
Dispute Settlement Systems

Building on the 1989 Canada-US Free Trade Agreement (CUSFTA), NAFTA contains formal dispute settlement provisions in six areas: Chapter 11 is designed to resolve investor-state disputes over property rights; Chapter 14 creates special provisions for handling disputes in the financial sector via the Chapter 20 dispute settlement process; Chapter 19 establishes a review mechanism to determine whether final antidumping (AD) and countervailing duty (CVD) decisions made in domestic tribunals are consistent with national laws; and Chapter 20 provides government-to-government consultation, at the ministerial level, to resolve high-level disputes. In addition, the NAFTA partners created interstate dispute settlement mechanisms regarding domestic environmental and labor laws under the North American Agreement on Environmental Cooperation (NAAEC) and the North American Agreement on Labor Cooperation (NAALC), respectively. This chapter examines the first four dispute settlement systems; the NAAEC and NAALC systems are evaluated in the environment and labor chapters of this book.

Before analyzing the framework for each NAFTA chapter, a brief review of the reasons for creating the NAFTA dispute settlement systems may be helpful. As a nation that trades heavily with the United States, Canada was primarily concerned about ensuring open access to the US market when it negotiated the CUSFTA.¹ Put succinctly, Canada wanted to en-

1. In 1986, two years before signing CUSFTA, exports to the United States represented about 75 percent of total Canadian exports, a proportion that increased to about 86 percent by 2003 (IMF Direction of Trade Statistics, November 2002, and Industry Canada Trade Data Online, October 2004). See Hart (2002).

sure that Canadian exports to California, for example, would face barriers no greater than New York exports to California. In the 1980s, Canada became increasingly concerned about the threat of US CVD and AD duties—provoked by adverse rulings on lumber, fish, and pork (Winham 1993). While the United States wanted to preserve its trade remedies to redress both Canadian public subsidies and private dumping, Canada wanted an agreement that would curtail overzealous application of trade measures against Canadian exports.

The preferred Canadian approach was harmonization of substantive trade remedy laws, but the United States was adamantly opposed to changes in its own unfair trade laws (Mena 2001). As a compromise, the United States and Canada agreed to create an innovative dispute settlement mechanism to review final national AD and CVD determinations and to defer talks on subsidies, AD, and CVD rules to the ongoing Uruguay Round of GATT negotiations. A few years later, when NAFTA loomed on the horizon, Canada wanted to make sure that its gains in CUSFTA were preserved in a trilateral agreement. Canada feared that a US-Mexico bilateral agreement might set the stage for backsliding on the dispute settlement provisions, which were not uniformly popular in the United States. Moreover, Canada wanted to make another run at harmonizing trade remedy laws.

Mexico's adherence to NAFTA's dispute settlement mechanisms was critical to assure its partners that Mexico was committed to faithfully implementing NAFTA reforms. Memories of the 1982 nationalization of banks, and its subsequent judicial controversy, fueled concerns about the value of Mexico's commitments. US investors and exporters also questioned the reliability of Mexico's judicial system.² In NAFTA, Mexico agreed to the basic principles of the Chapter 19 process, which are largely based on common-law tenets, as well as the other dispute settlement mechanisms.³ Mexico viewed the NAFTA dispute settlement process as a tool for providing institutional legitimacy, which would help promote foreign direct investment (FDI).

The United States sought improvements on CUSFTA investment provisions by providing for international arbitration of investment disputes, by broadening the coverage of dispute procedures, and by prohibiting additional performance requirements not addressed in CUSFTA. US officials were satisfied with the Chapter 11 dispute settlement mechanism, which enabled private investors to seek a binding arbitration of their disputes

2. In November 1982, President López Portillo nationalized a commercial bank, which local courts determined was a violation of the Constitution. Mexico's Supreme Court later controversially overturned this ruling. See Ramírez de la O (1993).

3. See Vega-Cánovas and Winham (2002). By contrast with common-law tenets, Mexico's legal system is built on a European-style civil code.

with NAFTA governments, and were not evidently worried that Chapter 11 might be used against the United States (IGPAC 1992).

Different expectations about the role of NAFTA panel determinations, particularly Chapter 19 binational panels, prevailed throughout the initial implementation of the agreement. Canada lobbied for resolving potential trade disputes through working groups.⁴ Like Mexico, Canada envisioned a similar outcome from the NAFTA dispute settlement process—namely that greater rigor and restraint would be practiced in the application of domestic trade remedy law. The United States, on the other hand, already opposed to Canada’s idea of harmonizing trade remedies, believed that tribunal decisions, particularly Chapter 19 panels, would follow domestic US standards of judicial review. These standards require deference to the factual conclusions of the initial examining body.

With this background in mind, we now turn to an overview of each NAFTA dispute settlement chapter.

Chapter 11

A big NAFTA innovation was the establishment of an international mechanism for investment disputes. Mexico had long been a champion of the Calvo doctrine, which called for strict regulation of foreign investment and required that disputes be adjudicated only in local courts. Under that doctrine, foreign investors had no recourse to diplomatic protection or the courts of their home states.⁵ Pursuing its vision of strict regulation, in 1973 Mexico enacted the foreign investment law, which effectively limited foreign equity to a maximum ownership stake of 49 percent.⁶ The National Foreign Investment Commission (NFIC) screened investments. Other regulations required that foreign-owned plants balance their imports with exports and locate outside the main urban areas, especially Mexico City (Ramírez de la O 1993). In 1993 (after NAFTA), a new foreign investment

4. NAFTA parties established a Working Group on Trade and Competition and a Working Group on Trade Law in 1993. The official function of the Working Group on Trade and Competition was to provide recommendations on issues affecting competition laws and policies and trade under NAFTA. The objectives of the Working Group on Trade Law included monitoring the success of Chapter 19 panels and antidumping laws and considering changes in those laws. Despite Canada’s support for these pre-NAFTA working groups, some US industry associations resisted any discussion of potential trade cases during working group meetings.

5. The Calvo doctrine was invoked by Mexico and other Latin American nations to emphasize national sovereignty over foreign investment.

6. However, Mexico also allowed “neutral investment,” namely foreign investment in non-voting shares. These shares are not included in the computation of the proportion of a firm owned by foreign investors. See Cuevas, Messmacher, and Werner (2002).

law allowed foreign investors to fully own Mexican corporations; however, several sectors were excepted from the reforms. As of 2004, investment restrictions remained *inter alia* on Pemex and other state monopolies and radio and TV other than cable.

NAFTA investment provisions inaugurated a major change in Mexican policy toward foreign investors. By liberalizing its investment rules and accepting the international dispute resolution framework of Chapter 11, Mexico signaled investors that it was committed to a new regime. In the wake of the 1995 financial crisis, Mexico went further: It decided that the wisest course was to put out a welcome mat for foreign investors. The government rapidly opened to FDI sectors that had previously been reserved in NAFTA's annexes.⁷

While many investor provisions in Chapter 11 were carried over from CUSFTA, NAFTA was unique in adopting the "negative list" approach to reservations. In trade and investment agreements, the negative list approach means that a country must specifically identify industries or measures *not* covered by the relevant obligations. The agreement applies to everything else.⁸

National reservations that exclude sensitive industries or measures from investment protection provisions serve to highlight the residual areas of discrimination. The negative list acts like a NAFTA warning sign: "keep out." At the same time, it invites the attention of future negotiators. There are three types of reservations under Chapter 11: sectoral, reciprocal ("tit for tat"), and investment review reservations listed in Annexes 1, 2, and 3.⁹

Mexico reserved the largest number (89) of sectors. The United States and Canada carried over reservations from CUSFTA—50 and 48, respectively.¹⁰ Sectoral reservations concentrate heavily on national treatment (Article 1102) and most-favored nation (MFN) rights for foreign investors (Article 1103). These exclusions represent 71 percent of all Mexican reservations, 76 percent of all US reservations, and 60 percent of all Canadian reservations. The most sensitive sector for all three NAFTA trading part-

7. According to Vega-Cánovas and Winham (2002), industries opened to FDI included railroads, telecommunications, satellite transmission, banking, and some petrochemicals.

8. By contrast, a "positive list" approach does not obligate a country to open its market unless it specifically lists sectors in its national schedule.

9. NAFTA Annex 1 provides the vehicle for investment review. In reserved sectors and sub-sectors, each party can invoke Annex 1 to add more restrictive measures. See Rugman and Gestrin (1993).

10. All members have absolute reservations on health and social services, while individual countries maintained absolute exceptions in specific sectors—for example, Canada excludes its cultural industries (newspapers, television programming, etc.) and large-scale water exports.

ners is the transportation sector, where each member scheduled extensive reservations.¹¹

“Tit for tat” reservations, scheduled in Annexes 1 and 2, enable NAFTA countries to retaliate against another member’s reservations as circumstances warrant. Among the three NAFTA partners, the United States retains the longest list of “tit for tat” reservations. US reservations cover mining, petroleum reserves, pipeline ownership, specialty air services, cable television, newspaper publishing, and ownership of US cultural industries. Canada has reservations against the US maritime sector and ownership of its waterfront land; and Mexico has reservations against US legal services (McMillan 2002).

More significantly, each country maintained investment thresholds or screening mechanisms. Canada’s threshold for direct acquisition in financial services, transportation, uranium, and cultural industries was set at \$5 million; and its threshold for indirect acquisitions was set at \$50 million. The United States does not have investment thresholds, though under the 1988 Exon-Florio legislation the US president may refuse any investment that would endanger national security (McMillan 2002).

Mexico’s investment thresholds were staggered throughout its NAFTA transition period: Controlling investment stakes in financial services were restricted to \$25 million for a three-year period beginning in 1997 and then were to be increased to \$75 million by 2000 and further raised to \$150 million by 2003.¹² However, these investment thresholds were lifted when Mexico enacted its bank bailout legislation in March 1998, which further eliminated restrictions on foreign investment in Mexican commercial banks. This reform enabled Citibank to purchase Banco Confia as a retail subsidiary in 1998 for \$195 million (and to acquire all of Banamex for \$12.5 billion in 2001, now named Grupo Financiero Banamex). As of 2004, more than 80 percent of the Mexican banking industry is foreign-owned.¹³

Chapter 11 is unique (among NAFTA provisions) in allowing private investors to enforce government obligations under NAFTA Articles 1116

11. Under Annex 1, Mexico lists sectoral reservations in the energy, air and rail transport, agriculture, postal services, media ownership, and social services sectors; Canada lists reservations in cultural industries, air transport, social services, and agriculture; the United States lists reservations in maritime and air transport, radio communications, social services, and agriculture. See McMillan (2002).

12. See NAFTA Annex 1, Reservations and Exceptions to Investment at www.sice.oas.org/trade/nafta/naftatce.asp (accessed in November 2002). See Jonathan Friedland, “Mexican Congress Clears Bank Rescue,” *Wall Street Journal*, December 14, 1998, and “Citibank Mexico, Banamex to Merge Bank Operations Monday,” *Dow Jones International News*, November 7, 2001.

13. In the first quarter of 2004, five principal banks—Banamex, Bancomer, Santander Serfin, HSBC, and Scotiabank—were foreign-owned. Monica Campbell, “Mexico: Chase Is on for the Whole Enchilada,” *The Banker*, June 1, 2004.

and 1117.¹⁴ For NAFTA dispute settlement process purposes, the definition of investment is broadened to include minority interests, portfolio investment, and real property.¹⁵ In the event that a state breaches one of NAFTA Chapter 11's substantive obligations, the investor may initiate an ad hoc arbitration tribunal, pursuant to Article 1120. The tribunals operate under the arbitration rules of either the International Center for Settlement of Investment Disputes (ICSID) or the United Nations Commission on International Trade Law (UNCITRAL).¹⁶ Chapter 11 tribunals award monetary relief to the winning party.

By contrast, the WTO does not grant substantive rights to private parties or give them access to the dispute settlement mechanism. The WTO is designed as an interstate agreement. Nonparties to a dispute, such as private firms and nongovernmental organizations (NGOs), are limited at most to submitting amicus curiae briefs in panel hearings.¹⁷

For reasons not anticipated when Chapter 11 was drafted, protection of investor rights has since become the most contentious feature of the NAFTA dispute settlement system. NAFTA's substantive rules on investor rights were carried over from CUSFTA. These include investment liberalization rights for foreign investors (Article 1101), as well as guaran-

14. Mandatory investor-state arbitration, enforceable in US courts through the New York Convention, is present in several bilateral investment treaties (BITs) signed by the United States and many other countries. We thank Gary Horlick for this observation and for providing written comments to an earlier draft.

15. NAFTA Article 1139. In the *S.D. Myers* case, for example, investment in US-based waste disposal operations was compared with investment in similar Canadian waste disposal operations. See Cosbey (2002).

16. NAFTA arbitration rules allow investors to bring claims under the following conditions: the investor has suffered loss or damage due to the breach in NAFTA obligations (Articles 1116 and 1117); the disputing parties have attempted but failed to settle the claim through consultation or negotiation (Articles 1118 and 1120); arbitration was initiated within six months of the events giving rise to the claim (Article 1120); and the investor waives the right to initiate similar proceedings for compensation before domestic courts and other tribunals (Article 1121).

17. WTO Article V, as interpreted by the Appellate Body. Third parties may submit amicus curiae briefs, but neither panels nor the Appellate Body have a legal obligation to accept non-WTO member submissions. Since its ruling in the WTO *EU-Peru sardines* case (October 2002), the policy of the Appellate Body is to consider amicus curiae briefs on a case-by-case basis and accept them if the briefs are pertinent and useful to that particular case. If an amicus brief interferes with the "fair, prompt, and effective resolution of trade disputes," the Appellate Body can reject the consideration of any amicus curiae brief. Prior to the *EU-Peru sardines* case, the Appellate Body had not considered an amicus curiae brief pertinent to any WTO case. Most developing countries opposed the acceptance of amicus curiae briefs by WTO panels, arguing that amicus submissions might give nongovernmental organizations (NGOs) and private parties a greater role in dispute proceedings than some WTO members with limited resources. Correspondence with Amy Porges of Sidley, Austin, Brown & Wood LLP, Washington, DC and Debra P. Steger of Thomas & Partners, Ottawa, Canada, and comments from Patrick Macrory.

tees to protect existing investments established under conditions more favorable than those scheduled in the national reservations of individual NAFTA members (Article 1108).¹⁸ However, the investor provisions that have sparked the most disputes filed under Chapter 11 are national treatment rights (Article 1102), MFN rights (Article 1103), minimum international standards of treatment (Article 1105), performance requirements (Article 1106), and especially provisions for compensation in the event of expropriation (Article 1110).

Articles 1102 and 1103 stipulate that a host country must treat foreign investors and their investments “no less favorably” than domestic investors or investors from any other country “in like circumstances.”¹⁹ Article 1103 is an extended version of the national treatment provisions contained in CUSFTA. This provision ensures that foreign investors based in North America will enjoy the best possible treatment among all foreign investors, even when one of the parties scheduled a NAFTA reservation against national treatment (Vega-Cánovas and Winham 2002). Article 1105 requires that NAFTA members meet minimum standards of “international law, including fair and equitable treatment and full protection and security.” This provision is the functional equivalent of MFN treatment. Article 1106 prohibits governments from imposing certain types of performance requirements on investors.²⁰

Several principles embodied in NAFTA Chapter 11 are also found in the WTO Agreement on Trade-Related Investment Measures (TRIMs) (as well as the Organization for Economic Cooperation and Development’s [OECD]

18. Under Article 1108(4), no party may “require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.” Other rights and obligations covered under Chapter 11 are compensation for acts of war or civil strife (Article 1105(2)), prohibitions on senior management nationality requirements (Article 1107), and an environmental protection provision—members are not allowed to reduce environmental standards as a way of attracting investment (Article 1114). It is worth noting that many Chapter 11 cases have a trade dimension.

19. There is some concern that since “fair and equitable treatment” is not further defined under NAFTA Chapter 11, the phrase could lead to mischief. The fear is that Chapter 11 arbitrators will not follow customary international law but instead will articulate their own standards on a case-by-case basis. As an extreme example, a foreign investor in the United States might lose its case before the US Supreme Court and then appeal to the NAFTA dispute settlement mechanism. In turn, NAFTA arbitrators could hypothetically overturn the US Supreme Court decision. Based on helpful comments from Theodore Moran. See Foy and Deane (2001).

20. As an example, governments cannot demand that firms use domestic inputs. The complete list of prohibitions on performance requirements includes government thresholds on exports of a given portion of production; using a given level of domestic content; making foreign exchange available based on the firm’s levels of imports or exports; showing preference for domestic goods or services; requiring a firm to transfer its technology; or requiring a firm to locate production, provide employment, or offer specific services within its domestic territory.

ill-fated Multilateral Agreement on Investment, or MAI). The WTO accord prohibits (apart from scheduled exceptions) discrimination between foreign and domestic investors (national treatment) and between foreign investors from different countries (MFN treatment). It also limits the imposition of some of the performance requirements on foreign investors covered by NAFTA.²¹ And it requires host states to compensate foreign investors for direct and indirect expropriations (Kurtz 2002).

Neither the CUSFTA nor the WTO TRIMs agreement grants private foreign investors the right to directly invoke and participate in dispute settlement cases (nor was such direct access contemplated in the MAI). But private investors are expressly given direct access to the NAFTA dispute settlement system under Chapter 11, and this has become one of its contentious features.²² As a result, NAFTA member governments publicly narrowed the scope of foreign investment protections under Chapter 11, and the US government adopted more restrictive language in recent free trade agreements (FTAs) with Chile, Singapore, and Central America.²³

The most criticized provision, Article 1110, is controversial because it attempts to balance investor rights against government measures to protect public welfare. Article 1110 of NAFTA states that a host country cannot expropriate from a foreign investor directly or indirectly, unless the expropriation is explicitly done for a public policy purpose, on a nondiscriminatory basis, in accordance with due process of law, and with fair compensation. These restrictions apply to direct or indirect measures “tantamount to nationalization or expropriation.” This language, and its application in individual cases, causes some observers to fear that Chapter 11 arbitration panels will interpret the “tantamount to expropriation” phrase broadly to encompass “regulatory takings.” Host governments would then be required

21. By contrast, the MAI would have required similar treatment of foreign investors in every province of Canada and every state of Mexico and the United States. NAFTA only requires that investors receive the best treatment provided in that province (or state). For complete details, see Appleton (2002).

22. Some practitioners, like Mark Cymrot of Baker & Hostetler LLP, argue that NAFTA governments are only beginning to see the potential implications of Chapter 11 as investment disputes face independent tribunals rather than governments. See Cymrot (2004). Specifically, NAFTA Chapter 11 actions can be brought not only by investors who are NAFTA nationals but also by any company incorporated in any one of the NAFTA countries. As an example, Sony United States, as an investor, could bring a Chapter 11 case against the United States. See Horlick and Marti (1997) and Dumbery (2001).

23. US Senator Max Baucus (D-MT), former chair of the Senate Finance Committee, called for an appellate mechanism in investor-state arbitration under future FTAs, a proposal that has since been adopted in the Central American Free Trade Agreement (CAFTA). The perceived overreaching influence of Chapter 11 led Congress to limit investor-state arbitration clauses in the US Trade Act of 2002. At Australian insistence, the recent Australia-US FTA excludes an investor-state dispute settlement clause. See Baker & Hostetler LLP (2004); also see Adam Liptak, “NAFTA Tribunals Stir US Worries,” *New York Times*, April 18, 2004, A1.

to compensate foreign investors for damages equivalent to the amount of profits lost on account of regulation designed to further domestic social policies (e.g., environment, human health, and safety).²⁴

In August 2000, an ICSID tribunal weighed in on the expropriation debate and made a relatively broad interpretation of expropriation under NAFTA. In the *Metalclad* case, the ICSID tribunal emphasized that expropriation is not limited to “outright seizure” but also includes “covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.” The ICSID tribunal also decided that the motivation for the Ecological Decree, used by the local Mexican government to protect a rare cactus, was “not essential to the Tribunal’s finding of a violation of NAFTA Article 1110.”²⁵

In contrast to the aggressive interpretation in the *Metalclad* case, other NAFTA Chapter 11 tribunal decisions have defined expropriation in more limited terms.²⁶ Moreover, new language in the US-Chile and US-Singapore FTAs limits the scope of investor protection and makes it very difficult for firms to claim that environmental or health measures are indirectly “tantamount to expropriation.”

Chapter 14

Building upon financial-sector provisions established in CUSFTA Chapter 17, NAFTA Chapter 14 develops a general framework for the treatment of

24. A similar concern arises from the effort of conservative US scholars to argue that any regulation that adversely impacts a company’s reasonable profit expectations could be considered an expropriation. The logical result is that, under the US Constitution, the regulating government body would need to indemnify the company for lost profits. Obviously this broad definition of expropriation would constrain regulatory regimes. We thank Theodore Moran for helpful written comments to an earlier draft. See Rose-Ackerman and Rossi (1999), van der Walt (1999), and Veloria (2002). See also “Interagency Group Struggles with Government Role in Investor Suits,” *Inside US Trade*, March 22, 2002.

25. The ICSID tribunal found (in paragraph 111) that “the Tribunal need not decide or consider the motivation or intent of the adoption of the Ecological Decree.” See *ICSID Award, Metalclad v. United Mexican States*, Case Number ARB (AF)/97/1, August 30, 2000. We thank Theodore Moran for providing the example in this paragraph, which draws heavily on written comments he provided to an earlier draft.

26. For different interpretations of expropriation under NAFTA, see the NAFTA tribunal determination in the *S. D. Myers* case and in *Pope & Talbot*. According to Daniel Price (2001), one of the lead US negotiators of NAFTA Chapter 11, negotiators tried to distinguish “between legitimate regulation on the one hand, bona fide and nondiscriminatory, and a taking on the other hand. We quickly gave up that enterprise. If the US Supreme Court could not do it in over 150 years, it was unlikely that we were going to do it in a matter of weeks.”

banking, insurance, and brokerage. Chapter 14 uses a negative list for specific reservations, and these enable each country to maintain distinct prudential and protective regulation of financial sectors.²⁷ Canada scheduled a single reservation, whereas the United States listed 18, and Mexico initially had 26.

Canada's only reservation restricted the purchase of reinsurance by Canadian insurers from nonresident reinsurers. The United States adopted certain restrictions to complement its decentralized financial system. The exclusions focus on national treatment.²⁸ US reservations include citizenship and residence requirements for bank directors, home country reciprocity in order for a foreign institution to gain the status of a primary dealer in government debt, and the exclusion of foreign banks from owning domestic banks under some regional holding company laws.²⁹

Mexico initially insisted on a very restrictive investment regime in financial services, focused primarily on limitations to Articles 1404 (Establishment) and 1407 (National Treatment). Mexico restricted foreign investment in existing financial institutions and ruled out foreign government ownership in an extensive list of financial institutions. Reflecting concerns that foreign financial affiliates would overrun Mexico's domestic financial industry, the Mexican government negotiated a comprehensive set of transitional limits.³⁰ As noted above, many of these restrictions were subsequently lifted as part of the Mexican government's response to the 1995 financial crisis.

