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## DISPUTE RESOLUTION UNDER NAFTA: A CANADIAN PERSPECTIVE

*Simon Potter\**

It is a nice opportunity to be able to stand up and speak to you, because, Mr. Chairman, you failed to recognize me earlier when I wanted to ask a question, and I am now able to ask that question and answer it. There was a discussion earlier about the question of sovereignty; and sovereignty in our country, I can tell you, is a loaded word. It carries a lot of emotional baggage, and I think, frankly, that word carries emotional baggage everywhere else, too, which we would be well to get rid of. I think we should start talking about something else, which gets to the point anyway, but avoids this emotional load that we just simply do not need in order to approach these questions.

Sovereignty, whatever we are going to call it, is something which is always used up. It is like freedom. When we become an adult, it immediately starts to evaporate as we sign contracts and get married and so on, you are suddenly quite a bit less sovereign. In fact, the whole purpose of the freedom is slowly to lose it. I think it is similar with countries. The purpose of the sovereignty is to use the bloody thing up and to put it to work. Why? It is to give our citizens a bit more influence over their own lives. At least it should be in this part of the world. I think, then, that what we ought to be talking about is the margin of maneuver or the leeway. We should not allow the emotion which surrounds this idea of sovereignty to get in the way of doing things which will actually give to our citizens more influence over their own lives.

There are plenty of countries out there which are fully sovereign, but whose citizens have not the slightest influence over anything at all. And obviously it is that influence that we have to weigh, that margin of maneuver for our citizens, whether they are businesses or people.

And that brings me to the questions and answers which arise in the context of the discussion which Riyaz Dattu had with Larry Herman and with others; this business about wanting to streamline the dispute settlement mechanisms which NAFTA has, and to do it by using a public

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interest exception.

Even though I make my money doing these things, I have never seen an anti-dumping case which is actually in the public interest. Is there any anti-dumping case which actually does the public interest good over the whole breadth of the country? I think a very strong case can be made for saying that, except perhaps for very highly added value goods, anti-dumping cases actually do more harm than good to your economy.

Now, in fact, the case has been made by American authorities who have studied this. The cost to American people, the people that you want to give this influence over, vastly outweighs the benefit that you get from these cases. If you come to that conclusion, which I offer as a hypothesis for the moment, but imagine that you come to the conclusion that most of these cases are just not worth it, it then suddenly puts into a very new light the discussion as to whether and how we should streamline the system. Instead of trying to find a way to paper over the flawed system, as you call it, instead of superimposing on top of one flawed system another necessarily flawed system, why do we not go after that flawed system itself?

We had the question whether this was necessarily a question of negotiation. I think Larry said this is a business of negotiations. Canada and Chile have negotiated just that in their Free Trade Agreement. They simply agreed not to kick each other anymore. There will not be any anti-dumping cases. At least they are going to try it for a while and see if it works.

You can go a step further; why should it be a question of negotiations? Could one country not simply unilaterally decide not to kick itself? And I wonder whether it is not in the public interest for at least a large slice of goods or of the economy simply to be carved out of that, and for Canada to say to itself, we are just not going to do this anymore. It does not make any sense. I hope it does not happen, of course, because, as I say, I make my living off these cases. I have come equipped with all my business cards in case you want to jump into this flawed system.

Is the NAFTA dispute settlement mechanism flawed? I agree with Bob, that on balance we have to say that this thing has succeeded. I come at it, though, from a bit of a different approach. I think the way to judge whether it has succeeded or not is first of all to remind ourselves what it was meant to do in the first place; and what it was meant to do was to deal more with a problem of perception than anything else.

There was a very bothersome perception among Canadian businesses that the dice were loaded in the United States, that political influence

was very deep, and that you just could not get a fair shake. If we now ask whether the system is flawed in that sense, I think that Canadian business would much more likely say, it is not perfect, but it is not that bad anymore. It seems to be working a bit better. And there is a system to oversee those bureaucrats who abused their power in the past. It is not perfect, but it is a lot better, and in that sense, I think the success has come.

The interesting question to ask is how did that success happen? Many of the answers to that question direct us to the answer to other questions which were asked this morning. First of all, the success came from a real shake-up of what was going on. It was not simply superimposing a flawed system on top of a previously flawed system. It is a dispute settlement mechanism, at least in Chapter 19, which has remanded a good number of decisions, I think fair to say vastly more than would have been remanded by the traditional courts, whether in the United States or in Canada. Part of the reason for that, I think, is that the animals are different; that the traditional courts are made up of quite comfortable judges who have grown up under the umbrella of judicial deference. The animals which are created *ad hoc* under this Chapter 19 are, by far, less deferential. Part of the reason for that is that they are practitioners and not judges.

I think that leads us quite directly to the question from a Canadian point of view; do we want to have a permanent institution to run Chapter 19 with permanently named judges or panelists, leaving aside from the question whether the two countries could ever agree on who should be in that permanent roster? I leave aside as well the question, does it really make sense to create a permanent body to handle eighty cases? So far, under all of the FTA and all of the NAFTA we have had about eighty-two judicial review cases. I do not know whether that justifies building a new building.

