EDITORIAL/OPINION

Fix Nafta's Dispute System

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• A Nafta dispute panelist, one of five examining a Mexican anti-dumping decision against U.S. exports, leaves the review panel to go to work for the Mexican government. He does this just as the panel is scheduled to issue its already-delayed decision. Action is postponed indefinitely, leaving U.S. exporters facing inflated duties while the governments try to work out a solution.

• Canadian exporters challenge U.S. government penalty duties against subsidized lumber imported from Canada. A review panel eliminates the duty through votes that are strictly along national lines — Canadian panelists simply outvote U.S. panelists on the meaning of U.S. law. Afterward, it is revealed that two Canadian panelists' law firms represent Canadian lumber interests and the Canadian government.

These are just two of the results from a special procedure in place under the North American Free Trade Agreement to review how a country applies its unfair trade laws. Called the Chapter 19 system after the provision that created it, it allows panels of private individuals to decide — in place of judges — whether anti-dumping and anti-subsidy decisions affecting exports from a Nafta country are consistent with the domestic law of the importing country. The examples cited here reflect a problem not with corrupt governments or individuals but with a flawed system.

The United States and Canada included Chapter 19 in the U.S.-Canada Free Trade Agreement as a provisional compromise when they couldn't agree on rules to discipline unfair trade. Congress accepted this controversial displacement of traditional judicial review based on, among other things, executive branch promises that it would exist no more than seven years and would apply only to trade with Canada. Unfortunately, the system was made a permanent part of Nafta.

Having reviewed Chapter 19's history, nine members of the Senate Finance Committee recently wrote to U.S. Trade Representative Mickey Kantor criticizing the system and insisting that it not be extended to other countries.

The Journal of Commerce promptly responded with an editorial ("Dole's Anti-Trade Agenda," Aug. 22, Page 6A) assailing those who signed the letter and singling out one of them — Sen. Bob Dole — for special rebuke. This criticism is misguided in several respects.

First, opposing Chapter 19 is not, as the editorial implies, the same as opposing Nafta's provisions for settling disputes. Chapter 19 is not the dispute settlement mechanism for Nafta — Chapter 20 is. Chapter 20 provides for rulings on the meaning of Nafta itself. Chapter 19, by contrast, introduces an additional and unnecessary dispute settlement mechanism: It replaces judicial review of each country's unfair trade rulings. In the absence of Chapter 20, we would have no means of deciding true Nafta disputes; without Chapter 19, we would have judicial review by domestic courts. Eliminating Chapter 19 would leave no hole in the agreement.

Second, opposition to this system is not born of protectionism but of concern for good government. Eliminating Chapter 19 would actually facilitate more U.S. free trade agreements by avoiding the unfair and conflicting decisions the system is generating. With a different panel for each trade case, Chapter 19 is inevitably leading to incoherent decision-making — nobody's idea of a pro-free trade result.

Third, omitting Chapter 19 as the Nafta expands will not induce any country to shun the free trade area. In fact, a representative of Chilean business interests testifying before the U.S. International Trade Commission expressed grave concerns about Chapter 19. The economic and political case for Nafta accession will be just as strong all across Latin America — probably stronger — if Chapter 19 is foregone.

Moreover, eliminating Chapter 19 for existing Nafta nations is unlikely to cause the agreement to unravel. Neither Canada nor Mexico — both reliant on trade with the United States — appears to be in a position to withdraw. Withdrawals are especially implausible since Chapter 19 is not essential to the overall agreement. A free trade agreement is a limited form of economic integration that does not require countries to strip their courts of authority over agency decisions affecting trade. Chapter 19 is a gratuitous and unfortunate adjunct to Nafta.

In any case, the rules of the new World Trade Organization reinforce that Chapter 19 is superfluous at best. WTO procedures satisfy the need for true international dispute settlement in trade remedy cases. Unlike Chapter 19 panels, WTO panels interpret trade agreements rather than domestic laws.

Fourth, concerns about an undue loss of sovereignty here are legitimate and troubling. Under Chapter 19, unaccountable private citizens issue binding decisions on domestic law that dictate the outcome of trade cases involving billions of dollars. No political or judicial review can prevent implementation of Chapter 19 decisions. U.S. Justice Department officials cited this when they warned Congress in 1988 that the system is unconstitutional.

Under these circumstances, Chapter 19 is a liability rather than an asset for extending U.S. free trade relationships. The system understandably is generating opposition from, among others, members of Congress who support impartial and fair appellate review. At the same time, Chile's admission to Nafta would not lose a single vote by excluding Chapter 19 from the accession agreement.

The letter Sen. Dole signed — and which the Journal criticized — simply states that the Chapter 19 system is bad; it does not take a position on whether Chile's accession to Nafta without Chapter 19 is good. It is hard to see how such a letter constitutes a smoking gun in the case against Sen. Dole's, or any signatory's, free trade bona fides.

Both supporters and opponents of expanded free trade can recognize a failed and unnecessary dispute system when they see one. Hopefully, the administration's trade negotiators will see this as clearly as the senators who wrote to Mr. Kantor.

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