The Future of NAFTA's ISDS and AD-CVD Dispute Settlement Mechanisms in the Trump Era and Their Role in NAFTA Renegotiation

Abbye West

Recommended Citation
https://scholar.smu.edu/til/vol51/iss3/11

This Comment is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
The Future of NAFTA’s ISDS and AD-CVD Dispute Settlement Mechanisms in the Trump Era and their Role in NAFTA Renegotiation

ABOUT WEST*

I. Introduction

The North American Free Trade Agreement (NAFTA) seeks to “eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties,” and “create effective procedures for the implementation and application of this Agreement . . . for the resolution of disputes.”1 By entering into an international trade agreement, states surrender “a certain measure of its sovereign freedom of action by committing itself to do, or not to do, certain things;” states surrender even more sovereign freedom “when that agreement provides for compulsory binding arbitration of disputes . . . .”2 But incorporating formal dispute resolution mechanisms into trade agreements is advantageous to parties to the agreement in the sense that they may “preserve the agreement and [] promote its smooth functioning.”3 Two categories of disputes arising under NAFTA are subject to resolution by binding arbitration: investor-state disputes under Chapter 114 and Chapter 19 disputes regarding the antidumping or countervailing duty laws.5

The future of these arbitration mechanisms is uncertain considering the current renegotiation and threats by the U.S. to withdraw from NAFTA. This comment will first define the context in which these dispute resolutions now stand, considering briefly their future should the U.S. withdraw from NAFTA. Then, because these arbitration mechanisms are a significant and contentious part of the current NAFTA negotiations, it is important to highlight key criticisms of these provisions and compare the two mechanisms for enforcement of NAFTA principles and resolution of

* Abbye West is a candidate for Juris Doctor at SMU Dedman School of Law, May 2019. She earned her B.A. in International Studies and Spanish from the University of Mississippi in 2016. Abbye would like to thank her parents, Deb and Garnett West, for their endless support throughout her academic career.

3. Id.
4. NAFTA, supra note 1, art. 1136.
5. Id. art. 1904(9).
disputes among parties to NAFTA. Turning back to the current relevance of these provisions, this comment will explore how scholars’ criticisms are playing out during NAFTA renegotiation, evaluating the Parties’ objectives and exploring how their concerns may be ameliorated. Though Mexico, Canada, and the United States are likely motivated by political pressures or the desire to secure leverage in negotiating these issues, legal criticisms about these dispute resolution mechanisms are useful in evaluating the signatories’ proposals to the extent that their proposals would improve the issues raised by this criticism.

II. The Context of Uncertainty: Procedures for U.S. Withdrawal from NAFTA

Since the beginning of his presidential campaign, President Trump has repeatedly criticized NAFTA and threatened to terminate NAFTA. During his campaign for presidency, Trump tweeted “I will renegotiate NAFTA. If I can’t make a great deal, we’re going to tear it up. We’re going to get this economy running again. #Debate.” In one of the presidential debates against candidate Hillary Clinton, then-Republican nominee Trump memorably classified NAFTA as the “worst trade deal maybe ever signed anywhere, but certainly ever signed in this country.” The following year, President Trump brought his campaign focus into action, with the first round of NAFTA renegotiation beginning August 16, 2017. He demonstrated his continued threat to withdraw from the agreement, tweeting “We are in NAFTA (worst trade deal ever made) renegotiation process with Mexico & Canada. Both being very difficult, may have to terminate!”

As to the question of procedure for withdrawal of NAFTA, article 2205 states: “[a] Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties. If a Party withdraws, the Agreement shall remain in force for the remaining Parties.”

Scholars are far from unanimous regarding the legality of unilateral action to withdraw from NAFTA taken by President Trump. For the purposes of

10. NAFTA, supra note 1, art. 2205.
11. See Gregory Husisian, The Future of NAFTA in the Trump Administration, Int. T.L.R. 29, 30 (2017) (Although NAFTA was approved by Congress, it is technically not a treaty. Rather, it is a Congressional-Executive agreement approved by a majority vote of each house of Congress (as are the WTO Agreements). NAFTA was put in place pursuant to the Trade Act of
this comment, however, the effect of potential withdrawal from NAFTA on investor-state dispute settlement and Chapter 19 arbitration mechanisms is unclear. Even in the event of President Trump’s withdrawal from NAFTA, “[b]ecause implementing legislation would remain on the books, many provisions of NAFTA would still be active, including trade and investment dispute arbitration systems that the Trump administration wants to change.”12 In other words, even if President Trump were empowered to unilaterally withdraw from NAFTA, the NAFTA Implementation Act contains Chapter 19 and Chapter 11 arbitration mechanisms and can only be repealed with congressional approval.13 Congressional approval to repeal the Implementation Act could be difficult, considering most Republicans’ position in favor of NAFTA and free trade in general.14 Thus, Chapters 11 and 19 mechanisms for dispute resolution are important to examine in detail because they have become such an important feature of negotiations and would likely remain a feature of dispute resolution between U.S., Mexico, and Canada even in the event of U.S. withdrawal from NAFTA by virtue of their presence in U.S. legislation.15 It is in this context of uncertainty that the dispute resolution mechanisms must be considered—uncertainty as to what means the U.S. may withdraw at all and the future of NAFTA itself and uncertainty regarding the future of these specific provisions, considering the fact that Chapters 11 and 19 are contentious parts of the negotiations themselves.

III. NAFTA Arbitration Mechanisms that are Central to Renegotiation

Chapters 11 and 19 of NAFTA provide dispute resolution mechanisms to adjudicate supranational disputes.16 These procedural mechanisms are, in

13. Id.
14. Id.
15. Id. That is, the forums for dispute resolution created by Chapters 11 and 19 would remain without action by Congress to repeal or replace the NAFTA Implementation Act.
fact, a key part of the concerns of the Trump administration. Specifically, the disputed mechanisms of trade dispute resolution—the Chapter 11 investor-state dispute settlement and the Chapter 19 dispute settlement mechanism for antidumping and countervailing duty cases—are “two of the most contentious parts of NAFTA discussions . . . .”

Though there are similarities in the arbitration processes of Chapters 11 and 19, the nature of these mechanisms is fundamentally dissimilar. Theoretically, a state-to-state model of dispute resolution like Chapter 19 “provides important political checks and balances before an arbitration is initiated,” in terms of carefully considering the political relationships with another state. On the other hand, Chapter 11 investors are not constrained by the need to maintain relations with another nation to the same extent—they “have only their self-interest to consider” when deciding to settle a dispute via the Chapter 11 arbitration process. But it is important to note that NAFTA’s Chapter 20 applies to the “settlement of all disputes between the Parties regarding the interpretation or application of this Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement . . . .” Chapter 19 disputes are the exception—this process applies specifically to cases concerning the application of antidumping or countervailing duty law. In other words, the concern that led to the Chapter 11 mechanism for resolving disputes between a foreign investor and a state is a “concern over the impartiality of the domestic courts that would otherwise be hearing the disputes,” rather than concern over unequal bargaining power that justifies the provision of the Chapter 19 mechanism.

