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The USMCA and its Environmental Protection Provisions

El T-MEC y las Normas de Protección Ambiental

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Abstract

One of the US-Mexico-Canada Trade Agreement's (USMCA) particularities is its chapter 24, titled "Environment". How innovative is this chapter? Or is it designed merely to placate environmentalists and the international community? This work seeks to analyze the USMCA environmental protection provisions, their effectiveness and innovativeness. This article concludes that what was done lacks innovation and is more environmentally relevant by what it excludes, in comparison to the North American Free Trade Agreement (NAFTA), then by what it includes. It seems that environmental protection was more of an afterthought in the USMCA, rather than a real goal.

Keywords: US-Mexico-Canada Trade Agreement's (USMCA); North American Free Trade Agreement (NAFTA); Environmental Protections, Environment

Resumen

Una de las particularidades del Acuerdo Comercial México-Estados Unidos-Canadá (T-MEC) es su capítulo 24, titulado "Medio Ambiente". ¿Qué tan innovador es este capítulo? ¿O está diseñado simplemente para apaciguar a los ecologistas y a la comunidad internacional? Este artículo pretende analizar las disposiciones de protección del medio ambiente del T-MEC, su eficacia y su carácter innovador. Este artículo concluye que el T-MEC no es innovador y es más relevante desde el punto de vista ambiental por lo que excluye, en comparación con el Tratado de Libre Comercio de América del Norte (TLCAN), que por lo que incluye. Parece que la protección del medio ambiente fue más una idea marginal en el USMCA, que un objetivo real.

Palabras clave: Acuerdo Comercial México-Estados Unidos-Canadá (T-MEC); Tratado de Libre Comercio de América del Norte (TLCAN); Protección ambiental; Medio ambiente

1 Introduction

It is widely known that since the industrial revolution, the climate has started to shift and in the last years the consequences of such a human-provoked climate change have started to cause important problems and even catastrophes. The international community has sought to avoid further damage, and international relations and international law have started to play a big role. Free trade agreements (FTAs) frequently include environmental provisions. In the case of the US- Mexico-Canada Trade Agreement (USMCA), also colloquially denominated as NAFTA 2.0, it was no different, as it includes environmental provisions in chapter 24. However, the USMCA was spearheaded by former US president Trump, who was rather sceptic about environmental protection. Thus, this article asks whether effective provisions were incorporated, if they are innovative, what their importance is, and what could have been done better.

2 Background: NAFTA environmental provisions

The North American Agreement on Environmental Cooperation (NAAEC) was the environmental annex to the North American Free Trade Agreement (NAFTA).

> "The NAAEC also created a Commission for Environmental Cooperation ("CEC") consisting of a Council on Environmental Cooperation and a semi-autonomous Secretariat, as well as a Joint Public Advisory Committee (JPAC) with four public members for each Party. The Secretariat also performs a useful function in public outreach and conducts research on such matters as climate change, ecosystems and pollutants, with reports issued on each" (D. Gantz 6).

Even more important than that, parties to the NAAEC had to effectively enforce their internal environmental laws and were responsible to investigate private claims on failure by the parties to comply with environmental laws and provisions. If the investigation showed a party's "persistent pattern of failure ... to effectively enforce its environmental laws", "a process of binding consultation and dispute resolution through an arbitral process" was made available (D. A. Gantz 74; D. Gantz 6).

Environmental arbitration in NAFTA in order to enforce internal environmental law was "not realistically enforceable", because the NAAEC "set no substantive environmental standards other than to call upon each party to create laws" to protect the environment. Thus, nothing prevented "a party from weakening its environmental laws and then neglecting to strongly enforce them" (D. Gantz 6). The NAAEC could not effectively compel state parties to comply with environmental law, but rather sought voluntary compliance, mainly because the agreement of two of the three national representatives on the Commission was required to start and arbitration (D. A. Gantz 74).

3 Assessment of USMCA environmental provisions

Several authors (Tienhaara; Laurens, Dove y Morin; D. Gantz; D. A. Gantz) agree that the USMCA not only includes more provisions, but it also improves on NAFTA environmental provisions. These authors argue that that the USMCA incorporates 72% more provisions than NAFTA, includes standard ("boilerplate") environmental provisions contained in FTAs since NAFTA, and incorporates more sectorial provisions especially regarding animal trafficking and fishing (Laurens, Dove y Morin 2-6). It is important to add only three USMCA are innovative, that the agreement does not mention climate change or global warning, and it does not include measures in order to promote positive climate policies and investment in renewable energies (D. Gantz 90; Laurens, Dove y Morin).

