SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Canada-United States Law Journal

Volume 26 | Issue

Article 19

January 2000

Chapter 19--Private Party Appeals from Government Rulings: A Dispute Settlement Procedure in Operation, How Effective Is It in the Resolution of Disputes--Are Changes Needed or Possible

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CHAPTER 19 - PRIVATE PARTY APPEALS FROM GOVERNMENT RULINGS: A DISPUTE SETTLEMENT PROCEDURE IN OPERATION, HOW EFFECTIVE IS IT IN THE RESOLUTION OF DISPUTES? ARE CHANGES NEEDED OR POSSIBLE?

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As we enter the 21st Century, I think it is the right time to be asking ourselves the question, is this animal that we created in 1989 still the animal we need? If it is not, what can be genetically modified? Or do we kill it, as Dick has suggested except for Mexico?

I am going to give you two doubles in my talk today. First of all, I am going to speak of what I call a double astonishment. I think we have to be astonished at the accomplishment which was made in 1989. Several people have spoken of this and I do not propose to go on and on about it. We have to remember that in 1989, the creation of this animal under the FTA was an astonishment. Just a few short years before that, a few short weeks before that, it was an unthinkable solution. It was extremely controversial, but it was an astonishing accomplishment considering the kind of trading world that we had, and the kind relationship we had between Canada and the United States just prior to 1989.

The second astonishment, in such a brief time since then, is that the accomplishment should have to be re-visited. That is to say, Is it working well within the NAFTA context?, but also within the larger context of NAFTA itself. "Is it the right animal for the context in which NAFTA operates?" By that, I mean the reference Dick has made to evolution within the WTO context. The WTO dispute mechanism was not there when this animal was created in 1989. So any criticism we make of Chapter 19 in light of the availability of the WTO dispute settlement is correct. It helps us move forward, but it is, perhaps, a little unfair to the accomplishment of 1989.

I propose to look at some of the pluses and minuses of what we have done, and conclude that some tinkering is necessary. I will then go on to the other double that I want to speak to you about, and propose new evolutions, not just tinkerings, and maybe some wholesale change. Just because this is Case Western *Reserve*, it is not a reason to actually show any.

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* Potter bio. Remarks rendered orally.

Dick has made the point that the Chapter 19 panel process has lost a bit of its relevance because of this evolving context. He comes to that by comparing the Chapter 19 panel system to WTO dispute resolution. I think that is a valid and good way to look at things. It is arguable that the United States has used dispute settlement in the NAFTA to give a kick to the WTO process, to make sure that when we are having a dispute settlement, that we move along in the two processes. We encourage each other by competition. I think that was a very sensible approach and it has brought some very positive things.

But there are, in the comparison, some hiccups which I think we should be reminded of before we go too far with it. The processes are, after all, not the same. They are not meant for the same thing. Chapter 19 is a judicial review of a determination. Under the WTO, it is not a judicial review of determination, it is a challenge of law and a challenge of a measure. Under Chapter 19, you assume the law to be okay. You are supposed to be applying not challenging the domestic law. Under the WTO, you are challenging the domestic law.

There is private party involvement, versus country involvement. Under the NAFTA it is not really dispute resolution under Chapter 19, it is judicial review. Under the WTO, at issue is enforcement of the treaty itself. It is dispute resolution to insure enforcement of the treaty where under Chapter 19, the NAFTA is not an issue. It is not to enforce the Treaty at all, but rather to apply domestic law. It is not a question of whether the law is too protectionist, but whether the determination is correct in light of that law.

There are distinctions which have to be borne in mind. There is overlap. Under that overlap, we are seeing the WTO becoming more and more a de facto forum for the challenge of particular determinations, even though it is cloaked in attacks on measures rather than on the determinations themselves.

In Dick's paper, he referred to the U.S. position on subsidies as a sporadic tendency to be wildly divergent from international trade norms. There are those phrases which one can only wish one had said oneself. It is a beautiful thing, that "a sporadic tendency to be wildly divergent," something I never do myself. Ysing the WTO as a corrective measure for things which you might think would normally go to judicial review is like opening a window wider. It is that wild divergence that we see from time to time. You do not see it Canada. Canadians are not like that. We are not wild. We are not very divergent, and, if there is a norm, we will follow it.

This wild divergence that we see in the States from time to time explains why Canadian exporters sometimes agree to an anathema, like Softwood Lumber, even something so unbelievably unacceptable as a volume restraint. Something so completely contradictory to free trade is better than going

through "wild divergence." Whether James Blanchard proves to be right or wrong that we will come rapidly to some kind of successor agreement, I do not know, but I think we do have to hope for something that looks a bit more like free trade once we get there.

