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Trade Dispute Settlement Procedures
in the North American Free Trade Agreement

I will begin this presentation, if I may, by introducing the organization to which I belong as Canadian Secretary. Our organization is only one of a kind. It comprises three national sections, one each for Canada, the United States and Mexico, with each section headed by a Secretary. In organizational terms, the sections are "mirror images" of one another.

As for myself, I am a social anthropologist. My doctoral field work was completed in the Swiss Alps among farmers struggling with the transition to a tourist economy, quite successfully should I say, if you measure success by achieving a better standard of living, while tending at great cost and great pleasure, to their beloved cattle. I got involved with free trade through my fascination, and that of my fellow anthropologists, with how rules are meant to be broken. And free trade is full of rules.

During the two years and a half that I have been Secretary of the Canadian Section of the North American Free Trade Agreement Secretariat (that is my somewhat convoluted official title), I have noticed that although "NAFTA Secretariat" looks nice on the office door, or on my business card, almost no one knows exactly what we are up to. I get a lot of respect though, because everyone knows about the NAFTA.

The three Secretaries report to the Free Trade Commission, which itself consists of the three Ministers responsible for international trade in their respective countries. The three Secretaries must always reach a consensus on any problem requiring resolution or a decision, since none of the Secretaries has authority over the others. We have to work together to implement the terms and conditions of the Agreement on the matters with which we are concerned.

One important thing to remember about our organization is that the Secretariat's three national sections operate independently of their respective governments (we entertain an arm's-length relationship), and this independence ensures the integrity and impartiality of the process.

In a few words, our mandate consists in administering the trade dispute settlement procedures that were negotiated by the three member countries:

- we register the complaint;
- we receive and redistribute all relevant documents;
- we organize the hearing(s);
- we issue the decision.

Now that you have an overview of the organization to which I belong, my presentation will therefore focus on the following:

- the short history of the Secretariat;
- the functioning of the NAFTA, specifically, when two national industries become involved in a trade dispute (Ch. 19), and;
- In closing, I will look at how things function under the NAFTA when these disputes involve two governments (Ch. 20).

Historically, the Secretariat dates back to the Canada—United States Free Trade Agreement, when those two countries established the Binational Secretariat (our former name) in 1989, with a mandate essentially the same as our mandate today.

When the NAFTA came into force with the addition of Mexico in 1994, the word "binational" was obviously inappropriate; however, the major change was that the Secretariat became permanent, from being a temporary institution since 1989.

More specifically, only part of its mandate was temporary: the part relating to administration of complaints about predatory pricing was to be replaced after seven years by a separate agreement on new rules of competition between our two countries.

The addition of Mexico changed all that, but there were also other circumstances warranting the institutionalization of the Secretariat. You will recall that in 1987-1988 the dispute settlement procedures in the proposed agreement with the United States were one of the most successful selling points, if I may use this marketing expression, in the eyes of the Canadian public. The Agreement was feasible only if Canadians could see that a mechanism had been provided, quote "to protect us from the United States." There was not much talk in Canada about the temporary part of the Agreement.

And that's also why, at the time, our neighbours to the South emphasized in their own country that the part of these procedures that was likely to be used most, would apply only on a temporary basis. Without spending too much time on the details, the United States implied to its own public that the absolute sovereignty

of the famous U.S. trade remedy laws would be “shared”, as it were, with Canada, for only seven years. By the time Mexico arrived on the scene in 1994, U.S. citizens’ worries in this regard had been soothed. The dispute settlement procedures had proven their worth in specific cases, to the satisfaction of almost all participants involved.

One reason for that state of mind in the South, is that under the NAFTA rules, the panel's mandate is to consider only (note my emphasis again) whether the laws of the country being challenged, have been strictly observed in the first place. It is not open to a panel to determine whether, in light of the case participants' explanations before it, the law has, as it were, some far-sighted provision that permits a novel interpretation. The panel cannot judge the case again. Of course, if an issue is remanded to the responsible authority by the panel, the decision will probably be amended; however, this will be because of an error in construing the law and for no other reason.

