Dispute Resolution under USMCA

Modifications to NAFTA And the Potential Implications

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Abstract

In this article the author discusses the differences in the dispute resolution mechanisms between the North American Free Trade Agreement and the United States-Mexico-Canada Agreement. The author notes that while all three dispute resolution mechanisms from NAFTA are present in USMCA, two of the mechanisms have been extensively modified. The author is critical of the Trump Administration's insistence on eliminating NAFTA's Chapter 11 provisions on investor-state dispute settlements, leading to a severely weakened ISDS mechanism in USMCA. State-to-state dispute settlement (Chapter 20 under NAFTA) was also significantly modified. The third dispute resolution mechanism, a binational panel process that was covered in Chapter 19 of NAFTA, survived with only minor changes as insisted upon by Canada. As the most extensive changes were made to investor-state dispute settlements and state-to-state dispute settlements, the author analyzes these two dispute resolution mechanisms in detail. The author dissects the changes made to these dispute resolution mechanisms and provides insight into the rationale of the countries involved that led to the changes. The author concludes that with Canada's refusal to sign on to Annex 14-D and a drastically diluted ISDS mechanism governing ISDs between the United States and Mexico, the most likely outcome under USMCA is that there will be a dramatic increase in Chapter 31 claims when the United States is involved and a heavy reliance on the CPTPP for claims between Mexico and Canada.

Keywords: international trade law, North American Free Trade Agreement, United States-Mexico-Canada Agreement, dispute resolution mechanisms, investor-state dispute settlements, state-to-state dispute settlements, investment disputes, investor protections, asymmetrical fork-in-the-road clause, panel blocking, enforcement actions, trade agreements.

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A Introduction

Former President Donald Trump's belief that the North American Free Trade Agreement (NAFTA) "was perhaps the worst trade deal ever made"[1] served as the catalyst for the negotiation of a new free trade agreement: The United States-Mexico-Canada Agreement (USMCA). While the vast majority of USMCA merely updates what had become an increasingly outdated NAFTA (adding new laws for intellectual property protection, the internet, investment, state-owned enterprises, and currency), several key changes were made.[2] One of the significant changes from NAFTA to USMCA came in the form of a modification of the dispute resolution mechanisms. NAFTA

> incorporated three distinct dispute settlement mechanisms. These address (1) investor-state disputes (ISDs) between foreign investors and host states; (2) binational panel review of national administrative agency rulings under domestic anti-dumping (AD) and subsidy/countervailing duty (CVD) laws; and (3) state-to-state disputes challenging another party's application or interpretation of the agreement.

The USMCA still includes all three of those dispute settlement mechanisms, but two of them have been 'extensively modified'.[3]

The Trump Administration was particularly intent on eliminating NAFTA's Chapter 11 provisions on investor-state dispute settlement (ISDS). These provisions essentially give the right to investors from any of the three countries to challenge measures of host country authorities if they interfere with the investment in ways that diminish its value or viability. For example, an investor operating a mine and holding a twenty-year licence could challenge new environmental regulations that make the operation of the mine significantly less profitable or even entirely impossible. According to the Trump Administration, the ISDS provisions "infringe[d] on US sovereignty and [encouraged] American enterprises to move their production facilities to lower-wage countries such as Mexico".[4] This statement from the Trump Administration has two parts – neither of which makes much sense. True, American entrepreneurs might feel safer making investments in Mexico if they have a formalized ISDS procedure enabling them to challenge measures by Mexican authorities that interfere with their business plans. This was true under NAFTA, and this is true for many other trading partners of the US who have signed bilateral investment protection agreements (BITs) with the US

1 Meg Wagner & Brian Ries, *Trump: We're Replacing NAFTA, Which was "Perhaps the Worst Trade Deal Ever Made"*, CNN (1 October 2018), www.cnn.com/politics/live-news/trump-us-mexico-canada-remarks-oct-18/h_2c0a8c6bad4dc7a2f98acda7c57ea454.

2 Ana Swanson & Jim Tankersley, *Trump Just Signed the U.S.M.C.A. Here's What's in the New NAFTA*, The New York Times (1 July 2020), www.nytimes.com/2020/01/29/business/economy/usmca-deal.html.

3 David A. Gantz, An Introduction to the United States-Mexico-Canada Agreement: Understanding the New NAFTA 45 (2020).

4 *Id*. at 47.

(Argentina, Bolivia, Ecuador, Grenada, Honduras, Jamaica, Panama, Trinidad and Tobago, Uruguay and a good dozen other countries in other parts of the world). In addition, ISDS provisions can also be found in free trade agreements concluded with Chile, Columbia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Peru and eight other countries in other parts of the world. Thus, there is no reason why having ISDS provisions with Mexico would specifically encourage Americans to move part of their business there. Businesses will move to where they get the highest quality for the lowest price. A measure of legal certainty is just one part of the calculation.

The statement that ISDS provisions infringe on US sovereignty refers to the possibility for Canadian and Mexican investors to challenge decisions of US authorities in the same way US investors can challenge Canadian or Mexican measures. Again, it is true that a country that accepts ISDS provisions limits to an extent its freedom to do as it wishes to the foreign investors (regulatory takings, for example). However, this is the price all countries pay who follow the rule of law and seek to participate in international trade on the basis of reciprocity. Thus, the elimination of the ISDS provisions in the relations with Mexico (and Canada) would have been a move from more rule-based trade relations to more power-based trade relations. Presumably, President Trump counted on the sheer size of the US economy to be able to impose his wishes on the trading partners selectively while not being held accountable by them in return. While ISDS survived (a noted concession by the US), the United States succeeded in an effort to significantly modify this mechanism. State-to-state dispute settlement (Chapter 20 under NAFTA) was likewise significantly modified, albeit for different reasons.

The dispute resolution mechanism that survived with only minor changes was covered under Chapter 19 of NAFTA. The Chapter 19 dispute resolution mechanism is a binational panel process that serves as

> an alternative to federal court review of anti-dumping and subsidies/countervailing duty determinations by the U.S. Department of Commerce and the U.S. International Trade Commission (and parallel agencies in Canada and Mexico).[5]

There were several points of contention in the negotiation of USMCA that brought the deal to the verge of collapse, and Canada's insistence on the preservation of NAFTA's Chapter 19 (despite its unpopularity in the United States)[6] was one of them. For its part, Canada has viewed the preservation of Chapter 19 as "a non-negotiable 'red line' … since 1987".[7] In September 2018, Prime Minister Justin Trudeau said "we will not sign a deal that is bad for Canadians and, quite frankly, not having a Chapter 19 to ensure that the rules are followed would be bad for

5 *Gantz*, *supra* note 3, at 55.
6 *Id*. at 57.
7 *Id*. at 55.

