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Making the most of the CUSMA review

Worker- and climate-focused options for strengthening North American economic, social, and environmental co-operation

Stuart Trew with Simon Archer, Angelo DiCaro, Gavin Fridell, Laura Macdonald, Mary McPherson, and Mark Rowlinson

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The 2026 CUSMA review

Prepare for the worst, plan for progress

Stuart Trew

CANADA, THE UNITED STATES and Mexico are two years away from a mandatory six-year review (see Annex) of the renegotiated North American Free Trade Agreement (NAFTA), now known as the Canada-U.S.-Mexico Agreement (CUSMA).[1] That may seem a long way off, but preparations for the potentially contentious review are already afoot in all three countries.

The Canadian federal government and large business associations appear to be united in the view that Canada should seek a smooth rollover of the agreement rather than risk another high-profile showdown with Washington.[2] This scenario seems unlikely, given corporate and political pressure on the U.S. government to reconsider CUSMA rules in areas such as dairy market access, energy, agriculture and food policy, automotive rules-of-origin, and digital trade. "The whole point [of the review] is to maintain a certain level of discomfort," said United States Trade Representative Katherine Tai in March 2024.[3]

A simple reapproval of CUSMA may also be a lost opportunity given shifts in thinking about trade governance since the treaty was negotiated. All three North American governments have embraced "inclusive trade" provisions to

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>
> **—Aaron Fowler,** senior Global Affairs Canada trade official, September 2023

respond to concerns about the unequal benefits of trade for women, racialized workers, and Indigenous Peoples, as well as trade's contribution to biodiversity loss and climate change. The geopolitics of trade, subsidies and industrial policy have also shifted since CUSMA came into force in July 2020.

While most of Canada's free trade agreements contain provisions allowing the treaty to be amended, these are almost never used. In effect, and by design, the economic liberalization, privatization and deregulation encouraged and facilitated by free trade has been a one-way street, no matter the impacts on people's livelihoods, the quality of public services, industrial development options, or the environment.

The inclusion of a six-year review clause in CUSMA, while not without significant risks to Canada and Mexico, forces governments to rethink whether the treaty is delivering substantive, widely shared benefits—or whether it may be undermining "inclusive trade" goals. A senior Canadian trade official acknowledged the utility of a CUSMA review in September 2023: "The way we see our relationships with each other in many respects is going to be a function of how we see our place in the world. That is very different in 2023 than it was in 2018. And I would expect it would be very different in 2026 than it is in 2023."[4]

Canada should prepare for the review as if a partial renegotiation of CUSMA were inevitable whether there is a Democrat or Republican in the White House. Sending Team Canada missions to the United States—to convince federal and state-level leaders of the importance of Canada-U.S. trade—may help prime the pump for a hoped-for CUSMA rollover.[5] But this effort will be of limited use if the next U.S. administration decides to turn the screws on Canada and Mexico to gain further concessions.

This report assesses the functioning of CUSMA to date and suggests ways to expand on the rights-based and worker-centred novelties in the agreement

that improved upon the original NAFTA. Though national elections will transform governments in all three countries between now and the 2026 review, the worker-centred trade policy of the current U.S. administration will likely live on. For political, geoeconomic and national security reasons, a bipartisan consensus has emerged on the need to renew North America's manufacturing base and better protect workers from subsidized—financially or through weaker labour and environmental standards—foreign competition.

This report therefore highlights reform proposals related to CUSMA's labour rights provisions, the agreement's innovative rapid-response labour mechanism, the chapter on rules-of-origin in the important auto sector, and the environment chapter. Other aspects of the agreement could also be made more inclusive and worker-centric under the right circumstances and with sufficient political will. The CUSMA review is an opportunity to discuss priority areas for possible reform in the agreement's digital trade, gender and inclusive trade provisions, and its dispute settlement mechanisms.

In particular, CUSMA leaders should find the courage to completely dismantle the vestiges of investor-state dispute settlement (ISDS) between Mexico and the United States, in line with a bipartisan shift in the U.S. on international investment arbitration. The ISDS regime is clearly incompatible with the achievement of human rights, including Indigenous Peoples' rights, the protection of biodiversity, or the achievement of Paris Climate Agreement goals. Leaving it intact even in a limited form creates unacceptable risks for Mexico and an unacceptable power imbalance in the treaty.

Progress in any of these areas will depend on the political configuration of the continent in the lead-up to the review. Still, Canada would be wise to come to the table with a solid list of proposals as leverage in a potentially stressful negotiation. Canada and its CUSMA partners should in any case use the review period productively, acknowledging that trade agreements could and must respond to shifting social, economic and environmental priorities.

Any trinational review should contain ample opportunities for consultation with civil society stakeholders in the three countries and should not be left to trade negotiators or corporate lobbyists. We hope this document will serve as a launching pad for trinational civil society discussions on the CUSMA record and alternatives for North American economic relations that will benefit the human and non-human inhabitants of all three countries.

Advancing worker-centred trade

Labour rights, migrant workers and the CUSMA rapid-response labour mechanism

Mark Rowlinson and Simon Archer

THE LABOUR CHAPTER of the Canada-U.S.-Mexico Agreement (Chapter 23) contains a number of significant developments compared to the labour provisions in any previously negotiated Canadian free trade agreement, including the North American Free Trade Agreement (NAFTA) and its labour side-agreement. An assessment of the functioning of these new provisions must take into account the CUSMA labour chapter improvements themselves, the important context of substantive labour law reforms in Mexico, and an account of labour-related CUSMA disputes to date.

The CUSMA labour chapter requires the parties to adopt and maintain robust labour standards in statutes, regulations and practices complying with the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights of Work, as well as minimum wages, hours of work, and occupational health and safety protections (Article 23.3). The agreement also requires the parties to refrain from weakening or derogating from the enforcement of labour regulation in a manner affecting trade or investment (Article 23.4).

Chapter 23 also removes the obligation found in previous trade deals that required substantive violations of labour rights be committed through a "sustained and recurring course of action or inaction," which had the effect of limiting the kinds of labour cases that could be filed.[6] Finally, while violations of labour rights must still be "in a manner affecting trade," CUSMA now reverses the onus of establishing this connection; the agreement presumes labour violations will affect trade until the responding state can prove otherwise (Footnote to Article 23.4). CUSMA also contains new prohibitions against importing goods made by forced labour (Article 23.6), and new commitments related to violence against workers (Article 23.7), migrant workers (Article 23.8) and workplace discrimination (Article 23.9).

However, the most significant improvements over NAFTA relate to the enforcement of these labour rights and standards. Unlike NAFTA and many Canadian trade deals, labour disputes can be addressed under the main treaty dispute resolution mechanism in CUSMA, as long as the disputing parties have first attempted to resolve the issue through consultations (Article 23.17). This responded to broadly shared criticism of NAFTA's labour side-accord, which "lacked sanctions for non-compliance, and rested on the requirement that each state enforce its own labour laws, rather than establishing common higher standards, and thus was an unpromising site for promoting labour rights in general, or the rights of women and gender-diverse people specifically."[7]

Furthermore, the parties to CUSMA agreed to a new and innovative dispute resolution protocol called the Facility-Specific Rapid Response Labour Mechanism (Annexes 31-A and 31B). This new instrument (the "RRM") provides a new complaint process when there is a "denial of rights" at a Mexican facility covered by the mechanism. Under the RRM, a "denial of rights" is limited to the denial of the right to freedom of association and collective bargaining.

The application of the RRM is, for all intents and purposes, limited to Mexico. The RRM can only apply in Canada or the U.S. if there is a denial of rights under an enforced order of the Canada Industrial Relations Board (the regulator of workplace rights in the federal jurisdiction in Canada) or the National Labour Relations Board (the federal labour dispute regulator in the U.S.) (see footnote 2 in Annex 31-A and 31-B). Neither of these scenarios is ever likely to occur.

Further, the RRM only applies at "covered facilities," defined as a facility in a "priority sector" that produces goods or services traded between parties or competes in another party's territory. A "priority sector" includes

the production of manufactured goods, the supply of services, or involves mining. As a result, the RRM does not apply to most collective bargaining parties in Mexico.

The RRM provides an expedited complaint and adjudication mechanism in which complaints are investigated within 45 days and resolutions must be reached in a timely manner. A review panel may be appointed if no resolution is reached. The RRM panel has the authority to conduct onsite investigations and verifications, after which it has 30 days to make a determination.

Finally, the RRM also contains the possibility for real remedies. Upon delivering a complaint, the complaining party may delay the settlement of customs accounts related to goods from the covered facility. Remedies for violations can include the suspension of preferential tariff treatment or the imposition of penalties on goods or services from the covered facility. If the signatory is found to have committed repeated violations, the complainant can deny entry for goods produced at the facility. This provides a powerful incentive for the corporation that operates the covered facility to comply with the process.

Overview of Mexican labour law reform

For many decades, worker and trade union freedoms in Mexico have been undermined by so-called protection unions and contracts, which saw often corrupt employer-friendly unions "own" collective agreements without any consultation or involvement with the workers themselves. This system was aided and abetted by a corrupt and ineffective Mexican labour relations bureaucracy. The NAFTA side accord did little or nothing to address this entrenched labour relations system.

Change has occurred in the Mexican labour sector through a combination of domestic advocacy from the independent labour movement and its allies, and external pressure from its trading partners. Annex 23-A to the CUSMA labour chapter required that Mexico pass and implement a number of reforms to its labour laws to enhance the associational and collective bargaining rights of Mexican workers and unions. The labour law reforms mandated by Annex 23-A were adopted in 2017 and 2019, and the implementation of those reforms between 2019 and 2023 provides an important context to any assessment of the value of the new CUSMA labour provisions.[8]

Mexico enacted major amendments to its Federal Labour Law on May 1, 2019 to implement reforms to the Mexican Constitution adopted in 2017 in

response to earlier pressure. The reforms addressed a number of longstanding obstacles to labour justice in Mexico, including protection contracts, the lack of democratic governance in some labour unions, and the lack of independence of government institutions responsible for labour relations and labour justice.

The May 2019 reform called for a four-year transition to fully implement the new labour justice system. The key transition mechanism required that all existing collective agreements must be reviewed and voted upon by workers at least once prior to May 2023,[9] a deadline which was extended to July 31, 2023.[10] Under this process, the incumbent union was required to schedule a legitimation vote, with at least 10 days notice to the affected workers. This process was to be combined with new union democracy procedures aimed at ending the decades long prevalence of protection unions in Mexico.

Although it is estimated that in that four-year period with about 30,000 collective agreements were subject to legitimation votes of varying quality, it is likely the case that fewer than 20 per cent of existing contracts have gone through this process. Moreover, the legitimation processes that did occur came under heavy criticism, reflecting prior corrupt practices.

The question that arises is what will happen to the 80 per cent of collective agreements that have not been legitimated. The answer appears to be that all of those collective agreements are nullified and the workers covered by those agreements shall find themselves without collective bargaining coverage. Moreover, there have also been numerous challenges and problems in respect to the administration of the new labour reforms in Mexico, including the certification of vote results and the speed with which applications are addressed.