Considering their place in the renegotiation of NAFTA, it is imperative to analyze the procedure of the dispute resolution mechanisms in Chapters 11 and 19 as well as scholarly criticism of the mechanisms.

A. Chapter 11

NAFTA’s Chapter 11 seeks to establish a “mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.” That is, in addition to setting

18. Id.
20. Id. at 20.
22. Id. art. 1901.
23. Johnson, supra note 2, at 2178.
24. NAFTA, supra note 1, art. 1115.
forth standards of nondiscriminatory treatment with respect to foreign investments among parties of NAFTA, Chapter 11 establishes its own framework for settling international investor disputes by giving foreign investors from Mexico, the U.S., or Canada the option to seek monetary damages for actions of the host state through international arbitration rather than through conventional means of the host country’s court system. This chapter’s intent is to “create a fairer, more transparent, and more predictable environment in which NAFTA investors may establish a local presence in Mexico, Canada, or the United States,” and, for this reason, it is “crucial to the expansion of the economic relationship among the NAFTA parties . . . .”

Foreign investors who believe that the host country has breached any of the rights or duties set forth in Chapter 11 may initiate arbitration proceedings in accordance with the procedure laid out for arbitration in Chapter 11.27 To begin the process outlined in Chapter 11, the foreign investor first delivers a written notice of intent to submit a claim to arbitration at least ninety days before the claim is actually submitted.28 After this ninety-day cooling off period, the investor may then submit their claim to arbitration and choose which international arbitration rules will govern the process.29 Timing is important—an investor must make a claim within three years of acquiring “knowledge of the alleged breach and knowledge that the investor incurred loss or damage,”30 but at least six months must have elapsed since the events in question.31 In submitting claims to arbitration, the investor waives the right to “initiate or continue before any administrative tribunal or court under the law of any Party . . . .”32 This is certainly logical considering it “allows parties to go to international arbitration to resolve investment disputes, in lieu of local judicial or administrative proceedings.”33 Once the investor sends the notice of arbitration to the national government of the NAFTA Party, each disputing

26. Id.
27. Though this comment focuses on the arbitration mechanism itself, Chapter 11 sets forth specific standards of behavior and guarantees for foreign investors who invest in Mexico, the U.S., and Canada. See Catherine M. Amirfar & Elyse M. Dreyer, Thirteen Years of Nafta's Chapter 11: The Criticisms, the United States' Response, and Lessons Learned, 20 N.Y. INT'L L. REV. 39, 40 (2007) (noting specifically the “national and most favored nation treatment, which guarantees that foreign investors will receive treatment equivalent to domestic investors and those from countries granted ‘favored nation’ status (arts. 1102-03); minimum standard of treatment under customary international law, including fair and equitable treatment (art. 1105); and full and timely compensation in the event of government expropriation of assets (art. 1110).”)
28. NAFTA, supra note 1, art. 1119.
29. Id. art. 1120.
30. Id. art. 1116(2).
31. Id. art. 1120.
32. Id. art. 1121.
33. Levin & Marin, supra note 25, at 85.
party selects one arbitrator and the third neutral arbitrator is appointed either by consensus among the parties or appointed by the Secretary-General.34 The panel generally interprets the rights of investors as laid out in NAFTA Chapter 11 but may also interpret broader issues under rules of international law.35 In the event that the NAFTA Free Trade Commission issues an interpretation of any part of NAFTA, this interpretation is binding on the panel as well.36 The tribunal is empowered to award monetary damages plus interest or restitution, but it may not enjoin the offending party from applying the disputed measure or award punitive damages.37 The tribunals are further limited in that they may not “force member countries to reverse or dismantle the laws or regulations in question.”38 Awards by the arbitral tribunal are “limited in their effectiveness to the parties at hand,” as is typical of decisions in arbitration, but they are final and they bind the parties to the dispute.39 Though a panel’s award of damages is binding as to the parties in the particular case, they do not generate precedent for later cases.40 Parties are charged with enforcing awards in their territory, and Chapter 11 provides additional security for successful claimants through alternative measures for enforcement should the offending party fail to comply.41

Some companies are in favor of keeping the mechanism and lobby to ensure that it remains a part of NAFTA, considering that it gives companies “a way to complain and get compensation for unfair treatment abroad, strengthening their position domestically and internationally.”42 But there is certainly criticism of the investor-state dispute settlement model procedurally in that there is a lack of transparency, impartiality, and consistency in decision making.43 Particularly, there is concern about fairness or legitimacy with respect to the limited ability to appeal a decision reached through arbitration.44 Finally, scholars have expressed concern that

34. NAFTA supra note 1, arts. 1123, 1124.
35. Id. art. 1131.
36. Id.
37. Id. arts. 1134, 1135. See also Amirfar & Dreyer, supra note 27, at 40.
40. NAFTA, supra note 1, art. 1136; see also Tran, supra note 38, at 436 (noting that “generally, tribunal decisions do not establish precedent under international law. Previous decisions cannot explicitly be used to influence future decisions.”).
41. NAFTA, supra note 1, art. 1136.
this provision gives foreign investors a competitive advantage, arguing that foreign investors are provided greater protection through international arbitration than domestic investors are afforded under domestic law in the U.S. court system.45

First, many procedural rules used in investor-state arbitration are derived from rules governing arbitration between private parties, which does not contemplate issues of public policy that may be relevant in investor-state proceedings and thus does not provide for public participation or awareness in these proceedings.46 Whereas the commercial arbitration process for private parties is designed to protect the privacy of the parties, transparency is important where issues impacting the public are concerned.47 Critics argue that secrecy in arbitration increases the likelihood of inconsistent decisions and undermines the credibility of the arbitration process.48 Stated differently, “[t]his absence of transparency is another way in which the Chapter 11 process lacks appropriate democratic safeguards and, therefore, public legitimacy.”49 Whereas minimal measures of transparency allow individuals or groups to become aware of disputes such that they may then lobby their representatives and exert indirect influence, public participation (in the form of amici curiae briefs, for example) empowers third-parties to exert direct influence over the disputes.50

Further, there is a lack of impartiality and protections against conflicts of interest.51 The tribunals themselves are not the only aspect of the Chapter 11 subject to the criticism of illegitimacy, because parties to NAFTA both “accuse claimants of advancing illegitimate claims and describe the illegitimate nature [sic] of tribunals and their decisions.”52 In other words, claims of illegitimacy regarding Chapter 11 arbitration stem from accusations of investor manipulation as well as the perception that the forum itself is illegitimate.53 The process itself may be seen as illegitimate in the sense that it raises concerns about democracy, with respect to the lack of an independent adjudicative body and the lack of democratic restraints.54 First, financial security and tenure—two prominent features ensuring an independent judiciary—are not afforded to arbitrators in the Chapter 11 process, because the arbitrators are appointed by the parties on an ad hoc


45. Amirfar & Dreyer, supra note 27, at 46.
47. Mann, supra note 19, at 45.
48. Dunoff, supra note 46.
49. Mann, supra note 19, at 45.
50. Amirfar & Dreyer, supra note 27, at 55.
52. Brower, supra note 44, at 49.
53. Id.; see also Tran, supra note 38, at 435.
basis. In other words, the appointment of arbitrators by the parties to the proceeding and the fact that arbitrators often serve as counsel to the parties call into question the neutrality and fairness of this system. This poses problems for the legitimacy of Chapter 11 arbitration, considering that

Although arbitrators are generally highly respected individuals who are well-versed in the area of international law, the market for appointments as an arbitrator is highly competitive and arbitral fees are very lucrative, heightening the need for arbitrators to be concerned about their reputations in order to ensure reappointment. Moreover, because arbitrators lack judicial tenure, many continue parallel careers as practicing attorneys. Accordingly, it is not uncommon for an arbitrator to preside over one dispute while acting as counsel in another. Because of this, arbitrators may seek to define investment terms expansively as a means of ensuring the continued viability of investment arbitration.