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Canadians".[8] In his book, *An Introduction to the United States-Mexico-Canada Agreement: Understanding the New NAFTA*, David A. Gantz posits that "it is safe to conclude that without US willingness to carry Chapter 19 provisions into USCMA with only minor changes, Canada would not have agreed to be part of USMCA".[9]

In Gantz's view, the United States

> wisely … demonstrated a significant degree of flexibility in modifying or abandoning [its dispute resolution objectives], without which the renegotiation probably would not have been successfully concluded and the US House of Representatives would not have approved USMCA.[10]

In consideration of the objectives of the United States regarding dispute resolution, it is evident why Gantz feels this way. The United States proposed a provision that would allow it "to opt out of ISDS protection for foreign investment, without necessarily providing a reciprocal protection for investors from Mexico and Canada".[11] The United States also proposed the "elimination of Chapter 19 reviews of unfair trade practice remedies imposed by national agencies",[12] which put the United States squarely at odds with Canada's non-negotiable objectives regarding Chapter 19. Finally, regarding state-to-state dispute settlement, the United States' proposal would have allowed the United States to "disregard panel decisions the US views as 'clearly erroneous'".[13]

B Analysis

I Investor-State Dispute Settlement

While US presidential administrations dating back to Ronald Reagan have "favoured robust investor protections subject to ISDS", the Trump Administration was vehemently opposed to those policies in the name of national sovereignty.[14] Gantz notes that there are legal scholars who are similarly opposed to ISDS, citing law professor Jason Yackee's argument that

> the inclusion of ISDS in treaties such as [the Trans-Pacific Partnership] (or by extension, USMCA) is 'unlikely to provide significant benefits' to investors or host countries and that because of ISDS 'costs' the 'rational way to proceed' is to exclude ISDS altogether.[15]

8 Catharine Tunney, *No NAFTA Without Cultural Exemption and a Dispute Settlement Clause, Trudeau Vows*, CBC News (4 September 2018), www.cbc.ca/news/politics/trudeau-cultural-exemption-1.4806919.
9 *Gantz*, *supra* note 3, at 56.
10 *Id*. at 46.
11 *Id*. at 45.
12 *Id*. at 46.
13 *Id*.
14 *Id*. at 47.
15 *Id*.

As Gantz mentioned, the flexibility of the Trump Administration on this point was presumably one of the key reasons that USMCA was approved by the United States House of Representatives. At a House Ways and Means hearing, Congressman Kevin Brady and the Trump Administration's U.S. Trade Representative, Robert Lighthizer, specifically discussed ISDS. Congressman Brady, in his appeal for the preservation of ISDS in USMCA, stated:

> To maximize economic growth … we need more customers, and many of those customers live outside the United States. Many of them are in Mexico, in Canada … We … have to invest in those countries to compete and win against China, Europe, and the rest of the world. But if that investment in those countries is to benefit America, our investors have to receive fair treatment from other governments. And many countries don't provide basic, substantive or procedural protections for American businesses. That means American investors have to rely on the investor state dispute settlement process to ensure that they are treated fairly, and they aren't discriminated against in these other countries, that the rule of law, the property, and investment is protected as it is in America. Without ISDS Americans' property is left unprotected against discrimination, foreign seizure, or regulatory abuses and other forms of unfair action.[16]

Brady went on to inform Ambassador Lighthizer that 103 House Republicans had signed a letter expressing their collective belief that "inclusion of a strong ISDS [in USMCA] is essential".[17] The pressure that the Trump Administration faced both internally and externally played a pivotal role in the shaping of the ISDS provisions of USMCA that were ultimately agreed upon.

1 Basic Investor Protections

The basic investor protections and substantive obligations that could be found under both NAFTA and the Trans-Pacific Partnership can also be found in USMCA.[18] These protections include: "national treatment; most-favoured-nation treatment, fair and equitable treatment, free choice of management, protection against performance requirements, free transfer of capital and profits, and protection against direct and indirect expropriation."[19] Specific to indirect expropriation, USCMA includes a provision on the government's right to regulate, stating that "except in rare circumstances, nondiscriminatory regulatory action by a party to protect legitimate public welfare objectives (e.g., in public health, safety, and the

16 Simon Lester, *Brady-Lighthizer ISDS Exchange*, International Economic Law and Policy Blog (21 March 2018), https://worldtradelaw.typepad.com/ielpblog/2018/03/brady-lighthizer-isds-exchange.html.

17 *Id*.

18 See USMCA, Arts. 14.4-14.11; USMCA, Ann. 14-A, 14-B; NAFTA, Arts. 1102-1110; TPP, Arts. 9.1-9.11.

19 Gantz, *supra* note 3, at 48.

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environment) do not constitute indirect expropriation."[20] Further, USMCA specifically provides

> that nothing in the Investment Chapter shall be construed to prevent a government from regulating in a manner sensitive to 'health, environmental, and other regulatory objectives,' as long as the action taken is otherwise consistent with the chapter.[21]

Investors, in general, under USMCA have more limited protection than they had under NAFTA Chapter 11:

> The expropriation provision is now qualified by a detailed shared understanding of expropriation that requires specific factors to be taken into account in determining if an action constitutes either a direct or indirect expropriation. The National Treatment and Most Favoured Nation Treatment provisions also now include a "public welfare" criterion to situate the "like circumstances" analysis. Thus, in considering whether the relevant treatment is accorded in "like circumstances," consideration must now be given to whether the treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives. The fair and equitable treatment and full protection and security provisions, which the NAFTA parties had previously clarified to align with the minimum standard of treatment under customary international law, are further defined by reference to specific obligations … Parties seeking to make a claim under USMCA Chapter 14 will have to consider how [these] new restrictions … may alter the applicable legal tests for evaluating claims for breaches of these provisions.[22]

These basic protections constitute the basis of Congressman Brady's registered concerns. In response to Congressman Brady, Ambassador Lighthizer said that, regardless of the ISDS outcome, the

> kinds of issues that members are concerned about in terms of U.S. investment overseas will be able to be handled within the context of what we call Chapter 20 or the state-to-state dispute settlement. So it isn't like we will be in a position where there will be no recourse.[23]

One of the key differences between USCMA and NAFTA is that the obligation of host countries to adhere to these protections is "enforceable against host

20 *The United States-Mexico-Canada Agreement (USMCA)*, Congressional Research Service 22 (27 July 2020), https://fas.org/sgp/crs/row/R44981.pdf.

