Lobbies and the USMCA: the role of interest groups in the negotiation of the New NAFTA's investment rules[1]

Lobbies y el T-MEC: el papel de los grupos de interés en la negociación de las reglas de inversión del Nuevo TLCAN

Lobbys et l'ACEUM : le rôle des groupes d'intérêt dans la négociation des règles d'investissement du Nouveau ALENA

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Abstract: This paper examines the USMCA (United States – Mexico – Canada Agreement) negotiation process that led to the replacement of NAFTA (North American Free Trade Agreement), fulfilling a key Trump-era promise. Focused on Chapter 14's investment provisions, our analysis uncovers the different outcomes for government contract investors, that were able to

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maintain the protection levels and ISDS (investor-state dispute settlement) access, to the detriment of other investors. Emphasizing the legal framework involving 25 advisory trade committees linked to the United States Trade Representative (USTR), we scrutinize a 40-document corpus, revealing the significant influence of interest groups, notably the National Manufacturers Association. Findings illuminate the intricacies of economic agreement negotiations and underscore lobbies' substantial impact on U.S. foreign economic policy formulation.
Keywords: USMCA; NAFTA; interest groups; foreign investment; United States.

Resumen: Este artículo examina el proceso de negociación del T-MEC (Tratado entre México, Estados Unidos y Canadá) que llevó a la sustitución del TLCAN (Tratado de Libre Comercio de América del Norte), cumpliendo una promesa clave de la era Trump. Centrándonos en las disposiciones de inversión del Capítulo 14, nuestro análisis revela los diferentes resultados para los inversores en contratos gubernamentales, quienes pudieron mantener los niveles de protección y el acceso a la solución de controversias entre inversores y Estados (conocida por la sigla inglesa ISDS), en detrimento de otros inversores. Al destacar el marco legal que implica 25 comités comerciales consultivos vinculados al USTR, examinamos un *corpus* de 40 documentos, revelando la influencia significativa de los grupos de interés, especialmente la *National Manufacturers Association* (NAM). Los hallazgos iluminan las complejidades de las negociaciones de acuerdos económicos y destacan el impacto sustancial de los grupos de presión en la formulación de la política económica exterior de Estados Unidos.
Palabras clave: T-MEC; TLCAN; grupos de interés; inversión extranjera; Estados Unidos.

Résumé: Cet article examine le processus de négociation de l'ACEUM (Accord Canada–États-Unis–Mexique), qui a conduit au remplacement de l'ALENA (Accord de libre-échange nord-américain), réalisant une promesse clé de l'ère Trump. Axée sur les dispositions d'investissement du Chapitre 14, notre analyse révèle les résultats divergents pour les investisseurs dans les contrats gouvernementaux, qui ont pu maintenir les niveaux de protection et l'accès au mécanisme de règlement des différends entre investisseurs et États (ISDS en abrégé en anglais), au détriment d'autres investisseurs. En mettant l'accent sur le cadre juridique impliquant 25 comités consultatifs commerciaux liés au représentant américain au commerce (USTR), nous examinons un *corpus* de 40 documents, révélant l'influence significative des groupes d'intérêt, notamment la *National Manufacturers Association* (NAM). Les résultats éclairent les complexités des négociations d'accords économiques et soulignent l'impact substantiel des groupes de pression sur la formulation de la politique économique extérieure des États-Unis.
Mots-Clés: ACEUM; ALENA; groupes d'intérêt; investissement étranger; États-Unis.

I. Introduction

The United States political system is characterized by a deeply fragmented decision-making framework. The level of separation of powers between government branches found there is rarely observed in other developed Western

democracies. The degree of vertical decentralization of power in the country is also notable, as the Constitution of 1787 grants states a high degree of autonomy, often at the expense of the federal government. According to Hacker and colleagues,[2] these characteristics of the US political system empower organized interest groups, as they can operate continuously and engage with diverse forums to accomplish their political goals.

Foreign policy, like any other policy, is also shaped by this fragmented and lobby-prone institutional environment, albeit with some peculiarities. The conduct of international relations is an exclusive prerogative of the federal government, excluding states from the formulation of this policy and relegating them to the role of lobbyists in the process. Still, this responsibility is shared not only between the federal Executive and Legislative branches but also among bureaucratic structures within these branches. The formulation of foreign economic policy, including the negotiation and adoption of trade and investment treaties, revolves around the Office of the United States Trade Representative (USTR), although other federal departments, such as Agriculture, Commerce, State and Treasury, wield significant influence in the formulation and adoption of rules.[3]

President Donald Trump and his Trade Representative, Robert Lighthizer, pledged to renegotiate the North American Free Trade Agreement (NAFTA) and implement profound changes to the investment rules within the renegotiated agreement, called the United States – Mexico – Canada Agreement (USMCA).[4] The negotiation resulted in a significant reduction in the level of protection offered to foreign investors. This occurred despite the United States having substantial stocks and flows of capital with its neighboring countries, Mexico and Canada. It is worth noting that the exclusion of rules such

[2] Hacker, Jacob S. *et al.* (eds.), *The American political economy: politics, markets, and power*, Cambridge, Cambridge University Press, 2022, p. 19.

[3] Vigevani, Tullo, Mendonça, Filipe and Lima, Thiago, *Poder e comércio: a política comercial dos Estados Unidos*, São Paulo, Editora Unesp, 2018, p. 15.

[4] "NAFTA 2.0" received different designations in each signatory country. In Mexico, the agreement is referred to as *Tratado entre México, Estados Unidos y Canadá*, with the acronym T-MEC. In Canada, the agreement is officially designated in English as CUSMA, which stands for Canada–United States–Mexico Agreement, and in French as ACEUM, an acronym for *Accord Canada–États-Unis–Mexique*. In this work, the US nomenclature is used, strictly due to the fact it is the most commonly used in the literature.

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as investor-State dispute settlement (ISDS) could potentially have adverse effects even on American investors.

A number of studies, such as those by Blecker,[5] Cabrera an Orlando,[6] Côté and Ali,[7] Gore,[8] and Menezes, Mariano and Contrera,[9] have sought to understand how and why changes in the investment rules from NAFTA to USMCA were implemented. Yet, even those acknowledging the significance of lobbying, such as Sacerdoti,[10] fail to provide comprehensive analysis of these groups' actual engagement in the negotiation process. Consequently, there is a noteworthy gap regarding the specific actions and impact of these interest groups, underscoring the need for additional investigation to elucidate their involvement and untangle the details of the transition from NAFTA to USMCA.

To comprehend how interest groups mobilized to preserve protection for their international investments, the following section of this article will analyze the historical relationship between the United States and the investment treaty regime. The third section will examine the changes made to the investment chapter of the new agreement, with a comparative basis on NAFTA and the defunct Trans-Pacific Partnership (TPP). The fourth section will scrutinize the institutional framework of the United States' foreign economic policy-making, with a particular focus on the space provided for interest groups to express their views in the trade advisory committees under the USTR. The fifth section will analyze the documents produced by these groups within the official consultation system, and in some exceptional cases, outside of it, to

[5] Blecker, Robert A., "The rebranded NAFTA: will the USMCA achieve the goals of the Trump administration for North American Trade?", *Norteamérica*, vol. 16, no. 2, 2021, pp. 289-315. https://doi.org/10.22201/cisan.24487228e.2021.2.516

[6] Cabrera, C. and Orlando, F., "The US-Mexico-Canada Agreement: the new gold standard to enforce investment treaty protection?", *Columbia FDI Perspectives*, no. 269, 2020, p. 3. https://doi.org/10.7916/d8-dh8t-ce37

[7] Côté, Charles-Emmanuel and Ali, Hanza, "The USMCA and investment: a new North American approach?", in Gagne, G. and Rioux, M. (eds.), *NAFTA 2.0: From the first NAFTA to the United States-Mexico-Canada Agreement*, London, Palgrave Macmillan, 2021, pp. 81-98.

[8] Gore, Kiran Nasir, "From NAFTA to USMCA: providing context for a new era of regional investor-State dispute settlement", *Young Arbitration Review*, no. 34, 2019, pp. 4-9. https://ssrn.com/abstract=3412709

[9] Menezes, Roberto G., Mariano, Karina L. P. and Contrera, Flávio, "Tempos difíceis: os Estados Unidos e o México na «renegociação» do NAFTA", in Bojikian, N. M. P. and Menezes, H. Z. (orgs.), *A economia política do governo Trump*, Curitiba, Appris Editora, 2021, pp. 39-62.

