

REVISING NAFTA: CONSEQUENCES OF ANTIDUMPING AND COUNTERVAILING DUTY LAWS ON IMMIGRATION AND POVERTY

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I. INTRODUCTION

There is a growing literature on the North American Free Trade Agreement (NAFTA), but much of this discussion fails to examine some of the more technical, yet highly consequential, aspects of NAFTA as it relates to law and social policy.¹ The following article examines Chapter 19 of the Agreement, with particular attention to Antidumping (AD) and Countervailing Duties (CVD) trade laws between the U.S. and Mexico. This is an increasingly important topic given NAFTA’s controversial foundation the recent adoption of its successor, the U.S.-Mexico-Canada Agreement (USMCA).² The influence of these laws—which remain unchanged by the USMCA—should not be understated. Many aspects of the Agreement are affected by the AD and CVD laws, and these laws have serious consequences for immigration, poverty, and the state of the Mexican economy.

The structure of this piece is as follows: First, this article examines the ideological underpinnings of NAFTA as a product of neoliberalism. Second, this piece analyzes NAFTA in accordance with its goals and implementation.

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¹ Simon Lester, *NAFTA Reboot Must Settle the Dispute Over Dumping Disputes*, THE HILL (Sept. 4, 2017), <http://thehill.com/blogs/pundits-blog/economy-budget/349111-nafta-reboot-must-settle-dispute-over-dumping-disputes>, archived at <https://perma.cc/8X5L-8WRS>.

² *Id*; see also, Heather Long, *The USMCA Is Finally Done. Here’s What Is In It*, THE WASHINGTON POST (Dec. 10, 2019), <https://www.washingtonpost.com/business/2019/12/10/us-mca-is-finally-done-deal-after-democrats-sign-off-heres-what-is-it/>.

Third—the crux of this article—this work examines AD and CVD laws in context as they exist in U.S. law, NAFTA, and the World Trade Organization (WTO). Finally, this article makes an original contribution to the study of AD and CVD laws, and aims to aid negotiators by outlining a set of eight recommendations to address the consequences of Chapter 19 of NAFTA.

II. NEOLIBERALISM AND INTERNATIONAL INSTITUTIONS

There is a tendency in the literature regarding NAFTA to distort the underpinnings of neoliberalism.³ On the one hand, advocates soften the unfavorable aspects of the ideology, referring to the world view opportunistically.⁴ Accordingly, these writers argue that world leaders who choose not to endorse neoliberalism's key tenets are misguided. On the other hand, as Mirowski describes, opponents “have written off the movement too quickly as a mere epiphenomenon” of a failed experiment in economics.⁵ These authors pick and choose evidence that comports with their position. But the goal of this section is to present a balanced perspective of the ideology and its impacts on the global economy. This section outlines the core of neoliberalism, expounding on the arguments put forth by both sides, and will briefly examine its impact on developing nations.

It is useful to begin with the Mont Pelerin Society's eleven principles of neoliberalism. This society was an early network of the leading neoliberal intellectuals which included Friedrich von Hayek and Milton Friedman amongst its members.⁶ First, a “good society” will come about only if it is constructed by members of society—a belief often referred to as a “constructivism.”⁷ Second, the market, which “always surpasses the state's ability to process information,” is the best vehicle for achieving this society.⁸ Third, the market should be understood as the “natural” state for human beings, and the understanding of this state should be prompted by “natural science metaphors,” which conceptualize the market as an “evolutionary phenomenon.”⁹ Fourth, the state must be reconfigured to support the proper function of the market.¹⁰ Accordingly, the preferred state is a “constrained” democracy.¹¹

³ See João Rodrigues, *Where to Draw the Line between the State and Markets? Institutional Elements in Hayek's Neoliberal Political Economy*, 46(4) J. OF ECON. ISSUES, 1007, 1007–33 (2012).

⁴ Philip Mirowski, *Postface: Defining Neoliberalism*, in *THE ROAD FROM MONT PELERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE* 417–46 (Philip Mirowski & Dieter Plehwe eds., 2015).

⁵ Philip Mirowski, *The Neo-Liberal Thought Collective*, 17(4) RENEWAL: A J. OF LAB. POL. 26, 26–36 (2009).

⁶ *Id.* at 29.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 30.

¹⁰ *Id.*

¹¹ *Id.*

Fifth, to accomplish a version of constrained democracy, the state must become a market and the citizen a customer of the state's services.¹² Sixth, freedom is the foremost virtue.¹³ Through freedom citizens can exercise their rationality and determine the quality of their lives.¹⁴ Seventh, capital, unlike labor, should be permitted to move across national borders unrestricted.¹⁵ Eighth, inequality is a lamentable "by-product" of capitalism, but inequality itself is not inherent in capitalism.¹⁶ Ninth, corporations are blameless.¹⁷ Tenth, the market is self-correcting, and therefore, problems that arise have a market solution.¹⁸ Eleventh, neoliberalism both comports and coincides with understandings of religion.¹⁹

A core argument of neoliberalism, therefore, is freer, less restricted trade. Jagdish Bhagwati, one of the world's leading free trade economists, has written that there are many benefits to freer trade.²⁰ In a system of free trade, he writes, "economies of scale" come to benefit the economy.²¹ Free trade also increases the diversity in "differentiated goods," as products that would otherwise not be in a country become present.²² Additionally, firms are required to increase their productivity and produce a superior product than would otherwise be the case.²³ Firms become more knowledgeable without "acquisition costs."²⁴ Capital, in turn, is used more efficiently.²⁵

Furthermore, trade liberalization is premised on the Heckscher-Ohlin Theory that liberalization increases the "relative" demand for workers categorized as both skilled and unskilled.²⁶ In brief, if Country A has an abundance or surplus of goods, it can ship these goods to Country B or another that has a dearth in these same goods. In exchange, Country B or another that has an abundance of a different good can ship these goods to Country A that has a dearth in that good. Under this arrangement, the demand for each of the country's specialized products will increase, and the demand for scarce products will decrease.²⁷ Consequently, unskilled workers who were previously underpaid benefit from a rise in their wage. As a result, the gap in the wages for the unskilled and skilled worker begins to narrow.²⁸

¹² *Id.*

¹³ *Id.* at 31.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 32.

¹⁹ *Id.*

²⁰ JAGDISH BHAGWATI, *FREE TRADE TODAY* 36 (2002).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Adrian Wood, *Openness and Wage Inequality in Developing Countries: The Latin American Challenge to East Asian Conventional Wisdom*, in *THE POLITICAL ECONOMY OF INEQUALITY* 316–19 (Frank Ackerman et al. eds., 2000).

²⁷ *Id.* at 317.

²⁸ *Id.*

Neoliberalism was greatly advanced by Simon Kuznets's 1955 publication which sought to understand income inequality amidst economic growth.²⁹ Kuznets purports to study datasets from the U.S., England, and Germany.³⁰ These datasets consist of income before direct taxes, exclude contributions by government, and consider the inter-sectoral transition from agriculture to industry.³¹ At the outset, Kuznets admits that the dataset represents a "scant sample."³² He later explains that the results from this data may be "perilously close to pure guesswork."³³ Kuznets nonetheless concludes that as the U.S., England, and Germany experienced economic growth, there was a "narrowing" of income inequality.³⁴ This phenomenon has since been referred to as the "Kuznets Curve" to symbolize that as nations move "down the inverted U" inequalities begin to fall.³⁵

Subsequently, Kevin Gallagher explains, Kuznets and other theorists advised policy makers to ignore short-term inequality, prioritizing instead trade liberalization, privatization, public sector reforms, and currency devaluation.³⁶ This platform became embodied in what has since been referred to as the "Washington Consensus."³⁷ But Kuznets and others did not explain one of Kuznets's important qualifications as fervently. Specifically, Kuznets writes that

the growing political power of the urban lower-income groups led to a variety of protective and supporting legislation, much of it aimed to counteract the worst effect of rapid industrialization and urbanization. . . . Space does not permit the discussion of demographic, political, and social considerations that could be brought to bear to explain the offsets to any declines in the shares of the lower groups.³⁸

Many neoliberalists who relied on Kuznets's research to champion privatization, trade liberalization, and public-sector reforms, have thus neglected a crucial limitation. Even mainstream economists, such as Jeffrey Sachs, encourage developing nations to liberalize and privatize as soon as possible to climb the "ladder" of development.³⁹ These economists point to successes in Korea, Singapore, and Taiwan, to confirm their beliefs. Paul Cook and Colin

²⁹ Simon Kuznets, *Economic Growth and Income Inequality*, 45 THE AM. ECON. REV. 1, 1–28 (1955).