In any event, we should remember that when Chapter 19 was invented, not only was the WTO dispute settlement not there, but that Chapter 19 was not intended to be there either. It was not meant to be perfect. It was meant to be a temporary stopgap. It should not be surprising if this stopgap, which has become permanent has difficulties. I say that only to make it clear that if I do make suggestions for tinkerings and some revolutionary changes, in the end, it is not meant as criticism for those who drafted this thing, which turned out to be quite a wonderful accomplishment. It is simply looking at things realistically, with our 21st century eyes.

Let us go through a short checklist of where the pluses and minuses are. First of all, on the question of deference, Dick is quite right to say that deference was a target of Chapter 19. Canadians saw American judicial review as inspired by protectionism and political influence, and the deference we saw in the United States was really not deference. It was protectionism. Americans saw Canadian courts as simply timid, which was true. The Canadian courts were simply too timid to do anything about the administrative tribunal. That is the reason that Chapter 19 came in. It was to rekindle a business person's faith in the system, looking at both sides of the border. I think it has done it. I think we have done it. I think there is a much greater confidence in the system. There is a confidence that in the end, one way or the other, we will get to some better result than we did have without Chapter 19.

I remember, Henry, when several years ago, instead of asking: "Has it worked?" "We were asking Is it going to work?" Henry kindly asked me to speak then. I said, "Look if you get a new dog, you have to expect it to bark." The fact is that this thing has indeed barked. It has barked several times. It has done remands, which I think generally have been appropriate. Remands which the traditional court would not have done. I think we have to look at that as success. On that basis alone I come to the conclusion that this Chapter 19 animal is still relevant. Without it, we would be back slowly to a loss of faith in the system by the people who are actually generating all this trade.

Another element that I think we have to look at as a positive is this openness to private parties. This is, after all, an international mechanism, not the private domain of all governments. It is not government which monopolizes it. As Dick has said, you are not in the hands of government to have your rights protected or trashed. You are going to do it yourself. I think that is a very positive measure.

We had one good example in Canada recently created by my colleague who is up in the back of the room, Terry Sweeney. He is also involved in the baby food case, in which a bi-national panel decided that standing would also be given to the Commissioner of Competition. If the Commissioner could be a party at the Canadian International Trade Tribunal (CITT) in Ottawa, the Commissioner could be a party and have standing at the judicial review. I think that is an indication that standing is not limited, and I think that is good.

Another good thing is the question of transparency. I think that when we compare this kind of judicial review, this kind of access to a corrective measure, to other mechanisms, particularly in country to country disputes, transparency, access to the pleadings, access to the hearings, is very good. This is a measure which, unlike the WTO, manages to handle confidential information quite well. In the WTO, there is no mechanism for redacted summaries or judgments that deal with confidential information. We have to say that Chapter 19 still has something to teach. Though NAFTA panels could make better use of web technology to make pleadings accessible. That would be one of the tinkerings.

Another positive on the checklist is the question of time. Time was a target of Chapter 19. Prior to the Free Trade Agreement, a proceeding before the CITT took an average of 734 days; two years, it took just about exactly two years. Under the Free Trade Agreement, Chapter 19, the average time it took was 360 days; less than half the time. The rigid time lines imposed by the NAFTA Chapter 19 amount to 315 days, which is a good thing. Not only has it been good in itself, this kind of competition and encouragement, but the fact is the CITT has had to speed itself up to save its own credibility, and so, by the way, has the Federal Court in Canada. Time is assisted by the fact that there is no appeal. There is the extraordinary challenge, but there have only been about three such appeals. I doubt we will see any more appeals.

The only negative to point out on the question of time is the limitations on remand. The panel remands, but cannot actually cancel the judgment that it is reviewing. They cannot outright tell the administrative agency exactly what to do the next time around, though they try to find a way to do it from time to time. So things go back and forth. You have to look at it two or three times. If we are going to tinker, we should tinker with that, I think.

Another item to bring up relating to time is this question of yearly judicial review. Are we up to Pork XIX? It just keeps coming back, with the commerce or injury finders always changing their methodologies. If we were going to tinker, I think we should tinker with that as well, to bring some kind of finality or some kind of predictability.

Let us get to the negatives. It is getting hard to get panelists on this thing. I used to be quite happy to get the $400 a day as a panelist, because it was so

much fun sitting on the panel, meeting interesting people, looking at wonderful problems, but, you know, $400. There is a limit to this. You cannot do a lot of those at $400 a day. Many of us have partners to worry about, so, I think that is a problem. If you are going to tinker, you look at that.

