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The United States–Mexico–Canada Agreement: Settlement of Disputes

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INTRODUCTION

The North American Free Trade Agreement (NAFTA)[1] incorporated three distinct dispute settlement mechanisms. These address 1) investor-state disputes (ISDS) between foreign investors and host states; 2) binational panel review of national administrative agency rulings under domestic anti-dumping (AD) and subsidy/countervailing duty (CVD) laws; and 3) state-to-state disputes challenging another party's application or interpretation of the agreement.[2] The United States-Mexico-Canada Agreement (USMCA)[3] incorporates the same three mechanisms, only one of which, ISDS, is extensively modified.

Retention of these three mechanisms was not a U.S. objective in the NAFTA renegotiation. Rather, the original proposals to Canada and Mexico contemplated:

- A provision that would allow a party (e.g., the United States) to opt out of ISDS protection for foreign investment, without necessarily providing reciprocal protection for investors from Mexico and Canada;
- Elimination of Chapter 19 (AD/CVD binational panel) reviews of unfair trade practice remedies imposed by national agencies; and
- Converting state-to-state dispute settlement (Chapter 20) into a less legal and more diplomatic means for resolving disputes over the interpretation and application of NAFTA provisions by allowing the United States to disregard panel decisions the U.S. views as "clearly erroneous."[4]

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INVESTOR PROTECTIONS AND INVESTOR-STATE DISPUTE SETTLEMENT

Worldwide some 3,339 international investment agreements—most of which are stand-alone bilateral investment treaties or investment chapters in regional trade agreements such as NAFTA Chapter 11—have been negotiated, and more than two-thirds are in force.[5] As noted in the overview report of this series,[6] most of these include investor-state dispute settlement (ISDS) with binding third-party international arbitration. This includes the Trans-Pacific Partnership (now the Comprehensive and Progressive Agreement for Trans-Pacific Partnership) negotiated by the Obama administration but rejected by President Donald Trump.[7]

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In its trade negotiations, the Trump administration has departed from policies favored by previous U.S. administrations dating back to Ronald Reagan that favored robust investor protections subject to ISDS. Rather, the president and Robert Lighthizer, his trade representative and chief USMCA negotiator, appear to be convinced that ISDS infringes on U.S. sovereignty and may encourage American enterprises to move their production facilities to lower-wage countries such as Mexico.[8] These views are not confined to the Trump administration. For example, law professor Jason Yackee has argued that the inclusion of ISDS in treaties such as TPP (or by extension, USMCA) is "unlikely to provide significant benefits" to investors or host countries and that because of ISDS "costs" the "rational way to proceed" is to exclude ISDS altogether.[9] Under such circumstances, supporters of ISDS should probably be relieved that it was not eliminated entirely from the USMCA.

The investment protection provisions of the USMCA can be divided into four categories:

1. The basic protections for "covered" investors and their investments—such as national treatment, most-favored-nation treatment, fair and equitable treatment, free choice of management, protection against performance requirements, free transfer of capital and profits, and protection against direct and indirect expropriation—generally apply under the USMCA as under NAFTA and the TPP.[10] However, in the USMCA, these host country obligations are enforceable against host governments only in national courts rather than in international arbitration, except as set out below.

2. For Canadian enterprises investing in Mexico and the United States, and Mexico- and U.S.-based companies investing in Canada, no USMCA investor-state dispute enforcement protections will apply after a three-year transition period from NAFTA for "legacy" investment claims and pending claims that remain subject to NAFTA Chapter 11.[11] The absence of ISDS affects most significantly U.S. investors in Canada and Canadian investors in the United States. Both will be required to rely on national courts for their disputes, courts that with a few exceptions are generally considered to be competent, unbiased, and free of corruption.[12] Still, there is no equivalent in Canada to the Fifth Amendment's prohibition on the seizure of private property for public use without providing just compensation, although such seizures are prohibited in some instances by statute. One study further concludes that of 35 Chapter 11 claims filed against Canada, awards would have been equivalent in only four cases had they been adjudicated by Canadian federal courts.[13] (No similar study exists for the United States since the U.S. has not yet lost a NAFTA Chapter 19 case.) It is evident both the Canadian and U.S. governments welcomed the elimination of ISDS from the USMCA because the change "strengthened the Canadian government's right to regulate in the public interest," according to one official.[14]

   From the point of view of Canadian investors in Mexico and Mexican investors in Canada, the CPTPP will provide a high degree of protection for investors, similar to those currently provided by NAFTA's Chapter 11, for claims that arise after January 1, 2019, when the CPTPP entered into force for Canada, Mexico, and five other parties.[15] However, the agreement excludes coverage for investment agreements and investment authorizations that were originally incorporated in the TPP.[16]

