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Canada Trade Law and Policy after NAFTA and the WTO

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Abstract

Canada entered into the North American Free Trade Agreement (NAFTA) before the conclusion of the Uruguay Round of multilateral trade negotiations and the coming into existence of the World Trade Organization (WTO). The relevance of the latter organization in regulating world trade issues, including its close to 150 States robust membership, and the opportunities it provides for multilateral controls and collective bargaining vis-à-vis the United States, raise the question as to whether NAFTA continues to make a positive contribution to Canada's trading future. This Report addresses that question focusing on whether the Agreement's institutions and particular dispute settlement mechanisms have contributed to strengthen the ability of Canada to manage and prevent trade conflict and negotiate with the U.S.

The Canada-U.S. trade and investment relationship is today the world's most important and vigorous in economic terms for any two countries. The same is true regarding the depth of interconnectedness of their societies through family, social, non-governmental organizations, immigration, business, and a rich and diverse governmental cooperation efforts. However, the two countries, and now including Mexico under NAFTA, have no intentions to share any political interdependence and wish to continue deciding on their own the values and institutions that will inform and develop their political systems.

The opportunities and risks posed by the U.S. economy has been a constant source of ambivalent feelings and actions in the history of Canadian trade policy and politics. Canada and the U.S. both face upcoming national elections. Senator Kerry in the U.S. has expressed his desire to review both NAFTA and the WTO if he is elected. It is in this context that the Report seeks to evaluate what is the added value of NAFTA for Canada today in connection with trade conflict management and negotiation vis a vis the U.S. and to make a set of suggestions on how to improve NAFTA as a roadmap for further discussion.

Any agenda should seek to include improved labour and professional mobility, integrated border management, improved communications and government to government, business to government exchange of information systems, a softwood lumber agreement, and improved environmental protection and labour commitments and procedures. This could be subject of either supplementary agreements or individual commitments additional or under NAFTA. These aspects relate to the breadth and quality of the trade and investment relation that should constitute, in the opinion of this Report, the objective and direction of the construction of the present and future North American relation.

Resumen

Canadá firmó el Tratado de Libre Comercio de América del Norte (TLCAN) antes que terminaran las negociaciones de la Ronda de Uruguay y del nacimiento de la Organización Mundial de Comercio (OMC). La importancia de esta última organización en la regulación del comercio mundial, incluyendo la robusta membresía de 150 Estados, y las oportunidades que ofrece en materia de controles multilaterales y de negociación colectiva vis-à-vis los Estados Unidos, generan dudas respecto de si el TLCAN constituye aún una contribución positiva al futuro comercial de Canadá. Este Reporte analiza ese cuestionamiento con un enfoque en si las instituciones del Acuerdo y, en particular los mecanismos de resolución de controversias, han contribuido a fortalecer la habilidad de Canadá de manejar y prevenir conflictos comerciales y de negociar con EUA.

La relación comercial y de inversión entre EUA-Canadá es hoy en día la más importante y vigorosa en términos económicos para dos países en el mundo. Esa afirmación es cierta también respecto a la profundidad de interconexión de las sociedades a través de vínculos sociales, familiares, de organizaciones no gubernamentales, migración, negocios e intensos y diversos esfuerzos de cooperación gubernamentales. Sin embargo, los dos países, ahora también incluyendo a México en el TLCAN, no tienen intenciones de compartir ningún tipo de interdependencia política y desean continuar decidiendo sobre los valores e instituciones que conforman y desarrollan sus propios sistemas políticos.

Las oportunidades y riesgos que representa la economía estadounidense han sido una constante fuente de ambivalencia en sentimientos y acciones en la historia de la política comercial y política canadiense. El Senador Kerry en E.U.A., ha expresado su deseo de revisar tanto el TLCAN como la OMC en caso de resultar electo. En este contexto, este Reporte evalúa el valor agregado actual del TLCAN para Canadá con relación al manejo de conflictos comerciales y a la negociación vis-à-vis E.U.A., y hace una serie de sugerencias en cómo mejorar el TLCAN como una guía para futuras discusiones.

Cualquier agenda debe intentar incluir una mejora en la movilidad laboral y profesional, manejo integral de fronteras, mejoramiento de comunicaciones entre gobiernos, intercambio de información empresa-gobierno, un acuerdo sobre madera suave, y mejores compromisos y procedimientos en materia ecológica y laboral. Esto podría ser a través de acuerdos suplementarios o compromisos individuales adicionales o bajo el TLCAN. Estos aspectos están relacionados con la amplitud y calidad del comercio y la inversión que deberían constituir, de acuerdo a este Reporte, el objetivo y dirección de la construcción del presente y futuro en la relación norteamericana.

Introducción

The Question

Canada entered into the North American Free Trade Agreement (NAFTA) before the conclusion of the Uruguay Round of multilateral trade negotiations and the coming into existence of the World Trade Organization (WTO). The now-proven efficacy of the latter organization, and the opportunities it provides for multilateral controls and collective bargaining vis-à-vis the United States, raise the question as to whether NAFTA continues to make a positive contribution to Canada's trading future. This project seeks to answer that question through a rigorous, objective, collective analysis, involving a number of leading experts on trade policy and trade law from across North America.

The Report's Approach

NAFTA and the WTO are international agreements that share the principal objective of facilitating trade and investment between their signatories. When GATT was established in 1947 high tariffs represented still the major obstacle for international commerce. At the turn of the present century however trade liberalization involves a variety of complex international and domestic issues that extend from non-tariff barriers (e.g., sanitary and other type of public regulations), to the role of investment, investors, and intra-company trade, the protection of intellectual property, the role of labour mobility and the impact of trade on labour markets, protectionist pressures and unfair trade practices, including government subsidies, competitive practices, government purchases, the protection of the environment, innovation and intellectual property protection, e-commerce and telecommunications, among others.

NAFTA, the successor agreement of the Canada-U.S. Free Trade Agreement (CUFTA), and the Uruguay Round Agreements, that built upon the previous GATT negotiation rounds developments, seek to address to one extent or another this richer trade liberalization complexity. The breadth and richness of what international trade law means today is conducive also to diffusing the divide between national and international trade and investment law and policy. Interaction and conflict between domestic and international policies and interests is common and recurrent, in particular between nations like Canada and the U.S. that have strong economies, important trade and investment relations, and strong national political systems.

Today Canada and the U.S. have the most important trade and investment relation in the world in terms of economic value and volume of transactions.

However, Canada is increasingly much more dependant on this relation than the U.S. For example, in 2000, while the value of Canadian exports and imports of goods and services as a percentage of the country's GDP surpassed 75%, the value of U.S. trade as a percentage of its GDP was somewhere above 25%.[1] The U.S. is the dominant market for Canadian exports capturing more than 85% of them. Canada is also the leading market for U.S. exports, but in comparison captures only 22% of them. Similarly Canada and the U.S. import from each other more than they each import from any other country. But Canadian imports from the U.S. constitute 75% of Canada's total imports, while U.S. imports from Canada only represent approximately 18% of U.S. total imports.

In 1989 Canada decided to enter into a Free Trade Agreement with the U.S. to pursue certain objectives, defined by Canada before a GATT working group as follows:

> *to create an expanded and secure market access for Canadian goods and services, to adopt clear and mutually advantageous rules governing the Free-Trade Agreement parties' bilateral trade; to ensure a predictable commercial environment for business planning and investment, to reduce government-created distortions while preserving flexibility to safeguard public welfare; to build on mutual rights and obligations under the GATT and other multilateral instruments of co-operation; to contribute to the harmonious development and expansion of world trade and provide a catalyst to a broader international co-operation.*[2]

These same objectives are included in the Preamble of NAFTA, CUFTA's successor agreement. When analyzed in their entirety, the objectives of NAFTA can be classified within three enfolding categories: a) expanding and protecting market access between the Parties; b) improving the breadth and quality of trade and investment economic relations between the Parties[3]; c) pursuing the above in a compatible and harmonious manner with WTO rights and obligations, international law, international cooperation, and the development of world trade. To pursue these objectives, NAFTA employs on one hand a particular combination of reciprocal rights and obligations and agreed rules governing the Parties' trade and investment relation, and on the other, certain procedures, a framework, or "institutions", for the implementation and application of the Agreement, the resolution of disputes, and the promotion of cooperation to build on the benefits of the Agreement.

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[1] *See* Michael Hart, *A Trading Nation* (2002); and, *Economic Report of the President (United States Government Printing Offices 2001)*; Survey of Current Business, March 2001.

[2] GATT BISD, Supplement 38.

[3] I include here objectives such as the reduction of distortions to trade, ensuring a predictable commercial framework for business planning and investment, protecting and enforcing intellectual property rights, preserving their flexibility to safeguard the public welfare, promoting sustainable development, developing and enforcing environmental law and basic workers' rights.

The WTO regime shares with NAFTA the same three enfolding categories of objectives. Where they differ is in the extension and content of some of the particular rights, obligations and rules adopted, as well as on the design and operation of the procedures, framework and institutions established to observe these rules, resolve conflicts, and build upon the benefits of the regimes. Naturally the WTO is the multilateral trade rules framework and NAFTA is a trinational agreement. NAFTA and the WTO recognize each other. NAFTA is a regional free trade agreement under Article XXIV of GATT 1947 and under WTO law is positively sanctioned insofar its purpose is to increase trade between the Parties and not divert it from non-Parties. NAFTA recognizes its special position in WTO law and explicitly incorporates parts of that particular law and its developments into its regime. In other words, NAFTA is a tool through which its Parties, through reciprocal concessions, and the definition of reciprocal rights and obligations, seek to deepen their GATT/WTO level of trade and investment liberalization commitments in order to increase and secure market access opportunities among themselves, and improve the breadth and quality of their mutual trade and investment relations without impairing their WTO law obligations.

Consequently any analysis of NAFTA and the WTO regimes, and this one in particular, made from Canada's trading interests perspective *vis a vis* the U.S., cannot be one comparatively static, but must have as its starting point a clear understanding of the two sets of agreements' close objectives, relationship and mutual recognition. In addition the two constitute evolving regimes where the day to day work through committees, government to government bureaucratic contacts, common interpretations, negotiations and dispute resolution procedures continue to shape and develop the regimes' scope and coverage.

Given that NAFTA was negotiated and entered into force before the conclusion and entry into force of the Uruguay Round Agreements, this report will first address what aspects of NAFTA continue to constitute deeper market access and quality of trade and investment liberalization commitments. One possibility could have been that the WTO regime and its recent developments had turned NAFTA completely irrelevant or obsolete. This is not the case. Even at the level of tariff concessions, NAFTA still offers Canada and Mexico a more favourable duty-level market access to the U.S. than that enjoyed by the rest of the world. For example, there is evidence that trade growth, measured in terms of quantity of goods exported, price of goods exported, and the addition of new tariff lines exported, for Canada-Mexico to the U.S., outperforms significantly trade growth between the rest of the world to the U.S. in the period 1993-2001.[4]

[4] *See* Russel Hillberry and Christine McDaniel, *International Trade Developments: A Decomposition of North American Trade Growth Since NAFTA*, May/June 2002 International Economic Review 1 and 2

The Report then turns to the regimes' institutional aspects. This is the framework used to administrate the regimes, build up their benefits, and create new rules. In this regard, NAFTA is less of a forum for the negotiation of new rules and more an opportunity for government to government bureaucratic contacts to prevent conflict, construe shared interpretations, and expand or consolidate perceived benefits of the regime. The WTO instead is, *inter alia*, a multilateral forum for the negotiation of new trade and trade related rules. It conducts its day to day work through standing and working committees, the Members' diplomatic and official representatives, and the support of a strong and sophisticated international bureaucracy. This Report suggests that government to government institutional frameworks are more favourable to advance Canada's interests *vis a vis* the U.S. in order to keep building up the depth and quality of the North American Free Trade Area. In this regard, the model of the OECD, or the experience of the International Joint Commission, with the addition of Mexico, should be more suggestive for institution-building than the European Union or other more comprehensive integration efforts.

In evaluating NAFTA from Canada's trading interests perspective, this report next focuses on dispute resolution to the extent it reflects the Agreements' capacity to protect Canadian goods and services access to the U.S. market, and to secure U.S. compliance with the Agreement's rules and obligations. The Report recognizes that dispute resolution is but the tip of the iceberg of what constitutes NAFTA and the Uruguay Round Agreements. However given the salient role of foreign trade generally within the Canadian economy, the weight of the U.S. economy in Canada's international trade and investment activities, and the nature of the U.S. political system, in which domestic interest groups play an important role in moving their government to take protectionist stands and threaten market access and other kind of international trade law obligations, the effectiveness of the dispute resolution mechanisms to address these issues is of principal importance to evaluate NAFTA in the interest of Canada.

The Report shows that Chapter 19 of NAFTA and the WTO DSU in combination have been effectively used by Canada to reduce export market access exposure in particular regarding the application of U.S. antidumping (AD) and countervailing duties (CVD) law. It is also evident that the number of U.S. AD and CVD investigations and orders against Canadian goods have dropped significantly since the entry into force of CUFTA and then NAFTA, and the same can be observed for Mexico, compared to the application of trade remedies to non NAFTA Parties. This at least suggests that the mechanisms have some deterring effect and that the level of free trade relationship counts. Canadian softwood lumber exports however continue facing unfair trade remedies in the U.S. and that particular and costly trade conflict now extends for more than twenty years. The general dispute settlement

mechanism of NAFTA Chapter 20 has been infrequently invoked. There is some evidence of disputes being resolved before reaching the arbitral mechanism and, a major potential source of conflict with the U.S., the application of AD and CVD domestic remedies, is principally addressed through Chapter 19 and the WTO DSU. Chapter 11 investor-State arbitration has been by far the most controversial NAFTA dispute resolution mechanism, but this report shows that though it is certainly subject of improvements, its working and results do not justify the major criticisms launched against it. The report includes a number of specific recommendations to improve the operation and design of the NAFTA dispute resolution mechanisms.

The Report finally turns to describing a roadmap of suggestions for possible improvements and changes to NAFTA in Canada's interest. The approach is precisely to seek for manners to improve the depth and quality of trade and investment for Canada. This means continuing to build upon market access security, upon the enforceability of the rules mutually agreed, and upon the proper environment for business transactions to grow and flourish, while improving border security, labour mobility, access and distribution of information, protecting the environment and workers' rights, promoting sustainable development, preserving governments' authority to regulate in the publics' interests, and improving trade and investment growth opportunities with non-U.S. actors, in particularly with Mexico, within the North American region.

The report seeks to take an objective and judicious engagement and distance of the craft of day to day trade negotiations, international rule making, and of the political debate. The engagement is through a respectful consideration of the challenges of government negotiators, trade policy-makers and politicians that must resolve problems and develop rules within the constraints of international and domestic political demands. The distance is in the recognition of their limitations and the need for broader horizons and nurturing ideas. Government negotiators and trade analysts represent their governments, but also belong to a larger community of their own that justify their craft in the every day negotiation and resolution of trade and investment agreements and their conflicts.

Canada and the U.S. both face upcoming national elections. Senator Kerry in the U.S. has expressed his desire to review both NAFTA and the WTO if he is elected. The opportunity to renegotiate some aspects of NAFTA could be real. However, it is important to note that opening a treaty in force in order to renegotiate with the U.S. is an extremely risky endeavour especially given the role of the U.S. Congress. The agenda proposed in this report, which includes labour and professional mobility, border management, improved communications and government to government, business to government exchange of information systems, a softwood lumber agreement, improved environmental protection commitments, and the opening of Mexico's energy

sector could be subject either of supplementary agreements or individual commitments under NAFTA reached through side negotiations. All these aspects relate to the breadth and quality of the trade and investment relation and should not necessarily depend on the reopening of the treaty.

The set of recommendations or guidelines presented are made upon the premise that despite the breadth of corporate and investment relations between Canada and the U.S., despite their geographic proximity and common language, and the extensive presence of Canadians in the U.S., despite the countries common heritage and the pervasiveness of social and cultural networks running across the two countries, Canada and the U.S., and to this extent Mexico, desire to continue building their economic relation, by zealously preserving their political independence. They all desire to continue differing in the values that inform relevant national policy decisions and their implications.[5]

The Context

Canadians' attraction to the U.S. market has been historically as profound as their concerns of relinquishing independence. Proposals for reciprocity, free trade, common tariffs, and even annexation have been part and parcel of the history of Canada-U.S. relations. The 1854 Elgin-Marcy Treaty proposed by Canadian Governor Lord Elgin created free trade for most products until the United Sates abrogated it in 1866. Up until 1874, when a sectoral trade agreement negotiated by the two nations died in the U.S. Senate, Canadians had been quite inclined to deepen the trade relation. In the 1890's a proposal by the U.S. to create a custom union was rejected in large part because it would have affected Canadian historic preferential economic ties with Great Britain. The proposal's failure contributed to trigger high tariffs in both countries and to the development of a "branch economy" in Canada by U.S. producers. In 1911 it was the U.S. who proposed reducing or eliminating tariff duties, but this time the agreement negotiated failed ratification in Canada giving rise to the fall of the liberal government of Prime Minister Wilfrid Laurier.