[10] Sacerdoti, Giorgio, "Is USMCA really «the new gold standard» of investment protection?", *Columbia FDI Perspectives*, no. 281, 2020, p. 3. https://doi.org/10.7916/d8-h0hq-bq50

understand the positions of the affected sectors and their influence on the final text of the agreement. Lastly, we present our conclusions in the sixth section.

II. The United States and the Investment Treaty Regime

The United States figured among the pioneers in promoting international investment rules. The Friendship, Commerce, and Navigation (FCN) treaties, which the country signed since its foundation, already contained provisions that can easily be found in contemporary investment treaties, such as granting most favored nation treatment to investors from the partner country and ensuring freedom of establishment.[11] Initially the signing of such treaties was not driven by an interest in promoting a vision of liberal international order but rather to serve the interests of specific bilateral relations, which limited their scope.[12]

Numerous proposals for the establishment of global comprehensive investment rules emerged throughout the 20th century. In the interwar period, discussions were held on adopting global mechanisms to protect the treatment of foreigners and their property within negotiations conducted under the League of Nations.[13] These attempts proved futile as World War II disrupted the possibility of economic cooperation among nations. In the same period, the United States expanded the scope of its FCN treaties, incorporating features of modern investment treaties, as noted by Alschner.[14] This shift entailed a transition from providing generic protection to nationals in other countries to safeguarding the private property of companies engaged in foreign operations.

[11] Vandevelde, Kenneth J., "A brief history of international investment agreements", *UC Davis Journal of International Law & Policy*, vol. 12, no. 1, 2005, p. 158. http://ssrn.com/abstract=1478757

[12] Alschner, Wolfgang, "Americanization of the BIT universe: the influence of Friendship, Commerce and Navigation (FCN) treaties on modern investment treaty law", *Goettingen Journal of International Law*, vol. 5, no. 2, 2014, p. 461. http://dx.doi.org/10.3249/1868-1581-5-2-alschner

[13] *Projets de conventions concernant le traitement des etrangers*, 1929. https://archives.ungeneva.org/projets-de-conventions-concernant-le-traitement-des-etrangers-geneve-1928

[14] Alschner, Wolfgang, *op. cit.*, p. 461.

In the post-war period, European countries and the United States embarked on a substantial expansion of economic cooperation. Foundations of the current economic order, such as the World Bank, the International Monetary Fund (IMF), and the General Agreement on Tariffs and Trade (GATT), were put in place in the 1940s. At that time, countries negotiated a new global trade and monetary order while also aiming to adopt multilateral investment rules,[15] as revealed by the Havana Charter, an unratified document that aimed to establish the International Trade Organization in 1948.[16] However, as in subsequent opportunities, divergent positions, particularly between capital exporters and importers, made the adoption of multilateral investment rules an impossible task.[17]

The current investment treaty regime reflects the impossibility of adopting uniform multilateral rules and therefore presents a highly fragmented normative structure. Its enforcement is carried out through investor-State dispute settlement (ISDS) procedures, which allows an investor allegedly affected by a state action prohibited by the investment treaty to file a claim before an arbitral tribunal. This dispute resolution mechanism is guaranteed by multilateral procedural treaties such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[18] and the Washington Convention[19] establishing the International Centre for Settlement of Investment Disputes (ICSID). Both legal instruments are designed to ensure the

[15] Vandevelde, Kenneth J., *The first bilateral investment treaties: U.S. friendship, commerce and navigation treaties in the Truman administration*, PhD thesis, San Diego, University of California, 2012, p. 3. https://escholarship.org/uc/item/1640x3p0.

[16] *Final Act of the United Nations Conference on Trade and Employment*, 1948. https://www.wto.org/english/docs_e/legal_e/havana_e.pdf.

[17] On at least two other occasions, countries of the Global North, primarily capital-exporting nations with an interest in securing legal protection for their investors, endeavored to promote the negotiation of multilateral investment treaties. The first instance, leading to the convention known as Abs-Shawcross, occurred in the immediate post-war period and served as inspiration for subsequent bilateral and regional investment agreements. In the 1990s, a renewed attempt to negotiate a Multilateral Agreement on Investment (MAI) initially took place within the World Trade Organization (WTO) and later within the Organization for Economic Cooperation and Development (OECD), following its failure in the former organization. However, none of these attempts resulted in the adoption of a binding multilateral treaty.

[18] *Convention on the recognition and enforcement of foreign arbitral awards*, 1958. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf

[19] *Convention on the settlement of investment disputes between States and nationals of other States*, 1965. https://icsid.worldbank.org/sites/default/files/ICSID_Convention_EN.pdf

global enforcement of awards rendered either by ad hoc arbitral tribunals or those established by ICSID, the World Bank Group institution responsible for the administrative handling of investment dispute proceedings.[20]

The substantive law, that for all purposes establishes rights and obligations between host states and foreign investors, is embodied in the 2,844 bilateral or regional investment treaties currently in force.[21] In the absence of multilateral treaty negotiations, countries seeking to enforce international rules on foreign investments have opted for signing treaties with narrower scopes.[22] In the case of the United States, complete adherence to the investment treaty regime was achieved through the development of a model bilateral investment treaty in the 1980s, during the presidency of Ronald Reagan,[23] and has continued with subsequent reforms culminating in the 2012 bilateral investment treaty (BIT) model.[24]

The majority of investment agreements comprise similar provisions derived from previous attempts to establish multilateral investment treaties (e.g., the Abs-Shawcross Draft Convention). Within the substantive law of the regime, two categories of provisions can be distinguished: relative clauses and absolute clauses. Relative clauses are named as such because they establish treatment standards for investors from one country that reference the treatment offered to other groups of investors. Clauses such as most favored nation and national treatment fall into this category. These provisions guarantee that foreign investors receive treatment no less favorable than that offered to foreign investors from third countries and to nationals of the host country,

[20] Bonnitcha, Jonathan *et al.*, *The political economy of the investment treaty regime*, Oxford, Oxford University Press, 2017, p. 5.

[21] Office of the United Nations High Commissioner for Human Rights (OHCHR), *Reforming international investment agreements*, 2022. https://www.ohchr.org/sites/default/files/2022-06/Reforming-International-InvestmentAgreements.pdf

[22] Bastos, Paulo P. Z., "A política comercial estadunidense: a estratégia de liberalização competitiva, os acordos bilaterais e a ALCA", *Economia Política Internacional: Análise Estratégica*, vol. 1, 2004, p. 37. https://www.eco.unicamp.br/docprod/downarq.php?id=3103&tp=a

[23] Alschner, Wolfgang, *op. cit.*, p. 464.

[24] Johnson, Lise, "The 2012 US model BIT and what the changes (or lack thereof) suggest about future investment treaties", *Political Risk Insurance Newsletter*, vol. 8, no. 2, 2012, p. 2. https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/160

respectively. These clauses generally generate less controversy, as they are already used in other economic treaties, such as trade agreements.[25]

Absolute clauses, as the name suggests, do not equate treatment to that offered to other groups of investors but impose specific obligations in relation to the affected foreign investor. The most prevalent absolute clause in treaties is the prohibition of expropriation of investments without just compensation. This clause encompasses two categories. In the case of direct expropriation, the nationalization of companies, which involves transferring control of the investment from private to government hands, is prohibited. In the case of indirect expropriation, acts that 'amount to expropriation' are prohibited, which, in practice, has led arbitrators to interpret that any state action that, even incidentally, diminishes an investor's profit expectations may be considered a violation of the investment treaty and subject to financial compensation.[26]

Another absolute clause consists of the minimum standard of treatment. Once again, this clause unfolds into specific categories that regulate the behavior of the state towards the private property of foreigners. The first of these implies, in an abstract manner, that government measures affecting the investor should be done in a 'fair and equitable' manner. In the second, the host state must ensure 'full security and protection' to the foreign investor. According to Bonnitcha, Poulsen, and Waibel,[27] the abstract nature and absence of comparative terms provide arbitrators with significant room for interpretation, leading to various tribunals issuing decisions that are seen as exceeding the stated objective of the regime, which is to offer legal certainty to foreign investors in order to promote foreign direct investment (FDI). Building upon this discussion of investment treaties, we will proceed to analyze the modifications made in the investment chapter of the USMCA in relation to NAFTA.

25 Bonnitcha, Jonathan *et al.*, *op. cit.*, p. 15.

26 *Ibidem*, p. 16.

27 *Idem*.

