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ADDRESSING DISPUTE RESOLUTION INSTITUTIONS IN A NAFTA RENEGOTIATION

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"Addressing Dispute Resolution Institutions in a NAFTA Renegotiation"

I. Introduction

One of the major challenges facing the three NAFTA parties as they continue a long, difficult, and very possibly unsuccessful process of updating and modifying NAFTA will be what changes to make with regard to the major cross-border institutions. Because NAFTA[1] is a trilateral agreement, these challenges necessarily face all three NAFTA parties if they all remain parties.[2] The only uniquely U.S.-Mexico cross-border institutions of this nature are the North American Development Bank (NADBank) and the Border Environment Coordination Commission (BECC),[3] both of which are discussed in a separate paper.[4] In contrast, the three major NAFTA institutions discussed in this paper deal with two borders— those between the United States and Mexico and the United States and Canada— not just the southern border.

The term "institution" is a mixed one in NAFTA parlance because of the aversion of the United States against creating new institutions. Thus, there is an ad hoc nature to most of the NAFTA institutions with, for example, the absence of anything that could be characterized as a NAFTA "court." While U.S., Mexican, and Canadian sections of the NAFTA Secretariat exist, they are effectively small offices in the respective departments of commerce or foreign trade. The only quasi-independent institutions originating as part of the NAFTA package are the Commission on Environmental Cooperation (CEC) and its secretariat, created under the North American Agreement on Environmental Quality (NAAEC).[5]

This discussion focuses on dispute settlement institutions but also discusses border impacts. Part II addresses the NAFTA mechanisms for dispute settlement in investment, unfair trade, and state-to-state controversies over application and interpretation of NAFTA

[1] North American Free Trade Agreement [United States, Canada, Mexico], December 15, 1992, accessed August 25, 2017, https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement.

[2] In the event that the United States terminates NAFTA under Article 2205, it would remain in force for Mexico and Canada unless one or both took additional action to terminate it. However, that would eliminate the concept of NAFTA cross-border institutions. Under the NAFTA Implementation Act of 1993, were NAFTA to be terminated, the United States-Canada FTA of 1988 would become effective again without further congressional or executive branch action. See North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, §107(c)(3) (1993), providing in pertinent part that "[o]n the date the United States and Canada agree to suspend the operation of the [CFTA] by reason of the entry into force between them of the North American Free Trade Agreement, the following provisions of this Act are suspended and shall remain suspended until such time as the suspension of the [CFTA] may be terminated," and going on to list those referenced provisions. U.S.-Mexico cross-border institutions would disappear unless replaced by those under a new bilateral trade agreement with Mexico.

[3] Over the 20-plus years of their existence, NADBank and BECC activities have been devoted to the facilitation of financing for border environment projects primarily relating to sewage treatment and clean water. See BECC, "Our Impact Along the Border Region, Certified Projects," 2017, http://www.becc.org/our-impact/border-region.

[4] This report is part of the Baker Institute Mexico Center's project "Binational Institutional Development on the U.S.-Mexico Border," which has commissioned a series of papers to be published as a book by the end of the project.

[5] NAAEC, December 15, 1992, http://www.sice.oas.org/trade/nafta/Environ.asp.

(Chapters 11, 19, and 20, respectively), along with the NAFTA Secretariat (which manages Chapter 19 and 20 disputes). Sections A-D each discuss the formation and operations of each of the institutions, including the NAFTA Secretariat. In each, possible changes (including the elimination) that might take place in a NAFTA renegotiation are reviewed. The focus is on the changes proposed by the Trump administration or stakeholder groups, or by Canada and Mexico. NAFTA is not likely to be denounced by the Trump administration based on the results of discussions of the dispute settlement mechanisms *per se*, but the perceived success or lack of success by the U.S. government in seeking changes to, or the elimination of, dispute settlement will undoubtedly influence the administration's decision to preserve or terminate NAFTA. Part III of the paper discusses the impact of the dissolution of NAFTA on trade aspects of cross-border economic relations, and comments briefly on the cross-border groups that might—but to date have not—had a major impact on efforts to preserve the benefits of NAFTA. Finally, Part IV constitutes a conclusion and recommendations for treatment of the noted institutions as part of a NAFTA renegotiation.

The positions of the NAFTA parties have only partially emerged through seven negotiating rounds occurring between August 2017 and March 2018, but this process has been dominated by U.S. proposals and the reaction of Canada and Mexico to them. For the United States, the initial documents are the summary of the administration's negotiating objectives, a vague listing presented to Congress on July 17, 2017;[6] the "Opening Statement of USTR Robert Lighthizer at the First Round of NAFTA Negotiations" on August 16, 2017;"[7] and a revised list of negotiating objectives presented to Congress in November 2017.[8] The first document in itself is relatively innocuous, raising major controversy only in suggesting again that one of the U.S. objectives is reduction of trade deficits (unrealistic in a "free" trade agreement), and suggesting elimination of NAFTA's review of national administrative unfair trade decisions under Chapter 19 (discussed in Part II below), and a few other areas.[9] November's revised objectives provide a slightly more specific discussion of U.S. government positions, but still leave the details unstated.

[6] U.S. Trade Representative (USTR), "Summary of Objectives for the NAFTA Renegotiation," July 2017, https://insidetrade.com/sites/insidetrade.com/files/documents/jul2017/wto2017_0234a.pdf (subscription required), or https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf.
[7] USTR, "Opening Statement of USTR Robert Lighthizer at the First Round of NAFTA Renegotiations," August 16, 2017, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/august/opening-statement-ustr-robert-0.
[8] USTR, "Summary of Objectives for the NAFTA Renegotiation," November 2017, https://insidetrade.com/sites/insidetrade.com/files/documents/nov2017/wto2017_0375a.pdf (subscription required), or https://ustr.gov/sites/default/files/files/Press/Releases/Nov_Objectives_Update.pdf.
[9] U.S. Objectives, July 2017, 14.

Lighthizer's opening statement, in contrast, is considerably more threatening because of the focus on trade deficits above all else:

> "We cannot ignore the huge trade deficits, the lost manufacturing jobs, the businesses that have closed or moved because of incentives—intended or not—in the current agreement … [O]ver the last 10 years, our deficit in goods has exceeded $365 billion. The views of the President about NAFTA, which I completely share, are well known. I want to be clear that he is not interested in a mere tweaking of a few provisions and a couple of updated chapters. We feel that NAFTA has fundamentally failed many, many Americans and needs major improvement."[10]

It is relevant here to observe that NAFTA and other free trade agreements (FTAs) cannot by their nature reduce trade deficits, which are effectively a result of a variety of domestic policies such as corporate tax rates and other factors that affect personal and corporate savings rates. As Martin Feldstein, the chairman of President Reagan's Council of Economic Advisers, has observed, "foreign import barriers and export subsidies are not the reason for the U.S. trade deficit. The real reason is that Americans are spending more than they produce. The overall trade deficit is the result of the saving and investment decisions of U.S. households and businesses."[11] If the United States insists on seeking to reduce the trade deficit with Mexico primarily through the NAFTA renegotiations, the renegotiations will fail.

The details of the U.S. negotiating positions were most extensively fleshed out in the fourth session in October 2017, but have been repeated in subsequent negotiating sessions. This non-exhaustive list includes:

- U.S. rather than North American content rules for the manufacture of automobiles and perhaps other products, with 82.5 percent of North American content (up from 62.5 percent), including 50 percent U.S. content (including steel and aluminum).[12]
- Limitation of the U.S. government procurement market to the same dollar value as U.S. procurement sales to entities of the other two parties, an impractical restriction given that the U.S. economy is 18-20 times the size of the economies of Mexico or Canada.
- A partial roll-back of U.S. textile and clothing market access through greater restrictions on the use of non-North American fabrics and yarns.
- Increases in the so-called "unfair" trade remedy protection for U.S. growers against imports of labor-intensive winter fruits and vegetables such as tomatoes and berries

[10] Lighthizer opening statement, 2017.
[11] Martin Feldstein, "Inconvenient Truths About the U.S. Trade Deficit," Project Syndicate, April 25, 2017, https://www.project-syndicate.org/commentary/america-trade-deficit-inconvenient-truth-by-martin-feldstein-2017-04?barrier=accessreg.
[12] See CNBC, "U.S. Seeks to Include Steel, aluminum in NAFTA Autos: Sources," October 13, 2017, noting also the proposal for a 50 percent U.S.-specific content and an increase in the total North American content to 85 percent, https://www.cnbc.com/2017/10/13/us-seeks-to-include-steel-aluminum-in-nafta-autos-rules-sources.html.

from Mexico. (This is apparently designed to counteract Mexico's comparative advantages in labor costs, lower humidity, and a more favorable winter climate.)[13]

- Removal of the highly contentious provisions in NAFTA that permit Mexican and United States cross-border carriage of goods by motor freight on a reciprocal basis.[14]
- A "sunset" provision under which a revised NAFTA could be reviewed and terminated by the United States after five years on the basis of as yet undefined criteria, throwing the entire process into further uncertainty.
- Elimination of Chapter 19 (antidumping [AD]/countervailing duty [CVD]) binational panel) protections against unfair trade practice actions imposed by the United States.[15]
- Conversion of 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 ignore panel decisions that in the view of the United States are "clearly erroneous."[16]
- A provision that would allow a party (e.g., the United States) to opt out of investor-state dispute settlement (ISDS) protection for inward investment, without necessarily providing reciprocal protection for the governments of Mexico and Canada.[17]

Only the last three items in this list address dispute settlement directly. However, the full list is reproduced here because several of the other items—including those relating to autos and auto parts; textiles and clothing; fruit and vegetables; and cross-border trucking—will have a disproportionate impact on the Mexican border if the changes are accepted by Canada and Mexico or, more likely, if Canadian and Mexican refusals lead to the dissolution of NAFTA.

