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In the Name of Energy Sovereignty

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Abstract: Throughout history, the phrase "In the name of the King" justified actions that trumped the rights of citizens in order to safeguard the interests of the Crown. Today, in the name of energy sovereignty, states deploy the government apparatus to access oil and gas in other parts of the world, build pipelines on private lands, subsidize renewable energy, and nationalize their oil and power industries. States justify each of these actions by noting that they create a sense of energy independence, ensure security, or achieve other social and economic goals. Energy, however, cannot be trapped in one "realm." Its nature is to move across human-created jurisdictions and to settle, at least in the cases of oil and gas, in specific geological formations where extraction is not always economically feasible. Additionally, energy evolves with technological advancements and its production must adapt to new challenges, like those posed by the global climate crisis. Thus, an efficient and reliable energy sector that "secures" the state requires engagement with other foreign powers to regulate the trade and investment of energy and its sources. States, however, have created a web of often inconsistent treaties, reflecting competing and frequently contradictory energy policy goals. When disputes inevitably arise, arbitrators or committees must balance the parties' competing energy goals. This Article introduces the concept of energy sovereignty as a novel analytical framework to explain the fragmentation and inconsistencies in international energy governance. By introducing archetypical energy sovereignties, this Article provides a framework through which interpreters of trade and investment agreements can balance the competing energy goals that are attached to the agreements. In doing so, this Article demonstrates how ignoring the complexities in the way states exercise their energy sovereignties can undermine integrated regional efforts to deal effectively with energy challenges like reducing carbon emissions or building a cost-effective and resilient energy ma-

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trix. This Article uses the United States-Mexico-Canada Agreement (USMCA), the latest North American international trade and investment agreement, to show how the archetypical energy sovereignties conflict with each other and how the USMCA's dispute resolution mechanisms may balance them.

INTRODUCTION

Governments are constantly justifying energy policies under the banners of "energy security" or "self-sufficiency," or as exercises of "state sovereignty."[1] The 2022 Russia-Ukraine conflict provides a recent illustration.[2] A few days after Russian President Vladimir Putin announced the start of a "special military operation" in Ukraine, the German government suspended the entry into operations of the Nord Stream 2 Baltic Sea gas pipeline project that would bring Russian natural gas directly into Germany.[3] Notwithstanding Germany's withdrawal, however, Western Europe remained prisoner to Russian oil and gas imports.[4] Russian energy products are essential for the operation of European markets and are a necessary product to transition into renewable energy. At the time of the invasion, Russian oil and gas undergirded more than one third of Europe's total energy supply.[5] Ironically, even Ukraine benefited from the trade of Russian energy products, as Russian pipelines cross through eight hundred miles of Ukrainian territory before reaching the Slovakian border.[6]

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[1] *See, e.g.*, Sarah Marsh & Madeline Chambers, *Germany Freezes Nord Stream 2 Gas Project as Ukraine Crisis Deepens*, REUTERS, https://www.reuters.com/business/energy/germanys-scholz-halts-nord-stream-2-certification-2022-02-22/ [https://perma.cc/9NLN-DEJ6] (Feb. 22, 2022) (explaining that Germany engaged in the Nord Stream 2 energy project to better diversify its sources of energy).

[2] *See id.* (discussing Germany's halt of the energy project).

[3] *Id.*; Ann M. Simmons, *Putin Announces Special Military Operation in Eastern Ukraine*, WALL ST. J., https://www.wsj.com/livecoverage/russia-ukraine-latest-news/card/putin-announces-special-military-operation-in-eastern-ukraine-BBbiFSHMKssPMTur01Vh [https://perma.cc/6YTV-U9XG] (Feb. 23, 2022). The project, which cost eleven billion dollars and had been completed in September 2021, was awaiting certification by both Berlin and the European Union. Marsh & Chambers, *supra* note 1. States have been litigating the suspension of the pipeline project by the European Union since 2019 in an international investment tribunal under the Energy Charter Treaty. *See Nord Stream 2: Pipeline Spat with EU Evolves into ECT Dispute*, INV. TREATY NEWS (Dec. 17, 2019), https://www.iisd.org/itn/en/2019/12/17/nord-stream-2-pipeline-spat-with-eu-evolves-into-ect-dispute/ [https://perma.cc/B7JM-TQQK] (recounting the history of the dispute).

[4] *See Borrell Says No EU Agreement on Russian Energy Embargo*, REUTERS, https://www.reuters.com/business/energy/borrell-says-no-eu-agreement-russian-energy-embargo-2022-04-25/ [https://perma.cc/5RWG-YVSD] (Apr. 24, 2022) (describing Europe's dependency on Russian gas).

[5] *See Explainer: Is the War in Ukraine Impacting Russian Gas Supplies to Europe?*, REUTERS, https://www.reuters.com/business/energy/is-war-ukraine-impacting-russian-gas-supplies-europe-2022-03-07/ [https://perma.cc/LBY4-U3PS] (Mar. 7, 2022) (discussing the impact of the Russo-Ukrainian war on European gas).

[6] *See id.* In contrast to Europe, the United States imposed an import ban on Russian oil, coal, and liquified natural gas. *Fact Sheet: United States Bans Imports of Russian Oil, Liquefied Natural Gas, and Coal*, WHITE HOUSE BRIEFING ROOM (Mar. 8, 2022), https://www.whitehouse.gov/briefing-

The trade of energy products by the Russian government not only represents close to forty percent of Russia's revenue, but also a source of its geopolitical influence.[7] Because neighboring countries are forced to rely on cheap Russian energy products due to a lack of their own resources, difficulty in permitting to extract them, or pledges to transition into a decarbonized economy, the Kremlin limits Western European nations' policy options to react to Russian aggressions.[8]

Russia is not unique. Indeed, in the name of security, self-sufficiency, and sovereignty, governments worldwide enact tax codes benefiting certain energy producers, retire nuclear or coal-fired power plants, empower or "pack" energy regulators, create sovereign-wealth funds with the profits from oil and gas extraction, force the renegotiation of contracts with private energy companies, and more.[9] Though these three terms—energy security, self-sufficiency, and state sovereignty—are commonly used, there is no consensus on what they mean.[10] At a minimum, these terms imply the exercise of state control over

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room/statements-releases/2022/03/08/fact-sheet-united-states-bans-imports-of-russian-oil-liquefied-natural-gas-and-coal/ [https://perma.cc/6HFS-66TU].

[7] *Putin May Collect $321 Billion Windfall if Oil and Gas Keep Flowing*, BLOOMBERG (Apr. 1, 2022), https://www.bloomberg.com/news/articles/2022-04-01/putin-may-collect-321-billion-windfall-if-oil-gas-keep-flowing [https://perma.cc/URV2-KV2V].

[8] Ciara Nugent, *Why Sanctions on Russia Aren't Targeting Oil and Gas*, TIME (Feb. 25, 2022), https://time.com/6151493/russia-oil-gas-embargo-sanctions-ukraine/ [https://perma.cc/LK7L-H8NG] (explaining how European reliance on Russian gas limits its policy options during conflict). "On average, the E.U. relies on Russia for 35% of its natural gas." *Id.*

[9] *See, e.g.*, Kirk Semple & Oscar Lopez, *Mexico Set to Reshape Power Sector to Favor the State*, N.Y. TIMES (Mar. 7, 2021), https://www.nytimes.com/2021/03/07/world/americas/mexico-energy-sector-privatization.html [https://perma.cc/K7HZ-YBAQ] (arguing that the goals of Mexican electricity reform included re-establishing energy self-sufficiency and protecting the sovereignty of Mexico); Mohammed bin Salman bin Abdulaziz, *Leadership Message*, KINGDOM OF SAUDI ARABIA VISION 2030, https://www.vision2030.gov.sa/v2030/leadership-message/ [https://perma.cc/95GC-6W6E] (advocating for economic diversification to avoid being "at the mercy of a commodity price volatility or external markets"); *Germany Shuts Nuclear Plant as It Phases Out Atomic Energy*, AP NEWS (Dec. 31, 2019), https://apnews.com/article/46c4e06013c8e14212e2f0e5bff3db6c [https://perma.cc/2HKJ-RYCC] (explaining Germany's decision to shut down one of its nuclear power plants); The Energy Emergency: The President's Address to the Nation Outlining Steps to Deal with the Emergency, 9 WEEKLY COMP. PRES. DOC. 1312, 1316–1317 (Nov. 7, 1973) [hereinafter *Nixon's Address*] (emphasizing that energy reform will lead to self-sufficiency). *See generally* U.S. DEP'T ENERGY, OFF. OF OIL & NAT. GAS, U.S. OIL AND NATURAL GAS: PROVIDING ENERGY SECURITY AND SUPPORTING OUR QUALITY OF LIFE (2020) (highlighting the national security value of U.S. energy independence, which was caused by the Trump administration's robust oil and natural gas policies), https://www.energy.gov/sites/default/files/2020/10/f79/Natural%20Gas%20Benefits%20Report.pdf [https://perma.cc/6WYK-WEHS].

[10] *See, e.g.*, Danila Bochkarev & Greg Austin, *Energy Sovereignty and Security: Restoring Confidence in a Cooperative International System* 1 (EastWest Inst., Policy Paper No. 1/2007, 2007) (describing how people ascribe different meanings to the term energy security); Martí Rosas-Casals, Mariano Marzo & Pep Salas-Prat, *Sovereignty, Robustness, and Short-Term Energy Security Levels. The Catalonia Case Study*, FRONTIERS ENERGY RSCH., May 12, 2014, at 1, 1 (stating that "[s]overeignty must not only be understood here in its political sense (as traditionally found in the literature) but also

energy resources to ensure the supply of energy-related products *and* to increase the government's capacity to advance particular social, security, and economic goals.[11] These terms encompass more than achieving the national security paradigm of seeking independence from foreign actors.[12] As such, these terms imply an insular approach to energy that focuses on protecting the nation from energy-connected threats and advancing national policies. Yet, energy markets have an important international component.[13] For example, oil and gas pipelines around the globe cross thousands of miles and span multiple

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in its technological and energy acceptations"); Chelsea Schelly, Douglas Bessette, Kathleen Brosemer, Valoree Gagnon et al., *Energy Policy for Energy Sovereignty: Can Policy Tools Enhance Energy Sovereignty?*, 205 SOLAR ENERGY 109, 109 (2020) (defining "energy sovereignty" as "involv[ing] centering the inherent right of humans and communities to make decisions about the energy systems they use, including decisions about the sources, scales, and forms of ownership that structure energy access"); Sara C. Bronin, *The Promise and Perils of Renewable Energy on Tribal Lands*, 26 TUL. ENV'T L.J. 221, 226–27 (2013) (discussing tribal sovereignty to define energy production on tribal lands); Arnulf Grübler & Nebojša Nakićenović, *Decarbonizing the Global Energy System*, 53 TECH. FORECASTING & SOC. CHANGE 97, 108 (1996) (identifying decarbonization efforts as the main driver to address climate change and achieve energy security); Murodbek Laldjebaev, Benjamin K. Sovacool & Karim-Aly S. Kassam, *Energy Security, Poverty, and Sovereignty: Complex Interlinkages and Compelling Implications* (focusing on energy sovereignty as acknowledging the rights of communities and individuals to make their own choices), *in* INTERNATIONAL ENERGY AND POVERTY: THE EMERGING CONTOURS 97, 103 (Lakshman Guruswamy & Elizabeth Neville eds., 2016).

[11] *See Nixon's Address*, *supra* note 9, at 1316–17 (outlining the steps required to deal with energy shortages). In particular, President Nixon observed:

> The challenge is to regain the strength that we had earlier in this century, the strength of self-sufficiency. Our ability to meet our own energy needs is directly limited to our continued ability to act decisively and independently at home and abroad in the service of peace, not only for America, but for all nations in the world.

Id.; *see also* G8 St. Petersburg Summit, *Global Energy Security*, MINISTRY OF FOREIGN AFFS. OF JAPAN, ¶ 1 (July 16, 2006), https://www.mofa.go.jp/policy/economy/summit/2006/energy.html [https://perma.cc/C8CU-L4W6] (framing energy security as the challenge of "ensuring sufficient, reliable and environmentally responsible supplies of energy at prices reflecting market fundamentals"). For Mexican President Lopez Obrador, energy sovereignty means self-sufficiency, but his version of self-sufficiency also includes heavy reliance on state actors. *See* Semple & Lopez, *supra* note 9 (explaining how Mexico's new legislation emphasizes the use of state-run energy companies).

[12] *See generally* Bert Kruyt, D.P. van Vuuren, H.J.M. de Vries & H. Groenenberg, *Indicators for Energy Security*, 37 ENERGY POL'Y 2166 (2009) (arguing that there is a lack of consensus on how to measure energy security); Christian Winzer, *Conceptualizing Energy Security*, 46 ENERGY POL'Y 36 (2012) (describing how there is no consensus on the definition of energy security, advocating for distinguishing supply security from "other policy objectives," and concluding that energy security should be defined as a "continuity of energy supplies relative to demand").

[13] *See* Andreas Goldthau & Jan Martin Witte, *The Role of Rules and Institutions in Global Energy: An Introduction* (asserting that the common view of energy security fails to take into account significant issues, such as the importance of international energy markets), *in* GLOBAL ENERGY GOVERNANCE: THE NEW RULES OF THE GAME 1, 2 (Andreas Goldthau & Jan Martin Witte eds., 2010).

international borders to power cities and factories in distant jurisdictions.[14] Every year, energy suppliers build terminals to ship liquified natural gas (LNG) between continents and to reduce energy prices and scarcity in regions with high energy consumption, but low resource endowment.[15] Countries are planning cross-border electricity lines to bring renewable energy from one country to another and to help neighboring states fulfill their carbon emission reduction pledges under the Paris Climate Agreement.[16] These two dimensions, the insular approach and the international character of energy, have become tangled in the web of legal instruments that states use to advance energy policy goals.[17] The international institutional architecture of energy governance, however, is fragmented, dispersed, and at times contradictory.[18]

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[14] Hiroko Tabuchi & Brad Plumer, *Is This the End of New Pipelines?*, N.Y. TIMES, https://www.nytimes.com/2020/07/08/climate/dakota-access-keystone-atlantic-pipelines.html [https://perma.cc/8FMA-K9XR] (Jan. 18, 2021).

[15] *Id.*; *see* Stanley Reed, *Liquefied Natural Gas Comes to Europe's Rescue. But for How Long?*, N.Y. TIMES (June 29, 2022), https://www.nytimes.com/2022/06/29/business/liquefied-natural-gas-europe.html [https://perma.cc/FM88-JSPB] (discussing how liquified natural gas (LNG) has lessened the impact of increasing prices and disruption in energy markets).

[16] *See, e.g.*, *Fact Sheet: President Biden's Leaders Summit on Climate*, WHITE HOUSE BRIEFING ROOM (Apr. 23, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/23/fact-sheet-president-bidens-leaders-summit-on-climate/ [https://perma.cc/6WF2-HXF6]; MOHIT CHANDRA JOSHI, DAVID J. HURLBUT & DAVID PALCHAK, NAT'L RENEWABLE ENERGY LAB'Y, CROSS-BORDER ELECTRICITY TRADING AND RENEWABLE ENERGY ZONES 1, 7 (2020); *see also* Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104 [hereinafter Paris Agreement].

[17] *See generally* Timothy Meyer, *Explaining Energy Disputes at the World Trade Organization*, 17 INT'L ENV'T AGREEMENTS 391 (2017) (asserting that states tend to challenge new, renewable energy trade restrictions as opposed to old, traditional energy trade restrictions); Timothy Meyer, *Global Public Goods, Governance Risk, and International Energy*, 22 DUKE J. COMPAR. & INT'L L. 319 (2012) [hereinafter Meyer, *Global Public Goods*] (describing how states prefer to act individually despite public issues being international); Timothy Meyer, *The Architecture of International Energy Governance*, 106 AM. SOC'Y INT'L L. PROC. 389 (2012) [hereinafter Meyer, *Architecture*] (analyzing the fragmentation of the governance of international energy).

[18] Meyer, *Architecture*, *supra* note 17, at 390. These institutions include international investment and trade agreements, such as the World Trade Organization (WTO), the Energy Charter Treaty (ECT), the United Nations Framework Convention on Climate Change (UNFCCC), the Organization of Petroleum Exporting Countries (OPEC), the Gas Exporting Countries Forum (GECF), the International Atomic Energy Agency (IAEA), the International Energy Program (IEP) Agreement, the International Energy Agency (IEA), the International Renewable Energy Agency (IRENA), and the International Convention for the Prevention of Pollution from Ships (MARPOL), among others. *Id.* at 389–91. When negotiators drafted the General Agreement on Tariffs and Trade (GATT) system, energy producing countries (who mainly extracted natural resources) were reluctant to participate in the system due to their dependency on rents generated by hydrocarbon extraction. Yulia Selivanova, *Managing the Patchwork of Agreements in Trade and Investment* [hereinafter Selivanova, *Managing the Patchwork*], *in* GLOBAL ENERGY GOVERNANCE, *supra* note 13, at 49, 52–53. Consequently, the general rules of the GATT, and eventually the WTO, "are arguably not designed to tackle some of the issues pertinent to energy trade" because "[t]rade-restrictive practices related to energy are mainly

International energy governance scholars have identified at least the following categories of institutions that deal with different aspects of the energy sector: (1) institutions that seek to facilitate the extraction of energy resources from one state to help the producers and consumers in another state;[19] (2) energy cartels that seek to protect and enhance the bargaining power of exporting nations;[20] (3) institutions that seek to tackle energy poverty and development challenges;[21] and (4) agreements that aim to address the environmental externalities that come from energy production and the extraction of related-resources, such as oil pollution and the global climate crisis.[22] All of these legal instruments form the "institutional architecture that underpins global energy."[23] Existing literature explains the fragmentation as a consequence of ill-designed structures that were built to address particular global crises or as the result of regulatory sidelines in other regimes with non-energy-related objec-

found on the export side, while multilateral trade rules have been devised in a manner to address import barriers to a larger extent than export barriers." *Id.* at 53.

[19] *See* Meyer, *Architecture*, *supra* note 17, at 391 (stating that the energy-consuming states primarily created the WTO, IEA, and ECT to secure long-term access to energy resources abroad). Unlike the other two institutions, the WTO indirectly addresses energy policy. *Id.* at 390. In fact, many scholars have argued that the WTO is primarily focused on lowering import tariffs and loosely regulating export restrictions, which are the major barriers to energy trade. Gabrielle Marceau, *The WTO in the Emerging Energy Governance Debate*, 106 AM. SOC'Y INT'L L. PROC. 385, 389 (2012); Selivanova, *Managing the Patchwork*, *supra* note 18, at 53, 68. The founders of the IEA, for example, sought to secure oil to a club of the Organization for Economic Co-operation and Development (OECD) consumer countries, particularly to counterbalance the power of OPEC. Meyer, *Architecture*, *supra* note 17, at 390.

[20] *See* ANNA-ALEXANDRA MARHOLD, ENERGY IN INTERNATIONAL TRADE LAW: CONCEPTS, REGULATION AND CHANGING MARKETS 28 (2021) (stating that, in contrast with supply-oriented institutions, supplier clubs created OPEC and the Gas Exporting Countries Forum to influence global prices and renegotiate concession agreements with major international oil companies). OPEC began in the 1960s, a time when many former colonies were exercising their independence and sovereign right to regulate their national resources. *Id.* at 25–26. As a consequence, the new "sovereigns" began renegotiating their licenses and concessions with the international companies that had been operating in their territories. *Id.* at 28–29. OPEC's goals, as stated in its founding statute, are to: (1) coordinate and unify the Member States' policies regarding petroleum; (2) determine "the best means for safeguarding their interests, individually and collectively;" and (3) "devise ways and means of ensuring the stabilization of prices in international oil markets with a view to eliminating harmful and unnecessary fluctuations." Org. of the Petrol. Exporting Countries [OPEC] Statute art. 2 (2021), https://www.opec.org/opec_web/static_files_project/media/downloads/publications/OPEC_Statute.pdf [https://perma.cc/GK4J-XFGQ]. The statute also created a new forum to mediate the supply of energy sources between consumer and exporter states, such as the International Energy Forum (IEF), which fostered initiatives to share and collect data, as seen through the Joint Oil Data Initiative. Meyer, *Architecture*, supra note 17, at 393.

[21] *See* Meyer, *Architecture*, *supra* note 17, at 391 (providing the IRENA as an example of a poverty reduction institution). IRENA attempts to tackle energy poverty by granting billions of people who lack electricity access to renewable energy technology. *Id.*

[22] *See id.* (listing examples, including the UNFCCC and MARPOL).

[23] Goldthau & Witte, *supra* note 13, at 2.

tives.[24] These scholars also see the fragmentation of international energy governance as part of a broader trend of plural international economic legal regimes, emerging global administrative law, and transnational legal processes that borrow rules and institutions from domestic legal systems and transplant them across both domestic and international jurisdictions.[25] In other words, to contemporary scholars, energy governance fragmentation is a consequence of the non-coordinated expansion of legal regimes to regulate international economic relations.

This Article takes a different approach. It advances the term "energy sovereignties" as a new analytical framework to explain the fragmentation in international energy governance. The term energy sovereignty integrates the state's desire to achieve energy security and self-sufficiency. It also captures the use of international law as a core element of statehood to achieve it. As the Article explains, states are not consistent in the ways that they exercise their energy sovereignty; one state may exercise sovereignty through market oriented-tools, whereas its neighbor may depend on government-centered institutions, such as state-owned enterprises, to achieve the same goal. Both nations, however, frame their policies under the same banners of independence, self-sufficiency, and the right to regulate the energy sector according to their na-

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[24] Fragmentation results from reactionary institutional behavior. Specifically:

> To the degree that states and other actors have established rules and organizations to try to deal with the four sets of market/governance failures, it has generally been as a result of a particular crisis (as in the case of oil in the 1970s), or as a sideline of efforts to achieve other objectives (such as the energy poverty role of the multilateral development banks as a component of their larger development mission).

See Navroz K. Dubash & Ann Florini, *Mapping Global Energy Governance*, 2 GLOB. POL'Y 6, 11 (2011); *see also* Meyer, *Architecture*, *supra* note 17, at 391 (arguing that "the fragmentation of international energy governance is a result of the fact that many energy institutions have been created to respond to specific contingent governance problems, rather than long-term governance challenges"); Goldthau & Witte, *supra* note 13, at 9 (stating that the "rules of the game" in international oil and gas markets stem from geopolitical events, including the Cold War and decolonization, and reflect "power differentials" between supplier and consuming countries). Trade agreements are "partially at odds with objectives of environmental protection" because they naturally "favor fossil fuels over renewables." Goldthau & Witte, *supra* note 13, at 14.

