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An Assessment of the Chapter 19 Dispute Settlement Mechanism in the Context of the NAFTA Renegotiation

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I. INTRODUCTION

One of the most salient characteristics of the North American Free Trade Agreement ("NAFTA")[1] is its dispute settlement framework. In contrast with many other trade agreements, NAFTA in fact contains a different dispute resolution structure for virtually every kind of trade and investment conflict.[2] Probably the most singular mechanism is the Chapter 19 system to resolve antidumping and countervailing duty ("AD/CVD") disputes between NAFTA Parties.

On July 17, 2017, the United States Trade Representative ("USTR") released the "Summary of Objectives for the NAFTA Renegotiation,"[3] which contends *inter alia* that since NAFTA came into force "…trade deficits have exploded, thousands of factories have

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1. North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 19 U.S.C. 21, 32 I.LM. 289 (1993) (entered into force Jan. 1, 1994).

2. Stephen J. Powell, *Expanding the NAFTA Chapter 19 Dispute Settlement System: A Way to Declaw Trade Remedy Laws in a Free Trade Area of the Americas?*, 16 L. & BUS. REV. AM. 217, 219 (2010).

3. *Summary of Objectives for the NAFTA Renegotiation*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (July 17, 2017), https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf.

closed, and millions of Americans have found themselves stranded, no longer able to utilize the skills for which they had been trained. For years, politicians promising to renegotiate the deal gave American workers hope that they would stop the bleeding. But none followed up."[4] This assertion is in accordance with the promise made by President Donald J. Trump when he was a candidate: renegotiate NAFTA or take the U.S. out of the Agreement.[5] The USTR document's chapter on Trade Remedies, in its summary of specific objectives for the NAFTA renegotiation, establishes as an objective: "Eliminate the Chapter 19 dispute settlement mechanism."[6] Although for many years politicians, the business sector and commentators have criticized Chapter 19 in the U.S.,[7] the statements that have followed the objectives of the NAFTA renegotiation, at least from the U.S. position, focus on the assertion that the U.S. has been the big "loser" in the AD/CVD disputes.[8]

In this context, the purpose of this article is to determine whether it is possible or not to find "winners" or "losers" in the NAFTA Chapter 19 dispute settlement mechanism by providing an empirical analysis of the outcomes of Chapter 19 binational panel reviews. Moreover, in the context of the NAFTA renegotiation, this paper briefly analyzes some alternative scenarios considering the possibility of Chapter 19 being eliminated from the agreement, or substantially or partially amended. Thus, the first section describes the origins and main characteristics of the mechanism, as well as its most commonly perceived flaws and advantages. A second section analyzes how binational panels have rendered their decisions, considering factors such as the sectors or products involved in the controversy, the participating Parties, and the number of decisions that have been remanded to the investigating authority. Finally, this paper briefly analyzes the role of Chapter 19 in the NAFTA renegotiation and some possible scenarios for the future of the North American AD/CVD dispute settlement regime.

4. *Id.* at 2.

5. *Id.*

6. *Id.* at 14.

7. *See* Daniel N. Adams, *Back to Basics: The Predestined Failure of NAFTA Chapter 19 and Its Lessons for the Design of International Trade Regimes*, 22 EMORY INT'L L. REV. 205, 243 (2008).

8. See USTR Releases NAFTA Negotiating Objectives, Office of the U.S. Trade Representative (July 17, 2017), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/july/ustr-releases-nafta-negotiating.

II. NAFTA CHAPTER 19: ITS ORIGINS AND MAIN CHARACTERISTICS

When Canada and the United States started the negotiations that ultimately produced the U.S.-Canada Free Trade Agreement ("FTA"), Canada proposed the elimination of AD/CVD enforcement of transactions occurring within the free trade area.[9] For the U.S. negotiators, this proposal was unacceptable. The alternative was the creation of an innovative and sui generis dispute settlement mechanism.[10] The creation of the Binational Panel review process was envisioned as a temporary measure until the Parties[11] reached a more permanent solution to the problem of the so-called unfair trade practices,[12] by means of a working group specifically conceived for such purpose. In this context, a mechanism designed to be temporary which had been working relatively smoothly and without undue controversy in the FTA context, and was extended to NAFTA with the inclusion of Mexico.[13]

When the FTA came into force, there were important arguments that supported the Binational Panels mechanism: Canada was unwilling to abide by what it perceived to be a biased and arbitrary administration of the US trade remedy laws. The US, on the other hand, refused to exempt Canada from the administration of those laws.[14] This is the most important rationale to explain one of the most singular characteristics of the Chapter 19 mechanism: Binational Panels apply domestic law.

In this context, "…Chapter 19's binational panel review became the 'eleventh hour' stop-gap measure of compromise."[15] A system

9. Richard O. Cunningham, *NAFTA Chapter 19: How Well Does It Work—How Much Is Needed*, 26 CAN.-U.S. L.J. 79, 80 (2000) (arguing that these negotiations led to the development of a truly viable mechanism for dispute settlement).

10. *Id.*

11. For purposes of the treaties discussed in this Article, the term "Parties" refers to the signing parties of the treaty referenced. *See, e.g.*, NAFTA, *supra* note 1, art. 101.

12. Gabriel Cavazos Villanueva & Luis F. Martínez Serna, *Private Parties in the NAFTA Dispute Settlement Mechanisms: The Mexican Experience*, 77 TUL. L. REV. 1017, 1019 (2002) (citing Sergio López Ayllón & Héctor Fix-Fierro, *Communication Between Legal Cultures: The Case of NAFTA's Chapter 19 Binational Panels*, *in* THE EVOLUTION OF FREE TRADE IN THE AMERICAS: L'ÉVOLUTION DU LIBRE-ÉCHANGE DANS LES AMÉRIQUES (Louis Perret & Judy Korecky eds., Wilson & Lafleur 1999).