³⁰ *Id.* at 4.

³¹ *Id.* at 12.

³² *Id.*

³³ *Id.* at 6.

³⁴ *Id.* at 16.

³⁵ James K. Galbraith, *Global inequality and global macroeconomics*, 29 J. OF POL'Y MODELING 587, 602 (2007).

³⁶ Kevin Gallagher, *Overview Essay*, in THE POLITICAL ECONOMY OF INEQUALITY 287–98 (Frank Ackerman et al. eds., 2000).

³⁷ JOSEPH E. STIGLITZ, MAKING GLOBALIZATION WORK 28–29 (2007).

³⁸ Kuznets, *supra* note 29, at 17.

³⁹ See generally JEFFREY SACHS, THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME (2005).

Kirkpatrick, for example, write that privatization soared in developing nations from 1988 to 1992.⁴⁰ Whereas revenues from these efforts began at \$2.6 billion in 1988, they had increased to \$23.1 billion in 1992.⁴¹ Over 70 percent of this privatization occurred in Latin America and the Caribbean.⁴² But these researchers fail to examine the evidentiary nuances in these Asian nations as well as disconfirming evidence from Latin America as demonstrated in Argentina, Chile, Mexico, Colombia, Costa Rica, and Uruguay.⁴³ Kwan Kim explains that the most successful East Asian nations “placed an emphasis on poverty alleviation.”⁴⁴ In doing so, these nations “packaged a unique blend of community based basic health and education, rural credit subsidies, and infrastructure development, combined with growth-oriented market interventions and stabilization of price and exchange rates.”⁴⁵ By contrast, in Africa there has been little political commitment to land reform or other measures of direct assistance.⁴⁶ Similarly, in Latin America, despite increased revenues, there has been growing poverty, which reflects the “legacy of import substitution strategies.”⁴⁷ These strategies, in turn, led Latin American countries to adopt austerity in the 1980s, immediately increasing the number of critically poor and low paid workers.⁴⁸ Kim thus concludes that “where growth has been associated with reduced poverty or inequality, the state has been involved.”⁴⁹

Likewise, Adrian Wood explains that the Asian successes may not have been as simple as privatizing services and liberalizing trade.⁵⁰ Instead, Asian countries increased incentives for exporters and developed protections for selected sectors.⁵¹ In Latin America, on the other hand, trade was opened by reducing barriers to imports.⁵² The difference in outcomes between Asia and Latin America, Wood writes, can also be explained by the makeup of the world economy during the respective periods of liberalization. As Latin America began to liberalize in the 1980s, so did other large parties, such as China and Indonesia, amidst a “shift” in the types of technologies that were used at this time.⁵³ As a result, these Latin American countries could not afford to compete.

⁴⁰ Paul Cook & Colin Kirkpatrick, *Summary of The Distributional Impact of Privatization in Developing Countries*, in *THE POLITICAL ECONOMY OF INEQUALITY* 320–23 (Frank Ackerman et al. eds., 2000).

⁴¹ *Id.* at 320.

⁴² *Id.*

⁴³ See Wood, *supra* note 26, at 318.

⁴⁴ Kwan S. Kim, *Summary of Income Distribution and Poverty: An Interregional Comparison*, in *THE POLITICAL ECONOMY OF INEQUALITY* 306–09 (Frank Ackerman et al. eds., 2000).

⁴⁵ *Id.* at 308.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See Wood, *supra* note 26, at 318.

⁵¹ *Id.* at 319.

⁵² *Id.*

⁵³ *Id.*

Joseph Stiglitz also concludes that East Asian countries have seen growth and success from market liberalization because “these countries managed globalization.”⁵⁴ These countries, for example, invested in education and emerging technologies.⁵⁵ The governments in these nations also emboldened their citizens to save money to avoid overreliance on foreign capital flows.⁵⁶ Further, these countries liberalized methodically by determining which imports they would permit and by how much.⁵⁷ They also required foreign firms to train workers within the country on the new technologies.⁵⁸ However, Stiglitz writes, not even these efforts were enough.⁵⁹ Some nations such as Thailand and Indonesia opened their borders to capital too quickly.⁶⁰ As a result, their currencies entered free fall.⁶¹ Turning to the International Monetary Fund (IMF) for help, these nations digressed to austerity and privatization.⁶² Panic spread, and banks collapsed.⁶³

These events have served as lessons to some. Bhagwati, for example, writes that “free trade could be maintained as the best policy [only] when used in conjunction with a domestic policy” that would help to eliminate distortion or an occurrence of the market not working well.⁶⁴ Presumably, however, distortions will never cease to exist. Stiglitz, for instance, explains that “information asymmetries” will always exist, causing some parties to know something that others do not.⁶⁵ Therefore, according to conservative economists, for free trade to exist without the accompaniment of government intervention, a distortion must not exist. Because a distortion will always exist in reality, government intervention will always be necessary to ensure a smooth transition to free trade.

Neoliberal arguments premised on liberalizing trade as fast as possible without government assistance thus cannot be said to be the best policy unless the rules for how institutions do so are changed. This emphasis on institutions is not misplaced. Milton Friedman, a leading neoliberalist and member of the Mont Pelerin Society, has written that “the role of government . . . is to do something that the market cannot do for itself, namely, to determine, arbitrate, and enforce the rules of the game.”⁶⁶ Similarly, Neil Fligstein has written that the state must create rules in the market for at least two reasons.⁶⁷ First, it is the responsibility of firms to maintain market suc-

⁵⁴ STIGLITZ, *supra* note 37, at 31.

⁵⁵ *Id.* at 32.

⁵⁶ *Id.* at 32-33.

⁵⁷ *Id.* at 33.

⁵⁸ *Id.*

⁵⁹ *Id.* at 34.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ BHAGWATI, *supra* note 20, at 27.

⁶⁵ STIGLITZ, *supra* note 37, at xiv.

⁶⁶ MILTON FRIEDMAN, CAPITALISM AND FREEDOM 25 (2002)

⁶⁷ Neil Fligstein, *The Architecture of Markets* (2001), in THE POLITICAL ECONOMY READER: MARKETS AS INSTITUTIONS 153-171, 154 (Nazneen H. Barma & Steven K. Vogel eds., 2008).

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cess and they do not have the capacity or resources to devote to rulemaking.⁶⁸ Second, provided the types of uncertainty and competition that firms face, they may not be the best positioned to make the rules of the game.⁶⁹

Other researchers, such as Thomas Pogge, write that the rules—developed by social institutions—are “the most important” contributor to global poverty.⁷⁰ Pogge notes that the “rules governing economic transactions—both nationally and internationally—are the most important causal determinants of the incidence and depth of poverty.”⁷¹ He identifies the following as areas where the rules may be amended: international trade, lending, investment, resource use, and intellectual property.⁷² Similarly, Stiglitz writes that these rules have been amended only when advanced industrial nations decide that they want to change them.⁷³ “Not surprisingly,” Stiglitz asserts, “[advanced industrial countries] have shaped globalization to further their own interests.”⁷⁴ For example, these nations have structured trade so that it is asymmetrical, maintaining a “host of subtle but effective trade barriers” that “put developing countries at a disadvantage.”⁷⁵ Developing nations like Mexico are thus forced to play by these rules of the game, drawn up by advanced industrial countries. The next section will describe how these rules were, in many ways, foisted upon Mexico in NAFTA.

III. NAFTA: AN OVERVIEW

In the literature on NAFTA, authors tend to use the same datasets to tell two different stories. For example, the President of the U.S. Chamber of Commerce, Thomas Donohue, has reportedly stated that “NAFTA has had a much more positive and comprehensive impact than almost anyone could have imagined.”⁷⁶ He explains that, “[f]rom a pure numbers perspective, NAFTA’s impact is undeniable.”⁷⁷ Donohue then cites the more than fivefold increase in trade from \$81 billion in 1993 to \$600 billion in 2014.⁷⁸ Another source generally describes NAFTA as the reason Mexico has “become a major manufacturer” with manufacturing constituting 72 percent of its total

⁶⁸ *Id.* at 154.

⁶⁹ *Id.*

⁷⁰ Thomas Pogge, *Severe Poverty as a Human Rights Violation*, in *FREEDOM FROM POVERTY AS A HUMAN RIGHT* 11, 26 (Thomas Pogge ed., 2007).

