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The Canada-U.S. Free Trade Agreement in Operation

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Mr. Fried:

There are some fundamental differences that influence the manner in which disputes are handled by governments rather than by private parties. First, governments are concerned with maintaining an ongoing relationship, not only as joint venturers in a particular project, but in a range of fields. As a result, they are concerned with managing their overall relations. And those relations are ones that grow and evolve, rather than remaining static. Therefore, the management of a particular dispute will undoubtedly be influenced by the overall relationship and the direction in which both countries want to take their relations.

Second, many disputes between governments carry with them various political imperatives. Disputes in the trade and economic field are often constituency, or constituent driven, and often attract public attention. Accordingly, despite the ancient wisdom that the greatest progress in negotiation is made in private, governments are sometimes deprived of that privilege and pursue amicable settlement of disputes in the middle of a fishbowl.

Third, governmental management of disputes must consider how broader foreign policy imperatives will be affected. The handling of a particular dispute may carry implications for foreign policy, for a political relationship, and for geostrategic interests. And governments inevitably must take those factors into account in choosing how best to pursue dispute settlement in this context.

Fourth, like the gentleman who was surprised to discover at middle age that he had been speaking in prose all his life without realizing it, governments have for some time been using alternative dispute resolution (ADR) without calling it such. The full range of tools for the peaceful settlement of disputes has been available to and has been used by diplomats in settling disputes, including negotiation, mediation, conciliation, good offices, and ultimately, arbitration or adjudication.

Fifth, particularly in the trade field, it is important to remember that at the end of the process for dispute settlement set out in the GATT and the FTA, the remedies a government has at its disposal - withdrawal of equivalent benefits or the right to retaliate - are not necessarily related to...
the violation. In other words, the particular constituent offended by a governmental action on the other side of the border may not in fact achieve restitution, although the government itself may have equalized the economic impact of the violation more generally.

A final reason that government-to-government disputes are different from private party disputes may be summed up in one word: sovereignty. Disputes in the trade and economic field (as well as in the environmental and other fields) often implicate not only the foreign policy imperatives of governments, but also their domestic economic and social policies. Accordingly, governments have to consider - and their public and media certainly consider - the extent to which a problem, identified as an international problem by one of the parties to the dispute, is seen as an interference in what the other government considers to be a purely domestic field.

With these distinguishing features of dispute settlement between governments as background, Jean Anderson will talk about the framework for dispute management and dispute settlement in the trade and economic field.

Ms. Anderson:

Why did we negotiate new and specialized dispute settlement procedures in the Canada-U.S. Free Trade Agreement? Why not just use the GATT? It was there and has been in use for approximately forty years. So why did we just not use it? To put the question in perspective, I will explain how the GATT works.

The GATT is an organization of 108 countries. It functions through several “sort of” institutions. I say “sort of,” because the General Agreement on Tariffs and Trade was originally intended to be an agreement; it remains an agreement, but has accidently also become an organization, functioning through the operation of the CONTRACTING PARTIES. When written in all capital letters, that means representatives of each of the member countries acting jointly. The CONTRACTING PARTIES are responsible for facilitating the operation of the Agreement, furthering its objectives, and resolving disputes.

Over time, an extensive network of specialized bodies has been developed. They include several committees established under the Codes that were concluded in the Tokyo Round. There are also specialized dispute settlement panels and several other subsidiary bodies that have specific responsibilities for aspects of dispute settlement.

Although in theory GATT decision making is majority rule, with each contracting party having one vote, by tradition (and given constitutional and sovereignty concerns of many members) the GATT operates by consensus. That is obviously a critical factor in whether GATT dispute settlement is effective.

GATT dispute settlement is based on a philosophy of balancing
rights and obligations. If Country A’s action, whether it violates the GATT or not, results in nullification or impairment of Country B’s GATT benefits, then the rights and obligations of the two countries are supposed to be rebalanced. They can be rebalanced by Country A, the violator, changing its conduct (e.g., by removing the act that it has taken, or bringing the measure into conformity with the GATT), or A can provide B with other equivalent benefits, known as compensation. If neither occurs, B can retaliate, that is, withdraw equivalent benefits from A.

This whole process operates through two articles of the GATT, Articles XXII and XXIII, which are the only real dispute settlement provisions in the GATT. Article XXII is merely a provision on consultations. Article XXIII provides for consultation among the parties in dispute (sometimes with the offices of the Director General of the GATT or other contracting parties), formal panel review, and the possible authorization by the CONTRACTING PARTIES to one of the countries to suspend its obligations to another.

This system has a number of shortcomings that have become apparent over the years; in fact, so apparent that by the mid 1980s there was fairly universal disappointment over how GATT dispute settlement was working. Consequently, improving GATT dispute settlement became one of the primary goals of the ongoing Uruguay Round of multilateral trade negotiations.