The period between the two great wars continued to be defined by protectionism and recession until the 1935 Reciprocal Trade Agreements Act that lowered the protectionist tariff duties implemented in 1922 and 1930 by both countries. World War II continued to reshape Canadian-U.S. relations as it did with the course of modern international relations generally. The traditional weight of Canadian political and economic ties with Great Britain had been already gradually gravitating towards increased ties with the United

[5] There seems to be a trend towards differing key values in U.S. and Canadian societies. *See e.g.*, Clifford Krauss, "Canada's View on Social Issues Is Opening Rifts with the U.S.", The New York Times nytimes.com (December 2, 2003), at www.nytimes.com, last visited December 2003).

States. Back in 1902, the popular English economist and Imperialist critic J.A. Hobson had already noted that the British preferential tariff for Canada had been "quite inoperative" as the percentage of American goods entering Canada continued to increase and British percentage of goods continued to decline.[6]

Take foreign investment and trade for examples. In 1900, U.S. investment in Canada represented only 15% of total foreign investment in the country, with Great Britain's investment accounting for the remaining 85%. By 1922 U.S. share had increased to half of total foreign investment in Canada, and by 1970 it reached approximately 80%. Since independence, Canada's major trading partners had always been Great Britain and the U.S. Up until the 1890s, approximately seventy to eighty percent of Canada's total trade with the world was divided, with some but not substantive variations, between the United States and Great Britain. Since the turn of the past century, the U.S. became the main source of Canadian imports enjoying shares ranging from approximately 58% to 80% of total Canadian imports while Britain's share oscillated between 15-30%. However Great Britain continued to be almost an equal important destination of Canadian exports until the end of World War II. It is only after the war that the United States became the unquestionable major Canadian export market capturing in average two times more of Canadian exports than Great Britain.

After the war, in 1947, Canada and the United States made another attempt for a free trade agreement. The governments of Mackenzie King in Canada and Truman in the United States embarked in secret negotiations to strike an accord that would have eliminated most tariffs between the two countries. The agreement was never sent to Parliament in part on recalling the Liberal electoral defeat in 1911 on the issue of reciprocal trade with the United States. King wrote then in his diary: "the long objective of the Americans was to control this continent to get Canada under their aegis. If I was an American, I would have the same view specially considering Russia's position".

The incident captures the ambivalence of a relation that has historically been a constant source of contradictory feelings for Canadians: worries of economic domination and imbalance of power on one hand, and significant economic opportunities on the other. More than four decades after 1947, Canadians held finally a nation-wide policy debate on free trade with the United States. In 1986, the Conservative government of Brian Mulroney launched negotiations with the U.S. on a comprehensive free trade and investment agreement. The Canada-United States Free Trade Agreement (CUFTA) was signed in September 1988 and became the major issue of the Parliamentary elections held two months later. The public retained the Conservatives in power as they won 60% of the seats in Parliament and thus

[6] JOHN A. HOBSON, *IMPERIALISM, A STUDY* (1902), at II.VI.20.

ratified the free trade agreement with the U.S. The parameters of Canadian democracy, defined the result in an election where the conservative received slightly less than 50% of the total popular vote.

Not even two years into the historical free trade agreement, and in the midst of economic recession, the governments of Mexico and the United States initiated talks on a comprehensive free trade agreement. Canada soon joined the talks and ensuing negotiations more out of concern with loosing market access advantages won in CUFTA than of conviction regarding the accession of Mexico into the free trade North American relation.[7] The North American Free Trade Agreement (NAFTA), in great part a successor agreement of CUFTA, was completed in August 1992, pending ratification or approval by the corresponding legislatures.

The national politics in the United States –marked by the electoral defeat of Bush senior to Clinton in the 1988 elections - forced additional negotiations leading to the 1993 environment and labour side agreements. These agreements sought to address concerns raised by labour and environmental organizations, among others, that the free trade agreement with Mexico would lead to a relaxation of environmental and labour standards, environmental degradation south of the border and job losses to Mexico's cheap labour market. In late 1993 the Canadian Parliament and the Mexican Congress comfortably approved NAFTA and its side agreements. The U.S. Congress followed but with a narrow difference of three votes for approval. NAFTA came into force on January 1, 1994.

Concurrently to the NAFTA negotiations, the Uruguay Round of Negotiations under the General Agreements on Tariffs and Trade (GATT) entered its critical phase. The Uruguay Round was launched in 1986 not to be finally concluded until December 1993. To some extent, NAFTA was a laboratory and incentive for the Uruguay negotiations and agreements. Canada, the United States and Mexico, among others signatories signed the WTO Agreement, along with the rest of the Uruguay Round agreements, in April 1994 at Marrakesh. The agreements that constitute the WTO regime entered into force on January 1, 1995.

Thus in a span of 10 years, perhaps to short for history and too long for politicians, Canadian trade policy set a new course away from the historic notion of the "National Policy" and the years of foreign investment controls and regulations Canada has not been alone in this historic trend. The world has participated in this trend of an expanding rule-based trade disciplines international system. The multiplication of international free trade and investment agreements forcefully exemplifies this. Today, the WTO boasts 146 member states in comparison to the 23 original contracting parties of GATT in 1948. A recent study on the proliferation of bilateral and regional

[7] *See e.g.*, Stanley Reed, William C. Symonds and Paul Magnusson, *In Canada, The Tree-Trade Deal is Hardly Home Free*, Business Week, International Outlook (September 7, 1992).

free trade agreements shows that, as of October 2003, 285 regional trade agreements had been notified to the WTO. Since the date of entry into force of the WTO, Members have notified an average of 15 free trade agreements per year compared to the average of less than three per year during the 1947-1994 GATT period.[8] Similarly the number of bilateral investment agreements negotiated internationally increased by five times in the ten years from 1989 to 1999, jumping from 385 to 1,857.[9] The estimate number of bilateral investment agreements negotiated up to 2004 is close to 3,000.

Comparatively Canada has walked through the liberalization process with high standards of transparency and public participation, consistently with its democratic convictions and political system. The free trade national debate of 1988 is just a prime example. In words of Lloyd Axworthy, a political figure in the Liberal caucus that opposed then the U.S. free trade deal, the debate was resolved in the democratic marketplace, "we lost and the public resolved".[10]

Notwithstanding the openness and deliberative nature of the Canadian political process and of the free trade debate of 1988, the question of trade with the United States, in the context of the broader international relation, is a question that should continue to be revised and discussed. It is in posing the questions and seeking to answer them that the process is of significant value. This report seeks to make a contribution to this process..

NAFTA is now ten years old and has entered the last phase of its remaining fifteen years liberalization target. Most tariffs and covered areas have now been liberalized and the institutions and dispute settlement mechanisms have been tested in order to allow a more critical and balanced appraisal of its working. The WTO is only a year younger and its dispute settlement rules have been invoked and used beyond the most generous predictions. In some significant aspects, these rules can be invoked alternatively to NAFTA dispute settlement mechanisms. NAFTA and the WTO as a negotiation and bargaining forums can also be assessed. But the overall purpose is to generate a set of questions and recommendations that can inform and contribute to Canadian public discussion and policy making as the nation sets its course in the openings of the twenty first century in an issue that is of significant relevance: strategic trade policy with the United States and more broadly, its economic, political and social implications.

At the turning of the century, the value of Canadian exports and imports of goods and services reached nearly 90% of the country's gross domestic product.[11] The Canadian-U.S. trading relation is the most important one of the world for any two countries in terms of economic value amounting to C$645

[8] WTO Secretariat, *The Changing Landscape of RTAS* (prepared for the Seminar on Regional Trade Agreements and the WTO, Geneva, 14 November 2003), at www.wto.org (last visited January 2004).
[9] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, BILATERAL INVESTMENT TREATIES 1959-1999 (2000), at 1.
[10] Comments in the workshop "NAFTA at 10: Is it still in Canada's interest?" held at UBC on January 16, 2004.
[11] [Michael Hart 2002 A Trading N] at 4.

billion in 2003. The U.S. accounted for 80% of Canada´s exports in 2003. Canada is the leading foreign export market individually in 39 U.S. states. Ontario alone is the U.S. fourth largest trading partner after Canada, Mexico and Japan. Figures for 2003 indicate that Canada imports more goods from the U.S. than Japan, Germany, Britain, Italy, China and Honk Kong combined.[12]

This is a source of pride and strength, but also of legitimate dependency concerns as Canadian trade and investment increasingly concentrates on the United States. To place the pride and concerns in relevance and context it is necessary to focus on the border issue. The sharing of an extended territorial border with the powerful and hegemonic Untied States is a significant feature experienced also only by Mexico.

The 8,900 kilometre border with the U.S. is a paradigm and a reality. It relates to the national identity and history of Canada and the U.S., it is the crossing and contact point of people, goods, services, and cultures. Currently about 200 million people move across that border every year. It is a source of jurisdictional, environmental and security cooperation, conflict and challenge.[13] The border opens tremendous economic opportunities, but the higher the opportunities, the greater the risks. The tragic events of 9/11 and ensuing developments not only raise higher the issue of border management but force creative thinking around what political and legal institutions are required in the North American context not only to resolve but prevent future conflicts. The tasks requires not only of imagination, but of an important dose of pragmatism and critical thinking.

The political debate, as faithfully represented by the Canadian 1988 CUFTA debate, is naturally framed in political terms. This means that the claims and counter-claims made at the political marketplace might not faithfully reflect what CUFTA and its successor NAFTA were fully about or could achieve. This raises a significant question: how should NAFTA be evaluated? If we are to be consistent with the reality and ideals of the democratic process, the question of whether a standard to assess NAFTA for Canada in the context of its relation with the United States should be the claims upon which the debate was won in 1988 and then ratified in 1993 can not be overlooked.

NAFTA was hailed by its promoters as a fundamental recipe for economic growth. Its detractors pointed to the serious threats the Agreement posed for labour conditions and stability in particular in the U.S. and Canada, and for local economies, and environmental protection in the three economies.

[12] See *Canada and the United States, A Unique Relationship*, at .http://www.ceocouncil.ca/publications/pdf/7bb724838a4857169528df7e8abd2167/Canada_and_USA_trade_facts_April_2004.pdf.

[13] More than 300 treaties and agreements support cooperative efforts between the U.S. and Canada on a multiplicity of issues. Id.

Neither the promises nor the threats fully materialized. The most difficult issue in evaluating NAFTA (and previously CUFTA) against the national political debates surrounding its approval is the difficulty of identifying the causality link.

Most studies that have sought to evaluate the overall effects of NAFTA on the economies of the Parties recognize the difficulties faced by the task. This is mainly explainable by the difficulties of controlling for political and economic variables that may have a more significant effect on the economies than trade liberalization, such as the Mexican peso crises of the late 1994, interest rates moves in the U.S. or currency exchange or inflationary pressures, recession, or simply the overwhelming volume and dynamism of the U.S. economy. Professor Clarkson sets the problem in eloquent terms:

> *Fourteen years after CUFTA, eight years after NAFTA, seven years after the WTO, and five years after the Canada-Chile Free Trade Agreement of 1997 came into force, Canadian citizens could expect to have some idea about the economic effects of what free traders and anti-free traders alike predicted would transform the Canadian economy. Strangely, it is difficult to make a coherent and reliable assessment of the Mulroney-Chrétien gamble. At the turn of the millennium, citizens were swamped with economic information of all kinds, but it is doubtful whether these daily doses of data allowed interested observers to determine if free trade had delivered its promised salvation.*
>
> *Even when a trend can be determined and a difference with comparable countries' behaviour observed, statistics are unlikely to indicate the phenomenon's cause. An economic result is generally the product of many forces, and the impact of different external factors is almost impossible to isolate.*[14]

As for the empirical work in the area seeking to assess effect of NAFTA on the U.S. and Canadian economies an investigation report for example prepared by the U.S. International Trade Commission in 1997 found that, having regard to the difficulties of isolating and quantifying NAFTA effects, these had been minimal on the U.S. economy. With respect to Canada, other empirical works have examined job creation and firm productivity gains after CUFTA and NAFTA.[15] A recent article that describes the behaviour of U.S.

[14] STEPHEN CLARKSON, UNCLE SAM AND US: GLOBALIZATION, NEOCONSERVATISM AND THE CANADIAN STATE (2002), at Chapter 11.

[15] *See e.g.*, Daniel Trefler, *The Long and Short of the Canada-US Free Trade Agreement*, University of Toronto Working Paper (2002); K. Clausing, *Trade Creation and Trade Diversion in the Canada-US Free Trade Agreement*, 34(3) Canadian Journal of Economics 677 (2001); John McCallum, *National Borders Matter: Canada-US Regional Trade Patterns*, 85(3) American Economic Review 615 (1995).

trade with Canada and Mexico points out that between 1993 and 2001, U.S. total trade with its NAFTA partners increased 78 percent in real terms, compared to a 43 percent growth with the rest of the world. Specifically, U.S. exports and imports with Canada increased 35 percent and 69 percent, respectively, in real terms during the period, compared to 30 percent and 59 percent, respectively, with the rest of the world.[16]

According to Canada's WTO Trade Policy Reviews, preferential agreements (NAFTA and the free trade agreements with Israel, Palestine, Chile and Costa Rica) have contributed to above-average growth in trade flows with these trading partners, and in particular with the U.S.[17] Trade flows across the two international borders have increased steadily over the past decade. How much of these figures and statistics are a direct effect of the Agreements is difficult to know.

It is interesting to note that within the NAFTA relation while the amount of trade between Canada and the U.S. on one hand, and Mexico and the U.S., on the other, have increased by approximately 100% and 170% respectively from 1989 to 2001, trade between Canada and Mexico has also surged significantly. Exports to Mexico more than doubled and imports had a five-fold increase.[18]

The evidence suggests that trade policy plays a role in international economic performance but does not have the impact announced by the CUFTA and NAFTA approval public debates. The volume and dynamism of the national economies, macroeconomic and industrial policies, structural and microeconomic conditions play a more predominant role in materializing or preventing the positive effects of free trade agreements on the national economies. Today after ten years of NAFTA it is still unclear whether Mexico can reap, preserve, distribute and increase the opportunities of free trade with the U.S. and Canada if the appropriate structural and industrial conditions are not implemented to do so. The lesson is perhaps that despite the market access opportunities opened by trade agreements the real challenge remains within each country's borders and national economic, legal and social policies.

[16] Russel Hillberry and Christine McDaniel, *International Trade Developments: A Decomposition of North American Trade Growth Since NAFTA*, May/June 2002 International Economic Review 1 and 2.
[17] Trade Policy Review Canada, Report by the Secretariat, WT/TPR/S/112 (12 February 2003), at 35.
[18] Exports to Mexico remain in a modest 0.7% of total Canadian imports, and imports from Mexico amount in 2001 to 3.3 percent of total Canadian imports. Canada Department of Foreign Affairs and International Trade, NAFTA @ 10: A Preliminary Report (2003), at 48, in www.dfait-maeci.gc.ca/eet (last visited March 2004).

NAFTA and the WTO

NAFTA, and its predecessor CUFTA, are close relatives of the WTO Agreements. The CUFTA negotiations were launched just before the start of the Uruguay Round signalling the eve of a decade of international trade liberalization. Later NAFTA was influenced by the Uruguay Round and particularly by developments arising out of the Dunkel draft. Cross-fertilization and overlap was natural given their common objectives and developments. NAFTA and the WTO Agreements cover almost the same areas, with the exception of investment treatment standards, competition policy and state trading which are covered by NAFTA and not the WTO Agreements, and customs evaluation and pre-shipment inspections which are covered by the WTO exclusively. Other differences can be found in the dispute settlement mechanisms and institutions, as well as in the scope and extension to which each set of agreements govern the topics. Generally NAFTA disciplines are more extensive and detailed than their WTO counterparts.

