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USMCA: A Legal Interpretation of the Panel-Formation Provisions and the Question of Panel Blocking

Congress has shown an interest in the effectiveness of the dispute settlement mechanism in the United States-Mexico-Canada Agreement (USMCA), which will replace the North American Free Trade Agreement (NAFTA). Some Members have questioned its effectiveness, and, as part of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA), Congress has identified effective dispute settlement as a negotiating objective that the U.S. Trade Representative must pursue when negotiating trade agreements. This In Focus examines one aspect of the State-State dispute settlement mechanism in USMCA Chapter 31: the ability of a USMCA Party to prevent the formation of a panel during dispute settlement proceedings, often termed *panel blocking*.

NAFTA Dispute Settlement

NAFTA Chapter 20, which deals with institutional arrangements and dispute settlement procedures, created a dispute settlement mechanism through which a NAFTA Party may bring a claim against another NAFTA Party for allegedly breaching its treaty obligations. Panels may hear these claims and determine whether a Party's domestic measures or conduct violate NAFTA.

Since NAFTA entered into force in 1994, three Chapter 20 panels have been convened, but none since 2000. Several reasons exist for this low number. First, the Parties resolve many disputes informally without invoking NAFTA's dispute settlement mechanism or through NAFTA's consultations mechanism, which permits the Parties to discuss confidentially, and attempt to resolve, the matter. Second, NAFTA countries have shown a preference for the World Trade Organization's (WTO's) dispute settlement mechanism over NAFTA's. Third, and most relevant to this In Focus, NAFTA Chapter 20 creates several avenues through which a Party may potentially block the establishment of a panel, thereby preventing resolution of the dispute.

Under NAFTA Chapter 20, the disputing Parties may select a panel chair by consensus. If they do not agree on a chair, then "the disputing Party *chosen by lot* shall select" the chair. The precise meaning of "chosen by lot" is unclear, as the text provides no additional procedural details. Under general principles of treaty interpretation (as stated in the Vienna Convention on the Law of Treaties), a treaty is generally interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Applying this principle, the phrase "chosen by lot" may be

interpreted as follows: "chosen" is defined as "selected"; "by" as "according to"; and "lot" as "the use of lots as a means of deciding something." Together, these definitions suggest that "chosen by lot" means selected according to the use of lots to decide something. In other words, the chosen-by-lot process seemingly involves a process that guarantees random selection of the disputing Party that may then select the panel chair.

Next, the disputing Parties may each select two panelists, typically from a roster of eligible panelists created by the Parties. A Party may select a panelist not on the roster, but that individual is subject to a peremptory challenge, by which the other disputing Party may reject the proposed panelist without justification. If a Party fails to select panelists, then the panelists "shall be *selected by lot* from among the roster members." As with the chosen-by-lot provision for selection of the panel chair, NAFTA provides little detail about how to interpret the selected-by-lot provision. Applying the treaty interpretation principle above, however, "selected by lot" may carry a substantially similar meaning to "chosen by lot."

These rules leave several opportunities for panel blocking. Two issues arise from the lack of a roster of potential panelists. (The absence of a roster may result from any Party's intentional refusal to designate individuals to the roster, as required by NAFTA, or from the Parties' inability to agree on who to name to the roster.) First, without a roster, a disputing Party may exercise its peremptory challenge against any proposed panelist, thereby blocking the formation of a panel. Second, there is no indication in Chapter 20's text as to how to select panelists under the selected-by-lot rule when a Party fails to select panelists, as that rule presupposes the existence of a roster. These issues prevented formation of a panel in a dispute between the United States and Mexico over U.S. restrictions on sugar imports in 2001. The United States noted the absence of a roster, and argued that the disputing Parties therefore could not apply any other rules on appointing panelists. Since this dispute, no NAFTA Chapter 20 panels have been convened.

The chosen-by-lot and selected-by-lot processes for the chair and panelists, respectively, are susceptible to panel blocking for another reason: NAFTA fails to identify who performs these procedures. Without such a provision, a disputing Party may potentially use this omission to prevent the formation of a panel by arguing that no Party or entity created by NAFTA (e.g., the Secretariat) possesses the

authority to conduct the chosen-by-lot or selected-by-lot processes.

USMCA Dispute Settlement

USMCA's primary State-to-State dispute settlement provisions are in Chapter 31. The Chapter 31 rules for selecting panelists draw heavily on NAFTA with some modifications. Relevant here are the rules that may allow or prevent panel blocking.