Also relevant are the negotiating objectives set out on the current Trade Promotion Authority (TPA) legislation enacted in 2015,[18] which contains *inter alia* negotiating objectives agreed upon by the Congress and the Obama administration, many of which were incorporated into the Trans-Pacific Partnership (TPP). (It is unclear to what extent these objectives are consistent with as yet unarticulated Trump administration objectives in

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[13] See Caitlin Dewey, "How a Group of Florida Growers Could Help Derail NAFTA," *The Washington Post,* October 16, 2017, noting efforts of Florida tomato growers to increase their protection against Mexican competition, https://www.washingtonpost.com/business/economy/how-a-group-of-florida-tomato-growers-could-help-derail-nafta/2017/10/16/e1ec5438-b27c-11e7-a908-a3470754bbb9_story.html?utm_term=.92fc11aa67c7.

[14] World Trade Online, "USTR Considering a Carveout for Cross-Border Trucking Services in NAFTA," October 6, 2017, https://insidetrade.com/daily-news/ustr-considering-carveout-cross-border-trucking-services-nafta. See also *Cross-Border Trucking Services,* USA-MEX-1998-2008-01, February 6, 2001, https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Decisions-and-Reports.

[15] Josh Wingrove and Eric Martin, "U.S. Proposes Gutting NAFTA Legal Dispute Tribunals," *Bloomberg Markets*, October 14, 2017, https://www.bloomberg.com/news/articles/2017-10-14/u-s-is-said-to-propose-gutting-nafta-legal-dispute-tribunals.

[16] Ibid.

[17] Ibid.

[18] Bipartisan Congressional Trade Priorities and Accountability Act of 2015, P.L. 114-26, June 29, 2015, sec. 102, https://www.congress.gov/114/plaws/publ26/PLAW-114publ26.pdf.

the NAFTA renegotiation.) Discussions of the positions of the Canadian and Mexican governments are drawn primarily from public statements of various officials. A further likely major source of changes in the NAFTA text is found in the provisions of the Trans-Pacific Partnership,[19] since all three NAFTA parties participated in the negotiations and signed the TPP (even though the Trump administration has withdrawn).[20] Both Mexican and U.S. officials have suggested that the TPP provisions could be used as a "starting point" for the NAFTA renegotiation.[21]

A strong word of caution is in order. At this writing, March 2018, the formal NAFTA negotiations have been underway for only seven months, and few contentious issues appear to have been agreed upon. It is thus impossible at this time to predict what changes, if any, will accepted by the three NAFTA parties in these institutions, whether a single revised NAFTA will be agreed upon, whether NAFTA will be divided into two bilateral agreements between the United States and Canada and the United States and Mexico, or whether after failure of the negotiations NAFTA will be terminated between the United States and one or both of the NAFTA parties. Whether or not a revised NAFTA can be approved by the U.S. Congress is also an open question, given that NAFTA remains unpopular and deeply controversial in Congress.[22] It is also impossible to know how long the negotiations will last. While the Trump administration hoped that the negotiations could be concluded by December 31, 2017, the deadline was extended to March 31, 2018[23]—and the negotiations may not be concluded until early 2019, given the difficulties of effectively negotiating during Mexico's presidential campaign (April-June 2018) and the U.S. congressional campaign (March into November 2018).

Moreover, there remains throughout the negotiations a risk that the administration will become impatient with the progress (or lack thereof) and simply notify Canada and Mexico that the United States is withdrawing from NAFTA, as the president has threatened on numerous occasions, as on October 25, 2017, to give notice of U.S. withdrawal from NAFTA[24] (perhaps as a highly risky negotiating tactic).

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[19] Trans-Pacific Partnership, February 4, 2016 [Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam], https://www.mfat.govt.nz/en/about-us/who-we-are/treaties/trans-pacific-partnership-agreement-tpp/text-of-the-trans-pacific-partnership.

[20] Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, January 23, 2017, https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific.

[21] Andrew Mayeda and David Gura, "Ross Says TPP Could Form Starting Point for U.S. on NAFTA Talks," *International Trade Daily,*May 11, 2017; World Trade Online, "Mexican Minister Says Aspects of TPP Could Be Put in Bilateral, Regional Deals," March 14, 2017.

[22] See Josh Wingrove and Andrew Mayeda, "Trump Reveals Start to NAFTA Talks as Canada, Mexico Huddle," 34 *International Trade Reporter* BBNA (July 27, 2017): 1049, quoting former acting deputy USTR Wendy Cutler, http://news.bna.com.ezproxy1.library.arizona.edu/itln/ITLNWB/split_display.adp?fedfid=117592271&vname=itrnotallissues&fn=117592271&jd=117592271.

[23] Andrew Mayeda, "Mexico, Canada Refused to Improve NAFTA Text, Lighthizer Says," *International Trade Daily*, October 18, 2017.

[24] *World Trade Online*, "Senators: Trump Called NAFTA Withdrawal Threat a 'Negotiating Tactic,' Urged Them to 'Trust' Him," October 25, 2017.

II. NAFTA's Principal Dispute Settlement Mechanisms and Institutions[25]

The North American Free Trade Agreement and its two parallel agreements on labor and on the environment incorporate a broad and sometimes confusing variety of mechanisms for resolving the disputes that relate to the interpretation and application of certain NAFTA provisions in specific situations. Essentially, there are five distinct dispute resolution procedures within the larger NAFTA framework for issues relating to:

- foreign investment and investor-state disputes (Chapter 11);
- appeals of antidumping and countervailing duty (unfair trade) actions by administrative agencies (Chapter 19);
- the interpretation and application of the agreement generally (Chapter 20), with a variation for financial services disputes (Chapter 14);
- the failure to enforce environmental laws (North American Agreement on Environmental Cooperation, or NAAEC); and
- the failure to enforce labor laws (North American Agreement on Labor Cooperation, or NAALC).

The discussion in Part II is limited to the first three, while aspects of the NAAEC (although not those related to dispute settlement) are addressed in Part III. (Labor law enforcement and dispute settlement is not addressed because there is no functional multilateral provision in NAFTA for that purpose.)

The wide range of dispute settlement procedures reflects the apparent views of the three NAFTA governments that disputes regarding NAFTA implementation were inevitable, and that third-party binding mechanisms for their prompt resolution were essential. National courts do not have or cannot exercise effective—and plausibly impartial—jurisdiction over most disputes between private individuals and foreign governments, or among governments, due to the sovereign immunity doctrine, act of state doctrine, concepts of comity, or other legal barriers[26]—with the possible exception of the unfair trade disputes area. In the foreign investment area, in particular, resolution of investor-host government disputes through local courts has been highly unsatisfactory.

The Dispute Settlement Body (DSB) under the World Trade Organization (WTO) now provides a viable alternative to the NAFTA government-to-government dispute settlement process under Chapter 20 for most trade disputes among the three NAFTA governments; that alternative did not exist in its present form at the time the NAFTA negotiations were

[25] The discussions of Chapters 11, 19, and 20 draw upon 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 Tribunals*, ed. Cesare P. Romano (Cambridge: University of Cambridge Press, 2009), 356.
[26] See, e.g., Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1330, 1332, 1391(f), 1441(d), 1602-11; Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), and subsequent cases relating to the act of state doctrine.

concluded. Yet the WTO and the DSB do not effectively extend to certain areas covered by NAFTA, such as foreign investment and land transportation services.[27]

The NAFTA mechanisms share some common threads. First, the major three have largely been copied from previously existing dispute settlement procedures. Chapters 19 and 20 were cut and pasted, with minor modifications, from Chapters 19 and 18, respectively, of the United States–Canada Free Trade Agreement (CFTA), which preceded NAFTA by five years, and the NAFTA negotiations by three years; likewise were the provisions guaranteeing certain rights to foreign investors, although the CFTA did not provide for mandatory investor-state arbitration.[28] They also share a similar secretariat, discussed in sub-section 2, below.

A. Resolution of Investment Disputes (Chapter 11)

1. Chapter 11 under NAFTA

The Chapter 11 provisions represented for what was the time the most advanced stage in the evolution of international investment law in agreements concluded by the United States. Logically enough they were adapted from the several hundred bilateral investment treaties the United States and other OECD countries had concluded in the 1980s.[29] There was nothing particularly radical about Chapter 11 for the United States. The sources were the CFTA Chapter 16 (for the obligations to investors language) and the various bilateral investment treaties (BITs) concluded by the United States with several dozen developing nations since 1980, particularly the 1992 U.S. "model" BIT.[30] Protection of U.S. foreign investment abroad has been a hallmark of U.S. international economic law at least since the early 1960s, with various efforts to establish the international law principle of "prompt, adequate, and effective compensation" following the Cuban and Brazilian expropriations. The inclusion in NAFTA of a compulsory arbitration procedure to settle investment disputes must have been seen as a major achievement for the U.S. Departments of State and Treasury and the U.S. Trade Representative's Office (USTR), considering that it overturned many decades of Mexico's adherence to the Calvo Clause[31] and a long and troubled history of investment disputes with the United States.

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[27] See NAFTA, Chapters 11 (foreign investment) and 12 (cross-border trade in services), especially Annex I (regarding transportation services); WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Annex 2 to the Agreement Establishing the World Trade Organization, http://www.wto.org.

[28] See United States-Canada Free Trade Agreement, Dec.-Jan. 1998 [United States and Canada], 27 I.L.M. 281, Chapter 16.

[29] Daniel M. Price and P. Bryan Christy, III, "Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement" in *The North American Free Trade Agreement: A New Frontier in International Trade and Investment in the Americas,* eds. Judith H. Bello et al., (New York: American Bar Association, 1994), 165, 167; see also K. Scott Gudgeon, "United States Bilateral Investment Treaties: Comments on Their Origin, Purposes and General Treatment Standards" *International Tax & Business Law* 4 (1986): 105.

