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## Canada-United States Trade Negotiations: Continental Accord or a Continent Apart

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# Canada-United States Trade Negotiations: Continental Accord or a Continent Apart?\*\*

## I. Introduction

On May 21, 1986, the United States commenced historic bilateral trade negotiations with Canada which, if implemented, will impact substantially upon North American multilateral trade relations and the nature of North American manufacturing. This article attempts to highlight areas of difficulty in the Canada-United States negotiations that could create major obstacles to their successful completion in a free trade agreement. In so doing, it considers the historical underpinnings of Canada-United States relations, the unique form of existing trade between the two countries and, finally, the results that the negotiations could achieve.

Both Canada and the United States are experiencing severe domestic and international economic challenges. In an international setting of declining economic sovereignty and increased interdependence between nations, concern over economic vulnerability has come to the forefront in

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**\*\*Editor's Note:** This article reflects the status of the law as of August 1, 1987. At the time this issue went to press the United States and Canada had signed the Canada/United States Free Trade Agreement. The following article provides an in-depth study of the negotiations leading to the Agreement.

The Editorial Reviewer for this article is Larry D. Johnson.

Canada and the United States. Both countries are experiencing difficulties competing with less-developed nations that have lower labor and resource costs coupled with increasing competitive efficiency. The United States, despite being the world's largest trading nation, is experiencing a severe imbalance between its imports and its exports. This imbalance is fueling the resurgence of trade protectionism. Canada, while not experiencing a trade deficit, has a national deficit that is substantially larger per capita than that of the United States. Its reliance upon the United States as a marketplace for exports is much more dramatic than that of the United States upon it, creating a greater level of economic dependence by Canada on the United States.

The two countries are each other's largest trading partner and key source of investment in each other's economy. In 1986, 24.5% of the United States' world exports are to Canada, with a comparative percentage of its imports originating there.<sup>1</sup> This is more than two times the value of the United States' trade with Japan. In fact, the United States' two-way trade with Canada is greater than its trade with all ten members of the European Economic Community. In 1986, approximately 80% of Canada's exports were to the United States' marketplace and approximately 69% of its imports came from the United States.<sup>2</sup> Two million jobs in *each* country depend on the two-way trade between the United States and Canada.

The importance of American imports from Canada is reflected by their intrinsic nature and by actual percentages. Canada is the largest foreign supplier of energy to the United States, providing 100% of American natural gas and electricity imports. Canada is the largest supplier of uranium and the second largest supplier of oil to the United States. Nearly 85% of American exports to Canada are manufactured or semifinished products that are more labor-intensive than resource exports, thereby creating jobs for Americans through Canadian imports. Comparable figures for Japan and the European Economic Community were 25% and 64% respectively.<sup>3</sup> American imports from Canada, other than those in the automotive sector, tend to be raw materials and semifinished products, all of which are incorporated and refined into finished products by American workers. Canadian imports, in general, are not a threat to the American worker.

Economic interdependence, coupled with a close binational affinity between the two countries and their individual populations, has created a

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1. United States Department of Commerce.

2. STATISTICS CANADA (1986).

3. Address by Ambassador Allan Gotlieb, Canadian Ambassador to the United States, Detroit, Michigan (Sept. 27, 1985).

spill-over effect whereby the domestic policies of one country often affect and are affected by the foreign and commercial policies of the other. The strength of the economic interdependence of the two nations, combined with an economic spill-over effect to the other country, is more pronounced in Canada because of its smaller population and lesser economic strength.

A bilateral trade enhancement agreement will increase the interaction of the domestic and foreign policies of the two countries. Because of the significant dependence of Canada upon the United States, its government is increasingly concerned with and affected by American trade laws and regulations.

A Canada-United States trade agreement would regulate and, ideally, eliminate economic barriers between the two nations including tariffs, economic irritants, and other nontariff barriers (laws or regulations that explicitly or indirectly impose discriminatory burdens on goods of foreign origin, such as government procurement practices, labeling requirements, and quality standards).

A significant aspect of the negotiations is the inequality of the two nations in their respective market size and ultimate economic strength. An open market between the two nations without other concessions from Canada would not be acceptable to Congress as Canada would effectively gain access to a market ten times the size of its own and the United States to one only a tenth the size of its domestic market. In exchange for opening the American market to Canada, Congress wants other concessions from the Canadians. The issue of whether secure access to the marketplace in the United States at the federal level is a fair exchange for secure access in Canada at both the federal and provincial levels has come under close scrutiny by Congress. In addition to access to the provincial marketplace, Congress has demanded other concessions from Canada relating to other economic irritants such as American access to the Canadian investment markets and communication industries.

## II. History Of Canada-United States Trade Relations<sup>4</sup>

In the years following the American Revolution up to and including the War of 1812, a number of American leaders were interested in the expansion of the United States northward.<sup>5</sup> Despite the "hostile" overtures

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4. For a comprehensive overview see Dr. Earl H. Fry, *An Historical Overview of Canada-United States Trade Relations*, Paper presented at The Trade Liberalization and Socio-Economic Integration in North America Conference, Association Quebecoise des Etudes Americaines, Montreal, Quebec (October 30-31, 1986).

5. *AMERICAN FOREIGN POLICY: A DOCUMENTARY HISTORY* 29-53 (R. Devine ed. 1960).

of the War of 1812, the United States' initial attempts to convince the then Canadian colonies to join their new country were friendly.

Canada acceding to this confederation, and joining the measures of the United States, shall be admitted into and be entitled to all advantages of this union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine states.<sup>6</sup>

When England terminated preferential trading arrangements with its colonies in 1846, Canada looked to the United States as a substitute market. After lengthy negotiations, Canada (which was still a colony of England) and the United States entered into the Elgin-Marcy Reciprocity Treaty of 1854, which provided for free trade in natural products including, *inter alia*, timber, fish, butter, coal, and grain. American relations with Canada became strained over high Canadian tariffs on manufactured products, and the treaty was terminated unilaterally by the United States in 1866.<sup>7</sup>

During the next decade Canada attempted unsuccessfully to interest the American leaders in another trade pact, having become reliant on the proportionately larger American market and having changed its currency from pounds to dollars. In 1874 a draft treaty was negotiated that included the natural products of the earlier one and, in addition, agricultural implements, steel, paper, furniture, footwear, and a number of other manufactured products. The United States Senate refused to ratify it.

In 1911 the Canadian Government, under the leadership of Sir Wilfred Laurier, negotiated another trade agreement with the United States. That agreement was to have been implemented by way of concurrent legislation. The Canadian federal election in 1911 centered on the proposed agreement and the advisability of entering into closer economic relations with the United States. The Conservative opposition defeated the Laurier government on this issue, using the campaign slogan "No Truck or Trade with the Yankees."

The next major development occurred in 1941 when a bilateral sectoral agreement was entered into through the Hyde Park Declaration for defense production sharing. This was followed in the early post-war years when President Harry Truman and Prime Minister Mackenzie King "privately" negotiated a "draft" free trade agreement.<sup>8</sup> However, the Canadian Prime Minister decided not to proceed and the negotiations ceased. The next agreement for free trade between the two nations was in 1965 with the Auto Pact.<sup>9</sup>

6. See Articles of Confederation of the United States, art. 11 (1781).

7. Reisman, *The Issue of Free Trade*, in *U.S.-CANADIAN ECONOMIC RELATIONS: NEXT STEPS?* 35-36 (E. Fried & P. Trezize eds. 1984).

8. For a copy of the draft agreement, see R. GWYN, *THE 49TH PARADOX* 337-40 (1985).

9. Agreement Concerning Automotive Products, Jan. 16, 1965, United States-Canada.

The bilateral trade history indicates that Canada from its pre-confederation era forward has had a recurring interest in obtaining secure access to the United States' market; the United States, while remaining interested, has not actively sought reciprocal access. Over the years there has been a recurring debate about the sovereign consequences for Canada of its close relations with the United States. The pervasive influence of the United States cannot be denied in trade and investment patterns and, to some extent, in culture. The impact has been less marked on Canadian political institutions, norms, traditions, and agendas, which differ substantially from those of the United States.<sup>10</sup>

Many of the existing Canada-United States trade barriers and irritants result from fundamental differences in the ideologies of the two nations. While Canadians quietly embrace "Peace, Order and Good Government," Americans proudly proclaim "Give me Life, Liberty and the Pursuit of Happiness."

### **III. Automotive Production: The Cornerstone of North American Trade**

Notwithstanding the magnitude of the trade relationship, no comprehensive agreement, framework, or dispute resolution mechanism has been implemented, except in certain areas such as the automotive sector and defense production sharing. Automotive trade (completed vehicles and parts) is the cornerstone of economic and trade relationships between Canada and the United States, in 1985 totaling more than U.S. \$50 billion in two-way trade and comprising over 35% of all Canadian exports to the United States. Automotive production is an important element in the domestic economies of both countries, employing a significant portion of the total work force. For twenty-two years the Agreement Concerning Automotive Products<sup>11</sup> (the 'Agreement') has shaped Canada-United States trade and the structure of the North American automotive industry. The Agreement was an imaginative and vital response to a complex situation that threatened the entire structure of Canada-United States trade in the early 1960s.

#### **A. THE SETTING**

The North American automotive industry in the early 1960s was characterized by common ownership, comparatively identical products, and

10. Gibbins, *Free Trade in Political Ideologies: The Impact of Reduced Trade Barriers on Canadian Political Life*, in 16(3) *THE AMERICAN REVIEW OF CANADIAN STUDIES* 253 (1986).

11. *Supra* note 9.

geographic concentration in southern Ontario and the American upper midwest region. The United States' industry was highly integrated, diversified, technically innovative, and profitable. The Canadian automotive industry had been established in Canada half a century earlier as an outpost of the American industry. From its inception until the signing of the Agreement, Canadian automotive production was not significant enough to create economies of scale. With one-tenth the population of the United States, it produced virtually all models of vehicles that were being produced in the United States.<sup>12</sup> Canada, as a high-cost duplicate (in miniature) of the American industry, producing a full range of makes and models, was unable to achieve economies of scale. The result was an inefficient industry characterized by consumer prices 10% to 15% (excluding federal and provincial sales taxes and adjusting for the exchange rate) greater for the finished product in Canada than in the United States,<sup>13</sup> while Canadian employees earned substantially less than their American counterparts.

The automotive industry was important to Canada; it was its second largest employer. Large volumes of major components were imported into Canada, whereas Canadian automotive exports at the time consisted predominantly of parts and accessories. Canada as a whole was tied irrevocably to the American automotive industry and the American economy in general, purchasing 20% of American exports in 1964, which was approximately 65% of Canadian imports for that year. In the same year the United States imported 55% of Canadian exports (being 23% of American world imports).<sup>14</sup>

The economic consequence was a Canadian industry protected by tariff barriers and content rules that encouraged Canadian assembly of motor vehicles. These protections were not, however, sufficient to enable the Canadian industry to become competitive and viable. The Canadian Government attempted to rectify its inefficient automotive production and automotive trade deficit through exports. In 1961 a one-man Royal Commission (Dean Vincent W. Bladen) issued the Bladen Report,<sup>15</sup> which recommended revised tariffs, excise reductions, and duty-free access by manufacturers of vehicles, original and replacement components, provided that they met a specified level of Canadian content. He stated: "My concern is to reconcile the interest of the consumer in low prices, that of

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12. For example, in 1964 General Motors of Canada, Limited produced twenty passenger car models on two production lines in one plant in Canada.

13. See the Annual Reports of the President to the Congress on the Operation of the Automotive Products Trade Act of 1965.

14. STATISTICS CANADA.

15. V. BLADEN, *REPORT OF THE ROYAL COMMISSION ON THE AUTOMOTIVE INDUSTRY* (1961).

the automotive producers in profits and employment and that of the producers of primary products in export markets.”<sup>16</sup>

Bladen concluded that the problems that the Canadian automotive industry was experiencing resulted from its low-volume production runs for a large number of vehicle models. Bladen broadly favored closer integration of the American and Canadian segments of the industry and suggested domestic content requirements as a means to achieve this.

In 1962 the Canadian Government adopted a duty remission program to expand exports<sup>17</sup> in an attempt to increase Canadian output and employment while lowering production costs. The program allowed Canadian automotive manufacturers a remission of duty on imported vehicles and parts in an amount proportional to the increase in Canadian content in the manufacturer's exports from Canada. The pilot program permitted manufacturers to obtain a remission of duties paid on transmissions and incomplete engines imported into Canada to the extent that Canadian value added surpassed that for the motor vehicle year 1962. The program<sup>18</sup> was finalized with dollar-for-dollar duty remission on vehicles and parts for those who qualified as Canadian manufacturers on all imports of original equipment components and motor vehicles. Canada experienced a substantial increase in exports to the United States in the years 1962–64.