On the question of conflicts, you are absolutely right. I think your words, "thoroughly nasty use of conflict rules" is absolutely appropriate. That is something with which we should tinker. I do not think it should be too difficult to find a more humane way to look at what a conflict is. We should remember that conflict rules under NAFTA are not just retrospective, they look at current conflicts. You have to tell your partners about it year after year after year and it becomes a conflict. It is very seriously discouraging to panelists sitting on these things. The breadth of these rules of conflict is such that in the past many, many years, I think I have declared myself in an absence of conflict, that is to say, available to sit on one of these panels twice in the past two or three years. It is becoming very difficult to find the panelists. Without wanting to cast aspersion on anyone, it is going to have an effect on the overall quality of panelists, and probably on the quality of their judgments.

However, I would like to get to the two new revolutionary ideas instead of just tinkerings. One of the problems under Chapter 19 is that the result, whatever it is under Chapter 19, never has an effect on the law itself. As Dick has said, it is not an external discipline. It does not look to any overriding law. The measure, the legal measure, the American measure or the Canadian measure, always survives. Under the Free Trade Agreement in 1989 that was understandable. Chapter 19 was supposed to be an interim solution. We were on the way to the disappearance of anti dumping altogether, so these measures would have no relevance, and on the way to a heavy discipline of countervailing duty, none of which came.

Here we are into the 21st century. I think it is a mistake to have the parties to this creation of the animal simply throw in the towel on a substantive change of law. I wonder whether we cannot use the Chapter 19 panel to push gradually toward a better vision of a more irritation-free cross border movement. For example, why shouldn't we have, under Section 19, a discussion about whether it is possible for the Department of Commerce to be able to treat as a subsidy the million dollars that Dick mentioned going to Plant A, when really now we are talking about owner B? Why shouldn't we be able to discuss that under Chapter 19? Right now, we cannot. That would have to be done at the WTO, which is why it went to the WTO. I think Chapter 19 might suddenly be a lot more relevant if the ludicrousness of positions like that could be handled at Chapter 19.

Should Commerce be able to treat other upstream measures that are not subsidies in themselves anyway, as downstream subsidies? For example, the prohibition exports on feed grain for cattle?

Why shouldn't we deal under Chapter 19, with the unbelievable ease under American law, of establishing injury under U.S. countervailing anti dumping law and causal linking? I suggest something new to give Chapter 19 a bit of an additional life and maybe even a further spur to WTO disputes settlements; to give it some kind of jurisdiction over the substantive law itself, and push gradually for substantive law changes.

The second issue I wish to deal with is the interplay with competition policy and competition law. As we all said, Chapter 19 was there to pave the way towards a disappearance of anti dumping mechanisms and that disappearance was going to leave cross border movement to competition law discipline. It was undecided which discipline order, whether it be Canadian, American, or some new kind of international discipline, but still it was going to be a competition law discipline. Somehow we have given up that fight by making Chapter 19 permanent. We are giving up on getting rid of anti-dumping in a market that is, after all, supposed to be integrated. I have made suggestions before for simply doing away with the anti-dumping, but no one seems to be listening to me.

I wonder whether we should not be putting into Chapter 19 some kind of saving provision so that a tribunal or a panel might come to the conclusion at the end of its analysis that, yes, it is dumping under these unbelievable calculations we have come up with. Yes, it is injury under this unbelievably soft criteria that you have got and, yes, there is a causal link; whatever the criteria is to define causal link. So in the normal way, we would come to the conclusion that there is injurious dumping and there ought to be anti-dumping duty. However, there is no predatory behavior. What has gone on is perfectly expected behavior in a competitive market. We are, after all, looking for an integrated market, so let us not put dumping duty on in this case. Why not look for some kind of safe provision which allows us to avoid stupidity? I was on Terry Sweeney's case, Gerber Baby Food, because Heinz complained about dumping. Heinz had something like eighty percent of the market, and it now has one hundred percent of the market in Canada. It is a stupidity beyond imagining. There ought to have been, and should now be, either in the domestic law or in the review mechanism, some kind of saving mechanism to allow us to get our feet out of the quicksand before it is too late.

Those are my suggestions for tinkerings and for revolution, and I would say even without the revolutions, even without the tinkering, we have a Chapter 19 which has operated and does operate well. It was foresightful

when it came and it has worked. We have had a great deal of benefit from it. We should not think of it as having lost its relevance. On the contrary, we should think of ways of giving it more relevance.