[30] See United States of America, Bilateral Investment Treaties, UNCTAD, International Investment Agreements, http://investmentpolicyhub.unctad.org/IIA/CountryBits/223 (listing 47 U.S. BITs).

[31] Named for Argentina jurist Carlos Calvo, who argued that investment disputes between foreign investors and host nations should be subject only the national courts of the host nation, without any effort by the home state to exercise its customary international law right of diplomatic protection.

The investment provisions of NAFTA were considered significant for U.S. and Canadian investors in Mexico, and for Mexico, which sought through NAFTA to encourage foreign investment, promote economic development, generate foreign exchange, and partially overcome the negative effects of a weak legal system. In this respect, Chapter 11 probably helped, generating an average of about $9 billion annually in U.S. direct foreign investment in Mexico during the first 10 years of NAFTA.[32] While it is difficult to separate the influences of other NAFTA provisions—particularly the elimination of tariffs on most Mexican exports to Canada and the United States[33]—and the rules of origin that limit the NAFTA tariff benefits to goods that "originate" within North America,[34] the existence of "rules of the game" for foreign investment and the provisions applicable to investment disputes undoubtedly contributed to this strong growth, given traditional concerns about the independence of court systems in developing countries.

Chapter 11 contemplates the likelihood of disputes between a foreign investor or service provider and the host government or an agency thereof. Foreign investors may seek arbitration under Chapter 11 of any of the obligations guaranteed under Section A of Chapter 11, such as most favored nation (MFN) treatment, freedom from export or local content performance requirements, and the right to make most financial transfers.[35] However, judging from the cases litigated through 2017, the most significant and controversial investors' protections in Section A are the rights to national treatment, to "fair and equitable treatment," and to fair compensation in the event of expropriation or nationalization, direct or indirect.[36] Tribunals established under Chapter 11 "decide the issues in accordance with this Agreement and applicable rules of international law." National law is not relevant, except to the extent tribunals must analyze government measures (including national legislation) challenged, to determine whether they constitute violations of NAFTA or international law at large.

Chapter 11, Section B, provides detailed provisions designed to facilitate the binding resolution of such disputes through compulsory arbitration, normally through the World Bank's International Center for the Settlement of Investment Disputes (ICSID) if both the investor's country and the host country are parties to the ICSID Convention. The ICSID Additional Facility, in contrast, is available if only one—the host state or the investor's home state—is party to the ICSID Convention. In all instances, arbitration under the arbitral rules of the United Nations Commission on International Trade Law (UNCITRAL) is available as an alternative. In this respect, Chapter 11 differs significantly from Chapters 19 and 20, in that procedurally Chapter 11 takes advantage of existing arbitral mechanisms, without creating any new ones. These mechanisms are not mandatory for the foreign investor who may elect to submit disputes to the local courts.

[32] Price and Christy, "Overview," 167, especially note 6.
[33] NAFTA, Chapter 3.
[34] NAFTA, Chapter 4.
[35] NAFTA, arts. 1103, 1106 and 1109.
[36] NAFTA, arts. 1102, 1105 and 1110.

NAFTA investment protection provisions have produced a significant volume of litigation over 23 years. Nearly 70 notices of arbitration have been filed by foreign investors against NAFTA host governments, 35 against Canada, 22 against Mexico, and 20 against the United States, including those that are dormant or abandoned,[37] and nearly 30 Chapter 11 arbitral awards or other dispositive opinions have been rendered on the merits.[38] A handful (*Methanex v. United States, Loewen v. United States, Glamis Gold v. United States, the Corn Products cases* [against Mexico]*, Clayton/Bilcon v. Canada* and *Eli Lilly and Company v. Canada*, among others[39]) have generated considerable attention among the NAFTA member governments, the foreign investment bar, and nongovernmental organizations that are concerned with environmental protection, alleged erosion of national sovereignty or other problems, real or imagined. More than six cases, each requiring the payment of monetary damages, have been rendered against Canada[40] and against Mexico,[41] but no monetary damages have been awarded to date against the United States. However, none of the cases between the United States and Mexico appear to have had a focus on the border region.

2. Possible Changes in a NAFTA Renegotiation

The idea of revising the investment provisions of NAFTA is not new. More recent U.S. and Canadian FTA investment chapters—beginning with U.S. FTAs negotiated in 2003-04 with Chile and Singapore, through Chapter 9 of TPP—have seen the pendulum swing from broadly protecting the foreign investor to preserving the host state's regulatory flexibility, particularly in areas relating to so-called "indirect" expropriations. Transparency has also been greatly increased.[42]

Incorporating the TPP investment provisions into a revised NAFTA seems a reasonable possibility for several reasons. The three NAFTA parties, all of which have had considerable experience in defending their governments in investor-state dispute settlement (ISDS) cases as noted above, approved the text of TPP Chapter 9 in an agreement that all signed in February 2017. The TPP incorporates a version of investment protection that increases the regulatory flexibility of host governments and the transparency of the process while decreasing somewhat the rights of foreign investors.

That being said, ISDS in particular remains controversial in the United States. Many Democratic (or Democratic Socialist) members of the Senate have long opposed ISDS because of the belief that it may encourage U.S. enterprises to shift jobs abroad. These include Senators Bernie Sanders and Elizabeth Warren, among others. For example, in an op-ed piece for *The Washington Post* in the course of the congressional TPA debates, Warren attacked ISDS: "Agreeing to ISDS in this enormous new treaty [TPP] would tilt the playing field in the United States further in favor of big multinational corporations. Worse, it

[37] U.S. Department of State, NAFTA Investor-State Arbitrations, https://www.state.gov/s/l/c3439.htm.
[38] Ibid.
[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] See, e.g., David A. Gantz, "Increasing Host State Regulatory Flexibility in Defending Investor-State Disputes: The Evolution of U.S. Approaches from NAFTA to the TPP," 50 *The International Lawyer* 231 (2017).

would undermine U.S. sovereignty."[43] More recently, others in Congress, mostly Democrats, including those who have opposed ISDS in the past, including during the TPA renewal debates in 2015, have renewed criticism of any form of ISDS and urged that such investment provisions be excluded from a revised NAFTA, on the grounds that "NAFTA's Chapter 11 makes it less risky and cheaper for U.S. firms to relocate offshore by guaranteeing privileged treatment for firms in Mexico and Canada and by providing for the enforcement of these new rights through the Investor-State Dispute Settlement (ISDS) mechanism."[44] The AFL-CIO has also been a consistent opponent of ISDS in trade agreements, whether in the TPP, Comprehensive Economic and Trade Agreement (CETA), Transatlantic Trade and Investment Partnership (TTIP), or TPA legislation.[45]

Lighthizer's opening statement says only "The dispute settlement provisions should be designed to respect our national sovereignty and our democratic processes."[46] However, more recently, the Trump administration, led by Lighthizer, has apparently endorsed the views of ISDS opponents by proposing that ISDS be made voluntary, through the inclusion of an opt-in provision that would allow each of the three NAFTA parties to decide whether to use the provision.[47] For all practical purposes, this would eliminate ISDS in a revised NAFTA because a failure of the United States to accept ISDS in cases against the United States would undoubtedly cause Canada and Mexico to do the same in cases against them.

Lighthizer has strongly and repeatedly articulated his view that ISDS is an unfair subsidy for business, and understands Chapter 11 has long been a flashpoint for anti-NAFTA union groups and activists, suggesting that its elimination might encourage support for a revised NAFTA by some Democrats.[48] Whether the elimination of ISDS would prevail given its fervent support from the U.S. business community remains to be seen. A coalition of business groups including the Business Roundtable, National Association of Manufacturers, and the U.S. Chamber of Commerce have formally attacked the opt-in, opt-out concept, contending that "Attempts to eliminate or weaken ISDS will harm American businesses and workers and, as a consequence, will serve to undermine business community support for the NAFTA modernization negotiations."[49]

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[43] Elizabeth Warren, "The Trans-Pacific Partnership Clause Everyone Should Oppose," *The Washington Post*, February 25, 2015, https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html?utm_term=.b6898dc6f0d4.
[44] See *World Trade Online*, "House Democrats Lay Out a NAFTA Wishlist," June 15, 2017, quoting a letter sent June 12 to USTR Robert Lighthizer by 10 House Democrats.
[45] See *International Musician*, "Labor Groups Oppose ISDS in Trade Agreements," May 1, 2015, https://internationalmusician.org/labor-groups-oppose-isds-in-trade-agreements/.
[46] Lighthizer opening statement.
[47] Josh Wingrove and Eric Martin, "U.S. Proposes Gutting NAFTA Legal Dispute Tribunals," *Bloomberg Markets*, October 14, 2017, https://www.bloomberg.com/news/articles/2017-10-14/u-s-is-said-to-propose-gutting-nafta-legal-dispute-tribunals.
[48] See Shawn Donnan and Jude Webber, "Bitter Differences Over NAFTA Break into the Open," *Financial Times,* October 17, 2017, https://www.ft.com/content/058aa538-b387-11e7-a398-73d59db9e399.
[49] Rossella Brevetti, "Business Groups Warn Administration Not to Weaken ISDS Provisions," *International Trade Daily*, August 25, 2017,

However, it is reasonable to assume that the proposal would not draw broad opposition from Canada and Mexico. By late February 2018, it appeared that both Canada and Mexico were prepared to join the United States in eliminating ISDS, at least as between the United States and Canada and the United States and Mexico.[50]

Should the parties nevertheless decide to maintain some form of ISDS, its scope might be narrowed, as by eliminating coverage for "fair and equitable treatment," indirect expropriation (regulatory takings), and reasonable expectations of foreign investors.