While the United States Government did not react to the pilot plan, it was forced to address the plan in its finalized form. On April 15, 1964, Modine Manufacturing Company, an American company that produced radiators, filed a petition<sup>19</sup> with the United States Department of the Treasury seeking a 25% countervailing duty, alleging that the Canadian remission program created a “bounty or grant.” Negotiations between the governments of Canada and the United States commenced. A trade war was averted when the parties negotiated a resolution of the dispute that was mutually acceptable, thus preserving their unique relations. The Agreement was signed on January 16, 1965, at Johnson City, Texas, by Prime Minister Pearson and President Johnson.

## B. THE AUTOMOTIVE PRODUCTION AGREEMENT

The Agreement does not contain all of the terms of what is commonly referred to as the Auto Pact. The term Auto Pact refers to:

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16. *Id.*

17. Pilot Program, Order in Council P.C. 1962 1/1536, passed pursuant to § 22 of the Financial Administration Act, R.S.C. 1970, c. F-10 (Oct. 26, 1962) (unpublished).

18. Full program, P.C. 1963 1/1344, passed pursuant to the Financial Administration Act, R.S.C. 1970, c. F-10 (Oct. 22, 1963) (unpublished).

19. Tariff Act of 1930, 19 U.S.C. § 303 (1958).



- Agreement Concerning Automotive Products Between the Government of the United States and the Government of Canada of January 16, 1965 (with Annexes) (the "Agreement");
- Letters of Undertaking of the Canadian Manufacturers of January 13 and 14, 1965;
- Automotive Products Trade Act of 1965;<sup>20</sup> and
- Orders in Council.<sup>21</sup>

The Agreement, in acknowledging the determination of both governments to strengthen their economic relations with each other, provides as its objectives:

- the expansion of automotive markets and economic growth while continuing to promote multilateral trade;
- the expansion of trade (automotive) through reduction and/or elimination of tariff and all other barriers to trade operating to impede or distort the full and efficient development of both countries' trade and industrial potential with a view to enabling the industries of both countries to participate on a fair and equitable basis in the expansion of the total market of both countries;
- the development and growth of the automotive industry in Canada and the United States; and
- the development of conditions in which market forces may operate effectively to attain the most economic pattern of investment, production, and trade.<sup>22</sup>

The Auto Pact by its terms is not, per se, a free trade agreement. It contains conditions (commonly referred to as "safeguards") for duty-free treatment of motor vehicles and original equipment parts that are inconsistent with the concept of "bilateral free trade." It is a *conditional* agreement providing for the economic integration of the automotive industry in North America. The conditional aspect is buttressed by safeguards in the Agreement and in the "voluntary" Letters of Undertaking received by Canada from the Canadian manufacturers, which vary slightly from corporation to corporation, guaranteeing that the Canadian share of the market will be proportionate to its consumption level. The conditions for duty-free entry of manufactured vehicles and specified parts for use as original equipment are not identical in both countries.

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20. United States' implementation was effected by the Automotive Products Trade Act of 1965, Pub. L. No. 89-283, 79 Stat. 1016 (1965), 19 U.S.C. §§ 2001-2033 (1982).

21. Canadian implementation was effected by Order in Council P.C. 1965-99, 143 SOR/25(65) and Order in Council P.C. 1965-100, 147 SOR/65-43.

22. *Supra* note 11, Art. I.

### C. DUTY-FREE ENTRY INTO THE UNITED STATES

Under the Auto Pact, duty-free entry into the United States from Canada is allowed for:

- finished vehicles and chassis therefor (excluding electric trolley buses, three-wheeled vehicles, or trailers accompanying truck tractors or chassis therefor), and
- fabricated components (excluding trailers, tires, or tubes for tires) for use as original equipment in the manufacture of motor vehicles described in the previous subparagraph, provided that the Canadian, American, or combined Canadian/American content is 50% of the value of the motor vehicles and specified original equipment parts.<sup>23</sup> The content requirement is in-product content for each item imported, rather than an aggregate content level of a product line or an aggregate content per motor vehicle year.<sup>24</sup>

The right to import motor vehicles duty-free into the United States from Canada is available to any importer (including individuals), while original equipment parts may only be imported by or for the account of a bona fide motor vehicle manufacturer in the United States.

In limiting the duty-free treatment of motor vehicles and original equipment parts to Canada, the United States implemented the Agreement as an exception under article XXV(5) of the General Agreement on Tariffs and Trade (GATT) and obtained a waiver under the GATT with respect to its most favored nation tariff obligations.

### D. DUTY-FREE ENTRY INTO CANADA

Canada's implementation of the Auto Pact was on a multilateral basis and, accordingly, it did not seek a GATT waiver. Canada extends duty-free treatment of motor vehicles or original equipment parts to any country, provided that the importer is a manufacturer of motor vehicles<sup>25</sup> in

23. *Id.* Annex B.

24. August 1st to July 31st.

25. *Supra* note 11, Annex A. Manufacturer of motor vehicles, namely automobiles, buses, or specified commercial vehicles is defined to mean a manufacturer that:

- (a) produced vehicles in Canada of that class in each of the four consecutive quarters in the base year (August 1, 1963 to July 31, 1964); and
- (b) produced vehicles in Canada of that class in the period of twelve months ending on the 31st day of July in which the importation is made provided that:
  - (i) the ratio of the net sales value to the net sales value of all vehicles of that class sold for consumption in Canada by the manufacturer in that period is equal to or higher than the ratio of the net sales value of all vehicles of that class produced in Canada by the manufacturer in the base year to the net sales value of all vehicles

Canada and complies with the conditions discussed below. Canada accords duty-free treatment to the following products:<sup>26</sup>

- automobiles<sup>27</sup> provided that they are imported by a manufacturer of automobiles and parts/accessories therefor (excluding tires and tubes) when imported for use as original equipment in automobiles to be produced in Canada by a manufacturer of automobiles;
- buses<sup>28</sup> provided that they are imported by a manufacturer of buses and parts/accessories therefor (excluding tires and tubes) when imported for use as original equipment in buses to be produced in Canada by a manufacturer of buses; and
- specified commercial vehicles<sup>29</sup> provided that they are imported by a manufacturer of specified commercial vehicles and part/accessories therefor (excluding tires, tubes, and certain machines and articles) when imported for use as original equipment in buses to be produced in Canada by a manufacturer of specified commercial vehicles.

A manufacturer of motor vehicles is obliged under the Agreement to meet two conditions relating to vehicle assembly in Canada and to the level of Canadian value added to vehicles. Firstly, a manufacturer is required to maintain a ratio of vehicles assembled in Canada to those vehicles of the same class sold in Canada for consumption in each motor vehicle year.<sup>30</sup> The minimum ratio under the Agreement required that 75 vehicles be produced in Canada for every 100 sold there (increased to 95:100 in 1969 for passenger vehicles). However, the Agreement provides that if a particular manufacturer had a greater ratio in the 1964 base year (for example produced 80 vehicles for every 100 sold in the same vehicle class), then this higher ratio is that particular manufacturer's minimum production-to-sales ratio. Individual manufacturer's production-to-sales ratios are not publicly disclosed.

Secondly, the minimum content added in each motor vehicle year for each class of vehicles must not be less than that achieved by the individual

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of that class sold for consumption in Canada by the manufacturer in the base year, and is not in any case lower than seventy-five to one hundred; and

(ii) the Canadian value added is equal to or greater than the Canadian value added of all vehicles of that class produced in Canada by the manufacturer in the base year.

26. *Id.*

27. *Id.* Automobile is defined as a four-wheeled passenger automobile having a seating capacity of not more than ten people.

28. *Id.* Bus is defined as a passenger motor vehicle having a seating capacity for more than ten persons, or a chassis therefor (excluding the following vehicles or chassis therefor: electric trackless trolley bus, amphibious vehicle, tracked or half-tracked vehicle or motor vehicle designed primarily for off-highway use).

29. *Id.* Specified commercial vehicle is defined to mean a motor truck, motor truck chassis, ambulance or chassis therefor, or hearse or chassis therefor.

30. *Id.*

manufacturer for that particular class of vehicles in the 1964 base year.<sup>31</sup> Canadian value added includes raw materials, components, labor, shipping, and burden (electricity, taxes, etc.).<sup>32</sup> This provision is substantially different from the American counterpart, which requires 50% "North American" content.<sup>33</sup> The Canadian content provision does not apply to particular in-product content as does the American, but rather is based on total Canadian value added to a particular class of motor vehicles during the motor vehicle year. Effectively, this enables Canadian manufacturers to import into Canada motor vehicles without any North American content.

In addition to the foregoing guarantees, Canada, through the Letters of Undertaking with each of the Canadian manufacturers, implemented other safeguards into the Auto Pact as follows: The first commitment was that the Canadian producers as a group would increase Canadian value added by Can. \$260 million by the end of the 1968 model year. Each Canadian producer's share of this \$260 million was added to its 1964 base for purposes of calculating its Canadian value-added attainment requirement. The second commitment (known as the "growth formula") requires each Canadian producer to increase in each trade year the amount of Canadian value added in vehicles produced (assembled) in Canada (i) by 60% of the increase in cost of sales of passenger cars in Canada over the 1964 base year and (ii) by 50% of the increase in cost of sales of commercial vehicles over the 1964 base year.<sup>34</sup> Further, the Canadian Government reserved the right to designate a manufacturer that does not come within the foregoing guidelines as being entitled to the benefits of full duty-free treatment under Annex A of the Agreement.

#### E. PROBLEMS AND IRRITANTS

Measured against its stated objectives, the Auto Pact has been a success, laying the foundation for the integration of American and Canadian automotive industries while encouraging its rationalization during the 1960s.<sup>35</sup> Although the United States still has a dominance over Canada

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31. *Id.*

32. Address by Eugene L. Hartwig, Vice President and Associate General Counsel, General Motors Corporation, "The Auto Pact," Section of International Law & Practice of the American Bar Association, Detroit, Michigan (Feb. 15, 1985).

33. *Supra* note 23.

34. *Supra* note 32.

35. UNITED STATES OFFICE OF AUTOMOTIVE INDUSTRY AFFAIRS, ANALYSIS OF U.S.—CANADIAN AUTOMOTIVE TRADE ISSUES, Attachment at page 4 (1985); Address given by Timothy Stock, Assistant General Counsel, Ford Motor Company, at the Detroit Athletic Club (Apr. 21, 1985).

in the automotive sector, Canada has had access under the Auto Pact to the world's largest automotive market and has achieved increased production, expanded trade productivity, increased employment, and lower consumer prices.

The Auto Pact has attracted criticism from its inception. The fact that the United States implemented the Auto Pact on a bilateral basis and that Canada did so on a multilateral basis has led to differences in how each country may deal with third countries in the automotive sector. The United States Trade Representative has denounced Canada's current duty remissions as a violation of the GATT. American domestic industry is calling for changes in the Auto Pact to correct what it feels is an imbalance in Canada's favor with regard to offshore automotive investment.

The Auto Pact, which may be terminated by either country on one year's notice to the other, does not address the period of existence of the safeguards. It has always been the position of the United States Government,<sup>36</sup> of many in the industry, and of some in Canada that the safeguards were to be of a temporary duration. In fact, the United States Government disavows the "production-sharing" concept. "The United States has rejected the 'fair share' concept on the grounds that the Auto Pact is a limited free trade arrangement, not a market sharing agreement, or a mechanism to manage an industrial strategy for the auto industry."<sup>37</sup>

Critics allege that the purpose of the safeguards was to give Canada an adjustment period to develop a viable automotive industry. In contrast, the Canadian Government has treated them as a permanent element of the Auto Pact and has used them as an impetus to encourage automotive investment and expansion in Canada by motor vehicle manufacturers under the Auto Pact.<sup>38</sup>

The duty remissions of the 1960s in Canada had been withdrawn when the Auto Pact was implemented. In 1975, however, Canada introduced an Automotive Component Remission Order,<sup>39</sup> which created a duty remission program to encourage exports of Canadian automotive parts and to encourage offshore investment from automotive producers who were not covered under the Auto Pact. The program, which gave duty remissions to vehicle importers who purchased original equipment parts from Canadian exporters, was extended in 1978 to give duty remission credit

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36. *Id.* at 1, 5.

37. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, REPORT ON THE NORTH AMERICAN TRADE ARRANGEMENT 54 (1981).

38. Even at the initiation of the Auto Pact, Canada required assurances from the manufacturers before signing. For example, in 1965 Ford announced a new plant for St. Thomas, Ontario. Address by Timothy Stock, Assistant General Counsel, Ford Motor Company, at the Detroit Athletic Club (Apr. 21, 1985).