III. From NAFTA to USMCA: Changes in Investment Rules in North America

Since the 1990s, unfavorable decisions against states and challenges to public policies involving sensitive issues such as the environment and public health have led to significant opposition and criticism of the investment treaty regime and ISDS.[28] In response to these concerns, various governments have proposed alternative approaches to reform the regime, aiming to limit the arbitrators' interpretative discretion and, in some cases, even eliminate the possibility of private investors initiating arbitration.[29]

The reformist momentum also reached the United States, particularly after *Loewen v. United States*, a case in which both the plaintiff and the defendant originated from the developed world.[30] There was a perception that arbitral tribunals had exceeded their original mission of protecting investors from the Global North in jurisdictions of the Global South, generally seen as weak in safeguarding private property, especially that of foreigners.[31]

During his presidency, Barack Obama took a reformist stance by releasing a model bilateral investment treaty in 2012, which aimed to restrict the arbitrators' interpretative discretion through textual modifications.[32] The 2012 Model BIT served as the basis for negotiating the TPP, an economic agreement involving the United States and 11 other economies in the Asia-Pacific region. TPP, however, never entered into force since President Trump with-

[28] Bas Vilizzio, Magdalena, "¿Soberanía en la encrucijada? Nuevas aproximaciones desde la solución de controversias inversor-Estado", in Martens de Willmars, Frédéric (ed.), *Nuevos tiempos, nuevos espacios para las relaciones internacionales y el derecho internacional*, Valencia, Tirant Lo Blanch, 2022, p. 126.

[29] Amorim, Lucas S. *et al.*, "Missing Calvo? Latin America's love-hate relationship with the investment treaty regime", *Conjuntura Austral*, vol. 12, no. 60, 2021, p. 62. https://doi.org/10.22456/2178-8839.113289

[30] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3). https://www.italaw.com/cases/632

[31] Polanco Lazo, Rodrigo, "The no of Tokyo revisited: or how developed countries learned to start worrying and love the Calvo Doctrine", *ICSID Review*, vol. 30, no. 1, 2015, p. 2948. https://doi.org/10.1093/icsidreview/siu028

[32] Office of the United States Trade Representative (USTR), *2012 U.S. Model Bilateral Investment Treaty*, 2012. https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf

drew the country's signature from the treaty in January 2017, shortly after assuming office.

Statements from both President Trump and his Trade Representative, Robert Lighthizer, prior to the negotiation of the USMCA, revealed clear resistance to investment treaties and ISDS. In one instance, Lighthizer likened the mechanism to 'sugar' that attracted US companies to invest in Mexico and Canada at the expense of the domestic economy.[33] The USTR attributes the previous governments' choice to maintain investor-state arbitration in their trade agreements to the influence of pro-trade lobbying groups that downplay the importance of job and income generation for the American worker, preferring to outsource their operations to countries with cheaper labor.

The opposition of Trump and Lighthizer to investment rules generated a wave of panic in the media. Analysts pointed out the possible exclusion of ISDS as one of the main flaws of the agreement that would replace NAFTA.[34] Despite presidential opposition, the resulting agreement did not completely eliminate the possibility for foreign investors to access ISDS. The USMCA retains all the substantive clauses present in NAFTA, generally adopting the linguistic modifications implemented by the 2012 Model BIT and found in the TPP.[35]

Reforms in the investment chapter aim to neutralize the linguistic "can of worms" of NAFTA's Chapter 11, that made possible ambiguous interpretations of treatment standards definitions.[36] The revised language incorporates the Salini Test, a legal framework that outlines specific criteria for defining an investment. These criteria involve the occurrence of (1) an asset or money

[33] Swanson, Ana, "The little-known trade adviser who wields enormous power in Washington", *The New York Times*, 2018. https://www.nytimes.com/2018/03/09/us/politics/robert-lighthizer-trade.html.

[34] Levy, Phil, "Critique of NAFTA provision highlights team Trump's misconceptions on investment abroad", *Forbes*, 2017. https://www.forbes.com/sites/phillevy/2017/10/23/should-team-trump-encourage-investment-in-mexico; Yong, Lacey, "Lighthizer justifies Trump's opposition to ISDS in NAFTA", *Latin Lawyer*, 2018. https://latinlawyer.com/article/lighthizer-justifies-trumps-opposition-isds-in-nafta; Bodea, Cristina *et al.*, "There's a hidden cost in Trump's new trade agreement with Canada and Mexico", *The Washington Post*, 2019. https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/02/theres-ahidden-cost-in-trumps-new-trade-agreement-with-canada-and-mexico/

[35] Côté, Charles-Emmanuel and Ali, Hanza, *op. cit.*, p. 89.

[36] Anderson, Greg, *op. cit.*, p. 12.

transfer within (2) a designated timeframe, (3) the assumption of risk by the investor, and (4) contribution to the economic development of the host country.[37] The qualification of clauses such as fair and equitable treatment and full protection and security has been strengthened, shifting the burden to the plaintiff to prove whether their claim finds basis in customary international law.[38]

The USMCA also excludes investor expectations as a determining factor for treatment standard violations. Significant changes, aligned with the 2012 BIT model, include the reformulation of the indirect expropriation clause and clarification that non-discriminatory regulatory measures for legitimate public welfare objectives do not constitute indirect expropriation, except in rare circumstances. The new text reinforces the ability to implement policies for environmental, health, and public safety goals, signaling a limitation in ISDS coverage. Despite innovations, the delegation of interpreting complex issues to private arbitrators, a concern highlighted by Gallegos Zuñiga, persists.[39]

Despite retaining most of the substantive clauses, yet in a modified form, the new agreement severely limits their application through the ISDS mechanism, both in terms of investor nationality and economic sector.[40] The first change is the impossibility, after a transition period that ended on June 30, 2023, of pursuing arbitration cases involving Canadian investors or the Canadian government under the USMCA. According to the agreement's text, the

[37] Grabowski, Alex, "The definition of investment under the ICSID Convention: a defense of Salini", *Chicago Journal of International Law,* vol. 15, no. 1, 2014, p. 290. https://chicagounbound.uchicago.edu/cjil/vol15/iss1/13. Note that the test is a jurisprudential construct that addresses yet another of the numerous imprecisions and normative gaps that make the regime of investment treaties prone to interpretational divergences. Even though authors like Grabowski argue that the Salini Test is crucial for maintaining the connection between investment promotion and economic development, it is not universally accepted among peers. For instance, the *Quiborax v Bolivia* tribunal employed a modified form of the test that excluded the requirement for the investment to contribute to the economic development of the country. Since there is no appellate body, there is no way to resolve jurisprudential differences.

[38] Gallegos Zúñiga, Jaime, "Algunos cambios que incorpora el T–MEC, en materia de inversiones extranjeras, en relación con lo previsto en el capítulo XI del TLCAN", *Arbitraje. Revista de arbitraje comercial y de inversiones*, vol. 12, no. 1, 2019, p. 171. https://repositorio.uchile.cl/bitstream/handle/2250/168639/Algunos-cambios-que-incorpora.pdf.

[39] *Ibidem*, p. 174.

[40] Gantz, David A., *An introduction to the United States-Mexico-Canada Agreement*, Edward Elgar Publishing, 2020, p. 14.

initiation of arbitral proceedings is only possible based on annexes to Chapter 14, and there are only two such annexes between Mexico and the United States.[41]

The general investment regime established by Annex 14-D of the USMCA maintains the potential for arbitral suits, allowing investors from any sector of the U.S. and Mexican economies to engage in such disputes. However, these investors cannot file claims regarding all clauses of the agreement but only in cases of direct expropriation and with respect to the two relative clauses (most favored nation and national treatment).

Table 1. Comparison of investment chapters in US economic agreements

Provisions	*NAFTA*[42]	*TPP*[43]	*USMCA*[44] *(Annex 14-D General Regime)*	*USMCA (Annex 14-E Covered Government contracts)*
Definition of investment includes the Salini test?	No (Art. 1139)	Yes (Art. 9.1)	Yes (Art. 14.1)	Yes (Art. 14.1)
National Treatment	Present (Art. 1102)	Present* (Art. 9.4)	Present* (Arts. 14.4 e 14.D.3)	Present* (Arts. 14.4 e 14.E.2)
Most favored nation	Present (Art. 1103)	Present* (Art. 9.5)	Present* (Arts. 14.5 e 14.D.3)	Present* (Arts. 14.5 e 14.E.2)
Pre-establishment clause	Present (Arts. 1102 e 1103)	Present (Arts. 9.4 e 9.5)	Absent (Art. 14.D.3)	Present (Arts. 14.4, 14.5 e 14.E.2)
Fair and Equitable treatment	Present (Art. 1105)	Present* (Art. 9.6)	Absent (Art. 14.D.3)	Present* (Arts. 14.6 e 14.E.2)

[41] Gallegos Zuñiga, *op. cit.*, p. 175.

