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Chair

Mr. John Cannis

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● (1540)

[*English*]

The Chair (Mr. John Cannis (Scarborough Centre, Lib.)): I call this meeting to order.

Before I introduce our guests, I'd like to ask my colleagues on the committee a question. As you know, earlier today we were before the Standing Committee on Foreign Affairs and International Trade to present our budget. I would ask if you would kindly take a moment of your time today or tomorrow to speak to your House leaders to bring them up to date. I hope we can wrap everything up as soon as we can and commence our work across the country.

Before I introduce our guests, there's one special individual here with us today. Gillian Prendergast is a political science student from McGill University. She is shadowing a member of Parliament. It's always nice to have students here.

Welcome to Ottawa, Gillian, and welcome to the session. I'm sure you'll enjoy it and you'll see how things work around here. It's good to have you.

Colleagues, we have before our committee today our witnesses. I'd like to go down the list and introduce them. We welcome Mr. Elliot Feldman from Baker & Hostetler LLP; Mr. Lawrence L. Herman, counsel for international trade, Cassels Brock & Blackwell LLP; Mr. Jon Johnson from Goodmans LLP; Mr. Donald McRae, professor of business and trade law from the University of Ottawa; and Mr. Simon V. Potter, a partner with McCarthy Tétrault LLP. It's nice to have you here.

Today we'll be discussing Canada-U.S. trade issues, specifically NAFTA chapter 19. In terms of who speaks when, we'll follow the order I've used for the introduction. You will each have 10 minutes, and then we'll go around the table for questions.

We'll start with Mr. Feldman.

Dr. Elliott Feldman (Baker & Hostetler LLP): Thank you, Mr. Chair. Thank you very much for inviting me here today; it's an honour to be here with you.

Canada decided in the mid-1980s to commit fully to negotiation of a free trade agreement with the United States, largely because the MacDonald commission had concluded that Canada's future depended on it.

The reasoning was uncomplicated. After the apparent loss of special relationship status in August 1971, Canada had tried to diversify its foreign markets. By 1985 this pursuit of a third option was an obvious failure, and the chemistry of the Shamrock Summit enabled Canada to pursue, as the best and perhaps only alternative, secure access to the U.S. market.

Canada's prosperity depends on secure access to the U.S. market. Allan Gotlieb recently characterized Canadian foreign policy as a continuous tension between romanticism and realism. No Canadian foreign policy, whether romantic or realistic, can neglect the unrebutted conclusions of the MacDonald commission.

The heart of the negotiated free trade agreement, and its most creative novelty, is chapter 19. The other features of the Canada-U.S. agreement are not significantly unlike what can be found in other bilateral agreements the United States has entered with other partners. With the extension of chapter 19 to Mexico, there is nothing like this feature in any relationship, treaty, agreement, or arrangement the United States has with any other country.

Chapter 19 thus is unique, and uniquely valuable to Canada. The United States has refused to negotiate anything like it with anyone else, and regrets having negotiated it with Canada and having extended it to Mexico.

The reason is simple: Canada has won most of the disputes taken to chapter 19 binational panels, and U.S.private interests believe they would have fared better in U.S. courts. The United States, therefore, wants to destroy chapter 19 and has been trying to do so for the last ten years.

The destruction of chapter 19 implies the destruction of NAFTA. NAFTA has been the unmistakable source of an economic boom for Canada, driven by the confidence of secure market access guaranteed by chapter 19.

Although Canada has a formidable history of negotiations with the United States, it also has a history of being rebuffed when thinking it has been successful. Consider, for example, the east coast fisheries treaty. Canada's negotiating team, led by Marcel Cadieux, certainly produced a deal favourable to Canada—too favourable. The New England delegation in the United States Senate voted unanimously to strike itdown. The United States will never lose a negotiation with Canada, sooner or later. Chapter 19, committing the United States to abide by the rule of law in trade dealings with Canada, and to give up, literally, home court advantage, has been Canada's oneway to be treated equally, as a partner, in its bilateral relations.

This unique institution has been a mainstay of Canadian sovereignty. There are several reasons. First, as the MacDonald commission advised, Canadian sovereignty requires economic independence, but such independence can be achieved only through secure access to the U.S. market following the manifest failure of the third option.

Second, chapter 19 and the rest of the NAFTA apparatus avoid a customs union and political integration, resisting the developments that characterize the growing unification of Europe and preserving, therefore, Canada's independence. NAFTA occupies the political and economic space that alternatively would be taken up by the more integrated relationship with the United States that many Canadians now believe necessary but possibly unobtainable.

Third, Canada is under intense and inevitable pressure to integrate with the United States in numerous ways, because of security. The border is increasingly a mutual enterprise, as is generally the movement of goods, people, and services. A perimeter defence necessarily means integration—a development that cannot be resisted, because the alternative would endanger the peace and prosperity of all our peoples.

Fourth, while a stream of Canadian foreign policy thinking continues to favour a romantic ideal of independence through multilateralism, Canada's population size and declining international influence produce from such initiatives of independence an American reaction that reduces Canadian stature and influence even more. The one, and perhaps only, institutional arrangement that sustains Canada's independent profile is, perhaps ironically, the institutional configuration of NAFTA, and especially chapter 19.

● (1545)

Despite the overwhelming importance that chapter 19 has taken on for Canadian identity, sovereignty, and prosperity, Canada has tended to squander the advantages of the institution, while neglecting other opportunities presented in other NAFTA chapters. The United States, for its part, continues to seize every opportunity to diminish Canada's economic and political independence, and it understands the obstacle that chapter 19 represents. The United States has mounted a coordinated offensive; regrettably, Canada has offered only a tepid response.

In a paper released last June, and tabled with this committee by Monsieur Carl Grenier, we wrote something of a history of chapter 19 on behalf of the Canadian American Business Council. It provides a proverbial chapter and verse of the U.S. strategy to deprive Canada of chapter 19's unique advantages. And although we believe the analysis has attracted attention, it has yet to stimulate concrete actions. For this purpose, time is not on Canada's side.

I have been asked often for specific proposals for action. The management and maintenance of chapter 19 are in decline, but—barely—they do not remain beyond repair. We can provide a very specific list of what needs to be done, beginning with expansion of the national secretariats; upgrading them professionally; removing them from the physical, geographic, and fiscal control of agencies that appear before them; and extending to them at least the authority of respected clerks of the court. Incredibly, the secretaries of NAFTA have absolutely no powers, including powers to resist the illegal and improper instructions they are sometimes given by the national governments who presume to control them.

Panellists need to receive reasonable pay, but even more importantly, they are entitled to the respect accorded to judges and the gratitude of the governments they serve, often with personal sacrifice. An enforcement apparatus needs to be created so that theundisciplined and controlling governments do not remain free to ignore or break the rules, as they now do almost routinely. If Canada wants the United States to live up toits legal obligations, Canada needs to at least abide reliably by the same rules, if not set an example.

We have suggested that the most promising vehicle for repairing chapter 19 is chapter 20. Canada tends to forget that the world is aware of NAFTA. The United States is not insensitive to its relations with Canada, even as it would like to take them for granted—as always—or in the present climate to make a negative example of a fair-weather friend.

The United States is very busy forging bilateral trade agreements with other partners. The backdrop of those negotiations is the presumed success ofNAFTA, the cornerstone trade relationship with our closest neighbour. Telling the worldthat the United States is not living up to its international obligations to Canada, notliving up to the terms of the deal it made, would get a lot of attention in Washington. That signal would be sent very loudly and very clearly through a formal request for consultations under chapter 20 to address failure to care for and maintain chapter 19. Even though chapter 20 procedures are non-binding, they are visible and persuasive.

Chapter 19 is not dead, but it is arguably on life support. Canada should be doing everything it can think of, including the mobilization of Mexican support, to resuscitate chapter 19, insisting that the deal be respected and the rules be followed. These steps are for the Government of Canada to take—and they will take time.

Meanwhile, private Canadian enterprises are embattled within the structures of acrumbling system. The alternative, already now exercised by Canadians in the softwood lumber war, is to abandon chapter 19 and return to U.S. courts. The fact that private Canadian enterprises made this choice, with the concurrence of the Government of Canada, should be signaling to all of you that action is urgent.

The Government of Canada has the resources to save chapter 19, but private interests in Canada do not always have the resources to survive within chapter 19. They need, and are entitled to, financial help in order to defend their interests and preserve the rule of law.

I have been deliberately provocative. The limitations of time obviously prevent me from much explanation or subtlety in this statement. I would be pleased to try to answer questions and expand on any of these remarks at your pleasure.

Thank you very much.

● (1550)

The Chair: Thank you very much, Mr. Feldman.

We'll go to Mr. Herman.

Mr. Lawrence L. Herman (Counsel, International Trade, Cassels, Brock & Blackwell LLP): Thank you, Mr. Chairman and members.

I must say that I don't disagree with the points Mr. Feldman made. I'm going to approach it this way. First of all, I'm going to address some comments to chapter 19 as it now exists, and then I'm going to suggest ways in which the system could be made to work better—and I think I'll pick up on some of what he said.