39. Order in Council P.C. 1975-1024, SOR/75-58.

for Canadian value added on exported original equipment parts and replacement parts. In 1981 an individual duty remission program was developed with Volkswagen, which was then planning on opening a second assembly plant in the United States and wanted duty-free treatment for its vehicles exported to Canada. Volkswagen agreed to make an investment of \$100 million in a parts manufacturing plant in Canada that would export virtually all of its production to the United States. In 1985 Volkswagen was allowed to decrease its investment commitment by 50% while retaining all of the benefits granted to it by the Canadian Government in 1981.<sup>40</sup> 1984 saw the implementation of a program to provide foreign vehicle importers with duty remissions in an amount equal to 70% of the Canadian value added in its purchases of original equipment parts exported from Canada.

It has been alleged that the Canadian remission programs violate the spirit of the Auto Pact and the GATT Subsidies Code.<sup>41</sup> Transition within the industry in the last twenty years has created a shrinking North American domestic market. As the North American automotive corporations continue to experience the impact of this decline, pressure between the two countries has increased in relation to the shared objectives for the Auto Pact.<sup>42</sup> The United States' policy of nonintervention in its domestic industries<sup>43</sup> is in marked contrast to Canada's active role in attracting and financially supporting new and existing operations in Canada.

At each stage in the evolution of the Canadian automotive sector, any threat to Canada's fair share of automotive manufacturing relative to domestic consumption has been countered by domestic policies—whether tariffs, content schemes or manufacturing requirements—that have sought automotive investment, production and employment in Canada.<sup>44</sup>

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40. The United States voiced objection to the duty remissions program and in particular to the Volkswagen agreement. In 1981 Ambassador Macdonald, Deputy United States Trade Representative, sent letters to Robert Latimer, Assistant Deputy Minister of Trade and Commerce, Canada.

41. UNITED STATES OFFICE OF AUTOMOTIVE INDUSTRY AFFAIRS, *supra* note 38, at 8; INT'L TRADE REP. (BNA) 1190 (Oct. 1, 1986). The former study indicates that use of the remission program in Canada has ballooned in recent years and has eroded benefits to the "Big Four" under the Auto Pact while diverting business from the United States to Canada.

42. THE AUTOMOTIVE AGREEMENT IN A CANADA-UNITED STATES COMPREHENSIVE TRADE ARRANGEMENT (1986). Note that this study was not prepared by the Canadian Government but by the outside consulting firm of Grey, Clark, Shih and Associates Limited.

43. The United States Department of Commerce (USDC) defined the policy issue in terms of economic adjustment to changing offshore market conditions and competition, concluded that the United States automotive industry had the capabilities to make the required adjustments, and recommended against additional trade protection for this sector. *See* USDC, THE UNITED STATES AUTOMOTIVE INDUSTRY (1983).

44. FEDERAL TASK FORCE OF THE CANADIAN MOTOR VEHICLE AND AUTOMOTIVE PARTS INDUSTRIES, AN AUTOMOTIVE STRATEGY FOR CANADA (1983).

That is not to say, however, that the United States has not provided subsidies and incentives for new offshore investment and new investment by domestic corporations. Subsidies and inducements to invest have been granted at the state level in the United States, as opposed to a combined federal/provincial level in Canada. The provision of inducements and subsidies, coupled in Canada with its duty remission program for parts exports, has created an ongoing tension between the countries in the automotive sector. Canadian Government support in the automotive sector, coupled with its remissions to offshore producers, has resulted in the most serious rift in automotive trade relations between the two countries since 1964.

#### F. SUMMARY

The Auto Pact is a sectoral agreement with conditions attached. As an example of a successful bilateral agreement in a multilateral trading environment, it was a practical response to a trade war that loomed between Canada and the United States in 1965, resolving the interests of both countries while serving the needs of the industry. It has fulfilled the expectations of its negotiators. The foresight and ingenuity that created the Auto Pact requires continuing objective examination of its operation in both countries. The Auto Pact did not attempt to address all of the automotive issues existing between Canada and the United States at the time. Its essential purpose was to obtain for Canada a better share of North American assembly and parts production and employment than it had in 1964, without imposing additional penalties on the Canadian consumer or Canadian labor. It sought to achieve this objective by introducing conditional free trade with the United States in this sector, combined with a guarantee of certain minimum assembly and parts production in Canada relative to Canadian vehicle consumption. It more than achieved its limited objectives.<sup>45</sup>

With the transition of the automotive industry during the last decade from one of United States' world dominance to one with an increasing offshore presence, it becomes evident that the Auto Pact fails to reflect the global character of the automotive business and the reality of overseas import competition. The Auto Pact, while not originally an issue in the negotiations, has been added to the list of contentious matters being discussed because of increasing concern with the Canadian remissions program. Whether or not the Auto Pact will remain a viable trade agreement and whether or not it will be amended or altered to reflect the changes

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45. MINISTER OF SUPPLY AND SERVICES, REPORT OF THE ROYAL COMMISSION ON THE CANADIAN AUTOMOTIVE INDUSTRY 231 (1978).

created by the internationalization of the industry is an issue that will remain at the forefront of Canada-United States relations.<sup>46</sup>

#### IV. Background to the Trade Negotiations

The current trade enhancement negotiations between Canada and the United States grew out of the 1983 trade policy review released by the then Liberal Government of Canada.<sup>47</sup> Talks between the two governments stemming from this report focused primarily on a sectoral form of trade agreement. Areas discussed for potential economic integration between the two countries included agricultural equipment, informatics, urban transportation equipment, and steel.<sup>48</sup> The impetus for developing the preliminary explorations into negotiations essentially ceased with the Canadian federal election in 1984, which placed the Progressive Conservative party in power.

##### A. CANADIAN DISCUSSION PAPER ON CANADIAN ACCESS TO EXPORT MARKETS

In January 1985 the Canadian Government released a discussion paper on enhancing Canadian access to export markets.<sup>49</sup> The Canadian Government stated in this paper that Canada's "first and most important priority" was to secure and expand Canadian access to world export markets and in particular to those of the United States.<sup>50</sup> As part of that priority, the government indicated that it would make a careful analysis of options for bilateral trade liberalization with the United States "in close consultation with the provinces and private industry."<sup>51</sup>

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46. As of the end of August 1987, the status of the Auto Pact in the negotiations remained unclear. On the one hand, Premier David Peterson of Ontario had indicated that he would not be prepared to approve a Free Trade Agreement which undermined the Auto Pact, and on March 16, 1987, Federal Trade Minister Patricia Carney had introduced a motion in Parliament stating that the auto industry in Canada would have to continue to be protected within the framework of a Free Trade Agreement. On the other hand, during the month of August the American Trade negotiator, Peter Murphy, was emphatic that the Auto Pact was indeed a poor consideration, and that some movement would have to be forthcoming from his Canadian counterpart.

47. MINISTER OF SUPPLY AND SERVICES, DEP'T OF EXTERNAL AFFAIRS, CANADIAN TRADE POLICY FOR THE 1980s: A DISCUSSION PAPER (1983).

48. For more information on the sectoral free trade considerations between the two nations see U.S.-CANADIAN ECONOMIC RELATIONS: NEXT STEPS? (E. Fried & P. Trezize eds. 1984); THE LEGAL ASPECTS OF SECTORAL INTEGRATION BETWEEN THE UNITED STATES AND CANADA (H. King, Jr. ed. 1985); CANADA/U.S. TRADE RELATIONS (H. Radebaugh & E. Fry eds. 1985).

49. MINISTER OF SUPPLY AND SERVICES, DEP'T OF INT'L TRADE, HOW TO SECURE AND ENHANCE CANADIAN ACCESS TO EXPORT MARKETS: A DISCUSSION PAPER (1984).

50. *Id.*

51. *Id.*



In analyzing the future for Canada-United States trade relations, the paper outlined and discussed four options:

- maintain the status quo of the relationship;
- negotiate sectoral or functional trade arrangements that go beyond existing GATT rules and agreements as a means of securing and widening market access for Canada in the United States;
- investigate whether or not the negotiation of a comprehensive trading arrangement between Canada and the United States that provided for the removal of tariff and nontariff barriers on substantially all bilateral trade would be a reasonable alternative; and
- establish a framework agreement.

The paper focused on whether Canada should enter into multilateral or bilateral trading relationships while stressing the need to pursue both avenues in a mutually reinforcing environment.

## B. QUEBEC SUMMIT

Two months later, at the Quebec Summit, Prime Minister Mulroney and President Reagan made a commitment to bilateral trade enhancement between the two nations in the Quebec Declaration on Trade in Goods and Services (the 'Declaration'), which mandated the exploration of means to reduce and eliminate existing barriers to trade between the two countries, enhance market access, halt protectionism, and facilitate trade between Canada and the United States.<sup>52</sup> Under the Declaration, the Canadian Minister for International Trade and the United States Trade Representative were required to report within six months on ways of reducing or eliminating trade barriers between the two countries.

## C. THE MACDONALD COMMISSION REPORT

On September 16, 1985, the Report by the Royal Commission on the Economic Union and Development Prospects for Canada (the Macdonald Report)<sup>53</sup> was released. The three-year, \$20 million study culminated in a three-volume report summarizing seventy-two background volumes. The Macdonald Report, in general, concluded that protective mechanisms in the Canadian economy should be dismantled and the forces of the marketplace be allowed to operate to foster competitiveness, entrepreneurship, and prosperity.

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52. Declaration by the Prime Minister of Canada and the President of the United States of America Regarding Trade in Goods and Services, Mar. 18, 1985, United States-Canada, reprinted in MINISTRY OF SUPPLY AND SERVICES, CANADIAN TRADE NEGOTIATIONS, SELECTED DOCUMENTS 13 (1985).

53. MINISTER OF SUPPLY AND SERVICES, REPORT OF THE ROYAL COMMISSION ON THE ECONOMIC UNION AND DEVELOPMENT PROSPECTS FOR CANADA, vol. 1 (1985).

The Macdonald Report recommended, in its discussion on Canadian trade,<sup>54</sup> that Canada negotiate and enter into a free trade agreement with the United States. Three basic elements of a potential Canada-United States trade agreement were analyzed, namely:

- the format or procedural framework for the negotiations; i.e., sectoral versus across-the-board free trade negotiations;
- the substantive provisions of the resulting "treaty" or agreement; i.e., nontariff barriers, safeguards, contingent protection; and
- procedural and legal mechanisms of implementation and enforcement of a trade agreement.

It emphasized that these elements must be analyzed with regard to the concerns of Canadians. Barrier-free market access that is dependable and secure and that will not be eroded by any future political climate or legal challenge is a required element of any agreement if Canadian industry is going to make the commitment and resulting adaptations needed in order to penetrate the American market. Finally, it stated that assurances to Canadians of national autonomy in social, economic, and defense policies must be given.

The study analyzed the various formats of sectoral arrangements, a common market, a customs union, and a comprehensive free trade area between Canada and the United States. The Commission concluded that a free trade agreement would yield the greatest benefits for Canada while minimizing the costs of the various other formats and the costs of maintaining the status quo. While the commissioners did not foresee the automatic exclusion of any sectors from consideration at the negotiations, they did foresee the possibility of exceptions arising during the course of the negotiations with the United States. Trade in service industries (e.g., banking, insurance, and financial services) were identified as potential extension sectors of the trade areas traditionally dealt with under the GATT. Cultural activities were identified as an area that might require special treatment under any resulting agreement.

The commissioners stated that a Canada-United States free trade agreement should regulate and ideally eliminate three types of barriers between the two nations: tariffs; contingent protection measures (antidumping duties, countervailing duties, and safeguard or escape clause actions); and other nontariff barriers (laws or regulations that explicitly or indirectly impose discriminatory burdens on goods of foreign origin such as government procurement practices, labeling requirements, and quality standards). Contingent protectionist measures and nontariff barriers were identified as important items to be dealt with in an agreement for Canadian

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54. *Id.* at 297-385.

industry in order to ensure its long-term access to the United States' market.

The Commission recommended that:

- Canada negotiate a free trade agreement with the United States while continuing to support multilateral efforts in the reduction and elimination of trade barriers;
- an office of Special Trade Negotiator be created that would report directly to the Prime Minister;
- tariffs between the two countries be reduced to zero within ten years;
- a "fast-track" method be used in the tariff reductions—more particularly, that the United States would reduce its tariffs over a five-year period and Canada over a ten-year period, since Canada has the greater vulnerability and need for adjustment;
- safeguards be incorporated into a free trade agreement that would ensure that the United States would not use its "stronger economic position" to attempt to influence Canada in areas not directly related to the trading relationship, such as foreign policy; and
- a three-tiered body be established to administer and enforce the agreement.

