The *Nueva Frontera* Initiative: Springing the Borderlands Towards Energy Independence with a New USMCA Side Letter

Introduction

Last February, winter storm Uri left much of Texas without power and water for days. In the spirit of the bitter polarization plaguing the nation, leaders across the nation wasted no time finding the culprits of the "Snowpocalypse." Many Texas Republicans blamed renewable energy, citing viral photographs of frozen wind turbines as proof that renewable energy had failed to meet Texas' energy needs. Other criticisms ranged from mismanagement by grid regulator ERCOT (now a household word in Texas) to the state's entire deregulated energy regime.

In the chaos surrounding Uri and its fallout, people north of the border paid little attention to the impact in Northern Mexico where five million people lost power due to disrupted natural gas from Texas. The power outages in Mexico reveal two seemingly contradictory aspects of cross-border energy. On the one hand, the fact that Mexico was so strongly affected by Texas energy policy shows how deeply integrated these regions have become in the past few decades. But this integration also highlights the shortcomings in energy policy on both sides of the border. In Mexico, President Andres Manuel Lopez Obrador ("AMLO") also came under criticism for his nationalistic energy policies that have stymied Mexico's vast potential to produce both traditional and renewable energy and exacerbated both Mexico's decades long decline in petroleum output and stalled new renewable energy projects in the country. A more vibrant energy scheme in Mexico fueled by investment may have provided Mexico with more of a cushion from Uri's outages.

Regardless of who should share blame for Uri's cross-border fiasco, the crisis presents a key opportunity for the countries to jointly formulate a comprehensive bilateral energy solution. Fortunately, both countries have legal frameworks in place that can be used to development a comprehensive solution to these problems in a way that satisfies both business interests and environmental concerns. Importantly, this article's *Nueva Frontera* Initiative might just be politically palatable enough to work.

The major legal frameworks discussed in this article are (1) Mexico's 2013 Energy Reform, including its General Law on Climate Change ("GLCC"); and (2) the United States-Mexico-Canada Agreement that was just ratified in 2020 ("UMSCA"). The USMCA in its current state does not contain specific provisions governing energy policy between the U.S. and Mexico. Instead, there is a largely symbolic statement in the USMCA that reaffirms Mexico's sovereignty over its hydrocarbons and evokes the spirit of the country's 1938 nationalization of the oil sector. Because of this energy nationalism south of the border, this author believes that targeting petroleum or PEMEX through USMCA amendments would be a nonstarter in negotiations. On the other hand, the Biden administration is under intense political pressure from certain sectors of his party to forego petroleum altogether.

Because of these political realities, this article focuses instead on amendments that would target Mexico's power-generation agency, Comisión Federal de Electricidad ("CFE"), and Mexico's 2013 General Law on Climate Change (ironically enacted in conjunction with Mexico's historic energy reform that sought to open the country to foreign investment in petroleum projects).

Specifically, this article proposes an amendment or "side letter" (similar to one enacted between the U.S. and Canada), that would require the countries to comply with their own domestic climate legislation, particularly the GLCC. This article also proposes "rapid-response" type enforcement mechanisms that mirror similar USMCA language governing labor but in this case would be limited to allow parties to challenge efforts by organizations like CFE from killing or impeding renewable energy projects that have a significant impact on cross-border generation or transmission of energy.

As a concession to Mexico in which there is significant political pressure against energy privatization, the article also proposes provisions requiring both countries to enact legislation to streamline cross-border electricity and hydrocarbon transmission through eased permitting. In contrast to the first proposal that targets Mexico's energy legislation, the second proposal targets U.S. permitting and encourage this country to pass something similar to the North American Energy Infrastructure Act that was recently tabled surrounding the Keystone XL Pipeline controversy.

Finally (and most ambitiously), the article requires the two member states to make good-faith efforts to create a unified energy block of border states analogous to a region in the Northwest Pacific in which power flows relatively freely between Washington State and British Columbia.

The *Nueva Frontera* Initiative aims to accomplish two goals. First, by encouraging Mexico to expand a variety of relatively clean energy sources to comply with its own laws, the country will

not only have greater energy diversity and independence but may occasionally have energy surpluses that can be sold to United States utilities. Second, by encouraging eased transmission permitting and creating a unified transmission block, the larger energy pie can be more easily distributed across the border as needed. Despite the focus on renewables, natural gas as a relatively clean fuel is bootstrapped to these proposals and will play a key role in helping Mexico both meet its energy needs and comply with its GLCC obligations. Because of the focus on easing clean-energy bottlenecks rather than traditional petroleum bottlenecks, leaders in both countries can be pressured to comply with their purported commitments to the Paris Climate Accords and energy independence and sovereignty.

