



June 4, 2019

The Honorable Earl Blumenauer  
House Ways and Means Committee  
1102 Longworth House Office Building  
Washington, DC 20515

Re: Enforcement in the New NAFTA

Dear Congressman Blumenauer,

We are submitting this letter in conjunction with your May 22 hearing on "Enforcement in the New NAFTA." We appreciate your interest in this issue and wish to offer some brief comments, based on our previous research and writing on this topic. We agree with comments made during the hearing that emphasized the critical importance of a functioning state-to-state enforcement mechanism.

Members of your committee asked a number of good questions during the hearing, but we highlight the following two statements/questions as particularly helpful for focusing the issue on the core problem with enforcement of the U.S.-Mexico-Canada Agreement (USMCA) as it currently stands:

*Rep. Murphy:* "Many people can agree that the new NAFTA is an improvement over the status quo in most areas. But I think when it comes to enforcement, specifically state-to-state dispute settlement, this agreement misses the mark. I believe our demands for improvements are reasonable. Trade rules must be clearly enforceable to provide both workers and companies the confidence that these agreements will work as intended. Enforcement provisions have to be strategic to maximize effectiveness, but I think instead of including strong enforcement mechanism in the agreement, the administration's "strategy" is to use Section 301 to unilaterally enforce provisions in this new NAFTA, and I think this is misguided and inappropriate. ... given that the state-to-state dispute settlement in the new NAFTA is ineffective and structurally flawed, and the approach that you discussed is also not an approach that gets to a cooperative solution, are there any previous trade agreements that we can point to that might be a better model for enforcement?"

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*Rep. Beyer:* "during both this hearing and my conversation with stakeholders, I've heard near unanimity about the deficiency of the state-to-state dispute settlement provisions of the new NAFTA, specifically with regard to panel blocking. It doesn't

seem that anybody thinks that the text as currently written is a good idea except a few people at 600 17<sup>th</sup> street."

As these remarks suggest, the problem with the original NAFTA state-to-state dispute settlement (Chapter 20) is the result of language in this chapter that allows the party complained against to block the appointment of a panel to adjudicate the dispute. Essentially, this means that there is no recourse to enforce the obligations the parties agreed to. In fact, a NAFTA panel has not been formed since 2000, as a blocked panel later that year seemed to permanently derail the normal appointment process.

We describe the historical circumstances of the panel appointment issue in a recent law journal article, entitled "Access to Trade Justice: Fixing NAFTA's Flawed State-to-State Dispute Settlement Process."<sup>1</sup> In that article, we discuss improvements to the panel composition process that have been developed in more recent trade agreements, such as the Trans-Pacific Partnership (TPP), the Canada-EU Comprehensive Economic and Trade Agreement (CETA), and the Japan-EU Economic Partnership Agreement (JEEPA).

Based on this analysis, we set out three general principles that could be followed in order to avoid such problems in the renegotiated NAFTA (Chapter 31 of the USMCA covers dispute settlement): the roster should not be a hurdle to appointing panelists; an independent third party can act as a facilitator in the panel appointments; and, without an independent third party, the complainant should have the power itself to appoint, in order to prevent the respondent from delaying panel formation. We address each in turn.

First, while it is helpful to have a roster/list of possible panelists, this should not act as a hurdle to panel selection. If a roster is to be used, there needs to be a clear procedure in place for what happens when there are not enough individuals on the roster, or the roster is not established. In this regard, when the Parties propose an individual to serve on a panel who is not already on the established roster (as can be done in NAFTA rules), peremptory challenges from the other Party should not be allowed. In addition, if the Parties have proposed individuals for the roster, but they have not reached agreement on a complete roster at the time the panel is being formed, the complainant should be able to choose from individuals that have been proposed for the roster, even if there is no formal agreement at that time (as TPP, CETA, and JEEPA all provide for in some context).