NAFTA Chapter 14 allows foreign banks the right to establish themselves in member countries through branch offices. This provision was echoed in the WTO's Financial Services Agreement (1997). One of the key differences is the broader concept of "competitive opportunities" under Chapter 14. Under the WTO Financial Services Agreement, members agree to provide nondiscriminatory national treatment for scheduled financial services. NAFTA Chapter 14 went beyond this by requiring members to

27. See Annex 7 of the NAFTA Agreement, www.sice.oas.org/trade/nafta/naftatce.asp.

28. The United States does not, however, limit the right of establishment. See Rugman and Gestrin (1993).

29. Under NAFTA Chapter 14, the United States preserved restrictions in the Bank Holding Company Act (1956) and the International Banking Act (1978) that prevent foreign banks from enjoying the same treatment as domestic bank holding companies based in the same state in terms of their ability to expand into other states. This directly applies to NAFTA Article 1405 (National Treatment). See Chant (2002). As a practical matter, foreign banks can avoid these restrictions using alternative legal structures.

30. Transitional exceptions put caps on the authorized capital of each institution relative to the total capital of all institutions in the same financial sector. See Chant (2002).

provide “equal competitive opportunities” so that foreign providers will not be disadvantaged relative to domestic suppliers (Article 1405(6)).³¹

Chapter 14 also promotes competitiveness by allowing insurance companies to sell certain products, including reinsurance and cargo insurance, on a cross-border basis (NAFTA Article 1404).³² Similarly, US and Canadian bonding companies can establish Mexican subsidiaries without any market share limitations. Through progressive liberalization, foreign investment in Mexican insurance companies was raised incrementally from 30 percent in 1994 to full ownership by 2000 (Kash 1997). Within the guidelines for financial liberalization in Chapter 14, Mexican restrictions on foreign ownership of banks and securities firms were initially subject to a gradual phaseout on a schedule extending through 2007.³³ This gradual liberalization timetable was scrapped in 1998, following Mexico’s bank bailout legislation.

Principles for the provision of financial services cover regulatory safeguards (Article 1410),³⁴ the freedom of cross-border trade (Article 1404), the right of establishment (Article 1403), and national treatment (Article 1405). In addition, Chapter 14 includes special dispute settlement procedures (Articles 1412 to 1415).³⁵

31. Exceptions are made with respect to national treatment that allow NAFTA members to pursue “reasonable measures for prudential reasons” (Article 1410) including protection of investors, depositors, and financial-market participants to whom a fiduciary duty is owed by a cross-border financial services provider; or maintenance of safety, integrity, or financial responsibility of financial institutions; or ensuring the integrity and stability of a party’s financial system. For complete details, see Canada Department of Foreign Affairs and International Trade, www.dfait-maeci.gc.ca/nafta-alena/chap14-e.asp (accessed in November 2002).

32. Under NAFTA Chapter 14, Mexico also agreed to eliminate restrictions on its residents to purchase the following services from cross-border insurance providers: tourist insurance, cargo insurance for goods on international transit, and insurance for a vehicle in the transportation of cargo.

33. The initial restrictive provision stipulated that the proportion of total bank capital held by foreign banks was allowed to rise gradually to a maximum of 15 percent before the aggregate constraint disappears. Despite commitments to financial services liberalization, each NAFTA member reserved the right to tighten limits on market access and national treatment. See White (1994).

34. To preserve each country’s sovereign monetary authority, regulatory safeguards ensure that each NAFTA party can maintain its autonomous right to monetary and exchange rate policies. As long as nondiscriminatory measures are applied to stabilization policies, each member country can pursue its own approach to regulation. For details see www.sice.oas.org/trade/nafta/chap-141.asp#A1402 (accessed in November 2002).

35. The special dispute settlement procedures are in Article 1412: Financial Services Committee; Article 1413: Consultations; Article 1414: Dispute Settlement; Article 1415: Investment Disputes in Financial Services. See [www.sice.oas.org/trade/nafta/chap-141.asp #A1402](http://www.sice.oas.org/trade/nafta/chap-141.asp#A1402) (accessed in November 2002).

An innovation in NAFTA Chapter 14 (by comparison with CUSFTA) is the mechanism for resolving disputes in the financial sector. In cases of investor-state disputes based on rights enumerated in Chapter 11, Article 1415 allows the defendant country to justify its public measures to the Financial Services Committee, which makes a binding determination. Committee members are drawn from government authorities responsible for financial services.³⁶

Ultimately, financial-sector disputes can be subject to dispute settlement procedures under Chapter 20, where disputes will be referred to a tribunal that has limited authority to uphold or remand the decisions of national authorities. If the tribunal upholds a complaint, the home country of the complaining party may suspend benefits in the financial services sector (Chant 2002). This dispute settlement mechanism is untested: As of April 2005, no financial-sector disputes have been filed under either Chapter 14 or 20.

Chapter 19

Chapter 19 of NAFTA basically extended the provisions of Chapter 19 of the CUSFTA to Mexico. In CUSFTA negotiations, Canada sought to reform trade remedies that it labeled “contingent protection”—namely CVD and AD actions. This initiative was unacceptable to the United States. The compromise—reached in the eleventh hour of negotiations—was a new mechanism to review final determinations in CVD and AD cases, designed to substitute for and expedite the judicial review of administrative actions.

However, such an approach requires some degree of harmonization of AD and CVD administrative procedures. This did not pose a problem in CUSFTA given the similarities in US and Canadian practices. To facilitate Mexico’s integration under the Chapter 19 dispute settlement process, negotiators adopted a two-pronged approach. One prong extended CUSFTA provisions within the NAFTA agreement itself; the other prong involved changes in Mexico’s domestic trade remedy laws. The binational panel process has operated relatively well despite initial reservations over differences between Mexico’s civil law system and the common-law US and Canadian legal systems.

The Chapter 19 panel process depends on the application of the domestic law of the party whose agency’s determination is being challenged. In the context of NAFTA, Mexico adopted domestic trade remedy laws similar to those of the United States and Canada.³⁷ For example, as required

36. In addition to its dispute settlement function, the committee meets annually to review the financial services agreement. See Potter (1999).

37. Mexico knew that these changes would be required as well by the GATT in the Uruguay Round of multilateral trade negotiations.

under Article 1904(15), Mexico changed its domestic law that previously allowed CVD and AD duties to be levied within five days after receiving a petition. To facilitate Mexico's enforcement of trade laws, in 1993 the Government of Mexico enacted the Foreign Trade Act (Ley de Comercio Exterior, or LCE).³⁸ Mexico later amended the LCE to include provisions for judicial review and clarified the criteria for assessing AD and CVD.

To ensure that each NAFTA member fairly applies its own national trade remedy laws, Chapter 19 allows parties to challenge final administrative determinations before binational panels in lieu of appealing through national courts. Moreover, Chapter 19 retained the Extraordinary Challenge Committee (ECC) procedure established in the CUSFTA. This is a safeguard procedure to protect the integrity of the panel process. If a country alleges that a panel is biased or exceeded its authority, it can challenge the panel's decision before a three-person ECC.³⁹ This procedure was invoked three times under CUSFTA and three times under NAFTA (always by the United States).⁴⁰

38. The LCE facilitates cooperation between antidumping authorities and the competition policy agency, the Federal Competition Commission (Comisión Federal de Competencia, or CFC).

39. Under Article 1904(13), the ECC process may be invoked if a party finds the NAFTA Chapter 19 tribunal decision was influenced by acts that threatened "the integrity of the binational panel review process." These actions include a panelist who is "guilty of gross misconduct, bias or a serious conflict of interest, or otherwise materially violated the rules of conduct." Other reasons for an ECC action include a panel "seriously [departing] from a fundamental rule of procedure; or if a panel "manifestly [exceeds] its powers, authority or jurisdiction set out in this Article" by "failing to apply the appropriate standard of review." The complete rules governing Chapter 19 are available at www.sice.oas.org/trade/nafta/naftatce.asp (accessed in November 2002).

40. The ECC process has been invoked only three times out of 101 NAFTA Chapter 19 cases. The United States initiated each ECC process and lost all three ECC decisions. The first ECC process was invoked by the United States in March 2000, after the Chapter 19 tribunal remanded the US Commerce Department's determination to impose final dumping margins on Gray Portland Cement and Clinker from Mexico (USA-97-1904-02). In October 2003, the ECC unanimously denied the US petition and affirmed the decision of the Chapter 19 panel. The second ECC process was invoked by the United States in September 2003, after the Chapter 19 tribunal remanded the US Commerce Department's decision to impose final dumping margins on pure magnesium from Canada (USA-CDA-2000-1904-06). This case was also resolved against the United States. The third ECC process was initiated by the United States in November 2004, after the Chapter 19 tribunal remanded the US Commerce Department's determination to impose 27 percent combined CVD and AD duties on Canadian softwood lumber with a specific instruction to enter a negative determination on injury and withdraw the countervailing duty order. The ECC rejected the US appeal in August 2005. See "US to Pursue Extraordinary Challenge of NAFTA Lumber Ruling," *Inside US Trade*, October 15, 2004; "Canadians See US Foot-Dragging on Formation of Lumber Panel," *Inside US Trade*, January 7, 2005; and "Canada Urges End of Lumber War After NAFTA ECC Rules Against United States," *Inside US Trade*, August 12, 2005. For details of the cases, see NAFTA Secretariat at www.nafta-sec-alena.org (accessed in August 2004).

Like CUSFTA before it, NAFTA does not have a body of substantive and procedural rules for handling AD and CVD cases.⁴¹ Under NAFTA, each member applies its own national trade remedy laws, with no requirement to conform to a common template. NAFTA Chapter 19 is limited to establishing binational panels of five experts to review whether CVD and AD cases have been decided in a reasonable manner consistent with national law.

From the standpoint of US exporters to Mexico, Chapter 19 ensured that Mexico observed due process guarantees. From the standpoint of Canada and Mexico, Chapter 19 was meant to ensure that US administrative decisions are closely scrutinized.⁴² In most cases, panel decisions have lowered US CVD and AD duties against Canadian and Mexican exports.⁴³ It is also worth noting that Canada and Mexico are subject to a lower intensity of US AD and CVD investigations than other countries, proportionate to trade volume. According to Patrick Macrory, since NAFTA was enacted, seven times as many AD and CVD orders have been filed against EU exports as Canadian exports, even though the total value of US imports from the European Union was not much higher than imports from Canada (Macrory 2002).⁴⁴

As of June 2005, 103 panel reviews have been initiated under NAFTA Chapter 19.⁴⁵ But it is important to note that intra-NAFTA cases are increasingly appealed to the WTO rather than Chapter 19 panels. As of August 2004, the NAFTA partners have litigated 27 intra-NAFTA disputes

41. By contrast, WTO codes go to great lengths to define impermissible subsidies and dumping and to lay out the procedural rights and obligations of WTO members in trade remedy cases.

42. However, some international trade law experts argue that in Chapter 19 proceedings, the US government wrongly insists on “excessive deference” to the US Department of Commerce (DOC) and USITC rulings and that this deference perverts the appropriate standard of review. See Feldman (2004).

43. Besides softwood lumber, some 8 Canadian product lines are subject to AD or CVD orders. Based on USITC AD and CVD orders in place as of June 7, 2005, available at www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/antidump_countervailing/index.htm (accessed in July 2005). See appendix 4A.5 of this chapter for a compilation and summary of Chapter 19 cases. Also, Macrory (2002) counts product categories differently than in table 4.9.

44. The disparity in filings partly reflects a “mutual nonaggression” pact between the US and Canadian steel industries: Neither files AD or CVD complaints against the other. Since 2001, US imports from the European Union have surpassed those from Canada. In 2004, US imports from the European Union totaled \$283 billion and US exports to the European Union reached \$173 billion; by comparison, US imports from Canada were \$256 billion, and US exports to Canada were \$190 billion. Data are from US Census Bureau, Foreign Trade Statistics 2005.

45. Figures are based on research and press releases from the US DOC, US Trade Representative, and Canada Department of Foreign Affairs and International Trade.

under the WTO Dispute Settlement Mechanism.⁴⁶ An important reason is that the WTO has enunciated common standards and procedures for AD, CVD, and safeguard remedies, whereas NAFTA requires that national agencies faithfully apply their own standards and procedures.

However, WTO rulings do not invariably favor the country objecting to trade remedies. In June 2002, the WTO upheld the US law that establishes a time frame for implementing WTO rulings in AD and CVD cases.⁴⁷ In August 2004, the WTO Appellate Body sidestepped the issue of whether US AD calculations were inconsistent with the WTO Antidumping Agreement (see appendix table 4A.1 for a chronology of WTO decisions on lumber).⁴⁸ By contrast, in May 2004, the NAFTA Chapter 19 tribunal ruled that the US International Trade Commission (USITC) determination of injury in the same AD case against Canadian softwood lumber was inconsistent with US law. Then, in August 2004, the NAFTA Chapter 19 panel unanimously overturned the USITC finding of threat of injury in the softwood lumber case. Instead of reversing the case—the customary procedure under Chapter 19—the panel ordered the USITC to reverse itself in 10 days (see appendix table 4A.2 for a chronology of NAFTA decisions on lumber).⁴⁹ In this instance, the NAFTA arbitration panel rulings against the United States were stronger than anything issued by the WTO.

To provide a context for different determinations in the WTO and NAFTA, we compare the two dispute settlement mechanisms following our discussion of NAFTA Chapter 20.

Chapter 20

NAFTA Chapter 20 establishes the overall institutional framework for implementing NAFTA. While NAFTA Chapters 11, 14, and 19 are narrowly defined, Chapter 20 emphasizes the resolution of disputes through a variety of means: interstate consultations (including within the Free Trade

46. See the WTO Web site for a complete description of the 27 WTO cases, www.wto.org/english/tratop_e/dispu_e/distabase_wto_members3_e.htm (accessed in August 2004).

47. See Ricardo Reyes, "WTO Panel Rejects Canadian Challenge to US law," US Trade Representative press release, June 12, 2002, www.ustr.gov/Document_Library/Press_Releases/2002/June/section_index.html (accessed in August 2004).

48. See "WTO Appellate Body Rules Against Zeroing in Softwood Lumber Decision," *Inside US Trade*, August 13, 2004.

49. The Chapter 19 panel already remanded the case three times, but the USITC refused to comply. In the end, the NAFTA panel felt compelled to overturn the USITC decision. We thank Patrick Macrory for this observation and for providing written comments to an earlier draft. See "NAFTA Lumber Panel Orders ITC to Find No Injury Threat in 10 Days," *Inside US Trade*, September 3, 2004.

Commission), referral to a panel of independent experts, or resolution of the dispute through national courts by the complainant.

Substantive law issues addressed in Chapter 20 include the interpretation of the NAFTA itself; domestic measures of a party that may be inconsistent with the agreement; and national measures that might cause “nullification or impairment” of benefits arising under the Agreement (Article 2012). In July 2001, the NAFTA Free Trade Commission engaged in an important piece of legal interpretation: It narrowed the potential scope of Article 1105 by using new language to describe the minimum standard of treatment for foreign investors.⁵⁰

Chapter 20 is similar in spirit to WTO consultation procedures, articulated in GATT Articles 22 and 23. Under NAFTA Chapter 20, the Free Trade Commission (a trilateral body of cabinet-level officers) conducts political consultations on matters arising from the implementation or interpretation of NAFTA obligations or resulting from changes in domestic or multilateral trade rules that affect NAFTA’s operation. By virtue of these powers, the Free Trade Commission is responsible for overall political supervision of the NAFTA agreement.

Unlike CUSFTA Chapter 18, which required in Article 1806 recourse to “binding arbitration” to settle disputes over safeguard measures (as well as other matters, if mutually agreed), NAFTA removes the binding flavor of Chapter 20 panel arbitration. Instead, NAFTA members opted for closer consultations in the event an emergency measure, or safeguard action, is imposed.⁵¹ While the NAFTA text provides the winning party an automatic right to retaliate in the absence of compliance,⁵² the Free Trade Commission itself does not play an active role in submitting binding recommendations to member governments either on a public or confidential basis. Ad hoc consultation and standing committees at the ministerial level of the Free Trade Commission also sponsor technical studies and provide forums for general issues.

As of June 2005, Chapter 20 panel consultations reportedly have occurred only 10 times, compared with 103 panel reviews initiated under Chapter 19. Unlike other NAFTA dispute settlement procedures, Chapter 20 lacks any comprehensive, official record of formal consultation re-

50. For more information, see Canada International Trade Minister Pettigrew press release, webapps.dfait-maeci.gc.ca/minpub/Publication.asp?FileSpec=/Min_Pub_Docs/104441.htm (accessed August 2004).

51. According to Gilbert Winham (1993), the removal of binding arbitration in NAFTA Article 804 is consistent with the NAFTA philosophy of resolving disputes at the ground level before they become difficult.

52. Under Article 2019, if both parties cannot reach a “mutually satisfactory resolution” within “30 days of receiving the final [NAFTA Commission] report,” the “complaining Party may suspend benefits of equivalent effect until . . . they have reached agreement on the resolution of the dispute.” For complete details, see NAFTA Secretariat, www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=176#A2018 (accessed March 2005).

quests compiled by the NAFTA Secretariat or individual governments. Some Chapter 20 cases have involved highly politicized disputes over trucking, sugar, and tomatoes. In these instances, consultations have had mixed results in promoting compliance with NAFTA obligations but have prevented episodes of “tit-for-tat” retaliation that could have undercut NAFTA reforms.

NAFTA and WTO Dispute Settlement Mechanisms Compared

Canada, Mexico, and the United States are members of the WTO as well as NAFTA. One consequence is overlapping jurisdiction between the NAFTA and the WTO dispute settlement mechanisms.⁵³ While the two systems have similarities, they also have key differences.

Decentralized System

Perhaps the biggest difference is that the WTO’s Dispute Settlement Understanding (DSU) creates a single, integrated dispute resolution system for almost all Uruguay Round texts. This avoids potential procedural controversies when a dispute overlaps the boundaries between trade in goods, services, and intellectual property. By contrast, NAFTA contains several adjudication systems and standards of review. Chapter 11 panels are instructed to evaluate claims against the minimum norms set forth in the NAFTA text.⁵⁴ Chapter 19 panels are instructed to apply the domestic law of the importing NAFTA party to review administrative determinations in trade remedy cases. NAFTA’s Chapter 20 establishes a political interstate dispute resolution mechanism, drawing on both NAFTA and international law.

53. At least two cases filed under Chapter 20 raised potential conflicts between NAFTA and WTO obligations: the *Canadian Agricultural Tariffs* case (CDA-95-2008-01) and the *Broom Corn Brooms* case (USA-97-2008-01). The *Agricultural Tariffs* case is particularly interesting. Before NAFTA, Canada used quotas to limit agricultural imports, and these were not disturbed by NAFTA. However, the WTO Uruguay Round accord required Canada to convert its agricultural quotas into new and higher tariffs. When this was done, the United States filed a complaint that Canada had breached its NAFTA obligation not to raise tariffs. In December 1996, the NAFTA Chapter 20 tribunal unanimously determined that Canadian agricultural tariffs conformed to NAFTA provisions. In the *Broom Corn Brooms* case Mexico alleged the United States failed to apply the appropriate injury test under the GATT Article XIX safeguards provision. The NAFTA Commission accepted this argument, and the United States withdrew its safeguard measures. See Abbott (1999) and Vega-Cánovas and Winham (2002).

54. NAFTA Chapter 11 on investment disputes is open to three arbitration procedures: ICSID, ICSID’s “Additional Facility,” and UNCITRAL.

Beyond the decentralized nature of the NAFTA system, other features distinguish dispute settlement under NAFTA from that under the WTO.⁵⁵

Judges and Panelists

The WTO DSU is unique among commercial agreements in creating a permanent appellate body that reviews panel decisions. Panels of first instance normally consist of three persons. The WTO Secretariat maintains a roster of approximately 200 potential panelists; the DSU has detailed procedures for panel selection to avoid delays in constituting panels (which often occurs in the NAFTA context).⁵⁶ The WTO process also ensures third-party adjudication: It does not allow panelists to be citizens of either party to the dispute.

Through August 2004, WTO panels had issued 146 reports, which in turn generated 63 Appellate Body decisions.⁵⁷ In cases of WTO appellate review, a three-person panel is drawn from the standing seven-person Appellate Body.⁵⁸ The procedures for selection are confidential so that no government can predict which Appellate Body members will sit on its appeal. The seven Appellate Body judges are appointed to four-year terms, renewable once; the WTO Dispute Settlement Body (DSB) selects them through a consensus process.

By contrast, NAFTA maintains smaller rosters of panelists, ranging from 30 to 75 members depending on the chapter.⁵⁹ Under Chapter 11, the

55. NAFTA parties have the option of simultaneously pursuing disputes under NAFTA Chapter 19 and the WTO. However, if a dispute has already been initiated under either NAFTA Chapter 20 or the WTO, the NAFTA party can choose only one forum and cannot pursue cases in both multilateral dispute settlement processes (see Article 2007). There are also conditions when the NAFTA defendant country may request to pursue disputes only under NAFTA (see Article 2005). Specifically, the option to limit disputes to the NAFTA dispute settlement forum is allowed only for cases pertaining to environmental and conservation agreements, sanitary and phytosanitary measures, or standards-related measures.

56. Delays in constituting NAFTA panels have been damaging. By contrast, a relatively minor mechanical step under the WTO makes a huge difference. Under the WTO, any party to the dispute can ask the director-general to appoint panelists within 20 days. We thank Gary Horlick for this observation and for providing written comments to an earlier draft.

57. All WTO panel and Appellate Body reports are described at www.wto.org/english/tratop_e/dispu_e/stats_e.htm (accessed in October 2004).

58. However, all seven Appellate Body panelists consult on each case to ensure consistency of rulings. See Bacchus (2003) and Jackson (2000).

59. Immediately before the enactment of NAFTA, negotiators anticipated an increase in trade remedy disputes and expanded the roster of candidates to serve as panel members. See "US NAFTA Secretariat Expands Roster of Eligible Panelists," *Inside US Trade*, November 25, 1994. NAFTA Chapter 11 maintains a roster of 45 panelists appointed from the ICSID Panel of Arbitrators, Chapter 19 maintains a roster of 75 individuals, and Chapter 20 a roster of up to 30 members appointed by consensus for three-year terms, with possibility for renewal.

disputing parties appoint an ad hoc three-member tribunal selected from legal experts on the ICSID roster. Each NAFTA party to the dispute appoints a panelist, and the presiding arbitrator is appointed either by consensus between the disputants or by the ICSID secretary-general.⁶⁰ Despite initial fears that NAFTA tribunal decisions would be determined along national lines, studies suggest this has not been the trend (Howse 1998, Macrory 2002).

