

## **NAFTA Dispute Settlement Mechanisms: An Overview**

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### **Introduction**

The 1994 North American Free Trade Agreement (NAFTA), and its two side agreements on the environment and labour, came with a large number and wide variety of dispute settlement mechanisms, of both a very traditional and highly innovative kind. Along with many new trilateral institutions and processes for dispute avoidance and management, the NAFTA regime brought five major formal dispute settlement mechanisms. There are NAFTA’s Chapter 19 on antidumping and countervailing duties, NAFTA’s Chapter 20 on general disputes, NAFTA’s Chapter 11 on investment, and two mechanisms in the accompanying North American Agreement for Environmental Co-operation (NAAEC) – the Article 14-15 citizen’s submission process, and the Part Five provisions for party-to-party environmental enforcement disputes.

What are the core features, and distinctive contribution of each, as they were designed and as they have operated during their first decade? This brief overview suggests some simple answers, as a start for the more detailed examination from the experts that follow.

## 1. NAFTA Chapter 19 on Antidumping and Countervailing Duty

The first pillar - NAFTA's Chapter 19 on Antidumping and Countervailing Duties - is much like the similar provisions of the bilateral Canada-US Free Trade Agreement (CUFTA) that preceded NAFTA in 1989. Chapter 19 offers a binational panel to review the work of national trade adjudication tribunals, when the aggrieved foreign government feels that a national tribunal of its partner has not properly interpreted that partner's own domestic trade law.

More specifically, NAFTA Article 1904 "establishes a mechanism to provide an alternative to judicial review by domestic courts of final determinations in antidumping and countervailing duty cases, with review by independent binational panels. A panel is established when a Request for Panel Review is filed with the NAFTA Secretariat by an industry asking for a review of an investigating authority's decision involving imports from a NAFTA country" (NAFTA Secretariat 2004).

The dominant view, especially outside Canada, is that Chapter 11 has been a clear success (Vega 2003). It is a **popular, well used** process, with 86 cases initiated from 1994 through to February 2003.<sup>1</sup> It has **made an autonomous difference**, as its panels have sustained some decisions made by domestic administrative authorities, but also remanded others for clarification or stronger justification, and even determined that the

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<sup>1</sup> By way of comparison, during the five years of CUFTA, the United States and Canada brought a total of 47 cases against each other that reached the panel stage. A majority of 28 were directed against US agencies, and a minority of 19 cases against Canadian agencies.

decision be vacated. It has operated **professionally**, as its panels have been composed of experts familiar with legal and economic concepts, who work more thoroughly than the domestic courts often did. And in contrast to concerns about its CUFTA predecessor, Chapter 19 panels have been unbiased on the basis of nationality, as over 80% of panel decisions have been unanimous and no panels have divided along strictly national lines.

Thus far, Chapter 19 has been a “pleasant surprise in reducing the cross border temperatures in trade remedy disputes” (Vega 2003). It has made officials in the United States, Canada and Mexico act within the boundaries of their own law, and thus reduced the protectionist pressures industries can mount on their administrative tribunals at home. In doing so it has brought more principled, less political dispute resolution, even in the high profile cases it has taken up. Yet more broadly, many Canadians still ask why antidumping and countervailing duty litigation are needed at all in NAFTA, given the deep integration of the real economy, and the heavy cost in process protectionism and economic inefficiency that such incentives to litigation and national closure provide.

## **2. NAFTA Chapter 20 on General Dispute Settlement**

The second pillar of the NAFTA regime’s dispute resolution repertoire is NAFTA’s Chapter 20 on general dispute settlement. It offers a process that starts with consultations and moves to formal panels if necessary.

More precisely, the Chapter 20 process is “applicable to all disputes regarding the interpretation of application of the NAFTA” and “intended to resolve disputes by agreement, if at all possible” (NAFTA Secretariat 2004). The process begins with government-to-government consultations, can then proceed to a meeting of the ministerial level Free Trade Commission, and finally to the creation of a five-member arbitral panel.

Chapter 20 has been used less frequently than Chapter 19. But on the whole Chapter 20 can be considered a success. Several difficult, politically charged cases have been resolved through consultations (for example uranium 1994, sugar 1995, tomatoes 1996, the Helms Burton Act against Cuba in 1996, and avocados in 1996-7). In nine years only three cases have had to be taken all the way to a formal panel – Mexico’s complaints against the United States over brooms and trucking, and US complaints against Canada’s poultry and dairy practices. From a legal standpoint, the decisions in all three cases are regarded as very high quality ones (Vega 2003).