The article begins with a summary of some major impediments to reliable energy on both sides of the border, continues with a discussion of the current state of the USMCA and what it does and does not say about energy, and concludes with specific proposed amendments to the USMCA in the form of a side letter that mirrors a similar agreement between the United States and Canada.

The Bottleneck at the Whitehouse

Aside from history and culture, Mexico and the United States share many things that make them inseparable when it comes to energy. Most notably, the Eagle Ford Shale cuts across both. Additionally, the vast deserts spanning the border states of both are ideal for both solar and wind. The “Shale Revolution” in the United States, brought by a combination of innovation and private investment, led to near complete energy independence and caused the U.S. to become a net

exporter of refined petroleum products by 2011.[1] Because the growth of unconventional drilling during this period led to an abundance of natural gas, this had the unexpected result of reducing carbon emissions in the U.S., which were lower in 2019 than their peak in 2000. The IEA called this "the largest absolute decline by any country over that period."[2]

For the purposes of this article, the issues with U.S. energy policy stem not from shortfalls in innovation or investment, but from impediments to transmission of power and gas to and from the U.S. To be sure, a good amount of power and fuel still flows south from the United States despite these impediments. A successful example was the recent opening of the Villa de Reyes-Aguascalientes-Guadalajara ("VAG"), which on October 2, 2020 began sending natural gas from the Permian Basin to Guadalajara's industrial sector.[3] And as discussed above, enough gas flows south to make parts of Mexico dependent on it during shortages. The U.S. is a net exporter to Mexico of all energy goods. In 2019, U.S. natural gas exports to Mexico averaged 5.5 billion cubic feet per day (Bcf/d) in 2019, 93% of which was sent through pipelines and the remainder through liquefied natural gas ("LNG") or truck.[4]

Despite the success of the VAG, the project was years in the making and subject to a burdensome presidential permitting process, which imposes similar burdens on both power transmission and

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[1] Energy Information Administration (September 17, 2021). "How much of the oil produced in the United States is consumed in the United States?" available at: https://www.eia.gov/tools/faqs/faq.php?id=268&t=6

[2] International Energy Agency (February 11, 20201). "Global CO2 Emissions in 2019," available at https://www.iea.org/articles/global-co2-emissions-in-2019

[3] Natural Gas Intelligence (October 5, 2020). "Mexico's CFE Declares Final Leg of Waha-to-Guadalajara Natural Gas Pipeline In-Service," available at https://www.naturalgasintel.com/mexicos-cfe-declares-final-leg-of-waha-to-guadalajara-natural-gas-pipeline-in-service/

[4] Energy Information Administration (November 4, 2020). "In 2019, the U.S. importer $13 billion of energy goods from Mexico, exported $34 billion," available at: https://www.eia.gov/todayinenergy/detail.php?id=45756

fossil-fuel pipelines. The permitting process requires several steps and the concurrence of different governmental cabinets and agencies.[5] In the case of power transmission, an applicant must present evidence supporting "two primary criteria" for proving that the project is "consistent with the public interest": (1) the impact the project would have on the operating reliability of the United States' electric power supply, and (2) an environmental assessment outlining the environmental consequences of proposed projects under the National Environmental Policy Act ("NEPA").[6] After the Department of Energy ("DOE") determines that the proposal would be a "major Federal action significantly affecting the quality of the human environment," an environmental impact statement is required, which is in turn subject to a notice-and-comment review period.[7] Even after the DOE gives the green light, it must obtain the agreements by both the Secretary of State and Secretary of Defense to move forward.[8]

All these steps are just threshold requirements for approval of a transmission line. If a company wishes to export energy using this line, it must go through additional steps with the Office of Electricity Delivery and Energy Reliability and show that the proposed export will not impair the sufficiency of the electric power supply within the United States.[9] There must also be NEPA

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[5] For a comprehensive explanation about the details and challenges of permitting, see Elizabeth Furlow, *Good Transmission Makes Good Neighbors*, 96 Tex. Law. Rev. (2018), available at: https://texaslawreview.org/good-transmission-makes-good-neighbors/

[6] 16 U.S.C. § 824a(e) (2012); U.S. DEP'T OF ENERGY, *Presidential Permits and Export Authorizations – Frequently Asked Questions*, ENERGY.GOV, https://energy.gov/oe/services/electricity-policy-coordination-and-implementation/international-electricity-regulatio-6

[7] NEPA Timing of Agency Action Rule, 40 C.F.R. § 1506.10 (2017).

