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The Protection of Environmental Law under NAFTA and CUSMA: A Canadian Perspective Student Articles and Notes

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THE PROTECTION OF ENVIRONMENTAL LAW UNDER NAFTA AND CUSMA: A CANADIAN PERSPECTIVE

George Moshenski-Dubov[†]

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I. INTRODUCTION

On July 1, 2020, the Canada–United States–Mexico Agreement (hereinafter “CUSMA”)¹ came into effect, replacing the existing North American Free Trade Agreement (hereinafter “NAFTA”).² Just like its predecessor NAFTA, CUSMA is a trilateral trade deal that eliminates and reduces most barriers to trade and investment between the three largest North American countries. Largely, this permits for the more efficient, expedient, and cheaper movement of goods and services between Canada, the United States, and Mexico (hereinafter “the Parties”). While CUSMA has been in effect since July 1, 2020, NAFTA had been in operation for 26 years, from January 1, 1994. At the time of NAFTA’s formation, it was a pioneer for large-scale free trade agreements, creating one of the world’s largest trade blocs in the world. While the main motivations behind both trade deals have been for economic and commercial purposes, the environment has also been a topic of concern before the signing of NAFTA and during the renegotiation of CUSMA. Most notably, the United States Trade Representative has referred to provisions in CUSMA as “the most advanced, most comprehensive, highest-standard chapter on the Environment of any trade agreement.”³ Thus, this begs the question, how have free trade agreements in North America, such as NAFTA and CUSMA, affected the environment? Given the multinational reach of these agreements, this research will be analyzed through a Canadian lens. This question is imperative given the importance of swift national-level environmental action to limit the effects of climate change.

This paper will begin by providing a history of NAFTA and its environmental provisions and developments. The effects of these provisions will then be examined to demonstrate the environmental outcomes of NAFTA. Third, a comparative analysis will be undertaken looking at the similarities and differences in environmental provisions between NAFTA and CUSMA. This paper will conclude by providing an outlook of the future environmental effects of CUSMA.

II. NAFTA HISTORY

NAFTA as we know it started with a bilateral agreement between Canada and the United States. On October 4, 1987, the countries signed the Canada-United

¹ Referred to as the USMCA in the United States, CUSMA/USMCA are used interchangeably. The author of this paper has determined to use CUSMA consistently throughout given the context and location of the writing.

² A New Canada-United States-Mexico Agreement, 32 I.L.M. 3 (2020), available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> [hereinafter “CUSMA”]; North American Free Trade Agreement, 32 I.L.M. 289 and 605, Ch. 11 (1993) [hereinafter “NAFTA”].

³ Office of the United States Trade Representative, *UNITED STATES–MEXICO–CANADA TRADE FACT SHEET Modernizing NAFTA into a 21st Century Trade Agreement*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (October 2018), ustr.gov/about-us/policy-offices/press-office/fact-sheets/2018/october/united-states%E2%80%93mexico%E2%80%93canada-trade-fa-1 [<https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2018/october/united-states%E2%80%93mexico%E2%80%93canada-trade-fa-1>].

States Free Trade Agreement (the “CUSFTA”) which came into effect in 1989.⁴ Shortly thereafter, in the early 1990s, Mexican President Carlos Salinas de Gortari approached the United States and President George H. W. Bush in the hopes of creating a similar bilateral agreement between the two countries. Despite having limited interest in creating a trade deal with Mexico, Prime Minister Brian Mulroney joined the negotiations between President Bush and President Salinas. From Canada’s perspective, the creation of a trilateral agreement after the signing of CUSFTA was a defensive tactic to limit the outcomes of sharing the country’s preferential access to the United States with Mexico. In other words, if Mexico and the United States had agreed to a comparable bilateral trade agreement to CUSFTA, then it was believed that Canada would lose many of the benefits it had gained from its original agreement. As such, joining the discussions would allow Canada to voice its concerns and desires. After 14 months of negotiations, the agreement was signed by all three countries in 1992.⁵

When President Bill Clinton was elected in 1993, he endorsed NAFTA, but demanded the inclusion of two new accords to enforce labor and environmental laws.⁶ The environmental accord, named the North American Agreement on Environmental Cooperation (the “NAAEC”), was a seven-part treaty that was signed by all three members on September 14, 1993, and came into force with NAFTA on January 1, 1994.⁷

A. *North American Agreement on Environmental Cooperation*

While the NAAEC is a separate side-treaty, its ratification by the Parties is a direct result of NAFTA. As the NAAEC is divided into seven parts spanning 51 articles, it is most effective to examine each part individually.

