CANADA UNITED STATES FREE TRADE AGREEMENT

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The Canada-United States Free Trade Agreement reflects the reality of commercial, economic and political relations between these two countries and establishes new regulations and procedures for the future. The author underlines the various sectors affected by the Agreement: services, investment, authorization for temporary visas for business people. She then analyzes new mechanismis established by the Agreement regarding dispute settlement, the first being of general order, the second concerning anti-dumping and countervailing rights.

L'Accord de Libre Échange Canada-États-Unis reflète la réalité des relations commerciales, économiques et politiques entre ces deus pays, et il établit de nouvelles règles et procédures por le futur. Dans cette perspective, l'auteure souligne diverse sectuerus visés par l'Accord: les services, les investissements, l'autorisation de séjour temporaraire por gens d'affaires. Elle analyse ensuite les nouveaux mécanismes institutionnels mis en place para l'Accord pour le règlament des différends, le premiere d'ordre général, le second en matière de droits *anti-dumping* et compensateurs.

I. INTRODUCTION

The Canada-United States Free Trade Agreement (FTA) is a classic, comprehensive free trade area

agreement which qualifies easily under article XXIV of the General Agreement on Tariffs and Trade (GATT). The GATT permits regional economic integration agreements which eliminate tariffs and other restrictive regulations of commerce on "substantially all the trade" between member countries. Comprehensive free trade area agreements are viewed as complementary to the GATT because they can help to accelerate the process of global trade liberalization.

In the FTA, Canada and the United States have expressly re-affirmed and strengthened their existing GATT obligations, rights and commitments. The FTA is complementary to, and in many areas builds and expands upon existing GATT obligations. In certain areas of unfinished business, such as agriculture, subsidies, intellectual property and government procurement, the two countries have agreed to cooperate further in the Uruguay Round of multilateral trade negotiations.

The FTA charts new paths in the areas of trade in services and investment which were not previously covered by the GATT. The obligations adopted in these areas are pragmatic and respond to the economic and social realities in both countries, but they also set the stage for the development of workable, new multilateral rules in the Uruguay Round.

Importand new institutional mechanisms have been established to govern the administration of the FTA, provide new channels for government-to-government consultations and procedures for dispute settlement. Two distinct dispute settlement mechanisms have been created: 1) Chapter 19 bina-

tional panels which review final antidumping and countervailing duty orders by domestic agencies, and 2) Chapter 18 panels which examine complaints relating to matters of application and interpretation of the agreement generally. The experience to date with the binational panel process has been very positive. The panels are contributing to the active application and enforcement of the FTA obligations and commitments.

The objectives of the FTA are:

1. To eliminate barriers to trade in goods and services between Canada and the United States;
2. to facilitate conditions of fair competition within the free trade area;
3. to liberalize conditions for investment within North America;
4. to establish effective procedures for the joint administration of the FTA and the resolution of bilateral trade disputes, and
5. to lay the foundation for future bilateral and multilateral cooperation.

In fulfilling these objectives, the FTA is extremely comprehensive in scope. It provides for the elimination of tariffs and non-tariff barriers to trade in goods and the liberalization of trade in other areas by reducing restrictions on trade in services, financial services, investment and temporary entry of business persons into the other country's territory.

One of the keystones of the GATT, the principle of national treatment, has become the fundamental guiding principle of the FTA. With the successive

rounds of tariff reductions in the GATT, there has been a proliferation of domestic measures taken by countries to restrict the flow of foreign goods. The national treatment rule in the GATT provides that goods imported into a country must receive equal treatment to that accorded domestically-produced, directly competitive goods. This GATT principle has been affirmed in the FTA with respect to bilateral trade in goods and has been expanded to govern future regulatory developments in new areas, such as trade in services and investment. The principle of national treatment will apply to future regulations, measures or practices of the Canadian and US governments as well as provincial, state and local governments.

II. SERVICES

Despite its significance in the world economy, international services trade, by and large, is not regulated by multilateral agreements. In the Uruguay Round of trade negotiations, achieving a multilateral agreement on trade in services is a major priority. The FTA broke new ground international by establishing a set of principles governing services trade between Canada and the United States.

The approach taken in the FTA was cautious and pragmatic. All existing measures are grandfathered and the obligations apply only to new measures involving "covered services". Coverage, therefore, is less than universal, but the principles are to be extended to other sectors as a result of continuing negotiations.