I think we have to recognize two things when we deal with chapter 19. First, it is a narrow, circumscribed process that only allows for judicial review of trade agency decisions. It is unique in U.S. treaty history, as Mr. Feldman has said, but it is a limited process. It does not address broader free trade principles, so let's recognize what it is.

It works reasonably well as a limited process. Those of us here who have been involved in NAFTA chapter 19 proceedings can tell you that it works pretty well and it is an advancement over going to domestic courts. Some of those advantages are being whittled away and lost because of time delays, but perhaps we can address those further during questions. So it works fairly well, but it needs to be improved.

The problem encountered in the softwood lumber dispute is, as I think Mr. Feldman has alluded to, that U.S. agencies give NAFTA panel decisions absolutely no respect, and when they do comply with remand orders they do it very grudgingly. All of this tends to diminish the respect for the treaty procedures and processes in the United States. Whether it's on life support is something we can talk about in discussion, but certainly we see little respect or grudging respect given to NAFTA chapter 19 panel decisions in the United States, and that is a great concern.

One of the key problems with the NAFTA is the lack of an institutional core. Chapter 19 as now constructed reflects the lack of an institutional core. There are certain fictional bodies such as the Free Trade Commission. The Free Trade Commission has certain treaty functions that it does not administer or discharge in a practical way, and I think this committee should address them. The second fiction is the NAFTA secretariats. There are three, but they are not effectively functioning as secretariats, they are really post offices that supervise national panel systems, and nothing more.

So at the core we have fictional bodies, both at the commission, which is to be composed of ministerial-level representatives, and in terms of having a functioning secretariat. However, by virtue of treaty wording, they do have substantive powers that could be exercised, and I think we need to address those powers.

My view looking down the road is that one of the problems, such as the one Mr. Feldman has addressed, is the lack of an institutional centre at the core of the NAFTA. Creating some kind of institutional permanency would help to establish the treaty's legitimacy—hopefully—in the eyes of some of our American friends.

I also think it's worth thinking about institutionalizing the panel system. There is another problem. At the core, there is no permanent panel system. The panels are ad hoc, appointed to hear individual chapter 19 cases. They are composed of whoever is available to serve, and it's getting increasingly difficult to find people, especially practitioners, to serve on the panels.

● (1555)

One of the features of the chapter 19 panels was to have expert bodies that had expertise in the trade law area and could address trade law issues on judicial review. It's becoming increasingly difficult to get persons with that expertise to serve. The remuneration is too low and the time burdens are onerous, so practitioners are not likely to want to serve on those panels. Then there are the overriding problems of conflicts in getting people to serve.

My view, again looking down the road a bit and maybe dreaming a little bit, is to think about institutionalizing a panel system. You could go beyond that. We have ad hoc panels throughout the NAFTA that deal with investment disputes. It's a complicated issue, because the investment disputes kick in other kinds of provisions. But investment disputes, chapter 20 disputes, and financial services disputes are all dealt with through different panel systems. So it is possible to construct a scenario where a permanent panel process would deal with a range of NAFTA disputes. But just going back to chapter 19, institutionalizing the panels would help to create the core that is lacking in the NAFTA system.

In terms of making the existing system work better, let me finish with two comments.

First, the reality in Washington is that they like the trade laws the way they are. They don't particularly like chapter 19. In Washington, whatever the government—whether it's Republican or Democrat—and whatever the configuration in the Senate or the House of Representatives, they are unlikely to want to change U.S. trade laws. So the political reality has to govern whatever recommendations you make here.

On the other hand, Canada has to push on the door, and I agree with Mr. Feldman that the Government of Canada hasn't been pushing on the door strongly enough. In other words, where NAFTA procedures and processes are not working, or where the treaty provisions are not being completely adhered to and implemented, the Government of Canada should be speaking up. That gets to the role of the commission, the role of the secretariat, and the functioning of the NAFTA working bodies.

The final point I'm going to make, coming back to what I said earlier, is that the chapter 19 process could be made to work better, even within the constraints of the present system, by addressing some of the timeline issues and appointment issues, and dealing with the lack of permanency at the centre of the chapter 19 process.

Thank you.

The Chair: Thank you, Mr. Herman.

Mr. Johnson, the floor is yours.

● (1600)

Mr. Jon R. Johnson (Goodmans LLP): Thank you very much, Mr. Chair.

I would like to speak to two specific issues that have arisen under the current softwood lumber dispute that I believe are going to bring matters to a head with chapter 19, and will, I believe, result in Canada having to push at the door.

The softwood lumber dispute, as you all know, is probably the biggest trade dispute we've ever had with the United States. It's particularly intractable because of the strength of the lobby group representing the interests of the softwood lumber producers, the amount of money involved being billions of dollars. It's exacerbated by the Byrd Amendment, which provides that this money will go to members of the industry, and they will put extreme pressure to see that the U.S. is successful in the end.

So that makes it a very intractable trade dispute. And intractable trade disputes put enormous pressure on dispute settlement mechanisms in trade agreements, because at the end of the day, the U.S. is a sovereign country, and if it chooses not to comply, then all that Canada can do is to withdraw NAFTA benefits. We can't make them comply.

Now, the two developments I want to speak about are horribly technical in one sense, but I'm going to try to go through them very quickly and put them in as simple terms as I can. These two developments could seriously damage, if not destroy, the future of chapter 19.

The first is a determination that has come out of section 129 of the Uruguay Round Agreements Act, and that's the U.S. legislation implementing the WTO Agreement. Essentially, the U.S. government has taken the position, whether rightly or wrongly under U.S. law—probably wrongly, but nonetheless the position has been taken—that this new determination trumps a decision that has been made by a NAFTA binational panel.

The second is the position that the U.S. government is taking that binational panel decisions operate prospectively. In short, when the panel makes a decision and the anti-dumping or countervailing duty orders are removed, you don't get your money back, which is a different situation than occurs if you pursue domestic remedies.

I'll just speak very quickly about section 129 of the Uruguay Round Agreements Act. That section was put in the legislation to deal with the implementation of the WTO panel or appellate body decision that ruled that a U.S. anti-dumping or countervailing duty order, or some aspect of it, was inconsistent with WTO obligations.

What section 129 provides in essence is that the matter is sent back to the agency in question—and the one we're particularly concerned with here is the International Trade Commission—which makes a new determination not inconsistent with the ruling of the panel or the appellate body.

Now, in the softwood lumber dispute there are a whole host of iterations. I'm going to speak to only one.

The injury determination went to the International Trade Commission, and they made an affirmative threat of injury finding, which was necessary for the imposition of anti-dumping and countervailing duties. Without that finding, without either an injury or threat of injury finding, duties can't be imposed.

Canada pursued the two courses of action open to it. Firstly, Canada and the industry invoked the rights under chapter 19 for binational panel review, and secondly, they commenced a challenge under the WTO of the ITC's threat of injury decision.

Now, the binational panel, of course, applies U.S. law. But it found that under U.S. law the threat of injury finding was invalid. There were a number of iterations, there were a number of remands, but ultimately the ITC reversed its threat determination.

The binational panel decision has been challenged before the extraordinary challenge procedure, which will work itself through over the next several months. If Canada wins that procedure, then the decision of the binational panel will be affirmed, and what should happen is that the negative determination of the ITC will stand and the duties will go away.

● (1605)

Canada also succeeded in its WTO challenge. The panel applying WTO law came to more or less the same conclusion as the binational panel did applying U.S. law. The matter went to a section 129 panel and the section 129 panel came out with an affirmative determination. In other words, they found threat of injury. The position that's been taken by the U.S. government is that an affirmative finding supercedes the negative NAFTA binational panel finding. Again, right or not, that is the position they appear to be taking. That will become a real issue once the extraordinary challenge process is over, if Canada wins it. While WTO challenges are relatively uncommon with respect to anti-dumping and countervailing duty proceedings in the U.S. against Canadian goods, essentially this would put an extreme inhibition on Canada pursuing those procedures if the U.S. is simply going to turn around and use the process to supercede a binational panel decision.

The second issue, probably simpler and more lethal, is that the U. S. government has taken the position that binational panel decisions, effectively, are prospective only, so the decision is made, the anti-dumping or countervailing duty order is revoked, and the government keeps the duties, or they get paid out as Byrd payments up to that point in time, and the duties only stop prospectively. This has not been a serious issue to this date. The U.S. government has made the practice of refunding the money—sometimes after a delay, sometimes after some difficulties—but now they are taking the position that the money is not refundable under NAFTA.

The fact of the matter is that the U.S. law relating to the refunding of duties is convoluted, but it is different if you use the domestic procedures than if you use the binational panel procedures. If that stands—so you don't get your money back if you use NAFTA, but you do get your money back, or have a better chance of getting your money back, if you use the domestic U.S. procedures—no one would ever use chapter 19. There would be absolutely no incentive to. That is a killer.

As to what to do, Mr. Feldman has raised chapter 20. There are remedies under NAFTA. There's another one under chapter 19. These actions of the U.S. government violate NAFTA. Canada could win a challenge under NAFTA.