Under Chapter 14, financial disputes would ultimately be resolved by a panel comprising at least two arbitrators selected by each government from an agreed roster of 15 financial services experts, plus a chair selected by the two arbitrators. The Chapter 14 panel procedure has not yet been invoked.

Under Chapter 19, each litigant chooses two of the five panelists, and the panelists themselves choose the fifth. Panelists are drawn from a roster of 75 individuals, mainly international trade lawyers.⁶¹ If there is an extraordinary challenge, three judges or former judges are selected as panelists.

Echoing criticisms of CUSFTA, there are, however, concerns about the standard of review⁶² and the panel selection process under Chapter 19. US Senators Larry Craig (R-ID), Saxby Chambliss (R-GA), Lindsey Graham (R-SC), and Jeff Sessions (R-AL) have questioned the integrity of the NAFTA dispute settlement process. Specifically, they contend that the Canadian government's refusal, in the softwood lumber case, to remove a panelist with an alleged conflict of interest violates the dispute resolution rules. Similar arguments are voiced from representatives of Canadian interests. Elliot J. Feldman of Baker & Hostetler LLP argues that US panelists are chosen based on politics rather than impartiality and that the US government uses conflict-of-interest allegations to delay the panel selection process.⁶³ We suggest procedural reforms to address these concerns in the last section of this chapter.

60. If NAFTA disputing parties fail to agree upon the presiding arbitrator, the secretary-general will select the arbitrator from among a roster of 45 individuals agreed upon by NAFTA governments.

61. Chapter 19 urges NAFTA members (at US insistence) to include individuals who are "sitting or retired judges" on their roster. To date, however, there seems to have been only one Canadian judge on a binational Chapter 19 panel, while no American judge or former judge has served on a panel (NAFTA Annex 1901.2).

62. As an example, in both panel decisions over softwood lumber—the original CUSFTA and the subsequent ECC process—there were clear differences about whether panelists based their previous decisions on US legal principles. US members argued that Canadian panelists systemically misapplied the US standard of appellate review used to evaluate administrative law decisions. See Macrory (2002), Howse (1998), and Baker & Hostetler LLP (2004).

63. Feldman argues that the US government preemptively removed US panelists in the middle of the *Magnesium from Canada* case that seemed to be hostile to the US position. The US senators refer to the *Softwood Lumber* case as an example of how conflict of interest by one of the Canadian panelists breaches the NAFTA dispute resolution system. See Larry Craig, Saxby Chambliss, Lindsey Graham, and Jeff Sessions, letter to John Ashcroft, May 12, 2004. See Baker & Hostetler LLP (2004) and Feldman (2004).

Under Chapter 20, five panelists hear cases that reach the arbitration stage. A chairperson is first selected from a neutral country and then two panelists are selected from citizens of each disputing party.⁶⁴ Parties agree to choose a chair within 15 days of the date a panel request is delivered. If disputing parties cannot agree on a chair, they must draw lots and choose a nonnational panelist.

As of August 2004, three arbitration panels have been convened; 8 of the 15 panelists have been law professors.⁶⁵ By comparison with the WTO dispute settlement mechanism, NAFTA Chapter 20 remains primarily a forum for political consultation. Unlike the WTO DSU, however, arbitral panels under NAFTA Chapter 20 can provide only nonbinding recommendations; moreover, there is no appellate review of Chapter 20 panels.⁶⁶ Chapter 20 panels are limited to reviewing findings of fact to determine whether a member country's policy is consistent with its obligations under NAFTA.

Timelines

Article 12 of the WTO DSU requires panel reports to be issued within six to nine months after the case is brought, but it also allows the losing party to have a "reasonable period of time" (Article 21) to implement rulings. Under Article 21, the losing party can propose a period of time to comply with the panel determination, and the normal 15-month timeline "may be shorter or longer, depending upon the peculiar circumstances" (DSU Article 21.3).

By contrast, NAFTA has both tighter and looser timelines for arbitration. Chapter 11 has strict time limits on what disputing parties must do to initiate and/or respond to proceedings, but it does not set time limits on actual arbitration (Wilkie 2002). As a consequence, some cases have taken four years or more.⁶⁷

64. A "reverse selection" panel process is designed to ensure impartiality. First, the chair of the panel is selected from a neutral third country, then each disputing party selects two additional panelists who are citizens of the other party (Article 2011).

65. See Gantz (1999). The citation of three panels refers to officially initiated dispute settlement panels under Chapter 20. See appendix 4A.3 for the list of known Chapter 20 cases and government consultations.

66. According to Gantz (1999), the NAFTA Free Trade Commission and Secretariat appear similar to the WTO Dispute Settlement Body (DSB) on paper, but in reality, the DSB and Secretariat are more impartial since members of the NAFTA Free Trade Commission also are officials of governments involved in NAFTA Chapter 20 disputes.

67. *Marvin Feldman vs. United States* (February 1998); *Loewen Group Inc. vs. Canada* (July 1998); *Sun Belt Water Inc. vs. United States* (November 1998); *Methanex Corporation vs. United States* (June 1999); *UPS of America Inc. vs. Canada* (May 2000); *ADF Group Inc. vs. Canada* (July 2000); *USA Waste vs. Mexico* (September 2000); and *Adams et al. vs. Mexico* (November 2000). For a description of the cases, see www.naftaclaims.com (accessed in March 2005). The cited dates indicate when cases were filed.

Chapter 19 panels have 315 days to submit their final determinations. After authorities in the importing country review the ruling, the exporting country has 30 days to submit its request for relief to the NAFTA importing country. If followed, this schedule would be shorter than resorting to judicial review through national courts. Through October 2002, the NAFTA dispute settlement tribunals on average decided cases within 18 months. While no case has been resolved within the 315-day schedule, the Chapter 19 binational system generally resolves disputes more quickly than either Canada's Court of International Trade or the US Federal Circuit.

Yet there is some concern that, without a permanent roster of panelists, the NAFTA dispute settlement process might be subject to delay. According to Eric J. Pan (1999), during 1994–99, the Chapter 19 dispute settlement mechanism took an average 502 days, and the Canadian Court of International Trade and US Federal Circuit took a combined average 1,210 days to resolve disputes. David A. Gantz (1999) also notes that inattention to Chapter 19 proceedings by NAFTA governments has led to endemic delay.⁶⁸ For example, in 1999, 6 of 11 active Chapter 19 cases were suspended during the proceedings, sometimes for more than six months.⁶⁹

Elliot Feldman (2004) contends that, in the past few years, deliberate delay by the US government has made Chapter 19 proceedings slower on average than the Canadian Court of International Trade. Feldman notes that missed deadlines are often the norm and there are no effective penalties to curb delay. As a result, some Canadian producers are turning to the Canadian Federal Court of Appeal and the US Court of International Trade to adjudicate disputes, because they see Chapter 19 as too costly and lengthy.⁷⁰

The Chapter 20 dispute settlement mechanism emphasizes consultations, good offices, conciliation, and mediation over arbitration. Most Chapter 20 disputes have been resolved during the prepanel stage. Compared with other dispute settlement chapters, the flexible nature of Chapter 20 is a liability because delays in the panel selection process only drag out politically sensitive issues—such as the Mexico-US trucking dispute and disagreements over Mexican sugar exports.⁷¹

68. For a complete list of cases and their timelines, please refer to appendix tables 4A.3, 4A.4, and 4A.5.

69. Most of the suspensions occurred because panelists resigned over alleged conflict of interest. We thank Patrick Macrory for this observation and for providing written comments to an earlier draft.

70. In May 2004, for example, the Heinz Company of Canada won a dispute in the Federal Court of Appeal against the Gerber Products Company (US). See Potter (2004) and Stobo (2004).

71. Panels are the last recourse under Chapter 20, and long delays in the panel selection process are normal. See Mena (2001).

Transparency

A key criticism of dispute resolution under both the NAFTA and the WTO is that settlement proceedings are closed to the public. Panel sessions and initial reports are kept confidential. Interested third parties are allowed only limited participation, fostering the confidential nature of the dispute settlement process.

Some NAFTA critics complain that secret notices of intent and confidential proceedings enable private interests to lobby governments with little public scrutiny (Mann 2001). As an example, during 1994–2004, the record indicates that notice of intent and arbitration proceedings were kept confidential in about 25 percent of cases filed under Chapter 11.⁷² These may include some of the most controversial cases.

In an effort to make the Chapter 11 dispute settlement process more transparent, the NAFTA Free Trade Commission agreed in 2001 to limit the circumstances when documents could remain confidential and to encourage the publication of all other documents.⁷³ In July 2002, the US Congress directed US trade negotiators to pursue similar guidelines in all new US trade agreements.⁷⁴ In August 2004, NAFTA trade ministers supported open hearings under Chapters 11 and 20 dispute settlement mechanisms but not under Chapter 19 (WorldTrade Executive, Inc. 2004).

Finality and Enforceability of Decisions

Neither the WTO nor the NAFTA dispute settlement systems have independent authority over national legislatures or domestic courts. In the last analysis, it is up to national administrative, legislative, and judicial bodies to implement WTO and NAFTA decisions. For example, the WTO Appellate Body has the final say on the rights and obligations of members under various WTO agreements. It can authorize the winning member to

72. Descriptions of disputes submitted under Chapter 11, including proceedings that were confidential, are compiled by Todd Weiler at www.naftaclaims.com (accessed in March 2005).

73. The NAFTA Free Trade Commission stated that documents withheld from the public could include confidential business information and information that is protected from disclosure under a party's domestic law. See NAFTA Free Trade Commission, "Notes of Interpretation of Certain Chapter 11 Provisions," July 2001. All NAFTA Free Trade Commission interpretive notes are described at www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-e.asp (accessed in March 2005).

74. Section 2102 (b)(3)(H) of the Bipartisan Trade Promotion Authority Act of 2002 directs US negotiators to ensure "the fullest measure of transparency in the dispute settlement mechanism." Subsequently, the NAFTA tribunal in the *Methanex* case determined that future substantive hearings will be open to the public. For details, see the International Institute for Sustainable Development at www.iisd.org (accessed in March 2005).

take countermeasures against the losing member. But it cannot instruct national judges sitting in the courts of the losing member to enforce WTO decisions.

Notable differences exist between the WTO and NAFTA institutional mechanisms for encouraging member countries to accept dispute settlement decisions. WTO adoption of Appellate Body decisions is virtually automatic, since a “reverse consensus” of member countries is required to overturn a decision of the Appellate Body.⁷⁵ If disputing parties cannot agree upon mutually acceptable compensation within 20 days, the complaining party can retaliate by requesting that the DSB authorize the suspension of WTO obligations in an amount equivalent to the value of its impaired WTO trade rights (DSU Article 22). WTO dispute settlement procedures seldom lead to compensation settlements, so retaliation is the final recourse when countries that violate their WTO obligations do not comply with panel rulings (Anderson 2002).⁷⁶ While WTO decisions are ultimately backed up by compensation or retaliation, according to the DSU text, “neither compensation nor suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements” (DSU Article 22). By comparison with the streamlined WTO system for encouraging compliance, the NAFTA works along several tracks.

Chapter 11

Under Chapter 11, arbitral awards are final. NAFTA Article 1136 requires each government to establish rules for enforcement of final awards.⁷⁷ The award can be enforced through either government-to-government arbitration under Article 2008, the ICSID Convention, or ultimately by domestic courts. As of August 2004, 6 out of 31 cases filed under NAFTA Chapter 11 have led to tribunal awards.⁷⁸ NAFTA governments have generally implemented these awards without resort to further proceedings. The only Chapter 11 arbitral award subject to a judicial review, the *Metalclad* case, was affirmed in favor of the investor. In *Metalclad*, the British

75. A “reverse consensus” under the WTO Agreement means that no WTO member, including the winning party, would accept the Appellate Body decision. So far this has not happened.

76. The WTO authorized retaliatory measures in eight cases during 1996–2004. See www.wto.org/english/tratop_e/dispu_e/distabase_e.htm (accessed in August 2004).

77. Article 1136(4) states that each disputing party should “provide for the enforcement of an award in its territory.”

78. So far, US investors are most successful at winning tribunal awards. The NAFTA tribunal ordered the Canadian and Mexican governments to pay about \$17 million each to US investors. The US government had to pay only for the cost of arbitration proceedings in the *USA Waste* case.

Columbia court denied an attempt by the government of Mexico to set aside the award.⁷⁹

Chapter 14

NAFTA Chapter 14 provides a mechanism for settling financial disputes, via a Chapter 20 arbitration, but tribunal decisions are not binding on administrative agencies or national courts. The winning complainant's final recourse is retaliatory action (Articles 1414 and 1415).

Chapter 19

Chapter 19 is unique in providing the only mechanism for resolving AD and CVD trade disputes with binational panels (Baker & Hostetler LLP 2004). Chapter 19 panel decisions either uphold or remand (in whole or part) a final administrative agency determination in AD or CVD investigations. In the event of a remand, the original administering agency is supposed to reconsider its decision in light of the panel's determination.⁸⁰ As a consequence, compliance ultimately rests with national administrative agencies.⁸¹ The dependence on national administrative agencies gives Chapter 19 flexibility but also raises questions about the finality of panel decisions. As an example, in the *Live Swine* case, carried over from CUSFTA, the US Department of Commerce (DOC) in May 1995 essentially ignored the Chapter 19 panel ruling that Quebec's Farm Income Stabilization Insurance (FISI) program did not create a countervailable subsidy.⁸² The DOC reopened the *Live Swine* case several times, imposing

79. In the Chapter 11 arbitration proceeding of *Metalclad vs. United Mexican States*, the tribunal gave an award to Metalclad, but the amount of damages to be paid was reduced from the \$90 million claim to an award of \$16.7 million. For details, see the NAFTA Secretariat at www.nafta-sec-alena.org/DefaultSite/index_e.aspx (accessed in March 2005).

80. However, given that each Chapter 19 panel review is *sui generis*, each panel decision is unique and cannot be used as a precedent for future Chapter 19 cases. See Baker & Hostetler LLP (2004).

81. While international trade experts may argue that the Chapter 19 process gives substantial deference to the US DOC and USITC, some US Senate members and industry lobbyists disagree. In May 1995, 40 US industry associations protested the "judicial activism" of NAFTA Chapter 19 panels. Industry lobbyists argued the NAFTA panels had moved beyond their original mandate of deciding cases based on the applicable national law. US Senate leaders raised similar concerns in August 1995. See "Canada Presses for Substantive Results of NAFTA AD/CVD Group," *Inside US Trade*, June 16, 1995; "Dole, Finance Committee Members Warn Against NAFTA Panel System," *Inside US Trade*, August 1995; and "Coalition Letter on NAFTA Dispute Settlement," *Inside US Trade*, May 1995.

82. The US DOC found that two agricultural programs benefiting swine producers were specific subsidies because the actual number of recipients of benefits was small compared with potential beneficiaries. However, the Chapter 19 panel determined the DOC did not provide substantial evidence that swine producers received disproportionately large bene-

new CVDs, most recently in May 2004, despite rulings by the Chapter 19 panel.⁸³ The prolonged softwood lumber case may lead to a US court decision determining whether or not the US DOC must observe specific instructions in a Chapter 19 panel report.

Chapter 20

The trilateral nature of NAFTA implies that at least two of the three NAFTA member countries will be parties to each Chapter 20 dispute. Peer pressure to resolve a Chapter 20 dispute therefore comes from a small but intensely interested set of countries. By contrast, in the WTO system, peer pressure can come from a great many countries, even though only a few may be intensely interested in the dispute.

Often overlooked, Chapter 20 is potentially useful for enforcing NAFTA obligations. Under Article 2004, NAFTA parties can hold each other accountable to their implementation of the agreement.⁸⁴ Specifically, any NAFTA member country can initiate consultations under Article 2006.⁸⁵ If bilateral or trilateral consultations fail, the NAFTA party has recourse to mediation under Article 2007.⁸⁶ The final recourse is arbitration under Article 2008.⁸⁷

fits under FISI. See Macrory (2002) and Feldman (2004). Also see *Live Swine from Canada*, USA-94-1904-01 and *Live Swine from Canada*, USA-91-1904-04, www.nafta-sec-alena.org/DefaultSite/index_e.aspx (accessed in March 2005).

83. See Baker & Hostetler LLP (2004), Potter (2004), and Office of the Federal Register (2004).

84. Article 2004 allows for the resolution of Chapter 20 disputes between NAFTA parties “regarding the interpretation or application of this Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Annex 2004.” Annex 2004 clarifies that a NAFTA member country can initiate a dispute if “any benefit . . . is being nullified or impaired” under the agreement in any of the following areas: trade in goods (except automotive and energy sectors), technical barriers to trade, cross-border services trade, and intellectual property. See NAFTA Chapter 20: Institutional Arrangements and Dispute Settlement Procedures, www.sice.oas.org/trade/nafta/chap-202.asp (accessed in March 2005).

85. Under Article 2006.1, “any Party may request in writing consultations with any other Party regarding any actual or proposed measure or any other matter that it considers might affect the operation of this Agreement.” See NAFTA Chapter 20: Institutional Arrangements and Dispute Settlement Procedures, www.sice.oas.org/trade/nafta/chap-202.asp (accessed in March 2005).

86. A mediation includes a meeting before the NAFTA Free Trade Commission, which comprises cabinet-level representatives.

87. Under Article 2008.1, “any consulting Party may request in writing the establishment of an arbitral panel.” See NAFTA Chapter 20: Institutional Arrangements and Dispute Settlement Procedures, www.sice.oas.org/trade/nafta/chap-202.asp (accessed in March 2005).

Table 4.1 Investor-state disputes under Chapter 11, 1994–2004

Claimant	Respondent		
	Canada	Mexico	United States
Canada	0	1	13
Mexico	1	0	0
United States	9	15	0
Total	10	16	13

Sources: US State Department, Office of the Legal Adviser, 2004, www.state.gov/s/l/c3439.htm; Canada Department of Foreign Affairs and International Trade, 2004; and Todd Weiler, www.naftalaw.org, 2004.

Noncompliance with a Chapter 20 ruling under NAFTA can theoretically lead to penalties. Under Article 2019 of NAFTA (like Article 22.2 of the WTO DSU), in the event of noncompliance, the winning complaining party can retaliate by suspending tariff concessions or other obligations covered by the trade agreement. As in the WTO, the ultimate penalty in NAFTA is retaliation. And like the WTO, difficult cases take a long time to resolve. Thus, both the sugar and trucking disputes between the United States and Mexico have been characterized by layered retaliatory threats and countermeasures between the parties.

Outcome of Dispute Settlement Cases

Chapter 11 Cases

Through January 2005, 39 investor-state disputes were initiated under Chapter 11.⁸⁸ The cases are summarized in appendix table 4A.4. Sixteen cases have been initiated against Mexico, 10 against Canada, and 13 against the United States (table 4.1).⁸⁹ US investors account for two-thirds of the cases initiated; only two cases have been initiated between Mexico and Canada. The number of cases filed has steadily increased over time.⁹⁰ US-Mexico cases are substantially more frequent, per billion dollars of US FDI in Mexico, than US-Canada cases (see table 4.2, which compares the number of disputes with the corresponding bilateral FDI).

88. For a complete description of cases, see Canada Department of Foreign Affairs and International Trade, www.dfait-maeci.gc.ca/tna-nac/nafta-e.asp (accessed in March 2005).

89. Cases initiated are based on notices of intention to arbitrate (whether or not a claim was filed).

90. Mark Clodfelter (2004) at the US State Department NAFTA Arbitration Division notes that a high proportion of Chapter 11 cases are rooted in trade disputes. He points out that the rise in Chapter 11 cases seems to be outrunning the availability of qualified arbitrators.

Table 4.2 FDI stock related to Chapter 11 disputes, 1994–2004

US FDI in	Bilateral FDI stock ^a (billions of dollars)	Chapter 11 cases	Cases per \$1 billion FDI
Canada	173	9	0.05
Mexico	36	15	0.41

a. Average 1994–2003, based on FDI stock.

Sources: Bureau of Economic Analysis, US Commerce Department, 2004; and Mexico Ministry of the Economy, 2004.

As of August 2004, US investors had been wholly or partly successful in five decided Chapter 11 cases (see table 4.3, which compares the number of disputes won by the investor and state by country).⁹¹ However, in none of the cases has the investor been awarded an amount close to its initial (probably overblown) claim. The cases in question are *Ethyl Corporation vs. Canada*, *Metalclad Corporation vs. Mexico*, *Azinian vs. Mexico*, *Marvin Feldman vs. Mexico*, *S. D. Myers vs. Canada*, *Pope & Talbot vs. Canada*, *Mondev International vs. United States*, *ADF Group Inc. vs. United States*, and *USA Waste vs. Mexico* (submitted twice) (see table 4.4, which compares settled Chapter 11 cases and arbitral awards).⁹² Five cases have been withdrawn, and another 16 cases are pending determination. Tribunal awards to successful claimants have so far totaled around \$35 million (see appendix table 4A.4 and table 4.4).⁹³ Arbitral awards are small relative to initial claims—on average, they amount to only 19 percent of the original claim. In the most extreme case so far (*Pope & Talbot*), the final NAFTA arbitral award represented only 0.5 percent of the original claim.⁹⁴ Nevertheless, the process shows that private investors can hold NAFTA governments accountable to their Chapter 11 obligations.

As of January 2005, 11 environment-related disputes had been brought under Chapter 11, seven of which were filed by US investors and four by a Canadian company. Among these cases, four each were filed against

91. Success is defined as a monetary award in favor of the respondent or claimant. Specifically, US investors won five cases with a monetary award and one case partly on legal grounds.

92. So far, 11 out of 13 settled cases received arbitral awards that are a fraction of the initial overblown claims. The remaining three cases were withdrawn before the commencement of arbitration. See table 4.4 for details.

93. Total awards amount to about \$35 million damages plus interest and plus the cost of tribunal proceedings.

94. Pope & Talbot's initial claim was \$130 million, but the NAFTA tribunal awarded final costs and damages totaling \$461,566 plus interest. The small NAFTA arbitral award reflects the fact that Pope & Talbot lost all of its main claims. For details, see Canada Department of Foreign Affairs and International Trade, www.dfait-maeci.gc.ca/tna-nac/NAFTA-e.asp (accessed in March 2005).