3. A limited group of potential ISDS claims against Mexico or Mexican government entities "relating to covered government contracts" will enjoy protections like those under NAFTA Chapter 11 and TPP Chapter 9. However, the list of covered sectors is narrow:

   (i) activities with respect to oil and natural gas that a national authority of an Annex Party controls, such as

> *exploration, extraction, refining, transportation, distribution, or sale,*
>
> *(ii) the supply of power generation services to the public on behalf of an Annex Party,*
>
> *(iii) the supply of telecommunications services to the public on behalf of an Annex Party,*
>
> *(iv) the supply of transportation services to the public on behalf of an Annex Party, or*
>
> *(v) the ownership or management of roads, railways, bridges, or canals that are not for the exclusive or predominant use and benefit of the government of an Annex Party. . .*[17]

The first three categories are mostly self-evident. With (i), for example, both the United States and Mexico likely had concerns that without ISDS, it would be difficult to convince foreign investors to participate in exploration and development of Mexico's oil and gas reserves, particularly after initial decisions by Mexico President Andrés Manuel Lopez Obrador that have increased investors' uneasiness. These include terminating construction of a new Mexico City airport (financed with about $6 billion in foreign-held bonds) using dubious "referendum" procedures even though it was about one-third complete, and postponing auctions for new oil leases until 2021.[18]

Category (v) has generated the greatest interest and concern among stakeholders. In the initial draft of the USMCA, the infrastructure scope was considerably more open-ended. Under the final version, infrastructure such as dams, seaports, and airports are not covered. While the USMCA provisions have no impact on the Mexico City airport bondholders—they would presumably be covered by NAFTA Chapter 11—investment in future infrastructure projects could be jeopardized. For example, long-running efforts by stakeholders in Sonora, Mexico, and southern Arizona to expand the Port of Guaymas, Sonora, through private funding are probably less likely to succeed under the USMCA.[19]

4. For investments between Mexico and the United States outside the scope of category (iii) above, ISDS is available but significantly circumscribed compared to NAFTA Chapter 11 or CPTPP Chapter 9. Significantly, ISDS claims are limited to alleged violations of national treatment, most-favored-nation treatment, and direct expropriation. Fair and equitable treatment and indirect expropriation claims are excluded.[20] In addition, for the first time in any U.S. investment agreement or trade agreement investment chapter, claimants seeking ISDS under the USMCA must demonstrate that they have first pursued proceedings under national courts or administrative tribunals and have either received a final decision or 30 months have elapsed from the date such proceedings were initiated.[21]

The ISDS provisions have probably generated more opposition than any other USMCA provisions. For example, industry lawyers have criticized the exclusion of indirect expropriation:

> *Most governments these days, maybe with the exception of a few I can think of, don't just issue a federal government decree saying they're going to expropriate your property. It's more sophisticated and it's more complicated than that. For heavily regulated industries it often is through regulation that they lose the value of their investment, often with a discriminatory element.*[22]

Various observers in the United States and elsewhere have asked an obvious question: Does the USMCA mean the death of ISDS, at least for agreements to which the United States is likely to become party? Analysts also wonder if the change represents a non-fatal but broader decline in ISDS. Globally, for instance, several Latin American countries have renounced the International Centre for Settlement of Investment Disputes

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(ICSID) Convention under which most ISDS proceedings are conducted, the EU Commission has developed an investment court/appellate body alternative, and opposition among citizens and legislators in EU member countries and the U.S. continues to grow.[23]

Displeasure among attorneys, businesses, and members of Congress over the weakened USMCA investment provisions goes beyond the agreement. The U.S. Chamber of Commerce has strongly urged that the investment protection provisions (and some others) not become precedents for future U.S. trade agreements, arguing that the USMCA "represents a notable step back" from NAFTA's Chapter 11.[24] These stakeholders will thus be unsatisfied with the treatment of investments in the United States' negotiating objectives for the proposed United States–Japan Trade Agreement, which does not mention ISDS in the investment objectives section at all. Instead, it states: "Secure for U.S. investors in Japan important rights consistent with U.S. legal principles and practices, while ensuring that Japanese investors in the United States are not accorded greater substantive rights than domestic investors."[25] The same sparse language is used in the USTR's negotiating objectives for a proposed trade agreement with the EU.[26]

It is thus likely that if trade agreements with Japan and the EU can be negotiated—big "ifs" in my view—they will exclude ISDS entirely, even if an investment chapter includes a list of host state obligations to foreign investors (e.g., national treatment, MFN treatment, and protection against performance requirements), as is the case with USMCA Chapter 14. Whether the absence of ISDS in such agreements would jeopardize congressional support is a premature question at present.