One of the major shortcomings is delay. Back in 1985, when the Reagan Administration decided it needed to be more aggressive in dealing with international trade disputes in order to ward off highly protectionist actions by the United States Congress, the Administration launched an effort to deal with all outstanding disputes that the United States had taken to the GATT. When the U.S. Trade Representative’s Office inventoried pending GATT disputes, they found one that had been pending for sixteen years without any resolution. So delay can be a problem in resolving a dispute in the GATT.

Another shortcoming in the GATT system is that historically there have been problems of availability, issues surrounding the expertise, and questions about the independence of GATT panelists when a dispute panel was actually formed. The panelists were generally selected from diplomatic personnel from various countries who happened to be stationed in Geneva. They might or might not have known anything about the dispute in question. And of course, there was a question about whether they were independent, since they were representatives of governments.

A third shortcoming is the need for consensus in the GATT. As a practical matter, what that has meant in dispute settlement is that when GATT consultations failed to resolve a dispute and one of the parties requested the establishment of a panel, another party to the dispute could block the formation of the panel. Although moral pressure usually led to panels eventually being established, after the panel had made its recom-
recommendations, a party could block adoption of the panel report by the GATT Council. Again, countries usually could not block a report indefinitely, but they could do so long enough to diminish the value of GATT dispute settlement.

Currently, in the Uruguay Round, there is an effort to overcome these difficulties in GATT dispute settlement. Based on the text that went to Trade Ministers in Brussels last December, there appears to have been substantial progress. For example, there are proposals for appeals from GATT panel decisions, after which decisions would be final and binding on the parties to the dispute. Other proposals would prevent a party from blocking either the establishment of the dispute settlement panel or the final report. An emphasis has been placed on ensuring that countries comply with GATT dispute settlement decisions after they are made. The negotiations are also establishing timetables that would make it impossible for a dispute to languish in the GATT for sixteen years without resolution; the deadline may well be closer to a year.

None of these improvements to the GATT was in place at the time of the FTA negotiations, and indeed they will not be in place until the last few minutes of the Uruguay Round negotiations. When the Canada-U.S. Free Trade Agreement was being negotiated, the two governments were presented with a flawed international dispute settlement system in the trade area. So what did they do? For the answer to that we will turn back to Jon Fried, who will talk about Chapter 18 of the FTA.

Mr. Fried:

In my view, at the time of negotiating the FTA, the two governments found inadequacies both in the substantive rules of the GATT and in its procedures for settling disputes as Ms. Anderson just described. However, we are not discussing the substantive improvements, the increased disciplines, the expanded scope of coverage that the FTA represents over GATT rules for the conduct of international trade. Even putting to one side the issue of substantive coverage, the two governments were in fact motivated to look at how to better manage disputes between them in the trade and economic field. As a result, in the FTA we have a GATT-based regime with significant improvements, centered in Chapter 18 of the Agreement.

Since the governments, by necessity, are concerned about overall management of an ongoing relationship, the FTA does create a body with that responsibility in the trade field. It is called the Canada-United States Trade Commission, and comprises cabinet-level officials, USTR Carla Hills, and her Canadian counterpart, Minister for International Trade John Crosbie, and any other officials that the two governments may want to include. Even though it is called a "commission," it is nothing like the European Commission. It is not a third party to the relation-
ship. There is no bureaucracy independent of the two countries. This Commission has overall responsibility not only for resolving disputes but for the implementation of the agreement and for its further elaboration on an ongoing basis.

The dispute settlement procedures are modeled on the GATT, but with significant improvements. Putting to one side the unique regime applicable to antidumping and countervailing duties, the FTA sets up a panel based system that looks something like the GATT. In addition, the two Parties can still use GATT procedures if they so choose. Once the complaining government chooses either the FTA or the GATT, that forum becomes exclusive. Canada has chosen to go to the GATT rather than to use the FTA dispute settlement procedures on more than one occasion, most recently to call into question recent American budget measures providing an exemption from an excise tax which is available only to small American breweries.

If the government chooses to proceed pursuant to the FTA, FTA panel procedures are invoked. Under the agreement, both Parties are obliged to provide advance notification wherever possible of any actual or even proposed measure that might “materially affect the operation of the agreement.” The first stage of dispute settlement, even absent notification, is for the parties to enter into direct consultations. Direct negotiation is still the preferred option, although strict time limits are applicable.

If the two governments do not resolve the dispute within thirty days through direct negotiations, either Party may if it so chooses, trigger a meeting of the Commission. It is still the same two Parties, but they have notched it up a level by formalizing their dispute into a Commission issue. The Commission would then institute its own consultations upon this request of either party. The FTA, interestingly enough, authorizes the Commission to call upon outside technical advice, seek third-party mediation, or use any other ad hoc procedure it may wish while discussing the dispute.