Stated differently, ad hoc tribunals that are based on “based on the commercial arbitration model” raise issues of legitimacy “due to their perceived failure to conform to historical practice and to incorporate fundamental values of the governed community.” In the arbitral process, then, there is a lack of institutional safeguards that court systems enjoy which protects the independence of judges from both state and private influence.

Moreover, democratic restraints imposed on courts, or perhaps more appropriately on administrative agencies, do not apply to arbitration. Like administrative agencies, Chapter 11 panels “operate below the formal legislative level but serve an adjudicatory and standard-setting function that affects the economic and social values of ordinary citizens.” Despite this similarity, the decisions made by Chapter 11 panels lack a meaningful or robust review mechanism “to ensure they are acting within their delegated authority.” Though there is no appeals process, Chapter 11 does allow limited judicial control over decisions rendered by Chapter 11 arbitration.

In terms of options that Chapter 11 provides for judicial control or involvement in arbitral decisions,

Chapter 11’s drafters gave the NAFTA Parties two mechanisms to remedy the legitimacy concerns raised by ad hoc tribunals. First, Article 1136(3) permits losing NAFTA Parties to seek revision or

55. See NAFTA, supra note 1, art. 1123, 1124; see also id.
56. Dunoff, supra note 46, at 708.
57. Choudhury, supra note 54, at 787.
58. Brower, supra note 44, at 68.
59. Dunoff, supra note 46, at 708.
60. Choudhury, supra note 54, at 787-88.
61. Id.
62. Id.
annulment—but not appeal—of awards by municipal courts at the seat of arbitration. While this limited form of judicial control does not provide an opportunity to cure doctrinal incoherence, supply pedigrees, or promote the incorporation of fundamental values, it does allow courts to review the arbitral proceedings for gross procedural defects; in other words, it promotes adherence to ritual. Second, Article 1131(2) authorizes the Free Trade Commission—the trade ministers of the three NAFTA Parties acting in concert—to issue binding interpretations of NAFTA provisions, which then become part of the governing law in Chapter 11 disputes.64

But with respect to seeking an annulment in domestic courts, reverence for very limited judicial review is critical; if NAFTA parties “urge their own courts to second-guess the merits of Chapter 11 awards,” the legitimacy of the annulment proceedings is undermined, and seeking annulment fails to be a meaningful domestic check on arbitration decisions.65 The Free Trade Commission’s issuance of binding interpretations has also “failed to perform the intended function of eliminating the doctrinal incoherence that gnaws at the legitimacy of Chapter 11 tribunals.”66 The creation of a “legally questionable, inconsistent record” that arises from the lack of an appellate review system could be ameliorated with an appeal mechanism to correct resolve discrepancies in the record and provide more certainty in the resolution of legal issues.67

Critics also advance the argument that there is persistent inconsistency in decision-making.68 For instance, interpretation of certain provisions of the agreement, including Articles 110569 and 111070 has led to varying conclusions that demonstrate “how unpredictable and inconsistent tribunal awards can be . . . “.71 The reach of Chapter 11 tribunals aggravates the unpredictable nature of the tribunals, because ad hoc legal regimes such as this one give private parties power to use adjudication to shape public law.72

64. Id.
65. Id. at 76-77.
66. Id. at 79.
68. Brower, supra note 44, at 83, 89 n.165.
69. NAFTA, supra note 1, art. 1105 (a regulation imposing a Minimum Standard of Treatment); see also Tran, supra note 38, at 438 (discussing that the interpretation of the doctrine of the expected minimum standard of treatment has been interpreted differently by various tribunals); Brower, supra note 44, at 66 (explaining that “incongruity has become the hallmark of decisions involving the minimum standard of treatment set forth in Article 1105(1).”).
70. NAFTA, supra note 1, art. 1110 (concerning Expropriation and Compensation); see also Tran, supra note 38, at 438 (finding that “this article raises the concern of the unpredictability of the ISDS mechanism to both claimants and NAFTA governments.”).
71. Tran, supra note 38, at 446.
Lack of consistency is even more troubling considering the lack of a meaningful appeals process from decisions made in arbitration.73 Critics also challenge the legitimacy of Chapter 11 tribunals based on investor manipulation of the mechanism. They argue that foreign investors can attempt to bypass local laws and procedures in favor of the more favorable international process afforded by Chapter 11 that are not available to domestic investors, giving foreign investors preferential treatment.74 This broader protection may come from the scope of protection offered by the agreement relative to domestic law; for instance, some NAFTA critics argue that foreign investors may be able to recover for some decrease in value to an investment where domestic investors would be unable to recover because the definition of “investment” is broader in NAFTA than it is in U.S. law.75 Comparative advantage has also been a concern with respect to recovery for regulatory expropriations, with critics arguing that foreign investors may be more likely to recover than domestic investors because a lesser showing is required under NAFTA than U.S. takings law.76 Concerns also arise from ambiguity regarding the scope of protection offered given the lack of textual determinacy in Chapter 11.77 This textual indeterminacy has lead claimants to interpret obscurity “to their greatest advantage,” which “suggest[s] that Chapter 11 provides unlimited access to an international forum for attacking all democratically-adopted measures that interfere with the performance of investments.”78 Such an interpretation, in the extreme, “depicts host states as helpless victims of mighty investors,” which in turn raises concerns regarding the legitimacy of Chapter 11.79 At a more abstract level, because the process of arbitration can only be initiated by foreign investors against the host government, these foreign investors are “granted special international law-based rights and the means to enforce them.”80 This is troubling in the sense that “[t]here are no counterbalancing rights of governments or obligations on foreign investors that limit the scope or exercise of the rights” to challenge the laws affecting their interests; while foreign investors are typically bound to abide by the law of the host country, they have significant power to fight against the laws that bind them, unrestricted by any other Chapter 11 obligations.81

73. Mann, supra note 19, at 46.
74. Id.
75. Amirfar & Dreyer, supra note 27, at 47.
76. Id.
77. Brower, supra note 44, at 61 (which discusses the “‘broad,’ ‘vague,’ or ‘uncertain’ provisions of Chapter 11, which leave abundant room for interpretive debate about the jurisdiction of tribunals, the scope of the chapter’s coverage, and the type of conduct prohibited or required by substantive disciplines.”).
78. Id. at 61–62.
79. Id. at 62.
80. Mann, supra note 19, at 19.
81. Id.
B. CHAPTER 19