Also, while there may be a case for excluding ISDS from trade agreements with developed nations that maintain well-established and independent court systems, different considerations may arise with respect to protecting U.S. investors in developing countries. For example, it has recently been suggested that the United States might strike a "quick hit" trade deal with Vietnam.[27] In the somewhat unlikely event that a trade agreement could be promptly negotiated, both parties would need to decide whether the current protections for U.S. investors under the United States–Vietnam Bilateral Trade Agreement[28] would be terminated if and when the new agreement enters into force.

RESOLUTION OF "UNFAIR" TRADE DISPUTES

As discussed briefly in the earlier overview report in this series, the NAFTA Chapter 19 dispute settlement mechanism has been a nonnegotiable "red line" for Canada since 1987.[29] The Chapter 19 binational panel process is an alternative to federal court review of anti-dumping and subsidies/countervailing duty determinations by the U.S. Department of Commerce and the U.S. International Trade Commission (and parallel agencies in Canada and Mexico). Under the United States–Canada Free Trade Agreement and again under NAFTA, administrative determinations in antidumping and countervailing duty cases—whether related to the amount of dumping, subsidies, or the existence of material injury—are reviewable by binational panels composed of private citizens from the two countries involved. The panels are subject to the national unfair trade laws of the country that imposed the duties, but the process is international in that the panelists are nationals of two countries (i.e., the U.S. and Canada) in a dispute involving the imposition of import duties onto either party.[30]

The maintenance of Chapter 19 procedures was apparently not a critical issue for Mexico in the USMCA negotiations (although the final provisions apply to Mexico as well as to Canada and the U.S.),[31] but it was politically essential for Canada. As Prime Minister Justin Trudeau said in early September 2018, "we will not sign a deal that is bad for Canadians and, quite frankly, not having a Chapter 19 to ensure that the rules [governing unfair trade rulings by administrative agencies] are followed would be bad for Canadians."[32] This statement reflected a long-held belief by Canada that U.S. federal courts (such as the Court of International Trade and the Court of Appeals for the Federal Circuit) were not sufficiently independent from the executive branch (despite, in my view, little or no evidence of any bias).

It is safe to conclude that without U.S. willingness to carry Chapter 19 provisions into the USMCA with only minor changes,[33] Canada would not have agreed to be part of the USMCA. The fact that the United States was willing to continue Chapter 19 provisions suggests perhaps—more than any other aspect of the negotiations with Canada—how important it was for the United States to assure that Canada became a USMCA party along with Mexico. Chapter 19 has never been popular with U.S. officials or stakeholders. As I observed after an extensive review 10 years ago,

> *The panel process has been criticized (mostly by U.S. NGOs and others who have opposed NAFTA generally) in several respects. First, it has been attacked for putting decision-making power in the hands of individuals, including foreign nationals, without judicial experience, who are not accountable for their performance, who have not been appointed in accordance with Article III of the U.S. Constitution, and who may disregard the requirement that they behave as would local courts and apply U.S. law. The complexities and costs of a largely ad hoc system, which substitutes for what most believe is an acceptable national court system, have also been cited.*[34]

For Canada, Chapter 19 has a long history rooted in a dispute over softwood lumber exports to the United States, which has generated multiple Chapter 19 reviews since the advent of the 1988 United States–Canada Free Trade Agreement[35] and again under NAFTA.[36] The dispute also generated one of three Chapter 19 "extraordinary challenges," a very limited review process in which Canada ultimately prevailed, as it did in the bulk of the Chapter 19 binational panel disputes.[37] As Canada asserted after the USMCA negotiations were completed,

> *Given the integrated nature of the North American economy, it is important to minimize the disruptions that can result from the imposition of trade remedies. This outcome ensures that trade remedies are applied in a fair, transparent, and responsible way while maintaining recourse, when necessary, to an impartial binational panel dispute settlement mechanism to review anti-dumping and countervailing duty measures imposed by CUSMA partners.*[38]

At the same time, there is little evidence that Canada, despite insisting on the inclusion of a Chapter 19-style mechanism in the USMCA, would have been unwilling to consider modifications that might have made it less controversial in the U.S. and more effective. The timing of the negotiations, whereby Mexico and the United States concluded what was effectively a bilateral agreement in August 2018 and the U.S. and Canada rushed to bring the latter into the accord by the end of September, effectively precluded a detailed review of Chapter 19.[39] Had the parties been afforded more time, it is at least possible that the limited review of binational panel determinations under NAFTA's extraordinary challenge procedures[40] could have been addressed and modified. Also, the parallel remedies provided in the event of challenges to anti-dumping and countervailing duty orders available to private parties under Chapter 19 and to governments under the World Trade Organization's dispute settlement mechanism might have been discussed. (NAFTA and the USMCA allow parties to choose between regional or WTO fora for most state-to-state disputes, but neither addresses parallelism with unfair trade disputes.[41])

