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Richard G. Dearden

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IMPLICATIONS OF NAFTA'S EXTENSION TO CHILE AND OTHER COUNTRIES-A CANADIAN VIEW

*Richard G. Dearden**

On an historical note, I entered the free trade agreement game because Jean, in a former life, was General Counsel of Commerce and retained my firm, and me in particular working with her, when the United States and Canada were putting together the final text of the Canada/U.S. Free Trade Agreement (FTA), Chapter 19. Little did we know then that Jean would actually be appearing before me as counsel in the *Softwood Lumber* panel case. Subsequently, it was alleged (unsuccessfully) that I had a conflict of interest.

Just as an aside, by the way, I totally agree with Simon Potter's comments this morning that never, ever in the deliberations did any nationality issues come up as to which way the panel voted. I have the utmost respect for Michael Reesman of Yale, who is one of the U.S. people who dissented. He is one of the most brilliant lawyers I ever met and worked with, and for anyone to suggest that that decision was based on national allegiances is really, really foolish.

So that is how Jean and I met. Gowlings represented Commerce and the USTR, which I did not disclose, by the way, in my *Softwood Lumber* disclosure form, because I did not think I had to, since it was so well-known. We put together the final text and then implemented the agreement. Ultimately, I was one of the Canadian counsel representing Mexico in the NAFTA negotiations, and we just finished representing Chile with the negotiation of the Canada/Chile Free Trade Agreement. However, my remarks are my own, and not those of the government of Chile.

Henry, thank you for inviting us here. Your attention to detail is absolutely amazing. Henry knew this panel would be talking about Fast Track, Slow Track, Off Track, Double Track, so who does he get to chair? A General counsel of a railway company! That is truly attention to detail.

* Richard Dearden is a partner in the law firm of Gowing, Strathy & Henderson's offices located in Ottawa, Ontario.

Outlining my remarks, I am really going to focus on the implications of not yet extending NAFTA to Chile. Within that heading, as you heard, Canada has gone ahead with its own bilateral deal with Chile. What is the second issue? What is the impact on the FTAA process, and does the failure to have Chile to date mean that maybe NAFTA has lost an opportunity to add a party? And, what are the implications in not adding a party yet? I will deal with those three issues. Lastly and very briefly, what are the implications of Chile and other countries acceding to NAFTA? There will obviously be concern about the content of the agreement; what will it look like with the fourth party, fifth party, sixth party, and what happens to institutions within NAFTA?

Knowing you all want to get over to the Glidden House Pub, I will not get into too much detail. Okay, I want to get over to the Glidden House Pub, so I will not get into too much detail on the institutions and what might happen to the NAFTA articles per se.

The first issue involves the implications in not extending NAFTA to Chile. First of all, it forced Canada to go ahead on its own and negotiate its own deal with Chile, and they did it hoping that it would be a bridge to a more rapid accession of Chile if and when the U.S. Administration ever got Fast Track authority. Canada could not sit back and wait for Washington to get its act together, and it did not. Why? Notwithstanding the huge debate we had about whether free trade was going to send us back to the days of being hewers of wood and drawers of water, and Mr. Mulroney almost getting defeated in the 1988 Canadian election over the Free Trade Agreement with the United States, now everybody talks free trade. It is the thing to do. The movement is there because we are a trading nation and we now realize that one out of three jobs depends on exports. We need secure and open access to markets. We need rules that can govern countries, especially countries in North and South America that may not know the rule of law.

So we have had the Canada/U.S. Free Trade Agreement, NAFTA, WTO, Canada/Israel, and now we have a Canada/Chile Free Trade Agreement that has created that momentum within government and within business, working together to keep up the whole notion of the liberalization of trade in other markets, because we need them. We did not want to lose that momentum, because there was a huge psychological barrier broken through, believe it or not, with Canadian exporters. We Canadians always tend to look to the United States as our only export market. Eighty percent of our exports go to the United States, even today. So there was a psychological barrier that we did not export beyond Texas. NAFTA helped right that thinking vis-à-vis Mexico, and now we are thinking of other countries in Latin America. We are doing

well, very well in Chile, thank you very much, and now we are concentrating on Brazil. But we need rules and agreements to work within to do that. The Canadian government did not sit back and wait for the United States to get Fast Track authority. It is taking a lead role in the FTAA process.