[8] U.S. DEP'T OF ENERGY, *supra* note 6; Exec. Order No. 10,485, 3 C.F.R. § 970 (1949–1953).

[9] *Id.*

compliance for this export authorization, since approval of a presidential permit constitutes a "major Federal action."[10]

For approval of a pipeline permit for hydrocarbons, there is a similar multi-step application process overseen by the Department of State as opposed to the DOE. The bottlenecks associated with the stringent presidential permit process rose to the national spotlight in 2015 when the Department of State denied a presidential permit for TransCanada's Keystone XL Pipeline after concluding that the project was not in the national interest.[11] This denial sparked a rare bipartisan coalition of business interests and law makers to address a process that is at times both burdensome and arbitrary. This culminated in a bill called the North American Energy Infrastructure Act ("NAEIA"), cosponsored by twelve Republicans and eight Democrats, the majority of which are from states along the U.S.-Mexico border.

NAEIA's primary sponsor Fred Upton (R-MI) praised the bill as an effort "to construct the architecture of abundance to realize [the] Nation's newfound energy potential."[12] The primary purpose of the Act was to "establish a more uniform, transparent, and modern process" for developing energy infrastructure—including the transport of oil and natural gas and the transmission of electricity—along both the Canada and Mexico borders "in the pursuit of a more secure and efficient North American energy market."[13]

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[10] U.S. DEP'T OF ENERGY, *Presidential Permits–Procedures*, ENERGY.GOV, https://energy.gov/oe/services/electricity-policy-coordination-and-implementation/international-electricity-regulatio-9

[11] Linda Luther & Paul W. Parfomak, Cong. Research Serv., R44140, Presidential Permit Review for Cross-Border Pipelines and Electric Transmission 3 (2017).

[12] *Hearing on H.R. 3301*, *supra* note 55, at 5 (statement of Rep. Fred Upton).

[13] North American Energy Infrastructure Act, H.R. 3301, 113th Cong. (2013).

Notably, the NAEIA shifts the burden from the existing process that requires applicants to satisfy a variety of "national interest" and environmental criteria to a streamlined approval unless it can be shown that a project is *not* in the national interest.[14]

Unfortunately, the bill and subsequent iterations suffered consecutive procedural defeats, and a comprehensive legislative solution has been unable to withstand persistent polarization in Congress and the political baggage associated with the Keystone XL Pipeline. However ,the extreme weather events over the past several months may make people reconsider the importance of energy independent and reliability. A revamped NAEIA type bill, if pitched as a means to reduce blackouts while making room for a significant supply of renewables, may be not only politically viable but crucial to reduce blackouts on both sides of the border.

The Bottleneck at *Los Pinos*

In 2013, after years of declining petroleum output by Mexico's state-owned oil company PEMEX, President Enrique Pena Nieto enacted historic legislation to open the country's ailing oil sector to foreign investment. In a lesser-known piece of legislation signed the year before, Mexico became one of the first nations on earth to enact comprehensive climate change legislation to reduce emissions. Through this law, the government committed to reduce its greenhouse gas emissions by 30% by 2020, and by 50% by 2050, as compared to 2000

[14] "H.R. 3301 – Summary." United States Congress. Retrieved 10 September 2021.

emissions.[15] To meet these goals, related legislation also opened power generation and renewable sectors to foreign investment and take these roles out of the exclusive realm of CFE.[16]

By promising to spur investment in not just petroleum production but also renewable projects, the new legislation would help Mexico enjoy the energy independence of its northern neighbor but also do so with a healthy mix of clean energy. These joint legislative efforts were important because, despite Mexico's commitment to reducing emissions, PEMEX remains the most polluting company in Latin America, contributing to 1.67% of the total greenhouse gas emissions in the world.[17]

The early optimism surrounding Mexico's new energy legislation has been dampened by the nationalistic policies of President Andres Manuel Lopez Obrador ("AMLO"). In line with his commitment to revamp PEMEX and resist foreign interference with Mexico's hydrocarbons, AMLO placed a moratorium on new deep-water oil exploration bids that were introduced in Mexico's 2013 energy reforms, exacerbating the country's 15-year decline in oil output.[18] AMLO has taken similar measure to stymie investments in power generation and renewable projects. Recently, a coalition of energy and utility companies filed several lawsuits in Mexico to