STATE-TO-STATE DISPUTES

U.S. Issues with Third-Party Trade Dispute Settlement

Current U.S. efforts to undercut the WTO's appellate body are due to dissatisfaction with both its procedures and substantive actions (the latter of which did not originate with the Trump administration)[42] and the Trump administration's commitment to "defending our national sovereignty over trade policy."[43] However, at least some of these complaints are applicable mutatis mutandis to other third-party dispute resolution mechanisms that affect the application of U.S. trade laws and policies, such as those in regional trade agreements.

Relatively little public discussion of U.S. objections to NAFTA's Chapter 20 dispute settlement mechanism exists for what I believe are several obvious reasons. First, it has been possible for the United States (and the other parties) to indefinitely delay panel proceedings under Chapter 20 simply by refusing to appoint individuals to the Chapter 20 roster;[44] instead of panel members being more-or-less automatically appointed to adjudicate a dispute, each panel member is selected only after extensive bilateral consultations among the states party to the dispute. For example, in the most recently completed Chapter 20 proceeding, "Cross-Border Trucking Services," 15 months passed between Mexico's first request for formation of the panel and when proceedings actually began. Distrust from Mexico and Canada was strongly reinforced when the United States refused to cooperate for more than four years on the formation of a panel requested by Mexico to adjudicate related disputes over high-fructose corn syrup and U.S. sugar quotas under NAFTA. Despite this history of U.S. stonewalling, Mexico remained open to a new dispute settlement mechanism in the USMCA that was only slightly altered from NAFTA's Chapter 20.[46]

Secondly, all three NAFTA parties appear to have generally preferred the WTO's dispute settlement process to NAFTA's for the review of trade disputes. They could be confident that WTO panels would be promptly appointed by the WTO secretariat, that panel and appellate body time limits would be more or less observed, that other members could intervene in cases (often a benefit for Mexico and Canada that was not available in NAFTA dispute settlement), and that procedures to enforce rulings would be enforced.[47] Unfortunately, delays in WTO dispute settlements have increased in recent years, in part due to U.S. refusal to appoint and reappoint appellate body members to the WTO;[48] if U.S policy does not change, the appellate body will become inoperable for lack of judges in December 2019.[49]

State-to-State Dispute Settlement Under the USMCA

Under these circumstances, Mexico and Canada faced an unpleasant choice in the negotiations: they could either support a NAFTA-type mechanism in the USMCA despite its imperfections, or accept a mechanism that likely would have posed fewer restraints on the U.S. than NAFTA Chapter 20. Faced with this dilemma, Mexico's negotiators beat back U.S. efforts to formally grant veto power to parties that object to adverse panel decisions. As one of Mexico's negotiators noted, "Dispute resolution is for the small country. So, Mexico is particularly interested."[50] Simultaneously, the negotiator admitted that USMCA Chapter 31 does not address the root problem behind the delays in establishing panels (i.e., the United States' failure to agree to designate panel rosters in advance). However, he argued that this was a necessary compromise to avoid the U.S. veto proposal.[51] In so doing, Mexico suggested—perhaps overly optimistically—that instances of blocked panels had been limited to a single case involving sugar, and "it's not something that will happen frequently, so we said okay."[52]

The result is a USMCA state-to-state dispute settlement Chapter 31 that makes few substantive changes compared to NAFTA and that more closely resembles NAFTA than the TPP. A few possibly significant differences exist. For example, NAFTA states that "On receipt of the final report of a panel, the disputing parties shall agree on the resolution of the dispute, which normally shall conform with the determinations and recommendations of the panel, and shall notify their sections of the secretariat of any agreed resolution of any dispute."[53] The USMCA simply mandates that "Within 45 days from receipt of a final report . . . the disputing parties shall endeavor to agree on the resolution of the dispute."[54] The USMCA provides more specific directions for the function of panels: "A panel's function is to make an objective assessment of the matter before it and to present a report that contains" findings of fact and determinations as to whether "the measure at issue is inconsistent with obligations in this agreement, (ii) a party has otherwise failed to carry out its obligations in this agreement, (iii) the measure at issue is causing nullification or impairment . . . or (iv) any other determination requested in the terms of reference" as well as recommendations and reasons for the findings and determinations.[55] Also, reflecting the technological changes of the past 25 years, the USMCA allows for electronic filing of documents.[56]

