



**RIGA  
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LAW**

**Comparative Study of the North American Free Trade Agreement  
and the United States – Mexico – Canada Agreement:  
The Compromised Deal of the Free Trade**

**MASTER'S THESIS**

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**DECLARATION OF HONOUR:**

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

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## **ABSTRACT**

Free Trade Agreements as international agreements are underestimated. Recent Trade Wars between the United States and China has brought and FTA back onto the stage. Comparative study of the two free trade agreements – the NAFTA and the USMCA uncovers new perspectives on modern trade. It shows that leaders of international trade shall not merely seek a free trade in their international agreement, rather a balanced trade. The trade balance mindset allows for the free trade to unfold through the duty free treatment, but incorporating non-tariff requirements. For developing economies the takeaway is trading with developed economies to benefit the most from their resources as we can see that from the example of trade between the United States and Mexico. Thus, protectionism shall be reviewed, and seen not as impeding the trade flow with other economies, rather the trade with set priorities to protect one's own interests and balancing them against each other's. USMCA's innovative provisions disrupt the traditional model of the FTA, by setting measures to keep the FTA model evolving and relevant thru the time.

## SUMMARY

After 25 years in force NAFTA was criticized as the ‘*worst trade deal ever made*’, and was replaced by a new agreement between the same North American economies, signed in November 30, 2018. If laws are made to empower, promote and regulate the wellbeing of a country and its Peoples, why did it fail this time, or maybe FTAs as such are doomed to fail? It is worth analyzing both trade agreements in their historical context and comparing the extent of changes pursued in the free trade agreement through their provisions.

The main objective is to analyze two treaties – the old NAFTA and the new USMCA, to evidence the similarities and differences between two drafted agreements, and it aims to establish, what new issues shall be considered in drafting the FTAs to establish mutually beneficial trade relationships with their trade nations. This thesis presents a qualitative research, which to a major extent is based on the comparative historical analysis approach towards analyzing trade issues of NAFTA and the USMCA. It shall be noted, that in difference to legal history, the historical comparative analysis compares two legal phenomena as two synchronic and static issues. This served as a great basis for the construction showing the transparency of how each topic is dependent upon another. Only the main text of international agreements was used to perform the comparative analysis, but we are withstanding the fact that annexes might present substantial information to analyze this topic in more detailed manner, providing a more wholesome picture.

It is apparent from the historical background analysis that the USMCA is a direct follower of NAFTA which achieved three things: it mainly kept the previous provisions of the NAFTA, modified existing provisions of NAFTA and added new provisions. However, there is a lack of scholarly articles arguing legal matters and their context in the USMCA, while NAFTA is presented to a sufficient extent in the scholarly articles for this research. Especially, this subject lacks broader and outside perspectives on NAFTA and USMCA, treated their potential impact on international trade law as such, at the moment, is missing in the academic writings. On the contrary the author of this thesis looked at the issues from outside, perhaps with likely more neutral and less biased stand on the FTA Parties. This has resulted in a different point of view on

the recent USMCA, where it is seen as an implication for the international trade law outside the North America.

Important findings are directly related to objectives of this thesis, and can steer into practical implementation. The great challenge that stands in front of the leaders of international trade, since the perfection of the deal is not seeking a free trade agreement, rather chasing for a balanced trade agreement. The perspective on protectionism shall be reviewed and seen not as an invisible wall impeding the trade flow with other economies, rather an invitation into the trade deal by setting priorities to protect one's own interests and balancing them against each other's. As we can see that from the example of trade between the United States and Mexico, developing economies shall encourage trading with developed economies to benefit the most from their resources.

The comparative analysis demonstrated that NAFTA was tailored for the consumer to access cheaper resources and supply of lower priced goods on the market, but the USMCA for the American working class, and the latter does not provide an open mindset to join with other economies in this FTA, but it directly targets trade against China on different provisional levels. This has resulted in general trends set out throughout the USMCA such as increasing control, monitoring, enforcement, verification, transparency and cooperation for the trade between the FTA parties. FTAs, in general, are among the most important and influential international agreements that a country could have. Interestingly, the inherited structure of provisions did not allow NAFTA to evolve and assume changes of the social environment and new trade realities; as a result it was largely criticized as being outdated, and perhaps promoted the dismantling of NAFTA. The new sunset clause in the USMCA has the chance to demonstrate to this legal field how to keep FTAs alive and relevant as the time passes while interests of the Parties and trade realities change. The thesis answers a few questions and raises a few more: Can an FTA serve as an international legal instrument to predict the development strategy of a country? How to find a place under protectionism policies for the free trade? When does the FTA cease to fulfill its mutually beneficial role? These are just a few possible and relevant questions in the international trade law for further research.

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## **LIST OF ABBREVIATIONS**

AD - anti-dumping

CFTA - Canada Free Trade Agreement

COO - certificate of origin

CVD - countervailing duty

DB - drawback

DDP - duty deferral program

EU - European Union

FTA - Free Trade Agreement

FTAA -Free Trade Agreement of Americas

GATT - General Agreement on Trade and Tariffs

GPA - Government Procurement Agreement

IP - intellectual property

ILO - International Labor Organization

MERCOSUR - Mercado Común del Sur (Eng. Southern Common Market)

MFN - Most Favored Nation

NAFTA - North American Free Trade Agreement

NAAEC - North American Agreement On Environmental Cooperation

NAALC - North American Agreement on Labour Cooperation

PTT - preferential tariff treatment

SMEs - Small and Medium Enterprises

SPS - Sanitary and Phytosanitary Measures

TPP - Trans Pacific Partnership

US - United States

USMCA - United States-Mexico-Canada Agreement

WTO - World Trade Organization

## 1. INTRODUCTION

In light of the recently escalated Trade War in 2018, Trump's administration has overturned the world of international trade into a new order. More than two decades mature trade agreement became the basis for an integrated, continent-wide, trillion-dollar free trade zone for many multinational companies<sup>1</sup>. Those companies operated based on the assumption that the free trade of goods within the NAFTA region will never change - is now gone<sup>2</sup>. Main arguments for changing the landscape of the agreement lied in the United States economic deficit caused by trade with NAFTA countries. While the stage was set as if they were victimized by the other economies, still one might ask a question: what happened in the first place that it led to such a situation? The argument was mainly based on socio-economic reasons, such as drawing employment away from the country, which led the Trump's election campaign onto the winning route in the first place<sup>3</sup>. The question arises, if laws are made to empower, promote and regulate the wellbeing of a country and its Peoples, why did it fail this time, or maybe FTAs as such are doomed to fail?

Although there are a number of FTAs under the review by the president of the United States, the primary trade agreement targeted with changes and re-negotiation was NAFTA. It was signed and agreed upon in 1992 by United States, Mexico and Canada, but had to be dismantled in 2017, after a period of 25 years. Nevertheless, instead of NAFTA, after rounds of negotiations all countries of the North America concluded the USMCA in November 30, 2018<sup>4</sup>. Additionally, the new trade agreement drags along a great marketing, because it is claimed as the most balanced and modern trade agreement ever signed. While undoubtedly, there is a gap of 25 years between the two FTAs, this claim shall be reviewed in its historical context. The relatively recent nature of the agreement led us to use mostly recent articles, written during the last three years with relation to the USMCA, and older sources, up to 20 years regarding NAFTA. Besides the fact that this topic is among the most escalated in the news feed around the world, the new

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<sup>1</sup> Husisian, Gregory. "The Future of NAFTA in the Trump Administration." *International Trade & Law Regulation* 23, no. 1 (2017):29-35, p.29

<sup>2</sup> *Ibid*

<sup>3</sup> *Ibid.*, pp.29-35

<sup>4</sup> Galibraith, Jean, ed. "NAFTA Is Renegotiated and Signed by the United States." *American Journal of International Law* 113 (January 2019): 150-59, p.150.

trade agreement driven by powerful economy such as the United States often establishes an effect of precedent. In such case, scholars have proved that there is a high chance of changing the norms of international law<sup>5</sup>. Therefore, it is worth analyzing both trade agreements in their historical context and comparing the extent of changes pursued in the free trade agreement through their provisions.

The main objective of this thesis puts us on the path for comparative analysis of two treaties – the old NAFTA and the new USMCA, by evidencing the similarities and differences between two drafted agreements, and evaluating how trends and provisions in the trade agreement changed since then. Furthermore, this objective sets the ground to discuss the main findings of the research, evidenced through the analysis. Finally, the thesis will aim to establish, what new issues shall be considered in drafting the FTAs to establish mutually beneficial trade relationships with their trade nations. This thesis presents a qualitative research, which to a major extent is based on the comparative approach towards analyzing trade issues of NAFTA and the USMCA. Although the most common approach is the external comparison, where the same legal phenomena is compared in different legal systems, this thesis takes a less common approach, by comparing the same legal phenomena in two different periods of time, also referred to, as historical comparative analysis<sup>6</sup>. It shall be noted: in difference to legal history, the historical comparative analysis compares two legal phenomena as two synchronic and static issues. The thesis is divided into three chapters, and their sequence eventually is directed at answering the central thesis question: *What new developments in the international trade law shall be considered in drafting the FTAs in the light of modern trade realities to nations that seek to establish mutually beneficial trade relationships with their trade partners?* The pursued method for this research supported the thesis in a structural and organizational manner, giving clear direction and objectives for each separate section. This served as a great basis for the construction showing the transparency of how each chapter is dependent upon another.

The first chapter introduces the historical evolution and background facts for NAFTA and USMCA development. The chapter briefly describes major circumstances and historical facts

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<sup>5</sup> Verdier, Pierre-Hugues, and Erik Voeten. "Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory." *American Journal of International Law* 108 (2014): 389, p.391.

<sup>6</sup> Kestemont, Lina. *Handbook on Legal Methodology: From Objective to Method*. Cambridge: Intersentia Ltd, 2018, p.27.



under which the need for NAFTA and the USMCA came into the existence. Moreover, it establishes the relationships among these two FTAs which will subsequently come back as a means of evaluating and linking the causal factors for the new provisions. The need for this chapter is to understand the subject itself and the interrelation between subjects. Finally, to a certain extent, this chapter satisfies the curiosity to see whether the new thing is a well forgotten old.

The second chapter of this work is a structured analysis of both FTAs, applying the comparative approach. First, it applies to the structure of the FTA itself and second, to a detailed comparison of trade provisions. The NAFTA is compared against USMCA in the most structured, but limited way, without diving into the details. The author used the international agreements to perform the comparative analysis. It is worth to note that, annexes of both agreements were left outside the scope of this work, although it would have uncovered more details for the discussion of similarities and differences. The reason why annexes were not taken is: they pertain very specifically to trade relationships among the FTA partners, which likely result irrelevant for the application to other trade nations ignoring their individual characteristics of trade agreements. Thus, the author focused more on the provisions which create the framework for the details presented in their annexes, instead of scrutinized analysis of those. Nevertheless, it shall be acknowledged that annexes might present substantial information to analyze this topic in more detailed manner, providing a more wholesome picture.

The third chapter evaluates in detail similarities and differences as they resulted from the comparative analysis. From the perspective of sources used for this chapter, there were certain limitations and weaknesses. While there is quite abundant information on NAFTA, scholarly and non-scholarly, there are almost no scholarly sources analyzed throughout about the new agreement, the USMCA. This is due to the fact that it is a very recent legal topic at the moment. While some scholars have already made publications on the USMCA, they also lack the basis for reliable and critically peer-reviewed sources used in their publications, simply because there are no precedents. Thus, the reliance on primary sources is critical in this case, so as the trust in the objective interpretation from their authors. Usually, the most reliable analysis of the USCMA encountered during the research is with regards to separate chapters of the new FTA, leaving out broader implications.

The fourth chapter is built upon a discussion of results of the previous chapter and is of a decisive importance for answering the thesis question. Since published academic sources that are relevant for this topic are mostly from the United States, approached through the academics from the inside of the system. On the contrary the author of this thesis looked at the issues from outside, perhaps with likely more neutral and less biased stand on the FTA Parties. This has resulted in a different point of view on the recent USMCA, where it is seen as an implication for the international trade law outside the North America. Meanwhile, the United States sources mainly focus on implications for the North America, only. This thesis is among the first scholarly attempts to discuss the new USMCA agreement in a broader perspective of the international trade law; as a result this can provide a basis for a broader future research.

## **2. BACKGROUND DESCRIPTION OF TWO TRADE AGREEMENTS**

This chapter will look at the historical background of NAFTA to recognize the events which led to the development of the FTA. Further, this chapter will assess the effectiveness of NAFTA during its years in force by researching it thru various scholarly and non-scholarly assessments. Also, the summary of NAFTA's main results and challenges is presented leading into the next agreement – the USMCA. In a similar manner, also the historical background of the new FTA is reviewed thru the development and negotiation process. Finally, the purpose of this chapter is to obtain broad and solid information with regards to the context in which these both FTAs were created and enforced.

## 2.1. NAFTA - Development Process

NAFTA of 1994 was implemented as an economical tool to develop the trade between the United States, Mexico and Canada. During centuries long, quasi successful, agenda to strengthen the United States and Canada trade relationships, two countries never succeeded until the CFTA in 1989. Mostly, because of political and war turmoil in the beginning of the 20th century, and periodically uprising protectionism policies. Also, treaties as GATT, WTO Uruguay Round and European Union's internal market creation placed the desire to keep the North American continent on the stage for the trade competitiveness. The trend for the trade cooperation went in hand with the idea for scaling up each trade partner's personal agenda to increase the total share of the global the economy.