B. Review of Administrative Decisions in Unfair Trade Disputes (Chapter 19)[51]

1. History, Overview, and Experience Under Chapter 19

Chapter 19 is unique in FTAs, existing only in the CFTA and the NAFTA. It is loved by Canada, disliked intensely by the United States, and appreciated but not worshipped by Mexico. This innovative dispute settlement mechanism provides for binational panel review of antidumping (AD) and countervailing duty (CVD) actions brought in one NAFTA member country against imports from another NAFTA country, in place of their review by national courts. Numerous such actions have been brought by national industries over the past two decades against the commodities of other NAFTA countries, in steel and steel products, beef, swine and other agricultural products, high fructose corn syrup, cement, and softwood lumber, among others. As of 2017, 73 decisions and reports on Chapter 19 actions had been issued, 44 against the U.S. authorities, 14 against Canadian authorities, and 15 against the Mexican authorities.[52] Some 70 others were terminated by the request of the parties.[53] As of mid-2017, six proceedings remained pending.[54] Several of these, such as those involving cement, have had major implications for the border region. The cement case, for example, for more than a decade made it prohibitively expensive for Arizona consumers to import cement from Sonora. The recent case against Bombardier aircraft exports from Canada[55] could indirectly affect the newly developed aircraft industry parts business crossing the border between Arizona and Sonora, even though the MFN duties on such products are zero under WTO rules.[56]

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http://news.bna.com/tdln/TDLNWB/split_display.adp?fedfid=119513974&vname=itdbulallissues&jd=0000015e157fd844a3df5d7fbab00000&split=0.

[50] *World Trade Online*, "Sources: Canada to Promise Eliminating ISDS at Meeting this Week; USTR to Agree," February 21, 2018.

[51] This subsection draws on Gantz, *The United States and Dispute Settlement*.

[52] NAFTA Secretariat, U.S. Section, Decisions and Reports 7, https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Decisions-and-Reports.

[53] NAFTA Secretariat, U.S. Section, Status Report of Panel Proceedings, https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Status-Report-of-Panel-Proceedings.

[54] Ibid.

[55] See Ana Swanson and Ian Austin, "Trump Talks Tough on China and Mexico, but Trade Actions Hit Canada," *The New York Times*, September 27, 2016, https://www.nytimes.com/2017/09/27/us/politics/bombardier-boeing-trade-trump.html?_r=0.

[56] Agreement on Trade in Civil Aircraft, Annex 4(a) to the WTO Agreement, April 15, 1994, https://www.wto.org/english/docs_e/legal_e/air-79_e.htm.

The Canadian motivating force behind Chapter 19 was the adamant refusal of the United States to provide Canada with an exemption from U.S. antidumping and countervailing duty laws, a position that threatened to block agreement on CFTA. The United States agreed to the Chapter 19 process and Canada temporarily abandoned demands for special trade remedy treatment—distinct from that available in the WTO/General Agreement on Tariffs and Trade (GATT) system—to be applicable in the United States and Canada.[57] This apparently allayed Canadian concerns about the costs and delays of the appellate process in antidumping and countervailing duty appeals to the U.S. courts, but most importantly because of their belief that these courts had been overly deferential to the determinations of the Department of Commerce and the U.S. International Trade Commission. Chapter 19 removed AD/CVD appeals from the jurisdiction of the federal courts of the United States and Canada, and assured that at least two Canadians would sit on any binational panel reviewing a U.S. agency decision.

Canada successfully insisted on carrying over the mechanism into NAFTA; it would have been politically impossible for Ottawa to give up the hard-won mechanism that had secured the CFTA only a few years earlier. Mexico favored Chapter 11 for reasons basically like those articulated by Canada; it would not have been feasible to provide the benefit to Canada without treating Mexico in the same manner. Mexico, as part of the negotiations, agreed to make major procedural reforms in the administration of its antidumping and countervailing duty laws, and to create a general right of judicial review of antidumping and countervailing duty determinations.[58] In the author's personal experience, at least, these have been significant benefits for U.S., Canadian, and other exporters to Mexico who wished to contest Mexican administrative rulings.

Chapter 19 is a hybrid system. It is binational in the sense that the panelists are nationalists of the two NAFTA parties engaged in the dispute. However, the national unfair trade laws of the party imposing the penalties, including its standard of review, rather than provisions of the GATT and WTO agreements, are controlling.[59] Panel procedures are in large part governed by tri-national rules and the Article 1904 Rules of Procedure as agreed by the three NAFTA parties, but with reference to national law where the rules do not apply.

Despite the generally perceived success of the Chapter 19 process, by 1999 political and financial support began to decline among the parties and controversy arose over several high-profile cases, including softwood lumber and pork and live swine. There is no effective review of a panel decision except where there is an allegation of gross misconduct, bias, or serious conflict of interest, where the panel decision departs from a fundamental rule of procedure, or where the panel exceeds its power, authority, or jurisdiction or fails to apply the proper standard of review, and such action materially affects the decision, and "threatens the integrity of the panel process." In such instances alone, a procedure before a

[57] For a more detailed discussion of the history and rationale for the incorporation of the Chapter 19 mechanism in CFTA and subsequently in NAFTA, as discussed in this and the next several paragraphs, see Gantz, *The United States and Dispute Settlement*, 375-385.
[58] NAFTA, annex 1904.15 (Mexico).
[59] NAFTA, arts. 1904(2), 1904(3).

special three-person review panel—the Extraordinary Challenge Committee (ECC)—is contemplated.[60] This ECC has been used only by the United States, and the U.S. has never prevailed, probably because of the extremely narrow standard of review as noted above. With the most recent group of trade actions by U.S. stakeholders against Canadian lumber moving forward, it can reasonably be predicted that U.S. government unhappiness with Chapter 19 and the ECC will continue in the future.

2. Possible Changes in a NAFTA Renegotiation

Chapter 19 has never been popular in the United States. Constitutional challenges against the panel process have been raised, with plaintiffs arguing, *inter alia*, that the appointment of panelists without the advice and consent of the Senate is a violation of the "appointments" clause of the United States Constitution, Article II, sec. 2(2), and that the removal of jurisdiction of the federal courts in favor of panels violates Article III, sec. 1.[61] All constitutional challenges to the panel process to date have failed.[62] Counsel for U.S. industries that file AD/CVD cases tend to be much less favorably inclined toward the binational panel process than those representing foreign producers, because the panels are thought to be less likely to affirm national administrative agencies than are the U.S. courts. It is thus not surprising that Chapter 19 is a U.S. target for elimination in the NAFTA renegotiations. The U.S. Summary of Objectives, as noted above, states simply, "Eliminate the Chapter 19 dispute settlement mechanism."[63]

However, efforts to eliminate Chapter 19 face resistance from Canada and Mexico. Canada's core objectives for the NAFTA renegotiation state: "Preserve Chapter 19."[64] Mexico apparently has concerns in the event Chapter 19 is eliminated, but the United States has not suggested an alternative.[65] Mexico has not objected to possible "modernization" of Chapter 19 but has not accepted its elimination.[66] One expert observer, Ricardo Ramirez, wisely advocates a more nuanced approach: "Chapter XIX was vital to reach an agreement in 1989 and in 1994; Mexico also considered its inclusion important.

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[60] NAFTA, art. 1904(13); annex 1904.13.

[61] See Harry B. Endsley, "Dispute Settlement Under the CFTA and NAFTA: From Eleventh-Hour Innovation to Accepted Institution," *Hastings International and Comparative Law Review* 18 (1995): 659, 671-72; *International Trade Daily* (BNA), "NAFTA: Group Files Constitutional Challenge to NAFTA, Binational Panel System," January 17, 1997, at D-5.

[62] See, e.g., *American Coalition for Competitive Trade v. United States,* 128 F.3d 761 (D.C. Cir. 1997) (dismissed for lack of standing); *Made in the USA Foundation v. United States,* 242 F.3rd 1300, 1319-20 (11th Cir. 2001) (holding that plaintiffs had standing to bring the action, but that the issue of whether NAFTA was a treaty requiring the advice and consent of the Senate, or had properly been concluded as an executive agreement, was a non-justiciable political question).

[63] U.S. Statement of Objectives, 14.

[64] Canada's core objectives, no. 11.

[65] See Emily Pickrell, "NAFTA Draft Notice Gets Thumbs up from Mexico," *International Trade Representative* (BBNA) 34 (April 13, 2017): 597, quoting former Mexican Commerce Undersecretary Luis de LaCalle, http://news.bna.com/itln/ITLNWB/split_display.adp?fedfid=109285400&vname=itrnotallissues&wsn=483414500&searchid=30102112&doctypeid=1&type=date&mode=doc&split=0&scm=ITLNWB&pg=0.

[66] See Kate Linthicum, Mexico Enters New NAFTA Negotiations with Delicate Task: Give President Trump a 'Win' but Do No Harm, L.A. TIMES (Aug. 14, 2017, 3:00 AM), http://www.latimes.com/world/mexico-americas/la-fg-mexico-nafta-20170814-story.html (discussing how Mexico wishes to avoid a renegotiated NAFTA at their expense).

But balances change and faced with the prospect of a renegotiation, a thorough evaluation must be carried out after more than 20 years of operation."[67] He suggests an objective analysis to decide whether Chapter 19's deficiencies in terms infrastructure, decisions, timetables, and possible alternatives mean that "the deficiencies in the operation of the Chapter XIX mechanism outweigh the benefits of maintaining it."[68]

Other options may well be considered once the negotiations progress further. For example, the primary concerns of the United States appear to be with the Extraordinary Challenge Committee process. Conceivably, one compromise would be to substitute a broader appellate process for the ECC, with a less circumscribed standard of review, since it seems very difficult to conceive of a situation in which a particular panel decision "threatens the integrity of the panel process."[69] It is also conceivable that Canada would give up its demand for retention of Chapter 19 if the United States offered major concessions in return, a result I believe is unlikely.