13. *Id.*

14. Gabriel Cavazos Villanueva, Binational Panels of Arbitration: Impartial Adjudicators or Spawning Ground of New Ideas?: The Mexican Experience Under the Mechanism for Dispute Resolution of Chapter 19 of the NAFTA (1997) (LL. M. thesis, University of Toronto) (available at http://www.collectionscanada.gc.ca/obj/s4/f2/dsk2/ftp01/MQ29454.pdf).

15. Barbara Bucholtz, *Sawing Off the Third Branch: Precluding Judicial Review of Anti-Dumping and Countervailing Duty Assessments under Free Trade Agreements*, 19 MD. J.

intended to last only for a few years, until the Parties negotiated a substantive regime to replace the domestic AD/CVD laws, thus became permanent.[16]

The binational panel review mechanism has several sui generis characteristics not found in any other system to resolve trade controversies:[17]

> a. The review is conducted by a Panel established *ad hoc*, i.e., it is not a standing supranational court but a group of five specialists in international trade from the Parties involved in the particular dispute (two from one Party and three from the other). In that sense, the system differs from third party arbitration.
>
> b. The Panels substitute for domestic judicial review of the final AD/CVD determinations made by the competent investigative authority of the importing Party.
>
> c. NAFTA Chapter 19 does not establish a substantive body of AD/CVD law; rather the Panels must apply the unfair trade law of the Party that rendered the determination. In this context, the Binational Panels are international adjudicatory bodies of domestic law that apply "the importing Party's antidumping or countervailing duty law to the facts of a specific case."
>
> d. The Binational Panels apply a specific domestic standard of judicial review. They can also apply, in addition to the domestic AD/CVD law, relevant statutes, legislative history, regulations, administrative practice and judicial precedents of the importing Party.
>
> e. The procedure involves the participation of private parties, in contrast to the dispute settlement mechanisms of NAFTA Chapter 20 or the Dispute Settlement Understanding of the WTO, which only allow the participation of governments. Any person who would otherwise be entitled under the law of the

INT'L L. & TRADE 175, 179 (1995); *see also* Villanueva, *supra* note 14, at 61–62.

16. Villanueva & Serna, *supra* note 12, at 1019.

17. *Id.*

> importing Party to commence domestic procedures for judicial review of a final determination of the importing Party's authority, can request a Panel review through the respective complainant's government.
>
> f. A Panel resolution does not provide a relief by itself; it may only uphold or remand an administrative authority's determination. In the case of a remand, the Investigating Authority shall render a new determination in accordance with a Panel's opinion. The Panels' decisions are binding on the involved parties with respect to the particular matter. However, their decisions do not give life to any sort of precedent, and their effects are not *erga omnes*, but only *inter partes*, and do not bind other Binational Panels or the domestic courts of the Parties. [This is relevant because some commentators have argued that Panels might be creators of a separate body of jurisprudence.[18]]
>
> g. A Panel's decision is not appealable to a domestic court. The only recourse is an Extraordinary Challenge Committee ("ECC"), which may be established either in cases where a Party argues that a Panel did not apply the appropriate standard of review or in cases of gross misconduct of a panelist.[19]

The use of ECC has been limited to some very controversial cases, however the challenges have not been successful.[20]

Some of these characteristics reflect many of the perceived advantages of the system. One of them, is that private parties have direct access to the mechanism, as opposed to what happens in other dispute settlement mechanisms such as the World Trade Organization ("WTO").[21] Panels also have demonstrated an advantage over domestic courts in terms of the expertise of the panelists and the impartiality of the process.[22] Also, the majority of the panel decisions have been unanimous and in those decisions taken by the majority of the panel, there has not been evidence of split along the nationalities

18. *Cf.* Powell, *supra* note 2, at 228.

19. Villanueva & Serna, *supra* note 12, at 1019–1021 (internal citations omitted).

20. *Cf.* Powell, *supra* note 2, at 237–38.

21. *See generally* Villanueva & Serna, *supra* note 12 (arguing in general that one of the most salient advantages of the mechanism is the possibility of private parties' participation).

22. Adams, *supra* note 7, at 233.

of the panelists.[23] Moreover, more claims have been filed under Chapter 19 than under any other NAFTA dispute settlement mechanism.[24]

Perhaps the most salient shortcoming of the system has been its complete failure to resolve the infamous Softwood Lumber disputes between the US and Canada. Particularly because on three separate occasions, Panels found for the Canadian position. Although these rulings were a clear win for Canada, the US did not want to comply with them and both countries reached an alternative settlement by means of an agreement.[25] Of course, the fact that the US didn't obey the decisions seriously threatens the legitimacy of the system, and it can be a good argument for those in favor of the elimination of the mechanism from NAFTA.

Stephen Powell has concluded that another major flaw of the mechanism is that, at least in the cases involving US determinations, Panels have applied a standard of review, that is clearly different than the one applied by the US domestic courts. He considers that Panels often examine the evidence anew, rather than reviewing the propriety of the agency or lower court findings and conclusions[26]

An interesting observation concerning the Panels reviewing Mexican determinations, is that WTO law (especially the Antidumping Agreement) is regularly applied as "Mexican law," because many of the arguments raised by the participants are based on the relevant agreements. This is certainly not a defect of the system, but an outcome certainly unexpected when NAFTA came into force.[27]

Another shortcoming that can be relevant for the NAFTA renegotiation process is the inability to appeal panel decisions, even when it was considered an advantage when the treaty was drafted.[28] The lack of opportunity to correct possible errors of law is also reflected in cases where there have been multiple remands, and sometimes agency resistance and even open hostility toward the panel decisions.[29]

23. *Id.*

24. *Id.*

25. *Id.* at 206.

