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*by Jonathan T. Fried**

It is very much a pleasure to be back in Cleveland, and each year that I return I have a better appreciation of the city. I would like to be very brief, so as to allow more time for discussion. I should state at the outset that I'm speaking only in my personal capacity and that my views do not necessarily represent those of Ambassador Reisman and the Government of Canada.

Against that backdrop, I would like to offer you some musings on dispute settlement and the role of the ITC and CIT— CIT of course, for you Americans, is the Canadian Import Tribunal rather than the Court of International Trade—in a free trade area in general terms. To those more expert, I leave the development of the details.

I appreciate Commissioner Brunsdale's football analogy, though I'm not sure I would describe the teams the same way. Working within the government as part of the team that is seeking to negotiate a true free trade arena, I would consider that the governments as a whole on both sides, as ratified or mandated by our respective legislatures, are construction workers and engineers. We are building a stadium in which there should be a level playing field. The kicker, the coach and the businessmen are the ones playing the game. We are seeking only to create the most advantageous conditions for conducting business.

Now I would like to restate what many of you have heard so many times before; that is, what is at issue in the trade negotiations? What are we seeking to do for business in constructing this Free Trade arena?

First and foremost, by entering into these negotiations, both governments have committed themselves to seeking to insure an environment that provides secure and predictable market access to business on both sides of the border. Carl Beigie talked a bit as to why, in economic terms, that is a desirable goal. In my view, very simply, secure and predictable access has the effect of encouraging producers and investors to take full advantage of a larger market by virtue of the removal of barriers to trade. That should generate economic growth. In order to achieve this result, a more open, larger market for business is needed.

Second, both governments wish to impose appropriate disciplines on

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themselves and on each other in the use of trade distorting government practices, as well as private party pricing practices that may have the effect of distorting trade. One wants to avoid trade distortion in furtherance of an overall objective to provide that larger market of fairer trade.

Third, if one wants to impose that discipline in furtherance of broader market access, one would do so in a manner that would avoid procedural harassment of legitimate commerce. If we have done our job in defining articulately what is fair and what is trade distorting, then the procedures around which those substantive standards are to be enforced should not cause further uncertainty or harassment.

Fourth, in connection with this avoidance of procedural harassment, one would want to insure that responses to these trade distorting practices—by way of government assistance or by way of private pricing or other market restrictive practices— provide effective and timely corrective action. The action should take place in a manner that not only determines the case at hand, but provides conditioning or deterrent effect, and provides guidance to businesses in their future and forward plans.

Fifth, one would hope that responses to trade distortions would take account of the North American market conditions in that regard. In many cases the issue is not and should not properly be viewed as is there a subsidy or is there an injury, but rather what is the North American market situation? Are we over capacity? Is there an adjustment problem? What are the downstream effects of restricting or keeping open bilateral trade in the specific product under consideration? One would hope that in responding to considerations of distorting practices, one would design solutions in a manner that takes a comprehensive view of the overall market situation.

Sixth, both the substantive disciplines imposed and the procedural responses that insure enforcement of those disciplines should be consistent with a free trade area. Article 24 of the GATT requires both Canada and the United States to reduce or eliminate, insofar as possible, those measures that have the effect of constituting a restrictive regulation of commerce. That's the language of the GATT. A restrictive regulation of commerce is a regulation that has the effect of constituting a border barrier to trade. So guided by the objective of pursuing an article 24 free trade area, it seems to me that Canada and the United States, in designing both their disciplines and their responses to conduct that does not comply with these disciplines, should do so in a manner that does not promote but rather reduces or eliminates border measures.

Finally, I think we should all keep in mind that, as the Prime Minister has stated publically and in the House of Commons, without significant progress on contingency protection, there will not be an agreement. So with that in mind, can we set out some general objectives or factors that may be relevant in considering the role of the ITC and the Canadian Import Tribunal or alternative procedures to respond to trade distorting practices?

I think first it has to be emphasized that one can't talk about procedures to respond to distorting practices until one knows what the substantive principles are going to be. Any procedures, domestic or binational, must be responsive to the substantive rules of the Free Trade Agreement itself; and as I stated at the outset, both governments started and are pursuing these negotiations with the shared objective of developing an agreed discipline that defines the terms and conditions of bilateral trade.

These principles that are to be reflected in a free trade agreement will, of course, be implemented through changes to domestic law, changes to domestic regulation, and changes to administrative practices of governments. The changes will be implemented in order to provide that environment of certainty which permits confident business planning in a competitive environment. Once you have the implementation of these rules on the books, your objectives are certainty and predictability so as to afford business the opportunity to play an entire game according to the rules with which they started playing the game. You want to insure that in the administration of these rules of the treaty, the rules are interpreted and applied domestically in a manner that maintains that certainty and predictability.