"Covered services" include agriculture, forestry, mining, construction, distributive trades, insurance, real estate and commercial services. Advertising, public relations, management services, computer services, telecommunications, tourism, engineering, architectural, accounting, and scientific and technical services are also covered. Financial services, with the exception of insurance, are dealt with in a separate chapter. Cultural industries are specifically excluded, and other sectors, notably transportation, basic telecommunications services (such as telephone services), doctors, dentists, lawyers, childcare and government services (such as health, education and social services) are not covered.

With respect to new government measures, the FTA establishes the GATT principle of national treatment as the primary obligation. Subjet to certain qualifications, Canada and the United States have agreed to treat services providers, whether persons or firms, of the other country no less favourably than their own nationals. The provision of services includes:

. production, distribution, sale, marketing and delivery of a covered service and the purchase or use thereof;

. access to, and use of, domestic distribution systems;

. the establishment of a commercial presence (other than an investment) for the purpose of distributing, marketing, delivering or facilitating the covered service, and

. any investment for the provision of a covered service and any activity associated with the provision of a covered service.

The obligation to provide national treatment ap-

plies to provincial and state governments as well as to the federal governments of both countries. Governments, however, may treat nationals of the other country differently from their own nationals where the difference in treatment is no greater than is justified for prudential, fiduciary, health and safety or consumer protection reasons. Where a government proposes a new policy that discriminates against nationals of the other country, it must notify the other country prior to implementing that policy.

Beyond the basic national treatment obligation, there is a requirement that neither country may introduce any measure that constitutes a means of arbitrary or unjustifiable discrimination against persons of the other country or a disguised restriction on bilateral trade in covered services. The FTA imposes no obligations or rights concerning government procurement practices or the use of subsides. In other words, in a covered service such as advertising, a government practice of awarding contracts for advertising services only to locally-based companies is not prohibited. Also, if a government decided to provide a new subsidy program or tax benefit to encourage the provision of accounting services in a particular region, it would not have to grant nationals of the other country equal opportunity to qualify for those benefits. The services obligations also do not apply to any new taxation measure as long as it does not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade.

The benefits of freer trade in services are exclusively

reserved for persons who are nationals or are controlled by nationals of either Canada or the United States. Both countries have reserved the right to deny the benefits of the services chapter to firms which are owned or controlled, directly or indirectly, by persons of a third country.

A special obligation has been included in the FTA governing licensing and certification procedures. Both countries have agreed that licensing and certification requirements for professional or other services should relate to matters of competency of ability to provide a service, and should not have the effect of impairing the access of nationals of either country to provide their services in the other country. To that end, Canada and the United States have agreed to work together to develop methods for mutual recognition of licensing and certification requirements for the provision of covered services by persons of either country.

Understanding the national treatment obligation is critical to understanding the services obligations of the FTA. The obligation to extend national treatment to nationals of the other country means that federal, state and provincial governments must treat providers of services from the other country equally with domestic providers of the same services in like circumstances. However, if the are important health, safety, prudential, fiduciary or consumer protection reasons for treating persons or firms of the other country differently, governments may do so as long as the treatment is equivalent in effect. Existing laws and regulations that are discriminatory may be maintained but, if amended, may not be made more restrictive.

The national treatment obligation will not in itself lead to the harmonization of services regulations. In the annex on enhanced telecommunications services, for example, it is explicitly recognized that the two countries have different regulatory systems with different procedures for setting rates, licensing services providers and otherwise regulating telecommunications services.

Canada and the United States both recognize that the FTA rules on services trade, although a significant first step, are not an end in themselves. The two countries have agreed to cooperate and regotiate further to develop new rules, to extend the obligations to sectors not covered and to modify or eliminate existing non-conforming measures.

Federally-regulated financial services are covered in a separate chapter of the FTA. Provincial or state regulation of securities dealers, loan and trust companies, and other financial institutions is not covered. Canada has already started the process of deregulation in the financial services sector. As a result, the strict separation that traditionally existed between the functions of banks, insurance companies, trust and loan companies and securities dealers is being relaxed. Although some US states are beginning to permit cross-ownership of financial institutions, there has been no major regulatory overhaul of U.S. federal banking legislation as yet.