Table 4.3 Outcome of investor-state disputes under Chapter 11, 1994–2004

Disposition	Canada	Mexico	United States
Total won by the investor/claimant	0	0	5
Total won by the state/respondent	0	0	1
Joint termination of case	4	2	4

Note: Winning is defined as a monetary award in favor of the claimant or respondent.

Sources: US State Department, Office of the Legal Adviser, 2004, www.state.gov/s/l/c3439.htm; Canada Department of Foreign Affairs and International Trade, 2004; and Todd Weiler, www.naftalaw.org, 2004.

Mexico and the United States, and three against Canada. Currently more than a quarter of all Chapter 11 cases involve environment-related issues.

Nearly half of all investor-state cases claimed violations under NAFTA Articles 1102 and 1105 (table 4.5). National treatment provisions in Articles 1102 and 1103 require governments to treat foreign investors based in any NAFTA member country no less favorably than domestic investors. Article 1105 requires members to observe the minimum standards of “international law.” In an effort to address the criticism that arbitration panels had overextended Article 1105, in August 2001 the NAFTA Free Trade Commission issued an Interpretive Note stating that “[a] determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).”⁹⁵ In other words, the commission narrowed the interpretation of minimum standards of treatment to limit possibilities for firms to litigate based on any international law obligation.⁹⁶ The third most frequently cited breach of NAFTA obligation is Article 1110, which provides the basis for “regulatory takings” claims. We examine a few cases to highlight how these and other provisions have featured in Chapter 11 disputes.

S. D. Myers Inc. vs. the Government of Canada

In the *S. D. Myers* case, decided in October 2002 in favor of the US investor, the NAFTA tribunal dismissed the company’s claims relating to expropriation and performance requirements but upheld its assertion that Canada violated its national treatment obligation. Until Canada’s Poly-

95. For more information about the NAFTA Free Trade Commission’s interpretation of Article 1105, see Canadian International Trade Minister Pettigrew’s press release, webapps.dfait-maeci.gc.ca/minpub/Publication.asp?FileSpec=/Min_Pub_Docs/104441.htm (accessed in March 2005).

96. The NAFTA Free Trade Commission’s interpretation of Article 1105 clarified that minimum standards of treatment correspond with customary international law.

Table 4.4 Comparison of settled Chapter 11 claims and arbitral awards

Case	Amount claimed (millions of dollars)	Amount awarded^a (millions of dollars)
Ethyl Corporation	250.0	13.0
Metalclad Corporation	90.0	16.7
Azinian	17.0	—
Marvin Feldman	50.0	1.0
USA Waste ^b	60.0	—
S. D. Myers	20.0	3.9
Pope & Talbot ^c	507.6	0.5
Mondev	16.0	—
ADF Group Inc.	90.0	—
Methanex Corporation	970.0	4.0
Total	2,070.6	39.0

— = No award on costs made; each side pays its own expenses plus half the costs and expenses of the tribunal proceedings.

a. Tribunal awards plus interest. Three cases (Sun Belt, Ketcham, and Trammel Crow) that were withdrawn before the commencement of arbitration are not included.

b. USA Waste is counted twice as it was submitted twice.

c. Based on claims that the Canadian government violated five Chapter 11 obligations: Articles 1102, 1103, 1105, 1106, and 1110.

Sources: US State Department, Office of the Legal Adviser, 2004, www.state.gov/s/l/c3439.htm; Canada Department of Foreign Affairs and International Trade, 2004; Todd Weiler, www.naftalaw.org, 2004.

chlorinated Biphenyls (PCB) Waste Export Regulations were adopted in 1990, Canadian law favored domestic treatment and disposal of PCBs.⁹⁷ Meanwhile, the United States prohibited PCB imports until 1995, when the US Environmental Protection Agency (EPA) allowed S. D. Myers and nine other companies to import PCB waste from Canada for processing and disposal. S. D. Myers, an Ohio-based waste treatment company, was located closer to Canadian PCB wastes than its Canadian competitor. Consequently, S. D. Myers was poised to gain from EPA's new policy.

In response, the government of Canada quickly issued an interim order banning the export of PCBs. Canada justified this emergency environmental legislation as a means of implementing a multilateral agreement governing trade in toxic waste—namely the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes. In turn, S. D. Myers challenged the Canadian government under Chapter 11 of the NAFTA, citing the following arguments:

- **National treatment (Article 1102):** Canada's PCB Waste Export Interim Order prevented any PCB wastes from being exported to the United States.

97. Canada's 1990 PCB Waste Export Regulations banned export of PCBs to all countries except the United States. And Canada could not export PCBs to the United States unless the US EPA gave prior approval.

Table 4.5 Types of measures disputed under Chapter 11, 1994–2003

Article	Contest measures	Total	Percent
1102	National treatment	16	25
1103	Most-favored nation treatment	7	11
1104 and 1105	Standard of treatment	19	31
1106	Performance requirements	5	8
1110	Expropriation	11	18
1116 and 1117	Obligation under Chapter 15 (monopolies and state enterprises)	4	3
Total		62	100

Note: Multiple grounds are cited in each case.

Sources: US Department of State, Office of the Legal Adviser, 2004, www.state.gov/s/l/c3439.htm; Canada Department of Foreign Affairs and International Trade, 2004; and Todd Weiler, www.naftalaw.org, 2004.

- **Minimum standard of treatment (Article 1105):** S. D. Myers was denied proper treatment because the Canadian government did not consult before implementing the PCB export ban, which Myers asserted was required under Canada’s domestic regulatory framework.
- **Performance requirements (Article 1106):** The PCB export ban amounted to a performance requirement—namely that contaminated waste could only be disposed in Canada.
- **Expropriation (Article 1110):** The PCB export ban eroded the value of the S. D. Myers investment in Canadian facilities, constituting a measure tantamount to expropriation.

The NAFTA tribunal decided that the real intent of Canada’s ban on the export of PCB waste was to protect the Canadian waste disposal industry from its US competitors. Environmental groups criticized the *S. D. Myers* decision, arguing that the tribunal elevated investor rights over an international environmental agreement. They were particularly offended by the tribunal’s suggestion that Canada should adopt a “least trade restrictive” policy (Public Citizen 2001). The tribunal suggested that to promote its domestic waste disposal industry, Canada could have subsidized domestic waste disposal firms and that such subsidies would not have been inconsistent with Canada’s national treatment obligation or the Basel Convention.⁹⁸ Contrary to this suggestion, some environmental advocates argue that governments should have a free hand to use what-

98. The tribunal affirmed Canada’s environmental obligations under the NAAEC. *S. D. Myers Inc. vs. Canada Partial Award* (November 13, 2000), at para. 247, 255. Complete details are at www.dfait-maeci.gc.ca/tna-nac/SDM-e.asp (accessed in March 2005).

ever trade restrictions they find appropriate to implement environmental policies.

The tribunal did not accept the “free hand” reasoning. Instead, in the *S. D. Myers* case, the tribunal found that the government of Canada, with protectionist intent, breached its national treatment obligation under NAFTA Article 1102. But the tribunal rejected claims that the PCB export ban additionally breached Article 1106 by requiring S. D. Myers to consume goods and services in Canada. The tribunal further decided that the ban was not “tantamount to nationalization or expropriation.”⁹⁹

Methanex Corporation vs. the United States

In 1999, the Vancouver-based Methanex Corporation, the world’s largest producer and marketer of methanol, which is a principal ingredient of the gasoline additive MTBE, requested a NAFTA tribunal review. The final outcome of the Methanex claim could become a leading precedent for future Chapter 11 cases.

In July 1999, Methanex initiated a Chapter 11 claim for nearly \$1 billion against the state of California, which banned MTBE on December 31, 2002 (the ban took effect on January 1, 2004).¹⁰⁰ The California ban on MTBE did not discriminate between imports and domestic production. Instead, a key issue in the opening round of litigation was whether the ban was based on “sound science” or practical politics. Methanex claimed that California did not act in the “least trade restrictive” manner to deal with treatment of groundwater pollution. Instead, according to Methanex allegations, the MTBE ban was used to protect Archer Daniels Midland Company (ADM), a major campaign donor for California Governor Gray Davis. ADM is a major US manufacturer of ethanol, the main alternative to MTBE as a gasoline additive.¹⁰¹ Since federal law requires all gasoline to contain either MTBE or ethanol,¹⁰² the California ban would shift the

99. In *S. D. Myers Inc. vs. Canada*, the tribunal also rejected the claim of an indirect expropriation. Direct expropriation refers to a “taking” by government authority, or seizing of private property, while indirect expropriation refers to measures that could erode all or nearly all the value of an investment property. See *S. D. Myers Inc. vs. Canada Partial Award*, para. 285.

100. Wendy Stueck, “Methanex to Take \$86 Million Charge to Be the Last One for Fortier Plant, It Says,” *Globe and Mail*, November 26, 2002, B6.

101. *The Financial Post* claims ADM produces more than 70 percent of the ethanol used in the United States. Media reports estimate ADM contributed \$220,000 in donations to Governor Davis’ 1998 campaign. Tony Seskus, “Methanex Loses the NAFTA Complaint: More Evidence Needed,” *Financial Post*, August 8, 2002, FP11. Robert Collier, “Canadian Trade Challenge Falls Flat—But More Fights May Be Coming,” *San Francisco Chronicle*, November 17, 2002, A14.

102. The stated rationale for this policy is to promote alternative energy sources to the use of petroleum.

state's additive market from the Canadian firm Methanex to domestic ethanol producers such as ADM.¹⁰³

The state of California EPA justified the ban on grounds that MTBE is highly soluble in water and posed a significant risk of water contamination.¹⁰⁴ Methanex argued that the groundwater problems in California are due to leaky gasoline storage tanks and not the use of MTBE itself. In July 2000, the NAFTA Commission for Environmental Cooperation (CEC) dismissed submissions by Methanex to review California's environmental enforcement policies.¹⁰⁵ Meanwhile, Methanex challenged California under Chapter 11 of the NAFTA with the following arguments:¹⁰⁶

- **National treatment (Article 1102):** The California Executive Order D-5-99, which banned MTBE, reflected a protectionist intent that improperly favored the US ethanol industry against foreign investors.
- **Minimum standard of treatment (Article 1105):** The California ban did not use the "least trade restrictive" method of solving the water contamination problem; campaign contributions allegedly violate principles inherent in Article 1105, namely that domestic decision making should be free from pecuniary interests; and a breach of Article 1102 (national treatment) is sufficient grounds to find a breach in Article 1105.¹⁰⁷

103. The US Department of Agriculture's August 2002 report restates its position that ethanol is an energy-efficient additive. The report can be viewed at www.usda.gov/news/releases/ (accessed in March 2005). According to the Sierra Club, ethanol helps reduce carbon monoxide but increases smog. The Sierra Club marks ADM among the top ethanol producers, which together contributed \$1.1 million to members of Congress via PAC and soft money contributions. Sierra Club's perspective ("The Bill that Industry Bought") is available at www.sierraclub.org/politics/lobbying/lobbying_details.asp (accessed in March 2005).

104. The decision is largely based on a 1998 University of California-Davis study that found "significant risks and costs associated with water contamination due to the use of MTBE," but there is disagreement about the toxicity of MTBE. California's Proposition 65 regulations require the state to list human carcinogens, but MTBE was not listed as a human carcinogen. The World Health Organization's International Agency for Research on Cancer also does not classify MTBE as a human carcinogen. The EPA classifies MTBE as a potential human carcinogen. See Public Citizen (2001) and Hufbauer et al. (2000).

105. In October 1999, Methanex filed a submission to the CEC requesting that it prepare a factual record on "California's failure to enforce its regulations concerning underground storage tanks." In July 2000, the CEC decided not to review the submission because the Methanex case was still pending arbitration under Chapter 11. For details about the CEC's determination, see www.cec.org/news/details/index.cfm?varlan=english&ID=2251 (accessed in March 2005).

106. Includes arguments added following the *Methanex Corporation Draft Amended Claim*, filed in February 2001. A complete description of the case is available at www.naftaclaims.com (accessed in March 2005).

107. Methanex argued that the principles of fair and equitable treatment embodied in Article 1105 include a minimum of four principles: (1) a decision maker purportedly acting in-

- **Expropriation (Article 1110):** The MTBE ban transferred market share in California's oxygenate market from Methanex to the domestic ethanol industry, which is tantamount to expropriation.

After considering the case for three years, the NAFTA tribunal side-stepped all these issues in an interim ruling handed down in August 2002. The interim ruling held that the NAFTA violations cited by Methanex, if true, applied to MTBE, not methanol. Since Methanex produces methanol and not MTBE, the tribunal ruled that Methanex was not directly affected by the California MTBE ban. In order to sustain its case, Methanex would need to show that methanol (not MTBE) was the object of discrimination. The tribunal's interim ruling was notable in its attempt to narrow the class of investors who might bring a Chapter 11 claim.

After Methanex submitted an amended claim in November 2002, the NAFTA tribunal invited third parties to submit amicus curiae briefs.¹⁰⁸ In June 2004, the tribunal also made final hearings open to the public.¹⁰⁹ The panel's final decision, issued in August 2005, rejected Methanex's amended claim.¹¹⁰

Metalclad Corporation vs. the Government of the United Mexican States

In the *Metalclad* case, a US investor purchased land in the early 1980s to establish a waste disposal facility in San Luis Potosi. Although Metalclad was granted a federal permit to construct a waste treatment facility, in December 1995 local municipal authorities denied permission, citing environmental problems. The governor of San Luis Potosi subsequently issued an Ecological Decree that declared the site of the landfill an ecological preserve for the protection of rare cactus. According to Greenpeace Mexico, environmental standards were violated at the site. An independent environmental impact analysis by the University of San Luis Potosi found that the facility was located on an alluvial stream and might con-

dependently and in the public interest must not be biased by pecuniary considerations; (2) state officials must act reasonably and in good faith; (3) nondiscrimination; and (4) a regulatory measure taken by a state must not be a disguised form of protection but instead must be the least trade restrictive of the reasonably available alternatives. See *Methanex Amended Claim*, *supra* note 101, para. 49.

108. For a complete description of claims filed in the Methanex case, see www.naftalaw.org (accessed in August 2004).

109. See ICSID press release, "Methanex v. United States: NAFTA/UNCITRAL Arbitration Rules Proceeding," January 30, 2004, www.worldbank.org/icsid/methanex.htm (accessed in March 2005).

110. For details on the final award, see www.state.gov/s/1/c5818.htm (accessed on August 15, 2005).

taminate the local water supply.¹¹¹ Metalclad was subsequently denied permission to continue construction of the landfill site at an ad hoc meeting of a distant town council.¹¹² In response, Metalclad filed a Chapter 11 claim in January 1997 based on the following arguments:

- ***Minimum standard of treatment (Article 1105):*** The lack of transparency in municipal law and the improper denial of a permit violated general obligations to grant fair and equitable treatment.
- ***Expropriation (Article 1110):*** The municipal authority's decision to refuse the operation of Metalclad's waste disposal facility was not for a public purpose and constituted both a direct and an indirect expropriation.

In one of the first NAFTA decisions based on general concepts of transparency and due process, the tribunal held that principles articulated in NAFTA Article 102(1) imposed an elevated transparency obligation under Article 1105.¹¹³ The tribunal noted the absence of an established procedure for handling municipal construction permits and Metalclad's reliance on misleading advice from federal officials as examples of Mexico's failure to uphold its commitment to transparency under the NAFTA agreement.¹¹⁴

111. See Wheat (1995). Also see Public Citizen's report about environmental hazards posted on the organization's Web site, www.citizen.org/publications/release.cfm?ID=7076 (accessed in March 2005).

112. Metalclad was not notified of (and did not participate in) the town council meeting that considered the permit application; the NAFTA tribunal found that this procedure constituted a failure to ensure transparency. See Weiler (2001). See also *Award of the Tribunal: Metalclad Corp. vs. The United Mexican States*, August 2000, www.state.gov/s/1/c3752.htm (accessed in March 2005).

113. The tribunal did not fully explain what constituted "fair and equitable treatment," but its decision suggested that San Luis Potosi's behavior failed to observe the customary international law standards that must be respected under NAFTA Article 1105. The tribunal argued that the principle of transparency refers to the state's "duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws." *Metalclad Award, supra note 111*, para. 76.

114. When the government of Mexico challenged the NAFTA tribunal decision, the Supreme Court of British Columbia upheld the tribunal award (on grounds discussed below) but decided against the panel's Article 1105 decision. The Canadian court held that the Chapter 11 tribunal exceeded its authority in determining that a breach of transparency constituted a violation of "fair and equitable" treatment. The recent NAFTA Free Trade Commission's interpretive note extends the Canadian court's argument by curtailing the creation of Article 1105 obligations out of other NAFTA commitments. VanDuzer (2002) contends there still exists uncertainty about Article 1105 standards despite the Commission's attempt to limit the scope of interpretation. Gastle (2002) argues that the Commission's interpretation of Article 1105 only provides for the "customary international law minimum standard of treatment of aliens."

More controversially, the tribunal decided Mexico had taken measures “tantamount to expropriation,” contravening Article 1110.¹¹⁵ The tribunal emphasized each NAFTA member’s obligation to the “substantial increase in investment opportunities in the territories of the Parties” (NAFTA Article 102(c)). In examining the Ecological Decree issued by San Luis Potosi, the tribunal held that enforcing the decree would “constitute an act tantamount to expropriation.”¹¹⁶ This aspect of the NAFTA tribunal decision got some environmental groups up in arms. They claim the Metalclad decision unnecessarily broadens the definition of takings and could hinder traditional governmental regulatory functions.¹¹⁷ However, the NAFTA tribunal awarded Metalclad only \$16.7 million in damages, which represented 18.5 percent of the initial claim (\$90 million) and did not include investment for a new facility or lost revenues. This suggests that the tribunal casts a skeptical eye not only on the regulatory shell game (municipal vs. federal authorities) but also on Metalclad’s overblown claims (Hufbauer et al. 2000).

Pope & Talbot Inc. vs. Canada

Based on the 1996 US-Canada Agreement on Trade in Softwood Lumber (SLA), the government of Canada established quota limits on duty-free exports of softwood lumber from four Canadian provinces to the United States. In March 1999, Pope & Talbot, an Oregon-based timber company with subsidiaries in British Columbia, Canada, claimed Canada’s SLA Export Control Regime violated investment provisions under NAFTA Chapter 11.

To facilitate the SLA, the Export Control Regime requires exporters of softwood lumber products originating from the provinces of Quebec, Ontario, Alberta, and British Columbia—together accounting for approximately 95 percent of Canada’s softwood lumber exports to the United States—to obtain export permits and pay fees to export their products to

115. See *Metalclad Award*, *supra* note 111, para. 70 and 111. The tribunal defined expropriation in Article 1110 to include “not only open, deliberate and acknowledged takings of property, such as outright seizure . . . but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property even if not necessarily of obvious benefit to the host State” (*Metalclad Award*, *supra* note 111, para. 103).

116. See *Metalclad Award*, *supra* note 111, para. 111.

117. Concurring in part with these concerns, Graham (2002) argues that compensating investors for diminution in value of investment under Chapter 11 is more likely to lead to non-optimal results than application of the “polluter pays” principle. Other observers see corporations using Chapter 11 to respond to environmental protectionism. Under Chapter 11, foreign investors are allowed to challenge discriminatory environmental regulation without the political support previously necessary on the part of national governments. See Rugman, Kirton, and Soloway (1999), 154–55; and *Metalclad Award*, *supra* note 111, para. 92.

the United States.¹¹⁸ Pope & Talbot argued that some lumber producers in British Columbia were treated more favorably and that the quota system, as implemented, discriminated against Pope & Talbot.¹¹⁹ Specifically, Pope & Talbot raised the following arguments:¹²⁰

- **National treatment (Article 1102):** Canada's implementation of the SLA discriminated against investors of lumber in provinces covered by the Export Control Regime by comparison with investors in other provinces.¹²¹
- **Minimum standard of treatment (Article 1105):** Canada's verification of softwood lumber quota audit violated international law standards.
- **Performance requirements (Article 1106):** Canada's Export Control Regime restriction on sales, coupled with performance requirements linked to exports, discriminate against Pope & Talbot.

118. Canada's Export Permit Regulations Act (1996) established requirements for exporting softwood lumber to the United States. These requirements were at issue in the *Pope & Talbot* case. At the heart of the underlying softwood lumber dispute are key differences in US and Canadian lumber industry trade policies. The Canadian government owns nearly all of Canada's forests (90 percent), Canadian logging and softwood lumber industries are highly integrated (75 percent), and Canadian stumpage fees are lower than the fees charged by private US forest owners. By contrast, most US timber (58 percent) is harvested from private land at market prices. See *Award on Merits Between Pope & Talbot Inc. vs. Government of Canada*, April 10, 2001, para. 86; and *Interim Award Between Pope & Talbot Inc. vs. Canada*, June 2000, para. 34 and 35. For complete details, see www.dfait-maeci.gc.ca/tna-nac/phases-en.asp#1 (accessed in November 2002). See also "Canada to Launch US Ad Campaign on Softwood Lumber Dispute," *Associated Press*, November 8, 2002; and Howse (1998).

119. When the SLA quota was established, the government of Canada granted the province of British Columbia 59 percent of Canada's total quota of lumber that Canadian companies can export to the United States duty-free; Quebec was given 23 percent. Pope & Talbot claimed that British Columbia's share was later dropped to 56 percent while Quebec's portion increased to 25.3 percent, a shift amounting to 500 million board feet less per year from British Columbia. Heather Scoffield, "US Firm Says Ottawa Bungled Lumber Pact," *Globe and Mail*, March 26, 1999, B7.

120. Pope & Talbot originally alleged a violation of MFN treatment as well as other claims, but the MFN issue was dropped by the time the *Interim Award* was issued on June 26, 2000. See *Memorial of the Investor*, January 28, 2000. For a complete account of all claims against Canada, see www.dfait-maeci.gc.ca/tna-nac/phases-en.asp#2 (accessed in November 2002). Pope & Talbot's claims against Canada under Article 1105 include the following issues: interpretation of Article 1105, discrimination of transitional adjustment provisions, unfair allocation of quota related to wholesale exports, inequitable reallocation of quota for British Columbia companies, unfair effect of Super Fee measures, secretive conduct of the Canadian government during the verification review process, and Canada's breach of administrative fairness. See *Award on Merits*, April 2001, www.dfait-maeci.gc.ca/tna-nac/phases-en.asp#2 (accessed in March 2005).

121. Canada claimed that its quota allocation provision was adjusted for new entrants under the SLA on an as-needed basis, and not according to provincial historical shares. See Government of Canada Statement of Defense, October 8, 1999, and Counter-Memorial of Canada, October 10, 2000, para. 359 to 438, www.dfait-maeci.gc.ca, www.naftaclaims.com (accessed in March 2005).

