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A Little Less Conversation, A Little More Action: How American Unwillingness To Escalate Emboldens Mexico's Populist Ambitions

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COMMENTS

A LITTLE LESS CONVERSATION, A LITTLE MORE ACTION: HOW AMERICAN UNWILLINGNESS TO ESCALATE EMBOLDENS MEXICO'S POPULIST AMBITIONS

DAVID MONTERO*

Mexico's president, Andrés Manuel López Obrador ("AMLO"), is a politician who has spent his career attempting to rectify what he sees as the wrongs that have stolen his country's future. He is dedicated to fighting the results and programs of neoliberalism to bring about a populist, nationalist Mexican society centered around left-wing policies. Unfortunately for him, two days before his term as president was set to begin, his predecessor signed an expansive free trade agreement with the United States and Canada, finalizing the negotiation of the North American Free Trade Agreement's ("NAFTA") principles. Hamstrung by the existence of a treaty now obligating AMLO to free trade, he has spent the entirety of his presidency under NAFTA's successor agreement, the United States – Mexico – Canada Agreement ("USMCA" or "the agreement"), attempting to push his way past its guardrails, and he is succeeding. This Comment argues that the United States has failed to effectively escalate its dispute resolution mechanisms set forth in the USMCA to curb the anti-trade actions of AMLO and his movement. Further failure to escalate to panel discussions will only embolden AMLO to

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I. INTRODUCTION

On January 11, 1992, a then little-known local party chief known as Andrés Manuel López Obrador (“AMLO”) led a march of around 500 protestors against what he claimed was mass electoral fraud in the rural countryside of Mexico.¹ By 2006, he was running for president

1. See Edward Cody, *Mexicans’ March for ‘Democracy’*, WASH. POST (Jan. 11, 1992), https://www.washingtonpost.com/archive/politics/1992/01/11/mexicans-march-for-democracy/f206086b-87fe-4c3a-ba3d-9df9c62821df/?utm_term=.76b1204cfdb5 (specifically claiming that the vote counts had produced more votes than registered voters, however no verification of AMLO’s claims were provided both at

of Mexico on a platform of reducing inequality and attacking corruption, following a five-year stint as the Mayor of Mexico City.² This campaign ended in a failure, but, hearkening back to his past experiences with public demonstrations, AMLO embarked on a mass campaign to overturn the election, taking a non-binding “oath of office” as the “legitimate president” before thousands of supporters in Mexico City.³ In 2012, he again ran for the highest office in the country, promising swathes of economic reforms⁴ and a new domestic security policy described as “hugs, not bullets.”⁵ Yet again, AMLO’s efforts led him to failure.⁶ Just as before, AMLO raged against the political establishment, declaring that he would refuse to accept the election results.⁷ Once more, his anger at political results inspired marches by thousands in several cities.⁸ For his third and final run for

the time or in the years since).

2. *Mexico City Mayor to Quit in July, Run for President*, ORLANDO SENTINEL (May 10, 2005), <https://www.orlandosentinel.com/2005/05/10/mexico-city-mayor-to-quit-in-july-run-for-president>.

3. Francisco Reséndiz, *Rinde AMLO protesta como “presidente legítimo” [AMLO Takes Oath as “Legitimate President”]*, AL CALOR POLÍTICO (Nov. 20, 2006), <https://www.alcalorpolitico.com/informacion/rinde-amlo-protesta-como-presidente-leg-timo-12.html>.

4. *Las 6 Promesas Economicas de AMLO [AMLO’s 6 Economic Promises]*, CNN EXPANSIÓN (Nov. 15, 2011), <https://web.archive.org/web/20120406150421/http://www.cnnexpansion.com/economia/2011/11/15/6-propuestas-economicas-de-amlo>. In 2012, AMLO’s six major spheres of proposals were: employment, austerity, progressive tax reforms, closing tax loopholes, increasing market competition, and systemic change in government. Many of these would go on to become centerpieces of his future campaign that resulted in his election to the presidency.

5. Joshua Partlow & David Agren, *Mexico’s Presidential Front-Runner, AMLO, Doesn’t Want to Escalate the Drug War*, WASH. POST (June 29, 2019), https://www.washingtonpost.com/world/the_americas/mexicos-presidential-front-runner-amlo-doesnt-want-to-escalate-the-drug-war/2018/06/29/f3081f12-7320-11e8-bda1-18e53a448a14_story.html.

6. *See Tribunal electoral rechaza invalidar la elección de Enrique Peña Nieto [Electoral Tribunal Refuses to Invalidate the Election of Enrique Peña Nieto]*, RFI (Aug. 31, 2012) [hereinafter RFI], <https://www.rfi.fr/es/americas/20120831-tribunal-electoral-rechaza-invalidar-eleccion-de-enrique-pena-nieto> (discussing the Electoral Tribunal’s refusal to invalidate election results).

7. *Counted Out*, THE ECONOMIST (July 14, 2012), <https://www.economist.com/the-americas/2012/07/14/counted-out>.

8. *Se unen miles en varias ciudades en #MegaMarcha Anti EPN [Thousands Join in Several Cities in #MegaMarch Against EPN]*, EL MAÑANA (July 07, 2012), <https://archive.ph/20130219040426/http://www.elmanana.com.mx/notas.asp?id=293001>.

the presidency in 2018, AMLO ran a populist campaign centered around anti-corruption and economic nationalism.⁹ This election, with the movement he had spent over a decade building, gave him that which the others could not: victory.¹⁰ However, two days before the start of his term as president, his predecessor signed onto the United States – Mexico – Canada Agreement (“USMCA” or “the agreement”), a free trade deal that had the potential to derail AMLO’s economically nationalistic preferences.¹¹

The USMCA is rooted in foundational principles of the United States-led international order.¹² The American inclination towards free trade, both as a method of economic development and political liberalization, is the cornerstone of this system.¹³ In 1987, in pursuit of these long-term goals, the United States and Canada created their largest free trade agreement at the time, the Canada United States Free Trade Agreement.¹⁴ Mexico began making entreaties to the United States to be included in the agreement after seeing the mutual benefits the rest of the continent was experiencing.¹⁵ These negotiations took place over several years, but ultimately culminated in the North American Free Trade Agreement (“NAFTA”).¹⁶ NAFTA was signed

9. Mark Stevenson, *For Mexican Presidential Hopeful ‘AMLO,’ 3rd Time a Charm?*, ASSOCIATED PRESS (June 5, 2018), <https://apnews.com/article/1dac66baa76d4ea0908c6833d6382015>.

10. *Elecciones Federales 2018: Programa de Resultados Electorales Preliminares* [Federal Elections 2018: Preliminary Electoral Results Program, EL INSTITUTO NACIONAL ELECTORAL [NAT’L ELECTORAL INST.] (July 2, 2018), <https://p2018.ine.mx/#/presidencia/nacional/1/1/1/1>.

11. Jonathan Allen, *Trump, Trudeau, Peña Nieto Sign USMCA Trade Deal as G-20 Kicks Off*, NBC NEWS (Nov. 30, 2018), <https://www.nbcnews.com/politics/politics-news/trump-trudeau-pe-nieto-sign-usmca-trade-deal-n942071>.

12. See David A. Lake et al., *Challenges to the Liberal Order: Reflections on International Organization*, 75 INT’L ORG. 225, 248 (2021) (describing the state of the post-war world, saying: “After 1945, the United States projected its domestically defined interests in private enterprise, free trade, democracy, and liberal values onto the emerging [liberal international order].”).

13. See *id.* at 226.

14. Can.-U.S. Free Trade Agreement, Jan. 2, 1988, 27 I.L.M. 281.

15. Clyde Farnsworth, *Mexican Free Trade Pact Pushed*, N.Y. TIMES, Sept. 14, 1990, at D1, <https://www.nytimes.com/1990/09/14/business/mexican-free-trade-pact-pushed.html>.

16. Keith Bradsher, *Bush, Salinas and Mulroney to Sign Trade Pact Dec. 17*, N.Y. TIMES (Dec. 4, 1992), at D1, <https://www.nytimes.com/1992/12/04/business/bush-salinas-and-mulroney-to-sign-trade-pact-dec-17.html> (noting that

in 1992 and brought the entirety of North America into a unified trade system.¹⁷

Despite the magnitude of successfully uniting North America in a mutually beneficial trading environment, NAFTA suffered withering criticism from both political actors and third-party groups.¹⁸ This criticism reached its apex during the 2016 election, when Republican candidate Donald Trump levied increasingly harsh criticism against it, calling it “the worst trade deal maybe ever signed anywhere,” and blaming NAFTA for the mass export of jobs overseas, as well as its broad attachment to then presidential contender Hillary Clinton.¹⁹ Upon entering office in 2017, the Trump Administration undertook efforts to renegotiate NAFTA that would ultimately mature into the USMCA.²⁰

The USMCA wasn’t just a revision of NAFTA; it introduced numerous new subjects for regulation and was more in line with the contemporary perspectives of the agreement’s largest member.²¹

NAFTA differed from previous agreements in that the entirety of the North American continent became part of the trade market). Whereas before, the only major trade agreement was featured solely between the United States and Canada, NAFTA included Mexico, for the first time alleviating trade barriers between North American countries on a truly unilateral basis.

