

NORTHERN PRUDENCE: NAFTA DEFENSE OF CANADA'S RANCHERS: CHAPTER 11: INVESTMENT and CHAPTER 20: DISPUTE RESOLUTION¹

It is indeed good news that selected beef cuts are now being allowed into the US,

But the point remains: Washington's failure to fully re-open the border to Canadian beef in *all forms* (on the hoof, sides, cuts, processed, embryos, semen, etc.) is based on politics, not science, and hence is **not permitted under the NAFTA,**

We are Canadians - the ultimate "resolvers"; we believe talk and reason should and will prevail. (Communities at our latitudes must negotiate with the elements for survival; little wonder we have honed our resolution skills...)

But our Northern Prudence would also suggest that holding a big stick behind our backs *couldn't hurt*. (What the Americans respect most is strength - "here's the rock and here's the hard place" holds a certain irrefutability...)

Attached is a quick overview of "the hard place" - NAFTA Chapter 20 (Dispute Mechanisms) and — more interestingly because it awards financial compensation for damages sustained/profits lost — NAFTA Chapter 11 (Investment).

NAFTA CHAPTER ELEVEN: INVESTMENT

Chapter Eleven (Investments) provides considerable protection to investors, beginning with equal rights of access (national treatment: can't favour your own) and ending with the rights of an enterprise in one country to seek compensation from the government of another country for profits lost because the Agreement is not upheld.

Canada's ranchers, individually and collectively, are investors. They have invested in the production of beef for a continental market. Live cattle and beef are the manifestation of that investment. As is Canada's share of the continental US market. Restrictions on the import of Canadian cattle and beef not supported by recognized science is expropriation of investment and the profits thereof.

Canada's meat packing industry - a highly concentrated oligopoly/oligoposony with strong investor ties to their US counterparts - may have arguments under Chapter 11 as well. However, it may not be in their strategic interest to mount such a challenge... If Canada's ranchers are forced to their knees, these large agri-business players can expand their sphere of influence (and market margins) at fire sale prices.

Chapter 11 is intended to provide grounds to investors of one Party who are wrongly treated by another Party. Here are some of the provisions of NAFTA's Chapter 11 that suggest support for such a challenge on behalf of Canada's farmers:

CHAPTER ELEVEN: INVESTMENT

Article 1101: Scope and Coverage

1. *This Chapter applies to measures adopted or maintained by a Party relating to:
(a) investors of another Party*

Article 1102: National Treatment

1. *Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*
2. *Each Party shall accord to investments of investors of another Party treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*
4. *For greater certainty, no Party may:
(b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.*

Article 1110: Expropriation and Compensation

1. *No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its Territory or take a measure tantamount to nationalization or expropriation of such an investment*

Article 1139: Definitions

investment means:

- (a) *an enterprise;*
- (e) *an interest in an enterprise;*
- (h) *interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under*
- (i) *contracts where remuneration depends substantially on the production, revenues or profits of an enterprise.*

enterprise means: an "enterprise" as defined in Article 201 and a branch of an enterprise.

Article 201: Definitions of General Application

enterprise means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association.

NAFTA CHAPTER 20, SECTION B - DISPUTE SETTLEMENT

Chapter 20 defines the process to be undertaken to resolve disputes between the Parties. Under the provisions of this Chapter, Canada would request a ruling that Washington's failure to reopen the Canadian border to Canadian live cattle and beef is based on the politics of market protection, not science, and must be lifted. Below are the relevant sections:

Article 2004: Recourse to Dispute Settlement Procedures

...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 this Agreement or wherever a Party considers that an actual or proposed measures 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 2006: Consultations

1. *Any Party may request in writing consultations with any other Party regarding any actual or proposed measure or any other matter that it considers might effect the operations of this Agreement.*
4. *Consultations on matters regarding perishable agricultural goods shall commence within **15 days** of the date of delivery of this request.*