CFTA became the basis for the NAFTA. The idea to include Mexico in the partnership with United States was not a probability before. As Britain and Spain were at war on the European Continent, the same pattern evolved on the American continent with continuous wars for the land between Mexico and United States, resulting in a very little probability for the economic cooperation. Moreover, at the time Mexico was seen as a solo player for the other economies. Extreme nationalization, bribery, high import tariffs and promotion of only internal market goods was perceived as economic independence by Mexico sheltering it from the world's competition<sup>7</sup>. But the curtain sustaining Mexico's perception that they are an independent part of the global economy fell as painfully as Oil Prices in 1981, and the new reality was filled with national debt. To find the way out of the situation GATT appeared as a great idea, and with joining the agreement Mexico proved the other economic participants, that they are open for the trade.

With just a timely resistance from Canada's side due to their concerns of losing benefits which were negotiated during CFTA, both countries took the newcomer into the North American Free Trade elite. From Canada's perspective this was also the chance to improve certain conditions for the trade which were overlooked in the previous agreement, for the United States it meant the access to the energy surpluses of Canada and Mexico, and for Mexico it was a

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<sup>7</sup> Folsom, Ralph H. *NAFTA in a Nutshell*. St. Paul, MN: West Group, 1999, p.6.

chance to rise from the poverty and despair. At that time the self-interests of the three economies could have been satisfied by NAFTA.

In this trade love triangle the United States is positioned as the most dominant and consumer driven economy capable of swallowing all the exports derived from Canada and Mexico. While for production driven Canada and poverty motivated Mexico this seemed as a good deal, it also meant the high domination of the United States. NAFTA promised to increase the dominance of the United States and the dependence of Canada and Mexico<sup>8</sup>. Resulting, that trade deals not only open new opportunities, but also open the opportunity costs.

## **2.2. Effectiveness of NAFTA during its years in force**

Negotiation and enforcement of NAFTA became a significant tool to change the trade landscape between all three member states. Based on what criteria the effectiveness of NAFTA can be assessed? Folsom puts forward the idea, that the interpretation shall be found in accordance with NAFTA objectives, which include the elimination of trade barriers and facilitation of cross border movement of goods and services, promotion of fair competition, increase of investment opportunities, protection and enforcement of IP rights, creation of effective procedures for implementation and application of the agreements and resolution of disputes, finally, establishment of framework for further expansion of free trade agreements<sup>9</sup>. In our opinion the measurement of effectiveness for the NAFTA shall also be reviewed from the perspective of self-interests of every party, when entering in the FTA negotiation deal, since those were the only strong motivators to sign the trade deal in the first place.

### **2.2.1. Elimination of Trade Barriers**

One of the most often implemented trade barriers is import tariffs. Benefits of the import tariffs for the importing country are quite immediate, by getting compensation in the national cashier

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<sup>8</sup> *Ibid*, p.11.

<sup>9</sup> *Ibid*, p.17.

for giving up the market reserved for domestic goods. Import tariffs are actively implemented at the time of protectionism.

NAFTA's strategy was to phase out tariffs on North American goods, eliminating them completely by 2008 without the risk that the trade tariffs might increase. While United States was always quite open economy, the dropping of the Mexican import tariffs represented a great step forward. The phase out elimination of tariffs succeeded, and was implemented according to three stage good qualification schedule, covering sensitive industrial goods for both - United States and Mexico, and the existing Canada-US tariff reduction schedule remained in place since the CFTA time<sup>10</sup>. Liberalization of trade in agriculture, textiles, and automobile manufacturing was a major focus of NAFTA<sup>11</sup>. Mexico and Canada were the highest producing states among all three, this allowed their goods a duty-free treatment, and increased the export to get the access to the sought United States purchasing power. Also, the duty-free treatment would mean that the products that would otherwise be manufactured in the United States can now be manufactured in Mexico by the same United States Corporations, because to sell them back in the domestic market does not represent any extra tariffs.

### **2.2.2. Facilitation of cross border movement of goods and services**

The cross border movement of goods and services is primarily facilitated by removal of trade tariffs, thus providing a duty free treatment. Such access has been granted to number of industries in NAFTA, but providing that the product shall be qualified as originating in one of NAFTA member states. Automotive, textile and agricultural goods are especially targeted industries from the sector of goods. Also the energy and petrochemical products have a separate treatment under NAFTA. And from the sector of services free trade principles govern accounting, advertising, architecture, broadcasting, commercial education, construction, consulting, telecommunications, engineering, environmental science, health care, land transport,

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<sup>10</sup> Folsom, Ralph H. et al., *International Trade and Investment in a Nutshell*. 2nd ed. St. Paul, MN: West Group, 2000, pp.368-369.

<sup>11</sup> McBride, James, and Mohammed A. Sergie. "NAFTA's Economic Impact." *Council on Foreign Relations*, October 1, 2018. Available on: <https://www.cfr.org/backgrounder/naftas-economic-impact>. Accessed: April 29, 2019.

legal, publishing and tourism. NAFTA adopts the “negative listing” of services where all services are subject to free trade, unless NAFTA has specified otherwise<sup>12</sup>. While the free movement of goods most likely was for the benefit of Mexico and Canada, the free movement of services targeted the United States.

Besides the tariffs, also other technical barriers are addressed to ease the cross border movement. Import and export quotas, licenses, export taxes, export subsidies, health measure certifications and standards customs duties tariff drawback refunds, waivers are all examples of non-tariff barriers to trade. All these barriers were removed, diminished or harmonized by making them as easy and transparent as possible to ease the movement of goods across the borders<sup>13</sup>. Further, to ease the trade of services, NAFTA strictly prohibits the requirement by states to establish a branch or subsidiary or the need to have a permanent residency, so trade of services can be exchanged to other countries without physical establishments or extra documentation requirements as licenses and permits. And public telecommunication shall be accessible, open and above all non-discriminatory to anyone who is willing to conduct business with the help of communication, e.g. phones, mails, data transmissions etc.

### **2.2.3. Investment Opportunity Increase**

Foreign investment issue gained a substantial attention under NAFTA, since investment promotion is directly related to free movement of goods and services. NAFTA’s investment promotion and protection provisions are considered innovative and controversial at the same time. In all, NAFTA provides a broad scope of investment definition, and a quite generously protects investor interests against the possible state’s sovereignty.

Before NAFTA, Mexico has gained a fame of being a state which largely exercised the power of the state in enterprise monopolization, expropriations or imposed regulations for foreign investors, when at some point they were not foreign anymore. As a result, NAFTA expanded the investment protection rules with a special focus to lower Mexico’s foreign investment control<sup>14</sup>. Considering the economic situation of all three countries, this deal was

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<sup>12</sup> *Supra* 8, p.376.

<sup>13</sup> *Ibid*, pp. 368-372.

<sup>14</sup> *Supra* 5, p.152.

especially beneficial for Mexico and the United States. On one hand Mexico could expect the investments pouring into the country, and on the other hand the United States could access Mexico's abundant resources at a lower cost, without concerns of unfair expropriation or creeping expropriation. And in case that still happened, NAFTA incorporated the provision to receive an immediate compensation at fair market price plus interest<sup>15</sup>. Measures for a strong investor protection were especially in the interests of the United States.

Even businesses from Europe and Asia could access NAFTA investment benefits, considering they have substantial business presence in the North America<sup>16</sup>. Investors and their investments were protected according to the international law 'minimum standard of treatment'; however NAFTA investors are entitled to the protection under the MFN. While a large scope of protection and freedom is given to the private investors, the few remaining restrictions that a state may use to prevent investor operations in the country are mostly based on the environmental concerns for Mexico, Canadian cultural industries, and national security for the United States.

The controversy arises from the NAFTA's relaxed restrictions for investments which may have a negative impact on overall socio-economic benefits of the country. Reducing largely the sovereign power exercising risks in a country as Mexico, at the same time can negatively limit the power in Canada, which interests of environment and cultural industries are automatically not protected enough. Such situation reflected in the case *Ethyl Corp. vs Canada*, where Canadian government had to lower the trade ban based on "precautionary measures", because it prevented the investors to access the market<sup>17</sup>.

#### **2.2.4. Protection of IP Rights**

NAFTA protects all possible types of IP rights, and provisions are mainly based on the international conventions and practice in the IP law, including terms of protection, types of rights and duties of damage restitution. To protect IP rights NAFTA provided national treatment and

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<sup>15</sup> *Supra* 8, p. 379.

<sup>16</sup> *Supra* 5, p.154.

<sup>17</sup> *Ethyl Corp. vs Canada* (UNCITRAL June 24, 1998).



effective internal and external enforcement rights in a non-discriminatory manner<sup>18</sup>. From the United States and Canada perspective IP laws required a few adjustments, but Mexico's IP law was majorly changed due to NAFTA provisions. Just as with foreign investment law discussed above, Mexico also had a tendency to control the IP law, in a way compensating itself for being mostly the importer of technology, not the producer.

Counterfeiting is another issue, which fostered the attention given to the IP law. Mexico has been particularly a country where combating counterfeiting has proven unsuccessful long after NAFTA was already in force<sup>19</sup>. Illegally produced and largely marketed copies of records, tapes and music significantly affected the sales of originals coming from the United States and Canada. When products were produced legally, there was a possibility that they would be traded on a gray market, thus illegally imported and sold at a higher price than in Mexico, but below the market price in the United States, also affected by the currency fluctuations. Nevertheless, gray market issue is not addressed in NAFTA, and is left under the national laws of each country. But this inconsistency has allowed the gray market to thrive, and market participants to enjoy the low price competition war<sup>20</sup>. While the protection of IP rights is heavily discussed under NAFTA, it lacks in the control of the unlawful commercialization issues stemming from the same sacred purpose of NAFTA: free cross-border movement of goods and services.

#### **2.2.5. Procedures for implementation and application of the agreements and resolution of disputes**

General NAFTA dispute settlement procedure is established with the idea to make it as effective as possible. General dispute system between countries is based on their mutual cooperation perspective, by granting possibilities to mutually agree without formal institution involvement and even after the arbitral recommendations are given. Still, not all disputes are effectively resolved, since a lot of them linger in the air, as discussed in the book by Folsom, due to long consultation and mediation stages<sup>21</sup>. NAFTA also allows involving all three parties into the interpretation. Investment, dumping and subsidy, financial services, environmental

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<sup>18</sup> *Supra* 8, p.382.

<sup>19</sup> *Supra* 5, pp. 174-175

<sup>20</sup> *Ibid*, pp.175-177.

<sup>21</sup> *Ibid*, p.240.

investment and standards disputes have separate dispute settlement mechanisms<sup>22</sup>. Countries may refer to NAFTA or WTO dispute settlement. According to established arbitration procedures in the NAFTA panel, which is non-binding requires five arbitrators and strict time limits are held in order to keep the panel effective<sup>23</sup>. After the hearing of the panel recommendations those are passed on to Trade Commission to reach resolution between countries. In case the resolution is not reached within 30 days, the claiming party has the rights to retaliate to equivalent benefits under NAFTA<sup>24</sup>. Also various commissions can be established depending on the disputed industry.

A special attention has been granted to anti-dumping and countervailing duty dispute settlement, and since NAFTA was signed, there were numerous industries undergoing AD and CVD investigations especially in the United States from Mexico and Canada.

Under the Tariff Act of 1930, U.S. industries may petition the government for relief from imports that are sold in the United States at less than fair value ("dumped") or which benefit from subsidies provided through foreign government programs. Under the law, the U.S. Department of Commerce determines whether the dumping or subsidizing exists and, if so, the margin of dumping or amount of the subsidy; the USITC determines whether there is material injury or threat of material injury to the domestic industry by reason of the dumped or subsidized imports.<sup>25</sup>

Such case was with tomato growers from Mexico, where after discovery of the margin of dumping, the investigation resulted in setting the minimum trade price per pound of tomatoes. Eventually, the price was higher and unlimited for the volume of Mexican tomatoes that may be shipped to the United States market<sup>26</sup>. In all, the amount of imports from Mexico has grown significantly into the United States, taking away the market share from the local growers.

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<sup>22</sup> *Supra* 8., p.386.

<sup>23</sup> *Ibid*, p.387.

<sup>24</sup> *Ibid*, p.388.

<sup>25</sup> "Understanding Antidumping & Countervailing Duty Investigations." *United States International Trade Commission*. Available on: [https://www.usitc.gov/press\\_room/usad.htm](https://www.usitc.gov/press_room/usad.htm). Accessed: April 30, 2019.

<sup>26</sup> *Supra* 5., p. 199.

### **2.2.6. Establishment of framework for further expansion of free trade agreements**

NAFTA was first established due to Mexico's expressed willingness to join the FTA between the United States and Canada, there was enough ground to think that other nations would join. Also, because NAFTA was positioned as the most liberal and open-market trade agreement there was, potentially welcoming new players to join in the open game. And the next prospective economy for NAFTA was Chile, but due to congress refusal to 'fast track negotiations' Mexico and Canada took their own way for the bilateral FTAs with Chile<sup>27</sup>. Meanwhile, more south in the Americas, the Brazil-led MERCOSUR agreement and various other bilateral FTAs between Canada and Mexico with Latin American countries were negotiated, leaving the United States behind, even the EU was not lagging behind in the negotiations with Mexico. There was a drafted idea of the FTAA, but it stayed on the level of a vision. Eventually, NAFTA did achieve its purpose - to become a leading framework for the FTAs and serving as an example of that time modern trade agreements that fostered other FTAs in different regions across the world. Still, it never achieved the growth plan to expand to other nations.