17. *Id.*

18. See *Edwards Takes Aim at NAFTA*, THE LEDGER (Dec. 9, 2007), <https://www.theledger.com/story/news/2007/12/09/edwards-takes-aim-at-nafta/25799370007> (quoting Senator John Edwards of North Carolina: “In all three countries, [NAFTA] has hurt workers and families while helping corporate insiders”); see also ZEPEDA ET AL., *RETHINKING TRADE POLICY FOR DEVELOPMENT: LESSONS FROM MEXICO UNDER NAFTA 1* (2009), https://carnegieendowment.org/files/nafta_trade_development.pdf (noting that “[t]he evidence points overwhelmingly to the conclusion that [NAFTA]’s effects have largely been a disappointment for the country”).

19. Patrick Gillespie, *Trump Hammers America’s ‘Worst Trade Deal’*, CNN (Sept. 27, 2016), <https://money.cnn.com/2016/09/27/news/economy/donald-trump-nafta-hillary-clinton-debate> (noting that the connection to Hillary Clinton was that the deal came into effect and was supported by her husband, then President Bill Clinton).

20. See Press Release, Off. U.S. Trade Rep., U.S. Announces First Round of NAFTA Negotiations (July 19, 2017) [hereinafter U.S. Announces First Round of NAFTA Negotiations] <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/july/ustr-announces-first-round-nafta>.

21. See Laura Ross, *USMCA vs. NAFTA What Are the Differences?*, THOMAS (May 17, 2021), <https://www.thomasnet.com/insights/usmca-vs-nafta> (recognizing

However, NAFTA's regulations governing investor-state arbitration of disputes have generally been considerably weakened in the USMCA.²² Exceptions to this rule are the carve-outs for claims relating to government contracts in specific industries; including oil and natural gas; public power supply; telecommunications services; supply of transportation to the public; and the ownership or management of roads, railways, bridges, etc. not for the exclusive use or benefit of the Parties.²³ Since the USMCA weakens the capacity of private actors to rectify disputes, most investors are forced to rely upon the protection of their state party to effectively resolve their issues.²⁴ This Comment will argue that the United States routinely puts itself in a holding pattern of discussion and debate when it comes to Mexican breaches of the USMCA rather than using the dispute resolution mechanics to their legal extent. The United States' intransigence to escalate emboldens AMLO's movement's willingness to violate the USMCA and serves as an invitation to his and future administrations to further pursue policies of economic nationalism.²⁵

Part II will explain the history of Mexico's relationship with trade, as well as the finer details of the dispute resolution provisions of the USMCA that are of note to this Comment.²⁶ Part III will analyze two key violations of the USMCA by AMLO's administration, contrasting the American response between the two and demonstrating the cycle of violations that has largely been created as a result of the failure to act.²⁷ Part IV provides a simple recommendation to the U.S. administration for how to effectively halt its southern neighbor's decline into unfettered populism that harms U.S. trade interests:

that the USMCA alters sections to benefit American automotive manufacturing).

22. See, e.g., U.S.-Mex.-Can. Agreement art 14.D.5, Nov. 30, 2018, 134 Stat. 11 [hereinafter USMCA] (requiring claimants to seek resolution through domestic courts before they can submit a claim for arbitration).

23. *Id.* at annex 14-E.

24. See Nathalie Bernasconi-Osterwalder, *USMCA Curbs How Much Investors Can Sue Countries – Sort Of*, INT'L INST. FOR SUSTAINABLE DEV. (Oct. 2, 2018), <https://www.iisd.org/articles/usmca-investors> (explaining arbitration requirements for U.S.-Mexico actors).

25. See *infra* Part III.C.

26. See *infra* Part II.A–B.

27. See *infra* Part III.A–C.

employ the use of dispute panels whenever possible.²⁸

II. BACKGROUND

AMLO's domestic economic policies run downstream of his nation's history with free trade.²⁹ One cannot begin to understand how his political ideology is motivated without understanding the roots of what he routinely rails against as a fundamental disaster for Mexico.³⁰ Additionally, it is necessary to understand how the USMCA dispute resolution process works to effectively understand where the administration is failing to act.

A. MEXICO AND FREE TRADE: HOW UNEQUAL GAINS DISILLUSIONED THE MEXICAN PEOPLE AND ITS GOVERNMENT

1. *The Years of Outreach and Adoption (1988–2000)*

As early as 1989, public figures from the United States were calling, and predicting, the creation of a free trade agreement between the United States and Mexico.³¹ By 1990, these voices were joined by the Mexican president himself.³² President Carlos Salinas de Gortari called for a trade pact with the United States, even recognizing the opportunity to extend such an agreement to Canada as well.³³ This call

28. See *infra* Part IV.

29. See “*No voy a alcanzar a reparar todo el daño que ocasionó el neoliberalismo*”, dice AMLO [“*I Will Not be Able to Repair All the Damage Caused by Neoliberalism*,” Says AMLO], SIN EMBARGO (Oct. 17, 2022), <https://www.sinembargo.mx/17-10-2022/4270110> (quoting AMLO claiming he will be unable to “repair all the damage neoliberalism caused” while recognizing that NAFTA is a facet of neoliberal trade liberalization).

30. See *id.*

31. Clyde Farnsworth, *Mosbacher Sees a Free-Trade Pact With Mexico*, N.Y. TIMES (Oct. 19, 1989), at D9, <https://www.nytimes.com/1989/10/19/business/mosbacher-sees-a-free-trade-pact-with-mexico.html> (quoting Commerce Secretary Mosbacher describing to the Senate Banking Committee his belief that a free trade deal with Mexico was in the cards, American private industry representative noting it has “serious possibilities” and Mexican economic affairs representative not explicitly precluding its creation in the future).

32. *Mexico Asks for Trade Pact*, N.Y. TIMES, (May 23, 1990), at D9, <https://www.nytimes.com/1990/05/23/business/mexico-asks-for-trade-pact.html> (noting Mexico's desire to seek “free trade with the United States and Canada, but not a common market like the example of today's Europe”).

33. *Id.*

came after a visit to the United States in which President Gortari, a career economist, noted that trade was one of his top priorities for discussions with then President Bush.³⁴ After four years of discussions, negotiations, and changes in text, the United States, Mexico, and Canada enacted a free trade agreement for the entirety of North America.³⁵

In the years following NAFTA's creation, Mexican exports increased by over 300% from 1994 to 2008, and in that same time frame domestic manufacturing productivity increased by another 80%.³⁶ In addition, foreign investment in Mexico more than tripled during that same period,³⁷ an outcome likely hoped for by President Gortari.³⁸ Despite this growth of investment and industry, many Mexicans failed to reap the rewards that NAFTA promised, with per capita income from 1988 to 2003 averaging only 1.4% growth.³⁹ This contrast effectively denied the Mexican people the promises of economic liberalization, especially when comparing it to the personal wage growth of Mexicans prior to the establishment of NAFTA.⁴⁰

2. *The End of NAFTA and the Rise of AMLO*

The disappointment felt by Mexican citizens at the concentration of economic gains was reflected in AMLO's 2006 campaign, where he

34. Larry Rohter, *Mexican Leader in the U.S. for Talks*, N.Y. TIMES (Oct. 2, 1989), at A6, <https://www.nytimes.com/1989/10/02/world/mexican-leader-in-the-us-for-talks.html> (quoting the Mexican president as having said: "I think that reciprocity in commercial relations is fundamental.").

35. Robert Reinhold, *Free Trade Era Begins, Uneventfully, at Border*, N.Y. TIMES (Jan. 4, 1994), at A6, <https://www.nytimes.com/1994/01/04/us/free-trade-era-begins-uneventfully-at-border.html>.

36. ZEPEDA ET AL., *supra* note 18, at 4.

37. *Id.*

38. See Miguel D. Ramirez, *Foreign Direct Investment in Mexico During the 1990s: An Empirical Assessment*, 28 E. ECON. J., 411, 415 (2002) (noting Gortari's administration removed approval requirements for any foreign direct investments valued at under \$100 million).

39. Enrique D. Peters, *Liberalización comercial en México: ¿Quién se ha beneficiado?* [*Trade Liberalization in Mexico: Who has Benefited?*], in MÉXICO EN TRANSICIÓN: GLOBALISMO NEOLIBERAL, ESTADO Y SOCIEDAD CIVIL [MEXICO IN TRANSITION: NEOLIBERAL GLOBALISM, STATE, AND CIVIL SOCIETY] 59, 66 (2006).

40. See *id.* (showing that from 1960 to 1980 wage growth was 3.5%).

focused heavily on economic populism.⁴¹ In his 2006 run for president, AMLO set his sights on NAFTA, promising to ignore it outright where it benefited him, while dramatically expanding the social safety net otherwise.⁴² While he may have lost, his message did not prove to be completely out of touch with the public, since AMLO's party took home over fourteen million votes, losing the election by only about 250,000.⁴³

In 2008, the final barriers of trade in North America came down as agreed to in NAFTA, and with this so called "fatal date" more than 100,000 Mexican citizens came to the capital to protest.⁴⁴ The protestors were largely poor farmers from rural regions of Mexico, who would bear the brunt of any pain resulting from the removal of agricultural trade barriers.⁴⁵ Their deep-seated anger against NAFTA, rooted in their wallets, was so palpable that one newspaper referred to the protests as "[t]he open battle against NAFTA begin[ning]."⁴⁶

While this working man's war against free trade would go under the radar for the next few years, in response to his first campaign's failure AMLO attempted to appear as a moderate.⁴⁷ Embracing policies focused on government supported economic development, fiscal responsibility, and anti-corruption, he attempted to tack towards the

41. Mark Stevenson, *Mexico Hopeful Takes Hard Line vs. NAFTA*, WASH. POST (June 18, 2006), <https://www.washingtonpost.com/wp-dyn/content/article/2006/06/17/AR2006061701073.html> (citing AMLO as having "no allegiance to a deal he sees as harmful to Mexican farmers").

