

Trade Remedy Redux

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October, 2017

Trade Remedies and the WTO Context

- Trade remedies provide “contingent” protection (viz the liberalizing objectives of the WTO). In some instances, trade remedy measures constitute exceptions to fundamental WTO principles: MFN and National Treatment
- subsidies/countervail; safeguards; and antidumping measures .
- Rules governing these measures are set out in WTO Agreements.
- WTO Committees undertake consultation, interpretation and application of applicable rules
- Agreements and Committees rely heavily on transparency provisions – notification and consultation
- Trade remedy actions are mainly applied under national laws which must adhere to terms of WTO Agreements

Antidumping

- What is dumping?
 - Conditions for application of antidumping measures (under national law in conformity with WTO Agreement)
 - Proof of dumping – price comparisons
 - Material injury to domestic industry
- Scope for administrative discretion/abuse in
Antidumping investigations
- Arguments pro and con for antidumping
in a globalising economy

Subsidies/Countervail

- The subsidies conundrum – challenging economic decisions of sovereign governments
- The trade effects justification for subsidies disciplines
- Forms of subsidies disciplines:
 - Prohibited subsidies
 - Actionable subsidies
 - Multilateral resolution
 - Countervailing duties (applied under national law)

Safeguards

- Rationale for contingent protection
 - safety valve for liberalization

Conditions for application of safeguard measures (trade restrictions imposed under national law)

- increased imports; serious injury test; domestic industry adjustment; limited duration

- to meet terms of WTO Safeguards Agreement, measures must be applied on a global basis

Special safeguards applying to specific countries, eg China; or specific products eg agriculture

- grey-area measures

Trade Remedies in NAFTA Context

- NAFTA Chapter 19 addresses antidumping/countervailing duty matters between and among Canada, the United States and Mexico
- Chapter 19 deals only with resolution of disputes and provides an alternative system of appeal to the application of national laws
 - “Article 1904 establishes a mechanism to provide an alternative to judicial review by domestic courts of final determinations on anti-dumping 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.” source: NAFTA Secretariat website
- A NAFTA partner can exercise dispute settlement rights under either WTO or NAFTA, but not both, in relation to the same issue in the same case

Negotiating Histories

- **Trade remedies was the dealbreaker/dealmaker of the Canada/ USA bilateral free trade negotiation (CUSTA, the predecessor of NAFTA)**
- Chapter 19 was a highly contentious issue in those bilateral negotiations, with Canada pressing for elimination of anti-dumping and countervail measures and USA refusing
- In final hours of CUSTA negotiation, Canada threatened to walk away from CUSTA altogether; Chapter 19 was the compromise outcome
- In WTO Agreements negotiation, conducted almost simultaneously with the CUSTA/NAFTA negotiations, trade remedies outcomes, most notably Subsidies/Countervail, were tightly constrained by Canadian and USA trade sensitivities including softwood lumber

Experience with Chapter 19

- In its early stages, Chapter 19 Panel review was observed to have a salutary influence on both Parties' antidumping/countervailing duty investigations administering authorities
- Canada and the USA have each requested NAFTA Panel review of certain of the other's anti-dumping and countervailing duty determinations
- Canadian resort to Chapter 19 has declined in the last decade

NAFTA Renegotiation Dynamics

- The Summary of Objectives for NAFTA renegotiation issued by the Office of the U.S. Trade Representative states: “Eliminate the Chapter 19 dispute settlement mechanism”. July 17, 2017
- This was reiterated in a U.S. Administration report notified to Congress in keeping with the Trade Promotion Authority law on September 29, 2017.
- It is reported that negotiators from all Parties have advanced proposals in the Trade Remedies Negotiating Group which would amend various aspects of the functioning of existing Chapter 19 provisions.

NAFTA Renegotiation Dynamics (cont.)

- Negotiating atmosphere is clouded by current high profile USA countervail and anti-dumping cases against Canada:
 - Softwood lumber
 - Bombardier aircraft

Compounded by broader threats of USA protectionism, eg current USA safeguard cases. Would USA Administration respect NAFTA provisions for separate injury determinations for Canada and Mexico before administering any global safeguard action?

Possible Outcomes for Chapter 19

- Scenario 1: assume some outcome in overall NAFTA Renegotiation
 - Improvements are negotiated to current institutional/transparency functions of Chapter 19
 - Chapter 19 is replaced by another approach to trade remedies, possibly safeguards?
 - While NAFTA continues in some form, Chapter 19 is terminated; does USA declared priority to eliminate Chapter 19 dispute resolution provide negotiating leverage for Canada to employ in some other area of the renegotiation?

Possible Outcomes (cont.)

- Scenario 2: assume NAFTA Renegotiation as a whole fails
 - Canada manages trade remedy files with existing tools available, including WTO Agreements and Dispute Settlement, and appeals to U.S. domestic courts
 - Canada negotiates (bilaterally or trilaterally?) a trade remedy replacement regime incorporating enhanced disciplines and transparency and/or some other form of dispute resolution
 - Canada proposes a common trade remedy regime applied by Canada, USA and Mexico (or bilaterally?) towards third countries, ie a customs union approach at least within the realm of trade remedies

Your Task

In light of the above, what strategy or strategies would you recommend Canada pursue to advance our interests in trade remedies? What would be the implications of pursuing a bilateral or trilateral approach?