I think basically the position should be this. The U.S. really should have a choice. They can either negotiate with Canada and comply with respect to chapter 19, so that Canada gets what it originally bargained for, and if they don't do that, then Canada would have the right to retaliate by withdrawing other NAFTA provisions, at least the benefit of other NAFTA provisions, vis-à-vis the U.S. The U.S. should either give Canada what Canada originally bargained for, which was very important to Canada—namely, a viable chapter 19—or the U.S. should lose the benefit of aspects of NAFTA that they particularly value.

Those are my comments.

The Chair: Thank you very much, Mr. Johnson.

We'll go to Mr. McRae.

Prof. Donald McRae (Hyman Soloway Professor of Business and Trade law, University of Ottawa): Thank you, Mr. Chairman.

I'd like to go back to some of the things that Larry Herman was saying at the beginning of his remarks, and that is, in talking about chapter 19 I think we ought to keep in perspective that it is a fairly small and limited provision. We ought to keep in mind what it was intended to do and what it's capable of doing, and not, I think, put on the shoulders of chapter 19 the blame for a lot of the current trade differences between Canada and the United States.

In the negotiations of the Canada-U.S. Free Trade Agreement, Canada obviously wanted relief from U.S. trade remedy laws. It wanted a tribunal, and what it got was not very much. One might argue it got very little, and the very little was chapter 19. In its very limited way, it is quite a useful and valuable institution, without perhaps going as far as Elliot Feldman has gone in pointing out the star position in Canada-U.S. relations that it has.

It does provide a fairly innovative way of dealing with a problem. It's innovative in the sense that it doesn't require the application of international standards. It requires each country to apply its domestic law fairly. That responded to a concern Canada had at the time that U.S. domestic agencies were not treating Canadian business fairly before the U.S. agencies and then on review before the U.S. federal courts.

It was innovative as well, I think, in providing a non-national oversight for this obligation to apply domestic law. Instead of leaving domestic courts as the guardians of the obligation, chapter 19 gave a role to these binational panels. No longer was it a matter for federal courts, and these panels, as it was pointed out, were going to be staffed not by generalist judges, but by trade law experts. Of course they only had a limited power, a power to remand back to the domestic agency, and the domestic agency had to act not inconsistently with the panels decisions. Panels don't have the power to substitute their own decision for that of the agency, although in practice some of them get fairly close to that.

I would suggest there have been some modest benefits from this. One of the things I think it has shown is that as a system it works quite well, in that Canadian and American panel members, who are generally specialists in trade law, although that's changing a little bit in some respects, have been able to work well on the panels, interpret each others laws effectively, and come up with collegial decisions. As a collegial decision-making process, something that was different and novel actually turned out to work quite well.

I think the other major benefit, and studies have suggested this, is that there is a perceptible change in the way the domestic agencies have functioned as a result of review by after-chapter 19 panels. This applies particularly to the Department of Commerce and the ITC. Both agencies have had to look at what they've done, again. They've both had to base their decisions on reasoning and conjecture. They haven't necessarily continued that all the time, but they've had to revise their determinations. They haven't done this willingly. There have been some very harsh things said by the agencies about panels. But I think acrimony apart, the panels have had a perceptible impact on the process of applying anti-dumping and countervailing duty law in all of the three countries.

With those modest successes, what really are the failures of chapter 19? I think it's intriguing to note that in a study done for the C.D. Howe Institute in 2002, the conclusion was reached that chapter 19 was working quite well and benefiting Canada. Yet in a study done last year for the Canadian American Business Council that Elliot Feldman referred to, the conclusion was that there were serious problems with chapter 19 and it was not providing the benefit to Canada that it should.

What changed between 2002 and 2004? I would suggest what really has changed, if it is a change, can be summed up in two words, and that's softwood lumber. Since the trade remedy issues in the Canada-U. S. Free Trade Agreement were essentially about softwood lumber, chapter 19 was seen as, and to some extent sold as, a way of preventing further softwood lumber disputes. Well, that didn't work under the Canada-U.S. Free Trade Agreement. It has not worked under NAFTA.

I think for chapter 19 to have been the vehicle to solve the softwood lumber dispute, given what the objectives were in chapter 19, it would have meant that the softwood lumber dispute was all about whether or not the United States was correctly applying its own law. Of course that's not what the softwood lumber dispute is about, or at least in large part it's not about that. Maybe in part it's about that. Part of it is about whether it's actually applying its law in a way that's consistent with its WTO obligation. That of course has gone to the WTO panel.

● (1610)

In large part it's really a political issue that has to do with, on the one hand, as was mentioned, the power of lobby groups in Washington and, on the other hand, the fact that the United States, frankly, has a domestic system that is dysfunctional in implementing its international obligations. I think that's something that is shown, whether one looks at softwood lumber or at the way the United States has been having difficulty in implementing some WTO panel decisions. So changing chapter 19 is not likely to have any impact on what I say is a dysfunctional domestic process.

I'm not trying to discount the concerns about delays in panel appointments and the length of time to reach decisions, the sorts of things that Elliot Feldman and Jon Johnson have raised.

But I think that notwithstanding these issues, which I would see in many respects associated with softwood lumber, the pattern of chapter 19 monitoring agencies continues. Panels frequently remand either in whole or in part. Again, a C.D. Howe Institute report pointed out that of the 26 reviews of the Department of Commerce determinations, only five were upheld without remand. All the others had a partial or full remand. Panels act with unanimity generally, or at least without dissent, and that's particularly so with the panels dealing with softwood lumber. The evidence, I must say, is in the report that was done for the Canadian American Business Council, which is a fairly compelling report.

But even if you did conclude that the United States did have a strategy of undermining impartial decision-making by panels, I think you'd have to say it's clearly not working.

In light of this, I think the benefits of continuing chapter 19 are there. I think the alternative of going back to Federal Court review is not a serious option. I think if one looks at the way in which those who have used chapter 19 have acted, one sees that they've voted with their feet. They continue to use chapter 19, notwithstanding the diminishing value perhaps of it. Notwithstanding the disadvantages, they still go to chapter 19 rather than to the courts.

Can it be improved? I would like to focus on one area where I think it can be improved. This is an area that has not been touched on, and that is the question of an appeal. There's no provision for a formal appeal of chapter 19 panels. There is just this extraordinary challenge procedure, which has been referred to already by Jon Johnson. It has some of the trappings of an appeal, but it is limited to questions of gross misconduct or serious conflict of interest or allegations that a panel has departed from fundamental rules of procedure. You also have to show it has manifestly exceeded its powers, such as failing to apply the appropriate standard of review. In addition to that, you have to show that this affected the panel's decision and threatened the integrity of the binational panel process. These are fairly stringent requirements to show.

There were three extraordinary challenges under the Canada-United States Free Trade Agreement and two decided under NAFTA so far, and another case is in process. Resort to this process has always been controversial. When the United States lodged the first challenge under the Canada-United States Free Trade Agreement, some argued that this was an improper use of the process because it was being used as a backdoor means to an appeal. The extraordinary challenge committee in the softwood lumber injury panel case under the Canada-United States Free Trade Agreement didn't do the process much good. It divided along national lines, and there was an extremely intemperate attack by one committee member, Judge Wilkey, on the whole rationale for the chapter 19 system. I don't think Judge Wilkey did himself any good with that attack, either.

But it seems that the use of the extraordinary challenge process is on the rise again. The authors of the report to the Canadian American Business Council accused the United States of trying to turn the extraordinary challenge process into an appeal. Well, in my view, the parties actually should do just that. I think the process does little to contribute to confidence in the chapter 19 system or to the legitimacy. As I mentioned, the grounds are limited. The chances of a challenge committee finding in favour of a petitioner are slim. There's an irony to this, because if the challenge committees always upheld claims against a panel, I think the panel process would lose some credibility. If the challenge committee never upholds a claim, I think the challenge process starts to lose some credibility. I think the two challenges decided under NAFTA highlight the credibility problem.

● (1615)

In the first, the Portland cement case, the committee rejected the petition even though it considered that the dissenting panel member had been correct. In the second case, pure magnesium from Canada, the committee found the panel had manifestly exceeded its powers, and they said this had probably affected its decision, but since this did not threaten the integrity of the binational panel process, the committee rejected the petition. As a result, in both cases agencies had to accept on remand decisions that independent review bodies had said were in some way flawed, and I don't think this does anything to encourage respect by the agencies for the process or to encourage public confidence in it.

We should face up to the issue of an appeal, move away from the extraordinary challenge, and not limit appeal to existing misconduct or egregious standard error as it exists at the present time. Those grounds should remain, but an appeal should be allowed where the panel has erred in its interpretation of the domestic law of the country whose agency's decision is being reviewed in that the committee shouldn't have to demonstrate a threat to the integrity of the panel process. In my view, a decision of a panel that has been tested by appeal is likely to have more credibility in the eyes of a domestic agency, and that could help eliminate some of this to-ing and fro-ing that goes on between panels and domestic agencies.

Now, there will be certain requirements for such a process. The tribunal would have to be independent and have a degree of permanency. Some of the things Larry Herman was suggesting for the institutional aspects of the panel process would have to be built into an appellate process. The tribunal would require experts in trade law, not just domestic court judges as the current extraordinary challenge process does. I think the appellate panels would have to be composed of members from all of the three NAFTA countries, although here it seems there may be some advantage in considering non-NAFTA-party nationals for inclusion on a body. As several of the previous speakers have mentioned, the NAFTA secretariat should be properly funded and be able to play a proper role in this kind of process.

