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Deep in the Heart of North America: Texas and the Future of North American Energy Trade

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DEEP IN THE HEART OF NORTH AMERICA: TEXAS & THE FUTURE OF NORTH AMERICAN ENERGY TRADE

Guillermo J. Garcia Sanchez & James W. Coleman*

Texas, the heart of North American energy markets, has recently emerged from history's biggest oil boom, and is becoming the crossroads for an increasingly two-way trade in oil and gas. Texas and Mexico, in particular have much to gain from expanded energy trade. Texas has become a global center of natural gas and light crude oil production that can meet growing demand for power for Mexican consumers and fuel for Mexican refineries. And Mexico's wind power resources in Tamaulipas would be most valuable if that power could be exported to centers of urban and industrial demand in Texas.

Yet there is an increasing danger that this potential will be squandered. Growing movements against eminent domain, infrastructure permits, and energy exports in the United States and moves to re-nationalize the energy sector in Mexico are making energy companies increasingly wary of investing in the future of Texas-Mexico energy trade. Ironically, politicians on both sides of the border accuse each other of being the source of uncertainty for the future of the North American energy industry.¹

This report shows how energy law changes in the U.S. and Mexico present under-studied dangers to cross-border energy trade and will set an agenda for legal reform to enable mutually beneficial fuel and power trade. This report is the result of a two-year research supported by the Mission Foods Texas-Mexico Center grant. With the help of the grant, we were able to interview policy makers, practitioners, and stakeholders involved in U.S.-Mexico energy relations. The findings of our research and the interviews, set the grounds for the key recommendations proposed in the report. The key final recommendations propose a set of

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¹ For example, Texas Governor Greg Abbott wrote directly to President Lopez Obrador complaining about the impact that his new energy policies are having on Texas producers. Robbie Whelan, *Legal Tussle Prevents \$2.5 Billion Gas Pipeline to Mexico From Opening*, WALL STREET JOURNAL, August 19, 2019, <https://www.wsj.com/articles/legal-tussle-prevents-2-5-billion-gas-pipeline-to-mexico-from-opening-11566229406> (last visited Jan 26, 2021).; on the Mexican side, President Lopez Obrador's administration officially complained about Gov. Abbott's executive emergency order to halt natural gas exports outside of the state during the Texas black out of February 2021. Mexico presses U.S. to guarantee natural gas supplies after Texas export ban, REUTERS, February 18, 2021, <https://www.reuters.com/article/us-mexico-ing-supply-idUSKBN2AI05C> (last visited Sep 3, 2021).

energy principles that could be adopted either by the United States Mexico Canada Agreement USMCA partners or by direct negotiations between Texas and Mexico to secure the benefits of increased energy trade and increase cooperation in energy and climate policy. These principles could be the basis of an international agreement, but could also be adopted through other transnational norm instruments, such as letters of intent or memorandums of understanding among the key stake holders. Regardless of the adopted form, we believe they serve as a guideline to regulate the already integrated energy region and bring transparency, and efficiency to this relationship.

Key Policy Recommendations:

- *Non-discriminatory access to energy infrastructure and freedom of energy transit.* Both countries should adopt clear rules that give partner country companies access to existing infrastructure, including transit-related infrastructure, and should not prevent companies from building new capacity when existing transit infrastructure is insufficient.
- *Investment protection principles for North American energy companies.* Both countries should adopt clear rules on expropriation and nationalization of energy assets, including formulas for compensation that contemplate market values, rates of return, and formulas to estimate future prices.
- *Principles for regulator's decision-making processes and coordination on energy data.* Energy regulators should have independence and adopt clear rules that do not discriminate against foreign entities and have a guiding principle or integrating the energy markets.
- *Principles on cooperation in security and energy supply.* Taking into account the interdependence of energy markets and the emergency situations faced by the region in the past decades, the energy partners should adopt protocols that recognize the principle to cooperate in emergency situations and alleviate the supply needs of the region.
- *Joint decision-making bodies.* These energy partners should work to create a North American commission that serves as a connecting point for coordinating energy policies to further integrate the region, but that also serves a platform for discussing government decisions that might negatively impact the energy principles.

- *Cooperation for joint environmental and safety standards.* Both nations should cooperate as much as possible in setting harmonized environmental and safety standards for the industry.
- *Transboundary resources related principles.* The U.S. and Mexico should take the existing transboundary agreements on the joint development of resources at the borderline and integrate them in their energy relationship.
- *Community engagement principles.* The construction of energy related infrastructure in the region has direct impacts on different communities, many of them historically disenfranchised from the decision-making process of governments. The United States and Mexico should work to establish best practices for address these impacts.

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I. INTRODUCTION

The United States has moved to the center of global energy markets, as the world's biggest producer of both oil and natural gas and Texas is the center of this titanic industry.² At the same time, the United States lies at the nexus of North American energy markets, bordering two important energy powers in Canada and Mexico. The United States and Canada have long had the world's most important bilateral energy relationship, with two-way flows of oil, gas, and electricity.³ But there is a new opportunity to construct an equally important relationship between the United States and Mexico.⁴ New oil and gas production in the United States is reaching growing markets in Mexico and Mexico has the potential for new production of oil, gas, and renewable energy that would most naturally be exported to the United States.

Yet there is an increasing danger that this potential will be squandered. Officials on both sides of the border are neglecting the potential of integrated North American energy markets. To the contrary the energy and its regional legal architecture have been frequently hijacked for political purposes. For example, after Mexican President Lopez Obrador forced a renegotiation of the pipeline contracts that export Texas natural gas to Mexico, Texas Governor Greg Abbott wrote, "Lingering questions about Mexico-U.S.-Canada project delays and longstanding contracts and business commitments could negatively impact our economies for years to come."⁵ A year later, Mexico officially complained about Gov. Abbott's order to halt the same natural gas exports to

² According to the U.S. Energy Information Administration Texas is the top crude and natural gas producing U.S. state. It accounts for around 43% of the nation's crude oil production and 26% of its marketed natural gas production. Texas Profile, , <https://www.eia.gov/state/print.php?sid=TX> (last visited Nov 12, 2021). For a review of the increase of U.S. natural gas exports *see* [Natural gas imports and exports - U.S. Energy Information Administration \(EIA\)](https://www.eia.gov/energyexplained/natural-gas/imports-and-exports.php), , <https://www.eia.gov/energyexplained/natural-gas/imports-and-exports.php> (last visited Nov 12, 2021).

³ AMERICAN PETROLEUM INSTITUTE, *North American Energy* (2019), <https://www.api.org/-/media/Files/Policy/Trade/North-American-Energy-Onepager.pdf?pla=en&hash=855A31713B8CB8FDFAFAA50E24467F4F72E06B18> (last visited Mar 29, 2021).

⁴ U.S.-Mexico Energy Relations | Wilson Center, , <https://www.wilsoncenter.org/publication/us-mexico-energy-relations> (last visited Sep 20, 2021). (describing the interdependence of energy markets and recommending further interinstitutional dialogues to enhance the region's potential)

⁵ Whelan, *supra* note 2. The U.S. Congress has also publicly complained to the last two U.S. Presidents', Donald J Trump and Joe Biden, for Mexico's reluctance to respect its USMCA

Mexico during the Texas blackout that left millions of Mexican households without power.⁶ The common argument on both sides is clear: the neighboring partner's actions against energy businesses breach the spirit of the recently approved U.S.-Mexico-Canada Agreement (USMCA).⁷ Regardless of the political back-and-forth, the key fact is that U.S. and Mexican leaders have not built a sustainable legal framework that puts energy integration and the protection of energy investments at the center.

Energy trade has flourished between Canada and the U.S. partly due to the existence of clear international trade rules between the two partners.⁸ The NAFTA 1994 deal contemplated an energy chapter that allowed for investment and trade in the sector to flow.⁹ Trade and foreign direct investment protections of the 1990s NAFTA, however, did not contemplate the energy sector in Mexico.¹⁰ On the contrary, the 1994 North American Free Trade Agreement (NAFTA) excluded the Mexican energy sector from the application of the trade deal.¹¹

commitments to energy investors, *see U.S. lawmakers complain to Trump over Mexican energy policy*, REUTERS, October 23, 2020, <https://www.reuters.com/article/us-usa-mexico-energy-idUSKBN2782BH> (last visited Sep 6, 2021); Sheky Espejo, *Lawmakers urge Biden to address concerns of US energy companies in Mexico* (2021), <https://www.spglobal.com/platts/en/market-insights/latest-news/oil/072121-lawmakers-urge-biden-to-address-concerns-of-us-energy-companies-in-mexico> (last visited Sep 6, 2021).

⁶ Mexico presses U.S. to guarantee natural gas supplies after Texas export ban, *supra* note 2.

⁷ United States-Mexico-Canada Agreement, Can.-Mex.-U.S., Nov. 30, 2018, 134 Stat. 11, art. 32.5 (2020), <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [hereinafter USMCA].

⁸ In addition to NAFTA's Chapter 6 on Energy Trade, the U.S. and Canada also signed in 1977 the Transit Pipeline Agreement. See The Agreement between the Government of the United States of America and the Government of Canada concerning Transit Pipelines, signed at Washington on January 28, 1977, available at <https://www.congress.gov/treaty-document/95th-congress/6?s=1&r=84>

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

¹⁰ Guillermo J Garcia Sanchez, *The Mexican Petroleum License of 2013: A Step to the Past to Bring Mexico into the Present and the Grounds for an Uncertain Future*, in THE NATURE OF PETROLEUM LICENSES , 27 (Tina Hunter, Jorn Oyrehagen Sunde, & Ernst Nordtveit eds., 2020), <https://papers.ssrn.com/abstract=3396727> (last visited Aug 25, 2020).

¹¹ Rios Herran and Poretti, *supra* note 10.; In addition to the rules set up in the energy chapter of the 1994 NAFTA, the U.S. and Canada also signed in 1977 the Transit Pipeline Treaty that according to Kristen van de Biezenbos and James Coleman it has proved “crucial to preserving these energy links by providing an unexpected bulwark against changing US environmental priorities at the state and federal level.” Van de Biezenbos, Coleman – A 40-year-old Treaty Could Save Line 5, RESEARCH INSTITUTE CANADA | CANADA ECONOMY NEWS | CANADIAN

Since the 1938 Mexican expropriation of the sector the extraction of hydrocarbons, the refining of petroleum products, the retail sale of gasoline; and the production, distribution, and sale of energy were all in the exclusive control of state-owned companies.¹² Foreign businesses were allowed to provide services, not partnerships, to Mexican state enterprises, but their deals were excluded from the protections set up in Chapter 11 of NAFTA.¹³ In those days Mexico's energy sector was focalized primarily to supplying electricity to the domestic market and selling hydrocarbons internationally to receive revenues to finance the government's budget. The system worked well until the major oil fields in the coast of Campeche, primarily Cantarell, reached peak production.¹⁴ The Mexican state-owned company, PEMEX, was highly taxed by the government and had oriented most of its investments into existing production, as opposed to expand its proven reserves and exploring new fields.¹⁵ By the late 1990s PEMEX was highly in debt and inefficient in bringing new fields into production. At the same time, CFE lacked sufficient investments to keep up with the growing demand for electricity.¹⁶ The government in the 1990s tried to expand investment in the sector by creating long-term contracts with CFE for electricity generation by private parties.¹⁷ However, CFE maintained the monopoly over transmission and distribution, and maintained the role of manager of the generation. In addition to underinvestment in capital stock, the government subsidized energy prices and most of CFE's electricity generation plants were highly dependent on fossil fuels. By early 2000, oil wells began to dry, the costs of electricity generation increased, and the lack of investment in new exploration fields led the government to push for an opening of the sector.

Mexican President Enrique Peña Nieto's 2013 energy reform both contemplated a tighter energy links within North America, with the prospect that the U.S. and Mexico might have an energy relationship as close and mutually beneficial as that between the U.S. and Canada. The reform for the first time allowed private companies to invest in the electricity and hydrocarbons sector. The opening of the sectors included the generation of electricity by private parties, with an emphasis on renewables, the participation in the production

GOVERNMENT POLICY , <https://www.cdhowe.org/intelligence-memos/van-de-biezenbos-coleman-%E2%80%93-40-year-old-treaty-could-save-line-5> (last visited Sep 7, 2021).