Article 2007: Commission - Good Offices, Conciliation and Mediation

1. *If the consulting Parties fail to resolve the matter pursuant to Article 2006 within:
(c) **15 days** of delivery of a request for consultation in matters regarding perishable agricultural goods
any such Party may request a meeting of the Commission.*
3. *The requesting Party shall state in the request the measure or other matter complained of and indicate the provisions of this agreement that it considers relevant and shall deliver the request to the other Parties and to its Section of the Secretariat.*
4. *Unless it decides otherwise, the Commission shall convene within **10 days** of delivery of the request and shall endeavour to resolve the dispute promptly.*

Article 2008: Request for an Arbitral Panel

1. *If the Commission has convened pursuant to Article 2004 (4) and the matter has not been resolved within:
(a) **30 days** thereafter;
any consulting Party may request in writing the establishment of an arbitral panel. The requesting Party shall deliver the request to the other Parties and to its Section of the Secretariat.*
2. *On delivery of the request, the Commission shall establish an arbitral panel.*

Article 2011: Panel Selection

1. *Where there are two disputing Parties, the following procedures shall apply:
(a) the panel shall comprise five members.*

- (b) *The disputing Parties shall endeavour to agree on the Chair of the panel within **15 days** of the delivery of the request for the establishment of a panel. If the disputing Parties are unable to agree on the chair within this period, the disputing Party chosen by lot shall select within **5 days** as chair an individual who is not a citizen of that Party.*
- (c) *Within **15 days** of selection of the chair, each disputing Party shall select two panelists who are citizens of the other disputing Party.*

Article 2012: Rules of Procedure

- 4. *If a complaining Party wishes to argue that a matter has nullified or impaired benefits, the terms of reference shall so indicate,*
- 5. *If a disputing Party wished the Panel to make findings as to the degree of adverse trade effects on any Party of any measure found not to conform with the obligations of the Agreement or to have caused nullification or impairment in the sense of Annex 2004, the terms of reference shall so indicate.*

Article 2016: Initial Report

- 2. *Unless the disputing Parties otherwise agree, the panel shall, within **90 days** after the last panelist is selected... present to the disputing Parties an initial report containing:*
 - (a) *findings of fact...*
 - (b) *its determination as to whether the measure at issue is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Annex 2004, or any other determination requested in the terms of reference; and*
 - (c) *its recommendations, if any, for resolution of the dispute.*
- 3. *A disputing Party may submit written comments to the panel on its initial report within **14 days** of presentation of the report.*

Article 2017: Final Report

- 1. *The panel shall present to the disputing Parties a final report, including any separate opinions on matters not unanimously agreed, within **30 days** of presentation of the initial report unless the disputing parties agree otherwise.*

Article 2018: Implementation of Final Report

- 1. *On receipt of the final report of a panel, the disputing Parties shall agree on the resolution of the dispute...*
- 2. *Wherever possible, the resolution shall be non-implementation or removal of a measure not confirming with this Agreement or causing nullification or impairment in the sense of Annex 2004 or, failing such a resolution, compensation.*

Article 2019: Non-Implementation - Suspension of Benefits

- 1. *If in its final report a panel has determined that a measure is inconsistent with the obligations of this Agreement or causes nullification or impairment in the sense of Annex 2004 and the Party complained against has not reached agreement with any complaining Party on a mutually satisfactory resolution pursuant to Article 2018(1) within **30 days** of receiving the final report,*

such complaining party may suspend the application to the Party complained against of benefits of equivalent effect until such time as they have reached agreement on a resolution of the dispute.

2. *In considering what benefits to suspend pursuant to paragraph 1:*
 - a. *a complaining Party should first seek to suspend benefits in the same sector or sectors as that affected by the measure or other matters that the panel has found to be inconsistent with the obligations of this Agreement or to have caused nullification or impairment in the sense of Annex 2004; and*
 - b. *a complaining Party considers it not practicable or effective to suspend benefits in the same sector or sectors may suspend benefits in other sectors.*

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. *(a) Part Two (Trade in Goods)*
is being nullified or impaired ...the Party may have recourse to dispute settlement under this Chapter.

Minimum Process Timeline: 279 days (9.3 months).

ⁱ Wendy Holm, P.Ag. is a policy economist, not a lawyer. As such, this discussion paper is intended to put forward trade policy options and does not constitute a legal opinion.