### **2.3. Results and Challenges of NAFTA**

Not only NAFTA never expanded to other nations, as it was envisioned, it was brought to dismantling in 2018 and replaced by another agreement between the same three parties - the USMCA. The new name of the FTA does not suggest any more plans to expansion. Was it a naive idea in the first place? However, NAFTA as an FTA is perceived to be a monumental one to serve the example for the trade law, especially innovating in the international trade aspects discussed above. Also, professor de Mestral states that it is the most influential and significant trade agreement in existence, setting the pattern for the next FTAs, since NAFTA reflects a deliberate choice made by three parties - United States, Mexico and Canada for its own political reasons, and serves as a symbol of the globalization chaining up two developed economies with a developing one<sup>28</sup>. This source is among one of the scholarly strongest articles written and

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<sup>27</sup> *Supra* 5, p.241.

<sup>28</sup> De Mestral, Armand. "NAFTA: The Unfulfilled Promise of the FTA." *European Law Journal*, 17, no. 5 (September 2011): 649–66, p.649.

encountered for this research to scrutinize NAFTA as being a great example of certain inherited flaws of the FTA model. De Mestral shows a brilliant example of contrasting NAFTA's heroic position as the most significant trade agreement in the history with its transcending limitations incorporated by its legislators.

Mexico and Canada economically has gained a lot thru NAFTA, by having a free access to the United States purchasing power and investment assets. Moreover, the criticism from the United States presidents Barack H. Obama and especially Donald Trump can suggest that the United States became the victim by playing the good neighbor. Still, it is heavily disputed among scholars, since the United States also benefited from this relationship by having the possibility to pour investments and earn interests, accessing energy and natural resource market in Mexico, and goods and services market in Canada. But Mexico was alleged guilty of retaining hundreds of billions of dollars in the United States trade deficit with Mexico, and Canada, next to this also was alleged as being very restrictive on taking agricultural products coming from the United States<sup>29</sup>. While majority of imports may have come from Mexico, eventually they were made with the United States dollar turning around.

When a developing country enters into the FTA with developed economies, one might perceive that there is a lot to gain. Indeed, Mexico had to increase their standards of law and a whole law system as such in order to keep up with developed players, as discussed in this chapter above. In a way the international agreement with developed countries allowed Mexico to review and organize their own law system to a certain extent. From the economic perspective, the market access for Mexico was based on the concept of 'maquilladoras', which formed import-export zones hosting only the manufacturing of products, that ultimately were investments made by the United States corporations, but with Mexican cheap labor resources<sup>30</sup>. In this way Mexico became one of the United States leading trading partners. But this same fact allowed Mexico to become a target for Donald Trump's anti-Latino campaign trail in 2016 with claims to force re-emigration, meanwhile Canada did not become guilty for the same allegations<sup>31</sup>. Mexico was

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<sup>29</sup> *Supra* 3., p.151.

<sup>30</sup> *Supra* 26, pp.650-651.

<sup>31</sup> Fox, William F. *International Commercial Agreements and Electronic Commerce*. Sixth. The Netherlands: Kluwer Law International B.V., 2018, pp.116-117.

causing the emigration issues for the United States long before NAFTA, and one of the reasons why NAFTA seemed a good idea was the threat that either the United States would come to Mexico as investors, or Mexico would come to the United States as immigrants.

Since NAFTA has been signed there are numerous events that have affected the trade. Nevertheless, NAFTA is claimed to be stuck in time, and had not managed to deal with new challenges<sup>32</sup>. Several problems arose with the time, mainly derived from the failure to provide the necessary committees to monitor and regulate the implementation of NAFTA's promises on the level of the intercountry cooperation<sup>33</sup>. For instance, in order for the United States to combat the barrier into the Canada's government procurement market, the United States launched the campaign in 2008 "Buy America". Canada by the time was already dependent on the United States export market, so it forced them to grant the access to procurement market<sup>34</sup>. Another example is the decrease in free movement of goods and people after the 9/11 event. Any security measures followed thereafter were taken disregarding the trade point of view. Consequently, it affected the trade flow negatively.

The only adjustment made to NAFTA was when the ex-president Bill Clinton used the lacking NAFTA environmental and labor provisions to win the 1992 election campaign. This led to two additional side agreements, which proved to be ineffective. The research led by Brown and Urpelainen sustained that often an FTA is used as an election tool by presidents or other election candidates to win the election. The research results show that negotiators can strategically select treaties to mobilize domestic interest groups as interest groups will support (oppose) political parties that will ratify treaties benefiting (harming) them<sup>35</sup>. The question may be raised here if additional agreements were a real attempt to improve the existing FTA, or merely the symbolic fact or an instrument to create an illusion that improvements are in place, used as a mere tool to win elections. The second time when NAFTA was targeted for successful

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<sup>32</sup> *Supra* 26, p.658.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*, pp.658-659.

<sup>35</sup> Brown, Joseph M., and Johannes Urpelainen. "Picking Treaties, Picking Winners: International Treaty Negotiations and the Strategic Mobilization of Domestic Interests." *Journal of Conflict Resolution*, 59, no. 6 (September 1, 2015): 1043–73, p. 1043.

election was during the president Trump campaign as a withdrawal argument to run the election against Hillary Clinton, which led to the re-negotiation of the whole NAFTA into the USMCA.

## 2.4. USMCA - Development Process

The major event giving the rise for the USMCA were the 2016 United States election campaign led by Donald Trump. At that time this argument was a leading idea to appeal to the Trump's audience - the American working class. Public criticizing of NAFTA made it sound as the worst trade deal of the history, taking away American jobs and raising the trade deficit with Mexico<sup>36</sup>. After elections were won, President Trump announced the withdrawal from NAFTA, although from the United States proposed list of issues to be re-negotiated with NAFTA countries, none of proposals suggested leaving NAFTA, as discussed by William Fox in his book on international commercial agreements<sup>37</sup>. Fox gives an insight into the pros and cons of NAFTA, adding a different perspective on the previous article of De Mestral. Combination of both of these works only emphasizes the fact that the trade agreement, although very relevant and modern at the time, was already mature to be replaced in the light of the modern socio-economic developments. The author also speculated in 2017 on two possible scenarios that would occur with NAFTA, one of them became true, which gave the rise to the USMCA. Nevertheless, the proposed withdrawal may have served other purposes: the election campaign goals, and as a negotiation tactics to lead other trade partners into concessions for the re-negotiation. Indeed, a research conducted by political science scholars found that international treaty negotiations and domestic politics are interrelated, and negotiators can strategically select treaties to mobilize domestic interest groups and support particular candidates for the election<sup>38</sup>. From this perspective the USMCA was a result of political strategy to pick on the FTA deal which was stuck in time, as discussed above.

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<sup>36</sup> Chelepiev, Maksym, et al., "How Differing Trade Policies May Impact U.S. Agriculture: The Potential Economic Impacts of TPP, USMCA, and NAFTA." *Farm Foundation*, March 28, 2019. Available on: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3346662](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3346662). Accessed: April 29, 2019, p.2.

<sup>37</sup> *Supra* 29, p.188.

<sup>38</sup> *Supra* 33.

The development of the new agreement became a significant part of the full agenda which was happening around the international trade. Headlines on Trump's Trade War fired up the idea that the worst is only yet to come. Although today it might seem far behind, Trump's actions on withdrawal from the TPP gave the rise to assume that the same might happen to NAFTA, moreover stiff tariffs were imposed on imported steel and aluminum from Canada, China, Mexico, and the European Union, which further motivated the trade partners to retaliate with the United States<sup>39</sup>. The chain of these battling events caused an unprecedented turmoil of uncertainty around the future of the trade between Mexico and Canada, at the same time setting the landscape for the upcoming negotiation between all three trade partners.

## **2.5. Negotiations leading to the USMCA**

The path thru the re-negotiation process was led by the demands of the United States, to which Mexico and Canada was very reluctant to agree. However, President Trump announced that in the first place the new key-provision agreement was reached between Mexico, which is meant to replace NAFTA. This statement worked as an invitation for Canada to join the talks, which set Canada into the negotiation process with its strong social position on gender equality, environmental and labor standards and indigenous rights, while United States interests were primarily economic based - modification of tariffs on agricultural and automobile products<sup>40</sup>. Although there's not much information on the new USMCA trade legislation, still the article of Jean Galibraith "NAFTA Is Renegotiated and Signed by the United States" published in the American Journal of International Law can be considered as one of the most recent and insightful articles treating the modern aspects of the recently announced USMCA. Albeit, it lacks critical assessment on the phenomena which author is presenting, this article already discusses the major provisional changes in the new agreement, which gives a great summary and an approximate idea on what can be expected from the new deal. Strong disagreements between parties evolved around the automobile rules of origin manufacturing requirements and the sunset clause<sup>41</sup>. Both modifications were proposed by the United States with its generous request for

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<sup>39</sup> Irwin, Douglas. "Understanding Trump's Trade War." *Foreign Policy*, Winter 2019, Available on: <https://foreignpolicy.com/gt-essay/understanding-trumps-trade-war-china-trans-pacific-nato/>. Accessed May 11, 2019.

<sup>40</sup> *Supra* 3, pp.152-153.

<sup>41</sup> *Ibid*, p.151.

automobile manufacturing where the 85% must be originated in the North America, and thru the sunset clause the new agreement shall be revisited every five years to stay in force. During the course of negotiation the United States also enforced the lasting threat to withdraw from the agreement completely, which motivated the two parties to eventually reach the agreement rather than leave the table without any.

After a year countries reached consensus replacing the NAFTA with the new agreement, the USMCA. The United States government communication sources position the deal as being the best modern trade deal ever made, while other sources approach this deal from a very grounded perspective, claiming that this is just an improved version of NAFTA with a few major changes on cars, new policies on labor and environmental standards, intellectual property protections, digital trade provisions, sunset clause.

### **2.5.1. USMCA Negotiation Achievements**

There are a number of changes in the USMCA that are heavily discussed among the media and scholars. Among which are: Automobile rules of origin have to meet 75% their components manufactured in North America to qualify for zero tariffs. Trump's goal for 85% lacked short, but found itself right in the middle between NAFTA requirement of 62.5% and the targeted 85%, which could also have worked out very well, if that was a part of the negotiation tactics. In return, Mexico and Canada did get the United States to make a side agreement that protects them from possible auto tariffs under Section 232 of Trade Expansion Act of 1962<sup>42</sup>. This industry is also tied to new labor provisions under the USMCA: at least 40 percent of automobile parts have to be made by workers who earn at least \$16 an hour by 2023. Above all, labor provisions targeted Mexico's labor laws for an update, since under the new agreement Mexico has to pass laws giving workers the right to union representation, extend labor protections to migrant workers, and protect women from discrimination, and the countries can also sanction one another for labor violations<sup>43</sup>. These provisions were likely set on the United States and Canada's agenda for the negotiations, while new laws will not likely affect Canada and the United States policy, it will generate changes in the Mexican labor laws.

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<sup>42</sup> Kirby, Jen. "Trump's New NAFTA Deal, Explained in 500 Words." *Vox*, October 3, 2018. Available on: [http://www.cronicasinfm.com/noticias/USMCA\\_Trump\\_s\\_new\\_NAFTA\\_deal\\_explained\\_in\\_500\\_words.pdf](http://www.cronicasinfm.com/noticias/USMCA_Trump_s_new_NAFTA_deal_explained_in_500_words.pdf). Accessed: April 30, 2019.

<sup>43</sup> *Ibid.*



Another painful topic on the Trump's agenda obtained the victory, and Canada opened its dairy market access to the United States farmers, and places the Canada's prime minister in the seat of promises to compensate Canadian farmers for their losses. Also, intellectual property and digital trade were new additions to the USMCA: the terms of copyright were extended to 70 years beyond the life of the author from 50. It also extends the period that a pharmaceutical drug can be protected from generic competition, and includes new provisions to deal with the digital economy, like prohibiting duties on music and e-books, and extra layer of protections for internet companies<sup>44</sup>.

One new provision to the old agreement deals not with trade regulations, rather with the FTA agreement model as such. The agreement puts in a 16-year "sunset" clause — meaning the terms of the agreement expire, or "sunset," after a set period of time, as a result the deal is also subject to a review every six years, at which point the United States, Mexico, and Canada can decide to extend USMCA<sup>45</sup>. Also, the USMCA provision takes a firm stand on "non-market" economies such as China. Providing that any USMCA trade partner needs to notify the other USMCA partners of trade negotiations with a "non-market economy" three months in advance, which leads the way for the affected parties to notify the others about their withdrawal from the USMCA agreement<sup>46</sup>.

Finally, this chapter delved into a historical review to gain the perspective of the context in which both FTAs were developed. The USMCA is a direct follower of NAFTA, which evolved from the trade law setting drafted in NAFTA in 1990s. In all achieved three things: it mainly kept the previous provisions of the NAFTA, modified existing provisions of NAFTA and added new provisions. Altogether was formed into a new USMCA trade agreement. In the further chapter of this work the author will compare the similarities and differences between the two trade agreements, to identify these groups in more detail.

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<sup>44</sup> *Supra* 3, p.156.

<sup>45</sup> *Supra* 40.

