Intelligence MEMOS

From: Konrad W. von Finckenstein

To: The Honourable Chrystia Freeland, Minister of Foreign Affairs

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Re: **Chapter 19 is unique and should not be given up in NAFTA renegotiations**

In the upcoming NAFTA renegotiations, I urge you not to relinquish Chapter 19 on dispute settlements. In a recent for paper for the C.D. Howe Institute entitled "NAFTA Negotiations – A different route to settle trade disputes," respected trade lawyer, Larry Herman, suggests Canada should not make the retention of Chapter 19 a breaking point in the negotiations. He suggests an enhancement of the Chapter 20 provisions as an alternative. While his suggestions are feasible, his conclusion that, "Chapter 20 adjudication offers a viable replacement for the chapter panel system in trade remedy disputes with the US," fails to recognize the uniqueness of Chapter 19.

Chapter 20 is a government-to-government dispute settlement. It can only be invoked by governments, and there is no automatic solution, even if a party wins. A panel's suggestion may not be adopted, another solution may be negotiated, and in case of failure to come to an agreement, the winning party is only able to suspend benefits; i.e., retaliate. This remedy often has negative consequences for the retaliating party, let alone a highly trade-dependent country like Canada. In addition, it is of little solace to the aggrieved industry.

By contrast Chapter 19 allows an aggrieved industry to take matters in its own hands. Without fiat it can start a panel process. Thus the contested decision by a US trade agency will be reviewed by a bi-national panel as to correctness and consistency with US law. The decision cannot be attacked in US court and must be applied along the dictates of the panel. Failure to do so leads to enforcement by US courts.

In short, the judicial review of administrative action by US trade agencies has been taken out of the hands of US courts and been given to an international panel. However, the enforcement of the panel decision reverts back to the machinery of US courts. This was the key achievement of Chapter 19. This is a unique remedy in trade negotiations and should not be given up. As former Canadian Chief Negotiator for the Canada-US Free Trade Agreement, Simon Reisman, observed, only a US court can force the US to apply a trade remedy in a way it does not want to.

The suggested enhancements to Chapter 20 are possible and would improve a tweaked NAFTA, but they should be in addition to Chapter 19, not a replacement thereof. Chapter 19 has served Canada well to guarantee access to the US market free of targeted trade remedy application. It is impossible to prove a negative but since the creation of Chapter 19, we have not seen a recurrence of what Larry Herman earlier described as:

"… a period when large-volume Canadian exports had been targeted in US trade investigations in the 1980s, including softwood lumber, groundfish and pork products. It seemed at the time that American industry would continue on its un-restrained path of alleging that Canadian imports were dumped or subsidized, putting broad swaths of the Canadian economy at constant risk."

Repealing Chapter 19 might well be seen as a green light to pursue such targeted trade remedy actions and therefore should not be countenanced.

Konrad W. von Finckenstein, former Chair of the Canadian Radio and Telecommunications Commission (CRTC), was Senior General Counsel in the Trade Negotiations Office during the Canada-US free trade negotiations in 1987 and 1988. In that position he was responsible both for negotiating the dispute settlement provisions and overseeing the drafting of the Canada US Free trade Agreement as well as its implementation legislation.