And now, along with having Chile as a free trade partner, Canada is now contemplating becoming an associate member of MERCOSUR. There is an internal assessment ongoing within Foreign Affairs now about joining MERCOSUR, and the issue is to be raised when Brazil's President comes to Canada in mid-April. It looks like there will be a pretty serious exploration of whether Canada should be an associate member of MERCOSUR. And again, we are not sitting back to wait to see if Fast Track comes in 1997, 1998, or not at all. Canada is moving ahead. Mexico has been doing the same thing.

Let us turn to the implications of not extending NAFTA to Chile and other Latin America countries. Bilateral agreements are abundant with the two other NAFTA partners, Canada and Mexico. I think that Mexico is trying to make itself the hub. Remember, there was concern about the hub. We spoke how the United States could be the hub and they would do bilaterals with all kinds of other countries which would be the spokes. Mexico has hundreds of free trade bilateral agreements, and they are still going. So that is a major implication of not extending NAFTA to Chile.

The upside from the Canadian exporters' point of view, in the Canadian government's being aggressive in trying to negotiate bilaterals and moving ahead of the United States, is that our exporters have an advantage over U.S. exporters who have had the preferential access. If there are huge tariffs out there for U.S. exporters, and those tariffs are removed for Canadian exporters, then that could make or break a deal. We do know that U.S. business is concerned about being left behind and other nations like the European Union or Mexico or Canada making their own deals, getting preferential access, when they do not have it.

The question I put to the floor is, why this isolation? What is going on? Why are you not getting Fast Track? Why are you not in this game? The United States was the leader. Your economy is in very good shape; interest rates have been pretty good. It strikes me as a little odd that the United States would not be taking the leadership role, as it traditionally has, in opening up markets. So I leave that question out there for comment later.

My second point is the impact of Chile and any other Party acceding to NAFTA on the FTAA process, the Free Trade of the Americas process. The hope, of course, was that Chile would be in serious negoti-

ations to accede to NAFTA. What that would do would be to provide an impetus for and movement among the thirty-three other countries in the FTAA process; that this must be a pretty good deal to be in and we should be doing this, too, and that would lend credibility to having a Latin American country like Chile in the NAFTA. It would lend credibility to the whole FTAA process. As we know, that did not happen. Has it deterred it? I am not sure it has. We have the second Summit of the Americas coming up in Santiago next year. But the hope was to point to concrete results with experience for a year or two of Chile being part of NAFTA, seeing it work, and convincing any nay-sayer nations in the FTAA that they should not have those concerns.

FTAA will not be a replacement for NAFTA, and NAFTA will not be a replacement for FTAA. There will not be negotiation between the two blocs. It will be, as far as the Canadian government is concerned, as I understand our trade policy of the day, it is that the FTAA will coexist and complement NAFTA and complement a regional trade zone like MERCOSUR. So Canada does not view the FTAA as a substitute for the NAFTA. They will work side-by-side.

Canada is hoping, taking a lead role at the second Summit in Santiago, to have an announcement that there will be a launch of the FTAA negotiations, not further study and delaying and waiting for another year, but that actual negotiations would commence. Now, whether that will come true or not, who knows? The NAFTA Commission recently met and their joint statement of the Trade Ministers was to welcome the progress to date in the hemisphere and at the subregional level to liberalized trade.

In the context of the Free Trade Area of the Americas, Canada reiterated the importance of meeting the commitment set forth by the 1994 Summit of the Americas and subsequent hemisphere of the Trade Ministerial Meetings. Canada discussed preparations for the FTAA Trade Ministerial Meetings schedule for May 1997 in Brazil, recognizing its importance in determining how and when the FTAA negotiations should be launched. This was not a ringing endorsement to get moving on this subject and get it into play.

Our Prime Minister was in Washington not so long ago, several weeks ago, stressing to President Clinton that some South American countries are losing patience with the slow pace of resolving the Fast Track issue and that we should be getting on with Chile acceding to NAFTA and getting on with an agreement that all thirty-four countries in the FTAA zone belong to.