[25] *See generally* Gregory Shaffer, *Transnational Legal Process and State Change*, 37 LAW & SOC. INQUIRY 229 (2012) (analyzing the transactional legal process and specifically focusing on the OECD); Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (2005) (discussing and identifying themes in global administrative law); Benedict Kingsbury, *The Concept of 'Law' in Global Administrative Law*, 20 EUR. J. INT'L L. 23 (2009) (arguing for a "'social fact' conception" of global administrative law); Harold Hongju Koh, *Why Transnational Law Matters*, 24 PA. ST. INT'L L. REV. 745 (2006) (defining transnational law and explaining its significance).

tional security goals.[26] In the process of exercising their sovereignty, states may breach international legal commitments crystalized in trade and investment treaties. Therefore, state policy choices to achieve energy sovereignty influence the global governance of energy and help to explain, in part, why the landscape of international legal instruments is scattered, inconsistent, and, at times, contradictory.[27]

The Article uses the United States-Mexico-Canada Agreement (USMCA) as a case study to demonstrate how the different energy sovereignties inform the seemingly contradictory energy policies reflected in the USMCA's provisions.[28] Additionally, this Article uses the USMCA as a template to reflect on the different energy sovereignties because the United States, Mexico, and Canada are, as a practical matter, interdependent and energy-integrated in the three major energy sectors of oil, natural gas, and electricity.[29] A complete halt of energy trade and investments among these three nations would shut down the entire region's governments, industries, and transportation.[30] Indeed, North America is a region where the exercise of energy sovereignty by one state directly impacts its neighbors.[31] Moreover, the USMCA's recent negotiation, drafting, and adoption makes it a timely template from which to study the impact of different energy sovereignties on international energy governance.[32] The emergence of renewable energy sources, the challenges posed by climate change, and the new geopolitical realities of the United States becoming a significant exporter of energy products informed the trade and investment talks.[33]

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[26] *See infra* notes 67–70 and accompanying text (distinguishing between market-oriented and government-centered approaches).

[27] *See* Meyer, *Architecture*, *supra* note 17, at 392–93 (outlining the disadvantages of fragmentation). As will be explained, the lack of coherent legal instruments that regulate energy is not unique to the international sphere. Rather, it is a reflection of how it is regulated at the domestic level. *See infra* notes 42–44 and accompanying text.

[28] *See* United States-Mexico-Canada Agreement art. 32.5, Nov. 30, 2018, 134 Stat. 11 [hereinafter USMCA] (outlining an agreement between participating countries to support trade).

[29] AM. PETROL. INST., ENERGY BENEFITS OF USMCA (2019) [hereinafter AM. PETROL. INST., ENERGY BENEFITS], https://www.api.org/-/media/Files/Policy/Trade/Energy-Benefits-of-USMCA.pdf [https://perma.cc/625N-4ZVV]; AM. PETROL. INST., NORTH AMERICAN ENERGY (2019), https://www.api.org/-/media/Files/Policy/Trade/North-American-Energy-Onepager.pdf [https://perma.cc/EY5Y-ZX3B] (stating that "North American energy markets (oil, natural gas, electricity) are integrated and interdependent with energy infrastructure and trade crossing the borders of the [United States], Canada and Mexico").

[30] *See* AM. PETROL. INST., ENERGY BENEFITS, *supra* note 29 (explaining the percentages of trade and dependency among the three nations).

[31] *See id.* (highlighting the integration of the North American energy market).

[32] *See United States-Mexico-Canada Agreement*, OFF. OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement [https://perma.cc/XA7M-MBA4] (stating that the agreement entered into force on July 1, 2020).

[33] *See United States–Mexico–Canada Trade Fact Sheet: Modernizing NAFTA into a 21st Century Trade Agreement*, OFF. OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-

Thus, studying the USMCA allows us to understand energy governance at the trade and investment treaty level in the face of contemporary energy challenges.

This Article proceeds as follows. Part I advances the concept of energy sovereignty as a new methodological framework for reading energy provisions in international trade and investment agreements.[34] Part I further discusses why the concept of energy sovereignty helps explain the fragmentation of the energy sector's international legal architecture and why trade and investment regimes impact energy governance in an uncoordinated way.[35] Next, Part II focuses on the USMCA provisions that regulate energy governance among the signatories to demonstrate how different provisions reflect market-oriented and government-centered energy sovereignties.[36] Moreover, Part II highlights sections where differently oriented provisions converge and conflict, and analyzes the dispute resolution mechanisms where these disputes can be balanced out.[37] Finally, this Article concludes by offering thoughts about the implications of the proposed framework for economically integrated regions.

I. Energy Sovereignty as a Tool to Explain Fragmentation in Global Energy Governance

The fragmentation of international energy governance is a phenomenon that has greatly piqued the interests of scholars. In particular, some scholars have studied the effect that this fragmentation can have on achieving consistent energy responses to contemporary energy and environmental challenges.[38] Accordingly, these scholars argue that fragmentation under specific contexts may be desirable because it creates a pluralist dialogue in which information and different policy views can be shared, allowing for productive legal debates and

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trade-agreements/united-states-mexico-canada-agreement/fact-sheets/modernizing [https://perma.cc/QKN9-PNL9] (arguing that the USMCA would modernize NAFTA into the twenty-first century by, among other things, including "the most advanced, most comprehensive, highest-standard chapter on the Environment of any trade agreement").

[34] *See infra* notes 38–88 and accompanying text.

[35] *See infra* notes 38–88 and accompanying text.

[36] *See infra* notes 89–374 and accompanying text.

[37] *See infra* notes 89–374 and accompanying text.

[38] *See, e.g.*, Meyer, *Architecture*, *supra* note 17, at 390–91, 393–94 (explaining the causes of the fragmentation of international energy governance and proposing solutions); Meyer, *Global Public Goods*, *supra* note 17, at 335–46 (exploring how to mitigate governance risks); Selivanova, *Managing the Patchwork*, *supra* note 18, at 68–70 (arguing that a more efficient international trade framework is needed). *See generally* Yulia Selivanova, *The Energy Charter and the International Energy Governance* (arguing that energy must be dealt with using a multilateral framework), *in* Regulation of Energy in International Trade Law: WTO, NAFTA and Energy Charter 373 (Yulia Selivanova ed., 2011).

dispute resolution.[39] Fragmentation also allows the voids left in one regime to be filled out by new agreements and organizations. But at the same time, fragmentation can also lead to overlaps, inconsistencies, and contradictory messages.[40] The policies advanced in some agreements might conflict with the policies of other legal regimes that have conflicting mandates. To address fragmentation challenges, then, certain scholars suggest creating epistemic institutions and issuing linkages that lead states to coordinate policies.[41]

It is worth noting that fragmentation and pluralism in energy institutions reflect a broader trend in international economic governance. To that end, several commentators have documented the expansion of international economic institutions and the tensions that emerge from a lack of hierarchy, order, and consistency.[42] The plurality of institutions is a function of new global challenges and a more profound expansion of international norms to regulate the relations among states, economic actors, individuals, and organizations. The legalization of international economic relations reflects the expansion of global regulatory networks that promote best practices, standards, and institutional change, both at the global and domestic levels. This may be referred to as a transnational legal process, where norms fluctuate both from the domestic to the international and across international regimes.[43] In contrast, fragmentation may be viewed as part of the emergence of a global administrative law that captures the evolution of norms, beyond state-centered ones, that are promoted by networks of public officials, private-public associations, and private actors.[44]

Rather than using a socio-legal framework or an epistemic institutional approach to explain fragmentation and pluralism in international energy governance, this Article proposes the framework of energy sovereignties. This Article acknowledges that networks of public officials and the influence of fragmented energy regulatory frameworks at the local level, such as in the United

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[39] *See, e.g.*, Meyer, *Global Public Goods*, *supra* note 17, at 321–24 (asserting that public good institutions aim to attract participation).

[40] *Id.*

[41] *Id.* at 322. Epistemic institutions refers to "international institutions that contain information-producing obligations aimed at facilitating cooperation by reducing scientific and market-related uncertainty." *Id.*

[42] Shaffer, *supra* note 25, at 245; Kingsbury, *supra* note 25, at 54; Kingsbury et al., *supra* note 25, at 47–50. *See generally* Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT'L L. 361 (2018) (outlining the development of tribunals); Sergio Puig, *The Merging of International Trade and Investment Law*, 33 BERKELEY J. INT'L L. 1 (2015) (detailing the merging of trade and investment across countries over time).

[43] Shaffer, *supra* note 25, at 230–36.

[44] *See* Kingsbury, *supra* note 25, at 25 (explaining that global administrative law is not rigidly organized and is evolving).

States, help explain why global energy governance is fragmented.[45] Nevertheless, existing literature downplays the role that the control of energy resources plays in a state's exercise of its sovereign powers and neglects how sovereign actions impact global energy governance.[46]

Sovereignty is a term coined by public international law and is a fundamental element of statehood.[47] The term is not uncontested, but the consensus among public international law scholars is that sovereignty entails the supreme power to exert authority over a particular territory's individuals.[48] Sovereignty is threefold. First, a state is sovereign when it exercises its legal capacities to regulate its economy and create rights, powers, and institutions.[49] Second, the state wields its sovereignty when it implements its legal and regulatory powers without foreign intervention or dependency.[50] Thus, the polity must have a level of autonomy and independence from outside forces. Third, a polity is sovereign when other states recognize it as an actor subject to international duties and rights, primarily the power to contract and sign international agreements with other states.[51] In sum, sovereignty implies a state that has independence, an abil-

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[45] *See* Dubash & Florini, *supra* note 24, at 15 (asserting that national energy policy is the central level of governance and is "poorly integrated with transnational processes"). The fragmentation and unprioritized objectives of international energy governance institutions also reflect uncoordinated national energy policies. ALEXANDRA B. KLASS & HANNAH J. WISEMAN, ENERGY LAW 1–3 (2d ed. 2020). For example, in the United States, energy regulation comprises an alphabet of agencies, competing state and federal laws, and regional and nonprofit entities with regulatory authority. *See id.* at 4–9; *see also* LINCOLN L. DAVIES, ALEXANDRA B. KLASS, HARI M. OSOFSKY, JOSEPH P. TOMAIN ET AL., ENERGY LAW AND POLICY 5 (2015) (stating that U.S. energy law is generally disjointed because it is "derived from the welter of statutes, regulations, and cases that affect the energy sector").

[46] *See* DAVIES ET AL., *supra* note 45, at 10 (noting the text's departure from the typical singular approach to the discussion of energy law).

[47] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 75–76 (6th ed. 2003). Under one view, sovereign statehood involves three separate components: (1) "international legal sovereignty," which is defined as the recognition of a state's "right to enter into contracts or treaties with other states"; (2) "Westphalian/Vattelian sovereignty," which is defined as a state's autonomy to create domestic institutions without foreign interference; and (3) "domestic sovereignty," which is defined as the right to "regulate and control activities within their territory." Stephen D. Krasner, *The Persistence of State Sovereignty*, *in* INTERNATIONAL POLITICS AND INSTITUTIONS IN TIME 39, 41 (Orfeo Fioretos ed., 2017). This Article also recognizes that the term sovereignty is used in the context of Indian nations. *See generally* Elizabeth Kronk Warner & Heather Tanana, *Indian Country Post*-McGirt*: Implications for Traditional Energy Development and Beyond*, 45 HARV. ENV'T L. REV. 249 (2021) (describing how Indian sovereignty interacts with energy). For a broader view of the term sovereignty with respect to Indian nations, see Seth Davis, Eric Biber & Elena Kempf, *Persisting Sovereignties*, 170 U. PA. L. REV. 549 (2022).

[48] ANTONIO CASSESE, INTERNATIONAL LAW 49 (2d ed. 2005).

[49] *See id.* (summarizing this as the power to exercise jurisdiction, which is defined as "[t]he power of the central authorities of a State to exercise public functions over individuals located in a territory").

[50] *See* BROWNLIE, *supra* note 47, at 76 (stating that "a state which has consented to another state managing its foreign relations, or which has granted extensive extraterritorial rights to another state, is not 'sovereign'").

[51] *See* Krasner, *supra* note 47, at 41 (outlining the three main elements of sovereignty).

ity to enter into agreements, and the capacity to regulate activities within its territory.[52] Energy has a direct impact on all three dimensions of sovereignty. First, the government's capacity to control the flow of energy helps the state achieve independence from outside influence. Second, energy resources allow the government to operate, maintain its relationship with constituencies, fund government programs, and reduce poverty. Finally, the control of energy allows the state to achieve security goals vis-à-vis outside threats, whether related to the military or the environment. For example, Russian strongarming in the wake of the Ukrainian invasion demonstrates how energy plays into sovereignty.[53]

International resolutions and treaties have long recognized the connection between control over natural resources to produce energy and the exercise of sovereignty.[54] For example, the 1962 United Nations General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources recognized the "right of peoples and nations to permanent sovereignty over their natural wealth and resources."[55] The same recognition is contemplated in economic agreements, such as Article 18(1) of the Energy Charter Treaty (ECT), which states that "[t]he Contracting Parties recognize state sovereignty and sovereign rights over energy resources."[56] To be sure, a state cannot exercise its sovereignty fully if it cannot keep the lights of government offices on, secure transportation fuel for its population, or provide electricity and funds to schools, hospitals, and courthouses. If foreign entities control a state's energy, that state likely cannot freely exercise regulatory control over its own territory. Under

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[52] *See id.*

[53] *See supra* notes 2–7 and accompanying text (discussing Russia's actions).

[54] *See, e.g.*, G.A. Res. 1803 (XVII), § I, ¶¶ 1–2 (Dec. 14, 1962) [hereinafter G.A. Res. 1803] (recognizing states' rights to extract natural resources, which are the primary source of energy commodities). In 1962, the United Nations General Assembly declared:

> The exploration, development and disposition of such 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 with regard to the authorization, restriction or prohibition of such activities.

Id. § I, ¶ 2. In General Principle Three of the Conference Recommendations, the first United Nations Conference on Trade and Development reaffirmed this principle. *See* Proceedings of the U.N. Conference on Trade and Development, *Final Act and Report*, ¶ 54, U.N. Doc. E/CONF.46/141 (Vol. I) (Mar. 23–June 16, 1964) (stating that "[e]very country has the sovereign right freely to trade with other countries, and freely to dispose of its natural resources in the interest of the economic development and well-being of its own people"). International courts and tribunals have also invoked the "principle of permanent sovereignty," most notably in the International Court of Justice. *See, e.g.*, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 244 (Dec. 19); Texaco Overseas Petrol. Co. v. Libyan Arab Republic,17 I.L.M. 1, 1 (Int'l Arb. Trib. 1978).

[55] G.A. Res. 1803, *supra* note 54, at 15 § I, ¶ 1.

[56] Energy Charter Treaty, Decisions and Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects art. 18(1), 33 I.L.M. 360 (1995) [hereinafter ECT].

those circumstances, that state is hardly independent, nor is it, in practice, equal among other nations.

Naturally, there are few examples where states are completely free of outside control of their energy products and production, as they might still depend on foreign capital to develop them or rely on international agencies and organizations for their efficient structure.[57] Nonetheless, the state may also voluntarily give some sovereignty away when it engages with international institutions and actors. In fact, the right to delegate authority through treaties and agreements is, itself, a recognition of sovereignty.[58] It is the sovereign right of the state to consent to regulate some aspects of its energy relations with other sovereign powers and to delegate jurisdiction to dispute resolution bodies through international treaties. In sum, energy sovereignty, as defined in this Article, captures the state's ability to exert its energy policies without foreign interference and to regulate the sector according to its own policy preferences. The state may still sign international treaties or work with entities to ensure the flow of energy products in and out of its jurisdiction, but this is a voluntary choice informed by different policy considerations.

All states aim to achieve energy security, but not all agree on how to accomplish it, prioritize energy sources, and deploy international instruments.[59] In other words, no states exercise their energy sovereignty in the same way. Building on the scholarly work that focuses on energy governance, this Article identifies at least two archetypical trends to achieve energy sovereignty through international instruments: (1) a market-oriented strategy of energy

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[57] *See, e.g.*, Olga Khakova, *European Energy Sovereignty Is Tied to Ukraine's Independence*, ATL. COUNCIL (Aug. 25, 2022) https://www.atlanticcouncil.org/blogs/energysource/european-energy-sovereignty-is-tied-to-ukraines-independence/ [https://perma.cc/MH5Z-G5YL] (describing European energy sovereignty as being connected to energy integration between European states); Stephen V. Arbogast, *Project Financing and Political Risk Mitigation: The Singular Case of the Chad-Cameroon Pipeline*, 4 TEX. J. OIL GAS & ENERGY L. 269, 270 (2008) (describing the World Bank's role in forcing host governments, such as Chad and Cameroon, to incorporate revenue management plans that channel revenues of energy investments toward alleviating poverty and developing new projects); Douglas Sarro, *Do Lenders Make Effective Regulators? An Assessment of the Equator Principles on Project Finance*, 13 GERMAN L.J. 1525, 1536–37 (2012) (describing how lenders can influence governments to adopt social and environmental standards in large infrastructure projects); Daniel C.K. Chow, *Why China Established the Asia Infrastructure Investment Bank*, 49 VAND. J. TRANSNAT'L L. 1255, 1278–80 (2016) (describing how China created its own development bank to reduce the influence of Western values and policies in less developed nations).

[58] Krasner, *supra* note 47, at 41.

[59] *Cf.* Raj Patel, *What Does Food Sovereignty Look Like?*, 36 J. PEASANT STUD. 663, 696 (2009) (describing state efforts to include energy sovereignty as part of the food security movement). Energy sovereignty, as such, shares similar characteristics to the term food sovereignty. *See id.* Food security, which involves securing the flow and production of food in a territory, fails to reveal a state's policy considerations of cultural and productive diversity. *Id.* at 665. A state cannot achieve food sovereignty until it exercises its right to decide the policy considerations around securing the production and flow of food products. *See id.* at 663–65.

supply, and (2) a government-centered production strategy that can evolve into mercantilism.[60]

The market-oriented strategy seeks to ensure the flow of energy products into a state's territory, primarily through international, liberalized markets.[61] The critical variable in this paradigm is the lowering of tariffs, both on imports and exports, and the opening of local markets to international private firms.[62] When the state needs to secure energy flows, it might deploy export tariffs to keep some production home, but this only occurs in exceptional circumstances.[63] From the perspective of market-oriented energy sovereigns, one of the driving factors in negotiating trade and investment agreements is ensuring sufficient energy supplies.[64] Trade agreements that lower export tariffs help en-

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[60] *See generally* Meyer, *Architecture*, *supra* note 17, at 391, 393 (explaining the fragmentation of energy institutions and suggesting solutions); Meyer, *Global Public Goods*, *supra* note 17, at 320, 323 (advocating for widespread participation in global public goods); Yulia Selivanova, *International Energy Governance: The Role of the Energy Charter*, 106 AM. SOC'Y INT'L L. PROC. 394 (2012) (analyzing how energy is regulated); GLOBAL ENERGY GOVERNANCE, *supra* note 13 (analyzing the governance of global energy).

[61] *See* Goldthau & Witte, *supra* note 13, at 3–5 (asserting that the emergence of more market forces pushed by producers and consumers alike has tamed the geopolitical and mercantilist frameworks in the past decades).

[62] Selivanova, *supra* note 60, at 395.

[63] *See, e.g.*, Timothy Gardner, *Congress Kills U.S. Oil Export Ban, Boosts Solar, Wind Power*, REUTERS, https://www.reuters.com/article/us-usa-fiscal-oil/congress-kills-u-s-oil-export-ban-boosts-solar-wind-power-idUSKBN0U121U20151219 [https://perma.cc/3XVQ-4Y2M] (Dec. 18, 2015) (describing how, in the last decade, the United States lifted its 1970s oil export ban); *China Issues New Refined Fuel, LSFO Export Quotas—Sources*, REUTERS, https://www.reuters.com/world/china/china-issues-5-mln-t-fuel-export-quotas-sources-2022-07-06/ [https://perma.cc/MPN2-HP3Z] (July 6, 2022) (describing how China increased its export quotas to assist Chinese refiners).

[64] *See* Goldthau & Witte, *supra* note 13, at 7–9 (stating that these institutions have the goal of "making energy markets tick" by "correct[ing] market failures," "lower[ing] transaction costs," circulating information, and creating rules for market exchange). The importance of energy security is reflected in the North American Free Trade Agreement of 1994 (NAFTA), which included an energy chapter between Canada and the United States that, among other market-oriented goals, secured Canadian oil exports for an energy-thirsty American market. *See* North American Free Trade Agreement, Can.-Mex.-U.S., art. 605(a), Dec. 17, 1992, 32 I.L.M. 289 & 605 [hereinafter NAFTA] (explaining restrictions on exports); *see also* DAVID A. GANTZ, THE UNITED STATES-MEXICO-CANADA AGREEMENT: ENERGY PRODUCTION AND POLICIES 7 (2019) (describing the impact of NAFTA on America's energy relationship with Canada). Other regional agreements, such as the Agreement on ASEAN Energy Cooperation of 1986 and the Energy Charter Treaty of 1994, also reflect the energy supply paradigm in their goals. *See generally* Agreement on ASEAN Energy Cooperation, June 24, 1986 [hereinafter ASEAN Agreement], http://agreement.asean.org/media/download/20170606100932.pdf [https://perma.cc/2T9S-QDZ7]; ECT, *supra* note 56. Article 3 of the ECT crystalized the market-oriented approach to energy by stating that "[t]he Contracting Parties shall work to promote access to international markets on commercial terms, and generally to develop an open and competitive market, for Energy Materials and Products." ECT, *supra* note 56, art. 3. The Preamble of the Agreement on ASEAN Energy Cooperation specifies the need to "assist each other by according priority to the supply of the individual country's needs in critical circumstances, and priority to the acquisition of ex-

sure that energy resources, such as fuels in automobiles or kilowatts in the grid, will be there when consumers, companies, and security forces need them.[65] A secured supply of energy gives the government an immediate sense of security and allows it to implement its chosen social policies.[66]

The government-centered production strategy, by contrast, seeks to insulate the energy market from private and foreign competition. Its ultimate goal is to use government-controlled actors to strengthen national energy production. To avoid dependency on foreign entities or actors, the government-centered production strategy interacts with global markets to the minimum extent possible. In countries where state-owned companies are prevalent, such as Russia, Saudi Arabia, and Mexico, energy supply insecurity is addressed through government-controlled strategies rather than through free trade agreements.[67] Instead of using the market to secure the flow of energy, these states use their state-controlled companies to obtain upstream assets, influence markets, and even engage in energy diplomacy to secure energy contracts abroad.[68] Government-centered strategies might also include an expansion of renewable energy to avoid having to depend on international markets. Countries such as China and

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ports from Member Countries, in respect of basic commodifies, particularly food and energy." ASEAN Agreement, *supra*.