1. Objectives

Part One, Objectives, is one of the shortest sections of the NAAEC. However, it does importantly outline the goals of the treaty. The primary objectives of the NAAEC are to “foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations” and “promote sustainable development based on cooperation and mutually supportive environmental and economic policies.”⁸

2. Obligations

Part Two builds off the previous section and sets out the obligations and requirements for the Parties. These obligations include individual and

⁴ Canada-U.S. Free Trade Agreement, Can.-U.S., Oct. 4 1987, 27 I.L.M. 2.

⁵ Laura Macdonald, *Canada and NAFTA*, THE CANADIAN ENCYCLOPEDIA (16 September 2020), www.thecanadianencyclopedia.ca/en/article/north-american-free-trade-agreement-nafta.

⁶ Los Angeles Times, *Accord Reached on NAFTA Enforcement: Trade: Resolution of environmental and labor issues clears the way for Clinton to seek congressional approval*, LOS ANGELES TIMES ARCHIVES (13 August 1993), www.latimes.com/archives/la-xpm-1993-08-13-fi-23373-story.html [www.latimes.com/archives/la-xpm-1993-08-13-fi-23373-story.html].

⁷ North American Agreement on Environmental Cooperation, 32 I.L.M. 6, (1993) [hereinafter NAAEC].

⁸ *Id.* at art. 1(a)-(b).

collaborative approaches to protecting the environment. For the latter, Part Two of the NAAEC recommends the Parties work together to stop the exportation of pesticides or toxic substances if one of the members adopts a measure restricting its use. Part Two also addresses the responsibility of each individual Party member, such as Article 5, which outlines that “With the aim of achieving high levels of environmental protection and compliance with its environmental laws and regulations, each Party shall effectively enforce its environmental laws and regulations through appropriate governmental action . . . ”⁹

3. Commission for Environmental Cooperation

Part Three of the NAAEC establishes the Commission for Environmental Cooperation (“the Commission”) as well as its Council, Secretariat, and Advisory Committees. For this research question, it is sufficient to acknowledge this formation, as well as the Council’s ability to develop recommendations regarding pollution, sustainable development, protection of animals and ecosystems, and data analysis. However, as with much of International Law, the Commission lacks the authoritative power to unilaterally make changes, resulting in recommendations and reports to the Parties as its sole influence.¹⁰

4. Cooperation and Provision of Information

Part Four outlines the agreement between the Parties to cooperate and share relevant information. This cooperation includes sharing information relating to violations of environmental law or a Party’s internal measures that may affect the agreement. However, this is not a mandatory requirement, as a Party may choose to forego cooperation or sharing of information if they provide the Commission with reasoning.¹¹

5. Consultation and Resolution of Disputes

Consultation and Resolution of Disputes is the longest section of the NAAEC. The purpose of Part Five is to allow the Parties to bring complaints against the other NAAEC members for failing to effectively enforce environmental provisions and laws. Important to note, the complaint must be related to environmental law associated with the trade of goods subject to NAFTA. Article 24 grants the Council the right to convene an arbitral panel to consider the matter. If it has been determined that the Party has demonstrated a persistent pattern of failure to abide by environmental law, the panel may propose a plan for the Party to remedy the non-enforcement and may impose a monetary enforcement assessment. According to proponents of the NAAEC, the penalties under Part Five “would be primarily symbolic”.¹² Penalties could not be in an amount higher than \$20 million USD and

⁹ *Id.* part 2.

¹⁰ *Id.* part 3.

¹¹ *Id.* at 4.

¹² Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treaty-making*, Intl & Comp L.J. 8, 8 (1994).

would be paid to the Commission to “improve the environment or environmental law enforcement” in the offending country.¹³

6. General Provisions and 7. Final Provisions

Part Six and Seven of the NAAEC outline general and final provisions such as definitions, funding requirements, and privileges. For the purposes of this paper, these sections do not need further explanation.