- **Expropriation (Article 1110):** Canada's Export Control Regime would interfere with business operations, constituting measures tantamount to expropriation under NAFTA Article 1110 and indirect expropriation under international law.

The NAFTA tribunal determined that Canada's implementation of the SLA Export Control Regime did not discriminate against foreign-owned companies. Moreover, the tribunal dismissed Pope & Talbot's claims regarding direct expropriation.¹²² However, the tribunal decided that Canada's verification audit of Pope & Talbot was unreasonable and violated Article 1105.¹²³ Specifically, the tribunal suggested that Canada's export control regulations as administered (apparently to punish Pope & Talbot) sustained a claim of indirect expropriation. The tribunal concluded that Canada should pay compensation for damages arising from the verification audit and the cost of proceedings, totaling \$461,566 plus interest.¹²⁴

While Canada essentially won the case, some NGOs criticized the tribunal's decision to broaden the concept of fair and equitable treatment under NAFTA Article 1105 (Public Citizen 2001). However, the recent interpretive note issued by the NAFTA Free Trade Commission precludes the wholesale creation of Article 1105 obligations from the violation of other NAFTA provisions.¹²⁵

122. See *Interim Award*, *supra* note 121, para. 64 to 80. The tribunal emphasized that the Export Control Regime did not place limitations on domestic sales of softwood lumber.

123. See *Interim Award*, *supra* note 121, para. 83 to 104. The tribunal invoked three arguments for its decision that Canada did not breach NAFTA Article 1102 obligations. First, the absence of US final determinations against exporters in noncovered provinces of the SLA partly reflects the fact that the SLA regime was designed to address CVD threats against covered provinces (British Columbia, Alberta, Ontario, and Quebec). Second, British Columbia, where Pope & Talbot has subsidiaries, faced a declining share of total Canadian exports to the United States, but not necessarily because of Canada's SLA export regime. The tribunal points toward new entrants requiring new quota allocations and preexisting market conditions before the SLA that show higher investment in new and existing mills in Quebec than in British Columbia. Third, the Super Fee that was introduced to settle the dispute over lower British Columbia stumpage fees did not discriminate against foreign-owned softwood lumber companies operating in British Columbia. However, the tribunal determined that Canada's behavior during the verification review violated Article 1105 obligations. According to the tribunal, Pope & Talbot was subjected to unfair treatment by the government of Canada, including "threats, [denial of] reasonable requests for pertinent information, [requirement] to incur unnecessary expense and disruption in meeting Softwood Lumber Department's requests for information, [forced expenditure of] legal fees and probably [suffered from] a loss of reputation in government circles." See *Award on Merits*, para. 181.

124. See *Interim Award*, *supra* note 121, para. 96 to 105, and *Memorial of the Investor re: Pope & Talbot, Inc.*, www.naftalaw.org (accessed in March 2005).

125. The NAFTA Free Trade Commission's interpretive note is described in Canadian International Trade Minister Pettigrew's press release, webapps.dfait-maeci.gc.ca/minpub/Publication.asp?FileSpec=/Min_Pub_Docs/104441.htm (accessed in March 2005).

Table 4.6 NAFTA disputes under Chapter 19: Complainants and respondents, 1994–2005

As petitioner/complainant	As respondent/defendant			Total
	Canada	Mexico	United States	
Canada	—	3	38	41
Mexico	2	—	31	33
United States	17	12	—	29
Total cases	19	15	69	103

a. Subsidiaries of private firms have initiated cases against the host government. Please refer to NAFTA Chapter 19 Dispute Settlement Tables for details about specific cases.

Source: NAFTA Secretariat, 2005, www.nafta-sec-alena.org.

Chapter 19 Cases

Since Chapter 19 reviews of final AD and CVD decisions began in 1994, NAFTA panels have convened in 103 cases. Most disputes are related to AD rather than CVD determinations. As the largest NAFTA user of trade remedy laws, the United States has been the main target of Chapter 19 disputes, facing more cases than Canada and Mexico combined (table 4.6). The United States has been the complainant in 29 cases and the respondent in 69 cases; Canada and Mexico defended decisions in 19 and 15 cases, respectively.

Under CUSFTA, nearly two-thirds of binational panel decisions against US agencies called for a remand.¹²⁶ This pattern holds under NAFTA Chapter 19. As of August 2004, the NAFTA Chapter 19 tribunal disagreed with US administrative decisions and partly remanded 11 cases against the United States and totally remanded 3 cases. Canada had 3 cases partly remanded and 1 case totally remanded. Mexico had 3 cases partly remanded and 3 cases totally remanded (table 4.7).¹²⁷ In addition, 41 cases have been terminated, and 68 cases are awaiting final tribunal decisions.

Most Chapter 19 cases resulted in the reduction of penalty duties. The ECC procedure has been invoked only thrice—in the *Gray Portland Cement and Clinker*, *Pure Magnesium*, and *Softwood Lumber* cases.¹²⁸ Despite Mex-

126. A remand is similar to a reversal. However, instead of entering its own judgment, the arbitration panel sends the case back to the administrative agency to reconsider its determination in light of the panel's ruling on the applicable law. As an example, an arbitration panel can remand a case if it concludes that the administrative agency provided insufficient evidence to back up its original decision.

127. While the United States and Mexico had nearly half of all their administrative decisions remanded, Canada had most of its agency determinations affirmed. See Vega-Cánovas and Winham (2002).

128. Some NAFTA scholars allege that the Chapter 19 ECC process is wrongly invoked to discipline panelists. Specifically, Potter (2004) argues that the ECC procedure has been

Table 4.7 Outcome of tribunal panel decisions under Chapter 19, 1994–2004

Disposition	Petitioning country		
	Canada	Mexico	United States
Affirmed in favor of respondent ^a	10	3	12
Remanded in favor of petitioner ^a	10	10	7
Remanded against respondent ^a	4	6	14
Ambiguous decision (terminated cases)	6	8	27
Pending cases	17	18	33
Total cases won as respondent ^a	10	2	12
Total cases won as petitioner ^a	9	8	7
Total cases involved as respondent or petitioner	18	14	63

a. Includes cases that are not unanimously decided but defined by being affirmed in part for the respondent or remanded in part for the respondent or petitioner.

Source: NAFTA Secretariat, 2004, www.nafta-sec-alena.org/english/index.htm.

ico’s increasingly active use of AD and CVD measures, the United States and Canada have challenged Mexican decisions only 14 times, mostly involving iron and steel products.

While Chapter 19 disputes are not as hotly debated as Chapter 11 disputes, they represent significantly larger economic stakes. As table 4.8 indicates, the intensity of US-Mexico Chapter 19 cases, relative to bilateral trade flows, is somewhat greater than the intensity of US-Canada Chapter 19 cases. The vast majority of Chapter 19 disputes, about 80 percent, focus on nonagricultural products. This is not surprising, as US two-way trade with NAFTA partners in nonagricultural products that attract AD and CVD cases increased from \$26 billion in 1994 to \$49 billion in 2003.¹²⁹ Overcapacity and slow demand growth characterize iron, steel, cement, glass, and ceramic products. While they account for about 10 percent of US trade with NAFTA partners, these products represent about half of all Chapter 19 disputes.

Base metal products (i.e., iron and steel) are the leader, accounting for 38 out of 82 total NAFTA nonagricultural Chapter 19 cases (table 4.9). Cement, glass, and ceramic products accounted for 17 out of the 82 nonagricultural cases under Chapter 19 (table 4.9). Agricultural products ac-

abused and this has aroused cynicism in the Canadian business community toward the Chapter 19 process. As a result, Potter sees a growing trend to use the Canadian Federal Court of Appeal instead of Chapter 19. The US government has since initiated an ECC process, in November 2004, to reverse the NAFTA panel’s adverse ruling against the USITC. See “US to Pursue Extraordinary Challenge of NAFTA Lumber Ruling,” *Inside US Trade*, October 15, 2004.

129. Based on two-way trade of US exports and imports of base metals (i.e., iron, steel, and nickel), cement, glass, ceramic, and plastic products with Canada and Mexico.

Table 4.8 Bilateral two-way trade among NAFTA countries

Countries	Two-way trade^a (billions of dollars)	Chapter 19 cases	Cases per \$1 billion
US-Canada	336	55	.16
US-Mexico	181	43	.24

a. Average sum of total exports and imports 1994–2003.

Sources: Secretaría de Economía, Dirección General de Inversiones Extranjeras; Bureau of Economic Analysis, US Department of Commerce; and Canada Department of Foreign Affairs and International Trade, 2003.

count for 19 cases. As agricultural trade barriers are lowered in NAFTA, AD and CVD actions could become much more numerous. Softwood lumber exports from Canada—a product with characteristics shared by mainstream agricultural goods—have already been the object of several trade remedy disputes.

US-Canada Chapter 19 Trade Disputes

The Chapter 19 dispute settlement process has been relatively successful at resolving US-Canada trade disputes. So far, out of 54 US-Canada Chapter 19 disputes, 43 cases have been settled.¹³⁰ During 2002–03, Canada challenged ten US AD and CVD determinations on softwood lumber, tomatoes, and steel wire rod. The tomato cases were subsequently terminated, but the softwood lumber case has stretched the limits of the Chapter 19 arbitration process. As such, it deserves a more detailed examination.

For all the success of the Chapter 19 process, its most glaring failure—and NAFTA’s continuing largest trade dispute—involves softwood lumber. Since 1982, the United States and Canada have been at odds over US CVD and AD actions against Canadian softwood lumber exports. Indeed, the dispute almost caused the CUSFTA talks to be stillborn in 1986, when the concern about softwood lumber sharply divided the Senate Finance Committee’s vote that allowed talks to go forward.

The economic stakes are huge. In 2001, Canadian softwood lumber accounted for one-third of the US market and by 2003 represented \$6.4 billion per year of exports for Canada.¹³¹ Softwood lumber is the basis for single-

130. Settled cases are here defined as cases with a final panel decision and cases that have been jointly terminated by both the United States and Canada. As of July 2005, 22 US-Canada cases reached a final Chapter 19 panel decision; another 21 cases were jointly terminated. See appendix 4A.5 for details.

131. Canada is more distant from other markets, and the United States remains the most important export market for Canadian softwood lumber. Canadian exports of wood products to the United States as a share of total bilateral trade increased from 3.9 percent in 1990 to 4.7 percent in 2001. US exports of wood products as a share of total bilateral trade grew from 3.3 percent in 1990 to 3.7 percent in 2001. See Canada House of Commons (2002) and Statistics Canada (2004).

Table 4.9 Types of products at issue in Chapter 19 disputes by defendant countries, 1994–2005

Harmonized System section ^a	Type of product	Cases brought against			
		Canada	Mexico	United States	Total
Agricultural products					
I	Animal products (including fish)	2	2	8	12
II	Vegetables	n.a.	n.a.	3	3
III	Animal or vegetable fats and oils	n.a.	n.a.	n.a.	n.a.
IV	Prepared foodstuffs, nes	2	1	1	4
<i>Subtotal</i>		4	3	12	19
Nonagricultural products					
V	Minerals	1	n.a.	6	7
VI	Chemicals	n.a.	4	2	6
VII	Plastics	n.a.	1	n.a.	1
VIII	Leather	n.a.	n.a.	1	1
IX	Wood	1	n.a.	4	5
X	Pulp and paper	n.a.	n.a.	n.a.	n.a.
XI	Textiles and clothing	n.a.	n.a.	n.a.	n.a.
XII	Footwear	n.a.	n.a.	n.a.	n.a.
XIII	Glass, cement, and ceramics	1	n.a.	14	15
XV	Base metals (iron and steel)	7	6	28	41
XVI	Machines and electronic equipment	5	n.a.	1	6
XX	Other manufactures	1	n.a.	n.a.	1
<i>Subtotal</i>		16	11	56	83
Total	All products	20	14	68	102

nes = not elsewhere specified

n.a. = not available

a. Harmonized Commodity Description and Coding System. The basic commodity chapters are numbered 1 to 97. The chapters are grouped into sections numbered from I to XXI. The table refers to these sections.

Source: NAFTA Secretariat, 2005, www.nafta-sec-alena.org/english/index.htm.

industry economies in several Canadian towns, notably in British Columbia, where lumber is the most important manufacturing industry. To date, US import tariffs on softwood lumber have led to an estimated 15,000 layoffs in Canada, yet twice as many American mills as Canadian ones have shut down or reduced output.¹³² Ironically, the adverse economic consequences of the softwood lumber dispute have made the Canadian lumber industry more efficient.¹³³ Bilateral disagreements can be traced both to

132. See “Canada, US Softwood Talks Break Down,” Canada Broadcasting Corporation, February 26, 2003. For complete details, see www.cbc.ca (accessed in March 2005). See also *The Economist*, “The Softwood-Lumber Dispute,” February 1, 2003.

133. According to *The Economist*, op. cit., average costs at Canadian mills have been reduced by an estimated \$65 per thousand board feet of lumber, which includes added duties. As a result, Canadian mills can maintain their market share in the United States despite the pressure on realized prices. US industry sources apparently concur that AD duties on Canadian lumber exports led Canadian firms to ramp up production to reduce production costs. See also “US, Canada Resume Lumber Talks Amid Divisions Over Export Tax,” *Inside US Trade*, February 21, 2003.

trade remedy measures pursued before and after NAFTA and to forest resource management practices.

As the CUSFTA negotiations demonstrated, the United States and Canada could not agree on trade remedy reforms. Subsequent bilateral efforts to resolve the dispute resulted in temporary fixes but no long-term framework for production and trade.¹³⁴ To reach a compromise, it appears that Canada will have to forgo its efforts to reform US trade remedy laws. Similarly, the United States will need to move away from solutions that are narrowly focused on market-based timber pricing methods.

A background understanding about different forest management practices is necessary before discussing details of the dispute. In the United States, private contracts or auctions determine timber prices, when timber is purchased from either the US Forest Service or privately owned lands. By contrast, in Canada, most timber is located on public (crown) lands, and the provinces control the crown forests. As a general matter, Canada severely limits the export of logs, preferring instead to export cut lumber. The provinces also assign Canadian companies long-term cutting rights in exchange for assured job numbers and sustainable forestry. Propelled by US mill producers and the Coalition for Fair Lumber Imports, the US government argues that Canada's low timber prices, both on account of log export restraints and low stumpage fees, confer provincial subsidies on domestic softwood lumber producers.¹³⁵ However, while the US Forest Service is burdened by costs for harvesting timber on public lands, Canada's provincial governments shift forest management costs to producers.¹³⁶

The softwood lumber dispute was carried over from CUSFTA into NAFTA. After Canada unilaterally terminated the 1991 memorandum of

134. A memorandum of understanding (MOU) was agreed between the United States and Canada in 1991 and again in 1996. Shortly after each MOU expired or was unilaterally terminated, Canada initiated an SWL dispute against the United States. The United States has not brought an SWL dispute against Canada in either the WTO or NAFTA.

135. Arguing different reasons for the same result, the Indigenous Network of Economies and Trade (INET) submitted a brief contending that stumpage prices set by the Canadian government do not reflect the cost of aboriginal proprietary interests on lands where softwood lumber is harvested. Amicus curiae submissions to the WTO by INET in April 2002.

136. US forest management policies have limited domestic supply, partly because the US Forest Service does not allow as large a timber harvest on federal lands as economic factors might warrant, thus causing relatively higher stumpage prices. Even so, according to GAO reports (GAO 1998), the US government apparently loses money on its stumpage auctions. Roger Sedjo (1997) at Resources for the Future adds that Canada's dominance in the US SWL market is based upon its comparatively larger volume of native forests situated on accessible flat terrain. Sedjo argues that the United States can increase SWL production by intensively managing forests. *The Economist* ("The Softwood-Lumber Dispute," February 1, 2003) notes that European producers have recently increased SWL exports, helping depress prices by 10 percent from May 2002 to January 2003. See Michael Percy, "A Hard Look at the Softwood Lumber Dispute," *University of Alberta ExpressNews*, March 10, 2003, www.expressnews.ualberta.ca/expressnews/articles/ideas.cfm?p_ID=933&s=a (accessed in March 2005).

understanding (MOU) that specified a schedule of export taxes on Canadian softwood lumber exports, the United States imposed CVDs on imports from Canada. Canada then initiated a CUSFTA binational panel review. After the CUSFTA panel decided in favor of Canada, the United States filed an extraordinary challenge in 1994. The ECC panel upheld the panel decision but was split along national lines, a divisive trend that would define future softwood lumber disputes addressed under NAFTA.

A temporary remedy emerged from another MOU in 1996. The 1996 MOU allowed Canada to export 14.7 billion board-feet of lumber without paying export fees for the five-year duration of the pact. After the five-year agreement expired in 2001, the US DOC imposed a CVD of about 19 percent and an average AD duty of 10 percent.¹³⁷ Canada responded by filing six disputes against the United States in the WTO; Canada also initiated three cases under NAFTA Chapter 19, two of which are pending final panel decisions.¹³⁸ (See appendix tables 4A.1 and 4A.2, which catalog the recent history of NAFTA and WTO disputes over lumber.) In response, the United States filed an extraordinary challenge in November 2004 to reverse the NAFTA panel's ruling against the USITC.¹³⁹

Meanwhile, the status of the Byrd Amendment hangs over the entire softwood lumber dispute.¹⁴⁰ The WTO Appellate Body has ruled that the

137. See Peter Watson, "Dispute Settlement Under FTA-NAFTA," *Policy Options*, June 1999.

138. In softwood lumber cases USA-CDA-2002-1904-02 and USA-CDA-2002-1904-03, NAFTA panels have remanded the case back to US agencies several times. See appendix 4A.5.

139. As the softwood lumber dispute intensifies, the United States and Canada seem to move further away from a negotiated bilateral compromise focusing on a sliding export tax. In January 2003, US proposals focused on a declining four-tiered tax schedule while Canada preferred a continuously sliding export tax that would fall as prices rise. One reason why Canada opposes the four-tiered export tax is that it would arbitrarily penalize Canadian lumber exports when prices are just below a tier. Another wrinkle: While the US DOC does not guarantee import duties would be revoked even if a Canadian province implemented all the policy changes, the US proposal includes province-specific policy frameworks that could lead to the revocation of import duties on lumber imported from some provinces but not others. See "Commerce Issues Second Draft Lumber Paper As Talks End Without Deal," *Inside US Trade*, February 7, 2003. See "Commerce Lumber Memo," *Inside US Trade*, January 31, 2003.

140. Currently all CVD and AD duties on Canadian softwood lumber are being held for possible distribution to domestic US lumber firms under the Continued Dumping Offset Act (the Byrd Amendment), against Canada's strenuous objections. In 2005, the "pot" of softwood lumber penalty duties will exceed \$4 billion (increasing at \$4 million per day). By March 2005, Canada (and the European Commission) announced intentions to retaliate against the US failure to repeal the Byrd Amendment. The Canadian government planned to impose a 15 percent tariff on US exports totaling about \$3.5 million. Former US Under Secretary of Commerce Grant Aldonas emphasized that the prospect of the United States refunding duty deposits to Canada would be one of the last issues to be resolved. See "Commerce Issues Second Draft Lumber Paper As Talks End Without Deal," *Inside US Trade*, February 7, 2003; "Lumber Talks Break Off," *Inside US Trade*, February 28, 2003; and "Canada Byrd Retaliation Notice Could Lead to New Fight with United States," *Inside US Trade*, April 1, 2005.

Byrd Amendment violates the WTO, but so far there is no indication that Congress will repeal the law. Meanwhile, the US DOC continues to collect CVD and AD duty deposits on Canadian lumber exports. The softwood lumber dispute heated up when, in May 2002, the United States levied a 27 percent CVD/AD tariff on Canadian softwood lumber.¹⁴¹ Faced with US penalty tariffs and stalled bilateral negotiations, Canada requested a WTO panel on April 3, 2003. In August 2004, the WTO Appellate Body upheld some US AD tariffs on Canadian softwood lumber but ruled against the US DOC zeroing methodology, a practice that tends to drive up the overall final AD margin.¹⁴² In commentary, Canadian International Trade Minister James Peterson urged the US government to comply with recent (and more favorable) NAFTA panel rulings. On August 21, 2004, the NAFTA panel ordered the USITC to rescind the injury finding underlying the 27 percent CVD and AD duties on Canadian softwood lumber, emphasizing that the USITC “consistently ignored the authority” of the NAFTA Chapter 19 panel in the past.¹⁴³ Likewise, the WTO panel concurred that the US injury finding was flawed (WTO 2004). The fact that Canada has always appealed softwood lumber cases (after being initiated by the US DOC) underscores the high economic stakes of the lumber industry for Canada’s economy.

Softwood lumber litigation is entering its third decade. In our view, the dispute will ultimately be resolved by negotiation, not further rounds of litigation. The pragmatic solution should include auction-based provincial timber sales, open to all bidders, for a significant portion of stumpage rights. Some Canadian provinces are receptive to adopting competitive timber auctions.¹⁴⁴ As Canada implements market-based lumber pricing

141. Canadian lumber firms allege that the highest sustainable rate for an export tax on SWL is 18 percent; they argue that the recent 27 percent penalty tariff would make it impossible for them to earn a profit. See “Lumber Talks Break Off,” *Inside US Trade*, February 28, 2003.

142. However, government and private-sector sources believe the US government would interpret the WTO decision narrowly so that it would not affect US DOC administrative reviews or the use of zeroing calculations for dumping margins on other products such as steel. See “WTO Appellate Body Rules Against Zeroing in Softwood Lumber Decision,” *Inside US Trade*, August 13, 2004.

143. See Steven Chase and Peter Kennedy, “Another Softwood Victory for Canada,” *Globe and Mail*, September 1, 2004, B3.

144. The British Columbia Forestry Revitalization Plan proposal adopts the idea of selling timber on an auction-based system for 20 percent of Canada’s government-owned timber. Auction results will then determine stumpage rates for the remaining 80 percent of crown timber. This new forest policy would resolve a key US complaint that stumpage fees act as a de facto subsidy by the Canadian government for its softwood lumber producers. See BNA (2003a).

measures, the United States should recalculate its CVDs on lumber derived from noncompetitive stumpage and totally exempt lumber derived from auction-based stumpage. Meanwhile, the “pot” of money potentially subject to distribution under the Byrd Amendment should be divided between US and Canadian producers, in a matter designed to balance the other components of the settlement.

