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Bizarre Love Triangle: The Trilateral Responses to Tame the United States-Mexico Border

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BIZARRE LOVE TRIANGLE: THE TRILATERAL RESPONSES TO TAME THE UNITED STATES-MEXICO BORDER

James M. Cooper*

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I. THE VIEW FROM THE AMBASSADOR’S OFFICE

“Look at that; they are burning banks,” complained the man wearing cowboy boots as he watched CNN on a television set in his office at the United States Embassy in Mexico City. Black smoke billowed out of a branch of Banco Santander in Mar del Plata, Argentina. “Why does everyone hate globalization so much?” asked Antonio Garza, Jr., United States Ambassador to Mexico in the administration of U.S. President George W. Bush, formerly Texas Secretary of State under then Governor George W. Bush.¹ The news coverage showed Argentine President Nestor Kirchner, Venezuelan President Hugo Chávez, and football legend Diego Maradona

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1. *Antonio O. Garza, Jr.*, COUNCIL AM. AMBASSADORS, https://www.americanambassadors.org/members/antonio-o-garza-jr_ (last visited Mar. 14, 2022).

cheering on crowds—estimated at 25,000 people—to protest *yanqui* imperialism in the form of the Free Trade Agreement of the Americas treaty under negotiation.² As Nikolas Kozloff wrote:

Located 230 miles south of Buenos Aires, Mar del Plata is nominally a peaceful Argentine beach resort. But during the Fourth Summit of the Americas in November 2005, the city was burned into a riot zone as activists protested the presence of President George Bush. The protests included *piqueteros*, anarchists, and community and labor groups. At one point, demonstrators hurled a Molotov cocktail and set a bank on fire. In an effort to get the situation under control, police fired tear gas.³

The protests in Mar del Plata were part of the many anti-globalization demonstrations that began more than a decade before. In the south of Mexico on January 1, 1994, the first day the North American Free Trade Agreement (NAFTA)⁴ went into force, the Zapatista rebellion took root.⁵ Later, there were protests against the World Trade Organization (WTO) in Seattle,⁶ against the International Monetary Fund (IMF) and the World Bank in Washington D.C.,⁷ anti-Free Trade Agreement of the Americas (FTAA)

2. MICHAEL REID, FORGOTTEN CONTINENT: THE BATTLE FOR LATIN AMERICA'S SOUL 309 (2006).

3. NIKOLAS KOZLOFF, HUGO CHÁVEZ: OIL, POLITICS, AND THE CHALLENGE TO THE UNITED STATES 73 (2006).

4. North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA]. Congress approved NAFTA by means of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (codified at 19 U.S.C. § 3311 (2006)). NAFTA went into force on January 1, 1994. Exec. Order No. 12,889, 58 Fed. Reg. 69, 681 (Dec. 27, 1993).

5. Because the EZLN [Ejército Zapatista de Liberación Nacional] uprising directly pointed at the exclusionary and exploitative practices of the Mexican socioeconomic and political systems, it contributed to the weakening of the one-party regime during the latter's years. It also contributed to the weakening of the prosperous façade that the regime had tried to create by implementing economic reforms that allowed the country to become a member of the Organisation of Economic Cooperation and Development (OECD) and of the North American Free Trade Agreement (NAFTA).

MARÍA INCLÁN, THE ZAPATISTA MOVEMENT AND MEXICO'S DEMOCRATIC TRANSITION: MOBILIZATION, SUCCESS, AND SURVIVAL 3 (2018).

6. "By the time tens of thousands of people spilled into streets of Seattle to protest against a meeting of WTO officials and member-state representatives, the organization had evolved into a powerful, secretive, and corporate-influenced overseer of government's mandate to protect citizens and the environment from corporate harms." JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER 22-23 (2004).

7. "Virtually every major meeting of the International Monetary Fund, the World Bank, and the World Trade Organization is now the scene of conflict and turmoil." JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 3 (2002).

protests in Québec City,⁸ the anti-Group of Seven protests in Genoa,⁹ and finally, the chaos in Mar del Plata.¹⁰

With each successive trade agreement,¹¹ institutional annual meeting, and global trade negotiation round that aimed to create the institutional underpinnings of the global economy, violence erupted in the streets outside the meeting forum.¹² Nobel laureate Joseph Stiglitz wrote:

International bureaucrats—the faceless symbols of the world economic order—are under attack everywhere. Formerly uneventful meetings of obscure technocrats discussing mundane subjects such as concessional loans and trade quotas have now become the scene of raging street battles and huge demonstrations.¹³

The events unfolding on television on that day in November 2005 signaled the beginning of the end of the Washington Consensus,¹⁴ the policy promoted by the Bretton Woods institutions (IMF and World Bank) and the United States Department of Treasury. These prescriptions encompassed,

8. The FTAA called for “the establishment of a hemispheric free trade area that would cover the whole continent and that would be, from an economic and political, perspective, the most significant express of Pan-Americanism.” MARÍA BELÉN OLMOS GIUPPONI, *RETHINKING FREE TRADE, ECONOMIC INTEGRATION AND HUMAN RIGHTS IN THE AMERICA* 21 (2017).

9. Alessandra Stanley & David E. Sanger, *Italian Protester Is Killed by Police at Genoa Meeting*, N.Y. TIMES, July 21, 2001, at A16. *See generally* James Gerstenzang, *Summit Opens Amid Deadly Street Protests*, L.A. TIMES, July 21, 2001; Richard Boudreaux & Marjorie Miller, *Genoa on Minds of Protestors*, L.A. TIMES (July 18, 2001, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2001-jul-18-mn-23619-story.html>; Robert Fife, *This One Could be the Last*, NAT'L POST, July 21, 2001, at A1; Aaron Bernstein et al., *Time to Regroup*, BUS. WK., Aug. 6, 201, at 26; *see also* Michael Elliott, *Death in Genoa*, TIME (July 30, 2001), <http://content.time.com/time/subscriber/article/0,33009,1000417,00.html>.

10. KOZLOFF, *supra* note 3, at 73.

11. In addition to focusing on the FTAA, the U.S. Government pursued a parallel strategy of concluding other trade agreements to benefit U.S. exporters and consumers. *See* James Cooper, *Spirits in the Material World: A Post-Modern Approach to United States Trade Policy*, 14 AM. U. INT'L L. REV. 957 (1999). Pacts like the U.S.-Chile Free Trade Agreement and CAFTA have gone into force and the U.S.-Peru and U.S.-Colombia Free Trade Agreements have been successfully negotiated.

12. A study by the World Development Movement highlighted that between 1999 and 2000, protests against IMF-dictated policies occurred in 13 developing countries and included at least 15 organized strikes, 29 demonstrations, and 16 riots or other violent incidents. *See* Jessica Woodroffe & Mark Ellis-Jones, *States of Unrest: Resistance to IMF Policies in Poor Countries* (Sept. 28, 2000), <http://www.hartford-hwp.com/archives/27d/053.html>; *see also* Carol M. Rose, *Privatization—The Road to Democracy?*, 50 ST. LOUIS U. L. J. 691 (2006).

13. STIGLITZ, *supra* note 7, at 3.

14. The Washington Consensus as I originally formulated it was not written as a policy prescription for development: it was a list of policies that I claimed were widely held in Washington to be widely desirable in Latin America as of the date the list was compiled, namely the second half of 1989.

See John Williamson, *The Washington Consensus as Policy Prescription for Development*, Institute of International Economics, Lecture in series “Practitioners of Development” 1 (Jan. 13, 2004).

“three main elements: macroeconomic stability (smaller fiscal deficits), a diminished governmental role in the economy (privatization and deregulation), and greater openness to the outside (free trade and an ‘open’ approach to foreign capital).”¹⁵ The Washington Consensus was to be achieved through fiscal discipline: the reordering public expenditure priorities, liberalizing inward foreign direct investment, liberalizing interest rates, and liberalizing financial services. It can further be achieved through tax reform, a competitive exchange rate, deregulation, privatization, and trade liberalization. These neoliberal policies had been implemented in the United Kingdom during the Thatcher government and in the United States during the Reagan administration.¹⁶ They were also imposed on the developing world as a form of “conditionality”¹⁷ once the Cold War was over in exchange for loans and grants.

As part of this global parade of mass protests and demonstrations against globalization, the battle in Mar del Plata was also a battle for Latin America’s soul: Would there be more extraction,¹⁸ plunder,¹⁹ and suffering or something different? The neoliberal model of accumulation,²⁰ economic growth, trickle-down benefits, and extraction (of minerals, agricultural products, and raw materials, profits, license fees, royalties) was now

15. MARIO ESTEBAN CARRANZA, SOUTH AMERICAN FREE TRADE AREA OR FREE TRADE AREA OF THE AMERICAS? OPEN REGIONALISM AND THE FUTURE OF REGIONAL ECONOMIC INTEGRATION IN SOUTH AMERICA 49 (2000).

16. In 1979, a Conservative government was elected in the UK under the leadership of Margaret Thatcher that abandoned its party’s postwar commitment to Keynesianism, a mixed-ownership economy and fairly generous welfare state in favour of monetarism, privatization, low taxes for wealthier people and a reduced social state. The following year the election of Ronald Reagan as President of the USA ushered in a tougher version of the same policies.

COLIN CROUCH, THE STRANGE NON-DEATH OF NEOLIBERALISM 16 (2011).

17. WORLD BANK, REVIEW OF WORLD BANK CONDITIONALITY (2005).

18. See ALEXANDER DUNLOP & JOSTEIN JAKOBSEN, THE VIOLENT TECHNOLOGIES OF EXTRACTION: POLITICAL ECOLOGY, CRITICAL AGRARIAN STUDIES AND THE CAPITALIST WORLDEATER 1 (2020) (“Total extractivism denotes how the techno-capitalist world system harbors a rapacious appetite of all life—total consumption of human and non-human resources—that destructively reconfigures the earth.”).

19. Plunder is defined as a noun meaning “pillaging” and “something taken by force, theft, or fraud: loot.” MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/plunder> (last visited Jan. 11, 2022; see also UGO MATTEI & LAURA NADER, PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL 11 (2008) (“An overly broad definition of plunder would be the inequitable distribution of resources by the strong at the expense of the weak.”).

20. DAVID HARVEY, THE NEW IMPERIALISM (2003) (exploring “accumulation by dispossession”); see also Victor D. Lippit, Social Structure of Accumulation Theory, Paper prepared for the Conference on Growth and Crisis: Social Structure of Accumulation Theory and Analysis, National University of Ireland, Galway (Nov. 2-4, 2006), <https://economics.ucr.edu/wp-content/uploads/2019/11/VictorLippit10-20-06.pdf>.

auditioning for the role of Hemispheric norm. But those who were demonstrating on the streets were not interested in the Washington Consensus, nor in what the United States' free market friendly and non-state interventionist approach proposed.²¹ U.S. President George W. Bush's visit to the Fourth Summit of the Americas slowed down the globalization process and marked a diplomatic defeat for the reformist, neoliberal policies of Hemispheric integration, harmonization, and liberalization.²² What played out of the streets of Mar del Plata was also an intra-Latin American struggle over development models.

President Hugo Chávez of Venezuela had been gunning for the FTAA and U.S. influence in the Americas for years.²³ He wanted his Bolivarian alternative—the Alianza Bolivariana para los Pueblos de Nuestra América²⁴ (ALBA)—to partner with Bolivia, Cuba, and eventually Ecuador, as well as with smaller Caribbean island countries—to become the region's trade organization of choice. Even if Latin American and Caribbean states did not join ALBA, Chávez could, at a minimum, slow the continued U.S.-led efforts to create an FTAA modeled after NAFTA.²⁵ After all, both the multilateral and bilateral free trade agreements that the United States entered into after NAFTA, such as the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA),²⁶ the United States-Chile Free Trade

21. “Clearly, in Latin America liberalization and reform have not yielded the growth results everyone had hoped for, while they have been associated with—and, to some degree, cause—a sharp increase in inequality.” Paul Krugman, *Inequality and Redistribution*, 31, 39 in *THE WASHINGTON CONSENSUS RECONSIDERED: TOWARDS A NEW GLOBAL GOVERNANCE* (Narcis Serra & Joseph E. Stiglitz eds., 2008).

22. “If there is a consensus today about what strategies are most likely to promote the development of the poorest countries in the world, it is this: there is no consensus except that the Washington Consensus did not provide the answer.” Joseph E. Stiglitz, *Is There a Post-Washington Consensus Consensus?* in *THE WASHINGTON CONSENSUS RECONSIDERED: TOWARDS A NEW GLOBAL GOVERNANCE* 41 (Narcis Serra & Joseph E. Stiglitz eds., 2008).

23. See Joel D. Hirst, *A Guide to ALBA*, AMERICAS Q., <https://www.americasquarterly.org/a-guide-to-alba/> (last visited Feb. 10, 2022).

24. *What is the ALBA?*, ALBA INFO (Mar. 20, 2019), <https://albainfo.org/what-is-the-alba/>.

25. James M. Cooper, *The North American Free Trade Agreement and Its Legacy on the Resolution of Intellectual Property Disputes*, 43 CAL. W. INT'L L. J. 157, 161-62 (2012) [hereinafter *NAFTA Legacy*]; Cooper, *supra* note 11, at 964. Cf. KEVIN P. GALLAGHER ET AL. BOSTON UNIVERSITY, *THE FUTURE OF NORTH AMERICAN TRADE POLICY: LESSONS FROM NAFTA 5* (2009) (“NAFTA and the other trade agreements based on the NAFTA template need deep reform”).

26. Dominican Republic-Central America-United States Free Trade Agreement, Central America-Dom. Rep.-U.S., Aug. 5, 2004, 43 I.L.M. 514 [hereinafter CAFTA] (implemented by the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act, Pub. L. No. 109-53, 119 Stat. 462 (2005)). Robert Lutz has explained:

The Dominican Republic-Central America Free Trade Agreement was born of controversy. From questions about the feasibility of teaming a huge developed country economy with a region of small, uneven developing country economies to those raising

Agreement,²⁷ and the United States-Peru Trade Promotion Agreement, were very similar to NAFTA.²⁸ Since Ronald Reagan, there has been a hope for a Free Trade Agreement of the Americas, a trade area that encompasses the entire Western Hemisphere with every country, save Cuba, a member.²⁹ On the morning of November 4, 2005, however, it was clear that no Hemispheric-wide trade agreement was in the offing—at least not a U.S.-led version. This accounts for United States Ambassador Tony Garza’s displeasure as he continued to share his dismay over the mayhem on the street in Mar del Plata.

The United States eventually retreated to the North American marketplace,³⁰ as evidenced by the United States-Mexico-Canada Agreement (USMCA),³¹ the successor agreement to the North American Free Trade Agreement. This article explores the role that multilateral (specifically among Canada, Mexico, and the United States) and bilateral (specifically between the United States and Mexico) agreements have played along the border and concludes that neither agreement make the border safer, nor make its working people more prosperous. The border remains a contested Wild West of sorts. Part I of this article explores the Washington Consensus and

the importance of integrating labor and environmental standards into the agreement, the debate continues about how to structure world trade to benefit all strata of society and improve the political stability and economic conditions of poor countries.

Robert E. Lutz, *CAFTA and Commercial Law Reform in the Americas: An Introduction*, 12 SW. J.L. TRADE AM. 177, 177 (2006).

27. United States-Chile Free Trade Agreement, Chile-U.S., Sept. 3, 2003, 114 Stat. 1526.

28. United States-Peru Free Trade Promotion Agreement, Peru-U.S., Apr. 12, 2006, 121 Stat. 1455 (implemented by United States-Peru Trade Promotion Agreement Implementation Act S. Rept. 110-249 (2007)).

29. Bryan Riley, *Revisiting NAFTA: Ronald Reagan on Free Trade in North America*, HERITAGE FOUND. (July 20, 2017), <https://www.heritage.org/trade/commentary/revisiting-nafta-ronald-reagan-free-trade-north-america> (quoting President Reagan, “Our goal . . . must be a day when the free flow of trade, from the tip of Tierra del Fuego to the Arctic Circle, unites the people of the Western Hemisphere in a bond of mutually beneficial exchange.”).

30. The decoupling of the U.S. economy from that of China resulted in the reshoring of jobs back to North America during the Trade War of 2018 and 2019:

Separating the effects of the various considerations supporting the reduction or elimination of Chinese supply chains may be difficult and will not be the same among all business sectors and individual enterprises, but it seems to me that the changes they are bringing about are both cataclysmic and irreversible. In my view, the advent of the USMCA has made this supply chain revision less difficult and complex than it might otherwise have been.

DAVID A. GANTZ, NORTH AMERICA’S SHIFTING SUPPLY CHAINS: THE USMCA, COVID-19, AND THE U.S.-CHINA TRADE WAR 25 (2020).