26. Powell, *supra* note 2, at 228–29.

27. This is a personal observation of the authors derived from their participation in the binational panel reviews.

28. Powell, *supra* note 2, at 226–27.

29. Adams, *supra* note 7, at 234.

Another major defect of the system is that there are unconscionable delays in the Panel formation, especially in cases involving Mexico. According to Stephen Powell, some of the delays are the result of the lack of available panelists in the Mexican legal system, but "the largest cause of the delays is one Party or the other taking the Chapter 19 process hostage to trade demands it makes of the other Party that are unrelated to the issues involved in the NAFTA review."[30] The delay in the appointment of the panelists in the High Fructose Syrup[31] Panel prompted the United States to seek relief from a WTO Panel, before the NAFTA Chapter 19 Panel was actually established.[32] The WTO Panel rendered a decision prior to the NAFTA Chapter 19 Binational Panel.[33] Therefore, by the time the Chapter 19 Panel was able to hand out its own resolution, it already had an interpretation of unfair trade practices made by an international adjudicatory body. It is clear that a NAFTA Chapter 19 Panel renders its decision in accordance with the domestic AD/CVD law of the importing Party, which in this particular case was Mexico.[34] However, the NAFTA Panel took into account the resolution made by the WTO Panel, in accordance with WTO law, and applied a principle of international comity to integrate the resolution of the special group into its own.[35] These kinds of "parallel proceedings" are possible because Chapter 19 does not contain a forum exclusion clause. If the system is amended, this is an opportunity to correct the omission of such a clause.

These defects can be deemed as a cause for the U.S. proposal to eliminate Chapter 19. Notwithstanding the above, it is not clear why the US Government claims that Chapter 19 has been especially negative for the US interests. As a matter of fact, the main purpose of the authors when choosing to draft this paper was to examine such empirical evidence, in order to confirm or disprove if Chapter 19 has been prejudicial for the Parties. In the following section this paper analyzes some data that can be relevant to reach such conclusions, although some of them could certainly be beyond the scope of this essay.

30. Powell, *supra* note 2, at 227–28.

31. *In re* Imports of High Fructose Corn Syrup, Secretariat File No. MEX-USA-98-1904-01 (Aug. 3, 2001), *translated at* https://www.nafta-sec-alena.org/DesktopModules/NAFTA_DecisionReport/pdf.ashx?docID=5376&lang=1.

32. *Id.* at 6.

33. *Id.*

34. NAFTA, *supra* note 1, at art. 1805.

35. *In re* Imports of High Fructose Corn Syrup, *supra* note 31.

III. THE CHAPTER 19 EXPERIENCE: HOW HAVE BINATIONAL PANELS RULED?

As has been described above, since the 2016 U.S. presidential campaign, commentators have expressed that NAFTA's Chapter 19 "has hindered" or "thwarted" the United States from pursuing antidumping and countervailing duty cases against Mexican and Canadian firms.[36] To the contrary, the Treaty not only imposes no obstacle for corporations to challenge trade remedy determinations, but the Agreement actually allows that they do it before an impartial forum for their complaints. This section analyzes Binational Panel decisions as a way to asses those assertions in the context of panel review results. In other words, we should look at the facts to answer the question: Has the United States really been "the biggest loser" in the NAFTA's Chapter 19 Binational Panel decisions?

In order to do that, we have looked into the Binational Panel decisions published in the official NAFTA Secretariat website,[37] which includes the rulings from 1995 to date. It is important to note that this website includes decisions of cases that are still active. Also, not every NAFTA Binational Panel has ended with a Final Decision, some have been "terminated" for several reasons (such as settlement between the litigants), but not by the normal course of the procedure. This analysis focuses only on the "completed cases" as classified by the Secretariat itself, i.e., not the ones that are active, suspended, or otherwise terminated.[38]

As of October 2017, there have been 64 completed Binational Panel decisions. This number includes challenges to all three Parties. Firstly, we were interested to know which products are most subject to recurring controversies. The latter, to see if this has become a politicized mechanism, where the merchandises that are the issue of the disputes are strategic for the parties' economies; as has been said about the WTO Dispute settlement mechanism, where it is considered

36. David Lawder, *Any Trump NAFTA Withdrawal Faces Stiff Court Challenge: Legal Experts*, REUTERS (Nov. 21, 2017, 4:20 PM), https://www.reuters.com/article/us-trade-nafta-trump-options/any-trump-nafta-withdrawal-faces-stiff-court-challenge-legal-experts-idUSKBN1DL2PK; *see also* Reuters Staff, *WTO Better for Solving U.S. Trade Spats than NAFTA Tool: Mexico Minister*, REUTERS (July 20, 2017, 11:56 PM), https://www.reuters.com/article/us-usa-trade-mexico/wto-better-for-solving-u-s-trade-spats-than-nafta-tool-mexico-minister-idUSKBN1A60A6?il=0.

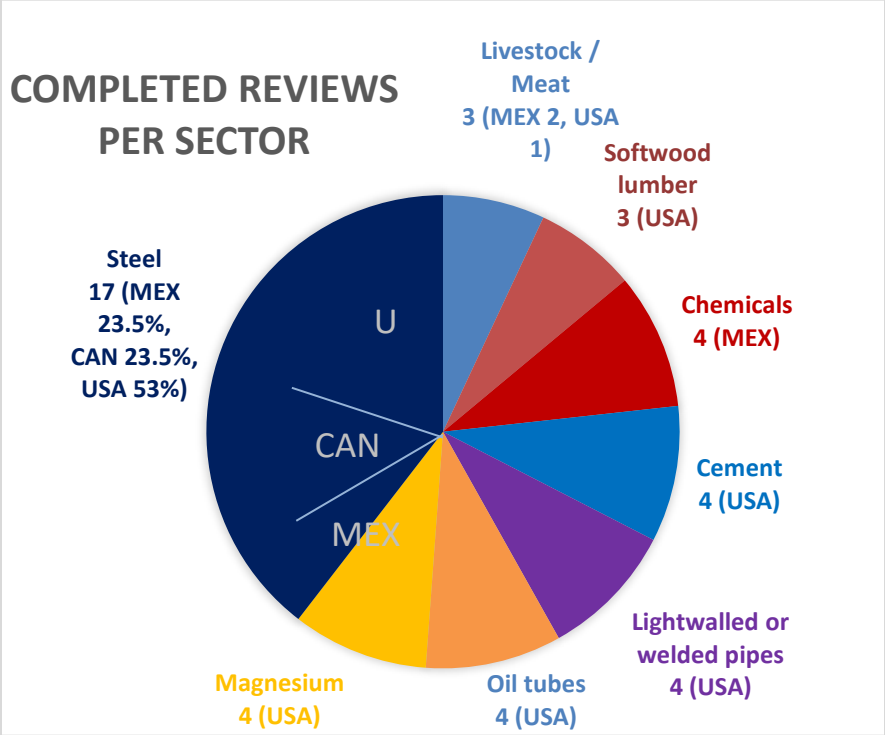
37. *Decisions and Reports*, NAFTA SECRETARIAT, https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Decisions-and-Reports (last visited Aug. 18, 2017).