Even after they are implemented, the rules of the treaty may be threatened by any one of a number of events. Government decisions by middle-level bureaucrats, political decisions by legislative bodies, administrative action, or private practices may all threaten to undermine or reinterpret the original intent of the parties. Only with the assurance that the terms of bilateral trade will be protected against these future threats can investors and exporters rely upon the originally developed framework.

Next, the procedures and the institutions designed to protect the disciplines undertaken by both governments should themselves promote the objectives of the Free Trade Agreement. This includes, most importantly, respect for the significant structural changes that both governments expect to be made. Merely restoring a balance of concessions, where a dispute settlement system or avenues for complaint premised only on consultation and conciliation, such as that of the GATT, would not protect the structural changes that we expect to be made, particularly by Canadian industry.

Such a system would, as it currently does, leave the two governments free to take compensatory or retaliatory action on the basis of nonbinding recommendations to restore a balance of rights and obligations. This would constitute authorization to erect new barriers to trade. Once these new barriers are erected, whether temporarily or indefinitely, they would effectively change the rules under which bilateral trade is conducted. The barriers would thereby change the basis upon which business will have undertaken a commitment to compete in a more fully integrated North American market.

Institutions and procedures in the Free Trade Area must avoid unravelling the framework of the treaty and must condition the future conduct of governments and private parties. Where does that take us? Let me offer you some general principles in terms of the manner in which the disciplines regarding subsidies, pricing practices, and a range of other substantive obligations— from intellectual property to services—might be governed in a free trade agreement.

First, any dispute settlement regime, or any institutional arrangement, be it the continuation of the ITC and CIT or a binational regime, must properly be understood as flowing from the substantive rules of the agreement. No dispute settlement regime can stand in isolation; rather dispute settlement institutions and procedures must be responsive to the kind and frequency of disputes that may arise concerning the obligations undertaken by the two governments in the agreement itself.

Second, to the extent that the Free Trade Agreement is meant to provide that stadium, in which business plays, the procedures and institutions must be comprehensive in terms of covering that which is substantively undertaken in the agreement. A single regime, possibly tailored to the imperatives of factual determinations versus questions of principle, should govern the interpretation and application of every aspect of the agreement, although modifying provisions may be required. This tailoring of procedures to specific circumstances, however, should not derogate from the overall framework.

Third, if the Free Trade Agreement is intended to be a comprehensive code—a self-enclosed stadium—the dispute settlement procedures and institutions should be exhaustive. In other words, for any dispute derived from or concerning obligations under the agreement, only the procedures set out in the Free Trade Agreement should be available. Resort to other forums, such as the GATT, or to actions not bilaterally agreed to, properly should be precluded.

Fourth, I can't overemphasize the importance that should be properly attached to dispute avoidance. The ultimate goal of any institutional arrangement and dispute settlement regime is to prevent disputes from arising. Courts, jurisprudence, and quasi-judicial and administrative agencies—to the extent that they are able to be public in their proceedings—may provide their most beneficial impact in avoiding future litigation or contentious proceedings. Any channels for complaint, any channels for consideration of the extent to which the substantive obligations of the Free Trade Agreement are being respected by the two governments in terms of possible subsidization or trade distorting practices, should try to avoid letting disputes arise or grow. To that extent, the response should initially be as pragmatic and as comprehensive as possible in order to take account of the broader impact of these trade distorting practices, market conditions, adjustment factors, downstream effects, and so on.

Fifth, procedures for notification, consultation, and amicable concil-

iation, which all flow from the notion of dispute avoidance, must be provided. In the end result, there must be an avenue for the binding settlement of disputes between Canada and the United States. Only through binding decisions can the integrity of the stadium—of the treaty framework—be preserved.

Last, it strikes me that Commissioner Brunsdale's call for greater predictability and Commissioner Bertrand's call for clear definition or description of differences in administration between the two tribunals require binational administration of the standards of the Free Trade Agreement itself.

The assessments, whether they be injury, industry, or relevant market, must be made properly on a North American basis. It strikes me that the logical implication of what each of our two speakers has said is that there is a need to look at these issues in a free trade area—of subsidization, of pricing, and of injury—on a North American basis. Binational administration in a binding manner is required in case dispute avoidance and amicable procedures fail to address these issues adequately in a manner satisfactory to both governments and their industries. There are a range of options that we can all think of as to how one achieves these objectives.