More generally, the ongoing implementation of Mexican labour law reforms, which form a key context to the rapid-response mechanism cases filed so far, have led to improvements in labour rights in Mexico, but have been subject to significant, continuing and systemic barriers to effective implementation.

The Mexican labour law reforms have had much more limited positive impact than what was hoped for. Mexican independent trade unions have reported systematic problems in labour adjudication procedures, lack of funding from the state in the implementation and adaptation to the new labour relations regime, and continued influence of company union federations and compromised labour relations actors, including adjudicators.

In short, Mexico still faces many challenges in the field of labour rights, particularly in connection with the rights to freedom of association and free collective bargaining.

Labour cases brought in the United States

Since CUSMA took effect on July 1, 2020, the vast majority of the complaints under the labour chapter have been filed by the United States against Mexican facilities under the rapid-response mechanism. Canada has filed one case involving a Mexican facility, and there have been no cases filed against Canadian or U.S. facilities for reasons already mentioned.

As of April 10, 2024, the United States had accepted 22 cases for review alleging a denial of workers' rights in Mexico, triggering the RRM mechanism.[11] It is not possible to summarize all 22 cases here, although there are a number of good sources that have done so including the United States Trade Representative web page.[12] The Maquila Solidarity Network has also prepared an excellent summary of all cases filed up to December 2023.[13] Of the 22 cases accepted to April 2024, five had not yet been resolved or litigated and were in the process of being investigated as this report was concluded.

Of the cases accepted for review by the U.S., several patterns emerge. First, a substantial majority of the cases, including the first eight, have come from the Mexican auto or auto parts sector. In the last year or so, a number of cases have emerged from other sectors of the Mexican economy. One case came from the rubber sector (Goodyear) and another from the broader manufacturing sector (mining and construction equipment-maker Caterpillar). In addition, one case has been accepted from the garment sector, one from the airline sector, and one case from the service sector (a call centre in Hidalgo Mexico). Finally, a case accepted in February 2024 emerged from the food processing sector in Mexico.

Second, the facts of the cases also reveal certain common elements. The substantial majority of the early cases (12) involved freedom of association disputes between authentic trade unions and protection unions connected to the *Confederación de Trabajadores de México* (CTM). Seven of those cases revolved around disputes related to legitimation votes connected to the labour law reform process. Nine of the early cases led to successful election results for authentic trade unions in Mexico either through the legitimation vote process or a certification vote.

Finally, of the 17 cases that have so far been concluded, 12 have been resolved through formal settlement agreements, while two have been concluded following successful election results (many cases involved both agreements and successful election results). Further, according to an April 10, 2024 press release from the United States Trade Representative: "Eleven cases included backpay to workers, nine included reinstatements of workers..., and many resulted in successful negotiations for higher wages, workers' rights trainings, and improved policies at the facilities."[14]

Only two cases so far have not been resolved and resulted in RRM dispute settlement panels being appointed. The first case involves the complaint by the Mexican Mining Union (Los Mineros) over a longstanding strike at the San Martin Mine operated by Industrial Minera Mexico (IMMSA). That panel heard several days of evidence culminating in two days of submissions from the U.S. and Mexican administrations in Mexico City on February 28 and 29, 2024. The second RRM review panel, requested by the U.S. in mid-April 2024, involves the case at the Hidalgo-based call centre.

On May 13, 2024, the first RRM dispute settlement panel issued its determination in the San Martin Mine case.[15] The panel found that it did not have jurisdiction over the dispute, which dates back to 2007. Specifically, the panel found that a denial of rights under the RRM can only be applied to events that took place after the entry into force of CUSMA (July 2020) and that are subject to the 2019 amendments to Mexican federal labour law. The panel found that the events alleged by the United States did not meet those criteria.

However, the panel rejected Mexico's argument that the San Martin Mine was not a "covered facility" because it allegedly does not export product directly to the U.S. The panel found instead that the mine produced goods that compete with U.S. exports into the Mexican market, which was sufficient for a finding under CUSMA Article 31-A.15(ii) that the mine was a covered facility.

While this initial panel decision is disappointing in that it found that the RRM did not apply to disputes that commenced prior to 2020, the panel emphasized that the San Martin mine dispute was "highly unusual and unlikely to repeat itself."[16]

It is worth noting that only one case has been brought under the main dispute resolution mechanism under Chapter 23 of CUSMA. In March 2021, a complaint was filed in Mexico against the U.S. government for failing to enforce its labour laws against sex-based discrimination for migrant worker women on temporary labor migration visas, violating its obligations under Article 23 of CUSMA. The complaint was filed by a coalition of organizations led by the *Centro de los Derechos del Migrante*.

That case concluded with the signing of a memorandum of understanding in January 2023 between the U.S. and Mexican governments which included key provisions protecting migrant workers including the prohibition of discrimination in recruitment, making gender-related data publicly available, increasing access to justice for migrant workers, and ensuring they receive their contracted compensation.

The Frankische RRM case brought in Canada

In sharp contrast to the considerable activity under the RRM in the United States, only one case has been brought pursuant to the Canada-Mexico RRM mechanism in Annex 31-B. That case, which was filed in Canada by Unifor on behalf of the Mexican union SINTTIA, involved a clear denial of rights connected to SINTTIA's campaign to organize the workers at the German industrial pipe manufacturer, Frankische.

SINTTIA was seeking to displace the incumbent protection union following a highly dubious legitimation vote. During the SINTTIA campaign, the employer and the incumbent CTM union engaged in intimidation, coercion and terminations of SINTTIA supporters. SINTTIA filed an application with the Mexican Labour Board in November 2022, but by March 2023 no progress had been made. As a result, the complaint under Annex 31-B was filed in March 2023, and was accepted for review by the Canadian government on March 13, 2023.

The Canadian government then proceeded to negotiate a resolution to the complaint. It reached an understanding with Frankische in May 2023, paving the way for a representation vote on June 26, 2023, which was won by SINTTIA. SINTTIA was recognized as the legitimate bargaining agent, and the Canadian government closed the file in July 2023.

Assessing CUSMA labour provisions to date

There were expectations that the substantially amended labour chapter in CUSMA, together with the new rapid-response mechanism, would represent a considerable step forward in the enforcement of labour rights compared to NAFTA. Based on the initial experience over the first number of years, it is fair to conclude that some of the expectations have been met.

Most notably, when and where it applies, the RRM has proved to be a relatively expeditious and effective mechanism for enforcing labour rights in

certain circumstances in Mexico. Of the cases filed so far, many have led to positive results for Mexican workers seeking to assert their right to freedom of association and collective bargaining, leading to several successful organizing campaigns, representation votes and negotiated collective agreements.

In light of the early success of the RRM, U.S. officials have noted that the RRM mechanism could become a new template for the enforcement of labour rights under bilateral and multilateral trade agreements.[17] However, in order for the RRM mechanism to become a model moving forward, several problems with the mechanism would need to be addressed.

The most common proposed reforms fall into two categories:

1. Reforms to the existing labour chapter and rapid-response mechanism
2. Reforms that would expand the scope of protections under the labour chapter and expand the application of the RRM itself

While the RRM and CUSMA labour chapter represent a major improvement over previous labour provisions in trade agreements, they can be improved and could be given greater scope to operate to create just and equitable labour outcomes.

First, the central limitation of the current RRM is that, for all intents and purposes, it only applies to Mexico. There are substantial and significant violations of the right to freedom of association and collective bargaining in both Canada and the U.S. If the RRM mechanism is to become a template for more trade agreements moving forward, both Canada and the U.S. need to amend the mechanism such that it has meaningful bilateral application in all of the signatory countries. There are technical hurdles in applying the RRM in the U.S. and Canada that should be studied and recommendations made for overcoming them.

Second, the scope of application of the RRM is too limited. By limiting its application to only violations of the right to freedom of association and collective bargaining, the RRM does not address a wide range of critical labour rights that are also affected by trade, such as health and safety, migrant work and gender-based violence.[18] Moreover, the fact that the RRM only applies to certain "covered facilities" is a significant limitation on the usefulness of the mechanism. The scope of complaints and the scope of application to economic sectors should be expanded to better reflect the integration of North American economies.

We also wish to identify a third concern from a uniquely Canadian perspective. It is no accident that there have been 22 cases filed in the United

States and only one RRM case filed in Canada. In part, this discrepancy flows from the primacy of the economic relationship between the U.S. and Mexico. However, Canada and Mexico also have a significant trading relationship, and Canadian economic actors have significant operations in Mexico in, for example, the mining and auto parts sector. Further, Canadian unions, supported by the Canadian government, have invested significant resources in capacity building in Mexico in solidarity with the Mexican union movement.

In the U.S., a substantial infrastructure was created when the RRM was implemented to ensure that these cases could be received, evaluated, investigated and, if necessary, litigated. Moreover, significant consultative bodies were created in the U.S., in collaboration with the labour movement, to ensure that this new mechanism was used to the fullest extent possible.

The Canadian government has not made any similar efforts, either to create the infrastructure or the consultative bodies. The Canadian government's role has largely been limited to funding important union projects in Mexico—but that has led to only one case being filed. Canada should share more of the burden and show stronger commitment to the cause of improving labour rights in Mexico and in the North American region.

Recommendations

1. Expand the application of the RRM to include labour rights violations in Canada and the U.S. by amending the conditions by which claims under the mechanism can be filed for an alleged denial of rights at facilities located in the United States and Canada.

2. Confirm and expand economic sectors to which the RRM applies. At the moment only those sectors involved in manufacturing goods, supplying services, or mining are defined as "priority sectors" covered by the RRM. The priority sectors should be confirmed and expanded to include energy, the broader service sector, agriculture and migrant workers.

3. Expand the definition of a "denial of rights" under the RRM from just freedom of association and collective bargaining rights to include discrimination on the basis of gender or sexual orientation or gender expression, gender-based violence, child labour, health and safety, and derogations from minimum standards of work.

4. Clarify the meaning and intent of footnote 2 in Annexe 31-B (the Canada-Mexico RRM annex) to confirm that the RRM applies to a denial of rights at

any covered facility covered by any domestic legislation. This recommendation is important given that the RRM panel in the San Martin Mine case found that the identical footnote in the U.S.-Mexico annex (31-A) limited the application of the RRM to only a denial of rights that is subject to the 2019 Mexican labour law reform.

5. Clarify and promulgate more specific criteria and requirements for remediation agreements that resolve RRM complaints, including content (damages, etc.), timelines, and requirements for consultation with stakeholders.

6. Create a Canadian consultative body, similar to the Independent Mexico Labour Expert Board (IMLEB) in the United States, which would provide a dedicated contact point and expert independent advice and guidance to the Canadian government in respect of CUSMA labour matters.

