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TRADE DISPUTE SETTLEMENT PROCEDURES IN THE NAFTA

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INTRODUCTION

The organization that is discussed here - the NAFTA Secretariat - has some unusual characteristics. It comprises three national sections, one each for Canada, the United States and Mexico, with each section headed by a Secretary. I am Secretary of the Canadian section. In organizational terms, the sections are "mirror images" of one another. The three Secretaries report to the Free Trade Commission, which itself consists of the three Ministers responsible for international trade in their respective countries. The three Secretaries must always reach a consensus on any problem requiring resolution, since none of the Secretaries has authority over the others. We have to work together to implement the terms and conditions of the Agreement on the matters with which we are concerned.

One important aspect of our organization is that the Secretariat's three national sections operate independently of their respective governments, i.e., we have an arm's-length relationship, and this independence ensures the integrity and impartiality of the process. In a few words, our mandate consists in administering the trade dispute settlement procedures that were negotiated by the three member countries. In short our role is to:

- register complaints;
- receive and redistribute all relevant documents;
- organize the hearing(s); and
- issue decisions.

DISPUTE CASES

The Secretariat does not initiate cases on its own. It is important to understand this point because some of you may wish we would do that. I will explain later exactly how cases are initiated. This will be useful because speakers appearing in a previous workshop have sent a somewhat inaccurate message about how exactly the process begins and unfolds. The paper in question was presented by Burfisher, Norman and Schwartz (2001) which said some flattering things about the role of the Secretariat, but they were not entirely correct.

Let's be clear about a second thing: the dispute settlement mechanisms of the NAFTA *are not informal processes*. Everything is codified in Rules of procedure that deal with the most minute details. It is not my intention today to criticize the system when I say that Rules are strict, but simply to drive home the point that this system is precisely codified. Rules do not bend. There are rules for disputes between private industries (NAFTA, Chapter 19) and there are other rules for disputes between governments (NAFTA, Chapter 20). In the latter case, rules allow for "consultations," as Burfisher, Norman and Schwartz have written (2001, p.133). In fact, this is the norm, but consultations occur in very formal settings, as a country must first officially request them, and there are no guarantees, other than goodwill, that they will occur anytime soon after the request is made. For Chapter 19, Burfisher, Norman and Schwartz use the expression "parties can inform interested parties" to describe the hard reality of the initiation of an antidumping *complaint* by a competitor¹ ("complaint" by a competitor is highlighted to distinguish it from "parties can inform"). The two situations are quite different from one another. In Canada, the complaint will be made before the Canada Customs and Revenue Agency.

¹ A competitor must control 25 percent of the regional or national market.

The authors continue their argument with the expression “and provide them (ie., the parties) with the opportunity to furnish information,” when in fact, the importer *receives* a lengthy questionnaire about its business practices to be filled before a set date, or else ... What is called a “normal value” (which in fact is the maximum value) will be assessed against that importer, as a duty. That is not really a benign “opportunity to furnish information,” as they wrote.

Also, parties may request “panel reviews”. This means in real life, that if the Agency did not come up with the required trade remedy, the dissatisfied company or industry group *must* (not “may”) request a panel, to review the decision. It is the economic and social responsibility of that company to use all means at its reach to protect its interests and that of its labour force. Let us not forget that real people bear the brunt of any unpleasant trade dispute. That is the rationale for these dispute resolution mechanisms.

HOW THE APPEAL PROCESS WORKS

The terms and conditions negotiated between Canada, the United States and Mexico to resolve trade disputes within the Secretariat are very strict, as in any appeal process. They provide an opportunity for the continent’s business firms to appeal a decision by a national tribunal to a supranational authority (in other words, the Secretariat), strictly with regard to dumping and subsidies.

For Canada, the decisions that can be reviewed on appeal are those by the Canada Customs and Revenue Agency or the Canadian International Trade Tribunal. In Secretariat jargon, these two entities (and only these two) are “the investigating authorities whose decisions can be subject to review by a special binational panel”. The procedure is as follows: the Customs Agency will have decided to impose a customs duty (technically called an “anti-dumping duty”), whose effect, as you well know, is to increase the prices of the goods in question on the Canadian market (or on the U.S. or Mexican market, depending on where the decision was made) and consequently, protecting the national producer from competition. In

Canada, it will have determined that the American or Mexican producer is selling its products, by itself or to an importer, for less than it costs to produce them domestically, and is therefore guilty of dumping, or alternatively that it is receiving a subsidy enabling it to sell its products at a lower price in Canada, that is the “countervailing duty.” When an alleged subsidy is involved, governments will be participants to a Chapter 19 case. As we saw this fall in the case of softwood lumber, these two tariffs can be applied cumulatively.