The FTA has accommodated this regulatory disparity by imposing different obligations on the United States and Canada in financial services. With respect to future regulatory changes to the Glass-Steagall Act and other federal legislation, the United

States has agreed to accord Canadian-controlled financial institutions the same treatment as their US-controlled counterparts. Canada has agreed to provide US-controlled funancial institutions with the opportunity to expand through the acquisition of other financial service businesses as a result to the Canadian deregulation process. The former commitment involves future consideration; the latter commitment involves modifications to existing laws and policies.

For its part, Canada was required by the FTA to amend a series of federal statutes that impose foreign ownership restrictions wich inhibit the sale of a substantial interest in a bank, a life insurance company, a *sales finance company*, a loan company or a trust company to non-Canadians. Generally speaking, these statutes prohibit the entry in the books of the financial institution of any transfer of shares that would result in 10 per cent or more of the shares being held by an individual who is not ordinarily resident in Canada, or by a legal entity controlled by any such individuals. The entry of a transfer of shares of such an institution is also generally prohibited if the result would be that a number of non-Canadians would hold, in the aggregate, 25 per cent or more of the outstanding shares. Existing Canadian federal legislation has been amended to make these prohibitions inapplicable to US-controlled investors.

Also, the financial services chapter of the FTA eliminates some of the restrictions under the Canadian Bank Act on the operation and expansion of foreign bank subsidiaries (Schedule B banks) as

they apply to US owned entities. In particular, in the case of Schedule B banks that are subsidiaries of US banks:

. the amount of capital is not to be constrained by the umbrella limit on the domestic assets of foreign bank subsidiaries;

. the opening of branches is not to require ministerial approval, and

. the transfer of loans from a bank subsidiary to its parent is to be permitted subject to prudential requirements of general application.

In summary, the financial services chapter represents a partial approach to some issues in the financial services area that are not the same on both sides of the border. The two countries explicitly recognized that this chapter does not signify their "mutual satisfaction... concerning the treatment of their respective financial institutions" and that laws and policies should evolve to the mutual benefit of both countries as the rules governing financial markets are liberalized. Further bilateral negotiations relating to financial services are anticipated.

III. TEMPORARY ENTRY OF BUSINESS PERSONS

The FTA calls for a general easing of restrictions on the cross-border movement of business personnel which will help to facilitate the free flow of goods and services between the two countries. Restrictions on the entry of consultants and professionals as well as sales representatives and maintenance personnel, in the past, have been a significant

non-tariff barrier to trade. The FTA establishes a special regime for temporary entry for business porpuses. No changes are contemplated in the immigration rules that determine who will be granted permanent resident status by either country.

The FTA requires Canada to grant temporary entry, without the necessity of a work permit or an employment authorization, to any citizen of the United States who is engaged in trade in goods or services or in investment activities, and who comes to Canada in the course or performing certain occupational functions and for certain business purposes. The listed occupations involve some degree of skill and, in most cases, the type of activity carried out in Canada must be limited either in its nature or in that the principal beneficiary must be US-based. In particular, these occupations include:

. technical or market researchers carrying out research for an enterprise located in the United States;

. purchasing, production management, financial services and supervisory personnel involved in transactions for an enterprise located in the United States;

. sales representatives taking orders for goods or services;

. buyers purchasing for an enterprise located in the United States;

. installers and maintenance pesonnel performing certain after-sales services in respect of equipment purchased from an enterprise located outside Canada, and

. public relations and advertising personnel consulting with business associates.

Some of these categories already had the benefit, in part at least, of existing exceptions to the work permit requirement under the Immigration Regulations. Others are new exceptions and clearly reflect special treatment for US business visitors to Canada.

As there are also FTA provisions relating to intra-company transferees, the business visitor rules do not apply to US citizens who have been seconded for a period of time to a Canadian affiliate or a branch of their US-based employer. Such an individual would probably be treated as having ceased to work for an enterprise located in the United States, for the purposes of the business visitor categories, and therefore as eligible to enter Canada, without an immigration visa, only if qualified under the intra-company transferees rules. In fact, the FTA does not make it clear what length of stay or what number of periodic visits may be enjoyed by a business visitor or, indeed, when the privilege of temporary entry may be taken to have been abused in that a temporary stay has become, in fact, a long-term settlement.

US business visitors to Canada may be subject to exclusion, as are other visitors, on security or health grounds. But otherwise, all that is required is proof of US citizenship and demonstration of the purpose of the visit in terms that fall within one of the designated occupational categories.