7. A significant barrier to Mexican labour reform is lack of capacity and support for plant-by-plant organizing in Mexico. The Canadian government could assist with measures and resources to engage in co-operative capacity building under Chapter 23 of CUSMA to help Mexico strengthen labour law enforcement and inspection systems to encourage labour law compliance. Canada could also help fund an arms' length oversight committee with a mandate that includes data collection and training to improve labour law enforcement in Mexico.

8. Implement meaningful Canadian enforcement measures to comply with the prohibition on the importation of goods produced using forced or compulsory labour found in Article 23.6. Include specific obligations regarding the resources devoted to enforcement agencies and practices, and enhanced reporting and transparency obligations.

CUSMA and the North American electric vehicle transition

A role for better rules-of-origin for the automotive trade

Angelo DiCaro

ONE OF THE key changes to come out of the renegotiated North American Free Trade Agreement (NAFTA) when it became the Canada-U.S.-Mexico Agreement (CUSMA) in 2018 concerns the conditions under which automotive trade takes place on this continent. The new agreement's stricter automotive rules-of-origin were a key political outcome of the renegotiated trade pact and were presented as a victory for autoworkers.[19]

Under NAFTA, at least 62.5 per cent of a vehicle, engine or transmission must have originated within North America to qualify for tariff-free treatment. Under CUSMA, the North American content requirements were raised to 75 per cent for light duty vehicles and core parts, and 70 per cent for heavy duty trucks and principal auto parts, among other changes shown in Table 1.

Proponents of CUSMA said that these new, more aggressive auto rules would address the competitive imbalances within North America caused by NAFTA, notably chronically low wages in Mexico and major capital outflows from the U.S. and Canada. By 2018, Mexico accounted for 45 per cent of North

American auto jobs while representing only eight per cent of North American auto sales. This disproportionate sector growth came to define NAFTA as a trade deal directly responsible for job losses in the heavily unionized auto sector in Canada and the northeastern U.S., and low-wage job growth in Mexico and the non-unionized U.S. south.

This regional de-industrialization of the auto sector had economic and political ramifications. Auto assembly plants are economic development anchors for communities. Auto plants provide good jobs with above-average wages and benefits that bolster local economies through spending and taxes. These facilities also spur local supply chain growth in component parts, transportation logistics, community services, and research and development.

The closure of an assembly plant, which typically employs thousands of workers, reverberates through the local supply chain resulting in greater job loss and service decline. Such disruptive and dislocating experiences for working people drive feelings of fear, anxiety and resentment toward those responsible for these outcomes, notably employers and government officials. The politicization of this anger became the frame through which NAFTA auto trade rules were renegotiated.

Advocates of CUSMA also proposed that new auto trade rules had the potential to "re-shore" (i.e., re-establish manufacturing in North America) foreign-sourced auto sector inputs, such as steel, aluminum, and other component parts previously offshored to overseas low-wage jurisdictions, notably China. Finally, the CUSMA auto rules included, for the first time, an hourly wage requirement for assembly plant labour that must be met for an automaker to qualify a vehicle to receive preferential-tariff treatment.

CUSMA impact on North American auto sector investment

The result of these changes to NAFTA's old rules-of-origin, among other factors, has been a shakeup in auto investment across the continent. The coming-into-force of CUSMA and its expanded automotive rules-of-origin coincided with the COVID-19 pandemic, major factory shutdowns and a supply chain shock that hampered vehicle production in various plants for many months. This production shock prompted global automakers to accelerate investments in large-scale, next generation vehicle electrification architecture and associated zero-emission technologies, including advanced batteries.

TABLE 1 Differences in auto rules-of-origin between NAFTA and CUSMA

	NAFTA	CUSMA
Content requirement for vehicles	**Vehicles** 62.5% (light duty vehicles) 60% (heavy duty trucks)	**Vehicles** 75% (light duty vehicles) 70% (heavy duty trucks)
Content requirement for vehicle parts (net cost method)	**Parts** 62.5% (powertrain) 50-60% (various other parts)	**Parts** 75% (core parts*) 70% (principal parts) 65% (complementary parts)
Content requirement for steel and aluminum inputs	n/a	70% sourced† from North American suppliers
Content requirement for "high-wage" labour (Labour Value Content)	n/a	40%‡ (light duty vehicles) 45%‡ (heavy duty trucks)

* Core parts include: engines, transmissions, steering systems, suspension systems, body and chassis, advanced batteries and axles.
† Effective July 1, 2027, to qualify as originating, steel must be melted and poured in North America. Imported semi-finished steel will not be eligible.
‡ Must contain vehicle content from production facilities paying eligible workers an average of $16 USD an hour. Thresholds may be lower if automakers meet certain other requirements, such as minimum R&D spending as well as North American powertrain and battery production.

Between January 2020 and March 2024, automakers invested nearly $175 billion USD into North American vehicle assembly and parts facilities, dwarfing the amount of capital investment in both internal combustion engine technology and zero-emission vehicles over the prior decade.[20] Canada received a significant and outsized share of this investment frenzy (approximately 14 per cent), thanks in part to its strategic proximity to the materials (e.g., minerals) required to make EVs. This level of investment is greater than Canada's current share of North American production and almost double the share of new investment earmarked for Mexico.

Government officials, including those in the United States, have pointed to these positive investment outcomes to justify the effectiveness of new CUSMA auto rules.[21] Automakers require significant lead time to make future product and sourcing decisions. It is possible that automakers have considered the future implications of CUSMA's expanded rules of origin and tailored investments to ensure compliance for vehicles.

However, CUSMA provides automakers with certain flexibilities, including provisions to extend the time by which they must comply with the new rules. These so-called alternative staging regimes can delay compliance until 2025 for light-duty vehicles (or longer, with government approvals),[22] and many North American automakers have been granted this flexibility.[23] Automakers

also won further reprieve in 2023 following a trade dispute under CUSMA that grants them flexibility in how North American content is calculated for "core" vehicle parts.[24]

Further, and despite CUSMA containing no requirement for automakers to publicly disclose domestic vehicle content levels, the U.S. Government Accountability Office (GAO) reports that since CUSMA's implementation automakers have tended to forego preferential tariff treatment in order to bypass the prescribed rules-of-origin. More specifically,

> the value of automotive imports from Canada and Mexico on which importers paid duty increased from $1.1 billion during the 3 years before the treaty entered into force to $16.5 billion during the 3 years after the treaty was implemented. Some importers have opted to pay the 2.5 percent duty on imports of automotive goods from Canada and Mexico rather than follow the new rules of origin requirements negotiated in the USMCA, according to knowledgeable industry representatives.[25]

Recommendations

The recent demonstrable growth in North American auto industry investment is welcomed by industry stakeholders, including trade unions. In Canada, the accumulated investment in vehicle production—stimulated by ambitious and competitive government investment incentives—outstrips industrial investments made over the past two decades. In fact, the Canadian auto industry's renaissance arguably has more to do with government investment policy than new trade rules, although as part of any cohesive industrial strategy both must work in tandem.

CUSMA's rules of origin for vehicles and parts are demonstrably more ambitious than the rules under NAFTA, as noted above. However, there are notable problems with the rules that should be addressed by governments as part of the six-year review of the agreement. We consider four potential solutions to those problems here.

1. Establish a new, harmonized North American tariff rate for vehicles and parts that encourages compliance with CUSMA's rules-of-origin and guards against a surge of Chinese imports.

The penalty to automakers for non-compliance with CUSMA's rules-of-origin is 2.5 per cent on the price of a vehicle imported into the United States or 6.1 per cent on a vehicle imported into Canada. As noted above, and based

on U.S. government data, it appears automakers are often willing to pay the tariff rather than adhere to the new rules, despite the significant flexibilities the deal provides them. This presents a crisis of confidence in the spirit and intent of the restructured automotive trade rules.

The United Automobile Workers union (UAW) has recommended the U.S. increase its current most-favoured-nation (MFN) tariff on light-duty passenger vehicles from 2.5 per cent to 10 per cent. This change would represent a far stronger deterrent against automaker non-compliance (in a country that represents the lion's share of North American vehicle sales), as well as help address the pending entry of Chinese vehicle exports into the North American market.[26] In May 2024, the Biden administration announced it would raise tariffs specifically on Chinese electric vehicles to 100 per cent, pre-empting Chinese automakers' entry into the U.S. EV market.

Canada and Mexico must consider harmonizing their own MFN tariffs to the higher level proposed by the UAW—to further encourage trade compliance as well as regional automotive production—alongside additional safeguards to prevent import surges of Chinese vehicles and parts. This can include the explicit disqualification of Chinese vehicles and components from tariff-free treatment in North America under CUSMA's automotive rules-of-origin or matching the U.S. special tariff on Chinese EV imports.

2. Update CUSMA's list of core automotive components to better reflect the advanced technologies in future vehicles, including EVs.

Research and development of new vehicle technologies happens at a rapid pace. Since CUSMA's implementation there is a clearer understanding of which auto parts are necessary to produce domestically to ensure the ongoing viability of existing and vulnerable facilities. The list of core, principal and complementary component parts within CUSMA is more extensive than in NAFTA. Importantly, advanced batteries, the most lucrative component in an electric vehicle, are listed among a vehicle's "core" components, including associated cells, modules, and packs.

Canada, the U.S. and Mexico must use the six-year review to further expand the list of advanced battery components to include cathodes and anodes. The list of raw materials requiring 70 per cent North American content must expand beyond steel and aluminum to include critical battery minerals such as nickel.

Further, and in addition to the component parts of advanced batteries, the list of core parts must be expanded to incorporate e-drivetrains, including electric motors and inverters. Domestic production of these drivetrain

components represents the best opportunity for the transition of existing internal combustion engine and transmission facilities in North America, and as such require a high regional value content.

3. Update CUSMA's labour value content requirement and create a mechanism that automatically adjusts this rate based on inflation.

The labour value content requirement of 40–45 per cent high-wage labour content in vehicles qualifying for tariff-free treatment is a novel trade provision not found in pre-CUSMA trade deals. The various flexibilities built into the model limit its effectiveness in encouraging automakers and parts-makers to raise the wages of production workers, mainly in Mexico, to an average of $16 USD per hour.

The most obvious limitation, however, is that the parties neglected to include an inflation-adjustment provision to this benchmarked wage rate. Following a period of extraordinarily high inflation, this benchmark wage must immediately adjust upward to at least $18.69 USD per hour[27] for the year 2024, with an automatic inflation adjustment mechanism applying annually after that.

4. Require the Canada Border Services Agency to release annual compliance reports for each automaker, to enhance public and consumer awareness of regional content levels for all vehicles sold in North America.

There is currently no requirement in Canada for automakers to publicly report on compliance with CUSMA's auto rules-of-origin. Therefore, it is not possible to publicly scrutinize and analyze the efficacy of those provisions in achieving their intended purpose: to onshore a larger share of auto assembly and component part investment and jobs and to raise the wage standards for workers across the industry.

The Canadian government and Canada Border Services Agency (CBSA), the organization responsible for monitoring and enforcing compliance, can provide regular compliance updates to the public while respecting the confidentiality of individual automakers' supplier and sourcing arrangements. Such a report can at least aggregate information on the share of originating material and compliance with labour value content provisions across automakers as well as vehicles and vehicle segments.