[42] *North American Free Trade Agreement: Chapter 11 – Investment*, 1992. https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2413/download

[43] *Trans-Pacific Partnership, Chapter 9 – Investment, 2016. https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3573/down*load

[44] *Agreement Between Canada, the United States of America, and the United* Mexican States. Chapter 14 – Investment, 2018. https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6008/download

Full Security and Protection	Present (Art. 1105)	Present* (Art. 9.6)	Absent (Art. 14.D.3)	Present* (Arts. 14.6 e 14.E.2)
Direct Expropriation	Present (Art. 1110)	Present* (Art. 9.8)	Present* (Arts. 14.8 e 14.D.3)	Present* (Arts. 14.8 e 14.E.2)
Indirect Expropriation	Present (Art. 1110)	Present* (Art. 9.8)	Absent (Art. 14.D.3)	Present* (Arts. 14.8 e 14.E.2)
Exhaustion of Local Remedies	Absent	Absent	Final judicial decision or 30 months (Art. 14.D.5)	Absent

*Text improved with qualifiers such as 'in like circumstances' for relative standards or 'in accordance with the principles of customary international law' for absolute standards, in order to restrict their interpretation.

Although the option for arbitral action exists, it is necessary for the investor to have exhausted all domestic remedies, either through an unfavorable final judicial decision or after a period exceeding 30 months without a resolution from domestic judicial or administrative processes. The full investment provisions of the agreement, including pre-establishment application that guarantees liberalized market access for investors, are exclusively granted to investors listed in Annex 14-E, referred to as covered government contracts.[45] Table 1 provides a comparative overview of the key modifications introduced by the new treaty in relation to its predecessors, NAFTA and TPP.

While the new agreement significantly limits the scope of arbitral actions, it does not completely rule them out. The provisions of Chapter 14 remain intact with minor adjustments in cases initiated under Annex 14-E. Scholars like Cabrera even raise the hypotheses that this represents a paradigmatic shift in the United States' international investment policy, anticipating that in future trade negotiations, the country would maintain access to ISDS only for selected economic sectors based on the frequency with which they file arbitral claims.[46]

Sacerdoti challenges Cabrera's conclusions, attributing the selection of sectors covered in Annex 14-E to the political proximity of those sectors to

[45] These sectors are: exploration, extraction, refining, transportation, distribution, or sale of oil and natural gas; supply of power generation services; supply of telecommunications services; supply of transportation services; ownership or management of roads, railways, bridges, or canals.

[46] Cabrera, C. and Orlando, F., *op. cit.*, para. 4.

the government and lobbying group pressure during the negotiation process. According to him, the new approach implemented by Trump, far from being a gold standard for new agreements, represents a setback marked by 'purely political choices rather than a rational social-economic evaluation of the benefits of FDI protection'.[47] In the following sections, we will analyze the role of lobbying groups in the formulation of the country's foreign economic policy in general and, more specifically, in relation to the case under study, to determine if these hypotheses holds true.

IV. The institutional framework of US Foreign Economic Policy-making

While it is not the aim of this work to delve into the origins and development of the institutions responsible for shaping the country's international economic policy, it is worth summarizing the process of establishing the system of advisory committees that assist the USTR and the president of the United States in addressing private sector demands regarding trade and investment agreements.

According to Vigevani, Mendonça, and Lima, the demand for an advisory role of the private sector in the process of trade policy formulation gained traction following the implementation of the Trade Act of 1974. This legislation brought about significant changes to the system of trade policy formulation, which remain in effect to this day. It positioned the Special Trade Representative (STR), the precursor to the USTR, as the central figure in negotiating trade agreements, both bilaterally and within multilateral frameworks such as GATT. Before the law came into effect, the authority of the STR faced competition from the Department of State and the National Security Council for influence in shaping and negotiating the nation's international economic policy.[48]

On one hand, the 1974 law solidified the STR's role as the government's interlocutor in economic negotiations, but on the other hand, it also propelled a progressively complex system of advisory councils composed of members from the private sector or civil society. The government's objective

[47] Sacerdoti, Giorgio, *op. cit.*, para. 7.

[48] Vigevani, Tullo, Mendonça, Filipe and Lima, Thiago, *op. cit.*, p. 152.

was not only to gather information about private sector interests but also to shape domestic consensus regarding foreign economic policy.[49]

Committee members are granted access to confidential information concerning ongoing negotiations. Additionally, their advisory role, which was previously optional, become mandatory. Negotiators who refuse to heed the committees' advice must report to the members and provide justification for their decisions. Another consequence of the law was the establishment of what is commonly referred to as the 'fast track' process, which grants the president extraordinary powers for the streamlined negotiation of economic agreements. These elements constitute fundamental characteristics of the US international economic policy-making that endure to this day, albeit with some modifications. In 1979, the STR was renamed the USTR, aiming to confer greater significance to the agency without necessitating the creation of a new government department.[50]

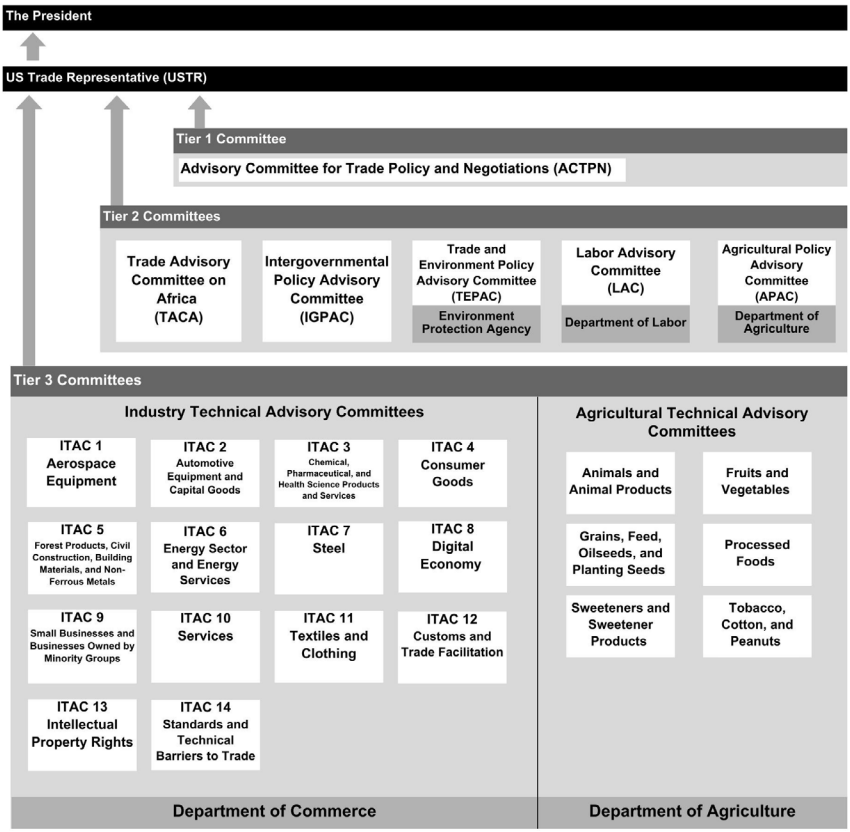
The advisory system has undergone various reorganizations over the years. At the top of this hierarchy is the Advisory Committee on Trade Policy and Negotiations (ACTPN). At the second tier of the system, we find five committees. Focusing on the agricultural sector is the Agriculture Policy Advisory Committee (APAC), whose members are nominated jointly by the USTR and the Department of Agriculture. The Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC) consists of labor union representatives, jointly appointed with the Department of Labor. The Trade and Environment Policy Advisory Committee (TEPAC), whose members are appointed with input from the Environmental Protection Agency (EPA), is responsible for assessing the environmental impact of trade agreements. The Intergovernmental Policy Advisory Committee (IGPAC) consists of representatives from subnational governments. Less relevant to the topic discussed in this article, a committee was also established for negotiations involving Africa, called TACA (Trade Advisory Committee on Africa).[51]

[49] *Ibidem*, p. 155.

[50] *Ibidem*, p. 215.