<sup>46</sup> Lawder, David. "Trade Pact Clause Seen Deterring China Trade Deal with Canada, Mexico." *Reuters*, October 3, 2018. Available on: <https://www.reuters.com/article/us-trade-nafta-china/trade-pact-clause-seen-deterring-china-trade-deal-with-canada-mexico-idUSKCN1MC305>. Accessed: April 30, 2019.

### **3. IDENTIFICATION OF SIMILARITIES AND DIFFERENCES BETWEEN NAFTA AND USMCA**

In the previous chapter the background information for the development of USMCA already shed some light on what degree of similarity and difference can we expect in the new legislation. Most scholars state that the similarity is quite high between two legislations, and the USMCA is only an improved version of the NAFTA, in few cases even named NAFTA 2.0. However, this chapter will unfold *the* structure of both legislations, and will compare chapters in their legal provisions identifying similarities and differences in more detail. Only the original statutes of both, NAFTA and USMCA legislations were used as the source, in order to perform the analysis in this chapter.

### 3.1. Structural Comparison of NAFTA and USMCA

To understand the landscape of the similarities and differences, first the structure of both FTAs is compared to see which parts of the content can be found in both legislations, and where the changes are evident already in the structure itself. NAFTA consisted of total 22 chapters discounting the annexes, whereas USMCA is a longer legislation comprising 34 chapters. This part of the chapter will compare provisions of both, the USMCA and NAFTA. Due to limitations of the thesis, the comparative analysis will not comprise annexes, and will regard only the general provisions of both legislations, unless information provided in the annexes is essential for the legal analysis part. From the structure's general perspective, both FTAs consist of preamble, initial and general provisions, but in comparison to NAFTA, the USMCA does not consist of objectives. Further, USMCA and NAFTA corresponding or non-corresponding chapters are compared in the table below:

USMCA CHAPTERS <sup>47</sup>	NAFTA CHAPTERS <sup>48</sup>
2: National Treatment and Market Access for Goods	3: National Treatment and Market Access for Goods
3: Agriculture	7: Agriculture and Sanitary and Phytosanitary Measures
4: Rules of Origin	4: Rules of Origin
5: Origin Procedures	5: Customs Procedures
6: Textile and Apparel Goods	Annex 300-B. Textile and Apparel Goods.
7: Customs Administration and Trade	5: Customs Procedures (minor)

<sup>47</sup> North American Free Trade Agreement (Washington D.C. 12 Dec. 1992) U.S.-Can-Mex. U.S. Gov't Printing Office (1992), *entered into force* 1 Jan, 1994. Available on: <https://ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta>.

<sup>48</sup> United States-Mexico-Canada Agreement (Buenos Aires 30 Nov 2018). Available on: <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

Facilitation	
8: Recognition of the United Mexican States' Direct, Inalienable, and Imprescriptible Ownership of Hydrocarbons	-
9: Sanitary and Phytosanitary Measures	7: Agriculture and Sanitary and Phytosanitary Measures
10: Trade Remedies	8: Emergency Action & 19: Review and Dispute Settlement in Antidumping/Countervailing Duty Matters
11: Technical Barriers to Trade	9: Standards Related Measures
12: Sectoral Annexes	-
13: Government Procurement	13: Government Procurement
14: Investment	11: Investment
15: Cross-Border Trade in Services	12: Cross-Border Trade in Services
16: Temporary Entry for Business Persons	16: Temporary Entry for Business Persons
17: Financial Services	14: Financial Services
18: Telecommunications	13: Telecommunications
19: Digital Trade	-
20: Intellectual Property	17: Intellectual Property
21: Competition Policy	15: Competition Policy, Monopolies and State Enterprises
22: State-Owned Enterprises and Designated	15: Competition Policy, Monopolies and State

Monopolies	Enterprises
23: Labor	Side agreement on: North American Agreement on Labor Cooperation (NAALC)
24:Environment	Side agreement on: North American Agreement on Environmental Cooperation (NAAEC)
25:Small and Medium-Sized Enterprises	-
26: Competitiveness	-
27: Anti-corruption	-
28:Good Regulatory Practices	-
29: Publication and Administration	18: Publication, Notification and Administration of Laws
30: Administrative and Institutional Provisions	20: Institutional Arrangements and Dispute Settlement Procedures
31: Dispute Settlement	20: Institutional Arrangements and Dispute Settlement Procedures
32: Exceptions and General Provisions	21: Exceptions / No General Provisions
33: Macroeconomic Policies and Exchange Rate Matters	-
34: Final Provisions	22: Final Provisions

After the structural comparison, the analysis is divided in two major parts - chapters in their similarities and differences between two legislations. Mostly differences arise after the

addition of new subjects in the international trade, which were not treated under the previous FTA. These provisions are directly identified as differences and reasons for these changes will be further discussed in the evaluation part of this work and analyzed in more detail later in this chapter. Whereas similar or same chapters are identified and analyzed further under similarities of both FTAs.

### **3.2. Identification of Similarities between NAFTA and USMCA**

Chapter 2 of the USMCA and Chapter 3 of NAFTA both cover the basic aspect of trade - national treatment and market access for goods, as it sets the standard for the treatment of trade participants. This chapter is similar to NAFTA in its scope, under the Article 2.2, in the national treatment under Article 2.3, and treatment of customs duties under Article 2.4. In general, these provisions evidence the progressiveness of the USMCA from NAFTA by shifting the tariffs from their progressive elimination to complete elimination. Nevertheless, the scope of this chapter portrays that there is no special focus anymore on certain goods, as automotive and textile as it was at the time of NAFTA, and now they are all included under the general scope - trade in goods, preserving their industrial exceptions. Drawback (DB) and duty deferral programs (DDP) in Article 2.5. are the same as in NAFTA, except that now according to Article 2.5.(f)(ii) of the USMCA, DB and DDP does not apply to prepared foodstuffs or beverages containing sugar. The NAFTA's provision regarding television picture tubes in this same provision has been removed. Also, both FTAs prohibit any waiver of customs duties.

Further, the Article 2.7 of the USCMA on Temporary Admission of Goods treats the duty free treatment for goods under temporary entry conditions, similarly as NAFTA. The only minor difference here is that USMCA adds a new condition for goods intended for exhibitions and demonstrations. Next to these minor additions, Article 2.7 also elaborates more on procedural aspects of temporary admission of goods, which NAFTA left out. Even more detailed attention in the USMCA is sub-provisions with regards to regulations for shipping container requirements related to temporary entry of goods under the Article 2.7.

The Article 2.8 of the USMCA is similar to NAFTA, with more precise definitions of issues included under the repair and alteration of a good. However, this article does not contain specific regulations of shipyards in comparison with NAFTA. MFN rates of duty on certain goods in Article 2.10 are similar to NAFTA, however with a major difference: while NAFTA preserved reduced MFN tariff rates in amount of 3.9% on most of the goods, USMCA grants the duty-free treatment to all of the goods on the list.

Article 2.11 of the USCMA dealing with import and export restrictions is based on the same provisions of NAFTA, incorporating additions as prohibiting parties to condition traders on certain performance requirements as in Article 2.11.2 (b), and contractual requirements with distributors in Article 2.11.5. Further this provision is not applicable to crypto graphical goods meant for the government use Article 2.11.8, but is applicable to used vehicles originated in the territory of another Party in Article 2.11.9. Mostly, this chapter is very similar to NAFTA, nevertheless new addition to this chapter are provisions on remanufactured goods covered under the Article 2.12, transparency in import and export licensing procedures Articles 2.13 and 2.14 of USMCA and Article 2.16 on administrative fees and formalities, which established the custom fee regulation to originating goods. Finally, the Article 2.17 on Committee on Trade in Goods is based upon NAFTA's Article 316 with a few more defined responsibilities of the committee.

Chapter 4 in both legislations is treating the Rules of Origin. Chapter 4 of the USMCA can be considered as an improved version of NAFTA, therefore their provisions are quite similar with a few exceptions. Provisions on scope - Article 4.2 and Article 4.5 on regional value content are based on NAFTA provisions. USMCA elaborates more on originating goods, as Wholly Obtained or Produced Goods with regards to livestock, plants and animals in Article 4.3 not mentioned in NAFTA. As a direct link to new provisions on remanufactured goods in Chapter 2 of USMCA, Article 4.4 is a new addition dealing with treatment of recovered materials used in the production of remanufactured good. Both FTAs cover types and value of materials (Article 4.7.) similarly, including intermediate materials (Article 4.8), indirect materials (Article 4.9) and fungible goods and materials (Article 4.13) used for production. Provisions on Packaging Materials and Containers for Retail Sale (Article 4.15) and for Shipment (Article 4.16) are the same under both USMCA and NAFTA. However, USMCA adds new provisions on sets of goods, kits and composite goods under Article 4.17, which is a new addition to this chapter.

The most part of the provisions of this chapter in the USMCA are all covered already in NAFTA, including the fact that both FTAs provide special attention to Automotive Goods. Still, USMCA covers in more detail the value of materials used in production in Art. 4.6, *De minimis* provision of Article 4.12 in the USMCA raises the value of non-originating material used in production of good from 7% in NAFTA to 10% with a separate regulation for textile and apparel. For the rest of Articles of the USMCA as Article 4.14 on Accessories, Spare Parts, tools, or Instructional or Other Information Materials and Article 4.18 on Transit and Transshipment and Art. 4.19 on Non-Qualifying Operations are based upon NAFTA with none to only slight differences, with a more precision under the USMCA.

Chapter 6 of the USMCA deals with regulations for Textile and Apparel Goods. While provisions regarding these goods are quite similar to NAFTA Annex 300-B, under the USMCA this industry is briefly treated in a separate chapter. Similarities with NAFTA can be traced to a large extent to types of provisions covered under the new legislation. Under the Article 6.1 *De Minimis* provisions have not changed, only the requirement of non-originating material in good has been raised to 10% in lieu of 7% as it was in NAFTA and the treatment of sets is a new addition. Duty Free treatment for Handmade, Traditional Folkloric or Indigenous Handicraft Goods under Article 6.2, Special Provisions under Article 6.3 and Review and Revision of Rules of Origin under Article 6.4 has remained in place in the USMCA from NAFTA. New additions to this chapter are provisions on cooperation Article 6.5 and extensive provisions of verification Article 6.6. Also, on determination, Article 6.7 and, finally the establishment of the Committee on Textile and Apparel Trade Matters Article 6.8, addressing also the issue of confidentiality during the information sharing in Article 6.9 of the USMCA.

Chapter 10 on Trade Remedies in the USMCA can be traced to the similarity extent of NAFTA's Chapter 8 on Emergency Action and Chapter 19 on Antidumping/Countervailing Duties Matters. Most of provisions with regard to these matters are kept in place in USMCA from NAFTA, with a few slight new additions on provisions regulating Right and Obligations Article 10.5, and provisions on the cooperation on Preventing Duty Evasion of Trade Remedy Laws in Articles 10.6 and 10.7 in the USMCA.



Chapter 14 of the USMCA is equivalent to Chapter 11 of NAFTA, regulating Investment. Both versions are similar to each other. Chapters keep the same general provisions of Investment, as the scope, Relation to other Chapters, National Treatment, MFN, Minimum Standard of Treatment, Treatment in Case of Armed Conflict or Civil Strife, Expropriation or Compensation with an addition on clearly determined actions leading to expropriation. Further, provisions on Transfers and Performance Requirements are similar, but more elaborated under USMCA, so as Non-Conforming Measures and Denial of Benefits. However, there are two new provisions incorporated by the USMCA: Article 14.15 on Subrogation and Article 14.17 on Corporate Social Responsibility.

USMCA's Chapter 15 on Cross-Border Trade in Services is equivalent and similar to NAFTA's Chapter 12 with a few provisional exceptions. USMCA incorporates the provision on Market Access in Article 15.5 dealing with Party measures that might limit the trade in services and Development and Administration of Measures in Article 15.8 covering the fairness and reasonability of such measures. For the rest, provisions covering general provisions as national and MFN treatment, local presence, non-conforming measures, denial of benefits and recognition are the same as in NAFTA. Other two provisions on SMEs in Article 15.10 and Payment and Transfers in Article 15.12 are new additions to this Chapter.

Further, Chapter 16 of USMCA is the same as Chapter 16 of NAFTA dealing with Temporary Entry for Business Persons. In difference to NAFTA, however, USMCA also adds the scope of these provisions under Article 16.2, which was not stated under the NAFTA. Financial Services in Chapter 17 of the USMCA are equivalent to Chapter 14 of NAFTA. Minor changes that this Chapter has undergone are directly related to the Chapter 15, discussed above. Therefore, in general this Chapter is very similar to NAFTA's version except, it is reshaped with new provisions on Market Access Measures in Article 17.5, Recognition on Prudential Measures in Article 17.12, Payment and Clearing Systems (Article 17.15), Expedited Availability of Insurance Services (Article 17.16), Transfer of Information (Article 17.17) and Location of Computing Facilities (Article 17.18).

With regards to USMCA Chapter 29 on Publication and Administration, it corresponds to Chapter 18 of NAFTA on Publication, Notification and Administration of Laws. USMCA can be divided here in two sections, where the first one is treating this field in general, applied to all industries, and has similarities with NAFTA. However, the main difference arises under the second part of the chapter 29 of USMCA, where in particular the industry of medical devices is treated under separate provisions, which was not in NAFTA.