31. United States-Mexico-Canada Agreement Preamble, Nov. 30, 2018 [hereinafter USMCA], <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement>.

the culture of accumulation, plunder, and extractivism³² that it has engendered. Part II delves into various economic integration pacts that are part of the Washington Consensus starting with the NAFTA, then the Security and Prosperity Partnership (SPP), and finally, the United States-Mexico-Canada Agreement.

Robert Lutz has reminded us that “harmonization of legal rules, procedure and even legal culture is a general goal, and inevitably a by-product of such institutions as the North American Free Trade Agreement.”³³ This convergence lays the framework for the Border Industrial Complex (BIC) and the complex, often for-profit relations of private, non-state actors as they navigate among, and at times act on behalf of, sovereign states.³⁴ Part III explores how the trilateral mechanisms that partner countries used to make the U.S.-Mexico border less contested have not made the border any safer.³⁵ These trade regimes and regional arrangements have, however, increased corporate welfare.³⁶

In short, the policies associated with NAFTA’s free market, the neoliberal economics, and the Washington Consensus favor multinational corporations,³⁷ for-profit, non-state actors who lower labor and environmental standards, facilitate foreign direct investment and repatriate corporate profits through the elimination of capital flow controls. Together, adherent countries harmonize government procurement practices, standardize customs procedures, reduce security paperwork, and protect property rights—all with the goal of increasing profits. It is no surprise that the resulting democracy deficit,³⁸ challenge to national sovereignty, and lack of regard for Indigenous Peoples, labor rights, and environmental concerns,

32. See MARISTELLA SVAMPA, *NEO-EXTRACTIVISM IN LATIN AMERICA* (2019); see also EDUARDO GUDYNAS, *EXTRACTIVISMS: POLITICS, ECONOMY AND ECOLOGY* at ix (2021) (exploring the negative local impacts including ecological and health degradation and violence, and the attendant spillover consequences that redefines democracy and justice).

33. Robert E. Lutz, *Law, Procedure and Culture in Mexico under the NAFTA: The Perspective of a NAFTA Panelist*, 3 SW. J.L. TRADE AM. 391, 392 (1996).

34. See James M. Cooper, *Same As It Ever Was: The Tijuana River Sewage Crisis, Non-State Actors, and the State*, 5 CARDOZO INT’L & COMP. L. REV. 175 (2022).

35. Measuring illegal entries into the United States is highly inaccurate by the U.S. government. NAT’L RSCH. COUNCIL, *OPTIONS FOR ESTIMATING ILLEGAL ENTRIES AT THE U.S.–MEXICO BORDER 1-2* (Alicia Carriquiry & Malay Majmundar, eds. 2013).

36. Doug Bandow, *Corporate Welfare Lives On and On*, CATO INST. (Aug. 29, 2018), <https://www.cato.org/commentary/corporate-welfare-lives>.

37. MICHAEL J. TREBILCOCK, *NAVIGATING THE FREE TRADE-FAIR TRADE FAULT-LINES 4* (2021).

38. See SARAH JOSEPH, *BLAME IT ON THE WTO? A HUMAN RIGHTS CRITIQUE* 56 (2011).

have angered the working class in Latin America and other developed countries.³⁹

A similar process of marginalization, non-representation, and frustration with the free trade negotiating process has also come to typify protests against globalization in developed and developing countries alike.⁴⁰ The trade regimes, as evidenced by the results in the aftermath of the trade agreements that the United States has signed with its Hemispheric partners, have not lived up to their promises.⁴¹ When U.S. President Bill Clinton signed NAFTA, he claimed the deal “promote[d] more growth, more equality, better preservation of the environment and a greater possibility of world peace.”⁴² Neither jobs nor prosperity through the trickle-down benefits of this regime of globalization have resulted.⁴³ For the AFL-CIO, “the enduring result of NAFTA has been just the opposite: stagnant wages, increasing inequality, and weakened social protections in all three countries.”⁴⁴

For Saskia Sassen, this is “a regime associated with increased levels of concentrated wealth, poverty, and inequality worldwide.”⁴⁵ Pollution and other environmental degradation also continued as the United States

39. See Adam Warner, *A Brief History of The Anti-Globalization Movement*, 12 U. MIAMI INT’L & COMP. L. Rev. 237, 238 (2005). See also Nick Carbone, *Fight for Your Right: Antiglobalization*, TIME (Oct. 12, 2011), http://content.time.com/time/specials/packages/article/0,28804,2096654_2096653_2096684,00.html; *Environment: A Brief History of the Anti-globalization Movement*, DEUTSCHE WELLE (June 7, 2017), <https://www.dw.com/en/a-brief-history-of-the-anti-globalization-movement/g-39573255>.

40. “If the wave of rebellions and social movements spreading unevenly across the South American continent draws on long-standing insurrectionary traditions there, it can also be directly attributed to the economic dislocations created by the Washington Consensus.” TARIQ ALI, PIRATES OF THE CARIBBEAN: AXIS OF HOPE 32 (2006).

41. “In the countries that followed Washington Consensus policies, economic growth was limited at best, and disproportionately benefited those at the top.” Narcis Serra et al., *Introduction: From the Washington Consensus Towards a New Global Governance*, in THE WASHINGTON CONSENSUS RECONSIDERED: TOWARDS A NEW GLOBAL GOVERNANCE 2 (Narcis Serra & Joseph E. Stiglitz eds., 2008).

42. Conor Lynch, *America is About to Make a Horrible Mistake All Over Again*, SALON (May 8, 2015, 12:00 PM), https://www.salon.com/2015/05/08/america_is_about_to_make_a_horrible_mistake_all_over_aga_in/#:~:text=On%20the%20signing%20of%20NAFTA%2C%20President%20Clinton%20said,environment%20and%20a%20greater%20possibility%20of%20world%20peace.

43. See Gordon H. Hanson, *Can Trade Work for Workers? The Right Way to Redress Harms and Redistribute Gains*, FOREIGN AFFS. (May/June 2021), <https://www.foreignaffairs.com/articles/united-states/2021-04-20/can-trade-work-workers>.

44. Am. Fed’n of Labor and Cong. of Indus. Org., *NAFTA at 20*, AFL-CIO (Mar. 27, 2014), <https://aflcio.org/reports/nafta-20>.

45. SASKIA SASSEN, *GLOBALIZATION AND ITS DISCONTENTS* xxviii (1998).

outsourced its manufacturing work⁴⁶ and dumpsites⁴⁷ abroad. There has been an attendant “Disneyfication”⁴⁸ of sorts in which Indigenous cultures die out to allow a global brand to extract rents, license fees, and other royalties.⁴⁹ For Indigenous farmers in Chiapas and other parts of Mexico, NAFTA was “a death sentence” according to Zapatista revolutionary leader *Subcomandante Marcos*.⁵⁰

However, that was not what the purveyors of the Washington Consensus intended. Instead, free trade was pitched as a panacea, a cure-all for underdevelopment and an engine for economic growth for all through trickle-down benefits.⁵¹ With the trilateral attempts, all boats would rise with better jobs for workers, efficiencies enjoyed from comparative advantage, and bigger profits for corporations and their shareholders.⁵² It is no surprise that free trade at the U.S.-Mexico border was pursued on both sides with vigor. That enthusiasm had started before 1989 when the Canada-United States Free Trade Agreement went into force.⁵³

NAFTA was created to integrate and unite all of North America, building on the U.S.-Canada FTA to provide for harmonization, trade liberalization, and institutional reforms.⁵⁴ It was not going to be easy to achieve: “On the whole, NAFTA can be qualified as an asymmetric

46. JOHN R. MACARTHUR, *THE SELLING OF “FREE TRADE”: NAFTA, WASHINGTON, AND THE SUBVERSION OF AMERICAN DEMOCRACY* ch. 3 (2000).

47. Cf. KEVIN P. GALLAGHER, *FREE TRADE AND THE ENVIRONMENT: MEXICO, NAFTA, AND BEYOND* 25 (2004)

48. See *A Reader’s Guide to Disneyfication*, NEW INTERNATIONALIST (Dec. 5, 1998), <https://newint.org/features/1998/12/05/guide/>.

49. Don Wallace, “*Moana*” *Is Turning Culture into Cash—Here’s Why it Matters for Hawai’i*, HONOLULU MAG. (Dec. 2, 2016), <https://www.honoluluomagazine.com/moana-is-turning-culture-into-cash-heres-why-it-matters-for-hawaii/>.

50. Medea Benjamin, *Interview: Subcomandante Marcos*, in *FIRST WORLD: HA! HA! HA! THE ZAPATISTA CHALLENGE* 57, 67 (Elaine Katzenberger ed., 1995).

51. Brian C. Albrecht, *Freer Trade and Economic Growth: Evidence of the Relationship*, AM. INST. FOR ECON. RSCH. (July 3, 2019); *The Benefits of Free Trade: Addressing Key Myths*, MERCATUS CENTER, GEORGE MASON UNI., https://www.mercatus.org/system/files/Benefits-of-Free-Trade_EP_110513.pdf (last visited Jan. 5, 2022); Denise Froning, *The Benefits of Free Trade: A Guide for Policymakers*, HERITAGE FOUND. (Aug. 25, 2000), <https://www.heritage.org/trade/report/the-benefits-free-trade-guide-policy-makers>.

52. “Businesses—multinational corporations (MNCs), banks, and small and medium-sized firms—have been the main agents for economic integration.” ROBERT A. PASTOR, *THE NORTH AMERICAN IDEA: A VISION OF A CONTINENTAL FUTURE* 97 (2011).

53. Canada-United States Free Trade Agreement, Can.-U.S., Dec. 22, 1987- Jan. 2, 1988, 27 I.L.M. 281 [hereinafter Canada-U.S. FTA]; United States-Canada Free Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449 (codified at 19 U.S.C § 2112 (1988)).

54. “The vision of a North American Community goes beyond the rhetoric of good relations that every leader deploys. Rather it means consigning a widening circle of domestic issues to trilateral consultation, which over time, could lead to coordinate, and perhaps even unified policies.” PASTOR, *supra* note 52, at 147.

agreement since it comprises two developed member states and a ‘developing nation’”⁵⁵ This was particularly true with a developing country that is Roman Catholic, Spanish-speaking, of the civil law tradition, and has weak institutions and corrupt officials which brings the administration of justice into disrepute.⁵⁶ Under the U.S.-Canada FTA, Canada was easy to integrate with because there is rule of law, a common law legal system and English speaking (but for Quebec) population. Mexico, as a party to a trade pact, was a different story.⁵⁷

Trilateralism⁵⁸ was stronger than two sets of bilateral relationships for each of the countries. The three countries were aligning their economies to better scale for global competition. Much of the world was hiving off into regional trading pacts as the negotiations to end the Uruguay Round of General Agreement on Tariffs and Trade negotiations were stalling, imperiling the global trading regime. “The original rationale for the North American Free Trade Agreement was to further regional integration and to go beyond what was attainable multilaterally.”⁵⁹

The European Community was transforming into the European Union as fifteen countries became one, only to expand to twenty-eight countries years later (and now twenty-seven due to Brexit).⁶⁰ The Mercado Común del Sur (MERCOSUR),⁶¹ the Southern Cone Customs Union, features even more harmonization beyond the reduction of tariffs. The partner countries

55. OLMOS GIUPPONI, *supra* note 8, at 125.

During the review period, almost all Mexican corruption cases (especially cases involving governors, businessmen, functionaries and union leaders) have gone unpunished. Of the numerous cases of corruption by governors, members of Congress, judges, lawyers, functionaries and corporate executives, only a handful have gone to trial and most of those tried have been released. Although increased levels of political democratization and transparency have contributed to the mass media’s autonomy and an increasing number of civic organizations that scrutinize politicians—resulting in increasing numbers of denunciations against corrupt or inefficient politicians—the fact that most go unpunished, merely increases public frustration, demeaning both democracy and the rule of law.

Mexico Country Report 2020, BERTELSMANN TRANSPARENCY INDEX, <https://bti-project.org/en/reports/country-report/MEX> (last visited Jan. 11, 2022).

57. James M. Cooper, *The Complicated Relationship: A Snapshot of the U.S.-Mexico Border*, Konrad Adenauer Foundation Washington Office (2010), reprinted in Konrad Adenauer Stiftung, INTERNATIONAL REPORTS, at 37, 41, <http://www.kas.de/wf/en/33.20667/>.

58. Richard H. Ullman, *Trilateralism: “Partnership” for What?*, FOREIGN AFFS. (Oct. 1976), <https://www.foreignaffairs.com/articles/japan/1976-10-01/trilateralism-partnership-what>.

59. Luis de la Calle Pardo, *NAFTA Looking Forward*, in CANADA AND MEXICO’S UNFINISHED AGENDA 111, 111 (Alex Bugailiskis & Andrés Rozental eds., 2012).

60. European Commission, *The European Union: What it is and What it Does*, <https://op.europa.eu/webpub/com/eu-what-it-is/en/> (2021).

61. See, e.g., Treaty Establishing a Common Market Between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, Mar. 26, 1991, 30 I.L.M. 1041.

have harmonized their respective customs policies to present a common front to countries outside their pact.⁶² ASEAN countries were also discussing plans for regional trade deals to better coordinate their economies. The Asia-Pacific Economic Cooperation group was also discussing more harmonization as these regional trading blocs proliferated.

Competitiveness in a global context is the common driver behind forms and rationales of regionalisation, yet it is in the conclusions drawn for responding action that cause implementations to vary between each example, as well as between intra-national, international and EU-defined cases. There is thus not just one recognisable form of ‘new regionalism,’ but there are several. Its very nature is its diverse, almost post-modern, character, reflecting varying experiences with, and strategic responses to, a globalising economy.⁶³

The North American Free Trade Agreement brought the three countries together to create the foundational international trade architecture—structures that undergird towards a globalization economy at that regional level. Trilateralism, a form of multilateralism restricted to three parties, has been only one of many strategies pursued by states in their international relations. As Atsushi Tago explained, “Multilateralism requires states to follow international norms and pay more respect to international institutions; this is contrasted with unilateralism, where a single state can influence how international relations can be conducted.”⁶⁴ But with some relationships and issues, bilateralism may be the preferred method of making international relations and the rules in the relationship between states.⁶⁵ Indeed, the United States is not the only country to follow this pragmatism in its trade policy.⁶⁶ Yet, the United States too has long pursued such a multipronged approach to its international trade policy.⁶⁷

62. Anne O. Krueger, *Free Trade Agreements Versus Customs Unions* (Nat’l Bureau of Econ. Research, Working Paper No. 5084), <https://www.nber.org/papers/w5084>.

63. TASSILO HERRSCHEL, *BORDERS IN POST-SOCIALIST EUROPE: TERRITORY, SCALE, AND SOCIETY* 60 (2011).

64. Atsushi Tago, *Multilateralism, Bilateralism, and Unilateralism in Foreign Policy*, OXFORD RES. ENCYCLOPEDIAS (2017), <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-449>.

65. JAMES M. ACTON ET AL., *REIMAGING NUCLEAR ARMS CONTROL* 48 (2021).

66. See Peter C.Y. Chow, Dep’t of Econs., City Coll. & Graduate Ctr., City Univ. of N.Y., *Bilateralism vs. Trilateralism in East Asian Economic Integration: Krugman-Baldwin’s Hub-Spoke Thesis Revisited* (2009), https://aacs.cuny.cuny.edu/2009conference/Peter_Chow.pdf.

67. See Cooper, *supra* note 11, at 978.

In the context of NAFTA, it had to be trilateral because there are only three sovereign States on the North American continent. The pact was designed to expand the supply chain to enjoy economies of scale. North America was a safe place in which to operate⁶⁸ and was competitive for the global marketplace in manufacturing.⁶⁹ Folding Canada with the U.S.-Mexico trade relationship was a triple win. The Parties could use the economic strength of the pact in other international institutions.⁷⁰

II. TRILATERAL ATTEMPTS TO TAME THE UNITED STATES-MEXICO BORDER

Proximity to the U.S. marketplace has long been important to the profitability of legitimate businesses.⁷¹ For over a century and a half, to foment trade, the Mexican government created free zones—tax-free and duty-free environments—along the U.S.-Mexico border. In the mid-1800s, the Mexican government officially recognized the border region as a special duty-free area.⁷² By 1965, the Mexican government initiated the Border Industrial Complex by providing tax and other incentives to factories at the north of Mexico.⁷³ By the 1980s, many of these maquiladoras (factories) were owned by and did the work of major Korean, Japanese, and Taiwanese companies; these “foreign-owned plants that use cheap Mexican labor to assemble imported materials then send the finished product back to countries

68. “The North American region has enjoyed peace for many decades and likely will continue to do so for years to come.” Enrique Berruga-Filoy, *Making the Case for Multilateral Co-operation Between Canada and Mexico*, in CANADA AMONG NATIONS 2011-2012: CANADA AND MEXICO’S UNFINISHED AGENDA 235, 235 (Alex Bugailiskis & Andrés Rozental, eds., 2012).