Despite the high number of environmental provisions and objectives contained in the USMCA, it is easy to see why some authors criticize the agreement, since its coverage of environmental issues is very broad (D. Gantz 90) and may stifle innovation (Laurens, Dove y Morin 9). I would go even further and contend that it demonstrates a lack of regard to important and current environmental issues.

Another important aspect is that the USMCA includes environmental provisions in its main text and not only in an annex (as was the case with NAFTA). This means that USMCA environmental provisions are enforceable by the same mechanism than the rest of the agreement. This seems as progress. However, its effectiveness is questionable: it is not sure if this will really help solve possible disputes, due to precedents of States using certain mechanisms to delay proceedings by failing to appoint panelists under NAFTA, which could also happen under the UMSCA and would be extremely expensive for States (D. Gantz 8).

The USMCA also includes a Commission for Environmental Cooperation (CEC), just like NAFTA. However, as the NAFTA CEC had been "consistently underfunded, it is an open question whether the adoption of" the USMCA "will lead to any real revitalization of cross-border environmental cooperation" (Tienhaara 2). The USMCA administrative structure "will be useful only if the three USMCA parties together make a good faith effort to support the USMCA secretariat and its investigations, both financially and otherwise" (D. Gantz 8).

USMCA Chapter 28 on Good Regulatory Practices has to be carefully observed because it places "significant burdens on regulatory agencies that are, in many cases, already under-resourced" (Tienhaara 2). It also provides "new avenues for corporations to influence regulation" (Tienhaara 3) due to a system that allows a period of unlimited written comments. Lobby industries may overflow the system, as the system provides stakeholders the opportunity to make suggestions for improvement on existing regulations (article 28.14

USMCA) including recommendations for repeal if a regulation has become more burdensome than necessary to achieve its objective (including with respect to its impact on trade) or relies on incorrect or outdated information.

The Rio Declaration principle 15 states:

> "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall be not used as a reason for postponing cost-effective measures to prevent environmental degradation".

Several authors criticize that the USMCA does not include the precautionary principle, as enshrined in the Rio Declaration principle 15. This may lead to a delay of effective action taken by States in order to mitigate environmental hazards due to a lack of full scientific certainty (Laurens, Dove y Morin 14; Tienhaara 3).

Another problem is that the USMCA does not encourage State parties to participate in other multilateral environmental agreements (MEA) (Laurens, Dove y Morin 15)

On a positive note, one of the environmentally most relevant aspects, if not the most relevant issue in the USMCA, is that it does not include the NAFTA energy proportionality provision. That provision required "that Canada exports to the US at least the same proportion of its energy output as it did during the previous three years. This includes 74 percent of the oil and 52 percent of the natural gas that Canada produces. The withdrawal of this rule will make it easier for Canada to meet its mitigation commitments under the Paris Agreement" (Laurens, Dove y Morin 14). The energy proportionality provision was quite harmful for the environment.

NAFTA investor–State dispute settlement (ISDS) was often criticized because it allegedly allowed investors to sue the host State "for violating obligations related to discriminatory, unfair, or arbitrary treatment by the host government. These ISDS provisions have been widely criticized (...) for giving foreign investors the power to sue governments for regulations that are designed to protect people or the environment" (Laurens, Dove y Morin 12). USMCA provisions on ISDS are substantially different:

> "ISDS between Canada and the US is completely ruled out (with a three-year sunset period for investors already established in these countries). The Canada-Mexico investment relationship will be governed by the Comprehensive and Progressive Agreement for a Trans Pacific Partnership. With respect to the US and Mexico, investors can only bring claims based on more traditional (e.g. direct expropriation) types of claims and they have to submit them to local courts first. The one exception is for investors with government contracts in certain "covered sectors" (Tienhaara 2).

These changes may help stopping the threat of lawsuits from investors against progressive environmental agendas taken in the host States.

4 Conclusions

The USMCA includes environmental provisions, but they have not excluded criticism. Skepticism refers mostly to the real usefulness of these environmental provisions. In the USMCA, I think it is clear that environmental issues were treated as a sort of afterthought, without an intention of being innovative or addressing current relevant topics such as climate change or global warming. The USMCA lacks innovation and is more environmentally relevant by what it excludes, in comparison to NAFTA, than by what it includes.

Yet, USMCA environmental provisions are, to be sure, better than the NAAEC. One can be cautiously optimistic, hoping the USMCA yields better results than NAFTA (D. A. Gantz 92). Despite this optimism, I believe an important and transcendental issue like complying with environmental law should not rely on good faith only, especially when it involves countries that have had a varied level of commitment with environmental issues, such as Mexico and the US. It is imperative to urge States to keep advancing on environmental protection, and to create effective mechanisms to force States, in case of non-compliance, to respect environmental regulations.

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