In addition, while the difficulty of establishing an initial roster is probably inevitable, the problems caused by roster creation can be limited by making the term of service indefinite, rather than time limited. If rosters need to be frequently reconstituted, there will be more opportunities for meddling in a way that interferes with panelist selection. With indefinite roster time periods, the Parties would be prevented from allowing the roster to lapse, and then having additional delays in proposing new members (that would again be subject to peremptory challenges).

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<sup>1</sup> Lester, Simon, Inu Manak, and Andrej Arpas. "Access to Trade Justice: Fixing NAFTA's Flawed State-to-State Dispute Settlement Process," 18 *World Trade Review* 1 (2019): 63-79, <https://www.cambridge.org/core/journals/world-trade-review/article/access-to-trade-justice-fixing-naftas-flawed-statetostate-dispute-settlement-process/833E151474CD2198068A6EB094759545>.

Second, it is important who has the power to select panelists in the event of disagreement between the Parties. An independent Secretariat is a great way to ensure that panel composition takes place. At the World Trade Organization (WTO), if either party is causing difficulty in this process, the other party can request that the WTO Director General appoint the panelists. The TPP makes reference to a role for an "independent party," but it is a much more limited role than the one played by the WTO Director General. To ensure that appointments take place in this way, an agreement would have to go further than the TPP in terms of giving the power of appointment to the Secretariat or some independent outsider.

Third, if an independent party is not permitted to appoint panelists when needed, the complainant must be given this authority. For example, in the TPP, the second panelist appointment can be carried out by the complainant if the respondent does not cooperate.

These solutions are not particularly complicated and could have been implemented during the negotiation of the USMCA. Unfortunately, there was resistance from the Trump administration. In a Q & A session with *Inside U.S. Trade*, the lead Mexican negotiator in the USMCA talks, Kenneth Smith Ramos, explained why we ended up with a flawed USMCA dispute settlement chapter:

Q: What do you think is the best way to address Democratic concerns about enforceability?

A: It's interesting because from the beginning, if you recall in the negotiation, Mexico was very clear about the importance of strengthening the dispute settlement mechanisms of the NAFTA and the USTR position was initially to do away with the dispute settlement mechanisms.

We put forward proposals to facilitate the way Chapter 20 panels are composed, to make it quicker for the panels to be put into place and to institute procedural changes that make it more expeditious to get panels going. That was not accepted by the U.S.<sup>2</sup>

Ultimately, the USMCA state-to-state dispute settlement mechanism does not address many of the problems related to panel appointments that arose under the NAFTA. However, there is still time to make changes that all parties will find amenable. Just about everyone agrees on the need for strong and effective USMCA dispute settlement: Congress, Canada, Mexico, and stakeholders from across the political spectrum all would like to see this. The task now is to put pressure on the administration to fix the problem. Members of your committee can play a role here. In conversations with the White House and the U.S. Trade Representative's Office, it is important to emphasize the necessity of a functioning panel process for achieving compliance with trade agreement obligations.

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<sup>2</sup> "Q&A: Mexico's former chief NAFTA negotiator talks USMCA," *Inside U.S. Trade* (April 2, 2019) <https://insidetrade.com/trade/qa-mexico%E2%80%99s-former-chief-nafta-negotiator-talks-usmca>.

To date, Congress has not made any proposals we are aware of that specifically address this issue, though there have been suggestions for obtaining compliance outside of Chapter 31, such as the Wyden-Brown proposal, Section 301, or a sunset clause. However, these will not work.

One major flaw in the Wyden-Brown proposal is that it only addresses labor issues, rather than the full range of USMCA obligations. In addition, it rests on the ability of the U.S. government to audit Mexican facilities suspected of violating labor standards. However, Mexican officials have made clear that enforcement must be reciprocal, so such a change would probably require the United States to allow corresponding verifications of U.S. labor practices by Mexico.<sup>3</sup> Furthermore, this kind of change would require the agreement to be reopened, which would make ratification of the deal even more challenging.