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[15] Richard H. K. Vietor & Haviland Sheldahl-Thomason, *Mexico's Energy Reform*, 4, 10 (Harv. Bus. Sch., Working Paper No. 717-027, 2017), https://www.hks.harvard.edu/hepg/Papers/2017/Mexican%20Energy%20Reform%20Draft%201.23.pdf

[16] Rousseau, Isabella, *Mexico's Energy Policies During the Presidency of Andrews Manuel Lopez Obrador*, Briefings D'Lifri (July 19, 2019), available at: https://www.ifri.org/sites/default/files/atoms/files/rousseau_mexico_energy_policies_2021.pdf

[17] Suarez, Juliana, "Mexico: What is Going on with the Paris Agreement?" (October 24, 2019), available at: https://latinamericanpost.com/30622-mexico-what-is-going-on-with-the-paris-agreement

[18] De Haldevang, Max. "AMLO's Nationalist Bent Casts 200 Energy Projects Into Limbo." Bloomberg, December 22, 2020, available at: https://www.bloomberg.com/news/articles/2020-12-22/amlo-s-nationalist-bent-casts-200-energy-projects-into-limbo

challenge new rules affecting the utilities sector. AMLO's predecessor Enrique Pena Nieto created a market for bankable "clean energy certificates" ("CEL") to foster green power generation.[19] The CEL's obligated companies to obtain a certain amount of electricity from such sources to meet national climate goals. After the AMLO administration took action to favor state-owned plants over private entities, the companies responded to the rule change by filing *amparo* suits to overturn the new measures. Julio Valle, deputy director of the Mexican Association of Wind Energy ("AMDEE"), said the legal actions may cover over 50% of new clean energy projects pending in Mexico.[20]

AMLO has been unable to formally reverse the 2012-2013 reforms, and his party's recent losses in Congress ensure that they will remain on the books through the end of his term in 2024. It remains to be seen whether AMLO will continue fighting the energy reforms. However, the mass of litigation against his efforts, the country's energy needs, and international pressure to address climate change are strong factors that should encourage both him and his successors to holding onto a forgone era in Mexican history.

Bridging the Energy Divide with the USMCA

The preceding sections highlight a confluence of major moving parts, both legal and political, that are preventing both countries from realizing their full energy potential. These moving parts reveal an inherent tension between battling climate change and ensuring sufficient energy production and independence. Whereas permitting bottlenecks in the U.S. not only undermine its

[19] "Legal Suits Mounting Against Mexican Renewable Energy Change." Reuters, November 22, 2019, available at: https://www.reuters.com/article/us-mexico-energy/legal-suits-mounting-against-mexican-renewable-energy-change-lobby-idUSKBN1XW2DO

[20] [CITE].

energy reliability but also impede free flow of power and fuels south, Mexico's nationalist energy policies prevent the country from reaching its own independence and require the country to import a significant amount of natural gas from the United States. In an ideal world, a variety of energy sources would flow both ways depending on the needs of each country. This is what this article proposes to address through amendments to the USMCA, specifically through a side letter between the U.S. and Mexico modeled after a similar agreement between the U.S. and Canada.[21] The side letter includes the following key provisions:

- Requires countries to comply with their own domestic legislation that has a substantial impact on cross-border energy or environmental concerns (e.g. Mexico's General Law on Climate Change and related provisions in the 2013 Energy Reform that allow for greater private investment in Mexico's utility monopolies);
- Creates a "rapid response" dispute mechanism whereby affected private parties from the U.S. could file a complaint against organizations like CFE for impeding or disrupting clean energy projects that have a substantial impact on cross-border energy transmission in a manner that prevents the country from complying with its domestic climate laws (i.e. GLCC);
- Requires the U.S. and Mexico to make good-faith efforts to enact domestic legislation (e.g. proposed North American Energy Infrastructure Act and a Mexican counterpart), to facilitate cross-border transmission of electricity and natural gas by streamlining the permitting and export process;
- Requires that measures governing access to or use of energy infrastructure must be "neither unduly discriminatory nor unduly preferential." This mirrors a similar provision between the U.S. and Canada by establishing non-discriminatory treatment regarding access to electric transmission facilities and pipeline networks;
- Requires countries to make good-faith efforts to create unified transmission zone among the U.S.-Mexico border states, similar to the U.S.-Canada region managed by BC Hydro and Bonneville Power Authority, with the North American Development Bank playing a critical role in spearheading energy investments in this zone.