A third cause of complaint has also appeared in the books of the Customs Agency or its equivalent in the United States or Mexico, i.e., “price discrimination.” As a matter of fact, an offence will be suspected if the advertised price of a product in Canada is less than its advertised price in the United States or Mexico.

The essence of a trade dispute rests on the calculation of the subsidy proportion affecting the price of a good for the purposes of calculating the customs duty. The same applies to the factors included in the production cost calculation of a firm accused of dumping. What in fact are the costs, down to the last red cent? That is what the Customs Agency decides and *the way, or how, it arrived at its determination*, is what can be appealed before the Secretariat. For a case to go forward, a competing business in another country must also have been harmed -- the injury test, as it was very briefly mentioned by Burfisher, Norman and Schwartz (2001, p. 137). If no harm has been caused, there is no case. The Canadian International Trade Tribunal is responsible, in Canada, for finding whether one or more firms representing a significant proportion of national production have been affected by dumping. These two institutions therefore work on the same cases at different stages of the procedure.

Decisions concerning dumping, subsidies and injury, by the Canada Customs and Revenue Agency and the Canadian International Trade Tribunal, as well as those issued by the equivalent agencies in the United States and Mexico, can also be appealed to the Federal Court of Canada, to the United States Court of International Trade and, in Mexico, to the Tribunal Fiscal de la Federación. The point is that the dispute settlement proce-

dures allow one or more firms, through our Secretariat, to challenge an administrative decision in a forum other than one of the national courts I have just named. There is not much room for informality in this.

To summarize, I would say that as a general rule foreign firms are interested in challenging, before the Secretariat's Canadian Section, the *imposition* of a customs duty, and Canadian firms are interested in challenging the *roll back* of a customs duty. Reading Burfisher' Norman and Schwartz, one could have thought that only foreign firms could appeal a decision made in Canada. This is not the case. In fact, when a customs duty is rolled back as a result of a periodic administrative review (normally every five years), all players are once again subject to the rules of the market and this may not suit a group of firms previously protected in Canada by a customs duty.

Finally, under the NAFTA rules, the panel's mandate is to consider *only* whether the laws of the country being challenged, have been strictly observed in the first place. It is not open to a panel to determine whether, in light of the case participants' explanations before it the law has, as it were, some far-sighted provision that permits a novel interpretation. The panel cannot judge the case again. Of course, if an issue is remanded to the responsible authority by the panel, the decision will probably be amended; however, this will be because of an error in construing the law and for no other reason.

CHAPTER 19 CASES

We now to elaborate further on the efficient and timely role that the NAFTA Secretariat plays in the administration of the dispute resolution process, and demonstrate that the provisions offered in Chapter 19 of the NAFTA, are an attractive alternative to judicial courts because they are far less expensive and not as lengthy. The Agreement was written in a way that allows companies or industries to have the option between a national tribunal and the NAFTA Secretariat, giving precedence to the NAFTA process.

For instance, a company that intends to initiate an appeal of a final determination before a judicial court, must file within 20 days of the publication of the official note announcing this final determination. This is called a “Notice of Intent to Commence Judicial Review.” It advises the Secretariat, as well as the importers and exporters of the product in question, of the company’s desire to have a federal tribunal review the matter. Another company who would prefer to go before a NAFTA panel has 30 days to file a Request for Panel Review. These extra 10 days are the proof that the three governments have clearly intended to give precedence to the panel system.

It has happened on a few occasions after a company’s Request for Judicial Review, that another company satisfied with the decision of the Agency, filed a Request for Panel Review with the Secretariat simply to prevent a judicial review. We can assume that the reasons for this were to have a panel of *experts* review the matter and also to avoid lengthy delays. I say, “we can assume” because there is only anecdotal evidence of the motivations of those companies that prefer our process to that of judicial courts.

The NAFTA Secretariat’s work is to ensure that the Rules are adhered to and that, to the extent possible, the prescribed time periods are respected, by both the participants and the panelists.