38. *Status Report of Panel Proceedings*, NAFTA SECRETARIAT, https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Status-Report-of-Panel-Proceedings (last visited Aug. 18, 2017).

that "*interest group pressure on both sides of a trade dispute pushes politicized trade topics into dispute adjudication*."[39]

Our findings are illustrated in the following chart, which shows forty three of the sixty-four completed Binational cases. This represents those Binational Panel cases that concern multiple reviews of certain goods. The remaining twenty-one cases are not shown on the chart, because there were only one or two reviews per product.

FIGURE 1



It is evident that a relative majority of the cases (seventeen out of sixty-four) are related to products of the steel industry. These are not always the same products, ranging from steel sheets, flat coated steel products, tubes and rebar, among others. It reflects that all three countries have important steel industries[40] that governments are

39. Christina L. Davis, *The Effectiveness of WTO Dispute Settlement: An Evaluation of Negotiation Versus Adjudication Strategies*, 1, 3 (Aug. 2008), *available at* http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.424.7368&rep=rep1&type=pdf.

40. *North American Steel Industry: Recent Market Developments and Key Challenges Going Forward*, OECD STEEL COMMITTEE (May 6–7, 2010), https://www.oecd.org/industry/ind/45144151.pdf.

inclined to protect, and with major players who want to defend their interests against an importing Party's adverse administrative decisions.

Also, it is noteworthy that, out of the thirty-six cases in which the United States has been the importing Party (see Figure 2), twenty-nine are amongst the products under recurring Panel review. This suggests that, at least in the U.S.' final determination, there are industries in which the Investigating Authority tends to impose antidumping or countervailing duties on "sensitive" products.

Regarding Mexico and Canada, from the authors' analysis of the products that were the subject of the completed cases, it is possible to conclude that the products vary. In the case of Mexico, there have been four Chapter 19 Panel Reviews concerning steel products that have completed cases challenged the Mexican investigating authority; four concerning the chemical industry (urea, caustic soda, stearic acid, and ether); two of meats or livestock (pork and bovine carcasses); and another four of various products.[41] In the case of Canada, steel has been the only merchandise that has been subject to panel review more than two times (four times).[42] At least from this data, it seems difficult to conclude that there is a strong interest group in Mexico or Canada that "pushes" for the establishment of antidumping or countervailing duties to products from the other NAFTA Parties. Of course, it is well known that between the United States and Canada, subsidies on Softwood Lumber have been the most important trade remedy issue for many years.[43]

On the other hand, it seems important to analyze whether there is a Party that mostly benefits from Chapter 19, since President Trump has called NAFTA "the worst trade deal maybe ever," and many of his supporters agree with him.[44] Also, the Mexican Secretary of Economy said on May 2017, that "*The majority of recent controversies (with the United States) . . . we have won them all in the WTO, which has been for us, a much more efficient mechanism than Chapter 19 of NAFTA*."[45]

In order to do that, we analyzed the disputes based on the Parties that were involved, and then studied the outcomes of the Binational Panel decisions. Again, the following chart illustrates the data obtained

41. NAFTA SECRETARIAT, *supra* note 38.

42. *Id.*

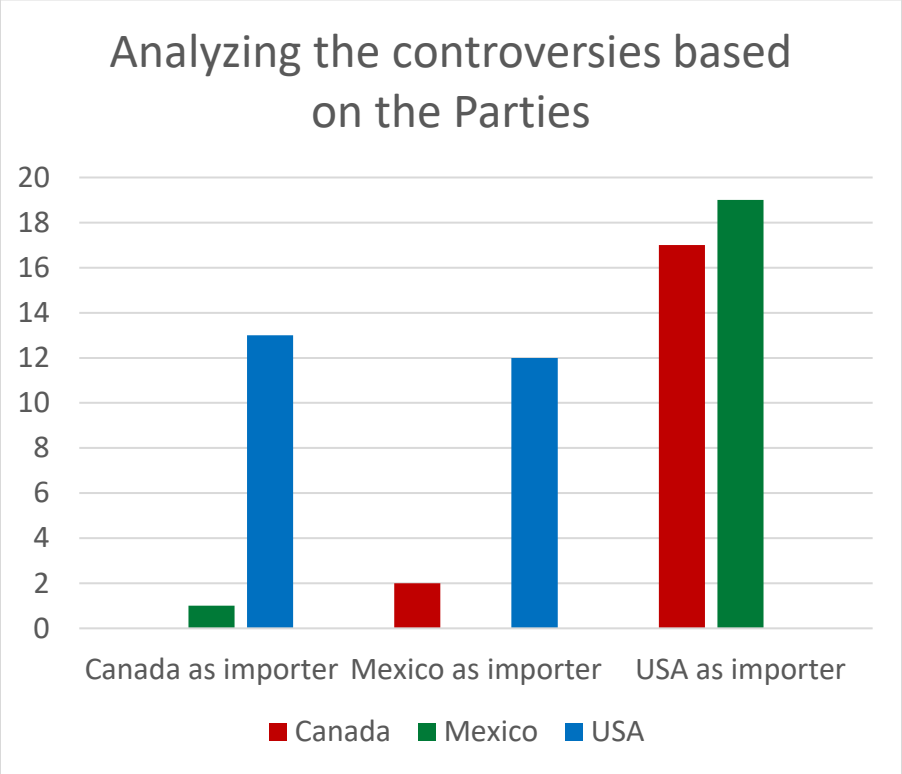
43. Adams, *supra* note 7, at 206–09.