Also, chapter 30 under the USMCA on Administrative and Institutional Provisions have not changed since NAFTA, and incorporated only one new provision under the Article 30.5 on establishing the Agreement Coordinator and Contact Points. The rest was already established under the NAFTA. USMCA Chapter 31 on Dispute Settlement is quite similar to provisions on Dispute Settlement under NAFTA in Chapter 20. With overall minor changes, USMCA incorporates new provisions on Choice of Forum Article 31.3, Terms of Reference (Article 31.7), and procedural issues on Replacement of Panelists under the Article 31.10, Electronic Document Filing (Article 31.12), Function of Panels under Article 31.13 and Suspension or Termination of Proceedings under the Article 31.16.

USMCA Chapter 32 on Exceptions and General Provisions corresponds to Chapter 21 on Exceptions in NAFTA. This chapter has been split under two sections in the USMCA. As a result, the first part of the USMCA on Exceptions has kept the majority of provisions and added a new one on Indigenous Peoples Rights Article 32.5. Whereas the section on General Provisions has rather no similarity to NAFTA, and is completely overtaken by new issues as: Personal Information Protection (Art.32.8), Access to Information in Article 32.9, Non-Market Country FTA in Article 32.10, also Specific Provision on Cross-Border Trade in Services, Investment, and State Owned Enterprises and Designated Monopolies for Mexico in Article 32.11, and Exclusion from Dispute Settlement (Article 32.12). As furthers Exceptions have been kept similar to NAFTA, but General Provisions are completely overturned. The final USMCA Chapter 34 on Final Provisions is equivalent to Chapter 22 of NAFTA. The most part of Final Provisions is kept from NAFTA, except the art. 34.1 deals with Transitional provisions from NAFTA 1994 Article 34.4 on Amendment of the WTO Agreement and the Article 34.7 on Review and Term Extension.

### **3.3. Identification of Differences between NAFTA and USMCA**

Chapter 3 of the USMCA focuses solely on agriculture. Under NAFTA these provisions are combined under the Chapter 7 together with Sanitary and Phytosanitary measures. Considering a larger focus on agriculture under the USMCA, this chapter presents variety of differences from NAFTA, although the scope of the agriculture in both FTAs is the same, the way how this industry is approached today is quite different from 25 years ago. USMCA recognized the role of the WTO and Parties established cooperation between them to promote the increase of agricultural trade in Article 3.3. This one article replaced NAFTA's provisions on international obligation (Article 702 of NAFTA) and market access (Article 703 of NAFTA). Additionally, the USMCA's chapter now provides regulation on Export Restrictions regarding the Food Security (Article 3.5) with special focus on fish and fish product regarding critical shortages.

Further, Article 3.6 of the USMCA on domestic support and Article 3.7 on Committee on Agricultural Trade and Article 3.9 on agricultural special safeguards is similarly provided already in NAFTA, but here with a stronger focus on cooperation and development, since USMCA also incorporated consultative committee on agriculture thru Article 3.8 with special focus on transparency and consultations added in Article 3.10. The first section of this chapter is concluded with annexes on trade in agricultural goods between parties. Major differences are that the United States and Canada established a new very extensive list of regulation of goods, whereas in NAFTA it used the previous CFTA. New additions are also separate regulations on trade in alcoholic beverages and new topic covering proprietary formulas for prepackaged foods and food additives. USMCA Agriculture chapter now also incorporates trade regulations for agricultural biotechnology, which is the major differentiation factor for this chapter under the USMCA.

Chapter 5 on Customs Procedures in NAFTA is re-named to Origin Procedures in USMCA. Although this chapter's provisions of the USMCA can be traced back with a great degree of similarity to NAFTA's Chapter 5, still Origin Procedures incorporate many provisions that cannot be found under NAFTA. Moreover, some of Customs Procedures of NAFTA are now

treated under the Chapter 7 of USMCA on Customs Administration and Trade Facilitation. In difference to NAFTA, Origin Procedure provisions in USMCA start with procedures and qualification requirements to claim the preferential tariff treatment (PTT). Further, Article 5.3 covers the basis for Certification of Origin (COO), but in difference from NAFTA, where this requirement was only established, under the USMCA it has developed in a unified system and a solid part of a trade deal. USMCA's Article 5.4 deals with Obligations Regarding Importations in a much more scrupulous way than it was under NAFTA, so these provisions are more extensive. However, provisions on exceptions to COO (Article 5.5), Obligations Regarding Exportations (Article 5.6) and Record Keeping Requirements (Article 5.8) have stayed the same from NAFTA, except for the incorporation of electronic medium in Article 5.6.5 and 5.8.3 as a modern way of communication.

New additions are Article 5.7 on Errors and Discrepancies that may occur in the COO procedures and Article 5.10 on determinations of Origin covering aspects which may lead to failure of achieving the originating product status. Article 5.9. of the USMCA on Origin Verification has gained its basis in NAFTA, but USMCA adds details and precision on verification process itself, on its forms and describes extra rules on verification procedures, by describing various situations at the verification process which were not covered by NAFTA. NAFTA already provided some aspects on provisions regarding Refunds and Claims for PTT after Importation in the USMCA (Article 5.11), Confidentiality (Article 5.12), but under the USMCA these provisions are more extended. Whereas, Penalties (Article 5.13) and Review and Appeal (Article 5.15) is made less extended leaving out a few sub-provisions of NAFTA. Provision on Advance Rulings Relating to Origin are covered in Chapter 7 of the USMCA and here only mentions their existence a such (Article 5.14) , while in NAFTA these provisions are dealt with to a lesser extent overall. Uniform Regulations have been modified under the USMCA. At the time of NAFTA their focus was to 'be established and implemented', but the USMCA focuses on 'adopting and maintaining' these provisions, mainly by acknowledging the special focus on textile and apparel goods, SMEs and the Origin Committee, which is renamed under Article 5.18. It was named: Working Group under NAFTA. And the provision on Sub-Committee under Article 5.19 in lieu of Sub-Group at the time of NAFTA. New addition to this chapter is also Art. 5.17: Notification of Treatment, which allows the Party to investigate or object some measures, rulings or determinations that are not in accordance with the Party.

Chapters 7 on Customs Administration and Trade Facilitation and Chapter 8 on Recognition of Mexican Ownership of Hydrocarbons in the USMCA are new additions to the trade agreement and were not covered before in NAFTA. Therefore, within the purpose of this analysis these chapters will be further dealt with in more detail in the next chapter of this work.

Chapter 9 of the USMCA covers Sanitary and Phytosanitary Measures. In NAFTA they are dealt with together with Agriculture in Chapter 7, and under the USMCA these two topics are separated. In all, Sanitary and Phytosanitary Measures are more sophisticated under the USMCA. It can be described as a stripped down version of NAFTA and re-vested in the new, more elaborated and much more detailed form under the USMCA. The same statement can be applied to the review of Chapter 11 in the USMCA on Technical Barriers to Trade, therefore these two chapters are quite a far from their versions during the era of NAFTA.

Chapter 12 of the USMCA comprises sectorial annexes, for which there is no precedent under NAFTA. It adds a separate group of annexes of sectors such as: chemical substances, cosmetic products, information and communication technology, energy performance standards, medical devices, and pharmaceuticals. Next, chapter 13 of the USMCA and Chapter 13 of NAFTA, both cover Government Procurement. Although on the provision level traces of NAFTA provisions can be found in the USMCA, the new version contains major differences in the provisions, starting with the fact, that Canada is not a Party to this Chapter, thus it is applied only between the United States and Mexico (Article 13.2.3).

Chapter 18 of the USMCA on Telecommunications is based on the Chapter 13 of NAFTA. The first part of the provisions in this chapter is quite similar in provisions on the scope, treated in Article 18.2 and Article 18.3 on Access and Use. However, the rest of the chapter reflects major changes and evolution for the Telecommunication industry, therefore USMCA includes new provisions, such as Obligations Relating to Suppliers of Public Telecommunications Services (Article 18.4), Treatment by Major Suppliers of Public Telecommunications Services (Article 18.5), Competitive Safeguards in Article 18.6, Resale (Article 18.7), Unbundling of Network Elements (Article 18.8), Article 18.9 on Interconnection with major suppliers, Provisioning and Pricing of Leased Circuits Services (Article 18.10), Co-Location (Article 18.11), Access to

Poles, Ducts, Conduits, and Rights-of-Way (Article 18.12), Submarine Cable Systems (Article 18.13). Article from NAFTA on Conditions of Supply of Value Added Services (Article 18.14) is kept similar. The rest of this chapter is full with new additions, starting from Article 18.15 on Flexibility in the choice of Technology, Approaches to Regulation (Article 18.16), Telecommunications Regulatory Bodies (Article 18.17), State Enterprises (Article 18.18), Universal Services (Article 18.19), Licensing Process (Article 18.20), Allocation and Use of Scarce Resources (Article 18.21), Enforcement (Article 18.22), Resolution of Disputes (Article 18.23), International Roaming Services (Article 18.25). Finally, the establishment of the Telecommunications Committee under Article 18.27. And provisions on transparency in Article 18.24 and Relation to Other Chapters in Article 18.26 have been kept from NAFTA.

Further, perhaps the most innovative regulatory field in the international trade law is Digital Trade, and its provisions are treated under the chapter 19 of USMCA. This topic did not exist under the NAFTA. In contrast, the chapter 20 of the USMCA regulates Intellectual Property Rights and they are equal to NAFTA's provisions in chapter 17 on IP rights. At that time they were among the most innovative trade deals dealing with this legal subject. Today USMCA has kept only a few basic provisions related to this regulatory field, and has revamped this chapter into more up-to-date provisions, including ones on digital IP right. As a result, this chapter has inherited only few basic provisions by adding a large extent of new ones.

Chapter 21 of the USMCA covers the Competition Policy. The equivalent in NAFTA can be found in parts of the Chapter 15 together with Monopolies and State Enterprises. Whereas, Chapter 22 of the USMCA on State Enterprises and Designated Monopolies is equivalent to the rest of NAFTA's Chapter 15. However, due to divided attention for the regulatory issues with regards to these topics, under the USMCA the Competition Policy is more extended and elaborated in comparison to NAFTA. It incorporated new provisions as on Consumer Protection, Competition Authorities, Enforcement and Procedures of Competition Law, Transparency, Cooperation and Consultations, all of which were not under the NAFTA provisions. Meanwhile, Chapter 22 of the USMCA presents larger extent of provisions in comparison to NAFTA, including the ones regulating issues as non-discrimination and injury. The next two chapters of the USMCA on Labor and Environment, Chapters 23 and 24 respectively are incorporated under

NAFTA in a separate cooperation agreements, after the NAFTA has been already signed. Under the USMCA these both issues have been treated to a larger and up-to-date extent and incorporated as a part of the main body of the FTA. Resemblance to NAFTA is minimal in these chapters.

Further Chapters of the USMCA are among the most innovative for the FTA, since their correspondence cannot be found anywhere in NAFTA. There are number of new issues in international trade which seemed relevant for the legislators to discuss in the latest FTA. Chapter 25 of USMCA regarding SMEs, Chapter 26 on Competitiveness, Chapter 27 on Anti-corruption and Chapter 28 on Good Regulatory Practices. All these are new additions under the USMCA and did not exist at the time of NAFTA. In the same way, a new addition to USMCA is the Chapter 33 on Macroeconomic Policies and Exchange Rate Matters.

In all, this chapter has discovered a number of chapters under the USMCA in comparison to NAFTA which can be considered as innovative in the field of international trade, for instance: Recognition of the United Mexican States' Direct, Inalienable, and Imprescriptible Ownership of an asset, Digital Trade, SMEs, Competitiveness, Anti-Corruption, Good Regulatory Practices and Macroeconomic Policies and Exchange Rate Matters. These are the new subjects that are treated under an FTA. The next group of subjects has been included already before, but today they are all reshaped with new provisions. These are USMCA and NAFTA matters as Agriculture, SPS Measures, Government Procurement, Telecommunications, IP Right, Labor and Environment. And finally, there are international trade regulatory fields, which have by a large part remained similar to the previous FTA, as National Treatment and Market Access for Goods, Rules of Origin, Origin Procedures, Textile and Apparel Goods, Investment, Cross Border Trade in Services, Temporary Entry for Business Persons, Financial Services, Dispute Settlement and other general FTA provisions. The next chapter will discuss in more detail each of these groups and will present the reasoning which led these distinctions into existence today.

#### **4. EVALUATION OF RESULTS OF COMPARATIVE ANALYSIS**

The evaluation of results in the comparative analysis between NAFTA and USMCA analyzes further the issues of both FTAs and presents the rationale behind the identified similarities and differences between them. The previous chapter of this work has described and discovered provisions and topics under the USMCA in comparison to NAFTA which can be considered as innovative in the field of international trade, for instance: Recognition of the United Mexican States' Direct, Inalienable, and Imprescriptible Ownership of an asset, Sectoral Annexes, Digital Trade, SMEs, Competitiveness, Anti-Corruption, Good Regulatory Practices and Macroeconomic Policies and Exchange Rate Matters. These are the new subjects that are treated under the FTA.



#### 4.1. New Provisions under the USMCA

Recognition of the United Mexican States' Direct, Inalienable, and Imprescriptible Ownership of Hydrocarbons - the major winner of Mexico in the USMCA in the incorporation of Mexico's constitutional law on the hydrocarbons (Ley de Hidrocarburos) from the 2014 into the international FTA as the Mexico state's sovereignty of the national energy sector<sup>49</sup>. This reform not only ended Mexico's national oil company's monopoly in the hydrocarbons sector but it also brought new investor opportunities for nationals and foreigners<sup>50</sup>. This law in Mexico was passed in 2014, and NAFTA failed to incorporate or update the FTA accordingly. Here we come across another important miscarriage of NAFTA. Nevertheless, USMCA has dedicated the whole chapter to recognize this Mexican law. On one side the energy market of Mexico has opened up for investors from the United States and Canada, on the other side any investment in the energy sector in Mexico needs to be shared with the State. As furthers, investment laws and disputes shall be strongly supportive in drawing the line where does the right of investor ends and the State's start, since the sovereignty of the Mexico's state in the energy sector can be omnipotent considering its monopolistic history.