If one had an appeal process, we could not assume that appeals would be rare. The experience in the WTO appellate body has been that appeals are pretty much routine, at least in the beginning. But it seems to me—and this of course might indicate there would be increased litigation and this would have an impact on the time it takes to resolve cases—this would have to be balanced against the fact that the NAFTA chapter 19 process would require a greater degree of credibility and legitimacy if panel decisions were subject to external review.

Thank you very much, Mr. Chairman.

● (1620)

The Chair: That you very much, Mr. McRae.

We'll close off our presenters with Mr. Potter. Mr. Potter, the floor is yours.

Mr. Simon V. Potter (Partner, McCarthy Tétrault LLP): Thank you very much, Mr. Chairman.

[*Translation*]

I will be giving my presentation in English, but of course I will be very happy to entertain questions in French.

[*English*]

I might say, Mr. Chairman, that the timing of your hearing is particularly appropriate, as I will be saying in a few minutes. I believe we are coming to a very serious juncture on the question of Canada-U.S. trade. There are some very difficult decisions that need to be made, and I think the timing of your hearing is very appropriate.

First of all, I think a point needs to be made that has not been made. It's obvious, and I think we should say it; we should make it explicit. The fact is that very much is happening right. Much of our trade crosses the border very, very well, happily and easily. The fact is that we do have a border that is, to use Mr. Feldman's words, although he meant them a bit differently, “a mutual enterprise”. It is a mutual enterprise. We are each other's largest trading partner, and both countries benefit from that two-way flow, that two-way easy flow. A very high percentage of our trade flows across the border with nearly no impediment whatsoever, and we should be happy about that.

Turning to chapter 19 itself, I think it bears pointing out as well that not only was chapter 19 an important part of getting the original free trade agreement, but it was a compromise. Canada had originally insisted on having no anti-dumping at all between the two countries and wanted that to be a condition of entering into the free trade agreement and, in fact, left the negotiating table because it could not get it. The chapter 19 solution was a compromise to patch things together so that a free trade agreement could happen.

I point that out to indicate the seriousness of our considering whether chapter 19 is any good at all, because if we come to the conclusion that it is no good and that we ought to ditch chapter 19, well, in the same spirit of our Canadian negotiators those years ago, perhaps we don't need NAFTA. So this is a very serious discussion that we are having.

We entered into that compromise in an effort to deal with a perception, certainly on the Canadian business side, but perhaps on the American business side as well, that the trading administrative agencies on the other side of the border were sometimes prone to a bit of bias, that the litigation took a long time, it was very expensive, it never resolved anything, and we hoped that this chapter 19 would increase assurance among business people, make things more expedited, and lead to some kind of certainty so that business could get down to business—and we succeeded. It was a great success.

Business turned to chapter 19 in much greater numbers than they had turned to the domestic judicial review prior. It used to be that only 20% or so of cases against Canada would result in judicial review. Once chapter 19 came in, that figure went up to 50%, and not only that, but whereas only one-third of the 20% succeeded in Canada's favour, about two-thirds of the 50% succeeded in Canada's favour one way or the other, either reducing the duty or erasing it.

What we are seeing now is that the perception of bias, what we thought we were getting rid of, and the perception of slowness, what we thought we were getting rid of, are coming back. The things that we thought we were getting with chapter 19, we are not getting any more. We still have many of the good effects, and we've heard mention of some of them, including the fact that our administrative agencies on both sides of the border do a better job explaining what it is they're doing and being transparent, but these problems, these main problems, our main targets, are creeping back into the picture.

I know Mr. Feldman quite well, and I know, as he said, he was being deliberately provocative, and that's fine. That's great in a situation like this, and I'll probably do it myself in the next minute or two. But in my view, it is being a little provocative to say that chapter 19 is essential to Canada's sovereignty. I think that's painting a starkish picture of the thing. Nevertheless, we have some benefits out of chapter 19 and we have some benefits out of NAFTA, and we have to look coldly at how to preserve those for trade, which, by the way, as I said, is in the interest on both sides of the border.

● (1625)

Looking at chapter 19, I think we have to see that there are some systemic problems and there are some problems that loom at us, particularly out of the softwood lumber case.

Under the systemic problems, we do have a series of situations that, as Mr. Feldman has said, appear to indicate some kind of deliberate attempt to render chapter 19 irrelevant, to take away the relevance of it. We have consistent attempts by the United States to make panels so deferential toward the agencies that they won't overturn them. And I have to say that's a bit ironic, it's a bit rich, because it was the United States that insisted, when the NAFTA came in, that Canada amend its legislation to make our own courts less deferential. So they wanted to reduce deference in Canada but increase deference in the United States. It was a bit rich.

We also have problems with the secretariat. The American secretariat is underfunded, and having it in three different places is not a sensible way to go. We have absolutely no precedential value. In the pork case—I forget where we got to, Elliot, you'll remind me—but it was administrative review number 17 or 18, and every time a binational panel said that such-and-such a methodology was not on, America just waited until the next administrative review and did it again, so it had to be challenged all over again. So that was a problem.

And people have suggested perhaps we need permanent rosters, permanent panels. The suggestion of the appeal court has come up, not only to add to credibility but to bring an element of precedence into the matter so that people know what kind of laws they're following.

Those are general problems, and I think we can deal with them. I think those can be addressed if there is good faith on both sides of the border.

The problem that comes from the lumber case—and I quite agree with Professor McRae—is that the problem is not so much a chapter 19 thing in lumber. It is a highly politically charged case, and what we get in the lumber case is the feeling that perhaps there isn't that much good faith. We wonder about that issue of trust, and what we are seeing in the lumber case is, at times, what I think can only fairly be described as an outright refusal to comply with NAFTA panels.

We have seen, as Jon Johnson explained, American agencies actually using a U.S. loss at the WTO in order to generate a determination that would overcome a U.S. loss at the NAFTA and present Canada with a new thing to challenge and start all over again. That didn't look like good faith to many people.

We also have a position advanced by the United States that because deference is owed by chapter 19 panels to these administrative agencies, no deference is due to chapter 19 panels, we can insult them with impunity. And that does nothing for the credibility that Professor McRae is talking about.

And we have seen instances of what appears to be simple political influence. We're, after all, at Lumber 4 after having an MOU, after having a softwood lumber agreement. There have essentially been six lumber cases, and in all the other cases—which America has lost—we've seen legislative change for it to be easier the next time for the United States to win. So that doesn't increase credibility.

We have seen an approach in the United States on lumber that, I think it's fair to say, is a bit unprincipled. If we read the NAFTA and WTO cases in the high-fructose corn syrup case—that's another case in which there was this interplay of WTO and NAFTA—there were many similarities there. It was a threat of injury case; it was a case of what's in the record and what's not; it was a case of making sure that you render a judgment based on the evidence in the record; it was a case having to do with the difficulty of proving a threat of injury in the future if you have evidence that there actually is no injury in the present. There were very many similar cases. What was different is that the U.S. was on the other side of the stick, and in that case the U. S. pleaded damn near every argument Canada has pleaded in lumber. And they were going on more or less simultaneously, so some commentators wondered just how principled that was.

● (1630)

I think the final straw is what Jon Johnson mentioned. What we now have is the U.S. administration saying that because you are a privileged NAFTA partner, you will be treated less well than if you were Korea. If you were Korea and did it under their domestic tribunals and won, you'd get your money back. But because you're a privileged NAFTA partner the U.S. is going to keep your money, and not only keep it but give it to your competitors, by the way. That hardly seems very principled. And I'm trying not to be provocative here, as you can see.

The question is, what do we do about it? You've heard a few suggestions from the panel in front of you. Many people have said to get tough, and I agree. Let's get tough, but we must get tough in a principled and chosen and surgical way. We have to continue with the kind of litigation we do have going. We have to stick to our guns.

On that issue, I might say that Elliot Feldman is quite right. You cannot ask industry to shoulder the burden of that kind of litigation —which is, after all, for the benefit of all Canadian exporters—and say to them that the government will not help. The Canadian lumber industry has had repeated promises of financial assistance in that regard. Those promises have not yet been kept, and they should be.

On retaliation, yes, there should be retaliation. When America does not comply with these judgments and the treaties provide for retaliation, there should be well-chosen retaliation. The minute Canada decides it is too frightened to retaliate because it is frightened for the relationship, that is the minute the United States will know they can do anything at all.

There has been the suggestion that we should find the benefits for the U.S. in the NAFTA. Of course there are some, and we should start talking about them. Without getting into details that might seem too provocative, the fact is that there are provisions in there dealing with equal treatment on various scores. We can talk about those.

There is, I think, another very important matter that has also already been made before you. The free trade agreement, the NAFTA, is an example used by the United States in order to negotiate not only the free trade agreement of the Americas, but other bilateral treaties. If we start asking what the point of entering into a treaty like that is if it's not going to be followed and obeyed not only in its letter but in its spirit, I think that's something the United States would rather not have noised about.