44. David Floyd, *NAFTA's Winners and Losers*, INVESTOPEDIA (Aug. 15, 2017), https://www.investopedia.com/articles/economics/08/north-american-free-trade-agreement.asp.

45. Reuters Staff, *supra* note 36, at 2 (emphasis added).

from the Secretariat database:

FIGURE 2



The horizontal axis shows the importing Party (i.e., the investigating authority that rendered the AD/CVD determination). The vertical axis shows the nationality of the exporting company (or companies). Both Canada and Mexico have been importers on fourteen of the completed disputes. The United States has been the importer Party on thirty-six cases. That means that in over fifty percent of the controversies (56.25%) Canadian or Mexican companies have requested a Binational Panel to review a Final Determination issued by the United States International Trade Commission of US.

Even though there have been more challenges against the U.S. Investigating Authority determinations through Chapter 19 Binational Panels, U.S. companies have also exercised their right to request a Panel review more times than the other Parties: 25% more times than the companies from Mexico or Canada. As shown in the chart, Mexican exporters have challenged other Parties' determinations twenty times, Canadians have requested nineteen reviews, and the

United States twenty-five.

Regarding the Parties involved in the disputes, it is evident that Canada and Mexico are in very similar conditions: They have challenged the U.S. Investigating Authority before a Binational Panel, and they have been challenged by U.S. and Canadian companies, almost the equivalent number of times.

Figure 2 also reveals that there have only been three completed cases between Mexico and Canada, one where Canada was the importing Party against Mexican exporters, and two where Canadian companies challenged the Mexican Investigating Authority determination. The vast majority of the controversies involve the United States, either as the Investigating Authority, or as the nationality of the exporting company. That leaves a U.S. party, either a company or the government agency, as a participant in sixty-one of the sixty-four cases. As such, it is the view of the authors that the abolition of Chapter 19, or the exit of the United States from NAFTA, would definitely change the dynamic of judicial remedies against dumping on North American trade.[46]

It is important to point out that, naturally, the fact that a company requests a Panel review of an AD/CVD determination does not necessarily mean that the duty would be ultimately revoked, even when the decision of the Panel is to remand the determination. Nevertheless, some analysts have concluded that the United States is "the biggest loser" in Chapter 19 Binational Panels, because they have "lost" in 67% of the cases where it has been involved, which includes 72% of the cases where the United States is the respondent party (twenty-six out of thirty-six cases).[47] It is difficult to agree with these figures, for the following reasons.

As has been established, both Canada and Mexico have been importers in fourteen of the completed disputes. For its part, the United States has been the importing Party in thirty-six cases. Not all those cases have ended with just one Decision of the Binational Panel. As a matter of fact, the majority have not. This is illustrated in the following

46. All of the completed cases that have been reviewed regarding determinations from Mexican and Canadian authorities have been regarding dumping issues. Only the United States has issued some determinations regarding countervailing duties in opposition to subsidized products. NAFTA SECRETARIAT, *supra* note 38.

47. Alfredo Carrillo & Sergio Lozano, *Sale EU Perdedor con Capítulo 19* (*The U.S. Has Lost with Chapter 19*), AGENCIA REFORMA (Aug. 16, 2017), http://www.reforma.com/aplicacioneslibre/articulo/default.aspx?id=1186594&md5=cf284d1c950c3f65b1d5d22dc4369bf3&ta=0dfdbac11765226904c16cb9ad1b2efe.

chart:

FIGURE 3: FIRST DECISIONS OF COMPLETED BINATIONAL PANEL REVIEWS

Importing Party	Upheld	Partially Remanded	Remanded	Terminated	**Total**
CDA	9	4	1	0	**14**
MEX	3	6	3	2	**14**
USA	8	27	1	0	**36**
Total	**20**	**37**	**5**	**2**	**64**

This graphic shows the ruling of all Binational Panels in every completed case on the first decision that they issued. As can be seen from this chart, the vast majority of the completed cases were not upheld in the first decision. Actually, more than half of the panel decisions partially remanded or remanded the Investigating Authority's determination. It is also possible to realize that both Mexican and American determinations under review were remanded more times that they were upheld, which shows that the system is not biased against one of the Parties.

Figure 3 demonstrates that it is uncommon for a panel to affirm the determination on its first decision. Often, there are multiple determinations on remand issued in a single case. This does not mean that any of the Parties "lost," as has been stated by some analysts.[48] There was even a review in which the Panel partially remanded the Investigating Authority's determination five times, and ultimately affirmed it.[49]

48. See *id.*

49. *In re* Certain Softwood Lumber from Canada, Secretariat File No. USA-CDA-2002-1904-03 (Mar. 17, 2006) (decision of panel on fourth remand determination), *available at* http:// www.nafta-sec-alena.org/app/DocRepository/ 1/Dispute/English/NAFTA_Chapter_ 19/USA/ua02035e.pdf.