The commissioners determined that adjustment problems in Canada would be greater than in the United States in both the labor force and the field of investment. Any agreement should contain transitional safeguards for Canada. Transitional assistance to Canadian industry should be included in any agreement and could take several forms, including government-backed loans, research and development grants, or tax concessions such as accelerated depreciation of expenditures incurred in adapting Canadian operations for the United States' market. The form of assistance recommended by the Commissioners was a program that would support displaced workers while accelerating their retraining or reemployment. Additionally, adjustment subsidies or assistance would have to be explicitly provided for in the agreement.<sup>55</sup>

The Macdonald Report stated that a free trade agreement should be implemented through either a treaty or legislation at the federal and provincial/state levels. The legislative method would likely prove to be impossible to implement uniformly at the provincial/state level. The legislative format would not provide the security of long-term access to the United States' market that a treaty would. This might well be an important consideration for Canadian manufacturers before making the commitment, monetary expenditures, and adaptations to penetrate the United States' market. The Macdonald Report argued that a treaty would give future security of competitiveness on a long-term basis in the American market.

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<sup>55</sup>. *Id.*

Unfortunately, it would require a two-thirds majority approval of the United States Senate—which might prove a difficult, if not impossible, goal in view of the current protectionist mood in Washington. The preferred route to take, according to the Macdonald Commission, and in fact the one that is being used, was that of the “fast-track” procedure under the Trade Act of 1974<sup>56</sup> as extended under the Trade Agreements Act of 1979.<sup>57</sup>

The commissioners recommended that an intergovernmental administrative entity be established to implement and monitor the agreement with a legally binding process for resolution of any disagreements arising under the free trade agreement. The three-tiered body would be composed of:

- a Ministerial Committee that would make major decisions on the interpretation and implementation of the agreement;
- a Trade Commission that would serve an administrative function in providing advice, research, and investigation; and
- an arbitration panel with binding authority to resolve disputes on the interpretation of the agreement to be composed of two Americans, two Canadians, and one neutral member.

Simultaneously, the strengthening of the GATT, the International Monetary Fund, and other multilateral or international economic entities would be a priority for Canada. Finally, assurances to Canadians of national autonomy in social, economic, and defense policies must be given in any agreement.

#### D. CANADIAN PROPOSAL TO EXPLORE NEGOTIATIONS

Prime Minister Brian Mulroney announced on September 26, 1985, that Canada would “propose” trade negotiations with the United States.<sup>58</sup> The statement, based on the written recommendations of the Minister for International Trade, James Kelleher,<sup>59</sup> arose out of the Quebec Summit Declaration of the previous March. At the time of the announcement, the Canadian Prime Minister stated: “We want to negotiate the broadest possible package of mutually-beneficial reductions in tariff and nontariff barriers between our two countries.”<sup>60</sup>

56. 19 U.S.C. § 2112, 2486 (1982).

57. *Id.* § 1101.

58. Prime Minister Brian Mulroney, Statement to the House of Commons (Sept. 26, 1985), reprinted in MINISTER OF SUPPLY AND SERVICES, CANADIAN TRADE NEGOTIATIONS, SELECTED DOCUMENTS 73 (1985).

59. The Honorable J. Kelleher, Report to the Prime Minister by the Minister for International Trade (Sept. 17, 1985), reprinted in MINISTER OF SUPPLY AND SERVICES, CANADIAN TRADE NEGOTIATIONS, SELECTED DOCUMENTS 65 (1985).

60. *Supra* note 58.

The Canadian Trade Minister concluded that a trade agreement with the United States should be directly explored.<sup>61</sup> He went on to state that he "envisaged" such negotiations commencing in early 1986.<sup>62</sup>

The statement delineated Canada's "broad objectives" in negotiating an agreement as follows:

- to save jobs in the short term and to create jobs in the medium and long term;
- to strengthen the economy in all geographic regions of Canada;
- to stimulate balanced growth and job creation throughout the nation (Canada);
- to allow all Canadians to share in the benefits of this national effort;
- to strengthen the economic basis for Canadian cultural objectives;
- to secure and enhance Canadian access to the United States' market by enshrining a better set of rules whereby Canadian trade is conducted; and
- to develop a more predictable environment for trade and investment in Canada.<sup>63</sup>

Simultaneously, the Canadian Government reaffirmed its commitment to the GATT and to the achievement of certain established trade objectives within the multilateral trading system. The Minister stated that complementary bilateral and multilateral trade negotiations would strengthen the Canadian economy, Canadian performance in the global marketplace, as well as bilateral economic relations with Europe, Japan, and the developing world. This commitment was put forward as an element in the Progressive Conservative Government's "program of economic renewal" for Canada.<sup>64</sup> This approach, it was stated, would reinforce Canada's independence and credibility in foreign policy. The Minister indicated that the following should be dealt with in any resulting negotiations:

- the manner in which Canadian companies' access to the United States' market can be frustrated by the use of trade remedy laws;
- the ease with which imports from Canada are swept up in measures aimed at other countries;
- the continual threat of unilateral changes in the rules of the game;
- the lack of access to the United States' procurement market because of Buy America provisions at the federal and state levels;
- the large number of United States' tariffs which continue to limit access to that market; and
- the inadequacy of current mechanisms to resolve disputes.<sup>65</sup>

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61. *Supra* note 59.

62. *Id.*

63. *Supra* note 59.

64. *Id.*

65. *Id.*

The Canadian Minister concluded that a trade agreement would save Canadian jobs currently threatened by protectionist measures in the short term and would create better jobs in the long term. He went on to assert that Canadian cultural identity would not be open for negotiation and that the government would only “pursue a negotiation which increases the well being of all Canadians.”<sup>66</sup>

E. REPORT TO THE PRESIDENT BY THE UNITED STATES  
TRADE REPRESENTATIVE ON TRADE WITH CANADA

Ambassador Clayton Yeutter released his report to the President responding to the Canadian initiative on the same day, and stated that:

Canada is a vital and integral player in the global marketplace. I welcome this opportunity for bilateral discussions with our neighbor and largest trading partner. This marks the beginning of greater, perhaps even historic, opportunities for both countries. I will soon begin consultations with the Senate Finance and House Ways and Means committees and our private sector on the desirability and objectives of such a bilateral negotiation.<sup>67</sup>

In his report, Ambassador Yeutter indicated several ways in which the United States could reduce and eliminate barriers to bilateral trade both in goods and services with Canada. Yeutter confirmed the United States' commitment to further liberalization of trade, whether bilateral or multilateral. A restated commitment was made to the strengthening of the multilateral trading system through a new round of negotiations under the auspices of the GATT, reflecting the President's statement made earlier in the week. The Ambassador indicated that a number of United States' industries “have an interest in expanding their access to a prosperous and proximate Canadian market.”<sup>68</sup> Significant barriers to United States' exports to Canada in particular sectors were identified as:

- high Canadian tariffs across a wide spectrum of products that act as major impediments to United States' exports;
- nontariff barriers at both the federal and the provincial levels that effectively preclude many United States' exports from entering the Canadian marketplace;
- obstacles to United States' investment in Canada;
- federal and provincial regulations that impede United States' exports of services; and

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66. *Id.*

67. Ambassador C. Yeutter, Report to the President by the United States Trade Representative (Sept. 17, 1985).

68. *Id.*

- governmental assistance programs (both at the provincial and federal level) that subsidize competition.<sup>69</sup>

On September 23, 1985, three days prior to the release of Ambassador Yeutter's report, President Reagan released a major multilateral trade strategy. It emphasized the importance of an open trading system in the world marketplace where trade plays a role of increasing importance in the domestic economies of the majority of nations.<sup>70</sup>

In October the Canadian Minister for International Trade clarified the Canadian proposal and indicated that it was not an invitation for the United States to negotiate, but rather was merely an invitation to explore the feasibility of negotiations.<sup>71</sup>

The United States Senate Finance Committee held a hearing on April 11, 1986, to determine whether to enter into negotiations with Canada for a comprehensive trade enhancement agreement under the fast-track review. The United States Trade Representative, when testifying that morning before the Committee, indicated that the Administration and the private sector advisory committees representing industry, labor, and agriculture generally gave broad support for entering into the negotiations with Canada. He indicated six broad areas of interest that had been identified and that would be pursued in the negotiations:

- **Tariffs:** Canadian tariffs average between 9% and 10% as compared to the United States' tariffs, which average 4% to 5%. The industries most concerned with high Canadian tariffs were furniture, telecommunications equipment, home appliances, cosmetics, electronics, paper products, recreational boats, aluminum products, wall coverings, and leather.
- **Nontariff Barriers:** Concerns were voiced over extensive nontariff barriers existing at both the provincial and federal level in Canada. The negotiations should reduce and eliminate these barriers at both governmental levels. Areas mentioned included government procurement, the alcoholic beverage industry, dairy, meat and poultry, technical standards in U.S. labor, agriculture, and plywood.
- **Foreign Investment in Canada:** It was indicated that the present government had significantly improved Canada's investment climate with the repeal of the Foreign Investment Review Act<sup>72</sup> and its replacement by the Investment Canada Act.<sup>73</sup> However, concern still exists

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69. *Id.*

70. President Ronald Reagan, *Information U.S.A.* (Sept. 23, 1985).

71. The Honorable J. Kelleher, Statement to the House of Commons (Oct. 1985).

72. Can. Stat. 1973-74, c.46, as amended by Can. Stat. 1976-77, c.52, s.128(2) and Can. Stat. 1980-81-82, c. 107, s.63.

73. Can. Stat. 1984-85, c.15.

with regard to Canadian investment policy. It was indicated that the stated objective would be to "produce a Canadian policy environment as open to inflows of foreign direct investment as [the United States]."

- **Trade in Services:** Several sectors stated to have an interest in enhanced trade relations were transportation services, informatics, communications, professional services, and advertising.
- **Intellectual Property:** The American business community is concerned about the protection of intellectual property in Canada. Areas where it was felt that Canada does not accord adequate protection to American ownership are pharmaceuticals and copyright (especially copyright issues arising in the border broadcasting sector).
- **Government Assistance:** American industry and Congress have questioned various forms of Canadian Government assistance at both the federal and provincial levels.

Extensive opposition emerged at the Senate Finance Committee hearing into the authorization of fast-track trade negotiations. Committee Chairman Robert Packwood indicated that the Committee was "at the end of its patience" on Canada-United States trade issues such as lumber and potatoes. Other opposition stemmed from the view that Congress should take a stronger and more active role in American international trade policy. Canadian officials expressed surprise and concern over the strong opposition by several Senators on the Committee.

The debate continued in the Senate Finance Committee on April 22-23, 1986. In an attempt to avoid denial of authority to enter into the fast-track trade negotiations with Canada, several of the members of the Committee met with President Reagan on the morning of April 23. During the debate the Senate Finance Committee indicated that the individuals in opposition to the fast-track procedure were not "picking on Canada." Rather, they were voicing their opposition to the Administration's vague trade policy. In a close vote, the Administration was given the authority to commence negotiations on the fast-track procedure. The President, in correspondence with Senate Finance Committee Chairman Packwood, assured the Committee that its members would be involved in the ongoing trade talks with Canada. The President offered assurances that the results of the negotiations would provide for "comparable treatment for America and Canada in investment and intellectual property rights in both countries . . . while involving outstanding trade disputes." He further assured the Committee that the United States would continue to apply and enforce its trade remedy laws against Canada.

Negotiations commenced in Ottawa on May 21, 1986, with Ambassador Peter Murphy as the Special Negotiator for the Office of the United States Trade Representative and Ambassador Simon Reisman as the Canadian negotiator.



## V. Subsidies and Countervailing Duties

### A. COUNTERVAILING DUTIES AND THE LUMBER DISPUTE

The countervailing duty provisions of the Trade Agreements Act of 1979<sup>74</sup> have been used to scrutinize such diverse Canadian products as raspberries, lumber, and swine. The countervailing duty provisions and investigatory process are viewed by Canada as a major irritant to trade relations. Canadian criticisms were several: first, that administrative discretion under the law is excessive; second, that the legal concepts developed by the Department of Commerce and by the courts are not always clear and are subject to change; and third, almost constant threats from Congress of legislation that would increase the perceived protectionist effect of the Act.

Accordingly, the Canadian Minister for International Trade recently stated that one of Canada's major objectives in the pursuit of a trade agreement with the United States was to "establish better trade rules and a better framework for settling trade disputes."<sup>75</sup> Several days later, in referring to the softwood lumber dispute, the Minister voiced the opinion of many Canadians when she stated that United States' trade laws (countervailing duties and antidumping provisions) are often employed in an unjustified manner against Canadians.<sup>76</sup>

On May 19, 1986, an American lumber industry coalition filed a countervailing duty petition with the Department of Commerce, alleging that lumber imports from Canada were being subsidized through the practices of the provincial government in awarding rights for harvesting trees on provincial government property. They alleged that the provincial stumpage fees gave Canadian industry an unfair advantage over the domestic industry in the United States. The petition was similar to a petition filed three years earlier, which had been dismissed in favor of the Canadian lumber industry.