Ideally, detailed vehicle-by-vehicle breakdowns of originating and non-originating content would serve a public benefit, identifying for consumers the amount of regional (North American) content in vehicles sold in Canada, the U.S. or Mexico.

Getting serious about enforcing CUSMA's environmental rules

Gavin Fridell

WITH ANNUAL GLOBAL carbon emissions from fossil fuels in 2023 reaching the highest ever recorded, the need for urgent action on climate change beyond current government activity is clear.[28] Yet, as was pointed out frequently in U.S. debates about the Canada-U.S.-Mexico Agreement (CUSMA), "climate change" is not mentioned once in the NAFTA replacement deal. Nor is the Paris Agreement, the 2015 treaty which sets targets for climate change mitigation, among the multilateral environmental agreements that can be enforced through CUSMA's new state-to-state environmental dispute settlement process.[29]

Political formations and election results across North America may make it difficult to improve upon CUSMA's environmental provisions during the agreement's scheduled review in 2026. But this is no excuse for Canada not to try. CUSMA parties should think big in this respect—by agreeing on a climate peace clause, or moratorium on using trade and investment rules to challenge climate change policies, and considering a rapid-response environmental enforcement tool similar to the successful rapid-response labour mechanism.

A CUSMA climate peace clause

The idea for a climate peace clause comes out of a growing movement to prevent trade and investment rules, written prior to widespread recognition of the climate crisis, from blocking climate policies. Basically all regulations, bans, subsidies, preferences, and procurement policies aimed at rapidly lowering emissions and transitioning to low-carbon energy, transportation, and industrial practices should be treated as immune to trade disputes.[30]

Recently, over 190 U.S. state legislators from 52 states and territories called on their government to support a climate peace clause.[31] As described by the Trade Justice Education Fund and the Sierra Club, such a clause:

> would help governments safeguard existing climate policies and create the space for them to adopt the bolder policies that justice and science demand. This could include, for example: (a) policies to reduce use of and reliance on fossil fuels (e.g., rejecting fossil fuel permits, bans on fossil fuel extraction, removal of fossil fuel subsidies) and (b) policies to ramp up the production and distribution of renewable energy and clean energy goods like electric vehicles, heat pumps, and wind turbines (e.g., subsidies, procurement policies, domestic content preferences).[32]

While aimed at state-to-state disputes at the World Trade Organization (WTO) and under free trade agreements like CUSMA, a climate peace clause could also apply to investor-state dispute settlement (ISDS), which unfortunately still exists in a limited form in the renegotiated North American trade deal (see below). Both state-to-state and investor-to-state disputes involving environmental policy pose serious barriers to rapid climate action, threatening governments with potentially billions of dollars in compensation and creating a "chill" effect around new regulations.[33]

Japan and the European Union used the state-to-state dispute mechanisms of the WTO to successfully challenge Ontario's feed-in tariff for renewable energy, which was phased out in 2017. The U.S. and India have both used the WTO to successfully challenge each others' renewable energy policies, which were aimed at promoting local industry while increasing the supply of wind, solar and other renewables.[34]

ISDS mechanisms have been favored by the fossil fuel industry, which has initiated more investment treaty and trade agreement arbitrations than any other sector, securing at least $77 billion USD in compensation from governments and, by extension, tax payers.[35] The ISDS process in NAFTA was frequently invoked against environmental measures.

In 2023, Ruby River Capital launched a huge NAFTA "legacy" claim against Canada for refusing to permit the construction of an environmentally and economically dubious liquified natural gas (LNG) plant in Quebec.[36] The U.S. investor is seeking no less than $1.04 billion USD in compensation, but this amount could increase significantly as the case proceeds, as it is based on an estimate of the potential value of the investment when the tribunal issues its final award.[37] Given the expansion of climate policies and the potentially lucrative gains to be made from ISDS, Kyla Tienhaara et al. anticipate more climate-related investment claims in the future.[38]

This will likely also be the case with state-to-state disputes. Several countries have already raised the possibility of challenges at the WTO against the European Union's new carbon border adjustment mechanism (CBAM), a tariff applied at the border to imports of high-carbon goods that are not subjected to carbon levies equivalent to those in Europe.[39] After decades subsidizing its now-booming electric vehicle industry, China initiated a WTO complaint against U.S. electric vehicle subsidies in March 2024, which is likely to lead to formal dispute proceedings.[40]

A climate peace clause can play an important role in preventing trade and investment challenges from delaying or blocking new policies and regulations aimed at rapidly responding to climate change. The inclusion of such a clause in CUSMA would be a major step toward its expansion to other trade and investment arrangements, including adoption "ultimately... by all WTO countries to offer global protection for climate policies."[41]

Rapid response mechanism for the climate

The dedicated environment chapter (Chapter 24) in CUSMA marked a potential step forward for environmental protection and conservation. The old NAFTA contained a side agreement, the North American Agreement on Environmental Co-operation (NAAEC), which produced reports and recommendations but had little direct impact on environmental enforcement. It was never used to launch a single formal dispute, even if this was technically possible during the NAFTA years.[42]

There is growing recognition that such imprecise and effectively un-enforceable agreements have been unsuccessful for meeting strong and necessary environmental objectives. Even the World Bank now recognizes that, "Environmental provisions in trade agreements can be effective in

improving environmental welfare, but need to be *specific and legally binding*" (emphasis added).[43]

The CUSMA environment chapter has stronger language around conservation and protecting biodiversity, and appears to offer a more direct pathway to enforcement through binding dispute resolution.[44] The NAAEC's public complaints process is maintained and brought into the body of the agreement, allowing individuals or groups from any CUSMA party to request investigations of non-enforcement of environmental protections in any other country.

While CUSMA is still a young agreement, so far there is little indication that the new environment chapter's impact differs significantly from the past.[45] Environmental investigations have been slow and there has yet to be a significant co-operative or enforcement outcome. For instance, one of the earliest submissions to the Commission for Environmental Co-operation (CEC) after CUSMA replaced NAFTA in July 2020 involves the near-extinction of the vaquita porpoise in Mexico. An investigation was launched in August 2021, but the CEC secretariat continues to work on a "factual record," even while there are approximately only 10 vaquita left in the world.[46]

Also concerning, in July 2022, environmental groups challenged the significant environmental and cultural impact of the Tren Maya, a 1,500-km rail link through the Yucatan peninsula, in the state of Quintana Roo, Mexico, through a submission to the CEC. The train project, which was rushed through with minimal and inadequate consultation, could be completed by the end of 2024, potentially before a "factual record" on Mexico's actions will be completed.[47]

The challenge with these cases is twofold. First, even when the CEC process is complete, it is not clear what impact it will have on enforcement. The CEC produces "recommendations" that governments may or may not act upon (Article 24.28). Second, if CEC investigations cannot be carried out in a reasonable amount of time, their effectiveness as a tool of co-operation or enforcement is questionable regardless of their final recommendations. Justice delayed is justice denied.

Given all this, there is an urgent need to revise the CUSMA environment chapter to provide more rapid responses and enforcement of the obligations therein. The Rapid Response Labour Mechanism (RRM) provides inspiration. Although the RRM cannot be replicated for environmental disputes, given its facility-specific orientation, a revised environment chapter could include the following features.

- Like with RRM labour disputes, there should be a 45-day process after which a public submission on environmental enforcement matters (CUSMA Article 24.27) is open to formal state-to-state dispute settlement. The process currently contains too many hurdles and undetermined timelines.

- Article 24.29 of CUSMA, on environmental consultations, should be altered so that governments have a responsibility to act on the basis of CEC recommendations. As it stands, there is no requirement that recommendations made by the CEC will lead to further action, whether in the form of consultations or dispute settlements between governments.

- The consultation process needs to be reduced to a single consultation before moving to the dispute resolution phase. Currently, before dispute settlement can be triggered, parties are required to conduct an environmental consultation (Article 24.29), a senior government representative consultation (Article 24.30), and a ministerial consultation (Article 24.31). International trade lawyer Jim Holbein observes that these steps "can be seen as either multiple points to reach an agreement or layers of governmental hurdles to be overcome, depending on the viewpoint one brings."[48]

On this last point, given there is only one case that has reached the consultation stage—requested by the U.S. around the endangered vaquita porpoise in Mexico[49]—and that these consultations have dragged on for two years, "layers of government hurdles" would appear to be the most accurate description so far. This does not reflect the urgent need for strong and rapid action around biodiversity loss and climate change.

Responsive environmental co-operation and enforcement through CUSMA also necessitate mechanisms to protect specific and diverse communities from environmental damage and unethical corporate practices. The CUSMA environment chapter provides only brief, unenforceable recognition of voluntary commitments from corporations and "the importance of promoting corporate social responsibility and responsible business conduct" (Article 24.13).

Instead of this soft language, enforceable mechanisms rooted in hard obligations ("shall" versus "shall endeavor to," for example) are needed. This could be done in the environment chapter and elsewhere in the agreement. For example, CUSMA parties could be required to put in place effective

mechanisms to ensure that internationally recognized rights and obligations around free, prior and informed consent, human rights due diligence, and Indigenous rights are respected and enforced.

Meaningful action on the environment also requires addressing the most significant environmental challenge of our time: climate change. The CUSMA environment chapter makes no reference to climate change or to major climate agreements, including the 2015 Paris Agreement and the United Nations Framework Convention on Climate Change (UNFCC). While the chapter does commit all three North American countries to implementing seven multilateral environmental agreements, and contains language that some suggest could be directed toward climate goals,[50] the chapter falls short in three important areas.

First, investigations and consultations under the environment chapter focus on biodiversity protection and conservation. These objectives are significant in their own right but have led to a disproportionate focus on Mexico,[51] which confronts challenges around state capacity, resources, and criminal networks. And yet, while Mexico is an important producer of fossil fuels, the U.S. and Canada are the third and fourth largest oil exporters in the world. The impacts of Canadian and U.S. fossil fuel production and exports have a heavy toll on the planet but are not addressed in the environment chapter.[52]

Second, in not mentioning climate change, the environment chapter also provides no commitments to meet climate action goals. This contrasts sharply with corporate-friendly chapters in the agreement such as Chapter 20, covering intellectual property rights, which contains numerous hard commitments. Under Chapter 20, all parties "shall provide a term of protection for industrial designs of at least 15 years," and Canada and Mexico pledge to "fully implement [their] obligations under the provisions of this Chapter no later than the expiration of the relevant time period specified," ranging from 2.5 to five years.[53] These are the sort of firm commitments, with precise timelines for implementation, that are required for climate change action and should be included in a revised environment chapter.

Finally, despite the fact that the environment chapter went into effect only a few years ago, it is already dated compared to more explicit commitments to addressing climate change. For instance, both Canada and the United States are members of the Coalition of Trade Ministers on Climate, which emphasizes "the urgent need for climate change mitigation and adaptation in line with the UNFCCC, the Paris Agreement, and the Sustainable Develop-

ment Goals."[54] One significant way to act on this commitment would be to bring these agreements directly into the CUSMA environment chapter.