69. “We need to think carefully about North America in a challenging neighborhood of the globe. We need to reinforce the role NAFTA can play in making our businesses more competitive.” John M. Weekes, *Reinforcing North American Co-operation through NAFTA*, in CANADA AMONG NATIONS 2011-2012: CANADA AND MEXICO’S UNFINISHED AGENDA 124, 127 (Alex Bugailiskis & Andrés Rozental, eds., 2012).

70. “Eventually, without any threat to individual sovereignty, it is easy to envision a ‘North American stance’ at future meetings of COP (Conference of Partners on Climate Change).” Joseph M. Dukert, *Energy: The Continental Bridge*, in CANADA AMONG NATIONS 2011-2012: CANADA AND MEXICO’S UNFINISHED AGENDA 160, 171 (Alex Bugailiskis & Andrés Rozental eds., 2012).

71. “The strong presence of manufacturing on the border indicates that the proximity of firms to a major market like the United States must also play a key role [in the geographic concentration of industry].” JOAN B. ANDERSON & JAMES GERBER, *FIFTY YEARS OF CHANGE ON THE U.S.-MEXICO BORDER: GROWTH, DEVELOPMENT, AND QUALITY OF LIFE* 94 (2008).

72. PAUL GANSTER & DAVID E. LOREY, *THE U.S.-MEXICAN BORDER INTO THE TWENTY-FIRST CENTURY* 32-33 (2d ed., 2008).

73. Lawrence Douglas & Taylor Hansen, *The Origins of the Maquila Industry in Mexico*, 53 *COMERCIO EXTERIOR* 1, 9 (2003); see also Anna-Stina Ericson, *An Analysis of Mexico’s Border Industrialization Program*, 93 *MONTHLY LAB. REV.* 33, 34 (1970).

such as the United States, paying tax only on value added by the cheap labor.”⁷⁴

After the implementation of NAFTA, U.S. and Canadian companies continued to enjoy the benefits from importing and exporting products through the maquiladora system in Mexico, such as the ability to avoid paying value-added taxes, avoid some non-tariff restrictions and temporary importation (duty-free).⁷⁵ NAFTA also provided extra duty drawbacks for importing products that contained components from other NAFTA partner countries.⁷⁶ However, Mexico went through a series of tax changes in January 2014, which posed challenges to those who benefitted from maquiladoras’ tax breaks.⁷⁷ To placate factory owners, Mexican President Enrique Peña Nieto granted other temporary and permanent tax benefits in early 2014.⁷⁸ Other incentives were provided at different times to corporations under the Security and Prosperity Partnership, the Mérida Initiative, and the United States-Mexico-Canada Agreement.

It is no wonder that major corporations have long done well in Mexico due to the country’s long history of rewarding friends of the government with

74. Debbie Nathan, *Work, Sex and Danger in Ciudad Juarez*, 33 NACLA REP. ON AMERICAS, Nov.-Dec. 1999, at 24.

75. Alejandro Garcia Seimandi, *Maquiladora and Pitex Programs: Trying to Improve the Obsolete*, 12 U.S.-MEX. L.J. 121, 126 (2004).

76. ROBERT E. SCOTT ET AL., ECON. POL’Y INST., BRIEFING PAPER #173, REVISITING NAFTA: STILL NOT WORKING FOR NORTH AMERICA’S WORKERS 1, 9 (2006) (“Significant and growing shares of U.S. exports to Mexico are apparently parts and components that are assembled into final products that are then returned to the United States.”); see NAFTA, *supra* note 4, art. 303.

77. See Leonie Barrie, *Mexico: Tax Law Poses Challenges to Maquilas*, JUST-STYLE.COM (Jan. 31, 2014), <https://go.gale.com/ps/i.do?id=GALE%7CA357248133&sid=sitemap&v=2.1&it=r&p=AONE&s w=w&userGroupName=anon%7E23479809> (maquiladoras were then required to pay VAT on their imports under the Mexican tax reform); see also *New Mexican Law Poses Significant Challenges to Maquiladora Operations*, STRTRADE.COM (Jan. 30, 2014), <http://www.strtrade.com/news-news-New-Mexican-Tax-Law-Significant-Challenges-Maquila-Operations.html> (under the tax reform, “temporary imports were going to be subject to a 16 [%] VAT, which generally is fully creditable but only for one month after such VAT is paid,” which typically results in the right to a tax refund); See Eugenio Grageda Nuñez, *Value Added Tax (VAT): Impacts In The Maquiladora Industry Began Jan. 1, 2015*, 5 NATL L. REV. 27 (2015).

78. Maquiladoras could apply a tax benefit that provides an additional deduction relating to tax-exempt employee benefits payments, taxpayers that complied with certain formalities were given a “two-year period to fulfill a requirement of a 30% foreign ownership machinery and equipment (M&E) used in the maquiladora operations,” and reduced income tax rates in place from 2003 and 2013. *Mexico: Presidential Decree Published Providing Tax Benefits for Maquiladoras*, PWC (Jan. 17, 2014), <http://www.pwc.com/gx/en/tax/newsletters/pricing-knowledge-network/tp-mexico-tax-incentives-maquiladoras.jhtml>.

protections for their respective industries⁷⁹ such as removing barriers to trade so they could be free from competition from foreign corporations.⁸⁰ For years, Mexico had been a protectionist, nationalist economy, with huge tariffs on goods from foreign competitors.⁸¹ Mexico only joined the General Agreements on Tariffs and Trade in 1986 as the Uruguay Round of negotiations commenced.⁸²

Notwithstanding the resulting obligations to provide legal regimes for neoliberal trade, reduce barriers to trade, and allow foreign competition, Mexico has been described as a “captured state,”⁸³ meaning:

[t]he Mexican state is confronted with very strong private interests in sectors such as telecommunications, banking, cement, and others, which the state is incapable of controlling. To a large extent, these companies or groups force the state to define regulatory conditions in their sectors so as to be favorable to their private interests rather than to the public at large.⁸⁴

Hence, the regulatory institutions created to control these companies remain weak and unable to do their work or are even controlled by the powerful corporations.⁸⁵ This is known as “regulatory capture.”⁸⁶ When it

79. “In the mid-1980s, barriers to imports in Mexico and Central America were greater than anywhere else in the world, while those in South America were surpassed elsewhere only in Africa.” REID, *supra* note 2, at 137.

80. See Andrew Bast, *Crony Capitalism in Emerging Markets*, NEWSWEEK (Aug. 16, 2010, 1:00 AM), <http://www.newsweek.com/crony-capitalism-emerging-markets-71795>; see also Eric Martin & Brendan Case, *Mexico’s President Can’t Shake Cronyism Doubts After Probe*, BLOOMBERG (Aug. 23, 2015, 3:51 PM), <http://www.bloomberg.com/news/articles/2015-08-23-mexico-s-president-can-t-shake-cronyism-doubts-after-probe>.

81. M. ANGELES VILLARREAL, CONG. RSCH. SERV., RL34733, NAFTA AND THE MEXICAN ECONOMY 2 (2010) (“From the 1930s through part of the 1980s, Mexico maintained a strong protectionist trade policy in an effort to be independent of any foreign power and as a means to industrialization.”).

82. *Members and Observers*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm; see also General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

83. See WORLD BANK MEXICO, DEMOCRATIC GOVERNANCE IN MEXICO: BEYOND STATE CAPTURE AND SOCIAL POLARIZATION 100-01 (2007).

84. BERTELSMANN STIFTUNG, BTI 2014 MEXICO COUNTRY REPORT 9 (2014), http://www.bti-project.de/uploads/tx_itao_download/BTI_2014_Mexico.pdf.

85. Regulation is needed to overcome and minimize the negative externalities that corporate activity produces because corporations cannot be expected to minimize their own negative externalities. It also stands to reason that to the extent that the negative externalities of corporate activity are global in nature, then the laws aimed at minimizing them need to be global in nature as well.

ALICE DE JONGE, TRANSNATIONAL CORPORATIONS AND INTERNATIONAL LAW: ACCOUNTABILITY IN THE GLOBAL BUSINESS ENVIRONMENT 27 (2011).

86. George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. MGMT. SCI. 3 (1971).

scales, there are big profits to be enjoyed. And when the corporations are transnational in nature, it is increasingly difficult for governments and international institutions to regulate them. Robert Lutz explained that “[t]he transnational corporation is neither subjected to the degree of the single state jurisdiction sufficient to control its activities, nor does its status in the international legal system make it easily susceptible to international law.”⁸⁷

Saskia Sassen described “the ascendance of this new legal regime that negotiates between national sovereignty and the transnational practices of corporate economic actors.”⁸⁸ NAFTA was meant to usher in an era of free trade.⁸⁹ The Harvard-trained Mexican President, Carlos Salinas de Gortari, was determined:

to challenge some of Mexico’s age-old ideological hang-ups. He was somebody U.S. officials and foreign investors could talk to—in their own language. Shrugging off a century of troubled U.S.-Mexican relations—and recent economic fiascoes such as Mexico’s 1982 nationalization of the banking industry—Wall Street firms had finally found a Mexican leader they could trust.⁹⁰

Through NAFTA, legitimate trade could occur more fluidly through the United States’ northern and southern borders, with reduced customs duties and paperwork kept at a minimum. At the same time, illicit goods would be interdicted.⁹¹ Peter Andreas wrote:

[By the mid-1990s] smugglers were increasingly hiding their cocaine shipments within the rising tide of commercial trucks, railcars, and passenger vehicles crossing the border. The boom in cross-border traffic encouraged by the North American Free Trade Agreement had the side effect of creating a much more challenging job for those border agents charged with the task of weeding out illegitimate flows from legitimate ones—a challenge that in turn provided the rationale

87. Robert E. Lutz, *The Export of Danger: A View from the Developed World*, 20 N.Y.U. J. OF INT’L L. & POL., 629, 633 (1988).

88. SASSEN, *supra* note 45, at xxvii.

89. MARK JICKLING, CONG. RSCH. SERV., RL32718, BARRIERS TO CORPORATE FRAUD: HOW THEY WORK, WHY THEY FAIL 32 (2004) (explaining that “‘regulatory capture’ may occur over the course of many years, as a regulatory agency receives less and less funding to perform the duties maintained by the law. As the regulatory body lost enforcement power, industry gains more control over the regulatory agenda”).

90. ANDRES OPPENHEIMER, BORDERING ON CHAOS: MEXICO’S ROLLERCOASTER JOURNEY TOWARD PROSPERITY 8 (1996).

91. Indeed, criminality increases exponentially in border regions. “Corruption may be present wherever money is to be made from moving valuable people or things across borders.” Richard Jones, *Checkpoint Security Gateways, Airports and the Architecture of Security*, in TECHNOLOGIES OF INSECURITY: THE SURVEILLANCE OF EVERYDAY LIFE 81-97 (Katja Franko Aas et al. eds., 2009).

for a further infusion of enforcement resources at official ports of entry.⁹²

Not surprisingly, freight forwarding, warehousing, and distribution networks at the U.S.-Mexico border all did well in this new neoliberal regime. Passing through U.S. Customs and Border Protection inspection and transporting the goods across the border became paramount, especially in a commercial world of just in time inventory management.⁹³

The mechanisms to do this provided the legal underpinnings of the Border Industrial Complex.⁹⁴ The corporate contracting that was designed to fight the war on drugs affected this too, as we shall see when this Article next examines the Mérida Initiative. Companies like Boeing, Lockheed Martin, Raytheon, and Northrop Grumman all got U.S. government contracts to beef up security with high-technology tools.⁹⁵ By 2005, Boeing's Predator-B drone, developed for military use, was deployed at the border to interdict illegal shipments of narcotics attempting to cross the U.S.-Mexico border.⁹⁶

A. *The North American Free Trade Agreement*

The North American Free Trade Agreement was, above all, designed to foment the growth of the economies of all three member countries. Unsurprisingly, NAFTA was a boon for many corporations, particularly large, multinational ones.⁹⁷ NAFTA provided the legal foundation for the creation of a fully integrated North American economy, allowing for free trade,⁹⁸ and reaping greater profits through comparative advantage.

92. PETER ANDREAS, *KILLER HIGH: A HISTORY OF WAR IN SIX DRUGS* 237 (2020).

93. See Courtenay Stevens, *What is Just-In-Time (JIT) Inventory Management?*, BUS. ORG. (Apr. 23, 2020), <https://www.business.org/finance/inventory-management/what-is-just-in-time-inventory-management/>; see generally Leander Quiring, *Multidisciplinary Design Optimization of NAFTA Supply Chains* (2008) (M.A. thesis, University of Waterloo), <https://uwspace.uwaterloo.ca/bitstream/handle/10012/3944/thesis.pdf?sequence=1>.

94. See James M. Cooper, *The Rise of Private Actors at the United States-Mexico Border*, 33 WISC. INT'L L.J. 104 (2015).

95. See *The Top 10 Defense Contractors*, BLOOMBERG GOV'T (June 10, 2021), <https://about.bgov.com/top-defense-contractors/>.

96. See William Booth, *More Predator Drones Fly U.S.-Mexico Border*, WASH. POST (Dec. 21, 2011).

97. William Mauldin, *Pacific Trade Deal Likely to Have Narrow Reach*, WALL ST. J. (Mar. 15, 2015, 8:25 PM), <https://www.wsj.com/articles/what-the-trans-pacific-partnership-wouldand-wouldntdo-1426441618> ("Sweeping trade deals of the past—with Canada and Mexico in 1993, for instance, or China in 2000—presented big upsides and big risks for a broad swath of U.S. companies").

98. See Allen Norrie, *William Twining, General Jurisprudence: Understanding Law from a Global Perspective*, 28 WINDSOR Y.B. ACCESS JUST. 233 (2010).

American multinationals, with managerial and production techniques more advanced than their European and other competitors, both led and profited from the liberalization of international trade—while they also operated to transfer managerial skills and technology through the demonstration effect of their overseas operations.⁹⁹

NAFTA was designed to eliminate economic boundaries between Mexico, Canada, and the United States. This was not a political agreement. The territorial integrity, political independence and overall sovereignty would remain. Nor would there be a combining of currencies, despite the populist concerns among right-wing media pundits.¹⁰⁰ Although this was just a trade deal, NAFTA was important for Mexico as it joined with the United States, long its adversary,¹⁰¹ at times occupier and at other times partner, to form an economically integrated region. After the U.S. Congress ratified NAFTA, the late Mexican poet and essayist Octavio Paz commented:

NAFTA will be important for Mexicans because it is a chance finally for us to be modern . . . We have failed to be modern for centuries. We only started trying to be modern at the end of the eighteenth century, and our conscious model of modernity has tended to be the United States. This is the first time in the histories of our two nations that we are going to be in some way partners with each other.¹⁰²

When the United States joined its economy with those of Canada and Mexico, it was to rival the European Union as a trade pact.¹⁰³ The results, at face value, have been good. Every day, an estimated \$1.4 billion worth of goods cross the U.S.-Mexico border.¹⁰⁴ By 2012, NAFTA created an annual

99. Daphné Josselin & William Wallace, *Non-state Actors in World Politics: A Framework*, in *NON-STATE ACTORS IN WORLD POLITICS* 6-7 (Daphné Josselin & William Wallace eds., 2001) (citing ROBERT GILPIN, *U.S. POWER AND THE MULTINATIONAL CORPORATION: THE POLITICAL ECONOMY OF FOREIGN DIRECT INVESTMENT* (1975); S. STRANGE, *STATES AND MARKETS: AN INTRODUCTION TO INTERNATIONAL POLITICAL ECONOMY* (1988)).

100. See Drake Bennett, *The Amero Conspiracy*, N.Y. TIMES (Nov. 25, 2007), <https://www.nytimes.com/2007/11/25/world/americas/25iht-25Amero.8473833.html>.

101. Robert Lutz explained that “the roots of enduring problems in the United States’ relationship with Mexican can be traced in part to the legacy of legal relations emanating from this Treaty [the Treaty of Guadalupe Hidalgo].” Robert E. Lutz, *The Mexican War and the Treaty of Guadalupe Hidalgo: What’s Best and Worst About Us*, 5 SW. J.L. & TRADE AM. 27, 27 (1998).

102. Frank Goldman, *The World After NAFTA According to Paz*, NEW YORKER (Dec. 19, 1993), <https://www.newyorker.com/magazine/1993/12/27/the-world-after-nafta-according-to-paz>.

103. According to Richard Rosecrance, writing two years after NAFTA went into force, “[d]eveloped states are putting aside military, political, and territorial ambitions as they struggle not for cultural dominance but for a greater share of world output.” Richard Rosecrance, *The Rise of the Virtual State*, 75 FOREIGN AFFS. 45, 45 (1996).