⁷¹ *Id.* at 26.

⁷² *Id.*

⁷³ JOSEPH E. STIGLITZ, *MAKING GLOBALIZATION WORK* 28–29 (2007).

⁷⁴ *Id.*

⁷⁵ *Id.* at 62.

⁷⁶ Alan M. Field, *NAFTA at 20: A Transformational Force that Continues to Evolve*, *JOURNAL OF COMMERCE* (Jan. 24, 2014), https://www.joc.com/international-trade-news/trade-data/mexico-trade-data/nafta-20-transformational-force-continues-evolve_20140124.html, archived at <https://perma.cc/SP4U-43J5>.

⁷⁷ *Id.*

⁷⁸ *Id.*

exports in 2011.⁷⁹ Others, such as Kyongwon Kim, argue that while the manufacturing sector has grown from 33 million positions in 1993 to 44 million positions in 2011, this improvement is offset by the “massive loss in positions in the agricultural sectors.”⁸⁰ In turn, NAFTA has deepened regional inequalities in Mexico, leaving poverty in its wake⁸¹ and—as demonstrated below—altering the diets of the poor. This section will examine these diverging stories with particular attention to the evidence.

The ideas behind NAFTA had long been in place before NAFTA’s launch on January 1, 1994.⁸² During his 1979 campaign for President, Ronald Reagan spoke of a North American agreement that would make the region more competitive in the global environment.⁸³ It was the successes of market integration demonstrated by the European Economic Community, however, that provided the inspiration.⁸⁴ Near the end of his Presidency, Reagan signed an agreement with Canada, represented by Prime Minister Brian Mulroney, entitled the Canada-U.S. Free Trade Agreement.⁸⁵ It was not until President George H.W. Bush came to office that Mexico, led by President Carlos Salinas, would be brought on as a negotiating partner for a similar agreement.⁸⁶ Soon afterwards, Canada called for a trilateral agreement that was negotiated by each of these parties and eventually signed into law in the U.S. on December 8, 1993.⁸⁷

NAFTA’s roll out was to proceed in stages with a reduction in some tariffs to begin immediately, while others would be removed over a period of years.⁸⁸ The Agreement made at least six changes, covering a vast swath of areas. First, members were to ensure unrestricted access in a number of their goods and commodities markets.⁸⁹ Second, signatories were to limit regulation in areas of banking, energy, and transportation.⁹⁰ Third, members were expected to extend medicine patent monopolies, and limit food and product

⁷⁹ *Differing Structural Challenges Dog Mexico and Brazil*, OXFORD ANALYTICA DAILY BRIEF (Jun. 25, 2013), <https://dailybrief.oxan.com/Analysis/DB184103/Differing-structural-challenges-dog-Mexico-and-Brazil>, archived at <https://perma.cc/6W44-WDVY>.

⁸⁰ Kyongwon Kim, *NAFTA and Mexico: Unemployment, Income Inequality, and Agriculture*, WASHINGTON REPORT ON THE HEMISPHERE 5 (May 13, 2013).

⁸¹ *Id.*

⁸² Kimberly Amadeo, *NAFTA’s Purpose and Its History*, THE BALANCE (Jun. 25, 2019), <https://www.thebalance.com/history-of-nafta-3306272>, archived at <https://perma.cc/S7XG-W582>.

⁸³ Andrea Ford, *A BRIEF HISTORY OF NAFTA*, TIME MAGAZINE (Dec. 30, 2008), <http://content.time.com/time/nation/article/0,8599,1868997,00.html>, archived at <https://perma.cc/AUC5-2YZX>.

⁸⁴ Peter Bondarenko, *North American Free Trade Agreement (NAFTA)*, ENCYCLOPAEDIA BRITANNICA (Jun. 21, 2019), <https://www.britannica.com/event/North-American-Free-Trade-Agreement> archived at <https://perma.cc/C8N9-V9QC>.

⁸⁵ Amadeo, *supra* note 82.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Bondarenko, *supra* note 84.

⁸⁹ *Id.*

⁹⁰ Lori M. Wallach, *Twenty-One Years of NAFTA’s Failed Promises; Trade Imbalance*, LE MONDE DIPLOMATIQUE (Jun. 2015), <https://mondediplo.com/2015/06/04NAFTA>, archived at <https://perma.cc/L3GA-QW8C>.

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safety standards as well as border inspections.⁹¹ Fourth, parties were to waive “buy local” preferences, treating all products equally. Fifth, signatories were to honor Agreement provisions geared toward securing intellectual property rights and deterring industrial theft.⁹² Sixth, members were to adopt formal rules for dispute resolution.⁹³

While Mexico had previously made efforts at liberalization, Fahrettin Sümer writes, NAFTA marked a definitive step for Mexico in a “neoliberal direction” which “opened the economy to the forces of capitalism.”⁹⁴ All sectors of Mexico’s economy felt the effects of the Agreement in the years following its adoption. Sümer explains that Mexico began in 1994 with “strong economic fundamentals.”⁹⁵ The economy had experienced growth at an average of 3 percent a year between 1988 and 1994.⁹⁶ By contrast, between 1982 and 1988, the Mexican economy had grown by an average of only .1 percent.⁹⁷ Additionally, inflation, which at one point in 1987 had reached 159.2 percent, had decreased to 8 percent in 1993.⁹⁸ The public sector deficit followed a similar trajectory.⁹⁹ In 1987 the public deficit had reached 16 percent, but by 1993 it was nearly eliminated.¹⁰⁰ There was great hope that Mexico would enter the next century with strong economic footing.

In turn, investor confidence soared.¹⁰¹ Investments came pouring into Mexico. Whereas capital inflows into Mexico rested at an average of \$2 billion for the first eleven months of 1993, these inflows skyrocketed to \$7 billion in December of 1993.¹⁰² Between the first and second quarter of 1994, private investment multiplied from 2 percent to 12.1 percent.¹⁰³ Mexico’s GDP was also on the rise. It “jumped miraculously” from 2.3 percent in the first three quarters of 1994, to 5.6 percent in the final quarter of the year.¹⁰⁴

Then suddenly, and without warning, a series of events shook investor confidence, increased interest rates, and headed the Mexican banking system to ruin.¹⁰⁵ Despite the influx of capital investment, the Mexican people were

⁹¹ *Id.*

⁹² Bondarenko, *supra* note 84.

⁹³ *Id.*

⁹⁴ FAHRETTIN SÜMER, THE NEGLECTED IMPACT OF NON-ECONOMIC FACTORS ON THE DEVELOPMENT OF FINANCIAL CRISES AND GOVERNMENTAL RESPONSES: THE MEXICAN AND MALAYSIAN CASES OF THE 1990s, 8 (2012).

⁹⁵ *Id.* at 33.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 50.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See Aldo Musacchio, *Mexico’s Financial Crisis of 1994-1995*, 12–101 HARV. BUS. SCH. WORKING PAPER SERIES 3 (2012).

not saving or investing their own money.¹⁰⁶ On the morning of January 1, 1994, the same date the NAFTA took effect, a rebel group called the Zapatista National Liberation Army took control of several large towns in Chiapas, a southern state in Mexico. The next month, the U.S. Federal Reserve increased interest rates. Then, in March, a number of high-level assassinations began, including the presidential candidate of the ruling party, Luis Donaldo Colosio.¹⁰⁷ Soon after investors began to divest from Mexico. To stem the exodus, the Mexican government attempted to borrow money. But the damage had already been done.¹⁰⁸ Investor confidence was shaken and Mexican consumers and businesses began to default on their loans. This exodus of capital was followed by the Mexican National Banking Commission's efforts to bailout the system.¹⁰⁹ According to Aldo Musacchio, not even these efforts could stem what was to become the "worst banking crisis in Mexican history."¹¹⁰

Writers such as Musacchio and Fahrettin Sümer have attempted to explain how this crisis came about. Explanations center around three major areas: trade liberalization, capital flow liberalization, and Mexico's pegging of the peso to the dollar.¹¹¹ Ultimately, these causes can be attributed to Mexico's failure to adequately enact safety mechanisms to protect the Mexican economy from shock.¹¹² In other words, Mexico, with U.S. guidance, liberalized too quickly. The origins of Mexico's economic crisis occurred, therefore, because the warnings in the previous section were not heeded.

