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IN FOCUS

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Enforcing International Trade Obligations in USMCA: The State-State Dispute Settlement Mechanism

Enforcement of many obligations in the proposed United States-Mexico-Canada Agreement (USMCA), which would replace the existing North American Free Trade Agreement (NAFTA) if ratified, is covered by the dispute settlement mechanism in USMCA's Chapter 31. This mechanism would permit any of the three Parties who intend to join the Agreement (i.e., the United States, Mexico, and Canada) to bring a claim against another Party that is allegedly violating its USMCA obligations. Chapter 31, which draws substantially on NAFTA's Chapter 20 mechanism, applies to a majority of the Parties' USMCA obligations, but there are exceptions. For instance, article 32.12 exempts certain investment decisions reviewed under the *Investment Canada Act* from Chapter 31. Additionally, USMCA includes more complex enforcement provisions for some of its chapters, including the Environment and Labor Chapters. This InFocus provides an overview of USMCA's Chapter 31 process.

Bases for Invoking Chapter 31

Article 31.2 lists instances when a Party may use the Chapter 31 dispute settlement process. First, a Party may invoke the process if it believes that another Party has proposed or adopted a domestic trade-affecting measure inconsistent with its USMCA obligations or has failed to carry out an obligation. Second, the Parties may use Chapter 31 to address disputes over interpretation or application of the Agreement's provisions. Finally, for specified chapters, Chapter 31 may be invoked when a Party believes that another Party has "nullified or impaired" a benefit that the first Party "could reasonably have expected to accrue to it" under such chapters.

Disputes may involve a variety of issues. Some of the NAFTA disputes that could similarly arise under USMCA might include: a Party's failure to authorize permits to foreign entities to provide cross-border services (e.g., as in the NAFTA *Cross-Border Trucking Services* dispute) or imposition of agricultural tariffs that are not permitted under the Agreement (e.g., as in the NAFTA *Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products* dispute).

The Chapter 31 Process

Consultations

As an initial step, the Party or Parties alleging that another Party is violating USMCA may request consultations. The disputing Parties must hold these consultations within 15 days after delivery of the request if the issue concerns perishable goods or within 30 days for any other matter. Consultations are confidential discussions between the Parties designed to provide an informal and early means of resolving a dispute.

Establishing a Panel

If consultations do not resolve the matter, then the complaining Party or Parties may request establishment of a panel. This request may generally not be made earlier than 30 days after delivery of the request for consultations for matters involving perishable goods or 75 days for any other matter, but the disputing Parties may agree on a different timeline.

Once a request for a panel is delivered, the panel is deemed "established." As a practical matter, panelists must still be selected before the panel process can commence. Panelists are typically selected from a roster created by the Parties, although the Parties may propose individuals who are not on the roster. Non-rostered individuals, however, may be subject to a "peremptory challenge" that does not apply to individuals on the roster. Specifically, a Party may reject a nonrostered individual without justification unless no one on the roster possesses the necessary qualifications to serve as a panelist.

To constitute the panel, the disputing Parties must first attempt to select a panel chair by consensus. Failure to do so within a specified timeframe triggers a mechanism whereby one Party is chosen by lot to designate the chair. If the responding Party fails to participate in the selection-by-lot process, the complaining Party or Parties may designate the chair, although the chair may not be a citizen of the selecting Party or Parties.

Next, the Parties must select the remaining panelists by consensus. Generally, panels have five members, but the Parties may agree to panels of three. In the first case, each side may select two panelists, and in the latter, one. In both cases, each Party chooses panelists who are citizens of the other Party. Should the disputing Parties fail to select panelists, then panelists are chosen by lot from the other Party's roster. If the responding Party fails to participate in the choosing of lots, then the other side may select panelists who are its own citizens.

The Panel Process

The function of a panel is to facilitate resolution of a dispute by creating a panel report that includes findings of fact, determinations of whether a Party has violated its USMCA obligations, and, if the Parties so request, recommendations as to how to resolve the dispute.

To prepare a panel report, a panel may receive written and oral submissions from the disputing Parties, any nonparticipating State-Party, and experts. The panel must offer the Parties at least one hearing and an opportunity to present their views orally. After receiving all submissions, a panel must prepare, by consensus or majority vote, a draft report. The panel must typically present the report to the Parties within 150 days after appointment of the final panelist, although the panel may extend the deadline by up to 30 days, or for a different period if the Parties so agree. The disputing Parties may comment on the draft report. After considering such comments, the panel may request additional submissions or order further examination before issuing a final report.

Resolving a Dispute

When a final report determines that the responding Party has violated its USMCA obligations, the Parties must seek to resolve the dispute within 45 days after receipt of such report. Even if a report contains recommendations for how to resolve the dispute, the Parties are not bound by them. Instead, they may negotiate their own terms, such as by requiring amendment of a USMCA-inconsistent law or providing compensation.

If a resolution is not reached within 45 days, then the complaining Party or Parties may suspend benefits to the responding Party (e.g., impose higher tariffs than allowed under USMCA) to the extent that such suspension has an "equivalent effect" as the measure or conduct found to be USMCA-inconsistent. The suspended benefit should be in the same sector as the subject of the dispute, unless this would be ineffective or impracticable.

If the responding Party believes the suspension of benefits is manifestly excessive or that it has cured the violation, it may request that the original panel consider the issue. Should the panel conclude that the suspension is manifestly excessive, it must "provide its views as to the level of benefits it considers to be of equivalent effect." Further, if the panel finds that the violation has not been cured, then the complaining Party may suspend benefits up to the level determined by the panel.

Consequences of Using Chapter 31

Once a Party requests establishment of a panel under USMCA, it may not raise the same issue under another trade agreement or in another forum such as the World Trade Organization (WTO). Thus, using USMCA limits the Parties to the panel process and remedies set forth in the agreement. When deciding whether to rely on USMCA or to invoke another agreement, a Party may consider whether it prefers an agreement with an appellate mechanism, which USMCA lacks, or whether the substantive provisions of other agreements more directly address its concerns.

Considerations for Congress

Over the past few decades, Congress has shown an interest in the effectiveness of NAFTA's panel system by asking questions (e.g., about the panel selection process) and proposing reforms (e.g., requiring any renegotiated agreement to "meet or exceed" prior dispute settlement objectives, as in H.R. 7014 (110th Congress), or to subject labor and environment commitments to dispute settlement, as in H.Res. 132 (115th Congress)).

Congress could consider whether USMCA's revised dispute settlement mechanism resolves any concerns about its effectiveness and whether it should be replicated in future free trade agreements or used as a template in formulating negotiating objectives in any future Trade Promotion Authority legislation. For instance, Congress may seek to address specific aspects of the mechanism, such as whether certain provisions that are not subject to Chapter 31 should be, or whether the panel process ensures timely resolution of disputes.

Nina M. Hart, Legislative Attorney

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