In summary, the NAAEC came into force as public concern over the negative effects of NAFTA led to former President Bill Clinton dedicating a side accord. According to Stephen P. Mumme of the Institute for Policy Studies, “Environmental concerns were afterthoughts to NAFTA, forced on the governments by environmental and labor groups.”¹⁴ While the NAAEC was established to focus on and make recommendations to the Parties to benefit the environment, it does demonstrate a consistent theme: environmental policies are not subjects of main agreements and are instead set aside into their own side-treaties. Without the post-factum addition of NAAEC, NAFTA lacks any environmental provisions apart from the mention of environmental preservation and regulation in the preamble, which were added at the same time as the NAAEC. This is exceptionally dangerous given that Canada and the United States are developed nations signing a free trade agreement with Mexico, a developing country whose environment policies are weak at risk of exploitation.

III. NAFTA EFFECTS ON ENVIRONMENT

Despite the existence of the NAAEC, NAFTA has led to mixed implications for the environment. Over the span of NAFTA’s 26 years, it has led to changes in the amount of pollution produced, has led to destructive practices, and has created barriers for the Parties to enforce protective policies.

Pollution

The topic of NAFTA-related pollution has been a contentious one for academics. While some scholars believe NAFTA and the NAAEC have led to decreased emissions and more efficient trade, others have argued that the agreement has been an ecological disaster. At the time of writing, NAFTA ceased to exist just over a year ago and, as such, many of its effects are not yet understood. However, the available literature has been collected and analyzed to provide consensus on the known pollutive effects of NAFTA.

Air

One of the most harmful effects of free trade is the increased transportation of goods between borders. Often trade is conducted through truck transportation, which can negatively affect air quality. This is most prominent in hot zones, such as land surrounding the borders. However, research conducted by the United States

¹³ *Id.*

¹⁴ Stephen P Mumme, *NAFTA and Environment*, INSTITUTE FOR POLICY STUDIES (1 October 1999), ips-dc.org/nafta_and_environment/.

Environmental Protection Agency has demonstrated that between 1990 and 2018, air quality has improved in American border cities.¹⁵ While this is a positive indication, it can be partially explained by the innovation of commercial freight trucks becoming cleaner and the investment into border crossings to alleviate congestion and long idling times, factors that are not a result of NAFTA.¹⁶ Further, while American cities such as El Paso, and San Diego, have seen cleaner air, Mexican cities demonstrate opposing data. One study compared the industrial hazards, such as air pollution, between El Paso and its bordering Mexican city, Ciudad Juárez. This research concluded with findings demonstrating residents in Ciudad Juárez faced industrial hazards at a rate 24 times higher than El Paso. The statistical difference between these two neighbouring cities is a result of El Paso's deindustrialization, as NAFTA pushed these industries and factories south in search of cheaper labor and less regulated environmental laws.¹⁷ In other words, while NAFTA investments have had positive effects on the United States with more efficient freight options and border crossings, Mexico has experienced a growth in its harmful and pollutive industries. Moreover, Canada has also experienced an increase in air pollution, specifically in border cities, further confirming that the increase in freight transportation has led to worsening air pollution.¹⁸

Water

NAFTA benefited many communities along the Mexican American border as clean water access and supply have increased, especially for farm workers and in rural communities. This is largely a result of necessity, as NAFTA has opened the gates for increased trade and cheaper farming and manufacturing. As a result, water access needed to be increased to allow border cities to become integral parts of the new supply chain.¹⁹ Predictably, as industrialization increased south of the American border, so too did pollution. Most notably, Canadian mining companies found a favorable home in Mexico after the signing of NAFTA. "Liberalization of the mining sector was wide and swift, opening the possibility to export principally to the United States under preferential conditions."²⁰ With mining comes the risk of ecological disasters, specifically as it pertains to harming water reserves. In 2014, Grupo Mexico, a Mexican mining company, spilled over 14,000 tons of copper sulfate acid solution into the Bacanuchi and Sonora rivers, affecting 22,000

¹⁵ Fiona Gladstone et al, *NAFTA and environment after 25 years: A retrospective analysis of the US-Mexico border*, 119 *Enviro. Sci. & Pol.* 18, 23 (2021); *Air Quality - Cities and Counties*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (5 May 2021), www.epa.gov/air-trends/air-quality-cities-and-counties [EPA Air Quality].

¹⁶ EPA Air Quality, *supra* note 15 at 23.

¹⁷ Sara E Grineski, *Environmental Injustices in Transnational Context: Urbanization and Industrial Hazards in El Paso/Ciudad Juárez*, 42 *Envir. & Plan.* 1308, 1321 (2010).