Advocates nevertheless point to how NAFTA "cushioned the adverse effects"¹¹³ of the peso crisis and how maquiladoras—Mexican manufacturers—have benefited from investments following the crisis.¹¹⁴ In doing so, such advocates neglect the demise of Mexico's agricultural sector and the overall effects on wages. For instance, Kim highlights this fact as she argues that growth has been largely disproportionate between the north and south of the nation. She notes that the manufacturing north had grown at 8 percent between 1994 and 2010 compared to the agricultural south, which during the same time period, had grown at a mere .1 percent.¹¹⁵

Lori Wallach demonstrates that the decline of Mexico's agriculture sector has been followed by harsh consequences.¹¹⁶ As a result of the U.S.'s export of subsidized corn to Mexico, during the first ten years of NAFTA

¹⁰⁶ *Id.* at 14.

¹⁰⁷ *Id.* at 15.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 3.

¹¹¹ *Id.*

¹¹² SÜMER, *supra* note 94, at 34.

¹¹³ See RAFAEL E. DE HOYOS NAVARRO, *THE EFFECTS OF TRADE EXPANSION: POVERTY AND INEQUALITY IN POST-NAFTA MEXICO* 103–27 (2013).

¹¹⁴ See *20 Years of NAFTA Brings Mixed Blessings*, *THE ECONOMIST* (Jan. 20, 2014), <http://country.eiu.com/article.aspx?articleid=531446037&Country=Mexico&topic=Economy>, archived at <https://perma.cc/889E-J5F7>.

¹¹⁵ Kim, *supra* note 44, at 308.

¹¹⁶ See Wallach, *supra* note 90.

over a million campesino farmers and more than 1.4 million others who relied on the agricultural sector lost their employment.¹¹⁷ In turn, a mass migration of previously employed farm workers occurred from the agricultural south to the manufacturing north.¹¹⁸ This influx of workers has since served to drive down the wages of workers in the maquiladoras. A worker in Mexico now can afford only 62 percent of the consumer goods that they could before NAFTA.¹¹⁹ The retail price of tortillas—a staple food item in Mexico—has increased 279 percent.¹²⁰ Mexico's real minimum wage in 2010 was 70 percent less than it was in 1980.¹²¹ Moreover, the poverty rate in Mexico has since increased despite an increase in GDP.¹²² In 2014 the poverty rate for Mexico had risen to 55.3 million people or 46.2 percent of the population, up from 45.5 percent in 2012.¹²³ An additional 40 million people are categorized as “vulnerable” either because they have unmet needs or a falling income.¹²⁴ Of Mexico's population, only 24.6 million people are considered neither impoverished nor vulnerable.¹²⁵

These developments have had harsh consequences for the diets of the Mexican people.¹²⁶ Ochoa, citing Carlson, writes that before NAFTA's implementation, Mexico spent \$1.8 billion on food imports. In 2014, that amount had increased to \$24 billion.¹²⁷ John Norris also notes that following the passage of NAFTA, there was more than a 1,200 percent increase in high fructose corn syrup exports from the U.S. to Mexico.¹²⁸ These events led Mexicans to shift their diets. Unable to afford nutritious meals, they turned to unhealthy foods. As a result, Mexico has surpassed the U.S. in its levels of adult obesity with one-third of all adults considered “extremely overweight,” at the same time that nearly half are impoverished.¹²⁹ Mexico had attempted to stop these happenings by taxing drinks sweetened with high fructose corn syrups, but the U.S. government appealed to the WTO, and these measures were ultimately stricken.¹³⁰

While criticizing the Mexican government for adopting preventive measures to protect both home grown industries and the Mexican people, the U.S., nevertheless adopts analogous measures under the title of “Antidump-

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See Enrique C. Ochoa, *The Crusade Against Hunger and the Persistence of Poverty*, 47 NACLA REP. AM. 37–40, 38 (2014).

¹²² Jude Webber, *Mexico Sees Poverty Climb Despite Rise in Incomes*, FINANCIAL TIMES (2015), <https://www-ft-com.ezp-prod1.hul.harvard.edu/content/98460bbc-31e1-11e5-8873-775ba7c2ea3d>, archived at <https://perma.cc/2PVE-46ZA>.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Ochoa, *supra* note 1, at 39.

¹²⁷ *Id.* at 38.

¹²⁸ See John Norris, *Make Them Eat Cake*, FOREIGN POLICY (Sep. 3, 2013), <https://foreignpolicy.com/2013/09/03/make-them-eat-cake/>, archived at <https://perma.cc/QF4X-S27B>.

¹²⁹ *Id.*

¹³⁰ *Id.*

ing” (AD) and “Countervailing Duties” (CVD). These measures affect a large swath of imports from Mexico.¹³¹ In an interview, Raúl Gutiérrez, a top executive of a Mexican steel industry, stated that “these antidumping actions—not just in steel but in such sectors as sugar—deviate from the spirit of NAFTA and prevent our three countries from realizing the prosperity our citizens need.”¹³² In response, Phillip Hayes of the American Sugar Alliance calls Gutiérrez’s comments “theatrics by the Mexicans.”¹³³ He goes on to say that “the trade cases are clearly following WTO and NAFTA rules.”¹³⁴ Consequently, these rules must be critically examined.

IV. THE CHAPTER 19 RULES

Provided that the AD and CVD rules can play such a pivotal role in areas of the Mexican economy, poverty rate, and diet, the rest of this article will focus on these rules. In particular, it is useful to examine how these rules came about, their stated intentions, and their consequences. As a NAFTA signatory and U.S. trading partner, Mexico is subject to both U.S. laws on AD and CVD as well as the processes for appeal under NAFTA. Additionally, as a member of the WTO, Mexico may seek to appeal a U.S. decision to the WTO. Accordingly, this section analyzes the origin, stated intent, and consequences of U.S. AD and CVD laws and then examines the two routes to appeal under NAFTA and the WTO. Subsequently, this section will close with a set of eight recommendations to address these findings.

A. U.S. AD and CVD Laws

The U.S.’s earliest efforts to combat dumping can be found in Title VIII of the U.S. Revenue Act of 1916.¹³⁵ Under the act, products intentionally sold in the U.S. at a price substantially below market value or below the wholesale value in the seller’s home nation were subject to both criminal punishment and treble damages.¹³⁶ This act was later amended by the Antidumping Act of 1921 and the 1930 Tariff Act to eliminate the required demonstration of “intent.”¹³⁷ Amended once again by the Trade Agreements Act of 1979—due to the belief that the U.S. Department of the Treasury had become “far less sympathetic to domestic antidumping petitioners”—the investigative and adjudicative authority for dumping cases was removed to the

¹³¹ See James Politi, *US and Mexico Producers Spar Over Sugar and Steel Duties*, FINANCIAL TIMES (Apr. 16, 2014), <https://www.ft.com/content/06690d00-c56a-11e3-89a9-00144feabdc0>, archived at <https://perma.cc/8XLL-4FJX>.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ See Winston W. Chang, *Antidumping, Countervailing, and Safeguard Measures*, GIT AM REV. INT. BUS. 5 (2008).

¹³⁶ *Id.*

¹³⁷ *Id.* at 6.

U.S. Department of Commerce (USDOC) and the U.S. International Trade Commission (USITC).¹³⁸

In 2000, because of the standard's draconian effects and "excessive remedies," the European Union, along with Japan and others, appealed to the WTO.¹³⁹ Consequently, the WTO took a hard line with the U.S. antidumping laws, forcing the U.S. to revise.¹⁴⁰ The current U.S. antidumping laws are enumerated in the amended version of Title VII of the Tariff Act of 1930.¹⁴¹ Title VII also includes auxiliary efforts to combat harm to U.S. industries.¹⁴² These laws may be invoked if the USITC concludes that a foreign government has financially subsidized the manufacture, production, or export of a particular good to the U.S.¹⁴³

The revised Tariff Act of 1930 permits U.S. industries to seek relief from the U.S. government in the event that a foreign government financially subsidizes imported goods.¹⁴⁴ An industry must first file a petition with the USDOC and USITC.¹⁴⁵ Subsequently, the USITC—an independent, "quasi-judicial" federal agency with "broad investigative responsibilities" concerning matters of trade—performs a preliminary phase injury investigation.¹⁴⁶ From the date of the petition, the USITC has 45 days to complete the investigation or 25 days if the USDOC initially extended the deadline to begin the investigation.¹⁴⁷ At the preliminary phase of investigation, the USITC must determine whether there is a "reasonable indication" that the domestic industry is materially injured or faces the threat of material injury, or whether an import is, or has been, sold at "less than fair value" (LTFV) or subsidized by a foreign government.¹⁴⁸ Where the USITC determines in the affirmative that either of these criteria have been met, the USDOC continues its investigation, unless the imports are negligible or less than 3 percent of similar imports.¹⁴⁹

Once the preliminary phase has been conducted and the Secretary of Commerce has made a preliminary determination, the USITC proceeds to the final phase of its investigation.¹⁵⁰ This stage of the investigation must yield a final decision within 120 days following the preliminary decision.¹⁵¹ The findings must indicate that either there is *in fact* a "material injury" or

¹³⁸ See Robert M. Feinberg, *U.S. Antidumping Enforcement and Macroeconomic Indicators Revisited: Do Petitioners Learn?*, 141 REV. WORLD ECON. 612–622, 617 (2005).

