# Resolving Trade Disputes under FTA: Who Are the Winners?

*by David Johnson*

In all likelihood this country will soon be engaged in another acrimonious debate about free trade. The federal government has recently placed NAFTA implementing legislation before Parliament for approval prior to calling the next election. That campaign, in turn, will be one in which the worth of free trade will figure prominently.

For all the tension that the issue of free trade has engendered in this country, it is curious to note that there has been little academic or journalistic attention devoted to an assessment of how the dispute resolution process established by the FTA has been working over the past four years. What types of cases have been resolved by the bi-national panels? What is the nature of the jurisprudence of these bodies? To what degree have Canadian interests been helped or harmed by this jurisprudence?

## The Cases

A review of cases decided and pending reveals some interesting dynamics. In general, the dispute resolution process has been neither as good as expected by supporters of the FTA nor as bad as prognosticated by those opposed to the agreement.

To date, 35 cases have entered the process — 22 have been completed and 13 are still active. Of total cases, 26 have been initiated by the United States. In contrast, between 1980 and 1988, a total of 41 trade disputes against Canada were initiated and resolved by U.S. authorities. Thus, contrary to some supporters of the agreement, it is questionable whether the FTA has secured easier access of Canadian goods and services into the American market through a reduction of American trade remedy actions. The extent of U.S. resort to such measures under the agreement has led Gordon Ritchie, former Canadian trade negotiator, to refer to American behaviour as "harassment" that is "getting dangerously close to systematic abuse of the letter and spirit of the agreement."

The vast majority of all cases resolved and pending have dealt with anti-dumping and countervailing duty policy. Only three cases have addressed the general application of trade law between the parties. The issues in dispute in all these cases have been quite diverse ranging from whether U.S. lobster size regulations constituted a restrictive border measure, through whether Canadian raspberries or American beer were being dumped in the other nation's markets, to whether various Canadian industrial support programs constituted illegitimate subsidies under American trade law.

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## The Jurisprudence

Of the 22 completed cases, the American position has been substantially affirmed in 8, the Canadian position substantially affirmed in 7, while a further 7 cases resulted either in split decisions or no decisions due to withdrawals. Although these general results suggest a rough state of equilibrium existing between the two parties with respect to how their interests are being treated by the panels, a closer analysis reveals that Canadian victories have tended to arise in anti-dumping cases whereas significant American victories have been recorded in countervailing duty cases. The American victories thus have the effect of being much more politically important in that they affirm restrictions on the ability of Canadian governments to establish a wide range of industrial support programs.

The major American victories to date have been recorded in the *New Steel Rails* case with respect to Canadian steel exports, with various panels affirming that Canadian governmental loan guarantees and regional development grants specifically targeted to steel producers constitute countervailable subsidies. In certain ongoing cases respecting Canadian pork, magnesium, and softwood lumber exports, panels have similarly held other Canadian agricultural support programs, energy pricing agreements, and stumpage fee policies as constituting unfair subsidization of goods in trade.

## Subsidies and Industrial Strategy

Although these conclusions are cause for concern for all those interested in the ability of Canadian governments to develop state-directed policies of industrial strategy, this jurisprudence does not negate the ability of Canadian governments to establish such strategies. Contrary to the dire predictions of many opponents of the FTA, the capacity of Canadian governments to promote Canadian economic development within the structure of the agreement remains significant.

American trade law brands as illegitimate and countervailable foreign government grants, benefits, and uncommercial loans that are specifically targeted to particular industries, groups of industries, or regions within the state. Government support programs of general availability, however, such as health, education, and welfare programs, do not constitute countervailable subsidies. Likewise, the establish-

ment of financial support programs generally available to all producers in a particular economic sector will escape countervail action, hence certain Canadian victories in the pork export cases in which agricultural support programs such as the national tripartite stabilization plan and Quebec's farm income stabilization insurance program were upheld as legitimate subsidization policies.

### Future Possibilities

Given the existence of the concept of legitimate subsidization under American law and free trade jurisprudence, those concerned with the ability of Canadian governments to deal with the new economic order established by the FTA should devote attention to the ways and means by which governments can operate within the agreement.

Clearly, there is much scope for governments to develop creative industrial policies, such as: promoting educational and skills training; developing a high-tech communications infrastructure for the Canadian economy; establishing research and development centres capable of innovative educational work in the technologies of value-added manufacturing and services; establishing investment capital pools for use by Canadian-based firms; promoting joint public-private ventures in manufacturing and services; and recognizing the role to be played by Crown corporations in the development and sale of specialized R & D and managerial services to private sector firms.

As we enter another free trade debate, this time involving NAFTA, it is hoped that this debate will be more refined, intelligent, and progressive. But given the experience of the rhetoric coming from all sides over the past few years, such hope may well be misplaced.

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## WESTERN REPORT

# The Reform Party as a Regional Weather Vane

*by Roger Gibbins*

A recent poll by Angus Reid shows a precipitous drop in support for the Reform party. National support has fallen to 7 from 13 percent a year ago and support in the Alberta heartland has fallen from 44 to 21 percent. In British Columbia, support stands at only 14 percent and in Saskatchewan and Manitoba it is a negligible 4 percent.

How do we explain this drop in support? Can RPC support rebound in time for the federal election and what does the current drop suggest about the more general political temper in western Canada?

### The RPC Coalition

Support for the RPC is an amalgam of at least four different elements. The first and core element is regional discontent or western alienation. The second stems from the RPC's perceived role as an English Canadian counterweight to the influence of Quebec within the national government and political parties. Third, the RPC provides an expressive vehicle for generalized discontent with the "system," broadly defined. Fourth, the RPC offers an ideological vehicle for those on the conservative right.

Only the first element confines the party's appeal to the west; the other three have potential appeal across English Canada and have been emphasized by Preston Manning in attempts to establish a beachhead in Ontario and Atlantic Canada. (Manning's more recent attempt to establish a beachhead in Quebec defies explanation.) However, support for the party has waned across all four elements.

### The Winds of Change

The winds of change are currently working against the RPC. Western alienation is at a low ebb across the region, perhaps because regional frustration was vented during the referendum debate. In the two provinces most critical to RPC success, voters are preoccupied with political debates closer to home. In Alberta, Premier Ralph Klein's efforts to rebuild the Progressive Conservatives in the run up to a provincial election dominate the political stage, while in British Columbia the domestic relationships among Liberal caucus members and the driving records of NDP ministers and appointees provide an all-engrossing political soap opera.

The need for an English Canadian counterweight to Quebec has been reduced in the short term by the quiescence of the nationalist movement in Quebec and by the end of the constitutional debate. Although it is unlikely that generalized discontent with the political system has evaporated, it, too, may have been vented by the referendum experience. Voters who want to lash out at the incumbent government, but who are also guided by rational calculus, will be directed by public opinion polls to vote Liberal. For those who might be inclined to vote Liberal but cannot stomach Jean Chrétien's policy vacillation, Mel Hurtig's National party may provide a more ideologically hospitable protest vehicle.

> *"... the basic problem facing the RPC may be too many rats fighting over a shrinking piece of ideological cheese."*