In the 1983 dispute between Canada and the United States over the alleged subsidization of the lumber industry in Canada, American producers alleged that differences in costs between Canadian and American lumber were the result of subsidization by the provincial governments of stumpage fees.<sup>77</sup> The International Trade Commission report concluded that there was no significant subsidization.<sup>78</sup> One reason for such a finding

74. 19 U.S.C. §§ 1671-1671f (1986).

75. The other objectives referred to included secure access to the American market, and elimination of tariff and nontariff barriers. Address by The Honorable Pat Carney, Canadian Club, Vancouver, British Columbia (Nov. 17, 1986).

76. Address by The Honorable Pat Carney, Americas Society, New York (Nov. 21, 1986).

77. Government of Canada, *The Forests and the Trees*, 17(1) CANADA TODAY/D'AUJOURD'HUI (1985).

78. *Id.*

is that Canadian lumber firms tend to be larger and have invested in modernizing their plants and equipment at a greater rate than their American counterparts, resulting in a productivity advantage based on the economies of scale.<sup>79</sup> In turn, Canadian competition has benefited American consumers.<sup>80</sup>

However, a new definition of "subsidies" has arisen based on the appellate decision of *Cabot Corp. v. United States*.<sup>81</sup> The petition alleged that the price that the Canadian provincial governments charge to the lumber industry in Canada for removing timber from government-owned forests constitutes a "subsidy-in-kind." The subsidy was claimed to comprise approximately 27% of the price of lumber imported into the United States. American imports of Canadian softwood lumber comprise approximately 30% of the United States' market.

Canada filed a formal statement protesting the petition. In its statement, Canada alleged "that the petition was a calculated protectionist action."<sup>82</sup> The statement went on to point out:

[T]he petitioner [the United States' lumber industry] is arguing that countervailing duty should be used to offset another country's comparative advantage in resources. . . . [T]he Canadian authorities believe strongly that such an interpretation of the GATT was never intended by the contracting parties and in particular that it would be an abuse of the remedy provided for in Article VI. . . . [T]he petitioner appears to rely primarily on the assertion that the factual situation is clearer now than in 1983, together with the perceived evolution of the Commerce Department's interpretation of the countervailing duty law since that time. In effect, the petitioner is requesting the Commerce Department to act as its own court of appeal.<sup>83</sup>

The statement further alleged that Canadian programs or stumpage fee systems had not changed since the 1983 petition. Canadians felt that the United States' action was an unjustified unilateral change in the rules for measuring subsidies and an attempt to circumvent the 1983 ruling.

During the same week, on May 22, 1986, President Reagan issued an Order under the escape clause provisions of section 201 of the Trade Act of 1974.<sup>84</sup> The Order increased the tariffs on cedar shakes and shingles imported into the United States from Canada. The initial increased tariff was set at 35% and will progressively decline over the next five years, bottoming at 8%.<sup>85</sup>

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79. *Id.*

80. *Id.*

81. 3 INT'L TRADE REP. 578 (Apr. 30, 1986).

82. 3 INT'L TRADE REP. 713 (May 28, 1986).

83. *Id.*

84. 19 U.S.C. § 2251(b)(1) (1986). The Order was based on the finding of the International Trade Commission that the subsidies granted to Canadian manufacturers of shakes and shingles were causing injury in the United States market.

85. *Id.*

In retaliation to the tariff, Canada imposed duties on certain American products exported to Canada on the same day that the increased tariff on shakes and shingles was to take effect, June 6, 1986. Canada's retaliatory action consisted of the imposition of tariffs on books, periodicals, and other publications that had been entering Canada duty-free. In 1985 approximately 90% of Canada's imports in this sector came from the United States.<sup>86</sup> These particular tariffs should total approximately Can. \$36 million per year. Tariffs were also increased on other items including tea, Christmas trees, oatmeal, rolled oats, diesel rail cars, cider, asphaltum, oil, ozone generators, and air lifters. The estimated duty on these items would total approximately Can. \$2.5 million per year. In addition, Canada claimed that it would withdraw from an agreement with the United States and Japan on computer parts and semiconductors, which could raise Can. \$41 million a year in revenues for the Canadian Government.

On October 16, 1986, the Commerce Department announced that it had made a preliminary determination that Canada subsidized softwood lumber exports to the United States in the amount of 15%. A final ruling on the countervailing duty by the Commerce Department was set for no later than December 30, 1986. If upheld in a final ruling, this finding would have effectively overruled the 1983 decision that held that the governments of the provinces of Canada were not granting subsidies in their awarding of stumpage rights.

The following week the Canadian Import Tribunal commenced an inquiry based on the preliminary finding by the Department of Revenue, Customs and Excise that American grain was being subsidized by approximately 60%.<sup>87</sup> This ruling, coupled with the two American ones concerning lumber, created considerable friction in Canada-United States trading relations and could have been the impetus for the derailment of the fast-track negotiations.

The Commerce Department's preliminary finding was not finalized when the United States and Canada agreed to an eleventh hour settlement, resulting in the withdrawal of the lumber coalition's petition. The Canadian Government agreed to impose a Can. \$0.15 export tax on softwood lumber exported to the United States in lieu of the proposed import tariff in the United States.<sup>88</sup> The export tax is contrary to the terms of the GATT, which require such a tax to be applied equally to all trading partners. The United States has the right pursuant to this agreement to monitor the Canadian lumber industry to ensure that the agreement is complied with and that no further subsidies are granted, and to commence a trade

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86. STATISTICS CANADA (1985).

87. *The Canada Gazette*, Part 1, Nov. 22, 1986, at 5874.

88. Softwood Lumber Products Export Change Act, Can. Stat. 1986-87, c.37.

action if it believes that the pact has been violated. Canada has the obligation to provide Washington regularly with statistics and facts relating to the lumber industry. In return for the settlement, Canada withdrew its petition to the GATT protesting the U.S. countervailing duty.

The fact remains that the export of Canadian softwood lumber and cedar shakes and shingles to the United States has been impeded as a result of complaints of hardship on the part of American industry. The lumber disputes and resulting settlement of the cedar shakes and shingles issue have had a negative effect on the Canadian population's support of a bilateral trade enhancement agreement. Whether the lumber dispute will have served as a catalyst for the successful negotiation of an agreement, or will have helped to erode the progress to date, is only speculation at this time. The lumber disputes appear to have caused the Canadian media and public to express concern over the trade negotiations between the countries. Prime Minister Mulroney indicated, however, that it was because of this type of use of trade law remedy in the United States that Canada sought free trade talks with the Americans. In marked contrast, Washington has been firm in explicitly rejecting the grant of any exemption or special status to Canada from its trade remedy laws in a free trade agreement. This position has recently been confirmed by Senator Lloyd Benston, the Chairman of the Senate Finance Committee.<sup>89</sup>

## B. SUBSIDIES

Nations throughout the world provide subsidies to attract new investments, to maintain existing ones, to encourage exports, to redistribute industry geographically within their borders, to encourage research and development, and periodically to rescue or rejuvenate a failing industrial sector or company. Many subsidies are direct grants or loans and are easily assessable. Others are indirect or are provided at various stages of the production cycle and as a result are difficult to evaluate monetarily in the end product cost.

If Canadians compete in the American market under a trade enhancement agreement, American officials will be closely monitoring Canadian development programs even though the particular programs may be purely domestic in their origin. A serious issue between the countries is the American perception of greater involvement by the Canadian Government in its domestic economy through industrial policy programs, which allegedly create subsidies for Canadian manufacturers. The people of each country have a different view of the role of government in business and

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89. 3 INT'L TRADE REP. 1480 (Dec. 10, 1986).

society. Canadians accept a stronger role of government in their daily lives. In fact, they expect more than their American counterparts in the way of services, financial aid, and other support systems from their government. Historically, the United States has based its ideology on protecting individual rights and freedoms in lieu of government intervention in the lives of its citizens, while Canadians look to their government as the protector of the population at large. The evolution of both nations has been very similar and yet inherent differences have caused the governments of each nation to address their roles in the intervention into and solution of problems in very different ways. Subsidies exist in the United States, but they are more piecemeal and are less extensive at the federal level than at the state level.

A bilateral trade enhancement agreement will have to achieve a balance between the differing practices of the respective governments for the implementation of subsidies. It should aim at achieving a proper domestic rationale, as opposed to creating an unfair competitive advantage in the Canada-United States marketplace. It will have to clearly define what is permissible subsidization and what is not. A subsidy provision in a trade agreement or in any ensuing code will have to be fair, flexible, and cooperative. Otherwise, it will lead to the utilization of subsidies that were not in existence at the time of the negotiation of the agreement. To be effective it must clearly bind the subnational governments, including municipalities. It should specifically address and satisfactorily resolve the Canadian phenomena of Crown corporations and Canadian concern with its own cultural identity.

The establishment of an agreement on subsidization would create a cooperative environment for new investment, in that many new major investments have a net spill-over effect into nearby jurisdictions. Any code should provide for greater discipline and create a forum for the investigation and resolution of any alleged violations or prohibited practices and/or any behavior that exceeds permitted norms.

Canada is of the opinion that it is necessary to develop a framework of rules governing a bilateral free trade arrangement, and to ensure that these rules effect the substantive content of the agreement and provide a comprehensive unified regime so as to interpret and to apply the agreement. Such a framework should be exhaustive, and should not have to resort to other domestic or multilateral procedures and remedies. Moreover, this framework needs an effective form of dispute resolution: a process that should seek to enforce decisions through executionary measures rather than retaliation in order to ensure that the two countries maintain an open trading regime. Other issues that need to be examined in the negotiations include: whether such a dispute resolution framework should exist at an inter-governmental level; whether it should permit direct

access by the private sector; whether the decision by a national tribunal should be enforceable at the domestic level or be binding at the international level between the two governments; and whether the framework should be effected through a standing court, through ad hoc panels, or through some combination of these options.

## **VI. Tariffs**

Tariffs are still a very important factor in the Canada-United States relationship and must be dealt with in any bilateral trade agreement. It is commonly stated that 80% of the goods exported to the United States from Canada in 1987 will be duty-free, 15% at less than 5%, and only 5% with greater than a 15% tariff. To state unequivocally that tariffs will no longer be a concern is a misapprehension, however. First, the statement is misleading because it does not take into account those types or classifications of goods that are not being traded between the two countries as a consequence of the remaining high tariffs. Second, in removing and reducing tariffs under the GATT, the ones that remain are high and create effective protection. For example, a natural resource may be classified at a zero tariff level and a finished product incorporating it at a 3–4% tariff level. The tariff, however, is actually on the value added and constitutes a tariff of approximately 30%.

## **VII. Role of the Subnational Governments in the Negotiations**

### **A. INVOLVEMENT OF THE SUBNATIONAL GOVERNMENTS**

Subnational governments have an important role to play in the economic development of their respective nations. With the increased role of the subnational governments in both countries, it will be difficult for either federal government to present a unified position to other nations and almost impossible to bind themselves to any type of agreement or treaty without their prenegotiated cohesive support. Consequently, if a bilateral trade agreement is to endure and be meaningful, it must involve the subnational governments<sup>90</sup> throughout the negotiations. The important caveat that must be kept in mind is that states are not directly equatable to provinces. It will be necessary to bind the subnational governments to the results of the negotiations if the two countries are to resolve their trade problems effectively and expeditiously.

While tariff barriers have been reduced and substantially eliminated over the last forty years, nontariff barriers have simultaneously increased

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90. This is especially true in Canada, which does not have an equivalent to the interstate commerce clause that allows Congress to regulate certain behavior of state governments.

dramatically, particularly at the subnational level. This significant increase in nontariff barriers has eroded the concessions obtained in the previous multilateral rounds under the GATT. These barriers, usually in forms of financial aid or support, often violate the GATT in spirit, though not in its letter.

If a comprehensive trade agreement is to achieve the stated objectives of both governments, it will have to deal extensively with nontariff barriers. Provincial governments (in Canada) requested actual involvement in a nontraditional format because a substantial portion of nontariff barriers have their roots at the subnational level. Major nontariff barriers in Canada are often solely within provincial jurisdiction or are shared with the federal government. To complicate the negotiation of a bilateral trade agreement further, the division of powers between the federal authorities and the provinces/states is not identical in both countries. In theory this can result in a specific nontariff barrier existing at the federal level in one country and at the subnational level in the other. In endorsing the terms of an agreement bearing upon nontariff barriers, the provinces and the states will have more influence than they have had in trade negotiations in the past, where their role has been limited to one of consultation.