¹³⁹ Chang, *supra* note 135, at 6.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See U.S. INT'L TRADE COMM'N, *Understanding Antidumping & Countervailing Duty Investigations*, https://www.usitc.gov/press_room/usad.htm, archived at <https://perma.cc/GF63-VQM>.

¹⁴³ Chang, *supra* note 135, at 10.

¹⁴⁴ See U.S. INT'L TRADE COMM'N, *supra* note 142.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

threat of material injury, or a domestic industry has been materially disadvantaged as a result of an import which is sold at LTFV or is subsidized by a foreign government.¹⁵² If the findings indicate either of these possibilities, the Secretary of Commerce puts forward an AD or CVD order which is to be carried out by the U.S. Customs Service.¹⁵³ Alternatively, if no such findings are made, then the case is dismissed.¹⁵⁴ Each party to the investigation may appeal to the U.S. Court of International Trade or, in a case involving a Mexican company, to a binational panel under the authority of the NAFTA.¹⁵⁵

Early on, efforts to study trends in the USDOC and the USITC's decisions were frustrated by the apparent "case-by-case" criteria previously outlined. In recent years, however, researchers have taken a greater interest in these decisions and have employed a variety of statistical tools. Chief among them is Robert M. Feinberg, who employs a negative binomial regression approach with random target country effects¹⁵⁶ and Mustapha Sadni-Jallab, who makes use of the Probit model.¹⁵⁷ Feinberg analyzes the elements of 473 country-specific AD petitions filed by U.S. firms against 15 nations—including Mexico—between 1981 and 1998 and attempts to explain their resulting outcomes.¹⁵⁸ Key amongst his findings is the determination that business cycle effects on AD decisions are "unambiguous."¹⁵⁹ In other words, despite the stated intent of trade law to enforce the law neutrally, U.S. industries have learned when to file their petition to increase their likelihood of success based on economic trends such as economic growth and exchange-rate related pressures.¹⁶⁰ Feinberg finds that in the years following the 1979 Trade Act, "it became apparent that a dumping finding was a virtual certainty, and the only issue of interest was how the [USITC] would find on the question of injury."¹⁶¹

Sadni-Jallab examines the potential of economic and political influences on the USDOC and the USITC's antidumping decisions. Sadni-Jallab concludes that there is a "clear risk that political pressure through political channels can lead bureaucrats to impose antidumping duties to protect politically powerful industries with little economic evidence of injury."¹⁶² Sadni-Jallab indicates that political pressure, defined in terms of the number of AD cases involving the product and the country, significantly influences AD de-

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Robert M. Feinberg, *U.S. Antidumping Enforcement and Macroeconomic Indicators Revisited: Do Petitioners Learn?*, 141 *REV. WORLD ECON.* 612, 616 (2005).

¹⁵⁷ Mustapha Sadni-Jallab, *The Political Influence of European and American Antidumping Decisions: Some Empirical Evidence*, 6 *ECON. BULL.* 1, 1 (2007).

¹⁵⁸ Feinberg, *supra* note 155, at 612.

¹⁵⁹ *Id.* at 614.

¹⁶⁰ *See id.* at 621–22.

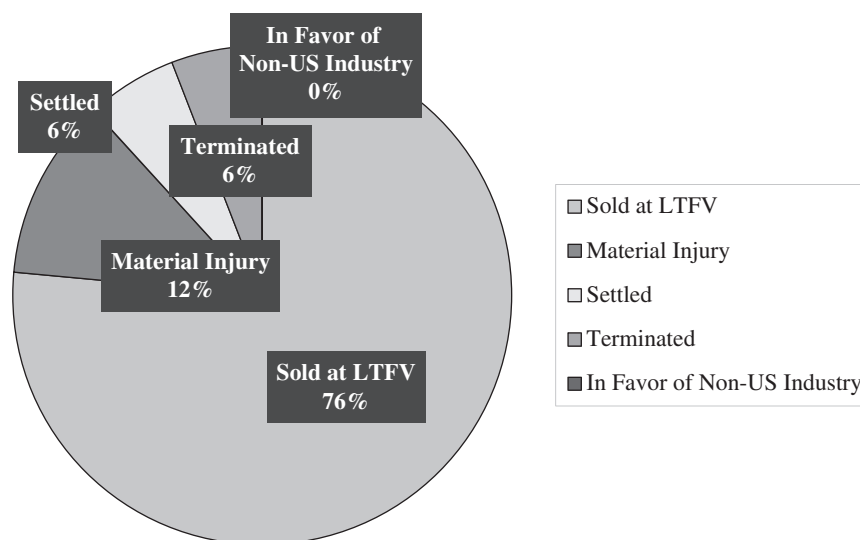
¹⁶¹ *Id.* at 620.

¹⁶² Sadni-Jallab, *supra* note 157, at 5.

cisions.¹⁶³ Sadni-Jallab writes that the large, politically connected steel industry as well as China, a U.S. competitor evidence such influences.¹⁶⁴

However, are there discernible trends in the USDOC and the USITC decisions with regards to Mexico or Mexican industries? To answer this question, I have reviewed,¹⁶⁵ using the USITC’s *Antidumping and Countervailing Duty Investigations Database Archive*, the seventeen petitions filed since 2003 by U.S. industries against Mexico or Mexican industries in addition to their eventual handling by the USDOC and the USITC in both the Preliminary Phase and the Final Phase.¹⁶⁶ First, every case that made it to Preliminary Phase was decided in favor of the petitioning industry. Second, all but two petitions (one that settled and the other withdrawn) that received affirmative decisions proceeded to receive an affirmative decision in the final phase. This data suggests that if U.S. petitioners successfully prove in the preliminary phase that there is a “reasonable indication,” or alternatively, “a reasonable basis”¹⁶⁷ grounded in “the best information available to it at the time,”¹⁶⁸ that a Mexican industry either sells a product at LTFV or has received subsidies from the Mexican government, they will also succeed in the final phase.

FIGURE 1. USITC, USDOC Final Phase Results.



¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ At the time of this writing, January 2018 – July 2018.

¹⁶⁶ This research excludes Sunset, Adequacy, Review, and Safeguard investigations.

¹⁶⁷ U.S. INT’L TRADE COMM’N, ANTIDUMPING AND COUNTERVAILING DUTY HANDBOOK, II-5, 13 (June 2015), https://www.usitc.gov/trade_remedy/documents/handbook.pdf, available at <https://perma.cc/7BL2-3MBU>.

¹⁶⁸ *Id.* at II-13.

Third, in 86 percent of the cases—excluding those settled or withdrawn—the USDOC and the USITC determined that the Mexican industry had sold the product at LTFV. This precedent indicates that future U.S. petitioners would be well served to emphasize that the Mexican industry in question has engaged in predatory pricing, an indication which, while strategically useful for U.S. industries, demonstrates Mexico's vulnerability. This research confirms Sadni-Jallab's findings that Mexico's vulnerability disproportionately impacts the Mexican steel industry.¹⁶⁹ Of the 17 cases which reached the Final Phase, eight were filed by the U.S. Steel Industry and two were filed by U.S. agricultural petitioners.

These trends demonstrate that Mexican industries are often on the losing end of USDOC and USITC decisions. As the next section demonstrates, USDOC and the USITC decisions concerning Mexico are not necessarily permanent. Each can be appealed to the US Court of International Trade or a binational panel under the authority of NAFTA.¹⁷⁰ However, this appeals process may not significantly alter the outcome nor influence how the U.S. enforces its antidumping and countervailing duty laws toward Mexico.