21 *Id*.

22 Martin J. Valasek et al., *Major Changes for Investor-State Dispute Settlement in New United States-Mexico-Canada Agreement*, Norton Rose Fulbright (October 2018), www.nortonrosefulbright.com/en/knowledge/publications/91d41adf/major-changes-for-investor-state-dispute-settlement-in-new-united-states-mexico-canada-agreement.

23 *Brady-Lighthizer ISDS Exchange, supra* note 16.

governments only in national courts rather than in international arbitration" – with certain exceptions.

2 Elimination of ISDS for Canada and the United States

Ambassador Lighthizer and the Trump Administration – while unsuccessful in eliminating ISDS in its entirety – secured an important victory in the accomplishment of their objectives in the form of the elimination of ISDS between Canada and the United States.

> For Canadian enterprises investing in Mexico and the United States, and Mexico- and US-based companies investing in Canada, no USMCA investor-state dispute enforcement protections will apply after a three-year transition period from NAFTA for 'legacy' investment claims and pending claims that remain subject to NAFTA Chapter 11.[24]

Under NAFTA, as alluded to in Congressman Brady's remarks, American investors in Canada, for example, were able "to seek redress from an international arbitral tribunal against a host country that has mistreated the investor in covered ways".[25] This is not the case under USMCA:

> Article 14.2(4) provides that an investor may only submit a claim to arbitration under Chapter 14 as provided for in the USMCA's annexes, and Annex 14-D addressed investment disputes for only the United States and Mexico … Canada, on the other hand, is not a party to Annex 14-D.[26]

In the absence of ISDS provisions, the United States and Canada will instead rely on national courts for their disputes.

Aside from the Trump Administration's belief that ISDS violated the national sovereignty of the United States, it is difficult to see how this significant change benefits American investors. Conversely, it is very evident why Canada did not desire to be a party to Annex 14-D: Canada does not have an equivalent to the United States' Fifth Amendment prohibition on the seizure of private property for public use without just compensation.[27] Additionally, the international arbitral tribunal mechanism had not been kind to Canada under NAFTA:

> Not only has Canada been subject to more investor-state claims under NAFTA Chapter 11 than either the United States or Mexico, but Canada has lost eight such cases. In contrast, the United States has never lost a NAFTA Chapter 11 case.[28]

24 Gantz, *supra* note 3, at 48.
25 Daniel Garcia-Barragan et al., *The New NAFTA: Scaled-Back Arbitration in the USMCA*, 36 J. Int'l. Arb. 739, 740 (2019).
26 *Id*. at 741-742.
27 Gantz, *supra* note 3, at 49.
28 Garcia-Barragan et al., *supra* note 25, at 742.

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One study concluded that "of 35 Chapter 11 claims filed against Canada, awards would have been equivalent in only four cases had they been adjudicated by Canadian federal courts".[29] While Gantz says that

> it is evident both the Canadian and US governments welcomed the elimination of ISDS from USCMA because the change 'strengthened the Canadian government's right to regulate in the public interest,' according to one official,[30]

this feels like an inadequate justification for the elimination of a resolution mechanism that had a significant success rate in the protection of US investors in Canada. Likely, for the United States, this decision came down to a combination of the Trump Administration's views on American sovereignty and an interest in avoiding the 'costs' associated with ISDS mentioned by Jason Yackee. Ideological blinders leading to a classic own-goal!

For Mexico and Canada, who are parties to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the CPTPP will provide a "high degree of protection, similar to that currently provided by NAFTA's Chapter 11" for Canadian investors in Mexico and for Mexican investors in Canada.[31] Absent the Biden Administration joining the CPTPP, American investors will have no such protection to fall back on. Ambassador Lighthizer discussed alternatives to ISDS in that same House Ways and Means hearing in 2018:

> The first alternative I'd say is state-to-state dispute settlement, the second alternative is if you go to any one of these companies and ask them 'Why do you need this; why don't you put in place an arbitration provision in your contract?' They'll all say 'Well we could do that,' and indeed they did do it – did it before we had ISDS. In a country like Mexico they subscribe to all the conventions and they have to enforce those. If they put [an] arbitration provision in their contract, these things are then resolved in a similar manner, but without the United States ceding sovereignty in order to encourage people to outsource jobs.[32]

Lighthizer – and, by extension, the Trump Administration – seemed to desire that the entire burden of foreign investment protection fall squarely on the investing enterprise and on Congress:

> It's a situation where somebody says … 'I want the U.S. government essentially to buy political risk insurance for me.' Our view tends to be that if you want to move a plant from the United States to Mexico, and the economics suggest that, then you should go with the economics … and your responsibility as a Congress is to make the U.S. more competitive so that isn't the problem. But if

29 Gantz, *supra* note 3, at 49.
30 *Id*.
31 *Id*.
32 *Brady-Lighthizer ISDS Exchange, supra* note 16.

> you're going there because we are underwriting the investment, we are putting our finger on the scale … that's not the job … of the United States government.[33]

While arbitration claims under Chapter 14, Annex 14-D of USMCA may still be brought by investors from the United States against Mexico and from investors from Mexico against the United States, Lighthizer's comments still serve as valuable insight into the desire of the United States' contingent to remove ISDS provisions as well as their belief that state-to-state dispute resolution provisions serve as a viable alternative.

For Canadian investors in the United States and American investors in Canada, two options remain: 1) foreign investors can attempt to convince their own government to bring a claim against the government of the host nation under Chapter 31 of USMCA, which replaced Chapter 20 of NAFTA; and 2) "Canadian and U.S. investors with a claim that substantive investment rights were breached can still commence a claim in domestic courts."[34] Regarding the first option, "these types of claims could include governmental interference in violation of the treaty". Regarding the second option, the ability of US and Mexican investors in Canada to bring a private claim against the government of Canada "for breaches of the treaty in the domestic Canadian courts … will largely depend on the implementing legislation in Canada".[35]

3 Mexico-United States Investment Disputes – Privileged Regime

Certain ISDS claims against Mexico "relating to government contracts" have been afforded protections similar to NAFTA's Chapter 11. These claims include the following:

i activities with respect to oil and natural gas that a national authority of an Annex Party controls, such as exploration, extraction, refining, transportation, distribution or sale;
ii the supply of power generation services to the public on behalf of an Annex Party;
iii the supply of telecommunications services to the public on behalf of an Annex Party; or
iv the ownership or management of roads, railways, bridges or canals that are not for the exclusive or predominant use and benefit of the government of an Annex Party.[36]

Gantz calls the first three categories 'mostly self-evident', speculating that (i), for example, was provided owing to concerns by both the United States and Mexico that "without ISDS it would be difficult to convince foreign investors to participate in exploration and development of Mexico's oil and gas reserves".[37] Importantly, these claims 'relating to government contracts' provide for fair and equitable

33 *Id*.
34 Garcia-Barragan et al., *supra* note 25, at 750.
35 *Id*. at 749.
36 USMCA, Ann. 14.E, para. 6(b).
37 Gantz, *supra* note 3, at 50-51.