But beyond that, from Canada's point of view, and I think frankly from a business point of view from both sides of the border, certainly from a practitioner's point of view, we have a dog which really barks. It barks a lot more than the more traditional courts and it is, frankly, very cheap. It is flawed, but, you know, it could be a lot worse. Now, having said that the thing is more or less successful, I think we have to look at some indications of complaint about the current system.

First of all, the United States has many more countervailing cases than does Canada. Is that because Canada is subsidizing much more than the United States, and America has to complain about it? I do not think that is the answer. I think probably that subsidization is as rampant here as it is in Canada. However, mounting a CVDS is an enor-

mous enterprise, and I think, frankly, when you are a domestic producer and you look at the need to protect your domestic market, that need is a lot greater, and the possibility of justifying the expense is a lot easier if you are looking at protecting your domestic American market than protecting your domestic Canadian market. That goes to the question of the cost of these anti-dumping and CVD proceedings, which I am going to get back to later on in my talk when I discuss the WTO.

Another problem area is the apparent reluctance of the American agencies actually to knuckle under and do what they are told. We have several instances in which final determinations in the United States have been remanded not once, but twice, and even in some instances three times, before the agencies do what they are told to do. But we also have instances, for example, pork, in which you have Pork I, Pork II, and Pork III, because the agencies redo what they were told not to do when it comes time for year two. This is just not calculated to build up an expectation among the real users, that is to say our citizens, that it is worth going there. It is very, very expensive and what do you get out of it? I think that is a problem we are going to have to face up to, sooner or later, and which plays into a prediction which I am going to offer you at the end of my talk.

I have to talk about Article 1904.13 of the NAFTA, which, without bragging too much, I think it is fair to call the Potter Provision, because it was put in there to allow an extraordinary challenge of a binational panel decision, not only on the grounds which the FTA provided, but on the additional grounds that panelists had somehow failed to keep themselves to the application of the domestic standard of review.

In both of the extraordinary challenges which were aimed at the panel on which I had sat, it was alleged that we had been overreaching to that extent, although we did not declare that the American institutions just did not exist, as apparently the Mexican panel did. (I cannot help adding, but there is a gentleman in Mexico, as well, saying that half the banks in that country do not exist because of a problem of chronology in assigning some administrative decree. The decree was signed before the legislative authority came in for the decree, and all these banks which had reconstituted themselves suddenly found themselves nonexistent, and could not sue for their mortgage claims, and so forth.)

In any event, 1904.13 was brought in with the NAFTA to make it an additional ground of extraordinary challenge, that the panelists had somehow gone beyond the confines of the domestic rules, on standard of review, and it was expected when that was brought in that that would open the door, pave the way to a greater number of extraordinary challenges. So far there has not been one, and why is anybody's guess.

Does that mean it is really not a big problem, or does it mean that the existence of 1904.13 has suddenly disciplined the panelists so that they can constrict themselves appropriately? I do not know. But it is interesting to note that there has not been one so far.

Now, as to the country-to-country disputes, the predictions were, at the end of the FTA and the beginning of the NAFTA, that we would see a good number of them. They were working not too badly under the FTA. There were five cases under the FTA, but there has only been one case since NAFTA. It had to do with agricultural products. I think that we should draw a lesson from that. Why has there been only one? One of the reasons is the existence now of the alternative body to go to, the new WTO remedies. Several Canada/U.S. disputes are either there or are heading there. The Helms-Burton business, that ludicrous piece of legislation in the United States, is already there, thanks to Europe, although it has been put to sleep for the time being. And the Canadian case may go NAFTA, maybe not, who knows. We have got a budding potential dispute regarding sugar-containing products, and that could well go anywhere.

What I am trying to get at is that the simple existence of the alternative remedy, not only for country-to-country disputes, but also for the anti-dumping and countervailing, may make it so that we are not looking at eighty-two NAFTA cases over a period, but a smaller number of cases, making it even less reasonable to consider setting up a permanent body.

There is another element that comes up which also has to make us wonder whether the system is working, and that is the example of *Softwood Lumber*. It is very funny to think that, in the context of the Free Trade Agreement, of which the two countries are very, very proud and indeed want to go around the world selling to other people, that the United States should insist on imposing, after going through two softwood lumber cases, of requiring a quota on Canadian exports to the United States, taking something out of the system which apparently is working and using rules which are the antithesis of free trade. That also is not likely to generate consistent credibility and belief and confidence in the system.

We have this agreement under which Canada imposes export quotas on softwood lumber, but why is it there? It is because of an American suggestion, which has twice failed, that Canadians' stumpage duties are equivalent to subsidies. Everything coming out of wood is related in one way or another to those stumpage duties; paper, cardboard, all wood products. And yes, indeed, now we see it, the precedent is there, and there is a constituency created in the United States to lobby for an

extension of that, to seek an extension of the quota arrangement to other wood products. We see people from your states, Nebraska and North Dakota, asking for quotas on exports of wheat, and that is a return to the past. It is not calculated to generate confidence in the system.

So yes, I think the system is working. It has fulfilled the limited expectations which it had, but it is impossible to say with resounding success. Frankly, I think it is impossible to say that it is such an important animal that it deserves its own freestanding and permanent institution. Although, momentum being what it is, that is probably where we are headed, eventually, anyway.