

NAFTA DEPLOYED (PART TWO):
DEFENDING CANADIAN BEEF - NAFTA CHAPTER 11 or CHAPTER 20?

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NAFTA CHAPTER 11

In NAFTA DEPLOYED, circulated July 17th, it was argued that the continued closure of the US border to Canadian beef was contrary to the NAFTA and that Chapter 11 should be used to defend Canadian interests (the argument being that Canada's ranchers and processors are investors in the Canadian beef industry and as such are being denied access to US markets - expropriation of profits - contrary to Chapter Eleven Article 1102 - National Treatment).

1. Each Party shall accord to investors of another Party treatment no less favourable than it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or disposition of investments.

NAFTA CHAPTER 20

Another route would be to seek damages under the NULLIFICATION AND IMPAIRMENT provisions of Chapter Twenty's Dispute Settlement mechanism (Section B). But the difficulty with this approach is that it is a very lengthy process.

Annex 2004 Nullification and Impairment

1. If any Party considers that any benefit it could reasonably have expected to accrue to it under any provision of:
(a) Part Two (Trade in Goods)...
is being nullified or impaired as a result of the application of any measure that is not inconsistent with this Agreement, the Party may have recourse to dispute settlement under this Chapter.

Article 2004: Recourse to Dispute Settlement Procedures

Except for the matters covered in Chapter Nineteen (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters) and as otherwise provided in the Agreement, the dispute settlement provisions of this Chapter shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of the Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Annex 2004.

Article 2005: GATT Dispute Settlement

1. Subject to paragraphs 2, 3 and 4, disputes regarding any matter arising under both this Agreement and the General Agreement on Tariffs and Trade, any agreement negotiated thereunder, or any successor agreement (GATT), may be settled in either forum at the discretion of the complaining party.
4. In any dispute referred to in paragraph 1 that arises under Section B of Chapter Seven (Sanitary and Phytosanitary Measures) or Chapter Nine (Standards-Related Measures):
 - (a) concerning a measure adopted or maintained by a Party to protect its human, animal or -plant life or health or to protect its environment, and
 - (b) that raises factual issues concerning the environment, health, safety or conservation, including directly related scientific matters,where the responding Party requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement solely under this Agreement.

THE POINT IS, IT'S TIME TO RATTLE OUR SABRES

The point is, what the Americans are doing in refusing to reopen their border to Canadian beef is protecting their markets, plain and simple. And they are counting on Canada to him and haw and "not anger the Americans". One industry spokesman interviewed by CBC actually argued Canada "can't afford to upset our major trading partner just to keep one sector happy."

NAFTA has remedies for this abuse of market position. And Canada should publicly prepare to use them. All of them. It's time to rattle our sabres.

For their part, Canadian consumers should support our farmers by vowing to boycott US products if the border is not open to Canadian beef by August 1st.