104. Patrick Gillispie, *NAFTA: What Is It, and Why Trump Hates It*, CNN (Nov. 15, 2016, 5:17 PM), <http://money.cnn.com/2016/11/15/news/economy/trump-what-is-nafta/index.html>; see

\$19 trillion regional market.¹⁰⁵ By 2016, bilateral trade under NAFTA expanded by 556%.¹⁰⁶ María Belén Olmos Giupponi applauded these results: “This trade agreement [NAFTA] represents a remarkable accomplishment taking into consideration the differences between the two major members states and Mexico. Contrary to what some analysts contended at the time, NAFTA has successfully dealt with all the different challenges.”¹⁰⁷

NAFTA facilitated trade by converging rules and reducing transaction costs among its three Parties. Harmonization brought decreased transaction costs, less delays, and a more integrated North American supply chain. Soon after NAFTA went into effect, Mexico’s trade increased 17.5% with the United States and 33.3% with Canada.¹⁰⁸ Additionally, exports, imports, and foreign investment increased in the country.¹⁰⁹ Mexican President Carlos Salinas de Gortari negotiated NAFTA and trumpeted his administration’s neoliberal policies to foment development in Mexico.¹¹⁰ Salinas’ successor, President Vicente Fox, also considered NAFTA as a success while he was in office from 2000 to 2006.¹¹¹ So did Presidents Felipe Calderón¹¹² and Enrique Peña-Nieto.¹¹³ Nobel laureate Paul Krugman noted:

[i]n the case of Mexico, it is natural to suppose that NAFTA has played an important role, although much of the growth in Mexican

Carla A. Hills, *NAFTA’s Economic Upsides: The View from the United States*, 93 FOREIGN AFFS. 122 (2014).

105. Hills, *supra* note 104, at 122.

106. Sergio M. Alcocer, *Managing the Mexico-U.S. Border: Working for a More Integrated and Competitive North America*, in THE ANATOMY OF A RELATIONSHIP: A COLLECTION OF ESSAYS ON THE EVOLUTION OF U.S.-MEXICO COOPERATION ON BORDER MANAGEMENT 19 (Christopher Wilson ed., 2016).

107. OLMOS GIUPPONI, *supra* note 8, at 125.

108. Chris Olive, *Member States Development: Mexico*, 1 NAFTA LAW & BUS. REV. AM. 122 (1995).

109. *Id.*

110. Laura Carlsen, *Armoring NAFTA: The Battleground for Mexico’s Future*, 41 NACLA REP. ON AMERICAS 17 (2008).

111. Carlos Salas, *Mexico’s Haves and Have-Nots: NAFTA Sharpens the Divide*, 35 NACLA REP. ON AMERICAS 32, 33 (2002); *see also* EDUARDO BOLIO ET AL., A TALE OF TWO MEXICOS: GROWTH AND PROSPERITY IN A TWO-SPEED ECON. (2014).

112. Remarks Following a Meeting with President of Mexico Felipe de Jesus Calderon Hinojosa, 2008 PUB. PAPERS 1565 (Jan. 13, 2009); *see also* Michael Abramowitz, *White House Defends NAFTA As Bush Meets with Heads of Mexico, Canada*, WASH. POST, Apr. 22, 2008, at A03.

113. The President’s News Conf. With President Enrique Peña Nieto of Mexico and Prime Minister Stephen J. Harper of Canada in Toluca, Mexico, DAILY COMP. PRES. DOCS. 1 (Feb 19, 2014); Patricia Rey Mallén, *20 Years of NAFTA: Enrique Peña Nieto, Barack Obama and Stephen Harper Talk the Economic Future of North America*, INT’L. BUS. TIMES (Feb. 20, 2014, 6:25 AM), <http://www.ibtimes.com/20-years-nafta-enrique-pena-nieto-barack-obama-stephen-harper-talk-economic-future-north-america>.

exports may also reflect two other factors: the delayed effects of Mexico's dramatic unilateral liberalization of trade between 1985 and 1988, and the weak peso that followed the 1994-95 financial crisis.¹¹⁴

As they sought political support to pass legislation to enable the trade pacts rules within the laws of the United States, the U.S. political leaders billed NAFTA as the future for prosperity, not only in the United States, but eventually all over the Americas.¹¹⁵ "NAFTA was promoted by presidents George H.W. Bush and Bill Clinton as something that would buoy up the Mexican economy and reduce or end illegal immigration—two claims that now are clearly refuted by facts."¹¹⁶

Labor rights and environmental protection were not part of NAFTA's main agreement; they were left as a side agreement (with no real meaningful enforcement mechanisms), a contribution by newly elected U.S. President Bill Clinton to the North American Free Trade Agreement, which had been negotiated by his predecessor.¹¹⁷ The side agreements, the North American Agreement on Environmental Cooperation¹¹⁸ and the North American Agreement on Labor Cooperation,¹¹⁹ were paper tigers, allowing for citizen submissions without any real ability to collect damages or change governmental or corporate behavior. As a result, non-governmental organizations, labor activists, and environmental advocates could not hold the NAFTA Parties accountable for failing to live up to their respective treaty commitments, within both the NAFTA framework and in international law.

During the 1992 Presidential election, then Arkansas Governor, Bill Clinton made it a great deal that NAFTA should not hurt labor rights.¹²⁰ This appealed to the trade unions in the U.S., which at the time, were rightfully scared of what would happen if lower cost labor was available and there were

114. Paul R. Krugman, *Trade and Wages, Reconsidered*, BROOKINGS PAPERS ON ECON. ACTIVITY 103, 111 (2008).

115. Matthew Rooney, *What's Next: Making NAFTA into a Tool for National Prosperity*, GEORGE W. BUSH INST. (2017).

116. Charles Bowden, *Chuck Bowden's Border War*, HIGH COUNTRY NEWS (Mar. 1, 2010), <http://www.hcn.org/issues/42.4/the-war-next-door>.

117. See Leonard Bierman & Rafael Gely, *The North American Agreement on Labor Cooperation: A New Frontier in North American Labor Relations*, 10 CONN. J. INT'L L. 533 (1995); see also Sarah Richardson, *Sovereignty, Trade, and the Environment—The North American Agreement on Environmental Cooperation*, 24 CAN.-U.S. L.J. 183 (1998).

118. North American Agreement on Environmental Cooperation, Sept. 8-14, 1993, 32 I.L.M. 1480.

119. North American Agreement on Labor Cooperation, Sept. 8-14, 1993, 32 I.L.M. 1499.

120. President Clinton had risked the wrath of the Democratic Party's trade union base by endorsing NAFTA, working closely with Republicans to help push the controversial trade pact through Congress in 1993 despite opposition from a majority of Democrats. EDWARD ALDEN, *THE CLOSING THE AMERICAN BORDER: TERRORISM, IMMIGRATION AND SECURITY SINCE 9/11*, 50 (2008).

no tariffs on the trade of these goods. While President Clinton said the trade pact would create one million jobs in the United States in its first five years,¹²¹ economists warned that NAFTA threatened U.S. jobs.¹²²

With membership in the trade pact, Mexico opened its traditionally protected industries, lowering trade tariffs between the three participatory countries and providing much needed confidence to foreign capital to invest in Mexico.¹²³ With the liberalization of government procurement, U.S. and Canadian corporations were finally allowed to bid on Mexico's public works projects, profit from their capital markets, and invest without limitation. (and Mexican companies could do the same in Canada and the United States).

NAFTA has brought increased benefits among some corporations.¹²⁴ Large firms benefited more than small and medium-size ones, a result that seems related to the unavailability of domestic credit after the financial crisis of 1995 (large firms were able to increase their access to international financial markets, but this option was not available for smaller ones), indicating the needs to strengthen efforts in deepening domestic financial markets to reach underserved sectors. This has been a boon for multinational corporations and their shareholders. Ricardo Grinspun and Robert Kreklewich note:

the regime on intellectual property rights to show that large corporations have imposed a set of rules that serve their interests rather than the public's. The rules limit the free flow of information,

121. Glenn Kessler, *The Strange Tale About why Bill Clinton Said NAFTA Would Create 1 Million Jobs*, WASH. POST (Sept. 21, 2018),

<https://www.washingtonpost.com/politics/2018/09/21/strange-tale-about-why-bill-clinton-said-nafta-would-create-million-jobs/>; Economic Impact of Trade Agreements Implemented Under Trade Auth. Procedures, Inv. No. 332-555, USITC Pub. 4614 (June 2016).

122. Robert E. Scott, *The High Price of 'Free' Trade*, ECON. POL'Y INST., 1 (Nov. 17, 2003) ("Since the North American Free Trade Agreement (NAFTA) was signed in 1993, the rise in the U.S. trade deficit with Canada and Mexico through 2002 has caused the displacement of production that supported 879,280 U.S. jobs.").

123. Roberto Rosas, *Trademarks under the North American Free Trade Agreement (NAFTA), With References to the Current Mexican Law*, 18 INTELL. PROP. L. REV. 167, 173 (2014).

124. While conceding that many U.S. high-wage manufacturing jobs were relocated to Mexico, China and other foreign locations as a result of NAFTA, Cohen argues that NAFTA has, on balance, been a good thing for the U.S. economy and U.S. corporations. "The sucking sound that Ross Perot predicted did not occur; many jobs were created in Canada and Mexico, and [the resulting] economic activity N/A created a somewhat seamless supply chain—a North American supply chain that allowed North American auto companies to be more profitable and more competitive."

Knowledge@Wharton, *Public Policy: NAFTA, 20 Years Later: Do the Benefits Outweigh the Costs?*, WHARTON/UNIV. OF PENN. (Feb. 19, 2014), <https://knowledge.wharton.upenn.edu/article/nafta-20-years-later-benefits-outweigh-costs/>.

technology, and trademarks to the detriment, in their view, of poor people and countries.¹²⁵

Size can matter. Joan B. Anderson and James Gerber explained that “[l]arge firms usually have greater access to capital and to the legal and administrative resources they need to navigate the legal system and the bureaucracy.”¹²⁶ The reduction of bureaucracy at the border between the United States and Mexico better aligned the two countries’ commerce.¹²⁷ By using U.S. technology, millions of goods could be produced by less expensive labor in Mexico for export to and consumption in the United States.¹²⁸ All of the North American continent would become part of the same supply chain, enjoying just in time production and the comparative advantage that comes with such liberalized trade regime.¹²⁹ Duty drawbacks allow for a fully integrated supply chain in the three partner countries and a truly regionally integrated inventory management, just in time, system.¹³⁰ The trade pact increased trade through tariff reduction and the integration of the production process.¹³¹ The rules and procedures were to be harmonized to align with those from the United States. Ronald Wolf has suggested that the globalization of law has met the primacy of international business law and American approaches to business law.¹³²

Nowhere is this dynamic more evident than in the rise of Investor-State Dispute Settlement provisions in the free trade treaties which the United States has entered. NAFTA facilitated foreign direct investment (FDI) and institutionalized rules regime with meaningful enforcement mechanisms—

125. ROBERT A. PASTOR, TOWARD A NORTH AMERICAN COMMUNITY: LESSONS FROM THE OLD WORLD FOR THE NEW 12 (2001).

126. ANDERSON & GERBER, *supra* note 71, at 101.

127. “NAFTA was a brave new world for the three governments.” David A. Gantz, *The Evolution of U.S. Views on FTA Investment Protection: From NAFTA to the United States-Chile Free Trade Agreement*, 19 AM. UNIV. INT’L L. REV. 679, 685 (2004).

128. ANDERSON & GERBER, *supra* note 71, at 89-90.

129. See Macleans Mzumara, et al., *An Analysis of Comparative Advantage and Intra-North American Free Trade Agreement (NAFTA) Trade Performance*, 5 J. SUSTAINABLE DEV. 103, 110 (2012).

130. “[G]oods produced in Mexico for export to the United States typically contain about 40% U.S. content (25% from Canada).” GANTZ, *supra* note 30, at 126 (citing Pia Orrenius, *Economic Outlook Deteriorates Due to COVID-19: Short and Long Run Implications for North American Supply Chains*, FED. RES. BANK OF DALLAS (May 13, 2020), <https://www.bakerinstitute.org/media/files/files/00d93381/orrenius-baker-inst.pdf>).

131. See generally David A. Gantz, *The United States-Mexico-Canada Agreement: Overview and Analysis*, BAKER INSTITUTE REPORT (2018), <https://www.bakerinstitute.org/media/files/files/1f9f406a/bi-report-121118-mex-usmca.pdf>

132. See generally RONALD CHARLES WOLF, TRADE, AID AND ARBITRATE: THE GLOBALIZATION OF WESTERN LAW (2004) (maintaining that the philosophies of present international institutional organizations, coupled with the fundamentals of international arbitration, has weakened national sovereignty over international trade issues).

independent, binding, and neutral arbitral panels comprised of trade experts from the pact's Parties to deal with disputes. Chapter 11 of NAFTA provides for an Investor-State-Dispute Settlement (ISDS) mechanism to adjudicate cases of takings, expropriation, and nationalization investments. This is the venue for deciding what is fair, just, and equitable compensation.¹³³ "NAFTA was a particular tipping point" for Haley Sweetland Edwards.

It marked the first time ever that an international treaty between two close investment partners—two of them well-developed, complex democracies—included all the provisions of a BIT as well as ISDS. The move not only allowed American and Canadian investors to challenge Mexico outside of its shaky judicial system, but it also allowed investors from all three signatory countries to challenge the U.S. and Canada outside of their robust and reliable courts. That was unprecedented—a watershed in the history of investors' rights.¹³⁴

This area of law by its very nature brings to bear a long history of private actor involvement.

Lex mercatoria is an area that is marked in particular by private actors that are creating the 'rules of the game' as well as—in the form of arbitration tribunals—by the institutional framework for the administration of these rules.¹³⁵

It is indeed a rarified world that is created by free trade agreements and other forms of harmonization—the very policy prescriptions of the Washington Consensus.

International trade law continues to concentrate wealth in artificial corporations that exist without territorial borders. This is deliberately encouraged by nation-states. International trade law and especially the arbitral systems that enforce international investment agreements have created a commercial empire that operates similar to colonialism and imperialism.¹³⁶

133. Manuel Pérez-Rocha, *Free Trade's Chilling Effects*, 48 NACLA REP. ON AMERICAS 223 (2016), <https://doi.org/10.1080/10714839.2016.1228169>. Cf. Simon Lester, *The ISDS Controversy: How We Got Here and Where Next*, CATO INST. (July 1, 2016), <https://www.cato.org/commentary/isds-controversy-how-we-got-here-where-next>.

134. HALEY SWEETLAND EDWARDS, SHADOW COURTS: THE TRIBUNALS THAT RULE GLOBAL TRADE 45 (2016).

135. GRALF-PETER CALLIENS & PEER ZUMBANSEN, ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW 31 (2010).

136. James (Sa'kej) Youngblood Henderson, *Foreword* to INDIGENOUS PEOPLES AND INTERNATIONAL TRADE: BUILDING EQUITABLE AND INCLUSIVE INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS xvi (John Borrows & Risa Schwartz, eds, 2020). Cf. Karen J. Alter, *From Colonial to Multilateral International Law: A Global Capitalism and Law Investigation*, 19 INT'L J. CONST. L. 798, abstract, (2021) ("[T]he shift from European colonial domination to a law-based multilateralism, [has] enabled a more equal and inclusive international law.").

NAFTA was not like the U.S.-Canada FTA—an agreement between both developed, Anglo-Saxon, common law, capitalist, and advanced countries. Mexico remains a civil law country.¹³⁷ The Parties wanted investment disputes to be arbitrated by outside experts, not Mexican judiciary members who may be open to corruption or influence.¹³⁸

These investor-state dispute provisions were indeed the most controversial part of NAFTA.

[Chapter 11] establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties to the Agreement in accordance with the principle of international reciprocity and due process before an impartial tribunal.¹³⁹

A NAFTA investor, an individual or corporation that is a non-state actor rather than one of the signatory countries, who alleges that a host government has breached its investment obligations under Chapter 11, may choose one of three arbitral mechanisms: the World Bank’s International Centre for the Settlement of Investment Disputes (ICSID), ICSID’s Additional Facility Rules, or the rules of the United Nations Commission for International Trade Law (UNCITRAL Rules).¹⁴⁰ Alternatively, the investor may choose the remedies available in the host country’s domestic courts.¹⁴¹ An important feature of the Chapter 11 arbitral provisions is the enforceability in domestic courts of final awards by arbitration tribunals.¹⁴²

This mechanism has been very costly and thus only accessible to the largest of corporations. Some critics have called these provisions from Chapter 11, “corporate welfare,” as they create a series of nuisance lawsuits to force foreign governments to capitulate for fear of incurring hundreds of millions of dollars of potential monetary damages and expensive legal fees.¹⁴³ The long-standing doctrine of sovereign immunity has been turned

137. Although the NAFTA is one of an increasing number of efforts to harmonize, merge, and even unify international trade law involving different legal systems, the comprehensive efforts to do so between the United States and Mexico under the cloak of NAFTA face stark contrasts between the traditions of the civil law and common law systems.