¹² Garcia Sanchez, *supra* note 11 at 5–6.

¹³ *Id.*

¹⁴ Garcia Sanchez, *supra* note 11 at 11.

¹⁵ *Id.* at 11.

¹⁶ Peter Nance, *Initial Results from the Mexico Electricity Reform*, WILSON CENTER MEXICO INSTITUTE 1 (2018).

¹⁷ *Id.*

and exploration of hydrocarbons, and the sale of gasoline to consumers.¹⁸ In the view of the drafters of the reform, for the State-owned companies to become more efficient, they are required to focus on their strengths (i.e. shallow waters and inland conventional fields for PEMEX and transmission of energy for CFE), compete with private actors in an open bidding market, and associate in those areas where their technological or financial capacities were weak.¹⁹ In other words, CFE and PEMEX were to keep some minor privileges in their sectors but had to compete or associate with other private actors in the market. The government gave assurances to the private companies that their investments would be protected under international treaties, giving as such the impression that Mexico had unilaterally amended the NAFTA 1994 exclusions.²⁰ As Subsection IV.C will show NAFTA's successor, the USMCA, failed to update the deal with an energy chapter that would contemplate the reality of actual energy integration.

This report shows how energy law changes in the U.S. and Mexico present under-studied dangers to cross-border energy trade and will set an agenda for legal reform to enable mutually beneficial fuel and power trade. And it will propose the foundations for a new energy agreements that could be adopted either by the USMCA partners or by direct negotiations between Texas and Mexico to secure the benefits of increased energy trade.

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

¹⁸ Duncan Wood & Jeremy Martin, *Of Paradigm Shifts and Political Conflict: The History of Mexico's Second Energy Revolution*, in MEXICO'S NEW ENERGY REFORM 17–35.

¹⁹ *Id.*

²⁰ Guillermo Jose Garcia Sanchez, *The Fine print of the Mexican Energy Reform*, in MEXICO'S NEW ENERGY REFORM 36–52 (2018); Garcia Sanchez, *supra* note 11; Condon, *supra* note 10.

II. DEFINING AND CREATING ENERGY INTEGRATED MARKETS

Over the past 120 years, North America has reaped the benefits of integrated energy markets.²¹ In times of energy plenty, oil producers in each country have relied on consumers in their continental neighbors.²² When demand has outstripped domestic supply—as it sometimes has in each country—imports from these neighbors have prevented price spikes. And Canada, the United States, and Mexico have been important, if sometimes inconstant, energy allies through geopolitical energy crises.²³ Despite these longstanding benefits, energy integration is under-theorized as a concept and encompasses different levels of market entanglement—from mere export and import of products, to common companies and cross-border supply chains, to common energy policy. This section explains the benefits of each level of integration and the legal means necessary and sufficient to achieve them.

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

Energy plays a complex role in international economic law.²⁴ At times, energy is regulated by agreements involving the trade of natural resources that are employed in the production of heat or electricity, primarily fossil fuels such as hydrocarbons, or the trade of electricity across borderlines.²⁵ At times energy is regulated in agreements by attending the investments done in construction of extractive sites involving energy sources or in power facilities that generate heat or electricity.²⁶ Energy, as such, has many complexities that differentiate it from other commodities and it requires a distinctive approach if a region is to be integrated.²⁷ For example, the starting point of any international

²¹ An American Petroleum Institute report issued during the NAFTA renegotiations argued that the existing framework already achieves a good level of market integration. *NAFTA Works – For the U.S. and U.S. Energy*, <https://www.api.org/443/news-policy-and-issues/blog/2018/03/02/nafta-works-for-the-us-and-us-energy> (last visited Sep 6, 2021).

²² YERGIN, DANIEL, *THE NEW MAP* 1–68 (2020). (describing the historical changes in North American energy production and the relationships built among Canada, Mexico and the U.S.)

²³ *Id.* at 1–68.

²⁴ ANNA-ALEXANDRA MARHOLD, *ENERGY IN INTERNATIONAL TRADE LAW*. 7–8 (2021). (describing the different uses of the term “energy” in international trade law)

²⁵ *Id.* at 7–8.

²⁶ PETER D. CAMERON, *INTERNATIONAL ENERGY INVESTMENT LAW THE PURSUIT OF STABILITY* (2010).

²⁷ Yulia Selivanova, *Managing the Patchwork of Agreement in Trade and Investment*, in *GLOBAL ENERGY GOVERNANCE. THE NEW RULES OF THE GAME* 49, 49–50 (Andreas Goldthau & Jean

trade agreement is to facilitate the access of foreign suppliers to the domestic market.²⁸ The GATT/WTO regime primarily aimed to reduce import tariffs so that foreign companies can access the local market.²⁹ In contrast, for energy markets to be fully integrated countries must allow foreign suppliers of energy commodities, including state-controlled suppliers, to access their export infrastructure (i.e. production sites, storage units and transportation infrastructure such as railroads or pipelines).³⁰ For the energy sector to be integrated, export barriers are just as important as import barriers. In fact, “import restrictions are not particularly problematic in the energy sector- on the contrary, states have been more concerned with securing access to energy suppliers at affordable prices.”³¹

The production of energy has additional characteristics that require attention when the goal is to integrate a region. First, many energy products, particularly hydrocarbons, are finite non-renewable resources.³² Moreover, they are unevenly distributed around the globe. The same could be said of certain renewables, even if they are more widely spread, they cannot be settled everywhere. Renewable sources of energy, such as solar panels or wind turbines, require to be installed where the geological fundamentals are present. Wind and sunlight need to be relatively consistent and transmission infrastructure needs to be in place in order for the investment to be successful. Manufactured products do not rely on geological or physical characteristics for their production sites, but rather on competitive advantages of cities or regions. The

Martin Witte eds., 2010).; see also, Alan Yanovich, *WTO Rules and the Energy Sector*, IN REGULATION OF ENERGY IN INTERNATIONAL TRADE LAW 1, 1-49 (2011) (describing how the WTO system does not deal specifically with energy but that touches on energy commodities in a way that generates inefficiencies and challenges); Sophie Nappert & Federico Ortino, *International Resolution of Energy Trade and Investment Disputes*, 34 in REGULATION OF ENERGY IN INTERNATIONAL TRADE LAW. WTO, NAFTA AND ENERGY CHARTER 302–333 (2011). (describing how the dispute resolution mechanism set up for the WTO is inefficient in dealing with energy disputes, and finding that the arbitration system recognized in the investment protection sections of trade agreements have a higher level of effectiveness at least when it comes to investment in energy services but not for trade of energy commodities); Rios Herran and Poretti, *supra* note 10. (arguing that NAFTA was an advancement, compared to the WTO rules, in regulating the trade of energy products among the Northern American partners but that it felt short of fully integrating the region due to Mexico’s five exclusions/exceptions)

²⁸ *Id.* (all of the authors mention the market access bias of the GATT/WTO system that serves as a basis of international trade agreements.)

²⁹ *Id.*

³⁰ By energy commodities here we mean energy sources such as gas, oil, coal, and nuclear material.

³¹ Yulia Selivanova, *INTERNATIONAL ENERGY GOVERNANCE: THE ROLE OF THE ENERGY CHARTER* |, 106 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 394–398, 395 (2012).

³² *Id.*

economic fundamentals, rather than the geological ones, are the most important driving factor for most manufactured products.

Second, many energy commodities, particularly those that require extraction from the subsoil, are controlled and in certain jurisdictions owned by the government (in the U.S. both offshore and on onshore federal lands, in Mexico in all the territory, and in Canada by the provinces).³³ As an important source of revenue for the States, there is an eagerness to capture as much rent as possible from oil and gas extraction.³⁴ The theory is that the rents serve a broader public purpose to finance important government programs and policies. Moreover, the fact that these are finite forces the State to derive maximum rent for their depletion. A series of policies arise out of these facts: export taxes become an important source for extracting the rents; special windfall taxes are attached to the projects; high national content requirements are forced into the investments; associations with state-owned companies are imposed as part of the exploration and production (E&P) contracts; domestic production quotas are required from private producers, etc. In trade agreements, such as the GATT/WTO, export restrictions are poorly addressed and export duties are unbound; moreover, the trade regime ignores issues involving ownership of national resources or access to energy supply.³⁵

Third, energy trade takes place through fixed infrastructure.³⁶ This is both for the purpose of moving hydrocarbons or carrying electricity from the production sites to the processing plants and the consumers.³⁷ Commodities in general share infrastructure and is interchangeable, depending on market prices. Energy infrastructure once built is not interchangeable: natural gas pipelines; electricity transmission lines or oil platforms are a capital-intensive infrastructure that once in place has a single purpose. One exception is the use of trains to transport crude oil, but even there, oil transport depends on rail routes made to connect producing fields with oil refineries, as well as long term investment in tanker car loading and unloading facilities.

Connected to the last point, the energy sector is highly capital-intensive in all of its stages: exploration, production, and transportation. Infrastructure is

³³ Guillermo Garcia Sanchez, *The Mexican Petroleum License of 2013*, in *THE CHARACTER OF PETROLEUM LICENSES: A LEGAL CULTURE ANALYSIS* (Tina Soliman Hunter, Jørn Øyrehagen Sunde, & Ernst Nordtveit eds., 1st ed. 2020), <https://papers.ssrn.com/abstract=3396727> (last visited Jun 26, 2020).

³⁴ Guillermo Jose Garcia Sanchez, *A Critical Approach to International Investment Law, the Hydrocarbons Industry, and Its Relation to Domestic Institutions*, 57 *HARVARD INTERNATIONAL LAW JOURNAL* 475 (2016).

³⁵ Alan Yanovich, *WTO Rules and the Energy Sector*, 34 in *REGULATION OF ENERGY IN INTERNATIONAL TRADE LAW. WTO, NAFTA AND ENERGY CHARTER* 1–48 (2011).

³⁶ Selivanova, *supra* note 32 at 395–96.

³⁷ *Id.* at 395–396.

essential for the sector. Without the constructions of long-term stable grids to transport electricity, it would not make economic sense to produce electricity; without the necessary pipeline capacity to transport natural gas, it is hard to make a long-term profit and the product would end up being flared; offshore deep-water platforms have very low reuse rate and require specific onshore supply centers and ports.³⁸ Most particularly, electricity and gas are costly and difficult to store. Without adequate infrastructure to transport them the economic fundamentals would not make sense. This is not the case with most commodities that are internationally traded. Most of the infrastructure built of other commodities can be shared, transformed, or moved to another location.

In many jurisdictions the existing energy transportation and distribution infrastructure is controlled by a handful of actors, including state-owned companies in Mexico's case. The control of these actors prevents outside companies from accessing the infrastructure claiming lack of capacity and/or charging fees that raise the cost of the investment to an uncompetitive level.

Hence, international agreements that seek to ensure a long-standing energy integration must contemplate rules that allow access to energy transportation and distribution infrastructure. An energy integration treaty must, for example, contemplate principles that prioritizes transit flows over other priorities. The costs of disruption in transit flows could jeopardize energy projects. For many projects the availability of capacity at the contracted time is essential for the success of the project. For a company to build a grid or a pipeline and be unable to deliver the products on the agreed time and moment, could be disastrous. Energy infrastructure is built and financed considering programmed volumes, expandable capacity, and backed by long-term supply contracts. Energy infrastructure contracts are financed relying on those conditions, otherwise the companies would be unable to guarantee repayment. Hence, when facing any dispute, a principle that ensures transit flows regardless of the outcome is essential.³⁹ In other words, treaties must include a freedom of energy transit principle that includes not only the non-discriminatory use of existing infrastructure but the possibility of expanding the transit capacity if needed.⁴⁰

In addition to a treaty recognition of these principles an effective framework for investment protections and the resolution of disputes is needed. It is a cornerstone for any regional integration to take place.