But I have also come here with a message of what we must not do, and what we must not do out of fear of losing the NAFTA, because that is the serious juncture we are at. If your Minister of International Trade is engaged in discussions on a possible settlement and doing it on what appears to be quite an expedited basis, is doing it without the kind of transparent consultation that we have had on past efforts, that is happening because of the seriousness of the juncture. It is happening because it is difficult to face the end game of winning all of this litigation with the United States and then having them not comply. It is difficult to imagine that scenario. What does Canada do if we win the extraordinary challenge case, if we win all the NAFTA litigation, if we win the WTO, and the United States still takes our money and hands it out to the competitors? What do we do then? That is a bad situation.

My message is that we must not cave. We must take a settlement if it is a reasonable, good, and sensible settlement, but we must not accept just any settlement in order to avoid that scenario. If we do, the message to the United States will be that we have already given up all of the benefits of NAFTA and keep all of its disadvantages.

Thank you.

● (1635)

The Chair: Thank you very much, Mr. Potter. I don't think you were very provocative.

We'll go to questions in rounds of ten minutes, and we'll start with Ms. Stronach.

Ms. Belinda Stronach (Newmarket—Aurora, CPC): Thank you for being so provocative. Most of you said you didn't want to be provocative, but you ended up being provocative, and I appreciate that.

This is complex subject matter, and I guess if it were so easy, softwood would be solved by now, and it isn't.

Let me just throw out a few thoughts, and then I'll wrap it up into a question.

It is in Canada's interest or willingness to strengthen chapter 19 and the binational process, and I appreciate your various comments about amending the extraordinary challenge process to create a broader framework for appeals and also institutionalizing the binational panel process. Those were all very good points and would go toward strengthening the process.

If you do this, would there be a greater incentive to use the process with respect to the outcome of that process? Does that talk to the deficiency and why it's not being respected now? That is one question.

With regard to strengthening chapter 19, how do you get the U.S. to agree to do this? The underlying theme here is that it's not their willingness to do so because they don't feel it serves their national interest. You talked about the dysfunctional domestic system of how their government works. How do you get the U.S. to agree to do this? I know that's a tough question to answer, but I'd be interested to know what our government can do.

Second, on softwood, this is a very complex problem and it's been ongoing for many years. Is this trade dispute putting the NAFTA agreement itself at risk? Can we find a solution, and if so, before we get to that point? Is it time for political intervention or a political solution? Is retaliation enough? Mr. Potter indicated we should not cave, and you posed a very good question: what if we win the extraordinary challenge and the U.S. still doesn't wish to comply? I guess then NAFTA is at risk. Where do you go from there?

Those are my two questions. If you can answer them, I'll sleep better at night.

● (1640)

Mr. Simon V. Potter: Let me just jump in, because I'll forget my answers if I don't.

On the first question, I agree with you that it's a tall order to expect that we can say to the United States, you know, chapter 19 isn't working very well and we're certainly stung by lumber; what we want to do is revamp the whole thing to make it even more favourable to Canada in future, and we'd like it institutionalized, and we'd like Canadian judges settling all these questions. We should aim to be reasonable.

One thing that we might do for chapter 11 is insist on finding a way that we have some precedent in at least one case. If we're talking about pork or swine or lumber, within pork or swine or lumber one binational panel's ruling should have some precedent value over another binational panel's ruling for that product in that case, and at least get that. I would say to aim low.

On your second question, perhaps it's my fault for being provocative, but I do not mean to say hold out for litigation forever and go right down to the end. You're right: the end game in this one is a difficult one, and I would say that the Minister of International Trade and his deputy minister are quite correct to be looking for ways to avoid that. It's already happening that there is political involvement in trying to find a settlement to this. I agree, we should be trying to find a reasonable, principled, workable settlement.

When I say don't cave, I mean, for example, don't agree to put just any old export tax at the border, and don't agree to put the export tax on there and then sort out later what kind of provincial forestry policies are going to have to be changed to get rid of it. If we're going to put that on the border, we should know how to get rid of that export tax so that we can one day get to some kind of free trade at the border with lumber.

I'm saying yes, settle, but don't settle at any price, because that communicates an extremely bad message to the United States.

Dr. Elliott Feldman: I interpret you as actually asking three questions.

I think your first question referred to the conversion of the extraordinary challenge process to an ordinary appeal, or a more routinized appeal, and your question was whether this would strengthen the process by giving it more integrity. It could only be done at the deliberate sacrifice of one of the underlying principles of chapter 19, which was expeditious review. The process now is taking longer than a case in the U.S. Court of International Trade, but still has the redeeming feature that you're then, in theory, finished. Unless you were able to arrest the delays in the process now, you would merely expand it beyond what takes place in the courts, with much less apparent benefit, and you would be initiating a quite substantial institutional change, a broad institutional change. It wouldn't just be to institutionalize the appeal. It would then mean that when you were before a binational panel, you would be building an appellate record for the purposes of appeal. It changes the entire character of the process, so it's something that has to be done, were it to be done, with a great deal of consideration, and with the rethinking of the original purpose for expeditious, inexpensive review.

Your second question, as I understood it, asked how you get the United States to agree to change anything, or fix anything, given that it really doesn't want to, and I think we've all agreed the United States doesn't really want to.

We all have different views, I think, in answering this question. I wanted to suggest that embarrassment does matter in international affairs, and that there is a not insignificant dimension of embarrassment here if Canada—the United States' number one ally and friend, at least as perceived by the rest of the world—were to very publicly say the United States is not living up to the bargain it made with Canada. My estimate of the American system is that there would be a reaction of concern to try to correct those deficiencies.

Do you have much weight, beyond embarrassment, for bringing about change? I don't think so; not really. Certainly the suggestions that have emerged about reopening the agreement, or negotiating again, would be a grave mistake. I don't think you want to reopen this agreement; I think you want all the parties to live up to its terms.

Lastly, as to softwood lumber, I've been litigating in softwood lumber now since 1991. I'm concerned that in this discussion here today, softwood lumber is being exaggerated a little in terms of its relationship to chapter 19. I've also been litigating magnesium since 1991. The sunset review, which was appealed and should have brought a conclusion to the orders on magnesium...that appeal started five years ago. The new sunset review is now due.

What happened? Well, an American panellist recused two weeks before the decision was due. We can only speculate as to why he recused, but we have suspicions it was not unrelated to the accusations and allegations levelled against a panellist in softwood lumber. The replacement panellist was named last summer. We're still waiting for a decision from that panel, with no mechanisms of any kind to even find out whether they've met, or what their intentions are.

And that was only the last episode. There were three recusals prior to that, and my client, Magnola, is out of business because of this case. Their smelter in Quebec cost close to a billion dollars; it's shut down, and nothing has been done about this problem. That's not softwood lumber, that's magnesium—and there are other such examples.

So I just offer a caution. Softwood lumber is a peculiarly difficult problem for a variety of reasons that are, I think, not the subject of this hearing today, but it's not unique in its relationship to chapter 19.

● (1645)

The Vice-Chair (Mr. Ted Menzies (Macleod, CPC)): We can quickly allow Mr. Herman to answer this question. I need to jump in here. We have a vote coming up. Bells will start at 5:15 p.m., so we'll try to keep each question period to 10 minutes. We're certainly not trying to take any opportunities away from you for providing input to us, but we're just over now.

So quickly, if you could, Mr. Herman.

Mr. Lawrence L. Herman: I don't think we can address the softwood lumber issue in a really meaningful way here. The process on softwood will have to take its course, and I think the strategy the government is pursuing of using a legal avenue and at the same time attempting to use the negotiating avenue is the right one. Let the legal route run its course and let's proceed on that basis and see if the negotiations at the same time can bring some fruitful results.

In terms of chapter 19 as it exists now, let me be very clear: it is a useful process that works pretty well. It is a limited process. Can it be improved without opening up the treaty? I'm not talking in the first instance about trying to renegotiate a treaty provision, which would raise a whole series of problems. Can it be improved as it is now? Yes. Are there ways Canada can address those improvements now? Yes.

One of them has been mentioned: the delays in getting panels constituted. That is a problem. Getting people to serve on panels is a problem. The governments have to find persons who are prepared to serve and who are not conflicted out. And if they're not conflicted out, are they prepared to serve? That to some extent goes directly to the question of remuneration and backstopping services panellists can get. This can be addressed within the provisions of chapter 19 as it exists now. It just takes some political will to address those issues.

Another matter, in my view, that can be addressed at the political level within chapter 19 is this: when a U.S. trade agency such as the International Trade Commission reports back on remand and questions the legitimacy of a panel order, the Canadian government should take that up with the U.S. government at the political level. Frankly, it is outrageous that this sort of thing happens.

In those two respects we can do something now to improve chapter 19. What I was addressing in my opening remarks was that while we may want to dream a little bit about some modest improvements that may require some changes to the treaty—maybe not opening up the agreement or maybe opening up the agreement, it's a little bit difficult to say—there are certain things that can be done within the framework of the NAFTA now without radicalizing the agreement, and one of those is institutional permanency. I believe a lot of that could be accomplished without treaty amendment. I believe institutionalization will help in legitimizing the NAFTA processes, including the decisions of the panels.

