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## Information Report on the Canada-United States Free Trade Agreement of January 2, 1988

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2. Disputes shall be submitted to the Joint Tribunal by agreement of the Parties determining the terms of reference. If such agreement is not reached within sixty days after a request for such agreement, either party may submit it to the Tribunal by an application. The application may ask the Tribunal to give an advisory opinion, a declaratory, interpretative judgment, or a judgment ordering a Party to take specified action or to refrain from certain action.

3. The Joint Tribunal shall have jurisdiction to give advisory rulings concerning questions relating to the interpretation, application or operation of this Agreement, at the request submitted by any court or administrative tribunal of either Party. When such question is raised before any such court or tribunal by any person whose rights, duties or interests under this Agreement may be seriously affected by the decision of the court or tribunal, that person shall have the right to have the question referred to the Tribunal for an advisory ruling. The proceedings before the court or tribunal shall be suspended pending the ruling of the Tribunal. The parties concerned shall be entitled to participate in the proceedings before the Tribunal. Any later court or administrative proceedings shall take into account the ruling of the Tribunal. The modalities of this procedure are specified in Annex IV.

## **II. Information Report on the Canada-United States Free Trade Agreement of January 2, 1988**

At the request of the concerned officers of the American Bar Association and the Canadian Bar Association, the Joint Working Group has studied carefully the Canada-United States Free Trade Agreement initialed on December 10, 1987, and signed by President Reagan and Prime Minister Mulroney on January 2, 1988. Consistent with its assigned mission, the Joint Working Group focused on the provisions on the settlement of disputes relating to the interpretation or application of the Agreement.

The Joint Working Group applauds the inclusion in this document of basic provisions on the settlement of disputes, and the recognition by the document that dispute resolution is an indispensable element of effective implementation of the Agreement. The Joint Working Group presented in April 1987, a report on the subject, with specific recommendations, and the Bar Associations of the two countries approved the recommen-

dates in May and June 1987, respectively. These joint recommendations were to the effect that there should be

(a) a joint institution to assist the two countries in the management of trade disputes between them;

(b) an arrangement for the interpretation of the Free Trade Agreement; and

(c) appropriate procedures for referring issues of interpretation and application of the Agreement raised in domestic proceedings to a common tribunal for an opinion.

The comments that follow are based on these Recommendations of the Joint Working Group and approved by the two Associations. They also take account of some of the suggestions contained in the associated report. The comments are not intended as criticisms of the Agreement, but are designed to assist in the implementation of one of the main objectives of the Agreement—the establishment of “effective procedures for the joint administration of this Agreement and the resolution of disputes.”

#### 1. *Scope of Comments on the Institutional and Special Dispute Settlement Provisions of the Agreement*

Two main sets of dispute resolution provisions are included in the agreement: (a) general institutional provisions relating to arrangements for the settlement of disputes (Chapter 18); and (b) special arrangements are temporary in nature for the settlement of disputes relating to anti-dumping, subsidies and countervailing duties (Chapter 19). The special arrangements are temporary in nature—lasting for five or seven years only—and are closely connected with the proposed legislative measures relating to these topics. Additional provisions on consultations and other means for the resolution of disputes may be found in Article 303 (rules of origin), Article 709 and Annex 705.42 (agriculture), Articles 1101 to 1103 (emergency action in case of serious injury), Annex 1404, Section A, Article 4 (architecture) and Section B, Article 4 (tourism), Articles 1503 and 1504 (temporary entry of business persons), Article 1608 (investment), Article 1704 (financial services), and Article 2011 (nullification and impairment of any benefit reasonably to accrue under the Agreement).

#### 2. *The Commission*

The Working Group welcomes the establishment of a strong Canada-United States Trade Commission, composed of cabinet-level officers or Ministers primarily responsible for international trade, as only such composition will enable the Commission to deal effectively with important national and international issues, which are usually both complex and highly political. These officers, or their deputies (high senior officials in the relevant departments or ministries) can provide policy-level guidance

only from time to time, and the Agreement obliges them to meet only once a year, except when a serious issue requires a special meeting. The Commission will, however, have a broad series of functions: "to supervise the implementation of this agreement, to resolve disputes that may arise over its interpretation and application, to oversee its further elaboration, and to consider any other matter that may affect its operation."