Whereas Chapter 11 provides a forum for foreign investors to settle disagreements, Chapter 19 provides a mechanism for resolving disputes about a party’s application of antidumping or countervailing duty law.\(^82\) Antidumping law governs the provision of duties on imports sold below fair value,\(^83\) and countervailing duty law provides for duties on imports that have been unjustly subsidized by the country of origin.\(^84\) Chapter 19 represents an “unique surrender of judicial sovereignty to an international body, a hybrid of national courts and international dispute settlement with as yet no parallel in the world of international trade or other international law regimes.”\(^85\) The stated goal of the provision of the Chapter 19 method of resolving these disputes is “to establish fair and predictable conditions for the progressive liberalization of trade between the Parties to this Agreement while maintaining effective and fair disciplines on unfair trade practices.”\(^86\)

It was included largely because NAFTA lacked substantive regulation of antidumping and countervailing duty.\(^87\) State-to-state dispute settlement mechanisms are fundamentally important to trade deals; without them, signatories to the agreement are put into a position of “permanent dependency,” and the trade deal itself is “just a set of promises” rather than a meaningful tool to ensure the desired behavior.\(^88\) But generally speaking, “panel decisions have been controversial because agencies chafe at their intimate examination of agency findings and supporting evidence.”\(^89\)

Whereas Chapter 11 claimants may seek arbitration through the Chapter 11 panel as early as six months after the alleged wrongdoing by the NAFTA Party with no previous domestic investigation, Chapter 19 panels function differently in that they serve as a review of final decisions “of a competent investigating authority of an importing Party to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party.”\(^90\) These panels “essentially operate as a transnational appellate court, applying the same domestic standards of review and domestic substantive law of the state and levying the duties to either affirm the agency application of domestic trade law or remand the

---

82. NAFTA supra note 1, art. 1902.
85. Powell, supra note 67.
86. NAFTA, supra note 1, art. 1902.
89. Powell, supra note 67.
90. NAFTA, supra note 1, arts. 1120, 1904(2).
issue back to the agency for renewed analysis.\textsuperscript{91} Moreover, unlike Chapter 11, Chapter 19 dispute resolution does not allow a private party to challenge the international validity of a NAFTA member’s action, as NAFTA imposes no substantive obligations on signatories concerning antidumping or countervailing duty law; instead, it allows individuals to appeal another NAFTA member’s agency decision regarding application of domestic antidumping or countervailing duty law.\textsuperscript{92} Where the function of the Chapter 11 mechanism can be analogized to an administrative agency, the Chapter 19 process mirrors judicial review of agency interpretation.\textsuperscript{93} International review of a NAFTA party’s countervailing duty or antidumping law is only available through the World Trade Organization (WTO) dispute-settlement mechanism, and this review is not made available to private parties.\textsuperscript{94} The process itself substitutes judicial review in the host country of antidumping or countervailing duty determinations with binational panel review.\textsuperscript{95} In other words, the inquiry in a Chapter 19 settlement is whether the agency decision at issue is in accordance with domestic law, rather than whether the decision aligns with standards in an international agreement.\textsuperscript{96} The party requesting review has thirty days from publication of an agency’s determination to file a written complaint requesting review by the panel; if the parties fail to do so within these time constraints, they lose the ability to arbitrate under Chapter 19.\textsuperscript{97} As written in the agreement, Chapter 19 adjudication is significantly faster-moving than Chapter 11 arbitration.\textsuperscript{98} Within thirty days of a party requesting a panel, each party is to appoint two panelists, chosen from a roster of at least seventy-five panelists.\textsuperscript{99} A fifth panelist must be chosen by the parties within fifty-five days of request, after which a chairman is appointed by the panel.\textsuperscript{100} In terms of overall timeline, these proceedings are meant to be temporally restricted: the first panel decision must be issued within 315 days after filing.\textsuperscript{101} With respect to the authority granted to Chapter 19 panels, these panels are only empowered to affirm the agency determination or remand it with instruction to review the domestic agency’s decision; technically, these

\textsuperscript{91} Adams, supra note 84, at 215; see also NAFTA, supra note 1, art. 1904(2).

\textsuperscript{92} Patrick Macrory, NAFTA Chapter 19: A Successful Experiment in International Trade Dispute Resolution, 168 C.D. Howe Inst. 1, 15 (2002).

\textsuperscript{93} See Choudhury, supra note 54, at 787-88.

\textsuperscript{94} Macrory, supra note 92, at 16.

\textsuperscript{95} NAFTA, supra note 1, art. 1904(1).

\textsuperscript{96} Kathleen W. Cannon, Trade Litigation Before the WTO, NAFTA, and U.S. Courts: A Petitioners Perspective, 17 Tul. J. Int’l & Comp. L. 389, 432 (2009) (comparing the nature of a NAFTA Chapter 19 appeal with a WTO appeal, where “the issue is whether the agency decision, policy, or law is in accordance with the WTO international agreements.”).

\textsuperscript{97} NAFTA, supra note 1, art. 1904(4).

\textsuperscript{98} Id. Compare art. 1904(14) with art. 1120.

\textsuperscript{99} Id. annex 1904.2(1), (2).

\textsuperscript{100} Id. annex 1904.2 (2), (3).

\textsuperscript{101} Macrory, supra note 92, at 6.
panels lack power to alter the decision itself or shape the domestic law being applied. In other words, “[w]hile Chapter 19 permits parties to alter their domestic law in response to a decision, the signatories to NAFTA are bound—both by their obligations under NAFTA and under the relevant domestic implementation legislation—to comply with the panel rulings.” In terms of finality, the panel’s decision is only “binding on the Parties with respect to the particular matter between the Parties that is before the panel,” these decisions do not generate binding precedent. The finality of these decisions is seen as high degree of “surrender of final judicial sovereignty” in that the decisions of the panel directly bind the domestic agency that issues the review, affording national courts or national governments no opportunity to appeal or overturn these decisions. Chapter 19 panels offer an advantage as an impartial alternative to domestic courts in reviewing agency determinations, and they “have demonstrated an advantage over domestic courts in terms of the expertise of the panelists and the impartiality of the process.” But the Chapter 19 mechanism has been heavily criticized regarding unconscionable delays in decision making, restriction over NAFTA Parties’ ability to participate in setting NAFTA antidumping countervailing duty policy, parties’ inability to appeal panel decisions, and persistent agency defiance of panel decisions.

While speed was intended to be an advantage to resolving disputes via the specialized Chapter 19 mechanism rather than in domestic courts, panels in practice have taken significantly longer to issue a decision in a case than the 315 days contemplated in the Agreement. These delays especially plague arbitration between Mexico and the U.S. rather than cases between the U.S. and Canada. Though there are various reasons underlying such egregious delays—including a lack of available panelists and linking Chapter 19 arbitration to other unrelated trade issues—these delays both undermine the goal of efficiency and reveal a lack of reverence for the arbitration process as a whole.

