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AFTER CHAPTER 19 NAFTA ELIMINATION: WHO WILL DEFEND US?

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USTR recently announced its objectives regarding the renegotiation of NAFTA, one seeking to remove Chapter 19 "Review and Dispute Settlement in Antidumping and Countervailing Duty Matters". Chapter 19 provides that ad-hoc Panels may review the decisions of the investigating authorities regarding antidumping and countervailing duties, replacing the judicial review of local courts.

I have read with attention what has been written in Mexican news outlets, which mainly criticize the position of the United States and suggest defending this instrument. But, what do litigants think about all this? Allow me to say that my experience on this matter arises from representing "complainants" that challenge Mexican authorities; in other words, defending "American" interests.

As such, even if many may criticize me for attacking Mexican interests, I have been fortunate enough to participate in more than a third of all antidumping disputes that have reviewed the actions of the Mexican investigating authority. I am aware of the system's strengths and weaknesses. I am neither defending the actions of the Mexican authorities nor attacking this dispute settlement mechanism, I simply intend to give an honest opinion on what I observe and perceive from a Mexican trade law practitioner point of view.

Chapter 19 system was not only an innovative mechanism at the end of last century, but also at the very beginning, it worked wonderfully. The three countries began with the willingness to believe in the system and it worked relatively well. Eventually, it ran out of gas and it ended up being a "zombie", but it at least has some life. Although Article 1907 provides a mechanism to modernize its operating rules, none of the three countries paid attention to it -because of disdain or fear to the unknown- and here we are now!

I understand that the US does not want a supranational court to review the decisions of its administrative agencies, but that it is just one side of the coin. What about the decisions of Mexican and Canadian authorities? Does the US really wants domestic courts to hear the cases of their exporters? Is this also a prelude to the abolition of the WTO dispute settlement mechanism?

As long as the WTO dispute settlement mechanism exists, which can only be triggered by its Members and is overwhelmed by the amount of disputes, there will be an opportunity to defend our industries against the abusive, discretionary and partial practices of the investigating authorities from other countries. Let us state the obvious; all countries including Mexico seek to disguise protectionist positions with legitimate measures. The WTO exists precisely to reveal and correct those "protectionist" measures that are disguised in the form of anti-dumping and countervailing duties, however, that will only happen when a Member brings a complaint against another. Meanwhile, the beauty in Chapter 19 is that an exporter is free to pursue a challenge in front of an impartial bi-national panel without its government's consent.

The point here is that without Chapter 19, US producers and exporters (as well as Mexican importers) will have to rely on Federal Administrative Justice Court (TFJA, acronym in Spanish) when they face an adverse antidumping or countervailing determination in Mexico. However, they will first have to exhaust the archaic administrative reconsideration in order to be able to access Mexico's courts. While it is true that the TFJA's Specialized International Trade Chambers were recently created, these Chambers are neither specialized nor do they have the competence to decide on antidumping or countervailing determinations. The competence to resolve these disputes continues to reside on the TFJA's Superior Chamber, which, with all due respect, are not familiar with anti-dumping and subsidy law. Exporters and importers would be at the mercy of Mexican courts!

Some may argue that it is good news that Mexican antidumping or countervailing decisions will not be challenged. Nevertheless, American producers and exporters may request their Government to challenge Mexican decisions before the WTO. Mexico might be defending itself more often at the WTO, unless, of course, the US is not willing to or intends to eradicate that system too.

Referring to the *US – Tuna II* and *US – COOL* disputes, the Mexican Minister of Economy recently stated that the WTO disputes settlement mechanism has been more efficient for Mexico than Chapter 19.[1] What a terrible statement from our chief negotiator! On the one hand, neither the tuna nor COOL disputes are anti-dumping or subsidy cases and, on the other hand, our Minister forgot that practically all of Mexico's

[1] Reuters, "*Más efectivo Mecanismo de OMC que de TLC*", July 21, 2017<http://www.reforma.com/ >

antidumping determinations that have been challenged at the WTO were found inconsistent. Moreover, Chapter 19 was designed to make its rulings more expeditious than the proceedings carried out in both domestic courts and WTO.

Regarding Mexican producers and exporters, the situation is also worrisome. Without this instrument, Mexican producers and exporters would be forced to litigate before the US courts, namely USCIT and USCAFC's, or to request the Mexican government to challenge the US before the WTO. Therefore, one may wonder if Mexico is prepared to claim every US decision before the WTO? Such scenario is unlikely as not every "case" is worthy or has sufficient grounds to bring it before WTO panels, in addition to the political cost and resources that are required to do so.

In light of the above, this leads to the following observations and conclusions:

- The elimination of Chapter 19 does not suit producers and exporters of Mexico or the United States.
- The system of Chapter 19 is outdated, impractical and its procedural rules need to be modernized.
- A permanent Panel system must be established, with authentic expert panelists, because, let the truth be said, few are truly experts, and in Mexico only a handful may be found.
- If this chapter is eliminated, what rules will Mexico establish so that its industries can genuinely access the WTO mechanism through the Mexican government?
- If its elimination is imminent, why not abolishing the possibility of imposing anti-dumping and countervailing measures between the three countries?