A clarification may be in order at this point. The Secretariat does not initiate cases on it's own. I say this because some of you may wish we would do that, upon learning of a trade dispute, from e-mails received at our web site, or after a conference such as this one, or after a request from an individual or an industry group, for instance. I will explain in a short while how cases are precisely initiated. I think this will be useful, as it seems that speakers appearing in previous meetings have sent a somewhat inaccurate message about how exactly the process begins and unfolds. The paper in question was presented by Burfisher, Norman and Schwartz and their intention was certainly very generous when they went on to describe the dispute settlement mechanisms of the NAFTA, under what computer-talk would qualify as “a user friendly way”, so that the Secretariat would appear as your benevolent ally, or something like this. The three secretaries should be very flattered by this description of their mandate, except that it is not exactly what it is for real, and I wish to elaborate on the specifics.

Let's be clear about another thing: the dispute settlement mechanisms of the NAFTA are not informal processes. Everything is codified in Rules of procedures that deal with the most minute detail. It is not my intention today to criticize the system when I say that Rules are strict, but simply to drive home the point that this system is precisely codified. Rules do not bend. There are rules for disputes between private industries (Chapter 19) and there are other rules for disputes between governments (Chapter 20). Sure, in the latter case, rules allow for “consultations”, as Burfisher, Norman and Schwartz have written (p.133), in fact, this is indeed the norm, but consultations occur in very formal settings, as a country must first officially request them, and there are no guaranties, other than goodwill, that they will occur anytime soon after the request is made.

For Chapter 19, Burfisher, Norman and Schwartz use the expression (quote) "parties can inform interested parties" (end of quote) to describe the hard reality of the initiation of an antidumping complaint by a competitor ¹[(I underline complaint by a competitor as opposed to (quote) "parties can inform" (end of quote))]. The two situations are quite different from one another. In Canada, that complaint will be made before the Canada Customs and Revenue Agency. The authors continue that sentence with the expression (quote) "and provide them (i.e. the parties) with the opportunity to furnish information" (end of quote), when in fact, the importer receives a lengthy questionnaire about its business practices to be filled before a set date, or else ..., what is called a "normal value" (which in fact is the maximum value) will be assessed against that importer, as a duty. That is not really a benign (quote) "opportunity to furnish information", as they wrote.

Also, (quote) "parties may request panel reviews" means in real life, that if the Agency did not come up with the required trade remedy, the dissatisfied company or industry group must request a panel, not "may", to review the decision. It is the responsibility of that company to use all means at its reach to protect its interests and that of its labour force. Let us not forget that real people bear the brunt of this unpleasant trade dispute. That is the rationale for the whole dispute resolution mechanisms.

So let me start over from here. Imprecise descriptions lead people that are listening or reading about the matter, to think that a camel may be a moose after all, and this is not useful.

The terms and conditions negotiated between Canada, the United States and Mexico to resolve the trade disputes arising among them from time to time are very strict. The Secretariat's role is to manage the trade dispute settlement procedures negotiated by the three countries. The Agreement provides the continent's business firms with an opportunity to appeal a decision by a national tribunal to a supranational authority (in other words, us), strictly with regard to dumping and subsidies.

For Canada, the decisions that can be reviewed on appeal are those by the Canada Customs and Revenue Agency or the Canadian International Trade Tribunal. In Secretariat jargon, these two entities (and only these two) are (quote) "the investigating bodies whose decisions can be subject to review by a special binational panel." (end of quote).

The procedure is as follows: the Customs Agency will have decided to impose a customs duty (technically called an "anti-dumping duty"), whose effect, as you well know, is to increase the prices of the goods in question on the Canadian market and protect the national producer from competition. It will have

¹ Must control 25% of the regional or national market.

determined that the American or Mexican producer is selling its products, by itself or to an importer, for less than it costs to produce them domestically, and is therefore guilty of dumping, or alternatively that it is receiving a subsidy enabling it to sell its products at a lower price in Canada, that is the "countervailing duty". As we saw this fall in the case of softwood lumber, these two tariffs can be applied cumulatively. A third cause of complaint has also appeared in the books of the Customs Agency or its equivalent in the United States or Mexico, that is "price discrimination". As a matter of fact, an offence will be suspected if the advertised price of a product in Canada is less than its advertised price in the United States or Mexico.