Still, in the event a party wishes to challenge another party's application or interpretation of the agreement, the USMCA, like NAFTA, provides for mandatory consultations and optional "good offices" (conciliation and mediation) before resorting to arbitration.[57] Roster appointment requirements are essentially unchanged from NAFTA as well, and five-person panels remain the rule.[58] Appointed panelists must "have expertise or experience in international law, international trade, other matters covered by this agreement, or the resolution of disputes arising under international trade agreements." Members must be selected objectively, be independent of the governments involved, and follow a code of conduct designed to avoid actual or apparent conflicts of interest.[59] Critically, under the USMCA (as was the case with NATFA), "The roster shall be appointed by consensus and remain in effect for a minimum of three years or until the parties constitute a new roster."[60] No appellate mechanism exists, and trade penalties (e.g., additional tariffs or quotas) are available if the losing party fails to implement the final report or otherwise "agree on the resolution of the dispute."[61]

Whether the Mexico negotiator's optimism that parties (read "the United States") will refrain from blocking roster and panel appointments under the USMCA remains to be seen. The text of the USMCA chapter does not instill confidence that there will be any change under the agreement in this regard compared to NAFTA. Although the language is different, if no roster members have been appointed, the responding party must agree with the claiming party to dispute a settlement before the mechanism can be utilized. Effectively, resorting to dispute settlement then becomes voluntary on the part of the responding party.

While neither NAFTA nor the USMCA addresses alternative dispute resolution other than state-to-state dispute settlement in any detail, both provide for a mandatory advisory committee on private commercial disputes.[62] Some may consider this potentially significant, since the TPP calls for no similar advisory committee.[63] The NAFTA 2022 committee has met periodically throughout the agreement's history.[64] Similar committees were contemplated in post-NAFTA FTAs negotiated by the U.S., but typically their formation was discretionary; to the best of my knowledge, none were ever formed.[65]

A Section 301 Alternative for the United States?

The USTR suggested in early February that Section 301 might be a potential tool to enforce U.S. rights under the USMCA.[66] (Section 301 is a unique U.S. statute, meaning it cannot be used by Mexico or Canada.)[67] The suggestion has been met with considerable skepticism in Congress and elsewhere,[68] but it is discussed herein because it has been suggested by the administration and because it is fully consistent with the administration's dislike of third-party dispute settlement (including implicitly USMCA Chapter 31) and its strong preference for unilateralism.

Section 301 consists of two major parts. Section 301(a) deals with situations where

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"the rights of the United States under any trade agreements are being denied" or the act of the foreign country "is unjustifiable and burdens or restricts U.S. commerce."[69] However, it requires the U.S. to bring such matters to dispute settlement under the WTO's Dispute Settlement Understanding (or under a regional trade agreement mechanism); if the WTO dispute settlement body (DSB) rejects the United States' assertion that its rights have been denied, the USTR may take no action.[70] The imposition of any trade penalties is similarly dependent on a favorable DSB ruling. The U.S. formally agreed in a 2010 WTO case brought by the EU that it would only use Section 301 in connection with the WTO dispute settlement mechanism procedures.[71]

Section 301(b) is broader and purports to authorize trade penalties unilaterally, although such action is inconsistent with U.S. assurances noted above. An example is the Section 301 action against China regarding intellectual property violations, which has resulted in hundreds of billions of dollars in U.S. penalties and retaliatory tariffs, all without the benefit of WTO proceedings.[72] "Discretionary action" under Section 301(b) provides the USTR the authority to take various remedial actions if he determines that "an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce." These include the imposition of duties or other import restrictions on the country that is allegedly performing such unreasonable or discriminatory actions.[73] The statute further indicates that "an act, policy, or practice is unreasonable if the act, policy, or practice, while not necessarily in violation of, or inconsistent with, the international legal rights of the United States, is otherwise unfair and inequitable."[74] In other words, the potential scope is extremely vague and broad.

There are numerous drawbacks of unilateral U.S. action to counter alleged USMCA violations (which never occurred with respect to NAFTA). First, such use of Section 301, without operating under the WTO or USMCA dispute settlement mechanisms, would violate GATT/WTO rules, which for now at least are binding on the U.S. as well as Mexico and Canada. Second, as with the Section 232 tariffs imposed inter alia on U.S. imports of steel and aluminum from Mexico,[75] use of Section 301(b) against USMCA partners would probably result in immediate retaliation by Canada and Mexico through penalty tariffs on U.S. goods, as has occurred with steel and aluminum.[76] Those who are concerned by the unilateral use of Section 301 are well aware of the U.S.-China trade "war." In this case, the United States initially imposed 25% tariffs on $50 billion worth of Chinese goods. When China retaliated with its own tariffs, the United States counter-retaliated with 10% tariffs on another $200 billion worth of goods. This second set of tariffs was originally scheduled to increase to 25% on March 2 if current negotiations did not resolve the issues,[77] but that increase has been postponed indefinitely as negotiations have continued well into the present.[78]