Recommendations

1. Revise the CUSMA environment chapter to provide more rapid responses and enforcement of CUSMA environmental obligations, inspired by the RRM in the labour chapter.

2. Negotiate a climate peace clause that shields measures aimed at reducing emissions or responding to the climate emergency from CUSMA state-to-state and investor-state dispute settlement.

Reversing Big Tech's power grab

CUSMA's digital trade chapter undermines worker rights, privacy and competition policy

Stuart Trew

THE CANADA-U.S.-MEXICO AGREEMENT includes a first-of-its-kind digital trade chapter that builds on the e-commerce chapter of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). Key language in both agreements favours large, established, mainly U.S.-based tech firms by giving primacy to the unimpeded flow of data across borders while restricting governments' ability to regulate the digital economy for public interest reasons.

However, a change of heart on digital trade policy in Washington opens a window for Canada, Mexico and the United States to rethink and potentially remove some of CUSMA's harmful regulatory restraints. With CUSMA coming up to a scheduled review period in 2026—for which governments are already beginning to prepare—now is the time to start working toward those goals.

What is digital trade? The OECD claims there is no singular definition but proposes that digital trade encompasses "digitally-enabled transactions of trade in goods and services that can either be digitally or physically de-

livered, and that involve consumers, firms, and governments."[55] According to this definition, buying a book or vacuum cleaner from Amazon is digital trade, but so is booking a hotel through Expedia or Airbnb, hailing a ride from Uber, or streaming a film on Netflix. Global trade in digitally delivered products reached $3.83 trillion USD in 2022, representing half of all global services trade.[56] A significant proportion of digital trade is carried out by U.S.-based firms offering digitally-supplied digital or physical goods or services in other countries.

At a different level, digital trade is a rhetorically useful label chosen by U.S. tech firms in the early 2010s to promote supra-national regulatory constraints on governments as a means of preserving the status quo that led to their oversized power.[57] Key elements of this agenda are limiting governments' capacity to regulate international data transfers and banning their capacity to demand transparency over the code and algorithms that undergird software.

"Underpinning digital trade is the movement of data," notes the OECD. "Data is not only a means of production, it is also an asset that can itself be traded, and a means through which [global value chains] are organized and services delivered.... Data is also at the core of new and rapidly growing service supply models such as cloud computing, the Internet of Things (IoT), and additive manufacturing."[58]

As the value of data has increased, so have corporate efforts to hoard and keep data secret. It is not surprising that countries with the highest share of digital products in their overall services trade, such as Luxembourg and Ireland, are also known tax havens, "where companies can exercise control without state interference."[59]

CUSMA's digital trade chapter, like the CPTPP, broadly covers any measures adopted by governments that "affect trade by electronic means" (CUSMA Article 19.2, CPTPP Article 14.2). Both agreements say there can be no discrimination between the digital products and services of national and foreign firms, similar to national treatment rules in the agreements' investment, services, and market access chapters.

On their own, these provisions limit countries' ability to foster domestic competition to established U.S. (or Chinese or Korean, for that matter) firms that currently dominate the digital economy. They may also interfere with efforts to regulate predatory behaviour by app-based firms such as Uber and Postmates, which compete with and in some cases completely destroy existing markets (and better paid jobs) in restaurant-based food delivery, regulated taxi services, and public services such as urban transit.

Indeed, industry groups representing U.S. big tech interests claim that digital governance policies adopted by Canada violate the digital non-discrimination obligations included in CUSMA's digital trade chapter. For instance, the Computer and Communications Industry Association has claimed that the Online News Act is a discriminatory policy in breach of CUSMA's non-discrimination obligations.[60] The American and Canadian Chambers of Commerce have jointly declared Canada's digital services tax, which has been repeatedly challenged by U.S. officials, would "directly contravene Canada's obligations under [CUSMA]."[61]

CUSMA and CPTPP further prohibit countries from applying customs duties to electronic transmissions, including the content of those transmissions. These rules have tax implications, as alluded to above with respect to companies claiming value generation from the use of data in countries with low or zero taxes.

Many lower income countries without developed income tax systems also depend on customs tariffs on imported goods for government revenues and rightly resist the idea of prohibiting import tariffs on digital products. It is not obvious why digitally supplied goods should be treated differently from any other dutiable product.[62] While it is unlikely Canada would start taxing imports of digital goods and services, countries needn't rule the policy out in perpetuity.

CUSMA also prohibits any restriction on the cross-border transfer of data, including personal information, if it is for business conduct. And the agreement forbids governments from requiring that businesses use or locate computing facilities (e.g., servers or cloud services) domestically, which is sometimes referred to as "data localization." There are clear privacy-based reasons why a country might reasonably expect domestically collected data to be stored locally. There are tax implications as well, as mentioned.

CUSMA further blocks governments from accessing a company's source code and algorithms, except "for a specific investigation, inspection, examination, enforcement action, or judicial proceeding" (Article 19.16). This provision could impede efforts by the United States, Canada or Mexico—individually or collectively—to regulate today's chaotic rollout of novel artificial intelligence technologies and address the mental health impacts on children of social media algorithms.[63] CUSMA may also undermine "right to repair" policies whose effectiveness will in some cases depend on access to corporate data such as source code and diagnostic tools.[64]

This article of the digital trade chapter further impedes governments from addressing company algorithms that may be discriminatory, harmful,

or involve intrusive surveillance practices—an important issue for workers in many different industries and especially so-called gig workers. "Technology companies and other employers are increasingly supervising, surveilling and even disciplining workers with automated artificial intelligence (AI) and algorithmic management systems that can shortchange workers' earnings, expose workers to unsafe workplace conditions, infringe on the right to form unions and exacerbate employment discrimination," wrote the U.S.'s largest labour union federation in February 2023.[65]

Until recently, the U.S. was using every available venue to lock in these invasive digital trade rules, including through regional trade deals like CUSMA and in plurilateral e-commerce negotiations at the World Trade Organization. However, in October 2023, the U.S. withdrew its backing for provisions in the planned WTO agreement relating to data flows, localization of computing facilities, and access to source code. The change of position "was made to preserve the ability of the government to regulate the technology sector, particularly in the emerging field of artificial intelligence."[66]

More recently, United States Trade Representative Katherine Tai suggested the policy shift is related to efforts by the Biden administration to tackle monopolization in the tech sphere. "Some of my antitrust enforcement colleagues in the administration will talk about a domestic market that is dominated by certain firms taking choice and freedom away from people, as consumers and also workers," Tai told an event hosted by the American Society of International Law in April. "We get dictated to by these dominant companies."[67] The influence and close relationship that companies like Google and Amazon have with staff at the United States Trade Representative was also recently exposed.[68]

These and other powerful Silicon Valley–based firms and others, backed by the U.S. Chamber of Commerce, decry this turn away from strict limits on regulating the digital economy. They have waged a public relations war against the Biden administration, enlisting key Republican congresspersons and senators to their cause. The prospects of using the CUSMA review period to gut the agreement of harmful digital trade rules may therefore depend on the results of the November election.

Regardless of who wins November's U.S. elections, Canada may come under pressure in the CUSMA review for its digital governance policies, including the three per cent digital services tax on revenues generated by large U.S. and Canadian digital service companies like Netflix and Amazon from Canadian users. Effectively implementing the digital services tax may require tax officials to verify company data via source code or algorithms—another

reason for Canada to support reforming language in CUSMA restricting access to this information.

Recommendations

1. Canada and Mexico should press for reforms to the digital trade chapter for the same precautionary reasons as the U.S. has proposed: to not hamstring the regulation of emerging AI-based technologies and services; to protect workers against invasive surveillance and unaccountable algorithm-based discipline by firms; to give primacy to privacy over profits in the handling of personal data; to begin to rein in data and tax hoarding in zero-tax jurisdictions; and to retain policy space to support domestic competition to monopoly firms in the global digital economy.

Target Mexico

Removing the bias in CUSMA dispute settlement and investor protection

Stuart Trew

AN ORDERLY METHOD for resolving trade disputes with the United States was a top Canadian priority in negotiations toward the 1988 Canada-U.S. Free Trade Agreement (CUSFTA), the 1993 North American Free Trade Agreement (NAFTA), and the 2018 Canada-U.S.-Mexico Agreement (CUSMA). The more integrated Canadian and U.S. supply chains became over this period, and the more dependent Canadian exporters were on the U.S. market, the more urgent the perceived need in Ottawa for restraining congressional activism in trade policy through binding treaty-based arbitration.

The state-to-state dispute settlement process in NAFTA was used only a handful of times. This is generally attributed to problems with the dispute panel formation process. Under NAFTA, respondent states could effectively block the establishment of a panel by refusing to pick an arbitrator, as the U.S. did in 1998 when Mexico raised concerns related to sugar exports to the U.S. While NAFTA established a roster of panellists who could be selected by lot—to avoid cases being blocked by one party indefinitely—this roster was never fully staffed.[69]

Other circumstances probably played a more significant role in the underuse of NAFTA's state-to-state dispute settlement process. Wide overlap between

NAFTA and the "single undertaking" agreements of the better organized and funded World Trade Organization (WTO) drew North American disputes to Geneva rather than Mexico City, Washington or Ottawa. As one paper put it, NAFTA lost its "technical superiority" to the WTO, which was seen as the better venue for "politically weaker parties" such as Canada and Mexico in the North American context.[70]

Beginning with the Obama administration and continuing under Trump, official U.S. opinion of the WTO dispute process tanked. A February 2020 report of the United States Trade Representative (USTR) pinpointed WTO dispute panel rulings on U.S. trade remedies as a clear case of arbitrators inventing obligations not found in the WTO agreements.[71] The Trump administration refused to approve new appointments to the Appellate Body as a way to pressure WTO member countries to reform the dispute settlement system—a policy sustained under the Biden administration.

CUSMA chapter 31: State-to-state dispute resolution

With the WTO Appellate Body held hostage by the U.S, the state-to-state dispute settlement process in Chapter 31 of CUSMA, which is not all that different to the one in NAFTA, is the only option for settling trade disputes within North America. This alone might explain why there have been more state-to-state disputes filed under CUSMA in four years than there were over the nearly three decade lifespan of NAFTA. These cases have targeted policies and measures near and dear to each of the respondent states, creating the potential for political backlash to CUSMA.

There have been five Chapter 31 disputes to date, two threatened cases related to changes to Mexico's energy policy (shaded in Table 2), and two U.S.-launched reviews of Mexico's actions in two rapid-response labour mechanism complaints. The five state-to-state disputes include two from the U.S. against Canada's tariff-rate quota system regulating dairy imports, a joint Canadian-Mexican challenge to how the U.S. calculates North American content in core auto parts (the rules-of-origin case), another joint challenge to U.S. tariffs (since removed) on solar panels and modules, and a U.S. complaint (with Canada as non-disputing participant) against Mexico's 2023 decree banning genetically modified corn in foods for human consumption.

