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Joint Group on Trade and Competition

ROUNDTABLE ON PUBLIC AND PRIVATE DISPUTE RESOLUTION MECHANISMS

-- Note by the US Delegation --

The attached note by the Delegation of the United States describes Dispute Settlement Procedures under the North American Free Trade Agreement. It is prepared in view of the discussion at the Roundtable to be held in the Joint Group on 26 October.

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DISPUTE SETTLEMENT PROCEDURES UNDER THE NORTH AMERICAN FREE TRADE AGREEMENT

Introduction

1. The North American Free Trade Agreement ("NAFTA") contains a number of provisions relating to dispute settlement. Chapter 11 affords investors the right to seek compensation through international arbitration for a Party's violation of NAFTA Chapter 11 investment obligations or of certain provisions of Chapter 15 governing the behavior of government monopolies and state enterprises. Chapter 19 provides for special dispute settlement procedures applicable to the review of antidumping ("AD") and countervailing duty ("CVD") determinations taken by NAFTA country governments with respect to imports from another NAFTA country. Amendments to a NAFTA country's AD and CVD statutes may also be reviewed for their consistency with Chapter 19. Chapter 20 of NAFTA, in turn, establishes the institutions responsible for overseeing the implementation of the NAFTA overall and provides for general procedures to assist in the avoidance and resolution of disputes between NAFTA countries under the Agreement. The basic features of these various sets of dispute settlement procedures are described below.

Chapter 11

2. Chapter 11 of the NAFTA sets out each NAFTA government's obligations with respect to investors from other NAFTA countries and their investments in its territory. In Section B of this chapter, a mechanism is provided by which an investor may pursue a claim through binding arbitration against a host government alleging that that government has breached its obligations under the chapter. The two kinds of claims which may be submitted to arbitration are allegations of direct injury to an investor and allegations of indirect injury to an investor caused by injury to a firm in the host country that is owned or controlled by the investor. In both cases, the investor may bring its claim where the injury results from an alleged breach of NAFTA country obligations as set forth in the investment chapter or in certain cases of certain provisions governing the behavior of government monopolies as set forth in Chapter 15 of the NAFTA.[1]

3. The procedures set forth in Chapter 11 encourage the settlement of claims first through consultations and negotiations. However, should such efforts not be successful, and subject to specific time requirements and certain exceptions relating to national security and specified provisions applicable to Mexico and Canada with respect to the screening of foreign investment, the investor may submit the claim for arbitration to: (i) the International Centre for the Settlement of Investment Disputes (ICSID), provided both the country of the investor and the host country are parties to the ICSID convention; (ii) ICSID's "Additional Facility" in the event one such country is not a party to the Convention; or (iii) an *ad hoc* arbitral tribunal established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

4. In such circumstances, the investor – and, in some cases, the enterprise that is owned or controlled by the investor – must consent in writing to arbitration, and to waive the right to initiate or continue any actions in local courts or other fora relating to the disputed measure (except for seeking injunctive or other extraordinary relief). The claim then is generally reviewed by a three-member arbitral tribunal, with one member appointed by each of the disputants and the presiding arbitrator appointed by agreement of the disputants. (In cases where, for whatever reason, any of the three is not appointed within 90 days of the submission of the arbitration claim, the ICSID Secretary General will appoint the arbitrator and, in the case of a presiding arbitrator, must draw from a list of candidates agreed upon by the three

NAFTA governments.) The tribunal is directed to decide questions in accordance with the NAFTA and applicable rules of international law, and any interpretation of the NAFTA made by the "Free Trade Commission" established pursuant to NAFTA Chapter 20 (see below) is binding upon the tribunal. Under certain conditions, tribunals may seek advice from experts on environmental, health, safety or other scientific matters, and there are procedures to ensure that a NAFTA government that is not the respondent in the arbitration is apprised of relevant facts and other information and, if it wishes, to submit views to the tribunal on questions of NAFTA interpretation.

5. A tribunal may order interim protective measures to preserve existing rights of the disputants, including the preservation of evidence. A tribunal cannot, however, order attachment of assets or enjoin the government from applying any measure that is the subject of the dispute. Final awards are limited to money damages or restitution, or a combination thereof, and awards of restitution must offer the alternative of paying damages. No punitive damages, however, may be awarded. Chapter 11 makes clear that an arbitral award has no precedential effect and is binding only on the particular disputants in the matter under arbitration. Disputants must abide by and comply with the award, but may seek revision or annulment of the award before enforcement. NAFTA governments are required to provide for enforcement of awards in their territories, and in the event that a NAFTA country does not comply with an award, the investor's government may seek a government-to-government arbitration panel under Article 2008 (in Chapter 20) of the NAFTA. The initiation of such proceedings, however, would not prevent the investor from seeking enforcement of the award.

Chapter 19

6. The main elements of Chapter 19 dispute settlement represent an adaptation of procedures that were negotiated between Canada and the United States for binational panel review of AD and CVD decisions under the Canada-US Free Trade Agreement ("CFTA"). Most changes were intended merely to modify a system designed for two member parties to one having three parties, though several innovations to the CFTA model were also instituted.