[65] *See* Goldthau & Witte, *supra* note 13, at 9–10 (describing how the focus on energy geopolitics generates a deep fear within consumer states that pressures policymakers to advance international legal rules to ensure the energy supply).

[66] *See* Dubash & Florini, *supra* note 24, at 8 (stating that there is a "considerable international consensus on the importance of energy supply security, and at least some investment in large-scale coordination to enable countries to achieve energy security, particularly through the smooth functioning of energy markets").

[67] *See* Goldthau & Witte, *supra* note 13, at 10–11 (arguing that increasing resource nationalism and the limited availability of foreign capital caused the "resurgence of state-centered energy policy programs aimed at rolling back the liberalization of oil and gas markets and shifting to mercantilist approaches to energy security"); Jacqueline L. Weaver, *Overview of the International Petroleum Industry* (describing the size and importance of national oil companies in petroleum markets), *in* INTERNATIONAL PETROLEUM LAW AND TRANSACTIONS 1, 33–38 (2020).

[68] Goldthau & Witte*, supra* note 13, at 13–14 (observing that energy diplomacy and energy nationalism "undermine principles of free trade and lever out generally accepted rules of investment"); Selivanova, *Managing the Patchwork*, *supra* note 18, at 50 (noting that the rise of national oil companies and their increased competition with international oil companies requires a review of the existing international trade and investment regulations). For concrete examples of China's use of its state-owned companies as tools to advance its geopolitical goals, see generally Guillermo J. Garcia Sanchez, *The Footprint of the Chinese Petro-Dragon: The Future of Investment Law in Transboundary Resources*, 94 TUL. L. REV. 313 (2020); Richard Aidoo, Pamela L. Martin, Min Ye & Diego Quiroga, *Footprints of the Dragon: China's Oil Diplomacy and Its Impacts on Sustainable Development Policy in Ecuador and Ghana*, 8 INT'L DEV. POL'Y, no. 1, 2017, at 1. For examples of Russia's use of its gas contracts and pipeline capacity, see Members of the Ukrainian Parliament, *Putin's Pipeline Is a Strategic Weapon. It Must Be Stopped*, ATL. COUNCIL (Oct. 13, 2020), https://www.atlanticcouncil.org/blogs/ukrainealert/putins-pipeline-is-a-strategic-weapon-it-must-be-stopped/ [https://perma.cc/2JAZ-ZSWT].

India are on target to become two major renewable energy producers while continuing to depend on foreign fossil fuels produced by state agencies.[69] Regardless of whether a state relies on fossil fuels or expands domestic renewable energy production, the fears of an increase in energy demand and a lack of stable supply substantially promote government-control of the energy sector.[70] This Article identifies how, for some countries, such as China, the government-centered strategy might evolve to a mercantilist energy supply strategy that also seeks to secure the flow of energy products back to the home country. This strategy differs from the market-oriented one in that the tools deployed by the government involve the use of (1) state champions, primarily state-owned companies; and (2) subsidies, tax breaks, or special permits for national producers to ensure supply at a domestic level first.[71]

The strategies are archetypical, evolving, and in many states, interacting with each other; states will sometimes shift strategies depending on who is in power due to existing institutional discretion and market forces. Indeed, some states have gone through several iterations of these strategies in different periods.[72] The changes in energy policies are particularly stark in regions like Latin America, where governments have gone through dramatic redesigns of macroeconomic policies.[73] In the late 1980s and early 1990s, for instance, extreme privatization and lower trade barriers quickly replaced import substitution policies and state monopolies in significant economic sectors.[74] Moreover, even those states embracing mercantilist policies, such as through state-owned companies' foreign investments, will, when price differentials benefit them, sell their production on the world market instead of shipping it back home.[75] Certain states have market-oriented policies interacting with government-centered

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[69] *See* Goldthau & Witte, *supra* note 13, at 10 (stating that China and India will be responsible for approximately 43% and 19%, respectively, of the increased need for oil globally by 2030).

[70] *See* Dubash & Florini, *supra* note 2424, at 13–14 (describing how countries transitioned from a closed energy market to an open market, which resulted in an increase in government intervention in the last few decades).

[71] Andreas Goldthau, *Energy Diplomacy in Trade and Investment of Oil and Gas* (describing the Chinese and Russian strategies of using state actors to advance policy goals and influence global energy governance), *in* GLOBAL ENERGY GOVERNANCE, *supra* note 13, at 25, 25; *see also* Amy Myers Jaffe & Ronald Soligo, *State-Backed Financing in Oil and Gas Projects* (describing how subsidies are used in the fuel industry), *in* GLOBAL ENERGY GOVERNANCE, *supra* note 13, at 107, 114–15.

[72] *See, e.g.*, PETER D. CAMERON, INTERNATIONAL ENERGY INVESTMENT LAW: THE PURSUIT OF STABILITY 6 (2010).

[73] *Id.*

[74] Guillermo J. Garcia Sanchez, *The Hydrocarbon Industry's Challenge to International Investment Law: A Critical Approach*, 57 HARV. INT'L L.J. 475, 484, 503–05 (2016).

[75] Goldthau & Witte, *supra* note 13, at 11 (arguing that even with the rise of state actors and resource nationalism, markets still influence mercantilist approaches).

ones.[76] The exact mixture of policies depends on how deeply those policies are embedded in the legal system.

The United States and Canada have, at times, exercised government-centered energy policies. In the United States, the deviation from market-oriented approaches to energy is primarily a consequence of the United States becoming a net exporter of energy products instead of a major importer.[77] For example, during the initial lockdowns of the COVID-19 pandemic, global gasoline demand collapsed and U.S. oil producers faced negative prices—that is, their large, stranded inventories cost them more to store than what the market was willing to pay for the product. As a response, President Trump actively tried to cut U.S. oil production and attempted to reach an agreement with the members of the OPEC cartel and Russia to influence global prices to benefit U.S. producers.[78] Moreover, during official state visits, the Trump administration pushed foreign dignitaries to commit their nations to buy liquefied natural gas from U.S. private producers to increase American leadership and influence abroad.[79] Texas Governor Greg Abbott employed the same non-market-oriented strategy during the 2021 Texas blackout when he issued an emergency order to secure the natural gas supply for local power producers before shipping it to international trading partners.[80] This move was partly responsible for leaving millions of Mexicans without power.[81]

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[76] *See id.* (providing, as an example, China, whose national oil companies trade in global markets rather than domestic markets).

[77] *See* Bradley Olson, *U.S. Becomes Net Exporter of Oil, Fuels for First Time in Decades*, WALL ST. J. (Dec. 6, 2018), https://www.wsj.com/articles/u-s-becomes-net-exporter-of-oil-fuels-for-first-time-in-decades-1544128404 [https://perma.cc/9Q3X-XYU2] (describing this shift as a major step toward accomplishing energy independence). *But see* Mason Hamilton, *Despite the U.S. Becoming a Net Petroleum Exporter, Most Regions Are Still Net Importers*, U.S. ENERGY INFO. ADMIN. (Feb. 6, 2020), https://www.eia.gov/todayinenergy/detail.php?id=42735 [https://perma.cc/G3KV-VKGH] (observing that there are still regions in the United States that are net importers).

[78] *See* Clifford Krauss, *Oil Nations, Prodded by Trump, Reach Deal to Slash Production*, N.Y. TIMES, https://www.nytimes.com/2020/04/12/business/energy-environment/opec-russia-saudi-arabia-oil-coronavirus.html [https://perma.cc/J58Q-ETHH] (Nov. 16, 2020) (explaining the agreement among countries to cut oil production).

[79] *See* Agnia Grigas, *Commentary: A Win for Trump's Gas Diplomacy*, REUTERS (Aug. 30, 2017), https://www.reuters.com/article/us-grigas-lng-idUSKCN1BB01K [https://perma.cc/L67P-ZJT7].

[80] Devika Krishna Kumar, Gary McWilliams & Jennifer Hiller, *Amid Texas Freeze, Oil Producers Still Shut; Governor Bans Natural Gas Exports*, REUTERS (Feb. 17, 2021), https://www.reuters.com/article/us-usa-weather-texas-energy-idUSKBN2AH1V2 [https://perma.cc/9HVV-Q2CS]; *Texas Gov. Abbott Orders No Exporting by Natural Gas Producers Through Feb. 21*, CBS NEWS DFW (Feb. 17, 2021) https://www.cbsnews.com/dfw/news/gov-abbott-orders-no-exporting-natural-gas-producers-until-feb-21/ [https://perma.cc/9T3J-ELYK] (providing analysis and footage from the Governor's announcement); Mark Smith, *Abbott's Natural Gas Export Ban Causes Energy Crisis Across the Border in Mexico*, WFAA (Feb. 19, 2021) https://www.wfaa.com/article/news/politics/gov-greg-abbott-natural-gas-export-ban-energy-crisis-mexico/287-78eb1b2d-2637-4f16-b3cd-66a60dc0ceed [https://perma.cc/DRA8-A44P].

[81] Smith, *supra* note 80.

At the same time, these government-centered efforts still relied on market-oriented policies, primarily export controls, to achieve the administration's goals. These efforts did not evolve to a fully government-centered policy, such as creating a state-owned company or dismantling energy regulators that lockdown market-oriented policies. The policy changes did, however, show that the Texas government, a so-called champion of the free market and deregulation, was nonetheless willing to ignore the effect of its decisions on long-term private supply contracts and producers. In these circumstances, the United States and Texas placed their governments' priorities over the interests of private actors and the free market.[82]

Provincial governments in Canada have also exercised their authority to deviate from a market-oriented sovereignty to a government-centered one. The clearest example is Alberta's investment in the Keystone XL pipeline (KXL) in 2020.[83] The Government of Alberta invested one and a half billion dollars in equity and guaranteed a six billion dollar loan to the Calgary-based TC Energy Corporation to support the accelerated KXL pipeline construction.[84] The Premier of Alberta even sided with the company and threatened to use NAFTA to bring an expropriation claim against the United States when President Biden canceled TC Energy's cross-border permit in 2021.[85] As discussed, a government-centered approach chooses national champions, invests in them, and uses them to access markets to benefit local interest holders.[86] In this case, Alberta did not seek to access foreign energy sources to bring them home, but instead,

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[82] *See* Marianna Parraga & Diego Oré, *Mexico Presses U.S. to Guarantee Natural Gas Supplies After Texas Export Ban*, REUTERS (Feb. 17, 2021), https://www.reuters.com/article/us-mexico-lng-supply-idUSKBN2AI05C [https://perma.cc/9PYT-LN8C] (explaining that this hard-learned lesson fed into Mexico's distrust of the United States as a partner). In press conferences, Mexican President Andrés Manuel López Obrador (AMLO) stated that Mexico could not rely on the United States for its energy security. *See id.* After the blackout, the administration of AMLO announced a substantive electricity reform aimed at reducing its dependency on U.S. energy products and, in turn, enhancing Mexico's security. *See* Alejandra Ibarra Chaoul & Kevin Sieff, *Mexico's Electricity Reform Draws Opposition from Investors, U.S.*, WASH. POST (Apr. 16, 2022), https://www.washingtonpost.com/world/2022/04/16/mexico-electricity-reform-amlo/ [https://perma.cc/ZC7Y-FNYP] (outlining Mexico's recent energy reforms).

[83] *Provincial Investment Kick-Starts KXL Pipeline*, GOV'T OF ALTA. (Mar. 31, 2020), https://www.alberta.ca/release.cfm?xID=69965D6D6EE7A-92F8-DD89-BBB9E1FE323BD2DD [https://perma.cc/UZ5V-XXGV].

[84] *Id.*

[85] *See* Robert Tuttle, *Keystone XL's Collapse Leaves Canada's Oil Heartland Seeking Payback*, BLOOMBERG L., https://www.bloomberg.com/news/articles/2021-02-04/canada-s-oil-heartland-mulls-u-s-compensation-for-keystone-xl [https://perma.cc/8GRE-92R9] (Feb. 4, 2021) (citing Jason Kenney, former Alberta premier); News Release, TC Energy, TC Energy Disappointed with Expected Executive Action Revoking Keystone XL Presidential Permit (Jan. 20, 2021), https://ml.globenewswire.com/Resource/Download/ca1c82cb-084d-4e3a-b608-138eae2c8567 [https://perma.cc/AW74-DTU9].

[86] *See supra* notes 66–69 and accompanying text.

searched for open market opportunities for local Albertan producers.[87] The strategy, as such, does fit within the government-centered view of energy sovereignty, where the state has to play a more decisive role in supporting national champions, as opposed to relying on market forces.

Even though energy sovereignty strategies change depending on who is in power and how they decide to face concrete challenges, it is worth reviewing the international legal frameworks with these two archetypical strategies in mind. As discussed above, the proposed framework advanced in this Article allows us to see how investment and trade agreements also reflect these policies and at which points they conflict. International trade and investment treaties, such as the USMCA, have components that reflect each of these conceptions of energy sovereignty.[88] This Article advances a new way to interpret the intention of the parties in the treaties and brings to the front the undecided energy policy goals that need to be addressed by dispute resolution bodies. Rather than siding with one interpretation of the way the treaty regulates energy, this Article invites interpreters to balance the different visions reflected in the same legal body.

II. COMPETING ENERGY SOVEREIGNTIES IN THE USMCA

The recent USMCA reflects the disconnect between the actions needed to meet global and regional challenges and the actions states prefer to take to protect their access to and distribution of energy. The USMCA has exceptions that allow each of the three actors to move their individual energy sovereignty agenda forward, sometimes at the expense of collective regional goals.[89] As explained below, this lack of common ground leads to contradictions and a disconnect that prevents North America from becoming a fully efficient, energy-integrated region.[90] For instance, the United States can point to the USMCA as an example of its effort to achieve energy security in the long term by pro-

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[87] *See Provincial Investment Kick-Starts KXL Pipeline*, *supra* note 83.

[88] *See* CAMERON, *supra* note 72, at 6 (describing the patterns of "'opening and closing'" energy markets and the legal frameworks surrounding these changes); USMCA, *supra* note 28, chs. 8, 22 (recognizing, for example, state-owned enterprises and Mexican ownership of hydrocarbons). The same tensions are present in the ECT Article 3, which imposes a duty on the signatories to "work to promote access to international markets on commercial terms, and generally to develop an open and competitive market, for Energy Materials and Products." ECT, *supra* note 56, art. 3. Yet, in Article 18, the same treaty recognizes "state sovereignty and sovereign rights over energy resources" and that these "must be exercised in accordance with and subject to the rules of international law." *Id.*, art. 18(1).

[89] USMCA, *supra* note 28, art. 32.2(b) (stating that "[n]othing in this Agreement shall be construed to . . . preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests").

[90] *See infra* notes 219–326 and accompanying text (discussing provisions of the USMCA that demonstrate one view of energy sovereignty and, as a result, conflict with the other view).

moting environmental standards and ensuring the flow of clean energy products.[91] At the same time, Mexico can use the same treaty to argue for a government-centered policy in favor of developing fossil fuels through state-owned companies and advancing welfare policies that infringe on the rights of foreign investors producing renewable energy.[92] The treaty allows both views to coexist without normative guidance, and it is left to dispute resolution bodies to work out the inevitable conflicts.[93]

This Part explains how the USMCA reflects the different energy sovereignties.[94] Moreover, it shows how provisions that impact the energy industry are disseminated throughout the treaty and reveals the lack of a shared vision on the role that energy should play in the integration of the North American market. Part II has four sections. Section A analyzes the provisions of the treaty that reflect an energy sovereignty vision based on more government control over the energy sector.[95] By contrast, Section B reviews those provisions that reflect a vision for energy sovereignty where markets are the key drivers to secure energy flows.[96] Section C discusses certain sections of the treaty, particularly the investment and environmental portions, where both visions collide.[97] Section D concludes Part II by providing an overview of the three distinctive dispute resolution mechanisms and an assessment of how the conflicting energy policies can be balanced out.[98]

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[91] *See* Brice Armel Simeu, *Free Trade 2.0: How USMCA Does a Better Job Than NAFTA of Protecting the Environment*, THE CONVERSATION (Sept. 24, 2020), http://theconversation.com/free-trade-2-0-how-usmca-does-a-better-job-than-nafta-of-protecting-the-environment-146384 [https://perma.cc/W3KY-GLRW] (emphasizing the advantages of the USMCA, including its inclusion of a whole chapter focused on environmental issues); Courtney Vinopal, *These 4 Changes Helped Trump and Democrats Agree to the USMCA Trade Deal*, PBS NEWSHOUR, https://www.pbs.org/newshour/economy/making-sense/these-4-changes-helped-trump-and-democrats-agree-to-the-usmca-trade-deal [https://perma.cc/8N77-DBXV] (Jan. 16, 2020) (describing how the USMCA improves upon NAFTA).

[92] *See generally* USMCA, *supra* note 28, art. 14 (providing language that may be interpreted as government-centered); *see also infra* notes 101–135 (explaining how the USMCA is government-centered).

[93] *See* Vinopal, *supra* note 91 (explaining that the USMCA includes provisions expressing both views); Selivanova, *supra* note 60, at 397 (recognizing that the ECT contains the same tension between the recognition of sovereignty of energy resources and the promotion of open and competitive markets); *see also* ECT, *supra* note 56, art. 3 (encouraging the parties to participate in open markets); *id.*, art. 18(1) (ordering the parties to acknowledge state sovereignty).

[94] *See infra* notes 99–374 and accompanying text.

[95] *See infra* notes 99–135 and accompanying text.

[96] *See infra* notes 136–218 and accompanying text.

[97] *See infra* notes 219–326 and accompanying text.

[98] *See infra* notes 327–374 and accompanying text.

A. Energy Sovereignty Through Government

As stated in Part I, the government-centered energy sovereignty is one where the state decides to regulate the energy market and become an active player in it through its agencies or state-owned companies. The ultimate goal of a government-centered strategy is to ensure that state actors have priority over the extraction, distribution, sale, and production of energy sources. Under this conception, the rights of other players, particularly foreign investors, are delegated to a second level in the name of the sovereign powers of the state. In this way, the government-centered view aims to reduce state dependence on international trade or foreign actors for its energy market to function. It becomes an insular approach to the functioning of the energy sector: keep resources at home, use government actors to exploit them, and reduce external influence.[99] Chapters 8 and 32 of the USMCA allow states to pursue this type of approach.[100]

1. The Sovereign Right to Exploit Hydrocarbons

A distinctive element of international energy trade is that many energy products, particularly those that require extraction from the subsoil, are controlled—and, in certain jurisdictions, owned—by the government.[101] Thus, the state is a significant player in the market, at times acting as both operator and regulator.[102] Because energy products are an essential source of revenue for the state, states are eager to capture as much rent as possible from energy resource extraction. Theoretically, the rents serve a broader public purpose to finance essential government programs and policies. Moreover, the fact that these are finite resources forces the state to derive maximum rent for their depletion. A series of policies arise out of these facts. For example, states implement export taxes, attach windfall taxes to projects, require high national content for investments, force extractors to associate with state-owned companies as part of exploration and production (E&P) contracts, and impose domestic production quotas on private producers all in an effort to extract the rents.

Chapter 8 of the USMCA provides one of the clearest examples of how a government-centered approach to sovereignty can be incorporated into an in-

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[99] Goldthau & Witte, *supra* note 13, at 10–11.

[100] *See* USMCA, *supra* note 28, chs. 8, 32; *infra* notes 101–135 and accompanying text.

[101] *See generally* Guillermo J. Garcia Sanchez, *The Mexican Petroleum License of 2013* (discussing Mexican control of petroleum), *in* THE CHARACTER OF PETROLEUM LICENSES: A LEGAL CULTURE ANALYSIS 207 (Tina Soliman Hunter, Jørn Øyrehagen Sunde & Ernst Nordtveit eds., 2020); John S. Lowe, *The Legal Character of Petroleum Licenses in the United States of America* (detailing U.S. government control of petroleum), *in* THE CHARACTER OF PETROLEUM LICENSES, *supra*, at 51; Nigel Bankes, *The Legal Character of Petroleum Licences in Canada* (describing Canadian control of petroleum), *in* THE CHARACTER OF PETROLEUM LICENSES, *supra*, at 72.

[102] CAMERON, *supra* note 72, at 3.

ternational treaty.[103] The title of Chapter 8 is "Recognition of the United Mexican States' Direct, Inalienable, and Imprescriptible Ownership of Hydrocarbons."[104] Article 8.1.1 affirms that "the Parties confirm their full respect for sovereignty and their sovereign right to regulate with respect to matters addressed in this Chapter in accordance with their respective Constitutions and domestic laws, in the full exercise of their democratic processes."[105] As such, Article 8.1.1 is a reaffirmation of the state's right to regulate hydrocarbon-related activities under its own policy goals.[106]

Article 8.1.2(a) clarifies even further that "the United States and Canada recognize that . . . Mexico reserves its sovereign right to reform its Constitution and its domestic legislation."[107] The Mexican reference internationalizes the Mexican Constitution. Article 8.1.2(b) paraphrases a section of Article 27 of the Mexican Constitution and converts it into an international reaffirmation of Mexico's sovereignty.[108] Article 8.1.2(b) states that "Mexico has the direct, inalienable, and imprescriptible ownership of all hydrocarbons in the subsoil of the national territory."[109] It then defines Mexico's national territory as includ-

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[103] *See generally* USMCA, *supra* note 28, ch. 8 (acknowledging state control over hydrocarbons).

[104] *Id.*

[105] *Id.* art. 8.1(1).

[106] *See id.* The USMCA is not the first source of international law that recognizes the state's sovereign rights to extract its natural resources, as the U.N. General Assembly recognized this right in 1962. G.A. Res. 1803, *supra* note 54, § I ¶ 2. The same can be said of the mineral rights over the continental platform recognized both in the 1958 Convention on the Continental Shelf and the 1982 United Nations Convention on the Law of the Sea (UNCLOS). *See* U.N. Convention on the Continental Shelf, art. 1, Apr. 29, 1958, 499 U.N.T.S. 311; U.N. Convention on the Law of the Sea, arts. 55–57, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. Article 18 of the ECT also recognizes state sovereignty over its energy resources. ECT, *supra* note 56, art. 18.

[107] USMCA, *supra* note 28, art. 8.1.2(a).

[108] *See* USMCA, *supra* note 28, art. 8.1.2(b); Constitución Política de los Estado Unidos Mexicanos, CP, art. 27, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-2015. Article 27 of the Mexican Constitution states that:

> [t]he following elements *are the property of the Nation*: all natural resources of the *continental shelf and the seabed of the islands* . . . . In the case of petroleum and solid, liquid or gaseous hydrocarbons found underneath the surface, *dominion by the Nation shall be inalienable and imprescriptible*, and no concessions shall be granted . . . . *The Nation has sovereign rights and jurisdiction on the exclusive economic zone, situated outside and beside the territorial sea*.