If after another thirty days the dispute is still not settled, either Party may request the creation of a panel, or both parties by Commission consensus can proceed to binding arbitration. A panel, composed of two American members, two Canadian members, and a fifth member chosen from the roster of either country, has specified time limits to investigate, to hear arguments from both sides, to issue a preliminary report that is to include findings of fact, a determination as to whether the measure or measures at issue are consistent with the agreement, and recommendations for the resolution of the matter.

Therefore, Chapter 18 panels, if both countries have not agreed to make them into a binding arbitral proceeding, are there to investigate, narrow the scope of dispute by setting out the facts, and to provide a basis for the governments themselves to ultimately resolve the dispute. To give the governments additional input, the panel issues preliminary
reports on a confidential basis which are provided to the two govern-
ments. The governments are given a short period to make comments on
the preliminary report and to present objections, which may then be re-
considered by the panel. Then the panel issues its final report to the two
governments.

It is then up to the Commission to agree on the resolution of the
dispute, which according to the Agreement, should be in conformity with
the recommendations of the panel. Recalling our introductory com-
ments, there may be other imperatives and other factors which dictate
that the two governments choose a resolution that for one reason or the
other does not fully conform to the recommendations of the panel.

If, however, despite the panel report and despite further discussion
by the Commission, a resolution is not reached, the complaining Party
may rely on GATT-based, and now FTA-based remedies: compensation
or retaliation as the case may be.

Several aspects of the FTA regime deserve mention. First, there are
strict time limits on the procedures. In fact, if all the stages are added
together, the time limits ensure that if every step is adhered to, a resolu-
tion of a dispute should occur within eight to nine months (as opposed to
the average one to two years under the GATT). Second, no other coun-
try is there, in effect, to intervene or to complicate or to delay matters.
Third, the FTA does not permit either country to block the adoption of a
report. Fourth, since the parties have prohibited government officials
from participating in panels and they are not using any other diplomats
from third countries, the independence of panels is much better assured.
Fifth, since the rosters are Canadian and American experts, the process
ensures that panels are likely to be familiar with the issues and with
North American legal traditions. Finally, the remedies are more direct,
more effective, and can be binding on both parties if they choose binding
arbitration.

Summarizing our experience to date under Chapter 18: there have
been two panels, one involving a Canadian measure, and one involving
an American measure, both involving a natural resource, namely, fish of
one sort or another.

The first Chapter 18 panel was the Pacific Salmon & Herring Panel.
Prior to the FTA, Canada had in place an export prohibition on un-
processed fish. The United States had challenged that measure in the
GATT and, indeed, the measure was found to be in violation of GATT
rules. In 1989, to comply with the GATT panel report, Canada replaced
those export prohibitions with a “landing” requirement. The measure
required that all Pacific salmon and herring be landed at a licensed land-
ing station in Canada. In Canada’s view, the measure was necessary for
gathering information, both biological and statistical, for conservation
and management purposes. Regulators could not set annual quotas or
maintain the resource unless they knew how many fish of what size and
what grade were being caught. The only way to do that is to get them on shore to count them.

The United States called for consultations under the FTA that directly and before the Commission failed to resolve the dispute. So the United States requested the formation of a panel in the Spring of 1989. The two countries agreed on the terms of reference (in effect, a stated case to the panel) asking the panel to consider whether the measure was an export restriction described in Article XI:1 of the GATT, and if so, whether it was a permissible exception to the prohibition contemplated by Article XX, which permits measures for sound environmental or resource management purposes. The panel issued its final report in October of 1989, completing a six to eight month process.

Regarding Article XX, the panel concluded that the Canadian landing requirement was a restriction on sale for export, even though it applied equally to fish for domestic and export sale, on the basis that it imposed significant additional costs on export buyers (who otherwise would ship directly from point of catch to U.S. landing points).

The panel accepted the legitimacy of the environmental concerns of Article XI. In respect to measures serving conservation purposes and having a trade-restrictive effect, the test is whether the measure would have been adopted for conservation purposes alone. On the basis of an examination of the scientific evidence, the panel concluded that covering 100% of the catch was not necessary for ("primarily aimed at") conservation. The question then became one of determining at what point an exemption from landing requirements would impede data collection and conservation objectives. The panel concluded that the precise proportion would depend on each fishery, and suggested that a range of 10 to 20% of the catch would be appropriate.

The Commission received the panel's final report, and jointly agreed on its implementation. Under the arrangement, 20% of salmon and herring caught was permitted to be transported directly to the United States in 1990, increasing to 25% for 1991 through 1993. The arrangement will be reviewed at the end of 1993.