C. State-to-State Dispute Settlement (NAFTA, Chapter 20)[70]

State-to-state settlement of international trade disputes has a long history. Dispute settlement provisions were included in the 1947 GATT,[71] and the 70 years of third party dispute resolution under the GATT and the WTO, with 528 filings in the WTO's Dispute Settlement Body between January 1, 1995, and July 31, 2017,[72] have proven their necessity. During the NAFTA negotiations the issue was not whether there should be such a mechanism but rather, how it should be structured. The model was Chapter 18 of CFTA rather than the GATT and the other WTO agreements. While the NAFTA negotiators were aware in 1991 and 1992 of the WTO's Dispute Settlement Understanding (DSU) draft, Canada and the United States both apparently sought to avoid wholesale renegotiation of CFTA, Chapter 18, and as a result NAFTA Chapter 20 closely followed that model.[73]

As in the case of Chapter 11 and 19 mechanisms, Chapter 20 of NAFTA raised concerns over the loss of U.S. sovereignty among some in Congress and with NGO groups (particularly those concerned with environmental regulation). To some extent, these concerns are dealt with in provisions permitting each NAFTA party to maintain its own environmental, sanitary, and phytosanitary standards.[74]

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[67] WTO Appellate Member, Chapter 19 panelist and professor at the National Autonomous University of Mexico, Ricardo Ramirez, Chapter XIX: The Hidden Gem of NAFTA," July 27, 2017, http://www.derechocomercialinternacional.net/blog/2017/7/27/chapter-xix-the-hidden-gem-of-nafta.
[68] Ibid.
[69] NAFTA, art. 1904(13).
[70] The initial parts of this section are based on Gantz, *The United States and Dispute Settlement*.
[71] General Agreement on Tariffs and Trade (1947), arts. XXII-XXIII, accessed August 26, 2017, https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm.
[72] See WTO, *Find Disputes Cases*, https://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm.
[73] Chapter 20 followed a similar approach to that of the DSU in seeking to put a limit on the level of retaliation by the prevailing party in a dispute, through providing for additional panel review—never used to date—if the retaliation levels were "manifestly excessive." (Art. 2019)
[74] NAFTA, art. 1904; see Bialos and Siegel, *Dispute Resolution Under NAFTA*, 327.

Like the WTO's Dispute Settlement Understanding, Chapter 20 calls first for consultation between the parties, followed by conciliation before the "Free Trade Commission" (the trade ministers of the three NAFTA countries), the convening of binational panels (arbitration) and, ultimately, implementation of the arbitral report.[75] The arbitral decision is not automatically applicable, and in that sense is not legally "binding" in the sense that the losing party may choose to suffer retaliation rather than changing its laws or practices. Rather, once the decision is rendered, the parties "shall agree on the resolution of the dispute, which *normally* shall conform with the determinations and recommendations of the panel."[76] However, the prevailing party may retaliate with trade sanctions 30 days after the issuance of the panel report, if the parties do not earlier reach an accord.[77]

The arbitral panel process contemplates the use of a standing roster of international legal experts, 10 designated by each NAFTA party, although as a general rule the NAFTA parties had not formally and publicly designated any of the roster members.[78] For each proceeding, a group of five arbitrators is to be chosen, primarily from the rosters; the chairperson is to be chosen by the two governments by agreement, with the choice by lot if there is no agreement.[79] Interestingly, in a unique "reverse selection process,"[80] one party chooses the two national arbitrators of the *other* party (e.g., in the dairy products[81] case, discussed below, the two Canadian panelists were selected by the United States from candidates offered by Canada).

Except for certain environmentally related matters, including those arising under the standards provisions of NAFTA, the NAFTA parties have a choice between resorting to NAFTA, Chapter 20, or the WTO procedures. This is because the NAFTA parties' existing rights and obligations under GATT and other agreements are explicitly reaffirmed and/or incorporated by reference in NAFTA.[82] Disputes relating to alleged conflicts between NAFTA and certain environmental agreements, and regarding the application of NAFTA provisions on the environment; or human, animal, or plant life; or health issues must be resolved under Chapter 20.[83] However, certain disputes among the NAFTA parties, such as disagreements over the consistency of national antidumping or countervailing duty laws

[75] NAFTA, arts. 2006-2017.
[76] *NAFTA,* art. 2018(1) (emphasis supplied).
[77] Ibid.
[78] It appears that the parties in the 1990s informally agreed on a roster of approximately five persons per party, but it was never adopted formally.
[79] NAFTA, art. 2011. Art. 2011(1)(c) provides that "[w]ithin 15 days of the selection of the chair, each disputing party shall select two panelists who are citizens of the other disputing party."
[80] According to a senior USTR official, with whom the author discussed the matter many years ago, this approach was suggested by Guillermo Aguilar, one of the principal Mexican NAFTA negotiators, in the belief that it would encourage governments nominating members of the standing rosters to be very careful about picking truly independent and objective individuals. Canada and the United States accepted the proposal.
[81] Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products, Case no. CDA-95-2008-01 (December 2, 1996), https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Decisions-and-Reports.
[82] NAFTA, art. 103(1).
[83] NAFTA, art. 2005(3-4).

with the WTO agreements, must be resolved through the WTO's dispute settlement procedure.[84]

During the first seven years of NAFTA, Chapter 20 was relatively extensively used but it has fallen into a state of disuse since 2001. To date, there have been only three regular Chapter 20 panel decisions and one non-NAFTA proceeding using Chapter 20 rules.[85] In the first, the United States charged that NAFTA required Canada to eliminate duties on certain dairy products (*Dairy Products*). The panel ultimately determined unanimously that Canada's actions were consistent with NAFTA.[86] In a second action, Mexico challenged the United States' application of safeguards to corn brooms from Mexico (*Brooms).* Mexico argued that the application of the safeguards was inconsistent with NAFTA, Chapter 8 and with the WTO Agreement on Safeguards. The panel, chaired by an Australian government official, found unanimously in favor of Mexico.[87]

The third proceeding involved the refusal of the United States to implement a NAFTA provision requiring the United States and Mexico, as of December 1995, to permit each other's trucking firms to carry international cargoes between the 10 Mexican and four U.S. border states (*Cross-Border Trucking Services* or *Trucks*).[88] Investment by Mexican firms in U.S. trucking companies had also been precluded. Mexico had charged that the United States had violated the national treatment and most-favored nation treatment provisions of Chapter 11 (investment) and Chapter 12 (cross-border services), as well as the specific provisions of Annex I imposing such obligations. The panel ultimately agreed with Mexico, although in recognition of legitimate safety concerns in the United States, it held that "to the extent that the inspection and licensing requirements for Mexican truckers and drivers wishing to operate in the United States may not be 'like' those in place in the United States, different methods of ensuring compliance with the U.S. regulatory regime may be justifiable."[89] Several reasons explain the disuse of Chapter 20. The United States government had not been satisfied with the results under CFTA, Chapter 18; several of the five cases decided

[84] There is no Chapter 20 jurisdiction over such matters under NAFTA Art. 2004, and only new national antidumping or countervailing duty laws may be challenged by the parties under NAFTA Art. 1903.
[85] The Softwood Lumber Agreement, May 29, 1996, 35 I.L.M. 1195, sought to resolve a long-running dispute between Canada and the United States over Canada lumber exports to the United States. That agreement contained an ad hoc dispute settlement mechanism that is based in part on NAFTA Chapter 20 (Art. V). An arbitral panel was convened in November 1998 to address an alleged violation of the agreement as a result of British Columbia's reduction of certain charges for harvesting timber from government-owned lands, "In the Matter of British Columbia's June 1, 1998, Stumpage Reduction." The panel, operating generally under the NAFTA Chapter 20 Rules of Procedure, reviewed briefs submitted by the parties, held a hearing, and drafted a decision, but the case was settled by the parties one day before the decision was due. See Exchange of Diplomatic Notes dated August 26, 1999. (The author was a member of the panel.)
[86] Agricultural Products, Case no. CDA-95-2008-01, December 2, 1996.
[87] U.S. Safeguard Action Taken on Broomcorn Brooms from Mexico, Case no. USA-97-2008-01 (January 30, 1998), https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Decisions-and-Reports.
[88] *In the Matter of Cross-Border Trucking Services*, Case no. USA-MEX-1998-2008-1 (February 6, 2001), https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Decisions-and-Reports.
[89] Id., para. 301; see also paras. 295-300, 302.

under those proceedings were thought to be poorly reasoned decisions, and there was no reason to believe that Chapter 20 would work better. Thus, even from the outset, there was healthy skepticism of the process.[90] Second, some of the major trade-related issues within the region—including post 9/11 security and immigration—are not easily addressed under NAFTA. NAFTA contains a "national security" exception in Article 2102 similar to Article XXI of GATT, which would make formal dispute settlement under Chapter 20 problematic. In fact, the NAFTA parties appear to have been successful in addressing issues of border security through negotiations and planning without resorting to dispute settlement.[91]

In addition, there appears to be a preference among all three NAFTA parties for the WTO dispute settlement over Chapter 20 procedures. Undoubtedly, this is at least partially a result of the lengthy delays in several cases—notably *Cross-Border Trucking Services*—that indicate significant procedural imperfections in the system, particularly with regard to the apparent inability of the parties to agree promptly on panelists.[92] Those who expect adjudicatory systems to follow set time limits and strict procedural rules, as at the WTO, are likely to find the NAFTA Chapter 20 system wanting. There is also a feeling among some U.S. government officials that it is better to have non-nationals than nationals of the parties as arbitrators.[93] Canada and Mexico, on the other hand, may well believe that when they are seeking changes in U.S. trade law measures and policy it helps to have support from other members of the WTO, who can participate in DSB actions as co-complainants or third parties.[94]