7. Chapter 19 provides for review and dispute settlement in "antidumping and countervailing duty matters". In the first instance, while permitting each of the NAFTA countries to retain, change and modify their own AD and CVD laws with respect to one another[2], Chapter 19 does set forth certain basic obligations and notification and consultation requirements with respect to any such changes and permits binational panel review, upon request, for declaratory opinions as to whether an amendment is consistent with the obligations set forth in Chapter 19. Declaratory opinions resulting in recommendations to modify an amending statute require consultations aimed at finding mutually satisfactory solutions and, should corrective legislation not be enacted, can lead to the right, *inter alia*, to take reciprocal measures.

8. More generally, however, the procedures provided for in Chapter 19 center on the review by independent binational panels, composed of judges and experts from the two NAFTA countries concerned, of final AD and CVD determinations made by the relevant administering authorities in one NAFTA country as to whether dumped and/or subsidized products from one of the other two NAFTA countries have caused, or are likely to cause, material injury to a domestic industry in the importing country producing a like product. Unlike WTO dispute settlement, Chapter 19 dispute settlement procedures can be and are frequently invoked by one of the non-governmental parties involved in the initial administrative proceeding. In reviewing the administrative determination, the binational panel is directed to render its decision in accordance with the domestic law and regulations of the importing country and to apply the judicial standard of review of the importing country as that standard would normally be applied by a domestic court of the importing country. The panel may uphold the final determination, or remand it to the administering authority "for action not inconsistent with the panel's decision." The mandate that the panel

apply the judicial standard of review of the importing country is intended, in part, to help prevent a lack of uniformity from evolving with respect to the judicial review of AD/CVD administrative determinations within the importing country, insofar as Chapter 19 panel review is an alternative to domestic judicial review of such determinations.[3] This desire to avoid a lack of uniformity is also one reason why Chapter 19 encourages the use of judges to serve as panelists, where possible.

9. As under the CFTA, the decisions of Chapter 19 binational panels may be subject to review by an "extraordinary challenge committee" (ECC). The conditions and criteria for invoking ECC review of a panel decision are if:

1. a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct;
2. the panel seriously departed from a fundamental rule of procedure; or
3. the panel manifestly exceeded its powers, authority or jurisdiction (*e.g.*, by failing to apply the appropriate standard of review);

and any of the above actions has materially affected the panel's decision and threatens the integrity of the binational panel review process.

10. If convened, ECCs are mandated to examine the legal and factual analysis underlying the findings and conclusions of a panel's decision, in addition to determining whether the panel applied the appropriate standard of review. Moreover, any failure by a binational panel to apply the appropriate standard of review – if such failure materially affected the outcome of the panel review and threatened the integrity of the binational panel review process – would provide grounds for an ECC to vacate or remand a panel decision. Unlike at the panel stage, private parties do not have the ability to invoke the extraordinary challenge procedure; only the NAFTA country governments may do so. However, a government's decision to seek ECC review could obviously be informed and influenced by the evidence and views provided by private parties.

11. Finally, Chapter 19 also contains a "safeguard mechanism" intended to protect the integrity of the panel review system. The safeguard is available to any of the NAFTA countries which may allege that another NAFTA country, through the application of its domestic law, has frustrated effective implementation of the binational panel process (*e.g.*, if the application of a NAFTA country's domestic law prevented the formation of a panel, prevented a panel from rendering a final decision, or interfered with the implementation of a panel decision). The safeguard procedures provide for consultation and recourse to a special committee which may review the allegation. Should no resolution be reached, the complaining country may suspend operation of the binational panel review system or, as appropriate, suspend other benefits under the NAFTA without having to abrogate the Agreement in its entirety.

Chapter 20

12. Chapter 20 of NAFTA establishes the various institutions charged with ensuring the implementation and administration of the Agreement, including a Secretariat and the Free Trade Commission composed of ministerial-level officials appointed by each of the NAFTA countries. In addition to such institutional arrangements, Chapter 20 also sets out detailed procedures for intergovernmental dispute resolution under the NAFTA for essentially all disputes other than those addressed through the procedures of Chapters 11 and 19.

13. The conflict resolution provisions of Chapter 20 apply to complaints by any NAFTA country that another NAFTA country has taken, or is proposing to take, action that is or would be inconsistent with the

Agreement or cause "nullification or impairment" of benefits that the complaining country reasonably expected to accrue to it under the Agreement. Disputes arising under both the NAFTA and the WTO generally may be settled in either forum at the discretion of the complaining government, subject to two exceptions or qualifications. First, before a country initiates a proceeding under the WTO that could also have been initiated under the NAFTA, it must notify the other two governments. The three governments may agree on the appropriate forum, but if no agreement is reached the matter normally is to be referred to NAFTA dispute settlement. Second, where the responding government claims that the action is subject to an environmental or conservation agreement listed in Article 104 of the NAFTA, or if the governmental action in dispute relates to the environment, health, safety or conservation, the dispute must be heard solely under the NAFTA.[4]