Section 301 involves a unilateral determination of a violation of trade agreements, with tariffs as an enforcement tool. This approach takes us away from a rules-based trading system and towards a free for all where governments raise tariffs whenever they are upset with other countries' trade policies. Moreover, the Section 301 approach would not be effective. Other governments consider such determinations to be biased, and respond with retaliatory tariffs rather than compliance.

Finally, the sunset clause (Article 34.7) states that the USMCA will expire 16 years after it enters into force unless the parties agree to continue it, with a joint review of the agreement beginning 6 years after entry into force. While review of agreements is generally a good thing, NAFTA already provides for this through the Free Trade Commission. Furthermore, the sunset clause is unproven as an enforcement tool, and there is no reason to think it will lead to compliance.<sup>4</sup> In addition, it involves a further transfer of Congress' constitutional power over trade to the executive branch.<sup>5</sup>

What we have outlined above makes clear that the USMCA, as it stands, does not provide for effective enforcement. Furthermore, alternatives that have been put forward will do little to improve the enforcement issues that plagued the NAFTA and may in some cases make things worse. Keeping all this in mind, we suggest two pathways forward for members of Congress who are looking to improve USMCA enforcement:

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<sup>3</sup> Inu Manak, "In USMCA Ratification Fight, It's Much Ado about Labor," International Economic Law and Policy Blog (April 17, 2019) <https://worldtradelaw.typepad.com/ielpblog/2019/04/in-usmca-ratification-fight-its-much-ado-about-labor.html>.

<sup>4</sup> Simon Lester, "The USMCA Sunset Clause as a 'Check on Bad Behavior,'" International Economic Law and Policy Blog (May 23, 2019) <https://worldtradelaw.typepad.com/ielpblog/2019/05/will-the-usmca-sunset-clause-.html>

<sup>5</sup> Simon Lester and Inu Manak, "New NAFTA's Sunset Clause Is a Ticking Time Bomb," *The Hill* (November 7, 2018) <https://thehill.com/opinion/finance/415290-new-naftas-sunset-clause-is-a-ticking-time-bomb>.

1. Call on the U.S. Trade Representative to reopen the USMCA and introduce new language to Chapter 31 that addresses the three principles we highlighted in our paper: the roster should not be a hurdle to appointing panelists; an independent third party can act as a facilitator in the panel appointments; and, in the absence of an independent third party, the complainant should have the power itself to appoint, in order to prevent the respondent from delaying panel formation.
2. Call on the U.S. Trade Representative to negotiate a side agreement with Canada and Mexico which establishes a roster of panelists before the agreement is ratified.<sup>6</sup>

There are domestic political challenges in Canada and Mexico that Congress should keep in mind with this, and with all other suggested changes to the USMCA as well. Canada is moving forward with the ratification process, and would like to proceed before June 21<sup>st</sup>, 2019, when parliament goes into recess. If ratification does not occur before then, it will not be taken up until after the federal elections in October. This could complicate matters if the Trudeau government does not hold on to its majority in parliament. In Mexico, there is little appetite for reopening the deal, given the vast array of issues President Lopez Obrador is currently juggling. Furthermore, as the USMCA was negotiated by his predecessor, Congress should expect a reopening to result in additional demands from Mexico, as President Lopez Obrador's party is likely to push for changes of its own.

In light of these factors, whether or not reopening the USMCA is pursued, Congress should act quickly to put forward its ideas for effective enforcement to the U.S. Trade Representative's Office. It is not too late to fix the flaws, and failing to do so could lead to serious problems later.

Regards,

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<sup>6</sup> Simon Lester, "Enforcement of the USMCA: Establish a Roster Now?," International Economic Law and Policy Blog (May 22, 2019)  
<https://worldtradelaw.typepad.com/ielpblog/2019/05/enforcement-usmca.html>