¹⁸ GOVERNMENT OF CANADA: NORTH AMERICAN FREE TRADE AGREEMENT NEGOTIATIONS – INITIAL ENVIRONMENTAL ASSESSMENT (2018), available at <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/initial_ea-ee_initiale.aspx?lang=eng>.

¹⁹ Gladstone, *supra* note 15 at 24.

²⁰ María Teresa Gutiérrez Haces, *The Growing Presence of Canadian Mining Companies in Mexico and the Dominance of Mexican Business Groups*, 7 *Lat. Am. Pol.* 241, 246 (2016).

residents and causing the worst ecological disaster of its kind in Mexico.²¹ Further, some scholars have argued that resource management and environmental protection take a back seat to the economic interests of profits.²² In other words, as NAFTA decreased the barriers to trade, companies, such as those in the mining industry, took to Mexico for new ventures, cheaper labor, and weaker regulations. Thus, this led to the contamination and pollution of the Mexican water supply.

Land

Apart from the abovementioned forms of pollution that can also affect land, such as ecological disasters, the stripping of land for new factories, and the dumping of resources and waste, NAFTA has led to the increase of land protection in Mexico. Between 1992 and 2018, Mexico's protected areas increased by 11.5%, largely a result of the NAAEC. While this land conservation is an optimistic step forward, it may be motivated by performative action. Most of Mexico's protected land is now adjacent to the American border, suggesting this effort is an attempt at strengthening the relationship between the two countries.²³ Further, while the preservation of land is an effective way of advancing ecological protection, it does not eliminate Mexico's weak environmental laws, nor does it stop the other harmful pollutive NAFTA-motivated activities.

To summarize, while NAFTA and NAAEC have inspired positive environmental change, the increased trade and movement of goods between the three countries, as well as the industrialization and offshoring to Mexico, has led to long-term air, water, and land pollution for Canada, the United States, and Mexico.

Destructive Practices

Apart from pollution, NAFTA has also led to destructive practices in many sectors and industries. For example, the reduction of trade barriers has increased Mexican agricultural production and exportation, but this has come at a cost. Before NAFTA, Mexico experienced seasonality with its produce. Resources, such as water, pesticides, and labor were cyclical, providing stability. However, this increased and higher demand from Mexican farmers has led to the exploitation of resources, specifically water. Not only has this become a destructive practice for Mexico's water supply, but it has also changed the nature of Mexican agriculture. As more water is demanded and used, its price increases. As such, farmers switch from growing local crops to export crops to increase profitability, thus damaging the regional food supply chain.²⁴

Likely the most expensive and destructive practice coming out of NAFTA has been its Chapter 11 provision. Chapter 11, also known as the "Investment" section of NAFTA, allows for private investors to launch dispute resolutions against

²¹ *Id.* at 261.

²² Gladstone, *supra* note 15 at 25.

²³ *Id.*

²⁴ *La agricultura y la gestión sustentable del agua en México*, CENTRO DE ESTUDIOS PARA EL DESARROLLO RURAL SUSTENTABLE Y LA SOBERANIA ALIMENTARIA 1, 13 (2015), www.cedrssa.gob.mx/files/b/13/100Reporte_FINALLa_agricultura_y_la_gestion_sustentable_del_agua_19-01-2015_PDF.pdf.

Canada, the United States, or Mexico in cases where national policy has affected the trade or investment of goods.

Chapter 11

Chapter 11, or more specifically Chapter 11 Section B “Settlement of Disputes between a Party and an Investor of Another Party”, allows for North American investors to start an action against the NAFTA Parties when public policy has negatively affected investors’ expectations.²⁵ While the purpose of Investor-State Dispute Settlements (“ISDS”) is to protect private corporations from private policies that may affect their profitability, the effects have been less than ideal for the Parties’ sovereignty in legislating environmental laws. Between 1994 and 2018, there were 85 known NAFTA ISDS claims filed. Of these 85 filed ISDS claims, 41 were against Canada, 23 against Mexico, and 21 against the United States.²⁶ Further, the breakdown in the type of measure challenged demonstrates that environmental laws were the most contentious form of private policy affecting investors. Of the 85 ISDS claims, 19 were filed against environmentally protective policies, and 14 were filed against policies relating to resource management. These two measures were the most challenged by investors, accounting for a combined 39% of all ISDS claims.²⁷