US-Mexico Chapter 19 Trade Disputes

Since 1994, Mexico has initiated 31 cases against the United States under NAFTA Chapter 19. One was affirmed in favor of the United States, 9 panels remanded decisions in whole or part to US agencies, 8 cases were terminated, and 13 are awaiting final panel decisions (see appendix table 4A.5). The vast majority of Mexico’s Chapter 19 complaints involve long-standing concerns over cement (14 cases).¹⁴⁵

By contrast, the United States challenged Mexican administrative determinations only in 12 cases, and only eight have been initiated since 1995. More than half the US cases initiated against Mexico deal with steel and chemical products.¹⁴⁶ Most US-initiated disputes were decided in favor of the United States and remanded back to the Secretariat of Commerce and Industrial Development (Secretaría de Comercio y Fomento Industrial, or SECOFI), Mexico’s Ministry of Trade and Industrial Development.¹⁴⁷ The most contentious case involves high-fructose corn syrup (HFCS), which is discussed in some detail below.

In February 1998, US exporters initiated a Chapter 19 case against Mexico’s decision to impose AD duties on US exports of HFCS.¹⁴⁸ Shortly after, the United States also requested a WTO panel to challenge Mexican AD duties on HFCS imports from the United States (WTO 1998). In June 2002, the Chapter 19 panel’s final decision suggested that Mexico’s AD duties on US exports of HFCS were inconsistent with NAFTA’s scheduled HFCS duty re-

145. During 1994–2004, US cement imports from Mexico totaled nearly \$2 billion. Based on statistics from the USITC Dataweb 2003, US imports for consumption, available at www.dataweb.usitc.gov (accessed in March 2005).

146. Under Chapter 19, the United States initiated disputes against Mexico over steel (six cases), chemicals (two cases), sugar (one case), beef (two cases), and cement (one case). See appendix table 4A.5.

147. Specifically, six cases were remanded to SECOFI, two were affirmed, three were jointly terminated, and one case is pending.

148. Five major US exporters of HFCS joined the US Corn Refiners Association to file the NAFTA HFCS Chapter 19 case against Mexico (MEX-USA-98-1904-01): Cerestar USA, Inc.; Cargill, Inc.; A. E. Staley Manufacturing Co.; Archer Daniels Midland Co. (ADM); and CPC International, Inc. Two Mexican firms with ties to US producers joined the dispute: Almidones Mexicanos S.A. and Cargill Mexico S.A. See NAFTA Secretariat for complete details, www.nafta-sec-alena.org/DefaultSite/index_e.aspx (accessed in March 2005).

ductions.¹⁴⁹ By 2003, both WTO and NAFTA panel decisions concurred that Mexico failed to justify its AD determination on US HFCS exports.¹⁵⁰

Meanwhile, in January 2002, the Mexican Congress imposed a 20 percent tax on soft drinks that use HFCS. The tax is just as effective in protecting Mexico's struggling sugar industry because almost all HFCS in Mexico is imported. Compounding the dispute, both the Mexican Supreme Court and Congress overruled the Fox administration's efforts to suspend the HFCS tax administratively.¹⁵¹ In January 2003, US Corn Products International Inc., one of the largest US exporters of HFCS, initiated a Chapter 11 claim for \$250 million against the Mexican 20 percent tax on soft drinks using HFCS rather than cane sugar.¹⁵²

A collateral disagreement concerns the Mexican government's claim that the original NAFTA sugar side letter is invalid. The side letter, drafted under pressure by domestic US sugar groups, amended NAFTA's original terms by including Mexico's domestic consumption of HFCS in the calculation of Mexico's eligibility for free access to the US sugar market.¹⁵³

Without political support to repeal the existing tax on HFCS imports, the Fox administration focused on bilateral industry negotiations.¹⁵⁴ Bilateral negotiations tried but failed to reach a compromise that would allow some US HFCS into Mexico and partly open the US market to Mex-

149. After SECOFI imposed AD tariffs, US exports of HFCS to Mexico declined from 186,000 tons to 2,000 tons. See "Briefing Room: Sugar and Sweetener Trade," US Department of Agriculture Economic Research Service, April 2002, table 14a. See also "Final Decision: Review of the Antidumping Investigation on Imports of High Fructose Corn Syrup, Originating from the United States of America" (MEX-USA-98-1904-01). The entire panel report is available at www.nafta-sec-alena.org/DefaultSite/index_e.aspx (accessed in March 2005).

150. According to the interim WTO panel decision (1999), SECOFI failed to take into account several basic factors in its injury determination: profits, output, and employment. See "WTO Panel Delivers Split Interim Decision on Mexico AD Action," *Inside US Trade*, October 15, 1999.

151. The Mexican Supreme Court held that the Fox administration acted illegally by suspending the tax. See "US Floats Temporary Sweetener Deal to Mexico, As HFCS Tax Revives," *Inside US Trade*, July 19, 2002.

152. In January 2002, the 20 percent tax prompted Mexican soft drink bottlers to switch from HFCS to sugar. (In turn, this makes Mexico's domestic market somewhat more attractive for sugar producers, compared with exporting to the United States above the NAFTA tier-two tariff.) According to the US National Corn Growers Association and Corn Refiners Association, US exports of HFCS have virtually been barred from the Mexican market. See BNA (2003b, 2003c) and "Zoellick to Raise Mexico Sugar in Hopes of Resolution this Year," *Inside US Trade*, February 28, 2003.

153. By including both domestic sugar and HFCS consumption, Mexico practically lost the possibility of unlimited duty-free access to the US market, should Mexico become a net surplus producer for two consecutive years. See Haley and Suarez (1999).

154. One proposal would guarantee Mexican access to the US sugar market up to 268,000 tons over three years starting in 2004. An equivalent amount of US HFCS would also enter Mexico. See "US Mexican Industries Make New Stab at Resolving Sweetener Dispute," *Inside US Trade*, April 23, 2004.

ico's surplus sugar. To date, US and Mexican trade officials have not been able to agree on the amount of Mexican access to the US sugar market, the portion of access that would be raw and refined, shipping patterns, how long the agreement would apply, and trade remedy rules governing sugar. Facing an impasse over sweetener negotiations, the United States initiated a WTO case against the Mexican HFCS tax in March 2004.¹⁵⁵ As NAFTA tier-two tariffs phase out through 2008, US-Mexico HFCS sweetener disputes will probably intensify.¹⁵⁶

The web of sugar and HFCS disputes is all about dividing up a delicious pie of economic rent. None of the private parties to the dispute wants a truly competitive market for sugar: that would simply slash the price. What each party wants is to keep sugar prices high but to enlarge its own share of the market at another party's expense. To be sure, there are persuasive health reasons for keeping sugar prices high—and even raising them. But the compelling health argument does *not* mean that high prices should confer a windfall on sugar producers, the world norm today, and the norm under NAFTA. It makes no more sense to enrich “Big Sugar” than it would to foster a Tobacco Monopoly or Whisky Trust. If legislators are persuaded by health arguments to raise sugar prices, then sugar taxes should be the mechanism, not border protection. The revenue should be used both to augment public health budgets and to phase out acreage devoted to sugar production. In our chapter on agriculture, these themes are explored further.

Chapter 20 Cases

The NAFTA partners seldom resort to Chapter 20 panels: Only 11 cases were brought during 1994–2004, and only three of them have progressed to the stage of panel deliberations. All Chapter 20 disputes have involved the United States either as defendant (seven cases) or complainant (four cases). There have been no cases between Mexico and Canada. US-Mexico trade in agriculture (e.g., sugar, tomatoes, and broom corn) and trucking services have been the most frequent sources of dispute. Canada and Mexico also challenged the US Helms-Burton Act (echoing European complaints brought to the WTO).

Broom Corn Brooms Case

In 1997, Mexico initiated a Chapter 20 panel to resolve Mexican concerns about US emergency safeguard actions against broom corn brooms.¹⁵⁷

155. In July 2004, a WTO panel was established to review the HFCS case.

156. Beginning in January 2003, US tier-two tariffs on Mexican sugar drop by 1.5 cents a pound each year until 2008, when US sugar tariffs are supposed to disappear.

157. According to Vega-Cánovas and Winham (2002), the Chapter 20 *Broom Corn Brooms* case is important in establishing precedents for reviewing USITC decisions by an international panel.

The Chapter 20 panel decided that the United States violated its NAFTA obligations by imposing tariffs on Mexican broom exports. In compliance with the NAFTA panel decision, the United States removed its safeguard measures and complied with the panel recommendations.

Cross-Border Trucking Case

A long-standing and commercially more important dispute between Mexico and the United States concerns cross-border trucking.¹⁵⁸ Potential spillovers into bilateral agricultural trade compound this complex case. More than 45 percent of cross-border trade in agriculture and agri-food products is perishable, and about 80 percent of the value of US-Mexico trade moves by truck.¹⁵⁹ US safety concerns, partly driven by domestic trucking interests, have delayed Mexican bus and truck access and indirectly prevented progress on cross-border traffic congestion. As a consequence, transportation delays, reaching as high as 23 hours, can act as a de facto tax on agri-food trade.¹⁶⁰

After NAFTA was signed, efforts were made to facilitate anticipated liberalization of cross-border trucking under Chapter 12 (Cross-Border Trade in Services). Specifically, cross-border trucking was supposed to be permitted within commercial zones of certain US border states: California, Arizona, New Mexico, and Texas.¹⁶¹ Under NAFTA, all other cross-border shipments were to be transferred through an inefficient drayage system, much as existed before the agreement: Under the drayage system, once Mexican trucks reach the US border, they must unload their container and hire short-haul drayage tractors to pull the trailers across the border. Long-haul trucks on the other side of the border then pick up the con-

158. A separate dispute, with parallel features, involves cross-border bus traffic. We do not cover the bus dispute in this section.

159. Based on USDA estimates. The United States exports animal and horticultural products to heavily populated Mexican areas such as Mexico City and Guadalajara. Mexico exports fresh fruits and vegetables from the northwest states of Sinaloa and Sonora through Nogales, Arizona to the western US states. US bulk exports in oilseeds and grain and Mexican perishable exports are made through Veracruz and other Mexican gulf ports to US east coast ports. See Coyle (2000). For economic concerns about cross-border trucking raised in a letter from Mexico's secretary of the economy to all US senators, see "Mexican Letter on Cross-Border Trucking," *Inside US Trade*, August 3, 2001.

160. According to studies done by Texas A&M International University, removing border bottlenecks could reduce travel time between Chicago and Monterrey, Mexico, by 40 percent. Transportation bottlenecks obviously threaten fresh and perishable agricultural products. "Mexican Letter on Cross-Border Trucking," *Inside US Trade*, August 3, 2001.

161. In effect, the United States lifted the 1982 Bus Regulatory Reform Act (BRRA) to facilitate Mexican truckers with access to US border states. The BRRA imposed a two-year moratorium on issuing new US highway authorizations to trucks based in a foreign country or those owned by foreign persons.

tainer trailers and take them to their destination in the United States. The reverse happens for shipments into Mexico.

After NAFTA was signed, the United States blocked Mexican truck access across the US border, citing truck safety concerns. Most observers believe that the real reason was fervent opposition from the Teamsters Union and some US trucking firms and that truck safety issues served as a convenient cover for deeper economic objections. Following consultations, Mexico initiated a Chapter 20 case against the United States in 1998, claiming that the United States failed to fulfill its NAFTA obligations. Canada sided with Mexico in its brief to the Chapter 20 panel, describing the cross-border trucking services dispute as “archaic.” The Chapter 20 panel ruled against the United States, and in February 2001 the US government agreed to comply. The US Department of Transportation (DOT) passed regulations three months later to facilitate the NAFTA panel decision.¹⁶² The DOT Trucking Regulations outline the necessary safety measures for Mexican trucks and buses to operate in the United States.

Meanwhile, the US Congress considered legislation offered by Senators Richard Shelby (R-AL) and Patty Murray (D-WA) that would raise new licensing obstacles to cross-border trucking. Faced with the prospect of President Bush’s veto, in late November 2001 the US Congress adopted a compromise on truck safety standards that abandoned earlier proposals for electronic verification of the driver’s license of every Mexican truck driver.¹⁶³

In November 2002, President Bush ended the moratorium by allowing Mexican buses to operate beyond the commercial zone along the US-Mexico border.¹⁶⁴ President Bush also lifted a moratorium on Mexican investment in trucking and busing firms based in the United States.

162. Based on 2001 DOT Trucking Regulations, once Mexican trucks receive provisional authorization confirming that all safety conditions have been met, they can operate throughout the United States. See Sheppard (2002).

163. See “Congress Strikes a Deal on NAFTA Trucks Supported by White House,” *Inside US Trade*, November 30, 2001. See also “US Congress and Bush Administration Reach Compromise,” *SourceMex*, December 5, 2001.

164. Since 1982 (Bus Regulatory Reform Act), Mexican buses and trucks have been prevented from traveling into the continental United States due to a variety of environmental and safety regulations imposed by the DOT. On November 27, 2002, President Bush declared the US border open to Mexican buses. President Bush’s proposal was significant in allowing Mexican companies to transport passengers in cross-border scheduled bus service rather than change carriers at the border. Around the same time, there were proposals to improve NAFTA’s highway infrastructure by extending I-69 from Canada, through Michigan and Mississippi, ultimately reaching Mexico. The budget for NAFTA highway construction, however, is nonexistent. See Howard J. Shatz, “Opinion: Mexican Trucking on the Road to Trade Liberalization,” *San Diego Union-Tribune*, December 18, 2002; Jerry Pacheco, “Cross-Border Trucking a Complex Issue,” *Albuquerque Journal*, December 16, 2002; BNA (2003d); and “Paving NAFTA’s Highway,” *Christian Science Monitor*, December 9, 2002.

Domestic interest groups that support a delay, if not a complete ban, on Mexican trucks took the DOT to court over its licensing measures. Sensing a loss on truck safety issues, these groups invoked environmental concerns in their court suit. In January 2003, the Ninth Circuit agreed with the plaintiffs, holding that DOT must complete an environmental impact statement (EIS) before authorizing Mexican truck access to the United States beyond established border zones.¹⁶⁵ Meanwhile US opponents of Mexican trucking continued to raise safety issues in their press releases.

Legitimate criticisms of Mexican truck safety standards center on Mexican drayage trucks, which have higher failure rates because the economic incentives favor the use of older, less safe trucks for short distances. But truck safety arguments have less force for normal long-distance hauls. A 2001 study by the US DOT found that Mexican trucks operating in certain US border states are not significantly less safe than US trucks: The Mexican failure rate is only 5 percent higher than the US rate. Moreover, pessimistic forecasts that cross-border trucking will attract a flood of Mexican trucks onto US highways are probably ill-founded. The DOT estimates that lack of financing for Mexican truck operators will prevent a surge in the truck fleet serving the US market (Sheppard 2002).

All this has taxed the patience of the Mexican government. On March 12, 2003, Mexico proposed bilateral government consultations. In the absence of US compliance with the Chapter 20 panel, Mexico threatened to seek compensation for lost profits due to the cross-border trucking dispute.¹⁶⁶ Meanwhile, Mexico has blocked the entry of US trucks.¹⁶⁷ The US Supreme Court unanimously overturned the Ninth Circuit decision in June 2004. While the Fox administration views the Supreme Court's decision as solving a domestic conflict rather than US-Mexico differences over 2002 DOT regulations, the decision did underscore the importance of NAFTA commitments (EIU 2004, Moore 2004). As of May 2005, the Bush administration was upgrading its inspection program to resolve the remaining doubts on truck safety. The final outcome will test whether the United States can balance the demands of its NAFTA commitment, the protests of organized labor, and its obligation to ensure highway safety.

165. The court determined that the DOT failed Clean Air Act and National Environmental Policy Act requirements when a DOT study concluded that Mexican truck access to the United States would not have a significant impact on the environment. See "Court Blocks Bush Implementation of NAFTA Truck Panel," *Inside US Trade*, January 24, 2003; and "Congress Strikes a Deal on NAFTA Trucks Supported by White House," *Inside US Trade*, November 30, 2001.

166. According to the Mexican Economy Ministry, 1,500 Mexican truck companies submitted applications for permission to enter the United States; 200 US truckers are waiting for authorization to operate beyond the commercial zone; and 1,300 Mexican truckers are waiting for approval to operate within the commercial zone. See BNA (2003d).

167. In March 2003, the Mexican economic secretary temporarily cancelled the transportation chapter of NAFTA and decided to close off Mexico's northern border from US transport vehicles. See "Border Will Remain Closed to US Truckers," *Corporate Mexico*, March 7, 2003.

Conclusion and Recommendations

While the alarms over NAFTA Chapter 11 seem overblown, the shortcomings of NAFTA Chapters 19 and 20 highlight the need for institutional improvements. Even though NAFTA governments have no desire to create supranational institutions (modeled along EU lines), stronger institutions would facilitate the resolution of disputes and strengthen the North American accord.

Institutional Consolidation

We think the place to start is with an agreed roster of panelists who would serve on all NAFTA cases for a period of six years. The roster might, for example, have 30 names (10 nominated by each country) from which five arbitrators would be selected in each case, whether it arises under Chapters 11, 14, 19, or 20 or involves labor or environmental questions. Just as federal judges hear a wide range of civil and criminal cases, panelists with a broad range of experience in international economic law can be selected. To attract qualified panelists, the NAFTA Secretariat should match the ICSID rate of about \$2,400 per day. The big advantage of a single roster is that once panelists are named to a roster, they can be disqualified only on highly specific grounds (e.g., conflict of interest). Time delays in choosing panelists will be reduced, and panelists are more likely to know one another, cultivating a certain degree of “judicial collegiality.”¹⁶⁸

Second, NAFTA partners need to establish a joint funding pool to cover costs for proceedings, travel, and panelist fees. Canada maintains a permanent staff of 8 to 15 persons and an annual budget of more than \$2 million. Mexico has 7 to 16 staff and an annual budget between \$1 and \$2 million. By contrast, the United States has 3 staff members and an average budget of about \$1 million. Part of the problem is that the US Section on NAFTA is buried in the International Trade Administration (ITA) of the US DOC and lacks a separate line item in the budget. The chronic lack of funding in the US section causes Canada and Mexico to reimburse about 50 percent of the panel costs. To resolve this disparity in funding levels, and to raise the profile of the US commitment to NAFTA, James R. Holbein, former US secretary at the NAFTA Secretariat, has recommended that the US section be assigned its own line item in the budget, funded with at least \$3 million annually, have at least 6 staff members, and report directly to the secretary of commerce (not through the ITA) (Holbein 2004).

168. As Gustavo Vega-Cánovas points out, panelists on the roster would need to subscribe to a high code of conduct, and a selection procedure (possibly a negative strike system) would need to be agreed to. Numerous other administrative features would also need to be worked out. We thank Vega-Cánovas for this observation.

As a profile-raising measure, NAFTA partners should consolidate their national NAFTA desks into a single staff, equally funded by all three parties. The staff members should have civil service protection and should all work in a single NAFTA headquarters building. We leave the choice of a headquarters site to political bargaining between the members.

Structural Changes: Chapters 11, 19, and 20

In addition to consolidating NAFTA staff in a single headquarters building and establishing a roster of semipermanent panelists, we offer structural recommendations for Chapters 11, 19, and 20.¹⁶⁹ Since these issues spark contentious debates, particularly in the US Congress, they will need to be bundled with NAFTA reforms in other areas to ensure congressional approval.

Chapter 11

Chapter 11 should harmonize investor-state dispute settlement provisions with US-Chile and US-Singapore FTAs, which clarify direct and indirect expropriation. The interpretation of Chapter 11 expropriation provisions is important, and the language in the Chile and Singapore FTAs indicates that environmental or health regulations would rarely constitute compensable indirect expropriation.¹⁷⁰ Moreover, both FTAs include changes that limit the scope of “expropriation.” While NAFTA uses broad language to define indirect expropriation as measures that are “tantamount to nationalization or expropriation,” the Chile and Singapore FTAs limit indirect expropriation to measures that “have an effect equivalent to direct expropriation.”¹⁷¹ Both FTAs also emphasize that the economic impact of government policies, by itself, does not establish the basis for indirect expropriation.

169. The Chapter 11 process has generally been successful, and Chapter 14 has never been invoked. In the chapters on environment and labor, we discuss how to strengthen dispute resolution in those agreements.

170. The Chile and Singapore FTAs narrow the protection against expropriation without compensation to “tangible or intangible property right or property interest” rather than to an “investment,” as defined under NAFTA Chapter 11. Unlike NAFTA, the Chile and Singapore FTAs also include claims based on the breach of “an investment authorization,” which some argue could open domestic regulatory programs to new areas of potential investor challenges. See Trade and Environment Policy Advisory Committee (TEPAC) Report, “US-Singapore FTA,” February 27, 2003.

171. Direct and indirect expropriations are clarified under Article 15 investment provisions and the expropriation side letter in the US-Singapore FTA. Similarly, indirect and direct expropriation provisions are clarified under Article 10 investment provisions in the US-Chile FTA. See USTR (2003a, 2003b).

Chapter 11 should also include an appellate body mechanism for investor-state disputes resembling the recent Central American Free Trade Agreement (CAFTA) proposal.¹⁷² Appellate mechanisms can be important for establishing clear jurisprudence in arbitration panels that are consistent with US investor protections (Butler et al. 2004, Peterson 2003). The Singapore and Chile FTAs, as an example, include language that could be used to establish an FTA appellate review mechanism or provide recourse to a future multilateral investment appellate body, options notably absent in NAFTA. In the context of CAFTA, an appellate body has been concretely proposed.

Chapter 19

While Chapter 19 served its purpose under CUSFTA—namely, expediting judicial review and providing a voice for Canada in US AD and CVD decisions—the Chapter 19 process under NAFTA has not fared as well. Decisions on Canadian complaints required an average of about 315 days under CUSFTA, compared with an average near 700 days under NAFTA.¹⁷³ Moreover, multiple remands and extraordinary challenges have marred the process. In light of this record, two alternative approaches should be considered.

One alternative is simply to maintain Chapter 19 provisions as they are currently written but set Chapter 19 panels within the context of the dispute settlement system reforms that we outlined above. Perhaps in this new setting, delays and frictions would be reduced in future Chapter 19 cases. But the institutional reforms we have suggested would not address the fundamental weakness in Chapter 19—the absence of a common NAFTA benchmark for judging national AD and CVD actions and the absence of agreed standards of NAFTA panel review.¹⁷⁴ Unless these fundamental difficulties are resolved, the Chapter 19 process will continue to encounter difficulty, especially in controversial big-ticket cases.

Alternatively, the NAFTA countries simply could abolish Chapter 19 and consign all disputes over AD and CVD determinations to the WTO.

172. The establishment of a CAFTA appellate mechanism is pending a decision over when to initiate the appeals process. At issue is whether only a serious error of law, or whether any error of law, is sufficient to initiate an appeal. See “Decision Close on CAFTA Investor-State Appellate Body Proposal,” *Inside US Trade*, September 17, 2004.

