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Comments on Dispute Resolution Under a North American Free Trade Agreement

*by T. Bradbrooke Smith**

My comments will be very confined and very general. First of all, I want to address the question of why we are concerned about dispute resolution. Please understand that I'm speaking in this capacity as a lawyer interested in the rule of law as well a Canadian. Under any new agreement, we are obviously going to have a great many disputes of various kinds, and various sizes of different qualities. They are going to have heavy political and economical overtones. People will suggest that we solve these problems in the way that we have solved other Canada/United States problems—we will negotiate.

We have done pretty well in the past, but there are two reasons that I would advance have kept us from doing better. The first is what I would call the level playing field reason. This reason recognizes that the negotiating strengths of the two parties are not equal. I'm sure that I speak for all Canadians in saying that we want to play a team on a field that's level and that is sort of our size. Second, I have a theory of my own, called, for want of a better expression, the sort of exponential maze theory.

Trade relations are complicated these days. We have gone from 120 disputes three to four years ago to 300 now. They have become so extensive and so complicated that, in my respectable opinion, they can no longer be negotiated all at once. They can no longer all be balanced. There are too many balls in the air and there have to be means, as Professor Sohn has described, of settling these disputes to assist us out of the maze.

My thesis this evening, and in commenting on Professor Sohn's presentation, is to say that mechanisms to solve disputes are vital to Canada. The existence of such mechanisms are going to make or break the issue in Canada. Quite apart from the substantive disagreements, any agreement without a satisfactory dispute resolution mechanism will not be acceptable. We cannot have a system that will see differences resolved on the basis of raw power. In cultural matters, for instance, there is a level playing field. I think I can speak generally for Canadians in saying that we find that a little mind boggling. What I think is important in all of this is to have some clear mechanism for dispute resolution.

If you look at this in the historical perspective, while we have had

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reasonably encouraging negotiations of our differences, our record on dispute resolution in any formal sense is pretty spotty. We did have a reciprocity arrangement in the middle of the last century. I don't believe that it had any particular dispute resolution mechanism associated with it. None was proposed in 1911 when reciprocity was an election issue and a candidate lost on the slogan of "The other side, no truck or trade with the Yankees."

Our record in arbitrations, while we have had some, is not very extensive. It's not very practical to do it on an ad hoc basis. Even the Boundary Waters Treaty, which has been so successful with its institution in the International Joint Commission, has not been resorted to in respect to arbitrations where there is a provision. The resolution of disputes by that means has not, in fact, been employed.

I'm not going to touch upon the recommendations that are going to come forward from our working group; but in my respectful submission, some sort of balance of those basic elements is going to be essential from a Canadian perspective. Some sort of dispute management system, some sort of ultimate arbitral resolution of problems should be followed at the insistence of private parties and not confined to the rather slow procedures of government.

There is a healthy suspicion in Canada of the power and dynamism of the United States and that suspicion, that recognition, is not at all new. Some of you will know of an early Canadian, Hal O'Bert. He lived in Nova Scotia and wrote in the 1820s and 1830s about the exploits of a Yankee trader. The Yankee trader always took advantage of the poor, ignorant and innocent Nova Scotians. The old judge, as Hal O'bert was called, developed a character named Sam Slick. Sam Slick had a recipe for selling practically everything and that recipe was soft, solder and human nature. The good judge developed a great many tales about how successful Sam Slick had been with the locals using this formula.

Well, maybe we are not as gullible today. We are obviously an advanced and, hopefully, as an astute society as that in the United States. However, the element in our collective psyche of "Beware of the Yankee Trader" still exists. I think we would like to see a dispute mechanism that will, with respect to certain disputes, at least avoid the domestic forum.

When Professor Hudec was telling you about the improvements that could be made to the American system, I was most impressed, but I don't think that I would accept improvements in the domestic system as a substitute for ultimate impartial joint dispute resolution in selected cases.

The thoughts that I have been expressing are not unique to me. I think you heard them earlier in another forum from Mr. Legault. I want to conclude but I also want to mention Max Cohen's article in the publication, *International Prospectus*, in which Max Cohen says, in his usual

eloquent way, that the current ad hoc approaches are not good enough for our future economic relations.

We have got to do something better and he says we have to have new institutions. Now, he doesn't spell them all out, but in reference to the whole gambit of institutional dispute settlement procedures that are required and are basic for Canada, he says the sine qua non of an acceptable agreement is, and I quote, "More fundamental if Canada and the United States are now to face this new era of the continental fact with realism, these institutional arrangements are necessary to safeguard against the natural anxieties of Canada. Indeed, in world eyes, Canadian sensibility henceforth become a litmus test of the U.S.'s ability to manage its power so as not to eviscerate culturally, distort economically or eliminate strategically the identity and will of a premier friend, ally and neighbor."