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treatment claims as well as indirect expropriation claims, where claims not covered in the preceding categories do not.[38]

4 Mexico-United States Investment Disputes – Nonprivileged Regime

For other investments between the United States and Mexico,

> ISDS is available but significantly circumscribed compared to NAFTA Chapter 11 or CPTPP Chapter 9. ISDS claims are limited to alleged violations of national treatment, most-favored-nation treatment, and direct expropriation. Fair and equitable treatment and indirect expropriation claims are excluded.[39]

A limitation within a limitation comes by way of footnotes in Annexes 14-D and 14-E, which provide that Article 14.5 (Most-Favored-Nation Treatment) cannot be used to import "provisions in other international trade or investment agreements that establish international dispute resolution procedures or impose substantive obligations".[40] According to Lisa Richman in her Law Review article titled *NAFTA and USMCA: The Next Stage of the Saga*, "This change is unprecedented – no other investment treaty explicitly restricts [a Most-Favored-Nation] clause in this way."[41]

Notably, under Article 5 of Annex 14-D, claimants seeking arbitration are required to "[initiate] a proceeding before a competent court or administrative tribunal of the respondent with respect to the measures alleged to constitute a breach".[42] Claimants must also wait either 30 months or for a final decision from a court of last resort.[43] This constitutes "the first time in any US investment agreement or trade agreement investment chapter" that claimants seeking ISDS are required to do so.[44] Under NAFTA's Article 1121, for example, an investor was merely required to waive its right "to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures".[45] Additionally, the USMCA modified both the requirements for arbitrators in Article 14.D.6: Selection of Arbitrators and the overall transparency of ISDS in Article 14.D.8: Transparency of Arbitral Proceedings. Under Article 14.D.6, arbitrators "shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration".[46] Arbitrators "shall not, for the duration of proceedings, act as counsel or as party-appointed

38 Timothy J. Keeler & James T. Coleman, *The "New NAFTA" and Its Revised Dispute Resolution Mechanisms*, Mayer Brown (8 October 2018), www.mayerbrown.com/en/perspectives-events/publications/2018/10/the-new-nafta-and-its-revised-dispute-resolution-m.

39 Gantz, *supra* note 3, at 51-52.

40 USMCA, Annex 14-D, fn 25.

41 Lisa M. Richman, *NAFTA and USMCA: The Next Stage of the Saga*, The Investment Treaty Arbitration Review (25 June 2020), https://images.mwe.com/Web/MCDERMOTTWILLEMERYLLP/%7Baa56350e-b995-46c2-941a-cd0e1623d729%7D_38NAFTA_and_USMCA.pdf

42 USMCA, Ann. 14-D, Art. 14.D.5, para. 1(a).

43 Id., para. 1(b).

44 Gantz, *supra* note 3, at 52.

45 NAFTA, Art. 1121, para. 2(b).

46 USMCA, Ann. 14-D, Art. 14.D.6, para. 5(a).

expert or witness in any pending arbitration [under the Agreement]".[47] Under Article 14.D.8, tribunals are required to be open to the public, and parties' non-confidential and unprivileged pleadings, memorials, briefs and written submissions, as well as the transcripts, orders, awards and decisions of the tribunal, are all to be made public.[48]

In Gantz's estimation, the ISDS provisions of the USMCA have faced more direct criticism than any of the other modifications to NAFTA. Apart from the domestic exhaustion of claims provisions, Article 14.D.3's specific exclusion of indirect expropriation as a claim for which a claimant may seek arbitration has drawn the ire of industry lawyers:

> Most governments … don't just issue a federal government decree saying they're going to expropriate your property. It's more sophisticated and it's more complicated than that. For heavily regulated industries it often is through regulation that they lose the value of their investment, often with a discriminatory element.[49]

The US Chamber of Commerce "has strongly urged that the investment protection provisions … should not become precedents for future US trade agreements, arguing that USMCA 'represents a notable step back' from NAFTA's Chapter 11".[50] Under NAFTA's Chapter 11, few to no specifics were provided regarding expropriation claims, so tribunals typically allowed them to proceed.[51]

One likely outcome of the change is the circumvention available to US investors who can incorporate in Canada and then use the Canadian special purpose vehicle to make the investment in Mexico. That way, they still have comprehensive protection for their investment at limited extra cost. Of course, as a side effect, they will be spending money for legal and other services in Canada and may well end up paying taxes there as well. Another loss, another own-goal for the US.

5 *Asymmetrical Fork-in-the-Road Clause*

One of the most unique ISDS provisions in USMCA can be found in Appendix 3. Appendix 3 provides as follows:

> An investor of the United States may not submit to arbitration a claim that Mexico has breached an obligation under this Chapter … if the investor or the enterprise, respectively, has alleged that breach of an obligation under this Chapter, as distinguished from breach of other obligations under Mexican law, in proceedings before a court or administrative tribunal of Mexico.[52]

47 USMCA, Ann. 14-D, Art. 14.D.8, para. 5(c).
48 Id., paras. 1-2.
49 Gantz, *supra* note 3, at 52.
50 *Id*. at 53.
51 Gerardo L. Alarćon et al., *USMCA Investor-State Dispute Settlement Provisions: Key Differences for Mexico*, DLA Piper (26 October 2020), https://www.dlapiper.com/en/peru/insights/publications/2020/10/usmca-investor-state-dispute-settlement-provisions-key-differences-for-mexico/.
52 USMCA, App. 3.