### **3. NAFTA Chapter 11 on Investment**

The third pillar in the dispute resolution pentarchy is NAFTA’s Chapter 11 for foreign investment. This provision marks NAFTA, in contrast to CUFTA, as an important investment as well as a trade agreement. It also makes an innovative contribution, by

giving civil society, in the form of corporations, direct access to international dispute settlement centers, whatever their own national government may want.

More precisely, “Chapter 11 establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the parties in the Agreement in accordance with the principle of international reciprocity and due process before an impartial tribunal. A NAFTA investor who alleges that a host government has breached its investment obligations under Chapter 11 may, at its option, have recourse to” one of several multilateral arbitral mechanisms, or the host country’s domestic courts (NAFTA Secretariat 2004).

Chapter 11, as it has operated, has been one of the most controversial of NAFTA’s provisions. It has taken all three governments and their citizens by surprise with how it has been used. Critics claim that it has not been just used, as intended, to protect property rights against government measures “tantamount to expropriation” but has legalized a peculiar American conception of property rights, given foreign corporations rights not available to nationals, and been used to attack a wide array of national government regulation aimed at the social, environmental and other public goods (Kirton and MacLaren 2000). Defenders claim that even in controversial cases related to environmental regulation, the actual decisions have, in practice, respected international law, national government regulatory authority, and NAFTA’s commitment to environmentally sustainable development as a whole (Gaines 2002, Soloway 2002, von Moltke 2002, Rugman, Kirton and Soloway 1999).

To the start of 2003, 23 cases had been initiated under Chapter 11. Nine were filed against Canada, nine against Mexico, and five against the United States. Of the eight cases settled, the initiating “claimant” investor has won four and the government defendant or “respondent” four as well. The Canadian government has been the respondent in two cases, and has lost both (Vega 2003). As a result, at least in Canada, the debate over Chapter 11 will go on for some time.

#### **4. NAAEC Article 14-15 Citizen’s Submission on Environmental Enforcement**

Another highly innovative dispute settlement mechanism that gives civil society actors direct access to international centers is contained in Article 14-15 of the environmental side agreement. This “citizens submissions” process allows any interested citizen to launch a complaint that a national government is not effectively enforcing its own environmental laws.

Article 14 has also been the subject of a rich debate. Critics claim that it gives environmental NGO’s fewer powers than Chapter 11 gives to foreign corporations, and that governments have tried to circumscribe even the weak powers of its executing agency, the Commission for Environmental Co-operation (Tollefson 2002). Supporters respond that whatever its defects, it is at least better than nothing and in some cases has brought far reaching, environmentally enhancing change (Alanis 2002, Wilson 2002).

Article 14-15 has proven to be a well used mechanism. But most of the final “factual records” it has issued have been directed against Canada and Mexico rather than the United States. Moreover, the results of Article 14-15, and of the similar but weaker equivalent in NAFTA’s labour side accord, raise the important questions of whether highly legalized processes are the best way to get the changes citizens, and often their governments, want (Banks 2002, Graubert 2002).

### **5. NAAEC Part 5 Party-to-Party Disputes on Environmental Enforcement**

This question arises even more strongly in regard to the last dispute settlement pillar of the NAFTA regime – the NAAEC Part Five provisions for one government to accuse and litigate against another over allegations that it is systematically not enforcing its own environmental laws. If the accused government is found guilty after a lengthy process, it can have trade sanctions imposed on it, in the case of the US and Mexico, and fines defined in domestic courts in the case of Canada.

In NAFTA’s first decade, the Part 5 provisions have been used not a single time. They are not unique in this regard, for other NAFTA dispute settlement provisions, such as that for financial services, have also sat unused. Some claim that their heavy penalties have a powerful deterrent effect, preventing governments from undertaking the actions they were designed to stop. Other claim they are irrelevant in this regard, but that the very

presence of such punitive provisions has a pervasive pernicious effect on both trade liberalization and environmental co-operations throughout North America as a whole.

Whatever the answer, both positions point to two central questions. Should they and other parts of NAFTA's dispute settlement regime, be adjusted as North Americans build their regional community for the decade ahead? And are they the models that should be adopted beyond North America, and ultimately in the global trading system as a whole (Kirton and Maclaren 2002).

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