USMCA Background and Key Provisions

[21] Weekes, John M. et al. "NAFTA 2.0: Drilling Down – The Impact of CUSMA/USMCA on Canadian Energy Stakeholders." Energy Regulation Quarterly, Vol. 7, Issue 1 (2019). Available at: https://energyregulationquarterly.ca/articles/nafta-2-0-drilling-down-the-impact-of-cusma-usmca-on-canadian-energy-stakeholders#sthash.cuKo0mD9.dpbs

After months of uncertainty, the USMCA went into effect and replaced the 25-year-old North American Free Trade Agreement ("NAFTA"). The USMCA leaves the bulk of NAFTA unchanged, but there are some significant differences in the areas of automobile manufacturing, intellectual property, labor, and investor-state dispute resolution ("ISDR"), the latter of which has already begun to impact energy-related investor disputes due to AMLO's policies discussed above. Not only does the USMCA lack concrete provisions governing energy, it contains the following largely symbolic language at the urging of AMLO:

> ***Article 8.1: Recognition of the United Mexican States' Direct, Inalienable, and Imprescriptible Ownership of Hydrocarbons***
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> 1. *As provided for in this Agreement, the Parties confirm their full respect for sovereignty and their sovereign right to regulate with respect to matters addressed in this Chapter in accordance with their respective Constitutions and domestic laws, in the full exercise of their democratic processes.*
> 2. *In the case of Mexico, and without prejudice to their rights and remedies available under this Agreement, the United States and Canada recognize that:*
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> *(a) Mexico reserves its sovereign right to reform its Constitution and its domestic legislation; and*
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> *(b) Mexico has the direct, inalienable, and imprescriptible ownership of all hydrocarbons in the subsoil of the national territory, including the continental shelf and the exclusive economic zone located outside the territorial sea and adjacent thereto, in strata or deposits, regardless of their physical conditions pursuant to Mexico's Constitution (Constitución Política de los Estados Unidos Mexicanos).*[22]

Although the USMCA's new labor provisions do not directly impact energy, they are discussed here because this article uses them as a template for similar energy-related amendments. The USMCA requires that its member countries not only enforce their own labor laws but also adhere

[22] USMCA Chapter 8, available at: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/08_Recognition_of_Mexican_Ownership_of_Hydrocarbons.pdf

to international standards.[23] In anticipation of the deal, Mexico passed labor reforms on May 1, 2019, giving workers more rights and unions more power to organize.[24]

The USMCA provides an important enforcement mechanism available to U.S. labor and manufacturing groups.[25] The so-called "rapid response" mechanism was primarily intended for use by companies and labor organizations in the United States if certain Mexican enterprises are not meeting the collective bargaining and other labor standards.[26]

Parties have already successfully used the "rapid response" mechanism. Recently, the U.S. Trade Representative announced an agreement with Mexico for a comprehensive remediation plan to address a denial of workers' right of free association and collective bargaining that occurred at a General Motors facility in Silao, Mexico.[27] This August 2021, Tridonex, the Mexican based subsidiary of American company Cardone Industries, entered into an action plan and agreed to pay damages including backpay to Mexican workers.[28] The action plan arose out of a petition

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[23] UMSCA Chapter 23, available at:
https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/23-Labor.pdf
[24] Clouthier Carrillo, Tatiana et al. "USMCA at One: Mexico's Labor Reform." The Wilson Center (May 14, 2021), available at:
https://www.wilsoncenter.org/article/usmca-one-mexicos-labor-reform
[25] USMCA Chapter 31, Dispute Settlement, available at:
https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/31-Dispute-Settlement.pdf
[26] Ferguson, Stephanie. "USMCA Rapid Response Mechanism Makes its Debut." U.S. Chamber of Commerce (July 8, 2021), available at:
https://www.uschamber.com/usmca-rapid-response-mechanism-makes-its-debut
[27] Picone, Brian. "USTR and US Labor Unions Initiate First Proceedings Targeting Mexican Facilities Under USMCA's 'Rapid Response' Mechanism." White & Case (May 17, 2021), available at:
https://www.whitecase.com/publications/alert/ustr-and-us-labor-unions-initiate-first-proceedings-targeting-mexican-facilities
[28] *Id.*

filed by the AFL-CIO and other unions alleging harassment and retaliation against collective bargaining.[29]