173. The Chapter 19 decision process has proven slower on average than the US Court of International Trade. In the *Magnesium* case, for example, which was initiated in 2000, the NAFTA Chapter 19 panel did not reach a final decision until June 2004. See Potter (2004) and Feldman (2004).

174. The question of standard of review comes down to how much deference the NAFTA panel should give to the national administering agency. Should the panel remand only those agency findings that are clearly erroneous? Or should it also remand agency findings that are not adequately supported by the evidence? The latter test is a common standard in US courts.

The WTO dispute settlement mechanisms were still on the drawing board when NAFTA was ratified. They have now been working for nearly a decade, and numerous AD and CVD cases have been decided. If NAFTA members are willing to consider adopting WTO codes in Chapter 19 cases, they might as well go all the way and simply turn to the established WTO system to resolve AD and CVD disputes. In our view, this option makes the most sense.¹⁷⁵ We note, however, that WTO decisions that reverse an AD or CVD determination do not result in the refund of penalty duties collected prior to the WTO decision, unlike Chapter 19 decisions. If this feature is critical, NAFTA members could agree among themselves to a refund protocol, in the event of an adverse WTO ruling.

Chapter 20

Chapter 20 should be strengthened by adding provisions for binding arbitration and monetary awards. In theory, NAFTA parties can already enforce Chapter 20 panel reports by suspending equivalent benefits against the defendant party.¹⁷⁶ However, without binding arbitration, it is hard to get an impartial measure of equivalent benefits. Moreover, monetary awards inflict less collateral damage than trade sanctions and should thus become the preferred remedy.

Frequently overlooked, Chapter 20 includes significant provisions for addressing administrative failures under NAFTA. To add teeth to Chapter 20 decisions, NAFTA parties should first clarify that Chapter 20 Commission “reports” are in fact “decisions.” Second, Chapter 20 should include a stipulation under Article 2018 that final Chapter 20 panel decisions “shall be binding.”¹⁷⁷

175. We recognize, however, that the Chapter 19 appeal process has been effective in resolving many cases, and the choice of Chapter 19 or the WTO (or both) has proved relatively favorable to Canada and Mexico. If the Chapter 19 process were not available, and if instead only the WTO ruled against the United States in the softwood lumber dispute, the United States might prolong the WTO compliance process much longer than it would prolong the Chapter 19 compliance process. We thank Patrick Macroy for this observation.

176. Under Article 2019, if the defendant party ignores Chapter 20 panel reports, the complaining party can retaliate by suspending benefits equal to the benefits denied by the defendant party’s violations. See Feldman (2004). While Article 2019 parallels remedies available under the WTO dispute settlement system, NAFTA Chapter 20 is different from the WTO in at least one respect. Since Chapter 20 decisions are not binding, the Chapter 20 panel would neither evaluate whether sufficient evidence warranted retaliation by disputing parties nor whether parties adequately followed Chapter 20 panel recommendations.

177. The language of Chapter 20 binding decisions should follow the Chapter 19 ECC procedure. Specifically, Annex 1904.13 stipulates that Chapter 19 ECC decisions “shall be binding on the Parties with respect to the particular matter between the Parties that was before the panel.”

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Appendix 4A

Table 4A.1 Chronology of WTO softwood lumber disputes, January 2002 to 2004

Date	Status
December 2001	WTO panel established to evaluate US antidumping (AD) determination against Canadian softwood lumber (SWL) exports to the United States (WTO DS 236).
May 2002	US Department of Commerce (DOC) final AD and countervailing duty (CVD) determinations: average CVD rate of 18.79 percent, average AD rate of 8.43 percent, and average combined rate of 27.22 percent.
September 2002	WTO final report determines that US CVD findings based on Canadian provincial stumpage programs violated some WTO obligations (WTO DS 236).
October 2002	WTO panel established to evaluate US CVD determination against Canadian SWL exports to the United States (WTO DS 257).
January 2003	WTO panel established to evaluate US AD determination against Canadian SWL exports to the United States (WTO DS 264).
May 2003	WTO panel established to evaluate US AD determination against Canadian SWL exports to the United States (WTO DS 277).
August 2003	WTO panel rejects some of the Canadian government claims and determines that US CVD actions are inconsistent with the WTO Agreement on Subsidies and Countervailing Measures (SCM) (WTO DS 257).
December 2003	WTO panel determines that the US International Trade Commission (USITC) AD determination violates WTO AD rules (WTO DS 264).
January 2004	WTO panel reverses WTO CVD panel's August 2003 finding. WTO panel determines that the DOC could use benchmarks other than market prices in "very limited circumstances," but WTO panel declines to specify whether comparison of US prices with Canadian stumpage prices is consistent with WTO rules (WTO DS 257).
March 2004	WTO panel rejects USITC AD injury findings (WTO DS 277).
April 2004	Final WTO panel report determines some elements of the US AD injury determination are inconsistent with US WTO obligations (WTO DS 264).
April 2004	The United States and Canada agree to adhere to the WTO CVD decision by December 17, 2004 (WTO DS 257).
June 2004	DOC preliminary determination in first administrative review: recalculates AD and CVD rates—imposes countrywide CVD rate of 9.2 percent and AD rate of 4 percent (about half of May 2002 rates).
July 2004	DOC issues revised, recalculated CVD determinations: New DOC recalculation could reduce the CVD cash deposit rate from 18.79 to 7.82 percent, but the CVD cash deposit rate is subject to further revisions until the WTO panel process is completed.
August 2004	WTO Appellate Body report upholds WTO panel findings that the US zeroing methodology violates WTO AD rules (WTO DS 264).
November 2004	WTO final determination on the CVD cash deposit rate is due.

Sources: WTO Dispute Settlement Body, www.wto.org/english/tratop_e/dispu_e/dispu_e.htm; Government of British Columbia, Ministry of Forests, www.for.gov.bc.ca/HET/Softwood/; and Office of the US Trade Representative, Monitoring and Enforcement, www.ustr.gov/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/Section_Index.html.

Table 4A.2 Chronology of NAFTA softwood lumber disputes, January 2002 to 2004

Date	Status
April 2002	NAFTA panel established to evaluate US antidumping (AD) determination against Canadian softwood lumber (SWL) exports to the United States.
April 2002	NAFTA panel established to evaluate countervailing duty (CVD) determination against Canadian SWL exports to the United States.
May 2002	US Department of Commerce (DOC) final AD and CVD determinations: average CVD rate of 18.79 percent, average AD rate of 8.43 percent, and average combined rate of 27.22 percent.
May 2002	NAFTA panel established for US threat of injury determination (AD) against Canadian SWL exports to the United States.
July 2003	NAFTA panel remands US AD injury determination to DOC.
August 2003	NAFTA panel remands US CVD determination to DOC.
September 2003	NAFTA panel remands US AD injury determinations to US International Trade Commission (USITC).
January 2004	DOC revises CVD finding in response to NAFTA panel remand.
March 2004	NAFTA panel again remands US AD injury determination to DOC.
May 2004	NAFTA panel rejects USITC injury determination and again remands US AD injury determination to USITC.
June 2004	DOC preliminary determination in first administrative review: recalculates AD and CVD rates—imposes countrywide CVD rate of 9.2 percent and AD rate of 4 percent (about half of May 2002 rates).
June 2004	NAFTA panel instructs DOC to recalculate its CVD determinations.
July 2004	DOC issues revised, recalculated CVD determinations: New DOC recalculation could reduce the CVD cash deposit rate from 18.79 to 7.82 percent, but the CVD cash deposit rate is subject to further revisions until the NAFTA panel process is completed.
August 2004	NAFTA panel releases third report, which again determines that USITC findings do not support threat of injury and remands AD determination to USITC, ordering USITC to find no threat of injury within 10 days. If the United States initiates an Extraordinary Challenge Committee (ECC) procedure and the NAFTA panel decision is still upheld, then CVD and AD cases concerning USITC findings will be terminated and Canada will have won the SWL phase IV litigation.
October 2004	NAFTA panel will issue its finding on the July 2004 DOC CVD determination.
December 2004	DOC final administrative review is due: If DOC finds CVD and AD rates lower than 27.22 percent, then exporters should receive refunds. Otherwise, exporters will have to pay the difference. Either the United States or Canada can appeal the final administrative review to a NAFTA panel.

Sources: NAFTA Secretariat, Decisions and Reports, www.nafta-sec-alena.org/DefaultSite/home/index_e.aspx; Government of British Columbia, Ministry of Forests, www.for.gov.bc.ca/HET/Softwood/; and Office of the US Trade Representative, Monitoring and Enforcement, www.ustr.gov/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/Section_Index.html.

Table 4A.3 Chapter 20 disputes under NAFTA, January 1994 to March 2003

Initial filing/ termination	Petitioner country	Defendant country	Subject of dispute	Status/outcome
February 1995/ settled December 1996 (CDA-95-2008-01)	United States	Canada	Canada's application of customs duties higher than those specified in NAFTA to certain US-origin agricultural products	Panel unanimously determined that the Canadian tariffs conformed with NAFTA provisions.
Consultations 1995/ active	United States	Mexico	Discrimination against US trucking firms	Consultations at NAFTA Commission meeting in 1995; discussions continue between governments.
Consultations January 1996/active	Mexico	United States	Tariff rate quota on tomatoes	Consultations were held on January 18, 1996. Bilateral negotiations on tomatoes ongoing.
Consultations April 1996/active	Canada and Mexico	United States	Cuban Liberty and Democratic Solidarity Act of 1996 (Helms-Burton Act)	Consultations were held on April 20, 1996 and May 28, 1996; discussed by NAFTA Commission on June 28, 1996.
October 1996/active	United States	Mexico	Alleged discriminatory regulations limiting truck size for local delivery	Consultations ongoing.
Consultations October 1996/active	Canada	United States	US Sugar-Containing Products Re-Export Program	Consultations requested on October 23, 1996 and held on November 20, 1996.
January 1997/settled January 1998 (USA-97-2008-01)	Mexico	United States	US safeguard action taken on broom corn brooms from Mexico, imports that allegedly caused injury to the US domestic industry	Panel determined that the United States violated its obligations and recommended that the United States bring its measure into compliance with NAFTA.
July 1998/settled February 2001 (USA-MEX-98-2008-01)	Mexico	United States	US restrictions on cross-border trucking services and on Mexican investment in the US trucking industry	Panel unanimously decided that the United States breached its NAFTA obligations.
April 1999/settled November 1999	United States	Canada	Certain measures and practices by Canada affecting sports fishing and tourism services	Province of Ontario revoked the provincial measures that were under investigation.
August 2000/active	Mexico	United States	US tariff rate quota on sugar	Bilateral negotiations on sugar ongoing.
March 2003/active	Mexico	United States	Discrimination against Mexican trucking firms	Mexico renewed government consultations on March 12, 2003.

Notes: The first column shows the date of request for panel review under Chapter 20 or date of initial consultations when no panel review has been requested. CDA: panels reviewing Canadian agency determinations; MEX: panels reviewing Mexican agency determinations; and USA: panels reviewing US agency determinations. Sources: NAFTA Secretariat, Decisions and Reports 2002, www.nafta-sec-alena.org/english/index.htm; OAS Foreign Trade Information System, SICE Dispute Settlement Binational Panel Decisions and Arbitral Panel Reports 2002, www.sice.oas.org/dispute/natfdispe.asp; Office of the US Trade Representative 2002, www.usitr.gov/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/Section_Index.html.

Table 4A.4 Chapter 11 disputes under NAFTA, August 1995 to August 2004

Initial filing/ termination ^a	Petitioner and nationality	Defendant country	Subject of dispute	Status/outcome
August 1995/ no claim filed	Halchette Distribution Services, United States	Mexico	Claim unknown	Notice of intent to arbitrate filed; no further action taken
March 1996/ no claim filed	Signa S.A. de C.V., Mexico	Canada	Canadian regulations injured Mexican company's investment in Canada	Notice of intent set claim for \$36.8 million; no further action taken
September 1996/ July 1998	Ethyl Corporation, United States	Canada	Canadian ban on MMT imports. Claimed \$250 million for dam- ages and expropriation	Case settled for \$13 million; ban on MMT imports eliminated by the government of Canada prior to tribunal decision
October 1996/ August 2000	Metalclad Corpora- tion, United States	Mexico	Government actions preventing the opening of a hazardous waste landfill. Claimed \$90 million	Tribunal ordered Mexico to pay Met- alclad \$16.7 million in damages
December 1996/ November 1999	Desechos Sólidos de Naucalpan C.V. (Azinian), United States	Mexico	Claim for \$17 million for seizure of property and breach of contract	Resolved in favor of the Mexican government; no award of costs made
February 1998/ December 2002	Marvin Feldman, United States	Mexico	Claim for \$50 million for lost profits due to refusal to rebate excise taxes on cigarette exports	Tribunal ordered Mexico to pay Feldman \$982,901 plus interest
June 1998/ June 2000	USA Waste, United States	Mexico	Claim for \$60 million	Resolved in favor of the Mexican government but no award on costs incurred by Mexico; the United States ordered to pay for costs of arbitration proceedings

July 1998/ November 2000	S. D. Myers, United States	Canada	Claim for \$20 million for losses due to export ban on PCB waste	Tribunal affirmed in part and remanded in part; resolved in favor of S. D. Myers for \$3.87 million plus interest
July 1998/active	Loewen Group Inc., Canada	United States	Claim for \$725 million for discrimination and expropriation due to a \$550 million damage sentence in civil case	Tribunal determined that NAFTA did not give jurisdiction over an investor that was founded in Canada and reincorporated in the United States (June 2003); tribunal also noted that undue intervention in domestic matters by international arbitrators could "damage . . . the viability of NAFTA itself"
November 1998/ Withdrawn 1999	Sun Belt Water Inc., United States	Canada	Claim for \$220 million for biased treatment by government of British Columbia in joint venture	Appears that claim is withdrawn
December 1998/ November 2002	Pope & Talbot Inc., United States	Canada	Claim for \$130 million ^b for discriminatory implementation of Softwood Lumber Agreement	Tribunal dismissed 2 of the 4 claims made by Pope & Talbot Inc.; tribunal ordered Canada to pay Pope & Talbot \$461,566 plus interest for damages and cost of tribunal proceedings
June 1999/ August 2005	Methanex Corp., Canada	United States	Claim for \$970 million in damages due to California state ban on the use of MTBE (gasoline additive)	Tribunal ordered Methanex to pay for the cost of US legal fees and arbitration proceedings totaling nearly \$4 million

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Table 4A.4 Chapter 11 disputes under NAFTA (continued)

Initial filing/ termination ^a	Petitioner and nationality	Defendant country	Subject of dispute	Status/outcome
September 1999/ October 2002	Mondev International, Canada	United States	Claim for \$16 million plus interest and legal costs for a failed 1978 small development deal in Boston; Mondev sued and won a jury trial in 1994 but the verdict was reversed by the Massachusetts Supreme Judicial Court (SJC); Mondev contested SJC's decision	Panel unanimously rejected each of Mondev's claims (October 2002); no award on costs was made
May 2000/active	UPS of America Inc., United States	Canada	Claim for \$100 million; UPS accuses Canada Post of subsidizing its courier services with revenue from its regular letter delivery service	Tribunal dismissed UPS Article 1105 claim and rejected Canada's jurisdictional challenge under Article 1102; consultations ongoing
July 2000/ January 2003	ADF Group Inc., Canada	United States	Claim for \$90 million; ADF protests US Department of Transportation enforcement of US Federal Surface Transportation Assistance Act (1982) that requires federally funded state highway projects to use only US-produced steel	Tribunal dismissed ADF claims against the United States; tribunal ordered the US government and ADF to split the costs of the proceeding
September 2000/ June 2002	USA Waste, United States	Mexico	Resubmitted claim that the tribunal's initial decision would prevent USA Waste from bringing any additional claims relating to a possible breach of NAFTA obligation	Tribunal dismissed Mexico's argument that the tribunal lacked jurisdiction on this case; no award on costs was made

November 2000/ active	Adams et al., United States	Mexico	Claim for \$75 million for expropriation of land developed by Adams et al.	Notice of arbitration filed February 2001; no further action taken
December 2000/ withdrawn 2000	Ketcham Investments, Inc. and Tysa Investments, Inc., United States	Canada	Claim for C\$30 million as compensation for damages caused by Canada's regulation on softwood lumber	Claim withdrawn
December 2001/ withdrawn April 2002	Trammel Crow Company, United States	Canada	Claim for \$32 million; Trammel Crow alleges Canada's control over the Canada Post Corporation breaches its NAFTA obligations	Claim withdrawn
December 2001/ active	Francis K. Haas, United States	Mexico	Claim unknown	Notice of intent to arbitrate filed December 2001; no further action taken
Unknown month 2001/active	Fireman's Fund Insurance Company, United States	Mexico	Claim for \$100 million; Fireman's Fund accuses Mexican government of facilitating the purchase of debentures denominated in Mexican pesos and owned by Mexican investors but not facilitating the purchase of debentures denominated in US dollars and owned by Fireman's Fund	Award on jurisdiction filed July 2003; tribunal ruled that it could allow the Fireman's Fund expropriation claim to proceed but that it lacked jurisdiction to examine the investor's claims of violation of Chapter 11's rules on national treatment and minimum standards of treatment, as well as Chapter 14's rules on national treatment
Unknown month 2002/active	International Thunderbird Gaming Corporation, Canada	Mexico	Claim for \$100 million for losses associated with the Mexican government's regulation, enforcement, and closure of gaming facilities	Notice of arbitration filed in 2002; consultations ongoing

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Table 4A.4 Chapter 11 disputes under NAFTA *(continued)*

Initial filing/ termination^a	Petitioner and nationality	Defendant country	Subject of dispute	Status/outcome
January 2002/active	Calmark Commercial Development Inc., United States	Mexico	Claim for \$400,000 for actions taken by Mexico's judiciary that amounted to measures tanta- mount to expropriation	Notice of intent to submit claim to arbi- tration filed January 2002; no further action taken
February 2002/active	Robert J. Frank, United States	Mexico	Claim for \$1.5 million as compen- sation for damages caused by Mexican government's expropri- ation of land occupied and de- veloped by Robert J. Frank	Notice of arbitration filed in August 2002; no further action taken
March 2002/active	James Russell Baird, Canada	United States	Claim for \$660 million as com- pensation for damages caused by US government regulation of methods for dis- posing nuclear and toxic waste beneath the seabed ("sub-seabed disposal"); Baird alleges that US Con- gress and Department of En- ergy retroactively and arbitrar- ily changed rules that placed a de facto ban on sub-seabed disposal, without submitting notices and publication re- quirements as necessary under NAFTA Article 718. ^{3c}	Notice of intent to submit claim to arbitration filed in March 2002; no further action taken

April 2002/active	GAMI Investments, Inc., United States	Mexico	Claim for \$55 million; GAMI says the Mexican government expropriated sugar mills owned by five subsidiaries of Grupo Azucarero México, S.A. de C.V., a company in which GAMI claims to hold a 14.18 percent ownership interest; GAMI also alleges the Mexican government regulated the sugar industry in a discriminatory and arbitrary manner	Resolved in favor of the Mexican government; no award of costs made
May 2002/active	Doman Industries Ltd., Canada	United States	Claim for \$513 million; Doman accuses the US government of preventing it from selling softwood lumber products in the United States	Notice of intent to submit claim to arbitration filed in May 2002; no further action taken
May 2002/active	Tembec Corporation, Canada	United States	Claim for \$200 million; Tembec accuses the United States of violating NAFTA Chapter 11 provisions when the USITC imposed antidumping and countervailing duties of 29 percent on Tembec's softwood lumber exports to the United States	Notice of arbitration and statement of claim filed in December 2004; in March 2005, the US government requested the establishment of a consolidation tribunal to address three Chapter 11 cases—Canzor, Terminal Forest Products, and Tembec Corporation
July 2002/active	Canfor Corp., Canada	United States	Claim for \$250 million; Canfor alleges losses as a result of US antidumping, countervailing duty determinations on softwood lumber in March 2002	Notice of arbitration filed July 2002; consultations ongoing

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Table 4A.4 Chapter 11 disputes under NAFTA *(continued)*

Initial filing/ termination ^a	Petitioner and nationality	Defendant country	Subject of dispute	Status/outcome
August 2002/active	Kenex Ltd., Canada	United States	Claim for \$20 million; Kenex claims injuries resulting from the Drug Enforcement Administration's interpretation of the Controlled Substances Act as prohibiting the sale of products that cause THC to enter the human body	Notice of arbitration filed in August 2002; the US Court of Appeals for the Ninth Circuit granted Kenex petition and affirmed enforcement of NAFTA Chapter 11 obligations
January 2002/active	Corn Products International, United States	Mexico	Claim for \$250 million; Corn Products International alleges the Mexican government's tax on high fructose corn syrup represented a breach of Mexico's NAFTA obligations	Notice of arbitration filed in October 2003; consultations ongoing
September 2002/ active	Crompton Corp., United States	Canada	Claim \$100 million for lost profit due to Canadian government's export ban of the pesticide Lindane	Amended notice of arbitration filed in September 2002; no further action taken
July 2003/active	Glamis Gold Ltd., Canada	United States	Claim \$50 million for California regulations requiring backfilling and grading for mining operations in the vicinity of Native American sacred sites	Notice of arbitration filed in July 2003; consultations ongoing

September 2003/ active	Grand River Enterprises et al., Canada	United States	Claim \$340 million for violation of NAFTA Chapter 11 rules con- cerning national treatment, and expropriation, among others; Grand River alleges the 1998 settlement agreement between various state attorney generals and the major tobacco com- panies adversely impacted the future of competition and trade in the US cigarette industry	Notice of arbitration filed in March 2004; consultations ongoing
September 2003/ active	Terminal Forest Products Ltd., Canada	United States	Claim \$90 million for alleged in- juries resulting from certain US antidumping, countervail- ing duty, and material injury determinations on softwood lumber	Notice of arbitration filed in March 2004; consultations ongoing
October 2003/ active	Archer Daniels Midland Co. and A. E. Staley Manu- facturing Co., United States	Mexico	Claim in excess of \$100 million. ADM and Staley allege the Mexican government's tax on high-fructose corn syrup has forced it to stop production in Mexico and halt exports to Mexico	Notice of intent to submit claim to arbitration filed in October 2003; consultations ongoing
February 2004/active	Albert J. Connolly, United States	Canada	Claim unknown	Notice of intent to submit claim to arbitration filed in February 2004

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Table 4A.4 Chapter 11 disputes under NAFTA (continued)

Initial filing/ termination ^a	Petitioner and nationality	Defendant country	Subject of dispute	Status/outcome
August 2004/active	Canadian Cattlemen for Fair Trade (CCFT), Canada	United States	Claim for \$113 million. CCFT claims the US government's prolonged closing of the US- Canada border violated NAFTA Chapter 11 provisions	Notice of intent filed in August 2004; consultations ongoing
August 2004/active	North Alamo Water Supply Co., United States	Mexico	Claim up to \$555 million for missed water payments; North Alamo Water Supply claims the Mexican government diverted water destined for the United States, violating the 1944 bilateral water treaty	Notice of intent filed in August 2004; consultations ongoing

Note: Environment-related cases are in bold.

a. Date of initial notice of intention to arbitrate (whether or not a claim was filed) and date of award or settlement (unless still active).

b. Damages claimed range from \$30 million to \$500 million depending on the source.

c. Damages claimed range from \$660 million each for alleged violations (Articles 1102, 1103, or 1105) to \$5.8 billion (Articles 1106 and 1110).