Lutz, *supra* note 33, at 394-95.

138. TRANSPARENCY INT’L, CORRUPTION PERCEPTIONS INDEX (2020) (indicating that Mexico ranked 124/180 and scored 31/100); *see also* LATINOBAROMETRO, INFORME 2021 (2021).

139. NAFTA, *supra* note 4, art. 1115.

140. *Id.* art. 1120.

141. *Id.* art. 1135(2)(c).

142. *Id.* art. 1136(4).

143. *See* PUBLIC CITIZEN, NAFTA CHAPTER 11 INVESTOR-TO-STATE CASES: BANKRUPTING DEMOCRACY I (Sept. 2001); Ethyl Corp. v. Canada, 38 I.L.M. 708 (1999) (a Virginia-based corporation, developed a gasoline additive known as methylcyclopentadienyl manganese tricarbonyl (MMT) and then exported it Canada). *Id.* at 710. After scientific studies brought light

on its head, as foreign investors sue sovereign states before independent and binding tribunals.¹⁴⁴ While the claim for the \$970 million in damages that the Canadian company Methanex made against the United States was dismissed in full in August 2005, *Methanex v. United States* showed how investors could stop environmental regulations. Keystone XL lawsuit is another example of corporations claiming outrageous damages in Chapter 11 proceedings.¹⁴⁵

And while Chapter 11 has been a boon for some corporations and their inventors,¹⁴⁶ NAFTA did very little for labor for environmental protections. These issues were relegated to “side agreements” that had no real, meaningful enforcement procedures, nor sanctions.¹⁴⁷ One report concluded, that “[r]ather than triggering a convergence across the three nations, NAFTA has accentuated the economic and regulatory asymmetries that had existed among the three countries.”¹⁴⁸

While Mexico experienced economic growth, several sectors within the country experienced a decline.¹⁴⁹ Critics have pointed out that real income

to the public health risks posed by MMT, in 1997 the Canadian Parliament banned MMT. *Id.* In response, Ethyl filed a NAFTA Chapter 11 investor-state claim against Canada and further argued that the ban was a violation of Article 1102 and 1106. *Id.* at 711. After a NAFTA panel overruled Canada’s objection to the suit claiming that MMT was not a measure covered under Chapter 11, Canada settled the claim, resulting in Canada’s reversal of the MMT ban and paid \$13 million to Ethyl for legal fees and damages. *Id.* at 731. In *Pope & Talbot, Inc. v. Canada*, the tribunal ordered Canada to pay investors \$120,200. *Pope & Talbot Inc. v. Canada*, para. 18 UNCITRAL (NAFTA), Final Award, Award in Respect of Costs (Nov. 26, 2002). In *S.D. Meyers, Inc. v. Canada*, the Tribunal ordered Canada to pay a total amount of \$850,000 to S.D. Meyers, Inc. with respect to arbitration fees and legal representation. *S.D. Myers, Inc. v. Canada*, paras. 53-54 UNCITRAL (NAFTA), Final Award (Dec. 30, 2002).

144. Since time immemorial people have travelled abroad to invest and to engage in business. When European traders began to sail to Asia, Africa, and Latin America to trade with the people in local communities, it was held that the local law could not be applied to traders since they were already subject to the law of their respective home countries.

Surya P. Subedi, *International Investment Law*, in *INTERNATIONAL LAW* 727, 728 (Malcolm D. Evans, ed., 4th ed., 2014).

145. Tracy Johnson & Kyle Bakx, *Transcanada an Underdog, but has Strong Case Against Washington*, CBC (Jan. 7, 2016, 5:00 AM) <https://www.cbc.ca/news/business/transcanada-kxl-keystone-nafta-lawsuit-damages-pipeline-1.3392720>; see also Cory Adkins & David Grewal, *Democracy and Legitimacy in Investor-State Arbitration*, 126 *YALE L.J.F.* 65 (2016).

146. OLMOS GIUPPONI, *supra* note 8, at 130.

147. Cooper, *supra* note 57, at 50.

148. GALLAGHER ET AL., *supra* note 25, at 3.

149. MARK WEISBROT ET AL., *DID NAFTA HELP MEXICO? AN UPDATE AFTER 23 YEARS*, CENTER FOR ECONOMIC & POLICY RESEARCH (March 2017) (arguing that “Mexico did not do as well as the region as a whole, averaging 1 percent in per capita GDP growth for those years.” Additionally, Mexico’s national poverty rate was 55.1% in 2014 compared to 52.4% in 1994 when NAFTA was enacted).

per capita, real wages, and income poverty have not improved much since NAFTA was signed. Indeed, NAFTA was designed to provide jobs for workers in Mexico.¹⁵⁰ Mexicans required a reason to stay in Mexico instead of emigrating to the United States. But the data demonstrates that the boom in Mexican jobs was not long-term.¹⁵¹ In the border factories that are owned by Mexicans in addition to Koreans, Taiwanese, and Chinese nationals, low skilled wages all supply the U.S. marketplace. However, this drew populations from southern Mexico towards the northern border in cities like Tijuana and Ciudad Juárez.¹⁵²

Labor conditions seldom improved where there are jobs forcing migrants to other countries to seek work. Saskia Sassen reflects on “the particular content of this new regime, which strengthens the advantage of certain types of economic actors and weakens those of others.”¹⁵³ In the latter category, with the commodification of Mexican and Central American migrants placed into incarceration, there has also been a commodification of labor in the North American marketplace. The architects of NAFTA even claimed that it would resolve the post-Cold War identity crisis of the United States.¹⁵⁴ Lower-skilled wages would flow to Mexico, as the low cost of labor in Mexico would become a comparative advantage for that country.¹⁵⁵ Additionally, as mentioned before, NAFTA relegated labor issues and environmental issues to side agreements, out of range of the NAFTA dispute resolution mechanisms and left the goals in those areas unenforceable and

150. See Lori Wallach, *NAFTA at 20: One Million U.S. Jobs Lost, Higher Income Inequality*, HUFF. POST (Jan. 6, 2014, 3:19 PM), https://www.huffpost.com/entry/nafta-at-20-one-million-u_b_4550207; see also Andrew Chatzky et al., *NAFTA and the USMCA: Weighing the Impact of North American Trade*, COUNCIL FOREIGN REL., <https://www.cfr.org/backgrounder/naftas-economic-impact> (last updated July 1, 2020).

151. In Mexico, real wages have fallen sharply and there has been a steep decline in the number of people holding regular jobs in paid positions. Many workers have been shifted into subsistence-level work in the “informal sector,” frequently unpaid work in family retail trade or restaurant businesses. Additionally, a flood of subsidized, low-priced corn from the United States has decimated farmers and rural economics.

Scott, *supra* note 122, at 10.

152. “One consequence of such rapid growth, however, is that, beginning in the late 1980s, the existing labor force in many Mexican border communities became inadequate to fill the available positions . . . Workers migrate from the interior of the country because jobs are relatively plentiful . . .” ANDERSON & GERBER, *supra* note 71, at 93, 95.

153. SASSEN, *supra* note 45 at xxvii.

154. Judith H. Bello & Alan F. Holmer, *The NAFTA: Its Overarching Implications*, 27 INT’L LAW 589, 601 (1993).

155. Joan B. Anderson & James Gerber explain “Mexico’s comparative advantage due to the availability of low-wage, unskilled or semi-skilled labor” and “the situation of low wages with relatively high levels of productivity.” ANDERSON & GERBER, *supra* note 71, at 94.

aspirational.¹⁵⁶ This has provided for a devaluation of labor as an abundant, cheap, and unprotected commodity.¹⁵⁷ Lynn Stephen wrote:

Americans face a dilemma. While in our post-9/11 culture many are calling for stricter border controls and ever more stringent immigration legislation to prevent the entrance of terrorists to the United States, we have a good economy that is highly dependent on recent immigrant labor—much of it Mexican and much of it undocumented.¹⁵⁸

Migrant workers, who by definition have fewer freedoms, are often more vulnerable than the laborers legally permitted to work earning average wages.¹⁵⁹ Too often, immigrants who work in low skilled jobs are seen “as an expendable resource, a resource whose social protection and continued reproduction is of little or no concern.”¹⁶⁰ Migrant workers have become more vulnerable after NAFTA, which has increased the free flow of trade between the participatory countries.¹⁶¹ For Ronald Wolf, economic liberalism has pushed a new world commercial legal order which has also affected civil rights.¹⁶² Labor laws (like environmental laws) are relegated to side agreements, out of range of the dispute resolution mechanisms for which the main guts of NAFTA provided.¹⁶³ The extremely low wages and long hours at maquiladoras “fosters the sense that workers are cheap, disposable commodities.”¹⁶⁴ Labor falls into the markets as if it were mainly a commodity, “subordinating the social to the ‘laws of the market.’”¹⁶⁵ Labor

156. See Ruben J. Garcia, *Labor as Property: Guestworkers, International Trade, and the Democracy Deficit*, 10 J. GENDER, RACE & JUST. 29 (2006).

157. Access to cheaper inputs is, therefore, just as important as access to widening markets in keeping profitable opportunities open. The implication is that non-capitalist territories should be forced open not only to trade (which could be helpful) but also to permit capital to invest in profitable ventures using cheaper labour power, raw materials, low-cost land, and the like. The general thrust of any capitalist logic of power is not that territories should be held back from capitalist development, but that they should be continuously opened up.

HARVEY, *supra* note 20, at 139.

158. LYNN STEPHEN, *TRANSBORDER LIVES: INDIGENOUS OAXACANS IN MEXICO, CALIFORNIA, AND OREGON* 143 (2007).

159. Stuart Rosewarne, *Globalization and the Commodities of Labour: Temporary Labour Migrants*, 20 ECON. & LAB. REL. REV. 99, 107 (2010)

160. *Id.* at 105.

161. Jeff Faux, *How NAFTA Failed Mexico*, 14 AM. PROSPECT 35 (2003); Garcia, *supra* note 156, at 33.

162. RONALD CHARLES WOLF, *TRADE, AID AND ARBITRATE: THE GLOBALIZATION OF WESTERN LAW* (2003).

163. Garcia, *supra* note 156, at 29.

164. Nathan, *supra* note 74.

165. Rosewarne, *supra* note 159, at 104.

is increasingly being commoditized in global markets, where international corporations are free to roam the world and hire the most vulnerable workers.¹⁶⁶

The colonial premises of international trade law have remained resilient, taking their sources and authorities from the colonial archive. This commercial empire promulgates a lie: that humanity reaps the benefits of a more meaningful life when nations specialize in developing natural resource and labour within their territory, based on comparative advantages, through a combination of national politics and private enterprise.¹⁶⁷

Some studies have shown that free trade has also exacerbated income inequality in the United States.¹⁶⁸ A report from Boston University concluded that “NAFTA has fallen short of achieving many of its own objectives. Rather than promoting convergence of incomes, wages, and standards, NAFTA has tended to accentuate pre-existing economic and regulatory asymmetries in North America.”¹⁶⁹ Since 1994, NAFTA has benefited the rich,¹⁷⁰ harmed the poor by displacing Mexican workers,¹⁷¹ devastated local communities with *maquiladora* factories, and decreased wages for the working class.¹⁷² “In Mexico, NAFTA is blamed for creating few new jobs while decimating many existing sources of livelihood, particularly in agriculture.”¹⁷³ In addition to a dearth in jobs, the basic ability to grow one’s own food was seriously diminished as agribusiness entered the market and began accumulating productive land, with better yields through

166. Garcia, *supra* note 156, at 28.

167. Henderson, *supra* note 136, at xvi.

168. Lori Wallach & Melanie Foley, *Studies Reveal Consensus: Trade Flows during “Free Trade” Era Have Exacerbated U.S. Income Inequality*, PUB. CITIZEN’S GLOB. TRADE WATCH (Jan. 28, 2014), <http://citizen.typepad.com/eyesontrade/2014/01/studies-reveal-consensus-trade-flows-during-free-trade-era-have-exacerbated-us-income-inequality.html>.

169. GALLAGHER ET AL., *supra* note 25, at 2.

170. See generally Carrie Kahn, *How NAFTA Helped the Mexican Billionaires’ Club*, NPR (Dec. 31, 2013), <http://www.npr.org/2014/01/01/258668414/how-nafta-helped-the-mexican-billionaires-club>.

171. Knowledge@Wharton, *supra* note 124 (“[W]orkers in Mexico have not seen wage growth. Job losses and wage stagnation are NAFTA’s real legacy.”) (citing Robert Scott, Chief Economist at the Economic Policy Institute).

172. Faux, *supra* note 161, at 36; see also Christopher Wilson, *Working Together: Economic Ties Between The United States And Mexico*, WILSON CENTER (2011), <http://wilsoncenter.org/publication/working-together-economic-ties-between-the-united-states-and-mexico>; Dustin Ensinger, *NAFTA Job Losses Continue to Mount*, ECONOMY IN CRISIS (May 3, 2011), <http://economyincrisis.org/content/nafta-jobs-losses-continue-mount>; Yves Smith, *NAFTA Successfully Undermined Regulations*, N.Y. TIMES (Nov 27, 2013), <http://www.nytimes.com/roomfordebate/2013/11/24/what-weve-learned-from-nafta/nafta-successfully-undermined-regulations>.

173. GALLAGHER ET AL., *supra* note 25, at 3.

mechanization.¹⁷⁴ Likewise, with the advent of genetically modified corn, tortillas became cheaper than the real thing made locally.¹⁷⁵

The attacks of September 11, 2001 changed not just the United States, but also Mexico.¹⁷⁶ For a year and a half prior to the terror attacks, Mexican President Vicente Fox developed a relationship with U.S. President George W. Bush to regularize the millions of Mexicans living without legal status (an initiative termed “the Whole Enchilada”).¹⁷⁷ The two knew each other as governors, had visited each other’s ranches, and were both businessmen in their previous professional lives. Prior to the terrorist attacks on the World Trade Center and Pentagon, the Fox administration had made some headway in lobbying for comprehensive immigration reform. The 9/11 attacks changed the United States to focus on border security. Robert Pastor explained:

If NAFTA had created institutions and a new relationship among the three governments, then the day after 9/11, the Mexican President and the Canadian prime minister would have joined President Bush to announce that the attack was against all three countries, and they would respond together. This did not happen, and indeed, 9/11 contributed to an escalation of fears and a downturn in trade and commerce.¹⁷⁸

Corporations could make profits that emerged in the War on Terror after the 9/11 attacks. The Border Industrial Complex was just getting started.

174. See generally Flavia Echanove, *Agribusiness and Farmers in Mexico: The Importance of Contractual Relations*, 171 GEOGRAPHICAL J. 166, https://www.researchgate.net/publication/227710386_Agribusiness_and_farmers_in_Mexico_The_importance_of_contractual_relations. Keith Sealing, *Indigenous Peoples, Indigenous Farmers: NAFTA's Threat to Mexican Teosinte Farmers and What Can be Done About It*, 18 AM. U. INT'L L. REV. 1383 (2003), <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1204&context=auilr>.

175. See Andrew Pollack, *Kraft Recalls Taco Shells with Bioengineered Corn*, N.Y. TIMES (Sept. 22, 2000), <https://www.nytimes.com/2000/09/23/business/kraft-recalls-taco-shells-with-bioengineered-corn.html>; Renee Alexander and Simran Sethi, *Mexico Is Phasing out Imports of Glyphosate and GMO Corn. Supporters Say That Could Reverse Years of Damage from U.S. Trade Policy*, THE COUNTER (July 19, 2021), <https://thecounter.org/mexico-phaseout-glyphosate-genetically-engineered-corn-united-states/> (“The pact (NAFTA) devastated rural economies in Mexico, flooding the market with cheap, government-subsidized U.S. corn and gutting domestic corn prices by nearly 70 percent. This shift led an estimated 2 million farmworkers to abandon the countryside to seek work in big cities or across the border in the United States”).

176. ALDEN, *supra* note 120, at 261.

177. Duncan Campbell, *Mexico Goes for the Whole Enchilada*, GUARDIAN (Sept. 5, 2001, 11:52 EDT), <https://www.theguardian.com/world/2001/sep/05/immigration.usa>.