There are a number of lessons to be learned from the Pacific Salmon and Herring dispute. First, the panel report did serve as a basis for the governments themselves to resolve the dispute. The panel had said 10 to 20%, the two governments came up with 20 to 25% along with a review arrangement. Again, governments were able to take account of the need for ongoing management of the relationship and of this resource. Second, the panel probably has helped both countries go further than the GATT has been able to guide them in understanding the relationship between trade measures and environmental measures. At the risk of oversimplification, the principle promulgated by this panel states that, if one is pursuing environmental regulation, the GATT provides that one do so in the least trade-restrictive way possible without compromising the environmental standard one has set for oneself. So already, as a re-
result of the first panel, we have a quick resolution of dispute within well under a year; we have a panel recommendation that the governments used as a basis to settle their dispute; and we have more precision in the rules than the GATT had been able to provide.

The second panel was formed in response to a dispute involving lobsters. It involved an American measure that prohibited the sale or transport in the United States of whole live lobsters smaller than the minimum possession size in effect under U.S. law. The effect of the measure, even though it only addressed sale or transport, was to prohibit entry into the United States of lobsters from foreign countries, including Canada, whose minimum size requirements were smaller than the U.S. minimum size.

Again, the two governments consulted. Again, a meeting of the Commission was called. Canada requested the formation of a panel. Under agreed terms of reference, the panel was asked to consider whether the measure amounted to an import restriction within the terms of GATT Article XI:1 (FTA Article 407), and if so, whether it was exempt as a conservation measure within the meaning of GATT Article XX (FTA Article 1201).

The majority of the Panel ruled that Article XI did not apply to the measure because it was an internal measure of the kind governed by GATT Article III. Some members accepted the Canadian view that the measure amounted to an absolute prohibition of imports in violation of Article XI. The minority then applied the Salmon and Herring test for Article XX, asking whether the measure was "primarily aimed at" conservation, and concluded that it was not.

The Commission received the final report on May 25, 1990. Both governments consulted extensively with various segments of the industry (lobstermen, processors, etc.), and the majority of industry on both sides of the border recommended an agreed solution to the two governments, under which the U.S. measure would be stayed, various state-level size restrictions would be adjusted, and the two countries would pursue more effective cooperation in management of the resource.

Canadian lobstermen objected, however, and the Government of Canada did not accept the industry recommendations. As a result, the panel decision stands, and the U.S. measure remains in effect and is applicable to Canadian lobster.

Aside from the formal panel procedures, the two governments have also pursued creative ADR in managing other trade disputes. Two examples illustrate how the governments have avoided adversarial panel procedures to resolve what would otherwise have been difficult issues to manage in the absence of Chapter 18 procedures.

First, in response to a difference of view regarding the standards applicable to plywood, namely what size of knothole is permitted in a certain grade of plywood, the Commission created a Binational Commit-
tee on Plywood Standards to oversee the development of a common standard for wood-based construction and sheathing panels. The Committee's work included a plywood testing project which generated technical information forming the basis for a recommendation for changes to the existing standards in the two countries. A joint drafting group was established by the Canadian Standards Association and the National Institute of Standards and Technology, and has agreed on a draft common standard.

Second, in converting the U.S. tariff schedules to the harmonized system, U.S. Customs reclassified sugar/dextrose blends to a tariff item subject to a more restrictive quota, resulting in the loss of an estimated $25 million in Canadian exports. Canada formally notified the GATT in 1989 of its intention to exercise its GATT Article XXVIII rights by withdrawing concessions, and published a draft list of products for such withdrawal. Both governments decided to obtain an advisory opinion from a third party expert on Canada's rights. The opinion confirmed Canada's right to withdraw concessions. Bilateral discussions are continuing in the light of this opinion.

Accordingly in the overall management of disputes under the Free Trade Agreement, Canada and the United States have taken the GATT and traditional arbitral procedures, added improvements, used the creativity available to them, and in a number of fields have managed to keep matters from developing into disputes.

One of the most intractable areas during the negotiations of the FTA, however, was the area of antidumping and countervailing duties. The Softwood Lumber case in the mid 1980s served as a lightning rod for this issue in Canada and in the United States. Part of the problem is that in the GATT there are very detailed rules as to how to administer countervailing duties. There are not, however, very precise rules as to what a legitimate versus an illegitimate subsidy is. Through the 1980s, Canadians witnessed vastly increased use of countervailing duty ("CVD") law by U.S. industry. In fact, from 1980 to 1987, over 300 countervailing duty cases were filed, of which eleven were against Canadian products. Five of the eleven led to final countervailing duty orders. Even though they covered only about $180 million worth of trade based on 1986 import values, the second lumber case by itself would have involved trade of about $2.7 billion a year. By contrast, from the passage of the Special Import Measures Act of 1984, through 1987 Canadian industries had filed only a total of eleven countervailing duty cases worldwide. Only one, the Corn case of 1986, was against U.S. products.

So, although U.S. countervailing duty cases touched only a small fraction of total Canadian exports to the United States of some $80 to $100 billion a year, Canada viewed U.S. countervailing duty law as a significant obstacle to reliable access to the U.S. market for a number of reasons.