Each of these functions involves an array of subsidiary duties. The supervision of the implementation of the Agreement will require the monitoring of the system of notifications and consultations envisaged in the Agreement. (In addition to special consultations listed in paragraph 1, above, a general system of notifications and consultations is established in Articles 1803 and 1804 for the Agreement as a whole.) Numerous articles of the Agreement need, and provide for, further elaboration, and it will be necessary to coordinate these efforts. The various methods envisaged in the Agreement for the settlement of disputes will require institutional underpinnings and administrative assistance. It is obvious, therefore, that the Commission itself, even if assisted by technical advisors or mediators, is not going to be able to perform all these duties.

The Agreement recognizes that these special responsibilities, as distinguished from the highly political functions mentioned above, need to be delegated "to ad hoc or standing committees or working groups," and will require also "the advice of nongovernmental individuals or groups." The Commission is given, therefore, a broad power to establish its rules and procedures, which can provide in detail for the appropriate means for dealing with these multitudinous responsibilities.

The Joint Working Group suggests that an early item on the agenda of the Commission should be the establishment of a principal subsidiary organ, a standing committee to which the Commission would delegate some of its numerous responsibilities. Thus, the Commission would not have to be burdened with the hundreds of daily problems that are likely to be submitted to it; it would have available a more practical means for discharging its many functions in an efficient, orderly, and evenhanded fashion. This standing committee, which may be named Joint Committee of Trade Experts, should be composed of persons serving full-time who are highly qualified specialists in trade matters. These experts may be either government officials seconded for a sufficiently long period by their departments and free from other governmental tasks, or private individuals recruited from among the professionals in trade matters (from business enterprises, law offices, or the universities). Persons are needed that would be able to approach their joint work in a collegiate rather than antagonistic manner, the main "enemy" being not the other side but the problem that has to be solved to the satisfaction of both sides. They need to be dynamic, dedicated to the smooth working of the Agreement, and

highly appreciative of the importance of their mission to the common well-being of the two countries and their peoples. To ensure that the persons considered for appointment will be well received by the other Party, that Party should be consulted before an appointment to the Trade Committee is made by a Party.

The Commission may wish to delegate to the Joint Committee the responsibility for making day-to-day arrangements required to ensure the effective implementation of the Agreement. In particular, it should perform the following tasks:

(a) to keep under constant review the implementation of the Agreement; to bring to the attention of the two Governments as early as possible any emergent dispute; and to suggest to the two Governments what steps should be taken to prevent the further deterioration of a situation;

(b) to receive copies of notifications made by either party that it considers that a proposed or actual item of its legislation, regulation, or governmental procedure or practice might materially affect the operation of the Agreement, and copies of requests by either party for information about measures taken by the other party that might affect it or its citizens.

(c) to assist in consultations between the Parties, including those resulting from notifications under paragraph (b), and, with the agreement of the Parties, appoint a joint fact-finding group of experts, to elucidate the relevant facts;

(d) to present to the two Governments, if at least one of them so requests, recommendations as to the best means for dealing with a particular dispute;

(e) to maintain rosters of experts acceptable to the two Governments from which members of fact-finding groups, mediators, conciliators or arbitrators may be chosen, and to assist the Governments in selecting from these rosters the most appropriate persons for the settlement of a particular dispute or a group of disputes;

(f) to assist the two Governments in reviewing the recommendations of panels of experts;

(g) to aid in the implementation of the Agreement and its further elaboration, and to prepare for this purpose proposals for long-range solutions that would diminish the chances of recurrence of particular categories of disputes.

In order to enable the Committee to fulfill these tasks, the Commission may use the authority conferred upon it by Article 1909.7 of the Agreement to direct the Secretariat established under Chapter 19 to assist the Joint Committee in its work.