Now, you have probably realized that the essence of a trade dispute rests on the calculation of the subsidy proportion affecting the price of a good for the purposes of calculating the customs duty. The same applies to the factors included in the production cost calculation of a firm accused of dumping. What in fact are the costs, down to the last red cent? That is what the Customs Agency decides and the way, or how, it arrived to its determination, is what can be appealed before the Secretariat.

For a case to go forward, a competing business in another country must also have been harmed—the injury test, as it was well described by Burfisher, Norman and Schwartz. If no harm has been caused, there is no case. The Canadian International Trade Tribunal is responsible, in Canada, for finding whether one or more firms representing a significant proportion of national production have been affected by dumping. These two institutions therefore work on the same cases at different stages of the procedure.

Decisions concerning dumping, subsidies and injury, by the Canada Customs and Revenue Agency and the Canadian International Trade Tribunal, as well as those issued by the equivalent agencies in the United States and Mexico, can also be appealed to the Federal Court of Canada, to the United States Court of International Trade and, in Mexico, to the Tribunal Fiscal de la Federación.

The point is that the dispute settlement procedures agreed among the three NAFTA countries allow one or more firms, through our Secretariat, to challenge an administrative decision in a forum other than one of the national courts I have just named. There is not much room for informality in this.

To summarize, I would say that as a general rule foreign firms are interested in challenging, before the Secretariat's Canadian Section, the imposition of a customs duty, and Canadian firms are interested in challenging the roll back of a customs duty by one or the other of these tribunals. When a customs duty is rolled back as a result of a periodic administrative review (normally every five years), all players are once again subject to the rules of the market and this may not suit a group of firms previously protected by a customs duty.

In addition, the arbitrators who are selected to hear a proceeding on a case-by-case basis are not accountable for their decisions to the governments that selected them, but somewhat, human nature being what it is, to their profession and ultimately, to their colleagues. If I were one of them, I would always bear in mind that my decision may be cited later and this would be a definite source of pride for me.

Arbitrators also are mindful of the Extraordinary Challenge Committees, a special procedure provided in the rules for the purpose of setting aside a panel decision because of gross misconduct on the part of one or several members of the panel. The mere fact that this procedure could be invoked will make them to think twice.

It is important to note in this context that in just 12 years, the 90 decisions heard under the rules of Chapter 19, which relates to dumping and subsidies, have resulted only once in a decision where the panelists lined up on the side of the industry of their respective nations. Accordingly, our panelists have made a great contribution to more harmonious trade relations between the North American Free Trade Agreement member countries, by confirming the power of the rule of law in these relations.

I would like to end this presentation by describing the other major aspect of the dispute settlement procedures provided in NAFTA. The three countries have given themselves, through a procedure separate from the one relating to industry groups or companies, the possibility of using arbitrators to resolve a dispute concerning the interpretation of the NAFTA by the signatory governments. For example, is a specific country entitled to make a new research assistance program available to local firms without infringing the spirit, and above all the letter, of the Agreement?

This separate procedure can be found in Chapter 20. When a dispute arises, the governments can decide to use this procedure, or take it to the World Trade Organization. Either, but not both. The Chapter 20 procedure is of a nature to promote the informality of settling a dispute in the way that Burfisher, Norman and Schwartz were thinking of.

Indeed, the involved countries begin by undertaking a consultation process among officials. If this fails, one of the countries will request a special meeting of the Free Trade Commission, which (again), consists of the three ministers responsible for international trade. They may decide to ask technical experts to review the facts, or recommend mediation by a specialized organization or special envoys. A five-member panel will be established only as a last resort.