In Canadian eyes, the absence of internationally agreed definitions
of what constitutes an "actionable" domestic subsidy left the United States free to determine unilaterally the propriety of foreign government actions. In 1986, for example, despite a 1983 case that did not find Canadian softwood lumber stumpage practices countervailable, a new petition was accepted that eventually led to a negotiated solution requiring Canada to impose a 15% export tax on lumber.

Some U.S. cases covered relatively insignificant amounts of trade, and to Canadians, this looked like harassment. An example was the fresh cut flowers case, where the volume of Canadian trade investigated was under $250,000.

Even though the overall volume of trade potentially affected by U.S. CVD cases was small compared to the size of the bilateral trade relationship, the impact on individual regions and industries in Canada was much larger. For example, softwood lumber is crucial to the economy in British Columbia, fish is the mainstay of the Atlantic provinces' economy, and steel is critical to central Ontario.

Many Canadians perceived many of the government practices subject to review under the U.S. CVD law, such as regional development programs, as what the GATT Subsidies Code calls "...instruments for the promotion of social and economic policy objectives," and therefore as a fully justified exercise of domestic governmental authority.

Many Canadians consider the U.S. system to have engendered a "litigation bias" that encourages U.S. firms to use trade remedies as an ordinary tool of business strategy (e.g., to "buy time"). On the other hand, from an American perspective, many in the United States viewed Canadian federal and provincial governments as prolific subsidizers whose programs often distort trade and place U.S. industries at a competitive disadvantage. In this view, regardless of Canadian motives, if Canadian subsidies injured a U.S. industry in the process, the U.S. CVD law was an appropriate, though not fully effective, GATT-sanctioned response. The CVD law, as the only bulwark against subsidized competition, could not be limited or relaxed unless and until credible, enforceable discipline over subsidies made it less essential.

Although the United States issued only five CVD orders against Canadian products from 1980 through 1987, and subsidy margins in Canadian cases were rarely over two percent, a few highly visible cases, most notably softwood lumber, and Canada's expressed commitment to regional development reinforced this view of Canada as a significant subsidizer.

As the Subsidies Code recognizes, subsidies may be motivated by domestic policy imperatives, by a desire for international competitive advantage, or both; and subsidies designed to meet domestic policy objectives may have an international trade effect. That is where CVD laws come in. In practice, countervailing duties often either do less, or do
more, than neutralize the cross-border impact of a foreign country's subsidies.

Some subsidies cannot be reached by countervailing duties at all, and Canadian and U.S. CVD laws (at least as applied in some cases) may go beyond the bilateral trade effects of subsidies to judge the legitimacy of programs the subsidizing country may view as purely domestic. For example, the Softwood Lumber Memorandum of Understanding that resolved the second lumber case led Canadian provinces to reassess, and in some cases to replace, their existing stumpage systems. To some Canadians, the Memorandum challenged the sovereign right of government to manage Canadian natural resources, if not to determine its own domestic economic policy. Similarly, the Canadian Corn case concluded that the U.S. domestic corn subsidy programs affected the price of corn in Canada, and found material injury on the basis of price suppression even though imports from the United States were near the low end of their historical range.

At the same time, the Code does not contemplate, and neither law has been used for, imposing countervailing duties where there is no cross-border trade. Yet subsidies with import substitution effects and investment incentives may have a significant impact on a trading partner, particularly in a free trade area.

So it was clear to both governments that something had to be done to address Canadian concerns about U.S. countervailing duties and American concerns about Canadian subsidies. The general dispute settlement procedures of non binding panels were not going to be adequate for this purpose. Ms. Anderson will tell us about Chapter 19, which does provide at least an interim solution.

Ms. Anderson:

I should say at the outset that Chapter 19 of the FTA, entitled "Binational Panel Dispute Settlement in Antidumping and Countervailing Duty Cases," is not really a dispute settlement system. It is a hybrid system; primarily a form of binational, quasi-judicial review, with a little bit of dispute settlement thrown in. It is also different from the Chapter 18 dispute settlement system in that it does not carry with it those characteristics of government-to-government dispute settlement that Mr. Fried outlined at the beginning of this session.

Of course, some people think that foreign policy intervenes in antidumping and countervailing duty cases. In fact, antidumping and countervailing duty cases and the quasi-judicial binational review established in Chapter 19 are procedurally detailed processes whereby decisions are made in accordance with quite extensive law and precedent. There is almost no room for foreign policy and other similar government-to-government considerations in the actual decisionmaking and re-
view of the cases. Nevertheless, in the negotiation of the FTA, this was seen as a central "dispute settlement" mechanism.