First, USMCA states that a Party's failure to designate individuals to the roster of proposed panelists will not prevent the establishment of a panel. However, it is unclear how this provision will prevent such an outcome, as the Agreement states only that a USMCA Free Trade Commission (FTC) must draft Rules of Procedure to address how to compose a panel in such circumstances. The FTC would consist of government representatives, at the level of ministers, from each USMCA Party, and may assist with implementation issues, propose amendments, and carry out other functions as the Parties permit. At present, the FTC's Rules of Procedure do not exist, thus making it premature to assess USMCA's success at resolving the issue of panel blocking when a Party fails to designate individuals to the roster.

Second, USMCA replicates much of NAFTA's text regarding selection of the panel chair and panelists when the disputing Parties disagree on proposed panelists or fail to participate in the process. With regard to selection of the chair, the Agreement states that, if the disputing Parties fail to agree on a chair, "the disputing Party chosen by lot shall select" the chair. USMCA also adds a second rule: "the complaining Party shall select an individual from the roster" if a responding Party fails to participate in the chosen-by-lot process. As to the selection of panelists, USMCA states that if a disputing Party fails to select panelists, its panelists "shall be selected by lot from among the roster members." Furthermore, the Agreement adds that if the Party that fails to select panelists is the responding Party, then the complaining Party may select all of the panelists.

Like NAFTA, USMCA does not specify who shall conduct the chosen-by-lot and selected-by-lot processes, which may leave open this avenue for panel blocking. One may argue that USMCA's delegation to the FTC to draft Rules of Procedure to address issues involving the absence of a roster may also delegate authority to the FTC to address who conducts the chosen-by-lot and selected-by-lot processes, as USMCA links these processes to the roster. However, because USMCA expressly delegates only the issue of how to compose panels in the absence of a roster to the FTC, a Party might argue that the FTC lacks authority to determine who performs these processes when a roster exists, and thereby block formation of a panel.

In addition, the Statement of Administrative Action (SAA) accompanying the implementing legislation for USMCA (H.R. 5430) appears to acknowledge the potential for panel

blocking, although it does not clarify which parts of the text may lead to such an issue:

The United States shall enforce its rights under the USMCA through consultations and the dispute settlement mechanism provided for in Chapter 31 when possible. However, a decision by Canada or Mexico to prevent or unreasonably delay formation of a dispute settlement panel would not prevent the Executive Branch from enforcing U.S. rights.

In sum, USMCA appears to address panel blocking as to a Party's failure to designate individuals to the roster, although whether the Agreement successfully prevents panel blocking in this context depends on the adoption of effective Rules of Procedure. Although the Agreement specifies some issues the Rules must address (e.g., a Party's right to a hearing and to file submissions), it does not discuss criteria or suggest processes that may help to ensure the effectiveness of provisions about constituting panels in the absence of a roster.

Moreover, USMCA appears to leave open the prospect of panel blocking with regard to the chosen-by-lot and selected-by-lot processes applicable to picking the chair and panelists.

Considerations for Congress

If another USMCA Party blocks formation of a panel, as suggested in the SAA, the United States may seek other avenues for addressing the matter. For example, if a USMCA matter also implicates WTO obligations, then the United States may seek to use the WTO's dispute settlement mechanism, by requesting either arbitration or a panel. A potential issue with requesting a WTO panel is the inability to finalize a determination, given the functional breakdown of the WTO's Appellate Body. Alternatively, the United States might be able to use domestic laws to address the issue, such as Section 302 of the NAFTA Implementation Act. This section, retained in the USMCA Implementation Act (Section 502 of P.L. 116-113), permits the United States to impose safeguards on imports from Canada or Mexico.

Given these other dispute-resolution tools, as well as the potential for panel blocking under USMCA, Congress may consider several matters. First, it may consider whether USMCA's Chapter 31 panel system satisfies the TPA negotiating objectives. Second, it may consider whether to incorporate Chapter 31's text on panel selection into future free trade agreements. Third, it may consider whether to address rules for panel selection in the negotiating objectives of any future TPA legislation. Finally, it may consider whether U.S. laws provide for effective responses to trade-related issues and an appropriate role for Congress under its U.S. Constitution, Article I power "[t]o regulate Commerce with foreign Nations."

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