Constitución Política de los Estado Unidos Mexicanos, CP, art. 27, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-2015 (emphasis added). For an English translation of the Mexican Constitution, see *Mexico's Constitution of 1917 with Amendments Through 2015*, CONSTITUTE PROJECT (2015) https://www.constituteproject.org/constitution/Mexico_2015.pdf?lang=en [https://perma.cc/YMF8-969P] [hereinafter *Mexican Constitution*].

[109] USMCA, *supra* note 28, art. 8.1.2(b).

ing the continental shelf and the exclusive economic zone that lie beyond the territorial waters of Mexico.[110]

Article 8.1.2(b) also includes a caveat about Mexico's ownership of hydrocarbon resources. Specifically, it states that Mexico will exercise its property rights over the resources "pursuant to Mexico's Constitution."[111] The article forces the interpreter to review how the Mexican Constitution regulates the Mexican State's right to own and extract hydrocarbons in its territory.[112] Can these provisions be construed as an exception that would allow Mexico to take actions contrary to the treaty and exclude the government from any liability to the other parties?[113]

A comparison of Chapter 8 with exemption clauses in other trade agreements clarifies that the reaffirmation of sovereignty does not preclude Mexico from complying with the other market-oriented provisions in the treaty. In contrast with Chapter 8, when the North American partners seek such an exception, they use language that specifies that "nothing in this Agreement shall be construed to prevent the adoption of [a policy]"[114] or that "[t]his agreement does not prevent a Party from adopting or maintaining a restrictive measure with regard to [a policy]."[115] In fact, Chapter 32 of the USMCA, "Exceptions and General Provisions," contains no exception for the energy sector in Mexico.[116]

Chapter 8's effect is similar to that of Article 18 of the ECT.[117] The ECT also contains a reaffirmation of "state sovereignty and sovereign rights over energy resources," but it clarifies that these "must be exercised in accordance with and subject to the rules of international law."[118] The recognition in the ECT of state sovereign rights over energy resources also lives in tandem with

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[110] *Id.* (stating that the territory includes "the continental shelf and the exclusive economic zone located outside the territorial sea and adjacent thereto, in strata or deposits, regardless of their physical conditions pursuant to Mexico's Constitution").

[111] *Id.*

[112] *See id.*; Constitución Política de los Estado Unidos Mexicanos, CP, art. 27 Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-2015.

[113] *Cf.* Caroline Henckels, *Should Investment Treaties Contain Public Policy Exceptions?*, 59 B.C. L. REV. 2825, 2827–29 (2018) (discussing how exception clauses for policy purposes are drafted and interpreted in investment and trade agreements).

[114] *See id.* at 2827–28 (first citing Reciprocal Promotion and Protection of Investments, Arg.-Qatar, art. 10, June 11, 2016; then citing Ass'n of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement, art. 17(1)(a), Feb. 26, 2009; and then citing Investment Agreement for the COMESA Common Investment Area, art. 22(1), May 23, 2007, https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/06/rei120.06tt1.pdf [https://perma.cc/9LFS-Y8NJ]) (providing a taxonomy of exceptions provisions)).

[115] *See, e.g.*, USMCA, *supra* note 28, arts. 32.2, 32.4.2 (outlining exceptions).

[116] *See generally id.*, ch. 32 (outlining general exceptions to the agreement).

[117] *Compare* USMCA, *supra* note 28, art. 8.1.1 (recognizing the sovereign rights of the parties), *with* ECT, *supra* note 56, art. 18 (acknowledging state energy sovereignty).

[118] ECT, *supra* note 56, art. 18(1).

Article 3's provision encouraging parties, for the purpose of energy products and supplies, to create open markets.[119]

In that same vein, Chapter 8 is not a carve-out clause that exempts an entire sector or policy from the treaty's scope. These clauses usually include language that specifies that principles or standards in the treaty are not applicable to a particular sector, government contract, or policy area.[120] The NAFTA provision regarding the Mexican hydrocarbon and electricity sectors provides an example of a carve-out clause. It specifies that Mexico reserved certain activities and investment in those activities.[121]

Finally, Chapter 8 cannot be considered a reservation that allows Mexico to reserve the rights to adopt or maintain what would otherwise be a nonconforming measure concerning the treaty obligations. Treaties that seek to create such an exception specify that the commitments on non-discriminatory treatment or national treatment "do not apply" to measures concerning particular services or sectors.[122] In other words, the recognition of Mexico's sovereign right to regulate its hydrocarbon sector, which is already recognized in international customary law, does not exclude Mexico from its treaty obligations with the United States and Canada.[123]

The reaffirmation of a government-centered energy sovereignty lives side by side with the other side of energy sovereignty—that is, the access to markets to secure the flow of energy products. The treaty's recognition of Mexico's sovereign right is accomplished "without prejudice to [the United States' and Canada's] rights and remedies available under [the USMCA]."[124] It reaffirms that Chapter 8 is not an exception, carve-out, or reservation to the treaty's obligations. In other words, the recognition of Mexico's sovereign right to reform its constitution does not preclude other parties from bringing claims against Mexico for breaching its international treaty obligations in the energy sector. In the same treaty, and even in the same section, both visions of energy sovereignty interact with each other.[125]

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[119] *Id.*, art. 3.

[120] Henckels, *supra* note 113, at 2828.

[121] NAFTA, *supra* note 64, annex 602.3.

[122] *See* Henckels, *supra* note 113, at 2827–32 (discussing the types of exceptions and their functions).

[123] *See* Guillermo J. Garcia Sanchez, *When Drills and Pipelines Cross Indigenous Lands in the Americas*, 51 SETON HALL L. REV. 1121, 1130–36 (2021) (describing how the right to extract mineral resources for the benefit of the state is recognized as customary in international law).

[124] *See* USMCA, *supra* note 28, art. 8.1.2 (acknowledging Mexican ownership of its hydrocarbons).

[125] *See id.* For example, the Mexican president has openly stated that Chapter 8 acts as a shield against foreign investor claims or foreign government pressure to maintain market access to private parties. Arturo Rodríguez García, *AMLO Exhibe Capítulo Energético del T-MEC y Asegura Que la Reforma Es para Fortalecer a CFE*, PROCESO (Feb. 9, 2021), https://www.proceso.com.mx/nacional/

2. Essential Security Exceptions

As mentioned, energy sovereignty is solidly connected to energy security. It is impossible to extinguish the fear generated in state policies resulting from a complete reliance on market forces to ensure energy. Even the most market-oriented energy supply policies have strong state regulation when national security is at play.[126] International economic agreements reflect that states reserve their right to breach international treaty obligations when national security and state stability are in danger.[127] Article 32.2 of the USMCA, for example, states that "[n]othing in this Agreement shall be construed to . . . preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own *essential security interests*."[128] This clause is traditionally used in the context of imposing trade sanctions on other countries as part of national security goals, such as combatting terrorism financing, fighting money laundering, or following resolutions from international organizations, such as the U.N. Security Council.[129]

2021/2/9/amlo-exhibe-capitulo-energetico-del-t-mec-asegura-que-la-reforma-es-para-fortalecer-cfe-257900.html [https://perma.cc/2P52-855T].

[126] *See, e.g.*, *supra* notes 77–82 and accompanying text (discussing instances where the United States shifted from a market-oriented approach to a government-centered approach).

[127] *See, e.g.*, USMCA, *supra* note 28, art. 32.2.

[128] *Id.*, art. 32.2.1(b) (emphasis added).

[129] *See* Rachel Brewster & Sergio Puig, *Can International Trade Law Recover?: Introduction*, 113 AM. J. INT'L L. UNBOUND 38, 38 (2019), https://www.cambridge.org/core/journals/american-journal-of-international-law/article/introduction/980D4A4D8D913FFE9080806966EF4DE4 [https://perma.cc/3T3Q-45UU] (describing the "substantive and procedural onslaught on international trade law"). In the past decade, states have regularly invoked security exceptions in trade agreements. *Id.* at 38–39. Challenges to the legitimacy of the WTO regime, the rise of China, the anxieties of economic crises, and the increase of nationalism in Western countries have all led to the abuse of security exceptions. *See id.*; Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN. L. REV. 1097, 1100–05 (2020) (explaining the constitutional grounds in the United States for security exceptionalism); Thomas J. Schoenbaum & Daniel C.K. Chow, *The Perils of Economic Nationalism and a Proposed Pathway to Trade Harmony*, 30 STAN. L. & POL'Y REV. 115, 117, 168–69 (2019) (explaining how the Trump administration's abuse of security exceptions is perceived as a way to wage a trade war that could lead to the destruction of the system); Gregory Shaffer, *A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations*, 44 YALE J. INT'L L. ONLINE 37, 41 (2018), https://cpb-us-e1.wpmucdn.com/campuspress-test.yale.edu/dist/8/1581/files/2019/02/5_Shaffer_YJIL-Symposium_A-Tragedy-in-the-Making_12.07.18-23keh7s.pdf [https://perma.cc/K3CL-A7F4] (describing the trend of the United States moving from a unilateral trade policy to a power-based one); Matthew Kahn, *Pretextual Protectionism? The Perils of Invoking the WTO National Security Exception*, LAWFARE (July 21, 2017), https://www.lawfareblog.com/pretextual-protectionism-perils-invoking-wto-national-security-exception [https://perma.cc/8VDQ-F2B2] (describing the WTO national security exception as the "'nuclear option' . . . of international trade" (quoting Rich Miller, *Trump Faces Laugh Test as He Weighs 'Nuclear Option' for Steel*, BLOOMBERG (June 28, 2017), https://www.bloomberg.com/news/articles/2017-06-28/trump-faces-laugh-test-as-he-weighs-nuclear-option-for-steel?leadSource=uverify%20wall [https://perma.cc/8HWQ-27UP])).

The essential security clause could also be used in the context of restricting trade or investment in the energy market. Because petroleum-dependent states are heavily reliant on the production of hydrocarbons, for example, they could be considered a threat to "essential security interests" under Article 32.2.[130] One could easily imagine that in Mexico's case, a government could argue that the existing legal framework of the energy market places its essential security means in danger. Factors such as: high costs for the government in maintaining subsidies to certain private actors, like renewable energy producers; the lack of control on the existing production fields where the state-owned company is unable to survive on its own; or the lack of new financing for new infrastructure to transport energy products produced by the energy-controlled companies could all lead to a renegotiation of existing contracts or the amendment of the legal regime in the name of "essential security interests."[131]

In fact, in the fall of 2021, the President of Mexico, Andrés Manuel López Obrador, submitted a constitutional amendment that would cancel existing power generation contracts with foreign investors, dissolve independent energy agencies, and reinstate a state monopoly by centralizing power generation in state-owned companies, namely Petróleos Mexicanos (Pemex) and the Comisión Federal de Electricidad (CFE).[132] Specifically, the bill amends Article 25 of the Mexican Constitution and states that "as a condition to guarantee national security and the human right to a dignified life [the] State will preserve energy security and self-sufficiency, and the continuous supply of electricity to all of the population."[133] Similarly, the Governor of Texas justified his order to halt

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[130] *See* USMCA, *supra* note 28, art. 32.2.1(a).

[131] *See, e.g.*, Andrew Baker, *Mexico's CFE Defends Natural Gas Pipeline Renegotiations*, NATURAL GAS INTEL. (Nov. 4, 2020) https://www.naturalgasintel.com/mexicos-cfe-defends-natural-gas-pipeline-renegotiations/ [https://perma.cc/4692-PWZF] (describing how a government-run power company forced the renegotiation of contracts with private companies in the name of energy security); Inu Manak & Alfredo Carrillo Obregon, *Mexico's Electricity Bill Rolls Back Energy Reforms and Threatens Relations with Trading Partners*, CATO INST. (Apr. 1, 2021) https://www.cato.org/blog/mexicos-electricity-bill-rolls-back-energy-reforms-threatens-relations-trading-partners [https://perma.cc/YAX4-8MJM] (describing how the energy bill's provision of benefits to state-owned entities (SOEs) rather than private companies is justifiable as a way to protect the reliability and security of the electrical grid).

[132] Mary Anastasia O'Grady, *Mexico Moves to Seize American Assets*, WALL ST. J. (Oct. 17, 2021), https://www.wsj.com/articles/mexico-american-assets-obrador-amlo-energy-11634496785 [https://perma.cc/VY8C-ZETH]. In English, these companies' names translate to Mexican Petroleum and Federal Electricity Commission, respectively. *See* Kate Brown de Vejar, Marcelo Páramo Fernández & Carlos Enrique Guerrero Alarcón, *New Developments in the Mexican Energy Sector Generate Uncertainty*, DLA PIPER (Nov. 17, 2021) https://www.dlapiper.com/fr/france/insights/publications/2021/11/new-developments-in-the-mexican-energy-sector-generate-uncertainty/ [https://perma.cc/PJG8-SVN3].

[133] Iniciativa del Ejecutivo Federal: Con Proyecto de Decreto por el que se Reforman los Artículos 25, 27, y 28 de la Constitución Política de los Estados Unidos Mexicanos en Materia Energética, Gaceta Parlamentaria, Número 5877-I, en 25 01-10-2021 (Mex.), http://gaceta.diputados.gob.mx/

the exports of natural gas during the February 2021 blackout as a necessary measure to face an imminent threat.[134] In sum, the term "essential security" can and currently is being used to justify government-centered policies that put private investment, contracts, and exports to commercial partners in danger.

This is where partner countries' conceptions of energy sovereignty become essential. Suppose sovereignty means securing the flow of energy products into a region to ensure long-term reliability and efficiency. In that case, the protection of national champions might not necessarily help to achieve that goal. From the perspective of a market-oriented energy sovereign strategy, reinstating a monopoly that is inefficient or disrespects the outflow of energy products and arguing that a security protection exception applies might be considered a threat to security. On many occasions, efficiency in the markets and reliability of the supply chain or grid conflict with government-centered policies.[135]

B. Energy Sovereignty Through Market Access

Ensuring the flow of energy products across state lines is a key element of market-oriented energy sovereignty.[136] This type of sovereignty seeks to reduce export tariffs and roadblocks that prevent products from flowing into the state.[137] The following Subsections review how parts of the USMCA and side agreements between Canada and the United States reflect a market-oriented view of energy sovereignty.[138] These Subsections live in tandem with the previously described government-centered approaches to energy sovereignty. Subsection 1 describes non-discriminatory access to energy infrastructure between the United States and Canada.[139] Subsection 2 reviews the provisions that address the flow of energy products.[140] Subsection 3 analyzes state-owned

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PDF/65/2021/oct/20211001-I.pdf [https://perma.cc/2DNF-H4KU]. This quotation has been translated by the author. *See id.* ("Adición de nuevo párrafo séptimo . . . [S]e establece que el Estado preservará la seguridad y autosuficiencia energéticas, y el abastecimiento continuo de energía eléctrica a toda la población, como condición para garantizar la seguridad nacional y el derecho humano a la vida digna.").

[134] *Governor Abbott Gives Update on State Response to Severe Winter Weather, Power Outages*, OFF. OF THE TEX. GOVERNOR (Feb. 17, 2021), https://gov.texas.gov/news/post/governor-abbott-gives-update-on-state-response-to-severe-winter-weather-power-outages [https://perma.cc/B8J5-JRDH]. Governor Greg Abbott issued the order on natural gas exports as part of an emergency declaration announced five days earlier. *Governor Abbott Issues Disaster Declaration in Response to Severe Winter Weather in Texas*, OFF. OF THE TEX. GOVERNOR (Feb. 12, 2021), https://gov.texas.gov/news/post/governor-abbott-issues-disaster-declaration-in-response-to-severe-winter-weather-in-texas [https://perma.cc/P7G6-MD8E].

[135] *See infra* notes 143–171 and accompanying text.

[136] *See supra* note 61 and accompanying text.

[137] *See supra* note 62 and accompanying text.

[138] *See infra* notes 143–218 and accompanying text.

[139] *See infra* notes 143–167 and accompanying text.

[140] *See infra* notes 168–181 and accompanying text.

companies and monopolies.[141] Lastly, Subsection 4 describes the connection between the USMCA and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).[142]

1. Non-discriminatory Access to Energy Infrastructure Between the United States and Canada

The creation of energy-related infrastructure is a fundamental aspect of energy trade. Moving hydrocarbons and carrying electricity from production sites to processing plants and then to consumers requires particular types of infrastructure. By requiring unique infrastructure, international trade of energy products is distinct from the trade of other commodities. Commodities, in general, share infrastructure and are interchangeable, depending on market prices. By contrast, once energy infrastructure is built, it is not interchangeable. Natural gas pipelines, electricity transmission lines, and oil platforms are capital-intensive infrastructures that, once in place, have a single purpose.[143]

Thus, international agreements that seek to ensure a long-standing energy trade must contemplate rules that ensure access to energy transportation and distribution infrastructure.[144] An energy integration treaty must, for example, consider principles that prioritize transit flows over other needs and policies because disruption in transit flows could jeopardize energy projects. For many projects, the availability of capacity at the contracted time is essential for the project's success. Energy infrastructure is built and its contracts are financed by relying on conditions such as programmed volumes, expandable capacity, and support from long-term supply contracts. Without considering these essential factors, companies would be unable to guarantee repayment.[145] Therefore,

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[141] *See infra* notes 182–206 and accompanying text.

[142] *See infra* notes 207–218 and accompanying text.

[143] *See Turning North Sea Projects into Power in Offshore Wind*, EQUINOR, https://www.equinor.com/news/20220830-turning-north-sea-projects-into-power [https://perma.cc/XX22-AHQS] (Sept. 1, 2022). One exception is the use of trains to transport crude oil, but even in that case the containers are not interchangeable like cargo containers for other commodities can be. ASS'N OF AM. R.RS., WHAT RAILROADS HAUL: CRUDE OIL (2022), https://www.aar.org/wp-content/uploads/2020/07/AAR-Crude-Oil-Fact-Sheet.pdf [https://perma.cc/ZG68-ACX9]. Also, some oil companies have been investing in converting existing hydrocarbon-related infrastructure and technology for use in renewable energy production. *See Turning North Sea Projects into Power in Offshore Wind*, *supra*. For example, some developers in the North Sea are converting oil platforms in deep-water fields into wind turbine platforms. *Id.* Carbon capture in abandoned gas fields is another example of technology and infrastructure being transferred from one industry into another. *See* Daniel Boffey, *Empty North Sea Gas Fields to Be Used to Bury 10m Tonnes of Co2*, THE GUARDIAN (May 9, 2019), https://www.theguardian.com/environment/2019/may/09/empty-north-sea-gas-fields-bury-10m-tonnes-c02-eu-ports [https://perma.cc/2HRL-6G8N].

[144] Selivanova, *supra* note 60, at 395.

[145] *See id.* at 395–96 (emphasizing the importance of fixed infrastructure in energy transit).

it could be disastrous for a company to build a grid or pipeline and to be unable to deliver the products at the agreed time. Thus, when facing any dispute, the industry needs to have a treaty-recognized principle that ensures transit flows regardless of the outcome of the case.[146]

Moreover, if two countries are trading partners but do not share a common border, energy transit must be addressed with the third country.[147] Many bilateral and regional agreements lack adequate guidance for transporting electricity and energy-related products across territories and into neighboring countries.[148] Treaties must include a principle of freedom of energy transit that provides for the "nondiscriminatory use of existing infrastructure" and the possibility of expanding the transit capacity if needed.[149] In many jurisdictions, a handful of actors, including state-owned companies, control existing energy transportation and distribution infrastructure.[150] These actors, by claiming they lack capacity and charging transportation fees that raise investment costs beyond competition, prevent outside companies from accessing the infrastructure.[151]

The USMCA is silent on energy transit principles and access to energy infrastructure.[152] The United States and Canada, however, signed a side letter incorporating these market-oriented principles into their relationship.[153] For instance, Article 3 of the Side Letter on Energy states specifically that Canada and the United States "recognize the importance of enhancing the integration of North American energy markets based on market principles, including open trade and investment among the Parties."[154] Market-based supply strategies secure "North American energy competitiveness, security, and independ-

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[146] *See, e.g.*, ECT, *supra* note 56, art. 7 (outlining the principles of freedom of energy transit and non-discrimination based on origin, destination, ownership, or pricing of energy materials and products).

[147] Selivanova, *Managing the Patchwork*, *supra* note 18, at 68–69 (asserting that the flow of energy across borders should be dealt with multilaterally).

[148] *Id.* For example, this issue would be implicated by a pipeline that brings natural gas from producing country A to consuming country B, but that must pass through the territory of a third country. *See id.*

[149] *Id.* at 56; Selivanova, *supra* note 60, at 396 (referring to these issues as "non-interruption of transit flow and non-impediment for building new infrastructure if available capacity is insufficient" (citing Selivanova, *Managing the Patchwork*, *supra* note 18)).

[150] *See* Selivanova, *Managing the Patchwork*, *supra* note 18, at 54.

[151] *Id.*

[152] *See generally* USMCA, *supra* note 28 (failing to mention transit principles or infrastructure). According to news reports, the original draft of the USMCA contemplated an energy chapter in roughly the same terms as the Canada-U.S. energy side letters, but Chapter 8 replaced the draft chapter when AMLO took office and his administration joined the negotiations. *See* GANTZ, *supra* note 64, at 4.

[153] Letter from Robert E. Lighthizer, Ambassador, U.S. Trade Representative, to Chrystia Freeland, Minister of Foreign Affs., Can. (Nov. 30, 2018), https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/CA-US_Side_Letter_on_Energy.pdf [https://perma.cc/63WQ-X8D5] [hereinafter Canada-U.S. Side Letter].

[154] *Id.*, annex, art. 3.

ence."[155] This provision is a clear recognition by the United States and Canada that both countries perceive their energy sovereignty as one that uses market goals to ensure their country's security, competitiveness, and independence. Article 3 further affirms the market-oriented approach to sovereignty by stating that the Parties to the side letter should aim to achieve cooperation regarding standards, approaches, energy security, and energy efficiency.[156]

At least three mechanisms crystalize the market-oriented principles of Article 3: (1) the establishment of independent regulatory agencies, (2) the principle of avoidance of disruption of contractual relationships, and (3) the notion of non-discriminatory access to infrastructure.[157] Article 4.1 cements the principles of regulatory independence and transparency in the energy market.[158] It states that the United States and Canada "shall maintain or establish regulatory authorities that are separate from, and not accountable to, persons subject to energy regulatory measures."[159] In other words, Article 4.1 requires that there be independent regulatory agencies supervising the energy markets and ensuring open trade and investment among the partners.

In line with the transparency and independence of the agencies, Article 4.2 states that when a party takes any energy regulatory measure, it must "avoid[] disruption of contractual relationships to the maximum extent practicable."[160] Moreover, the regulatory agency must ensure that the application of the measure "supports North American energy market integration, and provides for orderly and equitable implementation."[161] The only exceptions to this principle are those measures solely related to the safeguarding of health and/or the environment.[162] In sum, Article 4 seeks to create a regulatory environment that is independent, market-oriented, and prioritizes market integration and the protection of contractual relationships. A nationalistic measure that discriminates against foreign investors or producers that built infrastructure connecting neighboring markets would be contrary to the Canada-United States Side Letter on Energy.