In certain other situations not coming within the business visitor rules, Canada is obliged to issue work permits to US citizens engaged in trading in goods or services or in investment activities, enabling them to enter and work in Canada under the authority of such a permit. A work permit may be

issued at a port of entry (a border crossing, an airport or a port) to a US citizen and need not be secured in advance from a Canadian immigration post outside the country.

When a work permit is required to be issued to a US citizen by the terms of the FTA there will be no underlying requirement that an officer of Employment Canada first certify that in his or her opinion there will be no adverse effect on employment opportunities for Canadian citizens or permanent residents. The groups that will get the benefit of certification-free (validation exempt) entry are intra-company transferees, traders and investors, and professionals.

Intra-company transferees are US citizens seeking temporaty entry into Canada to work, within their corporate or business groups, in a capacity that is managerial, executive or involves specialized knowledge. They must be destined to work or render services in Canada for an employer for whom they have worked continuously for at least one year immediately prior to entry, or an affiliate or subsidiary of such an employer.

The trader and investor classification under the FTA covers, first, US citizens carrying on a substantial trade in goods or services who are seeking temporary entry to Canada in a capacity that is supervisory or executive or involves essential skills. The trade in question must be primarily between Canada and the United States. Since sales representatives, purchasers of goods and services, and certain services personnel may enter with even fewer impediments as business visitors, the number

of US citizens seeking temporary entry to Canada as traders may not be significant.

Finally, US citizens who are engaged in professions of a kind described in the FTA may enter Canada on a temporary basis. This does not mean that they would then be entitled, as of right and without holding any relevant federal or provincial certification, to carry out professional activities of such a nature as to constitute professional practice in a Canadian jurisdiction.

The professions included for the purposes of this classification are not just those occupational categories that have been traditionally recognizad as professions, but extend to such occupations as that of hotel manager and technical publication writer. A certain minimum academic or work experience is essential and, in a few cases, the type of professional activity that may be carried out is limited, for example, US physicians may only be engaged in teaching or research in Canada. Professionals also may be asked, at the post entry to Canada, for proof of citizenship and documentation demonstrating that they are engaged in one of the listed professions and describing the purpose of entry.

The FTA represents a first step toward the freer movement of business personnel between Canada and the United States. The objective is to reduce the unnecessary harassment that many business travellers previously experienced at the border. This chapter has been actively used by business persons in Canada and the United States. A consultative mechanism has been established, at the level of immigration officials, to develop measures for further

facilitating temporary entry of business persons between Canada and the United States on a reciprocal basis. New amendments to the FTA were made recently to add new categories and to prescribe minimum qualifications for professional.

IV. INVESTMENT

Canadian policies regulating doreign direct investment, in the past, have been a source of friction in Canada-US relations. In the 1950s and 1960s, a period of tremendous growth, US investment flowed freely into Canada. As a result, by the early 1970s about three-fifths of the Canadian manufacturing and mining industries, and approximately three-quarters of the Canadian petroleum industry, were foreign-owned, principally by US investors.

In response to growing concerns in Canada about increasing foreign ownership, the government of Canada introduced the Foreign Investment Review Act ("FIRA") in 1973. Under FIRA, establishment of new businesses in Canada and direct acquisitions of Canadian businesses were subject to review to determine whether such investments were of "significant benefit" to Canada. During the review process, foreign firms were often encouraged to give undertakings about export performance, import substitution, employment, local sourcing of products, research and development efforts and capital investment plans.

Although FIRA was always controversial, US complaints reached a boiling point in the early 1980s when the Canadian government introduced the National Energy Program and proposed more aggres-

sive regulation of foreign investment under FIRA. The US government protested and subsequently brought a complaint under the GATT regarding certain of the commitments commonly requested by the Canadian government as a condition for investment approval under FIRA. A panel ruled that Canada had contravened the GATT by requiring private firms to source supplies in Canada, but also ruled that the GATT did not cover export performance requirements, Canada adopted the GATT ruling, and changed its practices under FIRA.

In 1984, the new Conservative government introduced the Investment Canada Act, which altered FIRA considerably. This Act eliminated the requirement of review for the establishment of new businesses except for cultural businesses, and established thresholds of $5 million (Cdn.) and $50 million (Cdn.) for review of direct and indirect acquisitions, respectively. Although the Act's objective is to promote direct investment in Canada, the Investment Canada agency continues to seek understakings from foreign investors in a limited number of sectors, such as the oil and gas industry.