Understanding the general relation between the two regimes is not a complex issue. The WTO Agreements constitute the general regime governing the trade law rights and obligations of each of the NAFTA Parties with the other Members of the WTO Agreements. It also governs the relationships between Canada, Mexico and the United States, except as provided in NAFTA , or for those areas where rules exist in the WTO Agreements and not in NAFTA, and are not inconsistent with the latter. In other words, the WTO Agreements constitute the general law and NAFTA the specific law governing the trading relationship of Canada, Mexico and the United States. It is important to remember that when NAFTA was negotiation and adopted the applicable regime was the GATT 1947. NAFTA constitutes an exception to the most favourable nation (MFN) principle of GATT as it seeks to eliminate tariffs among the Parties, while leaving each Party free to manage their tariffs with third countries. This simply means that tariff reductions and other more favourable treatment in NAFTA are not applicable to other GATT Parties through the operation of the *MFN* principle. GATT 1947 itself, in Article XXIV, provides this possibility and the rules for countries to enter into custom unions and free trade areas.

Given that NAFTA is the specific agreement, NAFTA provides that in case of conflict of rules, NAFTA prevails over the WTO Agreements to the extent of the inconsistency unless otherwise provided in NAFTA (and of course, only in connection to the NAFTA Parties). In addition, NAFTA incorporates through direct reference certain WTO Agreements provisions, such as GATT Articles III, XI, and Article XX exceptions. This has at least two significant implications. First, it brings into NAFTA the interpretation and jurisprudence developed under GATT and the WTO Agreements for the incorporated provisions. Second,

because of the dispute settlement provisions of both regimes, as explained further below, it opens the possibility for NAFTA Parties to choose NAFTA or WTO dispute settlement provisions to settle disputes arising out of significant NAFTA areas.

National Treatment

GATT Article III and Article 301 of NAFTA establish that goods and services that have been imported from each other will receive within their territories no less favourable treatment than that provided to domestic products. The national treatment principle applies also to trade in services generally and to investors and investments of the NAFTA Parties. The WTO does not provide for national treatment regarding investments and investors.

Tariffs

When NAFTA entered into force, a history of tariff reductions, GATT negotiations and CUFTA had already eliminated a substantive amount of existing tariffs between Canada and the U.S. Currently and after 10 years of NAFTA, Canada and the U.S. have eliminated 98.8% of their tariff lines, while Canada and Mexico 93.8%. In comparison, the percentage of Canadian MFN duty-free lines –that is, the duties applicable to WTO Members- is 48.4%. In average, of the remaining tariffs, Canadian MFN average tariff is 6.8% compared to its 2.6% average under NAFTA for those few tariffs still in place.[19]

Trade in goods

In addition to creating a tariff-free trade area by 2008 (although most tariffs for trade in goods between the Parties have already been eliminated), NAFTA contains other trade in goods provisions that also go further than the WTO. Customs fees have been eliminated between NAFTA Parties. Export taxes are prohibited except for some Mexican food staples like corn, flour and milk, and drawbacks and tariff waivers are limited by NAFTA and are not permitted on goods originating in North America passing duty free across the borders. The rules of GATT Article XI on trade quotas and price controls are incorporated by reference to NAFTA. Rules of origin are relevant only for NAFTA purposes, as they establish what goods qualify as originating in the North American region and therefore receive duty-free access. NAFTA also incorporates the exceptions to international trade for public health and conservation of natural

[19] Id., at 36.

resources, found in GATT Article XX (and its interpretative notes). NAFTA provides preferential treatment to NAFTA goods in the application of temporary import restrains. Article 802 excludes NAFTA imports from escape clause proceedings initiated by another NAFTA Party unless the NAFTA imports constitute a substantial share of the total imports and contribute importantly to the domestic injury. Goods from Canada, for example, have been excluded from U.S. global escape clause applications in US cases, such as the 2001 measures against steel imports.

Trade in services

CUFTA and NAFTA introduced services into international trade law. CUFTA and NAFTA made a breakthrough in this area that was followed in the Uruguay round multilateral negotiations resulting in the General Agreement on Trade in Services (GATS). What NAFTA and GATS achieved was to extend the fundamental disciplines that have governed the international trade in goods since GATT (namely, *MFN*, national treatment and quantitative restrictions disciplines) to services.

It is first important to note the basic scope and coverage architecture of the Agreements in connection with services. NAFTA Chapter Twelve applies to cross-border trade in services only, and not to the provision of services through an investment vehicle established in one of the NAFTA Parties. Chapter Eleven investment provisions govern the latter. Consequently, for example, NAFTA Article 1205 explicitly prohibits NAFTA Parties from adopting local presence requirements as a condition to provide a service. In contrast, GATS applies to four modes of service provision: a) supplied from one territory to another territory (cross-border); b) supplied by a Member provider in its territory to a consumer of another Member; c) supplied through a local commercial presence of one Member provider in another Member's territory, and; d) supplied by a Member's provider through a natural person of the Member in the territory of another Member.

NAFTA specifically covers the telecommunications and financial services sectors in Chapters Thirteen and Fourteen. These Chapters and Chapter Eleven provisions prevail over Chapter Twelve. Government purchases of services are not covered by NAFTA or GATS. NAFTA also contains specific rules for professional services, legal consultants, engineers, and land transportation. The two regimes contain transparency obligations (NAFTA Chapter Eighteen and GATS Article III).

NAFTA applies MFN, national treatment standard and the best available of both standards disciplines at the federal level to all cross-border trade in services. In order to carve out a service it must have been previously included by the Parties in Annex I of the Agreement. This is known as a negative list system. Measures at the state or provincial level are excluded from NAFTA if

existing on the date of entry into force of the Agreement. Local non-conforming measures are also excluded.

The GATS applies MFN treatment to all services. In contrast to NAFTA, GATS uses a positive list system. In the same fashion, market access disciplines in GATS apply only to the sectors the Members listed in their Schedules. Market access under GATS means that once a Member has accepted opening its market to a service sector, it should not limit access through quantitative or other type of restrictions (*e.g.* limitations on the total number of people that can be employed, requirements on a specific type of legal vehicle to be used, economic needs tests, etc.).

Investment

NAFTA and the WTO Agreements cover investment disciplines. NAFTA Chapter Eleven provisions are broader in scope. They contain obligations that govern the kind of treatment NAFTA Parties must provide to investors and investments of the other NAFTA Parties.

NAFTA investment disciplines require the Parties to provide national treatment, most-favoured-national treatment, and the international minimum standard of treatment to investors and investments of the other NAFTA Parties. In addition, NAFTA prohibits expropriations, indirect expropriations, and measures tantamount to expropriation without compensation, due process, and public interest motivation. The NAFTA Investment Chapter also bans the imposition of performance requirements[20] to any foreign investment,– not restricted to NAFTA foreign investments -, and limits the possibility to restrict hiring of company directors and officers on nationality and residency grounds. NAFTA provides for investor-State arbitration to solve disputes arising out of the observance of the investment treatment standards.

The TRIMS Agreement governs investment measures that restrict trade contrary to GATT Articles III and XI national treatment and quantitative restrictions provisions. It contains a descriptive list of measures that are regarded as trade restrictive extending primarily to performance requirements.

Government Procurement

NAFTA and the WTO establish rules to open the government purchases sector to foreign providers and to adopt common standards of transparency, procedure, and non-discriminatory treatment. NAFTA procurement rules are

[20] Performance requirements are measures that require investments to do or restrain to do certain things, such as acquiring domestic goods for production, or sell a certain percentage of production to the domestic or international market, in order to establish the investment in the territorial jurisdiction of a Party or Member.

found in Chapter Ten, while the WTO provisions are found in the Agreement on Government Procurement (GPA), a plurilateral agreement (they did not form part of the Uruguay Round results single undertaking). Canada and the United States, but not Mexico, are parties to the GPA.

The two regimes use a positive list and minimum thresholds system. Parties negotiate reciprocal access and thresholds for procurement sectors, and specifically list the procurement agencies and contract values covered. National treatment and transparency obligations are then required. In addition, the two regimes establish general guidelines that should govern the procurement processes, including technical specifications, tendering procedures, and the establishment of a domestic bid challenge system that provides procurement bid participants a remedy to challenge government purchases bidding decisions.

Antidumping and Countervailing Duties (AD/CVD)

NAFTA and the WTO Agreements regulate unfair trade remedies. NAFTA basically extended to Mexico the binational dispute panel system originated in CUFTA. NAFTA Chapter Nineteen confirms the Parties' right to apply domestic antidumping and countervailing duty laws to NAFTA Parties imports; it establishes notification requirements in case a Party amends its domestic trade remedies law, and required Mexico to overhaul its unfair trade remedies legal system. Chapter Nineteen binational panel review system operates as an alternative to domestic judicial review. The importer and exporter can challenge antidumping and countervailing duties decisions to ordinary domestic judicial review or to a Chapter Nineteen panel. The panel also reviews the AD/CVD determination's conformity with domestic AD/CVD law, and must apply the same standard of review that a domestic court would use in that case.

The WTO Agreements also recognize the right of States to take action against dumped and subsidized goods, but in contrast to NAFTA, they establish international standards for the application of remedies. These rules originate in Article VI of GATT 1947, and have developed through specific agreements developed in the Kennedy and Tokyo GATT Negotiation Rounds. The Uruguay Round gave rise to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement) and in the Agreement on Subsidies and Countervailing Measures (Subsidies Agreement). The Antidumping Agreement contains, *inter alia*, specific rules on domestic antidumping determination procedures, how to determine that a good is dumped, and criteria to determine injury of the domestic like product. The Subsidies Agreement defines the type of prohibited subsidies, namely, export subsidies, and establishes also rules governing the application of CVD remedies.

The WTO Antidumping and Subsidies Agreements also set out more precise rules for the use of the WTO dispute settlement mechanism for reviewing WTO consistency of domestic antidumping and countervailing duty determinations. It is relevant to note that the unfair trade remedies laws of the NAFTA Parties must be consistent with the international standards set out in the WTO Antidumping and Subsidies Agreements, and that the domestic unfair trade remedies investigation procedures and decisions are subject of challenge before a WTO panel, on the grounds of its non-conformity with WTO Agreements, or before a NAFTA binational panel, directly by the importers and exporters, on the grounds of erroneous application of national AD/CVD law.

Agriculture

NAFTA and the WTO have both fell short of advancing in significant ways agricultural trade liberalization. NAFTA retained for Canada and the United States the main agricultural provisions of CUFTA, including Article 710 that incorporates the GATT rights and obligations of both countries with respect to agricultural, food, beverage and certain related goods. Canada and the United States also agreed to subject the incorporation of the CUFTA agricultural provisions to the Chapter Twenty Dispute Settlement Mechanism. Other commitments included certain leeway for export subsidies, quota reduction obligations, and import licenses and other agricultural non tariff trade barriers limitations. Mexico and the U.S. agreed tariffication or conversion of agricultural quotas and licenses under NAFTA. The first Chapter Twenty panel, confirmed that the WTO mandated this for Canada and the U.S. This meant that the NAFTA Parties had to convert any agricultural non-tariff barrier into a tariff or tariff rate-quota (a tariff rate-quota is a generally high and protective quota that applies to imports from a country above a fixed quota, having the in-quota imports entered free of duty or subject to a low tariff).

In addition to tariffication that seeks conversion of non-tariff agricultural barriers into tariff barriers that are subject of easier reductions, the WTO Agreement on Agriculture took a first and modest step towards reducing protection and support programs that distort international agricultural markets. It is important to note that both Canada and the United States protect and support in significant ways certain agricultural sectors, such as the sugar, diary products, and grains markets. The policies adopted by the industrialized world have the greatest impact on the distortion of international agricultural markets, in particular the United States and the European Union policies. In fact certain exceptions to the support restrictions provisions in the WTO Agreement on Agriculture resulted from bilateral negotiations between the U.S. and the EU.

What the WTO Agreement on Agriculture achieved was for WTO Members to agree to reduce tariff rates, domestic support, the volume of subsidised exports and the value of export subsidies. Different reduction rates apply to developed and developing countries. However the way base levels were established to measure the starting point for reduction commitments, as well as other technical issues involved in calculating and measuring the reductions have resulted in actual minimal reductions of domestic support, in particular in major developed countries. This is a major issue of the Doha Development Negotiation Round currently underway.

Energy

Canada and the U.S. basically extended their CUFTA commitments on free trade in crude oil, natural gas, electricity, uranium, petroleum products, petrochemicals and oil field equipments to NAFTA. Export restrictions are generally prohibited and exceptions relate to conservation, price stabilization and limited defined national security grounds. However any restriction must be applied to ensure that the burden equally applies to domestic and export Canada/U.S. markets. As for Mexico, oil, gas, refining, basic petrochemicals, and the nuclear and electricity sectors are reserved for the Mexican State sector pursuant to the country's Constitutional restrictions.

Canada is the number one supplier of energy to the U.S. It accounts for 100% of U.S. electricity imports and 93.5% of U.S. natural gas imports. The U.S. also imports more oil from Canada than from any other country. The energy and minerals sector represents approximately 17% of total U.S. foreign direct investment in Canada in 2001, down from 19% in 1989.

The interdependence of Canada and the U.S. in the energy sector, and the competitive advantage of Canada in this area constitute a powerful negotiating tool in a potential future process of renegotiation or deepening of the trade and investment relation. Canada should strive for the opening of the Mexican energy sector given its favorable position to service and invest in that sector.

Environment

The announced greening of NAFTA is still a pending issue of the North American Free Trade Area. The North American Agreement on Environmental Cooperation (NAAEC) established an Environmental Commission that has faced problems in defining its role and relevance. Though its reports have contributed to the solution of a few environmental threats, in particular regarding Mexico, it has remained short of the expectations raised by the environmental protection communities of the three countries. The dispute

resolution mechanism established in the NAAEC was carefully crafted to limit the possibility of the launching of an environmental related dispute. More effective environmental cooperation in the North American region should continue to be a desired objective that could follow a design and purpose in the steps of the Canada-U.S. International Joint Commission.

Labour and the movement of people

The protection of labour rights and the concerns that with NAFTA North American corporations would massively relocate to Mexico in pursuit of cheap labour and a less rigorous labour rights protection system gave rise to the negotiation of the North American Agreement on Labour Cooperation in 1993. The NAALC established a charter of labour rights and a system to expose and consult on potential violations to workers' safety and fundamental rights in any of the NAFTA Parties. The NAALC also contains a dispute settlement mechanism that, similarly to the one contained in the NAAEC has never been triggered given the carefully negotiated locks and burdens that limit their potential use.

The movement of people is a distinct but related issue. The mobility of the working and especially the professional force is required in economies that increasingly move to services economies. NAFTA includes some rules in this regard in Chapter Sixteen short of complete mobility which has only been introduced fully by the EU in the context of a free trade and investment regime. The issue of labour mobility however has been recently introduced in the North American context from a different perspective. The current Mexican administration has proposed to the U.S. a labour mobility agreement that cuts directly into immigration policy in the context of the important presence of Mexicans in the U.S. economy and the flux of illegal immigration. Remittances by Mexican workers in the U.S. to Mexico now constitute the second source of dollar currency imports into the Mexican economy after oil sales and without considering the black market of drug trade. Canada has not yet participated or made officially part of these discussions. Interestingly however, the Canadian presence in the U.S. is more significant than even the Mexican one, although its is naturally more discreet. According to recent U.S. immigration data, Canadians and not Mexicans constitute the main nationality of illegal immigrants in the U.S.

Institutions and Developments in NAFTA and the WTO

How do they work?

The WTO is made up of 146 member states. Along with the United Nations it is the most successful international law regime in terms of participation and activity. Its main activities consist of the negotiation, observance, implementation and application of trade and trade related international rules. To support these activities, the WTO regime has a professional and sophisticated institutional structure.

The highest body in the WTO is the Ministerial Conference consisting of the meeting of the Members' trade ministers, followed in hierarchy by the General Council, which is constituted by the Members' Ambassadors to the WTO. There are three major councils that report to the General Council, one for each major area of the WTO regime (trade in goods, trade in services and intellectual property issues). In addition, the organization has at least 20 standing committees, and 9 working and party groups, and a working group on trade negotiations set up to coordinate the Doha Development Round Negotiations currently underway. The WTO has a Director-General, with a 500 plus people strong secretariat under him, to support and carry the day-to-day activities of the organization.