In the USMCA chapter 12 on Sectoral Annexes all Parties have also agreed on new provisions covering trade in manufacturing sectors as Information and Communication Technology, Pharmaceuticals, Medical Devices, Cosmetic Products, and Chemical Substances. Each of the annexes includes provisions that exceed NAFTA that promote enhanced regulatory compatibility, best regulatory practices, and increased trade among the countries<sup>51</sup>. This chapter is based on the regulations of chemical substances when relating to the industries, where the risk shall be mitigated to the highest level, such as pharmacy, cosmetics or other industry close to the large number of mass consumers. Primarily these regulations are directed towards Mexico's duty

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<sup>49</sup> *Ley de Hidrocarburos*. Available on:

[http://www.diputados.gob.mx/LeyesBiblio/pdf/LHidro\\_151116.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/LHidro_151116.pdf). Accessed May 13, 2019.

<sup>50</sup> Eljuri, Elisabeth, and Maria Paula Silva. "The Transformation of Mexico's Hydrocarbons Industry." *International Energy Law Review*, no. 6 (2015): 236–41, p.236.

<sup>51</sup> "United States–Mexico–Canada Trade Fact Sheet: Rebalancing Trade to Support Manufacturing." *Office of United States Trade Representative*. Accessed May 12, 2019. Available on: <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/rebalancing>. Accessed: May 12, 2019.

to monitor and enhance their laws on chemical substance regulations to meet the demanding consumer of the United States. New provisions will affect the trade on corporate level between parties directly, for instance, with stricter rules on labeling and prohibition of the product testing on animals. These changes also stem from the consumer preference and social mindset changes on the market. The rise of conscious and responsible consumer with regard to choice for their products has increased exponentially in developed economies.

Digital Trade - substantially new chapter, which cannot go overlooked in today's tech development and economy. It is not only relevant to the developed economy as the United States, it is actually stated as one of the country's competitive advantages. Moreover, combined together with IPR and financial services it is designed to protect the competitive edge of the United States<sup>52</sup>. As furthers provisions in Digital Trade promotes the e-commerce liberalization and prohibition of setting barriers to flow of data or systems, which might impede the free flow of digital trade. At the same time, it attempts to ensure that digital environment is safe to use. Concern for Mexico and Canada is mostly found in their restrictions to protect consumer information and to establish a system which would allow to create a hub for digital trade in their own territories, due to elimination of borders in digital trade<sup>53 54</sup>. As a result, the United States takes the position where they can further proceed to remain the leading country in digital trade, subjecting Canada and Mexico to become main consumers of their digital products. Out of the all three, hardly any other country can lead the innovation for laws in digital trade better than the United States, because new regulations stem from the high digital commerce of the United States. From a different perspective, this can be a motivating element for Canada and for Mexico to find their own niche in the digital trade and to use the free access of the United States digital market resources to learn and develop their own digital markets, in that way competing not with the United States, but with other world's economic regions.

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<sup>52</sup> *Supra* 3, p.158.

<sup>53</sup> Hirsh, Jesse. How Will the Digital Economy Fare under the USMCA? *Center for International Governance Innovation* (blog), October 8, 2018. Available on: <https://www.cigionline.org/articles/how-will-digital-economy-fare-under-usmca>. Accessed May 13, 2019.

<sup>54</sup> Rojon, Gonzalo. "Comercio Electrónico y Propiedad Intelectual En El USMCA." *El Herald de Mexico*, October 8, 2018. Available on: <https://heraldodemexico.com.mx/opinion/telecom-en-perspectiva-comercio-electronico-y-propiedad-intelectual-en-el-usmca/>. Accessed: May 12, 2019.

SMEs on a global scale are a strategically important segment of business for any developed economy. However, combined with the development of the new regulations on digital trade, discussed in the previous paragraph, they are particularly important economic players for the United States. Economy as that of the United States and Canada does not depend on major players on the market, rather on the crowded and highly competitive market innovators, that are usually the SMEs. Moreover, the United States SMEs are not only providing goods, but also services, which USMCA targets particularly with the financial services companies. With Mexico it is different - there economy is led by large, often family owned enterprises. Seems as the focus on the SMEs has been maintained throughout the whole USMCA, and this segment is a particular beneficiary from most of the USMCA provisions, as it is outlined in the article 25.6 of the USMCA. Combination of provisions on Digital Trade, IP Protection, *De Minimis*, Cross Border Trade in Services and Good Regulatory Practices provide great advantage to the United States SMEs to continue to increase the trade with Mexico and Canada and sets it in a leading position. While in order to obtain the same level benefits for Canadian and Mexican SMEs will take a long time to adjust to the new market from the perspective of technology and human resource.

Competitiveness - chapter 26 of USMCA is more as a statement chapter fostering the cooperation ties between all three trade partners in order to become a competitive force on the world's global stage. Establishment and procedural provisions for the North American Competitiveness Committee is designed to strengthen the relationships among the partners. From a different perspective this chapter also brings all three parties to sit at the same side of the table, instead of opposite to each other, and positions them as economic partners against the rest of the world. On one side, this provision contrasts with the seeming inhibition of the unilateral protectionism of the United States expressed in other provisions discussed above, in this chapter. On the other side, this provision works well with other provisions as sunset clause and non-market economy FTA, which will be discussed further in this chapter, and with the goal to enhance the overall competitiveness of the region on the global trade landscape. While competition laws prevent cartels in the corporate world within any of the open markets, are they overlooked on the level of nations in the global international trade, masked behind the innocence

of the FTA? Or, maybe, that is the very purpose of the FTA: to create global cartels between nations to sustain the dynamics of competition and international trade?

Anti-Corruption is another important aspect arising often in the international trade and investment, and was not there 25 years ago at the time of NAFTA. Interestingly, a source states that the step to combat anti-corruption thru the USMCA was proposed by Mexican private sector parties and this argument was played as a trivial argument in the Mexican president's Andrés Manuel López Obrador election<sup>55</sup>. As a result, provisions on corruption and bribery, particularly in public sector, are primarily aimed at Mexico which will require the country to strengthen domestic laws to meet the requirement of the USMCA. On the opposite, other parties can bring anti-corruption case to the dispute according to USMCA chapter 31 as long as it is related to the agreement issues. The opportunity to combat the anti-corruption thru official dispute settlement mechanism which is already established and functions according to the system, increases the likelihood to actually enforce the provisions of this chapter. The effectiveness of these provisions will be determined by dispute settlement to bring parties to criminal, administrative or promotional responsibility under the USMCA agreement, otherwise this chapter will stay nothing more than just a symbol of recognition that such problem actually exists in trade between the parties. This goes in hand with the USMCA's agenda to eliminate unfair practices in international trade.

Another chapter directly related to pursuing fairness and transparency in international trade is chapter 28: Good Regulatory Practices. This chapter refers to good governance procedures when developing and implementing regulations. Such practices can support the development of compatible regulatory approaches among the Parties, and reduce or eliminate unnecessarily burdensome, duplicative, or divergent regulatory requirements, also the chapter includes provisions encouraging Parties to take into consideration the effects on small businesses in the development and implementation of regulations<sup>56</sup>. The intention to promote uniform, fair and transparent trade among the parties is realized in this chapter, by establishing a number of

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<sup>55</sup> Pardinás, Juan E. "El Instituto Mexicano Para La Competitividad." *USMCA y La Corrupción* (blog), October 7, 2018. Available on: <https://imco.org.mx/temas/usmca-la-corrupcion/>. Accessed: May 11, 2019.

<sup>56</sup> "United States–Mexico–Canada Agreement Fact Sheet Supporting America's Small and Medium-Sized Businesses." *Office of United States Trade Representative*. Available on: <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/supporting#>. Accessed: May 12, 2019.

committees, consultation and advisory bodies responsible to monitor and ensure implementation of regulatory practices, which will increase the certainty and uniformity across all three trade partners. In all the USMCA on the level of the FTA as such has established regulating bodies in each chapter relating to each trade issue covered in the agreement, mostly in form of committees. The number of these committees is much higher than under the NAFTA. While NAFTA was criticized for these regulatory bodies as not being effective and formalized until the end, it is soon yet to tell if USMCA will manage this better. Nevertheless, on the level of provisions, USMCA outperforms NAFTA making provisions on regulatory establishments more precise, clearer and more elaborated, perhaps bringing in the organizational aspects which NAFTA lacked at the time.

The re-negotiated agreement includes a chapter on Macroeconomic Policies and Exchange Rate Matters, with new policy and transparency commitments on currency issues. The chapter will address unfair currency practices by requiring high-standard commitments to refrain from competitive devaluations and targeting exchange rates, while significantly increasing transparency and providing mechanisms for accountability. This approach is unprecedented in the context of a trade agreement, and will help reinforce macroeconomic and exchange rate stability<sup>57</sup>. Interestingly, a number of sources state that this particular provision will unlikely affect the macroeconomic relationships between Mexico, Canada and the United States, since none of these countries practice the currency manipulation<sup>58</sup>. Nevertheless, in our opinion, this provision acts as the lighthouse for the future FTAs between any of three North American countries and other economies, especially with those where the currency manipulation is practices, to regulate the trade flow. Commitment to maintain the standard of this provision can directly translate to the need to include this provision in the future FTAs. This need can stem especially from the combination with the provision of the USMCA on non-market economy FTA in General Provisions, which will be discussed more in detail further in this chapter. This provision is innovative for the FTA, challenging the view of economic activity shaping the law

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<sup>57</sup> *Supra* 49.

<sup>58</sup> Bergsten, Fred C. A Positive Step in the USMCA: Countering Currency Manipulation, *Peterson Institute for International Economics* (blog), October 4, 2018. Available on: <https://piie.com/blogs/trade-investment-policy-watch/positive-step-usmca-countering-currency-manipulation>. Accessed April 30, 2019.

versus the law shaping the economic activity. Here this division driven towards the idea where, perhaps, the economy is the law.

The next group is subjects which have been treated already before, but today they are reshaped with new provisions. These are USMCA and NAFTA matters as Agriculture, Textile and Apparel Goods, Sanitary and Phytosanitary Measures, Government Procurement, Telecommunications, IP right, Labor and Environment.

## **4.2.Changed Provisions under the USMCA**

Chapter on the Agriculture was not very popular under NAFTA. Under the USMCA it has been dedicated much more attention to. This is one field which has gone underestimated under the NAFTA, primarily due to its very old and traditional aspects as an industry. In the end, the agricultural revolution is a way more outdated in comparison to industrial revolution or the internet revolution. One thing is overlooked still; today we depend much more on the first revolution of the history rather than the latter. Why exactly the agriculture has gained the honor to have the attention of such a developed economy as the United States?

The answer can be sought in the chapter itself. It has become of an increased importance to economies as the United States, primarily due to biotechnology development. While traditional and industrial agriculture was the only used manner to produce the food at the time of NAFTA due to its low level of innovation, agriculture was not that attractive as an industry for the USA. Today the USMCA brought it back on the table and due to its incorporation of the tech intelligence in the agricultural industry.

Textile and Apparel Goods used to be treated in the annex at the time of NAFTA. Under the USMCA this topic is now included in separate chapter with a few changes. While general provisions of this chapter have remained the same, e.g. matter related to rules of origin, the main change with regards to this is *de minimis* requirement. Under the NAFTA *de minimis* for the total weight of non-originating materials was 7%, while USMCA allows up to 10% in order to classify for the tariff of special treatment. This is the only concession found under the USMCA

among the rest of stricter rules on the origin. However, it is partially compensated by putting on the agenda the fraud prevention on the customs level and stricter customs rules has gained much attention under the USMCA, which were underestimated under the NAFTA. Therefore, the USMCA deals in much more detail with new provisions for verification of origin of a textile good, determination for origin and finally establishes the committee for this industry.

With the development of Agricultural industry, the chapter on the Sanitary and Phytosanitary Measures need to be developed too in order to ensure the proper safety and regulation of the agricultural products. By analyzing provisions of this chapter, it is notable that SPS measures are highly influenced, even based on the WTO standards on SPS. What is the role of the WTO here? The WTO Agreement is directly applicable to all members, which is the case with all three Parties of the USMCA<sup>59</sup>. NAFTA was concluded before the WTO SPS Agreement came into force, and just as with number of provisions also this regulatory change failed to be incorporated in the FTA at the time. USMCA's chapter, however, has completely incorporated the WTO SPS Agreement provisions and has served as a good basis for the Parties to reach the agreement on these provisions.

Government Procurement chapter is quite different from the rest, because within the FTA of three Parties, only two are bound with this chapter - Mexico and the United States. As a contributing reason for Canada's left out, is the fact that Canada and the United States became the WTO's Agreement on Government Procurement (GPA) members in 1996, after signing the NAFTA<sup>60</sup>. And NAFTA instead did not provide the space for these changes in the international landscape. For the rest, the same level of provisions have remained in place from NAFTA, and the United States and Mexico has maintained the open access to each other's procurement markets, with some reservations for domestic companies. In total the outcome of the openness for government procurement can be quantified in smaller amounts than under the NAFTA. Provisions under the GPA are more limited for Canada and the United States, which is beyond the scope of this work. And for the United States the material supply market to Mexico

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<sup>59</sup> "Understanding the WTO Agreement on Sanitary and Phytosanitary Measures." *World Trade Organization*, May 1998. Available on: [https://www.wto.org/english/tratop\\_e/sps\\_e/spsund\\_e.htm](https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm). Accessed: May 10, 2019.