178. PASTOR, *supra* note 52, at 28.

B. *The Security and Prosperity Partnership*

There was a proliferation of security initiatives among the NAFTA countries, as the United States sought to further lockdown its borders and more diligently regulate its trade with its trading partners after the September 11, 2001 attacks. The Security and Property Partnership was the culmination of these security initiatives and common defense policies.¹⁷⁹ “In a post-9/11 world, it also aimed to make the United States’ ‘war on terror’ into a regional security issue.”¹⁸⁰ This was the era of the Container Security Initiative¹⁸¹ and other programs of Department of Homeland Security to harmonize the customs process, increase the rigor of inspection processes, and transfer some of the inspection operations offshore to foreign ports.¹⁸²

Building on the North American Free Trade Agreement, the Security and Property Partnership (SPP),¹⁸³ agreed to by Canadian Prime Minister Paul Martin, Mexican President Vicente Fox, and U.S. President George W. Bush in March 2005, was a culmination of security initiatives and common defense policies. But it was not a treaty with legal obligations.¹⁸⁴ There was no actual agreement, nor any binding obligations to supplement NAFTA. By the time the three government leaders met in March 2006 at the second summit of the SPP in Cancun, Mexico, they turned to corporate leaders and trade associations to work together to create a more integrated trade area.¹⁸⁵ The North American Competitiveness Council, with thirty corporate representatives from some of North America’s largest corporations, which reported to the executive branches in the three NAFTA partner countries, and were directed to improve trade and commerce by liberalizing rules of origin, exchanging information on health and safety, and harmonizing the use of symbols on textiles and apparel. The SPP wanted to do business more

179. See *North American Leaders Show Unity*, BBC (Mar. 23, 2005, 5:42 PM), <http://news.bbc.co.uk/2/hi/americas/4376431.stm>.

180. Stephen Zamora, *Rethinking North America: Why NAFTA’s Laissez Faire Approach to Integration Is Flawed, and What to Do About It*, 56 VILL. L. REV. 631, 642 (2011).

181. See *CSI: Container Security Initiative*, U.S. CUSTOMS & BORDER PROTECTION, [https://www.cbp.gov/border-security/ports-entry/cargo-security/csi/csi-brief_\(last modified on May 31, 2019\)](https://www.cbp.gov/border-security/ports-entry/cargo-security/csi/csi-brief_(last%20modified%20on%20May%2031%2C%202019)).

182. For other security initiatives post-9/11 among the three NAFTA Parties, see *Border Security*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/border-security> (last modified on Jan. 4, 2022).

183. Joint Statement by President Bush, President Fox, and Prime Minister Martin, *Security and Prosperity Partnership of North America*, (Mar. 23, 2005), <https://georgewbush-whitehouse.archives.gov/news/releases/2005/03/20050323-2.html>.

184. See *North American Leaders Show Unity*, *supra* note 179.

185. See generally Katherine Sciacchitano, *From NAFTA to the SPP: Here Comes the Security and Prosperity Partnership, But-What Security? Whose Prosperity?*, DOLLARS & SENSE (2008), <http://www.dollarsandsense.org/archives/2008/0108sciacchitano.html>

efficiently, competing with other trade blocs, and benefiting from the comparative advantage¹⁸⁶ But without a multilateral treaty and a budget, not much came to pass in the end, and all talk of these initiatives came to a quiet end.¹⁸⁷

It can, at best, be characterized as an endeavor by the three countries to facilitate communication and cooperation across several key policy areas of mutual interest. Although the SPP builds upon the existing trade and economic relationship of the three countries, it is not a trade agreement and is distinct from the existing North American Free Trade Agreement (NAFTA). Some key issues for Congress regarding the SPP concern possible implications related to private sector priorities, national sovereignty, transportation corridors, cargo security, and border security.¹⁸⁸

Regional economic integration can provide some serious security challenges. There were unproven rumors that Al Qaeda and other terrorists could cross the U.S.-Mexico border,¹⁸⁹ that the *narcotraficantes* and other transnational criminal organizations were joining forces with Islamic extremist groups, and that Central American *maras*¹⁹⁰ were using beheadings

186. See generally Neil Craik & Joseph DiMento, *Environmental Cooperation in the (Partially) Disaggregated State: Lessons from the Security and Prosperity Partnership of North America*, 8 CHI. J. INT'L L. 479, 484-92 (2008).

187. While the spp.gov website has been taken down, there are still archived materials available online, primarily those posted by the Canadian government. See generally *Evaluation of the Security and Prosperity Partnership of North America (SPP) Pilot Project on Reducing Emissions from Vehicles and Engines (PPRE)*, GOV'T CANADA (July 2011) [hereinafter *Evaluation of the SPP*], <https://www.ec.gc.ca/doc/ae-ve/2011-2012/1405/ec-com1405-en-s2.htm>.

188. M. ANGELES VILLARREAL & JENNIFER E. LAKE, CONG. RSCH. SERV., RS22701, SECURITY AND PROSPERITY PARTNERSHIP OF NORTH AMERICA: AN OVERVIEW AND SELECTED ISSUES (2009).

189. See Ellen Weiss, *Opinion: Drug Cartels Across the Border Are Just As Brutal As ISIS*, ABC 10 NEWS SAN DIEGO (Oct. 23, 2014), <http://www.10news.com/decodedc/drug-cartels-across-the-border-just-as-brutal-as-isis>. Cf. John Parkinson, *DHS Rebuffs Congressman's Claim ISIS Infiltrating Southern Border*, ABC NEWS (Oct. 8, 2014, 10:39 AM), <http://abcnews.go.com/Politics/dhs-rebuffs-congressmans-claim-isis-infiltrating-southern-border/story?id=26043280>. This myth has been propagated for years:

In December 2005, the Department of Homeland Security sent word that authorities had arrested dozens of terrorist operatives who were already inside the country. While the total number of suspects was unknown, officials reported at least fifty-one people from countries known to support terrorist activities or harbor terrorist sympathies—Egypt, Iran, Iraq, Lebanon, Pakistan, and Syria—had been intercepted by the Border Patrol and other members of the Joint Terrorism Task Force (JTTF) since the unit began tracking such arrests a little more than a year before.

TOM TANCREDO, IN MORTAL DANGER: THE BATTLE FOR AMERICA'S BORDER AND SECURITY 86 (2006).

190. Maras are the plural for the members of Mara Salvatrucha, or MS-13, a transnational drug trafficking organization. See generally, ALBERT DEAMICIS, OFFICE OF JUST. PROGRAMS, MARA SALVATRUCHA: THE DEADLIEST STREET GANG IN AMERICA, NCJ NO. 251138 (2017),

and other public displays of violence similar to those employed by extremists in the Middle East.¹⁹¹ The SPP was aimed to counter threats posed directly by international terrorists. Thomas Shannon, the U.S. Assistant Secretary of State for Western Hemisphere Affairs, provided that “[t]o a certain extent, we’re armoring NAFTA.”¹⁹²

Some politicians viewed the SPP as a threat to the sovereignty of the United States. In the second session of the 109th Congress of the United States on September 28, 2006, Representatives Virgil Goode Jr., Ron Paul, Walter Jones, and Tom Tancredo submitted a resolution to the Committee on Transportation and Infrastructure that made some noise, but no resolution or law emerged.¹⁹³

In Canada, National Chairperson of the Council of Canadians, described it as anti-democratic and a threat to Canada’s water and energy.¹⁹⁴ Critics took to the media to lambaste the SPP and corporate control. For then-CNN anchor Lou Dobbs, the SPP was the gateway to a new common currency.¹⁹⁵ Stephen Zamora used a more academic term by referring to the SPP as an example of “NAFTA-related ‘quasi-supranationalism.’”¹⁹⁶

<https://www.ojp.gov/ncjrs/virtual-library/abstracts/mara-salvatrucha-deadliest-street-gang-america>.

191. Cf. CELINDA FRANCO, CONG. RSCH, SERV., RL34233, THE MS-13 AND 18TH STREET GANGS: EMERGING TRANSNATIONAL GANG THREATS? 1 (2010) (“[P]erhaps most disturbingly for policy makers in a post- 9/11 world, alarms have been sounded in some circles that international terrorist organizations like al-Qaeda could exploit alien and narcotics smuggling networks controlled by these gangs to infiltrate the United States. To date, however, no evidence suggests that these gangs and international terrorist groups are cooperating with one another.”); Joseph Rogers, *Gangs and Terrorists in the Americas: An Unlikely Nexus*, 14 J. GANG RES. 19 (2007).

192. Thomas A. Shannon, Jr., Asst. Sec’y of State, U.S. Dept. of State, Remarks at a AS/COA Hosted Conversation (Apr. 2, 2008), <https://www.as-coa.org/articles/us-asst-secretary-state-western-hemisphere-affairs-thomas-shannon>.

193. *H.Con.Res. 40 (110th): Expressing the Sense of Congress that the United States Should Not Engage in the Construction of a North American Free Trade Agreement (NAFTA) Superhighway System or Enter into a North American Union with Mexico and Canada*, GOVTRACK (Jan. 22, 2007), <https://www.govtrack.us/congress/bills/110/hconres40>; H.R. Con. Res. 40, 110th Cong. (2007).

194. Brent Patterson, *Maude Barlow Addresses ‘Peace with Water’ Conference*, COUNCIL OF CANADIANS, <https://canadians.org/analysis/maude-barlow-addresses-peace-water-conference> (last visited Feb. 21, 2022).

195. *Lou Dobbs Tonight*, CNN (June 21, 2006), <https://transcripts.cnn.com/show/ldt/date/2006-06-21/segment/01> (“The Bush administration’s open-borders policy and its decision to ignore the enforcement of this country’s immigration laws is part of a broader agenda. President Bush signed a formal agreement that will end the United States as we know it, and he took the step without approval from either the U.S. Congress or the people of the United States.”).

196. Zamora, *supra* note 180, at 642.

According to a United States Congressional Research Service report on the SPP:

The primary purpose of the initiative was to improve cooperative efforts among the three countries in areas related to economic prosperity and the protection of the environment, the food supply, and public health. The initial plan included the establishment of a number of security and prosperity working groups in each of the two categories. [For the U.S. government,] [t]he security working groups were chaired by the Secretary of Homeland Security and the prosperity working groups were chaired by the Secretary of Commerce.¹⁹⁷

While the spp.gov website has been taken down, archived materials are still available online, they are posted primarily by the Canadian government.¹⁹⁸ According to the Canadian government website, the SPP was about more than just a common defense policy:

The SPP . . . provides a flexible means for a dialogue, priority setting, collaboration and action on issues affecting the security, prosperity and quality of life of Canadians, Americans and Mexicans. It addresses diverse issues, such as border facilitation, the environment, food and product safety, and includes measures to improve overall North American competitiveness.¹⁹⁹

It is of little surprise that the SPP scared a great many economic nationalists, union leaders, conspiracy theorists, and media pundits. Critics painted the SPP as the blueprint for a takeover by the corporations.²⁰⁰ Elected representatives in the United States saw the lack of democratic oversight as troublesome. A congressional research report noted, “[s]ome key issues for Congress regarding the SPP concern possible implications related to *private sector priorities*, national sovereignty, transportation corridors, cargo security, and border security.”²⁰¹

Not much happened. Various representatives from Canada, Mexico, and the United States met in February 2007 to discuss the Security and Prosperity Partnership. When they later met at Montebello, Quebec in August 2007, the

197. VILLARREAL & LAKE, *supra* note 188, at 1.

198. *See Evaluation of the SPP, supra* note 187.

199. *Id.*

200. Lou Dobbs opined that the SPP was the gateway to a new common currency. *See also Lou Dobbs Tonight, supra* note 195 (“The Bush administration’s open-borders policy and its decision to ignore the enforcement of this country’s immigration laws is part of a broader agenda. President Bush signed a formal agreement that will end the United States as we know it, and he took the step without approval from either the U.S. Congress or the people of the United States.”). Zamora, *supra* note 180, at 642 (Professor Stephen Zamora gave the SPP a bit more academic respectability by referring to it as an example of “NAFTA-related ‘quasi-supranationalism’”).

201. VILLARREAL & LAKE, *supra* note 188 (emphasis added).

leaders of the three countries even referred to the SPP discussions as “NAFTA trade talks.”²⁰² Eventually, the blogosphere nationalist groups particularly in Canada and the United States, made enough noise to have the SPP die a quiet death by August 2009. The three governments abandoned the project by simply taking down the website and starting new projects, on bilateral and ad hoc bases, rather than through trilateral mechanisms.

North America’s governments follow a general *laissez faire* approach to integration of the economies and societies of the NAFTA countries. Trilateralism is eschewed in favor of ad hoc attempts at bilateral, generally short-term solutions to issues of common concern to North Americans. Canada, Mexico, and the United States (especially the last) prefer to conduct affairs unilaterally, with occasional resort to bilateral initiatives to smooth over economic or diplomatic problems.²⁰³

Perhaps trilateralism had run its course.

[I]n the absence of a compelling vision to define a modern regional entity, and lacking institutions to translate that vision into policies, the old patterns of behavior among the three governments remained. This meant that the U.S. penchant for unilateralism and the Canadian and Mexican preference for bilateralism have trumped NAFTA’s promise of a novel trilateral partnership.²⁰⁴

A dozen years later, Robert A. Pastor noted again that, “[i]nstead of tackling new transnational problems such as regulatory harmonization together, the United States and its neighbors reverted to old habits of bilateral, ad hoc negotiations.”²⁰⁵ And that was even before the Presidency of Donald J. Trump.

C. *The United States-Mexico-Canada Agreement*

Repeatedly during the 2016 Presidential election in the United States, candidate Trump promised to withdraw from the NAFTA.²⁰⁶ Trump

202. Steve Schifferes, *NAFTA Trade Talks Likely to Stall*, BBC (Aug. 18, 2007), <http://news.bbc.co.uk/2/hi/business/6940189.stm>.

203. Zamora, *supra* note 180, at 644.

204. PASTOR, *supra* note 125, at 2.

205. Memorandum from Robert A. Pastor on Shortcut to U.S. Econ. Competitiveness (Mar. 5, 2013), https://cdn.cfr.org/sites/default/files/pdf/2013/03/Policy_Innovation_Memo29_Pastor.pdf

206. Jared Bernstein, *Trump Promises to Tear Up Trade Deals. Here’s What He Should Do*, WASH. POST (Nov. 14, 2016), https://www.washingtonpost.com/posteverything/wp/2016/11/14/trump-promises-to-tear-up-trade-deals-heres-what-he-should-do/?utm_term=.39161b8f69a5. See generally Time Staff, *Here’s Donald Trump’s Presidential Announcement Speech*, TIME (June 16, 2015), <http://time.com/3923128/donald-trump-announcement-speech/> (However, Mr. Trump also

repeatedly pointed to the U.S. trade deficit with Mexico as emblematic of “unfair trade deals” which the United States entered.²⁰⁷ His campaign stated, that as President, he would tell NAFTA partners:

that we intend to immediately renegotiate the terms of that agreement to get a better deal for our workers. If they don't agree to a renegotiation, we will submit notice that the U.S. intends to withdraw from the deal. Eliminate Mexico's one-side backdoor tariff through the VAT and end sweatshops in Mexico that undercut U.S. workers.²⁰⁸

In his inaugural address, President Donald J. Trump fed into the anger of the trade.²⁰⁹ On January 26, 2017, President Trump tweeted, that “[the United States] has a 60-billion-dollar trade deficit with Mexico. It has been a one-sided deal from the beginning of NAFTA with massive numbers”²¹⁰ Maintaining that NAFTA was “a horrible deal,” President Trump opted to renegotiate NAFTA only a day after announcing that he was ready to trigger the article in the trade agreement to withdraw from it: “I think we'll be successful in the renegotiation, which, frankly, would be good because it would be simpler.”²¹¹

It is important to note that the renegotiation of NAFTA was not the brainchild of President Trump. As candidates for the Democratic Party's Presidential nomination, then Senators Barack Obama and Hillary Clinton also both called for a new NAFTA deal.²¹² Seeking delegates during the Ohio primary, both candidates criticized the deal for job losses in the state's

promised to withdraw from the Trans-Pacific Partnership, a twelve-country trade agreement the U.S. had recently signed. Trump also said, “I'll bring back our jobs from China, from Mexico, from Japan, from so many places. I'll bring back our jobs, and I'll bring back our money”).

207. Rex Nutting, *Opinion: How Donald Trump Hijacked the Democrats' Best Issue*, MARKETWATCH (Sept. 30, 2016, 11:23 A.M.), <http://www.marketwatch.com/story/how-hillary-clinton-could-beat-donald-trump-on-his-strongest-issue-2016-09-30>.

208. *Looking Back—Trump and Trade*, THOMPSON HINE (Jan. 9, 2017), <https://www.thompsonhine.com/publications/looking-back-trump-and-trade>.

209. *Donald Trump's Inaugural Address: Full Text as Prepared for Delivery*, WASH. POST (Jan. 20, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/01/20/donald-trumps-inaugural-address-full-text-as-prepared-for-delivery/?utm_term=.cda4ee831b81.

210. Nikita Vladimirov, *Trump Ripped Mexico in Tweet While Kushner Was Meeting with Mexican Officials: Report*, THE HILL (Feb. 11, 2017, 11:47 AM) <https://thehill.com/homenews/administration/319080-trump-ripped-mexico-in-tweet-while-kushner-was-meeting-with-mexican>; see Ioan Grillo, *Trumps' Mexican Shakedown*, N.Y. TIMES (Feb. 2, 2017), <https://www.nytimes.com/2017/02/02/opinion/trumps-mexican-shakedown.html>.