This international bureaucracy signifies an important distinction between the WTO and NAFTA. NAFTA is not an international organization and except for a modest Environmental Commission and a Mexico-U.S. bilateral development bank for the border area, it has no independent international institutions or administration. In any international organization with strong administrative bodies, such as the WTO or the United Nations, the own bureaucracy and direction of the organization plays an important role in the international arena in addition to that played by their members individually or collectively. The Director General, the Secretariat and its officials have an invested interest in the life, development, activities and goals of the WTO as an organization. They represent not only the means for the necessary administrative support for the organization, but an additional voice and driving force in the international trade arena. This feature generates institutionalism and durability, both real and perceived, and professionalism in the development of the activities of the organization that can have a positive impact in the observance of obligations and in the process of creation of new rules. The existence of this bureaucracy can generate the perception that the institution may have an interest different to that of its Members, individually or in groups, and in fact this might have an effect on the development of the institution. This effect is unavoidable, especially in an

international organization of the magnitude of the WTO. It was present in GATT, its predecessor, even though GATT was born as a provisional arrangement originally lacking a formal institutional framework.

In contrast, NAFTA was specifically designed to avoid the creation of an international bureaucracy independent of the Parties. The Free Trade Commission is NAFTA's principal institutional body, comprised by the cabinet level representatives of the three countries. In this it is no different to the WTO approach. The Commission meets at least once a year and can delegate responsibilities to ad hoc or standing committees, working groups or expert groups. Currently there are 22 committees and working groups under NAFTA. There are other cabinet level meetings mandated by NAFTA, e.g., the Financial Services Committee, comprised of the Finance and Treasury ministers. It should meet at least once a year to supervise the implementation and application of the Financial Services Chapter.

NAFTA also has a Secretariat, but in contrast to the WTO, it has no single director-general, NAFTA officials, or independent budget. The NAFTA Secretariat is formed by three national sections, each established, staffed and budgeted by the corresponding government. The national sections serve as contact points as they provide support for the Free Trade Commission meetings and for NAFTA Chapter 19 and 20 dispute settlement panels. The Free Trade Commission may direct the Secretariat, through its national sections, to support also the work of other committees and groups, and to facilitate the operation of the Agreement. Overall the role of the Secretariat has been limited, it is thinly staffed and modestly funded.

Therefore the most important part of NAFTA diplomacy, negotiation and problem-solving does not pass through the Secretariat and its national sections, but rather directly through the contact of government officials of the three Parties, and the Ministers in charge of trade and investment relations. In this respect, the NAFTA regime works without the input and participation of an independent administrative bureaucracy. This has an effect in the way business is conducted under NAFTA. The impulse is dependent only on the Parties, and that affects issues from the working of committees and groups to the establishment of dispute settlement panels. In principle, political and economic imbalances might affect to a greater extent the institutional working of NAFTA.

The lack of formal institutions and bureaucracies on the other hand can mean more flexibility and direct involvement in the administration of the regime. Trustworthiness, communication, personal relations, and other factors in short of more detailed formal and institutional mechanisms can play a significant role in managing the regime? Is this in Canada's interest and advantage? Is this flexibility necessary for the regime? It is indisputable that Canadian officials and politicians share with their U.S. counterparts a language, closer cultural heritages, and a history of alliances deeper than that

shared by Mexico with both Canada and the United States. On the other hand Canadian and Mexican officials share the challenge of dealing with their powerful and politically unique common neighbor. The richness of this triangular relation, not diluted or spread out, not too homogeneous, appears to generate opportunities for strategic negotiation and conflict management that are not present in more structured international economic forums.

The cooperative policy dimension coupled with strategic negotiation should not be overlooked when thinking on how to make better use of the interrelationship between NAFTA and the WTO in the context of the Canada-U.S. economic relation. U.S.-Canada relations specialist Christopher Sands has noted that U.S. officials view Canada today as a "wealthy, talented, generally friendly, but a small contributor to the international order which the United States finds itself responsible to maintain", that such assessment is not punitive, but that Canada has to its favour the advantage of a deep integration with the U.S. in a broader sense:

> *"Canadians and Americans are the most networked societies in the world. Our private institutions-companies, NGOs, families and circles of friends – seamlessly transcend the Canada-U.S. border, even now, with post 9/11 border security so changed".*[21]

A similar synergy has occurred between government to government relations, not only at the federal levels, where a myriad of U.S. agencies today outside the realm of the Department of State, Commerce and the USTR have direct, unmediated relationships with their Canadian counterparts, but also this is evolving at the state and provincial levels. In a sense, government to government, business to business and citizen to citizen Canada-U.S. relations have become more important as the official Canada-U.S. relationship strains. NAFTA's government to government less formal structure is but a tool within this perspective to promote problem solving and cooperative policy initiatives in Canada's interest.

In addition this means that Canada trade and investment policy making *vis a vis* the U.S. is growingly decentralized, but given the parliamentary system, still more cohesive than its U.S. counterpart. Cameron and Tomlin conclude in their study on the negotiation of NAFTA that asymmetry of power does not necessarily inhibits cooperation, and that a decentralized internal policy making structure, a degree of internal cohesiveness, and attractive non-agreement alternatives are key leverage negotiating factors.[22]

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[21] Sands speech to the 2003 Canadian Crude Oil Conference, Kananaskis, Alberta, September 5, 2003. See also Christopher Sands, From B2B to G2G: Re-engineering the Canada-United States Relationship, Remarks prepared for the Dalhousie Business Seminar, Halifax, Nova Scotia, January 28, 2001.

[22] MAXWELL A. CAMERON AND BRIAN W. TOMLIN, THE MAKING OF NAFTA: HOW THE DEAL WAS DONE (2000) 225-236.

Thus Canada U.S. policy making should build upon the degree and decentralization of U.S.-Canada public and private networking, improving information sharing, using NAFTA, along with the rest of Canada-U.S. cooperative institutions for strategic problem-solving and negotiated policy making. In the context of trade and investment relations in particular, NAFTA and the WTO themselves are also attractive non-agreement alternatives for leverage in future negotiations. In this respect a word of caution is appropriate. Though in a possible reopening of NAFTA, the WTO continues to be a potential non-agreement alternative, the case may be strengthened if instead additional agreements are pursued where both regimes remain as non-agreement alternatives. In addition it is important to consider within these prospective alternatives that current "fast-track authority" has further constrained U.S. negotiating authority. It is under this perspective that an OECD de facto or institutional model of North American relationship, based on decentralized government to government contacts, information sharing, common goals, standards and evaluation criteria, enforced through continuous follow-up and peer pressure can become a NAFTA plus alternative paradigm to a more formal bi-national or trinational institutional governance system.

WTO from Seattle to Cancun

The political highlight of the working of the WTO is represented in the Ministerial Conferences that are held at least every two years. Naturally the core of the work of the Organization is not done in or through the Ministerial Conferences, but these have significant political value for launching negotiations, setting their deadlines, and closing deals. Five Ministerial Conferences have been held. The last one was in Cancun, Mexico in September 2003.

The 1999 Seattle Ministerial Conference represents a landmark of the anti-globalization movement. Protests made the meetings of interest not only to specialists, but to world news. Seattle signified not only a clear example of the growth of an international non-governmental movement opposed to increasing international trade liberalization commitments perceived as constraining and affecting local domestic interests, but also the turning point of the consensus and impetus of governments worldwide toward economic openness and trade liberalization that started in the late eighties and crowned with the establishment of the WTO in 1995. Seattle also represented the first time since the establishment of GATT in 1947 that States failed to launch multilateral trade negotiations when they had the purpose of doing so. Many times States had failed to conclude negotiations or meet deadlines, but never had they failed to agree to initiate negotiations.

The challenge after Seattle was to reinvigorate international trade commitments in the eve of an international economic slowdown, a growing anti-globalization environment, and developing countries' growing dissatisfaction with liberalization and its results. Developing countries were concerned with the launching of negotiations that could increase the burden of implementation of issues of interest only, or primarily, to developed countries. Developing countries intellectual property issues generally, and in particular as played in the African AIDS crisis, were perceived by some developing countries as the high-cost low-benefits of WTO Agreements implementation. Thus a negotiation agenda based solely on issues such as competition, investment and anti-corruption policies, leaving out market-access issues and agricultural protectionism was problematic to many developing countries.

The Doha Development Negotiation Round launched in Qatar in 2001 was the response of the organization to these challenges. The Doha Agenda includes 21 subjects, consisting mostly of negotiating issues, but also including pending WTO Agreements implementation and monitoring issues. The Doha Agenda includes areas of significant importance for developing countries, such as agricultural market access and support programs and subsidies in developed countries, market access for non-agricultural products, intellectual property commitments and implementation issues, and anti-dumping and subsidies rules and practices, as well as items pushed by developed countries mainly, competition rules, services, trade and investment, and government procurement and transparency.

After Doha, Robert Zoellick, the U.S. Trade Representative declared: "Members of the WTO have sent a powerful signal to the world. We have removed the stain of Seattle".[23] Others were not as confident. For example, the Pakistani Ambassador to the WTO declared: "We don't like it but is a question of whether we will have to swallow it".[24] The Doha Ministerial Conference was followed by the Cancun Ministerial Conference, last year, which was marked not only by the tragic suicide of a Korean anti-globalization protester, but by failure of any significant progress, in particular in the agricultural realm. The Doha Agenda deadline of 2005 to reach single undertakings in many of its subjects seems almost unreachable now.

In this context, it is therefore important to note that, while the WTO regime might appear to offer a more stable institutional structure it faces its own challenges and problems generated mainly by the breadth of its membership and subject-issues, the still present developed-developing divide and the anti-globalization movement.

[23] Paul Geitner, WTO Delegates Agree on a New Round of Talks, Toronto Star, Business C1, Nov. 15, 2001, available at Lexis Nexis, Major World Publications.
[24] Helen Cooper & Geoff Winestock, Tough Talkers: Poor Nations Win Gains in Global Trade Deal, as U.S. Compromises, Wall St. J., Nov. 15, 2001, at A1,A12.

This gives rise to two important reasons that support the added value of NAFTA for Canada's international trade relations with the U.S. Strategic negotiation, deal-making and conflict resolution is of prime importance for Canada when dealing with the power and relevance of the U.S. for Canadian international economic relations. Strategizing is enhanced by the existence of more than one institutional and rule-based frameworks. In that regard, the OECD, the G-7, APEC, and the FTAA negotiation talks are to some extent other forums where Canada can strike arrangements, form alliances, compromise, dissent and raise it stakes strategically regarding its relations with the U.S. Among these possible forums NAFTA and the WTO are the most sophisticated and stronger rule-based regimes available for Canada to conduct its international trade relations with the U.S. NAFTA simply adds possibilities to strategic deal making and conflict management. It does not secure its success, nor its absence, prevents it. It simply adds to the arsenal of means and tools. In addition, given the specialized and rule-based nature of both regimes, NAFTA can be viewed as a natural complement to WTO providing more flexibility and closeness, along with its symbolic value as the expression of a political economic alliance, with the opportunities and risks this entails for Canada and Mexico.

NAFTA AND WTO DISPUTE SETTLEMENT SYSTEMS

What is their design and what do they cover?

To resolve disputes arising out of the observance, interpretation and application of the NAFTA regime, the Parties crafted five different mechanisms: i) a general dispute settlement mechanism under Chapter Twenty; ii) a dispute settlement mechanism to review national dumping and countervailing duty determinations under Chapter Nineteen; iii) an investor-State dispute settlement mechanism for potential violations of the investment disciplines under Chapter Eleven; iv) a dispute settlement mechanism for persistent patterns of violations of domestic environmental law under the North American Agreement on Environmental Cooperation (NAAEC), and; v) a mechanism for persistent patterns of violations of certain aspects of domestic labour law under the North American Agreement on Labour Cooperation (NAALC). In addition, Chapter Fourteen provides some special rules that modify in part the general dispute resolution mechanism and the investor-State arbitration for disputes involving financial services under the Treaty. A slightly modified procedure is established for investment claims under NAFTA involving a fiscal measure by one of the Parties. Section 3 of this Report

focuses on Chapter 20, 19 and 11 given that the Parties have not submitted any dispute to the Environmental and Labour Side Agreements.

The Parties can invoke Chapter Twenty regarding any conflict on the interpretation or application of the Treaty, except for matters covered by Chapter Nineteen antidumping and countervailing determinations review system. Chapter Twenty is not applicable either to disputes arising out of the NAAEC or NAALC that constitute actually separate international agreements.

The mechanism under Chapter Twenty consists of a conciliatory phase of consultations between the Parties in conflict followed by the establishment of a five member panel in case the conflict is not resolved. The panel will eventually issue a final report with determinations and recommendations. The Parties shall then agree on a resolution that shall normally conform to the panel report. In case no agreement is reached within thirty days of the publication of the final report, the complaining Party is allowed to suspend benefits under the Treaty of equivalent effect to the non-compliance. Chapter Twenty is based on its predecessor Chapter Eighteen of the CUFTA.

Chapter Nineteen is formally initiated by a Party at the request of a NAFTA importer or exporter affected by an antidumping or countervailing determination. In practice, the complaint by the exporter or importer has been enough to initiate Chapter Nineteen panel review proceedings. Chapter Nineteen establishes a bi-national panel process to review whether the antidumping or countervailing determination complained of was issued in conformity with the unfair trade remedies law of the Party. In this respect Chapter Nineteen is really an alternative to domestic judicial review concerning the government's agency trade remedy determination. The panel is composed of five members chosen by the Parties out of a roster list of panellists. Three members would be nationals of one Party and two members would be nationals of the other Party, alternating the nationality majority from one dispute to the other. The panel will eventually issue a decision that upholds the antidumping or countervailing determination or remand it back to the authority for action not inconsistent with the panel's decision. The same panel can review whether the authority's new determination is in conformity with the panel decision. Under limited circumstances, such as that of a panellist gross misconduct, a panel's departure of a fundamental procedural rule, or a panel manifestly exceeding its powers, competence or jurisdiction, a Party may require the establishment of an extraordinary challenge committee (EEC) to review a panel proceeding.

The Chapter Eleven dispute settlement mechanism provides the opportunity for investors of a Party investing in another NAFTA Party to bring an arbitration claim against that Party for a violation of the investment treatment obligations established in Section A of Chapter Eleven, and for measures concerning state enterprises and monopolies under Articles 1502 and 1503. The investor can bring the claim on her own behalf or on behalf of

an enterprise on which she has an investment. Investment is broadly defined under NAFTA. The measure complained of by the investor must have caused her injury. When bringing a claim, the investor can currently choose from two set of arbitration rules (ICSID Additional Facilities Arbitration Rules and UNCTAD Arbitration Rules). If Canada and Mexico ever become members of ICSID, the ICSID Convention could then be used by an investor for disputes where the Party of the investor and the other Party are both parties to the ICSID Convention. Under any of the rules chosen, Arbitral Tribunals would be comprised of three arbitrators, one chosen by each disputing party, and the third one chosen by agreement, or by a third institution in case of disagreement. The decision of the Arbitral Tribunal is obligatory for the Parties and is subject to challenge and enforcement as any other international arbitral award under the New York Convention. This means the award can be nullified or its enforcement opposed under the domestic tribunals either of the site of the arbitration or the site of enforcement correspondingly.

The NAAEC and the NAALC, the environmental and labour side agreements, establish each mechanisms to, on one hand, generate public reports and information in connection with the domestic enforcement of environmental and labour law, and on the other, to address through a dispute settlement mechanism a Party's claim that another has incurred in a persistent pattern of violations of its domestic environmental or labour law. The publicity procedures can be initiated under the environmental side agreement by a written submission of a non-governmental organization or person, and in the case of the labour side agreement technically at the initiative of one of the National Administrative Office established by each Party pursuant to the Agreement. Dispute settlement mechanisms to address a persistent pattern of violations to domestic law can only be initiated by a NAFTA Party. In the case of the labour side agreement a panel for that purpose can only be established for a claim that a Party has persistently breached its occupational safety and health, child labour or minimum wage technical labour standards.

In contrast to NAFTA, the WTO has one general mechanism for the resolution of disputes: the Dispute Settlement Understanding (DSU). The DSU applies to all disputes brought after 1995 under any of the WTO Agreements, including the DSU itself. The multilateral and plurilateral agreements may contain special or additional rules superseding those of the DSU for matters arising under those agreements. For all other purposes the rules of the DSU apply. For the plurilateral agreements only, the Parties to those agreements have decided the way in which the DSU applies. An important feature of the DSB is that in order to reject the adoption of a panel report, contrary to what happened under the GATT, all WTO Members in the DSB must agree to reject it by consensus. This has given rise to the automatic adoption of all panel reports and has addressed a significant drawback of GATT where the

opposition of one GATT Party could block the adoption of a panel decision. The panels are ad hoc panels conformed for the resolution of the particular dispute before them. The WTO has an indicative list of panellists but is never used. Another relevant feature of the DSU is the establishment of an appellate procedure and of a permanent Appellate Body, conformed of seven independent experts. Appeals are heard by a three member panel drawn from the Appellate Body. This appellate proceeding contributes to ensure uniform interpretation of Uruguay Round Agreements. Panels and the Appellate Body either confirm or reject that a government's measure is inconsistent with the Uruguay Round Agreements, and in case it is inconsistent, make recommendations to that government to bring the measure into conformity.