Finally, the USMCA significantly limits investor-state dispute resolution ("ISDR"). The USMCA completely eliminates the ISDR procedure against Canada within three years and limits it in Mexico to foreign investments in industries like hydrocarbons and utilities. Although the ISDR remains available for the energy sector, the USMCA only allows claims against direct expropriation in a significant departure from NAFTA (allowing ISDR claims for actions "tantamount to expropriation").[30]

Although affected parties have already begun initiating ISDR claims against Mexico, these proceedings can take years and face hurdles because of the manner in which AMLO has often delayed, rather than outright cancelled, various energy projects. USMCA's provisions affirming Mexico's sovereign right to hydrocarbons and limiting IDSR to direct expropriation will only exacerbate energy capacity and reliability in both nations.

Incentives to Comply with Climate Reforms

As discussed above, the USMCA expressly required member countries to enact and enforce labor laws, including those standards recognized by the International Labor Organization ("ILO") *Declaration on Fundamental Principles and Rights at Work*.[31] These provisions were

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[29] *Id.*
[30] USMCA Chapter 14, Article 14.8.1, available at: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Investment.pdf
[31] USMCA Chapter 23, Article 23.3, available at: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/23-Labor.pdf

targeted at Mexico and required the country to enact new labor laws and regulations, which it did through its May 2019 labor reforms.[32]

The first provision of the *Nueva Frontera* Initiative would require member states to similarly enforce their own laws affecting climate change, which could specifically reference Mexico's General Law on Climate Change and related provisions in the 2013 Energy Reform meant to reform Mexico's utility monopolies. The latter reforms allow for increased foreign investment to comply with these laws,[33] which necessarily requires private investment in not only renewables but relatively clean fuels like natural gas.

In emphasizing compliance with laws impacting climate change as opposed to hydrocarbons, this initiative is more politically viable and avoids the baggage that would come with trying to undo the USMCA's language affirming Mexico's sovereignty over its hydrocarbons.

"Rapid Response" Mechanism to Protect Clean Energy Projects

Because the USMCA's IDSR provisions continue to cover disputes related to hydrocarbons and utilities, there is already a fair amount of litigation and arbitration proceedings that have been asserted against the AMLO administration for his refusal to comply with the energy reforms. However, as any litigator knows, these proceedings can take years to resolve, and especially in the case of arbitration, standing is generally limited to the parties to a particular contract. This

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[32] *Supra* note 24, *Carrillo*.

[33] Dieck-Assad, Flory Anette, "Private vs. Public Investment in Mexican Utility Company: A Case Study." 12 Journal of International Education Research 1 (2016), available at: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Protocol-of-Amendments-to-the-United-States-Mexico-Canada-Agreement.pdf.

article proposes a mechanism with more "bite" that can resolve disputes quickly by an interested party against a "Covered Entity" that takes any actions to impede or prevent a clean energy project "in a manner affecting trade or investment between the Parties."[34]

The USMCA's labor provisions provide a helpful template for this article's proposals that impact energy and climate:

> Article 31-A.2: Denial of Rights. The Mechanism shall apply whenever a Party (the "complainant Party") has a good faith basis belief that workers at a Covered Facility are being denied the right of free association and collective bargaining under laws necessary to fulfill the obligations of the other Party (the "respondent Party") under this Agreement (a "Denial of Rights").[35]

Similarly, a counterpart to porrect clean energy projects from improper interference by the CFE or related entities can be drafted as follows:

> Article [TBD]: Denial of Rights. The Mechanism shall apply whenever a Party (the "complainant Party") has a good faith basis belief that any state-run monopoly, quasi-governmental entity, or affiliated entity is violating the laws necessary to fulfill the obligations of the other Party (the "respondent Party") under this Agreement (a "Denial of Rights") [including but not limited to, the 2012 General Law on Climate Change]. This Mechanism may only be employed to challenge a Covered Entity's unlawful termination, cancellation, or obstruction of a renewable-energy project in a manner affecting trade or investment between the Parties.

AMLO's policies have created an unusual coalition of business interests, energy companies, and environmental groups that all see the benefits of investment in new power projects. Thus, the proposed "rapid response" could be employed by a similar array of actors and interests. For

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[34] *See* e.g., Protocol of Amendments to the USMCA Article 23.3(A)(i), available at: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Protocol-of-Amendments-to-the-United-States-Mexico-Canada-Agreement.pdf

[35] *Id.*

instance, Mexican antitrust agency Comisión Federal de Competencia Económica ("COFECE") and environmental activist group Greenpeace both won recent injunctions over actions by the Mexican government that would prevent new clean-energy power plants from moving forward.[36] A rapid-response mechanism for clean energy would streamline and accelerate this process. To avoid groups from using it to undermine oil-and-gas pipelines altogether, the proposal above contains language that only allows the mechanism to be used to challenge impediments to new projects, not to impede new projects such as natural gas production or transmission.