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The lack of a parallel provision preventing Mexican investors from submitting to arbitration claims against the United States is what makes this provision 'asymmetrical'. This asymmetrical fork-in-the-road provision is the first of its kind.[53] The reason for this asymmetry comes down to the differences in the legal systems of the two countries. Mexico has a 'monist' legal system in which international treaties automatically become domestic law and are therefore directly enforceable in Mexican courts.[54] In contrast, the legal system of the United States "is much closer to a 'dualist' legal system", where treaties do not automatically become domestic law, making it "highly unlikely that a Mexican investor could bring a claim for breach of the USMCA in American courts".[55] This provision stands out in USMCA because it is one of the only pro-investor provisions in the Agreement. It also stands out as the only known 'asymmetrical' fork-in-the-road provision.

II State-to-State Dispute Settlement

As the parties came to the negotiating table, it was always going to be interesting to see just how much Mexico and Canada would endeavour to hold the United States accountable for its illustrious history of stonewalling in the form of panel blocking. What made the negotiations of state-to-state dispute settlement even more interesting was the boycott of the World Trade Organization's (WTO's) Appellate Body by the Trump Administration.[56] According to the World Trade Organization, the term of the last Appellate Body member ended on 30 November 2020.[57] According to Gantz, the United States, Mexico and Canada all seemed to prefer the WTO's dispute settlement process to NAFTA's for the review of their trade disputes.[58] This preference was presumably due to an overriding confidence in the expediency and enforcement procedures of WTO dispute settlement. This preference of the parties for WTO dispute resolution as well as the successful track record of the United States in stonewalling Chapter 20 claims under NAFTA combine to provide the 'obvious' explanation for the lack of objections to NAFTA's Chapter 20 in the United States.[59]

Under Chapter 20 of NAFTA, the United States was legally permitted to "indefinitely delay panel proceedings under Chapter 20 simply by refusing to appoint individuals to the Chapter 20 roster" because "instead of panel members being more-or-less automatically appointed to adjudicate a dispute, each panel member [was] selected only after extensive bilateral consultations among states

53 *The Asymmetrical Fork-in-the-Road Clause in the USMCA: Helpful and Unique*, Kluwer Arbitration Blog, Wolters Kluwer (29 October 2018), http://arbitrationblog.kluwerarbitration.com/2018/10/29/usmca/.

54 *Id*.

55 *Id*.

56 Gantz, *supra* note 3, at 59.

57 *Dispute Settlement: Appellate Body*, World Trade Organization (last visited 4 May 2021), www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm.

58 Gantz, *supra* note 3, at 61.

59 *Id*. at 60.

party to the dispute".[60] Gantz references one Chapter 20 case in particular, *In the Matter of Cross-Border Trucking Services*, where 15 months passed from Mexico's initial request for a dispute resolution panel and the beginning of proceedings.[61] In a separate case, the United States managed to stonewall a Mexican request for a panel review of high-fructose corn syrup and US sugar quotas under NAFTA for *four years*. In the first renegotiation of a North American free trade agreement between these parties in over 25 years, one would have expected that Mexico and Canada would enter the negotiations ready to negotiate sweeping changes to NAFTA's Chapter 20 provisions. As it turns out, internal pressure from a Democratic Congress was ultimately the reason for state-to-state dispute settlement changes under USMCA.[62]

For its part, the United States entered the negotiations with what *should have been* overly optimistic objectives to implement formal veto power to parties objecting to adverse panel decisions.[63] Noting that "dispute resolution is for the small country", Mexican negotiators staunchly objected to the United States' veto power proposal before agreeing to a mechanism that looked nearly identical to NAFTA's chapter 20, oddly watering down what was clearly 'bad faith' behaviour by the United States in the sugar dispute (as well as an extensive track record of stonewalling) to "a single case involving sugar".[64] In defence of their feeble acquiescence, Mexico's chief NAFTA negotiator for Mexican president-elect Andrés Manuel López Obrador, Jesús Seade, told Inside US Trade that

> in the history of the NAFTA [stonewalling] has been a problem only once. The sugar case … If the issue is very politicized, you may have a problem, but it's not something that will happen frequently, so we said okay.[65]

The United States Congress intervened in late 2019, demanding changes that focused "primarily on appointment of roster members and selection of roster members when a complaint is lodged".[66]

1 General Modifications to NAFTA's Chapter 20 under USMCA

Gantz speculates that the changes demanded by the United States Congress were "presumably welcomed by both Mexico and Canada".[67] Even prior to US congressional intervention in the negotiation, however, there were some potentially significant differences between USMCA and NAFTA. Under NAFTA,

60 *Id*.
61 *Id*.
62 *Id*. at 62.
63 *Id*.
64 *Id*.
65 Simon Lester, *Mexico's View of the Problems with the NAFTA Panel Appointment Process*, International Economic Law and Policy (12 October 2018), https://ielp.worldtradelaw.net/2018/10/mexicos-view-of-the-problems-with-nafta-chapter-20.html.
66 *Gantz*, *supra* note 3, at 64-65.
67 *Id*. at 64.

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> On receipt of the final report of a panel, the disputing parties shall agree on the resolution of the dispute, which normally shall conform with the determinations and recommendations of the panel, and shall notify their sections of the secretariat of any agreed resolution of any dispute.[68]

USMCA simplifies this provision, requiring that "[w]ithin 45 days from receipt of a final report … the disputing parties shall endeavour to agree on the resolution of the dispute".[69] Additionally, USMCA more clearly articulates its panel requirements for state-to-state dispute resolution:

> A panel's function is to make an objective assessment of the matter before it and to present a report that contains" findings of fact and determinations as to whether "the measure at issue is inconsistent with obligations in this agreement, (ii) a party has otherwise failed to carry out its obligations in this agreement, (iii) the measure at issue is causing nullification or impairment … or (iv) any other determination requested in terms of reference" as well as recommendations and reasons for the findings and determinations.[70]

Similarly to NAFTA, the USMCA state-to-state dispute settlement mechanism encourages the cooperative resolution of disputes, requiring the state party to attempt to resolve their grievance through "mandatory consultation and optional 'good offices' (conciliation, mediation or other instances where a third party seeks to help the disputing parties resolve their differences) before resorting to arbitration".[71] Further similarities may be found in the roster appointment requirements:

> Five-person panels remain the rule. Appointed panelists must "have expertise or experience in international law, international trade, other matters covered by this agreement, or the resolution of disputes arising under international trade agreements." Members must be selected objectively, be independent of the governments involved, and follow a code of conduct designed to avoid actual or apparent conflicts of interest. Critically, under USMCA (as was the case with NAFTA), "the roster shall be appointed by consensus and remain in effect for a minimum of three years or until the parties constitute a new roster." No appellate mechanism exists, and trade penalties (e.g., additional tariffs or quotas) are available if the losing party fails to implement the final report or otherwise "agree on the resolution of the dispute."[72]

The changes demanded by Congress, however, will likely have a more prominent impact on USMCA's state-to-state dispute resolution mechanism.