Why do we need this? One, to strengthen democratic principles and democratic thinking in those Latin American countries, some of which

do not particularly practice those principles; and so that we in North America do not lose our position economically with South America in particular. The European Union is there, and they are dancing with MERCOSUR, and what are we doing so as not to be left behind? So Prime Minister Chretien was chatting with your President about that.

At the same time, to show you what a die-hard Prime Minister we have on free trade, on the White House lawn, during a press conference, a reporter asked the Prime Minister, "What about all those drugs that are coming in through Canada into the United States?" Without batting an eyelash, the Prime Minister answered, "free trade." President Clinton, standing there beside him, looked at Mr. Chretien and sank down lower and lower. The Prime Minister realized maybe he did not hear that question right. President Clinton looked over to him and said, "She said drugs." Chretien says, "Oh. I heard trucks." To wit, President Clinton responded, "Good thing we clarified that or we would have to call off the Canadian election!" We are glad that our free trade Prime Minister cleared up that he is not so adamant on free trade that he includes drugs flowing in and out of our two countries.

Another issue confronting the expansion of NAFTA, one which the WTO is looking at, is what they call systemic implications of an expanded NAFTA on the multilateral system. That is, with all these regional agreements being entered into all over the world, what happens to the WTO? If you have a NAFTA and a European Union, and some have thought about those blocs merging together, and then you include a whole bunch of South American countries, then why do you need a WTO?

There is actually a committee formed on regional trade agreements that is chaired by Canada's former chief negotiator of the NAFTA, John Weekes, who is our Ambassador over in Geneva now. Part of that committee's task is to review the systemic implications of regional trade agreements on the world trade system. Stay tuned on what the WTO does and how it reacts to these regional blocs.

Why do I say that the failure to add Chile to date means that NAFTA may have lost an opportunity to add a party? Because of recent comments made by the chief negotiator for Chile of the Canada/Chile Free Trade Agreement, Juan Gabriel Valdez, who is quoted in *Inside NAFTA* as follows:

In today's more complicated context, the concept of accession to NAFTA should be reevaluated so as to ensure that it does not become counterposed as an elite club of excellence in opposition to the broader historical move toward hemisphere-wide integration. If we are pushing for the FTAA and consider it to be a very crucial endeavor, as we all think, then the idea that one after the other the

countries of the hemisphere would apply to join NAFTA is an ideal that is no longer valid. While Chile sees value in joining NAFTA, we value much more than the opportunity we have — in that the opportunity we have, which I think will probably not last for a long time to promote free trade in the Americas and therefore to promote and to produce a general movement of negotiations which will open our economies and will associate ourselves.

It was a very different scene in Chile back in 1994. Chile is an associate member of MERCOSUR, and things are happening on the FTAA front. So keep those comments of Juan Gabriel Valdez in mind. Chile got ready for accession to NAFTA and were hugely embarrassed by the fact that the negotiations never commenced.

It is not a slam dunk in Chile that you are just going to have them joining NAFTA or any free trade agreement. They, like Canada, have opposition like you are experiencing now in terms of the attitude towards NAFTA and to free trade. Not everybody is a free trader. That was greatly embarrassing, and that is why you do not see Chile offering to get into some kind of discussion about accession to NAFTA until Fast Track is in place and they know what the negotiation rules are. We have lost an opportunity to use Chile as a test case about how well NAFTA can withstand expansion. Hopefully we will get to see it, but it is not a sure thing that we will.

Another question that might come up is, what are the implications of expanding NAFTA to countries other than Chile? We hear Costa Rica, Columbia, maybe even Argentina are possibilities. Brazil is doubtful. We have heard about the European Union, which would be a huge undertaking. So the question put on the table is, which other countries might join? And, of course, the impact or the implications will depend on what country or what bloc we are talking about that might want to accede to NAFTA.

What are the implications if Chile does accede to NAFTA? Let us be optimistic and assume they do. Canada has been adamant that there is a huge difference between widening the membership of NAFTA and changing the agreement or deepening it or amending it, whatever words you want to use. Canada does not want to go through the process that it went through with NAFTA, which was essentially a renegotiation of the FTA. Even though the FTA is only suspended, it was essentially a total renegotiation of the FTA, dealing with many new issues.