<sup>60</sup> "Agreement on Government Procurement: Parties, Observers and Accessions." *World Trade Organization*, Available on: [https://www.wto.org/english/tratop\\_e/gproc\\_e/memobs\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm). Accessed May 13, 2019.

governmental institutions can be exchanged with Mexico's lower cost services for the United States public sector.

Telecommunications is the industry which has developed the fastest since the time of NAFTA. This is the main reason why this chapter looks quite different than the one written 25 years ago. Telecommunications industry has developed at the speed as rapid as no other industry. Considering the development of technology and internet since the mid-end of 90's, it is very surprising that NAFTA's provisions in this field have been updated only now with the USMCA.

Another matter extensively considered under the USMCA is the protection of the technology and its innovative development thru the IP Rights. The development of technology drags along the development of ways how the illegal dissemination of the same technology happens by stealing, copying, counterfeiting and in any other way infringing the way to obtain commercial benefits. At the time of NAFTA for Mexico this was a deeply grounded issue, and due to trade agreement the country had to introduce IP regulations which were quite innovative for them at the time. Nevertheless, the United States and Canada were much more advanced in this regulatory field, and today this advancement is even stronger. Primary target of these is the United States, having among the largest industry of the IP rights, which they have to protect. Dropping off the assets of steal and plants to poor neighbor countries, the United States investors have developed the need to keep the IP assets for themselves and take measures of protection for it. IP is directly linked to other USMCA chapter, especially to the innovative trade field - the digital trade. With the increase of liberalization of digital trade there is a need to increase the IP protection too, in order to balance out the risks. Such counter balancing in the FTA chapter has been observed before. For instance, where the agriculture is counterbalanced with SPS measures or free movement of goods is counterbalanced with strict customs rules. Elaborated chapter on the IP rights demonstrates not only the competitive edge of the most powerful party, but also the direction in which the Party is inclined to move into. E.g. specific IP protection on data on bio-drugs, pharmaceuticals and agricultural innovations are fields in which the innovation can be anticipated.



Labor issue at the time of NAFTA was a topic treated out of the actual process of drafting the treaty. Simply, the perspective and mindset to protect a worker was not a priority. The language of the scope of the labor provisions is very vague and does not show any intent for the cooperation or establishing common standards for the labor segment:

Affirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.<sup>61</sup>

The USMCA shows a different approach. Now it is a fully recognized and binding chapter on all parties, regulated also by international commitments such as ILO Declaration on Rights at Work and the ILO Declaration on Social Justice for a Fair Globalization of 2008 to which all parties are members to. Additionally, as with majority of progressive provisions, also the chapter on Labor puts the pressure on Mexico. Here Mexico commits to specific legislative actions to provide for the effective recognition of the right to collective bargaining<sup>62</sup>. As a result, Mexico shall establish Worker Representation in Collective Bargaining, which has been a system employed by the United States and Canada, but not a typical establishment for Mexico. Uncustomary and overly innovative establishment, although with the greatest purpose to raise labor standards in Mexico may result ineffective due to copy paste approach of American system into a Latino culture.

Environment just as Labor provisions during the NAFTA were annexed to the agreement after the treaty was signed. NAFTA in comparison to USMCA was just a minor attempt to raise the awareness of the environmental protection on the level of international trade. NAFTA's provisions are quite general and broad when it comes to the environmental issues. However, USMCA attempts to break down environmental provisions to very specific problems to which Parties shall enforce their laws. As a result, today in USMCA we can see provisions dealing with environmental matters as air pollution, marine litter and pollution, unregulated fishing,

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<sup>61</sup> *Supra* 46, Article 2.

<sup>62</sup> "United States–Mexico–Canada Trade Fact Sheet Modernizing NAFTA into a 21st Century Trade Agreement." *Office of United States Trade Representative*, 2018. Available on: <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/modernizing>. Accessed: May 13, 2019.

protections for species and forestry management<sup>63</sup>. The scope of this chapter leads to recognition that environmental regulations on protection affects the sustainability of the trade. Moreover, USMCA sets out provisions for actual enforcement, procedural matters and environmental assessment with its own dispute settlement mechanism.

And finally, there are international trade regulatory fields, which have by a large part remained similar to the previous FTA, as National Treatment and Market Access for Goods, Rules of Origin, Origin Procedures, Investment, Cross Border Trade in Services, Temporary Entry for Business Persons, Financial Services, Dispute Settlement and other general FTA provisions.

### **4.3. Similar Provisions under the USMCA**

With the chapter on National Treatment and Market Access for Goods in the USMCA, just as mostly with any other chapter which is described under this part of the chapter, differences in provisions between the USMCA and NAFTA are from none to very minor. Primarily due to the nature of these provisions. They represent the general elements of the international trade law which are not affected or hardly affected by changes and developments in the society. National Treatment and MFN are universally established international law language for interstate relationship treatment level. Just as, general rules for Market Access for Goods, was well established at the time of NAFTA and before in the international trade law. As follows, general provision on market access for goods will not vary, what is important here, as their goal can be aligned with the major scope of an FTA, which is to foster the exchange of goods between countries.

However, the major significance of these provisions will be found in the tariff schedules established for each Party and negotiated accordingly. In both, NAFTA and USMCA these schedules are scrupulously described in the annexes and a detailed review of those is beyond the scope of this work.

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<sup>63</sup> *Ibid.*

Rules of Origin and Origin Procedures can be considered as non-tariff barriers to trade, and in the case of USMCA they directly are. In general, provisions have not changed since NAFTA, and the main scope and procedures of determining rules of origin, but differences lie in their annexes. Legislators have been loud on the pro-North American approach to these provisions. Primarily targeted industry were automobiles raising the rule of origin for manufactured parts in North America from 62.5% to 75% in order to qualify for the duty-free treatment. Although the President Trump was targeting this number to 85%, Parties settled on less. Moreover, the agreement also provides that up to 40 percent of automobile parts manufactured for vehicles receiving duty-free treatment must come from factories paying workers at least \$16 an hour<sup>64</sup>. Again, these non-tariff barriers to trade dictated by the dominating party at the table target one object, but on two different levels. The first level object is to increase the manufacturing of auto parts in the whole North American region by raising the rule of origin, and the second level is to increase it particularly in the United States by raising the requirement for worker salaries in the automotive industry.

Investment chapter under the USMCA has remained the very similar to NAFTA in its provisions with its MFN clause for the investors and all the rest of general investment provisions already encountered under NAFTA. Nevertheless, there are slight new additions to this chapter - provisions of subrogation and corporate social responsibility. Subrogation clause is an extra relief for the investor transferring the right to claim damages or recoveries to an agency of his Party who had to make a payment to an investor for e.g. the suffered loss. Further, the clause on Social Corporate Responsibility has gained much popularity since society has recognized the tremendous impact of corporate actions on the social environment. Here these guidelines are suggested to be followed by principles as labor, environment, gender equality, human rights etc. However, this provisions seems more as a claim of the manifesto, rather than a 'must', only by stating that parties 'reaffirm the importance', but not extending to the level of actions and claims.

Cross Border Trade in Services was a newly treated subject under the NAFTA. At that time, also proposed in order to protect the main competitive edge of the United States, as the main services exporter to their neighbors. To a large extent this chapter has not been changed

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<sup>64</sup> *Supra* 3, p. 156.

since NAFTA, as it was based on general provisions governing the trade in services. General provisions include the scope, national and MFN treatment of service providers in another Party's territory. However, new addition to this chapter is market access, which enlists measures that no Party shall adopt, as it might prevent the free trade. Moreover, these measures are regulated by the provision standards set for development and administration for such measures. Strict control of measures that might prevent the access to market of services is a new addition to the USMCA and was not covered under NAFTA. Further this chapter also emphasizes the enhancement of commercial opportunities in services for SMEs, which is the major focus of the new agreement.

Since cross border trade in services is a chapter covering the service trade from its general perspective, this shall be attributed with an overlap to chapter on Financial Services. In both chapters, Trade in Services and Financial Services the attention is put on the provisions on liberalizing the payments and transfers in the Services industry across borders. Next to newly incorporated measures for market access, only minor additions have been placed in the USMCA, as binding measures for liberalization on location of computing facilities and free transfer of information. Also, expedited availability of insurance services, which is non-binding. In all, this chapter is quite similar to the version of NAFTA. Both chapters on services attempt to dismantle the barriers which might impede the trade in services among countries to ensure the market access.

Temporary Entry for Business Persons is left equal to NAFTA and no new clauses have been added to regulate this subject. What could have been changed in the light of the restrictions are stricter rules on the temporary entry for business people, or new visa requirements, nevertheless it was not the case. Also, list of professionals has not changed since NAFTA, which can be considered as one of the downsides of NAFTA under this chapter. With the evolution of new industries and professional fields especially in a digital field, today people as Information Managers or User Experience Managers are difficult to place among any traditional professions. Further, the first section of the chapter on Publication and Administration by a large extent has inherited provisions form NAFTA. However, this chapter also adds a second section that did not exist before - on Transparency and Procedural Fairness for Pharmaceutical Products and Medical

Devices, which to the greater extent is applicable to the provisions states in the chapter, without the direct consequence to changing anyone's national healthcare system.

Dispute Settlement under the USMCA has been pursued very similarly to NAFTA. All general clauses have been kept in place. Just as before, parties may pursue consultations and mediation with other Party as a first remedy. If that does not resolve the issue, then parties shall refer to establish the panel, and terms for reference are in a more extended version under the USMCA in comparison to NAFTA. A new forum clause has been added under the USMCA; however, where the complaining Party may choose the forum for the dispute, and this clause does not limit the scope of choice. Further, next to other NAFTA provisions in the dispute settlement, USMCA details the procedure for the panel replacement cases and describes more precise the function of such panel one it is established. Additionally, all case documents shall be filed electronically. In all, this chapter has remained the same, except that USMCA provides slight additions which add certainty and modern perspective on the dispute settlement process.

#### **4.4. Other USMCA provisions**

Chapter 30 reflects institutional establishment regulations that arise out of the new agreement. Next to the ones established already under the NAFTA, this chapter adds one more figure to administer and monitor the agreement - Agreement Coordinator and Contact Point. Previously NAFTA received a great and substantiated critique that it lacked the enforcement of formal bodies and institutions which would enforce and keep NAFTA up to date, as discussed by Professor de Mestral. USMCA in comparison to NAFTA has taken these formal establishments quite to a new extent, not only committees are provided next to every chapter of the USMCA, but also additional contact points, experts and coordinators are established. Often they are accompanied with more detailed descriptions of functions and work procedures than it was at the time of NAFTA. If this can be considered as attempt to solve the ineffectiveness or lack of formal institutions responsible for this FTA, only time will show if that worked out.

Only a few, but very significant new additions have been made to general and final provisions, while the rest of it has been left similar to NAFTA. One provision, which will largely affect the global trade and which shows the stand of the United States is the provision on non-market country FTA. The provision states that when any of Parties want to enter into a trade negotiation with non-market economy, they shall give notice to other parties about their negotiation goals, to which if the Partie does not agree to, they have the right to step out of this deal. Primary country which is targeted with this clause is China, and this decreases chances to use Canada or Mexico to reach the United States market. This clause not only provides the insight into the United States trade mindset, but also assures once again its dominant position on the world's trade stage, and has defied Mexico and Canada to act in their independent sovereignty in drafting FTAs with other states.

Another, perhaps the most innovative clause for the FTA is 'the sunset clause' or, under the USMCA Review and Termination Clause. It is also named as a first-of-its-kind provision, and its main purpose is to ensure that the USMCA, unlike NAFTA, will not become unbalanced and out of date<sup>65</sup>. Indeed, as argued by Armand de Mestral, the lack of remaining relevant and up to date could be considered as the primary defect of the FTA model itself. And without any doubt USMCA attempts to avoid it by setting timely requirement for the review and expiration day for the agreement in whole. This clause was proposed by the United States initially to review the agreement every five years, and parties settles for every six. Moreover the agreement shall terminate after 16 years, unless parties agree for extension during the review in the sixth year. One of the biggest problems with NAFTA is that it was outdated and is no longer the best trade agreement to serve Americans in the global marketplace<sup>66</sup>. This clause provides the opportunity for the parties on many aspects. First, the agreement can be brought up to date every six years. Second, in order to review the agreement changes and effects of the USMCA need to be monitored constantly. Third, since every Party has equal chance to step out of the agreement, each of the trade partners shall not give the reason to do so and must persist in a mutually beneficial trade not only for oneself, but for all parties involved. This clause can actually

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<sup>65</sup> *Supra* 3, p.157.

<sup>66</sup> Heitkamp, Heidi. Heidi Heitkamp: US/Mexico/Canada Agreement Strengthens American Workers and Competitiveness. *Government. Office of United States Trade Representative*, April 9, 2019. Available on: <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/what-they-are-saying/fox-news-heidi-heitkamp>. Accessed May 12, 2019

motivate all Parties to ensure multilateral trade benefits, knowing that the agreement can run the risk to be terminated every six years. Moreover, such provision goes more in hand with the idea of rapid social change affecting the trade and the free trade itself, as it does not lock in trade partners on outdated provisions made at the time which is not relevant today.