These cases have covered a lot of treaty ground, with three-person panels asked to review CUSMA language across nine chapters: 2) National Treatment & Market Access for Goods; 3) Agriculture; 4) Rules of Origin; 9) Sanitary &

TABLE 2 CUSMA state-to-state disputes under Chapter 31

Dispute	Complainant	Respondent	At issue	Consultations requested	Status	Result
Dairy supply management, 1st dispute	U.S.	Canada	U.S. alleges that Canada's tariff rate quotas (TRQs) for certain dairy imports violate the treaty's agriculture chapter and Canada's tariff schedule	5/1/2021	**Concluded**: Initial panel report sent to disputing parties Nov. 24, 2021; final report issued Dec. 20, 2021	**Complainant prevails**: Panel sides with U.S. on first of four complaints; Canada reforms dairy TRQs.
Dairy TRQ Allocation Measures 2023	U.S.	Canada	U.S. alleges that Canadian reforms to dairy TRQs resulting from the first CUSMA dispute continue to discriminate against U.S. producers	5/25/2022; 12/22/2022	**Concluded**: Mexico requested third-party status Feb. 2023; international food and retail groups requested third-party status Mar. 2023. Hearings in July 2023; final report issued Nov. 2023	**Respondent prevails**: Panel sides with Canada on all points, with chair presenting a dissenting opinion on whether Canada may exclude importers or retailers from accessing dairy TRQ.
Crystalline Silicon Photovoltaic Cells Safeguard Measure	Canada, Mexico	U.S.	Canada and Mexico allege that U.S. countervailing duties on imports of solar modules violate trade remedies provisions and nullify treaty benefits	12/22/2020	**Concluded**: Initial panel report sent to disputing parties Jan. 3, 2022; final panel report issued Feb. 1, 2022	**Complainant prevails**: Panel sides with Canada & Mexico; U.S. signs MOUs with both countries in July 2022 repealing solar tariffs. Canada & U.S. officially resolve dispute Aug. 5, 2022.
Automotive Rules of Origin	Mexico, Canada	U.S.	Mexico and Canada allege the U.S. is applying a formula for determining regional value content (RVC) in North American–made auto parts that is inconsistent with what was agreed in CUSMA	8/20/2021	**Concluded**: Initial panel report sent to disputing parties Nov. 14, 2022; final report issued Dec. 14, 2022 and made public Jan. 2023	**Complainant prevails**: Panel finds the U.S. RVC formulation in violation of the USMCA rules of origin chapter and autos appendix. There is no indication the U.S. has abided by the panel ruling yet.
Electricity, oil and gas reforms	U.S.	Mexico	U.S. alleges various measures favour Mexico's state-owned Comisión Federal de Electricidad (CFE) and Petróleos Mexicanos (Pemex) and negatively impact U.S. companies operating in Mexico and U.S.-produced energy	7/20/2022	**Pending**: Canada applied for third-party status on July 27, 2022	TBD

Electricity, oil and gas reforms	Canada	Mexico	Canada alleges various measures favour Mexico's state-owned Comisión Federal de Electricidad (CFE) and negatively impact Canadian companies operating in Mexico and with investments in Mexico's electricity sector	7/20/2022	**Pending**: U.S. requests third-party status July 27, 2022	**Possible settlement:** Mexico claimed in Jan. 2023 to have resolved the dispute with Canada, but neither this nor the U.S. case has officially closed.
Biotechnology approvals and import bans	U.S.	Mexico	U.S. alleges multiple violations of the CUSMA sanitary and phytosanitary standards chapter pertaining to Mexico's February 13, 2023 decree banning the use of genetically engineered corn in tortillas or dough, and the instruction to government agencies to gradually substitute the use of GE corn in all products for human consumption and for animal feed	6/2/2023	**Pending**: Canada gives notice of third-party (non-disputing) participation in the dispute on Aug. 26, 2023; tribunal allows multiple U.S., Mexican NGOs to submit briefs to the dispute; hearings scheduled for late June in Mexico City	TBD

Note Shaded disputes do not appear to be active. Table does not include the two rapid-response labour mechanism review panels (Annex 31-A) initiated to date by the U.S. against Mexico, which are described in the labour rights section of this report.

Phytosanitary Standards; 10) Trade Remedies; 14) Investment; 15) Cross-border Trade in Services; 22) State-owned Enterprises & Designated Monopolies; 29) Publication & Administration. Panels have, for the most part, presented their final reports on deadline and with remarkable efficiency. In contrast to the absurdly verbose tomes produced by the WTO Dispute Settlement Body and Appellate Body, CUSMA panel reports have stuck to the 50-page limit.

While many of these cases risk undermining political and public support for the young NAFTA replacement treaty, they may be unlikely to lead to demands in the U.S. for renegotiation of CUSMA Chapter 31. Despite the potential for trade sanctions against states at the end of a failed CUSMA defence, the treaty's dispute process largely sustains a power-based model of North American integration. The U.S. has not yet adjusted its method for calculating domestic content in core auto parts despite the CUSMA dispute panel finding that this method violates the agreement's auto rules-of-origin. Yet America's neighbours seem in no rush to retaliate.

In another sign of U.S. support for the CUSMA dispute process, the Biden administration is angling to replace the more legalistic, appeals-based WTO dispute settlement system with a "single-tier" model along the lines of the

one in Chapter 31 of the new NAFTA.[72] Still, it's possible the U.S. would seek changes to a North American dispute settlement process it sees as overreaching. Were Canada and Mexico to impose duties on U.S. imports in response to the automotive rules-of-origin decision, it could provide a potential trigger.

Canadian and U.S. challenges to Mexican energy reforms prioritizing publicly owned electricity would be similarly antagonistic and counterproductive, as North American governments grapple with interventionist forms of economic, environmental and social policy co-operation. Mexico may also respond harshly to a CUSMA panel ruling against its popular February 2023 decree restricting the use of genetically engineered corn in foods for human consumption, which is based on economic, health and environmental grounds, and as a means of preserving Indigenous rights and culture.[73]

Besides these CUSMA state-to-state disputes, there have been dozens of other treaty-based disputes under other chapters in the agreement. These include the 22 labour disputes lodged under CUSMA's rapid-response labour mechanism (RRM), a successful labour chapter petition by Mexican migrant workers against gender discrimination in U.S. farm policy, and a slate of Chapter 10 reviews of U.S. trade remedies initiated by Canadian exporters, involving mainly construction materials including pipe and softwood lumber.

In another reminder of the limits of NAFTA and CUSMA to settle long-standing Canadian complaints with U.S. policy, in January 2024 Canada launched a Chapter 10 review of recent duties imposed on Canadian softwood lumber exports.[74]

Investor-state dispute settlement

On top of these disputes, a large number of "legacy" investor-state disputes settlement (ISDS) cases were launched between July 2020 and May 2023, when this ceased to be an option for Canadian investors in the U.S. and vice versa. These contentious investor lawsuits include a $1.04 billion USD compensation claim against Canada related to a rejected LNG project in Quebec, the highly controversial $15-billion USD suit against the Biden administration's cancellation of the Keystone XL pipeline expansion, and a dozen or so claims against Mexico related to energy, mining, taxation and public services.[75]

The removal of ISDS between Canada and the U.S. is undoubtedly a positive feature of the new NAFTA, hailed by Deputy Prime Minister Freeland

in 2018 as a key achievement in the CUSMA negotiations. ISDS "has cost Canadian taxpayers more than $300 million in penalties and legal fees," said Freeland. "ISDS elevates the rights of corporations over those of sovereign governments. In removing it, we have strengthened our government's right to regulate in the public interest, to protect public health and the environment, for example."[76]

However, the continued applicability of ISDS to Mexico, even in a more limited form under Chapter 14 of CUSMA, is a great injustice that should be corrected during the six-year review. Mexico continues to permit ISDS claims involving alleged breaches of the national treatment, most-favoured-nation treatment, and expropriation clauses in CUSMA's investment chapter. This right is available to U.S. investors holding government contracts in the fossil fuel, telecommunications, power generation, transportation services sectors, or in the management of infrastructure like roads and bridges.

The experience of all three countries under NAFTA's investor-state dispute settlement regime was pitiable, though Mexico and Canada bore the brunt of costly private arbitral decisions which often second-guessed legitimate public policy measures that were found to violate NAFTA's broad investor protections. It is highly unfortunate that Canada continues to press for strong investor protections and ISDS provisions in its post-CUSMA trade negotiations with Ecuador, ASEAN and Indonesia. The government appears to be doing this largely on behalf of the influential fossil fuel and mining lobbies, which are responsible for more than 70 per cent of Canadian ISDS cases abroad.[77]

Still, every effort should be made to revisit the CUSMA investment chapter outcome that leaves North America's southernmost partner exposed to expensive, unreasonable and unnecessary ISDS claims. There is scant evidence that access to ISDS makes Mexico more attractive to foreign investment.[78] On the other hand, there is substantial evidence that investment arbitration poses a barrier to the enactment of responsible environmental measures and the achievement of human rights and Indigenous rights, as documented in a recent United Nations report.[79]

Recommendations

1. Canada should press the U.S. and Mexico to strip ISDS out of the agreement for all three countries—or co-operate with U.S. or Mexican proposals to do the same. Canada should further propose to Mexico to disapply the ISDS

mechanism of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) for Canadian investors in Mexico and vice versa.

2. With respect to the CUSMA state-to-state dispute settlement process, as discussed earlier in the section on environment and climate, the CUSMA parties should agree on a climate peace clause that will shield all three countries from state-to-state disputes involving a broad range of measures aimed at lowering greenhouse gas emissions, electrifying transportation networks, and transitioning to a more sustainable economic model.