If a Member fails to comply with a panel or Appellate Body recommendation, it must negotiate with the complaining party(ies) at its request mutually satisfactory compensation. Compensation however is rare as it must be offered not only to the winning parties to the dispute but to all WTO Members in the form of tariff concessions or other measure lifting trade barriers. If no agreement is reached however, the complaining party(ies) can request authorization to the DSB to retaliate through the suspension of concessions. As in the case of the adoption of panel decisions, the authorization to retaliate is automatically granted unless the WTO Members unanimously reject it. The suspension of concessions, having the character of a counter-measure under international law, must be equivalent to the level of nullification or impairment caused by the WTO breach. Retaliation through the suspension of concessions have been however infrequently invoked and used, though some trade specialists have noted that in those cases the end results have not been favourable to the trade system as a whole.[25]

THE MECHANISMS' RECORD

NAFTA CHAPTER TWENTY

Canada and the U.S. have the strongest trade relation in the world. Add to that Mexico, U.S. politics, and a dispute settlement mechanism, and you might expect the recurrent launching of proceedings. Though conflict

[25] In the first six years of the DSB only in two disputes, *European Communities--Regime for the Importation, Sale and Distribution of Bananas* and *European Communities--Measures Concerning Meat and Meat Products (Hormones)*, Members recurred to the suspension of concessions. *See* Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 A.J.I.L. 792 (2001). Pauwelyn notes that in the first five years, Members had invoked authorization to retaliate in five of the 30 panel decisions adopted, more times than in the whole pre-WTO GATT years. Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules Are Rules--TOWARD a More Collective Approach*, 94 A.J.I.L. 335 (2000).

constitutes evidence of a vigorous trading relationship, the absence of formal dispute settlement does not necessarily mean that conflict is not being addressed and resolved.

Indeed Canada has only participated as a defendant disputing party in the first Chapter Twenty panel proceeding (U.S.-origin agricultural products).[26] In less than half of the time that NAFTA has been in force, Canada recurred to the general dispute proceedings under CUFTA three times as a claimant.

The scarcity of Chapter Twenty formal panel proceedings can respond simply to the fact that in general the NAFTA rights, obligations and commitments have been successfully implemented, interpreted and observed to the satisfaction of the Parties. In addition, there is evidence that the Mechanism has also played a preventive and deterrent effect. A number of conflicts have been resolved during informal and formal consultations prior to the establishment of a panel. This is shown in a forthcoming collective book by Professors Vega, Winham, Mayer and the author on NAFTA dispute resolution, and in this respect further supports other works that have pointed out to the deterrent effect at work either by the availability of retaliation or simply by virtue of membership an institutional legal framework, with recourse to dispute resolution mechanisms.[27] It is also relevant to note that NAFTA continued and created respectively specialized mechanisms to address conflict derived of the application of unfair trade remedies laws, and for the treatment of foreign investors, including financial services. The much more frequent recourse to these other mechanisms indicate that these areas are a source of more conflict than the implementation, interpretation and observance of the rest of the Agreement covered by Chapter Twenty. Unfair trade remedies law, in particular in the U.S., have frequently been triggered as a protectionist measure by U.S. industries and interest groups and involve market access issues relevant to Canadian and Mexican foreign trade policy *vis a vis* the U.S. The fact that the majority of claims Canada has brought to the WTO consist challenges to either the application of AD/CVD law or to the legislation of AD/CVD law by the U.S. further confirm this. In addition this mechanism, and that of the investor-State arbitration can be triggered by private parties and is intentionally less conducive to State to State preventive and negotiated solutions.

Up to August 2003, 87 antidumping/countervailing panel proceedings were initiated under NAFTA Chapter 19, and 23 investor-State arbitration intention notices filed under Chapter Eleven. Under Chapter Nineteen, 51% of panel reviews initiated involved Canadian and U.S. parties, followed by panels involving Mexican and U.S. parties representing 42% of them. Under Chapter

[26] The other two disputes involved Mexico and the United States (broom corn brooms and cross-border trucking services).

[27] *See e.g.,* Bruce A. Blonigen and Chad P. Brown, *Antidumping and Retaliation Threats*, National Bureau of Economic Research Working Paper #8576 (2001).

Eleven, in 52% of the notices of intention filed up to September 2003 Canada and the U.S. or their investors were the parties. U.S. and Mexico or their investors were the parties in 43%. Canada-Mexico disputes have been almost inexistent revealing the centrality of the U.S. for trade and investment flows and market access issues.

The lack of implementation of certain Chapter Twenty provisions has weakened the mechanism in terms that a Party, in particular the United States, can delay the formation of a panel blocking the appointment of panellists. According to NAFTA, the Parties had to establish a roster of panellists by the date of entry into force of the treaty (January 1, 1994). No roster has been established up to the writing of this report, although according to Mexican trade officials an initial list of five panellists from each country has been exchanged and is in the process of approval. This has not yet been made public.

Thus currently the Parties under Article 2011 can challenge panellists appointed by the other disputing Party that are not within the roster, and this has been used by the United States in at least two disputes brought by Mexico to delay the formation of a panel. In *Cross-Border Trucking Services* Mexico requested the establishment of a panel in September 1998, but the panel was not established until February 2, 2000. In the case of the Mexican sugar export quota to the United States controversy, Mexico formally requested a panel in August of 2000, and the United States refused to accept the request. Up to the writing of this report a panel has not been established.

It is true that the two disputes involved problems generated since the negotiation and approval of NAFTA. It is uncertain whether the sole existence of a roster or a revamp of the procedural rules of the dispute settlement mechanism could improve the prospects of a faster resolution. In this regard it is important to note that panel-formation delays is not an exclusive problem of Chapter 20, playing also a role, as a strategic tool, in Chapter 19 and WTO disputes.[28]

In cases involving issues ranging from trade in goods, trade in services, antidumping and countervailing duties, among others, WTO DSB can be used as an alternative or parallel dispute resolution forum to NAFTA mechanisms. The choice of WTO or NAFTA Chapter 20 as alternative forums has been less frequent. An example of this was the U.S. claim against Canada in the WTO on certain Canadian measures on split-run magazines. The WTO was more attractive to the U.S. in order to signal a precedent to other industrial and cultural-protecting nations on the limits the international trading system contemplates in connection with these types of policies.

[28] WTO, documents on the current negotiations over DSU reform address the problem of panel formation delaying as a pernicious practice. See also Debra Steger, WTO Adjudication: The Next Step, Paper submitted for the Symposium on Reform of the WTO Dispute Settlement System at the College of Europe, Bruges (5 – 6 December 2003).

However, the most interesting effect is that of NAFTA and WTO dispute settlement mechanisms in combination. This has been recurrently used in AD/CVD challenges against the U.S. and even by the U.S. against its NAFTA Parties, such as in the case of antidumping duties imposed by Mexico to U.S. imports of high fructose corn syrup. The effect of this combination is further developed in the next section in particular regarding Canada-U.S. unfair trade remedies disputes.

Controlling for unfair trade remedies and U.S. politics

According to the WTO, Canada makes use of AD/CVD investigations on a non-discriminatory basis.[29] In late 2002, Canada had in place 91 antidumping measures. Approximately one third of them concerned imports from three major trading partners: 12 related to imports from the U.S., 15 to imports from the EU, and 9 to imports from China. Seventy percent of the total duties imposed concerned steel products.

In comparison, as of June 2003, the U.S. had 271 antidumping measures in effect, but only 2.9% of them related to imports from Canada.[30] EU imports accounted for 19.7% of U.S. AD measures in effect and China imports for 16.8%. According to U.S. data, imports subject to AD and CVD measures in 2001 accounted for less than 0.5% of total imports. More than half of the U.S. AD orders in effect in June 2003 concerned steel products. Agricultural, forest and food products represented 7.5% of total AD orders in effect.

Both Canada, the original crafter of AD remedies, and the U.S., the first country to legislate AD law, have employed unfair trade remedies as a component of their trade policies for most of the XXth. century. However, since the nineteen-eighties, Canada's concern with the application of U.S. AD and CVD remedies grew in response to U.S. amendments introduced in part to incorporate the GATT Tokyo Round agreements. The U.S. amendments established a more transparent domestic AD and CVD system and easier to invoke by U.S. producers. Consequently U.S. industry began to make frequent use of AD and CVD investigation petitions. For example, while the U.S. issued 41 AD/CVD determinations between 1934 and 1974 (approximately an average of one per year), in the six years after 1980 it conducted 11 AD and CVD investigations against Canada only (Michael Hart 1989 and J. Michael Finger 1987).[31]

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[29] *Trade Policy Review*, supra note 17, at 278.

[30] United States, 2004, *WTO Trade Policy Review*, at 50.

[31] Since 1980 U.S. authorities have conducted well over thousand AD and CVD investigations, including 60 investigations against Canadian exports. As of 2002, only ten orders were in effect. Patrick Macrory, *NAFTA Chapter 19: A successful Experiment in International Trade Dispute Resolution*, C.D. Howe Institute Commentary No. 168 (The Border Papers, September 2002) at 3.

Therefore this issue became of prime concern for Canada during the negotiations of CUFTA. It was a matter of market access given the U.S. industries trend to make use of U.S. AD/CVD remedies law as a protective device. In CUFTA negotiations, Canada sought first the elimination of the application of AD/CVD law, and then the establishment of a common AD/CVD system for the free trade area, but the U.S. rejected the proposals.[32] Instead, the two countries reached a last hour agreement to work towards developing a regional system, but agreed to continue applying their own AD/CVD laws. In addition, the CUFTA Parties established what was defined as a transitory bi-national panel review system that could be invoked as an alternative to domestic judicial review. Though the two countries never made any progress towards a common system, the bi-national panel review system was constantly used with good results for Canadian concerns that U.S. domestic judicial review was too deferential to the determinations of U.S. investigating authorities on AD/CVD proceedings.

In the four years of CUFTA experience (1989-1993), 28 bi-national panels were established to review U.S. investigating authorities AD/CVD determinations and 19 to review Canadian determinations. Out of the 28 U.S. determinations reviewed, 9 panels were concluded without reaching a panel decision, but the results of the other 19 panel proceedings were to remand the determinations in 12 occasions and to confirm them in 7. In contrast, out of the 11 panel decisions on Canadian AD/CVD determinations, the panels confirmed the determinations in 7 proceedings and remanded in only 4. A decision to remand meant that the panel had found that the investigating authority's determination was not in conformity, in part or on its entirety, with that Party's domestic AD/CVD law. This evidence supports the conclusion that Canada's objective of subjecting U.S. authorities´ determinations to a stricter review was met.

Based on this experience, Canada made the extension of the bi-national panel review system a necessary negotiating objective of NAFTA and Mexico joined the strategy. Though the U.S. government was hesitant given the pressure of the U.S. Congress, it was only able to introduce some minor amendments to the process, and a long list of obligations for Mexico concerning revamping its domestic AD/CVD law.

The experience of the bi-national panel system under NAFTA has further confirmed its relevance as an effective mechanism for Canadian interests. The U.S. again is the leading country in terms of panel reviews with 56 out of the 87 panels established under NAFTA as of November 2003. Not counting the 20 proceedings that were discontinued, U.S. determinations have been remanded

[32] Though the U.S. rejected the idea of a regional AD and CVD system, Canada and Chile have just moved in their recently negotiated FTA to waive the application of their AD and CVD law to one another. With this, they have joined others, like Australia and New Zealand, or the EU countries, that have taken steps in conformity with economic theory holding that unfair trade remedies do not make sense in a free trade area. No unfair trade remedies system exist within a State.

in 13 occasions and confirmed in 9. Following a similar trend to that under CUFTA, Canadian determination have been confirmed in 11 occasions and remanded only in 2, with 6 panel proceedings discontinued. Approximately two thirds of the cases against the U.S. have resulted in a remand, while approximately 80% of cases against Canada upheld the AD/CVD determinations. [33]

A significant feature of the panel system is its use by a limited number of industries, and mostly by competitors in manufacturer non-technological sectors. For example, steel and cement panel disputes make up 29 of the 87 total NAFTA panels established up to November 2003 (Gustavo Vega, et al., 2004). In addition, AD determinations, and not CVD determinations, constitute the most frequently challenged Chapter 19 determinations. As of May 2002, only five AD U.S. determinations, and no CVD determination had been upheld by Chapter 19 panel proceedings. Many remands have resulted in the reduction of duties and in some of them in their complete elimination.[34]The evidence shows that Chapter 19 bi-national panel review system continues to meet Canadian interest of subjecting U.S. determinations to a less-deferential review.

This has come not without criticism by the U.S. government and interest group confirming Canada's expectations on the working of the mechanism. The U.S. has charged bi-national panels with misapplying the standard of review. Bi-national panels must review the determinations using the same standard of review a national judicial authority uses and can only remand a determination when the authority made its decision not in conformity with the evidentiary administrative record or made a decision that was not reasonable under its law.

The U.S. has brought three extraordinary challenge procedures under CUFTA and two under NAFTA to challenge bi-national panel decisions. The procedure consists of the establishment of an extraordinary challenge committee of three panellists (federal judges or former judges[35]) to review a decision of a NAFTA bi-national panel on limited grounds, including excess of powers through the misapplication of the standard of review, gross misconduct or conflict of interest of a panellist.

The U.S. alleged that the panels exceeded their competence by erroneously applying the required U.S. standard of review. Four extraordinary challenge procedures have been completed (one is pending), and all of them

[33] *See* also Gustavo Vega and Gilbert Winham, *The Role of NAFTA Dispute Settlement in the Management of Canadian, Mexican and U.S. Trade and Investment Relations*, 28 Ohio's N.U.L. Rev 651 (2002). Perhaps the most interesting numbers are those for Mexican AD and CVD determinations reviewed: only 1 has been confirmed and 6 have been remanded (4 have been discontinued).

[34] Macrory, *supra* note 31, at 6.

[35] They are chosen from a 15 member roster appointed by the parties. Mexico has not appointed any member to its roster.

have upheld the bi-national panel's decision. Three have reached their decision unanimously.

The efficacy of Chapter Nineteen, along with WTO DSB, has contributed to limiting Canada's exports overall exposure to U.S. AD and CVD determinations.[36] This is clear just considering the volume of U.S.-Canada trade and the relatively small percentage of AD determinations in effect for Canadian goods in contrast to the percentage of AD determinations in effect for EU goods.

In addition, and in many cases concurrently, Canada has brought to the WTO DSB 13 complaints against the U.S. Most of them concern issues regarding the conformity of U.S. AD and CVD law, -and its application-, with WTO obligations. Five of these complaints derive from the latest U.S. AD and CVD investigations regarding softwood lumber from Canada initiated by the U.S. authorities after the expiry of the 1996 Canada-U.S. Softwood Lumber Agreement in March 2001.

[36] The mechanism has been more problematic concerning Mexico. Difficulties appointing panellists, conflicts of interest and difficulties in appointing extraordinary challenge committees in disputes with the U.S. has delayed proceedings. *See* Vega (2004).