Chapter 11 has had the most significant effect on Canada, as investors targeted the country 48% of the time. Consistent with the combined NAFTA ISDS claims the two most challenged measures were environmental protection (12) and resource management (13). Of the 41 filed ISDS claims, seventeen cases reached final arbitration with Canada winning nine and losing eight. Between 1997 and 2018, Canada has paid over \$200 million in damages and settlements with almost another \$100 million in legal fees.²⁸

The earliest Chapter 11 case occurred when Metalclad Corporation, an American landfill management firm, was barred by Mexico from opening an already-built hazardous waste facility. It was argued that Mexico violated Articles 1105 and 1110, the Minimum Standard Treatment and Safeguard Against Appropriation provisions, respectively. Mexico was held to pay over \$16 million in the settlement.²⁹ This controversial case was appealed at the Supreme Court of British Columbia (“BCSC”) as Mexico felt that the transparency standards under Article 1105 were unusually strict and the definition of expropriation under Article 1110 was too broad. The case was also contentious as it was the first example of

²⁵ North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, Chapter 11 s B, 17 December 1992, Can TS 1994 No 2, 32 I.L.M. 6.

²⁶ Scott Sinclair, *Canada’s Track Record Under NAFTA Chapter 11 North American Investor-State Disputes to January 2018*, CANADIAN CENTRE FOR POLICY ALTERNATIVES 1, 3 (January 2018), www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2018/01/NAFTA%20Dispute%20Table%20Report%202018.pdf.

²⁷ *Id.* at 5.

²⁸ *Id.* at 4.

²⁹ Jerry L Lai, *A Tale of Tale of Two Treaties: A Study of NAFTA and the USMCA’s Investor-State Dispute Settlement Mechanisms*, 35 *Emory Intl L Rev* 259, 262 (2021).

NAFTA affecting a Parties' sovereignty to protect the environment.³⁰ The BCSC upheld the Article 1110 infringement but overturned the findings under Article 1105, requiring Mexico to pay \$12 million in the settlement.³¹ At this appeal, the Canadian and Quebec governments joined as intervenors in support of finding Chapter 11 overtly broad.³²

The first case in Canada occurred in 1997 when the Ethyl Corporation, an American-based company with a Canadian subsidiary, challenged Canada's *Manganese-based Fuel Additives Act*. The Act prohibited the importation of MMT, a neurotoxin that contributed to harmful air pollution. The Ethyl Corporation was the sole importer and distributor of MMT, meaning the Act would plummet investor expectations.³³ The filed action claimed Canada violated Article 1102 (National Treatment), Article 1106 (Performance Requirements), and Article 1110. Originally, the Ethyl Corporation claimed \$251 million in damages, however, the Canadian government decided to lift the ban on MMT and settled with Ethyl for \$13 million.³⁴ This decision was the first of its kind under NAFTA in Canada and opened the doors to 40 more ISDS claims over the next 21 years.

As discussed above, environmental laws are not the only ones that have been challenged under NAFTA's Chapter 11 ISDS. Canadian resource management policies have also come under fire from foreign investors. Shortly after the Ethyl Corporation filed its claim, in October of 1999, Sun Belt Water inc. filed a claim alleging the Canadian government breached its NAFTA trade duties. The allegations stemmed specifically from British Columbia's enactment of *The Water Protection Act* which imposed control measures that prohibit the exportation of bulk water. Sun Belt, whose business was exporting bulk water from British Columbia into the United States, claimed damages and lost revenue in the sum of \$10.5 billion. While the claim was eventually abandoned, Sun Belt demonstrates that North American investors will challenge Canada's ability to regulate resources just as much as it challenges Canada's environmental policies.

Overall, Chapter 11 and ISDS should be viewed as a destructive practice of NAFTA. Not only has NAFTA financially cost Canada hundreds of millions of dollars, but it has also forced several policies to be retracted. This has limited Canada in the ways that it can protect its resources and environment.

As the foregoing makes clear, not only has the increase of trade led to an increase in freight transportation between Canada, the United States, and Mexico, but border cities have experienced more air pollution due to the rise of trucking. While NAFTA has caused some decrease in pollution in the United States, this is a result of offshoring manufacturing jobs to Mexico leading to a rise of industrialization in the south. Mexico's weaker environmental and labor

³⁰ *Id.* at 263.