[51] General Accounting Office (GAO), *Advisory Committee System should be updated to better serve U.S. policy needs*, 2002. https://www.gao.gov/assets/gao-02-876.pdf; Oliveira, Marcelo F. and Geraldello, Camila S., "O USTR e a institucionalidade da política externa comercial dos Estados Unidos", paper delivered at the 4th national meeting of the Brazilian Association of International Relations, Belo Horizonte, July 2013. https://www.encontronacional2013.abri.org.br/download/download?ID_DOWNLOAD=385

Figure 1. The USTR Advisory Committee System
during the USMCA Negotiation Process



Source: The Author with data from General Accounting Office (GAO), *op. cit.*; Oliveira, Marcelo F. and Geraldello, Camila S., *op. cit.* and USTR, *Advisory Committees*.

The third tier of the advisory system is formed by committees that represent the interests of specific industrial and agricultural sectors. There are six Agricultural Technical Advisory Committees for Trade (ATACs) that focus on specific agricultural sectors, ranging from fruits and vegetables to sweeteners and processed foods. Meanwhile, the fourteen Industry Trade Advisory Committee (ITACs) cover a wide range of topics, including aerospace equipment (ITAC 1), standards and technical trade barriers (ITAC 14), and small

and minority-owned enterprises (ITAC 9).[52] The composition of the advisory committee system during the USMCA negotiation is illustrated in Figure 1.

In the following sections, we will explore how interest groups operated in the negotiation process that led to the USMCA, taking into account this institutional framework established by the 1974 law as amended.

V. The Role of Interest Groups in the Negotiation Process

The trade advisory system, which offers input on all pertinent international economic negotiations, played a significant role in the renegotiation process of NAFTA. The period from September 27 to October 25, 2018 was when this system was active and issued reports with its opinions on the text that had been negotiated up to that point. In addition to being important in itself as a tool to assess the objectives of the various sectors included in the consultative process, the analysis of these documents will provide us with information about a critical period in the negotiations when the confidentiality of discussions among representatives of the three North American countries was emphasized.

A total of 40 documents were analyzed, including reports and addenda. The documents produced by the 25 advisory committees were examined for considerations regarding the investment chapter of the new agreement. In addition to the reports and addenda presented by the committees, we included testimonies from seven other entities that were found during the research process. Furthermore, in addition to all these documents, we chose to analyze an attachment to the report of ITAC 2 (Automotive Equipment and Capital Goods) presented by the union representing workers in that sector – the United Auto Workers (UAW).

For ease of reading, this analysis is divided into the following subsections: (1) the top tier committee, ACTPN, and most second tier committees LAC, TEPAC, IGPAC, (2) APAC and the six ATACs, focusing on the agricultural sector; (3) ITACs 1 to 14; and finally, (4) documents issued by entities outside the official advisory system of the USTR.[53] It is worth noting that during this

[52] General Accounting Office (GAO), *op. cit.*, p. 9; Oliveira, Marcelo F. and Geraldello, Camila S., *op. cit.*, p. 11; USTR, *Advisory Committees*.

[53] All documents analyzed in this section have been cataloged in an Appendix to this paper

period, alongside the drafting of the NAFTA replacement, there was uncertainty regarding the continuation of a trilateral agreement, as indicated by the text analysis. Trump considered excluding Canada from the new agreement, although this threat was not ultimately carried out.

1. *Political Advisory Committees (ACTPN, LAC, TEPAC, and IGPAC)*

LAC, the advisory committee composed of labor union representatives, strongly opposed the inclusion of ISDS in the agreement. The report describes the dispute settlement mechanism as a 'parallel justice system' that 'favors foreign producers over domestic ones' and 'promotes outsourcing'. Moreover, the LAC believes that the current text clashes with the fast-track legislation (Bipartisan Congressional Trade Priorities and Accountability Act of 2015), which required language demanding an ISDS appellate mechanism in future trade and investment treaties.[54] In an addendum after the negotiation, the committee approves of the modifications made by Trump that reduce the scope of ISDS application and restrict the clauses accessible to investors, but would like to see it completely scraped from the agreement.[55]

The IGPAC, composed of representatives from subnational entities (state and local governments, as well as collective representations of their legislative and judicial bodies), also took a predominantly opposing stance towards the investment chapter provisions that continued to grant foreign investors access to ISDS. According to the report:[56]

> Most, but not all, IGPAC members believe that the complete elimination of the investor-state dispute resolution mechanism would improve the Trade Agreement between the United States and Mexico. […] The USTR should further improve the investor-state dispute mechanisms by drawing upon the variety of thoughtful reform proposals that have been generated by trade groups and bar associations in recent years.

and are accessible through the following link: osf.io/ce8nd

[54] Labor Advisory Committee on Trade Negotiations and Trade Policy (LAC), *Report on the impacts of the renegotiated North American Free Trade Agreement*, September 27, 2018.

[55] Labor Advisory Committee on Trade Negotiations and Trade Policy (LAC), *addendum to the report*, October 25, 2018.

[56] Intergovernmental Policy Advisory Committee, *Report of the Intergovernmental Policy Advisory Committee on the trade agreement between the U.S., Mexico and potentially Canada*, September 27, 2018.

Among the reforms deemed positive by the IGPAC are the exclusion of the application of national treatment, most favored nation, and direct expropriation clauses in the pre-establishment phase of investment for most sectors. Additionally, the report highlights the maintenance of a three-year transition period for NAFTA provisions, the inclusion of article 11.14 allowing a party to restrict rights granted to a company controlled by a third country, the provision outlined in Annex 11-D requiring exhaustion of local remedies before admitting an arbitral claim, the elimination of the possibility of applying the ISDS provision with Canada, and the inclusion of a footnote in Annex 11-D preventing the use of provisions from other agreements between the United States and Canada through the MFN clause. Consequently, the represented entities perceive the renegotiated text as a partial, yet notable, advancement.

Contrary to the other committees, the members of TEPAC, responsible for the environmental analysis of trade agreements, did not reach a clear conclusion. The committee divided itself into two groups. One believed that ISDS was an important tool for protecting investors, while the other group argued that it could be easily abused, potentially preventing the state from regulating in favor of the environment and other related issues. Despite the lack of consensus, the committee reached a compromise and proposed several reforms, including: limiting the legal remedies and compensation amounts that could be granted by tribunals; providing greater clarity to substantive clauses to reduce arbitrators' interpretive discretion; establishing the requirement to exhaust domestic remedies; implementing transparency obligations such as document disclosure and the possibility of Amicus Curiae participation; and establishing an appellate mechanism.[57]

Since many of the proposals were not addressed, the TEPAC opposed granting special treatment to sectors such as oil and gas. The members, nevertheless, reached a consensus that there was progress concerning Chapter 11 of NAFTA, and they considered the exclusion of the possibility of ISDS application between the United States and Canada as a positive outcome. They held the view that both countries had independent judicial systems that had not displayed bias towards investors from either country.

[57] Trade and Environment Policy Advisory Committee (TEPAC), *Report of the Trade and Environment Policy Advisory Committee on the North American Free Trade Agreement 2018*, September 27, 2018.

The ACTPN, considered the highest advisory committee on international economic policy matters, did not provide an opinion on Chapter 14 of the agreement, which pertains to investment. Similar to the previous committees (LAC, IGPAC, and TEPAC), the ACTPN believes it is crucial for Canada to be included in the negotiations and the final agreement.[58] The committee issued an addendum to its report, celebrating the achievement of a trilateral agreement among the countries in October, following President Trump's announcement on September 30th that Canada had rejoined the negotiations.[59]

2. *Agricultural Advisory Committees (APAC and ATACs)*

The ATAC on tobacco, cotton, and peanuts issued separate opinions regarding each of the represented agricultural products.[60] The section on tobacco emphasizes the importance of maintaining ISDS clauses to protect trademarks of companies that use tobacco produced in the United States, likely referring to notable cases where ISDS was used in an attempt to freeze regulations on cigarette advertising and other tobacco-related products, such as *Philip Morris v. Uruguay* and *Philip Morris v. Australia*.[61] The committee did not evaluate that without the provisions on indirect expropriation, which were excluded for most cases in the new agreement, it would be impossible to initiate those ctionns. This ATAC also broadly asserts that, from a public health standpoint, the text is not yet ideal but represents progress compared to NAFTA.

The members of the ATAC on sweeteners unequivocally support investment provisions equivalent to those offered by NAFTA, stating that the 'erosion of ISDS provisions' undermines the 'stability and predictability' provided

[58] Advisory Committee for Trade Policy and Negotiations (ACPTN), *The Advisory Committee for Trade Policy Negotiations (ACTPN) Committee report to the President, the Congress and the United States Trade Representative on the trade agreement*, September 27, 2018.

[59] Advisory Committee for Trade Policy and Negotiations (ACPTN), *addendum*, October 25, 2018.