The U.S. reluctance to use Chapter 20 is probably best illustrated by the Mexican sugar case. This concerns U.S. market access to Mexican sugar, which Mexico considers to be directly related to a dispute over Mexican taxes on high fructose corn syrup. The Chapter 20 case remained pending for more than four years as U.S. authorities refused to appoint panelists, a refusal that was effectively supported by a WTO panel.[95] Later, when the

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[90] Discussion with a senior USTR negotiator, noted earlier.
[91] See "White House, Fact Sheet: Security and Prosperity Partnership of North America," March 23, 2005, committing the NAFTA parties, *inter alia*, to "develop a common security strategy to further secure North America," http://www.whitehouse.gov/news/releases/2005/03/20050323-4.html.
[92] See David A. Gantz, "Dispute Settlement Under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties," 14 *American University International Law Review* (1999): 1025, 1084. In *Cross-Border Trucking Services,* for example, there was a delay of approximately 15 months between the formal request by Mexico for a panel and agreement by Mexico and the United States on the panelists.
[93] The author recalls a conversation with one of the U.S. NAFTA negotiators some years ago in which the view was expressed that the foreign (e.g., Canadian or Mexican) nationals on the panel would tend to favor their own governments, while the U.S. national panelists would make every effort to be absolutely objective without regard to nationality! This despite the fact that in all three cases the panels were unanimous.
[94] WTO *Dispute Settlement Understanding,* art. 9, Annex 2 of the Agreement Establishing the World Trade Organization, April 15, 1994, accessed August 24, 2017, https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm.
[95] In *Mexico–Tax Measures on Soft Drinks and Other Beverages*, Appellate Body Report, WT/DS308/AB/R, adopted Mar. 24, 2006, the Appellate Body upheld a panel decision rejecting Mexico's request that the panel and Appellate Body decline to exercise WTO jurisdiction because the matter was "inextricably linked to a broader dispute" that only a NAFTA [Chapter 20] panel could

United States would have preferred to litigate the latest round of disputes over Mexican tuna fish exports to the United States, Mexico refused to submit the matter to Chapter 20 resolution, seeking recourse in the WTO instead.[96] Earlier, the panel decision in *Cross-Border Trucking Services*, which might have resulted in streamlining border crossings at the U.S.-Mexican border, has never been fully implemented.

2. Possible Revisions of Chapter 20

Many observers have believed that despite a strong preference among NAFTA governments for the WTO, it would be recognized that a dispute settlement procedure for matters that are unique to the NAFTA would be recognized in a NAFTA renegotiation. However, that is not the case. The July 2017 U.S. objectives paper supported many changes, most of which were already reflected in Chapter 28 of the TPP. Also, Mexico has suggested that this and other NAFTA dispute settlement mechanisms "have played a crucial role in resolution of disputes over more than three decades," with only a need for greater transparency and "participation by other relevant players."[97] Yet by November 2017, the U.S. position supposedly favored mechanisms "for ensuring that the parties retain control of disputes and can address situations when a panel has clearly erred in the assessment of the facts or the objectives that apply."[98]

It seems likely that both Canada and Mexico were surprised by the U.S. proposal to effectively make the Chapter 20 process voluntary, as noted earlier, by permitting any party to disregard a panel decision that was "clearly erroneous" as determined solely by the responding party! This proposal, in the unlikely event it were accepted by Canada and Mexico, would potentially allow any party to interpret the new text as that party saw fit, with the other parties deprived of any recourse other than in the WTO's Dispute Settlement Body. It is a difficult proposal to fathom because it would leave the United States with no other effective mechanism to challenge an alleged violation of the agreement by Canada or Mexico, except by political and economic might. On the other hand, one might speculate that if compliance with the final arbitral award were voluntary, the United States would be less likely to stonewall the formulation of NAFTA Chapter 20 panels in specific cases.

D. The NAFTA Secretariat and Free Trade Commission

1. The Current Framework

The NAFTA Secretariat was created to provide assistance to the NAFTA Free Trade Commission and to panels established under both Chapters 19 and 20.[99] The commission members are cabinet-level officials who meet at least once a year; typically their deputies

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properly decide. The Appellate Body concluded that once it was established that a WTO panel had jurisdiction, it could not refuse to exercise it. See paragraphs 10, 40, 57.

[96] See Appellate Body Report, *United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products,* WT.DS381/AB/R, adopted June 13, 2012.

[97] Prioridades de Mexico, at 7.

[98] U.S. Objectives, November 2017, 17.

[99] NAFTA, art. 2002(3).

also meet once a year.[100] The FTC has broad authority, *inter alia*, to delegate responsibilities to standing committees or working groups, to seek the advice of nongovernmental persons or groups, "and to take such other action in the exercise of its functions as the parties may agree."[101] Insofar as I have been able to determine, the most significant actions of the FTC have been to issue interpretations of the agreement under Chapter 11, a process that has been completed only once,[102] although joint statements have also been issued.[103]

The NAFTA Secretariat consists of three national sections located, respectively, in the U.S. Department of Commerce, the Mexican Ministry of Economy, and the Canadian Department of Foreign Affairs, Trade and Development.[104] Its functions are subject to the direction the NAFTA Free Trade Commission, which consists of the parties' three trade/economy ministers.[105] However, there is no truly independent secretariat comparable to that of the WTO to ensure that panels are promptly appointed and that delays in the process are avoided,[106] or to provide a legal staff to assist with the drafting of orders or decisions. This can help to explain why governments and NAFTA panelists regularly fail to comply with the relatively short deadlines provided in Chapter 20[107] and under Chapter 19.[108]

During some portions of the past 22 years the U.S. section of the NAFTA Secretariat has been understaffed, with only three to four employees during the early part of the 21st century, none of whom were lawyers.[109] This is not currently a problem, as it makes little

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[100] NAFTA, art. 2001(5).
[101] NAFTA, art. 2001(3).
[102] NAFTA, arts. 1131.2, 1132. See North American Free Trade Agreement, Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2001, relating to access to arbitration documents and attempting to further define the concept of minimum standard of treatment under international law under NAFTA article 1105, http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp.
[103] See, e.g., USTR, Joint Statement by the NAFTA Free Trade Commission: Building on a North American Partnership, 2001, reporting on the July 31, 2001 meeting of the FTC, https://ustr.gov/about-us/policy-offices/press-office/press-releases/archives/2001/july/joint-statement-nafta-free-trade-commission-; Gabrielle Kaufman-Kohler, *Interpretive Powers of the Free Trade Commission and the Rule of Law in Fifteen Years of NAFTA Chapter 11 Arbitration*, 175, Jurisnet.LLC, http://www.arbitration-icca.org/media/1/13571335953400/interpretive_powers_of_the_free_trade_commission_and_the_rule_of_law_kaufmann-kohler.pdf.
[104] NAFTA, art. 2002.
[105] NAFTA, art. 2001.
[106] See David A. Gantz, "Dispute Settlement Under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties," 14 *American University International Law Review* (1999): 1025, 1083-95.
[107] For example, art. 2011(1) provides that if the disputing parties cannot agree on panelists with 15 days, the panel members will be chosen by lot from the roster. This has never happened, since as noted above there has been no formal roster. Article 2016(2) also provides for the panel to render its initial report within 90 days after the selection of the last panelist. This also has never occurred; in some instances the time required for briefings and a hearing has almost consumed the 90 days allotted for the entire process.
[108] 315 days. See NAFTA, art. 1904:14.
[109] A fourth staffer was added in December 2004, according to a telephone conversation with a staff member.

sense to maintain large secretariat staffs when the number of Chapter 19 cases has substantially decreased in recent years and there has been no active Chapter 20 proceeding since February 2001.[110]

2. Possible Revisions Under the NAFTA Renegotiation

Expansion of the functions of the NAFTA Secretariat, in my view, is extremely unlikely. Even if the current Chapter 19 and Chapter 20 mechanisms are preserved, the volume of cases under Chapter 20 is not likely to increase (from zero over the past 17 years) and the volume under Chapter 19 would increase only if there is an increase in antidumping and countervailing duty actions by U.S. stakeholders, or a resurgence of Chapter 20 matters. While Chapter 19 binational panel proceedings in the latest round of *Softwood Lumber* actions (challenging the AD, CVD, and injury findings, respectively) are proceeding,[111] these are probably manageable within the current trade agencies (Department of Commerce in the United States, Global Trade in Canada, and the Secretariat of Commerce in Mexico), and in any event the actions may be suspended because of a new bilateral agreement (although none seems imminent at this writing).[112]

III. Impact of the Dissolution of NAFTA on Trade Aspects of Cross-Border Relations

As noted in the introduction, NAFTA is not likely to be denounced by the Trump administration, or even to fail, primarily as a result of discussions of the dispute settlement mechanisms. However, the perceived success or lack of success by the U.S. government in seeking changes or elimination of dispute settlement mechanisms will undoubtedly influence the administration's decision to preserve or seek to terminate NAFTA. Given that NAFTA has had an enormous impact on the U.S.-Mexico border, its demise would also be extremely significant. Thus, the Border Trade Alliance (BTA) has broadly argued against the termination of NAFTA:

> "Two thousand seventeen, however, represents a return to the BTA's foundational argument: that eliminating tariffs and non-tariff barriers to cross-border commerce is a driver of regional job creation, prosperity, and economic competitiveness. While some corners seek to turn the clock back on the pro-growth policies that are responsible for over 5 million U.S. jobs, we proudly advocate on behalf of borders

[110] *Cross-Border Trucking Services*, 2001.
[111] See Financial Post, "Ottawa Triggers NAFTA Chapter 19 over Punitive U.S. Import Duties on Bombardier C Series, Softwood Lumber," January 20, 2018, http://business.financialpost.com/news/economy/government-triggers-nafta-chapter-19-over-punitive-u-s-import-duties. The actions relating to aircraft were terminated after the U.S. International Trade Commission determined that such imports did not threaten Boeing with material injury, ending the case.
[112] See *World Trade Online*, "MacNaughton: U.S., Canada Not Close on Softwood Lumber Deal," June 19, 2017, quoting comments by Canada's ambassador to the United States, https://insidetrade.com/trade/macnaughton-us-canada-not-close-softwood-lumber-deal.