³¹ David Franklin Tysoe, *The United Mexican States (Petitioner) and Metalclad Corporation (Respondent) and Attorney General of Canada and la Procureure générale du Québec on behalf of the Province of Québec (Intervenors) -- Reasons for Judgment*, 2 *Asper Rev of Intl Bus and Trade Law* 473, 512 (2002).

³² Lai, *supra* note 29 at 264.

³³ Alan C Swan, *Ethyl Corporation v Canada, Award on Jurisdiction (under NAFTA/UNCITRAL)*, 94 *AJIL* 159, 159 (2000).

³⁴ Lai, *supra* note 29 at 263.

regulations have also been met with a rise in destructive mining and agricultural practices, harming the countries already weak water supply system. Finally, possibly the most damaging environmental effect of NAFTA is Chapter 11's ISDS. Not only does it limit the type of public policy the Parties can legislate, but it has also led to countries being forced to repeal their legislation and pay hundreds of millions in damages, settlements, and legal fees. Overall, while there were economic and political benefits to NAFTA, the agreement was problematic for the environment.

IV. CUSMA VS NAFTA

CUSMA Summary

The shift from NAFTA to CUSMA can be credited to former President Donald Trump's rise to power in the United States. During his presidential campaign, Trump often referred to NAFTA as "the worst trade deal maybe ever signed anywhere, but certainly ever signed in [the United States]."³⁵ In May 2018, over a year after coming into power, Trump began to unilaterally dismantle NAFTA by imposing tariffs on imported steel and aluminum from Canada and Mexico, infringing on NAFTA provisions. A week later, Mexico responded with tariffs on imports from the United States, including agriculture.³⁶ In July 2018, Canada joined Mexico in implementing tariffs against the United States.³⁷ In September 2018, the Parties convened to negotiate a new free trade agreement.

Changes

For the most part, CUSMA eliminates tariffs on all goods that were tariff-free under NAFTA. The most notable changes include increased access to the Canadian market for farmers, raising labor standards in Mexico to limit the offshoring of American manufacturing, and increasing the minimum rules of origin requirement.³⁸ On its face, some of these changes may benefit the environment. First, increasing Mexican labor standards not only promotes cleaner and safer workplaces but also supports American manufacturing. In the United States, manufacturers must abide by stronger environmental regulations than they would in Mexico. Further, by promoting local American products, the need for transportation between Mexico and the United States decreases. Second, the rules of origin requirement, which dictates that to be tariff-free products must have a minimum percentage of components manufactured in Canada, Mexico, or the United States, also promotes local manufacturing. For example, for vehicles to be eligible for tariff-free trade under CUSMA, 75% of its components must be made

³⁵ Patrick Gillespie, *Trump hammers America's 'worst trade deal'*, CNN (27 September 2016), money.cnn.com/2016/09/27/news/economy/donald-trump-nafta-hillary-clinton-debate/.

³⁶ Ana Swanson and Jim Tankersley, *Mexico, Hitting Back, Imposes Tariffs on \$3 Billion Worth of U.S. Goods*, NEW YORK TIMES (June 5, 2018), www.nytimes.com/2018/06/05/us/politics/trump-trade-canada-mexico-nafta.html.

³⁷ BBC "Canada retaliatory tariffs on US goods come into force", *BBC News* (1 July 2018), online: <<https://www.bbc.com/news/world-us-canada-44635490>>.

³⁸ Bradley J Condon, *From NAFTA to USMCA: Two's Company, Three's a Crowd*, 1 *Lat. Am. J. of Trade Policy* 30, 42 (2018).

in North America, a 12.5% increase from NAFTA.³⁹ Not only does this change promote manufacturing in North America, but it also reduces the need for expensive and pollutive cross-Atlantic or cross-Pacific trade from countries with weak environmental regulations.

Chapter 14

Likely the most beneficial difference between NAFTA and CUSMA from a Canadian environmental perspective are the changes implemented in the agreements 'Investment' chapter. Under NAFTA, investment and ISDS were dealt with in Chapter 11, however, under CUSMA these provisions are in Chapter 14. Chapter 14, which now deals with Investment, has two fundamental differences.