● (1650)

The Vice-Chair (Mr. Ted Menzies): Thank you very much.

Mr. Paquette.

[*Translation*]

Mr. Pierre Paquette (Joliette, BQ): Thank you, Mr. Chair.

Thank you for your very informative presentations, although I imagine it will take us several days to digest all this information.

I gather from nearly all your remarks that, at this point in the softwood lumber crisis, it is important not to set aside the rules. You are suggesting that we reach a settlement consistent with the rules we agreed to under the North American Free Trade Agreement. If we want to improve chapter 19 and NAFTA overall, a number of entities have to be institutionalized: the commission, the secretariat, etc.

In my opinion, there is a major problem, a flagrant example of which is the softwood lumber dispute. The problems we have with chapter 19 affect a number of issues: softwood lumber, hogs, and so forth.

Ultimately, is the American legislation itself, which allows for the harassment of Canadian industry, such as softwood lumber, not a problem? There could be a settlement next week, but who is to say that the American industry will not file another petition in a few months' time? Is the enforcement of NAFTA provisions not a problem? Is—and I think that someone mentioned this—the design and vision of American trade laws with regard to these international treaties not a problem?

Another flagrant example is the Byrd amendment. Despite the commitments of the American president, there has been no political action to signify that trade laws will be amended to repeal the Byrd amendment. I want to know, first of all, if you consider this is a problem.

What could Mr. Martin do at his March 23 meeting with Presidents Bush and Fox to initiate a political process so as to improve the situation? What should Canada propose in this regard?

[*English*]

The Vice-Chair (Mr. Ted Menzies): Who would like to answer that?

Dr. Elliott Feldman: I'll be happy to address those two questions. I'm not sure that I'll answer them.

● (1655)

The Vice-Chair (Mr. Ted Menzies): Once again, we'll try to remember to keep all of the answers within the ten-minute timeframe, if we can.

Dr. Elliott Feldman: I will answer in English, if you'll forgive me.

Mr. Pierre Paquette: That's okay.

Dr. Elliott Feldman: Much of international trade law is framed around U.S. law. The United States imprint on the Uruguay Round is quite comprehensive. If you were to focus your concern on a defect in U.S. law, you would be largely questioning the international trade regime. That may not be mistaken, but it's probably irremediable.

The experience of chapter 19 is such that under the regime of U.S. law, Canadian interests typically have prevailed. I don't think the problem is inherent in the U.S. law itself, it's in the capacity of the institutional arrangements to enforce the results.

For example, Mr. Potter was referring to the problem of the precedential value of panels. Of course, the weakness is that panels are treated as are courts of first impression in the United States, a U. S. district court. The Court of International Trade also does not set precedent. It's not treated as precedent. Only the appellate court sets precedent. The authority of a decision emerging from a binational panel is the same as the authority that emerges out of the Court of International Trade. Its authority is no more than its persuasive power in subsequent proceedings.

The defect is that the United States refuses to carry over a principle of collateral estoppel, where something already argued and settled for a specific program and a specific matter for a specific good isn't treated the same way in a subsequent review. Now that was tested in the binational panel process, and there was a panel that rejected the notion of collateral estoppel in these proceedings. I'm particularly familiar with that argument because it was my argument, and I lost.

I don't think it's a finished question. I would be happy to see it resurrected. The issue of collateral estoppel and *res judicata* should be returned to the process. They are the problems that I think Mr. Potter is addressing. They're not inherent defects in U.S. law. Most of those cases have in fact been won.

As to your second question on March 23, I understood today that already NAFTA is perhaps not even on the agenda for March 23. I understand also that quietly it still is, but unofficially perhaps it isn't.

I think that on March 23 Mr. Martin should be requesting chapter 20 consultations on chapter 19. He ought to have President Fox as an ally.

The Vice-Chair (Mr. Ted Menzies): Mr. Potter.

[*Translation*]

Mr. Simon V. Potter: Mr. Paquette, as to your first question about whether American laws are the problem, I agree with Mr. Feldman. To a large extent, no, the laws are fine. There are exceptions, such as the Byrd amendment, which was adopted to collect duties and distribute them to American complainants. This was a problem and Canada did what it had to do: it contested this amendment at the WTO and won. Consequently, the Byrd amendment is now illegal under international law and should be repealed. That is how problems with American laws should be dealt with.

There are other examples, where Canada did not react. However, we have the right, under NAFTA, to tell the United States that such and such an amendment to its laws does not apply to us. Chapter 19 gives us this right but, unfortunately, we do not use it enough.

As to your second question, I completely agree with Mr. Feldman that President Fox, of Mexico, is an ally in all this, and this kind of forum is perfectly suited to this strategy of embarrassment that some people have referred to here. The United States wants to use its positive experiences with NAFTA in order to do a sales job on other countries. We would only be honest with these other countries if we told them that not everything is perfect.

Mr. Pierre Paquette: I want Mr. Feldman or someone else to explain how chapter 20 can help us. Chapter 19 has been discussed in great detail. Mr. Carl Grenier, who appeared before us, mentioned it. I am no expert on the agreement, I do not read it every night before I go to bed, as I am not suffering from insomnia that badly. Perhaps you could illustrate further how we could use chapter 20 to improve the dispute resolution mechanisms.

[*English*]

The Vice-Chair (Mr. Ted Menzies): Mr. Feldman.

Dr. Elliott Feldman: The concept of chapter 20 is to address all of the disputes that arise out of NAFTA that aren't addressed in another chapter. The administration of chapter 19 is such a conflict, such a problem. Chapter 19 itself has a mechanism for this purpose, and Jon Johnson alluded to it in his remarks. It's something of an atomic bomb. In article 1905, you could blow up the agreement, essentially, through your disagreements over chapter 19.

Our formulation is more modest. Chapter 20 is an invitation, but a very public one, to address the issues that arise from the difficulties with chapter 19. Until now, the view of the Government of Canada has been that there is a continuing dialogue with the United States; people talk about these things all the time, and they're trying to work them out.

In our view, this kind of informality is working against Canada's national interest, on these matters at least. Canada needs to be more public and outspoken, and that's the issue of embarrassment to which I referred earlier. Through that public process of requiring consultations, which the United States would then be obliged to accept and participate in, there would be the opportunity to address all the kinds of issues that everyone at this panel has discussed—institutionalization of panel procedures, changing the appellate structure. All those kinds of solutions would be on the table in a chapter 20 proceeding.

● (1700)

Mr. Ted Menzies: Mr. Johnson, briefly, if you could.

Mr. Jon R. Johnson: What a chapter 20 proceeding would get Canada, or the atomic bomb proceeding alluded to by Mr. Feldman—article 1905, to be precise—is that it would give Canada the right to withdraw NAFTA benefits.

There are a couple of advantages of having that right as opposed to having a similar right under the WTO. Number one is that Canada can choose what benefits to withdraw, unlike under the WTO where Canada has to go to the dispute settlement body and effectively get permission to retaliate. Under NAFTA, you don't have to do that. If you win the case and you have the right to retaliate, then you can withdraw what benefits you see fit and it is up to the U.S. to come back and say that is excessive. When we're talking about softwood, we're talking about huge numbers. It's hard to find excessive.

The second thing is that under the WTO you would generally go after trade matters—trade and goods, imports—with a great deal of public dissension, obviously, from the affected importers. Under NAFTA, there are various other things you can go after that the Americans are particularly concerned about—for example, energy, energy security, investment protection, that kind of thing.

[*Translation*]

Mr. Pierre Paquette: Could we, for example, question the additional benefits granted under chapter 11 to protect foreign investments in comparison to what was in the initial agreement? Could this be a retaliatory measure? I am simply trying to understand.

Mr. Lawrence L. Herman: In theory, yes, but in reality, no.

Mr. Pierre Paquette: Could you elaborate a bit on that answer, please?

[*English*]

Mr. Lawrence L. Herman: This is a very arcane subject matter we're getting into. I don't know if the committee wants to address this.

The Chair: It will probably take 20 minutes, Mr. Herman, and we don't have the time. Monsieur Paquette has had his 10 minutes.

I'm intervening because I know bells are going to ring, on or about 5:15, for the vote. In all fairness to more people who wish to ask questions, we have to manage the time well.

If you'd like to respond in writing, by all means, do so. The rest of the committee would like to hear as well.

Madame Jennings, you're next. I'm going to be very strict with time because I know Mr. Julian is next and he too will have questions.

Hon. Marlene Jennings (Notre-Dame-de-Grâce—Lachine, Lib.): Thank you, Mr. Chair.

Thank you to all of the members of the panel for your presentations this afternoon.

When the Minister of International Trade came before this committee specifically on NAFTA chapter 19, I raised a number of issues with him about the problems of chapter 19 and what I thought the Canadian government should be doing. He took a lot of copious notes, but I haven't heard anything back since then.

Some of the things I proposed are in fact some that you have raised. For instance, there's the fact that panel decisions on a specific issue in which the facts are clear have no collateral estoppel. Two years, two months, two weeks, two days later, a new challenge can come with the same facts, same issue, and no precedents. Canada should be pushing that there is this collateral estoppel. That's the first thing.