[60] Tobacco, cotton, and peanuts ATAC, *Report of the Industry* [sic] *Trade Advisory Committee on tobacco, cotton, and peanuts on the trade agreement*, September 27, 2018.

[61] *Philip Morris Asia Limited v. The Commonwealth of Australia* (UNCITRAL, PCA Case No. 2012-12). https://www.italaw.com/cases/851; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7). https://www.italaw.com/cases/460

by the original arrangement.[62] The committee notes that companies in the sector have already benefited from investor-state arbitration, as seen in the case of *Cargill v. Mexico*, where it was determined that tariffs imposed on high-fructose corn syrup imported from the United States by Mexico were illegal.[63] This ATAC also opposes the inclusion of a sunset clause in the agreement, which would require an automatic renegotiation process every five years. In an addendum, following the announcement that it was possible to include Canada in the final agreement, the committee affirms that the partial maintenance of investment provisions (between Mexico and the United States) is positive. However, they believe it would be better to have a more robust set of rules that encompass all sectors.[64]

The ATAC on processed foods opposed proposals that would result in reducing the level of protection offered to investors from the United States, especially by distinguishing the level of protection based on economic sectors as outlined in the annex system of the new USMCA.[65] The report emphasizes that the processed food and beverage industry relies on complex supply chains and international investments to secure its raw materials, requiring therefore a high level of legal certainty. The modifications are seen as setbacks to the country's trade policy agenda, creating legal uncertainty and the potential for discrimination against products made in the United States. A majority of the committee expresses concern over the purported negotiation of a Mexico-United States bilateral agreement and conditions its support for the new agreement on the inclusion of Canada in the final version. The addendum does not introduce any new developments regarding this issue.[66]

The ATACs on grains, feed, oilseeds, and planting seeds; fruits and vegetables; and animals and animal products were the ones that expressed the least support for investor-state arbitration mechanisms. The first commit-

[62] Sweeteners and sweetener products ATAC, *Report of the Agricultural Technical Advisory Committee (ATAC) for sweeteners and sweetener products*, September 27, 2018.

[63] *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2). https://www.italaw.com/cases/223

[64] Sweeteners and sweetener products ATAC, *Supplemental ATAC letter on USMCA*, October 23, 2018.

[65] Processed foods ATAC, *Report of the Agricultural Technical Advisory Committee for trade in processed foods*, September 27, 2018.

[66] Processed foods ATAC, *Report of the Agricultural Technical Advisory Committee for trade in processed foods (addendum)*, October 25, 2018.

tee made a generic mention of the need to eliminate measures that result in 'investment distortions' and expressed general disapproval of the weakening of dispute settlement mechanisms, without specifically mentioning ISDS.[67] The second committee (fruits and vegetables) does not mention the investment chapter of the agreement,[68] and the same goes for the third committee (animal products).[69] The committee that encompasses all agricultural sectors, the APAC, also does not mention the investment chapter.[70] However, all four committees mentioned in this paragraph emphasize the importance of including Canada in the final version of the agreement.

3. *Industrial Trade Advisory Committees (ITACs)*

Unlike the ATACs, which are named after the specific products they represent, the ITACs were, during the negotiation of the USMCA, numbered from 1 to 14.[71] ITAC 2, which focuses on automotive equipment and capital goods, identifies Chapter 14, related to investment, as an area that could be improved.[72] This committee views the retaining of certain protection standards (direct expropriation and most favored nation) as positive, but opposes the exclusion of the fair and equitable treatment, full protection and security, and indirect expropriation clauses, which it equates to rights guaranteed by the US Constitution and domestic laws. The committee members argue that excluding the pre-establishment application of these agreement clauses reduces the ability to expand operations and sales to Mexico. Additionally, alongside

[67] Grains, feed, oilseeds, and planting seeds ATAC, *Report of the Industry Trade Advisory Committee on grains, feed, oilseeds, and planting seeds*, September 27, 2018.

[68] Fruits and vegetables ATAC, *Report of the Agricultural Technical Advisory Committee for trade in fruits and vegetables*, September 27, 2018.

[69] Animal and animal products ATAC, *Report of the animal and animal products Agricultural Technical Advisory Committee (ATAC)*, September 27, 2018; Animal and animal products ATAC, *addendum to the Committee Report on the New U.S.-Mexico-Canada Agreement*, October 25, 2018.

[70] Agriculture Policy Advisory Committee (APAC), *Report of the Agricultural Policy Advisory Committee*, September 27, 2018.

[71] Note that the number of committees is frequently changed, and topics are sometimes divided into different committees, merged for joint deliberation, or new topics are included in the advisory system. During the negotiation of the TPP the composition of the ITACs consisted of 16 committees instead of 14.

[72] ITAC on automotive equipment and capital goods (ITAC 2), *Report of the Industry Trade Advisory Committee on automotive equipment and capital goods*, September 27, 2018.

the elimination of anti-dumping provisions, ITAC 2 believes that the erosion of ISDS provisions diminishes the predictability and legal stability in North America. The comments are made under the assumption of Canadian participation, and the committee states that its support is contingent upon Canada's involvement.

ITAC 2 presented an addendum to its initial report, after it became clear that Canada's participation was guaranteed, offering partial support for the text under negotiation.[73] The committee advocated for the inclusion of investment rules similar to those found in NAFTA. However, the committee's decision was not unanimous, and the United Auto Workers, the union representing workers in the automobile industry, presented a separate opinion as an attachment to the committee's report. In contrast to the employers' representatives on the committee, the union believes that the reduction in access to ISDS is 'a step in the right direction' as the current system favors foreign investors at the expense of citizens and promotes outsourcing.

ITAC 3 focuses on chemical, pharmaceutical, and health science products and services. The committee emphasizes the importance of investment rules for maintaining production chains.[74] While acknowledging the partial retention of protection clauses for foreign investors, the committee advocates for the preservation of clauses such as national treatment and most favored nation, as well as clauses that prohibit performance requirements such as technology transfer, the use of domestic content, or the imposition of export obligations. This ITAC asserts that if these clauses are not included in the final agreement, it would result in unequal protection for US and Mexican investors. Mexican investors would have access to the same level of protection through US domestic courts, while the reverse would not be true. The committee also expresses disappointment over Canada's decision not to participate in the investment chapter.

The next advisory committee, ITAC 4'ealing with consumer goods, states that it 'does not support limiting the access to ISDS provisions to a limited number of sectors' as it perceives a contradiction with the history of the

[73] ITAC on automotive equipment and capital goods (ITAC 2), *addendum to the earlier (September 28, 2018) Report of the Industry Trade Advisory Committee on automotive equipment and capital goods*, October 24, 2018.

[74] ITAC on chemicals, pharmaceuticals, health/science products and services (ITAC 3), *Report of the Industry Trade Advisory Committee on Industry Trade Advisory Committee on chemicals, pharmaceuticals, health/science products and services (ITAC 3)*, September 25, 2018.

country's trade policy.[75] Committee members also regard ISDS as a tool 'supported by the business community' that ensures 'American investors, companies and their workers will be treated fairly overseas'. ITAC 4 conditions the partial support offered to the renegotiated agreement to the inclusion of Canada in its final version.

ITAC 5 covers a wide range of sectors, including forest products, civil construction, building materials, and non-ferrous metals. This committee, like several others, opposed the negotiation of a bilateral agreement solely between Mexico and the United States.[76] A majority of committee members also conditioned their support for a trilateral agreement on the inclusion of investment clauses that extend beyond Mexico and the United States, specifically in certain economic sectors. Members of ITAC 5 reference the *Abitibi-Bowater v. Canada* case as an example of the importance of maintaining the validity of the investment chapter with Canada.[77] The report emphasizes the significance of preserving the legal protection provided by ISDS for the mining sector, which, due to inherent reasons, cannot easily repatriate its investments. However, some committee members recognize the trade-off between sovereignty and investment protection, considering the protections offered by the US judicial system to be sufficient.

ITAC 6 deals with the energy sector and energy services. In its report, the committee identifies ISDS as one of the top five concerns of the sector since it depends on capital-intensive and long-term investments.[78] The committee acknowledges the significance of reintegrating the energy sector into the investment chapter of the renegotiated agreement. This refers to the sector's inclusion in Annex 11-E, which ensures a level of protection comparable to that of the TPP and NAFTA. However, the committee recommends expanding the scope of Annex 11-E to include sectors indirectly linked to energy generation, such as uranium extraction and processing. In the addendum fol-

[75] ITAC on consumer goods (ITAC 4), *Report of the Industry Trade Advisory Committee on consumer goods*, September 27, 2018.