First, it includes Article 14.17 'Corporate Social Responsibility' ("CSR"):

The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines, and principles of corporate social responsibility that have been endorsed or are supported by that Party, which may include the OECD Guidelines for Multinational Enterprises. These standards, guidelines, and principles may address areas such as labor, environment, gender equality, human rights, indigenous and aboriginal peoples' rights, and corruption.⁴⁰

Article 14.17 does not require corporations to follow these CSR policies, but it is a step in the right direction, specifically in favour of supporting local environmental law. However, as mentioned, requiring companies to voluntarily abide by CSR, most notably Canada's, which are the harshest of the three Parties, is wishful at best.

More promising is the second of the fundamental difference between NAFTA's Chapter 11 and CUSMA's Chapter 14, the exclusion of Canada in ISDS procedures. Annex 14-D, which is a division of Chapter 14, titled 'Mexico-United States Investment Disputes', is different from its comparable Chapter 11 section titled 'Section B – Settlement of Disputes between a Party and an Investor of Another Party'. In short, Canada is not included in CUSMA's ISDS processes. Mexican and American firms cannot file ISDS claims against Canada, nor can Canadian firms file ISDS claims against Mexico or the United States. While this does eliminate any future ISDS claims from American or Mexican companies (although there are ISDS provisions under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership in which Canada and Mexico are parties to the agreement after it came into effect in December of 2018) it may not have been the best-case scenario for Canada. First, Canada's exclusion from ISDS not only stops foreign corporations from filing claims against Canada but also stops Canadian companies from being able to file claims against Mexico or the United States. Second, during the CUSMA negotiations, former Canadian foreign minister Chrystia Freeland did not want to be excluded from ISDS, but instead wanted NAFTA's ISDS to be reformed to ensure that "governments have an

³⁹ *Id.* at 39.

⁴⁰ Canada-United States-Mexico Agreement [CUSMA], art. 14(17), 10 December 2019, (US Treaty Source) Can TS 2020 No 5.

unassailable right to regulate in the public interest”.⁴¹ It is likely, that despite Canada’s contentious experience with NAFTA ISDS claims, arbitration through the tribunal was a more practical method of dispute resolution than litigation in American courts. The main reason that ISDS would be better is that the price of litigation is far higher than arbitration, but more importantly, the ISDS under NAFTA and now under CUSMA do not follow the principles of *stare decisis*.⁴² As such, without ISDS Canadian environmental law will now be challenged by Mexican and American companies through their local courts. While it is too early to decipher the possible benefits or shortcomings of Canada’s absence in CUSMA’s ISDS, the CUSMA Outlook section will look at the possible future.

Chapter 24

Another important difference between NAFTA and CUSMA is the addition of Chapter 24 “Environment”. Unlike NAFTA, which had 26 environmental provisions which were only included in the NAAEC, CUSMA has added Chapter 24, an entire chapter dedicated to the environment, in the main text. Chapter 24 includes 30 environmental issues that were not mentioned or included under NAFTA.⁴³ Further, while the NAAEC dealt solely with the intersection between environmental policies and economic development, CUSMA includes provisions dealing with the environment and energy policies, social issues, indigenous communities, and human health.⁴⁴ Chapter 24 is made up of 32 articles including Article 24.9 Protection of the Ozone Layer, Article 24.10 Protection of the Marine Environment from Ship Pollution, Article 24.11 Air Quality, and Article 24.21 Illegal, Unreported, and Unregulated Fishing. In other words, unlike its predecessor, CUSMA sets precedent by including environmental provisions in the main text of the agreement while maintaining the existence of the NAAEC, whereas NAFTA had virtually no environmental provisions other than the NAAEC.

To briefly summarize, while CUSMA has renegotiated some elements of NAFTA, it has also included Chapter 24, which emphasizes the environment in the main body of the agreement. Further, although Canada no longer must deal with ISDS claims against their public policy, it would have been more effective for ISDS to remain trilateral under CUSMA but to grant the Parties more sovereignty for issues such as environmental law and resource management.

V. CUSMA OUTLOOK

As discussed in the previous section, there are significant divergencies between CUSMA and its predecessor, NAFTA. First, the inclusion of Chapter 24 upholds the environment as an integral element of sustainable development and

⁴¹ Alexander Panetta, *Canada’s 10 NAFTA Demands: A List of What Canada Wants as Talks Start This Week*, CBC NEWS (Aug. 14, 2017), <https://www.cbc.ca/news/politics/nafta-canada-demands-list-1.4246498>.

⁴² Lai, *supra* note 29 at 276.