42. *See id.*

43. Alonso Urrutia et al., *Ugalde se adelanta al TEPJF y declara ganador a Felipe Calderón* [*Ugalde Goes Ahead of the TEPJF and Declares Felipe Calderón the Winner*], LA JORNADA (July 7, 2006), <https://www.jornada.com.mx/2006/07/07/index.php?section=politica&article=003n1pol>.

44. *See* Wendy Call, *Mexico's Grassroots Answer to NAFTA*, YES MAG. (May 23, 2008), <https://www.yesmagazine.org/issue/just-foreign-policy/2008/05/23/reclaiming-corn-and-culture> (demonstrating rural opposition to NAFTA). Rural voters are a strong section of the base of AMLO's coalition's support.

45. *See* Mark Stevenson, *Mexican Farmers Protest, Warn of Crisis as Trade Barriers Lifted under NAFTA*, SOUTHCOAST TODAY (Jan. 2, 2008), <https://www.southcoasttoday.com/story/news/nation-world/2008/01/03/mexican-farmers-protest-warn-crisis/52690034007> (discussing the complaints of Mexican farmers who rely on government subsidies).

46. *Id.*

47. CLAIRE R. SEELKE, CONG. RSCH. SERV., R42548, MEXICO'S 2012 ELECTIONS 4 (2012).

center to win the general election.⁴⁸ He did not make NAFTA the focus of his campaign, while again noting his willingness to negotiate sections he felt were not effective for farmers, and only mentioned it a single time in his book released for his campaign.⁴⁹ As expected by many observers, these attempts to appear more palatable to the general public failed to grant him the victory he desired.⁵⁰ AMLO then claimed the election had been stolen from him and refused to recognize its legitimacy.⁵¹

For his 2018 campaign, he ran under his own party, *Movimiento de Regeneración Nacional* (MORENA), continuing to push his earlier complaints about the “mafia” he once claimed had stolen an election from him, the importance of ending corruption, and, most critically, the belief that the way to solve Mexico’s problems abroad was to focus on domestic policy.⁵² Looking at how much this campaign resembled his campaign from 2006, it would be easy to discount it as a folly, given that he was unsuccessful then.⁵³ However, it is more appropriate to view the playing field as this: the candidate didn’t change, the country changed around him.⁵⁴ Only a year before the elections,

48. *Id.*

49. *See id.*; *see also* ANDRÉS MANUEL LÓPEZ OBRADOR, NO DECIR ADIÓS A LA ESPERANZA [NOT SAYING GOODBYE TO HOPE], (2012) (“Some of his proposals, such as re-opening North American Free Trade Agreement (NAFTA) negotiations to better protect Mexican farmers, alarmed investors.”).

50. *See* SEELKE, *supra* note 47, at 4 (noting that AMLO’s “moderation” as it was noted by analysts during and in the run up to the 2012 Mexican presidential elections, “might be too little, too late”).

51. RFI, *supra* note 6.

52. ANDRÉS MANUEL LÓPEZ OBRADOR, LA SALIDA [THE EXIT] 4-5 (2017) [hereinafter LA SALIDA].

53. *Compare* ANDRÉS MANUEL LÓPEZ OBRADOR, UN PROYECTO ALTERNATIVO DE NACIÓN [AN ALTERNATIVE NATIONAL PROJECT] 22, 24-31, 69-73, 124-128, 138 (2004) (pushing for economic self-sufficiency, anti-corruption, and an emphasis on raising the working poor, among other similarities) *and* MORENA, *Proyecto Alternativo de Nación 2018 – 2024* [Alternative National Project 2018 – 2024], EL INSTITUTO NACIONAL ELECTORAL [NAT’L ELECTORAL INST.] (2017), https://repositoriodocumental.ine.mx/xmlui/bitstream/handle/123456789/94367/C_G2ex201712-22-rp-5-2-a2.pdf (pushing for anti-corruption, economic nationalism, and energy as a sector for attention, among other similarities).

54. Shannan Mattiace, *Mexico 2018: AMLO’s Hour*, 39 REVISTA CIENCIA POLÍTICA SANTIAGO [SANTIAGO POL. SCI. MAG.] 285 (2019) (describing how the political campaign of AMLO is uniquely situated for the crisis affecting Mexican society, recognizing “as a self-proclaimed transformational candidate, AMLO made

Mexicans had only a 13% rate of satisfaction with the state of their country, and 84% of Mexicans believed that “the corruption of political leaders” was a major problem.⁵⁵ 42% of the population was statistically considered to have been living in poverty at the time of the election,⁵⁶ following years of sluggish growth.⁵⁷ Corruption was and is a major problem in Mexico, with Mexican public sector corruption perceptions being the worst out of all countries in the Organization for Economic Co-Operation and Development as of 2017.⁵⁸ Due to bribes alone, minimum wage households suffer an approximate loss of 30% of their salaries.⁵⁹ For Mexican citizens who had spent years listening to AMLO decry *neoliberalismo* as a plague killing Mexico from the inside out, it finally seemed like he had a point.⁶⁰

This election also coincided with the global rise of populism, a political movement that juxtaposes an ostensible “real people” against a negative “elite” that has harmed their interests.⁶¹ This benefited AMLO to assist him in riding a wave of anti-establishment sentiment to the highest office in Mexico.⁶² This campaign’s strategy also

big promises in areas of great concern for Mexican citizens: anti-corruption, criminal violence and security, and the economy”).

55. Margaret Vice & Hanyu Chwe, *Mexican Views of the U.S. Turn Sharply Negative*, PEW RSCH. (Sept. 14, 2017), <https://www.pewresearch.org/global/2017/09/14/mexicans-are-downbeat-about-their-countrys-direction>.

56. *Number of People Living in Poverty in Mexico Between 2008 and 2020*, STATISTA (Oct. 20, 2022), <https://www.statista.com/statistics/1039479/mexico-people-living-poverty>.

57. *GDP Growth (Annual %) – Mexico*, WORLD BANK, <https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?locations=MX>.

58. OECD, OECD INTEGRITY REVIEW OF MEXICO 21 (2017), <https://www.oecd-ilibrary.org/content/publication/9789264273207-en>.

59. TRANSPARENCIA MEXICANA, INDICE NACIONAL DE CORRUPCION Y BUEN GOBIERNO [NATIONAL INDEX OF CORRUPTION AND GOOD GOVERNMENT] 6 (2011), https://www.tm.org.mx/wp-content/uploads/2011/05/INFORME_EJECUTIVO_INCBG2010.pdf.

60. See Mattiace, *supra* note 54, at 299.

61. See Erik Jones, *The Rise of Populism and the Fall of Europe*, 37 SAIS REV. INT’L AFF. 47, 47 (2017) (focusing on the prevalence of populism in Europe, but explicitly noting the rise of the ideological movement in the world at large, demonstrating the global reach of the populist movement).

62. See Vanda Felbab-Brown, *Andrés Manuel López Obrador and a New Era of Politics in Mexico*, BROOKINGS (July 3, 2018), <https://www.brookings.edu/articles/andres-manuel-lopez-obrador-and-a-new-era-of-politics-in-mexico> (stating that

featured a resurgence of the candidate's NAFTA bashing, with AMLO denouncing NAFTA as being emblematic of the "neoliberal" policies he saw as serving only to "legalize pillaging" in Mexico.⁶³ In contrast to his 2012 book, his 2018 campaign book featured NAFTA seven times directly, and spends a significant amount of time discussing its effects.⁶⁴

For the duration AMLO spent haranguing NAFTA, the United States was uniquely polarized on the agreement, never settling on one side or the other of the issue.⁶⁵ Despite this, the Trump Administration entered into negotiations with Mexico and Canada in an attempt to ameliorate the deal more to their liking.⁶⁶ Following this, with only one day left in his term, then President of Mexico Enrique Peña Nieto signed the new trade agreement, the USMCA, committing Mexico to the deal, regardless of any opinions AMLO may have had on it.⁶⁷

B. THE USMCA'S DISPUTE PROTOCOLS

To understand where the United States is coming up short in this dispute with Mexico, it's necessary to understand what tools are available to the U.S. and what is required to use them. The dispute resolution process has three stages outlined in Article 31 of the

"AMLO's crushing victory . . . is an expression of protest and disillusionment the Mexican electorate feels with traditional parties, symptomatic of the global tide of populism").

63. LA SALIDA, *supra* note 52, at 8–9.

64. *See id.* (discussing NAFTA's integration, the effects thereof, and subsequent requirements to be in compliance with the treaty).

65. *See International Trade/Global Economy*, POLLING REP., <https://www.pollingreport.com/trade.htm> (aggregating a litany of polls from the late 2010s related to trade, demonstrating a routine flip-flop of support and opposition, such as the Bloomberg poll regarding whether NAFTA was good or bad for the United States being 29% good and 44% bad in 2016, only to be 41% good and 37% bad the following year).

66. *See* U.S. Announces First Round of NAFTA Negotiations *supra* note 20 ("The negotiations immediately follow the 90-day consultation period with Congress and the public initiated on May 18, 2017. On that day, Ambassador Lighthizer notified Congress of President Trump's intent to renegotiate NAFTA to get a better deal for America's workers, farmers, businesses and manufacturers.").