C A N A D A A N D T H E W T O D S B

		CLAIMANT			RESPONDENT		
		AGAINST US	**AGAINST OTHERS**		**US CLAIM**		**OTHERS**
TAXES ON ALCOHOLIC BEVERAGES			1	JAP			
IMPORTATION OF SALMON			1	AUS			
PERIODICALS					1		
AIRCRAFT EXPORT FINANCING			1	BRA			
LIVESTOCK AND MEAT HORMONES			1	EC			
EXPORT OF CIVILIAN AIRCRAFT						BRA	1
MILK AND DIARY PRODUCTS					1		
PATENT PROTECTION PHARMACEUTICAL PRODUCTS						EC	1
ASBESTOS AND ASBESTOS PRODUCTS			1	EC			
AUTOMOTIVE INDUSTRY (AUTO PACT)						JAP EC	1
CANADA – PATENT PROTECTION TERM					1		
EXPORT RESTRAINTS AS SUBSIDIES		1					
CONTINUED DUMPING AND SUBSIDY OFFSET ACT		1					
SECTION 129(C)(1)		1					
EXPORT CREDITS AND LOAN GUARANTEES FOR REGIONAL AIRCRAFT						BRA	1
SOFTWOOD LUMBER PRELIMINARY DET.		1					
SUBTOTALS							
TOTAL DISPUTES	16						
FINAL DUMPING DETERMINATION SOFTWOOD LUMBER		1					
WHEAT BOARD AND IMPORTED GRAINS					1		
ITC IN SOFTWOOD LUMBER		1					
APPROVAL AND MARKETING OF BIOTECH PRODUCTS			1	EC			
FINAL CVD SOFTWOOD LUMBER		1					
IMPORT OF CATTLE, SWINE AND GRAIN		1					
CVD LIVE CATTLE		1					
REVIEWS OF CVD SOFTWOOD		1					
ITC HARD RED SPRING WHEAT		1					
PROVISIONAL AD SOFTWOOD		1					
RECLASSIFICATION SUGAR SYRUP		1	6		4	4	
SUBTOTALS		13					

In addition to the positive effects of integration and increased intra-company trade, the combination of NAFTA Chapter Nineteen and WTO proceedings provide Canada and Canadian producers a combination of remedies that, in addition to zealous and competent advocacy, and a less complex and more transparent export trade regime than that of the EU or China. It is important to note that NAFTA Chapter Nineteen and WTO DSB complement each other. The latter applies to WTO obligations adequacy issues and the former to U.S. law conformity issues. The Parties have recurred to the launching of both WTO and NAFTA Chapter Nineteen proceedings (*e.g.*, the sugar and softwood lumber disputes). Chapter Nineteen provides generally a faster procedure that can be initiated by the industries The WTO Subsidies Agreement in particular have constrained further the definition of subsidy and of specifity, which positively affects the effectiveness of both WTO and NAFTA Chapter 19 procedures. In concluding, Canada does better overall than other U.S. trading partners in terms of AD and CV duties and their restrictive access market effects. However it is also necessary to do a detailed analysis of the softwood lumber controversy, given its sensitivity and relevance for Canada.

Softwood Lumber

The history of the conflicts between Canada and the U.S. in connection with the lumber industry and trade dates back as far as the 1820s. Lumber and in particular Canadian lumber has always played an important role in the North American construction industry. An Ohio Congressman noted back in 1853 in the context of the Canada-U.S. Reciprocity Treaty discussions that "[t]he British Provinces have almost inexhaustible supplies of pine lumber. This is greatly needed for building purposes in most of the Western Cities and through the Prairie countries of the West immense quantities would be used, could it be freely imported".[37]

It was in the 1980s that the softwood lumber trade with Canada became a deeply politicized issue in the U.S. The deep recession of the late 1970s led to the U.S. government to bail out of a significant number of lumber companies that had entered into long term harvesting contracts. In 1981 a coalition of forest manufacturers issued a report alleging that Canadian lumber imports constituted the second most important cause of lumber industry unemployment in the Pacific Northwest and that their success relied on unfair

[37] Hon. N.S. Townsend, Remarks in the House of Representatives on the bill establishing free trade with the British North American Provinces, Washington, D.C. (24 Feb. 1853), quoted by F.L.C. Reed, The Timber Supply Context of the Lumber War of 1986, Starker Lecture Series, Oregon State University, Corvallis (6 Nov. 1986).

trade practices. Thus initiated a campaign that led to a now twenty years' old Canada-U.S. trade dispute involving four U.S. AD and CVD investigations, 5 binational panels and one extraordinary challenge committee under CUFTA or NAFTA, 8 GATT or WTO proceedings, the negotiation and signature of two softwood lumber agreements, and one U.S. constitutional challenge.

The irony is that it all started with the U.S. Department of Commerce finding in the first CVD investigation in 1983 that the export and sale of Canadian softwood lumber did not benefit of an unfair subsidy. The United States Coalition for Fair Canadian Lumber Imports (hereinafter "the Coalition), an association of lumber producers accounting in 1981 for 20 percent of the U.S. industry production, filed the countervailing duties investigation. Commerce decision rejecting that stumpage pricing (the fees provinces charge for woods harvesting) constituted subsidies, could not predict the dispute that ensued and still continues at the writing of this report.

In 1986 the Coalition seized the political moment created by the announcement of negotiations between Canada and the U.S. on a free trade agreement to step up political pressure in Washington and to petition the initiation of another CVD investigation. Softwood lumber became one of the trade-offs of the free trade negotiation. In October 1986, the U.S. Department of Commerce issued its preliminary determination in a reversal of its 1983 decision.

To solve a dispute that was threatening the CUFTA negotiations, the two countries reached a Memorandum of Understanding. Canada agreed to impose a 15% export tax on softwood lumber without prejudice to the legal situation of Canadian softwood lumber exports under domestic or international law. Canada withdrew the complaint it had submitted under GATT and the complainants withdrew their CVD investigation petition.

In September 1991, Canada moved to terminate the Memorandum of Understanding according to the terms of the agreement. The decision came after major lumber producing provinces raised stumpage fees and a new accounting system was employed to show that the provinces were recovering more than their costs of timber sales.

The Canadian decision was not well received in Washington. In October, the U.S. government announced the initiation of a third CVD investigation. This time the U.S. administration self-initiated the investigation in response to Canada's unilateral termination of the export tax and to the lack of information on the replacement value of provincial stumpage increases. Simultaneously the USTR initiated an investigation to define the termination of the MOU as an unreasonable restriction to U.S. commerce that required expeditious action, including the imposition of interim bonding requirements on Canadian imports. Canada moved to challenge the measures under GATT.

The Canadian Federal Government, the Provinces and the industry embarked in a concerted effort to challenge the U.S. measures. The united approach was fundamental, in the words of Apsey and Thomas, for the later success in the binational panel review under the CUFTA.[38] The economic evidence showed that the stumpage issue did not have an effect on Canada's comparative advantage in the sale of lumber in the U.S. and therefore could not be regarded as a subsidy under U.S. law. Although the U.S. DOC dismissed the evidence it proved to be compelling before the CUFTA binational panel established later.

The DOC final determination found a weighted average subsidy of 6.51%. The International Trade Commission followed in July 1992 with a determination of material injury. These measures were the subject of two CUFTA binational panels.

The GATT panel issued its report in February 1993 right into the CUFTA binational panel proceeding. The GATT Panel found the imposition of a bonding requirement prior to a preliminary determination inconsistent with GATT, but not the U.S. DOC self-initiation of the investigation on the basis of "special circumstances".

The CUFTA binational panel issued its decision in May 1993 and unanimously remanded the U.S. Commerce subsidies determination and found that the U.S. authority had ignored crucial empirical evidence offered by the Canadians. The only part of the decision that was not unanimous was the question of log export controls. Two panellists dissented on whether log export controls could be considered countervailable subsidies. The binational panel established to review the ITC injury determination issued its decision soon thereafter and found that the ITC conclusions were not supported by substantial evidence and remanded the final determination back to the ITC for reconsideration.

The U.S. DOC on remand not only criticized the binational panel decision but in recalculating the subsidy doubled the CVD to 11.54%. The ITC also confirmed its injury finding on remand. The binational panels then reviewed the determinations on remand and remanded them back to the U.S. authorities for reconsideration. This time the two U.S. panellists in the panel reviewing the DOC determination dissented and reversed themselves on the argument that a recent Federal Circuit Court decision altered the standard of review.[39] The U.S. panellists reviewing the ITC determination in contrast considered that the Court decision did not alter the standard of review. In that panel the U.S. panellists constituted the majority.

The Coalition used the dissent of the two U.S. panellists in the subsidies second remand to politicize the panel process. Allegations emerged that lawyers trained in another legal system could not grasp the subtleties of U.S.

[38] Apsey and Thomas, at 66.

[39] *Daewoo Electronic Co. Ltd. et al v. United States*, 1993 U.S. App. LEXIS 25042 (September 30, 1993).

law and that two Canadian panellists had materially breached conflict of interest disclosure obligations.

The U.S. government requested the establishment of an Extraordinary Challenge Committee. The U.S. argued that the subsidies panel had misapplied U.S. law and that the two Canadian panellists were in conflict of interest. The Committee upheld the decision of the panel and the panellists' conduct in discharging their conflict of interest disclosure obligations. However the Committee's decision split along national lines with the two Canadian members voting for the majority and the U.S. member dissenting. The U.S. judge dissent included remarks such as the following:

> *I submit that the well intentioned system of Extraordinary Challenge Committees, as a substitute for the standard appellate review under United States law has failed. It has failed both at the Panel and the committee level to apply United States law, substantively, and most clearly in regard to the United States standard of review of administrative agency actions…*
>
> *All of this has occurred in the operation of this innovative scheme of appellate review between Canada and the United States, two common law countries with similar legal traditions and antecedents. Now we have Mexico as a third member of NAFTA, and in the near future perhaps Chile and other Ibero-American countries. Mexico has no legal system or traditions in common with the United States whatsoever; it is proudly a Civil Law country. It has no mechanism and no concept of judicial review of administrative agency action; it has only the much abused and discredited "amparo", or flat prohibition against an official act being carried out. If Canadians on the Panels and ECCs have failed – as in my judgement here they have – to comprehend the United States standard of judicial review of administrative agency action, what can we expect from lawyers and judges schooled in the Civil Law?...*

The dissenting member, Judge Wilkey, went on to question the constitutionality of the panel review process and the problem identified in the free trade negotiations whether litigants could be deprived of a right to appeal to U.S. Constitutional Article III judges, including the possibility of seeking certiorari in the Supreme Court. The Coalition grasped on Judge Wilkey's comments and moved to challenge the constitutionality of the Softwood Lumber decisions as well as the panel system itself before the U.S. federal courts.

Finally, in August 1994, the Department of Commerce revoked the CVD order in response to the panel and ECC proceedings. Though Commerce decided then to refund only duties collected after the panel's final decision, Canada eventually convinced the U.S. authorities to honour their CUFTA

commitments and refund all entries made after the U.S. authority's CVD determination.

The Coalition did not stop here however. Taking advantage of the opportunity opened by the U.S. Congress drafting of the bill to implement the recently concluded WTO Agreements, the Coalition strongly lobbied U.S. Congress to clarify U.S. CVD law. The clarifications introduced through the implementing statute and legislative history addressed two of the Softwood Lumber CUFTA panel key findings. Congress thus prepared the way for the continuation of the dispute.

Canada and the U.S. embarked in late 1994 into consultations to address the range of issues affecting trade in softwood lumber and obstacles identified by industry in either country.[40] The costs of litigating had been very high and, in light of the Congressional clarifications, the two countries sought to avoid another round of softwood lumber litigation. The Coalition decided to withdraw the constitutional challenge and explained its decision in terms of contributing to the success of the consultations. It is also possible that the Coalition saw this as an opportunity to withdraw a constitutional challenge that had not a good chance of succeeding and that had provoked the antagonism of the administration given the separation of powers issues it raised.

In reflecting on the lessons learned in their involvement in the softwood lumber dispute up to this point, Mr. T.M. Apsey of the Canadian Forest Industries Council and J.C. Thomas of the Canadian law firm of Thomas and Partners reflected in a yet unpublished document:

> *"… [I]f a trade dispute can be escalated high enough in the U.S. political system, the U.S. industry can get a great tactical advantage over the foreign industry. If a climate of political hostility and legislative threats can be created, an administration can be pressured into taking action against imports. After all, "foreigners don't vote". In this respect, it is important to note that it does not take the whole of the U.S. industry or even a majority of it, to cause problems for Canada…*
>
> *Without expeditious and impartial dispute settlement such as that exemplified by the two Softwood Lumber panels, Canada's trading interests cannot be protected… We believe strongly that a free trade agreement with an extremely litigious country where special interest politics dominate cannot protect the smaller party's interests without effective dispute settlement".*

The consultative process eventually led to the negotiation of the Canada-U.S. Softwood Lumber Agreement that entered into force on May 29,

[40] Elements of a Consultative Process.

1996. The Agreement's duration was of five years starting on April 1, 1996. The Agreement established a quota-fee system for softwood lumber exports originating in four provinces (British Columbia, Alberta, Ontario and Quebec). Exports up to a specific volume entered fee-free and thereafter, volumes surpassing this and a higher benchmark had to pay a fee of approximately $50 and $100 USD respectively per thousand board feet. Canada established an implementation system to allocate export quotas and collect the fees from softwood lumber exporters. In exchange, the U.S. agreed not to self-initiate an AD or CVD investigation on softwood lumber imports from Canada and to dismiss any petition for such an investigation.

The Softwood Lumber Agreement worked effectively to solve the dispute during its duration. Ironically, Canada was not able to avert litigation during the time the agreement was in effect. U.S. investors in the softwood lumber industry filed investment claims under NAFTA Chapter Eleven challenging the Canadian government's administration of the fee-quota system under the Softwood Lumber Agreement. The Pope & Talbot claim advanced to the establishment of an Arbitral Tribunal. The NAFTA Tribunal dismissed the claim in most of its substantive parts but condemned Canada to the payment of damages for an administrative review incident where government officials "harassed" Pope & Talbot following a company's challenge to the allocation of quotas. The damages award not reaching $500,000 nevertheless involved complex and costly arbitration proceedings.

The Softwood Lumber Agreement expired in March 2001. A month later the Coalition filed AD and CVD investigation petitions. The U.S. Department of Commerce issued its final AD and CVD determinations a year later with findings of 9.67% dumping margins and a 19.34% country-wide subsidy of lumber exports. The Canadian government and exporters initiated NAFTA binational panel proceedings to challenge the Department of Commerce determinations, as well as the International Trade Commission determination of threat of injury. The three NAFTA panels have issued their decision remanding the determinations back to the U.S. investigating authorities for reconsideration. The three NAFTA proceedings are still active as the NAFTA binational panels review the decisions of the U.S. authorities on remand.

Simultaneously Canada moved to challenge the U.S. measures on this new round of the softwood lumber dispute before the WTO. WTO proceedings have already resulted in findings that Canadian export restraints do not constitute countervailable subsidies, and that the U.S. preliminary determination on subsidies was WTO inconsistent. In January of this year the WTO Appellate Body issued its decision on the final countervailing duty determination challenge. Panel reports have been recently issued on the challenges of the final antidumping investigation and the ITC determination on injury. It is still too early to evaluate the success of the Canadian challenges. So far the WTO decisions appear as a combination of partial wins and mix results for Canada.

The past experience has shown that the combination of NAFTA and WTO proceedings can contribute at least to negotiated, albeit so far temporary solutions. Because of their diverse design and scope even in this complex and politicized dispute it is an added value to have both NAFTA and WTO mechanisms available. However able diplomacy and political strategy is also required to temper the complex relation of economic interest groups and the U.S. political system.

The growth of investment and of investment conflict dispute settlement

As of 2002, the U.S. accounted for 46.7% of the total stock of Canadian investment abroad, followed by Great Britain with 10.5%. The U.S. is also the principal source of FDI in Canada accounting for 64.2% of the total foreign investment in 2002. France and the U.K come second and third with 9.2% and 7.5% correspondingly.[41] According to the Canadian government approximately 63% of Canadian foreign direct investment (FDI) abroad and 72% of FDI in Canada are covered by "NAFTA-type" investment protection rules.[42]

Therefore not only is Canada currently a major source and receiver of foreign investment, but important proportions of such investment is protected by foreign investment treatment standards established in NAFTA Chapter Eleven and other similar applicable instruments. Just considering U.S. investment in Canada and Canadian investment in the U.S., NAFTA Chapter Eleven is applicable to approximately half of all Canadian investment outflows and inflows.

Perhaps as extended as its applicability is the controversy that surrounds Chapter Eleven since the launching of the first arbitrations. Two major sets of criticism have been levelled against NAFTA Chapter Eleven investor-State arbitration: procedural and substantive criticisms. The procedural ones involve basically a challenge to the secrecy of the proceedings, to the fact that most arbitrations are conducted at the World Bank in Washington, D.C., and that arbitrators are unknown and unaccountable to domestic constituents. Substantiating the procedural criticisms, the substantive ones involve the claim that Chapter Eleven Tribunals can affect and revoke local

[41] Canada Department of Foreign Affairs and International Trade, Fourth Annual Report on Canada's State of Trade (May 2003), at 5, available at http://www.dfait-maeci.gc.ca (last visited March 20, 2004).
[42] This includes NAFTA and other similar treaties containing NAFTA type obligations and protections. Canada, Department of Foreign Affairs and International Trade Response to Federation of Canadian Municipalities Questions Regarding Trade Agreements, <www.fcm.ca/newfcm/Java/dfaitresponse.htm> (last visited January 2, 2004).

decisions and threaten environmental and other social policies at the local level, and "all to protect the rights of foreign investors...".[43]

As explained above, NAFTA Chapter Eleven provides foreign investors of a NAFTA Party the right to initiate arbitration against another NAFTA Party for a claim that the NAFTA Party has taken a measure related to the investor or its investment in violation of the investment treatment obligations of NAFTA Chapter Eleven, and damages have therefore been caused. The NAFTA investment arbitration is really an extraordinary procedure in the sense that it allows the substitution of a private party, the investor, for a State, for arbitration purposes, in connection with international treaty obligations adopted at a State to State level.