68 NAFTA, Art. 2018, para. 1.
69 USMCA, Art. 31, para. 18.
70 Gantz, *supra* note 3, at 63, *quoting* USMCA, Art. 31.12.
71 USMCA, Arts. 31.4, 31.5.
72 Gantz, *supra* note 3, at 64, *quoting* USMCA, Arts 31.6, 31.8, 31.9.

2 Panel Blocking

Article 31.8.1 under USMCA would now seem to appear to drastically reduce the ability of the United States to block panels. After the US Congress intervened, the parties agreed to the following panel roster provisions:

> The Parties shall establish, by the date of entry into force of this Agreement, and maintain a roster of up to 30 individuals who are willing to serve as panelists. Each Party shall designate up to 10 individuals. The Parties shall endeavor to achieve consensus on the appointments. If the Parties are unable to achieve consensus by one month after the date of entry into force of this Agreement, the roster shall be comprised of the designated individuals. The roster shall remain in effect for a minimum of three years or until the Parties constitute a new roster. If a Party fails to designate its individuals to the roster, the Parties may still request the establishment of panels under Article 31.6 (Establishment of a Panel). The Rules of Procedure, which shall be established by the date of entry into force of this Agreement, shall provide for how to compose a panel in such circumstances. Members of the roster may be reappointed. In the event that an individual is no longer able or willing to serve as a panelist, the relevant Party shall designate a replacement. The parties shall endeavor to achieve consensus on the appointment. If the Parties are unable to achieve consensus by one month after the date the replacement is designated, the individual shall be added to the roster.[73]

While Gantz laments that the Agreement "leaves to the yet-to-be-established rules of procedure the steps to be taken if the party refuses to designate its panelists", these rules were subsequently adopted, and they appear to both further expedite the panel selection process as well as further incentivize the active participation of the parties. Regarding the selection of the chair, Article 17 of the Rules of Procedure for Chapter 31 states that "if the responding Party refuses to participate … or fails to appear … the complaining Party shall select an individual to serve as chair".[74] Regarding the selection of panelists, Article 17 provides that "if the responding Party fails to propose all of its candidates … the proposed candidates will be those proposed by the complaining Party".[75] Both articulate strict and expedient time provisions. Overall, the language of the Chapter 31 Rules of Procedure essentially implies that the process will move forward expeditiously with or without the active participation of the responding party. Regarding the incentivization of participation, it is unlikely that a responding party would

> risk the selection of a panel chair by the complaining party without itself having any role in the selection process. Similarly, why would one party risk

73 USMCA, Art. 31.8.1.

74 *Rules of Procedure for Chapter 31*, Art. 17.1, para. 1(a-b), The Secretariat Canada-Mexico-United States, (last visited 4 May 2021), https://can-mex-usa-sec.org/secretariat/agreement-accord-acuerdo/usmca-aceum-tmec/rules-regles-reglas/chapter-chapitre-capitulo_31.aspx?lang=eng#art17.

75 *Id*. at para. 1(d-e).

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> the selection of two panelists, who are citizens of another party … rather than on its own behalf?[76]

Indeed, Article 17 goes on to provide that:

> If one or more panelists other than the chair are being selected under this process, then within 15 days of selection of the chair, each disputing Party shall select: (i) in the case of a five-member panel, two panelists who are citizens of the other disputing Party from the candidates proposed pursuant to subparagraph (d); or (ii) in the case of a three-member panel, one panelist who is a citizen of the other disputing Party from the candidates proposed pursuant to subparagraph (d) … If a disputing Party fails to select its panelists under subparagraph (f), within five days the panelist or panelists shall be selected by lot from the candidates proposed pursuant to subparagraph (d) who are citizens of the other disputing Party … If the disputing Party who failed to select its panelists under subparagraph (f) refuses to participate in or fails to appear for the choosing by lot procedure, within five days the other disputing Party shall select: (i) two panelists of its own citizenship [for five-member panels]; or (ii) one panelist of its own citizenship [for three-member panels].[77]

In a 30 January 2020, Congressional Research Service article titled *USMCA: A Legal Interpretation of the Panel-Formation Provisions and the Question of Panel Blocking*, the Congressional Research Service expressed its concerns about panel blocking:

> Like NAFTA, USMCA does not specify who shall conduct the chosen-by-lot and selected-by-lot processes, which may leave open this avenue for panel blocking. One may argue that USMCA's delegation to the FTC to draft Rules of Procedure to address issues involving the absence of a roster may also delegate authority to the FTC to address who conducts the chosen-by-lot and selected-by-lot processes, as USMCA links these processes to the roster. However, because USMCA expressly delegates only the issue of how to compose panels in the absence of a roster to the FTC, a Party might argue that the FTC lacks authority to determine who performs these processes when a roster exists, and thereby block the formation of a panel.[78]

The Congressional Research Service goes on to conclude that the USMCA appears to address panel blocking in terms of a party's failure to designate individuals to the roster but that the question of panel blocking through that avenue would ultimately come down to "the adoption of effective Rules of Procedure".[79] They further conclude that "USMCA appears to leave open the prospect of panel blocking

76 Gantz, *supra* note 3, at 66.

77 *Rules of Procedure for Chapter 31*, *supra* note 74, at Art. 17.1 para. 1(f-h).

78 *USMCA: A Legal Interpretation of the Panel-Formation Provisions and the Question of Panel Blocking*, Congressional Research Service 2 (30 January 2020), https://fas.org/sgp/crs/row/IF11418.pdf.