Finally, Article 5 of the Side Letter contemplates broadening energy sovereignty through market integration by forcing states to "ensure that a measure governing access to or use of electric transmission facilities and pipeline networks" impacting trans-border supply is "neither unduly discriminatory nor

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155 *Id.*
156 *Id.*
157 *See id.*
158 *See id.*, art. 4.1.
159 *Id.*
160 *Id.*, art. 4.2.
161 *Id.*
162 *Id.*, art. 4.2 n.3.

unduly preferential."[163] Additionally, the "tolls, rates, or charges" set for using the networks have to be "just, reasonable, and neither unduly discriminatory nor unduly preferential."[164] Again, the goal behind these provisions is to ensure that once foreign investors build energy infrastructure aimed at integrating the region further, states will not discriminate against the export of energy products to protect the domestic market. As specified in the exceptions chapter, a party can shut down a pipeline and transmission line that exports energy products only under exceptional circumstances.[165] The specific exceptions for the market-oriented energy supply, however, are limited.[166] These exceptions are connected to essential security interests, non-discriminatory regulatory actions, and legitimate public welfare.[167]

2. Provisions on the Flow of Energy Products

Chapter 6 of NAFTA contained specific provisions on energy and basic petrochemical products.[168] Under that chapter, the United States and Canada restricted the measures that established minimum or maximum export-price requirements.[169] Mexico, on the other hand, reserved its policymaking authority over "foreign trade; transportation, storage, and distribution" of all energy products, including supplying, "generation, transmission, transformation . . . and sale of electricity."[170] Mexico therefore reserved the right to grant import or export licenses in a discriminatory way.[171]

In contrast to the 1994 NAFTA provisions, the USMCA does not contain a chapter on energy products.[172] Instead, the treaty spreads out its energy-connected provisions in various scattered chapters.[173] Nonetheless, the USMCA limits the restrictions on the flow of energy products imposed by Chapter

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[163] *Id.*, art. 5.1(a).

[164] *Id.*, art. 5.1(b).

[165] *See generally* USMCA, *supra* note 28, ch. 32 (outlining the agreement's general exceptions).

[166] *Id.*, art. 32.4 (providing the agreement's "Temporary Safeguards Measures").

[167] *See supra* notes 126–135 and accompanying text (outlining essential security exceptions); *infra* notes 224–326 and accompanying text (analyzing USMCA provisions where the two different approaches to sovereignty conflict).

[168] *See generally* NAFTA, *supra* note 64, ch. 6 (outlining provisions governing energy and petrochemicals).

[169] *Id.*, art. 603.2 (excluding measures connected to the performance of "countervailing and antidumping orders").

[170] *Id.*, art. 602.3, annex 602.3.1(b)–(c). The only exception associated with electricity was for companies that met their own electricity needs by "acquir[ing], establish[ing], and/or operat[ing] an electrical generation facility in Mexico." *Id.*, annex 602.3.5(c).

[171] *See id.*, art. 602.3.

[172] *See generally* USMCA, *supra* note 28 (failing to include a chapter specifically dedicated to energy products).

[173] *See, e.g.*, *id.*, ch. 8 (recognizing Mexico's ownership and control over hydrocarbons).

6 of NAFTA and implements a more market-oriented approach to energy sovereignty.[174]

Under Article 2.11.1 of the USMCA, a party may not "adopt or maintain any prohibition or restriction on the importation" or exportation of energy products.[175] The only exceptions to this provision are those in the 1994 General Agreement on Tariffs and Trade that relate to "antidumping and countervailing duty orders" or performance requirements.[176] A significant difference between NAFTA and the USMCA is that the USMCA requires Mexico to comply with non-discriminatory and transparency principles when awarding export licenses.[177] This requirement limits the exercise of government-centered energy sovereignty because the requirement would compel the state to explain, justify, and ground the decision in a non-discriminatory way.

Consequently, Chapter 2 of the USMCA is another example of a market-oriented energy sovereignty that seeks to ensure the flow of energy products, only subject to precise exceptions that must be non-discriminatory and transparent to all parties.

Chapter 4 is another provision that fosters a market-oriented flow of energy products. It updates the rules of origin for petroleum and refined petroleum products.[178] The chapter adds specific provisions for blended and refined products that make it easier for these products to be considered as originating from within the region.[179] Namely, if the refining or processing activity takes place within the USMCA region, or the base product is from the USMCA region, Chapter 4 provides for ease of sale and transport.[180] This provision is significant for heavy crude producers that require blending with diluents before export. This provision allows Canadian oil sands exporters to face a lower burden in proving that their product originates from the USMCA region.[181]

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[174] *Compare id.*, art. 2.11 (prohibiting restrictions on imports and exports between parties, with some exceptions), *with* NAFTA, *supra* note 64, art. 603 (establishing some prohibitions on energy imports and exports).

[175] USMCA, *supra* note 28, art. 2.11.1.

[176] *Id.*, art. 2.11.2.

[177] *Compare id.*, art. 2.A.3 (requiring non-discriminatory and transparent behavior), *with* NAFTA, *supra* note 64 (lacking a requirement of non-discrimination and transparency).

[178] *See generally* USMCA, *supra* note 28, ch. 4 (outlining, among other products, petroleum and refined petroleum products).

[179] *See, e.g.*, *id.*, ch. 4, annex 4-B, § VI, ch. 27 r.3 (outlining the "Mixtures and Blends Rule"); *id.*, ch. 4, annex 4-B, § V, ch. 27 n.2 (mentioning how the refining process impacts origin).

[180] *See generally id.*, *supra* note 28, ch. 4 (detailing refined petroleum products and their sale).

[181] *See id.*, ch. 4, annex 4-B, § VI, ch. 27 r.3. According to the United States International Trade Commission's USMCA Report, the new rule of origin for energy products primarily benefits Canadian producers. U.S.-Mexico-Canada Trade Agreement: Likely Impact on the U.S. Econ. and on Specific Indus. Sectors, Inv. No. TPA 105-003, USITC Pub. 4889, at 107 (Apr. 2019) (Final).

3. State-Owned Enterprises and Designated Monopolies

International investment and trade agreements are not ignorant of the fact that some states use state-owned entities (SOEs) to influence the markets and advance social policy goals.[182] The challenge of regulating SOEs in international agreements is particularly relevant for the energy sector. Many governments own companies that are in charge of the production, transmission, and distribution of natural resources.[183] The USMCA recognizes these state actors' participation in the economy and seeks to level the playing field with private competitors by creating a specific chapter on SOEs and Designated Monopolies (DMs).[184] Specifically, Chapter 22 of the USMCA includes principles that ensure that the SOEs and DMs are regulated impartially and transparently.[185] Except for the specific circumstances defined in the treaty, governments should not provide special treatment or take regulatory actions in favor of an SOE that "affect or could affect trade or investment between Parties within the free trade area" or that "cause adverse effects in the market of a non-Party."[186] This chapter is a clear example of the efforts used to secure energy flows through a market-oriented strategy and to reduce the state's power to advance an exclusive government-centered policy in the energy sector.

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[182] *See, e.g.*, NAFTA, *supra* note 64, ch. 15 (including a chapter dedicated to competition, monopolies, and state enterprises). Under Article 1502.3(a) of NAFTA, administrative and regulatory agencies of the states had to ensure that a state monopoly

> act[ed] in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such a monopoly exercise[d] any regulatory, administrative or other governmental authority that the Party ha[d] delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions or impose quotas, fees or other charges.

Id., art. 1502.3(a). *See generally* MATTHEW E. CHEN, NATIONAL OIL COMPANIES AND CORPORATE CITIZENSHIP: A SURVEY OF TRANSNATIONAL POLICY AND PRACTICE (2007) (documenting the rise of SOEs as arms of the state that advance energy policies, and stating that today, close to 80% of the world's proven oil reserves are controlled by SOEs with "no equity participation by foreign, international oil companies").

[183] *See generally* CHEN, *supra* note 182 (providing examples of state-owned companies across the globe and describing their purposes). For example, Norway owns Statoil, a major oil production company. *Id.* at 28.

[184] *See* USMCA, *supra* note 28, ch. 22 (outlining SOEs and designated monopolies). Article 22.1 defines "designated monopoly" as "a privately owned monopoly that is designated after the date of entry into force of this Agreement and a government monopoly that a Party designates or has designated." *Id.*, art. 22.1. Although NAFTA did not have a specific chapter on SOEs or designated monopolies, its Chapter 15, entitled "Competition Policy, Monopolies and State Enterprises," contained some of these USMCA provisions. *See* NAFTA, *supra* note 182, ch. 15.

[185] *See* USMCA, *supra* note 28, art. 22.5.

[186] *Id.*, art. 22.2.1.

Under the USMCA, SOEs are clearly defined as enterprises where more than fifty percent of equity is owned, directly or indirectly, by the state.[187] This definition also includes cases where the state "controls . . . the exercise of more than 50 percent of the voting rights;" "control[s] the enterprise through any other ownership interest, including indirect or minority ownership;" or "holds the power to appoint a majority of members of the board of directors or any other equivalent management body."[188] The precise definition of what qualifies as an SOE is an advancement in international trade law because it resolves some of the difficulties faced by the WTO's limited interpretation of what constitutes as an SOE.[189]

Chapter 22 states that the government will ensure that SOEs and DMs are guided by commercial consideration in their buying and selling of products or services.[190] Governments and regulators cannot discriminate against partner countries' private parties in performing their commercial activities.[191] In addition, a new provision of the USMCA also states that the parties to the USMCA must retain "jurisdiction over civil claims" against a foreign-controlled SOE "based on a commercial activity carried on in its territory."[192] Following the same spirit of impartiality, Article 22.5 establishes that administrations regulating SOEs and enterprises should act impartially in the use of their regulatory discretion.[193]

The USMCA also regulates the types of benefits that the SOEs can get from the government that would be considered in breach of the market-oriented principles. Non-commercial assistance to SOEs that are primarily en-

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[187] *Id.*, art. 22.1(a).

[188] *Id.*, art. 22.1(b)–(d). For some scholars, these clear definitions are an advancement compared to the WTO provisions. *See* DAVID A. GANTZ, THE USMCA: UPDATING NAFTA BY DRAWING ON THE TRANS-PACIFIC PARTNERSHIP 3 (2020), https://www.bakerinstitute.org/research/usmca-updating-nafta-drawing-trans-pacific-partnership [https://perma.cc/9S6Z-FNFR] (noting that the USMCA's stating that "bright-line rules make much more sense" compared to the uncertainty from a WTO agreement). The terminology of the WTO Agreement on Subsidies and Countervailing Duties "exclude[s] many SOEs that are effectively controlled and heavily subsidized by the government from the WTO subsidies disciplines." *Id.*

[189] *See* GANTZ, *supra* note 188, at 3 (stating that the United States complains of the high standard set up by the WTO's Appellate Body, which requires proof that a Chinese company is in fact a "public body" of the state (citing *Statement on WTO Appellate Report on China Countervailing Duties*, OFF. OF THE U.S. TRADE REPRESENTATIVE (July 16, 2019), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/july/statement-wto-appellate-report-china [https://perma.cc/6HD9-DC9P])); *see also Statement on WTO Appellate Report on China Countervailing Duties*, *supra* (observing that "[t]he WTO appellate report undermines WTO rules, making them less effective to counteract Chinese SOE subsidies that are harming U.S. workers and businesses and distorting markets worldwide").

[190] USMCA, *supra* note 28, art. 22.4.

[191] *See id.*

[192] *Id.*, art. 22.5.1.

[193] *Id.*, art. 22.5.2.

gaged in producing or selling goods, other than electricity prohibited by the treaty, includes "loans or loan guarantees provided by a state enterprise . . . to an uncreditworthy [SOE] of that Party."[194] To determine whether an SOE is uncreditworthy, the interpreter must identify whether the SOE's "financial position would preclude it from obtaining long-term financing from conventional commercial sources."[195] The USMCA further specifies that governments cannot provide non-commercial assistance to SOEs "in circumstances where the recipient is insolvent or on the brink of insolvency, without a credible restructuring plan designed to return the state-owned enterprise within a reasonable period of time to long-term viability."[196] Moreover, a party cannot convert outstanding debt of an SOE to equity if it is not consistent with the investor's typical investments.[197] In other words, the subtext of the USMCA is that governments cannot intervene in the market to "save" an SOE that is poorly run and has no sustainable plan to survive other than a plan involving wiping out private and foreign competition.

In the case of Mexico, Annex 22-F clarifies that Mexico can provide non-commercial assistance to its SOEs that are "primarily engaged in oil and gas activities, in circumstances that jeopardize the continued viability of the recipient enterprise, and for the sole purpose of enabling the enterprise to return to viability and fulfil its [constitutional] mandate."[198] Under Article 25 of the Mexican Constitution, the public sector is in charge of strategic areas and, as such, has the power to create agencies and public productive corporations to carry on activities in these areas.[199] The Mexican Constitution explicitly mentions the "planning and control of the national power system, . . . the public power transmission and distribution systems, . . . [and] the exploration and exploitation of oil and other hydrocarbons."[200] The provision is unclear as to

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[194] *Id.*, art. 22.6.1(a).

[195] *Id.*, art. 22.6(a) n.14.

[196] *Id.*, art. 22.6.1(b) (footnotes omitted); *see also id.*, art.22.6.1(b) n.15 (defining when an SOE is considered insolvent).

[197] *Id.*, art. 22.6.1(c).

[198] *Id.*, annex 22-F.1.

[199] *See* Constitución Política de los Estado Unidos Mexicanos, CP, art. 25, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-2015.

[200] *Id.*, art. 28.

> In the United Mexican States, all monopolies, monopoly practices, state monopolies and tax exemptions are prohibited. Protectionist policies are also prohibited . . . . The functions carried out by the State in an exclusive manner in the following strategic economic sectors shall not be considered monopolistic: post, telegraph, radiotelegraphy; radioactive minerals and nuclear power generation; planning and control of the national power system and the public power transmission and distribution systems; the exploration and exploitation of oil and other hydrocarbons, pursuant to paragraphs six and sev-

whether Mexico can discriminate against foreign competitors of its SOEs to "save" them, even if there are other, less restrictive alternatives available that could also help the SOEs return to viability and fulfill their mandate. Suppose, for example, the Mexican government decides to expand its program to "rescue" Pemex from its financial ruin. Further suppose that in the process, the government discriminates against private actors by taking actions that prevent them from participating in the market.[201] A dispute resolution panel might consider that such a policy is "applied . . . in a discriminatory manner []or as a disguised barrier to equal opportunit[ies]" to foreign investors.[202] In that case, these actions could be considered in breach of the spirit of the USMCA.[203]

The USMCA also includes provisions on domestic industries generated by prohibited non-commercial assistance to the SOE.[204] A party to the USMCA may claim that one of its domestic industries is injured due to non-commercial aid provided to an SOE. A panel can determine the injuries based on the volume of the SOE's production, the "effect of that production on prices for like goods produced and sold by the domestic industry," and the SOE production's effect on the domestic industry's production.[205] The injury provisions, however, only apply to SOEs that are covered investments in another party's territory.[206]

In sum, Chapter 22 prioritizes market-oriented policies over SOEs. SOEs can still operate, but they cannot discriminate against private operators, take actions that might injure their operations, or act in a way that adversely affects the market. As such, Chapter 22 evidently makes efforts to tame the exercise of a government-centered energy sovereignty.

> en of the 27th Article of this Constitution, as well as any other activity expressly determined by the laws issued by Congress.

Id.

[201] *See* GAMI Invs., Inc. v. Mexico, 13 ICSID Rep. 147, Final Award, ¶¶ 23–24 (UNCITRAL Arb. Trib. Nov. 15, 2004). In the NAFTA context, in 2004, in *GAMI Investors, Inc. v. Mexico*, the International Centre for Settlement of Investment Disputes had to resolve a connected question involving whether "saving" a national industry by discriminating against foreign investors constituted an unfair treatment, a discriminatory measure, or an indirect expropriation. *Id.* ¶ 24. The *GAMI* tribunal determined that the subsidies awarded to Mexican sugar mills were based on a legitimate public interest to save the national economy and, as such, decided that Mexico did not discriminate against the investors. *Id.* ¶ 114 (stating that the "measure was plausibly connected with a legitimate goal of policy . . . and was applied neither in a discriminatory manner nor as a disguised barrier to equal opportunity").

[202] *See id.* (finding that the measure did not discriminate against the foreign investor).

[203] *See generally* USMCA, *supra* note 28, ch. 22 (suggesting that countries may not save an SOE when the SOE is unlikely to survive and can only be saved by eliminating any competition).

[204] *Id.*, art. 22.8.

[205] *Id.*, art. 22.8.1.

[206] *See id.* (stating that the determination of injury involves "the volume of production by the *covered investment* that has received non-commercial assistance" (emphasis added)).

4. The USMCA and Its Links to the CPTPP

The USMCA's most-favored-nation clause builds a bridge to other trade and investment agreements.[207] The general exception provisions, particularly those in Article 32.11, reinforce this bridge. Article 32.11 deals with specific requirements for "[c]ross-[b]order [t]rade in [s]ervices, [i]nvestment," and Mexican SOEs.[208] Further, Article 32.11 specifies that "Mexico reserves the right to adopt or maintain a measure" in the energy sector "only to the extent consistent with the least restrictive measures that Mexico may adopt . . . under the terms of applicable reservations and exceptions . . . in other trade or investment agreements."[209] Therefore, if Mexico adopts a specific reservation in a different treaty, and that reservation is less restrictive than the one it seeks to adopt under the USMCA, Mexico breaches Article 32.11. In other words, Mexico tied its hands when it agreed to adopt only less restrictive measures than those adopted in other treaties.[210]

The goal of such a provision was to link the USMCA closely to the CPTPP.[211] In the CPTPP's general reservations and exceptions provisions, Mexico pledged to maintain the 2013 energy reform framework in its trade and investment relationship with the treaty partners.[212] Mexico stated that it would only take measures that were in accordance with the 2013 energy reform that opened the energy market to foreign investment.[213] It is beyond the scope of this Article to describe all of the elements included in the energy reforms of 2013, but suffice it to say that the reforms seek to integrate market-oriented principles to diversify Mexico's energy sources.[214] The model did not destroy the presence of the SOEs in the market, but it did allow private companies to

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[207] *See id.*, art. 2.10.1 (requiring parties to provide "most-favored-nation duty-free treatment" to goods). Most-favored-nation clauses require parties to provide each other with the same treatment provided to third parties, assuming the treatment is more favorable. Stephan W. Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses*, 27 BERKELEY J. INT'L L. 496, 502 (2009) (citing Endre Ustor, *Most-Favoured-Nation Clause*, *in* 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 468 (Rudolf Bernhardt & Peter Macalister-Smith eds., 1997)). These clauses prevent discrimination and promote equal treatment. *Id.*

[208] USMCA, *supra* note 28, art. 32.11.

[209] *Id.*

[210] *See id.*

[211] *See* Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art. 1, Mar. 8, 2018 [hereinafter CPTPP], https://www.dfat.gov.au/sites/default/files/tpp-11-treaty-text.pdf [https://perma.cc/KNR2-LQ7B].

[212] *See id.* (establishing, in Annexes I, II, and IV, reservations for the hydrocarbons sector); *see* GANTZ, *supra* note 64, at 4 (explaining that CPTPP incorporated the Peña Nieto administration's reforms).

[213] *See* CPTPP, *supra* note 211, annex I. For a general description of Mexico's 2013 energy reform, see generally Guillermo José García Sanchez, *The Fine Print of the Mexican Energy Reform*, *in* MEXICO'S NEW ENERGY REFORM 36 (Duncan Wood ed., 2018); Garcia Sanchez, *supra* note 101.

[214] *See* Garcia Sanchez, *supra* note 101, at 219.

compete and associate with CFE and Pemex in particular segments.[215] For example, the 2013 energy reform allows international oil and gas companies to participate in open bidding rounds to sign contracts with the state to explore and produce hydrocarbons, sign farm-outs, and associate with Pemex for new bidding rounds.[216] Moreover, private companies can generate electricity and compete in the wholesale market with CFE.[217]

Through its inclusion of Article 32.11, Mexico pledged to U.S. investors to maintain market-oriented principles in their investments and relationships between Mexico's government and SOEs. A counter-reform that would implement more restrictive measures impacting foreign investors or trading partners would be contrary to the CPTPP and consequently, through Article 32.11, to the USMCA.[218]

C. USMCA Sections Where Sovereignties Collide

The previous subsections reviewed the USMCA provisions that reflect either government-centered or market-oriented approaches. Nonetheless, the USMCA also contains provisions where both approaches collide. This Section analyzes how the agreement attempts to balance both government-centered and market-oriented approaches.[219] Subsection 1 compares regulatory powers with investors' expectations.[220] Subsection 2 analyzes the fair and equitable treatment (FET) standard and demonstrates how it reflects both approaches.[221] Subsection 3 discusses energy policies centered around legitimate public welfare objectives.[222] Subsection 4 details environmental provisions.[223]

1. Regulatory Powers vs. Investors' Expectations

Any development of energy infrastructure requires analyzing the risk of state regulatory changes.[224] The search for regulatory and policy stability is embedded in the decision-making process of any international energy investment.[225] The way each state seeks to achieve energy sovereignty matters for

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[215] Garcia Sanchez, *supra* note 213, at 48–49.
[216] *Id.* at 39–40.
[217] *Id.* at 48–49.
[218] *See* USMCA, *supra* note 28, art. 32.11.
[219] *See infra* notes 219–326 and accompanying text.
[220] *See infra* notes 224–255 and accompanying text.
[221] *See infra* notes 256–262 and accompanying text.
[222] *See infra* notes 263–281 and accompanying text.
[223] *See infra* notes 282–326 and accompanying text.
[224] *See infra* notes 244–251 and accompanying text (discussing this risk and its consequences).
[225] *See generally* CAMERON, *supra* note 72 (reviewing the expansion of international investment treaties, arbitration cases, and the pursuit of stability from energy companies in the context of an evolving energy market).

the investors' stability expectations. As discussed further below, international investment and trade agreements address the regulatory power of the state to achieve specific energy policy objectives and balance them against investors' expectations.[226]

Customary international law and investment agreements recognize that states have regulatory police powers over their territory.[227] The treaties specify that the agreements do not prevent a government from taking measures necessary to maintain public order.[228] The right to maintain order is coupled with the state's right to modify the legal frameworks when certain circumstances are met, and to regulate activities, especially those involved in the extraction of national natural resources.[229] International treaties and the tribunals interpreting the treaties have not ignored the fact that social, economic, and political circumstances change.[230] The state, as part of its sovereign powers, has an interest in addressing those changes.[231]

International tribunals face challenges in balancing the state's regulatory rights against the investors' legitimate expectations when deciding to invest in a particular country.[232] States can change the legal frameworks on which the

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[226] *See* Yulia S. Selivanova, *Changes in Renewables Support Policy and Investment Protection Under the Energy Charter Treaty: Analysis of Jurisprudence and Outlook for the Current Arbitration Cases*, 33 ICSID REV. 433, 445 (2018) (describing the balancing of legitimate expectations against a state's right to regulate in arbitral practice); Elizabeth Trujillo, *Balancing Sustainability, the Right to Regulate, and the Need for Investor Protection: Lessons from the Trade Regime*, 59 B.C. L. REV. 2735, 2737–41 (2018) (describing the right to regulate in investment treaties).

