they met and their performance is hard to come by, at least by what was available at the *NAFTA* Secretariat website and via the new *CUSMA* Secretariat website.<sup>41</sup> The OAS's Foreign Trade Information System has *NAFTA Free Trade Commission Joint Statements* and related information with references to the working groups for 1997, 1998, 1999, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2009, 2011 and 2012<sup>42</sup>. This can indicate that either there were no Free Trade Commission or Working Groups meetings in 1994, 1996, 2000, 2008, 2010 and from 2013 to 2020, which seems unlikely, or that the information has not been made easily available to the public.

A review of several joint statements shows that, based on frequency of reference, the most active working group was that on rules or origin, followed by those on investment, textiles, trade in goods, steel, steel, textiles, private commercial disputes, temporary entry of businesspersons, SMEs, and labour and environmental issues. Except for rules or origin changes, there is scant detail on the specific recommendations, actions and effectiveness thereof of the meetings carried out by other working groups.

It is interesting to note that the 2007 *Joint Statement* mentions a commitment to promote a work plan for North American competitiveness, and revisit and strengthen the working group work programs, while the 2009 statement calls for a strengthening of institutions, communication and transparency, and to establishing a Working Group on Communication and Outreach<sup>43</sup>. In the *CUSMA*, the number of working groups and committees increased, covering more than half of its chapters. This is probably the best way to guarantee that the agreement can evolve with changing realities in the region, constantly updating it not through renegotiations requiring legislative approval, but through the consultations and cooperation within these working groups. However, to do so, they must meet regularly and establish institutionalized mechanisms to update, upgrade, and adjust *CUSMA*'s institutional design to reflect the evolving reality in North America's integrated supply chains, lest the agreement becomes obsolete in several areas despite the flexibility awarded by the working groups.

The three North American countries committed to review *CUSMA* every six years, and to comply with a 16-year so-called sunset clause whereby the agreement would terminate after 16 years unless the parties agree otherwise. This novel mechanism will hopefully avoid administration of the agreement to go into "auto pilot", as happened on occasion during *NAFTA*, and especially to have

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<sup>41</sup> "The Secretariat", online: *The Secretariat Canada-Mexico-United States* <[can-mex-usa-sec.org/secretariat/index.aspx?lang=eng](http://can-mex-usa-sec.org/secretariat/index.aspx?lang=eng)>.

<sup>42</sup> "Canada-Mexico-United States (NAFTA)" (last visited 14 July 2021), online: *OAS SICE Foreign Trade Information System* <[www.sice.oas.org/tpd/nafta/nafta\\_e.asp](http://www.sice.oas.org/tpd/nafta/nafta_e.asp)>.

<sup>43</sup> NAFTA Commission, "Joint Statement" (14 August 2007), online (pdf): *OAS SICE Foreign Trade Information System* <[www.sice.oas.org/tpd/nafta/Commission/2007meeting\\_e.pdf](http://www.sice.oas.org/tpd/nafta/Commission/2007meeting_e.pdf)>; NAFTA Commission, "Joint Statement" (28 October 2009), online (pdf): *OAS SICE Foreign Trade Information System* <[www.sice.oas.org/tpd/nafta/Commission/2009meeting\\_e.pdf](http://www.sice.oas.org/tpd/nafta/Commission/2009meeting_e.pdf)>.

something to show for in terms of working group and committee achievements at the first six-year review.<sup>44</sup>

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As we argued in this article, three strategies were employed in the modernization of *NAFTA* into *CUSMA*: updating, upgrading, and adjusting its institutional design. We explored whether these strategies have provided a better governance of free trade and investment in North America in three issue areas: DSMs, working groups and institutional architecture. After an in-depth evaluation of *NAFTA* and *CUSMA*, we found that there were both progress and reversals in DSMs, an improvement in working groups and variable changes in the flexibility or rigidity of its architecture depending on the sector.

As we discussed in this article, the issues covered by the agreement are numerous and complex: it changed from the 22 *NAFTA* chapters to the 34 of the *CUSMA*, with its Amending Protocol, annexes, and parallel letters. However, some issues have not received the same degree of attention as labour issues and rules of origin; the *CUSMA* working groups and Chapter 26 on competitiveness are a case in point.

*NAFTA* contained some twenty working groups and committees on issues as diverse as trade in goods, rules of origin, customs procedures, agriculture, temporary entry of businessperson and government procurement, among others. These working groups and committees were not always fully exploited; for example, there was an Advisory Committee on Private Trade Disputes on Agricultural Products that should have proposed recommendations for effective solutions to agricultural disputes, but after a quarter-century of operation, agricultural disputes between North American countries were as high as at the beginning; the Working Group on Temporary Entry was also going to look for ways to make it easier for businesspeople to move freely in the region, but the temporary entry agreement remained somewhat frozen over time in terms of the professions and activities covered.

The lack of adequate use was not because of the poor design of *NAFTA* but because these working groups were not used. Fortunately, the *CUSMA* has working groups and committees in many of its 34 chapters, and some of them offer the opportunity for civil society to contribute its knowledge and recommendations. Some of the topics covered are agriculture, textiles, customs, transport, telecommunications, financial services, SMEs, and competitiveness.

Given the severe recession facing North America, aggravated by the COVID-19 pandemic (at the time of writing, the U.S. is the country with the highest

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<sup>44</sup> Canada-United States-Mexico Agreement. *supra* note 33.

absolute number of deaths, and Mexico the third),<sup>45</sup> the region's competitiveness will need to be strengthened to attract as much investment as possible, and seek a rapid recovery in economic growth and employment in the region.

How could the North American Competitiveness Committee be used to attract investment to the region? Firstly, endeavouring that the Committee should meet, virtually, as soon as possible, and not wait for the whole year provided by the *CUSMA* to take place. Second, the *CUSMA* allows the Committee to seek advice, consider the work of experts and establish a mechanism for interested persons to present their ideas to improve *competitiveness*. It can therefore seek opinions and recommendations from civil society; it is not a question of governments having all the answers. The private sector and civil society can and must seize the opportunity for participation offered by the *CUSMA* committees and working groups, not only in competitiveness but in all the issues they cover.

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<sup>45</sup> Coronavirus Resource Centre, "Global Map", online: *John Hopkins University & Medicine* <[coronavirus.jhu.edu/map.html](https://coronavirus.jhu.edu/map.html)>.