67. *See* Allen, *supra* note 11 (describing the signing of the United States-Mexico-Canada Agreement, noting that Mexican President Enrique Peña Nieto "is leaving office").

USMCA: Consultation, panel creation, and implementation.⁶⁸ If at any point, during any stage, an alternate resolution to the issue has been reached that is satisfactory to both parties, it can supersede the stages and end the issue.⁶⁹

1. *Consultations*

Before calling for a dispute resolution panel, the complainant party must first initiate bilateral talks, referred to as consultations, with the state party it claims is in error.⁷⁰ Although not usually needed, when the matter concerns “sanitary or phytosanitary” disputes under Chapter 9.19 of the USMCA, so-called “technical consultations” are prerequisites for formal consultations.⁷¹ These are functionally identical to ordinary Article 31.2 and 31.4 consultations, but must be undertaken prior to the beginning of ordinary consultations.⁷² In order to institute these technical consultations, the requesting party must send a notification of such a request to its assigned contact within the responding party’s state.⁷³ Both parties to the dispute are required to meet within thirty days of the responding party’s receipt of the request for technical consultations, with a stated goal of finding a resolution within 180 days.⁷⁴ If these talks are considered to have failed, then the parties can move towards Chapter 31 consultations.⁷⁵

68. See generally USMCA, *supra* note 22, ch. 31 (laying out the consultation process, the establishment, composition, and rules of procedure of a panel, and implementation methods).

69. See *id.* art. 31.16.

70. See *id.* art. 31.6.1 (“[A] consulting Party may request the establishment of a panel by means of a written notice delivered to the responding Party.”).

71. See *id.* art. 9.19.6 (containing Chapter 9 of the USMCA on Sanitary and Phytosanitary Measures and explaining that “[n]o Party shall have recourse to dispute settlement under Chapter 31 (Dispute Settlement) for a matter arising under this Chapter without first seeking to resolve the matter through technical consultations in accordance with this Article”).

72. *Id.* art. 9.19.6.

73. See *id.* art. 9.19.2 (detailing how a requesting party may initiate technical consultations by “by delivering a written request to the Contact Point of the responding Party”).

74. *Id.* art. 9.19.3.

75. See *id.* art. 9.19.6 (“No Party shall have recourse to dispute settlement under Chapter 31 . . . without first seeking to resolve the matter through technical consultations.”).

Chapter 31 consultations are much the same as technical consultations; the only major difference is that Chapter 31 consultations can be instantly requested for any dispute that doesn't concern sanitary or phytosanitary measures.⁷⁶ The requesting party fills out a written request that details the reasons for the dispute and delivers it to the responding party.⁷⁷ Within either fifteen days—for matters concerning perishable goods—or thirty days otherwise, both parties must begin the discussions.⁷⁸ These discussions are like technical consultations in that both parties shall endeavor to find a solution to the issue at hand.⁷⁹ The principal difference between Chapter 9 consultations (technical consultations) and Chapter 31 consultations (regular consultations) is that if Chapter 31 consultations fail, the requesting party may be able to establish a panel to solve the issue.⁸⁰ To qualify for a panel, it must be thirty days after the delivery of a party's request for consultations for perishable disputes, or seventy-five days otherwise.⁸¹

2. Panels

As outlined above, if the parties fail to negotiate a solution, the complaining party may request an arbitral panel by means of a written notice granted to the responding party.⁸² Panels comprise three or five members, with the chair of the panel decided upon within fifteen days of the delivery of the call for panel establishment.⁸³ Parties to the dispute have the right to at least one hearing before the panel, which is: open to the public, subject to a public rebuttal, and accepting of the admission of what are essentially amicus-curiae briefs.⁸⁴ Following

76. *See id.* art. 31.4 (describing how consultations can be requested).

77. *Id.* arts. 31.4.2–3.

78. *Id.* art. 31.4.5.

79. *See id.* art. 31.4.6 (“The consulting Parties shall make every attempt to arrive at a mutually satisfactory resolution of a matter through consultations under this Article.”).

80. *Compare id.* art. 31.6 (stating that if formal consultations are insufficient, a panel may be the next step), *with id.* art. 9.19.6 (stating that if technical consultations are insufficient, Chapter 31 consultations are the next step).

81. *Id.* art. 31.6.1.

82. *Id.*

83. *See id.* art. 31.9 (laying out the various procedures for establishing panel composition).

84. *See id.* art. 31.11 (establishing Rules of Procedure for Panels created under

the panel procedure, the panel will create a report which comprises the final judgment on the dispute.⁸⁵

If the panel finds that a party has breached its obligations as alleged, the parties are then encouraged to “endeavor” to agree on a way to resolve the dispute at the heart of the matter to their consummate satisfaction.⁸⁶ If the disputing parties are unable to agree on a resolution, the complainant party is permitted to take “offensive” actions against the respondent party, often understood as suspending benefits in the targeted sector of the dispute.⁸⁷

III. ANALYSIS

A. MEXICAN VIOLATIONS OF KEY USMCA PRINCIPLES

One of the bedrock international trade principles upon which the USMCA rests is the concept of national treatment for the goods and services of all parties.⁸⁸ Under AMLO’s administration, however, the Mexican government has seemingly decided that this principle does not apply to industries it cares about, such as energy. The principal example of this strategy is in AMLO’s reform to *la Ley de la Industria Eléctrica* (“The Law of the Electricity Industry”).⁸⁹ Mexico’s government operates a state-run enterprise known as the *Comisión Federal de Electricidad* (CFE).⁹⁰ This company is what the

the Agreement).

85. *See id.* art. 31.17 (“[T]he disputing Parties shall make the final report available to the public.”).

86. *Id.* art. 31.18.

87. *See id.* art. 31.19 (noting that benefits in this regard refers to any benefits conferred by the USMCA such as national product protection, freedom from tariffs, etc.).

88. *See id.* art. 2.3.2 (“The treatment to be accorded by a Party . . . with respect to a regional level of government, [must be] treatment no less favorable than the most favorable treatment that regional level of government accords to any like, directly competitive, or substitutable goods, as the case may be, of the Party of which it forms a part.”).

89. *See* Decreto por el que se reforman y adicionan diversas disposiciones de la Ley de la Industria Eléctrica, Diario Oficial de la Federación [DOF] 9-03-2021, (Mex.) [hereinafter Industrial Energy Law] (outlining revisions to the Law of the Electricity Industry).

90. *See generally* *Nuestra Empresa* [Our Company], COMISIÓN FEDERAL DE ELECTRICIDAD [FED. ELECTRICITY COMM’N], <https://www.cfe.mx/nuestraempresa/Pages/queeslacfe.aspx> (“The Federal Electricity Commission (CFE) is a public

government of Mexico refers to as a “basic service provider.”⁹¹ Article 2.3 of the USMCA explicitly states that the government of a party cannot afford to any business of another party to the agreement any less favorable treatment than it affords to its own.⁹² Despite this, Mexico’s government under AMLO has sought to alter the base level of the rules of the game in the energy sector in Mexico.⁹³ Under reforms committed to on March 9, 2021, the Mexican government established that only “basic service providers” can enter into electricity coverage contracts with physical delivery.⁹⁴ Given that by law there is only one “basic service provider” in the country, AMLO has effectively restricted all other energy companies in Mexico from engaging in physical delivery for any electricity coverage contracts.⁹⁵

Favoring state enterprises in the energy industry is rooted in AMLO’s convictions on self-sufficiency, as seen with the government’s treatment of its oil company, Pemex.⁹⁶ The Mexican government granted a five-year postponement of the enforcement of rules for ultra-low sulfur diesel sales to Pemex, without offering the same deal to other purveyors of petroleum products.⁹⁷ This effectively

company of a social nature that provides electric energy, a fundamental service for the development of a nation.”).

91. FRANCISCO ALEJANDRO CONTRERAS DEL VALLE, BLOCKCHAIN IN THE MEXICAN ENERGY SECTOR 20 (2020), https://energypartnership.mx/file/admin/mexico/media_elements/reports/Blockchain_en_el_Sector_Energ%C3%A9tico_Mexicano.pdf.

92. See USMCA, *supra* note 22, art. 2.3.2 (“The treatment to be accorded by a Party . . . with respect to a regional level of government, [must be] treatment no less favorable than the most favorable treatment that regional level of government accords to any like, directly competitive, or substitutable goods, as the case may be, of the Party of which it forms a part.”).

93. See Industrial Energy Law, *supra* note 89, art. 3 (reorganizing who can provide what services in favor of CFE).

94. *Id.*

95. See *id.* (“Only Basic Service Providers may enter into Electrical Coverage Contracts with a Physical Delivery Commitment”).

96. See Yuka Hayashi & Juan Montes, *U.S. Initiates Trade Fight with Mexico Over Energy Policy*, WALL ST. J. (July 20, 2022), <https://www.wsj.com/articles/u-s-initiates-trade-fight-with-mexico-over-energy-policy-11658322032> (noting that the two broad spheres of issues being addressed by the United States are the Mexican treatment of Pemex and the electricity industry at large in Mexico).