³⁸ CAMERON, *supra* note 27 at 4–7.

³⁹ For example, the Energy Charter Treaty lays down the principle of freedom of energy transit and non-discrimination on the basis of origin, destination, ownership, or pricing of energy materials and products, see The Energy Charter Treaty, 34 I.L.M. 360, 385 (1995) [hereinafter ECT]

⁴⁰ Selivanova, *supra* note 32 at 396. (Silanova calls them, non-interruption of transit flow and non-impediment for building new infrastructure if available capacity is insufficient principles)

B. Import and Export Integration

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

C. Common Company and Supply Chain Integration

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

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

D. Common Energy Policy Integration

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

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

III. OPPORTUNITIES FOR TEXAS-MEXICO ENERGY TRADE

Texas is the heart of North American energy markets: it is the center of the biggest oil boom the world has ever seen and the crossroads for an increasingly two-way trade in oil and gas.⁴¹ Texas and México in particular have much to gain from expanded energy trade in both oil and gas and electricity.

A. Increased Oil & Gas Trade

Texas has vast supplies of natural gas—it usually produces more than enough gas to provide power to its growing population and sometimes so much that producers must pay to have it taken away. Mexico, by contrast, is looking to provide more power to its residents and industry, making Texas gas a low-cost option.

Mexico is also hoping to provide more reliable power to eliminate the need for diesel backups.⁴² Gas consumption for power generation has tripled since

⁴¹ James W. Coleman, *The Third Age of Oil and Gas Law*, 95 IND. L.J. 389, 391 (2020). (“This Article unearths these histories and defines these two ages of oil and gas law that have built the modern legal world. It shows that we are now entering a third age of oil and gas law, which will be defined by the legal challenges posed by fracking and climate change. And it shows how landowners can ensure that they receive the full benefit of this decade’s oil boom—the biggest that the world has ever seen”).

⁴² James W. Coleman, *Pipelines & Power-Lines: Building the Energy Transport Future*, 80 OHIO ST. L.J. 263, 273 (2019). (“As a result, fracking and new gas production have opened up wide natural gas price differentials around the world. Even markets in close proximity can have very different gas prices if there is not enough transport capacity to serve the demand in the high cost market: for example, while Pennsylvania and Texas have the cheapest natural gas in the world, nearby markets in Massachusetts and Mexico at times pay the world’s highest prices for natural gas”).

2000.⁴³ Mexico is the second-largest electricity market in Latin America.⁴⁴ Falling natural gas costs, conversion efficiencies, and new environmental considerations have sparked a growing shift from oil-fired to gas-fired power generation.⁴⁵ Since 2000, demand for natural gas in Mexico has increased by more than 70%.⁴⁶ Mexico has allowed private investment in gas storage and pipelines since 1995.⁴⁷ Pipeline infrastructure has been expanding in Mexico since that time.⁴⁸

U.S. natural gas exports to Mexico are crucial for both countries. About half of U.S. gas exports go to Mexico,⁴⁹ and 94% of Mexico's natural gas imports come from the United States.⁵⁰ With Mexico's increased dependence on gas imports, 40% of natural gas used in Mexico now comes from the United States.⁵¹

⁴³ International Energy Agency (IEA), *Mexico Energy Outlook*, PARIS: ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT [OECD]/IEA 129, 18 (2016).

⁴⁴ Nance, *supra* note 17 at 1. ("Mexico is currently the second-largest power market in Latin America and appears poised for continued growth"). 11/18/2021 4:23:00 PM

⁴⁵ *Id.* at 16. ("Due to falling costs for gas, more attractive conversion efficiencies, and environmental considerations, the fuel mix has shifted from oil-fired to gas-fired generation. Between 2012 and 2017, CFE has had a goal of reducing oil consumption by more than 80 percent. Although reaching this goal has proven elusive for fuel reliability reasons, progress has been made and can be expected to continue as gas pipeline expansions currently in progress are completed").

⁴⁶ International Energy Agency (IEA), *supra* note 44 at 18. ("Demand for natural gas has increased by more than 70% since 2000, with its share in the primary energy mix increasing from 24% in 2000 to 32% in 2014. Fuel switching in the power sector, rising industrial demand and, more recently, the import opportunity that opened up for Mexico by the shale gas boom in the United States (and facilitated by Mexico's policy of constructing new gas import pipelines) have accelerated the use of gas. The overall share of renewable energy has fallen slightly, to 8.5% of total primary energy, reflecting in part the declining use of solid biomass, mainly fuelwood used by poorer households").

⁴⁷ José Alberto Hernández Ibarzábal, *Examining governability of Mexico's natural gas transmission pipelines under the energy reform*, 35 JOURNAL OF ENERGY & NATURAL RESOURCES LAW 271–291, 273 (2017).

⁴⁸ *Id.* 11/18/2021 4:23:00 PM at 278; BRIAN ARTHUR, INCREASING RETURNS AND PATH DEPENDENCE IN THE ECONOMY (University of Michigan Press 1994).

⁴⁹ Robert Rapier, *Mexico Is Our Most Important Natural Gas Export Market*, FORBES, <https://www.forbes.com/sites/rrapier/2019/06/02/mexico-is-our-most-important-natural-gas-export-market/> (last visited Jul 25, 2020).

⁵⁰ Mexico Regulator Forecasts 25% Increase in U.S. Natural Gas Imports by 2024, NATURAL GAS INTELLIGENCE (2019), <https://www.naturalgasintel.com/mexico-regulator-forecasts-25-increase-in-u-s-natural-gas-imports-by-2024/> (last visited Jul 25, 2020).

⁵¹ International Energy Agency (IEA), *supra* note 44 at 24. ("However, the incentive to develop Mexico's gas resources at scale has been weakened by the ready availability of gas for import, at very competitive prices, from southern US states. Gas imports from the United States have been increasing at an average annual rate of 26% over the past five years and now meet around 40% of Mexico's natural gas demand.")

Texas also is producing unprecedented amounts of light crude oil that are a better match for Mexico’s refineries than for refineries in Texas because most Texas refineries are optimized for heavy crude.⁵² As a result, both Texas and Mexico are exporting more and more oil to each other’s refineries.⁵³ These two-way trades started even in the early days of shale before Congress repealed the U.S. oil export ban—companies took advantage of an exception to the ban that allowed swapping crude oil.⁵⁴ When Congress repealed the export ban in 2015,⁵⁵ two-way trade in crude quickly ramped up.⁵⁶ Alongside the long-standing U.S.-Canada energy partnership, cooperation between the United States,

⁵² James W Coleman, *Beyond the Pipeline Wars: Reforming Environmental Assessment of Energy Transport Infrastructure*, 2018 UTAH LAW REVIEW 119, 161 (2018); International Energy Agency (IEA), *supra* note 44 at 23. (“A partial fix for some of Mexico’s refinery limitations has taken the form of joint ventures with US refiners, such as the Deer Park Shell-PEMEX refinery at the Houston Shipping Channel in Texas, which processes heavy Maya crude imported from Mexico and exports products back to the Mexican market.”); Runnin’ Down a Dream, Part 3 - Mexico’s Plan to Revive their Crude Oil Refining Sector | RBN Energy, , <https://rbnenergy.com/runnin-down-a-dream-part-3-mexicos-plan-to-revive-their-crude-oil-refining-sector> (last visited Jul 25, 2020). (“Mexico’s refineries are relatively simple — that is, not complex — and configured to process lighter, sweeter crudes, the exact quality that’s getting harder and harder to come by in Mexico.”); Mexico to tender new refinery by March: AMLO, (2018), <https://www.argusmedia.com/en/news/1808463-mexico-to-tender-new-refinery-by-march-amlo> (last visited Jul 25, 2020). (“Mexico’s existing refineries are designed to refine mostly light crude.”).

⁵³ International Energy Agency (IEA), *supra* note 44 at 23. (“The falling trajectory of oil production and the steady rise in demand in the domestic market have squeezed the volumes of crude oil available for export: shipments fell to 1.2 mb/d in 2015 from a peak of 1.9 mb/d in 2004. Mexico’s dependence on imports of refined products has also risen substantially: since 2000, net imports of gasoline and diesel have almost tripled, most of which are furnished by refineries in the United States”).

⁵⁴ Christian Berthelsen & Lynn Cook, *U.S. Loosens Longtime Ban on Oil Exports*, WALL STREET JOURNAL, <https://www.wsj.com/articles/u-s-approves-limited-crude-oil-trade-to-mexico-1439570613> (last visited Aug 3, 2020). (“The U.S. Commerce Department told members of Congress it intends to approve an application by the national oil company of Mexico to exchange heavy oil pumped there for light crude pumped in the U.S. ... The swap deal with Mexico doesn’t need congressional approval. Such oil trades—which aren’t considered true exports because the U.S. is getting oil in return—were contemplated under the original ban legislation, but haven’t taken place before”).

⁵⁵ CONSOLIDATED APPROPRIATIONS ACT, 2016, PUB. L. 114-113, (2015).

⁵⁶ International Energy Agency (IEA), *supra* note 44 at 23. (“Mexico’s dependence on imports of refined products has also risen substantially: since 2000, net imports of gasoline and diesel have almost tripled, most of which are furnished by refineries in the United States Mexico’s own refinery capacity has not kept pace with the increase in domestic product demand and, in addition, some of the existing capacity is not well adapted to process Mexico’s increasingly heavy crude slate.”).

and Mexico is poised to make North America a leading supplier of oil and gas.⁵⁷

Mexico also could benefit from increased import of U.S. shale technology and investment from fracking companies. Mexico has significant geological potential for more oil and gas production in its deepwater and unconventional oil and gas plays.⁵⁸ The Burgos Basin is very similar to the adjacent Eagle Ford formation in the United States, which has been an important part of the Texas oil boom.⁵⁹ Mexico's rig count, which reflects active oil drilling crews, began to rise in 2018.⁶⁰ Mexico has 21 billion barrels of recoverable onshore oil and 20 billion barrels offshore.⁶¹

The United States' oil industry in and around the Gulf of Mexico has some of the world's most advanced, extensive, and developed transport and processing infrastructure. As a result, Texas oil processing facilities and pipelines in the Gulf of Mexico are in better position to process the crude that will soon

⁵⁷ Clare Ribando Seelke, *Mexico: Background and U.S. Relations*, 1 MEXICO: BACKGROUND AND U.S. RELATIONS 1–42, 28 (2020); Clare Ribando Seelke, *Mexico: Background and U.S. Relations*, 1 MEXICO: BACKGROUND AND U.S. RELATIONS 1–39, 27 (2021). (“Because of the [2013] reforms, Mexico has received more than \$160 billion in promised investment. . . . Private sector trade, innovation, and investment have created a North American energy market that is interdependent and multidirectional, with cross-border gas pipelines and liquefied natural gas (LNG) shipments from the United States to Mexico surging.”)

⁵⁸ Wood and Jeremy Martin, *supra* note 19 at 20. (“As the IEA’s recent assessment of Mexican oil confirms, the problem is not one of resource availability. There is no questioning Mexico’s geological potential, particularly in its underexplored deepwater and unconventional oil and gas plays”).

⁵⁹ Matthew Fry et al., *What Happened to Mexico’s Burgos Shale?*, SMU MISSION FOODS TEXAS-MEXICO CENTER 1, 2 (2020). (“As a coterminous geologic region, the Eagle Ford shale and the Burgos Basin share similar development histories”).

⁶⁰ Duncan Wood, *Introduction: A reform years in the making*, in MEXICO’S NEW ENERGY REFORM 1–4, 2. (“And yet the reforms have brought about an extraordinary, rapid and profound liberalization. In the oil sector, we have witnessed the signing of more than 100 contracts for E&P, with a total future investment value of more than \$160bn. In mid-2018, the rig count in Mexico began to rise for the first time in years. Pemex is now partnering with private and foreign firms in oil exploration and production, and has been allowed to farm out certain blocks entirely to private firms for a share of the profits”).