Finally, this chapter provided the detailed insight into the pivotal aspects of provisions in the new trade agreement. The main purpose was to evaluate and to understand how the time and society has shaped the international trade agreement, but only to discover that trade agreements shape the societies as well. USMCA can be considered as an improved version of NAFTA, adapted to modern day trade reality, social and economic landscape. It provides more certainty and clarity to provisions in NAFTA, therefore to a certain extent they can be considered as similar. Also, the new agreement inserts a number of innovative trade issues and provisions which were not treated before. And exactly these provisions can be helpful to understand in which direction the international trade might evolve, assuming that it will be shaped by the most modern trade agreement up today led by the dominant trade actor as the United States. The next chapter on main findings will discuss the outcomes of the evaluation and, finally, conclusions will present the developments of the modern international trade which other countries may consider in drafting their FTAs.

## 5. DISCUSSION OF MAJOR FINDINGS

This chapter discusses the main findings on the analysis and evaluation by linking certain major topics to their background presented in the first chapter of this work. Also, this part is dedicated to see the new issues of the FTA into a broader and sometimes from a contrasting perspective on how they might evolve into the practical side in the international trade.

Before NAFTA, the America was engaged in protectionist policies, just as the most part of the world, critically affected by the World War II. Traditionally, protectionism means using import tariffs and duties to protect the home market for domestic producers<sup>67</sup>. Afterwards, NAFTA rose with the promise to liberalize the trade with the purpose to fade the protectionism from the trade in America. Moreover, as Folsom described, NAFTA set to increase the dominance of the United States and the dependence of Canada and Mexico<sup>68</sup>. It certainly did, but only to some extent, since the United States dominance also became dependent on its neighbors. The liberal trade resulted not only in new opportunities, but also in the opportunity costs, primarily to the dominant party. Otherwise, the need to claim for the new deal replacing NAFTA would have never appeared. One shall assess, the great challenge that stands in front of the leaders of international trade, since the perfection of the deal is not seeking a free trade agreement, rather chasing for a balanced trade agreement.

The USMCA came as a breeze echoing the protectionism. As described by the Chepeliev et al., in their research, the United States have moved towards protectionism policies and trade restrictive approach<sup>69</sup>. It can be argued, however, that in the time of protectionism usually import tariffs are actively implemented, as the source mentioned it in the previous paragraph. But the USMCA leaves the duty-free treatment to goods and services to much larger extent, even than the liberal-trade driven NAFTA. In fact, the USMCA takes a different approach, which rather allows us to re-define the protectionism in a new light. The message sent by the USMCA is: *the trade is free within its limits*. The trade in goods and services between Parties can still be free

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<sup>67</sup> Regan, Donald H. "The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause." *Michigan Law Review*, 84, no. 6 (May 1986): 1091–1287, pp.1095-1096.

<sup>68</sup> *Supra* 5, p.11.

<sup>69</sup> *Supra* 34.



and exempt from tariffs, but to qualify for it Parties need to meet certain conditions. Consequently, one might oppose that there is no free trade in this case, and that would be difficult to argue, since there are certain non-tariff barriers placed as an invisible hand playing the strings. This constructs a certain level of controversy in the free trade agreement concept as such. From a supporting perspective of this action, this relates to the issue discussed in the previous paragraph - the challenge to strike a balanced rather than a free trade. Thus, a question can be posed as follows: What if, the trade agreement shall seek the equilibrium and balance, instead of freedom. Today, the balancing act appears in the shape of rules of origin, *de minimis* and throughout verification of origin, and stricter customs procedures. As a result, perhaps the perspective on protectionism shall be reviewed and seen not as an invisible wall impeding the trade flow with other economies, rather an invitation into the trade deal by setting priorities to protect one's own interests and balancing them against each other's. At least, this is the direction suggested by the USMCA.

Further, both trade deals NAFTA and USMCA are very unique, since they are formed between three very different economies. That is a boat with quite different power division, where a captain, lieutenant and a midshipman come together to make a deal which can benefit all of them. Although the boat is the same, one cannot say it about equal outcome to all parties, due to the differences in their starting position where the United States is a consumer driven economy versus Canada and Mexico, who are supply driven economies. The new from the outside looks more as an attempt to turn back the time and recover the lost opportunity for the United States, to gain also the role of the supplier, at least to one's own Peoples. However, this can be compared to chasing a ghost, because the United States might not be a supplier of tangible goods, they are surely among the greatest suppliers of intangible goods. Intellectual property, services, financing, investments, digital commerce, shared economy businesses, as Uber and Airbnb are just a few examples of intangible supplies provided by the United States to the rest of the world. And now the seeming return to the archaic world of steel, plants and pre-NAFTA time seems as a 'we want it all' strategy. Or maybe that is the effect of intangibility?

After reviewing the impact of NAFTA, although in free trade everyone managed to grow the pie bigger, Mexico is a great example on a global scale, demonstrating how a developing

economy can benefit from international trade. Especially, developing economies can learn that as global salesmen they need to trade with developed economies to benefit the most from their resources. And as global buyers, they need to trade with even less developed countries to have access to lower cost goods, as we can see that from the example of trade between the United States and Mexico. While the United States was always quite open economy, the dropping of the Mexican import tariffs represented a great step forward for Mexico at the time of NAFTA. And today, after the USMCA, Mexico again has to make many steps forward, as to improve their labor conditions, IP and Digital Laws and other provisions to meet their forward looking and advanced neighbors. Thus, it can be expected that Mexico will continue to accelerate the growth and improvement of their legal system. In this context it is useless to compare Mexico to the FTA partners - the United States and Canada, also due to the reasons discussed above in this chapter. However, by comparing Mexico to its Southern neighbors, the country's rapid advancement and relatively stable political environment advances the Mexico's performance ahead of the Latin America.

NAFTA's impact on the United States facilitated the departure of manufacturers outside the states and inflow of cheaper resources from outside the North American Region, especially China. Imposing stricter rules of origin attempts to impede the cheap resource inflow from outside the region, and it aims to promote the manufacturer come back to the states. However, stricter customs control based on provisions of the USMCA will likely affect also non-Party country customs verification procedures, since it will require the re-organization of the whole customs system as such. Also, comparison of laws of NAFTA and USCMA allows considering that at the time NAFTA rules were created to benefit the consumer by shifting attention to access cheaper resources and supply of lower priced goods on the market. Instead, USMCA demonstrated that the American worker is put on the pedestal today and rules are created to benefit the employees.

Another phenomena which is linked to USMCA's agenda to benefit the working class, is the firm stand against the non-market economy, China. NAFTA was positioned as the most liberal and open-market trade agreement there was, potentially welcoming new players to join in the open game field. USMCA does not provide this mindset. Moreover, with certain provisions as

currency regulations and non-market country FTAs, it directly targets China. USMCA suggests in which direction the trade opponent shall be pointed at. And it is just a coincidence that Pacific waters separate them from each other. In order for the protectionism to exist and make sense, the choice of a trade opponent is a ‘must’. Protection from invaders in any form, have resulted in general trends set out throughout the chapters of the USMCA, such as increasing control, monitoring, enforcement, verification, transparency and cooperation for the trade between the FTA parties.

Further, NAFTA was criticized among scholars as being stuck in time and is not dealing with new challenges<sup>70</sup>. Indeed, the inherited structure of provisions did not allow NAFTA to evolve and assume changes of the social environment and new trade realities. It stayed locked in time where it was created, as a result it expired the moment it was written. Now, thru the sunset clause, the USMCA has the chance to demonstrate to this legal field how to keep FTAs alive and relevant as the trade between Parties gets affected by many factors. From one side for the FTA it gives the chance to be regularly reviewed and up-to-date. For trade Parties it gives the opportunity to re-negotiate certain provisions as their interests and economy evolve. Moreover, it might create more equality between the dominant and non-dominant parties to introduce changes in the one signed agreement. On the other side, this can cause instability and uncertainty in the trade between Parties. Either way, the sunset clause can be considered as the solution to the increasing irrelevance of the FTA over time, a much more advanced question for the future is - what will be the next solution to resolve the potential problem caused by the sunset clause?

For one paragraph, we might change the perspective on how we look on the FTA. Ideas brought up by Brown & Urpelainen from political studies, discussed in this thesis before, shall be looked with a closer look. While author’s see it from the perspective of the winning candidate, we can take a look from the position of a legal agreement. This leads us to review not only FTA as a tool for winning the candidacy and support for the elections or merely limiting it to an international trade instrument. In fact, this places any FTA among the most important and influential international agreements that a country could have. And it has a direct effect on lives, which is perceivable on the individual and mass level. Only NAFTA was targeted twice as an election

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<sup>70</sup> *Supra* 26, p.658.

campaign tool - during the Bill Clinton's electoral campaign and now during Donald Trump's. Also, the TTP was eliminated from the list of FTAs within three days after stepping into the office.

While the influence of the FTA as such shall be recognized as an important factor on the political platform, the influence of the WTO shall be recognized within the USMCA. Albeit subtle, but still, WTO can set the tone in the FTA for certain provisions. In this analysis we saw that in provisions as regarding the SPS measures, Government Procurement and Good Regulatory Practices. SPS measures are entirely set upon the WTO standards, almost mirroring them. While the WTO Agreement on Government Procurement for the United States and Canada overrides the USMCA. WTO can be compared to a silent pastor for the international trade agreements.

The sunset provision discussed in the above paragraph sends the message that an FTA is not embedded in stone, but can be flexible, and perhaps it is about time. From the general view, the USMCA's content has reached to 34 chapters from NAFTA's 22 which demonstrated the growth in the complexity of the international trade. As the world is getting more complex, laws shall be made simpler. In fact, throughout the USMCA's chapter the focus is placed on making provision more clarifying and more certain. Not only the new provisions, and not only by adding explanatory footnotes, but also by clarifying and making more precise certain provisions taken directly from NAFTA.

## 6. CONCLUSIONS

Firstly, it is apparent from the historical background analysis that the USMCA is a direct follower of NAFTA. In the first chapter of this work, the background of both legislations was presented in attempt to draw the connection between two FTAs. The new agreement, although innovative to certain extent, it evolved from the trade law setting drafted in NAFTA in 1990s. In all achieved three things: it mainly kept the previous provisions of the NAFTA, modified existing provisions of NAFTA and added new provisions. Altogether they are formed into a new USMCA trade agreement, which today is claimed to be the most modern trade agreement with a high chance to set a precedent for the international trade law.

Nonetheless, there is a lack of scholarly articles arguing legal matters and their context in the USMCA, but NAFTA is presented to a sufficient extent in the scholarly articles for this research. Especially, this subject lacks broader and outside perspectives on NAFTA and USMCA, treated their potential impact on international trade law as such, at the moment, is missing in the academic writings.

Secondly, under the comparative structural analysis of the USMCA in comparison to NAFTA, uncovers in more detail provisions which can be considered as innovative in the field of international trade, subjects which have been included already before, but today they are all reshaped with new provisions, sometime to an unrecognizable level, and there are international trade regulatory fields, which have remained similar to the previous FTA.

Thirdly, a detailed insight into the pivotal aspects of provisions in the new trade agreement served to evaluate and to understand how the time and society has shaped the international trade agreement, but only to discover that trade agreements shape the societies as well. USMCA can be considered as an improved version of NAFTA, adapted to modern day trade reality, social and economic landscape. It provides more certainly and clarity in comparison to provisions in NAFTA, therefore to a certain extent they can be considered as similar. Also, the new agreement inserts a number of innovative trade issues and provisions which were not treated before. Noteworthy, exactly these provisions can be helpful to understand in which direction the international trade might evolve, assuming that it will be shaped by the most modern trade agreement up today leaded by the dominant trade actor as the United States.

Fourthly, to answer the main question of the thesis, the great challenge that stands in front of the leaders of international trade, since the perfection of the deal is not seeking a free trade agreement, rather chasing for a balanced trade agreement. The perspective on protectionism shall be reviewed and seen not as an invisible wall impeding the trade flow with other economies, rather an invitation into the trade deal by setting priorities to protect one's own interests and balancing them against each other's. For developing economies the takeaway is to trade with developed economies to benefit the most from their resources as we can see that from the example of trade between the United States and Mexico.

Fifthly, this comparative analysis demonstrated that NAFTA was tailored for the consumer to access cheaper resources and supply of lower priced goods on the market, but the USMCA for the American working class, and the latter does not provide an open mindset to join with other economies in this FTA, but it directly targets trade against China on different provisional levels. This has resulted in general trends set out throughout the USMCA such as increasing control, monitoring, enforcement, verification, transparency and cooperation for the trade between the FTA parties. FTAs, in general, are among the most important and influential international agreements that a country could have not only in trade, but also in a political context.

Finally, the inherited structure of provisions did not allow NAFTA to evolve and assume changes of the social environment and new trade realities; as a result it was largely criticized as being outdated. The new sunset clause in the USMCA has the chance to demonstrate to this legal field how to keep FTAs alive and relevant as the time goes by and interests of the Parties and trade realities change.

Future research can attempt to move in many different directions from this departure point, since this research still raises different new questions. Can an FTA serve as an international law tool to predict a country's development strategy? How to find a place for free trade under the protectionism? When does the FTA cease to exist as mutually beneficial? These are just a few among the many possible questions which this research thesis has raised thru its findings and further research is needed.

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