I also said that if it's possible without amending NAFTA as it now stands, Canada should be looking at the idea that there be some way of punishing someone who comes forward with what are clearly frivolous and vexatious challenges or complaints. We see it in administrative law in Canada. Our administrative law basically flows out of British law and is similar to that of the United States. It's not unheard of. You do have that possibility in some legislation in administrative law, and I would like to see that. I'd like your opinion on whether or not that's possible without opening up NAFTA.

The other thing that I didn't mention—but I loved your suggestion—is embarrassing the hell out of the Americans in front of other countries with which they are attempting to negotiate new binational trade agreements. Let's do it. If we can do it under chapter 20 without there being any danger to Canada and Canada's interests, by all means. On the other hand, if you think going with chapter 20 could represent some danger to Canada, then let's just do it on the public scene. I'm all for it. Let's take out ads in South Korea's newspapers and in some of the new "-stans", the countries in the former Soviet Union. Let's do it. The Americans want to expand their markets, but other countries are going to be leery if they see that America's best trading partner, its closest neighbour, is saying we're having problems getting the United States to respect this agreement. I don't think that would play very well for the Americans.

So let's take it to their own backyard. Let's take it down into the States, into the districts of these U.S. senators and these representatives. Let's take it there.

● (1705)

The Chair: Mr. Herman, I guess you want the first shot at this one.

Mr. Lawrence L. Herman: Just very quickly, first of all, the disputes that are dominating the bilateral agenda are softwood lumber and BSE. I think the government wants to let those two cases resolve themselves somehow. It's a highly charged atmosphere now, and I think there are limits to what can be done while those cases are running. What the government wants to do is resolve those issues, and I think they have to be prudent about how they handle the bilateral issues on the legal front and on the political front, while those cases are running, because there's always the hope that we're going to resolve them.

What can we do? I think the government has to be careful not to jeopardize the possibility of resolving BSE and softwood on a bilateral basis at this juncture. That doesn't mean your suggestions aren't worth considering, but I think the government has to be careful.

The other thing is to not forget that NAFTA is a trilateral agreement. I'm not sure all of these issues can be addressed within a trilateral context. Some of these are purely bilateral issues, and getting action in the NAFTA means you have to get Mexico onside. That's just a factor that has to be considered. We often think it's a two-way agreement, but it's a three-way agreement.

The Chair: Anybody else?

Mr. Potter.

Mr. Simon V. Potter: Ms. Jennings, regarding your question about the frivolous complaints, the WTO agreements have various requirements to prevent frivolous agreements from going forward. For example, when a Canadian complainant files an anti-dumping complaint against the United States, that complaint has to go through the CBSA, and the CBSA must come out with a reasoned decision justifying going forward and saying that in fact it looks as though there are reasonable grounds to go forward, and in fact that it looks as though this is not frivolous, in short.

So there are corrective mechanisms in there, and in U.S. law there are similar ways for the U.S. to comply with those WTO requirements. I'm not sure what more we could get, for example, by requiring people to pay costs on a lost complaint. The fact is, it's costly anyway to file a complaint.

I don't hold out much hope of having countries agree to punish people whose complaints are found to be frivolous, even if those complaints make it through, for example, the CBSA.

Hon. Marlene Jennings: And, on the other part, about embarrassing the Americans?

Mr. Simon V. Potter: I think we've all said we should be speaking openly and loudly about America appearing not to live up to the spirit of this agreement.

Hon. Marlene Jennings: Is there any danger in our doing that through the chapter 20? Is there any danger to Canada if we took the route of chapter 20 to air all of these issues and problems?

Mr. Simon V. Potter: Mr. Feldman is right, that doing it under chapter 20 avoids the "atomic bomb" scenario of article 1905 and requires that we get, in the final scenario under chapter 20, actual decisions on the question. I sat on a chapter 20 panel, and you end up with a reasoned, grounded decision, which is sometimes unanimous, sometimes not; nevertheless, you get a decision as to whether the party is living up to the NAFTA commitment or not. I've been saying for a long time that we should be using chapter 20.

● (1710)

Hon. Marlene Jennings: Did it have an impact?

Mr. Simon V. Potter: It does have impacts. If you win, it has an impact, yes.

The Chair: Thank you.

We'll go to Mr. Julian. You will have your full ten minutes.

Mr. Peter Julian (Burnaby—New Westminster, NDP): I'm very interested in your comments. This is an extremely important issue for my province. I come from British Columbia. We've lost 20,000 jobs in softwood lumber, so it is not a theoretical issue for us in our communities. We're talking about lost jobs, and people and families who've been badly hurt. The level of frustration is climbing.

I was interested in the comments, particularly by you, Mr. Johnson, about looking at the Americans and the benefits of NAFTA that they receive, particularly when we talk about proportionality in energy resources—that privileged, preferential access to our energy resources, the second largest reserves in the world. That seems to me to be something that would make a difference in how Americans react.

I was one of the members of the delegation down in Washington. I was surprised, in speaking with members of Congress, how they react to the issue of softwood lumber. It was very clear in the minds of a number of the members I met with that Canada was being unfair, that we were dumping on the American market, and that the American industry was right. It was surprising to me to get that very clear sense that they haven't understood any of the procedures we've undertaken through the NAFTA process. Their sense is that we're doing something wrong.

Getting back to the issue of energy and the issue of investment provisions, moving to the point where we look at issues the Americans see as their big advantages to NAFTA, I'd like your response on what the Americans see as the beneficial aspects of NAFTA to them and how we can leverage those issues so that there is a resolution to this that is not caving in, as Mr. Potter said so eloquently; that is a respectful resolution that takes into consideration Canadians' interests.

Dr. Elliott Feldman: I'd like to leave the linkage question to Jon, he raised it, but I would like to say something about the lobbying question that you mentioned.

You've been through 20 years of legal proceedings in which you've established that Canadian softwood lumber is not subsidized. You've been through 20 years of legal proceedings that have established repeatedly that trade in softwood lumber causes no injury and threatens no injury to any United States industry. And yet you encountered the reality that members of the United States Congress don't believe it.

The message there is that the United States industry is very effective on Capitol Hill and Canada is very ineffective on Capitol Hill. Now, one of the reasons that's true is that you have America allies in this dossier and in other dossiers. You have significant American importers. You have significant American stores like Home Depot and the National Association of Home Builders and so on, all of which are allies but are seriously underfunded in making your case on Capitol Hill. And the Government of Canada has worked erratically, at best, in seeing them as allies.

So in this dossier, as in others, it's important to identify and recognize that there are allies in the United States. It's important to mobilize them, to work with them, to help them, and to promote their interest so that those interests are in fact heard in Congress.

Mr. Jon R. Johnson: On the provisions of NAFTA that the Americans have a particular interest in, certainly the U.S. has been one of the world's proponents of investment protection. They have formulated their model bilateral investment treaty; they've entered into bilateral investment treaties with a number of countries. They were very concerned to get rid of the Foreign Investment Review Agency in the original Canada-U.S. agreement, or at least greatly reduced its impact. Investment review, those sorts of things, obviously were high on their list of priorities. Also, energy security has been mentioned by the Bush administration over and over again, for obvious reasons. So I think it's fairly obvious that those provisions of NAFTA are of considerable value to the United States.

As to utilizing that, say, for example, you had the situation where the U.S. continued to push the position that there was a difference in proceeding under NAFTA, where you didn't get your money back, or you're the Korean who proceeds under the domestic law and you do get your money back. Certainly under those circumstances, if that were resolved in Canada's favour in a chapter 20 or an article 1905 proceeding—which isn't necessarily an atomic bomb.... In any event, if Canada then had the right to retaliate, because that's what Canada would have, then the U.S. would have the choice of either resolving the issue, negotiating a conclusion to it—in other words, putting chapter 19 back on the rails—or accepting retaliation, and Canada could consider that sort of retaliation. The trick would be to—

● (1715)

Mr. Peter Julian: And how would that look, in your mind?

Mr. Jon R. Johnson: It sounds fine to me. It wouldn't look very good to a lot of interests in the U.S.

Mr. Peter Julian: There might be some Canadian options there for us.

Mr. Jon R. Johnson: There certainly would be, but not quite as many perhaps as with the import sort of situation.

Well, that's the trouble. Retaliation, withdrawing benefits, you always have domestic issues with that, because somebody is going to get hurt by it.

Prof. Donald McRae: Does that mean something?

The Chair: Yes, it means the bells have gone for the vote tonight, and it's a 15-minute bell. We have 13 minutes to go.

Mr. Julian will have his full ten minutes, and then we're going to take another four minutes to split with Mr. Menzies and Mr. Eyking.

Mr. Julian.

I'm sorry, Mr. McRae, you were responding.

Prof. Donald McRae: I just wanted to say this. A lot of the comments you've been hearing, particularly in this latter part, have been to the effect that in trying to deal with the United States, one has to disaggregate. We say to respond to the United States but in fact the problem is hydra-headed. Part of it is the question of lobbying. Part of it is the question of the way the domestic agencies function; they will not listen to binational panels. Part of it is the fact that the United States executive is simply domestically unable to control Congress.