B. AD and CVD Laws Under NAFTA

While Mexico's industries have the option to appeal to the U.S. Court of International Trade, nearly all respondents opt to use the binational panel established in NAFTA.¹⁷¹ Importantly, these procedures represent a compromise of the proposal initially presented by Canada and Mexico in the early trade discussions.¹⁷² In brief, Canada and Mexico recommended that signatories shelve their AD and CVD policies as a part of the larger Trade Agreement.¹⁷³ Reluctant to agree, however, the U.S. negotiated a weakening of this proposal.¹⁷⁴ Canada and Mexico were left to accept a binational panel charged with reviewing antidumping and countervailing duty decisions. The results are now set out in Chapter 19 of NAFTA.¹⁷⁵

Explicitly, Article 1902 states that, each of the signatories maintain their ability to formulate and enact AD and CVD laws to foreign imports.¹⁷⁶ Therefore, despite NAFTA's moniker of free trade, the laws set out in the previous section take precedent for any industry within Canada or Mexico that wishes to export goods to the U.S. Such laws may be amended at any time by the U.S., so long as the U.S. notifies the other parties of this

¹⁶⁹ See Sadni-Jallab, *supra* note 157, at 5.

¹⁷⁰ See U.S. INT'L TRADE COMM'N, *supra* note 142.

¹⁷¹ Bruce A. Blonigen, *The Effects of NAFTA on Antidumping and Countervailing Duty Activity*, 19 WORLD BANK ECON. REV. 407, 408 (2005).

¹⁷² See *id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ North American Free Trade Agreement, U.S.-Can.-Mex., ch. 19, Dec. 17, 1992, 32 I.L.M. 289 (1993) (entitled, "Review and Dispute Settlement in Antidumping and Countervailing Duty Matters").

¹⁷⁶ *Id.* at art. 1902.

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change.¹⁷⁷ Each party reserves this right with respect to their own AD and CVD laws.¹⁷⁸

The core of Chapter 19 rests in Article 1904. A Party may ask that a panel review based on the:

administrative record, a final antidumping or countervailing duty determination of a competent investigating authority of an importing Party to determine whether such determination was in accordance with the antidumping or countervailing law of the importing Party.^{179]}

This binational review should specifically use the relevant laws of the country that has made the earlier determination in addition to that nation's standard of review. In the case of the U.S., the standard of review is set out in 19 U.S. Code §1516.¹⁸⁰ The panel must decide based on errors of "fact or law" based on the arguments posited in the complaint.¹⁸¹ Further, the decision to overturn the earlier ruling is not a part of the panel's purview. Instead, the panel may decide to affirm the decision or to remand the proceeding for review to the court of initial jurisdiction.¹⁸² Decisions that are remanded by the binational panel to the USDOC and USITC fall under the guidance described in 19 U.S. Code §1516(b)(3)(a), "Effect of Decisions by NAFTA, or United States-Canada Binational Panels." Specifically, this subsection states that:

[A] court of the [U.S.] is not bound by, but may take into consideration, a final decision of a binational panel or extraordinary challenge committee convened pursuant to article 1904 of the NAFTA or of the Agreement.^{183]}

Accordingly, the strength of the binational panel with respect to USDOC or USITC decisions is appreciably diluted.

Nevertheless, a party from Mexico who wishes to access this process of review must first file a complaint to the relevant office of the Organismos de Comercio Exterior, the Secretary of the Economy in Mexico.¹⁸⁴ Following this step, Mexico may then request that the NAFTA Secretariat establish a binational panel review on the part of the Mexican exporter.¹⁸⁵ If, however, the panel is not requested within 30 days, the earlier decision is precluded

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at art. 1904.

¹⁸⁰ *See* 19 U.S.C. §1516 (1988).

¹⁸¹ Blonigen, *supra* note 171, at 411.

¹⁸² *Id.*

¹⁸³ 19 U.S. §1516(a).

¹⁸⁴ U.S. CUSTOMS & BORDER PROTECTION, *Antidumping and Countervailing Duties*, <https://www.cbp.gov/trade/nafta/guide-customs-procedures/effect-nafta/en-antidumping>, archived at <https://perma.cc/HAM8-AVQP>.

¹⁸⁵ *Id.*

from review.¹⁸⁶ Provided that a Party successfully petitions for the panel, each of the relevant countries becomes responsible for appointing two panel members.¹⁸⁷ The final member of the five-member panel must come from a third country, usually chosen from a list of 25 people designated by each country.¹⁸⁸

Integration of this dispute resolution mechanism has been met with varied responses. The literature and research supportive of Chapter 19 emphasizes that despite the complexities of disputes which involve two different languages, legal cultures, and economies, the binational panel has managed to review most of its cases without “significant disagreement” amongst panelists and with “great patience, flexibility, and resourcefulness.”¹⁸⁹ Stephen Powell, a former panelist of the binational panel, concludes that all of the Americas would be well served by adopting an analogous tribunal.¹⁹⁰ In emphasizing the benefits of the binational panel, Powell refers to Patrick Macroy who, in his own review of the binational panel system as it relates to Canada, highlights the panel’s commitment to increased fairness, timeliness, and a lack of national bias in decisions involving each of the signatories.¹⁹¹ To reach this conclusion, Macroy, writing in 2002, heavily relied on the U.S. Government Accountability Office’s¹⁹² (GAO) 1997 report which studied NAFTA, on the whole, three years after its implementation.¹⁹³

This report has informed researchers for the past twenty-one years. Therefore, it is useful to understand how the GAO arrived at its conclusions. The 29-page GAO report titled “[NAFTA]: Impacts and Implementation,” purports to study three areas.¹⁹⁴ First, it examines the economic impacts of NAFTA and an overview of the Trade Agreement’s adjustment programs.¹⁹⁵ Second, it analyzes the dispute resolution mechanisms (studied here) inherent in the Agreement.¹⁹⁶ Third, it studies the execution of NAFTA’s supplemental environmental and labor cooperation agreements.¹⁹⁷ The GAO’s report, however, devotes less than five pages to Chapter 19 and the dispute

¹⁸⁶ North American Free Trade Agreement, *supra* note 175, art. 1904.

¹⁸⁷ Blonigen, *supra* note 171, at 410–11.

¹⁸⁸ *Id.* at 411.

¹⁸⁹ David A. Gantz, *Resolution of Trade Disputes Under NAFTA’s Chapter 19: The Lessons of Extending the Binational Panel Process to Mexico*, 29 LAW & POL’Y INT’L BUS. 297, 298 (1998).

¹⁹⁰ See 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, 240 (2010).

¹⁹¹ Patrick Macroy, *NAFTA Chapter 19: A Successful Experiment in International Trade Dispute Resolution*, C.D. HOWE INSTITUTE COMMENT NO. 168, 1, 18 (2002).

¹⁹² Formerly known as the “U.S. General Accounting Office.”

¹⁹³ See U.S. GEN. ACCOUNTING OFFICE, NORTH AMERICAN FREE TRADE AGREEMENT: IMPACTS AND IMPLEMENTATION: TESTIMONY OF JAYETTA Z. HECKER, ASSOCIATE DIRECTOR, INTERNATIONAL RELATIONS AND TRADE ISSUES, NATIONAL SECURITY AND INTERNATIONAL AFFAIRS DIVISION, <https://www.gao.gov/archive/1997/ns97256t.pdf>, archived at <https://perma.cc/5MXV-NFQS>.

¹⁹⁴ *Id.* at 1.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

resolution processes, which are also comprised of a review of two other Chapters (Chapter 11 and Chapter 20). The conclusions reached concerning these chapters were purportedly based on interviews that GAO employees conducted with Canadian, Mexican, and U.S. trade officials as well as citation to committee and group discussions held by NAFTA.¹⁹⁸

However, Mexican interests are minimally represented in this report. The report states that Mexican officials “acknowledged that Mexico’s pool of potential panelists [for the binational panel] is somewhat limited because Mexican attorneys are still developing expertise in trade dispute matters.”¹⁹⁹ The binational panel was evaluated as leading to fairness despite the fact that Mexican attorneys had yet to fully understand NAFTA’s implications on trade, and thus, constituted inadequate representation. One would expect in the years since the 1997 GAO was published, that the GAO would have issued an updated or revised version. In a brief review of the GAO’s publications since 1997, I have determined that the GAO has published a total of 114 reports or white papers with reference to NAFTA. Of these reports, 36 make a passing mention of the Chapter 19 binational panel review process and none of these reports have specifically undertaken a systematic analysis of Chapter 19.