It can be argued that Chapter 19 panel decisions effectively “set regime-wide policy on AD/CVD orders one case at a time.” It is unfavorable to

102. Id.
103. Adams, supra note 84, at 216.
104. King et al., supra note 86, at n.36 (citing to NAFTA arts. 1901–04).
105. Powell, supra note 67, at 222.
106. Adams, supra note 84, at 233.
108. Beatriz Leycegui & Mario Ruiz Cornejo, Trading Remedies to Remedy Trade: The NAFTA Experience, 10 Sw. J. L. & TRADE Am. 1, 37 (2004) (finding that “[d]uring the first eight years of NAFTA enforcement, the average time taken by panels to issue their decisions was 533 days when the Agreement provides for 315 days following the request for the establishment of a panel. The delays in the panel procedures are closely linked to the delay in the integration of the panels; it takes an average of 256 days when the Agreement establishes a 60 day time limit.”)
110. Id.
111. Adams, supra note 84, at 237.
make policy that parties to NAFTA had no role in forming because this can lead to a result from a panel decision that neither party would have bargained for if they would have chosen to settle the dispute from the beginning.\textsuperscript{112} In other words, policymaking on a decision-by-decision basis can be seen as problematic, considering that policymaking occurs “not through debate and consensus among the NAFTA nations, but by the independent and unilateral action of the parties and by panel decisions.”\textsuperscript{113} Some critics argue that because NAFTA states have such limited opportunities for involvement in the rendering of the panel decision itself, given the lack of “ability to shape the trade policies of the other, to insert its preferences into the panel process, or to decline to adopt a panel decision,” the regime itself could suffer from legitimacy issues because of the disconnect between enforcement and participation in the review process.\textsuperscript{114}

Further, many critics take issue with the fact that “Chapter 19 provides no corrective mechanism and general guidance from an appellate system;” this lack of meaningful appellate review can lead to “devastating” results to the parties.\textsuperscript{115} Chapter 19 does provide for limited challenge to a panel’s binding decision in extraordinary circumstances, like gross misconduct, bias, or a failure to apply to appropriate standard of review.\textsuperscript{116} In and of itself, the fact that a Chapter 19 decision is a binding and final decision is not necessarily problematic.\textsuperscript{117} The ability to challenge a panel’s decision has been invoked just three times and is not an appeal procedure, but “a safety net to deal with mistakes that are so egregious as to undermine the functioning and acceptance of the entire Chapter 19 of NAFTA.”\textsuperscript{118} Moreover, in all three cases, the decision of the panel was affirmed.\textsuperscript{119} On its face, the limited ability to appeal panel decisions and the lack of flexible compliance with such decisions seems to indicate a strong system of enforcement.\textsuperscript{120} But taken with the NAFTA Parties’ inability to participate in creating a common policy for antidumping and countervailing duty law between Canada, the U.S., and Mexico, the limited means of appeal lead to the conclusion that there are relatively limited options for a Party who is dissatisfied with the result of a panel, and many of these opportunities for redress are not

\begin{itemize}
  \item \textsuperscript{112} Id.
  \item \textsuperscript{113} Id.
  \item \textsuperscript{114} Id.
  \item \textsuperscript{115} Powell, supra note 67, at 227.
  \item \textsuperscript{116} NAFTA, supra note 1, art. 1904(13).
  \item \textsuperscript{117} Id. art. 1904(9).
  \item \textsuperscript{118} In re Pure Magnesium from Canada, Secretariat File No. ECC-2003-1904-01USA, ¶ 13 (Oct. 7, 2004).
  \item \textsuperscript{120} Adams, supra note 84, at 238.
\end{itemize}
favorable or in accordance with principles set forth in NAFTA.121 This gives parties who are unhappy with an unfavorable panel decision more incentive to refuse to comply with a panel decision.122

Because “[p]arties challenging the application of AD/CVD law or challenging the legality of a subsidy have little to no say in the rule making processes, but are bound to the holdings of the NAFTA panels,” there is pressure for parties who have received an unfavorable ruling to defy the panel’s decision given that there are few alternative options for a party who feels that the decision is unjust.123 Chapter 19 panel decisions have elicited particularly high levels of defiance from Parties, likely stemming from the finality of the decision (in that it is not subject to appeal) and the ad hoc nature of panelists (which could lead some parties to view panelists as ill-equipped to properly analyze the case).124

Though in the context of NAFTA renegotiation, there have been some concerns that Chapter 19 is tainted by bias; in fact, evidence suggests that the opposite is true. A previous study, which was conducted when Chapter 19 was used more frequently, indicates that eighty-six percent of Chapter 19 panel decisions were decided unanimously, finding that this figure “is strong proof of the panel’s fairness and objectivity.”125 Though there is distrust of the system arising from fear of bias along country lines, there is no evidence of nationalist bias; out of the forty-seven Chapter 19 cases brought against the U.S. by Canada or Mexico, thirty-six of them were unanimous decisions.126 Moreover, there has never been a successful challenge to a panel’s decision based on bias or gross misconduct by a panelist.127

IV. Course of Negotiations and Parties’ Objectives

Though information including the negotiating text, proposals of each government, and substantive emails exchanged between the U.S., Canada, and Mexico with respect to the current NAFTA renegotiation must remain

121. Id. at 237-38. These options really only include exit from NAFTA and amending domestic law. Exit from NAFTA is not likely to be the most favorable option for all NAFTA parties. Amending domestic law is problematic because it might violate Article 1902. Even if it doesn’t, it fails in the sense that it can only satisfy the successful party if this is the party levying the duties.
122. Id. at 240.
123. Id. at 239.
125. Lecegui & Cornejo, supra note 108, at 34.
126. Beazley, supra note 88.
127. In re Gray Portland Cement and Clinker from Mexico, supra note 118, at 3; in re Pure Magnesium from Canada, supra note 117, ¶ 13; in re Certain Softwood Lumber Products from Canada, supra note 118, ¶ 187(d).
confidential, there are some expressed objectives that reveal the parties’ positions on the Chapter 11 and Chapter 19 mechanisms.128

A. Chapter 11

With respect to current U.S. interests in renegotiation of NAFTA, the Trump administration initially expressed desire to “secure for U.S. investors in the NAFTA countries important rights consistent with U.S. legal principles and practice, while ensuring that NAFTA country investors in the United States are not accorded greater substantive rights than domestic investors.”129 This seems to address concerns or criticism about the Chapter 11 investor-state arbitration without directly stating that the U.S. is seeking to eliminate this forum for dispute resolution altogether. After negotiations commenced, more specific U.S. objectives for investor-state dispute resolution include the provision of “meaningful procedures for resolving investment disputes, while ensuring the protection of U.S. sovereignty and the maintenance of strong U.S. domestic industries;” improvement of dispute resolution procedure by choosing impartial and independent arbitrators and providing “tools to ensure the coherence and correctness of the interpretation of investment rules;” and more opportunity for public participation, by allowing hearings to be open to the public and allowing *amicus curiae* submissions in proceedings from the public.130 But there is some indication that the U.S. may seek to opt out of the dispute resolution panels if alteration is taken off the table.131 From the Canadian perspective, U.S. rationale for wanting to opt out of the Chapter 11 arbitration mechanism is that the U.S. views it as “an invasion of sovereignty and an incentive for companies to outsource to Mexico by guaranteeing them a forum to sue for unfair treatment.”132 Should the U.S. opt out of Chapter 11, there is some indication that Mexico and Canada would preserve this


129. Press Release, Office of the U.S. Trade Representative, Summary of Objectives for the NAFTA Renegotiation (July 17, 2017), https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAOjectives.pdf. The administration’s goals for Chapter 11 investor-state dispute resolution were less straightforward than the administration’s clear goal to eliminate the Chapter 19 antidumping countervailing-duty dispute settlement mechanism at this point in its discussion.


mechanism between the two countries. But in the most recent round of negotiations, the U.S. did not reject the Canadian proposal regarding Chapter 11, so there is some evidence of compromise regarding this provision.