If the panel is established, the selection process is not the same as the one under Chapter 19. Each country selects two members from the other country. The panel chair is selected by the Parties involved and can be a citizen of any country in the world, whereas under Chapter 19 the chair is identified by consensus among the panelists (it is my job to promote this consensus during an initial conference call).

The governments then file submissions and rebuttals and at least one hearing will be called by the responsible Secretariat in the country whose program or legislative measure is being challenged. Although this hearing is not open to the public, a transcript of the pleadings is available 15 days after release of the panel's initial report, which is expected 90 days (three months) after the last panelist is selected and will contain recommendations for a possible solution of the dispute. Each country then makes a submission regarding the suggestions made to them and the panel prepares a final report within the next 30 days.

The only delays allowed in this time schedule (and don't forget the NAFTA's basic goal, which is to reduce the length and cost of any dispute) are to enable a panel to grant a request by a country for the establishment of a scientific board to hear experts on environmental, health, safety or other scientific matters; it is up to the panel to decide whether this is relevant in the case before them.

Certain restrictions on release of information must also be complied with during disputes concerning the interpretation of the Agreement by governments. Each of these restrictions is strictly specified in the Rules. Their only purpose is to maintain the integrity of the dispute settlement procedure, so that the Parties can resolve their dispute informally at any time. It is not generally known that since Mexico joined the Agreement, of the 23 instances brought to the attention of the Secretariat by governments concerning another government, only four have resulted in formal requests for review by a panel. In other words, 19 cases have been resolved before their conclusion through consultations between the Parties.

In my work and in that of all three National Sections' staff, we act as if the credibility of the Agreement itself was at stake on a daily basis because pass the individual disputes, trade agreements are under close scrutiny in public opinion of recent years. Ours should be nurtured closely.

In this context, I would like to bring to your attention that four months ago, three World Bank Vice Presidents wrote in defence of trade agreements by pointing out that economic growth is necessary to combat global poverty³. Demographic increase must be complemented by at least equal growth of the economy. They

³ Sarbib, Jean-Louis, Ian Johnson and Gobin Nankani: "New Thinking About How to Help the Poorest Help Themselves", *International Herald Tribune*, 17-18 November 2001, page 8.

wrote that, when it comes to economic growth, what we need is quality more than quantity.

Quality growth provides resources to send children to school, that enables governments to build health centres, preserve fragile environments, introduce rules reducing the vulnerability of the poor to natural disasters, and introduce social safety nets promoting redistribution of wealth to all social strata.

And since trade agreements imply trade disputes by definition, as when you have rules, rules may be interpreted differently by different signatories⁴, we must constantly return to the source, that is, to the people affected by a conflict. Today, when a business is forced to pay customs duties it did not pay before, the first victims are very often the workers employed by the firm and its suppliers, if the importing business is not in a position to pass on the customs duties to its customers through an equivalent increase in its prices. A significant proportion of the employees are then hit by technical unemployment, as an economist would say, which is the same, in the street, as real unemployment.

We therefore always bear in mind this vital issue of rapid resolution of trade disputes, and the dedication of all the staff is conditioned by this dramatic reality. The cost avoidance here concerns employees of an affected company and the well-being of their families or, as the United States constitution promises, their pursuit of happiness. In fact, there is a real world behind each case and we are all aware at the Secretariat, that the sooner a dispute is resolved, the more the NAFTA will meet public expectations.

My last word will be very short. The major trend emerging from the last 12 years of dispute resolution practice in NAFTA is that this part of the Agreement is a success that is used as a model globally when countries liberalize their mutual trade.

The world has also come to realize that resolving disputes is critical to the success of free trade agreements, both in general and in particular. And dispute avoidance is even better. As I have described above, the NAFTA dispute settlement mechanisms incorporate both provisions, but in separate chapters.

And if your company has a complaint against a competitor, do not forget to mail it to the appropriate agency with enough postage on the envelope.

Thank you for your attention.

⁴ Does freer trade leads to more formal disputes? Yes by definition, but do dispute resolution mechanisms increase trade stress? No. It provides an avenue to manage stress.