### 3. *Arbitration*

The Commission will be obliged, under the Agreement, to refer all disputes relating to emergency action by an importing Party (taken under Chapter 11) to binding arbitration; and it "may" refer any other dispute to such binding arbitration. The Commission has the duty to develop a roster of qualified persons from which a special panel of five members will be appointed for each dispute. The Commission is given broad powers to determine the "terms" of an arbitration, and the general rules of pro-

cedure, though each panel may adopt the necessary supplementary rules. The Commission's rules of procedure should provide for the participation in the proceedings by the private parties involved in a dispute; they may be entitled, for instance, to present *amicus curiae* briefs and to appear before the panel and be represented there by counsel (by analogy to paragraph 1904.7).

The difficulties and delay that occurred recently with respect to the selection of members of several arbitral tribunals under other international agreements suggest the need for a more easily accessible institution. The particular need to provide speedy and certain action in trade disputes, and the desirability to provide consistent and predictable jurisprudence, also make it highly desirable to authorize in the Agreement the establishment of a standing arbitral tribunal as soon as it becomes clear to the Parties that the increasing volume of disputes requires an expeditious procedure.

#### 4. *Binational Dispute Settlement in Antidumping and Countervailing Cases*

The Working Group welcomes the clarifications, improvements and additions in the provisions relating to this highly complex topic. The negotiators faced a difficult problem and were able to provide a temporary solution for issues to be faced in a transition period, with the hope that during that period a special working group might be able to develop expeditiously a new system of rules in both countries for antidumping and countervailing duties as applied to their bilateral trade. As soon as these rules enter into force, Chapter 19 will lapse. It may be hoped, however, that some of the positive innovations such as allowing for a review of national administrative decisions by binational panels entitled to render binding decisions, providing for access of private parties to international procedures (paragraphs 1904.5 and 7), and establishing a Secretariat (Article 1909) would survive the disappearance of this Chapter and would be incorporated in the general system of dispute settlement envisaged in Chapter 18. This transition should be facilitated by the fact that the Secretariat established for Chapter 19 purposes is authorized to "provide support for the Commission established pursuant to Article 1802 if so directed by the Commission."

The Working Group also notes that the binational panels established under Annex 1901.2 are to be composed of persons "of good character, high standing and repute," and are to "be chosen strictly on the basis of objectivity, reliability, sound judgment, and general familiarity with international trade law"; that the majority of the members of each panel shall be "lawyers in good standing"; and that the chairman of a panel is

to be selected "from among the lawyers on the panel" (Annex 1901.2). These provisions should be also applied, to the largest extent possible, when panels are to be established under Article 1807.

In view of the fact that in several international arbitrations, a party to a dispute has refused to comply with an award of an arbitral tribunal because of alleged irregularities in making the decision, the Working Group welcomes the introduction of an extraordinary challenge procedure before a committee of judges or former judges of a federal court of the United States or a court of superior jurisdiction of Canada. This provision might also prove useful for purposes of Chapter 18.

### 5. *Involvement of Private Parties*

It has been noted already that the rules to be adopted for panels functioning under Chapter 18 should include provisions similar to those contained in paragraphs 1904.5 and 7, and should oblige a party:

(a) to request the establishment of an arbitration panel upon request of a person who might be materially affected by an actual or proposed measure which affects the operation of the Agreement, and

(b) to make possible for such person to present an *amicus curiae* brief in the case and to appear and be represented by counsel before the panel.

To facilitate this procedure, each Party should develop an appropriate mechanism for reviewing private claims and to espouse them, thus avoiding criticism that the Government is too busy or too unconcerned to espouse the cause of a person to whom a particular trade measure may be of vital importance. The suggested procedure should provide the person concerned with sufficient due process guarantees that his claim will receive a proper hearing.

## CONCLUSION

As noted in the introduction, the foregoing comments are made from the perspective of the position taken by both the American Bar Association and the Canadian Bar Association. These recommendations were the result of several joint studies made by the American and Canadian Bar Associations since 1974, continuing a tradition which started in the 1940's in connection with the preparation of the United Nations Charter. The comments here presented are made in a similar cooperative spirit. Should the two Governments or the Commission seek their advice, pursuant to Article 1802.4 of the Agreement, the two Bar Associations might be able to provide assistance in the drafting of various rules, regulations and codes of conduct which are to be prepared for the implementation of various dispute settlement provisions of the Agreement. The two Bar Associations may establish a special joint committee for this purpose or