Though the official U.S. position seems to favor elimination or an overhaul of the NAFTA investor-state dispute settlement mechanism, the American business community sees the mechanism as fundamental to protect their legal rights when doing business abroad. There are some U.S. companies lobbying to preserve it, “particularly investors in long-term projects, such as energy exploration, that might be sensitive to domestic political changes.” U.S. investors in the energy sector have incentives to defend legal protections like the Chapter 11 mechanism particularly in Mexico, underscoring the need to advance their “role as a global energy leader by retaining US access to Mexico’s newly-opened oil and natural gas market and providing strong protections, including Investor-State Dispute Settlement (ISDS), for these U.S. energy investments.” On the other hand, environmental groups and labor unions support scaling back the Chapter 11 arbitration mechanism, as they see it as a way for companies to invest abroad while reducing the “risk of environmental fines or regulatory action by the government.” Thus, labor unions support the proposition to scale back of investor-state dispute settlement by limiting the types of challenges that investors could bring to the host state’s action; under this proposal, investors could only “seek damages from foreign governments if their assets were essentially stolen through ‘direct expropriation.’”

Canada also seeks to address the Chapter 11 process in renegotiation. On a short list of Canada’s core objectives is to make NAFTA more progressive by “reforming the Investor-State Dispute Settlement process, to ensure that governments have an unassailable right to regulate in the public interest.”

---

133. Wingrove, supra note 131.
137. Behsudi & Palmer, supra note 135.
139. Behsudi & Palmer, supra note 135.
Canada’s proposal, which has not yet “gained traction,” is said to be modeled on its negotiation with the European Union in its Comprehensive Economic and Trade Agreement, which “established a new ‘investment court system’ that would be public, and use professional and independent judges, moving away from the traditional temporary tribunal process.”141 Beyond a move toward a permanent multilateral investment court, another improvement to Chapter 11 that would be “along the lines” of what was done in the Canada-EU Comprehensive Economic and Trade Agreement is a court with a permanent appellate mechanism.142

Like Canada, Mexico does not wish to abandon Chapter 11 arbitration, but it also wants to apply “pressure on the United States to decide whether it wants to be part of NAFTA’s investor-state dispute mechanism,” as it does not wish for the U.S. to dominate negotiations regarding this provision if it plans to opt out of it.143 This mechanism is significant to Mexico with respect to its ability to attract foreign investors.144 Prior to NAFTA, a foreign investor seeking to resolve a dispute with the Mexican government by arbitration would have difficulty getting consent from the Mexican government and would be left to seek a remedy in Mexican courts, in which domestic law that deterred foreign investment was applied.145 As such, the Chapter 11 arbitration mechanism has been hailed as “widely considered as the most important means for the Mexican Government to provide investors with an attractive investment climate,” which, in turn, attracts foreign investment in Mexico.146 From the Mexican perspective, the U.S. opt-out proposal is unfavorable and would create disproportionate protections for U.S. investors because “if the U.S. were to leave the system, as would be expected, it would protect U.S. companies by allowing their complaints to go to arbitration but wouldn’t allow Mexican and Canadian companies to use the system in challenges against the U.S. government.”147 Thus, from the Canadian and Mexican perspective, the creation of a bilateral investor-state dispute settlement mechanism between Mexico and Canada is attractive in light of the proposed U.S. opt-out scheme, because the bilateral mechanism “would exclude U.S. companies from being able to file investment claims in either country.”148

141. The Canadian Press, supra note 132.
143. The Canadian Press, supra note 132.
145. Id.
146. Id.
147. Mauldin, supra note 136.
B. Chapter 19

From the U.S. perspective, the Chapter 19 mechanism “has hindered the United States from pursuing antidumping and anti-subsidy cases against Mexican and Canadian firms.”149 The Trump administration has steadfastly emphasized that the U.S. intends to eliminate the Chapter 19 system altogether, because it sees Chapter 19 as “an erosion of sovereignty, since the panels have primarily been used to overturn tariffs imposed by the U.S. Commerce Department on Canadian and Mexican products.”150 Acting U.S. Trade Representative Steven Vaughn sent a draft notice to Senate Finance and Ways & Means Committees articulating the Trump administration’s NAFTA renegotiation objectives on March 28, 2017.151 In this letter, one of the nineteen goals listed was to “[e]liminate Chapter 19 dispute settlement . . . where panels have ignored the appropriate standard of review, and where aberrant panel decisions have not been effectively reviewed and corrected.”152 In a subsequent Press Release published on July 17, 2017, which included a much more broad list of goals for negotiation, the Office of the U.S. Trade Representative listed as one of its many objectives to “eliminate the Chapter 19 dispute settlement mechanism.”153 After negotiations began, the U.S. did not waver in its objective to eliminate Chapter 19; both the elimination of this dispute settlement mechanism and the intention to “[p]reserve the ability of the United States to enforce rigorously its trade laws, including the antidumping, countervailing duty, and safeguard laws,” remained on the list of U.S. objectives in the post-negotiations Press Release.154 But the U.S. has demonstrated some flexibility in negotiation by proposing that Chapter 19 decisions be non-binding.155

In terms of Canada’s position with respect to NAFTA renegotiation, the Canadian Minister of Foreign Affairs underscores the desire to “uphold and preserve the elements in NAFTA that Canadians deem key to our national interest,” which includes “a process to ensure antidumping and