The FTA reinforces the recent trend toward liberalization of Canadian foreign investment policies and provides greater transparency in the investment restrictions that remain on both sides of the border. Except for financial services, bilateral disputes concerning the investment provisions of the FTA are subject to the general dispute settlement mechanism.

The investment chapter of the FTA parallels in many ways the services chapter. With the exception of cer-

tain changes to the Investment Canada Act agreed to in the FTA, all other existing investment restrictions and review requirements are grandfathered. Any new investment policies or regulations must be consistent with the principle of national treatment. In other words, any new policies or programs designed to regulate foreign investment in future must not discriminate against US investors. This applies to provincial and state governments as well as to the federal governments. The investment provisions apply to all goodsproducing activities and covered services, with certain specific exclusions. The transportation industry, the cultural industries, and financial services except for insurance are excluded from the provisions of the investment chapter.

The national treatment obligation concerning future investment policies applies to the establishment of a new business or the acquisition of control of an existing business by a US investor. Canada agreed to make the following changes to the investment Canada Act as it applies to investments by US investors: 1. The screening of indirect acquisitions will be phased out by 1992, and 2. The threshold for screening of direct acquisitions will be increased to $150 million (Cdn.) by 1992 from $5 million (Cdn.) in 1988.

The FTA explicitly precludes the imposition of certain performance requirements on US investors. For example, Investment Canada may not require US investors to provide undertakings with respect to export performance, import substitution, local sourcing or levels of domestic content. However, an

investment review agency, as a condition of approving an investment in future, may require a US investor to give undertakings relating to factors such as research and development efforts or job creation. Minimum domestic equity requirements, except for designated industries, are prohibited.

The FTA does not affect the right of the Canadian government, to review investments by US investors in designated culturally-sensitive Canadian businesses, whether through the establishment of a new business or the acquisition of an existing Canadian business of whatever size. Canadian "cultural industries" are defined as those involved in the production, distribution or sale of books, newspapers, periodicals or music; the production, distribution, sale exhibition of films, video recordings, audio recordings, or records; and radio and television broadcasting (including cable TV, satellite programming and broadcast networks). As a matter of policy, the Canadian government currently requires new foreign investment in Canadian book publishing and distribution enterprises to be in the form of joint ventures with Canadian control, or in the case of an acquisiton of control, to be accompanied by an undertaking to divest control to Canadians within two years at fair market value. Under the FTA, where the Canadian government requires the forced divestiture of a cultural business acquired indirectly by a US investor, the government is obliged to make an offer to purchase the business at fair market value where there are no Canadian purchasers ready and willing to acquire the business at a reasonable price.

The new thresholds for review of acquisitions by

US investors under the Investment Canada Act do not apply to investments in the uranium and oil and gas industries which remain subject to existing thresholds and established policy.

The FTA also provides for procedures governing expropriation, ensuring due process and fair compensation, as well as ensuring repatriation of earnings subject to laws of general application, such as those relating to insolvency or the imposition of withholding taxes. Where either Canada or the United States decides to expropriate a business owned by an investor of the other country, such expropriation must be for a public purpose, be made on a non-discriminatory basis, be made in accordance with due process of law and be accompanied by prompt payment of adequate and effective compensation at fair market value.

Government procurement practices are explicitly excluded from the investment chapter. Financial services, with the exception of insurance, transportation services and cultural industries are also excluded from the investment obligations. Subsidy programs and taxation measures are also not subject to the nationall treatment or other investment provisions provided that they do not constitute a means of arbitrary or unjustifiable discrimination against investors from the other country or a disguised restriction on trade.

If a government decides to privatize a government-owned enterprise in future, it is permitted to impose national ownership restrictions in determining who may purchase that entity. This applies to enterprises owned, directly or indirectly, by the federal

government, or a state or a provincial government. It also applies to the subsequent privatization of any business enterprise acquired or established by a government in future.

The FTA contains special provisions concerning the maintenance or designation of monopolies. It provides that either country may maintain existing, or designate new, monopolies in any relevant market. Prior to designating a new monopoly that might affect the interests of firms in the other country, a government must notify the other country and cosult, if requested. Also where there may be an adverse impact on firms in the other country, the government establishing the monopoly is required to regulate the monopoly's operations in such a manner as to minimize the possible adverse impact.