⁶¹ International Energy Agency (IEA), *supra* note 44 at 63. (onshore reserves are mostly in the Tampico-Misantla Basin, including the Chicontepec field, and offshore reserves are in the Sureste Basin, including the Cantarell and Ku-Maloob-Zaap complexes).

be produced in the deepwater fields in Mexican territory in the Gulf of Mexico.⁶² Gulf of Mexico crude tends to be heavy. U.S. Gulf Coast refineries are optimized to process heavy crude.⁶³

B. Electricity and Joint Export Capacity

Turning to electricity generation, Mexico has enormous potential for growth in both wind and solar energy.⁶⁴ Future efforts to expand production of wind power in the state of Tamaulipas, the center of Mexico's wind resources, would be most valuable if that power could be shipped north to centers of industrial and urban demand in Texas.⁶⁵ Moreover, Mexico is building battery storage capacity for renewable energy in Mexicali Baja California that can serve as a backup power source for California's grid.⁶⁶

Finally, together Mexico and Texas could become major exporters of liquefied natural gas to the Asian markets.⁶⁷ Rather than building a new pipeline through potentially hostile states such as California, it could be easier for Texas

⁶² Guillermo J. Garcia Sanchez, *Mexico's Energy Reform and the 2012 U.S.-Mexico Transboundary Agreement: An Opportunity for Efficient, Effective and Safe Exploitation of the Gulf of Mexico*, 9 SEA GRANT L. & POL'Y J. 1, 6–7 (2018). (“Finding answers to all of these challenges will not be an easy task for Mexico and the United States, particularly now that the industry is already operating in the region. On the U.S. side of the Gulf, operations have already begun in fields that could contain transboundary resources. On the Mexican side, last December, the Ministry of Energy announced the fourth phase of the Energy Reforms. This new development consists of the tendering process of ten deep and ultra-deep water blocks in the Gulf. Four of them are located in the Perdido Foldbelt, a geological area shared by both countries”).

⁶³ International Energy Agency (IEA), *supra* note 44 at 23. (“Mexico's own refinery capacity has not kept pace with the increase in domestic product demand and, in addition, some of the existing capacity is not well adapted to process Mexico's increasingly heavy crude slate”).

⁶⁴ *Id.* at 24. (“Mexico's solar power potential is based on average daily irradiation of around 5.5 kilowatt-hours per square metre (kWh/m²)(SENER, 2012), roughly double the levels seen in Germany.”).

⁶⁵ Texas has a far greater population than Tamaulipas or any of its bordering states. Binational Population Data in Sister Cities along the Rio Grande, TCEQ, <https://www.tceq.texas.gov/border/population.html> (last visited Aug 10, 2020). There is growing industrial capacity along the border. Jesus Cañas, Roberto Coronado & Robert W Gilmer, *Employment and Maquiladora Growth*, TEXAS BORDER 27, 32 (2005). (“Mexico's maquiladora jobs are growing once more, beginning with the resumption of U.S. industrial expansion in mid-2003”). Also, wind power generally peaks in the hours before dawn, so it is rarely shipped West, where it would still be the middle of the night, the time of day with lowest power consumption. *See* Coleman, *supra* note 53 at 270.

⁶⁶ IENOVA already owns a cross-border transmission line that provides energy to California Independent System Operator (CAISO). IEnova, IFC Develop Large Battery Storage Project in Mexicali, MEXICO BUSINESS, <https://mexicobusiness.news/energy/news/ienova-ifc-develop-large-battery-storage-project-mexicali> (last visited Sep 3, 2021).

⁶⁷ México plantea exportar gas a Asia para resolver conflictos de ductos, (2020), <https://es-us.finanzas.yahoo.com/noticias/m%C3%A9xico-plantea-exportar-gas-asia-155053958.html> (last visited Feb 15, 2021).

producers to use the existing infrastructure South of the border, including pipelines and terminals, to transport the overproduction in the Texas fields and sell them in the Asian markets.⁶⁸ Ironically, as mentioned before Texas producers might find less regulatory and logistical barriers in Mexican territory than trying to access the U.S. pacific coast through New Mexico, Arizona and California. Mexico's energy infrastructure is regulated at the federal level and Mexico's government might be eager for new infrastructure that could boost Mexico's energy exports, which have faltered along with stagnant domestic oil production.

IV. OBSTACLES TO TEXAS-MEXICO ENERGY INTEGRATION

The advantages for an energy integrated region are clear. Yet there is a growing danger that new energy laws and a missed opportunity to update regional energy trade will frustrate these trade policies by cutting growing Texas energy production off from growing energy demand in Mexico. Mexico is taking steps to reverse its energy reform, close the country off to foreign investment, and reduce its energy imports.⁶⁹ And in the United States, new movements against the use of eminent domain for export projects and against all fossil fuel infrastructure threaten to strand U.S. energy producers and choke off Mexican consumers access to new fuel supplies. Finally, NAFTA and the USMCA now appear to be failed opportunities to update regional energy trade laws to protect international energy trade.

A. Growing Barriers to Energy Investment in Mexico

President Lopez Obrador's moves to re-nationalize the oil and gas sector are making U.S. energy companies increasingly skeptical of investing in the future of Texas-Mexico energy trade.⁷⁰ Notwithstanding the reforms of 2013,

⁶⁸ California's Sempra Energy is the first company to explore this possibility. The projects have gone through different stages and initially the Mexican government was reluctant to provide export permits to the company. *See* Sempra Looking to Add Second LNG Project on Mexico's West Coast, , NATURAL GAS INTELLIGENCE (2021), <https://www.naturalgasintel.com/sempra-looking-to-add-second-lng-project-on-mexicos-west-coast/> (last visited Sep 6, 2021).

⁶⁹ Megan Rollag, *Future of cross-border pipeline projects in AMLO's Mexico: what's the risk?*, (2020) 13 (1): 58 J WORLD ENERGY LAW BUS.

⁷⁰ *See* Garcia Sanchez, *supra* note 21 at 36.

President Lopez Obrador has a substantial control of the energy sector.⁷¹ Under the Mexican constitution the Executive power appoints the energy regulators, the National Hydrocarbon Commission and the Energy Commission; the Ministry of Energy can halt future public auctions for the E&P sector and has control over energy export permits; finally, the state-owned companies, PEMEX and CFE, have representatives appointed by the President in the board of directors and the heads of the companies.⁷² President Obrador has not been shy in exercising his constitutional powers to impact the implementation of the energy reform, and in some circumstances, backtrack the advancements initiated by previous administrations to increase private participation, competition, and integrate further with the U.S.⁷³

Examples of President Obrador's efforts to negatively impact the implementation of the energy reform include new policies in the electricity sector forcing U.S. contractors to renegotiate transboundary pipeline deals signed during the Energy Reform.⁷⁴ In May 2020, Mexico's energy ministry enacted new rules that limit private participation in the power generation market, particularly those in the renewable sector, and increase the amount state utility generation.⁷⁵

In the E&P sector, President Lopez Obrador cancelled all planned new auctions for the development of shale fields in the north of Mexico and of deepwater fields in the Gulf. Moreover, the Ministry of Energy modified the rules applicable to the export permits granted under the energy reform, restricting the ports of export of hydrocarbon products for private companies.⁷⁶ The rule provides a strategic advantage to PEMEX, since private parties are limited now to a number of exporting points as opposed to using the most

⁷¹ *Id.* at 36. ("The second and perhaps the biggest weakness of the reform was the designers' inability to surpass the legal culture that surrounds Mexico's tradition of hyper-presidentialism. Mexican presidentialism tends to consolidate state power in the president as the central figure in determining public policy, as opposed to relying on independent agencies to control the key policy decisions in their assigned areas of oversight").

⁷² *Id.*

⁷³ Duncan Wood, *An Uncertain Future: The Energy Sector under AMLO*, in MEXICO'S NEW ENERGY REFORM 164–68, 164 (2018). Garcia Sanchez, *supra* note 21 at 42. ("If the Peña Nieto administration had included everything in the text of the constitution, the available alternative for the detractors would be to fight for a constitutional amendment. However, with the adopted legal architecture, a new president could argue that the existing contracts violate the spirit of the constitution because, as he or she understands it, the terms are closer to the ones of a concession. Hence, the new president would not need to amend the constitution to challenge the existing contractual architecture of the reform").

⁷⁴ Rollag, *supra* note 70.

⁷⁵ Jude Webber, *Mexico Rams Through Electricity Market Overhaul*, FINANCIAL TIMES, (May 15, 2020) <https://www.ft.com/content/da6e5abd-b1b5-497f-9fff-f7c131c81b27>

⁷⁶ Jude Webber, *Is third time the charm for AMLO's energy reforms?*, MEXICO NEWS DAILY (2021), <https://mexiconewsdaily.com/news/analysis/is-third-time-the-charm-for-amlos-energy-reforms/> (last visited Sep 3, 2021).

cost efficient and closer one to export markets.⁷⁷ Moreover, the Ministry of Energy issued determinations favoring PEMEX in unitization processes in the Zama field off the Gulf coast over the technical and financial advantages of private actors.⁷⁸ The precedent of the Zama field shows that the Ministry is willing to discriminate against private companies and provide the state-owned company an unfair advantage in the E&P sector.⁷⁹

Now, the fact that Mexico is undergoing a process of re-centralization of its energy policies, as opposed to prioritizing competition and maximizing state-rents, does not necessarily mean that integration opportunities with the U.S. are out of the question.⁸⁰ To the contrary, as long as the government's priorities are met, reaching a politically respectable level of energy sovereignty, there are strategies in which U.S. companies could reach agreements with the State-owned companies. As this paper shows, the North American energy sectors are already interdependent but under the new Mexican energy policies the state-owned companies and the Ministry of Energy have to be at the center of the interdependence as opposed to the market.

B. Growing Barriers to Energy Investment in the United States

The United States is seeing growing movements against energy transport infrastructure and especially against the use of eminent domain that could prevent construction of new pipelines & powerlines between Texas and México.⁸¹ New energy sources require new energy transport so the simultaneous booms

⁷⁷ *Id*

⁷⁸ Mary Anastasia O'Grady, *Opinion | Showdown in Mexico's Zama Oil Field*, WALL STREET JOURNAL, June 27, 2021, <https://www.wsj.com/articles/showdown-in-mexicos-zama-oil-field-11624823865> (last visited Aug 27, 2021).

⁷⁹ Under the Energy reform, when a unitization negotiation fails among operators, the Ministry of Energy has the power to decide who the operator of the field will be but it has to be based on the financial and technical capability of the licensees that maximizes the recovery in an economically sustainable way.

⁸⁰ Under the energy reform the government has to maximize long-run state-rents. We argue that providing advantages to CFE or Pemex does not translate into a maximization of state-rents. In fact, by allowing the government to pick the best partner for each project, as stipulated by the energy reform, the government can efficiently maximize the rents. Forcing the state to award fields or buy electricity from state owned companies can create losses because of their lack of efficiency and technical and financial capabilities. In other words, it is not clear that in every circumstance the state will maximize rents by providing advantages to the state-owned entities.

⁸¹ James W. Coleman & Alexandra B. Klass, *Energy and Eminent Domain*, 104 MINN. L. REV. 659, 655, 716 (2019). (“This Part then suggests ways that policymakers can use eminent domain laws to either support or prevent different types of energy transport projects”). (“The owner may attempt to hold out for the entire economic surplus from the infrastructure proposal, so this bilateral monopoly raises transaction costs and may entirely prevent construction of efficient projects”).

in oil, gas, and renewable energy production requires more pipelines and power-lines. But cleaner energy sources are particularly dependent on new linear infrastructure.⁸² Coal and oil built the modern world in part because they are relatively easy to transport and store—they can be moved by truck, ship, or rail. By contrast, cleaner burning natural gas can only be moved by expensive pipelines or by even more expensive liquefied natural gas facilities.⁸³ And electricity from cleaner sources such as wind, solar, and geothermal can only reach customers through powerlines. The “financial fate” of new energy production depends on “affordable paths to market.”⁸⁴

But new legal challenges are emerging to this energy transport infrastructure just when it is most needed. First, both states and the federal government are increasingly asserting the right to block projects that have traditionally been approved by the other level of government. On one hand, the federal government and the courts are insisting on wider federal environmental reviews of oil pipelines and powerlines, which have been traditionally approved by the states.⁸⁵ Any substantial utility project will technically require federal permits for routine activities such as cross federal waters, which include any tributaries of navigable waters. The federal government historically has not required an individualized process for the innumerable permits required to cross every anonymous backyard creek. But in recent years, the federal government, sometimes at the insistence of the federal courts, has been imposing more and more environmental review on these water-crossings. For example, since 2016 the Dakota Access pipeline has been stuck in litigation concerning the adequacy of the federal government’s review of its crossing of the Missouri River in North Dakota—in 2020 a federal court finally determined that these years of review had been inadequate and that the government would have to go back and do a full environmental impact statement to assess the pipeline’s river crossing.