152. Id. This official grievance regarding the Chapter 19 mechanism addresses previous criticism regarding less favorable decisions from the U.S. perspective relative to decisions in national courts as well as the inability to appeal panel decisions.
153. See Press Release, Office of the U.S. Trade Representative, supra note 129.
154. See Press Release, Office of the U.S. Trade Representative, supra note 130.
countervailing duties are only applied fairly when truly warranted."\textsuperscript{156} Canada has a particularly strong interest in keeping Chapter 19 despite its infrequent use because without this mechanism, Canada would have to seek relief in U.S. courts, and some Canadians feel that “binational dispute settlement has been much more balanced and fair to Canada than the U.S. courts in trade disputes between the two countries.”\textsuperscript{157} The few cases that have been resolved by the Chapter 19 arbitration mechanism have mostly been decided favorably for Canada; it is also significant that these disputes have related to the softwood lumber industry, which is an essential component of the Canadian economy.\textsuperscript{158} In fact, Canada’s skepticism regarding fair application of antidumping and countervailing duties by the U.S. was “due in large part to events concerning softwood lumber,” and the U.S. and Canada’s inability to reach a consensus on antidumping and countervailing duty law in the 1980s led to the proposal of Chapter 19 as a solution.\textsuperscript{159} Canada’s vehement opposition to the elimination of Chapter 19 is central to renegotiation, and experts have posited that “[t]here will not be a deal unless the United States agree to keep Chapter 19 as part of NAFTA.”\textsuperscript{160} In response to the U.S. proposition that Chapter 19 panel decisions be non-binding, Canada’s chief negotiation Steve Verheul finds that there is “no point negotiating legal language . . . if the obligations are not going to be enforceable through the dispute-settlement mechanism.”\textsuperscript{161}

Mexico has also expressed interest in keeping the Chapter 19 mechanism; Mexico’s Congress backed a non-binding motion advising it to reject the U.S. proposal to eliminate the Chapter 19 arbitration mechanism early in the course of negotiation.\textsuperscript{162} Also included in an official document was the intent to “bolster the dispute resolution mechanisms of NAFTA.”\textsuperscript{163} But Mexico does not share Canada’s intense dedication for keeping Chapter 19 arbitration; though Mexico is in favor of keeping this provision, its protection is not their top priority.\textsuperscript{164} Mexico is much more willing than Canada to concede as to this provision, especially considering its infrequent

\begin{itemize}
  \item \textsuperscript{156} Freeland, \textit{supra} note 140.
  \item \textsuperscript{158} Id.
  \item \textsuperscript{161} Vieira, \textit{supra} note 155.
  \item \textsuperscript{162} Dave Graham & Peter Cooney, \textit{Mexico Congress backs motion defending NAFTA dispute mechanism}, \textit{Reuters} (July 26, 2017), https://ca.reuters.com/article/topNews/idCAKBN1ARJUE-OCATP.
  \item \textsuperscript{163} Stargardter, \textit{supra} note 149.
  \item \textsuperscript{164} Cassella, \textit{supra} note 159.
\end{itemize}
use in recent years. Mexico’s Economy Minister Ildelfonso Guajardo noted that for Mexico, the WTO’s mechanism for resolving disputes has been a “much more efficient mechanism than Chapter 19 of NAFTA” for Mexico in its disputes with the U.S., though he did not clarify Mexico’s position on whether Chapter 19 was important to keep in his neutral statement.

V. Evaluation of Parties’ Objectives and Recommendations

A. Chapter 11

With respect to concerns regarding transparency, major concerns can be addressed with “adoption of rules permitting participation by amicus curiae, the disclosure of documents, including briefs and hearing transcripts, and open hearings.” The official U.S. proposal calling for enhanced opportunities for public participation by allowing open hearings and amicus curiae submissions from the public seems to address this concern. Increased transparency may in turn increase the legitimacy of the mechanism.

In terms of addressing the desire to implement appeal procedures or to address issues of a lack of meaningful judicial review,

Effective dispute resolution requires finality and enforceability. Although the prospect of a second instance would necessarily affect investors’ expectations of finality, the countervailing benefits to legitimacy would be substantial and the consequences would be less deleterious than current fears of heightened review by municipal courts. Furthermore, treaty texts could discourage abuse of the appeals process by requiring appellants to pay respondents’ costs and attorney fees following unsuccessful appeals. With respect to enforceability, treaty texts could provide for automatic enforcement of appellate tribunal decisions—and decisions not timely appealed—in the manner contemplated by the ICSID Convention.

As such, the Canadian proposal—which might establish a permanent multilateral investment court, a standing appellate mechanism, or both—would address these concerns. A standing appellate tribunal that would review questions of law “could focus on reviewing adherence to ritual at the first instance and supervising the development of a coherent body of law...
among the various tribunals.\footnote{171} As such, Canada’s proposal for a permanent appellate mechanism thus does have merit with respect to patterns of inconsistency or concerns about legitimacy.\footnote{172} Moreover, Canada’s concern regarding its desire to ensure that it is able to regulate in the public’s best interest could be a desire to prevent investor manipulation. The U.S. labor union proposition that would limit the scope of challenges that foreign investors could bring against the action of the host state could serve this purpose, in that it would work to prevent investor abuse of the system and not allow them to completely circumvent the established law in the country in which they are investing.\footnote{173}

The U.S. desire to provide “tools to ensure the coherence and correctness of the interpretation of investment rules” certainly seems to speak to an effort to reduce the extensive inconsistency in Chapter 11 panel decisions.\footnote{174} Providing a clearer framework for panel arbitrators to work from is crucial to reduce textual indeterminacy that plagues Chapter 11 and to remedy inconsistent decisions; as such,

\[\text{[t]he ISDS mechanism should be reformed to lessen public concerns of its vulnerability to manipulation by investors. While many investors did not succeed in their claims, Chapter 11 remains a powerful tool for private parties to create political influence and inflict financial burdens on NAFTA countries’ environmental laws and regulations. Further, there should be a detailed guideline on how to interpret articles 1105 and 1110. Past tribunal awards on these articles have shown how unpredictable and inconsistent tribunal awards can be, especially when ISDS tribunal awards are not binding. Thus, drafters for future trade deals should include detailed guidance on the interpretations of articles 1105 and 1110 for future ISDS tribunals to follow.}\footnote{175}

Guidance on how to interpret the law of Chapter 11 in an effort to reduce vulnerability to investor manipulation would also assuage labor union and environmental lobbyists who fear that U.S. companies support the investor-state dispute settlement mechanism in order to minimize risk of environmental or regulatory fines in the course of their foreign investment activity.\footnote{176} Clarification of the legal obligations that arise under Chapter 11, as well as incorporation of proposals that would satisfy NAFTA signatories like appellate review and increased transparency, still support goal of the American investors to provide a forum for investment dispute resolution abroad and advance the efforts of Mexico and Canada to attract investment by providing a safe environment for foreign investors.

\footnotesize

\footnote{171} Brower, \textit{supra} note 44, at 91.  
\footnote{172} See id. See also Palmer, \textit{supra} note 142.  
\footnote{173} Behsudi & Palmer, \textit{supra} note 135.  
\footnote{174} See Press Release, Office of the U.S. Trade Representative, \textit{supra} note 130.  
\footnote{175} Tran, \textit{supra} note 38, at 446.  
\footnote{176} Mauldin, \textit{supra} note 136.
B. Chapter 19

The U.S. proposition that panel decisions be non-binding is somewhat counterproductive given the persistent agency defiance of panel decisions; because the goal of providing a forum that is similar to domestic courts’ review of agency action, the issuance of non-binding interpretations of agency action does not provide a meaningful remedy to those challenging the decision.177 But underlying concerns that might have led to U.S. proposing non-binding decisions for Chapter 19 arbitrations, including inconsistent jurisprudence and an inability to appeal, may be cured by the institution of stare decisis and a meaningful system of review.178 Though under the Extraordinary Challenge Committee review does offer a “limited avenue for appellate review,” this mechanism in practice is an “illusion,” because the barrier to qualifying for a review is high and the ECC has never vacated a judgment.179

In response to criticism about both the Chapter 11 and Chapter 19 mechanisms in that a lack of appellate review is problematic, a permanent appeal mechanism could cure the “legally questionable, inconsistent record” that has plagued these panel decisions.180 From the Canadian perspective, Chapter 19 reviews are guarded based on the sentiment that they are “respected because they come from panelists who are experts in the area, rather than generalist judges” and “often produce unanimous rulings that show no sign of domestic bias or overreach of jurisdiction.”181 But a respect for the process does not necessarily equate to an effective mechanism for resolving disputes, given the problem of agency defiance of panel decisions in the Chapter 19 process.