The Time is Ripe for a North American Energy Infrastructure Act

Largely as an incentive to Mexico to agree to the proposals above, the side letter would also require the U.S. to make good faith efforts to pass legislation streamlining the permitting of cross-border power transmission and pipelines, with specific reference to the recently proposed North American Energy Infrastructure Act ("NAEIA").

Recent versions of the NAEIA would replace the burdensome presidential-permit process with "crossing certificates" issued by the Secretary of State for oil pipelines and the Secretary of Energy for electric transmission facilities and would not require the complete concurrence of the Secretary of State, the Secretary of Energy, and the Secretary of Defense.[37] The bill also significantly shortens the permitting time frame by requiring agencies to issue the certificates within 120 days of the findings of the NEPA review.[38]

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[36] "Energy Protectionism in Mexico has Made Climate the Victim." Bloomberg (January 9, 2021), available at: https://www.bloomberg.com/news/articles/2021-01-09/energy-protectionism-in-mexico-has-made-climate-the-victim

[37] North American Energy Infrastructure Act, H.R. 3301, § 3(b)(1)–(2), 113th Cong. (2013).

[38] *Id.*

A subtle but key change in the NAIEA is a burden shift relating to the "public interest" requirement. The current permitting process requires a permit applicant to prove that the project was either in the public interest or consistent with the public interest.[39] The new legislation creates a rebuttable presumption in favor of granting unless the project is found to be "*not* in the public interest."[40]

The most recent version of the legislation, "Promoting Cross-Border Energy Infrastructure Act," did not make it out of the House of Representatives. It now in limbo in light of President Biden's early executive order to cancel the Keystone XL Pipeline.[41] As shown by the Keystone XL controversy that helped kill the NAEIA, passing NAIEA will not be an easy fight. But recent power outages and uncertainty about energy reliability presents politicians with a good opportunity to pitch a NAEIA type bill as essential to keeping the lights on from Dallas to Monterrey. Leaders must also work to convince the public, including those concerned with climate change, a blanket war on all fossil fuels including natural gas not only decreases reliability but does nothing to address the demand for these fuels. In fact, these efforts can do more harm than good if shutting down domestic fuel production and pipelines leads to these in-demand products simply being imported on tankers from Saudi Arabia or Russia.[42] Until

[39] *Supra* note 5.
[40] H.R. 3301 § 3(b)(1) (emphasis added).
[41] Promoting Cross-Border Energy Infrastructure Act, H.R. 2883, 115th Cong., 163 CONG. REC. H6010, H6023 (2017).
[42] In his book The New Map, Daniel Yergin discusses how this scenario is already occurring, notably because of efforts Northeastern U.S. to ban fracking and fuel pipelines without addressing this region's ongoing demand for natural gas. Yergin, Daniel. The New Map: Energy, Climate, and the Clash of Nations (Penguin Press 2020).

society finds a way to efficiently go completely green, promoting U.S.-Mexico fuel and power is the cleanest and most reliable alternative.

Non-Discrimination

The side letter's non-discrimination provision creates a fair and uniform standard and reduces inefficiencies caused by piecemeal state legislation. These proposals mirror a similar provision in the U.S.-Canada side letter stating that measures governing access to or use of energy infrastructure must be "neither unduly discriminatory nor unduly preferential."[43] The provision in the U.S.-Canada side letter was apparently prompted to address efforts by the *California Public Utilities Commission* to upset the longstanding flow of natural gas from Alberta.[44] This author anticipates that the same state of California could make similar measures to undermine transmission between its state and Baja California. A similar scenario occurred in Vermont, which stopped an effort to import hydropower from Quebec to Massachusetts.[45]

Across the regulatory spectrum from Vermont and California is Texas, a state whose deregulated regime was front and center during last winter's snowstorm. To avoid regulation by the Federal Energy Regulatory Commission ("FERC"), Texas' deregulated grid is isolated from the nation at large.[46] Ironically, passage of an NAEIA type bill would open Texas' grid to Mexico and ease some of the volatility caused by the winter storm. Just like the non-discrimination measures