The fact that a foreign investor can have a remedy not otherwise available to a national, and the fact that the claim involves questions regarding whether local or national government decisions, and the acts of local or national government officials, give rise to a breach of NAFTA investment protections and to the payment of damages to a foreign investor, has been used by NGOs, the media, and anti-globalization organizations, among others, to exemplify the claim that globalization transfers sovereignty, local autonomy, and domestic decision-making power to international decision making bodies to the advantage of international corporations.

NAFTA Chapter Eleven was put in the negotiating table by the U.S. as a necessary component of the free trade deal. The U.S. primary concern was Mexico and its history of expropriations, nationalizations and public interventionism. NAFTA was considered by both the U.S. and Mexico a crowning tool of the liberalization and privatization reforms of the Salinas administration (1988-1994). Therefore Chapter Eleven served as a guarantee to U.S. investors that Mexico was serious about its commitment to create a stable and attractive investment environment. Mexico was indeed in need of foreign investment and welcomed Chapter Eleven as an additional device to promote it. Canada did not have much choice and did not want to send a wrong signal either and consequently Chapter Eleven, including its investor-State arbitration proceedings, became a novel feature of NAFTA not found as such in its predecessor CUFTA.[44]

The greatest surprise of Chapter Eleven dispute settlement mechanism has been that it has been invoked not only against Mexico, but also against Canada and the own United States. Equally unexpected has been its use not only by large investors, but by medium and even small foreign investors, and the ways these investors have tried to use it to advance novel tantamount to

[43] Anthony de Palma, New York Times (2001).

[44] CUFTA had an investment chapter and Canada agreed to phase out the application of the Foreign Investment Review Act (FIRA) and to limit performance requirements. The national treatment obligation was also an important feature, but there was no need for investor-state arbitration, as there was apparently sufficient confidence in the Canadian legal system to protect U.S. investors' interests.

expropriation claims in the context of federal, democratic and post-modern government systems.

Canada had an unfortunate debut in the NAFTA investor-State arbitration mechanism when it had to settle for US $13 million the first claim brought against it by Ethyl, a U.S. corporation. The claim was brought against the Federal Government for its decision to ban the international and inter-provincial trade of MMT, an ethanol based car-additive. Ethyl Corp. produced MMT in Ontario and distributed it through a subsidiary in all of Canada. The prohibition meant basically that Ethyl had to establish an industrial plant in each Canadian Province in order to continue in business. Ethyl was the only MMT producer and distributor in Canada. The settlement came after Canada lost a jurisdictional objection in the NAFTA arbitration and a panel established under the Canadian Inter-Provincial Free Trade Agreement handed also a contrary decision. It appears that the Canadian Government lacked the safety and environmental hazard evidence to support the measure, which had been taken in response to intense lobbying by the Canadian auto-manufacturing industry.

Notwithstanding the settlement, Ethyl did not raise as much concern as the Metalclad and S.D. Myers cases that followed. Both cases involved claims by U.S. investors in connection with the hazardous waste business.

Metalclad was the first NAFTA investment arbitral award condemning a NAFTA Party to the payment of damages. The Tribunal awarded the U.S. investor approximately US $16 million dollars, including interest, as compensation for the indirect expropriation of the investor's hazardous waste landfill. The award found that the Mexican Municipality's denial of a construction permit, -denied, *inter alia*, on environmental grounds-, to construct a hazardous waste landfill (that the company constructed anyway in reliance on its State and Federal permits), and the Federal Government's inability to secure the opening of the landfill despite the lack of Municipal permits, aggregately constituted actions tantamount to an expropriation requiring the payment of compensation. Not preponderant in the award, but central to the conflict giving rise to the arbitration was the local community's opposition, behind the State and local authorities', to the opening of a hazardous waste landfill, in an agricultural area that produces no industrial waste, and in a site that was contaminated by a previous domestic investor through the dumping of close to 25,000 tones of hazardous waste.

Mexico sought to set aside the award before the courts of the site of the arbitration (Vancouver, Canada). [45] It was then that a fuller exercise of Chapter Eleven transparency was conducted. The Superior Court of British Columbia allowed a petition by the Independent Media Center to webcast live

[45] Eventually the Canadian court nullified in part the award dismissing grounds for expropriation based on the denial of the Municipal construction permit. However, the Court did not nullify the part of the award survived on the basis of another ground: a State Environmental Decree passed by the State Governor and cover

the entire proceeding. A few activists protested outside the Vancouver court. A few months later the case was the subject of a PBS documentary in the Now with Bill Moyers show.[46] The B.C. Court set aside the award in part, but the tantamount to expropriation finding survived on the basis of a state environmental decree that the Arbitral Tribunal mentioned as a non-controlling but additional indirect expropriation measure. The compensation was adjusted downward by about US $1 million to reflect reduced interest accruing from a later expropriation date, and the landfill was turned over to the Mexican government which has assumed responsibility for, the U.S. company left Mexico, no landfill was opened, and remediation of the hazardous waste contamination that remains today at the landfill site is pending.

The claim in S.D. Myers arose from the Canadian government's decision to ban the export of PCB into the U.S. The decision came after S.D. Myers (Canada) Inc., a Canadian Corporation owned by U.S. nationals, secured permits from the U.S. EPA to import PCB for their treatment and destruction in S.D. Myers (U.S.) Ohio waste treatment plants. Canada argued in the arbitration that it banned the export to comply with international environmental law, namely its obligations under the Basel Convention. However, the NAFTA Tribunal found that the measure had had the principal objective of protecting Canadian competitors and that less restrictive measures could have been taken to meet the environmental agreement's objective of developing national hazardous waste treatment capabilities.

The Arbitral Tribunal awarded the U.S. investor US$4.4 millions USD for damages arising out of Canada's breach of the national treatment and international minimum standards of NAFTA Chapter Eleven. Canada, like Mexico in Metalclad, moved to nullify the award before the competent Canadian courts. In January 2004, the Canadian Federal Court dismissed Canada's application.

The Metalclad and S.D. Myers are two of the thirty-two cases that have been initiated under Chapter Eleven. Many of these cases are inactive and have not proceeded to the establishment of an Arbitral Tribunal. NAFTA Chapter Eleven Tribunals have heard and issued awards in nine of these cases: 2 brought against Canada, 4 against Mexico, and 3 against the United States.

The three cases against the U.S. have been dismissed, but the Loewen case might be in part reheard. The largest damages claim is that of Methanex, a Canadian corporation, against the U.S. The case is still pending, although the U.S. won a jurisdictional objection that limited significantly the scope of the claim.

In the case of Canada, the Arbitral Tribunals in both cases have awarded damages to the disputing investor. In the pending UPS case, Canada won a jurisdictional objection that also limits importantly the success of the claim.

[46] *See* http://www.pbs.org/now/politics/tradingdemocracy.html (last visited March 2004).

Mexico has prevailed in two of the cases and has been found responsible of a breach in the other two. Thus NAFTA Tribunals have dismissed four cases without any finding of State responsibility and have found a breach and awarded damages in the other five.

Interestingly the NAFTA Chapter Eleven Tribunals' trend is slightly in favour of the disputing investors. However a more careful look at the awards reveals that NAFTA Tribunals have both dismissed important substantive parts of the claims and awarded damages way below the amount of damages sought by the disputing investors in those cases resolved in favour of the disputing investor. The highest award in damages is Metalclad. The damages awarded represent 16.7% of the damages the disputing investor requested. The highest relation between damages-sought and damages awarded is S.D. Myers. The damages awarded constituted 22% of the damages requested. Pope & Talbot in contrast sought $505 millions USD and the Tribunal rendered damages for only $461,000 USD.

DAMAGES SOUGHT AND AWARDED

	SOUGHT	AWARD	%
CANADA			
ETHYL	201	13	6.4
POPE & TALBOT	505	0.461	-1
S.D. MYERS	20	4.4	22
UPS	160	P	
TOTAL	886	17.861	
MEXICO			
AZINIAN	20	0	0
WASTE MANAGEMENT *	60	0	0
METALCLAD	120	16.7	13
FELDMAN	50	1	2
TOTAL	250	17.7	
UNITED STATES			
LOEWEN	600	0	0
MONDEV	16	0	
METHANEX	970	P	
ADF	90	0	
TOTAL	1676	0	

* This claim was dismissed on jurisdictional grounds. It was been refilled and proceeded to a hearing. The tribunal's decision on the merits is pending.

Four of the nine disputes concluded have been in connection with investments in the waste collection and landfill industry. But if we take a look at the 32 claims initiated they involve a variety of industries and a variety of creative allegations. One claim only actually arises from a direct expropriation measure (GAMI Investments).

More than double of the total of cases advancing to an Arbitral Tribunal involve claims against actions of a Party's Federal government. However, out of the 9 cases resolved, in 5 of them the State and local authorities' actions constituted the main targets of the claims. But in contrast to one of the major criticism launched against Chapter Eleven, so far only in one case, *Metalclad*, the actions of State or local authorities have given rise to the responsibility of the State and to the payment of damages to a foreign investor. All of the proceedings heard against Canada involve actions of the Federal Government and not of the Provinces or local authorities.

Therefore so far the aggregate results of Chapter Eleven do not confirm the worst fears against the mechanism. However evaluating Chapter Eleven is a difficult task. Mexico has lost two and won two of its cases. However, one of the cases resolved in Mexico's favour, the Waste Management case, was dismissed on jurisdictional grounds and thereafter resubmitted before a new Tribunal. During the writing of this report, the new Tribunal resolved in the merits the Waste Management case dismissing the claim in its entirety.

Another interesting fact is that the U.S. is the common denominator in all of the cases. In other words, no case has so far involved Canadian or Mexican investors against the governments of Canada and Mexico or Canada as disputing parties. It is also undeniable that the first cases (*Ethyl*, *Metalclad*, and *S.D. Myers* in particular) generated an attractive litigious environment supported by Canadian and U.S. private law firms. Approximately one case resolved per year in average or more than three filed every year are not impressive numbers if compared with NAFTA Chapter Nineteen or WTO arbitration, but they are significant if we are to consider that Chapter Eleven is the most costly proceeding by far under NAFTA. Chapter Eleven proceedings, in contrast to any other NAFTA dispute settlement mechanisms, are fact intensive and, given part of them are driven by private lawyers advising private parties, the litigating atmosphere tends to elevate costs. Add to that that arbitrators fees are not capped in the manner they are under NAFTA Chapter Nineteen, and that proceedings are in average longer and involved longer hearings, the costs are substantial.

Does Chapter Eleven arbitration subject local measures to review by international decision makers? Do they curtail and infringe sovereign and legitimate national and local decision/making and regulatory powers? We have already pointed out that all claims heard by arbitral tribunals against Canada

have involved measures taken by federal and not provincial or local governments. Except for *Metalclad*, no award has been based on a finding of a violation of Article 1110 direct or indirect expropriation (including the tantamount to expropriation issue). NAFTA Tribunals have no power to order a change of policy, they can ultimately only award damages to an investor. Of course the threat of damages can eventually have a significant impact on the kind of policies undertaken.

The last trend of decisions, in contrast to *Metalclad, S.D. Myers, and Pope & Talbot*, show NAFTA investment Tribunals emphasizing the international and extraordinary character of the mechanism and defining more restrictively the scope of claims disputing investor can advance. The jurisdictional or final decisions in *Mondev*, *Methanex* and *UPS* confirm this. These decisions might have a restraining effect on disputing investors and their counsels, encouraging a more careful review of the maturity and strength of a potential claim before initiating a costly arbitration.

Notwithstanding the above, the Canadian and Mexican cases in particular do merit a reflection on the accountability issue from another perspective. Because of the ad-hoc nature of Chapter Eleven Arbitrations, and the elevated hourly fees of arbitrators, the arbitrators have strong incentives to perform in a way that can give rise to a subsequent appointment. This incentive is particularly present with the presiding arbitrator, given that the Party-appointed arbitrator has no problem siding with his or her appointing party.

The balancing weight of the deciding vote rests on the third and presiding arbitrator. Given that, as a practical matter, the disputing parties' agreement is necessary for the appointment of the Presiding Arbitrator[47], the prospect best performance in terms of probabilities of being reappointed in the future is best preserved by giving both of the disputing parties something in the award. Under this logic, an outright dismissal, unless clearly demanded by the applicable law, is not a likely decision in terms of reappointment prospects. There is no suggestion of bad faith. It is simply a question of incentives that play a subtle role in promoting the splitting of a decision so that both parties can take something positive back. This most often occurs through a negotiated outcome, where the tribunal has attempted to give a unanimous award, without the necessity of a dissenting opinion by either of the party-appointed arbitrators.

Although the evidence of this phenomenon is entirely anecdotal, experienced practitioners report that the same incentives are also present in international commercial arbitration. However, Chapter Eleven Arbitrations retain a significant public interest dimension that is not found to the same extent in private arbitration. This should encourage the NAFTA Parties to either establish a permanent roster of Chapter Eleven arbitrators, or seek a

[47] The ICSID secretary general is the appointing authority where the parties cannot agree. He is supposed to pick from the ICSID list but will only act unilaterally after exhausting efforts to get agreement of the parties.

way to create an appeal process that can provide the institutionalism the mechanism currently lacks.

It is important to note that in response to the procedural lack of transparency criticisms, the NAFTA Parties have slowly but steadily taken important steps to address openness. Canada has played a leading role in these efforts. First providing ready access to the documents filed and decisions made in the proceedings without the need of a citizens' request. This example has been followed now by the two other NAFTA Parties. Second, by seeking that the Free Trade Commission, which has authority to make binding interpretations of Chapter Eleven, issued an interpretation in July 2001 to the effect that nothing in NAFTA imposed a general duty of confidentiality on the Parties regarding Chapter Eleven Arbitration or prevented them from making publicly available the submissions and decisions. Regarding private right of participation in the disputes, a NAFTA Tribunal has already ruled that nothing in Chapter Eleven prevents a Tribunal from admitting the filing of an opinion by a third interested actor if that opinion may help the Tribunal in the decision. The Tribunal however retains the right to admit or denied such application. Further, in October 2003, the NAFTA Trade Ministers approved guidelines for submissions from non-disputing parties. Also Canada and the United States agreed to Chapter Eleven open public hearings. Mexico has not yet agreed to open hearings.

Concluding section and recommendations

In 2002, intra-NAFTA merchandise imports accounted for 9% of world imports, while intra-NAFTA merchandise exports accounted for 10% of world exports.[48] A large percentage corresponds to Canada-U.S. trade. It is difficult to assess the economic impact of the NAFTA agreement itself. It is unquestionable however that the Canada-U.S. economic relation is in aggregate terms the world's most significant.

However NAFTA and international trade are not only about aggregate figures. It is equally important a question of particular industries, specific business relations, and the impact of market access, integration of economic activities, regional interdependence and reliance of economic opportunities on determinate social sectors.

This report has not contemplated the particular effects on communities of regional or industry-wide production and economic shifts result of increase or changing patterns of trade and competition. This is not a minor issue. However, not only it is an issue outside the focus of this report, but it is one that national, provincial and local governments need to address through fiscal, economic development, and other public policies. International agreements including NAFTA are not ideal tools to address these issues. Treaties may constitute a contributing factor, but are ill designed to address them.

Central to the debate of NAFTA is whether the Agreement, and particularly its dispute settlement mechanisms, restraint the States' legitimate regulatory powers. Has Canada relinquish thus important present or future decision making authority? For example, in a recent article, Epps and Flood argue that "NAFTA provides some protection for medicare, yet still poses a number of roadlblocks to reforms needed to modernize medicare...".[49] In particular they argue that the expropriation clause of Article 1110 threatens the expansion of medicare to cover drugs used outside of hospitals, home care and alternative and complementary therapies. They note that in 2000, thirty seven out of the one hundred and forty private health insurance firms operating in Canada were Americans. Therefore any measure that might put these firms out of business is potentially a costly Chapter Eleven claim.