Now consider the time line these Rules prescribe. The provisions with respect to panel reviews conducted pursuant to Article 1904 are designed to result in decisions of the panels within 315 days after the commencement of the panel review. The Secretariat, on receipt of a Request for Panel Review and without any undue delays, assigns a case number to the file, notifies both involved Ministers, the investigating authority and the service list, which is comprised of importers and exporters of the goods that have been subjected to the investigation. The Secretary also publishes the Notice in question in the official gazette of her or his country. And the computation of time begins.

Persons on the service list are then allowed 30 days from the Request date to file Complaints, and 15 more days to file Notices of Appearance. These Notices can be filed either in support or against the complaint. The process becomes really animated, when you find out that a company fights both the complaint and the investigating authority, the first for asking too much, and the second, for not going far enough. On the 55th day following commencement, panelists are named. Upon receiving the names of the panel members, the Secretariat ensures that a conference call is held in the following days with the intent of scheduling the hearing as closely as possible to the time period prescribed in the Rules.

It is not often that the list of panel members is completed in time but that does not, in any way, prevent the process from continuing and participants from filing their respective briefs within the prescribed time period. Further, once appointed, the Panel shall take into account the intent of the Rules to secure just, speedy and inexpensive reviews of final determinations when considering any delays or extensions of time.

Panelists or not, 15 days after the filing of Notices of Appearance (we are then at day 60), the investigating authority files the administrative record comprised of all documents or other information presented to or obtained by the competent agency in the course of the administrative proceeding. The Secretariat receives anywhere between two and twenty boxes of documents which are copied and distributed to the five panelists. This leads to the filing of briefs by complainants and respondents at intervals of 60 days. Complainants' reply briefs are due 15 days after that (we are then at day 195). Oral arguments are normally heard 30 days after the filing of reply briefs depending on the availability of the five members. No later than 90 days after the oral arguments, the panel renders its decision and the Secretariat is responsible for the issuance and translation of it.

The panel decision coincides with the 315 days prescribed by the Rules. Of course, the panel may remand, i.e. send back the issue(s) to the investigating authority. But then, the complainant has won its case in terms of getting the responsible agency to modify its decision and perhaps, the company will obtain everything it pleaded for.

Then, there is a possibility that a “new,” if I may say, unsatisfied customer, will object to the new decision of the Agency, and the process will be prolonged. This “customer” is never a government, it can only be one of the original participant to the case who files what is called “a Written Submission with respect to the Determination on Remand,” commonly known as a “Challenge to the Determination on Remand.” The panel will only consider the Agency’s remand if such a document is filed. There is *no* situation where a panel will revise its decision only after informal comments by participants.

Throughout that process, the Secretariat is responsible for administrative support, protection of confidential and proprietary information, timely service and distribution of documents, arrangements for the hearing (including pre and post-hearing meetings). Its effectiveness in performing all of these tasks is essential to making this dispute resolution mechanism a less costly one for interested parties. One can only imagine the impacts and delays associated to a breach of confidentiality or oversight in service of documents. A worthy anecdote on that subject was reported by William P. Alford (now a U.S. panelist) in 1987, when he mentioned a case that was remanded by the Court of Appeals for the Federal District to the Court of International Trade “to dismiss ... for lack of jurisdiction” because [the complainant] complaint initially lacked adequate postage and reached the CIT approximately two weeks later than is permitted by the CIT’s Rules.”² Alford, with humour, concluded the episode in old English, writing “Woe unto ye who think deadlines are mere formalities!”

In Canada, 47 experts can be called upon to reach a decision in a dispute. To be included on this roster, a person must of course be familiar with international trade law, either as a lawyer, or as a professor of law or political science. The professional and personal reputations of these individuals are already established and respected in business circles. To be

² Alford, William P., “When is China Paraguay? An examination of the application of the antidumping and countervailing duty laws of the United States to China and other ‘nonmarket economy’ nations.” *Southern California Law Review*. 61: 79-135, 1987, p. 82.

selected as a panelist, the jurist must then agree to comply with the Code of Conduct developed in the Rules of Procedure; this Code is essential if the procedure is to have any credibility. Any financial interest, business relationship or personal situation likely to influence the jurist's independence or impartiality, or that could be so perceived, must be declared in writing as soon as it occurs during a proceeding.

In addition, the arbitrators are selected to hear a dispute on a case-by-case basis and they are not accountable for their decisions to the governments that selected them but, human nature being what it is, to their profession and ultimately, to their colleagues. If I were one of them, I would always bear in mind that my decision may be cited later and this would be a definite source of pride for me. Arbitrators also are mindful of the Extraordinary Challenge Committees, a special procedure provided in the rules for the purpose of setting aside a panel decision because of gross misconduct on the part of one or several members of the panel. The mere fact that this procedure could be invoked ensures that rules are closely followed.