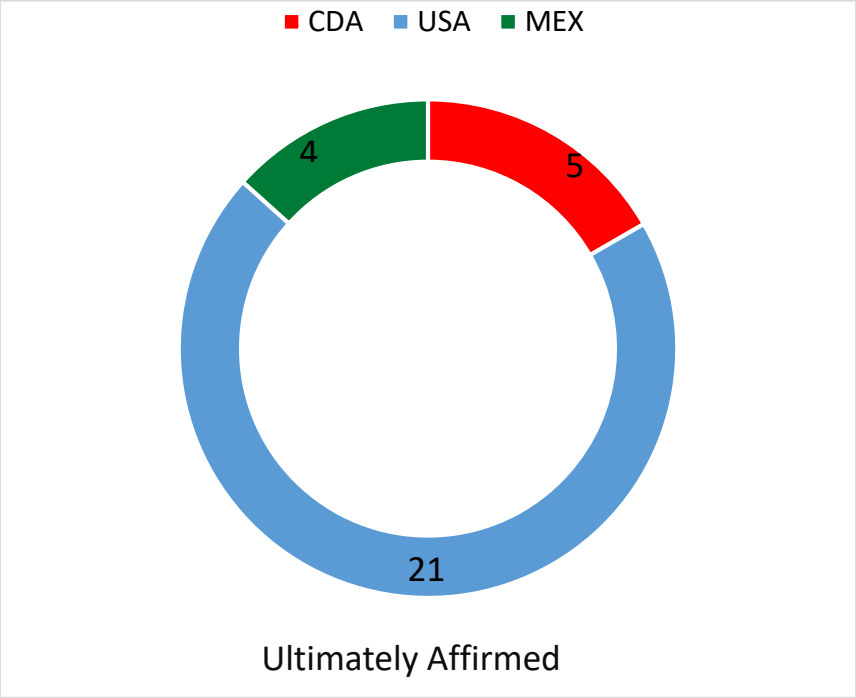
As has been stated, there is no accurate way to conclude that the mentioned analysis that established that the United States "lost" on twenty-six out of thirty-six cases where they were the importing Party is correct.[50] Firstly, because the number "26" cannot be found on the graphic, but mainly because of the reasoning that follows.

On a "partially remanded" decision, the Panel affirms some rulings of the Investigating Authority, and remands one or more of other rulings in the determination. This does not mean that the Investigating Authority -or the Party- "loses"; since it is entirely possible that in the determination on remand, the Agency keeps the antidumping duty, but elucidates its decision according to the law, and consequently the Panel affirms the determination, as happened recently on the *Rebar* review.[51] The following graphic is relevant:

50. See Carrillo & Lozano, *supra* note 47.

51. *In re* Steel Concrete Reinforcing Bar, Secretariat File No. USA-MEX-2014-1904-02 (July 14, 2016), *available at* https://www.nafta-sec-alena.org/DesktopModules/NAFTA_DecisionReport/pdf.ashx?docID=20741&lang=1.

FIGURE 4



This last chart makes evident that thirty out of the forty-two cases where the determinations were remanded or partially remanded, were ultimately affirmed. Of these cases, all of the ones that reviewed a Canadian determination were affirmed, and twenty-one from the twenty-eight US determinations were affirmed.[52]

By correlating the last two charts, we can see that the Binational Panels have issued twenty-nine affirmative decisions regarding American determinations. Twenty-nine out of thirty-six represent 80% of the decisions. With respect to Canada, the Binational Panels have issued affirmative decisions on 100% of the cases where the Canadian Investigating Authority was challenged. It is noteworthy that these affirmative decisions were either the first or the second decisions of the review, and in just one case the affirmative decision was the third one.[53] Regarding Mexico, there is information of affirmative decisions

52. In the case of Mexico, four out of nine were ultimately affirmed; but it is important to point out that, in five cases, the last decisions were not published on the Secretariat website. NAFTA SECRETARIAT, *supra* note 38.

53. *In re* Certain Iodinated Contrast Media Imaging, Secretariat File No. CDA-USA-2000-1904-01 (Sept. 23, 2003), *available at* https://www.nafta-sec-alena.org/DesktopModules/NAFTA_DecisionReport/pdf.ashx?docID=7404&lang=1.

in only seven of the fourteen cases where the Mexican Authority was challenged[54]

It is important to insist that it is incorrect to use the term "losing" regarding countries in a Chapter 19 panel review, mainly because a determination that is remanded can be ultimately upheld.

From this analysis, this paper would not conclude that the United States has experienced any disadvantage, or bias against it, in the Binational Panel decisions. Moreover, the U.S.' participation in the vast majority of the disputes somehow demonstrates the importance of Chapter 19 to American interests.

IV. CHAPTER 19 IN THE NAFTA RENEGOTIATION

Since July 2017, when the Office of the United States Trade Representative published its objectives for the NAFTA Renegotiation, Chapter 19 has become a focal point. This was mostly because, almost immediately, Canada's Ambassador to the United States David MacNaughton stated that it is critical that NAFTA has some kind of antidumping and countervailing duty dispute resolution mechanism,[55] which was backed by Prime Minister Justin Trudeau a week later.[56] In Mexico, the Senate recommended the administration to protect Chapter 19,[57] and Ildefonso Guajardo, secretary of Economy and Mexican chief negotiator concurred with the Senate, stating that a dispute settlement mechanism should persist, although it may not necessarily be the same.[58]

One of the main reasons that this issue became troublesome in the negotiations was the fact that there was no detailed proposal from the

54. That is to say, that either the last decision of the Panel was a decision to remand, and the process did not continue, or that the Secretariat did not publish such decision in their website.

55. David Ljunggren, *NAFTA Dispute Resolution Mechanism Critical - Canada*, REUTERS (July 18, 2017, 1:55 PM), https://www.reuters.com/article/usa-trade-nafta-canada/nafta-dispute-resolution-mechanism-critical-canada-idUSL1N1K916X.

56. Leah Schnurr, *Canada's Trudeau: NAFTA Dispute Resolution System is Essential*, REUTERS CANADA (July 25, 2017, 12:01 PM), https://ca.reuters.com/article/topNews/idCAKBN1AA22E-OCATP.