Almost all states grant eminent domain powers for energy infrastructure because linear infrastructure is so difficult to build if it can be killed by any

⁸² *Id.* at 14. (“For years, oil companies focused on energy production: if oil could be produced, there would be a market for it. Of course, increased production has always required increased transport capacity to take new product to market. But in the past, this new production could often use the same pipelines and shipping routes used by previous producers”).

⁸³ *Id.* at 8. (“Virtually all states grant eminent domain authority to oil and gas companies by statute to build oil and gas pipelines and associated infrastructure and to electric utilities to build electric transmission lines”).

⁸⁴ *Id.* at 15.

⁸⁵ *See id.*; James W. Coleman, *Policymaking by Proposal: How Agencies Are Transforming Industry Investment Long Before Rules Can Be Tested in Court*, 24 GEO. MASON L. REV. 497, 512–14 (2017).

holdout landowner along an approved route.⁸⁶ Gas pipelines that obtain a certificate from the national energy regulator, the Federal Energy Regulatory Commission (FERC), are also granted eminent domain authority.⁸⁷ The United States has a bifurcated system for approving pipelines.⁸⁸ U.S. Senators recently introduced a bill to ban the use of eminent domain for export projects.⁸⁹ And pipeline and power-line opponents have increasingly brought challenges to projects designed to export energy from the state, arguing that if the project is meant to serve consumers in other states it must not be serving the exporting state's interest.⁹⁰

The U.S. is also seeing a raft of proposals to ban future federal permits for U.S. oil and gas projects which could, if adopted, prevent new pipelines between Texas and Mexico. Anti-fossil fuel advocates are increasingly asking for government intervention to limit the ability to produce, move, and burn fossil fuels.⁹¹ Pipelines between Texas and Mexico will have to go through the National Environmental Policy Act (NEPA) process.⁹² Pipelines may be rejected if they are “perceived as enabling further emissions globally.”⁹³

⁸⁶ James W. Coleman, *The Jurisdictional Anticommons* in Getting to Yes on Linear Infrastructure Projects, Macdonald-Laurier Institute (2021). Coleman and Klass, *supra* note 69 at 716-18.

⁸⁷ *Id.* at 8. (“Likewise, nearly a century ago, Congress granted nationwide eminent domain authority to interstate natural gas pipelines that obtain a Certificate of Public Convenience and Necessity from the Federal Energy Regulatory Commission (“FERC”)”). States have tried to use conservation easements plus their sovereign immunity to resist federally-authorized eminent domain but that gambit was rejected in a controversial 5-4 Supreme Court decision in 2021. *Penneast Pipeline Company, LLC v. New Jersey et al.*, No. 19-1039 (June 29, 2021).

⁸⁸ *Id.* at 16.

⁸⁹ Erik Neuman, *Oregon’s US senators seek to restrict eminent domain for gas pipelines*, OPB (2020), <https://www.opb.org/article/2020/08/17/oregons-us-senators-seek-to-restrict-eminent-domain-for-gas-pipelines/> (last visited Sep 3, 2020).

⁹⁰ James W. Coleman, *Eminent Domain for Exporting Energy*, Energy Law Professor Blog, <https://www.energylawprof.com/?p=1025> (June 3, 2019).

⁹¹ Coleman and Klass, *supra* note 82 at 17. (“By contrast, the primary advocacy groups opposing fossil fuel energy projects come from the other end of the political spectrum. They advocate broad government intervention in the energy economy to protect the environment by (among other things) limiting the ability to burn fossil fuels. The energy project opponents generally favor government action on behalf of the public interest over private rights...As energy companies have rushed to build new natural gas pipelines, some plaintiffs have argued that, as private companies, pipeline companies should have to make a stronger showing that their proposals are in the public interest”).

⁹² NATIONAL ENVIRONMENTAL POLICY ACT, , 42 U.S.C. § 4322 (B)-(C) (2017).

⁹³ UNITED STATES DEPARTMENT OF STATE, RECORD OF DECISION AND NATIONAL INTEREST DETERMINATION, 29, <http://www.energylawprof.com/wpcontent/uploads/2016/01/KeystoneXL.Record-of-Decision.pdf>. (last visited Nov 3, 2015). (“While the proposed Project by itself is unlikely to significantly impact the level of GHG-intensive extraction of oil sands crude or the continued demand for heavy crude oil at refineries in the United States to prioritize actions that are not perceived as enabling further GHG emissions globally”).

There is also a widespread and growing movement to challenge energy transport projects in the individual U.S. states.⁹⁴ Many argue that transport projects should be rejected if they will increase oil production up or down stream.⁹⁵ California recently passed a bill to forbid new oil and gas pipelines on state property, making it virtually impossible to build new pipelines across the state.⁹⁶

C. Missed Opportunities for International Agreements on Energy Integration

When formal renegotiations began in the spring of 2017, many observers believed that the 1994 NAFTA required an update.⁹⁷ The emergence of new technologies, the need to include new labor and environmental regulations, the ringfencing of the North American partners from Chinese competition, and the new realities of the energy sector, were factors that the three nations were looking forward to address.⁹⁸ Many of these needed updates were already in the text of the Trans Pacific Partnership (TPP) that was negotiated by the Obama administration a year earlier with eleven other partners.⁹⁹ However,

⁹⁴ Coleman, *supra* note 53 at 6. (“Despite the delays and contradictions surrounding the State Department’s rejection of Keystone XL, an increasingly powerful global movement is taking it as a model, looking to expand it to all state and federal environmental assessments and to export this Keystone XL precedent to other projects and countries. Some of these cases, such as the Dakota Access Pipeline, have attracted widespread and sustained attention. But the movement is much broader, raising challenges to a wide range of energy transport projects across the nation: gas pipelines, coal export terminals, and liquefied natural gas facilities.”)

⁹⁵ *Id.* at 7. (“Scholars and environmental organizations argue that, from this point forward, all state and federal environmental reviews of new fossil fuel transport projects must consider whether they could increase fuel production upstream of the project or increase fuel consumption downstream of the project”).

⁹⁶ Associated Press, *Gov. Newsom Signs Law to Prevent Building Pipelines on State Property*, KTLA, October 12, 2019, <https://ktla.com/news/local-news/gov-newsom-signs-law-to-prevent-building-pipelines-on-state-property/> (last visited Sep 3, 2020).

⁹⁷ Renegotiating NAFTA: What should the priorities be?, ECONOMIC POLICY INSTITUTE, <https://www.epi.org/publication/renegotiating-nafta-what-should-the-priorities-be/> (last visited Sep 6, 2021); What the U.S., Canada and Mexico Want From a New NAFTA, US NEWS & WORLD REPORT, <https://www.usnews.com/news/articles/2017-08-16/what-the-us-canada-and-mexico-want-from-a-new-nafta> (last visited Sep 6, 2021); NAFTA Works – For the U.S. and U.S. Energy, *supra* note 22.

⁹⁸ A Really Big Button that Doesn’t Do Anything? The ‘Anti-China Clause’ in US Trade Agreements by Geraldo Vidigal :: SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3377492 (last visited Sep 20, 2021).

⁹⁹ David Gantz, *The USMCA: Updating NAFTA by Drawing on the Trans-Pacific Partnership*, Baker Institute for Public Policy at Rice University, Report (February, 2020), available at <https://www.bakerinstitute.org/media/files/files/ab609023/bi-report-022120-mex-usmca-8.pdf>;

President Donald Trump’s campaign-promise to abandon the TPP and renegotiate NAFTA forced the partners to update their trade relationship through a trilateral negotiation as opposed to benefit from the multilateral trade agreement negotiated a year earlier. Canada and Mexico remained partners in the TPP.¹⁰⁰

From the outset, the NAFTA renegotiation used the TPP as a template.¹⁰¹ Hence many of the “new” articles in the USMCA resemble the TPP, and in the protection of foreign investments, due to the most-favored-nation clause, complement each other.¹⁰² In the USMCA, however, the energy sector is treated distinctively. As opposed to including a chapter that would foster a deeper North American integration the USMCA adopted a series of provisions that reinforce Mexican nationalism, gives some limited protection to existing investments, and pushed Canada and the U.S. to agree to side letters to regulate their energy trade.¹⁰³ Without doubt, it was a failed opportunity to recognize the potential of North America as an energy integrated region.

1. *USMCA Hydrocarbons Chapter*

USMCA’s Chapter 8 title is called “Recognition of the United Mexican State’s Direct, Inalienable, and Imprescriptible Ownership of Hydrocarbons.”¹⁰⁴ The Chapter begins by recognizing that the Parties fully respect the “sovereignty and their sovereign right to regulate” the energy sector “in accordance with their respective Constitutions and domestic laws, in the full exercise of their democratic processes.”¹⁰⁵ It did, however, maintain the promise to respect the investor protections for energy companies that had invested during the energy reform.¹⁰⁶

¹⁰⁰ Comprehensive and Progressive Agreement for Trans-Pacific Partnership art. 1, Mar. 8, 2018, <https://www.dfat.gov.au/trade/agreements/in-force/cptpp/Pages/comprehensive-and-progressive-agreement-for-trans-pacific-partnership.aspx>. [hereinafter CTPP/TPP]

¹⁰¹ Garcia Sanchez, *supra* note 11 at 26–28; David A Gantz, *The United States-Mexico-Canada Agreement: Energy Production and Policies*, RICE UNIVERSITY’S BAKER INSTITUTE FOR PUBLIC POLICY 1 (2019).

¹⁰² *Id.*

¹⁰³ Canada-U.S. Side Letter on Energy, available at https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/CA-US_Side_Letter_on_Energy.pdf

¹⁰⁴ USMCA Chapter 8

¹⁰⁵ *Id.*

¹⁰⁶ The Chapter states that the sovereign rights over their natural resources is done “without prejudice to their [U.S. and Canada’s] rights and remedies available under this Agreement [USMCA].” Chapter 8 of the USMCA.

Chapter 8 did not recognize anything new in terms of Mexico's sovereign rights to regulate the extraction of its natural resources.¹⁰⁷ In fact, Chapter 8 reaffirms recognized customary international law on the sovereign power of any State to extract and regulate its resources.¹⁰⁸ One only needs to look at Resolution 1803 of the United Nations General Assembly, voted 87 to 2, with twelve abstentions, declaring "the right of peoples and nations to permanent sovereignty over their natural wealth and resources" to be "exercised in the interest of their national development and of the well-being of the people of the State concerned."¹⁰⁹ Moreover, Resolution 1803 clarified that the exploration, development and disposition of the resources "as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable."¹¹⁰ This widely accepted resolution, however, also recognized that if nationalization, expropriation, or requisitioning of the foreign investment in the sector takes place, it "shall be based on grounds or reasons of public utility, security or the national interests which are recognized as overriding purely individual or private interests [and] the owner shall be paid appropriate compensation."¹¹¹ In sum, Chapter 8 of the USMCA only reaffirmed a recognized right of the State by international customary law.