TABLE 3 CUSMA "legacy" ISDS claims against Mexico, July 2020 to July 2023

Complainant (nationality)	Request for arbitration	Status	Award sought	Date of alleged NAFTA violation	Sector
Cyrus Capital Partners & Contrarian Capital Mgmt. (U.S.)	Not known. Registered by ICSID Aug. 11, 2023.	Active	$219 million USD	Events leading up to Mar. 23, 2023	Financial and insurance activities
Mario Noriega Willars (U.S.)	Not known. Registered by ICSID July 21, 2023.	Pending	Not known	Not known	Transportation and storage
First Majestic Silver Corp. (Canadian)	Not known. First case Mar. 31, 2021; second case registered by ICSID July 21, 2023.	Active	$500 million USD	Events leading up to and since Mar. 2021 (continuing violation of NAFTA)	Oil, gas, mining (taxation)
Silver Bull Resources Inc. (U.S.)	June 29, 2023	Active	$178 million USD	Events since Sept. 2019	Oil, gas, mining
Arbor Confections Inc., Mark Alan Ducorsky (U.S.) and Brad Ducorsky	Not known (registered by ICSID July 20, 2023)	Pending	$80 million USD	Not known	Other industry (food manufacturing)
Enerflex US Holdings and Exterran Energy Solutions (U.S.)	16-Jun-23	Active	$120 million USD	January 31, 2022	Oil, gas, mining
Access Business Group (U.S.)	April 13, 2023	Active	$3 billion USD	July 1, 2022	Agriculture, Fishing & Forestry
Goldgroup Resources (Canadian)	Feb. 17, 2023	Active	At least $100 million USD	Events leading up to Apr. 30, 2021	Oil, gas, mining (legal dispute in Mexican courts)
Amerra Capital Mgmt LLC and others (U.S.)	Aug. 3, 2022	Active	Not known (redacted)	Events leading up to Apr.-May 2022	Finance (debt instruments)
Doups Holdings LLC (U.S.)	July 13, 2022	Active	Not known	Events post June 12, 2019	Transportation (permits—metered parking)
Margarita Jenkins, María Elodia Jenkins and Juan Carlos Jenkins (U.S.)	Notice of intent sent to Mexico on July 19, 2021	Pending	Not known	Events leading up to June 29, 2021	Services and trade (private university)
Finley Resources Inc., MWS Management Inc. & Prize Permanent Holdings LLC (U.S.)	Mar. 25, 2021	Active	$100 million USD	Events post Oct. 4, 2018	Oil, gas, mining (oilfield contracts)

Notes Case details are drawn from the World Bank ICSID database, Investment Arbitration Reporter, the Italaw ISDS database, the Government of Mexico, and other news sources. Cases involving incidents that postdate NAFTA (i.e., that occurred after July 2020) are shaded blue unless the complainant alleges violations for both pre- and post-July 2020 actions (e.g., where a pattern of behaviour versus a single post-NAFTA incident is being disputed). Cases are ordered by date of request for arbitration where this information is available. Under status, "active" indicates that a tribunal has been formed.

CUSMA's incomplete gender and inclusive trade record

Laura Macdonald and Mary McPherson

THE RENEGOTIATION OF the North American Free Trade Agreement (NAFTA) happened at a time of upheaval in the so-called rules-based international order. The election of Donald Trump on an anti-NAFTA mandate, the United Kingdom's withdrawal from the European Union (Brexit), and the failure of the Obama administration's free trade pact with the EU—and near failure of Canada's own EU deal, CETA, in part due to its excessive investor protections—exposed simmering antipathy for neoliberal globalization in the West.

In Canada, the Trudeau government responded to public and political concerns about the unequal impacts of trade by promising to devise a "progressive trade agenda." Global Affairs Canada's 2017-18 departmental plan spoke of the government's "increased commitment to openness and transparency, especially in evaluation and reporting" on trade policy, which should "consider issues such as labour, the environment, gender equality, transparency and inclusive economic growth."[80]

The policy, later renamed "inclusive trade," purports to "ensure that the benefits and opportunities that flow from trade are more widely shared, including with under-represented groups such as women, [small and medium-

sized enterprises], and Indigenous Peoples."[81] Following Chile and Uruguay, Canada began adding gender chapters to its free trade agreements.[82] Canada now performs gender-based analyses (GBA+) of all new trade deals prior to their ratification by Parliament.[83]

Canada's underlying assumptions about trade rules have not changed, however. Canada maintains that the "international rules-based order" governed by the World Trade Organization (WTO) and NAFTA "has provided unparalleled prosperity to Canada and others for decades."[84] Canadian trade policy continues to prioritize market access opening for Canadian commodity and agricultural exporters and financial and other services, and strong protections for Canadian extractive firms operating abroad.

South of the border, in contrast, a bipartisan consensus has emerged that free trade has produced destabilizing losses for many and highly unequal gains for others. "Simply put," writes Trump's United States Trade Representative (USTR) Robert Lighthizer, "I believe that American trade policy should revolve around helping working-class American families. Enhancing corporate profits, increasing economic efficiency, and lowering consumer prices are important but, in my view, secondary to this goal."[85]

The Biden administration has retained the worker-centred trade stance of its predecessor while incorporating racial and gender equity into its trade data collection and reporting requirements for USTR.[86] The USTR's 2022–26 strategic plan outlines "inclusive" processes through which a more equitable trade policy might be developed, including working with "unions, Tribal Nations, state and local government," and through outreach to "underserved and disadvantaged communities" in policy development, negotiations, and implementation and enforcement of agreements."[87]

The same document proposes to identify how trade policy can "contribute towards increasing equity, reducing income inequality, and expanding micro, small, and medium-sized enterprises and their potential to create good U.S.-based jobs through trade." What's more, where Trump's trade reforms and rhetoric focused on U.S. workers largely from traditional, male-dominated sectors, Biden's USTR Katherine Tai speaks of the value of advancing workers' rights abroad, so that "we are not pitting our working communities against each other, but instead allowing them to compete fairly and thrive in this global economy."[88]

In the NAFTA renegotiations, Canada proposed to add chapters to the new deal on trade and gender and trade and Indigenous Peoples. Neither chapter appeared in the final agreement because of opposition from the Trump administration. Given developments in U.S. trade policy since then,

the CUSMA review provides an opportunity to revisit these exclusions and consider other ways in which inclusive elements from Canadian, U.S. and Mexican trade policy could be mainstreamed into the agreement.

Gender and trade

The NAFTA agreement was completely gender blind and lacked any consideration of what the different impacts of the agreement might be on men and women. This was despite the fact that Canadian feminist political economists and activists had drawn attention to these issues during the debates on both the Canada-U.S. Free Trade Agreement (CUSFTA) and NAFTA.

The economic integration which occurred after implementation of these agreements did have clear gender effects, including the loss of economic sectors in Canada that employed a disproportionately female and racialized workforce, like textiles and apparel production. In Mexico economic integration and neoliberal reforms led to the rapid growth of the maquiladora sector (export-oriented factories close to the U.S. border) where women represented a large majority of the workforce, especially in the early years of NAFTA.

Even if the number of male workers in the maquilas has increased over time, women still tend to occupy more poorly paid and precarious positions and are often subject to discrimination, sexual harassment and violence. Protection unions (see the labour rights section of this report) are particularly common in the maquila sector. Women are over-represented in the informal sector, which is not covered by the rapid-response mechanism (RRM) in CUSMA.

Global Affairs Canada lists the following objectives of including gender chapters in Canadian free trade agreements:

1. Reaffirm the importance of incorporating a gender perspective into economic and trade issues.
2. Reaffirm a commitment to international agreements on gender equality and women's rights, including the Convention on the Elimination of All Forms of Discrimination against Women.
3. Provide a framework for parties to the agreement to undertake co-operation activities on issues related to gender and trade.
4. Establish a dedicated trade and gender committee and other institutional provisions.[89]

Gender chapters draw attention to the unequal impact of trade agreements on men and women and gender-diverse individuals, but they are not legally binding. Most Canadian trade deals do not grant recourse to dispute settlement for matters arising from their gender chapters, meaning there are no sanctions attached to any failure to abide by the commitments therein.[90]

Many of the contemporary efforts to mainstream gender in existing trade architectures, such as separate gender chapters in regional or other multilateral trade agreements, the 2017 WTO Buenos Aires Declaration on Trade and Women's Economic Empowerment, efforts to promote women's entrepreneurship, and gender-based analysis (GBA) of trade policies fall seriously short because they fail to acknowledge the importance of social reproduction in the economy or to consult with women's organizations in devising new strategies.[91]

Despite the absence of a gender chapter, CUSMA does include limited references to gender in other parts of the agreement. The most significant are found in the labour chapter, as discussed in the labour section of this report. CUSMA includes a commitment to International Labour Organization (ILO) core labour rights, including "the elimination of discrimination in respect of employment and occupation" and "acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health." However, the labour chapter does not include a commitment to equal pay for work of equal value.

Furthermore, Art. 23.9 of the CUSMA labour chapter commits the parties to: "implement policies that it considers appropriate to protect workers against employment discrimination on the basis of sex (including with regard to sexual harassment), pregnancy, sexual orientation, gender identity, and caregiving responsibilities; provide job-protected leave for birth or adoption of a child and care of family members; and protect against wage discrimination."

In response to backlash from U.S. members of Congress, however, a footnote was added to the article stating: "The United States' existing federal agency policies regarding the hiring of federal workers are sufficient to fulfill the obligations set forth in this Article. The Article thus requires no additional action on the part of the United States, including any amendments to Title VII of the Civil Rights Act of 1964, in order for the United States to be in compliance with the obligations set forth in this Article."

This is a questionable claim in light of the many challenges faced by women and LGBTQI+ workers in the United States, and underlines the weakness of the labour provisions with regard to the rights of U.S. or Canadian

workers.[92] Notably, the CUSMA labour chapter also included protections for migrant rights. As discussed in the section on labour rights, this led to the successful labour chapter dispute regarding the rights of Mexican women migrant workers in the United States.

The Facility-Specific Rapid Response Labour Mechanism (RRM) in CUSMA, described in detail in the labour rights section, only focuses on violation of the right of free association and collective bargaining, and contains no reference to the ILO core labour rights regarding elimination of discrimination in the workplace, which are designed to address gender and other forms of discrimination. Nor does it refer to such issues as sexual harassment and sexual violence in the workplace which are addressed in Mexico's labour reform.

Chapter 25 of CUSMA, on small and medium-sized enterprises (SMEs), pledges each party to "strengthen its collaboration with the other Parties on activities to promote SMEs owned by under-represented groups including women, indigenous peoples, youth and minorities, as well as start-ups, agricultural and rural SMEs, and promote partnership among these SMEs and their participation in international trade." This commitment recognizes the fact that women are much more likely to own small businesses than own or be represented in senior management of large corporations, and that SMEs are much less likely to export than larger companies.

Like gender chapters in other trade agreements, however, the commitments in the SME chapter have no sanctions attached to them, and none of the other text of the chapter refers to the specific barriers faced by businesses owned by women, gender-diverse or racialized individuals.

Indigenous Peoples and trade

As settlers, we are not in a position to make recommendations for changing or building on the provisions in CUSMA pertaining to Indigenous Peoples. We will simply make a few observations on the outcome in those negotiations, developments in Canadian trade policy with respect to Indigenous Peoples since then, and the need to broadly consult with Indigenous Peoples across the continent in the six-year review process.

First, we recognize Canadian negotiators' past efforts to try to include a chapter on Indigenous Peoples' rights in CUSMA. Though an Indigenous chapter did not make it into the final text of the agreement, Indigenous Peoples' rights were protected to an extent in Article 32.5 of the exceptions

and general provisions chapter, in the preamble to the agreement, in the environment chapter with respect to biodiversity, and in other chapters.

The limits of the general exception for Indigenous Peoples may be tested in the U.S. dispute against Mexico's GE corn measures (see the dispute settlement section of this report) depending on how the dispute panel handles each side's arguments. We note that in Canada's initial submission to that dispute (as a non-disputing party), the federal government reinforces that it is up to each country to determine whether a measure is "necessary to fulfill its legal obligations to indigenous peoples."[93] Depending on the result of the dispute, CUSMA parties may need to clarify the broadest possible scope for the Indigenous Peoples' exception.