[76] ITAC on forest products, building materials, construction, and nonferrous metals (ITAC 5), *Report of the Industry Trade Advisory Committee on forest products, building materials, construction, and nonferrous metals*, September 27, 2018.

[77] *AbitibiBowater Inc., v. Government of Canada* (ICSID Case No. UNCT/10/1). https://www.italaw.com/cases/39

[78] ITAC on energy and energy services (ITAC 6), *Report of the Industry Trade Advisory Committee on energy and energy services*, September 27, 2018.

lowing the negotiation, the committee expresses regret over the limited access to ISDS in certain sectors with Mexico and the complete exclusion of Canada from investor-state arbitration. Given the significant reduction in the level of protection offered by the USMCA, the committee members believe it should not be seen as a model to be adopted for future trade negotiations by the country.

ITAC 8, the thematic committee on digital economy, was one of the most vocal advocates for the investment provisions of NAFTA.[79] The report argues for the adoption of 'as strong as possible' provisions for US investors abroad in US trade agreements and bilateral investment treaties. The committee strongly believes that the agreement should maintain its trilateral nature, including Canada.

ITAC 9 addresses the interests of small businesses and businesses owned by minority groups. The report briefly comments on Chapter 14, as well as its Annexes D and E, considering them suitable for promoting US interests.[80] ITAC 9 is another committee that strongly encourages the government to continue negotiations with Canada in order to reach a trilateral agreement.

The committee on services, ITAC 10, dedicated the most pages to the topic of investment. Its report recognizes ISDS as 'vital' to ensure the property rights of US investors.[81] It considers NAFTA as a good starting point but believes that the advancements implemented by the TPP and the 2012 model BIT should be incorporated into the text of the new agreement. Unlike other committees that were satisfied or offered their partial support to the new wording of the investment chapter, ITAC 10 considers it inappropriate for the defense of US economic interests.

ITAC 10's report tries to anticipate the problems that could be caused by abandoning the investment chapter clause by clause. Four main issues were highlighted: the inability to use ISDS to ensure a similar degree of property rights protection to that found in the United States, the elimination of the pre-establishment clause, the need to exhaust local remedies, and the requirement of government contracts for certain sectors to access ISDS. It also

[79] ITAC on the digital economy (ITAC 8), *Report of the Industry Trade Advisory Committee on the digital economy*, September 25, 2018.

[80] ITAC on small and minority business (ITAC 9), *Report of the Industry Trade Advisory Committee on small and minority business*, September 27, 2018.

[81] ITAC on services (ITAC 10), *Report of the Industry Trade Advisory Committee on services*, September 27, 2018.

emphasizes that interstate arbitration is an inadequate tool for resolving investment disputes. Like many others, ITAC 10 conditions any support for the agreement on maintaining its trilateral nature. A subsequent addendum states that the modifications implemented in the USMCA are unwarranted and could harm the country, and therefore should not be taken as a model for future economic agreement negotiations.[82]

ITAC 13, the committee on intellectual property rights, expresses 'serious concerns' regarding the investment topic, particularly regarding the resolution of disputes between investors and states.[83] Additionally, it states that numerous foreign investments involve intellectual property components and that it is not beneficial for the United States to restrict companies' rights to protect their intellectual property.

Five committees, namely ITAC 1 (Aerospace Equipment),[84] ITAC 7 (Steel),[85] ITAC 11 (Textiles and Clothing), [86] ITAC 12 (Customs and Trade Facilitation),[87] and ITAC 14 (Standards and Technical Barriers to Trade),[88] did not make significant comments on Chapter 14 – Investment. All of them expressed opposition to the negotiation of a bilateral agreement between Mexico and the United States.

4. *Statements outside the official advisory framework*

Expressions to the USTR are possible outside the official advisory committee system, despite limitations like the inability to access the draft agreements

[82] ITAC on services (ITAC 10), *addendum on the U.S.–Mexico–Canada Agreement ("USMCA") to the report submitted by the Industry Trade Advisory Committee on services ("ITAC 10") on September 27, 2018*, October 19, 2018.

[83] ITAC on intellectual property rights (ITAC 13), *Report of the Industry Trade Advisory Committee on intellectual property rights (ITAC-13)*, September 27, 2018.

[84] ITAC on aerospace equipment (ITAC 1), *Report of the Industry Trade Advisory Committee on aerospace equipment*, September 27, 2018.

[85] ITAC on steel (ITAC 7), *Report of the Industry Trade Advisory Committee on steel*, September 27, 2018.

[86] ITAC on textiles and clothing (ITAC 11), *Report of the Industry Trade Advisory Committee on textiles and clothing*, September 27, 2018.

[87] ITAC on customs matters and trade facilitation (ITAC 12), *Report of the Industry Trade Advisory Committee on customs matters and trade facilitation*, September 27, 2018.

[88] ITAC on standards and technical trade barriers (ITAC 14), *Report of the Industry Trade Advisory Committee on standards and technical trade barriers*, September 27, 2018.

being negotiated. In the case of the NAFTA renegotiation, these drafts were subject to a 25-year confidentiality agreement signed by the parties. As mentioned earlier, a public hearing process prior to the agreement negotiation took place from June 27 to 29, 2017. Additionally, various private sector entities and non-governmental organizations expressed their demands through public statements regarding the drafting of the new agreement. This subsection gathers those publicly available expressions. Note that time constraints and the overwhelming volume of data prevent a comprehensive analysis of these documents. Testimonies given at public hearings, for example, were not transcribed by the USTR and are only available in video format, making it impossible to analyze them in this article. Given the analysis of the entirety of the advisory committee reports, the documents analyzed here should be understood as complementary to the research and analysis effort.

The National Association of Manufacturers (NAM) expressed its position even before the public hearings process in June 2017. In a letter to the USTR, in which it requested to testify at that occasion, the organization took a strong stance on the investment issue.[89] Firstly, NAM felt the need to counter the hostile stance towards foreign investment observed in the new government. The organization emphasized that there is no trade-off between trade, investment with Mexico, and jobs in the United States. The document highlights the need for investment provisions and enforcement mechanisms, namely ISDS. With optimism, the group lists as its primary objective in renegotiating NAFTA's Chapter 11 to 'raise investment standards to the level of the United States' and expand ISDS coverage to intellectual property.

The NAM intends to achieve this objective by maintaining the pre-establishment clause and establishing a ratchet clause, which would solidify American access to foreign markets and prohibit rollbacks in investment protection levels. Additionally, the organization advocates for preventing forced technology transfers, a common requirement for foreign investment establishment. The document also supports expanding the use of ISDS to government contracts that pertain to: (a) natural resources controlled by state entities, including their exploration, extraction, refining, transportation, distribution, and sale; (b) the provision of public services such as electricity generation and

[89] National Association of Manufacturers, *Comments of the National Association of Manufacturers on negotiating objectives regarding modernization of the North American Free Trade Agreement with Canada and Mexico*, June 12, 2017.

distribution, water treatment and distribution, and telecommunications; or (c) infrastructure projects such as road construction, bridges, canals, dams, or oil and gas pipelines that are not exclusively or predominantly for government use.

Table 2. Comparison of Investment Agreement Provisions and United States Domestic Law

Protection provided by ISDS	*US Law Provisions*
Non-discrimination (National Treatment/ Most Favored Nation)	14th Amendment (Equal protection clause)
Fair and Equitable Treatment/ Minimum Standard of Treatment	5th and 14th Amendment (Due process clause), Administrative Procedure Act
Government Expropriation Compensation	5th Amendment (Takings clause) and state constitutions

Source: National Association of Manufacturers (2017)

The trade association also advocates for expanding access to ISDS to all sectors and extending the investment provisions' duration to ten years after termination. The NAM presents an interesting argument regarding the investment provisions that draws historical precedents from the evolution of the United States' investment agreement system: the comparison of ISDS clauses with the domestic protection offered by the country to private property, as seen in Table 2.

The National Foreign Trade Council (NFTC) is a business association that, according to its website, 'advocates for a rules-based global economy'. In a statement during the USTR hearings held on June 29, 2017, the organization's president expressed that the renegotiation process should focus on improving the provisions of NAFTA, which is considered a success, rather than implementing new trade and investment restrictions.[90] Like several other institutions analyzed throughout this section, the NFTC considers it essential to maintain the trilateral nature of the agreement. Regarding investment pro-

[90] Yerxa, Rufus, *Testimony of ambassador RufusYerxa, president, National Foreign Trade Council*, June 29, 2017.

visions, the organization expresses support for modernizing the investment chapter by expanding the coverage of rules to state-owned enterprises. Additionally, at that time, the NFTC opposed the introduction of thematic carve-out clauses (e.g., tobacco, health, etc.).