Chapter 8 cannot be construed as a general exception to Mexico's treaty obligations.¹¹² Exceptions in investment treaties can either have the intention of limiting the scope of the substantive treaty obligations or be available defenses invoked to justify an unlawful conduct.¹¹³ The text in Chapter 8 has neither of those effects. By stipulating that Canada and the U.S. recognize

¹⁰⁷ Gantz, *supra* at 32, p. 3. ("The United States view is that Chapter 8 language essentially states the obvious: any sovereign state retains the rights to change its constitution and laws, even if such changes may incur international responsibility to treaty partners.")

¹⁰⁸ United Nations resolution on Permanent Sovereignty over Natural resources, U.N.G.A. Res. 1803 (XVII), 2 I.L.M./ 223 (1963). [hereinafter UN General Assembly Resolution 1803]; see also for resources located in the continental shelf and the seabed, United Nations Convention on the Laws of the Seas arts. 55-57, Dec. 10, 1982, 1883 U.N.T.S. 31363; and Convention on the Continental Shelf art 1. Apr. 29, 1958, 499 U.N.T.S. 311. ; see also Art. 18, Energy Charter Treaty (The same principle reflect in Chapter 8 of the USMCA is integrated in Article 18 of the Energy Charter Treaty entitles "Sovereignty over Energy Resources" where it states that "the contracting Parties recognize state sovereignty and sovereign right over energy resources. They reaffirm that these must be exercised in accordance with and subject to the rule of international law.")

¹⁰⁹ *Id.* UN General Assembly Resolution 1803

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² For analysis of how exception clauses are drafted in investment and trade agreements, see Caroline Henckels, Should Investment Treaties Contain Public Policy Exceptions, 59 B.C. L. REV. 2825 (2018)

¹¹³ *Id.*

Mexico’s sovereign right to reform its constitution and the domestic legislation “without prejudice to their rights and remedies available under this Agreement” the USMCA does not limit the scope of the rights recognized in the treaty. To the contrary, the agreement reaffirms the scope of the substantive treaty obligations regardless of Mexico’s “sovereign right.” General exceptions in other treaties specifically use language such as “nothing in this Agreement shall be construed to prevent the adoption of...”¹¹⁴ Other treaties use carve-out to exempt certain sectors or policy areas from the treaty (such as NAFTA 1994 did), or specifically carve out the application of investment rights, such as national treatment or most-favored nation treatment, by saying that such treatment “do not apply to ... procurement by a Party or a state enterprise...” (NAFTA 1108(7)) (another example is Article 22 of the investment chapter of the Australia Singapore FTA that provides “[n]o claim may be brought ... in respect to a tobacco control measure of a Party.”). Finally, other treaties have specific reservations to treaties by stipulating that certain obligations, such as establishment or non-discriminatory treatment of investments, “do not apply to a measure with respect to [X service or industries]” (Articles 8.2(3) and 9.2(2)(b) and (C) of the Comprehensive Economic and Trade Agreement between Canada and the EU).

Chapter 8’s recognition of the sovereign right to develop natural resources served more as a political statement to conciliate the incoming Mexican administration views on the need to achieve “energy sovereignty”.¹¹⁵ In that unique view of the energy sector, the State-owned companies should receive priority privileges over private actors in order to ensure the capacity of the State to exercise control over the extraction, production, and transformation of energy resources.

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

One of the most striking changes in North American investment protection was the erosion of the investment protection chapter in the USMCA.¹¹⁶ NAFTA’s Chapter 11 provided for a series of protection to North American investors against adverse government interference and for a national and “nondiscriminatory treatment” (with the exception of the energy sector in Mexico as explained above). If those protections were ignored, American, Canadian, and Mexican investors had a right to bring specific claims against the

¹¹⁴ *Id.* at 2828.

¹¹⁵ *See supra* Section IV.A.

¹¹⁶ Isaac Olson, *New Challenges to Transboundary Unitization in the Gulf of Mexico*, 6 TEXAS A&M JOURNAL OF PROPERTY LAW 109–111 (2020).

governments to international investment arbitral tribunals. The USMCA modified the basic structure of the system.¹¹⁷

The USMCA first eliminated the arbitration proceedings from the Canada-U.S. relationship.¹¹⁸ Under the USMCA Canadian or American investors affected by actions taken by the respective governments of their neighboring nation do not have access to an international arbitral dispute resolution mechanism.¹¹⁹ They are left with only two options: convince their governments to initiate a State-State proceeding under chapter 31 or bring a claim under U.S. domestic courts to resolve any dispute against the host governments.¹²⁰ The exclusion of the investor-state dispute resolution mechanism was a clear consequence from the Trump's presidency's view that the U.S. government should not be in the "business" of promoting and protecting American investments abroad.¹²¹ If American companies wanted to build plants outside of the U.S. they had to assume a risk. To the Trump administration the goal of the government should be to bring investments back to the U.S. instead of making it easier for them to take their capital abroad. In their view one of the catastrophic consequences of the established U.S. trade policies was the promotion of American investment abroad instead of the safeguarding of existing investment in the U.S.¹²² The exclusion of the dispute resolution mechanisms for Canadian investment was also consistent with "anti-global judges" sentiment of some conservative groups in the U.S. In their conception, world judges/courts should not be in a position to tell the U.S. government what it can or cannot do in terms of its national interest.¹²³

In a surprising turn of events, Mexico held its grounds in favor of providing investors an international dispute resolution mechanism. Faith in international tribunals did not come from a fear that Mexican investors could be affected in the U.S., but out of the Pena Nieto advisor's views that investors were afraid that the "structural reforms" in Mexico could be amended if a more left oriented government could take office. According to news reports at the

¹¹⁷ M Angeles Villarreal & Fergusson, Ian F., *NAFTA and the United States-Mexico-Canada Agreement (USMCA)*, CRS.GOV , <https://fas.org/sgp/crs/row/R44981.pdf>.

¹¹⁸ USMCA Chapter 14 Annex 14-C

¹¹⁹ *Id.*

¹²⁰ Chapter 31 of the USMCA, Dispute Settlement.

¹²¹ Offshore Jobs to Mexico at Your Own Risk - WSJ, , https://www.wsj.com/articles/offshoring-isds-usmca-nafta-keystone-11626460641?mod=article_inline (last visited Aug 30, 2021).

¹²² *Id.*

¹²³ One of the oldest published views from the American conservative establishment against international courts and tribunals is present in Robert H. Bork's book "coercing Virtue: the Worldwide Rule of Judges" where he critiques international courts "activism" and characterizes them as a threat to national sovereignty.

time, the Peña Nieto administration believed that without including a specific mechanism to redress investors complaints against actions taken by future governments, foreign investors would not invest in the recently opened sectors, primarily in energy and telecommunications. The fears were confirmed by a series of comments from the industry, specifically the American Petroleum Institute, that publicly requested the U.S. to include some type of investor-state dispute settlement mechanism because eliminating it would “undermine U.S. energy security, investment protections and our global energy leadership.”¹²⁴ As such, Mexico was willing to have a Chapter to allow claims between U.S. investors and the Mexican government, and a specific annex that would cover certain government contracts in covered sectors. In other words, they were willing to submit themselves to international tribunals in order to guarantee energy investors that they would be protected by international forums in case the government changed its energy or telecommunications policies. The result was the adoption of articles 14 D and 14 E of the USMCA.

Chapter 14 initially recovered most of the text of NAFTA’s Chapter 11, except for a couple of clarifications on substantive rights to the investors. For example, the USMCA has specific clarifications on what national treatment and most-favored national treatment means. According to the USMCA, when determining expropriation claims and whether national treatment was afforded, a “like circumstances” test is required. According to Article 14.4.4 a “like circumstances ... depends on the totality of the circumstances including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.”¹²⁵ Another standard that was clarified in the treaty was the “minimum standard of treatment” to foreign investors. The USMCA defined the standard as the “customary international law minimum standard of treatment of aliens” which includes fair and equitable treatment and full protection of security. The standard, however, does not require treatment in addition to or beyond that which is required under customary international law nor it creates “additional substantive rights.”¹²⁶ For further clarification, the USMCA specifies that fair and equitable treatment “includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.”¹²⁷ The treaty also clarifies

¹²⁴ American Petroleum Institute (API), *API Supports NAFTA Modernization that Retains Strong Protections for U.S. Investors*, February 20, 2017, <http://www.api.org/news-policy-and-issues/news/2018/02/20/api-supports-nafta-modernization-that-protect-us-investors>.

¹²⁵ USMCA Article 14.5.4.

¹²⁶ USMCA Article 14.6.2

¹²⁷ USMCA Article 14.6.2(a)

that full protection and security “requires each party to provide the level of police protection required under customary international law.”¹²⁸

In addition, Article 14.6(4) clarifies that an action taken by the government that “may be inconsistent with an investor’s expectations does not constitute a breach.”¹²⁹ In the same spirit, Article 14.16 states that “[n]othing” in the investment Chapter of the USMCA shall be construed as preventing the governments from adopting environmental, health, safety or other regulatory actions that they “consider appropriate.”¹³⁰ These clarifications are a game changer in general when it comes to challenges from investors that might argue in courts for the recovery of damages for governmental actions that might affect their legitimate expectations.

Now when it comes to general U.S.-Mexico claims, Article 14-D narrows the type of claims that can be brought to international arbitration. Under the USMCA indirect expropriation and breach of fair and equitable treatment are excluded from the mechanism.¹³¹ In contrast with NAFTA’s fork in the road provision, in the USMCA U.S.-Mexico general investment proceedings local remedies must be exhausted as a precondition to bring claims to international arbitral panels.¹³² These exclusions, however, are not included in the dispute resolution mechanism available for investors who signed contracts with government entities.

According to Annex 14-E on Mexico-United States Investment Disputes Related to Government Contracts claimants who fall under the category of “covered sectors” do maintain a series of grounds against the Mexican government. Covered sectors include specifically “activities with respect to oil and gas ... such as exploration, extraction, refining, transportation, distribution, or sale”, and the supply to the public on behalf of the State of power generation, telecommunication, and transportation services. For these set of investors, the USMCA expands the ground available to them including national treatment, most-favored nation treatment minimum standard of treatment (including fair and equitable and full protection and security), non-discriminatory treatment in case of armed conflict or civil strife; and direct and indirect or regulatory expropriation. The treaty, however, does clarify that any “unilateral act of an administrative or judicial authority, such as a permit, license, certificate, approval, or similar instrument” issues by the government in its “regulatory ca-

¹²⁸ USMCA Article 14.6.2(b)

¹²⁹ USMCA Article 14.6.4

¹³⁰ USMCA Article 14.16

¹³¹ 14-D-2

¹³² 14-D-5.

capacity” shall not be considered an agreement signed with the government subject to the protection of Chapter 14-E.¹³³ Only those written agreements between a national authority and a covered investor that grants rights to develop the investment shall be considered as “covered government contracts.”¹³⁴

Now, by recognizing the most favored nation treatment to investors in the energy sector, the Mexico pledge to afford U.S. investors treatment that is no more restrictive than the treatment it grants to nationals of other trade or investment agreements. That is, Mexico has to grant U.S. energy companies the same protections it gives to its other energy investment partners. This is further clarified in the USMCA Article 32.11 (“Specific Provisions on Cross-Border Trade in Services, Investment, and State-Owned Enterprises and Designated Monopolies for Mexico”). The Article specifically states that Mexico reserves the right to adopt or maintain a measure in the energy sector “only to the extent consistent with the least restrictive measure that Mexico may adopt or maintain under the terms of applicable reservations and exceptions to parallel obligations in other trade and investment agreements that Mexico has ratified prior to entry into force of this agreement, including the WTO agreement, without regard to whether those other agreements have entered into force.”¹³⁵ Here is where the CPTPP/TPP text becomes relevant for purposes of energy investment protections under the USMCA. What article 32.11 did was to integrate the investment protections afforded to that sector from the CPTPP/TPP into the USMCA.¹³⁶

If the CTPP/TPP would have included a similar provision as Chapter 8 of the USMCA, Article 32.11 would have been irrelevant. In the CTPP/TPP, however, Mexico included a list of reservations connected to the energy sector.¹³⁷ In Annex I-Mexico-17 to 26, Mexico specified that it would not take more restrictions to the sector than the ones afforded under the Mexican Energy reform of 2013.¹³⁸ In other words, the Pena Nieto administration pledge to maintain the regulatory and legislative framework in place when it signed and ratified the CTPP/TPP, making sure that future government could not take more restrictive rules. The CTPP/TPP internationalized the energy reform of 2013, and then the USMCA included it by reference to the CTPP/TPP most favored nation clause.