Canada is not interested in renegotiating the culture exemption, however you want to interpret it from what you have heard this afternoon. Whether you think we have one or not, it is extremely political. And the free trade dog is asleep right now, just like at one time Quebec's secessionist dog was asleep. Someone woke up the Quebec's

secessionist dog, so now we are talking about amending the Constitution, and we have a country that could be on the brink of breaking up.

The same thing could happen with waking up the anti-free traders. The majority of Canadians are positive about free trade now. The press is not critical for the time being; but you would only need to push a hot button like culture to set them off. Somebody alleges that the United States is threatening our culture. The average man and woman on the street probably do not even know what NAFTA means in full, in terms of the acronym, let alone having read two pages of it. Somebody alleges our freshwater exports are threatened by free trade, and an election was almost lost over that allegation. I do not have a clue why our freshwater exports would be threatened by joining a Free Trade Agreement with the United States. But that is a great sound bite. It takes two seconds. It is the same thing with an allegation that culture is threatened by free trade, a great sound bite. I am saying to you tonight that you do not want to renegotiate culture. It is very politically explosive, and I just do not want to risk, speaking for myself, that Canada terminate the NAFTA. That is not in our country's interest, in my opinion.

However, is some renegotiation of NAFTA inevitable? Canada is heralding the fact that the Canada/Chile Free Trade Agreement is going to exempt anti-dumping investigation of exports from the two countries. The next time Chile comes to accede to NAFTA, this will be held up to the U.S. government to show them, in a free trade area we do not need anti-dumping duties. Will the U.S. government back off of anti-dumping trade remedies? In your dreams! The working group that was charged with the task of looking into that has just reported that they got nowhere, which is not a big surprise.

The reality is that we should look at it sector-by-sector, and really, as a general principle in the free trade area, we probably should not have anti-dumping duties or countervailing duties, because they can be used as a tremendous harassment tool for exporters. But the reality is that, in my lifetime anyway, I would be shocked to see the U.S. government discard trade remedies in the anti-dumping/countervailing duty area. It would be a little inconsistent to say we are not renegotiating anything, but then try to herald the fact that we have negotiated a bilateral with Chile on the elimination of anti-dumping duties.

Lastly, if there is accession, what happens to institutions? Of course, rules, procedures governing working groups, and committees including the Free Trade Commission will have to be amended and revisited, not the least of which is how you vote. Do you do it by consensus? Is it three-quarters; is it three-fifths, or is it two-thirds, or whatever? The Secretariat really is an administrative body right now, performing admin-

istrative functions. As it gets bigger, there has to be serious concern given to making it like the WTO Secretariat, giving it more power and allowing it to assist panels in making the decisions in both Chapter 19 and Chapter 20. That should be given a serious look.

Then, of course, you have the Chapter 19 panel system. I am an advocate of a permanent Chapter 19 panel if we are stuck with that system. As I told you, I chaired the *Softwood Lumber* panel, so I did actually go through the process, and I think it is a lot more complicated now with Mexico in the picture. Remember, *Softwood* was just between Canada and the United States under the FTA.

If you are a panelist who is unilingual, speaking only English, how do you do your job if you cannot speak Spanish to review the record or review any of the submissions that are made to you? If you are a smart advocate, you make sure you put your brief in English so the person making the decision can actually understand your argument. But how do you review the administrative record, which is entirely in Spanish? You have to hire an assistant who is bilingual. And who is making the decision? Only the panelist can make the decision. I know in *Softwood*, we looked at the record a lot. We went into that material a great deal. How do you, as a decision-maker, do that if you cannot read it? Translation is available, but time and costs may prove to be obstacles.

Then there was the institutional memory issue that was raised this morning as well. The institutional memory for us was Jim Holbein, who has been the NAFTA Secretary for the United States for a long, long time. You are going to ask, whenever procedural issues come up, was there ever a case like this? Nothing was on-line, and nothing was recorded on what panels had done in the proceedings. You could not search it, it was all in his head. I think that the system would work smoother if all proceedings are recorded and available to panelists and counsel.

The advantage of permanent panelists is that you significantly reduce the risk of conflicts. They are there. That is their job. You are not using lawyers from law firms that represent private interests, so no one can be accused of a conflict of interest. They will build up a body of precedent, and I think the system can work really well.

So the NAFTA institutions will have to change with accession. The extent of the changes will depend upon the attitudes of the day toward free trade in each country taking part in the accession.