97. See Norma Oficial Mexicana, Res. 1817/2019, Resolución de la Comisión Reguladora de Energía, 12-18-2019 (Mex.) (granting an extension solely to Pemex so that it can market ultra-low sulfur diesel and automotive diesel).

meant that Pemex did not have to make the switch to less sulfurous fuel in large part, while the rest of the industry had to abide by more stringent regulations.⁹⁸ Providing a commercial benefit to state enterprises is against the spirit and text of the USMCA.⁹⁹

B. U.S. COMMITMENT TO CONSULTATIONS REGARDLESS OF EFFICACY UNDERMINES MEXICAN ADHERENCE TO THE USMCA

In light of the energy-related violations of the USMCA principles, the United States' trade representative, Katherine Tai, took action by initiating a call for consultations with the Mexican government.¹⁰⁰ This allegation of violations was based on Article 31.2 of the USMCA and covered not only the mentioned issues but also broader concerns of competition-fixing in the energy market.¹⁰¹ The request for consultations noted that Mexico's actions were in violation of both Article 2.3 of the USMCA, mandating that parties effectively provide equal treatment to goods from another party, and Article 14.4, as Mexico is providing less favorable treatment to U.S. investors and their investments than to its own.¹⁰²

While consultations were entered into August 19, 2022, in accordance with the USMCA's protocols, there is no evidence that they have accomplished anything after that point. To that end, in March 2023, Reuters reported that the Biden Administration was

98. See *id.*

99. See USMCA, *supra* note 22, art. 2.3 (containing the most favorable treatment standard requiring that regional levels of government accord provide no less favorable treatment to any like, directly competitive, or substitutable goods, as they would to local ones).

100. See *generally* Press Release, Off. U.S. Trade Rep., U.S. Request for Consultation with Mexico on Energy (July 20, 2022), https://ustr.gov/sites/default/files/US%20Cons%20Req%20Mexico%20energy_072022.pdf (initiating a call for consultations with the Mexican government).

101. See *id.* ("Pursuant to Articles 31.2 and 31.4 of the *United States-Mexico-Canada Agreement* (USMCA), the United States requests consultations with Mexico with regard to various measures of Mexico that favor its state-owned electrical utility, Comisión Federal de Electricidad (CFE), and petroleum company, Petróleos Mexicanos (Pemex), and negatively impact U.S. companies operating in Mexico and U.S.-produced energy. These measures appear to breach Mexico's commitments under the USMCA.").

102. *Id.* ¶¶ 5–6.

preparing an “ultimatum” for AMLO.¹⁰³ This ultimatum was said to be the “final offer” before the administration called for a dispute panel to resolve the matter once and for all.¹⁰⁴ Given how much time has passed since the date this news broke, one of two things is true: either the administration has delivered the ultimatum and its bluff was called, or the administration never attempted such a gambit in the first place. Over a year after the ultimatum was ostensibly being tendered, the dispute over Mexican energy policy remains an afterthought on both sides of the aisle.¹⁰⁵ Either way, the United States still has not called for the establishment of a dispute panel in this matter. At the same time, Canadian Minister of Trade Mary Ng has noted that Canada, also a party to the dispute, would not be interested in escalating the dispute.¹⁰⁶

Almost as if to illustrate the failure of U.S. policy in curtailing Mexican energy centralization, AMLO’s government continued to engage in, and tout its expansion of, dominance in the energy sector.¹⁰⁷

103. See Jarret Renshaw & David Lawder, *Exclusive: U.S. Plans Ultimatum in Mexico Energy Dispute, Raising Threat of Tariffs*, REUTERS (Mar. 27, 2023), <https://www.reuters.com/business/energy/us-plans-ultimatum-mexico-energy-dispute-raising-threat-tariffs-2023-03-27> (“The Biden administration plans to send Mexico an “act now or else” message in coming weeks in an attempt to break a stalemate in an energy trade dispute.”).

104. See *id.* (“The Office of the United States Trade Representative (USTR) is expected to make what was described as a ‘final offer’ . . . [before] the U.S. will request an independent dispute settlement panel.”).

105. See *The Biden Administration’s 2024 Trade Policy Agenda with United States Trade Representative Katherine Tai Before the Ways and Means Comm.*, 118th Cong. 4 (2024) (Testimony of Ambassador Katherine Tai, U.S. Trade Rep.) (mentioning the energy dispute once, without indicating any progress, over the course of a four-hour long hearing).

106. See Cat Rainsford, *Trade Minister Says Canada Sees No Need to Escalate Energy Dispute with Mexico*, MEX. NEWS DAILY (May 5, 2023), <https://mexiconewsdaily.com/news/canada-trade-minister-rules-out-escalating-mexico-energy-dispute> (noting that, despite this unwillingness to act on the energy issue, Canada has joined the United States in its dispute with Mexico on the “Corn Decree”).

107. See Perla Velasco, *CFE to Reach 61% Participation in Electricity Generation in 2024*, MEX. BUS. NEWS (Jan. 17, 2024), <https://mexicobusiness.news/energy/news/cfe-reach-61-participation-electricity-generation-2024> (“CFE has met President López Obrador’s objectives on electricity generation and keeps working to regain a majority share . . . [t]he commission has already reached 52% participation in electricity generation participation and . . . is

Within a month of the news coming out that the United States was planning to issue an ultimatum to the Mexican government, AMLO announced that by the end of the next year the state-run electricity company would produce 65% of the nation's energy, following the acquisition of a Spanish power company at a purchase price of six billion dollars.¹⁰⁸ AMLO's decision to proceed with nationalizing the nation's energy sector, despite American representatives arguing against it, demonstrates how the absence of serious counteractions has only empowered AMLO to intensify his efforts in this direction. Even when the United States announced the request for consultations, AMLO stated "[n]othing will happen."¹⁰⁹

C. MEXICAN ADVANCEMENT ON DOMESTIC POLITICAL GOALS IN THE WAKE OF U.S. INACTION

1. *The "Corn Decree" as a Violation of the USMCA*

In February 2023, in an attempt to head off the establishment of a panel by the United States, the Mexican government retooled its 2020 decree imposing a phased in ban of all genetically modified corn in the country.¹¹⁰ The Mexican government's new decree would not ban genetically modified corn in totality.¹¹¹ Instead, the ban would direct government agencies to revoke approvals and refrain from granting new approvals for the use of genetically engineered corn for human consumption (for use in dough and tortillas) immediately, but will

projected to increase to 61% by September 2024.").

108. See Karen Dilge, *CFE to Generate 65% of Energy by 2024: López Obrador*, MEX. BUS. NEWS (Apr. 14, 2023), <https://mexicobusiness.news/energy/news/cfe-generate-65-energy-2024-lopez-obrador> ("President Andrés Manuel López Obrador . . . stated that by the end of next year, CFE will generate 65% of the nation's power.").

109. See Hayashi & Montes, *supra* note 96 (discussing AMLO's remarks at his daily press conference on energy policy, where he ordered his staff to play a popular song "Oh, so scared" and declared that "nothing will happen," with regards to the trade dispute).

110. Decreto por el que se establecen diversas acciones en materia de glifosato y maíz genéticamente modificado, Diario Oficial de la Federación [DOF] 13-02-2023, (Mex.) [hereinafter 2023 Corn Decree].

111. See *id.* (noting that the ban would not necessarily extend to the use of genetically modified corn for animal feed or industrial purposes).

gradually phase out such imports when it comes to animal feed.¹¹² 94% of corn grown in the United States is genetically modified.¹¹³ A successful ban on 94% of American corn products in Mexico could have catastrophic effects on the industry, potentially removing billions from the U.S. economy.¹¹⁴ The new decree is not so much a concession to the United States, but rather an outright assault on U.S. interests based on faulty science¹¹⁵ rooted in AMLO's political goals. The only way for any of AMLO's restrictions on U.S. genetically modified corn to be valid under the USMCA is for it to be based on either international standards or scientific evidence that it represents a harm to his people.¹¹⁶ Given that the ban on importation was based on the idea that genetically modified corn is harmful to the Mexican population, the onus is on AMLO to prove his scientific claims.¹¹⁷ Despite this, AMLO's government has suggested that the blame lies with the United States for not sufficiently proving the safety of GE corn.¹¹⁸

112. *Id.*

113. *See Adoption of Genetically Engineered Crops in the U.S.*, USDA, <https://www.ers.usda.gov/data-products/adoption-of-genetically-engineered-crops-in-the-u-s> (showing the widespread use of genetically engineered crops in the United States, a unique threat to the U.S. farm industry if the claims made by the Mexican government fail to be challenged by the United States on the grounds that GMO foods are not a threat to human health).

114. *See* Kuypers Karisha, MEXICO PUBLISHES DECREE TO BAN GLYPHOSATE AND GE CORN 2 (2021), https://apps.fas.usda.gov/newgainapi/api/Report/DownloadReportByFileName?fileName=Mexico%20Publishes%20Decree%20to%20Ban%20Glyphosate%20and%20GE%20Corn_Mexico%20City_Mexico_01-06-2021 (showing that, specifically, the decree to ban GE Corn comes with the argument that such corn is deleterious to the health of Mexican citizens, and therefore it is fair to exclude it from importation, except as a food product for livestock).

115. *See Food, Genetically Modified*, WHO (May 1, 2014) [hereinafter WHO], <https://www.who.int/news-room/questions-and-answers/item/food-genetically-modified> (showing that, despite the claims by the Mexican government that GMO foods are uniquely harmful for human consumption, GMO foods in the international market are subject to safety standards that largely preclude such harm).

116. USMCA, *supra* note 22, art. 9.6.3 (“If a sanitary or phytosanitary measure is not based on relevant international standards, guidelines, or recommendations . . . the Party shall ensure that its sanitary or phytosanitary measure is based on an assessment . . . of the risk to human, animal, or plant life or health.”).