Earlier this year, Canada ratified the 2023 Canada-Ukraine Free Trade Agreement (CUFTA), which includes a full chapter on rights and expectations with respect to Indigenous peoples in Canada and Ukraine. The chapter is in the spirit of Canada's inclusive trade agenda in that it highlights the desirability of facilitating trade and investment by Indigenous-owned businesses. It also includes a non-derogation clause, as requested by the Assembly of First Nations in the CUSMA negotiations.[94] However, nothing in the chapter is subject to dispute settlement, and there is no obligation for the committee on Indigenous Peoples established by the treaty to include representatives from Indigenous nations or communities in either country.

Recommendations

Given the limitations and omissions in CUSMA with respect to addressing gender inequity and Indigenous Peoples' rights in North American economic relations, Canada should use the six-year review to pursue the following priorities.

1. Conduct a thorough equity review and gender-based analysis of CUSMA, and consider ways in which an intersectional analysis could lead to better inclusion of provisions designed to address how trade may have negative impacts on women, racialized people and other disadvantaged groups.

2. Include women's and LGBTQI+ organizations from the three countries in the CUSMA six-year review process.

3. Include a gender chapter and develop ways in which the provisions of the chapter can be subjected to dispute resolution.

4. Remove footnote 15 of the labour chapter, which indicates that the United States has no responsibilities with regard to the language on discrimination in the workplace.

5. Include the violation of commitments to eliminate discrimination of employment and occupation as grounds for triggering a rapid-response labour mechanism complaint.

6. Include consideration of the right to equal pay for work of equal value in the labour chapter.

7. Provide financial support for the gender elements in the Mexican labour reform and for Mexican labour activists' efforts to organize women workers and provide capacity-building, training and other measures.

8. Consult with representatives of Indigenous nations and communities in all three countries on all aspects of the six-year CUSMA review.

A roadmap for a worker- and climate-focused CUSMA review

Conclusion and recommendations

THE SIX-YEAR CUSMA review period will be upon us sooner than we expect. Elections in all three countries will delay preparations for that review and frustrate attempts to anticipate political opportunities and challenges. No matter who is in power at that time, a smooth rollover of the existing CUSMA is unlikely, as both Republican and Democratic trade officials have suggested they may use the six-year review to press for further concessions from Canada and Mexico.

"[Y]ou do not want that review to happen in a way that all three parties come to the conversation too comfortable," said United States Trade Representative Katherine Tai in March 2024. "The whole point is to maintain a certain level of discomfort, which may involve a certain level of uncertainty, to keep the parties motivated to do the really hard thing, which is to continue to re-evaluate our trade policies and our trade programs to ensure that they're really responding to the changes that are happening around us."[95]

While the CUSMA review period is not without significant risks, there would be social, economic and environmental benefits to improving upon language in the agreement's labour, environment, digital trade, investment,

and inclusive trade chapters. Representatives of the Mexican government, for their part, have indicated they also plan to use the review to push for changes, including improvements to the RRM to make it more symmetrical, a welcome possible revision.[96]

This collaborative report has proposed a number of such improvements but should not be seen as an endorsement of the agreement. Rather, it indicates the potential for reforming our trade institutions—in consultation with trinational civil society—to foster inclusive, sustainable, and just economic and social relations on this continent.

Recommendations

1. Expand the application of the CUSMA Facility-specific Rapid Response Labour Mechanism (RRM) to include labour rights violations in Canada and the U.S.

2. Confirm and expand economic sectors to which the RRM applies beyond those involved in manufacturing goods, supplying services, or mining to include energy, the broader service sector, agriculture and migrant workers.

3. Expand the definition of a "denial of rights" under the RRM from just freedom of association and collective bargaining rights to include discrimination on the basis of gender or sexual orientation or gender expression, gender-based violence, child labour, health and safety, and minimum standards of work.

4. Clarify Annex 31-B (the Canada-specific rapid-response mechanism) to confirm that the RRM applies to a denial of rights at any covered facility covered by any domestic legislation.

5. Clarify and promulgate more specific criteria and requirements for remediation agreements that resolve RRM complaints, including content (damages, etc.), timelines, and requirements for consultation with stakeholders.

6. Create a Canadian consultative body, similar to the Independent Mexico Labour Expert Board in the United States, to provide a dedicated contact point and expert independent advice and guidance to the Canadian government in respect of CUSMA labour matters.

7. Engage in co-operative capacity building under the CUSMA labour chapter to strengthen law enforcement and inspection systems in Mexico and assist

with funding and capacity for an arms' length oversight committee with a mandate to collect data and offer training in respect of labour law enforcement.

8. Implement meaningful Canadian enforcement measures to comply with the prohibition on the importation of goods produced using forced or compulsory labour found in Article 23.6 of CUSMA.

9. Establish a new, harmonized North American most-favoured-nation (MFN) tariff rate for vehicles and parts that encourages compliance with CUSMA's rules-of-origin and guards against a surge of Chinese auto imports.

10. Update CUSMA's list of core automotive components to better reflect the advanced technologies in future vehicles, including electric vehicles (EVs).

11. Update CUSMA's labour value content requirement and create a mechanism that automatically adjusts this rate based on inflation.

12. Require the Canada Border Services Agency to release annual compliance reports for each automaker to enhance public and consumer awareness of regional content levels for all vehicles sold in North America.

13. Revise the CUSMA environment chapter to provide more rapid responses and enforcement of CUSMA environmental obligations inspired by the RRM in the labour chapter.

14. Negotiate a climate peace clause that shields measures aimed at reducing emissions or responding to the climate emergency from CUSMA state-to-state and investor-state dispute settlement.

15. Revise rules in the CUSMA digital trade chapter on cross-border data flows, data localization, and source code and algorithms to give North American countries the flexibility to adequately regulate emerging digital technologies, protect privacy (especially in the workplace), and otherwise limit data flows outside of national boundaries where there is a public interest reason to do so.

16. Create an equal playing field across North America with respect to investment by completely eliminating investor-state dispute settlement in Mexico as it has been for Canada and the United States.

17. Propose to remove access to the ISDS process in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) for Canadian investors in Mexico and Mexican investors in Canada.

18. Conduct a thorough equity review and gender-based analysis of CUSMA, and consider ways in which an intersectional analysis could lead to better inclusion of provisions designed to address how trade may have negative impacts on women, racialized people and other disadvantaged groups.

19. Include women's and LGBTQI+ organizations from the three countries in the CUSMA six-year review process.

20. Include a gender chapter and develop ways in which the provisions of the chapter can be subjected to dispute resolution.

21. Remove footnote 15 of the labour chapter, which indicates that the United States has no responsibilities with regard to the language on discrimination in the workplace.

22. Include the violation of commitments to eliminate discrimination of employment and occupation as grounds for triggering a rapid-response labour mechanism complaint.

23. Include consideration of the right to equal pay for work of equal value in the labour chapter.

24. Provide financial support for the gender elements in the Mexican labour reform and for Mexican labour activists' efforts to organize women workers and provide capacity-building, training and other measures.

25. Broadly engage North American Indigenous communities including First Nations, Inuit and Métis in the Canadian preparations for the six-year CUSMA review.

Annex

CUSMA Article 34.7: Review and Term Extension

1. This Agreement shall terminate 16 years after the date of its entry into force, unless each Party confirms it wishes to continue this Agreement for a new 16-year term, in accordance with the procedures set forth in paragraphs 2 through 6.

2. On the sixth anniversary of the entry into force of this Agreement, the Commission shall meet to conduct a "joint review" of the operation of this Agreement, review any recommendations for action submitted by a Party, and decide on any appropriate actions. Each Party may provide recommendations for the Commission to take action at least one month before the Commission's joint review meeting takes place.

3. As part of the Commission's joint review, each Party shall confirm, in writing, through its head of government, if it wishes to extend the term of this Agreement for another 16-year period. If each Party confirms its desire to extend this Agreement, the term of this Agreement shall be automatically extended for another 16 years and the Commission shall conduct a joint review and consider extension of this Agreement term no later than at the end of the next six-year period.

4. If, as part of a six-year review, a Party does not confirm its wish to extend the term of this Agreement for another 16-year period, the Commission shall

meet to conduct a joint review every year for the remainder of the term of this Agreement. If one or more Parties did not confirm their desire to extend this Agreement for another 16-year term at the conclusion of a given joint review, at any time between the conclusion of that review and expiry of this Agreement, the Parties may automatically extend the term of this Agreement for another 16 years by confirming in writing, through their respective head of government, their wish to extend this Agreement for another 16-year period.

5. At any point when the Parties decide to extend the term of this Agreement for another 16-year period, the Commission shall conduct joint reviews every six years thereafter, and the Parties shall have the ability to extend this Agreement after each joint review pursuant to the procedures set forth in paragraphs 3 and 4.

6. At any point in which the Parties do not all confirm their wish to extend the term of this Agreement, paragraph 4 shall apply.

Notes

1 The details of the review are contained in Article 34.7 of CUSMA, which is included as Annex 1 of this report.

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5 Chamber of Commerce, "Canadian Chamber hosts executive roundtable on Canada-US engagement strategy," February 15, 2024: https://chamber.ca/news/canadian-chamber-hosts-executive-roundtable-on-canada-us-engagement-strategy/.

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7 Laura Macdonald, "Gender and Regionalization in North America: From NAFTA to CUSMA and Beyond?" International Journal, Vol. 77, Issue 3 (December 15, 2022): https://journals.sagepub.com/doi/10.1177/00207020221146492.

8 These reforms began prior to the CUSMA negotiation, as a condition of Mexico entering the Trans-Pacific Partnership (TPP) negotiations in 2016.

9 Estimates vary, but during this period there may have been 140,000 registered collective agreements, a substantial portion of which were unknown or unenforced in any material sense.

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13 Maquila Solidarity Network, "What have rapid response labour complaints achieved for Mexican workers," December 11, 2023: https://www.maquilasolidarity.org/en/what-have-rapid-response-labour-mechanism-complaints-achieved

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15 USTR, "USMCA Rapid Response Labor Mechanism Panel Releases Determination Regarding Grupo México Mine; Biden-Harris Administration Will Continue Seeking to Enforce USMCA Labor Obligations and Advance Workers' Rights," May 13, 2024: https://ustr.gov/about-us/policy-offices/press-office/press-releases/2024/may/usmca-rapid-response-labor-mechanism-panel-releases-determination-regarding-grupo-mexico-mine-biden.

16 MEX-USA-2023-31A-01, p. 61: https://ustr.gov/sites/default/files/San%20Martin%20-%20Panel%20Determination%20-%20For%20Posting.pdf.

17 Oliver Ward and Margaret Spiegelman, "Former USTR general counsel: RRM needs adaptations for use in other agreements," Inside US Trade, April 15, 2024.

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19 White House Fact Sheet (January 29, 2020): https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trumps-united-states-mexico-canada-agreement-delivers-historic-win-american-workers/

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