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[43] *Supra* note 21.
[44] *Id.*
[45] Green, Jemma. "Energy Congested by a Lack of Realism: Will We Need a Stick or Carrot for 24-Hour Renewable Power?" Forbes, August 13, 2021, available at: https://www.forbes.com/sites/jemmagreen/2021/08/13/a-short-sharp-dose-of-reality/?sh=299902827979
[46] Gardner, Timothy. "Regulators issue standards to prevent another Texas grid freeze." Reuters (September 23, 2021), available at: https://www.reuters.com/business/energy/regulators-issue-standards-prevent-another-texas-grid-freeze-2021-09-23/

would prevent states like California or Vermont from impeding power projects, it would also facilitate trade between U.S. border states and Mexico without requiring these states to compromise their deregulated regimes.

La *Nueva Frontera*

The most ambitious proposal of this article is a requirement for the member states to negotiate in good faith for a uniform energy block, similar to the U.S.-Canada region managed by BC Hydro and Bonneville Power Authority.[47] On the southern border, a free transmission zone could include the states of Texas, New Mexico, Arizona, California, Baja California Norte, Sonora, Chihuahua, Coahuila, Nuevo Leon, and Tamaulipas. This proposal is a logical step for a highly integrated region that already has existing pipeline infrastructure and similar terrain for wind, solar, and shale. It also falls within the same region financed by the North American Development Bank ("NADB"), which already serves as a vanguard financial institution for a variety of cross-border infrastructure projects.

As a concession during the NAFTA negotiations, the NADB was authorized to serve communities located within 100 km (about 62 miles) north of the international boundary in the four states of Texas, New Mexico, Arizona and California and within 300 km (about 186 miles) south of the border in the six states of Tamaulipas, Nuevo Leon, Coahuila, Chihuahua, Sonora, and Baja California. Some of its successes thus far include: (1) 2,999 megawatts of renewable generation capacity installed in 19 solar plants, 14 wind farms, and 2 biogas plants; (2) 4.31 million metric tons/year of CO2 emissions displaced, equivalent to removing 949,888 vehicles

[47] *Supra* note 21.

from roadways.[48] Because the NADB is already financing several renewable projects, and it would not be a significant step to further integrate those projects to counterparts across the border.

This proposal also takes the focus from controversial hydropower projects in the southern parts of Mexico. AMLO has responded to criticisms that he is undermining Mexico's climate legislation by pointing to these projects.[49] However, creation of dams required for these projects can release large amounts of carbon.[50] These projects have also been criticized by indigenous groups in southern Mexico for their environmental impact. In 2015, protests from indigenous groups in Oaxaca succeeded in shutting down a $30 million dam project.[51] On the other hand, solar power and unconventional drilling can thrive in the northern part of the country that is much more sparsely populated.

Conclusion

North America is still recovering from the Covid-19 fallout. While cases have stabilized in the United States, Mexico struggles with a slow recovery. Pedestrian border traffic is still at a trickle and shipping costs have skyrocketed. Despite these struggles, the countries of North America managed to pass a comprehensive revamp to NAFTA at the beginning of the Covid chaos. Earlier in the decade, Mexico managed to pass the most comprehensive energy reforms in almost

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[48] North American Development Bank. "Our Impact." Available at: https://www.nadb.org/our-impact

[49] Gross, Samantha. "AMLO reverses positive trends in Mexico's energy industry." Brookings (December 20, 2019), available at: https://www.brookings.edu/blog/order-from-chaos/2019/12/20/amlo-reverses-positive-trends-in-mexicos-energy-industry/

[50] *Supra* note 36.

[51] Orsi, Peter et al. "U.S.-Backed Mexico dam project triggered protest, rare defeat." AP News (January 30, 2015), available at: https://apnews.com/article/ac2f80071878433e9f22856a679e2b35

a century. These developments say much about the perseverance of the U.S.-Mexico relationship and the co-dependence of the countries despite their differences. If the countries wish to continue a prosperous 21st Century, especially in light of rising threats like China and Russia, they would do well to come to create a *Nueva Frontera* for their energy needs. The political climate may be daunting, but the countries' leaders need only look at existing legal tools like the USMCA and Mexico's energy reforms for solutions right under their noses. Hopefully, it does not take another Snowpocalypse to help all key players—politicians, lawyers, climate activists, oil executives—see that they have more in common than the network talking heads have led us to believe.

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