117. *Id.*

118. *See* Adriana Barrera & Cassandra Garrison, Mexico waiting on US proof that GM corn safe for its people, deputy ag minister says, REUTERS (Mar. 6, 2024),

From the beginnings of AMLO's history with populism and politics, he set out to benefit the interests of rural farmers in Mexico, regardless of any restrictions placed on him.¹¹⁹ His 2018 campaign platform put the issues of self-sufficiency in agriculture front and center, specifically calling out the weakness of the Mexican corn sector in confronting this problem.¹²⁰ To AMLO and his movement, this is not merely a campaign promise; it is the next stage in a war against neoliberalism.¹²¹ The mere presence of genetically modified corn in Mexico, to him, represents a battle in that war.¹²² AMLO believes that neoliberalism and foreign interests have been gutting Mexico from the inside out, and that any hint of their commercial existence is a threat to Mexico's wealth.¹²³ To that end, in his book written for the 2018 election he stated succinctly that Mexico must reject genetically modified corn, as it undermines the existence of traditional corn varieties in Mexico.¹²⁴ From top to bottom, the issue of corn, much like that of energy control, is an issue central to AMLO's core convictions.¹²⁵

Alas, just because a party believes it is necessary to "value"

<https://www.reuters.com/markets/commodities/mexico-waiting-us-proof-that-gm-corn-safe-its-people-deputy-ag-minister-says-2024-03-07/> (noting that Mexico's Deputy Agriculture Secretary Victor Suarez said "Mexico is waiting for the United States to prove imported genetically modified (GM) corn is safe for Mexicans").

119. See Stevenson, *supra* note 41 ("[AMLO] said he won't eliminating tariffs on U.S. white corn and beans if elected, showing no allegiance to a deal he sees as harmful to Mexican farmers.").

120. See MORENA, *supra* note 53, at 14 (highlighting the challenges of food security in Mexico with data published in Enrique Peña Nieto's Fifth Report).

121. See ANDRÉS MANUEL LÓPEZ OBRADOR, PROYECTO ALTERNATIVO DE NACIÓN 2010 [ALTERNATIVE NATIONAL PROJECT 2010] 188 (2010), <http://em.fis.unam.mx/public/mochan/proyectoAlternativoDeNacion20101231.pdf> (discussing neoliberal policy as a purported imposition by the hegemonic interests of the US and its large corporations, as well as the involvement of Mexican oligarchs).

122. See *id.* at 182 (showing AMLO's political manifesto describing free trade imports of transnational grains as being part of a war propagated by foreign governments).

123. See generally *id.* (reflecting the basis of AMLO's beliefs as featured in his policy proposals).

124. LA SALIDA, *supra* note 52 ("Estas especies deben perdurar y por eso decimos: no al maíz transgénico.").

125. *Id.*

traditional crops does not give it the right to unilaterally ban its import in violation of a trade agreement.¹²⁶ To that end, the United States invoked the technical consultations required under Article 9.19 on March 6, 2023.¹²⁷ The argument behind the consultations is simple: Mexico's ban on the importation of genetically modified corn, which largely comes from the United States, is the outright denial of entry of one party's goods in violation of Article 2.11 of the USMCA.¹²⁸ Additionally, while blocking imports could be undertaken if the product in question were scientifically proven to be legitimately harmful to the lives of a party's citizens (the only valid reason to halt imports under USMCA), Mexico's decision to ban the importation of genetically modified corn is unsupported by the scientific evidence.¹²⁹ On June 2, 2023, the United States trade representative followed up with the request for formal consultations, the final step before the establishment of a dispute panel.¹³⁰

2. *The Mexican Government's Views on Panels*

In response to this move, AMLO imposed a 50% tariff on imports of white corn.¹³¹ Such an attack is a unique form of protest, as the levying of such a stiff tariff is likely violative of the USMCA¹³² but

126. See USMCA, *supra* note 22, at art. 2.11 ("Except as otherwise provided in this Agreement, no Party shall adopt or maintain any prohibition or restriction on the importation of any good of another Party").

127. Press Release, Off. U.S. Trade Rep., U.S. Request for Technical Consultation with Mexico on Agricultural Biotechnology (Mar. 6, 2023), <https://ustr.gov/sites/default/files/2023-03/US%20Tech%20Consult%20Request%20March%202023.pdf>.

128. *Id.*

129. See USMCA, *supra* note 22, art. 9.6. (allowing parties to establish levels of protection, establish approval procedures, and adopt measures necessary for the protection of human, animal, or plant life or health, while requiring a basis in scientific evidence); see also WHO, *supra* note 114 (expressing a lack of a health risk from genetically modified foods).

130. Press Release, Off. U.S. Trade Rep., U.S. Request for Consultation with Mexico on Agricultural Biotechnology (June 2, 2023), <https://ustr.gov/sites/default/files/US%20Dispute%20Settlement%20Consultations%20Request%20-%20June%202023.pdf>.

131. *Mexico Imposes 50% Tariff on White Corn Imports Amid Trade Dispute with U.S. and Canada*, ASSOCIATED PRESS (June 24, 2023), <https://apnews.com/article/mexico-tariff-corn-canada-united-states-48b414c2dafdff8543223f88fc7bc7a7>.

132. See USMCA, *supra* note 22, art. 2. (detailing how national goods are to be

will not cause as much damage to the United States as the wholesale banning of genetically modified corn.¹³³ The increased tariff is further proof that discussions alone do not deter the government in Mexico City. It was an intentional provocative act from the AMLO Administration against what appeared to many as moves towards escalation.¹³⁴ In an interview with the Mexican newspaper Milenio, AMLO's agricultural minister addressed the potential risks of a panel being established, with his explanation making clear the connection between the perceived threat of a dispute panel and the revised decree.¹³⁵

The Mexican government is aware of the effects that dispute panels can have and, moreover, has respected and supported their use in the past.¹³⁶ In a speech to businessmen at the award of the Medal of Industrial Merit in August 2022, AMLO's foreign secretary noted that the party the dispute panel sides with "wins everything."¹³⁷ On January

granted no better treatment than foreign goods, with tariffs, being taxes on imports, undeniably changing the equality of treatment).

133. See STEVEN ZAHNISER ET AL., *THE GROWING CORN ECONOMIES OF MEXICO AND THE UNITED STATES* 14 (2019) (finding that white corn makes up approximately 1% of U.S. corn production).

134. See *U.S. Asks Mexico for Trade Consultations Over GM Corn Limits*, ASSOCIATED PRESS (Mar. 6, 2023), <https://apnews.com/article/us-mexico-corn-trade-ban-genetically-modified-e391801aec39fe442b12ea7ed47a8190> (stating that the United States had "escalated its trade dispute" by calling for consultations over the Corn Decree).

135. See Jesús H. Hernández, *Con segundo decreto, México desactivó eventual panel por maíz en T-MEC* [*With Second Decree, Mexico Deactivated Possible Corn Panel in T-MEC*], MILENIO (May 30, 2023), <https://www.milenio.com/negocios/decreto-mexico-desactivo-eventual-panel-maiz-t-mec> (arguing that there is no longer any conflict that would even necessitate a panel, but even if the United States thinks so, he does not believe that a panel should be called at all).

136. See Anthony Harrup, *Mexico Requests USMCA Panel to Resolve Dispute Over Auto Rules*, WALL ST. J. (Jan. 6, 2022), <https://www.wsj.com/articles/mexico-requests-usmca-panel-to-resolve-dispute-over-auto-rules-11641513131> (noting Mexico called for the establishment of a panel against the United States, an implicit recognition of the adherence of the Mexican government to the doctrines of the USMCA).

137. See, e.g., Patricia Romo, *México no abandonará el T-MEC ni lo pondrá en riesgo: Ebrard* [*Mexico Will Not Abandon the USMCA Nor Put It at Risk: Ebrard*], EL ECONOMISTA (Aug. 24, 2022), <https://www.economista.com.mx/empresas/Mexico-no-pondra-en-riesgo-el-T-MEC-ni-planea-abandonarlo-Marcelo-Ebrard-20220824-0079.html> (demonstrating the knowledge and beliefs of the Mexican government towards the dispute resolution procedures).

10, 2023, a dispute panel called for by both Canada and Mexico against the United States concerning tariff-free import requirements for automobiles ruled against the United States.¹³⁸ Mexico itself established the panel in 2022 following insufficient negotiations with the Biden Administration, subjecting itself to their requirements, and in so doing hoped to reap the rewards of the agreement.¹³⁹ Expressing its indication to abide by the ruling, the administration expressed that it began talks with private and commercial interests to explore the implementation of the panel's report.¹⁴⁰ While there is significant evidence that Mexico will continue to engage in policies that violate the USMCA if it is mired in lengthy consultations with no end in sight,¹⁴¹ its responses and participation in previous panels are illustrative of how it would respond to future panels.

It would even be fair to say that discussions are effectively the "home turf" of the Mexican government.¹⁴² These conferences put the subjects in question in the hands of the public, not the law, and allow AMLO and his cabinet to manipulate public opinion through false overtures.¹⁴³ On August 3, 2023, Mexican Deputy Agriculture Minister Victor Suarez spoke to the news publication Reuters to complain that the United States had rejected an offer by Mexico to "cooperate on [genetically modified] corn studies."¹⁴⁴ To the less

138. Anthony Harrup & Paul Vieira, *USMCA Panel Rules Against U.S. in Auto Dispute With Mexico, Canada*, WALL ST. J. (Jan. 11, 2023), <https://www.wsj.com/articles/usmca-panel-rules-against-u-s-in-auto-dispute-with-mexico-canada-11673480106>.