> that are secure, efficient, and outfitted to compete in a modern economy that is defined by integration and interdependency, not isolation."[113]

However, other border organizations appear to have been relatively low-key when it comes to defending NAFTA. For example, the Border Governors' Conference, which met regularly during the first 15 years of NAFTA, has not met since 2012.[114] While individual governors from the border states have presumably lobbied for NAFTA with their congressional delegations, joint action does not appear to have occurred.

The U.S.-Mexico Border Mayors Association remains active, having met in July 2017 for the first time since January 20, 2017, produced a joint resolution underscoring the benefits of trade under NAFTA.[115] That resolution, *inter alia*, called upon the president and Congress "to recognize the importance of trade between the U.S., Mexico, and Canada as an opportunity to renegotiate, modernize, and optimize North America's competitiveness" and reiterated that the first "rule of negotiation should be Do No Harm."[116] However, attendance was disappointing, with the mayors of El Paso, Laredo, Mexicali, Nogales (Sonora), Nuevo Laredo, and Matamoros all absent.[117]

Since it is well beyond the scope of this paper to analyze the myriad impacts that the demise of NAFTA would have on the U.S.-Mexico border regions, this section concentrates on what I expect to be the most significant impact, with few illustrative examples. These include the following: 1) the possible demise of many of the border industries ("maquiladoras"), particularly in the areas of auto parts, textiles, and clothing, along with reduced investment and employment in those sectors; 2) the impact on U.S. imports of Mexican fruits and vegetables; and 3) anecdotal evidence of the impact of frequent border crossings. These impacts are, of course, not limited to the border, but are magnified by the interdependence of the two countries, particularly in border cities such as Tijuana/San Diego, Mexicali/Calexico, Nogales/Nogales, Juarez/El Paso, and Matamoros/Brownsville, and clearly with cities that are well beyond the border zone, such as San Antonio, Tucson, Hermosillo, and Ensenada.

It is also notable that a withdrawal from NAFTA would disproportionately hurt two border states, Texas and Arizona (although probably not as severely as Michigan or Wisconsin).[118] For Texas, it is estimated by the U.S. Chamber of Commerce that one million jobs would

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[113] BTA 2017 Policy Agenda, introductory letter from chairman Russ Jones, https://thebta.org/wp-content/uploads/2015/02/BTA-brochure-2017.pdf.
[114] See Border Governors' Conference, New Mexico, October 2012, http://bgc2012.com/participating-states/. There is no public record of a subsequent formal meeting.
[115] See *Seattle Times*, "U.S.-Mexico Border Mayors Worry About NAFTA Makeover," July 27, 2017, https://www.seattletimes.com/nation-world/us-mexico-border-mayors-convene-amid-high-stakes-debates/.
[116] Border Mayors Association, Resolution, July 2017, http://www.bordermayors.org/documents/resolution_summit_2017_eng.pdf.
[117] Ibid.
[118] See John J. Murphy, U.S. Chamber of Commerce, *Which States Would be Hit Hardest by Withdrawing from NAFTA?* November 2017, https://www.uschamber.com/above-the-fold/which-states-would-be-hit-hardest-withdrawing-nafta.

be put at risk, since 92 percent of its motor vehicle parts, 86 percent of its plastic products, and 83 percent of its computer products exports—40 percent of the state's total exports—go to Mexico and Canada. Texas' energy and agricultural sectors would also suffer. For Arizona, 230,000 jobs would be at risk, and $10 billion in export revenue, particularly in the metal and ore, engines and turbines, and vegetables and melons categories.[119]

A. Border Industries

Despite competition with China for the assembly of goods that require low-wage workers, some 3,000 maquiladoras[120] exist along the Mexican border (including as far inland as Hermosillo and Monterrey), employing over one million Mexican workers and resulting in the importation of over $50 billion in supplies from the United States.[121] As of 2006, maquiladora production was estimated to account for 45 percent of Mexico's exports.[122] While most of the manufacturing takes place on the Mexican side of the border, cross-border commerce also employs many in the various service industries on the U.S. side, particularly those relating to transportation and warehousing.

In addition, some businesses perform labor-intensive operations on the Mexican side and other operations in the United States. For example, MFI International produces mattress covers, whereby the fabric is cut in El Paso, transferred to a stitching facility in Cd. Juarez (employing 650 workers), and returned as a finished product to the United States, all free of tariff and other restraints under NAFTA, but continuously under pressure from lower labor costs in China. Without both the tariff advantages and NAFTA's common set of rules and regulations, it seems highly likely that MFI would be forced to move its entire operations to China or elsewhere in Asia, laying off all or most of its employees in both Juarez and El Paso.[123]

If a modified NAFTA is ultimately agreed upon by the three parties and approved by the congresses and parliament, it may well reduce maquiladora production of auto parts, if the new agreement includes any significant U.S. (rather than North American) minimum content requirements, as discussed earlier. In a worst-case scenario, if U.S.-assembled autos or Mexican-assembled autos exported to the United States require 50 percent U.S. content, some component production in the maquiladoras could be moved to highly automated facilities in the United States. Should NAFTA be replaced by trade under WTO tariffs, Mexican factories could also suffer. This change would be accompanied by

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[119] Id., 5, 10.
[120] Originally referring to grain/flour milling, today the term refers to a manufacturing or assembly operation whereby factories import materials and components from the United States and elsewhere to produce finished goods primarily for export, with labor being the major Mexican input.
[121] J. Rene Villalobos et al., "Inbound for Mexico," *Industrial Engineer* 36, no. 4 (2004): 38-43.
[122] William C. Gruben and Sherry L. Kiser, *The Border Economy: NAFTA and Maquiladoras: Is the Growth Connected?*
[123] See Jan Tracy, "With NAFTA in Trump's Crosshairs, Mexico's Border Factories Brace for the Unknown," *The Washington Post*, February 21, 2017, https://www.washingtonpost.com/business/economy/with-nafta-in-trumps-crosshairs-mexicos-border-factories-brace-for-the-unknown/2017/02/21/f91a3960-ee49-11e6-b4ff-ac2cf509efe5_story.html?utm_term=.ce87a165879d.

the disappearance of the current 62.5 percent North American regional value requirement for autos. Consequently, auto assemblers in Mexico and the United States would remain in business, despite somewhat higher costs, but they probably would import more lower-cost components from China and elsewhere in Asia rather than continue to source them in Mexico.

Likewise, Mexican border industries producing items or parts for items that are subject to high tariffs under U.S. MFN tariff rules, such as footwear, clothing, and small trucks, would likely find their businesses no longer economical. To take another example, a Phoenix company that markets plastic products ranging from toys to car air fresheners manufactures its products in Hermosillo, Sonora. The owner, Hector Placencia, a native of Phoenix, credits his success to the "almost symbiotic economy" that benefits both sides of the border. The Trump administration has created uncertainty among his clients, who question whether he should continue to do business in Mexico or move production to China, Vietnam, or Taiwan.[124]

B. Agricultural Trade

Should NAFTA disappear, Mexican fruits and vegetables, including tomatoes and berries, would be subject to varying tariffs instead of entering duty free, although the magnitude of U.S. MFN tariffs varies considerably and in many instances are very low. This would have a particular impact on Nogales, Arizona, which is a gateway for most of the fresh produce imported from northern Mexico. The Fresh Produce Association of the Americas, headquartered in Nogales, Sonora—representing Mexican growers, distributors, and customs brokers in both Nogaleses—notes the existence of a $3 billion industry that employs thousands of workers in both Arizona and Sonora.[125] Even if NAFTA remains in force in one form or another, if new trade remedies sought primarily by Florida tomato growers were to be included in a new text, dumping and countervailing duty (anti-subsidy) actions could significantly curtail the volume of imports, with adverse effects on everyone employed in the fresh produce industry.

Agricultural exports to Mexico from the United States tend to concentrate in grains and meat products, and processed foodstuffs. Most of these goods move by truck, providing employment for a variety of transportation and other service workers, even though the products primarily originate far from the border in the Midwestern and Plains states, often under the direction of agribusiness giants such as Archer Daniels Midland and Cargill. This traffic could be seriously disrupted if Mexico's zero NAFTA tariffs are replaced by MFN tariffs, which are said to be 15 percent on wheat, 25 percent on beef, and 75 percent on chicken and potatoes.[126]

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[124] See Rafael Carranza, "NAFTA Talks Make U.S. Mexican Border Businesses Nervous," *Arizona Republic*, August 21, 2017, https://www.usatoday.com/story/money/business/2017/08/21/nafta-talks-make-u-s-mexican-border-businesses-nervous/587695001/.
[125] Ibid.
[126] Ana Swanson and Kevin Granville, "What Would Happen If the U.S. Withdrew from NAFTA," *The New York Times*, October 12, 2017, https://www.nytimes.com/2017/10/12/business/economy/what-would-happen-if-the-us-withdrew-from-nafta.html.