Section 301 is attractive to the administration because it can be used (even if not legally under international trade rules) unilaterally and without the delays associated with either WTO or NAFTA litigation. As Bill Reinsch of the Center for Strategic and International Studies has noted, the Trump administration "prefers an approach where the U.S. can throw its weight around and bully other parties," and the terms of Section 301 are broad enough to apply to the USMCA.[79]

USTR Lighthizer's suggestion that the administration is contemplating the use of Section 301 to enforce Mexico and Canada's obligations to the United States was made in the context of efforts to assure members of Congress concerned about effective enforcement of the USMCA's labor chapter regarding Mexico, but labor advocates were not satisfied. They took the position that Section 301 does not give private parties such as U.S. labor unions any direct right to initiate enforcement actions on their own.[80] Technically, this objection is correct, but it is worth noting that under Section 301 procedures, "any interested person may file a petition with the trade representative requesting that action be taken under Section [301] and setting forth the allegations in support of the request."[81]

> *The USTR has broad authority to accept or reject such a petition,[82] but this proviso could be used, for example, by one or more labor unions to demand the initiation of a Section 301 action against Mexico in the future for its "unreasonable" failure to comply with labor obligations under USMCA's Chapter 23. Such labor-initiated action would be appropriate given that a foreign country's policy is considered "unreasonable" under the statute because of denial of "core" labor standards such as right of association, right to organize, bans on forced labor and child labor and standards for minimum wages and hours.[83]*

Still, to many observers the Section 301 unilateral approach is fraught with difficulties, including the possibility that it will encourage some members of Congress to vote against the USMCA. As Simon Lester of the Cato Institute suggests,

> *If Section 301 will be used to make a unilateral determination of a violation and then to impose tariffs, it won't make the USMCA enforceable. It will just lead to Canada and Mexico retaliating with their own tariffs . . . rather than complying with U.S. demands... The way to make the USMCA enforceable is simply to have dispute settlement rules that ensure that panels are appointed. It's not very difficult. Canada and Mexico would be on board, and the current rules can be adjusted without too much difficulty.[84]*

ENDNOTES

1. See North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 15, 1992, http://bit.ly/2FZ8d3z.

2. See NAFTA chapters 11, 19, and 20, respectively.

3. Agreement between the United States of America, the United Mexican States, and Canada, Nov. 30, 2018 (not in yet in force), http://bit.ly/2YSXFL9.

4. Josh Wingrove and Eric Martin, "U.S. Proposes Gutting NAFTA Legal Dispute Tribunals," *Bloomberg Markets*, Oct. 14, 2017 (subscription), https://bloom.bg/2Uo23Cr.

5. UNCTAD, "Investment Policy Monitor," December 2018, Issue 20, http://bit.ly/2IaP0xC.

6. See David A. Gantz, The United States-Mexico-Canada Agreement: Overview and Analysis, Baker Institute Report no.12.11.18, Rice University's Baker Institute for Public Policy, Houston, Texas, http://bit.ly/2UiOiFA.

7. Trans-Pacific Partnership, Feb. 4, 2016 (Australia, Bahrain, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States, and Vietnam) (superseded), ch. 8, http://bit.ly/2uLoYcb. TPP has been replaced for all parties other than the United States by the Comprehensive and Progressive Tans-Pacific Partnership, March 8, 2018, http://bit.ly/2UgPSIb. (The TPP and CPTPP must be read together. The CPTPP made minor modifications in the investment chapter not relevant to this discussion.)

8. See "Brady-Lighthizer Exchange [on ISDS]," *International Economic Law and Policy Blog*, March 21, 2018, http://bit.ly/2UmJkYM.

9. See Jason, Yackee, "New Trade Agreements Don't Need ISDS," *Cato Unbound*, May 19, 2015, http://bit.ly/2HW3UZ6.

10. USMCA, art. 14.4-14.11; annexes 14-A and 14-B; NAFTA, art. 1110-1110; TPP, arts. 9.1-9.11.

11. USMCA, Annex 14-C.

12. *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AFT)/98/3, http://bit.ly/2UilewU, wherein what some believe was a gross miscarriage of justice in the Mississippi state courts was effectively upheld by the Chapter 11 tribunal, with the tribunal noting, inter alia, "A reader following our account of the injustices which were suffered by Loewen and Mr. Raymond Loewen in the Courts of Mississippi could well be troubled to find that they emerge from the present long and costly proceedings with no remedy at all"(para. 241).