So any kind of strategy has to look at the fact that you have to deal with the different aspects of the United States differently. Retaliation always sounds good until you actually sit down and try to work out who in fact is going to suffer domestically when you retaliate, because retaliation generally means someone domestically suffers.

What this does suggest is, first of all, it's not a single United States out there you have to deal with. The strategy has to be at a variety of levels. Second, although I take Mr. Feldman's point that you can't distinguish softwood lumber from chapter 19 in order to deal with solutions—as I think Larry Herman was saying—you can't solve softwood lumber through dealing with chapter 19. You have to deal with softwood lumber separately, solve it separately, and then address the issues of chapter 19, some of which are similar but some of which are separate. It's important to keep the two things somewhat separate in terms of solutions.

The Chair: You say “separately”. What mechanism would you use to solve it?

● (1720)

Prof. Donald McRae: Well, softwood to me is an issue that has to be negotiated. It's important to use all of the legal strategies that are being done; they help bring pressure. But I do not believe, at the end of the day, there's going to be a legal decision and the United States will say, oh yes, we realize we're wrong and we'll accept the Canadian position. The strategies have to be legal, but ultimately there has to be some kind of negotiation between the two governments.

The Chair: Dr. Feldman.

Dr. Elliott Feldman: I've been trying to stay away from the softwood lumber subject, but I can't on this one.

Some hon. members: Oh, oh!

The Chair: We know it's of great interest to Mr. Julian, so your response will be...?

Dr. Elliott Feldman: I'm afraid I'm in complete disagreement with Professor McRae on this point. I think, moreover, that Canada has acted unwisely for three years in injecting negotiations into the litigation process in such a way as to undermine the litigation process and to encourage the United States to extend and expand the litigation process in the belief that at any minute Canada will cave; therefore, they need to just push it back a bit further, and then the talks will be inevitable and Canada will give in. That's a process that's been regrettable, and it's now time to be very clear that the legal process must be completed and that Canada is entitled to now be vindicated after three years of such litigation.

Indeed, it maybe that in the long term there has to be some kind of further agreement on softwood lumber. I say “maybe” because I'm one who does not believe there is a Lumber 5 out there. I don't believe there'll be a Lumber 5 because Georgia-Pacific led Lumber 3 and then retired from the fray. We have very good reason to believe that International Paper does not want to do this again or even any more, and they're the leader of Lumber 4. No one can identify the next leader that's prepared to spend $100 million or more to litigate against Canada for Lumber 5, so I'm one who doubts there'll be a Lumber 5.

Even if there is to be a Lumber 5, it's separable from the chapter 19 process because the solution to Lumber 5 is not the solution to Lumber 4, and the solution to Lumber 4 is in the legal process now.

The Chair: Ask one quick one, Mr. Julian. You have 10, but I took a minute of your time.

Mr. Peter Julian: You all have acute legal minds and you know part of the process in our legal system is the accessibility of the justice system, where things not only take place in the open, but judgments are made with due process.

Among the witnesses we had here a couple of weeks ago talking about chapter 11 provisions, there was great concern raised by the secretive provisions of chapter 11. There's been reference to the magnesium panel and the fact that we weren't aware of what was happening there. Do the secretive aspects of NAFTA beyond chapter 19 disturb you in any way? I'm talking about chapter 11 but also about chapter 19 in that these processes are taking place in a way where there is no access.

Mr. Lawrence L. Herman: There is a need for greater transparency, and some of that is being addressed under chapter 11 by the parties. I don't think we want to talk about chapter 11 here.

Mr. Peter Julian: No. It was just a quick question, whether it bothers you.

Prof. Donald McRae: Let me say, as a matter of principle, yes, secretive processes bother me, period.

The Chair: We have to go to two quick questions and two quick responses.

I'm going to go to Mr. Menzies with your permission, Parliamentary Secretary Eyking, because I was told it was going to be a very, very short question.

Hon. Mark Eyking (Sydney—Victoria, Lib.): It had better be a good question.

Mr. Ted Menzies: I hear Mr. Eyking is quite ill and doesn't have much of a voice anyway.

Hon. Mark Eyking: But I can still vote.

Mr. Ted Menzies: I have more of a comment than a question. I was told in Washington last week by some pretty good sources that, due to the Byrd Amendment, the $4 billion.... I was corrected on that. My sources said there's certainly been some leakage out of that. Some of that money is already gone. I guess I would ask for a quick comment on that.

I was also asked by a past chair of the International Trade Commission why Canada has not retaliated against the Byrd Amendment. Why have we not gone after products from West Virginia specifically—Mr. Byrd's constituency—and those of his seconder, Iowa? Why haven't we done that?

Dr. Elliott Feldman: I'd be pleased to address both of those questions.

About $5 million was released in December from liquidations of entries that came from companies in the maritime provinces subject only to the dumping order and not the countervailing duty order. A number of companies in the last three days in both Quebec, the border mills, and in the Maritimes have withdrawn from the dumping review and so are subjecting their entries to liquidation, including some of the larger companies in the Maritimes. We don't know what sum of money that will represent, but it won't be insubstantial. So there are moneys now becoming again available under the Byrd Amendment.

Now, the Byrd Amendment works on a calendar, and the moneys won't in fact become available for distribution until the autumn. In the meanwhile the Government of Canada has committed to, but has not yet acted on, bringing suit in the United States Court of International Trade under article 1902.2, that the Byrd Amendment does not apply to Canadian merchandise. I developed that theory, so I'm happy to discuss it further if you like.

The legal theory is that there are three criteria in article 1902.2 for application to Canada or Mexico of amendments to the trade law in the United States. This was an amendment to Title VII. Canada was not notified. Canada and Mexico are not named in the amendment, and the amendment, as Mr. Potter quite rightly pointed out earlier, does not comply with the WTO. So the Byrd Amendment fails all three of the criteria under article 1902.2. It should not apply.

Now, we've also heard from intelligence on the Hill that Senator Byrd is scrambling to amend his amendment to overcome this legal proceeding that Canada is about to launch. That chapter, therefore, is not yet written.

● (1725)

The Chair: There seems to be light at the end of the tunnel.

I'm going to go to Mr. Eyking.

Hon. Mark Eyking: I'm not going to have too much preamble. I have two questions, I guess.

My first one is this. If the Prime Minister has a chat with President Fox before he goes to the barbecue, will he get an earful from him? I guess what I'm asking is, do they have a lot of the same problems as we have? Does Mexico have a lot of problems with its trade agreement, enough to even warrant bringing it up at that time?

My second one is, the idea of retaliatory measures was bounced around here. It's my understanding that most of you disagree with this. Should we have that hammer and hit the California wine producers, or whomever, out there with some measures to wake the Americans up, because that might be the only stick we have?

Dr. Elliott Feldman: Let me try to answer both questions quickly, and then others may have something else to say.

A couple of weeks ago, the Government of Mexico filed a brief in the extraordinary challenge proceeding involving Canada and the United States. No one knew it was coming. It's a brief that is entirely supportive of the Canadian position. I've subsequently been in touch with senior officials in the Mexican government. They are very concerned about chapter 19. So I think if there was a question raised with President Fox, he would be sympathetic.

Mr. Simon V. Potter: There are several Mexican complaints about the operation of NAFTA. Not all of their complaints are the same as Canada's, but there will be a great sympathy in Mexico for dealing with the United States on a two-on-one basis. Whether it's on lumber or just generally, Canada should be doing much more to approach NAFTA together with Mexico.

On the question of retaliation, I think our position across the table here is that, yes, there should be some retaliation. We have to make an issue when we win a case. If we win a case and do nothing, what's the purpose of winning it?

Mr. Jon R. Johnson: It's better to be in a position to retaliate than not to be. Whether you do or not, it's better to have the right to retaliate.

The Chair: Thank you.

I just want to say thank you very much for your comments, gentlemen. They have certainly been very enlightening.

Perhaps I may close, seeing that we have two minutes before the vote. Hearing your views and the word “retaliation”, and we've heard from people in the past.... Mr. Potter, you said that very much is happening right and that we're doing a lot of great things for the percentage of trade. On the other hand, you're saying, look, we have to get tough. I didn't hear the word “linkage”, and many people are saying we should not link somehow. Energy was brought up, but there must be other means and ways by which we could approach it.

I think the biggest thing I'm hearing on the street from our constituents is, how do we get them to comply with the rulings? There has to be some mechanism, at some point in time, where compliance is sought and adhered to. Really, that's the frustration that exists out there. We could have the bodies, we could support them financially—permanent members, acquainted members within the area—but what good is it, if I may say, at the end when they rule and compliance is not forthcoming? Where is the mechanism—

Mr. Lawrence L. Herman: The answer is to keep the pressure on at all fronts, and that's something we have not been astute at doing in the softwood case.

Dr. Elliott Feldman: If I may, Mr. Chairman, we're not quite at the end game. There has not yet been a genuine non-compliance. We're not quite there.

The Chair: Okay.

But I do want to thank you, and I'm sorry I'm rushing. We have to get there because we have numbers to play with, as you know. The votes yesterday, today, and coming are very important.

So I'll adjourn this meeting. I thank you very much for coming.

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