Intelligence MEMOS

From: Konrad von Finckenstein

To: The Honourable Chrystia Freeland, Minister of Global Affairs

Date: August 1, 2017

Re: **How we can save NAFTA's Chapter 19**

The summary of objectives for NAFTA renegotiation issued by the US Trade Representative on July 17 is blunt: "Eliminate the Chapter 19 dispute settlement mechanism."

It is worthwhile to recall that in the original free trade negotiations Canada asked for:

a) suspension of trade remedies between the free trade partners,

b) a code regarding permissible subsidies between free trade partners, and

c) a binding dispute settlement regarding the application and interpretation of the code.

As the US was not willing to agree to the first two demands, Canada walked out. But in the end Canada won on binding dispute settlement with respect to trade remedies, the sine qua non of the 1987 negotiations. The final compromise reached involved interpretation and application of trade remedies by bi-national panels making binding decisions that are enforceable before the national courts of either country. This was the key achievement of the free trade agreement, a dispute settlement process that ultimately relies on the US courts for enforcement, not on any right to retaliate.

Given this background it is surprising that the US now again asks for abolition of Chapter 19, knowing the importance Canada attaches to the issue. No reasons are given.

It is commonly assumed that the US unhappiness with Chapter 19 is based on two perceived objections:

a) panels do not correctly apply US law.

b) panels show insufficient deference to the expertise of the bodies whose decision it reviews.

These perceived concerns can be addressed without eliminating Chapter 19 entirely.

First, current panels must have a majority of lawyers and the chairman has to be drawn from among the lawyers. There is no reason why Canada could not concede that all panellists have to be lawyers or retired judges. It would not make a meaningful difference but it would eliminate the perception that non-legal minds are applying or interpreting US law.

Second, as to deference two solutions are possible

1. The standard of deference can be defined for each nation. The US standard would codify the standard presently applied in review of anti-dumping and countervailing duty decisions where no Chapter 19 is involved.

2. The court that is being replaced by the Chapter 19 panels could be given a right to make submissions to panels, purely on the issue of deference as applied by that court. It is quite normal in the US context to see different agencies make separate submissions to courts. Indeed article 1904(7) already allows the competent investigating authority to appear before the panel and be represented by counsel. This would be merely a further extension of giving rights to neutral bodies, with no interest in the outcome of a proceeding, to make representations before a panel.

Rather than even contemplating the abolition of Chapter 19, Canadian negotiators should try to address US concerns by putting forward positions for amending Chapter 19 along the above lines.

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