13. See Armand de Mestral and Robin Morgan, "Does Canadian Law Provide Remedies Equivalent to NAFTA Chapter 11 Arbitration?," CIGI Investor-State Arbitration Series Paper no. 4, May 2016, 11, http://bit.ly/2YMgz6a. Others would have received only administrative remedies and no monetary damages.

14. See James Munson, "Canada Told to Pay $7 million in NAFTA Quarry Case," *Bloomberg Law*, February 26, 2019, http://bit.ly/2IhYMOB.

15. CPTPP, ch. 9. As of December 30, 2018, the parties that had ratified the CPTPP were Australia, Canada, Japan, Mexico, New Zealand, Singapore, and Vietnam. Ratification is pending in Brunei, Chile, Malaysia, and Peru.

16. TPP, ch. 9; CPTPP, annex, para. 2.

17. USMCA, annex 14.E, para. 6(b).

18. Colby Smith, "Investors Face Big Call as Mexico's Lopez Obrador Prepares Budget," *Financial Times*, Dec. 11, 2018, https://on.ft.com/2UwkZ1K.

19. See Gabriela Rico, "Port of Guaymas Set to Double its Capacity, Seeks Arizona Ties," *Arizona Daily Star*, Nov. 24, 2013, http://bit.ly/2uOzAHa.

20. USMCA, annex 14-D, art. 14.D.3.

21. USMCA, annex 14-D, art. 14.D.5.

22. See "Industry Reps: Future Investment Rules Should not be Modeled on USMCA," *World Trade Online*, November 5, 2018, http://bit.ly/2G0RfSH.

23. See Calliope Sudborough, "What is the ISDS Landscape Under the 'New NAFTA,'" *Kluwer Arbitration Blog*, Jan. 9, 2019, http://bit.ly/2YM8OwZ.

24. "Chamber: Elements of USMCA should not be viewed as model for new FTAs," *World Trade Online*, Jan. 9, 2019, http://bit.ly/2YQV2sX.

25. "United States-Japan Trade Agreement (USJTA) Negotiations," Office of the U.S. Trade Representative, December 2018, http://bit.ly/2FPP9Us, 6.

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27. "Pompeo: U.S. Could Strike a 'Quick Hit' Trade Deal with Vietnam, *World Trade Online*, March 5, 2019, http://bit.ly/2TYStl4.

28. Agreement Between the United States of America and the Socialist Republic of Vietnam on Trade Relations, July 13, 2000, ch. IV, http://bit.ly/2I03DEG.

29. USMCA, ch. 10, sec. D, art. 4. Chapter 19 was critical to Canada's acceptance of the United States-Canada Free Trade Agreement in 1987. See Alexander Panetta, "NAFTA's Third-Party Arbitration System was Canada's Big Prize…Is it worth Fighting For?" *The Star*, Aug. 23, 2018, http://bit.ly/2K5W4hr.

30. NAFTA, art. 1904.

31. USMCA, Annexes 10-B.1, 10-B.2, 10-B.3, 10-B.4, and 10-B.5, http://bit.ly/2CWnpgf.

32. See "Trudeau: Chapter 19, Cultural Exemptions are NAFTA Red Lines for Canada," World Trade Online, Sept. 4, 2018, http://bit.ly/2OOcXMo.

33. USMCA, Annexes 10-B.1, 10-B.2, 10-B.3, 10-B.4, and 10-B.5.

34. David A. Gantz, "The United States and Dispute Settlement Under the North American Free Trade Agreement: Ambivalence, Frustration and Occasional Defiance," in *The Sword and the Scales: The United States and International Courts and Tribunal*, edited by Cesare P.R. Romano (New York: Cambridge University Press, 2009), 356, 381.

35. See Certain Softwood Lumber Products from Canada, Case nos. USA-CDA-1992-1904-01, USA-CDA-1992-1904-02, http://bit.ly/2IctBE3.

36. See Certain Softwood Lumber Products from Canada, Case nos. USA-CDA-2002-1904-02, USA-CDA-2002-1904-03, USA-CDA-2002-1904-07, USA-CDA-2005-1904-01, USA-CDA-2006-1904-04, USA-CDA-2006-1904-05, http://bit.ly/2IctBE3.

37. See NAFTA, art. 1904.13, annex 1904.13; and Softwood Lumber Products from Canada, Case no. ECC-2004-1904-01USA, NAFTA Decisions and Reports, http://bit.ly/2IctBE3.

38. Government of Canada, "Trade Remedies and Related Dispute Settlement (Chapter 19) Summary, October 2018, http://bit.ly/2Vp7WfU.

39. It was critical for Mexico to be able to sign the USMCA before President Lopez Obrador entered office on Dec. 1. President Trump under the TPA could not sign in less than 90 days after the text was made public.