⁴³ Noemie Laurens, *NAFTA 2.0: The Greenest Trade Agreement Ever?*, 18 World Trade Rev 659, 666 (2019).

⁴⁴ *Id.*

trade between the Parties. Chapter 24 sets out several obligations and responsibilities that work alongside the other chapters of CUSMA. The Parties have signed on to promote policies that will help limit air pollution,⁴⁵ marine litter,⁴⁶ invasive species,⁴⁷ while encouraging sustainable developments,⁴⁸ corporate social responsibility,⁴⁹ and biodiversity.⁵⁰

The most notable change, for the purposes of this paper, is the exclusion of Canada from ISDS. As climate change legislation continues to become an urgency for Parliament, CUSMA will be less of a roadblock than NAFTA. No longer will Canadian environmental policy, such as the repealed *Manganese-based Fuel Additives Act*, be removed at the hands of disgruntled American corporations. However, as discussed above, the lack of a CUSMA ISDS section for Canada means American corporations may resort to the US court system for guidance. That being said, we have yet to see the effects this will have on Canadian sovereignty over environmental policy, or the number of settlements Canada will be forced to payout. We are currently witnessing the beginnings of the first CUSMA dispute relating to the environment. In June of 2019, Prime Minister Justin Trudeau announced a plan to ban some single-use plastic.⁵¹ In September of 2020, over 60 American corporations wrote an open letter to Mary Ng, the Minister of Small Business, Export Promotion, and International Trade. The letter expresses these companies' displeasure with the planned banning of some single-use plastics: "Instead of this regulatory approach, the Canadian government should focus its efforts on directly addressing the issue of concern: plastic waste entering the environment."⁵² Moreover, this letter pushes back against Canada by highlighting CUSMA articles to suggest the proposed ban violates the agreement. "Second, misguided regulatory action by Canada to ban products manufactured in North America from being offered for sale in Canada violates the country's international trade obligations under the CUSMA and World Trade Organization. This approach would preclude products from entering Canada based on an incomplete and inconclusive "scientific assessment." This is contrary to Canada's obligation under the CUSMA Sectoral Annex 12A.4.3 to endeavor to use a risk-based approach to the assessment of specific chemical substances and chemical mixtures, where appropriate."⁵³ [*emphasis added*].

While Canada has delayed this ban due to the ongoing COVID-19 pandemic, it is likely that once it does go into effect the affected American corporations will seek all possible dispute resolution opportunities to challenge the law.

⁴⁵ CUSMA, *supra* note 40 at art 24(11).

⁴⁶ *Id.* at art 24(12).

⁴⁷ *Id.* at art 24(16).

⁴⁸ *Id.* at art 24(24).

⁴⁹ *Id.* at art 24(13).

⁵⁰ *Id.* at art 24(15).

⁵¹ *Ottawa announces plans to ban single-use plastics starting in 2021 at the earliest*, CBC NEWS (10 June 2019), www.cbc.ca/news/politics/plastics-ban-trudeau-mckenna-1.5168828.

⁵² The Adhesive and Sealant Council et al, *Multi-Association Letter to Minister Mary Ng on CEPA plastics issue*, US CHAMBER OF COMMERCE (21 September 2020), www.uschamber.com/international/multi-association-letter-minister-mary-ng-cepa-plastics-issue.

⁵³ *Id.*

VI. CONCLUSION

As Canada, the United States, and Mexico embark on a new era of free trade through CUSMA, the Parties also start a new chapter for environmental law. While NAFTA set precedent as the first trade agreement amongst the North American countries, it demonstrated the environment as an afterthought, requiring a side-treaty to include environmental provisions. The increased mobility between the three countries led to increased pollution, most notably in cities alongside borders and in Mexico with the increased industrialization. NAFTA's Chapter 11 also hurt Canada and Mexico's ability to protect their environment and resources within their borders as American corporations challenged these laws on the basis of hurting investment opportunities. The signing of CUSMA brought with it a new prioritization of the environment. Not only have environmental provisions been included in the main text of the agreement, but Canada is no longer a party to ISDS claims. Further, changes to labor standards and rules of origin will also create lasting benefits for the environment, as goods and services will become more localized, requiring less transportation. Overall, CUSMA builds off NAFTA but incorporates more green provisions. Though to see lasting environmental change to thwart the effects of climate change the Parties must do more, the changes made in the most recent free trade agreement are a step in the right direction.