The Canadian union Unifor was the only labor organization outside the United States that provided a specific statement regarding Chapter 11 of NAFTA. The organization recommends the complete repeal of Chapter 11, without replacement, as it believes that the arbitration cases unfairly favored foreign investors at the expense of important public policies.[91]

The Cato Institute, a self-described libertarian think tank, devotes few lines to the topic of investment, but considers the TPP model as a reference to be adopted in the renegotiation.[92] It highlights the role of NAFTA in generating the crisis of trade agreements by integrating investment to its text, considering the current negotiation process as a moment for reflection on whether this practice should be maintained.

The American Petroleum Institute, an organization representing oil producers and refiners, considers the preservation of the ISDS in its original format, without making it a voluntary adoption provision or weakening its clauses, as one of the main objectives in its position paper.[93] The other two objectives are the elimination of the 5-year sunset clause and ensuring market access for the energy sector in Mexico.

Lastly, a few months prior to the advisory committee process, the influential corporate lobbying group, the Business Roundtable, issued a statement published on its website. According to the organization, the modernization and strengthening of NAFTA should include the retention of ISDS provisions, ensuring fair treatment for US investors in foreign markets and enabling US companies to pursue international growth opportunities with confidence.

A summary of the positions expressed by various economic and social sectors is provided in Table 3. We discriminated sectors represented in the USTR trade advisory committee systems in three groups: *Pro-ISDS* (those

[91] Unifor, *Unifor position statement on the renegotiation of the North American Free Trade Agreement*, July, 2017.

[92] Lester, Simon, Manak, Inu and Ikenson, Daniel, *Renegotiating NAFTA in the era of Trump: keeping the trade liberalization in and the protectionism out*, CATO Working Paper No. 46, August 14, 2017.

[93] American Petroleum Institute *NAFTA protects US national security: how to increase US influence over Russia and China in Mexico's energy market*, February 19, 2018.

who advocated for either maintenance of current rules or even an upsurge in investment protection, including ISDS), *Indifferent* (those sectors that did not support neither express dissatisfaction with the proposed investment rules), and *Against-ISDS* (sectors that either expressed satisfaction with the investment rules rollback or demanded the complete removal of investment rules from the treaty).

Table 3. Positions for sectors involved in the negotiation process

Against-ISDS	Indifferent	Pro-ISDS
Labor unions (LAC, Unifor, UAW) Environmental groups (TEPAC) Local governments (IGPAC)	Agrifood sector (ATACs on grains, feed, oilseeds, and planting seeds; fruits and vegetables; and animals and animal products; APAC) Aerospace equipment (ITAC 1) Steel (ITAC 7) Small businesses and businesses owned by minority groups (ITAC 9) Textiles and clothing (ITAC 11) Technical standards committees (ITACs 12 and 14) ACPTN (Tier 1 Committee)	Agrifood sector (ATACs on process foods; tobacco, cotton and peanuts; and sweeteners) Automotive equipment and capital goods (ITAC 2) Chemical, pharmaceutical, and health science products and services (ITAC 3) Consumer goods (ITAC 4) Forest products, civil construction, building materials, and non-ferrous metals (ITAC 5) Energy and energy services (ITAC 6) Digital Economy (ITAC 8) Services (ITAC 10) Intellectual property rights (ITAC 13) American Petroleum Institute Business Roundtable National Association of Manufacturers

VI. Conclusions

The documentary analysis conducted in this study has yielded significant findings regarding the renegotiation of NAFTA, which gave rise to the USMCA. It has illuminated the interests of key economic, social, and political sectors within the United States and their connection to the provisions of the new agreement. However, the inherently secretive nature of lobbying poses

a challenge, and we recognize that a study relying solely on publicly available data about the actions of interest groups is destined to only partially capture the activities of these actors. We acknowledge, for instance, that major corporations may bypass the official consultation mechanism and, due to greater resource availability, engage in direct lobbying with the Executive and members of Congress. Therefore, further studies are essential to uncover the lobbying activity during the negotiation of the USMCA.

The negotiations were held during a time when investment rules were widely questioned. Numerous reform proposals were (and still are) being discussed in international forums, and the United States had been actively involved in the reform process. This is evident through the revision of the 2012 model BIT and subsequent changes in the TPP. The ongoing negotiation process has incorporated several of these modifications into its final text.

Despite the similarities with the TPP, the USMCA introduces changes that go beyond the text that served as its inspiration. One notable change is the severe restriction imposed on most sectors regarding access to ISDS, which surpasses the efforts of other recent reform initiatives, with the notable exception of proposals from Latin American countries such as Bolivia, Brazil, Ecuador, and Venezuela. However, while the radical response from South American countries can be expected due to their disproportionate exposure to investment arbitration cases, it is surprising to see such a response from the United States. As the world's largest capital exporter, the country has never suffered a defeat in any ISDS case.

It is noteworthy to perceive that the 'plutocratic-populist coalition' led by Trump, as described by Hacker and colleagues,[94] faced tensions during the negotiation of this agreement. A coalition formed by workers represented by labor unions (LAC, Unifor, UAW), supported by environmentalists (TEPAC), and representatives of local governments (IGPAC) expressed opposition to the inclusion of investment rules in the final version of the agreement. Members of these committees tended to view the reduction in the level of protection for former investors as a positive development in the renegotiated text compared to the provisions found in NAFTA.

The committees representing specific economic sectors, which were dominated by representatives of employers, tended to oppose the changes implemented by USMCA. Sectors heavily reliant on the internationalization

[94] Hacker, Jacob S. *et al.*, *op. cit.*, p. 35.

of supply chains, such as services, the digital economy, and processed foods, strongly opposed the renegotiated investment chapter, viewing it as contrary to the country's economic interests. A second group partially supported Trump's proposal to create two ISDS systems, segregating companies from certain sectors with government contracts into a more privileged category. This group primarily consisted of sectors that would benefit from this arrangement, such as the energy sector, or few sectors that were more receptive to criticism regarding ISDS and therefore perceived the restrictions as a step forward. A third, smaller group, generally composed of entities engaged in simpler economic activities that do not require international supply chain integration, showed apathy towards investment rules.

One notable finding was the level of influence of the National Manufacturers Association's proposal on the final drafting of the USMCA. The business association's proposal to include government contracts in the ISDS was accepted and incorporated as a specific annex to the agreement. Despite meeting this specific demand, other suggestions such as the introduction of the ratchet clause, which would have prevented governments from reducing the levels of protection offered to investors, and the request for the expansion of investment provisions, were ignored.

The changes in the dispute resolution system implemented by Chapter 14 of the USMCA were significative. Firstly, it removes the option of investor-state disputes between Canada and the United States. Secondly, it greatly limits investors' access to arbitration in the Mexico-United States relationship. Only a select few sectors have been chosen to enjoy privileges similar to those offered under NAFTA and virtually identical to those outlined in the TPP text.

These sectors were deliberately chosen to advance the president's America First policy, which favored bringing back economic sectors, such as the automotive industry, to American territory. Analysis of the trade and investment policies of the agreement makes this objective clear in the cited example. The reduction of legal protection for operations in Mexico, along with economic incentives found in other chapters of the USMCA, such as the requirement for higher regional content in vehicles and the use of better-paid workers, serve as clear disincentives to the strategy of internationalizing companies in the sector in search of cheap labor in Mexico.

Meanwhile, the USMCA maintained protection for sectors where repatriating operations was not feasible. Some investments pursued market-seeking

internationalization strategies, aiming to access markets that were not easily reachable through international trade. This was the case for meeting the Mexican government's demand for infrastructure, energy generation, and telecommunications. On the other hand, sectors such as oil and gas relied on resource-seeking internationalization strategies, sourcing basic commodities from Mexico at lower prices compared to the domestic market.

The justification for the new legal design of Chapter 14 of the USMCA cannot be exclusively attributed to either a reformist interest seeking to reduce the United States' exposure to arbitration or the complete fulfillment of the powerful lobbying groups. Even the NAM, that seems to have inspired the revised investment text, did not have all its interests addressed, since the manufacturing sector was not included among the most privileged investors and the overall level of investor protection decreased. The USMCA investment rules were ultimately subordinated to the former president's America First policy, which aimed to promote the country's reindustrialization. In conclusion, contrary to what analysts such as Cabrera and Sacerdoti asserted, Trump's investment rules reform project exhibits a clear economic rationale, albeit one that defies the neoliberal economic consensus.

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