Original or updated research in this area is necessary to form an accurate and current assessment of the binational panel system. Since 1997, other researchers have attempted to fill this void. Bruce Blonigen, for example, examines each of the U.S.’s AD and CVD actions from 1980 through 2000.²⁰⁰ His research differs from previous scholarship in this area, as it studies the AD and CVD actions across all U.S. import sources and uses in depth measures of disputes arising from Chapter 19 dispute settlement activity.²⁰¹ Importantly, Blonigen concludes that although Chapter 19’s dispute settlement process was intended to reduce U.S.’s reliance on AD and CVD laws, there is “no evidence” that for Mexico “Chapter 19 activity significantly lowered U.S. filings or the number of affirmative decisions.”²⁰² For Canada, on the other hand, Blonigen determines that the binational panel system has lowered the number of affirmative U.S. antidumping and countervailing duty decisions.²⁰³

In addition, Martha Thomas explores the factors that led industries in one country to appeal the decisions made in another country under NAFTA.²⁰⁴ Thomas starts from the premise that the degree to which firms and industries resort to the appeal process has varied.²⁰⁵ To explore the underlying reasons for this variance, Thomas compiles a dataset containing all

¹⁹⁸ *Id.* at 13.

¹⁹⁹ *Id.* at 12.

²⁰⁰ Blonigen, *supra* note 171, at 409.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 410.

²⁰⁴ See generally Martha Thomas, *The Logic of Dispute Initiation under NAFTA Chapter 19*, 41 *POL. & POL'Y* 155, 155–88 (2013).

²⁰⁵ *Id.* at 157.

of the “potential and actual Chapter 19 disputes” stemming from 1994 to 2009, resulting in a total of 242 cases.²⁰⁶ She then tests this data set against external variables (industry size, industry concentration, temporal proximity to elections) and internal variables (revenue of the plaintiff industry, concentration of the plaintiff industry, and the type of industry).²⁰⁷ Thomas finds that an industry is more likely to appeal a USDOC or USITC decision if that industry perceives there to be unfairness stemming from its U.S. counterpart’s size or concentration, and if the decision is close in time to a political election.²⁰⁸

However, this desire to appeal may be offset by the industry’s own characteristics.²⁰⁹ If that industry is smaller and less concentrated, for example, it is far less likely to initiate an appeal.²¹⁰ Both Blonigen and Thomas’s research demonstrate that under Chapter 19, Mexican firms are at a disadvantage compared to their U.S. and Canadian peers. Mexican firms who wish to export to the U.S. must overcome both the direct challenge presented by AD and CVD laws as well as the likelihood that their industries may not be as well positioned to mount a challenge to a USDOC or USITC ruling. While similar troubles exist for Canadian firms, the extent to which they are problematic is not as severe. Thomas notes, for example, that of the 242 petitions between 1994 to 2009, 76 were issued by Canada, 109 were issued by the United States, and only 57 were issued by Mexico.²¹¹ Even if a Mexican industry does mount a challenge under Chapter 19, Blonigen writes, it is not as likely as a Canadian industry to be successful on remand.²¹² The next section will explore Mexico’s final route to fair treatment to trade with the United States: appeal to the WTO.

C. WTO Dispute Mechanisms

As of this writing, the WTO is comprised of 164 members, all of whom have agreed to abide by the WTO’s AD and CVD dispute resolution mechanisms.²¹³ Established on January 1, 1995, the WTO superseded the 1947 General Agreement on Tariffs and Trade (GATT) for the purpose of oversight in matters regarding international trade.²¹⁴ In doing so, the WTO adopted the Uruguay Round Agreement on the Implementation of Article VI

²⁰⁶ *Id.* at 170.

²⁰⁷ *Id.* at 175.

²⁰⁸ *Id.* at 179.

²⁰⁹ *Id.* at 169.

²¹⁰ *Id.* at 179.

²¹¹ *Id.* at 170.

²¹² Blonigen, *supra* note 171, at 409–10.

²¹³ *Members and Observers*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm, archived at <https://perma.cc/U9GA-RJRW>.

²¹⁴ *The 128 Countries that had Signed GATT by 1994*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/gattmem_e.htm, archived at <https://perma.cc/H6XB-VNVE>.

of GATT, popularly known as the “Anti-Dumping Agreement,”²¹⁵ which was subsequently amended in 2001 at the Doha Round in Qatar.²¹⁶ These developments and their consequences are discussed below with particular attention to trade between the U.S. and Mexico.

In accordance with Article VI, WTO members are permitted to take steps to prevent dumping in their nations, but only in the event that they comply with the investigative and procedural requirements. This being the case, members may impose duties if, following their investigation, they determine that dumping has occurred, that the relevant domestic industry has suffered as a result, and that there is a causal link between these events.²¹⁷ Provided that an industry believes that it has been treated unfairly or that the exacting nation has not adequately conformed to the agreed upon process, an industry may seek appeal to the WTO.

Macrory explains that this process may be less than ideal for at least four reasons.²¹⁸ First, private parties are unable to present their case to the WTO.²¹⁹ Instead, the party must persuade their government to commence an action.²²⁰ At this stage in the process, a government may decide against taking action, especially if the industry is small or if the nation prefers to use its limited resources for other matters.²²¹ If unsuccessful, the party must forego WTO guidance. Second, if the WTO decides in favor of an industry, this does not mean that the industry will receive compensation.²²² The losing country may elect either to amend the transgression, offer compensation, or face retaliation.²²³ Third, WTO measures around AD and CVD law are not as detailed as Chapter 19 or other avenues.²²⁴ Therefore, the scope of appeal with the WTO is more limited.²²⁵ Fourth, despite the Uruguay Round and Doha Round amendments, the WTO decisions still often require nearly a year and a half to reach a full resolution.²²⁶

Chad Brown highlights that the literature reveals a discrepancy between the number of countries who suffer a harm from an imposed antidumping trade remedy and those who resort to the WTO.²²⁷ In the first attempt to empirically understand this conundrum with the U.S. as an export market, Brown writes that governments perform a cost-benefit analysis to determine

²¹⁵ *Introduction to Antidumping in the WTO*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm, archived at <https://perma.cc/A66N-853P>.

²¹⁶ *The Doha Round*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dda_e/dda_e.htm, archived at <https://perma.cc/VX6F-7YX3>.

²¹⁷ *Technical Information on Antidumping*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm#requirements, <https://perma.cc/4CZY-49HL>.

²¹⁸ Macrory, *supra* note 191, at 16–17.

²¹⁹ *Id.* at 16.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* at 17.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Chad Brown, *Trade Remedies and World Trade Organization Dispute Settlement: Why are so Few Challenged?*, 34 J. OF LEGAL STUD. 515, 515 (2005).

which actions they should pursue.²²⁸ Brown's contribution is to determine the factors that make it more likely for a country to pursue the WTO process. First, Brown concludes that a measure which affects a larger value of a nation's exports are more likely to be challenged than one that affects a smaller value of nation's exports.²²⁹ Second, his research reveals that whether a country has the capacity to retaliate in the event of a positive WTO ruling will affect whether the country will initially bring forward a case.²³⁰ Third, countries that are not as diversified or that are "more reliant" on the U.S. as an export market are less likely to resort to the WTO.²³¹

Nevertheless, there is evidence that developing nations turn to the WTO more than they did under GATT.²³² In an earlier research publication, Brown, with reference to Y.D. Park and Marion Panizzon, determines that under the GATT regime, 30 percent of the disputes were brought by developing nations compared to 33 percent under the WTO dispute mechanism.²³³ Brown explains that one reason for this might be that developing nations tend to experience more success with the WTO than under GATT.²³⁴ Success, however, is relative and should be accompanied by the understanding that developing nations "have been the target of roughly 45 percent" of WTO disputes.²³⁵ This, according to Brown, is much higher than was the case under GATT.²³⁶ So, it is unclear whether the WTO process was actually beneficial for developing nations.

As demonstrated by Mexico and the U.S., it is not always clear who benefits more from the WTO procedures, developing or developed nations. Mexico has consistently relied upon the WTO provisions. For example from 1995 through 2017, Mexico initiated a total of 78 actions.²³⁷ One-third, or 26 of the 78 actions, were initiated against the U.S.²³⁸ The U.S., by contrast, has initiated a total of 283 actions, fourth most in the world behind China, Korea, and Taiwan, respectively.²³⁹ Of these 283 actions, the U.S. has filed 48 against China, 43 against Brazil, and 31 against Mexico.²⁴⁰ Although Mexico

²²⁸ *Id.*

²²⁹ *Id.* at 521.