Some background on what Chapter 19 is and how it works will be helpful. First, it is unique in the annals of dispute settlement, at least where the United States is involved. It would have been easier to achieve political acceptance of this binational quasi-judicial review process if we had been following in others' footsteps, whether the famous or obscure. But from the Jay Treaty to the Iranian Claims Tribunal, the precedents we found were never quite on point. Consequently, it is fair to say that the Chapter 19 system is the first mechanism in which governments have subjected the application of their own national laws to binational review, and in which governments have made the binational panel decisions absolutely binding on them as a matter of both international agreement and domestic law.

Second, Chapter 19 came about in an unusual way. As Mr. Fried indicated, the subsidies issue was, potentially, a deal breaker; and it nearly broke the deal. Because its real economic importance was blown out of proportion, the issue became critical to a successful negotiation despite its intractability. The two governments did not set out to negotiate a dispute settlement system. Rather, they sought to negotiate subsidies, countervailing duties, antidumping, and unfair pricing practices.

The Chapter 19 system was in some respects accidental; a result of the fact that the United States and Canadian governments were politically unable at the time to risk the domestic political reactions they anticipated to a subsidies agreement. Indeed, although under the fast track legislative timetable, the President had to notify Congress by October 3, 1987, of his intent to enter into a free trade agreement with Canada. The two sides did not even start negotiating the Chapter 19 dispute settlement regime until October 1.

Chapter 19 has three elements. The first, the heart of the system, is the Article 1904 binational panel review of final national administrative antidumping and countervailing duty determinations. These determinations may be when either the Department of Commerce or the International Trade Commission in the United States, or Revenue Canada or the Canadian International Trade Tribunal in Canada reach a final decision, i.e., a finding of subsidies or dumping of a product from the other country. Any person who could have sought judicial review in the home country may request a binational panel to review that decision.

Once any eligible party requests panel review under the FTA, national judicial review is completely precluded for that determination, assuming, of course, that all the procedural requirements have been met. An independent five-member panel is then established to review the decision as a substitute for review by a national court. The panel reviews the administrative decision to determine whether the national administrative agency applied its domestic law correctly.
Specifically, the panel applies U.S. law to review a U.S. determination, and Canadian law in reviewing a Canadian case. Review is limited to the administrative record before the administrative agency that made the decision. Panels are to apply the same standard of review and the same general legal principles as the domestic court of the importing country would have applied. And the decision of the panel is binding on both governments with respect to the case before the panel. It may be persuasive precedent, but it is not binding precedent for either national courts or subsequent panels in other cases.

A final point on how Chapter 19 works is that there is no appeal as such from a panel decision. There is a special safety valve written into the agreement, however. The FTA provides that in extraordinary circumstances there may be review if requested by the governments (but not by a private party) by an “Extraordinary Challenge Committee.” This committee is composed of three judges or former judges from the two countries. Although it was designed with the hope that it would never have to be used, it was invoked for the first time in the Pork case.

This interim system was a disappointment to some who wanted the Chapter 19 system to be a more traditional dispute settlement system. That is, it was a disappointment to those who wanted the panels to review each country’s law and decide whether the law was “right,” rather than simply review whether an administrative agency in the importing country had applied its own law correctly.

At this stage, however, there is still no obvious standard that a panel would apply to decide whether U.S. countervailing duty law or Canadian antidumping law is “right.” Until there is such a standard by which a panel might judge the substantive merits of a national law, I would suggest that an effort by a panel to judge the substantive merits of a national law would usurp the legislative function of both countries. So, for purposes of the FTA, the panel review is limited to deciding whether the law was applied correctly.

The second element of Chapter 19 provides for advisory panel review of amendments to either FTA country’s antidumping and countervailing duty law. Such an amendment applies to the other country only if the amending statute expressly provides that it so applies. If such an amendment is put into effect, the other country can request that an advisory panel review it to obtain a declaratory opinion as to whether the amendment to the law is consistent with the GATT and the FTA.

A third element was the establishment of a working group charged with developing a new and permanent bilateral regime on subsidies and unfair pricing and the application, if any, of antidumping and countervailing duty laws. In short, it was hoped that a working group could accomplish what negotiations had failed to accomplish. This work on a new regime has been suspended for the present, pending the negotiation of a trilateral North American Free Trade Agreement including Mexico,
but the working group will presumably resume on a trilateral basis in the future.

To date the panel process has largely worked well. There have been fourteen panels requested; thirteen by Canada or a Canadian interest to review U.S. cases, and one U.S. request to review a Canadian case. Four of them have been terminated for a variety of reasons, and there have been eight decisions. No decision has been split along national lines - something that was feared by many before this process went into effect. Panel decisions have been unanimous in virtually all cases. Most people who have taken a case before a panel have found the panel review of administrative decisions to be: thoughtful and carefully analyzed; that panelists put a great deal of time and effort into the process; and that the quality of the review is perhaps an improvement over the kind of review that might have been available in crowded courts which have only limited time to review a case.