[227] *See, e.g.*, ECT, *supra* note 56, art. 24(3)(c) (stating that parties may take a measure needed to ensure public order).

[228] *Id.*; Selivanova, *supra* note 226, at 445.

[229] Selivanova, *supra* note 226, at 446. This power has been affirmed since 1963 by the U.N. General Assembly. G.A. Res. 1803, *supra* note 54, § I, ¶ 2.

[230] *See, e.g.*, Comprehensive Economic and Trade Agreement, Can.-European Union, art. 8.9.1, Oct. 30, 2016, 2017 O.J. (L 11) 23 [hereinafter CETA] (describing investment and regulatory measures and reaffirming the "right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity"). Article 8.9 even recognizes that "the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section." *Id.*, art. 8.9.2.

[231] Selivanova, *supra* note 226, at 445–46 (stating that even international human rights tribunals, such as the European Court of Human Rights, recognize that states have a "wide margin of appreciation" to justify enacting regulatory measures to achieve public and social policy goals (citing Anatole Boute, *The Potential Contribution of International Investment Protection Law to Combat Climate Change*, 27 J. ENERGY & NAT. RES. L. 333, 368–69 (2009))).

[232] *See id.* at 445–47 (discussing the approaches of different tribunals); Trujillo, *supra* note 226, at 2743 (finding that investment tribunals tend to be more deferential to state regulatory powers compared to trade panels, which are less deferential unless the policies are in line with international standards).

investors rely as long as the changes are motivated by legitimate public purposes and states explore other less restrictive choices.[233]

There is a long-standing debate in international investment law on how the right to treat a foreign investor fairly and equitably connects to the investors' legitimate expectations. Several tribunals have limited this fair and equitable treatment (FET) to mean an "'even-handed,'" "'unbiased,'" and "'legitimate'" treatment that fosters foreign investment in the country.[234] Other tribunals have found a connection between the investors' legitimate expectations and FET, to the point of making them indistinguishable.[235] The challenge in these cases is identifying what is considered a "reasonable" or "legitimate" expectation.[236] To be sure, the standard is not supposed to operate as an "insurance policy" against any regulatory change that affects the investment.[237]

One of the elements that tribunals have identified as being part of FET is the right not to be discriminated against or affected by arbitrary decisions.[238]

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[233] Selivanova, *supra* note 226, at 446.

[234] *See, e.g.*, MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, ¶ 113 (May 25, 2004), 12 ICSID Rep. 1 (2007) (stating that "the terms 'fair' and 'equitable' . . . [typically] mean 'just,' 'even-handed,' 'unbiased,' [and] 'legitimate'" (citing CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH (5th ed. 1964)).

[235] Nat'l Grid P.L.C. v. Argentine Republic, No. 1:09-cv-00248-RBW, Award, ¶ 173 (UNCITRAL Arb. Trib. Nov. 3, 2008) (stating "this standard protects the reasonable expectations of the investor at the time it made the investment and which were based on representations, commitments or specific conditions offered by the State concerned" so "[that] treatment by the State should 'not affect the basic expectations that were taken into account by the foreign investor to make the investment'" (citing Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, ¶ 154 (May 29, 2003), 10 ICSID Rep. 130 (2006) [hereinafter *Tecmed* Award])).

[236] *See id.*; Selivanova, *supra* note 226, at 440–45 (discussing what "legitimate expectations" are).

[237] *See* Selivanova, *supra* note 226, at 440–43 (quoting EDF (Servs.) Ltd. v. Romania, ICSID Case No. ARB/05/13, Award, ¶ 217 (Oct. 8, 2009), 20 ICSID Rep. 118 (2022)); LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶¶ 103–131 (Oct. 3, 2006) [hereinafter *LG&E* Decision on Liability], https://www.italaw.com/sites/default/files/case-documents/ita0460.pdf [https://perma.cc/V2BJ-HGRJ] (analyzing the characteristics of an investor's fair expectations and determining that there must be an agreement among the parties as to the expectation; legal enforceability if infringement occurs; a "duty to compensate," except when there is a "state of necessity"; and inclusion of "parameters such as business risk or industry's regular patterns"); El Paso Energy Int'l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Award, ¶¶ 350, 352 (Oct. 31, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0270.pdf [https://perma.cc/U8TX-EU5H] (stating that "if the often repeated formula . . . that 'the stability of the legal and business framework is an essential element of fair and equitable treatment' were true, legislation could never be changed" and that "[s]uch a standard of behavior, if strictly applied, is not realistic, nor is it the BITs' purpose that States guarantee that the economic and legal conditions in which investments take place will remain unaltered *ad infinitum*" (quoting Waste Mgmt., Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award, ¶ 98 (Apr. 30, 2004), 11 ICSID Rep. 361 (2002) [hereinafter *Waste Mgmt.* Award]).

[238] *See* Pope & Talbot Inc. v. Canada, UNCITRAL, Interim Award by Arbitral Trib., ¶¶ 84, 96–97 (June 26, 2000) (assessing whether nondiscriminatory policies were an obligation under customary international law); *Waste Mgmt.* Award, *supra* note 237, ¶ 96; Petrobart Ltd. v. Kyrgyz Republic,

Stability and predictability in government policies and regulatory frameworks are also recognized elements.[239] Some tribunals, particularly in the context of NAFTA, have implied that stability and predictability require the host state's transparency in how it decides to modify its regulatory frameworks.[240]

In sum, FET is breached when a government provides certain "objective" assurances "in order to induce investment" and subsequently repudiates them without a legitimate public purpose.[241] It is hard to argue that investors' expectations are not legitimate when their claims are backed up by specific actions that lead them to expect a particular future behavior.[242] Long-term projects in-

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SCC Case No. 126/2003, Award, at 26–27, 76 (Mar. 29 2005) (failing to mention arbitrariness, but finding in favor of the investor when describing the government's attitude toward the investor in a series of proceedings and actions taken by government officials); CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶ 274 (May 12, 2005), 14 ICSID Rep. 151 (2009) [hereinafter *CMS* Award] (stating that "one principal objective of the protection envisaged is that [FET] is desirable 'to maintain a stable framework for investments and maximum effective use of economic resources'" and that "[t]here can be no doubt, therefore, that a stable legal and business environment is an essential element of [FET]").

[239] *See CMS* Award, *supra* note 238, ¶ 276 ("In addition to the specific terms of the Treaty, the significant number of treaties, both bilateral and multilateral, that have dealt with this standard also unequivocally shows that fair and equitable treatment is inseparable from stability and predictability."); *see also* Occidental Expl. & Prod. Co. v. Republic of Ecuador, LCIA Case No. UN 3467, Final Award, ¶ 183 (July 1, 2004) (stating "[t]he stability of the legal and business framework is thus an essential element of fair and equitable treatment"); *LG&E* Decision on Liability, *supra* note 237, ¶¶ 125, 131 (stating that "the fair and equitable standard consists of the host State's consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor").

[240] *See, e.g.*, Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, ¶ 76 (Aug. 30, 2000), 5 ICSID Rep. 209 (2002) ("Prominent in the statement of principles and rules that introduces the Agreement is the reference to 'transparency.'" (citing NAFTA, *supra* note 64, art. 102(1))). This principle was reaffirmed in another case. *See Tecmed* Award, *supra* note 235, ¶ 154 (stating that "[t]he foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor").

[241] *See* Glamis Gold, Ltd. v. United States, Award, ¶ 22 (NAFTA Arb. Trib. June 8, 2009) (stating "[s]uch a breach may be exhibited by a 'gross denial of justice or manifest arbitrariness falling below acceptable international standards;' or the creation by the State of objective expectations *in order to induce* investment and the subsequent repudiation of those expectations" and that " although bad faith may often be present in such a determination and its presence will certainly be determinative of a violation, a finding of bath faith is not a requirement for a breach of Article 1105(1)"). Another way of including such a right to regulate is the approach taken in NAFTA, which includes a provision that prevents a state from relaxing health, safety, and environmental regulations in order to attract investment. *See* NAFTA, *supra* note 64, art. 1114.2 (providing that "[t]he Parties recognize that is it inappropriate to encourage investment by relaxing domestic health, safety or environmental measures," that "a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment . . . an investment or an investor").

[242] *See* Trujillo, *supra* note 226, at 2740 (arguing that "a claimant must show that the investment made was based on a current state of affairs that did not include the measure and that it was not reasonably foreseeable that such a measure would be passed").

volve basic expectations assumed in good faith by both parties, and, as such, investors expect states to act in a manner consistent with those expectations.[243]

Energy infrastructure projects that require long-term government commitments inevitably involve strategies to offer different regulatory schemes to attract investments.[244] Energy companies back up their investments with financial instruments. This requires energy companies to obtain assurances from governments that rates, licenses, taxes, permits, and any other regulatory operational requirements will not change, or at least that the project's economics will be respected in case these factors need to change.[245] On many occasions, it takes a whole decade of capital investment before companies see any profit.[246] In general, energy projects last longer than the office terms of the government officials who planned the projects.[247] This characteristic makes energy projects particularly vulnerable to political risks.[248] As new government members enter office, they may enact unilateral policies or regulations that modify the project's economic terms.[249] That is why energy projects, compared to other types of investments, are structured around a web of legal instruments that seek to achieve as much stability as possible.[250]

To put the issue in simple terms, it is hard to convince a company to build a pipeline, wind farm, or transmission line if the company does not know how much it will be able to charge in the long term to secure a return on its investment. A company is less inclined to spend ten years exploring, drilling, and studying a terrain to find an oil or a gas deposit if it cannot receive assurances that it will be able to extract hydrocarbons to recover its expenses and profit under a specific tax regime. An energy project's long-term regulatory and fiscal stability affects both fossil fuel-based and renewable energy projects. These projects rely on government commitments both in deciding where to invest and how to structure the projects' economics.[251]

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[243] *See, e.g.*, *Tecmed* Award, *supra* note 235, ¶ 159 (discussing an agreement made for a relocation based on the current conditions).

[244] *See* Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶ 316 (July 14, 2006), 14 ICSID Rep. 367 (2009) (stating that the standard is breached "when a State repudiates former assurances, or refuses to give assurances that it will comply with its obligations depriving the investor in whole or significant part, of the use of reasonably-to-be-expected economic benefit of its investment").

[245] *See* Goldthau & Witte, *supra* note 13, at 15 (discussing how the global energy market and financial market integrate).

[246] *See* CAMERON, *supra* note 72, at 4–5 (outlining the cycle of an investment); Garcia Sanchez, *supra* note 74, at 491–95 (describing types of projects that take years to come to fruition).

[247] CAMERON, *supra* note 72, at 5.

[248] *Id.*

[249] *Id.*

[250] *Id.*

[251] *See id.* at 3–6 (discussing risks in energy projects). Renewable energy projects have been featured in multimillion dollar arbitration cases. *Id.* at 13–14. These projects mainly emerged out of gen-

erous incentive programs passed in the early 2000s by European nations to promote investment in the renewable energy sector. *Id.* at 9–12. The incentive programs took the shape of fixed feed-in tariffs and legal frameworks that promised investors "'reasonable profitability rates' (Spain), a 'fair return' (Italy) or a certain payback period (Czech Republic) . . . ." Maximilian Schmidl, *The Renewable Energy Saga from* Charanne v. Spain *to* The PV Investors v. Spain*: Trying to See the Wood for the Trees*, KLUWER ARB. BLOG (Feb. 1, 2021), http://arbitrationblog.kluwerarbitration.com/2021/02/01/the-renewable-energy-saga-from-charanne-v-spain-to-the-pv-investors-v-spain-trying-to-see-the-wood-for-the-trees/ [https://perma.cc/EW64-6QYK]. The countries, however, faced enormous financial burdens in keeping the programs going during the 2008 financial crisis and consequently rolled back many of these incentives. *Id.* The main issue discussed by the investment tribunals included whether the measures taken by the government frustrated legitimate expectations as protected by Article 10(1) of the ECT. *See, e.g.*, ECT, *supra* note 56, art. 10(1) (establishing protections for investors); Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award (May 16, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw9710.pdf [https://perma.cc/X7NA-9BYJ] (contrasting a scenario where the government would not provide specific assurances with a scenario where the government would provide specific commitments and changed the general legislation). In contrast, other tribunals considered the general legislation as specific commitments because they were deliberately implemented to attract foreign investment. *See, e.g.*, 9REN Holding S.À.R.L. v. Kingdom of Spain, ICSID Case No. ARB/15/15, Award (May 31, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw10565.pdf [https://perma.cc/DJ7E-7DHF]; Greentech Energy Sys. A/S v. Italian Republic, SCC Case No. 2015/095, Final Award (Dec. 23, 2018); Antaris GmbH v. Czech Republic, PCA Case No. 2014-01, Award, Dissenting Opinion, ¶ 7 (May 2, 2018) (dissenting opinion by Born, Arb.) (asserting that the country's legislation was a specific commitment to investors). Other tribunals did not find the change in legislation itself to be a violation of legitimate expectations, but instead found it to be the abolition of the previous regime and its replacement by a significantly less generous remuneration regime. *See, e.g.*, Charanne B.V. v. Kingdom of Spain, SCC Case No. 062/2012, Final Award (Jan. 21, 2016) (unofficial translation) (arguing that the regulatory framework was not a commitment, and hence could not be frozen in time, but that the state would not act against the public interest); Blusun S.A. v. Italian Republic, ICSID Case No. ARB/14/3, Award (Dec. 27, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw8967.pdf [https://perma.cc/SPE3-NK4W]; SolEs Badajoz GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/38, Award (July 31, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw10836.pdf [https://perma.cc/H6PY-A6BV]; Eiser Infrastructure Ltd. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award (May 4, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw9050.pdf [https://perma.cc/7QE5-7GSE]; Novenergia II – Energy & Env't (SCA)(Grand Duchy of Lux.), SICAR v. the Kingdom of Spain, SCC Case No. 2015/063, Final Arbitral Award (Feb 15, 2018). Another group of tribunals found that legitimate expectations could only be breached when the state significantly altered the economic basis of the investments affected by the regulatory change. *See, e.g.*, Cube Infrastructure Fund SICAV v. Kingdom of Spain, ICSID Case No. ARB/15/20, Award (July 15, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw10694.pdf [https://perma.cc/BF9K-Y4FZ]; Waltkins Holding S.À.R.L. v. Kingdom of Spain, ICSID Case No. ARB/15/44, Award (Jan. 21, 2020), https://www.italaw.com/sites/default/files/case-documents/italaw11234_0.pdf [https://perma.cc/CQ4W-ML4X]. Lastly, several tribunals found that investors could not legitimately expect to be paid the fixed feed-in tariffs specified in the legislation, but that they could at least expect a reasonable return as the framework law had promised. *See, e.g.*, Isolux Infrastructure Neth., B.V. v. Kingdom of Spain, SCC Case No. 2013/153, Award (July 17, 2016) [hereinafter *Isolux* Award]; Antaris GmbH v. Czech Republic, PCA Case No. 2014-01, Award (May 2, 2018) [hereinafter *Antaris* Award]; Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40, Award (Aug. 6, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw10759.pdf [https://perma.cc/NR2C-ES7Y]; PV Invs. v. Kingdom of Spain, PCA Case No. 2012-14, Final Award (Feb. 28, 2020); Jürgen Wirtgen v. Czech Republic, PCA Case No. 2014-03, Final Award (Oct. 11, 2017).

In addition to the difficulty of recognizing legitimate expectations, another challenge is identifying if the state's legitimate public purpose in modifying the promised regulatory framework is justified. The regulatory interference must be justified, transparent, and proportional to a legitimate end.[252] Some scholars and tribunals argue that a balancing test should be used, especially in the face of national emergencies.[253] In cases of national emergencies, such as the massive economic crisis experienced in Argentina, tribunals become divided on whether the state of emergency should exclude any state liability for actions affecting investors' legitimate expectations.[254] Some tribunals argue that extreme emergency cases are within the scope of the risks of investing abroad, and, as such, that investors cannot hold the state accountable for a risk that investors should assume. This view reaffirms the principle that investment treaties are not insurance policies that protect against extreme events.[255]

2. Conflicting Energy Sovereignties Under the USMCA's FET Standard

In the USMCA, Canada, Mexico, and the United States further clarified what FET implies and what could be considered legitimate public purposes for new regulations that affect investments. Article 14.6 of the USMCA states that the North American partners will provide foreign investors with "treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."[256] It further clarifies that FET and "'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive

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[252] Selivanova, *supra* note 226, at 446; *see* Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/1, Decision on Liability, ¶ 123 (Dec. 27, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0868.pdf [https://perma.cc/HQZ4-7BGV] (stating "[t]he determination of a breach of the standard requires, therefore, 'a weighing of the Claimant's reasonable and legitimate expectations on the one hand and the Respondent's legitimate regulatory interest on the other'" and that "[t]he context of the evolution of the host economy, the reasonableness of the normative changes challenged and their appropriateness in the light of a criterion of proportionality also have to be taken into account").

[253] *See* Selivanova, *supra* note 226, at 446 (arguing that "[a] balancing test in such situations includes the investor's legitimate and reasonable expectations, and the State's regulatory sovereignty and interest in achieving a reasonable solution for all"); *see also* M.N. Eckardt, *The Fair and Equitable Treatment (FET) Standard in International Investment Law*, TRANSNAT'L DISP. MGMT., Apr. 2012, at 1, 22 (arguing that the balancing approach allows states to react to domestic policy concerns without giving them a cart blanche to affect investors' interests).

[254] *See CMS* Award, *supra* note 238, ¶¶ 383–394 (arguing that the "state of necessity" does not preclude a state from compensating investors for losses). The actions taken in a "state of necessity" should be temporary and proportional to the goal of achieving stability. *Id.*

[255] *See id.*

[256] USMCA, *supra* note 28, art. 14.6.1.

rights."[257] The USMCA's FET provision requires that states do not deny due process in legal proceedings.[258]

Though some argue that FET protects investors' expectations, the USMCA disregards investors' expectations when considering a breach of the minimum standard of treatment of aliens. According to Article 14.6.4, "the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result."[259] As such, when viewing this FET provision through the lenses of energy sovereignty, state authorities may interpret it as allowing policy changes in favor of a more government-centered energy vision.

Under the USMCA's FET provision, as long as the state allows a foreign energy company to present its case in domestic administrative or judicial proceedings, due process is satisfied. Additionally, if the state's actions are grounded on public policy and not aimed at discriminating against investors, tribunals will find it more challenging to sustain a breach of FET claim.[260]

Looking through the lenses of energy sovereignty, if a state has a government-centered vision, it is hard to argue that investors expect energy regulation to stay frozen in time. This argument becomes even weaker if the state depends on profits produced in the energy market for its survival.[261] If the state has a government budget that depends on the extraction of hydrocarbons to survive; if the electricity market at the consumer level is highly influenced by subsidies and programs from the state-owned company to keep the electorate happy; or if regulators are not truly independent because they are backed by politicians whose survival depends on the will of the party in function, it does not matter that the investor is now able to participate in the market and receive assurances in contracts and international agreements. The system is still biased toward government-centered approaches to energy. As such, investors must account for risks in a country structured to ensure that the government is a critical player in the energy market. Under these conditions, investors can expect a reasonable return on their investments, but not an eternally fixed regulatory and tariff framework guaranteeing their expected returns.[262]

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[257] *Id.*, art. 14.6.2.

[258] *Id.*, art. 14.6.2(a).

[259] *Id.*, art.14.6.4 (introducing the provision with the phrase "[f]or greater certainty," which implies an intention of the parties to signal to the interpreter that, in case of doubt regarding whether legitimate expectations should be included or not in the interpretation, the interpreter should take a restrictive approach).

[260] *See id.*, ch. 14.

[261] Garcia Sanchez, *supra* note 74, at 518–23 (describing investor reliance on compensation).

[262] *See id.* at 509–25. In the context of the Spanish, Italian, and Czech saga, some tribunals found that, on principle, general legislation could give rise to legitimate expectations, but that when inves-

3. Energy Policies in the Name of Legitimate Public Welfare Objectives

Other sections in the investment chapter of the USMCA contain provisions that allow a government-controlled energy sovereignty policy to be implemented without breaching treaty obligations.[263] This is particularly clear when the energy policy is framed under legitimate public welfare objectives.[264] For example, Annex 14-B clarifies the expropriation provisions.[265] It states that "[n]on-discriminatory regulatory actions . . . that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances."[266] Thus, classic regulatory actions that affect investors' businesses and profits cannot be considered indirect expropriations if done to protect "legitimate public welfare objectives."[267]

Considering the history of energy-related disputes, which on most occasions concern regulatory actions involving the forced renegotiation of contracts, new taxes, or the loss of subsidies, it is surprising that the parties decided to exclude those types of actions from the definition of expropriation measures.[268] As will be explained below, the USMCA parties were fully aware

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tors invest knowing that there is unsuitability in the incentive schemes created by previous administrations, they could only expect a reasonable return. *See Isolux* Award, *supra* note 251, ¶¶ 787–815; *Antaris* Award, *supra* note 251, ¶¶ 368, 434–435, 437, 440–441, 444. A change in legislation could not, in and of itself, frustrate their legitimate expectations. *See Belenergia* Award, *supra* note 251, ¶¶ 579–585, 596, 599–600.

[263] *See generally* USMCA, *supra* note 28, ch.14 (outlining procedures and rules regarding investments).

[264] *See* Catharine Titi, *International Investment Law and the European Union: Towards a New Generation of International Investment Agreements*, 26 EUR. J. INT'L L. 639, 654–56 (2015) (reviewing the right to regulate in various agreements). The same principle has been framed under the "'right to regulate'" in investment cases. *Id.* (quoting EUR. COMM'N, INVESTMENT PROTECTION AND INVESTOR-TO-STATE DISPUTE SETTLEMENT IN EU AGREEMENTS 7 (2013), https://www.italaw.com/sites/default/files/archive/Investment%20Protection%20and%20Investor-to-State%20Dispute%20Settlement%20in%20EU%20agreements_0.pdf [https://perma.cc/P4GX-WZM3]). The consensus position is that the state, as a sovereign, has the right to regulate, but that this right is limited by the international treaties the state signs with other states. In fact, very few first-generation investment and trade agreements specified this principle explicitly. *Id.* It is only the new generation of treaties that have incorporated a provision specifying the right to regulate in response to specific investment tribunal decisions. *See* Trujillo, *supra* note 226, at 2738 (discussing the right to regulate and how conversations and concerns about the right are increasing); Catharine Titi, *The Right to Regulate* (discussing the right to regulate within the context of CETA), *in* FOREIGN INVESTMENT UNDER THE COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (CETA) 159, 181–82 (Makane Moïse Mbengue & Stefanie Schacherer eds., 2019).