How the provinces will bind themselves has constitutional implications. The Honorable William Bennett, former Premier of British Columbia, recently stated:

There would have to be a constitutional amendment binding the provinces to the trade agreement. A formula has already been suggested, similar to the flexible amending formula of our national constitution. There is no agreement on exactly what it will be, but there should not be as much difficulty as there is with the constitutional agreement.<sup>91</sup>

This particular issue will continue to be a question of historic constitutional importance for Canada. In a positive vein, a federal-provincial compromise on a major constitutional issue of this nature could lead the way to a new era of federal-provincial involvement and cooperation.

## B. INTERPROVINCIAL BARRIERS

Canada is a confederation as opposed to a union of states. Canadian provinces hold more power than their American counterparts. Canadians, however, have not used their provincial structure in as assertive a manner as the European countries have used the European Economic Community or the United States has used the Congress to strengthen their internal economy. Instead, interprovincial relations have often revolved around disputes, as have federal-provincial relations.

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<sup>91</sup>. Address by The Honorable William Bennett, Americas Society, New York (Nov. 20, 1986).

The negotiations and any resulting agreement should, in part, focus on domestic provincial policies, many of which are outdated and have not been reviewed in several decades. These policies have become an accepted way of doing business and their purposes are not questioned. Those policies that create interprovincial barriers and also barriers between Canada and the United States should be examined to assess:

- the economic rationale for the policy;
- the political motivation for the policy;
- the gain in foreign markets that might stem from a revision of these policies; and
- the potential losses as a result of keeping the status quo (for example, Canadian access to the United States' market for liquor and beef is more advantageous than the American access to Canada).

Many policies are no longer important economically, and the rationale for the existence of others has disappeared. The policies often create interprovincial trade barriers both within Canada and at the international level. If a negotiated agreement is to work, interprovincial cooperation will have to increase.<sup>92</sup> If Canadians can remove these barriers at the interprovincial level, it will be a positive sign of a new cooperation internally within Canada that could develop into a positive resolution of major interprovincial problems unrelated to Canada-United States issues.

### **VIII. Other Nontariff Trade Irritants<sup>93</sup>**

Existing nontariff trade barriers facing manufacturers in the penetration of each other's market are numerous and extensive both at the federal and subnational levels. Trade practices that impede bilateral trading include, *inter alia*: import restrictions, export subsidies, customs barriers (e.g., origin marketing on pipes and tubes), "Buy America" and "Buy Canadian" laws and policies, government procurement, refusal of visas for service personnel (which jeopardizes prospective export of machinery and equipment from Canada to the United States), United States' trade remedy laws, United States Defense Department expenditures on research and development, restrictions on technology transfer, misuse of trade remedy laws, unitary taxation in the United States, foreign investment controls in Canada, and small business set-asides in the United States that effectively preclude Canadian entry into markets that are open in Canada to Americans. This indirectly results in forcing Canadian branches to open subsidiary plants in the United States.

92. "If this agreement is to go through, then there are going to be very significant changes in the way the provinces do business with each other. Everybody in both the private sector and Congress would agree on that." Address by Ambassador Peter Murphy, Americas Society, New York (Nov. 20, 1986).

93. The nontariff irritants discussed here are not a comprehensive or complete review of either existing barriers or of the barriers themselves.



An example of an American nontariff barrier and the far reaching effect of import restrictions is the Jones Act<sup>94</sup> with its impact upon not only ship building, but also upon the lumber industry in both countries. Transportation costs comprise an important factor in the cost of producing lumber and delivering it to market. It amounts to a de facto total embargo for export to the United States of vessels constructed by Canadian manufacturers.

Restrictions creating nontariff barriers in both countries, such as the Jones Act, should be examined in terms of their negative impact upon other domestic industries in addition to their detrimental impact on foreign trading relations.

## **IX. Impact of a Canada-United States Trade Agreement**

### **A. A TRADE AGREEMENT AND FOREIGN INVESTMENT IN CANADA**

#### *1. Foreign Investment in Canada*

The Investment Canada Act (ICA),<sup>95</sup> which repealed the controversial Foreign Investment Review Act (FIRA),<sup>96</sup> reflects Canada's current policy of encouraging investment in Canada by both Canadians and non-Canadians. The major focus of the new agency established by the ICA has been to promote Canada as a favorable place to invest and to do business. Business acquisitions completed under the ICA raise most of the same issues as arose under FIRA. Under the ICA, however, the rules and their application have been greatly simplified and the scope of the legislation has been significantly reduced. Other major factors easing the burden on foreign investors making business acquisitions under the ICA include the greatly compressed review time required for reviewable cases, the absence in most cases of any requirement for negotiated undertakings, and the current track record of allowed transactions under the Mulroney government (100%).

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94. Merchant Marine (Jones) Act of 1920, 46 U.S.C. § 688 (1982). For register in the United States the owner of the ship must be a United States citizen or, if a corporation, the principal officer must be one and 75% of the issued stock must be owned by United States citizens. The Jones Act provides, with certain exceptions, that only vessels of United States' registry may be used in United States' territorial waters for commercial purposes such as dredging, salvage, and carrying freight and passengers between points in the United States.

95. Can. Stat. 1984-85, c.15.

96. Can. Stat. 1973-74, c.46, *as amended* by Can. Stat. 1976-77, c. 52, s. 128(2) and Can. Stat. 1980-81-82, c.107, s. 63; *repealed* by Investment Canada Act, Can. Stat. 1984-85, c.15 (effective June 30, 1985).

## 2. *Foreign Investment Regulation and the Impact of an Agreement Upon Foreign Investment in Canada*

Trade is only one aspect of the complex interdependent economic relationship between Canada and the United States. Both countries are significant investment partners to the other: Canada is the fourth largest investor in the United States,<sup>97</sup> and the United States the largest investor in Canada.<sup>98</sup> There is a correlation between trade and investment, although it is difficult, if not impossible, to measure it quantitatively. Approximately two-thirds of the two-way trade between Canada and the United States is estimated to be intrafirm,<sup>99</sup> arising out of American investment in Canada. Historically, Canada erected trade barriers through high tariffs to achieve the economic goals of protecting existing domestic producers and to encourage foreign ones to invest in and establish manufacturing operations in Canada as opposed to exporting there. Two investment issues are raised in the negotiation of a trade enhancement agreement. First, the impact of an agreement upon investment in Canada must be analyzed. Second, United States' concern with foreign investment controls and restrictions in Canada must be resolved.

Will a comprehensive trade agreement increase both domestic and foreign investment in Canada or cause it to decrease at either the domestic or foreign level? Increased investment in Canada will depend upon the security of access for Canadian manufacturers to the American market. Unless access is secure, both Canadian and foreign manufacturers would be prudent to locate in the United States rather than in Canada for the purposes of penetrating the American market. Additionally, for the American manufacturer secure access to the American market will be required before any expansion on a large scale is initiated in Canada for facilities to serve other than the Canadian market. An example would be Michelin, which invested in a manufacturing plant in Canada primarily to service the American market. It was later subjected to a countervail suit in the United States based upon alleged subsidies given to Michelin to locate in Canada and in particular in Nova Scotia (an economically depressed area). Increased interest in investing in Canada will exist if a large degree of security of access to the American marketplace can be achieved for Canadian-produced goods.

Security of access to the American market is the major negotiating objective of Canada in any comprehensive trade agreement. Security of

97. Information from United States Department of Commerce.

98. STATISTICS CANADA (1985).

99. Address by Dr. Earl Fry, former Special Assistant United States Trade Representative, "Canadian Cultural Sovereignty: Myth or Reality," Windsor, Ontario (Nov. 6, 1986).

access would remove an important concern for continued and new domestic and foreign investment. Note that foreign investment would not be merely American, as it is anticipated that investors and manufacturers from other countries would establish operations in Canada, as opposed to the United States, because of lower operating expenditures through lower costs for employees, land acquisition, and energy. The broadest bilateral trade package (which is what Prime Minister Mulroney has stated he would be negotiating for) would give "national treatment" to Canadian-produced goods in the United States. National treatment would give security of access to Canadians and foreign investors in Canada to the American marketplace, ensuring increased investment in Canada.

A comprehensive trade agreement would have a significant effect not only upon foreign and domestic investment in Canada, but also upon investment flows from Canada into the United States. The issue has been raised as to whether as many branch plants will be established, expanded, and maintained in Canada once the tariffs are removed. The assumption is that many subsidiaries of American corporations established operations in Canada to get "behind" the tariff walls and they have maintained their operations in Canada predominantly for that reason.

### 3. *Assured Access to the Canadian Investment*

#### *Market for American Corporations*

While Canada wants assured access to the American marketplace, the United States wants assured access for investment in Canada. Blanket ICA<sup>100</sup> restrictions on acquisitions and on investments in certain sectors will have to be resolved to give the required security of investment to the United States. It is not known how much investment was displaced from Canada through the enactment of the FIRA.<sup>101</sup>

The ICA, while acknowledged as a substantial improvement over the FIRA, is nonetheless perceived in Washington as: (i) an unreasonable restriction on entry of American investment into Canada; and (ii) an unreasonable denial of national treatment to American-owned investments in Canada.<sup>102</sup> The United States has seen Canada impose stringent blanket controls through the FIRA and the National Energy Program.<sup>103</sup> Concern exists that this might happen again in the future. Americans feel that the ICA does not provide the security of access to the Canadian marketplace

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100. *Supra* note 96.

101. *Id.*

102. UNITED STATES TRADE REPRESENTATIVE, 1986 REPORT ON FOREIGN TRADE BARRIERS 57-59 (1986).

103. Budget Speech by the Honorable Allan MacEachan, House of Commons (Oct. 28, 1980).

by way of investment necessary for them to open their marketplace to the Canadians in exchange.

## B. INTELLECTUAL PROPERTY CONCERNS (PHARMACEUTICAL PATENTS)

One of the primary concerns for the United States in the trade negotiations is in the area of protection granted to intellectual property rights in Canada. Prime Minister Mulroney undertook at the Quebec summit to "[cooperate] to protect intellectual property rights . . . [from] abuses of copyright and patent law."<sup>104</sup>

The most noteworthy measure that has emerged to date from the Prime Minister's undertaking is the introduction by the government of amendments to existing Canadian patent legislation<sup>105</sup> that would, if adopted, significantly alter the procedures for obtaining and maintaining a patent. The amendments<sup>106</sup> are intended to bring Canada's patent legislation more closely in line with international practices as a prelude to Canada's ratification of the Patent Cooperation Treaty.<sup>107</sup> Canada signed that treaty in 1970 but has not yet ratified it.

Canada currently grants compulsory pharmaceutical licenses to domestic manufacturers, allowing them, after a period of patent protection of three or four years, to copy a patented drug and to market it.<sup>108</sup> The licensee, or "generic" drug manufacturer as it is referred to, pays to the patent holder a royalty equal to 4% of its sales of the drug. International pharmaceutical corporations, most of which are American, have complained bitterly since the implementation of this legislation in 1969. They maintain that compulsory licensing provides inadequate patent protection, discourages research and development of new products, and has enabled generic manufacturers to compete unfairly in export markets. The cost to brand-name pharmaceutical manufacturers is perhaps typified by the Pfizer pharmaceutical company, which asserts that one-third of its total sales in Canada will be lost next year because of compulsory licensing.<sup>109</sup> In contrast, a recent Canadian Royal Commission could find no evidence that compulsory licensing had reduced the profits of multinational pharmaceutical corporations.<sup>110</sup>

104. *Supra* note 52, at 14.

105. Patent Act, R.S.C. 1970, c.P-4, as amended.

106. Bill C-22, An Act to Amend the Patent Act, 2nd Session, 33rd Parliament, 35 Elizabeth II (1986).

107. The Patent Cooperation Treaty, June 19, 1970, United States-Canada, 28 U.S.T. 7645, T.I.A.S. No. 8733.

108. *Id.* § 41(4).

109. Address by Edmond T. Pratt, Chairman, Pfizer, Inc., Section of International Law and Practice of the American Bar Association (Aug. 11, 1986).

110. MINISTER OF SUPPLY AND SERVICES, REPORT OF THE COMMISSION OF INQUIRY ON THE PHARMACEUTICAL INDUSTRY 253 *passim* (1985).

