Canadians and Mexicans take heart! A call for confidence in the rules of NAFTA

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Canadians and Mexicans have many things in common. Perhaps the most important and widely discussed is their common neighbor and its role in their political, cultural and economic systems. Canada and Mexico have moved steadily towards a closer political and economic relationship with the United States throughout their histories. Nevertheless, some members of both countries have been fearful when doing so. For example, a healthy trade relationship with the United States has always been important in ensuring the vitality of the Canadian and Mexican economies because of the size, proximity and wealth of the American market.

However, some policy makers and academics in Canada and Mexico have been very cognizant of issues such as autonomy, sovereignty, independence and fairness. They have argued that a closer economic relationship would have negative political ramifications for Canada and Mexico. They have been torn between desires for the benefits that closer economic ties with the United States would offer, and fears that such ties would threaten political autonomy, independence and identity.

Critics of NAFTA have used these concerns to fuel the fires of their arguments against the trilateral agreement. They have charged that NAFTA will take away what is left of Canadian and Mexican sovereignty and individual decision making ability by not only beginning a process of economic integration but of political integration as well. By virtue of its size, power and wealth in the trilateral relationship, critics have alleged that the United States will be able to dictate foreign, monetary, trade, labor and environmental policies to Canada and Mexico.

In other words, critics have argued that the provisions of NAFTA will be manipulated by American interest groups and policy makers, thus removing the independence, sovereignty and autonomy of the other two countries. They have lamented the fact that NAFTA has taken effect, and has begun to integrate the economies of the "Three Amigos" into a closer, more interdependent relationship.

When asserting their critiques about sovereignty and autonomy, these critics forget a central element of NAFTA —the rule of law. Canadians and Mexicans worked

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together during the NAFTA negotiations to ensure that effective rules and dispute settlement mechanisms were placed into the agreement. They fought and won against American resistance to the presence of binding trilateral dispute settlement panels to preserve and promote their independence, sovereignty and autonomy within an agreement that embodied the rule of law.

Both Canada and Mexico pursued free trade with the United States in order to institutionalize rules governing free and fair trade. Both had fallen victim to the rising levels of protectionism in the United States too many times during the 1970s and 1980s. Both Canada and Mexico wanted to reflect the importance of rules and effective dispute settlement mechanisms in North American trade. Rules were regarded as the best means to ensure that the fate of Canadian and Mexican domestic producers/exporters, and the sovereignty, autonomy and independent decision-making ability of the two governments were not placed at the merey of the American trade remedy regime which championed American interests above ali others.

The common concerns of Canadian and Mexican negotiators bound them together and allowed them to achieve a very strong, effective system of dispute settlement within NAFTA. The institutional provisions that were built inside of NAFTA have been upheld around the world as the most comprehensive and rigorous examples of dispute settlement that have been included in a free trade agreement to date.

They have been singled out as examples which other regional agreements should pattern their institutions and dispute settlement provisions upon. For example, the provisions of NAFTA were pointed to as models which could improve the dispute settlement mechanisms of GATT during the Uruguay Round of multilateral trade negotiations (1986-1994). Many of the provisions of NAFTA's dispute settlement mechanisms were entrenched into the new World Trade Organization which now governs global trade.

NAFTA contains a number of mechanisms to settle disputes. Chapter 11 (investments), Chapter 14 (financial services), Chapter 19 (anti-dumping and countervailing duties), and Chapter 20 (general dispute settlement mechanism) set out very specific, detailed, comprehensive dispute settlement provisions and institutions. The environmental and labor side deals also contain explicit rules and procedures that are to be used to settle disputes arising out of their provisions. Essentially, ali of NAFTA's dispute settlement mechanisms follow a very similar pattern.

In the event that political consultations and negotiations are unable to settle a dispute, the disputing members of NAFTA (and individuals under their jurisdiction) have the right to demand that a trinational dispute settlement panel be convened to hear the dispute. Dispute settlement panels are made up of lawyers, judges or issue-area experts from ali three countries. They are chosen collectively by the disputing parties from a roster held by NAFTA's Secretariat. After hearing a dispute within specified time frames, the panels are empowered to render decisions that are occasionally binding on the parties involved.

In the event that panel decisions are binding (e.g., disputes dealing with Chapter 19), the party which violated the agreement must amend its domestic laws to ensure that they comply with the rules of NAFTA. If decisions are not binding, the disputing parties must use the panel's reportas a starting point to settle the dispute by negotiation. Safeguard measures, appeal procedures and sanctions are permitted in narrowly defined circumstances if the dispute settlement mechanisms are not allowed to work as they are intended to by one of the NAFTA members.

Skeptics argue that NAFTA's rules can be broken. They ask what assurances are there that the rule of law will be able to triumph over power politics within international trade? What guarantees are there that the dispute settlement mechanisms will work as intended? How can rules be used to ensure free, fair, equitable trade? How will NAFTA's dispute settlement mechanisms protect and promote the autonomy, sovereignty and independence of Canada, Mexico and the United States? Answering these questions requires one to recognize that there are no simple answers or solutions, as there are few, if any, in life itself. Rules and laws, whether domestic or international, are only as good andas strong as the will of the people to uphold them.