211. Scott Horsely, *With Billions at Stake, Trump Agrees to Mend NAFTA—Not End It*, NPR (Apr. 27, 2017, 5:38 PM), <http://www.npr.org/2017/04/27/525920241/with-billions-at-stake-trump-agrees-to-mend-nafta-not-end-it>.

212. Adam Davidson, *Clinton, Obama and NAFTA: A Non-Issue?*, NPR (Feb. 26, 2008, 4:00 PM), <https://www.npr.org/templates/story/story.php?storyId=38185288> (“The two candidates seem to really hate NAFTA.”).

rustbelt.²¹³ When the Democrats took the White House in 2008, the promises to renegotiate NAFTA went unfulfilled. That was not so with the new Trump administration.

In a letter to Congressional leadership, U.S. Trade Representative Robert Lighthizer notified the U.S. Congress that through improvements to NAFTA, the Trump administration looked to spark economic growth and create better-paying jobs.²¹⁴ Those improvements were not detailed.²¹⁵ In August 2017, trade negotiations commenced.²¹⁶

On August 22, 2017, President Trump told a campaign-like rally audience in Phoenix that he doubted that the United States could reach a deal to renegotiate the NAFTA and that his administration would end up just terminating the trade pact with Canada and the United States. “So I think we’ll end up probably terminating NAFTA at some point, OK? Probably.”²¹⁷ This occurred only five days before the first set of renegotiations had just ended.²¹⁸ And just five days before the start of a second round of talks, President Trump announced via Twitter that he planned to withdraw from NAFTA altogether.²¹⁹ This threat lit a fire for the trade officials crafting the

213. Associated Press, *Clinton, Obama Slug It Out in Ohio*, CBS NEWS (Feb. 28, 2008, 4:13 PM), <https://www.cbsnews.com/news/clinton-obama-slug-it-out-in-ohio/>.

214. Letter from Robert E. Lighthizer, U.S. Trade Rep., to Charles E. Schumer, Democratic Leader, Orrin Hatch, President Pro Tempore, Paul Ryan, Speaker of the House & Nancy Pelosi, Democratic Leader (May 18, 2017) (on file with Congress).

215. Julie Hirschfeld Davis, *Trump Sends NAFTA Renegotiation Notice to Congress*, N.Y. TIMES (May 18, 2017), https://www.nytimes.com/2017/05/18/us/politics/nafta-renegotiation-trump.html?_r=0.

216. Jorge Valencia, *NAFTA Talks Could Begin as Early as August; ‘We Are Ready,’ Mexican Official Says*, FRONTERAS DESK (May 18, 2017), <http://www.fronterasdesk.org/content/10679/nafta-talks-could-begin-early-august-‘we-are-ready’-mexican-official-says>.

217. Chris Cillizza, *Donald Trump’s 57 Most Outrageous Quotes From His Arizona Speech*, CNN (Aug. 22, 2017, 10:16 AM), <http://www.cnn.com/2017/08/23/politics/donald-trump-arizona/index.html>. See also Jethro Mullen, *Trump: We’ll probably End Up Killing NAFTA ‘at Some Point,’* CNN (Aug. 23, 2017, 3:47 PM), <http://money.cnn.com/2017/08/22/investing/trump-nafta-termination/index.html>; Reuters Staff, *Trump Warns May Terminate NAFTA Treaty*, REUTERS (Aug. 22, 2017, 10:39 PM), <https://www.reuters.com/article/us-usa-trump-nafta-idUSKCN1B30F2>; Jacob Pramuk, *Trump: We’ll ‘Probably’ End Up Terminating NAFTA*, CNBC (Aug. 22, 2017, 3:47 PM), <https://www.cnbc.com/2017/08/22/trump-well-probably-end-up-terminating-nafta.html>; *President Trump Ranted For 77 Minutes in Phoenix. Here’s What He Said*, TIME (Aug. 23, 2017, 9:30 AM), <http://time.com/4912055/donald-trump-phoenix-arizona-transcript/>.

218. Rodrigo Cervantes, *As NAFTA Talks Start, Trade Deficit Arguments Prevail*, FRONTERAS (Aug. 16, 2017), <http://www.fronterasdesk.org/content/10772/nafta-talks-start-trade-deficit-arguments-prevail>.

219. Reuters Staff, *Trump Renews Threat to Scrap NAFTA Going into Next Round of Talks*, REUTERS (Aug. 27, 2017, 8:09 AM), <https://www.reuters.com/article/us-trade-nafta-idUSKCN1B70NA>.

deal. More lightning speed rounds of negotiations were undertaken, some through separate tracks—beyond the parties’ initial deadline of December 2017²²⁰ and into Spring 2018 with both Canada²²¹ and Mexico.²²² A bilateral deal with Mexico—the United States-Mexico Trade Agreement—was announced in late August 2018, leaving out Canada.²²³

After the back and forth of the lightning speed negotiations during 2018 and 2019, the parties finally reached a deal.²²⁴ The USMCA was initially signed and agreed upon in December 2019. However, President Trump did not sign the agreement until January 29, 2020.²²⁵ Canada agreed to the final terms on April 3, 2020.²²⁶ Referred to in Canada as the Canada-United States-Mexico-Agreement (CUSMA) (and in French Canada as the Accord Canada–États-Unis–Mexique (ACEUM)),²²⁷ and Tratado entre México, Estados Unidos y Canadá (T-MEC) in Mexico, the USMCA went into force on July 1, 2020.²²⁸

220. Ana Swanson, *Nafta Talks’ Extension May Make for Slow, Painful Demise*, N.Y. TIMES (Oct. 17, 2017), https://www.nytimes.com/2017/10/17/us/politics/nafta-negotiators-extend-talks-delaying-its-expected-demise.html?ref=collection%2Fsectioncollection%2Fpolitics&action=click&contentCollection=politics®ion=stream&module=stream_unit&version=latest&contentPlacement=3&pgtype=sectionfront.

221. Rodrigo Cervantes, *Canadian Prime Minister Visits Mexico Amidst NAFTA Discussions*, FRONTERAS (Oct. 13, 2017), <http://www.fronterasdesk.org/content/10848/canadian-prime-minister-visits-mexico-amidst-nafta-discussions>.

222. Elisabeth Malkin, *Mexico Braces for the Possible Collapse of NAFTA*, N.Y. TIMES (Oct. 16, 2017), https://www.nytimes.com/2017/10/16/world/americas/mexico-nafta.html?ref=collection%2Fsectioncollection%2Fworld&action=click&contentCollection=world®ion=stream&module=stream_unit&version=latest&contentPlacement=6&pgtype=sectionfront&_r=0.

223. Damian Paletta, Erica Werner & David J. Lynch, *Trump Announces Separate U.S.-Mexico Trade Agreement, Says Canada May Join Later*, WASH. POST (Aug. 27, 2018), https://www.washingtonpost.com/business/2018/08/27/us-mexico-reach-partial-agreement-resolve-trade-conflict-step-towards-nafta-deal/?utm_term=.5b8c3d156642. *See also* Matthew Rooney, *Don’t Split NAFTA*, NAT’L REV. (June 9, 2018), <https://www.nationalreview.com/2018/06/nafta-treaty-trilateral-better-than-bilateral/>.

224. Ana Swanson, *Canada on the Sidelines as U.S. and Mexico Near an Agreement on NAFTA*, N.Y. TIMES (Aug. 17, 2018), https://www.nytimes.com/2018/08/17/us/politics/nafta-canada-mexico.html?ref=collection%2Fsectioncollection%2Fpolitics&action=click&contentCollection=politics®ion=stream&module=stream_unit&version=latest&contentPlacement=4&pgtype=sectionfront.

225. Eugene Beaulieu & Dylan Klemen, *You Say USMCA or T-MEC and I Say CUSMA: The New NAFTA - Let’s Call the Whole Thing On*, 13:7 SCH. PUB. POL’Y PUBL’N. 1, 2 (Apr. 2020).

226. *Id.* at 1.

227. *Id.* at 2, n. 1.

228. Press Release, Robert Lighthizer, U.S. Trade Rep, USMCA To Enter into Force July 1, After United States Takes Final Procedural Steps for Implementation (Apr. 24, 2020),

The new agreement is not exactly an earth-shattering change for the parties. David A. Gantz wrote that “much of NAFTA has been carried over into the USMCA.”²²⁹ The Investor-State Dispute Resolution mechanisms of Chapter 11—the impugned procedures that allow foreign corporations to sue sovereign countries for the expropriation, nationalization or other “taking” of their investment—did not change much under the new agreement.²³⁰ Arbitrators are now empowered to throw out nuisance lawsuits—blatant attempts at seeking unjust enrichment by arguing for expectation of profits as part of the damages they claim.²³¹ This perversion of mechanisms to ensure fair and just compensation for foreign corporations has been part of all trade agreements the United States has entered into since the North American Free Trade Agreement. Chapter 11 has been the target of U.S. politicians on both sides of the political spectrum even though the United States has never lost a case under the provision.²³² New rules to prevent corporations from extracting hundreds of millions of dollars for “losing an investment” must be renegotiated, at least that is what Canada and Mexico—both of which have paid U.S. corporations dearly over the years—will seek. Investor-State arbitration procedures under the USMCA will continue to work outside of domestic court systems, remain anti-democratic, and function as a corporate welfare scheme.

NAFTA’s environmental and labor side provisions, contained in so-called “side agreements” were scrapped for the United States-Mexico-Canada Agreement.²³³ Those issues were placed inside the agreement, with more enforcement measures.²³⁴ The new agreement provided for more deals

<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/april/usmca-enter-force-july-1-after-united-states-takes-final-procedural-steps-implementation>.

229. David A. Gantz, *North America’s Shifting Supply Chains: The USMCA, COVID-19, and the U.S.-China Trade War*, CTR. FOR THE U.S. & MEX. 1, 3 (2020).

230. USMCA, *supra* note 31, ch. 2, art. 14.D.3(1)(a)(i)(A), n. 22.

231. *See id.*, ch. 4.

232. Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html.

233. Mario Andrew Torrico et al., *New Labor Obligations Contained in USMCA Present Risks for Covered Employers*, NAT’L L. REV. (Apr. 28, 2021), <https://www.natlawreview.com/article/new-labor-obligations-contained-usmca-present-risks-covered-employers>.

234. *See* USMCA *supra* note 31, chs. 23-24.

for corporations under the guise of “America First,”²³⁵ creating boons for multinational capital and global financial institutions.²³⁶

The USMCA provides for changes in regional content value concerning automobiles and automobile parts.²³⁷ The focus on regional content value rules to truly make cars in North America. The USMCA provided a requirement that 75% of the automobiles manufacturing, must have occurred in North America to qualify for zero tariffs (in comparison to 63.5% under NAFTA).²³⁸ Additionally, 45% of automobile components must be made by workers making at least \$16 per hour by the year 2023.²³⁹ USMCA sections 19, 20, 23, and 24 also provide changes to digital, intellectual property (IP), labor, and environmental standards. Investors no longer have the ability to sue governments which policy changes damage business in the United States and Canada; Mexico imposed restrictions on the ability to sue.²⁴⁰

One of the highlights of the USMCA is the novel chapter on trade in digital goods.²⁴¹ The USMCA addresses the use and inclusion of algorithms in trade, recognizing interactive computer services, and addresses the liability of intermediaries regarding IP infringement. Radically, Article 19.18 addresses the availability of having public government data to promote innovation, competition, and social development.²⁴² The chapter dedicated to digital goods is visionary, making the USMCA a truly innovating regime among modern free trade agreements.²⁴³

But the USMCA is not in *ad infinitum*; it provides for a five-year sunset clause on any new agreement.²⁴⁴ In the end, the USMCA is likely not a

235. Lily Rothman, *History/Politics: The Long History Behind Donald Trump's 'America First' Foreign Policy*, TIME (Mar. 28, 2016), <https://time.com/4273812/america-first-donald-trump-history/>; see also White House: 'America First': Read Trump's Full United Nations Speech, NBC NEWS (Sept. 19, 2017), <https://www.nbcnews.com/politics/white-house/america-first-read-trump-s-full-united-nations-speech-n802676>.

236. Alan Rappeport, *As NAFTA Talks Resume, U.S. and Canada Aren't Budging on Key Priorities*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/us/politics/nafta-talks-us-canada.html>.

237. Eric van Eyken, *Is America First the End of FET?*, KLUWER ARB. BLOG (Aug. 3, 2017), <http://arbitrationblog.kluwerarbitration.com/2017/08/03/america-first-end-fet/>.

238. David A. Gantz, *The United States-Mexico-Canada Agreement: Tariffs, Customs, and Rules of Origin*, RICE U. BAKER INST. PUB. POL'Y RPT. 3 (2019).

239. Beaulieu & Klemen, *supra* note 225, at 5.

240. *Id.*

241. See generally USMCA, *supra* note 31, ch. 19.

242. Mira Burri, *Towards a New Treaty on Digital Trade*, 5 J. WORLD TRADE, 77, 90 (2021).

243. Eleanor Wragg, *USMCA: A High-Water Mark for Digital Trade?*, GLOBAL TRADE REV. (July 14, 2020), <https://www.gtreview.com/magazine/volume-18-issue-3/usmca-high-water-mark-digital-trade/>.

244. Swanson, *supra* note 224.

panacea for all of the United States' trade challenges.²⁴⁵ Experts, stakeholders, academicians, as well as dairy farmer organizations predict that results of the USMCA will not be so great.²⁴⁶

One area of focus is the impact of the USMCA on the United States labor market. The total average wage across all education levels is expected to increase by an average of only 0.27%.²⁴⁷ In comparison to baseline changes in 2017, employment among workers with ten to twelve years of education and thirteen to fifteen years of education is expected to increase a paltry 0.12%.²⁴⁸ It was no surprise that the International Union of Machinists and Aerospace Workers (IAM) opposed the USMCA. "U.S. workers have been waiting over 25 years for a responsible trade deal that puts their interests ahead of corporations who are fleeing our shores. They are still waiting. The IAM will oppose NAFTA 2.0."²⁴⁹

Corporations, however, will likely prosper as they did under the previous trilateral trade agreement. "Powerful multinational corporations have used and controlled the negotiation of trade and investment deals to facilitate offshoring and the deregulation of the U.S. and global economy."²⁵⁰ U.S. trade with Canada is expected to grow 5.9% in exports (19.1 billion), 4.8% in imports (19.1) billion.²⁵¹ U.S. trade with Mexico is expected to grow 6.7% in exports (14.2 billion) and 3.8% (12.4 billion) in imports.²⁵²

The United States International Trade Commission (USTIC) prepared a report on the likely impact of the implementation of the USMCA. The report was created in compliance with the Bipartisan Congressional Trade Priorities and Accountability Act of 2015.²⁵³

245. *North American Business Associations Issue Joint Statement on USMCA: "USMCA is Here, But the Work is Just Beginning,"* U.S. CHAMBER COM. (July 1, 2020), <https://www.uschamber.com/international/trade-agreements/north-american-business-associations-issue-joint-statement-usmca-usmca-here-the-work>.

246. *USMCA: A Bad Deal for Farmers*, NAT'L FAM. FARM COALITION (Mar. 18, 2020), <https://nffc.net/usmca-a-bad-deal-for-farmers/#:~:text=In%20another%20disappointment%20for%20farmers%2C%20the%20USMCA%20does,revoked%20following%20a%202015%20WTO%20complaint%20from%20Canada>.

247. U.S.- Mexico-Canada Trade Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors, Inv. No. TPA 105-003, USITC Pub. 4889 (April 2019) [hereinafter USMCA Impact].

248. *Id.* at 47.

249. International Union of Machinists and Aerospace Workers, *Machinists Union Opposes USMCA* (Dec. 10, 2019), <https://www.goiam.org/news/imap/machinists-union-opposes-usmca/>.

250. See Thea M. Lee & Robert E. Scott, *News from EPI: U.S.-Mexico-Canada Agreement—Weak Tea, at Best*, ECON. POL'Y INST. (Dec. 10, 2019), <https://www.epi.org/press/u-s-mexico-canada-agreement-weak-tea-at-best/>.

251. USMCA Impact, *supra* note 247, at 14.

252. *Id.*

253. *Id.* at 27.