Canada's remedial legislation, which has yet to be enacted, will grant patent protection for a period of ten years, unless a generic pharmaceutical manufacturer applying for a compulsory license manufactures the fine chemical ingredients for the drug in Canada, in which case exclusive patent protection will exist for a period of seven years.<sup>111</sup> Canadian criticism of the proposed amendments centers on both the anticipated sharp increase in the cost to consumers of pharmaceuticals and on concern that no net research and development will occur in Canada, despite promises to the contrary by several pharmaceutical corporations. For their part, the pharmaceutical corporations lament the fact that the new legislation will not extend the same seventeen-year protection to pharmaceuticals that is currently provided to other patented products in Canada. While this remedial legislation is a step towards assuaging American criticism over the perceived inadequacies of patent protection afforded by Canada to intellectual property, it will probably not quell it absolutely.<sup>112</sup>

### C. THE CANADIAN NATIONAL IDENTITY AND THE AMERICAN COMMUNICATIONS INDUSTRY

Will the search by Canadians for a national identity be the ultimate stumbling block in a bilateral trade agreement? Cultural sovereignty in Canada is less of a concern at the provincial level than at the federal (especially in Quebec, which is somewhat shielded by the French language). This reality may stem from the regional nature of the Canadian character, which is more secure in its regionalism than it is in its Canadian image of itself. In examining cultural sovereignty, the interests of the communications industry must be analyzed in conjunction with Canada's goals relating to its cultural heritage.

Clearly Canada has defined policies, programs, and goals in the cultural area, and should be entitled to pursue those goals. Conversely, the United States has its own defined policies, programs and goals, and should be entitled to pursue those goals. The question arises as to what happens

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111. OSLER, HOSKIN & HARCOURT, BILL C-22: AMENDMENTS TO THE PATENT ACT RELATING TO THE COMPULSORY LICENSING OF PHARMACEUTICALS (1986) (unpublished commentary).

112. As of August 1987 the status of this legislation remained unclear. More particularly, the Liberal-dominated Senate in Canada was refusing to pass this legislation without major amendments that were designed to substantially reduce the amount of time during which protection was to be provided to drug manufacturers. The Progressive Conservative Government, with its majority in the House of Commons, was not prepared to accept this reduced period of protection, and was attempting to secure passage of the original version of the legislation without prompting a major constitutional crisis in which the unelected Senate would have prevented legislation approved by the elected members of the House of Commons from becoming law.

when the goals or policies of one nation infringe upon the sovereignty of the other nation or its citizens.

Canadian government action in four aspects of the broadcasting area is particularly relevant to our current discussion:

- deductibility of foreign advertising expenses;
- Program Substitution: Program substitution effectively results in the elimination of United States' advertising commercials with the substitution of Canadian ones;
- The Telecommunications Programming Services Tax<sup>113</sup> imposes a seven percent tax on revenue of Canadian cable corporations, a tax which is then used to subsidize the development of Canadian programming; and
- Canadian Satellite Communications, Inc. relays United States' border programming by satellite to areas in Canada that are underserved in terms of broadcast signals. The Canadian Radio-Television and Telecommunications Commission has licensed Canadian Satellite Communications, Inc. to relay United States' border broadcast signals by satellite to those geographic areas of Canada that are not reached by two or more broadcast signals. This transmission or retransmission is without copyright compensation to the American owner.

### 1. *Deductibility of Advertising Expenses*

In January 1976 the Income Tax Act of Canada<sup>114</sup> was amended by Bill C-58, which was enacted as section 19.1 of the Income Tax Act. The amendment prevents the treatment of advertising expenditures as properly deductible business expenses by Canadian taxpayers if the advertising is placed in a foreign periodical or on a foreign broadcasting station and directed primarily at a Canadian audience. Expenses for advertisements placed in the Canadian media are deductible. The purpose of the amendment was to reflect the government's policy of encouraging more advertising in Canada, thereby bringing Canadian advertising expenditures on border stations in the United States back into Canada. The Government believes that this would develop Canada's cultural identity by increasing the amount of funds available for the production of Canadian programming while improving its quality.<sup>115</sup> Simultaneously, this amendment decreased revenues of American border broadcasters, effectively leaving them with-

113. Excise Tax Act, R.S.C. 1970, c.E-13, § 19.12, as amended.

114. R.S.C. 1970, c.I-63, as amended.

115. DONNER AND LAZER RESEARCH ASSOCIATES, AN EXAMINATION OF THE FINANCIAL IMPACT OF CANADA'S 1976 AMENDMENT TO SECTION 19.1 OF THE INCOME TAX ACT (BILL C-58) ON U.S. AND CANADIAN BROADCASTERS (1979).

out compensation for programming received by Canadian audiences. This provision of the Canadian Income Tax Act affected approximately \$15 to \$20 million annually in advertising fees.<sup>116</sup> This estimate would appear to have been somewhat conservative in light of a draft report to the Department of Communications in 1983<sup>117</sup> that estimated that the three major American markets attracting Canadian advertising in 1982 had lost about Can. \$37.2 million relative to their potential for that year because of the combined effects of Bill C-58 and simulcasting.<sup>118</sup>

The United States, which alleged that Bill C-58 constitutes a violation of international law, conducted an International Trade Commission inquiry into this matter and, as a result, enacted mirror legislation in 1984.<sup>119</sup> It alleged that Bill C-58 did not afford American broadcast networks "national treatment" because, firstly, it subjected them to less favorable tax treatment than domestic Canadian programming received and, secondly, because it constituted an unreasonable restraint on international trade. The mirror legislation denies a deduction from United States income tax for advertising expenses incurred on foreign broadcast stations directed to the American market. The legislation is operative only when the foreign country denies deductions to advertising on American stations. Effectively, the only country to which this legislation is applicable is Canada; it would become inoperative upon the repeal of Bill C-58.

The express goal of Bill C-58 was to discourage advertising on American broadcast stations while encouraging it on Canadian ones. Critics allege that its result has been to make the cost of advertising on Canadian stations artificially low as compared to the cost of advertising on American stations, because Canadians advertising on American stations are effectively taxed at twice the rate as on Canadian stations.

## 2. *Program Substitution (Simulcasting)*

The Broadcasting Act Regulations<sup>120</sup> grant Canadian broadcast signals preference over American ones (often referred to as simulcasting). Under the substitution policy, when an identical program is carried by a cable station on both a Canadian and an American network, the American program may be replaced by the Canadian one at the request of the local Canadian broadcaster. This is an attempt to support local Canadian broadcasters and protect their local advertising base. The United States has

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116. *Id.*

117. DONNER & KLIMAN, TELEVISION ADVERTISING AND THE INCOME TAX ACT: AN ECONOMIC ANALYSIS OF BILL C-58 (1983) (A draft report for the Department of Communications).

118. *Id.*

119. *Supra* note 57, at 232.

120. Can. Cons. Regs. 1978, c.374, as amended by SOR/81-944.

similar simulcasting provisions.<sup>121</sup> However, the United States' provisions, which require that distant signals be blacked out to avoid program duplication, applies equally to all distant signals both foreign and domestic. In practice the Canadian provisions have been applied only to American signals.

In effect, the programming is identical, the only difference between the Canadian and American broadcasts being commercial advertising. Simulcasting prevents an American advertiser from reaching the Canadian cable viewer market unless the advertising is run simultaneously on the Canadian station at the expense of the American advertiser.

### 3. *The Telecommunications Programming Services Tax*

The Telecommunications Programming Services Tax<sup>122</sup> imposes a seven percent tax on the revenues of Canadian cablevision companies. This tax or levy is placed in a Canadian Broadcasting Development Fund, which is used to develop Canadian programming.

The Fund has been criticized as encouraging the export of Canadian programming through subsidization, especially when Canadian cablevision companies do not pay for the American programming they receive from border broadcasters. Critics have alleged that the Fund constitutes an export subsidy in violation of article XVI of the GATT by allowing Canadian programming to enter into the international marketplace at an artificially low cost.

### 4. *CANCOM*

In 1983 the Canadian Radio-Television Commission (CRTC) authorized the Canadian Satellite Communications Inc. (CANCOM) to distribute American network broadcast signals to remote and underserved areas of Canada by satellite to be used there by cable television and low power television transmitter operators. The transmission is without authorization by the American border broadcaster and without monetary compensation to the American copyright holders of the program. This irritant is further aggravated by the allocation of a percentage of Canadian profits to the development of Canadian programming.

The international implications of signal piracy by CANCOM have created a severe rift in the economic relations of Canada and the United States.<sup>123</sup> Approximately 40–50% of the motion picture industry's rev-

121. 44 C.F.R. § 76.93(a) (1974).

122. *Supra* note 113.

123. See INTERNATIONAL LAW INSTITUTE, *PIRACY OF U.S. SATELLITE PROGRAMMING IN THE WESTERN HEMISPHERE* (1986).



venues come from foreign sales.<sup>124</sup> Their largest customer is Canada.<sup>125</sup> In a world-wide study on intellectual property, the United States Copyright Office concluded that although Canada may not technically be violating international treaties that protect intellectual property, it is violating them in spirit by not providing adequate and effective copyright protection for American programming.<sup>126</sup>

Canada has begun to address the question of retransmission. The Government of Canada acknowledged the problem in a White Paper and requested further study of the issue.<sup>127</sup> This was followed by a parliamentary report<sup>128</sup> and a government response.<sup>129</sup> The House of Commons Committee on Copyright, in its 1985 report, and the government response indicated an intention to amend Canadian law so as to create a retransmission right for compensation to the author. However, the payment system was left to be determined at a future date following study and recommendation.

All four measures (Bill C-58, the requirement of simulcasting, the licensing of CANCOM, and the 7% tax), from the American viewpoint, deny American owners equitable compensation for the use of their copyrighted works. In addition, the measures can be viewed as detracting from Canadian-American business and investment relations. Economic and cultural imperatives, rather than foreign policy priorities, placed pressure on Canadians to cease to invest in American border advertising.

The Canadian policies are embedded in the country's goal of preserving and fostering its cultural identity as being separate and distinct from that of the United States. This goal, standing by itself, is an acceptable national policy and an acceptable norm at the international level. These policies have, however, created a severe irritant, if not a rift, in Canadian-American relations by reason of their negative economic impact on the copyright and communications industries in the United States. National sovereignty is a serious challenge facing the international business community. Piracy of goods, both tangible and intangible, distorts international trade flows and investment. It is estimated that the CANCOM measures implemented by Canada cost American copyright owners U.S.

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124. *Id.*

125. *Id.*

126. *Oversight on International Copyrights: Hearing Before the Subcommittee on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary*, 98th Cong., 2d Sess. 1183 (1984).

127. MINISTER OF SUPPLY AND SERVICES, DEP'T OF COMMUNICATIONS, FROM GUTTENBERG TO TELIDON: A WHITE PAPER ON COPYRIGHT (1984).

128. MINISTER OF SUPPLY AND SERVICES, A CHARTER OF RIGHTS FOR CREATORS (1985).

129. MINISTER OF SUPPLY AND SERVICES, GOVERNMENT RESPONSE TO THE REPORT OF THE SUB-COMMITTEE ON THE REVISION OF COPYRIGHT (1986).

\$25 to U.S. \$100 million and that Bill C-58 deprives American firms of U.S. \$20 to U.S. \$40 million in advertising revenues every year.<sup>130</sup> Improved protection of intellectual property is of crucial importance to international trading and investment.

Whether or not a comprehensive trade agreement is achieved in the negotiations, a bilateral agreement setting substantive norms and minimum standards relating to border broadcasting issues, coupled with both countries' adhering to higher standards at the international treaty level, would be a means to redress economic distortions caused by inadequate protection in the international marketplace. Border broadcasting irritants, unlike many international trade disputes or investment impediments, involve a restriction on the entry of services as well as products into the foreign marketplace. Additionally difficult is the inseparable meshing of economic and cultural interests in border broadcasting. Although certain policies may be desirable to achieve internal goals within Canada in fostering its unique cultural heritage, they have been very costly to copyright owners and broadcast interests south of the forty-ninth parallel.

#### D. TRADE IN SERVICES

The Quebec Declaration constituted a commitment to halt growing protectionism in cross-border trade in services. In the negotiations, the United States is attaching priority to the negotiation of a framework of rules relating to trade in services.<sup>131</sup> Ambassador Yeutter indicated that a significant trade barrier existed in Canadian and provincial regulations that impeded American export of services to Canada.<sup>132</sup> He reaffirmed that this sector was to be an issue in the negotiations during his testimony before the Senate Finance Committee in Spring of 1987. At that time he identified the service sectors that the United States was interested in negotiating as: transportation, informatics, communications, professional services, and advertising.

As international competition increases between the developed trading nations and the newly emerging ones, many sectors of exported goods from the industrialized nations will become sunrise industries. Attention must be focused on how the technical innovations of the last thirty years have changed our trading patterns. Greater consideration must be given to the conduct of international trade in services. In general, the service industries tend to be regulated ones. With few exceptions, trade in services

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130. UNITED STATES TRADE REPRESENTATIVE, 1986 REPORT ON FOREIGN TRADE BARRIERS 53 (1986).