The Pork case, however, poses a real test of whether this system is going to work. It involves a U.S. countervailing duty case alleging subsidies on Canadian pork, and includes an allegation that subsidies to Canadian swine are passed through and become, in effect, subsidies on Canadian pork exported to the United States.

The Pork case had the earmarks of a problem from the very beginning. There had been an earlier case which the United States pork industry lost. The U.S. pork industry then went to Congress and obtained legislation that would help it win the next case. (That legislation, incidentally, has been declared illegal by a GATT panel instituted at Canada's request.) This history meant that there were organized industries on both sides of the border who had already decided that it might be useful to use the political process in the context of their dispute over trade in pork products.

The procedural history of the Pork review process in the panels is complex, but the decision that has become controversial is the United States International Trade Commission's (ITC) determination that the U.S. pork industry was threatened with material injury by imports of pork from Canada. That ITC decision was sent to a binational panel for review. The panel has now reviewed the ITC's decision twice. The panel first remanded to the ITC, saying that it had relied on faulty statistical information and that the reliance on those statistics had infected the whole analysis. The ITC came out with another decision, which again came up for panel review. This time the panel issued a decision that the ITC had committed an error of law by not adhering to its own procedural notices, and again, that there was not substantial evidence to support the decision the ITC had reached.

In short, the second panel decision gave the ITC little choice but to reverse its finding of threat of material injury to the U.S. industry. That, of course, was not the end of the story. The International Trade Commission issued something it called its "Final Views on Remand," follow-
ing the instructions of the panel, but asserting in a twenty-seven page, two-Commissioner majority opinion that the panel had violated both the Free Trade Agreement and U.S. law. The U.S. domestic pork industry quickly announced publicly that it would request the U.S. government to seek establishment of an Extraordinary Challenge Committee to review the panel's decision. On the 29th of March, the United States Trade Representative's Office did request establishment of such a Committee, which is to be established by April 15. It will have thirty days to issue its opinion.

In the meantime, the controversy has become more widespread. Trade lawyers and others in Washington discuss the merits of the various panel and ITC decisions and whether or not an Extraordinary Challenge Committee should have been established. In Canada, the Trade Minister, Mr. Crosbie, has announced that if Canada loses, Canada may have to rethink the value of the Free Trade Agreement.

What brought us to this point? I would say that the panel was fairly restrained. It might have said some things better. Interestingly, the panel thought that the FIA language required it to come to a final decision, that it could not send the issue back to the International Trade Commission and perhaps end up reviewing it for a third time.

At the same time, many in Washington are privately very embarrassed by the ITC's rather intemperate opinion. Notably, the United States International Trade Commission, as an independent agency, not a part of the Executive Branch, is not in a position to declare whether or not an international agreement to which the United States is a party has been violated. So when the ITC issued its opinion, it was not speaking for the U.S. government; it is simply the opinion of two Commissioners. Moreover, this two-Commissioner majority is an odd happenstance. The International Trade Commission is supposed to have six Commissioners. There are two vacancies at the moment, and one Commissioner was excused. As a consequence, two people made this decision, while if the Commission had been at full strength, at least the opinion, if not the result, might have been different.

Finally, trade disputes are rarely played out in a vacuum, and the Pork case is no exception. The United States Trade Representative's (USTR) decision to request an Extraordinary Challenge Committee has been strongly criticized in Canada and by some in the United States on the ground that the panel's action did not warrant a challenge because it did not threaten the integrity of the binational panel system (one of the FTA criteria). In Washington, there is speculation (among some strong belief) that one reason the USTR did request the extraordinary challenge was that the Administration faces a very hard fight in the Congress right now to obtain an extension of the fast-track authority for negotiating trade agreements. Some members of Congress used the Pork case to put pressure on USTR. Given the importance of the fast-track extension, it probably was at least one of the reasons why we now have the first Ex-
traordinary Challenge Committee established under the FTA. We will have to see how it all comes out.

Mr. Fried:

Lest we finish on a negative note, I will discuss the context of overall management of the relationship. A lot of the attention in the media has been on the panel process or processes themselves. This hides the fact that the two governments successfully negotiated a much more elaborate and multi-faceted set of procedures and institutions for the implementation and further elaboration of the Agreement. For implementation of the agreement, the following procedures are enshrined:

- Article 303: regular consultation on effective administration of rules of origin and consideration of any proposed revisions;
- Annex 705.4: Working Group to review levels of government support for wheat, oats, and barley;
  - Applying OECD-based Producer Subsidy Equivalent ("PSE") to determine aggregate levels of support;
  - Canadian import restrictions lifted if levels of support are equal;
  - Oats freely traded as of 1989; wheat under review this year;
- Article 708, Annex 708.1: joint monitoring committee to monitor and report on progress in the further elaboration of technical regulations and standards in respect of agricultural products;
- Article 1503: consultative mechanism to review implementation of provisions relating to the temporary entry of business persons into the territory of each Party;
- Article 1909: Secretariat to facilitate implementation of provisions on binational dispute settlement on AD/CVD matters.