It is important to note in this context that in just 12 years, the 90 decisions heard under the rules of Chapter 19, which relates to dumping and subsidies, have resulted only once in a decision where the panelists lined up on the side of the industry of their respective nations. Accordingly, our panelists have made a great contribution to more harmonious trade relations between the North American Free Trade Agreement member countries, by confirming the power of the rule of law in these relations.

OTHER DISPUTE RESOLUTION PROCEDURES

I would like to end this presentation by describing the other major aspect of the dispute settlement procedures provided in NAFTA. The three countries have given themselves, through a procedure separate from the one relating to industry groups or companies, the possibility of using arbitrators to resolve a dispute concerning the *interpretation of the NAFTA* by the signatory governments. For example, is a specific country entitled to

make a new research assistance program available to local firms without infringing the spirit, and above all the letter, of the Agreement?

This separate procedure is found in Chapter 20. When a dispute arises, the governments can decide to use this procedure, or take the issue to the World Trade Organization, either, but not both fora. The Chapter 20 process is of a nature to promote informality in the ways of settling a dispute, much like Burfisher, Norman and Schwartz described. The involved countries begin by undertaking a consultation process among officials. If this fails, one of the countries will request a special meeting of the Free Trade Commission, which (again), consists of the three ministers responsible for international trade. They may decide to ask technical experts to review the facts, or recommend mediation by a specialized organization or special envoys. A five-member panel will be established only as a last resort.

If a panel is established, the selection process is not the same as the one under Chapter 19. Each country selects two members from the other country. The panel chair is selected by the Parties involved and can be a citizen of any country in the world, whereas under Chapter 19 the chair is identified by consensus among the panelists (it is my job to promote this consensus during an initial conference call).

The governments then file submissions and rebuttals and at least one hearing will be called by the responsible Secretariat in the country whose program or legislative measure is being challenged. The panel's initial report, which is expected 90 days (three months) after the last panelist is selected, will contain *recommendations* (as opposed to a binding decision under Chapter 19's Rules) for a possible solution of the dispute. Each country then makes a submission regarding the suggestions made to them and the panel prepares a final report within the next 30 days.

The only delays allowed in this time schedule (and don't forget the NAFTA's basic goal, which is to reduce the length and cost of any dispute) are to enable a panel to grant a request by a country for the establishment of a scientific review board to hear experts on environmental, health, safety

or other scientific matters; it is up to the panel to decide whether this is relevant in the case before them.

Certain restrictions on release of information are also strictly specified in the Rules. Their only purpose is to maintain the integrity of the dispute settlement procedure, so that the Parties can resolve their dispute informally at any time without a panel intervening. It is not generally known that since Mexico joined the Agreement, of the 23 instances brought to the attention of the Secretariat by governments concerning another government, only four have resulted in formal requests for review by a panel. In other words, 19 cases have been resolved before their conclusion through consultations between the Parties.

In my work and in that of all three National Sections' staff, we act as if the credibility of the Agreement itself is at stake on a daily basis because beyond the individual disputes, trade agreements are under close scrutiny in public opinion of recent years. Ours should be nurtured closely. For instance, we always keep in mind that today, when a business is forced to pay customs duties it did not pay before, the first victims are very often the workers employed by the firm and its suppliers, if the importing business is not in a position to pass on the customs duties to its customers through an equivalent increase in its prices. A significant proportion of the employees are then hit by technical unemployment, as an economist would say, which is the same, in the street, as real unemployment.

Therefore, the well being of their families or, as the United States Constitution promises, their "Pursuit of happiness," depend on the rapid resolution of trade disputes. In fact, there is a real world behind each case and we are all aware at the Secretariat, that the sooner a dispute is resolved, the more the NAFTA will meet public expectations.

CONCLUSION

My last word will be very short. The major trend emerging from the last twelve years of dispute resolution practice in NAFTA is that this part of the Agreement is a success that is used as a model globally when

countries liberalize their mutual trade. Negotiators have come to realize that resolving disputes is critical to the success of free trade agreements, both in general and in particular. And dispute avoidance is an even better approach. As I have described above, the NAFTA dispute settlement mechanisms incorporate both provisions, but in separate chapters.

And if your company has a complaint against a competitor, do not forget to mail it to the appropriate agency with enough postage on the envelope!

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