131. *Supra* note 52.

132. *Supra* note 67.

is not subject to international agreement. In the same way that trading nations benefitted from liberalized trade in tangible goods during the post-war years under the GATT, so would trading nations benefit from liberalized trade in services. An agreement relating to trade in services would require changes in both countries' domestic policies, laws, rules, and regulations. While regulation of particular industries and financial sectors are important, regulation should not be used for protectionism. Regulation should not be applied in a manner that creates a barrier to international trade in services. In most instances, proper regulatory objectives can be achieved in a nondiscriminatory manner.

Of particular significance is the strong interest of the United States in having Canada's financial services sector liberalized and made more accessible to the American financial industry. There is a strong perception in the United States of inequality in the manner in which each country treats foreign financial service firms. The American financial industry perceives that Canadians have much wider and more secure access to the American market than Americans have to the Canadian.

Among the financial service issues that the American firms are interested in having negotiated and liberalized are:

- the prohibition against foreign firms' offering financial advisory services to both individuals and institutions in Canada;
- the need for guaranteed access to telecommunications and information networks and to electronic services delivery systems, both public and private;
- current restrictions on the operations of foreign securities firms and banks in Canada;
- restrictions on the ability of Canadian pension funds to invest outside Canada;
- the lack of rules to ensure fair competition with services provided by Canadian government-owned entities, and to ensure the provision of services to the government and government-owned entities on an equal basis; and
- differences in national regulatory structures that impose hardships on firms of either country seeking to do business in the other.<sup>133</sup>

In December 1986 the Government of Ontario announced new liberalized ownership rules for nonresident securities firms<sup>134</sup> carrying on business in Ontario under the Securities Act.<sup>135</sup> As of June 30, 1987,

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133. Address by Harry L. Freeman, Executive Vice-President, American Express Company, Americas Society, New York (Nov. 20, 1986).

134. The Honorable Monte Kwinter, Statement in the Legislature of Ontario, "Re: Entry Into and Ownership of the Securities Industry" (Dec. 4, 1986).

135. Ont. Rev. Stat. 1980, c.466, as amended.

nonresidents of Canada have been permitted under these rules to own up to 50% of a securities firm in Ontario, and the limits on the degree of nonresident ownership of securities firms in Ontario are scheduled to end on June 30, 1988. On the other hand, the federal Minister of Finance in Canada stated, in connection with a review of the ownership and powers of federal financial institutions, that "[t]he government has reviewed existing laws regarding foreign ownership of federally regulated financial institutions and concluded they should not be changed, subject to trade negotiations currently underway."<sup>136</sup>

A trade in service agreement between the two countries would require national treatment of service firms. Ideally, they would be subject (whether directly or through a subsidiary) to the same policies, laws, rules, and regulations that are applied to domestic industry. Acceptable commercial practices and private international laws that bear on services should be supplemented by a set of rules that take into account the globalization of financial markets. The globalization of capital markets has increased the amount of offshore competition that the North American financial industry has experienced. In order to compete effectively in the international marketplace, the financial services sector and many other service industries cannot be hermetically sealed against the entry of foreign services through discriminatory regulation. Regulatory barriers sustained in the absence of industry support effectively become economic incentives to go offshore, further eroding the regulatory framework.

The negotiation of such an agreement poses many conceptual problems, but we should not be deterred by this. The prospect of being pioneers of liberalized trade in this sector is an opportunity with respect to which our nations must take the initiative.

#### E. THE ROLE OF COMPETITION LAW IN A TRADE ENHANCEMENT AGREEMENT

##### 1. *Canadian Competition Law and Enforcement*

Throughout its lengthy history, Canadian competition legislation has been characterized by significant difficulties of enforcement. These problems have largely proceeded from constitutional limitations (relating to the Canadian Federal Government's power to legislate and enforce legislation), which has meant that, until quite recently (1976), the law being applied has been exclusively criminal in nature. Canada's competition law was substantially revised last year.<sup>137</sup>

136. MINISTER OF SUPPLY AND SERVICES, *NEW DIRECTIONS FOR THE FINANCIAL SECTOR* 14 (Dec. 18, 1986).

137. On June 19, 1986, Bill C-91, amending the Combined Investigation Act, R.S.C. 1970, c.C-23, as amended, came into force and renamed it the Competition Act, R.S.C. 1986, c.26.

The enforcement problem in Canada has been particularly important in relation to such matters as mergers and monopolies, which the Act presently attempts to regulate on a criminal law basis. As evidence of this, one need only mention that, to date, the Canadian Government has yet to succeed in a contested merger prosecution and that its record in relation to monopoly offenses is similarly unimpressive.

Other enforcement concerns involve efforts by the Canadian Government to nullify the extraterritorial enforcement of foreign (i.e., United States) competition laws in Canada, most recently exemplified by the Foreign Extraterritorial Measures Act.<sup>138</sup> It would appear that the Canadian Government, in addition to clothing itself with the power to resist the extraterritorial application of American competition laws by enacting the Foreign Extraterritorial Measures Act, has also taken steps to encourage a reduction in such extraterritoriality by entering into various Memoranda of Understanding with the United States.

Subsection 32(4) of the old Act provided for an exemption, in certain limited circumstances, from the conspiracy provisions, when the "conspiracy, combination, agreement or arrangement related only to the export of products from Canada." Many Canadian firms and trade associations consistently took the position that because the application of this exempting provision was conditioned on, among other things, the agreement's not having lessened competition unduly in the domestic market, it was of limited practical utility. The new Act attempts to make the export exemption more useful to Canadian firms that combine efforts in an attempt to expand into foreign markets. The new Act replaces the old limitation with a less stringent requirement that the agreement must not have lessened competition unduly in the supply of services facilitating the export of products from Canada. The new Act also permits parties to an export agreement to reduce the volume of exports of certain products if the real value of these products is not reduced, suggesting that product quality may be upgraded as a trade-off for a reduction in unit export sales.

## 2. *The Interaction of Competition and Trade Law*

The interaction of domestic competition and international trade laws and their impact upon international commerce are inextricably linked. Competition law is generally intended to protect the population from any negative impact of monopolies and conspiracies, while trade law protects domestic industry from offshore competition. In theory, the world trading system under the GATT is consistent with the philosophy of competition law:

Competition policy is aimed at ensuring the efficient functioning of markets by the removal of control of restrictive business practices. Trade liberalization

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138. Can. Stat. 1984 c.49.

policies focus on the removal of barriers to international trade through actions to reduce tariff levels and through agreements to limit the effects of nontariff measures.<sup>139</sup>

A bilateral agreement reducing tariffs and, more importantly, nontariff barriers is expected to "sharpen competition" in North America.<sup>140</sup> In Canada, increased economic activity with the American market would heighten competition, increasing the rationalization of industry and thereby enhancing Canada's international competitiveness.<sup>141</sup>

If a trade enhancement agreement is entered into by the two countries, the high degree of economic integration that will result will create problems in the administration and enforcement of each country's domestic competition laws. Guaranteed access to the American market for Canada may undermine the basis of its traditional objections to the extraterritorial application of United States' competition laws to Canada. Canadian and United States' competition laws differ substantially and, when these differences have an impact upon the behavior of corporations operating within the four corners of an agreement, conflicts will arise unless provision is made in any resulting trade agreement for harmonization in relation to transborder transactions.<sup>142</sup> Canada and the United States have an opportunity as nations to be an example to the rest of the trading world on how to be constructive in resolving the conflicts between their respective trade and competition laws and having them function efficiently at the international level.

#### F. THE IMPACT OF A BILATERAL AGREEMENT UPON THE GATT

Although the objective of the GATT is the liberalization of world trading practices, it is not inconsistent to attempt to further this objective through a bilateral agreement within the parameters of article XXIV of the GATT. To enter into a bilateral trade enhancement agreement while continuing to negotiate at the multilateral level is desirable for several reasons:

- **Time:** A bilateral trade agreement will have to be completed this year before the authority under the fast-track procedure expires in January 1988. The multilateral negotiations will continue into the next decade.

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139. ORGANIZATION FOR ECONOMIC CO-OPERATION & DEVELOPMENT, *COMPETITION & TRADE POLICIES: THEIR INTERACTION* 11 (1984).

140. MINISTER OF SUPPLY AND SERVICES, *ANNUAL REPORT OF THE DIRECTOR OF INVESTIGATION AND RESEARCH: COMPETITION ACT*, 9-10 (1986).

141. *Id.*

142. Any attempt to amend Canadian competition law in order to ensure that there is harmonization of competition policy would have to be handled with particular care. This is because the new Competition Act has only been in force for a little over a year. As a result, its administrators and boards subject to its jurisdiction are only just coming to terms with this new idea. Amendments to this newly created statute have to be designed in such a way as to ensure that it continues to evolve in as smooth a manner as possible.

- **Precedent:** An opportunity to discuss, negotiate, and determine many of the issues (which are also issues in the GATT round of negotiations) would be a distinct advantage. Many of these issues have not been part of the GATT in the past. To negotiate and resolve them at a meaningful bilateral level would give greater credence to the United States' and Canada's positions at the multilateral level.
- **Bilateral Issues:** Many of the issues on the table in the negotiations are unique to the Canada-United States relationship, for example, border broadcasting issues.
- **Example:** if Canada and the United States can negotiate successfully, their behavior and the agreement itself will stand as a model for the rest of the trading nations.<sup>143</sup>

Through their unique relationship Canada and the United States have an opportunity and a responsibility to be an example to the other trading nations of the world in demonstrating how to expand and liberalize their economic relations while achieving their domestic objectives.

## X. Conclusion

While support in Canada for trade enhancement with the United States was not originally overwhelming, the Macdonald Commission Report's conclusion helped to increase public acceptance of the idea. Generally, there has been support in Canada for the proposal, provided that: (i) programs are developed to assist the adjustment process for certain key industries; and (ii) any resulting agreement is phased in over a sufficiently long period of time.

The Ontario Government remains to be convinced and has expressed concern about its ability to stay competitive under a trade agreement. The Canadian Minister of External Affairs, Joseph Clark, stated that despite the Canadian Government's intent to involve the provinces, the federal government will retain control of the negotiations, determine the terms of an agreement, and retain full constitutional supremacy over international trade. He stated that "the bottom line of what I mean is that the responsibility for international trade is ours and we intend to exercise that responsibility."<sup>144</sup> Provincial ratification of certain sections of any resulting agreement will be required, however, unless the federal government expands its jurisdiction through a constitutional amendment.

Labor is strongly opposed, as are those concerned about Canadian independence, identity, and culture, and they continue to voice concerns

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143. Address by The Honorable Donald Macdonald, Canada and International Trade: The Canada-United States Trade Negotiations Conference, Ottawa (May 8, 1986).

144. Interview with The Honorable Joseph Clark, *The Financial Post* (Feb. 21, 1986).

over growing economic interdependence with the United States.<sup>145</sup> Such interdependence would be difficult, if not impossible, for Canada to later reverse, which has raised concern over the ability to attain national objectives. Many laws, regulations, and policies will ultimately need to be harmonized between the two countries. Is this a price that Canada, as the smaller of the pair, is willing to pay?

Canada has more to gain economically than the United States from a comprehensive trade agreement: a market ten times larger than that to which it currently has secure and open access. In return, the United States will want substantial nontariff concessions by Canada. Sufficient justification for the United States to give away a portion of its market to Canada will have to exist if an agreement is to win the approval of Congress.

The minuses of a United States-Canada free trade arrangement are easy to see and should not be allowed to cloud the issues. The pluses are more diffuse. In Canada it could lead to improved products that are competitive in the world marketplace, increased jobs, higher wages, and lower cost of consumer goods. In the United States, it could lead to a more open trading regime with other nations as they come to realize that an open trade policy with the United States is necessary to avoid the stings of American protectionism. Overall, the binational effects could be expected to result in a more efficient North American industry with improved competitiveness in the world marketplace.

The negotiation of a bilateral trade agreement has been involved, frustrating, time-consuming, and has required perseverance on the part of both countries. Substantial impediments remain to be overcome before we achieve an improved and expanded trade relationship between the United States and Canada. Greater compromise and less rhetoric are required before unrestricted and fair trade becomes a reality. One can only hope that the foresight and compromise that produced the Auto Pact will enable the current negotiators to overcome these impediments and create solutions that benefit and strengthen the economies of both nations.

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145. See *THE OTHER MACDONALD REPORT* (D. Drache & D. Cameron eds. 1985); *THE FREE TRADE PAPERS* (D. Cameron ed. 1986).