¹³³ USMCA Article 14-E-2(d), footnote 34

¹³⁴ USMCA Article 14-E-2(a)

¹³⁵ USMCA Article 32.11

¹³⁶ Gantz, *supra* note 23, at 4.

¹³⁷ Comprehensive and Progressive Agreement for Trans-Pacific Partnership Annexes I, II and IV, Mar. 8, 2018, <https://www.dfat.gov.au/trade/agreements/in-force/cptpp/Pages/comprehensive-and-progressive-agreement-for-trans-pacific-partnership.aspx>. [hereinafter CTPP/TPP]

¹³⁸ *Id.*

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

V. BUILDING U.S.-MEXICO ENERGY TRADE

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

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

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

Even in the face of new regulatory roadblocks and nationalistic policies there are still avenues to mutually beneficial energy trade because the economic fundamentals and the geological and geographic characteristics are there. First, roadblocks in one country are opportunities for the neighbor. You can use

your trading partner to avoid regulatory issues on your side of the border. (Example, pipelines in Mexico to export natural gas to Asia; climate change pledges on the U.S. side and renewable energy built on the Mexican side)

Second, distances matter. Energy commodities, infrastructure, and resources on one side of the border might be closer to high demand urban areas or adequate exports points across the border than the ones in your own territory. For example, gas fields in Texas can feed combined cycle natural gas power plants in North Mexico. Renewable energy storage capacity in Baja California is available to serve the power-hungry California market.¹³⁹ And U.S. refineries in Houston and Gulf of Mexico are natural destinations for growing production in Mexican offshore oil fields.¹⁴⁰

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

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

B. An Agenda for North American Energy Integration

As noted, there are different levels and instruments for integrating energy markets. Some require formal treaty formation, others could be integrated into side trade letters, and would demand joint policymaking through high level dialogue or commissions. Using the Energy Charter Treaty, the U.S.-Canada Side Letters on Energy, NAFTA's Energy Chapter, the U.S.-Canada Transit Pipeline Treaty, the U.S.-Mexico Agreement for the Exploitation of Trans-

¹³⁹ IEnova, IFC Develop Large Battery Storage Project in Mexicali, *supra* note 67.

¹⁴⁰ Crude oil inputs to Mexico's petroleum refineries continued to decline in 2018 - Today in Energy - U.S. Energy Information Administration (EIA), , <https://www.eia.gov/todayinenergy/detail.php?id=39972> (last visited Sep 7, 2021). (According to the EIA report "U.S. refineries along the Gulf Coast are able to process heavy Mexican crude oil blends with a higher yield of finished, low-sulfur motor gasoline.")

boundary Hydrocarbons as references we propose the following energy integration principles to set an agenda for future U.S.-Mexico negotiations toward North American energy cooperation.¹⁴¹

Non-Discriminatory Access to energy infrastructure and freedom of energy transit. Both countries should adopt clear rules that give the partner country companies access to existing infrastructure, including transit-related infrastructure, and should not prevent companies from building new capacity in case the existing transit infrastructure is insufficient.¹⁴² The guiding principles should be freedom of transit and a duty not to impose unreasonable restrictions or charges, including making sure that energy transit flows are not disrupted even in light of disputes among nations.¹⁴³ These principles could build upon the 1977 Pipeline Transit Treaty between the United States and Canada but apply more broadly to all three countries, to transport of electricity and other energy products, and to import and export of energy products.¹⁴⁴ In the same vein, any fees, charges, or permits set up to allow the access to existing energy infrastructure should be set up in a non-discriminatory and transparent way.¹⁴⁵ At

¹⁴¹ Agreement Concerning Transboundary Hydrocarbon Reservoirs in the Gulf of Mexico, U.S.-Mex., Feb. 20, 2012, T.I.A.S. No. 14-718, [hereinafter the U.S.-Mexico Hydrocarbons Transboundary Agreement] available at <https://www.boem.gov/sites/default/files/regulations/Treaties/US-Mexico-Transboundary-Reservoirs-Agreement.pdf>

¹⁴² Selivanova, *supra* note 32 at 397. (explaining the importance of energy transit under the ECT); the Energy Charter Treaty regulates the principle of freedom of transit in Article 7 (“Each Contracting Party shall take the necessary measures to facilitate the Transit of Energy Materials and Products consistent with the principle of freedom of transit and without distinction as to the origin, destination or ownership of such Energy materials and Products or discrimination as to pricing on the basis of such distinctions, and without imposing any unreasonable, delays, restrictions or charges.”); the U.S.-Canada Side Letter on Energy also contemplated access to electric transmission facilities and pipeline networks, see Art 5, U.S.-Canada Side Letter on Energy (specifying that the measures governing access to or the use of these facilities shall be “neither unduly discriminatory nor unduly preferential” and that any tolls, rates, or charges connected to the access are “just, reasonable, and neither unduly discriminatory nor unduly preferential”)

¹⁴³ *Id.* at 397.; see also Article 7 of the Energy Charter Treaty.

¹⁴⁴ See *supra* notes 8-11 and accompanying text.

¹⁴⁵ The Inter-governmental Agreement (IGA), the model treaty drafted by the Energy Charter Treaty Secretariat for states involved in transit cross border infrastructure, also contemplated principles involving “freedom of transit” and non-discriminatory, transparent regulations, see Article 6 and 7, Model Intergovernmental and Host Government Agreement for Cross-Border Pipelines, Second edition, available at <https://www.energycharter.org/what-we-do/trade-and-transit/model-agreements/>; the same principles are contemplated in the Energy Charter Treaty Secretariat Model Agreements for Cross-Border Electricity Projects, see Sections on Land rights, Transport of Electricity, Ownership of Transmission Rights With respect to Electricity in the Electricity Transmission Facility, and Non-Interruption of Project Activities, Model Intergovernmental and Host Government Agreements for Cross-Border Electricity Projects, released in 2011, available at <https://www.energycharter.org/what-we-do/trade->

a minimum, governments should not prevent or impede the cooperation among energy companies to allow access to and use of existing infrastructure.¹⁴⁶

Investment protection principles for North American energy companies. Both countries should adopt clear rules on expropriation and nationalization, including formulas for compensation that contemplate market values, rates of return, and formulas to estimate future prices.¹⁴⁷ Moreover, there should be compensation mechanisms beyond monetary compensation—for example, priority access to future developments or projects. Moreover, both nations should recognize the importance of Mexican state-controlled entities and their investments in the U.S. The principles that protect foreign investment should also be available for Mexican state-owned enterprises that are currently subject to different regulatory standards in the U.S. Additionally, both governments should specify the level of civil liability and immunity that the state-owned companies from Mexico will have in U.S. territory. These state-controlled entities, by being a central actor in Mexico’s energy sovereignty and the development of North American energy resources, should have specific rules applicable to them as opposed to standards applicable to other State-owned enterprises from other nations.

[and-transit/model-agreements/](#) see also, PETER D. CAMERON, INTERNATIONAL ENERGY INVESTMENT LAW THE PURSUIT OF STABILITY 94–97 (2010). (discussing the different stability mechanisms available for cross-border infrastructure)

¹⁴⁶ This principle for example was established in Article 12 of the U.S. Mexico Hydrocarbons Transboundary Agreement for facilities near the delimitation line, see U.S.-Mexico Hydrocarbons Transboundary Agreements, art. 12, *supra* note 172. (“1. The Parties shall use their best efforts to facilitate cooperation between Licensees in activities related to the Exploration and Exploitation of a Transboundary Unit, including the facilitation of access to and use of Facilities near the Delimitation Line, and shall not prevent or impede such cooperation by unreasonable withholding necessary Permits. 2. The use of Facilities near the Delimitation Line may include, inter alia, access to and interconnection with a Pipeline and physical access to Pipeline capacity and, where appropriate, to Facilities supplying technical services incidental to such access. 3. The Parties shall facilitate, subject to their respective national law, access to Facilities for workers engaged in any activities related to a Transboundary Unit.”),

¹⁴⁷ CAMERON, *supra* note 27 at 26–35. (describing the different layers of legal instruments employed by investors to protect their investments, including long-term contracts with stabilization clauses, international treaties, foreign investment laws, and dispute resolution mechanisms, including international arbitration); on a critical view of the impact of arbitration in the hydrocarbon sector, see generally, Guillermo Jose Garcia Sanchez, *A Critical Approach to International Investment Law, the Hydrocarbons Industry, and Its Relation to Domestic Institutions*, 57 HARVARD INTERNATIONAL LAW JOURNAL 475 (2016).

*Principles for regulator's decision-making processes and coordination on energy data.*¹⁴⁸ Energy regulators should be independent and have clear rules that do not discriminate against foreign entities that are transparent and have a guiding principle integrating the energy markets. Regardless of the type of authority, policies that impact the energy sector should balance their goals with the goal of further integrating energy markets to strengthen north American energy interdependence, resiliency, self-sufficiency, and transition.¹⁴⁹ In other words, any government entity under these principles, must consider these elements as part of its energy decision-making process, and be transparent about how it reaches a particular decision.¹⁵⁰ In the same vein, for energy markets to be properly integrated and face common challenges, it is required that states coordinate and share energy data.¹⁵¹ By exchanging and evaluating information, business and scientific uncertainty is reduced and regulators can engage in substantive discussions and negotiations.¹⁵² Mexico and the U.S. should harmonize and improve the availability of energy data across the region.¹⁵³

¹⁴⁸ By regulators we mean any government official that has the power to affect energy markets through rule or norm making processes. As such, these include formal regulatory agencies, but also executive branch officials at the Ministry of Energy in Mexico and the Energy Department in the U.S.

¹⁴⁹ The U.S.-Canada Side Letter on Energy establishes a cooperation principle that enhances “the integration of North American energy markets based on market principles” and where the parties pledge to promote “North American energy cooperation, including with respect to energy security and efficiency, standards, joint analysis, and the development of common approaches.”, Art 3 U.S.-Canada Side Letter on Energy, *supra* note.

¹⁵⁰ The U.S.-Canada Side Letter on Energy is an example of such a principle. According to Article 4.2 state that the government “shall endeavor to ensure that in the application of a energy regulatory measure, a energy regulatory authority within its territory avoid disruption of contractual relationships to the maximum extent possible, supports North American energy market integration, and provides for orderly and equitable implementation appropriate to those measures.” The Side letter also clarifies in footnote 3 that such a principles “does not apply to a measure related exclusively to the protection of human health or the environment.”, Art 4, U.S.-Canada Side Letter on Energy, *supra* note 122.

¹⁵¹ Timothy Meyer, *Global Public Goods, Governance Risk, and International Energy*, 22 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 319 (2012). (arguing that many of the challenges faced by public good institutions can be attended by the exchange and evaluation of information.)

¹⁵² *Id.* at 320. (Arguing in favor of the exchange and evaluation of information but also warning that “[i]nstitutions that emerge the knowledge-exchange and development process with the ability to negotiate and impose binding legal regulations thus run the risk that states that oppose the imposition of substantive regulations will use epistemic processes as a way to try to block the adoption of substantive regulation.”)