79 *Id*.

with regard to the chosen-by-lot and selected-by-lot processes applicable to picking the chair and panelists".[80]

Chapter 30 of USMCA establishes the Free Trade Commission and appears to grant a broad range of obligations and rights to the Commission. The FTC, "composed of government representatives of each Party at the level of Ministers or their designees",[81] is given the powers to "consider matters relating to the implementation or operation of this Agreement" and "adopt and update the Rules of Procedure and Code of Conduct applicable to dispute settlement proceedings", among others.[82] The FTC is also afforded the rights to "establish, refer matters to, or consider matters raised by, an *ad hoc* or standing committee, working group, or other subsidiary body"; "develop arrangements for implementing this Agreement"; "seek to resolve differences or disputes that may arise regarding the interpretation or application of this Agreement"; and "issue interpretations of the provisions of this Agreement". With such a broad range of powers granted to the FTC, it is unlikely – as suggested by the Congressional Research Service – that the FTC lacks the authority to determine who performs the chosen-by-lot and selected-by-lot processes when a roster is established. Regardless, the Congressional Research Service acknowledges that – in the event that either Mexico or Canada block the formation of a panel – the United States could address the matter through the WTO (even though there is currently no Appellate Body) or through domestic laws "such as Section 302 of the NAFTA Implementation Act … retained in the USMCA Implementation Act".[83]

At least in the near future, concerns regarding the process for establishing a roster in the event that a party fails to designate individuals to the roster are moot. The Office of the United States Trade Representative published an "Invitation for Applications for Inclusion on the Dispute Settlement Rosters for the United States-Mexico-Canada Agreement" on 19 March 2020, outlining the specific requirements and qualifications for the position.[84] Subsequently, on 1 July 2020, the Office of the United States Trade Representative issued a press release announcing that the United States had named 10 panelists to the roster, indicating an intent by the United States to adhere to the panel roster requirements under USMCA in a way that it did not under NAFTA.[85]

III Enforcement Actions under USCMA Since It Came into Force

With the NAFTA legacy provisions articulated under USMCA governing the majority of ongoing trade disputes between the United States, Mexico and Canada,

80 *Id*.
81 USMCA, Art. 30.1.
82 USMCA, Art. 30.2.
83 Congressional Research Service, *supra* note 78.
84 *Invitation for Applications for Inclusion on the Dispute Settlement Rosters for the United States-Mexico-Canada Agreement*, Federal Register (last visited 4 May 2020), www.federalregister.gov/documents/2020/03/19/2020-05726/invitation-for-applications-for-inclusion-on-the-dispute-settlement-rosters-for-the-united.
85 *U.S. Names Panelists for USMCA Enforcement*, World Trade Law (1 July 2020), www.worldtradelaw.net/document.php?id=usmca/USChapter31Panelists.pdf.

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enforcement claims under USMCA have yet to leave the consultation phase. Under Annex 14-C,

> foreign investors with 'legacy investments' may bring claims against Canada, the US or Mexico under the provisions of NAFTA Chapter 11 for three years after NAFTA's termination [June 30, 2023], when each NAFTA party's consent to such arbitrations will expire.[86]

A 'legacy investment' under Annex 14-C is:

> An investment of an investor of another party in the territory of the party established or acquired between January 1, 1994 (when NAFTA came into force), and the date of termination of NAFTA, and that existed on the date of [USMCA's] entry into force. Arbitrations that have already been commenced under NAFTA Chapter 11 (i.e., pending claims) will be permitted to proceed to their natural conclusion.[87]

With a far more robust ISDS mechanism proscribed under NAFTA's Chapter 11, it is highly likely any qualifying 'legacy investors' will leap at the opportunity to use NAFTA's Chapter 11 right up until the parties' consent to such arbitration expires on 30 June 2023. This author was unable to find any instances in which a Chapter 14 ISDS claim has been filed so far under USMCA.

Notably, the United States (and Ambassador Lighthizer) was the first to invoke USMCA's new Chapter 31 state-to-state dispute resolution mechanism. On 9 December 2020, the Office of the United States Trade Representative issued a press release exulting over the United States' effort to "[take] action for American dairy farmers by filing [the] first-ever USMCA enforcement action".[88] In the press release, Lighthizer announced that the United States was "exercising its rights under [USMCA] to address measures adopted by the Government of Canada that are contrary to the provisions of the agreement and harm U.S. dairy farmers".[89] Specifically, Lighthizer said, this claim by the United States sought to challenge Canada's "allocation of dairy tariff-rate quotas (TRQs)".[90] Lighthizer goes on to say that

> by setting aside and reserving a percentage of each dairy TRQ exclusively for processors, Canada has undermined the ability of American dairy farmers and

86 Martin J. Valasek et al., *supra* note 22.

87 *Id*.

88 *United States Takes Action for American Dairy Farmers by Filing First-Ever USMCA Enforcement Action: Action by USTR Seeks to Hold Canada Accountable for Undermining Value of Its Dairy TRQs*, Office of the United States Trade Representative (9 December 2020), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/december/united-states-takes-action-american-dairy-farmers-filing-first-ever-usmca-enforcement-action.

89 *Id*.

90 *Id*.

> producers to utilize the agreed-upon TRQs and sell a wide range of dairy products to Canadian consumers.[91]

Not to miss an opportunity to celebrate the Trump Administration's role in securing the Agreement while doubling down on his assertions that Chapter 31 was an adequate alternative to diluted ISDS mechanisms under Chapter 14, Lighthizer was quoted as saying, "President Trump successfully renegotiated the USMCA to replace the failed NAFTA, and a key improvement was to give U.S. dairy producers fairer access to Canada's highly protected dairy market".[92] While the overarching 'mood' of the press release felt celebratory in nature, Lighthizer almost ironically expressed disappointment, saying

> Canada's measures violate its commitments and harm U.S. dairy farmers and producers. We are disappointed that Canada's policies have made this first ever enforcement action under the USMCA necessary to ensure compliance with the agreement. This action demonstrates that the United States will not hesitate to use all tools available to guarantee American workers, farmers, ranchers, and businesses enjoy the benefits we bargained for.

Lighthizer is almost certainly aware that with Canada's refusal to sign on to Annex 14-D, the 'tools available' to dairy farmers under USMCA have been severely restricted, thereby necessitating the United States' lack of hesitation "to use all tools available to guarantee workers, farmers, ranchers, and businesses" enjoy the "benefit of the bargain". It remains to be seen whether or not the United States government will fight as vigorously to protect foreign-investing businesses. With a new administration occupying the White House, this is anyone's guess. Considering Lighthizer's previous assertions to the House Ways and Means Committee that it was the role of Congress to keep American businesses in the United States (and that said, businesses are capable of negotiating their own arbitration clauses), it is safe to assume that if Lighthizer still occupied the Office of the United States Trade Representative, there may be some 'hesitation' to 'use all tools available' to guarantee those benefits to investing businesses.

To initiate this Chapter 31 claim, Ambassador Lighthizer "provided official notice to Canada that it was exercising its rights to enforce the USMCA in a letter to Canada's Minister of Small Business, Export Promotion and International Trade".[93] As previously articulated, the USMCA carried forward the provision in NAFTA requiring aggrieved state parties to "first [seek] redress of a grievance through a request for consultation with the other party", including 1) initial consultations between the parties; 2) good offices, conciliation, or mediation in the event a resolution cannot be agreed upon; and, finally, 3) the establishment of a dispute settlement panel.[94] Canada and the United States held consultations via

91 *Id*.
92 *Id*.
93 *Id*.
94 *The United States-Mexico-Canada Agreement (USMCA)*, *supra* note 20, at 35.