Regarding further elaboration of the Agreement, the expansion and enhancement of benefits is a shared objective (Article 102). Additional negotiations are specified in the following areas.

- Article 401(5): consultation on request of either Party to consider acceleration of elimination of tariffs;
- Article 608: to harmonize non-agricultural technical standards;
- Article 1307: to expand provisions on government procurement;
- Article 1405: to improve provisions on trade in services, including development of mutually acceptable professional standards and criteria for architectural services (Annex 1401-A);
- Annex 1404-B: consultations to facilitate tourist trade;
- Annex 1503: consultations to further facilitate temporary entry for business purposes.

Several subsidiary institutions, accountable to the Commission, were also established, as follows.

- Article 708: eight working groups on technical regulations and standards in agriculture;
- Article 1004: Select Panel on North American automotive trade and production;
- Article 1907: working group on rules and disciplines concerning
government subsidies and unfair pricing;
- Article 2006(4): joint advisory committee on outstanding issues re-
lated to retransmission rights.

Finally, it is worth noting that the FTA provides for other dispute
settlement procedures.

- Article 702(5): notification and consultation prior to application of
temporary duties on fresh fruits or vegetables ("snapback");
- Article 1103: binding arbitration with respect to actions proposed
under Chapter 11 (safeguards or "escape clause" actions) not re-
solved by consultation;
- Article 406, Annex 406: consultations on uniform administration of
customs measures and notification and consultation prior to major
changes in such measures;
- Article 407: consultation upon request of either Party respecting re-
strictions on imports of goods from third countries to avoid undue
interference with or distortion of pricing, marketing and distribu-
tion arrangements in the other Party;
- Annex 705.4: compulsory binding arbitration on the determination
of levels of government support for wheat, oats and barley;
- Article 905: consultations on regulatory matters in the field of
energy;
- Annex 1404: review of compliance with agreed professional stan-
dards and criteria for architectural services by a special committee
established for this purpose;
- Chapter 16: panel recommendations, or binding arbitration by mu-
tual agreement for disputes regarding interpretation or application
of investment provisions, excluding Investment Canada decisions
on proposed acquisitions;
- Article 1704: consultations on financial services between the Cana-
dian Department of Finance and the U.S. Department of the Treas-
ury, and prior notification of any change in the regulation of such
services;
- Article 1808: joint or separate intervention in domestic judicial or
administrative proceedings;
- Arts. 1305, 1306: expanded domestic procedural transparency re-
specting procurement obligations, with binational monitoring of
implementation, administration and enforcement.

All of these procedures have worked quite well. The two govern-
ments have accelerated tariff reductions on over $6 billion worth of
goods. They have resolved several minor questions and some major ones
regarding rules of origin, and have already further streamlined documen-
tary and other procedures at the border. They have resolved several clas-
sification and definitional issues under the rules of origin. The
Automotive Select Panel has already issued an interim report on the
rules of origin and is in the middle of a study on the global competitiv-
ness of the North American industry. On services, the Royal Architec-
tural Institute of Canada and the American Institute of Architects are in
the final stages, apparently, of agreeing on mutually acceptable licensing standards for architects to practice on both sides of the border.

Having a Commission with a mandate for oversight and joint management of the FTA, including its expansion and growth, has led to an effectively cooperative basis for managing the relationship. The FTA's rules-based regime for managing the relationship has not only helped to resolve disputes, but more importantly has provided the means to mitigate or avoid potential disputes that otherwise might arise by improving and harmonizing procedures before disputes arise.

Ms. Anderson:

The operation of government-to-government dispute settlement under Chapter 18 and the Chapter 19 hybrid may offer some lessons for the private sector. One is that if private companies and associations identify their own interests very carefully in relation to what governments are doing in bilateral or multilateral negotiations, there are a myriad of opportunities for the private sector to plug into those processes. Mr. Fried just reviewed a partial list of the ongoing efforts under the Free Trade Agreement where standards are being developed, disputes are being avoided, and new kinds of trade and cooperation across the border are being developed. This process has been going on for several years; it will continue to develop. The private sector can affect the process, and therefore their future business environment.

A second point might be that the private sector ought to get involved early on and for the long term. This is true, for example, of the Auto Panel that Mr. Fried spoke about, or the subsidies working group. Those with interests in whether the North American auto industry is competitive, or what kind of subsidies regime there will be in North America, optimally should participate in those issues on an ongoing basis.

The third point is that it is important that the private sector interests that decide to get involved have a full appreciation of the political atmosphere they must deal with, where governments have to work with governments on these issues, devise their strategy, develop their input, and set their expectations accordingly.

Lessons from the FTA, both on the governmental level and in the private sector, will be applicable in the upcoming negotiation of a North American Free Trade Agreement as well as negotiations in many other areas around the world.