57. Leopoldo Hernández, *Mé.xico debe defender el Capítulo 19 en TLCAN: Senado* [*Mexico must defend NAFTA's Chapter 19: Senate*], EL ECONOMISTA (July 26, 2017, 9:26 PM), https://www.eleconomista.com.mx/empresas/Mexico-debe-defender-el-Capitulo-19-en-TLCAN-Senado-20170727-0157.html.

58. Notimex, *Coincide Guajardo con senadores sobre capítulo de controversias en TLCAN* [*Guajardo Coincides with Senators on Controversy Chapter in NAFTA*], GRUPOFÓRMULA (July 21, 2017), http://www.radioformula.com.mx/notas.asp?Idn=700171&idFC=2017.

United States but only the plain elimination of Chapter 19. In that regard, as has been stated, the Office of the USTR established in its objectives simply "Eliminate the Chapter 19 dispute settlement mechanism," without stating why or with what they planned to substitute it.[59] And it was not until the fifth round of negotiations on November 2017 that the United States finally proposed a "non-binding resolution system that would permit contestants to disregard panel decisions if those decisions were considered 'clearly erroneous' by the parties themselves."[60]

Naturally, this has not been accepted by the other two Parties, and it is very likely that it will never be. Canada has repeatedly stated that this "NAFTA dispute settlement mechanism cannot be eliminated or weakened and should remain independent of any single national justice system."[61] It has been said that Canada could leave the negotiations if the Parties cannot reach an agreement on an independent dispute resolution mechanism concerning final antidumping and countervailing duty administrative determinations.[62]

As discussed above, Canada's position is nearly thirty years old, since, when drafting the Canada-United States Free Trade Agreement, Canada was concerned that U.S. agencies and tribunals were not applying even their own countervailing duty law correctly. Therefore, a binational panel review—putting review at least in part in the hands of non-nationals—was seen as an important concession to Canada.[63]

As we have shown, U.S. exporters have benefitted from the Chapter 19 panel review, as it gives certainty against the other Parties' domestic tribunals, and it is somehow considered more efficient.[64] In that regard, they have said they are "alarmed" by the U.S. position since "the panels protect their interests overseas."[65] The President of

59. *Summary of Objectives for the NAFTA Renegotiation*, *supra* note 3, at 14.

60. Brandon Smith, *Updates on NAFTA Renegotiation Talks*, BRAUMILLER LAW GROUP (Nov. 20, 2017), https://www.lexology.com/library/detail.aspx?g=654aa3b4-9567-4c7b-aa82-64069d156d5b.

61. Nathaniel Parish Flannery, *Have NAFTA Talks Reached a Breaking Point?*, FORBES (Nov. 30, 2017, 8:59 AM), https://www.forbes.com/sites/nathanielparishflannery/2017/11/30/have-nafta-talks-reached-a-breaking-point/#2612adaf276b.

62. *Id.*

63. MICHAEL HART, ET AL., DECISION AT MIDNIGHT: INSIDE THE CANADA-U.S. FREE-TRADE NEGOTIATIONS 234–35 (1994).

64. Powell, *supra* note 2, at 223

65. William Mauldin & Paul Vieira, *With Latest Nafta Proposals, U.S. Takes on Bigger Targets, Critics*, FOX BUSINESS (Sep. 23, 2017), http://www.foxbusiness.com/features/2017/09/23/with-latest-nafta-proposals-u-s-takes-on-

the U.S. Chamber of Commerce, United States' most powerful business lobby, Thomas J. Donohue, has even called the administration's proposed changes to NAFTA's Chapter 19 "unnecessary and unacceptable."[66]

Given these positions, and the findings established above, there are several scenarios that are worth mentioning, as well as some ideas that would update the dispute settlement system, based on its own experience.

V. FACING THE RENEGOTIATION: POSSIBLE SCENARIOS FOR THE DISPUTE SETTLEMENT SYSTEM

Even though it is likely that, by the time this article is published, a decision will have been reached regarding the future of Chapter 19, we consider it important to mention the possible scenarios for the future of the North American antidumping and countervailing duty dispute settlement mechanism. The possible scenarios are: (a) the Chapter 19 dispute settlement mechanism remains exactly the same; (b) the renegotiated Agreement is signed without an AD/CVD dispute settlement mechanism; (c) Chapter 19 is updated, with some changes; or (d) Parties draft a completely new system.

Certainly, the most plausible scenarios for Chapter 19 are either that it would be improved from the same basis, or that there would be a completely new system with totally different rules. Because of the position of the United States, and the importance that this issue has had in the negotiation, it is improbable that Chapter 19 remains the same. Moreover, the renegotiation is a good opportunity to amend some of the perceived shortcomings of the mechanism that have been mentioned in the first part of this paper. Also, given the Canadian and Mexican stance in the matter, it is very unlikely that the renegotiated NAFTA would not comprise any AD/CVD dispute settlement mechanism. Correspondingly, if Chapter 19 (or even NAFTA) is repealed, controversies between the three countries would be heard by the WTO Dispute Settlement Body.

The analysis as to whether the WTO has been a better forum for the United States than Chapter 19 is certainly beyond the scope of this article. However, keeping the WTO as the sole alternative to resolve

bigger-targets-critics.html.

66. Ana Swanson, *Trump's Tough Talk on Nafta Raises Prospects of Pact's Demise*, N.Y. TIMES (Oct. 11, 2017), https://www.nytimes.com/2017/10/11/business/economy/nafta-trump.html.