Nevertheless, critics of NAFTA would be wise to consider how the rule of law and binding forms of dispute settlement have become increasingly important in the global trading environment during the last 20 years when asking these questions. More importantly, they would also be wise to apply the lessons learned from the success of the dispute settlement mechanisms of the Canada-United States Free Trade Agreement (FTA) to their fears about the future of Canadian and Mexican sovereignty in the context of North American trade.

The FTA contained a system of dispute settlement that was very similar to NAFTA's. In fact, many of NAFTA's provisions were borrowed directly from the dispute settlement mechanisms of Chapter 18 (general dispute settlement mechanism) and Chapter 19 (antidumping and countervailing duties) of the FTA. The FTA's dispute settlement mechanisms have not worked perfectly, nor have they solved bilateral trade disputes altogether. Indeed, it is not realistic to assume that dispute settlement mechanisms could ever eliminate trade disputes altogether. Sovereign states such as Canada and the United States will always try to uphold their country's domestic interests and concerns.

Moreover, trade disputes over issues such as antidumping and countervailing duties will continue to occur as sovereign states continue to build upon their often irrational and politically motivated domestic laws. Nevertheless, the dispute settlement mechanisms of the FTA have been very successful in lowering the temperature in cross-border relations, because they have encouraged Canada and the United States to look to the rule of law when resolving actual or potential trade disputes between them.

For example, the dispute settlement mechanisms of the FTA significantly improved the ways that Canadians could voice their concerns regarding American protectionism and harmful trade remedy laws passed in the interests of "free and fair trade." Prior to the institutionalization of the rule of law in the FTA, Canadian governments and exporters were forced to use diplomacy and/or American trade tribunals to signal their displeasure with American trading practices.

As the smaller, weaker partner in the relationship, Canada's national interests and those of its domestic producers/exporters were often overridden by American ones. Power politics caused the balance of the trade relationship to be tipped clearly in favor of the United States. Canadian governments and exporters often lacked the time, money and political power needed to ensure that mutually beneficial solutions were applied to disputes arising out of bilateral trade. Canadian sovereignty and independent decision-making ability were sometimes threatened prior to 1989 in the absence of the rule of law, and effective, impartial, bilaterally created dispute settlement mechanisms.

Trade law experts have argued that the dispute settlement mechanisms of the FTA changed all of that when the agreement came into force in 1989. Canadians and Americans have submitted over 50 cases to FTA dispute settlement panels between 1989-1995. The vast majority of those cases dealt with antidumping and countervailing duties. They were ruled upon by bilateral panels that were able to issue binding decisions that had to be implemented by the government whose domestic laws violated the spirit and letter of the agreement.

Therefore, Chapters 18 and 19 of the FTA have offered Canadians and Americans a substantially more conciliatory, effective, objective, fair, efficient, faster and less politically motivated process of settling disputes than those that were used prior to 1989. The FTA's dispute settlement mechanisms have placed Canada and the United States on a more equitable footing despite the overwhelming political and economic disparities that characterize their relationship. The dispute settlement mechanisms have transferred the terms that governed the bilateral trade relationship from the context of power politics to the rule of law.

Because the FTA was a bilaterally created trade agreement, both Canada and the United States were given an equal voice in the way that domestic trade laws would be applied. The dispute settlement mechanisms have reduced the strength of power politics and American unilateralism from the trade relationship and application of domestic trade laws. Canadian sovereignty, autonomy and independent decision making ability have thus been enhanced because the rule of law made Canada and the United States more equal political, economic and legal partners within the agreement.

Based upon the positive experiences that Canada has had with the rules of the FTA, Canadians and Mexicans can take heart from the fact that those rules have been replicated in NAFTA. Indeed, trade law experts argue that NAFTA's rules and dispute settlement mechanisms are even more effective, binding and rigorous than those of its predecessor. NAFTA's rules have strengthened the FTA rules in three ways:

1. NAFTA included mechanisms to settle disputes arising out of investment issues, financial services as well as environmental and labor laws.

2. NAFTA created a permanent Secretariat to ensure that the administrative aspects of the dispute settlement mechanisms worked properly and smoothly.

3. NAFTA made the rules and procedures governing antidumping and countervailing duty disputes clearer, more transparent and permanent.

Canadians and Mexicans need to approach their relationship with the United States in a bold and confident manner in the future. Trade with the United States is vital to the health of their economies. Protectionism and isolationism are not appropriate responses in today's international political economy. Globalization, regional trading blocs and the very presence of NAFTA make aggressive, outward-looking trade policies essential and imperative for both Canada and Mexico. The rules and dispute settlement mechanisms of NAFTA are good reasons for Canadian and Mexican producers, exporters, policy makers and academics to recommend assertive, competitive trade policies and practices to their publics. NAFTA's rules and dispute settlement mechanisms are highly regarded in the international community as excellent means to promote free and fair trade, as well as ones that can protect and promote the equality, sovereignty and autonomy of each member state.

Therefore, Canadians and Mexicans, take heart! Place your confidence in the rules of NAFTA. You have the rule of law on your side to protect your domestic producers and exporters, as well as your country's autonomy, sovereignty and independence. The rule of law has already been working for Canada in the FTA. It can now work for all of NAFTA's "Three Amigos."