



The fundamental flaw in the new NAFTA deal

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Unlike much of international law, trade agreements usually have a good enforcement mechanism. When one government believes another is not complying, it can file a complaint with an ad hoc panel and have its claims adjudicated.

Unfortunately, the original North American Free Trade Agreement's (NAFTA's) enforcement rules did not function properly.

The NAFTA renegotiation was a chance to fix these problems, but the negotiators passed up this chance, leaving the new U.S.-Mexico-Canada Agreement (USMCA) somewhat toothless and perhaps fundamentally flawed as a result.

In the beginning, the NAFTA dispute mechanism worked well enough. From 1995 through the middle of 2000, there were 18 complaints filed, with panels ruling on three of those complaints. But then in late 2000, in a claim filed by Mexico against U.S. restrictions on sugar, the United States blocked the appointment of the panel.

Since that time, NAFTA complaints have essentially dried up. From 2001 until today, there have only been four complaints, none of which have gone to a panel.

Proving cause and effect is difficult, and it is possible that the decline in NAFTA complaints is unrelated to the blocking of the panel appointment process. Perhaps the NAFTA governments simply did not have many complaints about each other's behavior during this later period.

However, the correlation here is striking, and if the enforcement process is, in fact, not working, it is clear that NAFTA's value is severely diminished.

The panel process is important because disagreements over trade restrictions are often complex and benefit greatly from neutral adjudication. Most disputes are not about simple matters such as whether a government is charging a 10-percent or a 20-percent tariff.

Rather, they tend to involve a detailed examination of domestic laws and regulations and the application of complex trade rules and exceptions to determine if the domestic measures are in compliance with trade agreement obligations.

NAFTA was one of the first bilateral or regional trade agreements to go beyond the multilateral rules of the World Trade Organization. It was an experiment in many ways, and it was not clear how many of its rules would work in practice.

The dispute settlement rules were no exception. The drafters of those rules probably thought they had ensured that panels would be appointed when there was a need. But after the sugar dispute was blocked, everyone learned otherwise.

The NAFTA renegotiation was a chance to correct this flaw in the original NAFTA text. Over the years, many new trade agreements have refined these trade dispute procedures in an attempt to address this problem.

For example, the Trans-Pacific Partnership (TPP) tries to offer a better guarantee that a government will not be able to block appointment of the panel. As part of the NAFTA renegotiation, the drafters of the new NAFTA could have at least borrowed from the TPP provisions.

Even better would have been to push further than the TPP, as the TPP still leaves possible avenues for delaying panel selection.

Unfortunately, the USMCA makes no progress at all on these issues. While it modernizes the rules in many ways, on dispute mechanisms it simply continues with the original flawed NAFTA.

U.S. Trade Representative Robert Lighthizer has expressed a desire to make trade agreements less enforceable than they currently are, so it is not surprising that the United States would ignore this issue.

And while Mexico and Canada have an interest in making sure the NAFTA can actually be enforced in the face of U.S. protectionism, it is possible that they felt pressure to get a deal done and eliminate the risk that President Trump would simply withdraw from NAFTA.

As we move beyond NAFTA and consider trade agreements with other countries, there is the broader question for Congress as to whether it wants trade agreements to be enforceable. The Trump administration seems to want to keep the enforcement mechanism weak.

But if Congress wants trading partners to honor the commitments they make, enforceability is crucial. The new NAFTA is flawed in this regard, and while Congress might just be happy that President Trump has not wrecked NAFTA, in the future it should make sure trade agreements have a proper enforcement mechanism.

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