If either country designates a monopoly, it is required to ensure in its regulation or supervision of that monopoly that it does not discriminate in sales against persons or goods of the other country in its market or use its monopoly position, in another market, to engage in anti-competitive practices that adversely affect a firm of the other country through the discriminatory provision of a good or covered service, cross-subsidization, or predatory behaviour.

V. DISPUTE SETTLEMENT

The FTA dispute settlement mechanisms represent an important break with the pattern of unilateralism that had characterized bilateral trade relations prior to 1988. Canada and the United States have agreed to work together to develop a common

system of trade laws. In the interim, an important new set of checks and balances has been established to ensure that the two countries' domestic trade laws are not applied or changed in ways that would hamper access to each other's market. New binational review procedures are available to provide exporters involved in antidumping or countervailing duty cases with more timely and less expensive review of final agency orders. In addition, general dispute settlement procedures, similar to the GATT procedures, have been established to deal with matters of interpretation and application of the FTA generally.

Specifically, the dispute settlement mechanisms of the FTA provide the following benefits:

. The Agreement mandates substantial changes to the "escape clause" or "safeguards" laws of both countries, changes that are likely to reduce the number of bilateral disputes involving the imposition of emergency border measures, such as temporary surcharges or quantitative restrictions. Either country may refer complaints about the imposition of an emergency measure to a binding arbitration panel.

. The new binational system for antidumping and countervailing duty cases should reduce the delays and costs involved for private firms in appealing the decisions of international trade agencies through the courts.

. The two countries' commitment to work together to develop and implement a new system of trade laws is an important step for the bilateral trading relationship as well as for the Uruguay Round of multilateral trade negotiations.

. The establishment of formal, new channels of com-

munication between the two governments prior to the enactment of new trade legislation should provide an early warning mechanism for potential conflicts.

. The establishment of a Canada-US Trade Commission with the ability to appoint binding arbitration panels or panels of experts to arbitrate or resolve particular disputes is an important new step in Canadian-US trade relations.

Although the Agreement's dispute settlement mechanisms are not perfect, they could evolve into a more permanent, authoritative binational institution in the future. Designing a set of institutions to administer a new trade agreement and to resolve disputes requires delicately balancing the purpose and objectives of the Agreement with the concerns of the governments about ceding decision-making authority to a supranational body.

The FTA, by its nature, is an evolutionary document. Some of its rules —on antidumping and countervailing duty laws, intellectual property, trade in services, financial services, government procurement, and agriculture, for example— will be subject to future negotiations and development. Economic and political exigencies will require that rules and institutions be modified over time to meet changing conditions in both countries.

A. *Chapter 19 - Antidumping and Countervail*

Until a new system of trade laws is developed, both countries will continue to apply their own domestic antidumping and countervailing duty laws and may change those laws. This means that Canadian

and US firms may continue to bring antidumping or countervailing duty cases against imports from the other country under their existing domestic laws and procedures.

Each country's right to apply and amend its domestic laws, however, is subject to important new constraints. A new binational panel procedure has been established to take the place of judicial review by the courts of final antidumping and countervailing duty orders in both Canada and the United States. At the request of either country, a binational panel is selected from a roster of panelists to review a final order made by the Department of Commerce or the International Trade Commission in the United States, or the Department of National Revenue-Customs and Excise or the Canadian International Trade Tribunal in Canada. The panel's task is to determine if the agency concerned made its decision in accordance with domestic law. The panel is required to apply the standard of judicial review applicable in the country where the investigation tool place. The decision of the panel is binding on the governments and their agencies.

Only the federal governments may initiate the new binational panel review procedures. The FTA, recognizing that antidumping and countervailing duty cases are essentially private actions, has expressly assured access by private parties to the binational panel review mechanism. Where a private party involved in an antidumping or countervailing duty investigation requests that its government commence a binational panel review on its behalf, that government is required to do so.

The new binational panel review process offers several major advantages for private firms over the previous system. First of all, the binational panel process reduces the time for final resolution of antidumping and countervailing duty cases. Appeals of US cases through courts previously could lake as long as four years. The binational panel procedure is subject to a limit of 315 days measured from the end of the agency proceedings. This maximum time limit has worked to reduce delays in individual cases and to provide private firms with greater certainty than under the previous system. The binational already are having a notable impact on the decisions made by domestic trade agencies.