Should Chapter 19 be eliminated, as the U.S. proposes, parties would be left to seek remedies by looking to “the general dispute resolution provisions of NAFTA’s Chapter 20 or to the WTO’s Dispute Settlement Body (DSB).”182 More substantial reliance on the WTO process does offer some benefits:

- The adjudicable issues would be confined to international law on dumping and subsidies...

---

177. See Adams, supra note 84.
179. Id.
WTO mechanism would increase the likelihood of consistency and would eliminate the operating problems of Chapter 19 by eliminating the process itself.\textsuperscript{183}

But there are disadvantages to reliance on the WTO mechanism should Chapter 19 be abandoned as well. Private interested parties (i.e., importers, domestic industries, and foreign producers) would lose a forum to resolve investment disputes unless they could persuade their governments to “champion their causes at the WTO,” because only governments have standing to bring a case to the WTO arbitral mechanism.\textsuperscript{184} But it should be noted that the WTO dispute settlement mechanism would provide some protection for foreign investment among Mexico, the U.S., and Canada should Chapter 19 be eliminated. Regardless, there is certainly an argument to be made that there is no place for Chapter 19 until there is either negotiation of a common set of rules for the arbiters to apply rather or enough ability for NAFTA signatories to participate in the dispute resolution mechanism “such that the process of setting regime-wide policy after the fact is a collaborative process, taking into account the power and preferences of all member states.”\textsuperscript{185} In this sense, “coming to an agreement on regime wide policy […] is preferable to deferring to ex post dispute settlement mechanisms like Chapter 19.”\textsuperscript{186}

Canadian arguments in favor of keeping the Chapter 19 mechanism are not insulated from criticism; in practice,

Because of U.S. obstructionism, [Chapter 19] reviews are arguably more time consuming, costly and unfair than appeals through U.S. domestic courts. Moreover, if you win in the U.S. courts you can get your money back. Under Chapter 19 the process just starts over again. Even if the review process were abolished completely, Canadian exporters will still be able to have a final determination reviewed in the U.S. courts.\textsuperscript{187}

Though the importance to Canada to maintain this mechanism for “defend[ing] Canadian economic interests against U.S. corporate bullying” is clear, their focus should be on meaningful reform rather than preservation of the status quo, should they continue to insist that the mechanism be kept as a part of the agreement.\textsuperscript{188} Beyond significant change to the mechanism by amendment, NAFTA signatories could commit to “making the success of the panel process a higher priority” by enhanced cooperation in respecting time limits to bolster its success and efficacy, especially by committing to

\textsuperscript{183} Id. at 352-53.
\textsuperscript{184} Id.
\textsuperscript{185} Adams, supra note 84, at 244.
\textsuperscript{186} Id.
\textsuperscript{187} Brent Patterson, NAFTA’s Chapter 19 binational review process should be strengthened, not eliminated, COUNCIL OF CANADIANS ACTING FOR SOC. JUST. (Oct. 15, 2017), https://canadians.org/blog/naftas-chapter-19-binational-review-process-should-be-strengthened-not-eliminated.
\textsuperscript{188} Id.
promptly appoint panelists, review conflict statements, and appoint replacement panelists in the event of a conflict.189

VI. Conclusion

In conclusion, while NAFTA’s Chapter 11 and Chapter 19 dispute resolution mechanisms differ in significant ways (namely, the substance of their review, the parties who may request arbitration, the timeline of review, and the law that is applied), each mechanism is important to examine in depth given their importance in the current NAFTA renegotiation.190 Chapter 11’s mechanism is useful and unique in that it allows private parties to seek recourse against adverse action by a foreign government in an alternative forum than traditional judicial remedy in the national court system; this creates an attractive investment climate because it offers additional protection to foreign investors.191 But Chapter 11 is highly controversial and has been criticized for being subject to investor manipulation in which foreign investors have a competitive advantage over domestic investors, having persistently inconsistent interpretations, failing to provide meaningful review of decisions, lacking institutional safeguards to protect democracy and state sovereignty, and failing to be sufficiently transparent.192 Chapter 19, on the other hand, is a tool for NAFTA signatories to review agency determinations regarding antidumping or countervailing duty decisions for non-compliance with domestic law to hold NAFTA parties accountable in an impartial setting.193 This mechanism is heavily criticized for its lack of a meaningful appellate system, massive delays in timing, routine agency defiance of panel decisions, and its infrequent use.194

NAFTA parties have yet to reach a decision regarding the future of these mechanisms in the NAFTA dispute settlement procedures. The concerns of Mexico, Canada, and the United States that are manifested throughout the course of NAFTA renegotiation highlight each parties’ view on some of the scholarly criticism advanced regarding Chapters 11 and 19 and underscore their proposition to correct these concerns. The U.S. proposal regarding Chapter 11 aims to increase transparency, whereas the Canadian proposal for appellate review could alleviate concerns about finality and legitimacy of the system.195 Moreover, to correct inconsistent decisions and prevent investor abuse of the Chapter 11 mechanism, it is important to narrow the types of challenges that investors can bring as proposed by the U.S. labor

189. Gantz, supra note 182, at 356.
190. Lawder, supra note 12.
191. Levin & Marin, supra note 25.
192. Brower, supra note 44, at 74; Powell, supra note 66, at 227.
193. Adams, supra note 84, at 211.
195. See Press Release, Office of the United States Trade Representative, supra note 130; The Canadian Press, supra note 130; Brower, supra note 44.
unions and provide clearer guidance on how panels should interpret the law. 196 This would enhance legitimacy and maintain protections for investors abroad. In terms of Chapter 19, meaningful judicial review is important to enhancing the legitimacy of the mechanism. 197 If Chapter 19 were eliminated, parties would be left to resolve disputes using the WTO mechanism, which would eliminate a tool for private parties to challenge agency decisions. 198 If Chapter 19 stays, amendments to NAFTA might resolve some issues, but a joint commitment to prioritizing the success of the mechanism and demonstrating respect for the process is crucial. 199 Overall, scholarly criticism about these processes can be useful in shaping negotiation and provides some insight into the priorities of NAFTA signatories.

197. Tracy, supra note 178, at 211.
198. Gantz, supra note 182, at 351.
199. Id.