[265] USMCA, *supra* note 28, annex 14-B (referring to art. 14.8.1's expropriation provisions).

[266] *Id.*, annex-14-B.3(b).

[267] *See id.*

[268] *See* Selivanova, *supra* note 226, at 446 (explaining how, in the context of renewable energy litigation, states argue that they need to "adapt the level and duration of support to avoid overcompensating low-carbon investments").

of this fact because the public welfare exception is limited with respect to government contracts between Mexico and private actors in the energy sector.[269] It is also in this context that many investment tribunals have combined the two energy sovereignties.[270] For instance, states have argued under the public welfare exception that they must modify existing regulations "to avoid overcompensating low-carbon investments."[271] States have also asserted that they need to respond to international agreements on climate change, or modify support schemes for specific energy sources to reduce public debt or protect consumers.[272] In these cases, investment tribunals tend to ask whether "such short-term policy objectives justify State interference with low-carbon investors' rights and expectations."[273] Tribunals in such cases observe that renewable energy projects are rarely "financially viable without State support."[274] State support can take the form of subsidies, lower charges for using transportation and distribution networks, or regulated tariffs.

But the question cannot be fully addressed without considering the state's overall energy policy, which, as mentioned, connects with its energy sovereignty. Seen through the eyes of the government's goal to be an energy sovereign, what would seem like an arbitrary policy by the state is seen as a consequence of a fight to determine how to achieve energy sovereignty. The state's withdrawal of support to certain producers also means that it gives that support to other energy sources that may help the state achieve its vision of sovereignty. In this sense, the case of Mexico is paradigmatic. The constitutional amendment proposed in 2021 sends renewable energy producers to the end of the discharge order.[275] As opposed to respecting the existing contracts that established a principle favoring the lowest marginal cost of energy to benefit consumers, the reform prioritizes the electricity produced by the SOE.[276] In the view of a government-centered energy sovereignty, relying on private producers, even if doing so reduces prices for consumers, takes away governmental

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[269] See *infra* notes 355–374 and accompanying text.

[270] *See, e.g.*, Alexander Reuter, *Retroactive Reduction of Support for Renewable Energy and Investment Treaty Protection from the Perspective of Shareholders and Lenders*, TRANSNAT'L DISP. MGMT., May 2015, at 1, 25 (describing the balance between regulatory schemes and investments).

[271] *See* Selivanova, *supra* note 226, at 446; Reuter, *supra* note 270 at 25–26.

[272] *See* Reuter, *supra* note 270, at 25–29.

[273] Selivanova, *supra* note 226, at 446.

[274] *Id.* at 447 ("When applying the 'fair balance' test to interference with support schemes, arbitral tribunals are likely to take into consideration that investment in electricity production from renewable energy sources is rarely considered to be financially viable without State support.").

[275] *See* Semple & Lopez, *supra* note 9.

[276] Adriana Barrera, *Mexico Launches Reform to Put State in Charge of Power Market*, REUTERS (Oct. 1, 2021), https://www.reuters.com/world/americas/mexico-president-says-electricity-reform-has-been-sent-congress-2021-10-01/ [https://perma.cc/2Q5U-RX6F].

control over energy production.[277] Protecting the SOE has broader social goals according to this view: the protection of consumers by setting fixed prices, the creation of state-controlled jobs, and the development of projects in less profitable areas, among other things.

The same language is present in Article 14.4.1, which accords foreign investors "treatment no less favorable than that it accords, in like circumstances" to domestic investors.[278] Article 14.4.4 clarifies the "like circumstances" test by stating that it includes a review of "legitimate public welfare objectives" that motivated the treatment.[279] Whether the treatment is "accorded in '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."[280] The same caveat is reaffirmed in Article 14.5, which also accords treatment "no less favorable" in similar circumstances to any investor.[281]

4. Environmental Protection Provisions Through the Lenses of Energy Sovereignty

Energy sovereignty is also present in contemporary debates on the transition to renewable energy. Energy sovereignty can be framed as one that involves reliable, environmentally friendly sources that prevent long-term impacts on global climate change and provide energy independence. Thus, renewable energy and environmental commitments involve a short-term market component, less dependency on foreign energy sources, and a long-term security component. In doing so, they fight climate change and its consequences on infrastructure, communities, and military installations.[282]

The narrative of climate change affecting the security of sovereign nations began in the early 2000s.[283] The U.N. General Assembly 2009 Resolution, which expressed concern "that the adverse impacts of climate change, including sea-level rise, could have possible security implications," provides an example of the confluence of climate change and national security.[284] Similarly, the U.S. armed forces are concerned about the potential that climate

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[277] *See id.* (describing how the Mexican government responded to a market of private producers to increase government control).

[278] USMCA, *supra* note 28, art. 14.4.1.

[279] *Id.*, art. 14.4.4.

[280] *Id.*

[281] *Id.*, art. 14.5.

[282] *See* Goldthau & Witte, *supra* note 13, at 9–12 (arguing that the institutional architecture around energy governance rarely reflects the challenges of climate change).

[283] Dubash & Florini, *supra* note 24, at 10.

[284] *Id.* (quoting G.A. Res. 63/281, U.N. Doc. A/RES/63/281 (June 11, 2009)) (discussing climate change and its potential security implications).

change will "serve as a threat multiplier" and impact existing military infrastructure due to the intensity of storms from rising sea-levels.[285] On the other hand, renewable energy can also be part of a government-centered energy sovereignty by reducing dependency on fossil fuel imports. For example, security concerns have motivated China and India to undertake energy projects relating to "energy efficiency and renewable energy."[286] Indeed, the less a country relies on imports for its electricity production, the better positioned it is to face foreign threats.

In sum, environmental protections fit in both the government-centered and market-oriented approaches because the protections serve both short-term goals of reducing trade dependency and long-term goals of ensuring national security and combatting climate change. A market-oriented state with a long-term vision on the threat of climate change will seek to enforce environmental provisions on its energy partners through trade agreements.[287] The state will seek imported fuels that are environmentally friendly through markets. Moreover, it will promote environmentally friendly investments in energy partners' territories.

Environmental protections, however, can conflict with the government-centered approach when the government depends deeply on fossil fuel production by state-owned companies. Government-centered approaches will inevitably clash with environmentally friendly approaches and lead to global insecurity.[288] Suppose, for example, the market-oriented approach is less concerned with the long-term insecurity provoked by climate change and is more focused on the flow of cheap energy products into its territory. In that case, the state's market-oriented approach will clash less with the government-centered approach of its neighbors. In a short-term market-oriented strategy, the central policy involves efforts to access oil and natural gas in trading partners' territo-

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[285] *See id.* (stating that by 2010, the United States National Security Strategy mentioned climate change, specifically asserting that "[t]he change wrought by a warming planet will lead to new conflicts over refugees and resources; new suffering from drought and famine; catastrophic natural disasters; and the degradation of land across the globe" (quoting WHITE HOUSE, NATIONAL SECURITY STRATEGY (2010), https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/national_security_strategy.pdf [https://perma.cc/UHX4-3T7W])).

[286] *Id.* at 14.

[287] *See* Kate Abnett & Susanna Twidale, *EU Proposes World's First Carbon Border Tax for Some Imports*, REUTERS (July 14, 2021), https://www.reuters.com/business/sustainable-business/eu-proposes-worlds-first-carbon-border-tax-some-imports-2021-07-14/ [https://perma.cc/7MBV-5JYW] (discussing the European Union's carbon border tax, a measure taken to reach the Union's climate change goals).

[288] PHILIPPE BENOIT, COLUM. SIPA CTR. ON GLOB. ENERGY POL'Y, ENGAGING STATE-OWNED ENTERPRISES IN CLIMATE ACTION 30–31 (2019), https://www.energypolicy.columbia.edu/sites/default/files/pictures/SOE%20Benoit-CGEP_Report_090919.pdf [https://perma.cc/3YA3-B7C6] (discussing the priority of various government goals).

ries. In contrast, if a state with a long-term market-oriented approach is worried about the effect of climate change on national security, it will place emphasis on the environmental impact, affordability, and efficiency of the energy sources in the territories of its energy partners.

a. USMCA Environmental Protections

The USMCA contains a chapter on environmental obligations that, when seen through the lenses of energy sovereignty, reflects the different policies described in this Article. Article 24.3 is a clear example of the sovereignty paradigm in international governance.[289] It begins by recognizing that each state has "the sovereign right . . . to establish its own levels of domestic environmental protection and its own environmental priorities, and to establish, adopt, or modify its environmental laws and policies accordingly."[290] The USMCA does not establish a standard to follow or a consensus on a priority in facing climate change. Chapter 24 does not even mention climate change or carbon emissions. It only recognizes that each state can design its own environmental policies, although it does require each state to ensure that those policies promote environmental protection.[291]

The recognition of national priorities and circumstances is reaffirmed in the scope and objectives section of the chapter. The objectives, as stated in Article 24.2, are to "promote mutually supportive trade and environmental policies and practices; promote high levels of environmental protection and effective enforcement of environmental laws; and enhance the capacities of the Parties to address trade-related environmental issues."[292] These goals should take

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[289] *See* USMCA, *supra* note 28, art. 24.3.

[290] *Id.*, art. 24.3.1. Article 24.3.1 is consistent with the approach taken by the European Union and Canada in Article 24.3 of CETA, which establishes that the involved parties "recognise the right of each Party to set its environmental priorities, to establish its levels of environmental protection, and to adopt or modify its laws and policies accordingly and in a manner consistent with the multilateral environmental agreements to which it is a party and with this Agreement." *See id.*; CETA, *supra* note 230, art. 24.3. The Canada-Colombia Free Trade Agreement (CCFTA) takes a different approach by recognizing that the states have sovereign rights but also "responsibilities to conserve and protect [their respective] environment[s]." Canada-Columbia Free Trade Agreement, art. 1701.1, Can.-Colom., Nov. 21, 2008, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/index.aspx?lang=eng [https://perma.cc/2QF6-QAQL] [hereinafter CCFTA]. Thus, the CCFTA reaffirms both the right to regulate and the responsibility of the state to the international community. *See id.*

[291] USMCA, *supra* note 28, art. 24.3.2. Here, too, Article 24.3.1 is consistent with Article 24.3 of CETA. *See id.*; CETA, *supra* note 230, art. 24.3 (stating that "[e]ach Party shall seek to ensure that those laws and policies provide for and encourage high levels of environmental protection, and shall strive to continue to improve such laws and policies and their underlying levels of protection").

[292] USMCA, *supra* note 28, art. 24.2.2.

into account each country's priorities and specific situations.[293] Hence, the USMCA's environmental chapter is relevant as long as the policies impact trade-related environmental issues.[294] The chapter seems to imply that if an action or omission of the state affects its environmental obligations, but does not impact trade or investment, it will not create a treaty-related liability.[295]

Another example of government-centered tools used to advance energy policy goals is demonstrated by the USMCA provision that specifically prohibits states from waiving, derogating, or weakening their environmental laws to gain trade or investment advantages among the parties.[296] The provision further affirms that none of its language should be understood as allowing a party to enforce environmental laws in another party's territory.[297]

The chapter, however, also contains elements of the market-oriented approach by recognizing that the parties agree that it is "inappropriate to establish or use their environmental laws or other measures in a manner which would constitute a disguised restriction on trade or investment between the Parties."[298] This implies that in the face of an environmental measure that impacts energy trade among the signatories, one would need to evaluate whether the measure is achieving the goals it seeks, or whether there are alternative measures available to the state that are less restrictive toward trade and investment protected by the treaty. The state would have to prove that the measure is proportionate, transparent, and the only measure available to achieve the environmental goals.

The USMCA enhances the opportunity for citizens to be aware of the environmental impact of government-approved projects and measures. The USMCA forces signatories to "maintain appropriate procedures for assessing the environmental impacts of proposed projects that are subject to an action by that Party's central level of government."[299] As such, the USMCA forces states to issue environmental impact assessments for major projects with potential

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[293] *Id.*, art. 24.3.1 (acknowledging the "sovereign right of each Party to establish its own levels of domestic environmental protection and its own environmental priorities, and to establish, adopt, or modify its environmental laws and policies accordingly"); *see* CPTPP, *supra* note 211, art. 20.3.2 (same).

[294] *See* USMCA, *supra* note 28, art. 24.2.

[295] *See id.*

[296] *Id.*, art. 24.4.3 (stating "[w]ithout prejudice to Article 24.3.1 . . . the Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protection afforded in their respective environmental laws"). The CCFTA contains a similar statement in Article 1702. *See* CCFTA, *supra* note 290, art. 1702 (providing similar language to safeguard environmental laws).

[297] USMCA, *supra* note 28, art. 24.4.4.

[298] *Id.*, art. 24.2.5.

[299] *Id.*, art. 24.7.1.

environmental impact. The obligation aims at "avoiding, minimizing, or mitigating adverse effects" on the environment.[300]

The USMCA environmental chapter's focus on enforcement is an advancement when compared to NAFTA and similar agreements.[301] Chapter 24 of the USMCA starts with the primary goal of ensuring that the states enforce their own regulatory environmental measures.[302] Article 24.4 states that "[n]o Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or

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[300] *Id.* The environmental impact assessment must be publicly disclosed in accordance with domestic law and allow public participation. *Id.*, art. 24.7.2.

[301] *See generally id.*, ch. 24 (emphasizing the enforcement of environmental laws and regulations); North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., art. 6, Sept. 14, 1993, 32 I.L.M. 1480 [hereinafter NAAEC] (containing, in Article 6, a duty to provide remedies to private actors for alleged violations of domestic environmental laws and regulations). The George H.W. Bush administration originally negotiated NAFTA. *See* C. O'Neal Taylor, *Fast Track, Trade Policy, and Free Trade Agreements: Why the NAFTA Turned into a Battle*, 28 GEO. WASH. J. INT'L L. & ECON. 1, 2 (1994). In 1993, however, after the signing of NAFTA and with ratification of the agreement pending, the United States elected William J. Clinton as president. *Id.* at 4. As a precondition to proceeding with the ratification process, Clinton pushed for the inclusion of a parallel agreement on labor and environmental standards. *Id.* The three countries then signed the North American Agreement on Environmental Cooperation (NAAEC). *Id.* at 109. Under NAAEC, private actors could not bring the issue to the attention of the commission. *See* NAAEC, *supra*. Moreover, the agreement did not contemplate parties' concrete actions or inactions to avoid enforcing environmental protections that could have an impact on trade. *Id.*; *see* Bradly J. Condon, *NAFTA and the Environment: A Trade-Friendly Approach*, 14 NW. J. INT'L L. & BUS. 528, 531–34 (1994) (providing commentary on NAFTA's friendly approach to the enforcement of environmental laws).

[302] USMCA, *supra* note 28, art. 24.2. Article 24.5.3 of the CETA has similar wording, but specifically prohibits Parties from neglecting the enforcement of environmental laws to attract investment or encourage trade. *See* CETA, *supra* note 230, art. 24.5.3 (stating "[a] party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its environmental law to encourage trade or investment"). The USMCA instead prohibits enforcement failures that "affect[] trade or investment." USMCA, *supra* note 28, art. 24.4.1. As such, the USMCA could be more comprehensive. *See id.* The CETA also establishes that no environmental legislation can be abrogated or waived to promote trade and investment. *See* CETA, *supra* note 230, art. 24.5.2 (stating "[a] Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental law, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory"). The CCFTA is accompanied by the Canada-Chile Agreement on Environmental Cooperation and the NAAEC. *See generally* CCFTA, *supra* note 290; Canada-Chile Agreement on Environmental Cooperation, Can.-Chile, Feb. 6, 1997, 36 I.L.M. 1193; NAAEC, *supra* note 301. According to Article 24 of the NAAEC, a party may invoke an arbitration panel to "consider the matter where the alleged persistent pattern of failure by the Party complained against to effectively enforce its environmental law relates to a situation involving workplaces, firms, companies or sectors that produce goods or provide services." NAAEC, *supra* note 301, art. 24.1. As such, this mechanism resembles the one in the USMCA in that a failure to enforce environmental laws must be connected with a traded good or service. *See id.*; USMCA, *supra* note 28, art. 24.4.1 & n.4. It does not have to be, as stated in CETA, for the purposes of encouraging or expanding the trade as long as it is connected to trade. *See* CETA, *supra* note 230, art. 24.5. Article 20.3(4) of the CPTPP uses nearly identical wording as the USMCA. *See* USMCA, *supra* note 28, art. 24.4; CPTPP, *supra* note 211, art. 20.3(4).

investment between the Parties."[303] The "action" or "inaction" then must be "consistent or ongoing" and "occur[] periodically or repeatedly."[304] "Isolated instance[s]" cannot be considered breaches of the USMCA environmental protections.[305] The treaty, however, recognizes that states have enforcement discretion over their environmental regulations.[306] A state complies with the USMCA when its environmental enforcement action demonstrates either the use of (1) reasonable use of discretion or (2) a bona fide decision to distribute resources pursuant to the state's environmental enforcement priorities.[307]

The treaty further enlists and enforces a series of multilateral conventions of which the three nations are parties.[308] These include important treaties that affect the environment and the energy sector, such as the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer and the 1978 Protocol Relating to the International Convention for the Prevention of Pollution from Ships.[309] Yet, the treaty does not mention the most recent multilateral treaties that address climate change directly, such as the Paris Agreement or the U.N. Framework Convention on Climate Change.[310] Nonetheless, parties can agree to alter the list, including by adding additional agreements to it.[311]

The listed common multilateral conventions must be enforced at the domestic level.[312] If the state fails, there are remedies available in the treaty to steer the government into compliance.[313] There is, however, a caveat. For USMCA enforcement provisions to apply to a violation of the multilateral agreements, government actions must be "in a manner affecting trade or investment between the Parties."[314] Further, the USMCA sets up a standard to use to identify when a breach of a multilateral environmental treaty affects trade or investment.[315] The breach must involve a party providing a good or service that either: (1) trades "between the Parties or has an investment in the territory of

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[303] USMCA, *supra* note 28, art. 24.4.1 (footnotes omitted).

[304] *Id.*, art. 24.4.1 n.3. (defining "sustained or recurring course of action or inaction" within the meaning of the article and clarifying that "[a] course of action or inaction does not include an isolated instance or case").

[305] *Id.*

[306] *See id.*, art. 24.4.2.

[307] *Id.* Again, Article 20.3.5 of the CPTPP has the same wording as the USMCA. *See id.*; CPTPP, *supra* note 211, art. 20.3(5).

[308] *See* USMCA, *supra* note 28, art. 24.8.

[309] *Id.*, art. 24.8.4(b)–(c).

[310] *Id.*, art. 24.8.

[311] *Id.*, art. 24.8.5. Thus, under this provision, the United States, Canada, and Mexico could add the most important climate change agreements into the mix of enforceable agreements listed in the treaty. *See id.*

[312] *Id.*, arts. 24.8.2, 24.8.4.

[313] *Id.*, art. 24.8 n.6.

[314] *Id.*

[315] *Id.*

the Party that has failed to comply with this obligation"; or (2) "competes in the territory of a Party with a good or a service of another Party."[316] For Mexico, however, under domestic legislation, ratified environmental and climate change agreements have the force of law above federal legislation, but below the Mexican Constitution.[317] These agreements do not require additional legislation to make them enforceable.[318]

Another way that the USMCA impacts the enforcement of domestic environmental standards is by establishing the duty to "maintain appropriate procedures for assessing the environmental impacts of proposed projects."[319] The states' environmental impact assessment must be done "with a view to avoiding, minimizing, or mitigating adverse effects" on the environment.[320] These procedures have a transparency standard, as they force the state to allow the public to learn of this information, as well as participate.[321]

The recognition in Article 24.14 that "flexible, voluntary mechanisms" including "market-based mechanisms" and "public-private partnerships" are to be encouraged by states to achieve "high levels of environmental protection and complement domestic regulatory measures" provides yet another recognition of market-oriented principles to address externalities produced by energy resources.[322] As opposed to recognizing the importance of a prescriptive regulation mandated by agencies, the USMCA recognizes the value of performance-based standards set up by the industry itself. Article 24.14 further

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[316] *Id.*

[317] Dechero humano a un medio ambiente sano. Su contenido, amparo directo en revisión 5452/2015, Suprema Corte de Justicia [SCJN], Gaceta del Semanario Judicial de la Federción, Décima Época, Tomo I, Diciembre de 2017, Tesis CCXLVIII/2017, página 411 (Mex.) (recognizing the constitutional right to a healthy environment and stating that, from international agreements "there is recognition of the right to a healthy environment; . . . the State is bound to establishing measures that protect and allow the development of the law; and . . . citizens are bound to the protection of the environment"); Antonio Moreira Maués, Breno Baía Magalhães, Paulo André Nassar & Rafaela Sena, *Judicial Dialogue Between National Courts and the Inter-American Court of Human Rights: A Comparative Study of Argentina, Brazil, Colombia and Mexico*, 21 HUM. RTS. L. REV. 108, 118–19 (2021) (describing the hierarchy of human rights treaties in Mexico under Article 1 of its Constitution); *see* Cody Copeland, *Mexico Supreme Court Sets Precedent for Environmental Impact Assessments*, COURTHOUSE NEWS SERV. (Feb 10, 2022), https://www.courthousenews.com/mexico-supreme-court-sets-precedent-for-environmental-impact-assessments/ [https://perma.cc/643S-T33L] (describing the Mexican Supreme Court decision that identified environmental obligations as human rights).

[318] Maués et al., *supra* note 317, at 118–19. Mexico has signed several environmental agreements, including the Paris Climate Agreement. *See, e.g.*, Paris Agreement, *supra* note 16. Even if multilateral conventions enforcement in the USMCA is limited, most of the relevant climate change agreements of the past decade in Mexico fall under the enforcement provisions like any other piece of federal legislation.

[319] *See* USMCA, *supra* note 28, art. 24.7.1.

[320] *Id.*

[321] *Id.*, art. 24.7.2.

[322] *See id.*, art. 24.14.1.

acknowledges that states shall encourage these private-oriented voluntary mechanisms to achieve environmental impact mitigation goals.[323]

In line with the market-oriented view of energy sovereignty, the USMCA also seeks to "facilitate and promote trade and investment in environmental goods and services."[324] These goods and services include clean technologies "as a means of improving environmental and economic performance."[325] Article 24.24 even empowers the Environmental Committee to "consider issues identified by a Party related to trade in environmental goods and services, including issues identified as potential non-tariff barriers to that trade."[326] As such, goods and services connected to renewable energy can fit under Article 24.24. Suppose a state enacts discriminatory policies or takes actions that hinder the flow of these products and services. In that case, the state's actions could be subject to the USMCA's dispute resolution proceedings.