40. NAFTA, annex 1904.13.

41. NAFTA, art. 2005.1; USMCA, art. 31.3(1).

42. See Kimberly Ann Elliott, "Can the World Trade Organization be Saved?" *World Politics Review*, October 16, 2018, http://bit.ly/2YMiffY.

43. USTR, "The President's Trade Policy Agenda," 2017, http://bit.ly/2WIGSs4, 3.

44. NAFTA, arts. 2008, 2009.

45. *In the Matter of Cross-Border Trucking Services*, USA-Mex-1998-2008-1, February 6, 2001, 6-7 (paras. 21, 22), NAFTA Decisions and Reports, http://bit.ly/2IctBE3.

46. See "Mexico's View of the Problems with the NAFTA Panel Appointment Process," *International Economic Law and Policy Blog*, Oct. 12, 2018, http://bit.ly/2uR2tm5.

47. See Understanding on the Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the WTO Agreement, April 15, 1994, especially arts. 4, 6, 10, 11, 12, 16, 17, 19, 20, and 22, http://bit.ly/2uR2x5j. In fairness, a significant majority of the nearly three dozen WTO actions involving NAFTA parties addressed anti-dumping and subsidies for unfair trade actions, where NAFTA jurisdiction is excluded. See NAFTA, art. 2004; WTO, "Chronological List of Disputes Cases," March 2019, http://bit.ly/2TXpIoO.

48. Elliott, "Can the World Trade Organization be Saved?"

49. As of Dec. 10, 2019, only one (of the mandated seven) judges will remain in place. See World Trade Organization, "Members of the Appellate and their Respective Terms of Office," http://bit.ly/2UuyGy5.

50. "Mexico's View of the Problems."

51. Ibid.

52. Ibid.

53. NAFTA, art. 2018(1).

54. USMCA, art. 31.18.

55. USMCA, art. 31.13(1)

56. USMC, art. 31.12.

57. USMCA, arts. 31.4, 31.5.

58. USMCA, arts. 31.6, 31.8, 31.9.

59. USMCA, art. 31.8.2.

60. USMCA, art. 31.8(1) (emphasis added).

61. USMCA, art. 31.8.

62. NAFTA, art. 2022; USMCA, art. 28.23.

63. TPP, art. 28.23.

64. See NAFTA 2022 Committee, http://bit.ly/2VovcKG.

65. See, for example, Central America-United States-Dominican Free Trade Agreement (Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, United States), August 5, 2015, http://bit.ly/2FPw4l3, art. 20.22(4).

66. "Lighthizer Floats Section 301 as Potential Enforcement Tool for USMCA," *World Trade Online*, Feb. 6, 2019, http://bit.ly/2Vk6Fq5.

67. Section 301 of the Trade Act of 1974, as amended, Pub. L. 93-618, 19 U.S.C. § 2411.

68. See "Analysts Debate Section 301's Potential as a USMCA Enforcement Tool," *World Trade Online*, Feb. 7, 2019, http://bit.ly/2YOOkDZ.

69. Section 301(a) (1) (19 U.S.C § 2411(a) (1).) The latter is further defined as being limited to violations of trade agreements.

70. Section 301(a)(2).

71. See United States—Sections 301-310 of the Trade Act 1974, WT/DS152, adopted January 27, 2010 (finding that Section 301 was not inconsistent with GATT or WTO provisions based on U.S. claims in the Statement of Administration action that Section 301 would not be used except in conformity with GATT and the WTO Agreements), http://bit.ly/2YOOQBV.

72. See USTR, "Update Concerning China's Acts, Policies and Practices Related to Technology Transfer, Intellectual Property, and Innovation," Nov. 20, 2018, http://bit.ly/2ORjMwx.

73. Section 301(c).

74. Section 301(d)(3)(A).

75. See "Section 232 Tariffs on Aluminum and Steel," U.S. Customs and Border Protection, 2018, http://bit.ly/2K7ufFE.

76. See "Current Foreign Retaliatory Actions," International Trade Administration, U.S. Department of Commerce, July 2018, http://bit.ly/2uMrVti.

77. "Analysts Debate Section 301's Potential."

78. USTR, "Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, Office of the U.S. Trade Representative, March 5, 2019, http://bit.ly/2VVf1Fe.

79. See "Analysts Debate Section 301's Potential."

80. bid.

81. 19. U.S.C § 2412(a)(1).

82. 19. U.S. § 2412(a)(2) and (3).

83. 19 U.S.C § 2411 (d)(B)(iii).

84. Simon Lester, "Section 301 as an Enforcement Tool for the USMCA," *International Economic Law and Policy Blog*, Feb. 7, 2019.

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