Chapter Eleven claims are burdensome. This report discussed the fact-intensity, elevated costs, and litigation environment associated with the proceedings. In addition, there is no empirical evidence correlating investor-State arbitration to the sustained attraction of investment flows. The truth is

[48] WTO Secretariat, *supra* note 8, at 2.
[49] Tracey Epps and Colleen M. Flood, *Have We Traded Away the Opportunity for Innovative Health Care Reform? The Implications of the NAFTA for Medicare*, 47 McGill Law Journal 751 (2002).

that the availability of foreign investment treatment obligations does not figure first in investors' reasons to invest. China is a case at point.

However, at the time NAFTA was negotiated Chapter Eleven was considered necessary. The Chapter was a *sine qua non* part of the package. The Parties' desire to move into a closer trade and economic relationship, sanctioned by international law, and including Mexico, required in addition to trade and intellectual property protections, investment protections and a mechanism to resolve investment disputes.

Mexico has indeed experienced a historic soar of foreign investment flows since the passage of NAFTA. Additionally the world-wide multiplication of bilateral investment agreements in the last fifteen years, many of them establishing the availability of investor-State arbitration, confirm a trend of general acceptance at the State level of foreign investment treatment standards despite the failure of the OECD Multilateral Agreement on Investment negotiations.

The question ultimately is whether the general costs of Chapter Eleven are high enough to erase the value-added of NAFTA as a forum for negotiation and resolution of trade and investment disputes? This report has focused on an assessment of the law, institutions and dispute settlement mechanisms of NAFTA ten years after its entry into force. It is submitted that in balance, NAFTA, as well, and along with the WTO, provide Canada a necessary level of due process to deal with the U.S. The strength of the U.S. market, the complexity of its internal politics, the possibilities interests groups have to influence Congressional and others' decision-making, demand more and not less due process. More due-process and more engagement is in Canada's best interest, as well as in Mexico's, when dealing with U.S. trade relations.

In international negotiations and particularly in international trade negotiations what you get is also what you give. Canada and Mexico made Chapter Nineteen a necessary part of the NAFTA deal. The results of Chapter Nineteen have confirmed Canada's expectations. Chapter Nineteen, along with the WTO DSB, have greatly contributed to Canada's more secure and stable U.S. market access. Twenty years ago Canada was a U.S. principal AD and CVD target country. Today, despite the difficult softwood lumber dispute, Canada enjoys better and more secure market access to the U.S. than any other U.S. major trading partner.

The U.S. made Chapter Eleven a necessary part of the deal. In order to have Chapter Nineteen it was necessary to have Chapter Eleven. In balance still, the results of Chapter Eleven arbitrations do not confirm the worst fears launched by the mechanism's critics. It is not an ideal mechanism. It is still too costly and unpredictable, although the degree of unpredictability is gradually diminishing as Chapter Eleven tribunals and the Free Trade Commission continue constructing the mechanism's interpretation and jurisprudence. Tribunals have made disputed decisions, but they have also

awarded in general conservative damages, have dismissed important claims, and have limited their jurisdiction, thus raising the standards of suitability and proof of future and potential claims.

Chapter Eleven will continue to be controversial. The fact that the U.S. courier company UPS would initiate a claim against the practices of the Canadian postal service, or that an investor involved in grey-market cigarette exports won a damages award against Mexico lead us to expect other complex and creative claims in the future.

However, what Chapter Eleven, Chapter Nineteen, Chapter Twenty and the DSB do generally is to rise to some extent due process in the conduct of international trade and investment relations. Due process has the effect of limiting what governments can do. This is true internationally and it is true nationally. Law and its institutions are the way modern societies have created the sidelines of the political game field. Politics is still the game, but the sidelines are important to provide boundaries and some degree of security, not only for business opportunities, but for human relations and development generally.

Unfortunately, in NAFTA, due process has been raised more effectively in connection with the rights and opportunities of foreign investors and trading commercial interests than in connection with their investors' obligations, including labour and environmental obligations. The NAFTA countries have been more successful in promoting closer and more secure investment and trade relations than in raising environment and labour standards. The reason that explains why this report has not covered the environment and labour dispute settlement mechanisms is simply because there has been no formal dispute in this area. The side agreements public report and investigations procedures have contributed to making the regimes, in particular the Mexican environment and labour regime more transparent, and in some cases, have contributed to the resolution of environmental issues.[50]

But environment and labour are still pending unfulfilled promises of NAFTA. However it is important to keep in mind that despite the political promises made to sell NAFTA, the treaty is still but a complement of what national and local governments can, should, and must do. In addition to due process, NAFTA constitutes an opportunity for more engagement. Effective due process and strong and respectful engagement are both useful international tools to deal with the United States. In the words of Lloyd Axworthy:

> *"Engagement emphasizes building from within, enhancing the capacity of local civil society, establishing dialogue with the government in order to pressure and persuade, and pushing the acceptance of international rules… Bilateral engagement, whatever its vicissitudes, has proven, I*

[50] *See* Vega (2004).

believe, to be a useful distinctive approach for Canada and a pragmatic policy for human rights promotion and protection."[51]

"Soft power" became the shorthand term for this approach that sought to use our advantages of wealth, good education and a generally secure, stable society. It drew upon the culture of compromise we use to govern a vast, diverse, multiracial, bilingual country".[52]

Although there, Mr. Axworthy applies this concept to the Cuban crisis, is it possible to apply the same rationale for the whole relationship with the United States as that country's current administration moves away from multilateral collaboration and towards unilateral action? Christopher Sands remarks that face to face Canadians and Americans treat themselves as equals. Can NAFTA be viewed as a bilateral engagement opportunity in this respect? This approach views the value added of NAFTA as an opportunity to build on due process by strengthening the dispute settlement mechanisms. This can be done within NAFTA itself through FTC interpretations of Chapter Eleven, concluding a roster of panellists, and moving to further institutionalize the procedures. NAFTA is an opportunity for enhancing the local capacity of civil society. The Side Agreements constitute a pending agenda in this regard. NAFTA is also an opportunity to establish contacts with the U.S. government, to push and persuade and build international rules. The three NAFTA Parties have developed bodies of professional government trade specialists and bureaucracies that must be used to continue building on more secure market access and fair trade among and throughout the three countries. But the relation should not rest only in this bureaucracy. The three countries have progressively built, Mexico with less success perhaps, a large number of independent specialists in international economic areas. Building up on these resources is important for the future of the relationship. In addition, the establishment of contacts between independent regulatory agencies, as well as the strengthening of independent regulatory agencies can contribute more to making the best of the North American opportunities.

Finally perhaps the biggest challenge today is constructing a strong and respectful international economic relation in the midst of national security and terrorist threats. The border becomes again an important aspect of the relationship. The closure of the border for security reasons can represent huge economic losses for the NAFTA States. However, the losses are greater for the smaller nation and the U.S. is the one that is more concerned about the national security threats. A great deal of engagement and creativity is required because any move to strengthen the relation in any respect must be

[51] LLOYD AXWORTHY, NAVIGATING A NEW WORLD (2003), at 72 and 74.
[52] Id., at 74.

based on the premise that the three NAFTA countries desire to maintain their sovereign independence.

Having said this, the report recognizes that NAFTA, as any other legal framework, is subject to improvements in Canada's interest, and in the interests of a dynamic relation that evolves and builds from its experience. The lingering issue of the reopening and renegotiation of NAFTA is periodically raised in the three NAFTA Parties and as the prospects of national elections in Canada first, and the U.S. next, approach, this report makes in the following paragraphs a set of recommendations for a revision/renegotiation scenario.

As a starting point, Canada should consider the effects of negotiating with or without NAFTA. As pointed out in the report, NAFTA, as was the CUFTA during the negotiations of the former, can represent an attractive non-new-agreement alternative. In this respect it is important to secure that failure of any revision of the text, or alternatively supplementary agreements, means that NAFTA continues in place as approved in 1993.

This report identifies first a number of initiatives regarding the working of the dispute settlement mechanisms and next some general reform suggestions on specific areas in order to provoke further discussion and analysis regarding their viability and content.

Regarding the dispute settlement mechanisms, the Parties should renew their efforts to complete the roster of panellists for Chapter Twenty. To continue strengthening the mechanisms, a revamped design should include a permanent roster of panellists for all mechanisms, and more adequate and clear rules regarding fees, that are sufficiently attractive to specialists, but in the case of investor-State arbitration adequately capped. The NAFTA Secretariat could also be redesigned in order to provide it with the capacity to provide independent support to panellists, perhaps through a special section, and better information gathering and distribution, and translation and interpretation capabilities. Chapter 19 will remain a controversial issue in any further negotiations as Canada and Mexico would have to resist pressures to water-down the mechanism in the face of U.S. Congressional and interest groups pressures. The ideal is moving eventually to the non-application of unfair trade remedies law in the North American region and their substitution by anticompetitive policies, strengthening an investigation and enforcement cooperation regime in this area. Short of this however, Canada should seek to secure a particular deal to protect the softwood lumber industry from trade remedies and the 1996 Softwood Lumber Agreement could be a starting model for a more durable and integrated view of this industry.

For Chapter 11 two alternatives are suggested. The reform alternative would imply in addition to establishing a permanent roster of arbitrators, the possibility of an appellate procedure that could entail special recourse to a chamber of the International Court of Justice, a small permanent appellate arbitration board, or the commitment of the three NAFTA Parties to become

Parties to the ICSID Convention and have recourse to that Agreement's award revision procedures. In addition, clarifications could be made to the scope and content of the expropriation clause, the crafting of a dismissal recourse for frivolous or not mature claims, and the reintroduction, under well defined circumstances, of the need of exhausting local remedies before a claim can be advanced to arbitration. A more radical alternative would entail simply to eliminate the investor-State arbitration mechanism. This alternative faces two particular problems, namely, surmounting the notion that such move would represent a problematic precedent and signal regarding U.S. bilateral investment policy, especially regarding developing countries, and the need for Mexico to secure effective local remedies for foreign investors. The latter would entail the possibility of damages and appropriate direct and indirect expropriation proceedings against governmental action. Prospects for the reform of the Mexican judicial system (currently underway for criminal procedures only), and a civil remedy against State illegal acts now enshrined in the Constitution can pave the way in this regard.

Culture and its protection continues to be a Canadian policy interest value and any renegotiation should include strengthening the ability of Canada to intervene in that sector especially in the context of acute market power disparities. The culture provisions of NAFTA, carried over from CUFTA, have been criticised as toothless. The energy provisions of NAFTA were controversial when negotiated mainly because they secured non-discrimination and reliability to the U.S. market. However, the Canadian energy industry is a dominant player in the U.S. market *vis a vis* foreign competitors and it appears that such a circumstance is in Canada's foreign trade and economic interest. Perhaps more appealing to Canada should be opening the Mexican market to the well positioned electricity and gas Canadian industry. Despite the current Mexican administration efforts to open it, the initiatives have failed in the Mexican Congress. International negotiations may provide an avenue to informing and enriching the Mexican debate and provide incentives to renew these efforts.

The protection of the environment and labour rights continue to be a pending promise of a North American free trade zone. There is evidence that the NAFTA side agreements have facilitated cross-border contacts and cooperation between non-governmental groups and that the private-initiated complaint procedure have led governments to take action to solve some environmental and labour problems. However the mechanisms still are short of what the economic integration of the NAFTA Parties and their societies require. Further negotiation could include the prospects of building institutions with the necessary representation, flexibility and expertise, closer to the model of the IJC, than moving towards more effective dispute resolution mechanisms. In this regard, an improved and well funded monitoring procedure controlled by the Parties, involving cooperation,

common goals, technical assistance, peer pressure, and involvement of non-governmental organizations or citizens could provide a better model than quasi-judicial mechanisms.

Finally, a renewed North American relation can move towards a more decentralized, government to government contact relation, with appropriate mechanisms to generate and share useful information, and to involve the private sector, reflecting better the reality of the networked and increasingly integrated economic and social relation. For this purpose it is necessary to link custom procedures and information both to security concerns and trade facilitation and market access, but also to improve professional and labour mobility generally in the North American region.

The approach must focus on improving the depth and quality of trade and investment for Canada. This means continuing to build upon market access security, upon the enforceability of the rules mutually agreed, and upon the proper environment for business transactions to grow and flourish, while improving border security, labour mobility, access and distribution of information, protecting the environment and workers' rights, promoting sustainable development, preserving governments' authority to regulate in the publics' interests, and improving trade and investment growth opportunities.

ANNEX

SUMMARY COMPARATIVE TABLE NAFTA AND WTO MAJOR AREAS

AREA	NAFTA REGIME	WTO REGIME
TRADE IN GOODS	YES. CHAPTER 3. IT INCORPORATES GATT NATIONAL TREATMENT OBLIGATION TO NAFTA TRADE IN GOODS.	YES. WTO REGIME IS DEFINED AS A FORUM FOR THE LIBERALIZATION OF TRADE IN GOODS THROUGH TARIFF REDUCTIONS, MFN PRINCIPLE, AND THE REDUCTION AND ELIMINATION OF NON-TARIFF BARRIERS.
TRADE IN SERVICES	YES. CHAPTER 12 COVERS TRADE IN SERVICES, CHAPTER 13 TELECOMMUNICATIONS, CHAPTER 14 FINANCIAL SERVICES.	YES. GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)
RULES OF ORIGIN	YES. CHAPTER 4. EXPERTS IDENTIFY RULES OF ORIGIN AS ONE OF THE MAJOR CHALLENGES TO CAPITALIZE THE BENEFITS OF LIBERALIZATION IN LIGHT OF THE MULTIPLICATION OF BILATERAL AND REGIONAL FREE TRADE AGREEMENTS. THE RULES OF ORIGIN ARE SOMETIMES MORE COSTLY THAN TARIFF REDUCTIONS.	YES. RULES OF ORIGIN AGREEMENT. IT ESTABLISHES GENERAL STANDARDS ON RULES OF ORIGIN. THE COMMITTEE ON RULES OF ORIGIN IS SEEKING TO HARMONIZE RULES OF ORIGIN AMONG MEMBERS, EXCEPT FOR PREFERENTIAL ARRANGEMENTS LIKE NAFTA.
CUSTOMS PROCEDURES	YES. CHAPTER 5.	YES. CUSTOMS VALUATION AGREEMENT.
ENERGY	YES. CHAPTER 6.	NO.
AGRICULTURE	YES. CHAPTER 7.	YES. AGREEMENT ON AGRICULTURES.
STANDARDS	YES. CHAPTER 9 GENERALLY, AND CHAPTER 7, SECTION B, SANITARY AND PHYTOSANITARY MEASURES.	YES. AGREEMENT ON TECHNICAL BARRIERS TO TRADE; AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES.

GOVERNMENT PROCUREMENT	YES. CHAPTER 10.	YES THROUGH A PLURILATERAL AGREEMENT: AGREEMENT ON GOVERNMENT PROCUREMENT (CANADA AND THE U.S. ARE PARTIES, NOT MEXICO)
INVESTMENT	YES. CHAPTER 11.	LIMITED TO AGREEMENT ON TRADE-RELATED INVESTMENT MEASURES AND GATS. THE ISSUE IS STUDIED AT COMMITTEE LEVEL.
COMPETITION POLICY	YES, BUT LIMITED IN SCOPE. CHAPTER 15.	NO. WTO HAS SET UP AN EXPLORATORY WORKING GROUP TASK.
IMMIGRATION	LIMITED TO BUSINESS PEOPLE AND PROFESSIONALS (CHAPTER 16).	NO.
INTELLECTUAL PROPERTY	YES. CHAPTER 17.	YES. TRIPS AGREEMENT.
SAFEGUARDS AND EMERGENCY ACTIONS	YES. CHAPTER 8.	YES. AGREEMENT ON SAFEGUARDS.
DISPUTE SETTLEMENT (SEE SECTION 4 OF THE REPORT FOR A DETAILED ANALYSIS).	YES. GENERAL MECHANISM (CHAPTER 20); ANTIDUMPING AND SUBSIDIES (CHAPTER 19); INVESTMENT (CHAPTER 11); FINANCIAL SERVICES (CHAPTER 14); ENVIRONMENT AND LABOUR (SIDE AGREEMENTS).	YES. DISPUTE SETTLEMENT BODY.
CULTURAL INDUSTRY	YES.	NO.
ANTIDUMPING AND COUNTERVAILING DUTIES	LIMITED TO BINATIONAL PANELS TO REVIEW APPLICATION OF DOMESTIC TRADE REMEDIES LAWS.	YES. ANTIDUMPING AGREEMENT; AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES.

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