

November 15, 2017

The Honorable Robert Lighthizer
United States Trade Representative
Office of the U.S. Trade Representative
600 17th Street NW
Washington, D.C. 20006

Dear Ambassador Lighthizer:

The undersigned organizations represent the U.S. food and agricultural sector. We previously wrote to you to emphasize the importance of preserving Chapter 19 of the North American Free Trade Agreement (NAFTA): “Review and Dispute Settlement in Antidumping/Countervailing Duty Matters Chapter.” During follow-up discussions with U.S. Trade Representative staff, we were invited to provide suggestions on how to improve Chapter 19. We provide those suggestions below.

As discussed during our meeting, Chapter 19 has provided clear and significant benefits to U.S. agricultural exporters, but it is not perfect, and can and should be improved during the current NAFTA negotiations. In particular, we suggest that the United States seek the following improvements:

- Qualifications of Panelists: The quality of the decisions issued by Chapter 19 panels is heavily influenced by the qualifications of the panelists on each Party’s roster. The guidance provided in Annex 1901.2 of NAFTA (“the Annex”) for each Party to choose its roster, if actually followed would enhance the choice of panelists. Unfortunately, the Parties have not adhered to this guidance. For example, the Annex seeks to ensure the qualifications of panelists by directing the Parties to include on their rosters “judges and former judges to the fullest extent practicable,” as opposed to practicing trade attorneys. However, this guidance has not been followed. This language could be made mandatory, as it is under 1904.13 with respect to extraordinary challenge committees. In addition, the current fees paid to panelists are far below market and should be increased to enhance the quality of panelists and ensure that panel work is a priority.
- Appointment of Panelists: One of the key benefits of Chapter 19 to U.S. agriculture exporters is the speedy resolution of disputes and quickly reopening markets that are closed due to illegal anti-dumping or countervailing duties. Under the Annex, it should be possible for a panel to be established within 61 days of the request for a panel. However, in many cases, it takes a year or more for a panel to be established.¹ This problem would be corrected if the Parties followed the procedures already set forth in the Annex for when a Party does not timely name its panelists or when the Parties do not timely choose a fifth panelist – namely, the selection of panelists by lot. To be clear, we do not propose that the United States should request the selection of panelists by lot in every case immediately after the deadline has passed. On the other hand, we do not believe the United States should simply accept the repeated failure of the Parties to select panelists based on the tacit understanding that the Parties will not challenge the United States when it does not timely select panelists.

The process of appointing panelists also could be made more efficient by reducing the number of panelists from five (as it is currently) to three. This would reduce the burden on the Parties of

¹ According to one study, the average time to establish a NAFTA binational panel was 256 days – more than four times the mandatory, 60-day maximum timeframe. See Beatriz Leycegui and Mario Ruiz Cornejo, “TRADING REMEDIES TO REMEDY TRADE: THE NAFTA EXPERIENCE” (2004), available at <http://ageconsearch.umn.edu/record/16925>.

identifying appropriate panelists, without altering the current balance of the panelists chosen by each Party vis-à-vis the panelist chosen jointly by the Parties.

- Deadlines for Panels to Issue Decisions: The NAFTA rules are designed for a panel to issue a final decision within 315 days of the filing of the complaint. In practice, panels take significantly longer than this with one study placing the average at 533 days.² As with delays by the Parties in appointing panelists, delays by panels in issuing decisions reduce the effectiveness of Chapter 19 review to U.S. agricultural exporters. We believe that the Parties could take various actions that would cause panels to issue more timely decisions. As discussed above, the process could be made more efficient by reducing the number of panelists from five to three. This would reduce practical difficulties in scheduling the time and orchestrating panel deliberations. In addition, the Parties should amend the Annex and, where appropriate, the Code of Conduct under Article 1909 as to ensure that panels comply with the 90-day deadline, including by requiring panelists to enter into written agreements obligating them to complete work within a specified period, unless due cause is shown. Further, and as suggested above, panelists should be better compensated for their time to ensure that panel responsibilities are given priority.
- Determinations Subject to Panel Review: Currently, final determinations by the administering authorities of the United States and Canada in five-year expiry reviews of anti-dumping and countervailing duty orders are reviewable by a Chapter 19 panel. However, final determinations by the Mexican administering authority in such reviews are not. Chapter 19 should be revised to correct this imbalance and require that Mexico submit final determinations in five-year expiry reviews to panel review.

Through these actions – most of which simply require the Parties to following existing NAFTA provisions, rather than revising the agreement – the already important role Chapter 19 has played in enabling U.S. agricultural exporters to challenge and overturn illegal anti-dumping and countervailing duties can be enhanced.

We would welcome the opportunity to discuss these ideas in greater detail. Thank you for your consideration of these points.

Sincerely,

American Farm Bureau Federation
American Feed Industry Association
American Peanut Council
American Soybean Association
Animal Health Institute
Corn Refiners Association
Global Cold Chain Alliance (GCCA)
National Association of Egg Farmers
National Association of State Departments of Agriculture (NASDA)
National Association of Wheat Growers
National Confectioners Association
National Corn Growers Association
National Cotton Council
National Council of Farmer Cooperatives
National Grain and Feed Association
National Oilseed Processors Association
National Pork Producers Council

² See *id.*

National Renderers Association
National Turkey Federation
North American Export Grain Association
North American Meat Institute
North American Millers' Association
Northwest Horticultural Council
Pet Food Institute
USA Poultry and Egg Export Council
USA Rice
U.S. Apple Association
US Dry Bean Council
U.S. Grains Council
U.S. Meat Export Federation
U.S. Wheat Associates
WineAmerica

CC: Wilbur Ross, Secretary, U.S. Department of Commerce
Gary Cohn, Director, National Economic Council
Sonny Perdue, Secretary, U.S. Department of Agriculture