¹⁵³ The U.S.-Mexico Hydrocarbons Transboundary Agreement already contemplated a duty to share data concerning transboundary field and operations around the border, see Art. 4 U.S.-Mexico Hydrocarbons Transboundary Agreement, *supra* note ; see also Section 2 of the U the U.S. Department of Interior and the Mexican Ministry of Energy also signed an MoU in 2016 to enhance cooperation, sharing of best practices and information involving the energy

Principles on cooperation in security and energy supply. Taking into account the interdependence of energy markets and the emergency situations faced by the region in the past decades, the energy partners should adopt protocols that recognize the principle to cooperate in emergency situations and alleviate the supply needs of the region.¹⁵⁴ Examples of these cooperation mechanisms include the expansion of cross-border interconnections, pipelines, and the share of storage capacity for border towns.¹⁵⁵

Joint decision-making bodies. These energy partners should work to create a North American commission that serves as a connection point for coordinating energy policies to further integrate the region, but that also serves a platform for discussing government decisions that might negatively impact the energy principles.¹⁵⁶ Such a commission could receive several key charges. For one, this board could serve to resolve emergency issues such as the one faced in February 2020. They could approve or recommend emergency responses and help the relevant parties coordinate the response. The U.S. and Mexico have used this type of mechanism before to address challenges on joint natural

resources on both sides of the border, Sect 2 Memorandum of Understanding between the Department of Interior of the United States of America and the Ministry of Energy of the United Mexican States, signed at Mexico City, February 2016, available at <https://www.doi.gov/sites/doi.gov/files/uploads/DOI%20-%20SENER%20MOU%20Final%20Formatted%20US%20text%20-%20English.pdf> [herein after the U.S.-Mexico MoU on Energy Cooperation] (Section 2 of the agreement enlists all of the exchanges of information, procedures and best practices among the parties.)

¹⁵⁴ An example of such a principle can be found in Article 6 of the Agreement on ASEAN Energy Cooperation see Art. 6 Agreement on ASEAN Energy Cooperation, signed in Manila, 1986-06-24, entered into force, 1987-04-26, available at <http://agreement.asean.org/media/download/20170606100932.pdf> (“Cooperation in security of energy supply. Recognizing the need to alleviate emergency situations relating to the shortage and/or oversupply of renewable and/or non-renewable energy products, the Member Countries shall endeavor to cooperate in drawing up and concluding: i. emergency agreements for different energy forms as may be desirable from time to time; and ii. appropriate measures to cope with these emergency situations.”)

¹⁵⁵ Successful examples of cross border transmission lines helping the region to overcome blackouts, includes the 2011 Mexico’s transmission of 300 mw into the Texas grid in 2011, see Christopher Helman, *Rolling Blackouts Force Texas To Import Power From Mexico*, FORBES , <https://www.forbes.com/sites/christopherhelman/2011/02/03/rolling-blackouts-force-texas-to-import-power-from-mexico/> (last visited Sep 13, 2021).

¹⁵⁶ U.S.-Mexico Energy Relations | Wilson Center, *supra* note 5. (This principle is also consistent with the key recommendations from Wood and Ramiro, but it seeks to institutionalize further the relationship. Wood and Ramiro recommend a “return to regular meetings of the North America’s energy ministers” and to “reinvigorate the U.S.-Mexico Energy Business Council, with a renewed focus not just on hydrocarbons but also on renewable energy.”)

resources located at the border.¹⁵⁷ This commission could also play an important role as an informal forum for dispute resolution when new circumstances or policies threaten North American energy trade.

Even if these energy neighbors decide to forgo a commission, at a minimum they could play a larger role in each other's energy councils. For example, the U.S. and Mexico should consider allowing each other's agencies to be observers in energy-related national commissions. Mexico should participate, at least as an observer, in the U.S. Interstate Oil & Gas Compact Commission. As a historical oil exporter, Mexico has historically cooperated more closely with the Organization of Petroleum Exporting Countries, whose interest was often opposed to the United States when it was a major net energy importer. Now that both Mexico and the United States have moved toward net zero energy exports—with important interests both as importers and as exporters—it would make more sense for them to align their policies. Certainly, to the extent that the Interstate Oil & Gas Compact Commission will be taking a larger role in avoiding oil and gas price spikes, Mexico could participate in these discussions.¹⁵⁸

Another minimum effort would be to reinvigorate the U.S.-Mexico Energy Business Council that was created in 2016 with the purpose of improving institutional relations among Mexican and U.S. agencies with the participation of energy companies.¹⁵⁹ The Council is tasked with providing non-binding recommendations on actionable items to strengthen U.S.-Mexico energy relations.¹⁶⁰

¹⁵⁷ Most notably, Mexico and the U.S. have a water commission set up for the joint rivers at the border that has power to issue binding decisions on both sides of the border and that has the character of an international organization giving its members diplomatic protection, see Treaty on the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, U.S.-Mex., art. 2 and 3, Feb. 3, 1944, 59 Stat. 1219 [hereinafter 1944 U.S. Mexico Rivers Treaty]; see also Guillermo J. Garcia Sanchez & Richard J. McLaughlin, *The 2012 Agreement on the Exploitation of Transboundary Hydrocarbon Resources in the Gulf of Mexico: Confirmation of the Rule or Emergence of a New Practice*, 37 HOUS. J. INT'L L. 681, 726–734, 761–767 (2015). (arguing that Mexico and the U.S. have a longstanding practice of creating joint commissions for the development of transboundary resources but that they failed to create a strong commission for hydrocarbon resources in the Gulf of Mexico.)

¹⁵⁸ James W. Coleman, *State Energy Cartels*, CARDOZO L. REV. (forthcoming 2021).

¹⁵⁹ Terms of reference of the United States-Mexico Energy Business Council, Signed in 2016, available at [https://legacy.trade.gov/hled/documents/Signed%20US-MEX%20Energy%20Business%20Council%20Terms%20\(May%202016%20-%20English\).pdf](https://legacy.trade.gov/hled/documents/Signed%20US-MEX%20Energy%20Business%20Council%20Terms%20(May%202016%20-%20English).pdf) (The Energy Business Council was created as part of the commitments made in January 2015 during the U.S.-Mexico High Level Economic Dialogue)

¹⁶⁰ *Id.* (According to Section II of the Terms of reference “The Council’s objectives are to 1) facilitate the exchange of information between representatives of the energy industries from the United States and Mexico; and 2) encourage the development of actionable, non-binding recommendations for the benefit of the Participant’s governments”)

Cooperation for joint environmental and safety standards. Both nations should cooperate in setting joint environmental and safety standards for the industry.¹⁶¹ A transparent and consistent regulatory framework for the North American industry will make the region more competitive at the global level. The costs of differentiated standards are eventually translated into inefficient practices and prices to the consumer.¹⁶² The North American partners could elaborate these principles by high level dialogues among agencies or by setting up joint commissions under recommendations contemplated above.

Transboundary resources related principles. The U.S. and Mexico should take the existing transboundary agreements on the joint development of resources at the borderline and integrate them in their energy relationship.¹⁶³ The existing Transboundary Agreement on hydrocarbon resources located in the Gulf of Mexico should be used as the base for other resources located inland, such as the Burgos Basin in the Tamaulipas-Texas border, and for the resources located in the 9 nautical miles that fall under the jurisdiction of Texas.¹⁶⁴ The guiding principles should continue to be the efficient, effective, and joint development of the resources, with a focus on long-term economically feasible return for both nations. Moreover, in those applicable hydrocarbon fields, a principle of unitization of the area should guide any decision or policy on both

¹⁶¹ The U.S and Mexico already have a duty to adopt common safety and environmental standards for transboundary fields in the Gulf of Mexico. They, however, have not enacted any since the signing of the Treaty. See, Art. 19 U.S.-Mexico Hydrocarbons Transboundary Agreement, *supra* note .. (1. The Parties shall adopt, where appropriate, common safety and environmental standards and requirements applicable to activity contemplated under this Agreement. In any event, the Parties shall strive to ensure that their respective standards and requirements are compatible where necessary for the safe, effective, and environmentally responsible implementation of this Agreement.”); See also Sect 3 of the U.S.-Mexico MoU on Energy, *supra* note ... (Sect 3 enlists the modalities of cooperation including “mutually beneficial exchanges and sharing of scientific and technical practices, knowledge and publicly available information; exchange visits of staff; meetings (including workshops, video-conferences, or webinars); cooperative research projects; joint studies; joint training; evaluation of effectiveness of activities; or other modalities of cooperation”)

¹⁶² The USMCA does contemplate a duty to enact best regulatory practices and improve regulatory cooperation among the trade partners in order to “prevent, reduce or eliminate unnecessary regulatory differences to facilitate trade and promote economic growth, while maintaining or enhancing standards of public health and safety and environmental protection.”, see Art 28.1, USMCA *supra* note

¹⁶³ Sanchez and Mclaughlin, *supra* note 156. (Describing in general how the Mexico agreement deviated from international practice and could be improved, particularly in its dispute resolution mechanisms and the decision-making processes of the joint commission)

¹⁶⁴ Jorge Vargas, *The 2012 US Mexico Agreement on Transboundary Hydrocarbon Reservoirs in the Gulf of Mexico, A Blueprint for Progress or a Recipe for Conflict*, 14 SAN DIEGO INTERNATIONAL LAW JOURNAL 3, 39 (2012). (describing the potential for joint gas developments in the Tamaulipas and Texas borderline)

sides of the border. This includes making it mandatory in any license, concession, or contract assign by the states.

Community engagement principles. The construction of energy related infrastructure in the region has direct impacts on different communities, many of them historically disenfranchised from the decision-making process of governments.¹⁶⁵ Both the Canadian-U.S. border and the Mexican-U.S. border are home to ancestral communities and indigenous lands that have a historical and spiritual value to society. An efficient longstanding energy integrated region requires the consent of those communities and policies that reduce the impact of the investment on their lands. The new principles should go beyond the required duty to consult communities, and include principles of consensus building processes with them, the protection of their cultural and religious sites, and the share of benefits from the projects.¹⁶⁶ Considering the potential of North America as an energy region can lead to decisions that avoid building infrastructure that will impact disenfranchised communities. For example, the passing of a pipeline through indigenous lands might seem like the only solution to bring communities from one coast to the other, but if regulators consider the potential of using the neighboring state, alternative routes that seemed impossible before are visible to decisionmakers and companies. If states coordinate their energy policies, they could expand alternatives that do not involving the negative impact of energy infrastructure over disenfranchised communities.

VI. CONCLUSION

The borderlines of North America’s jurisdictions are increasingly irrelevant to the energy challenges spanning the continent. Storms that destroy energy infrastructure, excessive electricity demand during heat and cold waves, oil spills, and wild fires all flow unchecked across these borders. These are common challenges that require joint approaches. In fact, when governments jump into their “jurisdictional” trenches and avoid addressing regional energy challenges, the most common results are binational blackouts, inefficient allocation of investment and production capacity, and at the minimum, energy is wasted

¹⁶⁵ Guillermo Garcia Sanchez, *When Drills and Pipelines Cross Indigenous Lands in the Americas*, 51 SETON HALL LAW REVIEW 1121 (2021). (discussing the conflicting principles that arise from investment arbitration law and international law on indigenous rights in the context of energy related projects in the American continent. Prof. Garcia Sanchez concludes that the system tends to monetize the value of indigenous lands as a solution to continue with the construction of energy related projects, leaving the communities on the wrong side of the cost benefit analysis.)

¹⁶⁶ *Id.*

on both sides of the border. The Winter storm that hit North Mexico and Texas in 2021 is just one example of these joint problems. Joint efforts and cooperation mechanisms are needed to meet these common energy challenges.

As the center of the United States' energy industry—the world's biggest producer of both oil and natural gas—Texas is the crossroads for global energy. But it is also the center of the cross-border energy trade with Mexico that is a linchpin of the energy future in both countries. Mexico is the principle source for Texas growing natural gas exports and Texas is a likely consumer of the oil and renewable energy that Mexico hopes to produce in coming years. At the same time, new challenges have emerged to international energy trade and investment on both sides of the border. It is high time that North American policymakers developed an agenda to ensure that the U.S. and Mexico gain the full benefit promised by their potential collaboration. One lesson of the past decades is that the windows for furthering cross-border cooperation are often brief, and it is crucial to use them to set the stage for market integration driven by shifting energy markets. The agenda set forth in this report should provide a roadmap for policymakers to take advantage of the next opportunity to take full advantage of North America's energy resources.