Sources: Mann and von Molke (1999); Soloway (1999); Canada Department of Foreign Affairs and International Trade, www.dfaif-maeci.gc.ca/fna-nac/dispute-e.asp; US Department of State, www.state.gov/s/l/c3433.htm; and Todd Weiler's Web site, www.naftaclaims.com (also known as www.naftlaw.org).

Table 4A.5 Chapter 19 disputes under NAFTA, January 1994 to present

Date of initial filing	Complainant	Respondent	Products subject to administrative determinations	Status/outcome
[CDA-94-1904-01] Unknown month/ terminated 1994	US producers	Canada	Finding of injury on certain fresh whole delicious, red delicious, and golden delicious apples in nonstandard containers for processing	Review terminated by joint consent of participants
[CDA 94-1904-02] January 1994/ settled July 1995	US producers	Canada	Finding of injury on synthetic baler twine with a knot strength of 200 pounds or less	Unanimously affirmed in part and remanded in part the agency's determination
[CDA-94-1904-03] August 1994/settled June 1995	US producers	Canada	Antidumping (AD) determination against certain corrosion-resistant steel sheet products	Unanimously affirmed in part and remanded in part the agency's decision; panel affirmed, with two partial dissenting opinions
[CDA-94-1904-04] September 1994/ settled July 1995	US producers	Canada	Determination to exclude certain corrosion-resistant steel sheet products	Unanimously affirmed the agency's determination
[MEX-94-1904-01] September 1994/ settled April 1998	US producers	Mexico	Final AD duty on flat-coated steel products	Unanimously remanded the determination to the agency twice, in each instance affirming part of the determination
[MEX-94-1904-02] September 1994/ settled October 1995	US producers	Mexico	Final AD and injury determination on cut-to-length steel plate industry	Panel majority, with two dissenting opinions, remanded the final determination to the investigating authority
[MEX-94-1904-03] December 1994/ settled September 1996	US producers	Mexico	Final AD duty determination on crystal and solid polystyrene	Panel majority, with one dissenting opinion and one concurring opinion, affirmed the agency (SECOFI) provided sufficient findings of fact and conclusions of law to support its final determination

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Table 4A.5 Chapter 19 disputes under NAFTA, January 1994 to present (continued)

Date of initial filing	Complainant	Respondent	Products subject to administrative determinations	Status/outcome
[USA-94-1904-01] March 1994/settled September 1995	Canadian producers	United States	Countervailing duty (CVD) determination on live swine	Unanimously affirmed in part and remanded in part the agency's determination
[USA-94-1904-02] Unknown month/settled October 1995	Mexican producers	United States	CVD determination on leather wearing apparel	Unanimously remanded the final determination at the request of Mexico's investigating authority
[CDA-95-1904-01] August 1995/settled November 1995	US producers	Canada	Finding of injury on certain malt beverages	Unanimously affirmed the agency's determination
[CDA-95-1904-02] Unknown month/terminated 1995	US producers	Canada	Final AD determination on fresh whole delicious, red delicious, and golden delicious apples	Review automatically terminated by complainant
[CDA-95-1904-03] Unknown month/terminated 1995	US producers	Canada	AD determination on machine tufted carpeting	Review automatically terminated by complainant
[CDA-95-1904-04] December 1995/settled January 1997	US producers	Canada	Final AD determination on refined sugar	Unanimously affirmed in part and remanded in part the agency's determination
[MEX-95-1904-01] Unknown month/terminated 1995	US producers	Mexico	AD duty determination on seamless line pipe	Review automatically terminated by the complainant
[USA-95-1904-01] January 1995/settled July 1996	Mexican producers	United States	AD determination on porcelain-on-steel cookware	Unanimously affirmed in part and remanded in part the agency's determination

[USA-95-1904-02] May 1995/settled September 1996	Mexican producers	United States	AD determination on gray Portland cement and cement clinker	Unanimously affirmed the US Department of Commerce's final determination
[USA-95-1904-03] June 1995/settled May 1996	Canadian producers	United States	Finding of AD on color picture tubes	Unanimously affirmed, with one concurring opinion, the decision of the US Department of Commerce
[USA-95-1904-04] July 1995/settled December 1996	Mexican producers	United States	Final AD determination on oil country tubular goods	Unanimously affirmed in part and remanded in part the agency's determination
[USA-95-1904-05] November 1995/ settled March 1997	Mexican producers	United States	Final AD determination on fresh cut flowers	Unanimously remanded the agency's determination
[CDA-96-1904-01] Unknown month/ terminated 1996	US producers	Canada	Final AD determination on bacteriological culture media	Review automatically terminated by complainant
[MEX-96-1904-01] Unknown month/ terminated 1996	Canadian producers	Mexico	Final AD determination on cold-rolled steel sheet	Review automatically terminated by complainant
[MEX-96-1904-02] January 1996/ settled December 1998	Canadian producers	Mexico	Final AD and countervailing determinations on rolled steel plate	Unanimously affirmed in part and remanded in part the agency's determination twice
[MEX-96-1904-03] February 1996/ settled September 1997	Canadian producers	Mexico	Final AD determination on hot-rolled steel sheet	Unanimously affirmed in part and remanded in part
[USA-96-1904-01] Unknown month/ terminated 1996	US producers	Mexico	Final AD determination on porcelain-on-steel cooking ware	Review automatically terminated by complainant

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Table 4A.5 Chapter 19 disputes under NAFTA, January 1994 to present (continued)

Date of initial filing	Complainant	Respondent	Products subject to administrative determinations	Status/outcome
[CDA-97-1904-01] August 1997/settled August 1998	US producers	Canada	Finding of injury on certain concrete panels, reinforced with fiberglass mesh	Unanimously affirmed the agency's determination
[CDA-97-1904-02] December 1997/ settled December 1999	Mexican producers	Canada	Finding of injury on certain hot-rolled carbon steel plate	Unanimously remanded the agency's determination on standard of review; panel majority, with two dissenting opinions, affirmed the agency's determination on remand
[MEX-97-1904-01] Unknown month/ terminated 1997	Mexican producers	United States	Final countervailing determination on hydrogen peroxide	Review automatically terminated by joint consent of participants
[USA-97-1904-01] May 1997/settled February 2000	Mexican producers	United States	AD determination on gray Portland cement and clinker	Panel unanimously affirmed the agency's determination on remand; Extraordinary Challenge Committee (ECC) filed by the US government in March 2000
[USA-97-1904-02] May 1997/settled December 1998	Mexican producers	United States	AD determination on gray Portland cement and clinker	Panel affirmed, with one partial dissent, the agency's determination
[USA-97-1904-03] May 1997/settled September 1999	Canadian producers	United States	Final AD determination on corrosion-resistant carbon steel flat products	Panel unanimously remanded the determination to the agency twice
[USA-97-1904-04] Unknown month/ terminated 1997	Canadian producers	United States	Final countervailing determination on pure and alloy magnesium	Panel review terminated by the requestors

[USA-97-1904-05] Unknown month/ terminated 1997	Mexican producers	United States	Final AD determination	Panel review terminated by the requestors
[USA-97-1904-06] Unknown month/ terminated 1997	Mexican producers	United States	Final AD determination on circular welded nonalloy steel pipe and tube	Panel review terminated by joint consent of participants
[USA-97-1904-07] August 1997/settled July 1999	Mexican producers	United States	Final AD determination on porcelain-on-steel cookware	Panel unanimously affirmed in part and remanded in part the agency's determination
[USA-97-1904-08] Unknown month/ terminated 1997	Canadian producers	United States	Final countervailing determination on steel wire rod	Panel review terminated by joint consent of participants
[CDA-USA-98-1904-01] June 1998/settled November 1999	Canadian producers	United States	Finding of injury on certain prepared baby food products	Panel unanimously affirmed the agency's determination
[CDA-USA-98-1904-02] September 1998/ settled July 2000	US producers	Canada	Finding of injury on certain cold-reduced flat-rolled sheet products of carbon steel (including high-strength low-alloy steel)	Panel unanimously affirmed the agency's determination
[CDA-USA-98-1904-03] December 1998/ settled April 2000	Canadian producers	United States	Finding of injury on certain solder joint pressure pipe fittings and solder joint drainage, waste and vent pipe fittings, made of cast copper alloy, wrought copper alloy or wrought copper	Panel unanimously affirmed the agency's determination
[USA-CDA-98-1904-01] April 1998/settled August 2001	Canadian producers	United States	Final AD determination on certain corrosion-resistant carbon steel flat products	Majority panel, with one partial dissenting opinion, remanded the agency's determination

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Table 4A.5 Chapter 19 disputes under NAFTA, January 1994 to present (continued)

Date of initial filing	Complainant	Respondent	Products subject to administrative determinations	Status/outcome
[USA-MEX-98-1904-02] Unknown month 1998/active	Mexican producers	United States	Final AD determination on gray Portland cement and cement clinker	Panel unanimously affirmed in part the agency's determination; determination on remand due to be determined
[USA-CDA-98-1904-03] August 1998/settled November 1999	Canadian producers	United States	Final AD determination on brass sheet and strip	Panel unanimously affirmed in part and remanded in part the agency's determination
[USA-MEX-98-1904-04] Unknown month/terminated 1999	Mexican producers	United States	Final AD determination on porcelain-on-steel cookware	Panel review terminated by joint consent of participants
[USA-MEX-98-1904-05] Unknown month 1998/settled June 2004	US producers	Mexico	Final AD determination on circular welded non-alloy steel pipe	Panel unanimously affirmed the third determination of remand to the agency
[MEX-USA-98-1904-01] February 1998/settled June 2002	US producers	Mexico	Final AD determination on high-fructose corn syrup	Panel unanimously remanded the determination to the agency twice
[CDA-MEX-99-1904-01] Unknown month 1999/terminated 1999	Mexican producers	Canada	Finding of injury on certain hot-rolled carbon steel plate	Panel review terminated by joint consent of participants

[USA-CDA-99-1904-01] Unknown month/ terminated 1999	Canadian producers	United States	Final AD determination on certain corrosion-resistant carbon steel flat products	Panel review terminated by joint consent of participants
[USA-CDA-99-1904-02] Unknown month/ terminated 1999	Canadian producers	United States	AD determination on certain cut-to-length carbon steel plate	Panel review terminated by joint consent of participants
[USA-MEX-99-1904-03] April 1999/settled January 2004	Mexican producers	United States	Final AD determination on gray Portland cement and cement clinker	Panel affirmed, with two partial dissents, determination on remand
[USA-CDA-99-1904-04] Unknown month/ terminated 1999	Canadian producers	United States	Final AD determination on stainless steel round wire	Panel review terminated by joint consent of participants
[USA-MEX-99-1904-05] Unknown month/ terminated 1999	Mexican producers	United States	Final AD determination on porcelain-on-steel cookware	Panel review terminated by joint consent of participants
[USA-CDA-99-1904-06] Unknown month/ terminated 1999	Canadian producers	United States	Final CVD determination on live cattle	Panel review terminated by joint consent of participants
[USA-CDA-99-1904-07] Unknown month/ terminated 1999	Canadian producers	United States	Finding of injury on live cattle	Panel review terminated by joint consent of participants

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Table 4A.5 Chapter 19 disputes under NAFTA, January 1994 to present (continued)

Date of initial filing	Complainant	Respondent	Products subject to administrative determinations	Status/outcome
[CDA-USA-2000-1904-01] Unknown month/ terminated 2000	US producers	Canada	Final AD determination on certain iodinated contrast media used for radiographic imaging	Panel review terminated by joint consent of participants
[CDA-USA-2000-1904-02] Unknown month 2000/settled January 2003	US producers	Canada	Finding of injury on certain iodinated contrast media used for radiographic imaging	Panel unanimously affirmed agency's determination
[CDA-USA-2000-1904-03] August 2000/settled April 2002	US producers	Canada	Final AD determination on certain top-mount electric refrigerators, electric household dishwashers, and gas or electric laundry dryers	Panel unanimously affirmed the agency's determination
[CDA-USA-2000-1904-04] August 2000/settled January 2002	US producers	Canada	Finding of injury on certain refrigerators, dishwashers, and dryers	Panel unanimously affirmed, with one concurring opinion, the agency's determination
[MEX-USA-2000-1904-01] May 2000/settled January 2004	US producers	Mexico	AD determination on imports of urea	Panel unanimously remanded agency's determination
[MEX-USA-2000-1904-02] Unknown month 2000/active	US producers	Mexico	Final AD determination on bovine carcasses and half carcasses, fresh or chilled	Panel unanimously affirmed in part and remanded in part the agency's determination; decision on remand due to be determined

[USA-CDA-2000-1904-01] Unknown month/ terminated 2000	Canadian producers	United States	Final AD determination on certain cut-to-length carbon steel plate	Panel review terminated by joint consent of participants
[USA-CDA-2000-1904-02] Unknown month/ terminated 2000	Canadian producers	United States	Final AD determination on certain corrosion-resistant carbon steel flat products	Panel review terminated by joint consent of participants
[USA-MEX-2000-1904-03] Unknown month 2000/active	Mexican producers	United States	Final AD determination on gray Portland cement and cement clinker	Decision to be determined
[USA-MEX-2000-1904-04] Unknown month/ terminated 2000	Mexican producers	United States	Final AD determination on porcelain-on-steel cookware	Panel review terminated by joint consent of participants
[USA-MEX-2000-1904-05] Unknown month 2000/active	Mexican producers	United States	Final AD determination on gray Portland cement and cement clinker	Decision to be determined
[USA-CDA-2000-1904-06] September 2000/ settled in August 2003	Canadian producers	United States	AD determination on pure magnesium	Panel unanimously affirmed the third determination on remand; Extraordinary Challenge Committee (ECC) filed by the US government in September 2003
[USA-CDA-2000-1904-07] August 2000/settled October 2002	Canadian producers	United States	Final CVD determination on pure magnesium and alloy magnesium	Panel unanimously remanded the determination to the agency twice

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Table 4A.5 Chapter 19 disputes under NAFTA, January 1994 to present (*continued*)

Date of initial filing	Complainant	Respondent	Products subject to administrative determinations	Status/outcome
[USA-CDA-2000-1904-08] Unknown month/terminated 2000	Canadian producers	United States	Final AD determination on certain corrosion-resistant carbon steel flat products	Panel review terminated by joint consent of participants
[USA-CDA-2000-1904-09] August 2000/active	Canadian producers	United States	Final AD and CVD determinations on magnesium	Majority panel, with one dissenting opinion, remanded the agency's determination; decision on remand to be determined
[USA-MEX-2000-1904-10] Unknown month 2000/active	Mexican producers	United States	Final AD determination on gray Portland cement and cement clinker	Decision due on September 22, 2005
[USA-CDA-2000-1904-11] Unknown month 2000/settled in April 2005	Canadian producers	United States	Final countervailing and AD determinations on carbon steel products	Majority panel, with one dissenting opinion, affirmed determination on remand
[ECC-2000-1904-01][USA] April 2000/settled in October 2003	United States	Mexico	AD determination on gray Portland cement and clinker	ECC panel rejected US arguments and affirmed the panel's decision to remand the agency's determination
[USA-CDA-2001-1904-01] Unknown month/terminated 2001	Canadian producers	United States	Final AD determination on certain cut-to-length carbon steel plate	Panel review terminated by joint consent of participants
[USA-MEX-2001-1904-02] Unknown month/terminated 2001	Mexican producers	United States	Final AD determination on porcelain-on-steel cookware	Panel review terminated by joint consent of participants

[USA-MEX-2001-1904-03] Unknown month 2001/active	Mexican producers	United States	Final AD determination on oil country tubular goods	Panel unanimously remanded the determination to the agency
[USA-MEX-2001-1904-04] Unknown month/active	Mexican producers	United States	Final AD determination on gray Portland cement and cement clinker	Decision to be determined
[USA-MEX-2001-1904-05] Unknown month 2001/active	Mexican producers	United States	Final AD determination on oil country tubular goods	Decision due on October 18, 2005
[USA-MEX-2001-1904-06] Unknown month 2001/active	Mexican producers	United States	Final AD determination on oil country tubular goods	Decision to be determined
[MEX-USA-2002-1904-01] Unknown month/terminated 2002	US producers	Mexico	Final countervailing determination on bovine carcasses and half carcasses, fresh or chilled	Panel review terminated by joint consent of participants
[USA-MEX-2002-1904-01] Unknown month 2002/active	Mexican producers	United States	Initiating investigation on Section 751(b) on gray Portland cement and cement clinker	Decision to be determined
[USA-CDA-2002-1904-02] Unknown month 2002/active	Canadian producers	United States	AD determination on certain softwood lumber products	Panel unanimously affirmed in part the agency's determination on remand; determination on third remand to be determined
[USA-CDA-2002-1904-03] Unknown month 2002/active	Canadian producers	United States	Final CVD determination on certain softwood lumber products	Panel unanimously affirmed in part and remanded in part the agency's third determination on remand

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Table 4A.5 Chapter 19 disputes under NAFTA, January 1994 to present (continued)

Date of initial filing	Complainant	Respondent	Products subject to administrative determinations	Status/outcome
[USA-CDA-2002-1904-04] Unknown month/terminated 2002	Canadian producers	United States	Final AD determination on green-house tomatoes	Panel review automatically terminated by sole requestor
[USA-MEX-2002-1904-05] Unknown month 2002/active	Mexican producers	United States	Final AD determination on gray Portland cement and cement clinker	Decision to be determined
[USA-CDA-2002-1904-06] Unknown month/terminated 2002	Canadian producers	United States	Final AD determination on green-house tomatoes	Panel review automatically terminated by sole requestor
[USA-CDA-2002-1904-07] Unknown month 2002/active	Canadian producers	United States	Finding of injury on certain softwood lumber products	Panel unanimously affirmed the third determination on remand; ECC filed by the US government in November 2004
[USA-CDA-2002-1904-08] September 2002/terminated 2003	Canadian producers	United States	Final CVD determination on carbon and certain alloy steel wire rod	Panel review terminated by joint consent of participants
[USA-CDA-2002-1904-09] Unknown month 2002/settled April 2005	Canadian producers	United States	Final AD determination on carbon and certain alloy steel wire rod	Panel unanimously affirmed the agency's determination
[MEX-USA-2003-1904-01] Unknown month 2003/active	Mexican producers	United States	Final CVD determination on sodium hydroxide (caustic soda)	Decision to be determined
[MEX-USA-2003-1904-02] Unknown month 2003/active	Mexican producers	United States	Final CVD determination on fresh red delicious and golden delicious apples	Decision to be determined

[USA-MEX-2003-1904-01] Unknown month 2003/active	Mexican producers	United States	AD determination on gray Portland cement and cement clinker	Decision to be determined
[USA-CDA-2003-1904-02] Unknown month 2003/active	Canadian producers	United States	Final CVD determination on alloy magnesium	Decision due on September 9, 2005
[USA-MEX-2003-1904-03] Unknown month 2003/active	Mexican producers	United States	AD determination on gray Portland cement and cement clinker	Decision to be determined
[USA-CDA-2003-1904-04] Unknown month 2003/terminated 2003	Canadian producers	United States	Final AD determination on certain durum wheat and hard red spring wheat	Panel review automatically terminated by sole requestor
[USA-CDA-2003-1904-05] Unknown month 2003/active	Canadian producers	United States	Final CVD determination on certain durum wheat and hard red spring wheat	Panel unanimously affirmed in part and remanded in part the agency's determination on remand; determination on another remand due August 8, 2005
[USA-CDA-2003-1904-06] Unknown month 2003/active	Canadian producers	United States	Finding of injury on certain durum wheat and hard red spring wheat	Majority panel, with one partial dissent, remanded the agency's determination; determination on remand due on October 5, 2005
[ECC-2003-1904-01USA] September 2003/active	United States	Canada	AD determination on pure magnesium	ECC panel unanimously affirmed the panel's decision to remand the agency's determination.
[ECC-2004-1904-01USA] November 2004/active	United States	Canada	Finding of injury on certain softwood lumber products	Decision to be determined

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Table 4A.5 Chapter 19 disputes under NAFTA, January 1994 to present (continued)

Date of initial filing	Complainant	Respondent	Products subject to administrative determinations	Status/outcome
[USA-CDA-2004-1904-01] Unknown month 2004/active	Canadian producers	United States	Final CVD determination on alloy magnesium	Decision to be determined
[USA-CDA-2004-1904-02] Unknown month 2004/terminated	Canadian producers	United States	Final AD determination on carbon and certain alloy steel wire rod	Panel review terminated by joint consent of participants
[USA-MEX-2004-1904-03] Unknown month 2004/active	Mexican producers	United States	AD determination on gray Portland cement and cement clinker	Decision to be determined
[USA-CDA-2005-1904-01] Unknown month 2005/active	Canadian producers	United States	Final CVD determination on certain softwood lumber products	Decision to be determined
[USA-CDA-2005-1904-03] Unknown month 2005/active	Canadian producers	United States	USITC implementation of the new de-termination under Section 129(a)(4) of the Uruguay Round agreement	Decision to be determined
[MEX-USA-2005-1904-01] Unknown month 2005/active	US producers	Mexico	AD determination on certain steel tubing	Decision due on May 8, 2006
[USA-CDA-2005-1904-04] Unknown month 2005/active	Canadian producers	United States	US Department of Commerce AD determination under Section 129 of the Uruguay Round of Agreements Act	Decision due on April 11, 2006

Note: CDA stands for panels reviewing Canadian International Trade Tribunal determinations; MEX for panels reviewing Mexican Ministry of Trade and Industrial Development (SECOFI) determinations; and USA for panels reviewing US Department of Commerce determinations.

Sources: NAFTA Secretariat, Decisions and Reports 2002, www.nafta-sec-alena.org/english/index.htm; OAS Foreign Trade Information System, SICE Dispute Settlement Binational Panel Decisions and Arbitral Panel Reports 2002, www.siceoas.org/dispute/natdispeasp.