Even if NAFTA survives, if it includes new trade remedies for seasonal products as noted above, Mexico has threatened to retaliate against Mexican imports of grains and meats.[127] Moreover, if NAFTA is terminated, Mexican authorities have promised that Mexico would seek alternative sources for grain and meat imports from Brazil, Argentina and elsewhere; Brazil and Argentina are said to be "moving aggressively to take advantage of the perceived opportunity to access our North American markets."[128] Since such imports would arrive by ship at Mexican seaports rather than by cross-border truck into Mexico, the impact on current land-based border services would likely be significant, although presumably some Mexican seaports would see an increase in employment. In the short-term at least, such a shift could increase food prices for Mexican consumers, including those living in the border region. The demise of the cross-border trucking regime, which permits trucks from Mexico to travel to American border states and vice versa, would also have an adverse impact, including an increase in border congestion and pollution, according to its users.[129]

C. Other Border Impacts

The indirect effects of NAFTA's demise on the border area could also be significant, albeit difficult to quantify. For example, the city of Tucson (100 kilometers, or about 62 miles from the border) benefits from thousands of visits by Sonora residents each year (although some shoppers come from as far away as Mexico City). They visit to purchase goods at Tucson's malls, stay at Tucson's hotels, and entertain themselves at local theaters, bars, and restaurants, with total spending at the rate of some $1 billion annually.[130] Such shopping tourists spend an average of $5,000-$7,000 per family during popular trips during Holy Week alone.[131] This type of tourism, which is replicated for San Diego, San Antonio, and other American cities that are near, but not adjacent to, the border, will no doubt be threatened by a U.S. withdrawal from NAFTA and/or the construction of a border wall if that occurs, as well as by what is perceived by many Mexican citizens as an unwelcoming atmosphere in the United States.[132] It is estimated that lost visits will cost the U.S. economy some $1.1 billion, not including day border crossings, the latter of which are likely to be the most severely affected if Mexican authorities effectively collect customs duties on U.S. purchases.

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[127] *World Trade Online*, "Mexico to Aim Retaliation at U.S. Grains, Meats If Seasonal Proposal Makes It Into NAFTA," October 14, 2017.
[128] *World Trade Online*, "Ag Groups Warn of 'Substantial Harm' If NAFTA Withdrawal Notice is Given," October 26, 2017.
[129] *World Trade Online*, "100+ Industry Groups Urge Lighthizer to Preserve NAFTA's Trucking Provisions," November 14, 2017, https://insidetrade.com/inside-us-trade/100-industry-groups-urge-lighthizer-preserve-naftas-trucking-provisions.
[130] See Lupita Murillo, "Mexican Shoppers Contributing to Tucson Economy," *News4 Tucson*, April 7, 2016, quoting Visit Tucson executive Felipe Garcia, http://www.kvoa.com/story/31562226/mexican-shoppers-contributing-to-tucson-economy.
[131] Ibid.
[132] See Laura Tillman, "Mexican Tourists Don't Want to Visit Trump's America. It will Cost Us Billions," *Los Angeles Times,* April 14, 2017, http://www.latimes.com/world/mexico-americas/la-fg-mexico-us-travel-20170414-story.html.

IV. Conclusions and Policy Recommendations

The legal institutions created under NAFTA and the subject of this article are, in most respects, worth carrying over and improving in a revised NAFTA. Some sort of ISDS mechanism may be included considering the strong business stakeholder support in the United States, but as noted earlier, Lighthizer and others in the Trump administration (along with many Democrats in Congress) believe that ISDS encourages American businesses to shift manufacturing abroad. The need for ISDS in investment among developed countries (such Canada and the United States), with independent judiciaries and a strong rule of law, has long been questioned. In contrast, the desirability of investor protections in countries with weak judiciaries and a high level of corruption may well be much more important to foreign investors.

After nearly 25 years of NAFTA, the level of confidence of foreign investors in Mexico remains high, and it is difficult to assert with any degree of certainty that the demise of ISDS would have a significant negative effect on investment (even in the newly opened petroleum sector) in the absence of a shift in Mexican policy toward its encouragement, an unlikely development. For U.S. investors, in the border region and elsewhere, it may be necessary to balance the risks of a renegotiated NAFTA with no ISDS against the termination of the agreement and future trading under WTO rules. In my view, elimination of ISDS is on balance likely to be accepted, albeit grudgingly, by foreign investors, if it assists the parties in preserving duty-free trade, existing rules of origin, and other key benefits of NAFTA and avoids the termination of the agreement.

The survival of Chapter 19 will depend on who prevails between the Trump administration—which wants to eliminate it—and Canada and Mexico, which strongly support it. Chapter 19 could conceivably be modified to make it more acceptable to the United States. Similarly, a more discretionary Chapter 20 could be traded for other perceived benefits, if any, for Canada and Mexico from the negotiation. Chapter 19, nevertheless, remains one of the possible red lines for the NAFTA parties, and is one of a handful of factors (including the sunset clause and U.S. demands for more U.S. origin auto parts) that could lead to a breakdown in the negotiations. I recommend that Chapter 19 be preserved in some form, perhaps with an appellate mechanism to review binational panel decisions, or modification of the extraordinary challenge process in order to make it easier to challenge errant decisions.

Typically, no party to an FTA disputes the need for some sort of state-to-state dispute settlement mechanism to address differences among the parties concerning the interpretation and application of the revised agreement. Still, given the lack of use of Chapter 20 for 17 years, it is difficult for Canada and Mexico or those in the U.S. Congress to argue credibly that Chapter 20 is essential in light of U.S. attempts to emasculate the dispute settlement mechanism. That being said, the conduct of the negotiations through March 2018, with the Trump administration adopting a “take it or leave it” approach to a series of onerous modifications, could encourage Canada and Mexico to fear a revised NAFTA that offers no legal mechanism for reining in the United States except through the

WTO's dispute settlement mechanism. In my view, it is very unwise for any party to an FTA to risk agreeing to obligations without some form of binding dispute settlement mechanism, even if it is infrequently used. Chapter 20 could, of course, be strengthened, in particular by focusing on the process of selecting the panelists, but none of the parties appears to have suggested improvements to date. One only needs to look at the ASEAN FTA, where the 10 parties feel free to ignore commitments when it suits them, secure in the knowledge that there is no effective legal recourse against such violations by the other parties, even though the mechanism has been available for more than a decade.[133] There, at least, the FTA is not dominated by a superpower.

Finally, given the strong possibility that an ambitious NAFTA renegotiation will fail because the parties cannot agree on changes or because different stakeholders in the United States are unwilling to support such an agreement in Congress, the options are relatively narrow: 1) agree on a limited modernization of NAFTA without addressing the trade deficit or restricting U.S. investment in Mexico; 2) revert to the U.S.-Canada FTA as between the U.S. and Canada, which happens automatically for the United States if NAFTA is terminated (unless and until the U.S. were to terminate CFTA as well),[134] and revert to WTO tariffs and dispute settlement as between the United States and Mexico; or 3) continue the existing NAFTA for some specific or unspecified period of time,[135] or at least until the Mexican presidential and U.S. Congressional elections in 2018 have taken place.

In the absence of NAFTA, ISDS among the NAFTA parties per se would disappear, and any investment disputes within the region would be subject to the jurisdiction of a national court, unless or until the parties agree on new investment agreements. (CFTA contains no ISDS provisions in the investment Chapter 16.[136]) However, as both Mexico and Canada have signed a revised "Comprehensive and Progressive Trans-Pacific Partnership," which includes ISDS in Chapter 9, once ratified those provisions would govern investor-state disputes as between Canada and Mexico.[137] As between the United States and Canada,

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[133] Gonzalo Villalta Puig and Lee Tsun Tat, "Problems with the ASEAN Free Trade Area Dispute Settlement Mechanism and Solutions for the ASEAN Economic Community," *Journal of World Trade* 49 (2015): 277-308.

[134] North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, § 107(c)(3) (1993), providing in pertinent part that "[o]n the date the United States and Canada agree to suspend the operation of the [CFTA] by reason of the entry into force between them of the North American Free Trade Agreement, the following provisions of this Act are suspended and shall remain suspended until such time as the suspension of the [CFTA] may be terminated" and going on to list those referenced provisions.

[135] Another option, in which Canada and Mexico simply bow to U.S. demands, has been suggested, but it seems so remote to me that I have not considered it. Among other things, no Mexican government could survive such a cave-in. See Gary Clyde Hufbauer, Euijin Jung, and Melina Kolb, "Predictions on How NAFTA Talks Will Go," August 21, 2017, available online at Peterson Institute, https://piie.com/blogs/trade-investment-policy-watch/predictions-how-nafta-talks-will-go?utm_source=update-newsletter&utm_medium=email&utm_campaign=2017-08-24.

[136] See CFTA, Chapter 16 (Investment), which provides no mechanism for ISDS; available online at http://www.international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusfta-e.pdf.

[137] CPTPP, New Zealand Foreign Affairs and Trade, signed March 8, 2018, https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/.

Chapter 19 (AD/CVD disputes) and Chapter 18 (state-to-state dispute settlement) of the CFTA would apply under a renewed CFTA unless modified or terminated. Between Mexico and the United States, the WTO's Dispute Settlement Understanding would apply to trade disputes as it does today, without the need for any national secretariats.

Given that the border region would disproportionately suffer from NAFTA's demise, particularly with regard to future maquiladora operations and numerous cross-border services ranging from transportation to warehousing to purchases by individual tourists, it can be hoped that the border institutions such as the Border Trade Alliance and members of Congress and the Senate in the four U.S. border states (Arizona, New Mexico, California and Texas) will make their views known often and publicly. Whether or not such pressures can influence an administration that seems intent on taking steps that will greatly reduce or eliminate the broader benefits of NAFTA for all of the NAFTA Parties remains to be seen.