139. See Harrup, *supra* note 136 (describing the dispute and both parties' actions).

140. See Harrup & Vieira, *supra* note 138 (indicating U.S. Chamber of Commerce engagement).

141. See *supra* Part III.B. (illustrating how the U.S. commitment to consultations with Mexico over energy-related USMCA violations, despite a lack of progress or effective counteraction, has emboldened Mexico's continued centralization of its energy sector, undermining adherence to the trade agreement).

142. See *supra* Part III (noting the Mexican government has engaged in discussions and not been made to alter its course of action over the course of more than a year).

143. See USMCA, *supra* note 22, art. 31.4 (giving wide deference to the specifics of consultations).

144. Adriana Barrera & Cassandra Garrison, *Exclusive: Mexican Official Says U.S. Refuses to Cooperate on GM Corn Studies*, REUTERS (Aug. 3, 2023), <https://www.reuters.com/science/mexican-official-says-us-refuses-cooperate-gm-corn-studies-2023-08-03>.

observant, it may appear as though AMLO's administration offered the United States an olive branch: a good faith attempt to actually determine whether or not genetically modified corn is a risk. The refusal on the part of the United States could seem like intransigence for no reason other than stubbornness.¹⁴⁵ In reality, this "olive branch" bears no fruit. For decades, scientific research has proven that genetic modification of crops does not pose a special harm to humans or animals.¹⁴⁶ In fact, analyses of studies point to the opposite conclusion.¹⁴⁷ With this knowledge, one can recognize that the Mexican government offered to "cooperate" on new studies in an attempt to stall the creation of a dispute panel, knowing full well that creation and execution of a full-scale study would take time, allowing for the implementation and acceptance of the AMLO regime on corn restrictions.¹⁴⁸ Ultimately, even if the United States were to have accepted the offer made by AMLO and his government, there is no evidence that it would have yielded results any different than those seen for the past several decades.¹⁴⁹

The United States Trade Representative is a role beset by unique difficulties.¹⁵⁰ It is inarguable that Katherine Tai is forced to approach

145. *Id.* (quoting the AMLO cabinet member condemning the American refusal as holding "Their science [as] the word of God. That is not science, that is ideology.").

146. Megan L. Norris, *Will GMOs Hurt My Body? The Public's Concerns and How Scientists Have Addressed Them*, HARVARD BLOG (Aug. 10, 2015), <https://sitn.hms.harvard.edu/flash/2015/will-gmos-hurt-my-body> ("After more than 20 years of monitoring by countries and researchers around the world . . . GMOs have been found to exhibit no toxicity").

147. See ELISA PELLEGRINO ET AL., *IMPACT OF GENETICALLY ENGINEERED MAIZE ON AGRONOMIC, ENVIRONMENTAL AND TOXICOLOGICAL TRAITS: A META-ANALYSIS OF 21 YEARS OF FIELD DATA 6* (2018) (finding that mycotoxin and other toxin levels, which are carcinogenic to humans and animals, were lower by anywhere from 20% to over 90% in genetically modified corn as opposed to its unmodified equivalent).

148. See 2023 Corn Decree, *supra* note 110 (explaining that the Corn Decree's gradual implementation was to be achieved by January 31, 2024, prior to the institution of full panel proceedings against Mexico).

149. See Norris, *supra* note 146 (showing decades worth of research that ultimately points to the conclusion that genetically modified foods do not pose a risk to human beings).

150. See *Mission of the United States Trade Representative*, U.S. TRADE REP., <https://ustr.gov/about-us/about-ustr> (demonstrating that the United States Trade Representative is tasked with adhering to both private industry goals as well as the

her role as Trade Representative while balancing the interests of multiple parties at once.¹⁵¹ To that end, the United States is currently in the midst of requiring Mexico's assistance in its region for numerous issues.¹⁵² It is, however, worth noting that the Mexican government of AMLO was only a temporary instance of the larger movement. His government came to an inauspicious end on October 1, 2024, whereupon the keys to the National Palace were handed over to the new administration.¹⁵³ This new administration, headed by AMLO's longtime political ally Claudia Sheinbaum, is the natural heir to his movement and its policies.¹⁵⁴

On August 17, 2023 the United States invoked its Article 31 powers as established in the USMCA treaty text to create an arbitral panel to resolve the corn dispute.¹⁵⁵ The establishment of a panel in this matter brings the contracting parties to the last level of enforcement possible before the outbreak of more severe economic conflict.¹⁵⁶ In response

interests of the United States at large, necessitating subordination to the interests of the administration by which they serve).

151. *Id.*

152. See Colleen Long, *U.S., Mexico Agree on Tighter Immigration Policies at the Border*, ASSOCIATED PRESS (May 3, 2023), <https://apnews.com/article/border-immigration-biden-mexico-a0b8f4730521d90fd5ea305e2f2cbc5e> (showing cooperation on a contentious issue which the Biden administration is under significant fire for domestically); see also Mary B. Sheridan, *As Fentanyl Crisis Grows, U.S.-Mexico Divide Deepens*, WASH. POST (Apr. 29, 2023), <https://www.washingtonpost.com/world/2023/04/29/mexico-us-fentanyl/> (demonstrating another difficult political agreement created on an issue that is important for the President of the United States in the region).

153. See *The Mexican Electoral System*, EL INSTITUTO NACIONAL ELECTORAL [NAT'L ELECTORAL INST.], <https://ine.mx/the-mexican-electoral-system> (describing in detail the process by which Mexican presidents are elected).

154. Diego Oré & Adriana Barrera, *Mexico Kicks Off Election Campaign with Ruling Party's Sheinbaum in Lead*, REUTERS (Mar. 1, 2024), <https://www.reuters.com/world/americas/mexico-kicks-off-election-campaign-with-ruling-partys-sheinbaum-lead-2024-03-01> (quoting Sheinbaum as saying: "On June 2, the people of Mexico will make a decision. There are only two paths: that the transformation continues or that corruption returns.").

155. Press Release, Off. U.S. Trade Rep., United States Establishes USMCA Dispute Panel on Mexico's Agricultural Biotechnology Measures (Aug. 17, 2023) [hereinafter U.S. Panel Request], <https://ustr.gov/sites/default/files/2023-08/US%20Panel%20Request%20-%20Mexico%20Biotech.pdf>.

156. See USMCA, *supra* note 22, art. 31.19 (describing how, in the absence of adherence to a panel's recommendations, the winning party may suspend benefits in the sector in question for the opposing party, through methods such as tariffs).

to this action, AMLO demonstrated his appreciation for precedent,¹⁵⁷ and while claiming that he was not in violation of the USMCA, noted that his administration would respect the results of a panel's decision.¹⁵⁸ The effects of the panel's establishment were instant and obvious, with private groups inside Mexico calling for AMLO to avert what they saw as a coming crisis.¹⁵⁹ The reaction from both the Mexican government and NGOs is remarkable, making the fact that the United States has not attempted to renew this success with regard to the Mexican energy dispute even more striking.¹⁶⁰

IV. RECOMMENDATIONS

The United States should abandon its policy of attempting, far beyond the requirements of the USMCA, to negotiate with the MORENA government in Mexico on what is, to them, a key ideological issue.¹⁶¹ The American administration should seek to establish panels to reach a quick and effective resolution to its dispute. Uneven use of Article 31.6 dispute resolution measures has taught AMLO, and his successor by extension, that they can both avoid major consequences for trade violations and achieve their ideological goals.¹⁶²

AMLO's movement recognizes the strength of panel reports and the

157. See Harrup & Vieira, *supra* note 138 (demonstrating a previous time in which Mexico has supported a panel and its decision).

158. Valentine Hilaire & Raul C. Fernandez, *Mexico President Says He'll Accept Resolution of Panel in Corn Trade Spat with U.S.*, REUTERS (Aug. 18, 2023), <https://www.reuters.com/markets/commodities/mexico-president-says-will-accept-resolution-panel-corn-trade-spat-with-us-2023-08-18>.

159. Eliza Galeana, *Mexico Will Lose the GM Corn Panel: CONCAMIN*, MEX. BUS. NEWS (Aug. 22, 2023), <https://mexicobusiness.news/agribusiness/news/mexico-will-lose-gm-corn-panel-concamin> (quoting the leader of the Confederation of Industrial Chambers, an organization representing 30% of the GDP in Mexico, as calling for AMLO to work with the United States to avert a "negative scenario," while also noting that Mexico will likely lose the panel).

160. See *supra* Part III (showing only consultations being used against AMLO's energy policies).

161. See *supra* note 53 and accompanying text (comparing the national campaign platform of AMLO for multiple elections, focusing on the primacy of domestic economic issues).

162. See *supra* Part III (illustrating the lack of consequences for trade violations).

threat they pose to its economic goals.¹⁶³ AMLO's own ministers attempted to defuse the conflict by noting that their revised and less harsh Corn Decree removed any agricultural issues as "topic[s] for discussion," remarking that the establishment of a panel is a real "threat."¹⁶⁴ Without course correction, the Sheinbaum Administration is likely, if not guaranteed, to threaten U.S. economic interests in the future, especially given the state of the oil industry in Mexico as it stands today.¹⁶⁵

AMLO has spent his entire time on the global stage speaking out of both sides of his mouth. To his neighbors, Canada and the United States, he extolls the values of the USMCA,¹⁶⁶ while at work in Mexico City he pushes for actions to undermine that same agreement.¹⁶⁷ Members of his administration claim the utmost respect for the agreement and its principles, while participating in a government that openly flouts them.¹⁶⁸ The United States must use the tools available to it to discover what the administration in Mexico City is really committed to. It is not as though the United States is

163. Harrup, *supra* note 136.

164. Hernández, *supra* note 135.

165. See Simon Romero, *Mexico's President Bet Big on Oil. His Successor Will Be Stuck with the Tab*, N.Y. TIMES (Aug. 24, 2024), <https://www.nytimes.com/2024/08/24/world/americas/mexico-oil-sheinbaum-pemex.html> (depicting Pemex as being in a considerable amount of debt, with the political interests of Sheinbaum's presidency and the financial stability of the state-run energy industry on a collision course).