D. Dispute Resolution Mechanisms to Balance Energy Sovereignties

In the energy sector, there are at least three ways to resolve disputes. The energy sector's first and most employed mechanism is the investor-state dispute settlement (ISDS).[327] Foreign investors trigger this dispute resolution proceeding when host governments breach investor rights that are recognized in the treaties.[328] Investors cannot trigger this mechanism against their home governments.[329] After exhausting procedural steps, the system allows investors to initiate an international arbitration proceeding against the host state for actions that allegedly breached Chapter 14 of the USMCA.[330] As will be explained below in further detail, the USMCA has scaled back many of the ISDS provisions available under NAFTA.[331] Yet, at the same time, the USMCA created a special regime for U.S. investments in the Mexican energy sector.[332]

The second dispute resolution mechanism available to resolve energy disputes is the state-state dispute settlement mechanism set out in Chapter 31 of

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[323] *Id.*, art. 24.14.2.

[324] *Id.*, art. 24.24.2.

[325] *Id.*, art. 24.24.1.

[326] *Id.*, art. 24.24.3.

[327] *See* CAMERON, *supra* note 72, at 32–33.

[328] *Id.*; *see* Garcia Sanchez, *supra* note 74, at 477–79.

[329] Garcia Sanchez, *supra* note 74, at 483.

[330] *Id.* at 481–82.

[331] *See infra* notes 355–365 and accompanying text (discussing the three major differences between the two agreements).

[332] *See generally* NAFTA, *supra* note 64, ch. 11 (failing to designate a regime for investments in Mexican energy).

the USMCA. [333] Here, the USMCA is an improvement over NAFTA because it makes it harder for a party to block the establishment of a panel.[334] This second mechanism is triggered by one of the three governments and allows the government to bring a claim against another party for allegedly violating the treaty's provisions.[335] Under Chapter 31, a party can bring a claim under three instances. First, the chapter allows trading partners to trigger the mechanism when there is a dispute concerning the USMCA's "interpretation or application."[336] Second, a party may assert a claim when its trading partners (1) propose or adopt a trade-affecting measure inconsistent with the USMCA, or (2) fail to satisfy a USMCA obligation.[337] Third, parties may initiate a proceeding when one partner has "nullified or impaired" a benefit that its partner "could reasonably have expected to accrue to it" under the USMCA.[338] Chapter 31 of the USMCA, in contrast with the ISDS, draws substantially on NAFTA's Chapter 20 and includes more complex enforcement provisions.[339]

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[333] *See generally* USMCA, *supra* note 28, ch. 31 (outlining dispute mechanisms available to the parties).

[334] *See id.*; David A. Gantz, *The United States and NAFTA Dispute Settlement: Ambivalence, Frustration and Occasional Defiance* 356, 385 (Ariz. Legal Stud., Discussion Paper No. 06-26, 2009) (discussing the state-to-state settlement mechanism under NAFTA); Joost Pauwelyn, *Adding Sweeteners to Softwood Lumber: The WTO-NAFTA 'Spaghetti Bowl' Is Cooking*, 9 J. INT'L ECON. L. 197, 204 (2006) (providing examples of such disputes and their resolutions); David A. Gantz, *Government-to-Government Dispute Resolution Under NAFTA's Chapter 20: A Commentary on the Process*, 11 AM. REV. INT'L ARB. 481, 492–94 (2000) (describing procedural delays); Sidney Picker, Jr., *The NAFTA Chapter 20 Dispute Resolution Process: A View from the Inside*, 23 CAN.-U.S. L.J. 525, 529–32 (1997) (detailing the lack of a complete roster of potential panelists).

[335] *See generally* USMCA, *supra* note 28, ch. 31 (laying out the dispute mechanism and its requirements).

[336] *Id.*, art. 31.2(a) (stating that the USMCA dispute mechanism applies "with respect to the avoidance or settlement of disputes between the Parties regarding the interpretation or application of this Agreement").

[337] *Id.*, art. 31.2(b).

[338] *Id.*, art. 31.2(c). In the past, treaty partners brought cases against each other concerning the failure to authorize cross-border services or the adoption of agricultural tariffs not permitted under NAFTA. *See generally* In the Matter of Cross-Border Trucking Servs. (Mex. v. U.S.), Secretariat File No. USA-MEX-98-2008-01 (NAFTA Arb. Panel 2001) (evaluating Mexico's claim against the United States regarding an alleged failure of the United States to authorize Mexican truckers to deliver cross-border services). The United States also triggered this mechanism against Canadian tariffs applied to certain American agricultural products. *See generally* In the Matter of Tariffs Applied by Can. to Certain U.S.-Origin Agric. Prods., Secretariat File No. CDA-95-2008-01 (NAFTA Arb. Panel 1996).

[339] *See* USMCA, *supra* note 28, art. 31.19. *See generally* NAFTA, *supra* note 64, ch. 20 (outlining the procedures of dispute mechanisms). These enforcement provisions are spread out in the USMCA and are chapter-based. *See generally* USMCA, *supra* note 28. Once a final report is issued, the parties must seek to resolve the dispute within 45 days. USMCA, *supra* note 28, art. 31.19.1. As such, the parties ultimately may decide how to resolve the dispute. *See id.* They may agree that the losing party must repeal an act or legislation, or they may agree on particular compensation. *See id.*, art. 31.19. If the parties are unable to agree on how to resolve the dispute within forty-five days, then the complaining party may suspend trade benefits to the responding party. *Id.*, art. 31.19.1. The suspen-

The main challenge with the state-state provisions, from the industry perspective, is that they require the governments' goodwill to initiate the proceedings and suspend trade benefits in case the other state is found to be in breach of the treaty.[340] Hence, companies or individuals must lobby their respective trade representatives into bringing a claim against another North American partner. This is a process that, by its nature, can quickly become politicized and subject to other foreign affairs considerations.[341]

Finally, the USMCA sets up a hybrid dispute resolution mechanism involving a committee that processes individual claims under the environmental chapter.[342] Yet, this mechanism does not have the same force as the ISDS mechanism because enforcement of the recommendations depends on the state-state dispute resolution mechanism.[343] The individual activation of claims for breaches of the environmental chapter of the USMCA starts at the domestic level.[344] It begins with the obligation to publicize environmental laws and pro-

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sion must have an "equivalent effect" to the measure or conduct found inconsistent with the USMCA by the panel. *Id.* Moreover, the suspended benefit cannot be connected to a different sector than the one involved in the dispute unless such a suspension would be ineffective or impracticable. *Id.*, art. 31.19.2. If the suspension is "manifestly excessive" or has cured the violation, the responding party may request reconsideration of the issue by the original panel. *Id.*, art. 31.19.3. The panel must "provide its views as to the level of benefits it considers to be of equivalent effect." *Id.* If the panel finds that the USMCA violation persists, that is, that the measure did not cure it, the complaining party may continue the suspension of benefits up to the level determined by the panel. *Id.*, art. 31.19.4.

[340] *See* USMCA, *supra* note 28, art. 31.19.

[341] *See, e.g.*, Anthony Esposito, *U.S. Lawmakers Complain to Trump Over Mexican Energy Policy*, REUTERS (Oct. 23, 2020), https://www.reuters.com/article/us-usa-mexico-energy-idUSKBN2782BH [https://perma.cc/7XDU-98S7] (stating that the Trump administration did not respond to a bipartisan letter from Congress requesting that the White House condemn Mexico's new energy policy in 2020).

[342] *See* USMCA, *supra* note 28, art. 24.27 (providing the conditions under which individuals can file a submission on behalf of a party failing to effectively enforce its environmental laws).

[343] *Id.* The agreement builds on pre-existing NAFTA parallel agreements concerning the environment, specifically, the NAAEC. *See id.*; NAFTA, *supra* note 64; Taylor, *supra* note 301, at 2. The NAAEC established a commission, that among other things, had the power to review citizen complaints regarding the lack of enforcement of domestic environmental laws. Taylor, *supra* note 301, at 109–10. For a review on the Commission's work, see generally John H. Knox, *A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 ECOLOGY L.Q. 1 (2001) and John H. Knox & David L. Markell, *Evaluating Citizen Petition Procedures: Lessons from an Analysis of the NAFTA Environmental Commission*, 47 TEX. INT'L L.J. 505 (2012).

[344] USMCA, *supra* note 28, art. 24.6.1. The members of the USMCA must provide legal mechanisms by which individuals in the state can submit questions or comments regarding the implementation of environmental provisions. *Id.* The treaty further establishes duties to respond promptly to these questions or concerns in writing and to make them available to the public. *Id.*, art. 24.5.2. The USMCA even forces the states to "make use of existing, or establish new, consultative mechanisms" through which comments on the implementation of the treaty's environmental provisions can be received. *Id.*, art. 24.5.3. Moreover, the states must ensure that interested persons "have appropriate access to administrative, quasi-judicial, or judicial proceedings for the enforcement of the Party's

vide local enforcement mechanisms for all citizens of the treaty's partners. [345] If the domestic proceedings are ineffective in addressing a lack of enforcement, then any person in the North American region may file a submission to the Commission for Environmental Cooperation asserting that one of the countries is "failing to effectively enforce its environmental laws."[346] If the issue is not resolved by the Commission, the next steps involve state to state consultations.[347] If the dispute remains unresolved, it could then trigger a state-state panel under Chapter 31.[348]

The USMCA environmental chapter dispute resolution mechanism therefore provides a hybrid system of accountability. Yet, it does not reach an enforcement level equal to the one provided to foreign investors under the ISDS mechanism.[349] The USMCA's hybrid mechanism, however, positively advances the way that parties may enforce their environmental laws and shared multilateral agreements by subjecting issues to international scrutiny.[350] The domestic mechanism must comply with clear standards and publicity mechanisms

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environmental laws." *Id.*, art. 24.6.2. The individuals' access is coupled with the "right to seek appropriate remedies or sanctions for violations of those laws." *Id.* Regarding available remedies and sanctions, the parties "shall ensure that [they] take[] account of relevant factors when establishing sanctions or remedies, which may include the nature and gravity of the violation, damage to the environment, and any economic benefit derived by the violator." *Id.*, art. 24.6.7. The treaty also specifies that the domestic proceedings must be "fair, equitable, transparent, [compliant] with due process of law, ... [and] not unnecessarily complicated." *Id.*, art. 24.6.3.

[345] *Id.*, art. 24.5.3. The USMCA fosters internal mechanisms of accountability for the treaty's enforcement instead of relying exclusively on external international adjudicatory bodies or committees. *See id.* This approach resembles what some liberal international law scholars argue is the most effective mechanism to enforce international legal obligations—state internalization of international law within its domestic legal system. *See generally* Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999); Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. PROC. 240 (2000).

[346] USMCA, *supra* note 28, art. 24.27.1. The submissions are filed with the Environmental Commission Secretariat, who then reviews whether the submissions "appear[] to be aimed at promoting enforcement rather than at harassing industry." *Id.*, art. 24.27.2(d).

[347] *Id.*, arts. 24.29–24.32.

[348] *Id.*, art. 24.32.1 (stating that if all previous consultations fail, parties may request, under Article 31.6, that a state-state dispute resolution panel be established). If the dispute involves issues on the enforcement of multilateral environmental agreements, the panel shall "seek technical advice or assistance . . . from an entity authorised under the relevant multilateral" treaty. *Id.*, art. 24.32.2(a). In any case, the panel shall "provide due consideration to any interpretive guidance" from the multilateral entities. *Id.*, art. 24.32.2(b).

[349] *See supra* notes 328–332 and accompanying text (discussing the ISDS).

[350] *See generally* USMCA, *supra* note 28, ch. 24 (providing for this hybrid dispute mechanism). This approach contrasts with the one taken in CETA, where the parties agreed to create a Committee on Trade and Sustainable Development. CETA, *supra* note 230, arts. 22.4.1, 26.2.2(g). In the CCFTA, Colombia and Canada signed a parallel agreement providing for the creation of a Committee on Environment. CCFTA, *supra* note 290, arts. 1703–1704. The trans-Pacific partners took the same approach in Article 25.6 of the CPTPP for regulatory cooperation on environmental issues. CPTPP, *supra* note 211, art. 25.6.

that can steer governments into enforcing their own environmental laws.[351] If governments fail to do so, the USMCA allows individuals to file a request at the international level to set up a record, publicly exposing that the governments are avoiding their environmental duties.[352] The system, however, remains weak by entrusting the governments to bring the claim to the next enforcement level.[353] In the next step, the state-state dispute mechanism, litigation is contingent on the government's goodwill and can be subject to political considerations and tradeoffs.[354]

1. Investor-State Dispute Settlement

The USMCA's investor-state dispute settlement mechanisms are substantially different for most investments when compared to NAFTA. There were three significant changes. First, the mechanism excludes investments made by Canadian nationals in the region.[355] NAFTA gave Canadian investors the opportunity to bring claims against policies taken by the United States and Mexican governments.[356] Under the USMCA, Canadian investors have a three-year window to bring claims against the U.S. government.[357] Yet, Canadian investors in Mexico can still bring claims under the CPTPP because Mexico and Canada are both parties to that agreement.[358]

The second significant change in the way the USMCA deals with investment claims, which has a particular effect on energy-related cases, is the clarification in Chapter 14 on the substance of several standards that NAFTA did not define. Chapter 14 clarifies the concept of indirect expropriation, the minimum treatment accorded to foreigners under customary international law, the role of the legitimate expectations of investors, and the new exceptions on welfare policies.[359]

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[351] *See* USMCA, *supra* note 28, arts. 24.5.2, 24.6.1.

[352] *See id.*, art. 24.27.1.

[353] *See id.*, arts. 24.29–24.32.

[354] *See id.*, art. 31.19.

[355] *Id.*, art. 14.2.4.

[356] *See generally* NAFTA, *supra* note 64, ch. 11 (outlining remedies for investors). In fact, since 1998, Canadian investors have been the primary claimants in investment arbitration proceedings against the United States. *Investment Dispute Settlement Navigator: United States of America*, UNCTAD INV. POL'Y HUB, https://investmentpolicy.unctad.org/investment-dispute-settlement/country/223/united-states-of-america/respondent [https://perma.cc/QZ6L-MPZC] (indicating that 18 of the 23 NAFTA claimants were Canadian).

[357] USMCA, *supra* note 28, annex 14-C, ¶ 3.

[358] *See generally* CPTPP, *supra* note 211, ch. 9 (outlining how an investor may bring a claim against another party).

[359] *See* USMCA, *supra* note 28, ch. 14 (defining these terms and standards); *supra* notes 219–281 (discussing these standards of protections).

Third, the USMCA limits the types of claims investors may bring to the ISDS system. Companies can only bring claims involving (1) direct expropriation and (2) national treatment and most-favored-nation treatment.[360] There is a broad exclusion of claims on the "establishment or acquisition of an investment."[361] The remaining rights in Chapter 14, particularly those connected to indirect expropriation and the minimum standard of treatment, can still be brought in the state-state dispute resolution mechanism. That is, the company may be able to convince its home government to bring a claim under the general dispute resolution mechanism in Chapter 31, but, as explained above, political considerations may impact this possibility.[362] Investors, however, can still bring these claims in domestic proceedings against the host state. The effectiveness of such a challenge depends on how international trade agreements are integrated into the domestic legal system and the hierarchy of these vis-à-vis federal laws or executive decrees that could affect the investment.[363] It is beyond the scope of this Article to describe in detail the differences between the United States, Canadian, and Mexican hierarchies of international agreements. Nevertheless, suffice it to say that in some circumstances, such as in Mexico, treaties have hierarchy above federal law, and when treaties recognize rights to individuals, these rights may even be considered on equal footing as constitutional protections. This is particularly relevant in the context of the USMCA because, in general, all investor claims must first exhaust domestic remedies or defend claims locally for thirty months before bringing the claim to an international tribunal.[364] There is a caveat, though, if the investor can prove that the domestic action would be "obviously futile."[365]

In the energy sector, all of these reforms in the ISDS mechanism of the USMCA seem to benefit a government-centered energy sovereignty. The system essentially carves out many of the traditional claims that energy investors bring: indirect expropriation and breaches of FET.[366] Moreover, by forcing investors to first litigate in domestic courts, the system causes investors to consider the additional time these proceedings cost when deciding whether to activate an international claim. For these reasons, the USMCA created a special regime for government contracts signed by the Mexican State with private investors in strategic sectors.

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[360] USMCA, *supra* note 28, annex 14-D, art. 14.D.3.1(a)(i).
[361] *Id.*, art. 14.D.3.1(a)(i)(A).
[362] *See generally id.*, ch. 31 (providing for dispute mechanisms).
[363] *See id.*, art. 14.D.5.
[364] *Id.*
[365] *Id.*, art. 14.D.5.1(b) n.25.
[366] *See id.*, art. 14.D.3.

The special regime for U.S. investments in the hydrocarbon, power generation, telecommunications, transportation, and infrastructure sectors in Mexico provides the full protections of Chapter 14.[367] That is, investors can bring claims against Mexico for indirect expropriation, breach of the minimum standard of treatment of foreigners, most-favored-nation treatment, and national treatment.[368] Moreover, there is no requirement to exhaust domestic remedies. Each American company that has invested in the power generation sector of Mexico and signed contracts with Mexican authorities can bring claims for changes in the regulation that mistreat them, discriminate against them, or that could substantially interfere with their business model.[369] The clarifications on the scope of the investors' legitimate expectations and the customary international law components of the minimum standard of treatment still apply to these claims. The general exception of Chapter 32, regarding essential security interests, and the welfare exception in Chapter 14 also apply to the special regime.[370]

Notwithstanding the clarifications and exceptions, the special United States-Mexico government-covered contracts ISDS regime makes clear that the USMCA negotiators ensured the protection of the energy sector from abrupt policy changes. The USMCA special regime, as such, can be classified as a market-oriented energy sovereignty approach to ISDS. It provides investors with an entire panoply of litigation tools to defend their investment. In theory, this approach provides security to these investments against the nationalistic views of the central government. In reality, however, as has been explained in this Article, if the state keeps the fundamental variables of a government-centered approach to energy sovereignty, even with treaties' investment section assurances, companies cannot expect the state to respect its contractual obligations fully. Once energy policy is seen through the lenses of energy sovereignty, international investment agreements or stabilization clauses attempt to tame a wild beast that naturally aims to absorb as many rents as it can. Suppose the state sees its energy security through government-oriented views. In that case, it will do everything in its power, under strained circumstances, to control the sector, even if down the line it must compensate the investor for it.[371]

Governments under this approach are not afraid of litigation. Instead, they fear losing control of the energy sector.[372] Compensating companies for actions

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[367] *See generally id.*, ch. 14 (detailing investor rights).

[368] *Id.*

[369] *Id.*

[370] *Id.*, chs. 14, 32.

[371] *See generally* Garcia Sanchez, *supra* note 74 (discussing the impact, or lack thereof, of investment tribunal decisions on rent-seeking behavior).

[372] *See id.* at 479–80 (discussing how host governments care more about control than losing an international tribunal case).

taken does not prevent policies from being enacted. Compensation is just another transaction cost that can be transferred down to future administrations, and those costs can be recouped by the seized investment when the prices of the commodities are high.[373] The state can use the same assets taken from investors to compensate them down the line.[374] When a state, however, sees energy sovereignty through a market-oriented lens, it will seek to attract as many private parties from abroad as possible. Only by securing a diversity of actors in the sector can the state ensure that energy will flow in and out of its jurisdiction. The diversification of actors can ensure energy security in the state's territory. In those contexts, the threats of losing investments and scaring investors by forcing them to renegotiate contracts can potentially chill government policies.

CONCLUSION

The trade of energy products and sources is as old as the history of human civilization itself. We can find the use of fuels in ancient Egypt, Greece, China, and Native American societies, including the Seneca tribes and the Aztec empire. Ancient cultures traded and used bitumen and oil for lighting, construction, and even weapons of war. With the advent of the industrial revolution and the invention of the steam engine, energy sources became a global commodity that would define the future of empires. Without secure energy sources, none of the existing and rising powers could have sustained their position worldwide. The fear of being a country subject to blackouts, without enough electricity or fuels to power its economy and military, is still embedded in government and national identities today. It is no surprise that the search for energy security is coupled with the sovereign rights to extract and regulate energy sources. The confluence of energy, security, and independence, however, has also complicated international governance.

As described in this Article, international energy governance is characterized by a multiplicity of instruments that regulate the extraction, transfer, and use of energy sources. Some of these instruments deal with energy directly, such as the ECT or energy chapters in free trade agreements. Others deal with energy indirectly, by touching on the externalities that energy production has on the environment. As this Article explains, these instruments can be divided into four silos: (1) trade and investment of energy sources; (2) energy poverty and development; (3) security and diplomacy; and (4) externalities of energy production. These instruments sometimes contradict each other and create tension that prevents nations from facing common challenges, such as the com-

[373] *Id.* at 498 (asserting that the costs of compensation do not outweigh the many other benefits that host governments appreciate).

[374] *Id.* at 480.

batting the global climate crisis, or building an efficient and resilient energy matrix that bolsters the economies of trading partners.

This Article proposes two archetypical views of how states exercise their sovereign right to regulate the energy sector and how their choices impact international energy governance. To achieve energy sovereignty, some states rely on market-oriented tools, by promoting treaties that lower access barriers to private investors so that energy products can be brought back to the home country. Other states rely on government-centered policies, by creating state-owned enterprises or controlling domestic energy markets, to reduce the power of foreign influence. The different energy sovereignties this Article describes are valuable for understanding why international instruments seem ineffective in addressing existing energy challenges. The global legal landscape that regulates energy ultimately mirrors these different sovereignties and the power that each state has to imprint their energy choices on the treaties. The same treaties have dispositions that reflect the competing views and ultimately lead to conflicts of interpretation.

This Article analyzed the USMCA to describe how the agreement reflects different ways in which the energy sovereignties are exercised. The existing underpinnings in the USMCA are weak in steering governments into thinking in regional terms. On the contrary, this Article argues that the USMCA reflects the emerging tensions of the conflicting energy goals of treaty partners. Like many other trade and investment agreements, the USMCA lacks a shared vision of what the sector in an integrated region should look like. It is a template of conflicting domestic energy goals and policies. Rather than serve as a tool for addressing conflicts, the USMCA is the battlefield where these conflicts play out. The USMCA, as such, reflects how undecided governments perceive the future of North American energy flow and production. The treaty does not align the partners' energy priorities, but rather offers a mechanism through which arbitrators and committees can reconcile competing energy sovereignties.