The binational review procedure provides a cost advantage for small and medium-sized businesses in both countries. Previously, firms wich decided to appeal antidumping or countervailing duty decisions to the courts paid for it themselves. Under the FTA, the binational panel reviews are initiated and conducted largely by the federal governments. Therefore, a small or medium-sized business that would not otherwise have been able to afford the expense of challenging an agency ruling in the courts may have its case presented by its government. Private firms also may make representations and appear before a binational panel on their own behalf.

The FTA also establishes a mechanism to deter future protectionist changes in either country's trade laws. Neither the United States or Canada is permitted to amend its antidumping or countervailing duty laws as they affect the other country unless the amending legislation states specifically that it

will apply to the other country, there has been prior notification to the other country, and the proposed amendments are consistent with the GATT, the Antidumping Code or the Subsidies and Countervailing Duties Code and with the object and purpose of the FTA. Where the other country objects to a country's proposed amendments to its trade laws, government-to-government consultations are to be initiated. If those consultations fail to achieve a solution, the other country may request that a binational panel be appointed to review and issue a declaratory opinion on the proposed amendments. Where a binational panel issues a declaration recommending changes to the proposed amendments, the two governments are required to enter into compulsory consultations for a period of 90 days during which they are to seek a mutually-agreeable solution. If the country proposing the amendments fails to comply with a panel's opinion, and no mutual resolution is reached within nine months, the other country may enact mirror legislation or take action to terminate the FTA upon 60 day's notice.

B. *Chapter 18 - General Dispute Settlement Procedures*

Chapter 18 of the FTA contains dispute settlement procedures, modelled on the GATT system, wich deal with matters of application or interpretation of the Agreement generally. The Canada-United States Trade Commission (The "Commission") has been established to supervise the implementation of the FTA, to resolve any disputes that may arise over interpretation or application, to oversee its further

elaboration and to consider any other matter that may affect its operation. It has the authority to create subsidiary ad hoc committees or working groups to investigate and resolve disputes or to negotiate and develop new rules as provided for in the FTA. It also may appoint binding arbitration panels or panels of experts to hear and give rulings on disputes. Chapter 18 does not apply to disputes arising under the chapters relating antidumping or countervailing duty laws or financial services.

Where a dispute concerning the application or interpretation of the FTA arises, the two governments are required to make every attempt to arrive at a mutually-satisfactory resolution through consultations. If they fail to resolve the matter, either country may apply in writing to the Commission. It is required to convene within 10 days to endeavour to resolve the dispute. The Commission may use a range of different mechanisms to reach a solution, including appointing a special committee or a working group or calling on technical advisors or on the assistance of a mediator to achieve a consensus solution.

Where a dispute has been referred to the Commission and there has been no resolution within 30 days, the Commission is required, upon the request of either country, to establish a panel of experts to consider the matter. All disputes involving "emergency actions" taken under Chapter 11 of the FTA must, and any other dispute the Commission selects may, be referred to a binding arbitration panel.

There are explicit time limits at every stage of the dispute resolution process. In any case where the Commission has referred the matter to binding arbitration,

the decision of panel is final. In other cases, the Commission will make a final decision, which normally will be based on the panel's report. The Commission must reach its decision by consensus. If it does not reach its decision expeditiously, and the complainant country feels that it is being injured by the continuing action of the other country, it may retaliate with measures of equivalent effect until the matter is resolved.

The establishment of an independent, binational Commission to supervise the operation of the FTA, assist in its further elaboration and resolve disputes is an important achievement in Canada-US trade relations. New formal channels of communication between the two governments, prior to taking any new measures or actions that may affect trade, are available where there were none before. The express short time limits set out for every stage of consultation, conciliation, arbitration and dispute adjudication also help to ensure that matters are dealt with in an expeditious and efficient manner.

The experience to date with the FTA dispute settlement procedures has been positive. There have been 11 binational panels which have rendered decisions in countervailing duty or antidumping cases. In two important cases, the panels have overturned agency decisions and are proving to be an important watchdog on agency decision-making. The experience with Chapter 18 —the general dispute settlement mechanism has been mixed. There have been two cases, both of which had significant GATT implications. It is not clear, in these sorts of cases, whether the GATT or the FTA is the better forum. With FTA, governments have a choice.