166. Lilia González, *Industria automotriz pide al Gobierno de AMLO mejorar el T-MEC; "no basta con mantenerse dentro" [Automotive Industry Asks AMLO Government to Improve MEC; "It is Not Enough to Stay in It"]*, EL ECONOMISTA (Aug. 25, 2022), <https://www.economista.com.mx/empresas/Industria-automotriz-pide-al-Gobierno-de-AMLO-mejorar-el-T-MEC--no-basta-con-mantenerse-dentro-20220825-0060.html> (noting that here AMLO notes that the North American economies "need" each other, and the only way to effectively deal with their industrial issues was to improve and work within the USMCA).

167. See *Mexico Institute Experts Comment on AMLO's Proposed Reforms*, WILSON CTR. (Feb. 14, 2024), <https://www.wilsoncenter.org/article/mexico-institute-experts-comment-amlos-proposed-reforms> (noting that AMLO's last proposed reforms in office feature proposals that would dramatically weaken Mexico's commitment to the USMCA, including enshrining the corn ban in the constitution).

168. See Romo, *supra* note 137 (including a strong denial from AMLO's foreign minister as to the chances of Mexico leaving the USMCA).

necessarily shy about calling for panels in general.¹⁶⁹ The first U.S. requested panel against Canada on dairy allocation led to a moderate change in Canadian policy.¹⁷⁰ It can be accomplished again with Mexico.

The personal and political success of AMLO and his movement have been based around the idea that, unlike the previous ruling party (Partido Revolucionario Institucional), MORENA can defeat the specter of neoliberalism that AMLO claims is the primary driver of Mexican decline.¹⁷¹ The only way the Mexican government, now firmly under the thrall of the *Obradoristas*, AMLO-aligned ideologues, would be disincentivized from taking hostile actions towards American investments is by using the tools the United States has at its disposal to enforce an equal trading environment in North America.¹⁷² The Mexican government, be it of AMLO or Sheinbaum, must now reckon with the slow rolling catastrophe that is its energy industry.¹⁷³ Nearly one hundred billion dollars in debt, Pemex has been

169. See, e.g., Press Release, Off. U.S. Trade Rep., United States Establishes Second USMCA Dispute Panel on Canadian Dairy Tariff-Rate Quota Policies (Jan. 31, 2023), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/january/united-states-establishes-second-usmca-dispute-panel-canadian-dairy-tariff-rate-quota-policies> (noting that, while this is the second dispute panel that the United States has instituted against Canada, its establishment is not an indictment of the success of panels, but rather a representation of how diplomacy works at its best). The United States believed the efforts undertaken by the Canadians to rectify the results of the first panel were insufficient, the panel was convened to resolve that issue without undue interparty conflict.

170. See *Panel Report Implementation - Proposed Allocation and Administration Policy Changes*, GOV'T OF CAN. (Mar. 01, 2022), https://www.international.gc.ca/trade-commerce/consultations/TRQ-CT/cusma_dairy_changes-produits_laitiers_aceum_changements.aspx?lang=eng (demonstrating actual political change on the part of Canada because of the dispute panel).

171. See *El AMLO revolucionario; el presidente vapuleado y el neoliberalismo 'perverso'* [The Revolutionary AMLO: The Battered President and "Perverse" Neoliberalism], EL UNIVERSAL (Jan. 12, 2018), <https://www.eluniversal.com.mx/columna/mario-maldonado-expres/el-amlo-revolucionario-el-presidente-vapuleado-y-el-neoliberalismo> (noting AMLO's particular rage against neoliberalism during the 2018 campaign); see also Mattiace, *supra* note 54, at 287 (noting that the strength of AMLO's coalition comes with the "need to make concrete progress in [anti-corruption, criminal violence and security, and the economy]").

172. See *supra* Parts II–III.

173. See Romero, *supra* note 165 ("To stave off a default on its nearly \$100 billion debt, the company has required multibillion-dollar bailouts using taxpayer money").

allowed to survive only by the constant and unceasing intervention on the part of the federal government, all while being tied inextricably to the populist movement that holds the keys to a real political legacy, and has become the ultimate Faustian bargain.¹⁷⁴ No amount of mere discussions can reasonably force the hand of a government in the opposite direction of billions of dollars of support.¹⁷⁵ As it pertains to energy, there is no evidence that the ideological beliefs held by the *Obradoristas* have been shifted in any way, major or minor, on the part of the United States expressing muted disapproval and requesting dialogue.¹⁷⁶

Further to this point, the fact remains that AMLO is now not a one-off. From October 1, 2024, Claudia Sheinbaum now leads the next of what could become a legacy of *Movimiento de Regeneración Nacional* administrations.¹⁷⁷ This transfer of power is has become a transfer of unimaginable control, with MORENA deputies in congress pushing forth AMLO's final set of reforms.¹⁷⁸ These reforms that have passed have already brought Mexico to the brink, consolidating vast amounts of power in the central government, resulting in the removal of all federal judges and leading to the direct election of all judges in Mexico, while reducing the requirements for attaining such judgeships.¹⁷⁹ These reforms threaten the independence of the judiciary in Mexico, and their imposition has led to significant protests from both the pundits and the populace.¹⁸⁰ The United States must

174. *Id.* (noting that the Mexican government has “granted Pemex the staggering amount of at least \$70 billion . . . since 2019”).

175. *Id.*

176. *See supra* Parts II–III.

177. Claudia Osborn, *Claudia Sheinbaum Wins Landslide Victory*, FOREIGN POL’Y (June 7, 2024), <https://foreignpolicy.com/2024/06/07/mexico-election-sheinbaum-amlo-morena-majority>.

178. Mary B. Sheridan, *López Obrador’s Final Act: A Radical Challenge to Mexico’s Democracy*, WASH. POST (Aug. 31, 2024), <https://www.washingtonpost.com/world/2024/08/31/lopez-obrador-elected-judges-democracy>.

179. *Id.*

180. Alex Vasquez, *Mexico Passes Judicial Reform Cementing Morena Party’s Power*, BLOOMBERG (Sept. 11, 2024), <https://www.bloomberg.com/news/articles/2024-09-11/mexico-passes-judicial-reform-cementing-morena-s-sweeping-power> (noting that critics say that this reform will “undermine democracy,” and recognizing that the debate on the bill was interrupted by “hundreds of protestors” entering the main floor of the chamber of deputies).

recognize that, given AMLO's final slate of reforms, the Sheinbaum Administration, regardless of any pretensions of moderation, would be empowered in a way Mexico has not seen in generations.¹⁸¹ The chance to reset the relationship and challenge the new administration on its commitment to conciliation is immense. Equally, allowing the new administration to get away with violating the USMCA would set a precedent for future Mexican administrations that international agreements and cooperation are only real insofar as one wants them to be. While it is understandable that the United States may want to withhold scathing criticism of its southern neighbor, as well as any actual consequences, due to the existence of other agreements that are important to the Biden Administration, the failure to take AMLO and his movement's ambitions to task here puts those agreements equally at risk.¹⁸² If Mexico chooses to pull out of the aforementioned agreements as a result of the United States merely enforcing the rules both parties had agreed to be bound by, then Mexico will naturally suffer the consequences of intransigence.¹⁸³ The move to establish a panel in the case of the corn dispute is a recognition that the U.S. policy of consultations on these issues is not working, and that the use of arbitral panels is required to effect real change.¹⁸⁴ This requires the United States to treat its disputes with Mexico equally, granting its energy dispute the same level of attention and enforcement. For the United States to maintain regularity on the part of its multilateral ties, it must consistently enforce the rules it has on the books.

V. CONCLUSION

The Mexican government under AMLO has not only violated the United States – Mexico – Canada Agreement, but shows no signs of stopping this economically nationalistic crusade. Unless the *Obradoristas* experience significant economic or political

181. *Id.*

182. *See supra* note 152 and accompanying text (describing two key political issues that are being touched by Biden's international agreements with Mexico, drugs and immigration, which are threatened by any anger on the part of the Mexican administration).

183. *See Long, supra* note 152 (recognizing Mexico gained the benefits of U.S. support for their efforts as part of the agreement).

184. U.S. Panel Request, *supra* note 155 (noting how the panel came after consultations "failed to resolve the matter").

repercussions, their violations will only grow more flagrant, as evidenced by past responses to mere consultations. While establishing a panel for the corn dispute was the right decision, choosing not to further pursue the energy dispute will fail to modify the violative policies espoused by the government in Mexico City. Allowing Mexico to breach its agreements undermines not only the strength of the free trade agreement in question, but also the strength and validity of all other multilateral agreements entered into by the United States. Above all else, pushing for the establishment of dispute panels forces both the current and all future administrations to make conscious and distinct choices as to whether they believe themselves to be bound by their international obligations, or whether they believe agreements are merely ink on paper without the respect of law.