14. Whenever any matter arises that could affect a government's rights under the NAFTA, it may request consultations and the countries concerned will promptly consult on the matter. If only two NAFTA governments are involved, the third may still participate or seek its own consultations. If the disputing governments cannot resolve the matter, any country that participated may refer the matter to the Free Trade Commission for resolution. To help resolve the dispute, the Commission may employ technical advisers, "good offices," conciliation, mediation or other dispute resolution procedures. If the Commission cannot resolve the matter within 30 days or another agreed period, any country that participated in the consultations may convene an arbitral panel. If the third government considers that it has a substantial interest in the matter it may join as a complainant. However, if that government does not join in a panel proceeding, it normally must refrain from initiating a separate proceeding under the NAFTA or the WTO on the same matter. That government is nevertheless entitled to attend all NAFTA panel hearings, to make written and oral submissions to the panel and to receive the written submissions of the disputing governments.

15. Arbitral panels are composed of five individuals, selected normally from rosters established by each of the NAFTA governments according to criteria intended to ensure their objectivity, reliability, sound judgement, independence and expertise or experience in law, international trade, other disciplines covered by the NAFTA or in dispute resolution. Panels are chosen by "reverse selection," *i.e.*, the chair is selected first, either by agreement of the parties or by lot, and then each of the disputants will select two panelists from among citizens normally on the roster of the other disputing government. A disputing country may exercise a peremptory challenge against any individual proposed as a panelist who is not on the roster.

16. Unless the participating governments decide otherwise, the panel must present its initial report within 90 days of the selection of the last panelist. The initial report must contain findings of fact and a determination on whether the measure at issue is inconsistent with a provision of the NAFTA, or nullifies or impairs benefits that the complaining government could reasonably have anticipated under the Agreement. In addition, the initial report will include any recommendations that the panel may have to resolve the dispute. If the terms of reference so provide, the report will also contain the panel's findings on the adverse trade effects of any measure that the panel finds to be inconsistent with the NAFTA.

17. Final reports to the disputing parties are due within 30 days of the presentation of the initial report, unless the involved governments agree otherwise. Those governments, in turn, must transmit the final report (including any report of a scientific review board that may have been established in connection with the dispute settlement proceeding) for publication to the Free Trade Commission within a reasonable period of time, unless all three NAFTA governments decide that the report should not be published. Upon receipt of the final report, the disputing governments must attempt to resolve the dispute, normally in conformity with the panel's recommendations. Whenever possible, the parties are to resolve the dispute by agreeing that any measure found to be inconsistent with the NAFTA will be removed or, where the dispute

involved a proposed measure, will not be introduced. If that remedy cannot be agreed upon, the parties must, where possible, agree on trade compensation for the complaining party.

18. If a panel has found that a measure is inconsistent with the NAFTA and no settlement has been reached within 30 days or another agreed period, the complaining party may suspend the application to the other party of NAFTA benefits equivalent in effect to those that the complaining party considers were impaired, or may be impaired, as a result of the disputed measure. The suspension of benefits may remain in effect until the parties have resolved the dispute. Upon request of any disputing party, the Free Trade Commission will establish a panel to determine whether the level of benefits suspended is "manifestly excessive."

19. Finally, among the other provisions of Chapter 20, the NAFTA governments agreed to seek a common interpretation of NAFTA provisions that come under scrutiny in domestic court or administrative proceedings in those instances in which a government wishes to make its views known to the court or administrative body, or where that body or court solicits a government's views on the subject. Absent common agreement on interpretation, any government is free to submit its separate views to the extent and in the manner prescribed for such interventions by the appropriate forum. Chapter 20 also prohibits a NAFTA country from providing a right of action in its domestic law to challenge the consistency of another government's actions under the Agreement, and the three governments are mandated to encourage and facilitate the use of arbitration and other alternative dispute settlement mechanisms to settle international commercial disputes between private parties in North America.

NOTES

[1] NAFTA Chapter 15 requires, *inter alia*, that each government impose several specific disciplines on designated monopolies. First, in exercising any governmental authority delegated to them by a NAFTA government in connection with the monopoly good or service (such as the power to grant import licenses), monopolies must act in a manner consistent with the government's NAFTA obligations. This obligation, as it applies to actions affecting investments – as well as the Chapter 15 obligation stipulating that all enterprises owned or controlled by a federal, state or provincial or local government must act in a manner consistent with the investment and financial services provisions of the NAFTA whenever they exercise any delegated governmental authority – are both to some extent enforceable through the Chapter 11 arbitration procedures described here.

[2] While the NAFTA parties were permitted to retain and modify their trade remedy laws, all three were required to ensure that those laws contained certain provisions designed to ensure minimum levels of due process and transparency.

[3] Chapter 19 panel review is understandably not available for proceedings involving imports from a non-NAFTA country, and is not even mandatory for a proceeding involving another NAFTA country should the interested parties in the proceeding elect standard judicial review by a domestic court of the importing country.

[4] In this regard, it bears noting that NAFTA dispute settlement rules provide a number of possibilities for panels to make use of experts and scientific review boards to improve the quality of the dispute settlement process, particularly where disputes involve environmental, health, safety or other scientific matters.