²³⁰ *Id.*

²³¹ *Id.* at 525.

²³² Chad Brown, *Developing Countries as Plaintiffs and Defendants in GATT/WTO Disputes*, 27 *WORLD ECON.* 59, 64 (2004) (quoting Young Duk Park and Marion Panizzon, *WTO Dispute Settlement Mechanism 1995-2001: A Statistical Analysis*, 5 *J. OF INT'L ECON. L.* 221, 221-44 (2002)).

²³³ *Id.*

²³⁴ *Id.* at 78.

²³⁵ *Id.* at 64.

²³⁶ *Id.*

²³⁷ WTO, *Anti-dumping Initiations by Exporting Country 01/01/1995 – 31/12/2018*, https://www.wto.org/english/tratop_e/adp_e/AD_InitiationsByExpCty.pdf, archived at <https://perma.cc/A8ZQ-42KW>.

²³⁸ WTO, *Anti-dumping Initiations: Reporting Member vs Exporter 01/01/1995 – 31/12/2018*, https://www.wto.org/english/tratop_e/adp_e/AD_InitiationsRepMemVsExpCty.pdf, archived at <https://perma.cc/G2EW-33SB>.

²³⁹ *Id.*

²⁴⁰ *Id.*

is one of the U.S.'s largest trading partners, it is also one of the U.S.'s largest targets for petition to the WTO. No other country, aside from China, has filed more petitions against Mexico.²⁴¹ Therefore, while the WTO does provide Mexico with an opportunity to challenge the severity of U.S. antidumping laws, it also comes at a substantial cost.

V. DISCUSSION

The purpose of this research has been to contribute to the growing, yet technically insufficient, body of literature on NAFTA. In light of the ongoing trade discussions between the U.S., Mexico, and Canada, it is important that representatives understand Chapter 19 and its consequences on immigration, poverty, and the state of the Mexican economy. Unchecked neoliberalism as manifested in NAFTA is simply not an adequate growth and development strategy for Mexico.

But without more, this understanding will not ensure that Mexico is given a fair deal under the renewed trade discussions. Accordingly, the remainder of this paper presents eight recommendations to guide the negotiators. These recommendations go beyond NAFTA and employ the aforementioned discussion to propose improvements to the WTO and its approach to AD and CVD disputes.

A. Recommendations

First, although the U.S. has historically prized itself on its individualism, it should be held to the same standard as other countries with regards to AD and CVD laws. As previously demonstrated, the U.S. resists imports from other countries that are sold at LTFV or that are subsidized. At the same time, the U.S. floods Mexico with heavily subsidized corn, flattening Mexico's agricultural industry—creating vast unemployment and forced migration. Therefore, if the U.S. is to maintain its harsh AD and CVD laws, it should permit others to do the same. Alternatively, the U.S. should significantly amend these rules to permit the free flow of trade.

Second, the U.S. should amend its rules for investigation and adjudication of AD and CVD cases. This recommendation consists of three parts. The USDOC and USITC should place a higher burden on petitioning parties to prove their cases. As described, petitioners can succeed on a claim based on inadvertent or unintentional effects. Next, the USDOC and USITC should adopt a higher standard with regards to the preliminary phase of review. As it currently stands, in order for a case to move to the final round of review in the U.S., there needs to be a "reasonable indication" that an import has been subsidized or sold at LTFV. This standard should be enhanced to ensure that only the most serious cases make it to the final phase of investigations. Fi-

²⁴¹ *Id.*

nally, while the U.S. may have an interest in maintaining its AD and CVD laws to prevent against abuses by nations such as China, the U.S. should adopt rules that eliminate these duties for its North American trading partners and neighbors.

Third, provided that the U.S. has previously expressed reluctance to amend its AD and CVD laws, the U.S. should incorporate a provision to its immigration laws that grants immigration status or points toward citizenship for those who have been negatively affected by NAFTA. As Lori Wallach notes, NAFTA has “contributed to a doubling of Mexican immigration to the U.S.”²⁴² The idea of reimbursement is not new to NAFTA. Buried in Chapter 11, for example, is a provision that permits U.S. investors to recoup losses to their assets resulting from Mexican regulations. Accordingly, U.S. investors have filed over \$13 billion dollars of claims to the Mexican treasury.²⁴³ Given that investors can recoup, so should those who have become unemployed and impoverished as a result of NAFTA.

Fourth, NAFTA should be amended to incorporate a permanent appeals court rather than an *ad hoc* committee. Parties would benefit from expertise and a more efficient process.

Fifth, this permanent appeals court should be based on international law rather than on the laws of the court of initial jurisdiction. This would ensure that all cases are treated equitably and would overcome various country-specific nuances in AD and CVD laws.

Sixth, this appeals court, or otherwise, should adopt a neutral standard of review, rather than adopting the standard of review from the court of initial jurisdiction. Additionally, this standard of review should be binding on the courts of initial jurisdiction. This would eliminate U.S. courts from ignoring the decisions of the permanent tribunal on remand.

Seventh, the WTO should amend its procedural rules to permit not only nations from appealing to the WTO dispute mechanism, but also individual parties. This would eliminate concerns that countries with limited resources would forego an appeal and would allow industries in need of redress to file an appeal without having to wait for a country to approve their claim.

Eighth, as demonstrated, the WTO procedures for AD and CVD cases are not always clear. Therefore, the WTO should expand its rules on AD and CVD to more adequately inform parties considering appeal to the WTO dispute mechanism.

Finally, the WTO, as proposed for the U.S., should adopt a rigorous process of review to ensure that the proposed expanded access does not lead to miscellaneous or unfounded claims.

²⁴² Wallach, *supra* note 90.

²⁴³ STIGLITZ, *supra* note 37, at 197.

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VI. APPENDIX

A. APPENDIX A: USITC INVESTIGATIONS AND OUTCOMES

Investigation Title	Start Date	End Date	Preliminary Phase Outcome	Final Phase Outcome
Carbon and Certain Alloy Steel Wire Rod from Brazil, Canada, Germany, Indonesia, Mexico, Moldova, Trinidad, and Tobago, Turkey, Ukraine.	10/2/02	10/29/02	No Record	Domestic Industry Materially Injured
Prestressed Concrete Steel Wire Strand from Brazil, India, Korea, Mexico, and Thailand	7/16/03	1/14/04	No Record	Sold at LTFV
Light-Walled Rectangular Pipe Tube from Mexico and Turkey	4/13/04	10/12/04	No Record	Sold at LTFV
Circular Welded Carbon Quality Line Pipe from China, Korea, and Mexico	10/6/04	2/17/05	No Record	Petitioner Terminated Case
Purified Carboxymethylcellulose from Finland, Mexico, Netherlands, and Sweden	12/27/04	6/27/05	No Record	Sold at LTFV
Lemon Juice from Argentina and Mexico	4/26/07	10/24/07	Evidence of Material Injury	Settlement Agreement
Light-Walled Rectangular Pipe Tube from China, Korea, Mexico and Turkey	11/30/07	5/23/08, 7/28/08	Evidence of LTFV	Sold at LTFV
Seamless Refined Copper Pipe and Tube from China and Mexico	9/30/09	11/23/09	Evidence of LTFV	Sold at LTFV
Certain Magnesite Carbon Bricks from China and Mexico	3/12/10	9/7/10	Evidence of LTFV	Sold at LTFV
Bottom Mount Combination Refrigerator-Freezers from Korea and Mexico	11/2/11	4/30/12	Evidence of LTFV	Sold at LTFV
Galvanized Steel Wire from China and Mexico	11/4/11	5/3/12	Evidence of Material Injury	Sold at LTFV
Large Residential Washers from Korea and Mexico	8/3/12	2/8/13	Evidence of Material Injury	Sold at LTFV
Prestressed Concrete Steel Rail Tie Wire from China, Mexico, and Thailand	12/12/13	6/12/14	Evidence of LTFV	Sold at LTFV
Steel Concrete Reinforcing Bar From Mexico	4/24/14	10/28/14	Evidence of LTFV	Sold at LTFV
Sugar from Mexico	11/3/14	11/6/15	Evidence of Material Injury	Domestic Industry Materially Injured
Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Korea, Mexico, and Turkey	3/1/16	9/6/16	Evidence of LTFV	Sold at LTFV
Emulsion Styrene-Butadiene Rubber from Brazil, Korea, Mexico, and Poland	2/24/17	8/23/17	Evidence of LTFV	Sold at LTFV