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videoconference on 21 December 2020.[95] As of 8 March 2021, the parties were still in the consultation phase.[96]

Canada, likewise, submitted a USMCA Chapter 31 claim requesting consultations with the United States on 22 December 2020.[97] Canada requested this consultation

> regarding implementation of a safeguard measure on certain crystalline silicon photovoltaic cells (whether or not partially or fully assembled into other products) that are imported into the United States. The increased duties and tariff-rate quota pursuant to the safeguard measure apply to imports of covered products from Canada.[98]

On 30 December 2020, Mexico formally requested "to join the consultations under USMCA Chapter 31 as a third party".[99] As of March 2021, this claim was also still in the consultation phase.[100]

While outside the scope of this article, it should also be noted that – according to Federal Register filings – Canada quickly began invoking the USMCA Chapter 10 mechanism that they fought so hard to preserve. On 26 November 2020, a request for panel review was filed on behalf of CGC Inc., requesting a review

> of the decision to not conduct an interim review made by the CITT with respect to Certain Gypsum Board, Sheet, or Panel originating in or exported from the United States of America.[101]

On 10 December 2020, a request for panel review was filed on behalf of several government parties in Canada requesting a review of "the U.S. International Trade Administration's Final Results of the Countervailing Duty Administrative Review (2017-2018) in Certain Softwood Lumber from Canada".[102] Finally, on 22 December 2020, a request for panel review was filed on behalf of Resolute FP Canada Inc., the Conseil de 'Industrie forestière du Québec and the Ontario Forest

95 *2021 Trade Policy Agenda and 2020 Annual Report of the President of the United States on the Trade Agreements Program*, United States Trade Representative 51 (March 2021), https://ustr.gov/sites/default/files/files/reports/2021/2021%20Trade%20Agenda/Online%20PDF%202021%20Trade%20Policy%20Agenda%20and%202020%20Annual%20Report.pdf.

96 Bill Tomson, *US Dairy Groups Press for Action on Canadian USMCA Quotas*, AgriPulse (8 March 2021), www.agri-pulse.com/articles/15474-us-dairy-groups-press-for-action-on-canadian-usmca-quotas.

97 United States Trade Representative, *supra* note 95, at 51.

98 *Id*.

99 *Id*.

100 *Id*.

101 *United States-Mexico-Canada Agreement (USMCA), Article 10.12; Binational Panel Review: Notice of Request for Panel Review*, Federal Register (last visited 4 May 2020), www.federalregister.gov/documents/2020/12/30/2020-28030/united-states-mexico-canada-agreement-usmca-article-1012-binational-panel-review-notice-of-request.

102 *United States-Mexico-Canada Agreement (USMCA), Article 10.12; Binational Panel Review: Notice of Request for Panel Review*, Federal Register (last visited 4 May 2020), www.federalregister.gov/documents/2020/12/18/2020-27830/united-states-mexico-canada-agreement-usmca-article-1012-binational-panel-review-notice-of-request.

Industries Association, requesting a review of "the U.S. International Trade Administration's Final Results of the Antidumping Duty Administrative Review (2017-2018) in Certain Softwood Lumber from Canada".[103]

C Conclusion

It is remarkable that Ambassador Lighthizer – and, by extension, the Trump Administration – attempted to kill ISDS in favour of a state-to-state dispute resolution mechanism by which the United States single-handedly exposed its deficiencies. Under NAFTA,

> only three state-to-state dispute resolution panels were completed (between 1994 and 2001). Because the United States was able to block a panel chair, a fourth case [the sugar dispute with Mexico] was never considered.[104]

The panel selection process was never used again after the United States exposed those deficiencies, so Lighthizer's insistence that Chapter 31 would provide an alternative recourse to the ISDS mechanism, which the administration attempted to kill is, at best ironic and, at worst, a complete abandonment of United States' investors. While the lack of case studies so far under USMCA makes it difficult to determine whether or not the modified state-to-state mechanism is similarly flawed, the language of both the Agreement itself and the Rules of Procedure for Chapter 31 seems to make it unlikely that similar tactics to the ones used under NAFTA will be used by state parties under USMCA. With Canada's refusal to sign on to Annex 14-D and a drastically diluted ISDS mechanism governing ISDs between the United States and Mexico, the most likely outcome under USMCA is that there will be a dramatic increase in Chapter 31 claims (formerly NAFTA Chapter 20) when the United States is involved and a heavy reliance on the CPTPP for claims between Mexico and Canada. Whether or not the Biden Administration eventually signs on to the CPTPP remains to be seen, but early indications are that this will not be the case.

The ability of investors in all three countries to convince their national governments to bring claims against the governments of the other parties to the Agreement is worth keeping an eye on when assessing the overall effectiveness of the dispute resolution mechanisms under USMCA. Canada's hardline stance in favour of (formerly Chapter 19 claims under NAFTA) the Chapter 10 dispute resolution mechanism makes it no surprise that Canada has (thus far) led the way in Chapter 10 claims under USMCA. Likewise, the combination of the Trump Administration's heavy criticisms of ISDS (NAFTA Chapter 11; USMCA Chapter 14) and rigorous defence of the state-to-state dispute resolution mechanism makes it

103 *United States-Mexico-Canada Agreement (USMCA), Article 10.12; Binational Panel Review: Notice of Request for Panel Review*, Federal Register (last visited 4 May 2020), www.federalregister.gov/documents/2021/01/19/2020-29126/united-states-mexico-canada-agreement-usmca-article-1012-binational-panel-review-notice-of-request.

104 *The United States-Mexico-Canada Agreement (USMCA)*, *supra* note 20, at 36.

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no surprise that Ambassador Lighthizer, through the Office of the United States Trade Representative, issued a press release that seemed to celebrate the "first ever enforcement action under the USMCA".[105] While the coming years (and the progress of any requests for consultation to the panel review phase of Chapter 31's state-to-state dispute resolution mechanism) will shed far more light on the trends that one can expect in terms of free trade dispute resolution in North America, it is clear that these modifications to NAFTA are going to usher in an era of trade disputes between the three parties that looks considerably different from the past three decades and that the changes are unlikely to play out in favour of the US and US-based investors.

105 Office of the United States Trade Representative, *supra* note 88.