The statute requires the Commission to assess the likely impact of USMCA on the U.S. economy as a whole and on specific industry sectors, including its impact on the U.S. gross domestic product (GDP); exports and imports; aggregate employment and employment opportunities; the production, employment, and competitive position of industries likely to be significantly affected by the agreement; and the interests of U.S. consumers.²⁵⁴

The USTIC estimates that the USMCA would raise the United States, “real GDP by \$68.2 billion (0.35%) and U.S. employment by 176,000 jobs (0.12%).”²⁵⁵ Additionally, U.S. exports to Canada and Mexico would increase by \$19.1 billion (5.9%) and \$14.2 billion (6.7%), respectively. U.S. imports from Canada and Mexico would increase by \$19.1 billion (4.8%) and \$12.4 billion (3.8%), respectively.²⁵⁶

The report noted the United States economy in comparison to Mexico and Canada, as well as the prior reduction in tariffs within NAFTA, will likely cause a minimal impact overall to the United States economy, with the real GDP staying at baseline.²⁵⁷ The most significant impacts are, “reduc[ing] policy uncertainty regarding cross-border data flows and data localization and certain automotive rules of origin (ROOs) have the most significant impact on the estimated results.”²⁵⁸ In addition, trade disputes with the parties in the USMCA continue into the Biden administration.²⁵⁹

In the end though, trilateral initiatives did not do much to tame the border, and there has been a mixed set of results from NAFTA and SPP; similar results are likely with the newest trade agreement—the United States-Mexico-Canada Agreement. As noted above, corporations did well under NAFTA and the SPP and they are poised to do well again under the United States-Mexico-Canada Agreement, particularly in the provision of digital goods.²⁶⁰

Corruption reigns in Mexico, as reports from Transparency International confirm.²⁶¹ Even the USMCA negotiations were not without their own scandal. Mexican prosecutors from the federal Attorney General’s Office

254. *Id.*

255. *Id.* at 14.

256. *Id.*

257. *Id.* at 15.

258. *Id.* at 15-16.

259. Gavin Bade & Andy Blatchford, *Biden’s Made-in-America Push Raises Trade Tensions at Meeting with Canada, Mexico*, POLITICO (Nov. 18, 2021, 5:01 AM), <https://www.politico.com/news/2021/11/18/joe-biden-made-in-america-tensions-canada-mexico-522868>.

260. USMCA Impact, *supra* note 247, at 171.

261. TRANSPARENCY INT’L *supra* note 138.

charged former economy minister Ildefonso Guajardo, the lead negotiator for Mexico in the USMCA negotiations, with corruption in July 2021.²⁶² This charge alleged that blurring of public and private dealings is not dissimilar to that what occurred in the U.S. fundraising and personal enrichment criminal prosecutions of the border vigilantes and in We Build the Wall, implicating former Trump advisor Steve Bannon, nor to the fleecing of donations by various border vigilante groups a few years ago.²⁶³ It is not unlike the behavior exhibited by Pancho Villa when he was both a bandit and Governor of the State of Chihuahua in the aftermath of the Mexican Revolution.²⁶⁴

III. THE TRILATERAL RESPONSES HAVE NOT TAMED THE BORDER

In the view of the United States' trade policymakers in the late 1980s and early 1990s, NAFTA was necessary for economic²⁶⁵ and national security reasons.²⁶⁶ The three countries in the trade pact promised to increase economies of scale by lowering trade barriers to facilitate a continent-wide supply chain to allow for greater efficiency and creation of competitive firms ready for the global marketplace. With the attacks of 9/11, most U.S. policies and international agreements revolved around national security.²⁶⁷ After a decade of NAFTA, the security measures that emerged after the 9/11 attacks included principally another trilateral agreement that harmonizes rules for

262. *Mexico Accuses Former USMCA Negotiator of Illicit Enrichment*, BLOOMBERG TAX (July 9, 2021, 1:48 PM), <https://news.bloombergtax.com/daily-tax-report-international/mexico-accuses-former-usmca-negotiator-of-illicit-enrichment>.

263. David Holthouse, *Jim Gilchrist Fired by Minuteman Project*, S. POVERTY L. CTR. (July 1, 2007), <https://www.splcenter.org/fighting-hate/intelligence-report/2007/jim-gilchrist-fired-minuteman-project>. See generally, Sonya Geis, *Minuteman Project in Turmoil Over Financial Allegations*, WASH. POST (Mar. 13, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/12/AR2007031201297.html>.

264. When Villa entered the governor's palace in Chihuahua he took personal command of the relief work among the residents of the town. His first act was to reduce prices so as to permit the poor to obtain the necessary supplies. Any merchant found guilty of charging famine prices was to be shot and his stores and property confiscated.

I. THORD-GRAY, *GRINGO REBEL: MEXICO 1913-1914*, 257-58 (1960).

265. MAXWELL A. CAMERON & BRIAN W. TOMLIN, *THE MAKING OF NAFTA: HOW THE DEAL WAS DONE* 182 (2000).

266. "The United States has long understood that instability in Mexico could not be contained at the border. That is the national security rationale that underlies NAFTA." PASTOR, *supra* note 125, at 189.

267. Historical and national security concerns have always driven U.S. policy towards Central America. Since the early days of the United States, American business played a significant role in the region And despite the relatively small size of the market offered by Central American countries, U.S. policymakers saw the promise of stable economies and political conditions offered by greater trade and investment in the region.

Robert E. Lutz, *CAFTA and Commercial Law Reform in the Americas: An Introduction*, 12 SW. J. L. TRADE AMS. 177, 177 (2006).

transportation, travel, and other communications among the three partner countries. The Security and Prosperity Partnership arrived in 2005, building a security narrative into the free trade area. The USMCA added on the harmonization and provided, among other features, the pioneer architecture for an integrated digital goods marketplace, free of duties and administrative challenges. This Article has focused on these trilateral initiatives to tame the border areas, while further augmenting the regional integration and making the borders, specifically the U.S.-Mexico border, less contested and safer.²⁶⁸ However, that has not happened.

Instead, these trade regimes laid the framework for a culture of extraction of agricultural products, minerals, oil, and eventually people. Eduardo Galeano in *Open Veins of Latin America* wrote:

The division of labor among nations is that some specialize in winning and others in losing. Our part of the world, known today as Latin America, was precocious: it has specialized in losing ever since those remote times when Renaissance Europeans ventures across the ocean and buried their teeth into the throats of the Indian civilizations. Centuries passed and Latin America perfected its role. We are no longer in the era of marvels when fact surpassed fable and imagination was shamed by the trophies of conquest—the lodes of gold, the mountains of silver. But our region still works as a menial. It continues to exist at the service of others' needs, as a source and reserve of oil and iron, of copper and meat, of fruit and coffee, the raw materials and foods destined for rich countries which profit more from consuming them than Latin America does from producing them.²⁶⁹

Indeed, the monocultural economies of Latin America continue while the secondary and tertiary production processes—wherein much of the surplus value is extracted—provide profits for the developed world. The legal frameworks under the Washington Consensus, contained in the free trade agreements, and a whole host of other neoliberal policies, allow for legitimated extraction of natural resources and, in turn, profit. In *Plunder: When the Rule of Law is Illegal*, Ugo Mattei and Laura Nader explored:

the mechanisms through which the transnational rule of law, as a deeply Western idea, has led incrementally to patterns of global plunder, a process initiated by the expansion of Euro-American society worldwide, and now continued by nations, in particularly the

268. Cf. “Globalization is a process that generates contradictory spaces, characterized by contestation, internal differentiation, continuous border crossings.” SASSEN, *supra* note 45, at xxxiv.

269. EDUARDO GALEANO, *OPEN VEINS OF LATIN AMERICA: FIVE CENTURIES OF THE PILLAGE OF A CONTINENT I* (Monthly Rev. Press 1997) (1973).

USA, and multinational corporate entities independent of explicit political or military colonialism.²⁷⁰

More plunder has come with the protection of big tech's data harvesting business model that Chapter 19 allows.²⁷¹ Extraction is present also in agricultural exchange, mining, cattle ranching, which became the subsequent priorities for economic growth, and in railroad construction, which was designed to connect the natural resources of the Mexican North to the marketplaces in the United States.²⁷² These industries had a ready-made workforce—the Mexican and Mexican-American population were ready to work in those industries for wages necessary to survive after being dispossessed of their lands.

Extraction is also baked into the ISDS system of the USMCA, created to assist corporations in dealing with lost investments or dashed expectations of profits. There is indeed profit in that space. It is not just human traffickers, drugs traffickers, and other nefarious groups plying their trades along the border, but also other individuals who can access the international system that can hook into the food trough of transnational trade. It is multinational enterprises, transnational corporations, international capital markets, and individuals who profit from this system.

The Washington Consensus forced broad structural changes in developing countries like Mexico, transforming the state to be less an engine of economic growth and order and instead allowing for the private sector to instigate economic growth and wealth.²⁷³ The resulting market-friendly policy prescriptions, however, did not produce economic benefits for the working class, Indigenous Peoples, and marginalized groups around Latin America.²⁷⁴ Privatization, market liberalization, and free trade have, for the

270. MATTEI & NADER, *supra* note 19, at 2.

271. Gary Clyde Hufbauer & Megan Hogan, *Digital Agreements: What's Covered, What's Possible*, PETERSON INST. FOR INT'L ECON. (Oct. 2021), <https://www.piie.com/reader/publications/policy-briefs/digital-agreements-whats-covered-whats-possible>.

272. GANSTER & LOREY, *supra* note 72, at 36 (“Often the railroad tied Mexican communities more closely to the United States than to the Mexican interior”).

273. “Given Latin America’s long history of protectionism, the trade reform was dramatic.” MICHAEL REID, *FORGOTTEN CONTINENT: THE BATTLE FOR LATIN AMERICA’S SOUL* 137 (2010).

274. Foreign investment is, of course, a very good thing. The more of it, the better.

Stable currencies are good, too, as are free trade and transparent banking practices and the privatization of state-owned industries and every other remedy in the Western pharmacopoeia. Yet we continually forget that global capitalism has been tried before. In Latin America, for example, reforms directed at creating capitalist systems have been tried at least four times since independence from Spain in the 1820s. Each time, after the initial euphoria, Latin Americans swung back from capitalist and market economy policies.

HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 3 (2000).

large part, benefited corporations but did not bring any noticeable trickle down economic effects.²⁷⁵

The trade treaties provided some of the underpinnings of a regime of plunder. The resulting democracy deficit, challenge to national sovereignty, disregard for Indigenous Peoples, labor movements, and environmental concerns has angered the lower socio-economic class in Latin America and ignited a new kind of civil society direct action being asserted contemporaneously with the trade negotiations themselves. This reaction to the negative aspects of globalization was exacerbated by the world financial crisis. Ntina Tzouvala explained:

Ours is a time of crises. A decade after the global financial crash the edifice known as the “liberal international order” is under profound pressure. Worryingly, some of the alternative competing for hegemony offer an even more violent, exploitative and environmentally destructive future than the current configuration.²⁷⁶

IV. CONCLUSION

The illicit drug industry has grown exponentially.²⁷⁷ It is the economic space in which there is still job growth. After all, with few well-paying, legitimate jobs available, people turn to illegal activities.²⁷⁸ Worldwide the illicit drug industry is estimated to be worth \$300 billion annually.²⁷⁹ Mexican drug cartels annually supply billions of dollars’ worth of cocaine, marijuana, methamphetamines, and MDMA to the United States.²⁸⁰ Over

275. See Teddy Chestnut & Anita Joseph, *The IMF and the Washington Consensus: A Misunderstood and Poorly Implemented Development Strategy*, COUNCIL HEMISPHERIC AFFS. (July 17, 2005), <https://www.coha.org/the-imf-and-the-washington-consensus-a-misunderstood-and-poorly-implemented-development-strategy/>. See generally, Joseph Stiglitz, *Broadening Our Thinking on Vulnerability*, Human Development Reports, UN DEV. PROGRAMME (Oct. 02, 2017).

276. NTINA TZOUVALA, *CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW* 19 (2020).

277. JUNE S. BEITTEL, CONG. RSCH. SERV., R41576, *MEXICO: ORGANIZED CRIME AND DRUG TRAFFICKING ORGANIZATIONS* 15 (2020).

278. Briseida Valencia Soto, *Controversial Alternative for a Trapped Labor Force: Mexico’s Formal Employment and Illicit Drug Production*, COUNCIL HEMISPHERIC AFFS. (July 5, 2016), <https://www.coha.org/controversial-alternative-for-a-trapped-labor-force-mexicos-formal-employment-and-illicit-drug-production/>.

279. TOM WAINWRIGHT, *NARCONOMICS: HOW TO RUN A DRUG CARTEL* 3 (2016) (“[The narcotics industry’s] products are designed, manufactured, transported, marketed, and sold to a quarter of a billion consumers around the world”).

280. DEP’T OF JUST., DRUG ENF’T AGENCY, *2020 NATIONAL DRUG THREAT ASSESSMENT* 69 (2021), https://www.dea.gov/sites/default/files/2021-02/dir-008-21%202020%20national%20drug%20threat%20assessment_web.pdf.

twelve years some \$3.3 billion has been spent to fight it through the Mérida Initiative.²⁸¹

As Tom Wainwright explained more than half a decade ago (and nothing has changed since), “[n]ew bulletins feature little else: every week brought new stories of corrupted cops, assassinated officials, and massacre and bloody massacre of *narcotraficantes*, by the army or each other. This was the war on drugs, and the drugs were winning.”²⁸² The war on drugs and criminal procedure reform are indeed linked to regional trade: the enforcement of contracts, transparent legal rules, and judicial independence are all components and all lead to a culture of the rule of law. However, after 9/11 the U.S. government has been looking at the U.S.-Mexico border through the national security lens first, and then it thinks about it through an international trade lens.

Back at the United States Embassy in Mexico City in November 2005, we briefed the U.S. Ambassador on our work in training prosecutors and judges in new oral trials that were being instituted and began in different states throughout Mexico²⁸³ as Mexico moved away from the closed, written trials of its past inquisitorial system. We even talked to Los Pinos, Mexico’s Executive Branch, about assisting the transitioning of the Superior Court of Mexico City, part of the Federal District’s jurisdiction, from an adversarial criminal procedure to an inquisitorial one. This laid the groundwork for what would eventually be the Mérida Initiative a few years later, a program that provided human capacity building and other training contracts to the law school at which I was on faculty.

One of the pillars of the Mérida Initiative, which was furthered under the Obama administration, was the reform of the justice system.²⁸⁴ This effort to reform the laws in Mexico also runs counterintuitive to the Mexican culture which leads to inefficient law making and inconsistent law enforcement.²⁸⁵ With its emphasis on jury trials in the reformed criminal justice system, Mexico has also seen plea bargains. This approach seems indifferent to context in Mexico and undermines the foundation for improved outcomes in the criminal justice system.²⁸⁶ The federal government, too, was looking at

281. CLAIRE RIBANDO SEELKE, CONG. RSCH. SERV., IF10578, MEXICO: EVOLUTION OF THE MERIDA INITIATIVE, FY 2008-2022 1 (2021).

282. WAINWRIGHT, *supra* note 279, at 2.

283. James Cooper, *Slow Road to Legal Reforms in Mexico*, SAN DIEGO UNION-TRIB., Nov. 27, 2006, at B7 (on file with author).

284. CLAIRE RIBANDO STEELE & KRISTIN FINKLEA, CONG. RSCH. SERV., R41349, U.S.-MEXICAN SECURITY COOPERATION: THE MERIDA INITIATIVE AND BEYOND 15 (June 29, 2017).

285. Deborah M. Weissman, *Remaking Mexico: Law Reform as Foreign Policy*, 35 CARDOZO L. REV. 1471, 1504 (2013).

286. *Id.*

this transition work as Mexico modernized its judiciary, prosecution, and public defense institutions.

When we first came into the Ambassador's office, I thought I had introduced my colleague—a Chilean prosecutor working on the rule of law reform as a consultant in all the Americas—formally to the man sporting the Texas cowboy boots, as he watched the images unfold on television. We were in Mexico to promote efforts of the Mexico White House—Los Pinos—and to provide some regional context for all the stakeholders in the legal sector—law schools, bar associations, law enforcement institutions, and regulatory agencies.²⁸⁷ We briefed the transplanted Texan about burgeoning rule of law reforms in Mexico and encouraged the Embassy's collaboration in legal education programs that we were rolling out in support of many of the thirty-one Mexican states taking on these reforms.

Over half a decade before Chile had implemented oral trials in its country, it successfully transitioned various regions' criminal procedure from the inquisitorial model to a more adversarial model.²⁸⁸ Mexico had an additional burden of reforming its procedures on a number of matters under the Security and Prosperity Partnership and a harmonization program post-9/11 and in the context of national security and customs bureaucracy liberalization. We did not get very far in our briefing when the Chilean prosecutor colleague and I looked over and saw the live TV images of protests in Argentina raging on. More smoke billowed out of another bank—this time, a branch of BankBoston. Tony Garza pointed away from the television to a Chuck Close painting that hung on his office wall. He showed us a catalog from a celebrated Mexican art collection that featured the painting. A few minutes later, after we walked out of the office, my Chilean colleague looked at me and asked, “so when do we get to meet the Ambassador?”

287. See PROYECTO ACCESO, www.proyectoacceso.com (last visited Jan. 24, 2022).

288. James M. Cooper, *Competing Legal Culture and Legal Reform: The Battle of Chile*, 29 MICH. J. INT'L L. 501, 520 (2008).