AD/CVD disputes between NAFTA countries seems to offer no benefit to the United States. Also, leaving domestic courts as a unique resort to challenge a U.S. determination, seems to be very unlikely, although some commentators tend to favor this alternative.[67] Also, with the current Chapter 19, the standard of review is the law of the country where the dispute arouse, contrary to the WTO forum, where the relevant WTO Agreements would be the applicable law.[68] In certain respects, the Chapter 19 dispute settlement mechanism "has been active and successful in dealing with particular kinds of disputes in the NAFTA area."[69] Nevertheless, as has been stated before, there are aspects where the system may be improved.

"The tripartite [S]ecretariat is often seen as part of the reason for problems with [the system], including delays in the panel selection process and the panel proceedings themselves."[70] Much of the criticism stems from the fact that an independent trade secretariat was not created alongside NAFTA, similar to the secretariats established by the labor and environmental side agreements. In fact, an independent trade secretariat was originally agreed upon by the Parties to be based in Mexico City. It was never formally established, due primarily to absence of funding.[71]

In the past years the lack of importance that the administrations have given to the tripartite Secretariat has led to a diminishment of staff that often reflects in delays in the panel procedures.[72] As such, these government offices, which used to be larger, nowadays consist of only a couple of people. The fact that the Secretariats are understaffed and under-budgeted,[73] leads to a series of efficiency problems: delays in

67. *See* Chris Fournier, *This Obscure Nafta Chapter Could Be Canada's Deal-Breaker Again*, BLOOMBERG (July 24, 2017, 5:00 AM), https://www.bloomberg.com/news/articles/2017-07-24/this-obscure-nafta-chapter-could-be-canada-s-deal-breaker-again.

68. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, 33 I.L.M. 1226, *available at* https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf.

69. Donald McRae & John Siwiec, *NAFTA Dispute Settlement: Success or Failure?*, BIBLIOTECA JURIDICA VIRTUAL DEL INSTITUTO DE INVESTIGACIONES JURÍDICAS DE LA UNAM 363, 364 (2010), https://archivos.juridicas.unam.mx/www/bjv/libros/6/2904/21.pdf.

70. *Id.* at 380.

71. J. Ernesto Grijalva & Patrick T. Brewer, *Monitoring and Managing North American Free Trade: The Administrative Bodies of the North American Free Trade Agreement*, 2 SAN DIEGO: JUST. J. 1, 2 (1994).

72. David A. Gantz, *Dispute Settlement Under the NAFTA and the WTO: Choice of Forum Opportunities and Risk for the NAFTA Parties*, 14 AM. U. INT'L L. REV. 1025, 1090–91 (1999).

73. This is a personal observation of the authors derived from their participation in the binational panel reviews.

sending the case files to the panelists, delays in clearing them for access to confidential information, delays in the establishment of hearing dates, and a less-than-thorough follow-up on the status of the active cases.

Also, the renegotiation may present a major opportunity to change the dynamic for appointing the panelists. According to the Agreement, within 30 days of a request for a panel, each involved Party (through its Secretariat) shall appoint two panelists, in consultation with the other Party.[74] "Within 55 days of the request for a panel, the involved Parties shall agree on the selection of a fifth panelist."[75] Each Party has the right to disqualify from appointment to the panel up to four candidates proposed by the other Party.[76] This provision, which should be an exception and not the general practice, has caused the conformation of the panel to take several months, and in some cases, even years.[77] The latter, even when NAFTA clearly states that the five members shall be chosen by the 61st day of the request for a panel.[78]

Lastly, another scenario could be the creation of a completely new dispute settlement system, with new rules regarding the conformation of the judicial body, the Secretariat and even the standard of review. There are limitless possibilities for the concept and structure of a new mechanism. Some options are: the establishment of a standing panel, whose members work fulltime and solely to review NAFTA antidumping and countervailing duty disputes; the restructuring of the Secretariat into a single entity with its own pre-established budget; the drafting of a new set of Rules of Procedure; or even the creation of an integrated North American antidumping and countervailing duty legal framework. This scenario is not impossible, considering that Chapter 19 was itself an original conception. It is, however, unlikely that a new mechanism could be drafted from scratch given the timeline that the Parties have established for the negotiation, to be concluded before

74. NAFTA, *supra* note 1.

75. *Id.* at annex 1901.2(3).

76. *Id.* at annex 1901.2(2).

77. Pamela D. Velazco Herrera, *Ventajas y Desventajas de los Mecanismos de Solución de Diferencias sobre Prácticas Comerciales Desleales Actualmente Disponibles para México: un Análisis Comparativo entre el Órgano de Solución de Diferencias de la Organización Mundial del Comercio y los Paneles Constituidos bajo el Capítulo 19 del TLCAN, ante una Posible Terminación del Mismo* [Advantages and Disadvantages of the Dispute Settlement Mechanisms of Unfair Trade Practices Currently Available for Mexico: a Comparative Analysis Between the Dispute Settlement Body of the World Trade Organization and the Panels Constituted under Chapter 19 of NAFTA, in Face of its Possible Termination], ITESM (2017). Unpublished paper on file with authors.

78. NAFTA, *supra* note 1, at annex 1901.2 (3).

Mexico's general elections in July 2018.

VI. CONCLUSIONS

The NAFTA dispute settlement mechanisms do not further the process of economic integration. With them, during the original negotiations, the NAFTA Parties did not seek the harmonization of social, political or legal regimes. Chapter 19 reflects this limited objective, which is now even more limited because of the recent protectionist political discourse. "[T]he system would work even better if it was developed as a catalyst for economic integration."[79] This is certainly not going to happen in the near future. Therefore, the main objectives of the NAFTA Parties are going to be the maintenance and application of their own trade remedy laws, especially in Canada and the United States. In this context, the only possible alternative, if NAFTA is going to survive, is to maintain an improved Chapter 19. Other more political alternatives pose even greater challenges to resolving the current AD/CVD disputes. The future of Chapter 19 and the outcome of the renegotiation process lie in the hands of the Parties' principals. These decisions are going to be mostly political at the end of the day.

79. Villanueva, *supra* note 14, at 146.