THE PROPOSED CANADA-UNITED STATES FREE TRADE AREA: A PHOENIX ARISES

David L. Ganezer*

I. INTRODUCTION

> Canadians could have had the best of all worlds; French culture, British government, and an American business climate. Instead, they now have the worst of all worlds: French government, British business climate, and American culture.
>
> —a joke currently popular in Canada[1]

As 1988 commences, the United States and Canada stand poised at the brink of the greatest change in their bilateral relations since General Montcalm's victory over France upon the Plains of Abraham. With the Senate Finance Committee's reluctant blessing, trade liberalization talks (negotiators disdain the term "negotiations") began on May 21, 1986 in the shadow of a 35% tariff on "subsidized" Canadian cedar shingles, imposed by the U.S. International Trade Commission (ITC).[2] A year later, the nations surprised world observers by settling the softwood lumber dispute, freeing trade representatives to consider a proposed bilateral Free Trade Area (FTA).[3] Despite a Canadian boycott less than a week before Congress' October 3, 1987 deadline, negotiators somehow reached a midnight compromise. They sent the Senate an accord less sweeping than some had hoped, but still a landmark in international trade relations.

As the deadline neared, restraining the ITC became one of Canada's key demands. Canada walked out on September 23 over U.S. insistence that any dispute settlement mechanism would in-

* J.D., 1987, UCLA School of Law; M.A., 1983, Stanford University; B.A., 1982, Stanford University. The author is currently a solo practitioner in Los Angeles.
He would like to thank Professor William Alford for his help in researching this article

1. Finn, *Good Neighbors Again*, 137 FORBES, May 19, 1986, at 130. "From a land of limitless possibilities 20 years ago, Canada transformed itself into a bristly, chauvinistic spendthrift. Now it is having its own version of the Reagan revolution, and smart U.S. businessmen and investors smell opportunity."
2. Wall St. J., May 28, 1986, at 4, col. 2.
3. N.Y. Times, May 8, 1986, at D1, col. 3.

fringe American sovereignty. "Brinksmanship!"[4] the Americans muttered, as Canadian Prime Minister Brian Mulroney blamed the U.S.—knowing full well that the "outcome of the next election"[5] depends on the talks. For their part, American negotiators insisted that Canada constrain its "elaborate subsidy programs."[6] Sovereignty demands and differing legal systems seemed to doom complete regional integration between the two nations.

Despite dire predictions, the phoenix arose. The accord includes the following points:[7]

> 1. Elimination of all tariffs by January 1, 1999, and the reduction of enough non-tariff barriers to unite the two economies more effectively.
> 2. A dispute settlement procedure consisting of binding arbitration panels, which would review the imposition of penalty duties by either nation. The panels would use U.S. Federal Courts' "substantial evidence" rule. If Congress imposed penalties anyway, "Canada would have the right to retaliate. The precise way all of this would work was still unclear" as of October 6, 1987.[8] The panels nevertheless fulfilled Canada's key demand.
> 3. Canadian access to as much as 50,000 barrels a day of Alaskan oil, in exchange for the sale of cheap Canadian hydroelectricity to the American East. Congress opposes the export of any American oil, but this mutually advantageous trade may be more palatable to it.

Critics cry that the accord is more remarkable for its omissions than for its contents. It does little to protect American pharmaceutical patents from Canadian "generic" copies.[9] American breweries will barter their brew no more easily in Canada, since the U.S. would not back down on sugar import quotas.[10] Curiously, price protection for Canadian wines will be phased out, thus permitting the sale of more vîn de table. The pact affects neither the U.S. "Buy America" military procurement policy, nor the Jones Act requirement that coastal shipping be in American ships. Canadian restrictions on American cultural "imperialism" remain unchanged, as does the 1965 AutoPact. American labor will therefore continue to object to the accord, charging that it favors the assembly of cars in Canada.[11]

---

4. *Two Nations Size Up Trade Pact. U.S. Prepares For Scrutiny in Congress*, N.Y. Times, Oct. 6, 1987, at 29, col. 3 [hereinafter cited as *Two Nations Size Up Trade Pact*].
5. *Canadians Walk Out at U.S. Trade Talks*, N.Y. Times, Sept. 24, 1987 at 29, col. 1.
6. *Canada Sees Major Snags in Trade Talks*, N.Y. Times, Sept. 30, 1987 at 30, col. 1.
7. *See generally Two Nations Size Up Trade Pact, supra* note 4 for details of the accord.
8. *Id.*
9. *Canada Split on Drug Patents*, N.Y. Times, Aug. 24, 1987, at D1, col. 1.
10. *Two Nations Size Up Trade Pact, supra* note 4.
11. *Id.*

A review of the accord's perilously twisted path to fruition suggests that the most remarkable aspect of the accord is not its omissions, but its mere existence. Anxious to avoid special interest impact, the Reagan Administration in April 1986 requested the Senate Finance Committee to approve "fast-track" negotiating authority, removing the measure from Congressional consideration until negotiators completed it. The Committee approved fast track authority on a narrow 10-10 vote,[12] surprising most observers—but hardly insulating the measure from special interests. Congress stipulated that a first draft of the proposed Free Trade Agreement would have to be submitted to the Senate by October 5, 1987.

When talks stalled in early 1987, experts predicted that any treaty would be stillborn without the popular President's absolute attention. They doubted that Ronald Reagan, a man not noted for his interest in technical details, would ever devote time to such a dull and arcane issue. Besides, Americans in general "are congenitally unable to interest themselves in the affairs of their northern neighbour," sniffed England's *Economist*,[13] while *Newsweek* admitted that "many Americans greet the very word 'Canada' with either yawns or smirks. The *New Republic* last year challenged its readers to come up with a more boring newspaper headline than *worthwhile Canadian initiative*."[14]

Few foresaw that by April 1987, the President would badly need a foreign policy victory unconnected with Iran and the Contras, or that the talks would offer the Administration "its only opportunity to strike a blow for free trade in this protectionist year."[15] On April 6, 1987, Reagan told the world of his new dream—a free trade area reaching "from Tierra Del Fuego to the Arctic Circle."[16]

That week, President Reagan met Canadian Prime Minister Brian Mulroney in Toronto. The agenda contained three main items: acid rain, a sovereignty dispute over the North-West Passage, and the free trade proposal. To the surprise of both delegations, the President (whose "trees cause pollution" theory has become legendary everywhere south of the Gaspé) agreed to consider a bilateral accord to contain acid rain, "building on the tradition of agreements to control pollution of our shared international waters."[17]

In other international waters, the Canadians in April of 1987

12. Wall St. J., April 21, 1987, at 5, col. 1.

13. *Trade with Canada: Start of Something Big?*, ECONOMIST, April 11-17, 1987, at 27 [hereinafter cited as *Start of Something Big*].

14. *Reagan and Mulroney: The Bloom is Off the Shamrock; A Summit on Sore Points in U.S.-Canada Relations*, NEWSWEEK, April 6, 1987, at 34.

15. *Start of Something Big, supra* note 13.

16. *Id.*

17. Wall St. J., April 7, 1987, at 8, col. 3.

protested a Coast Guard icebreaker's 1985 voyage through the North-West Passage. Canada claims the Passage as territorial waters, an issue so sensitive that Mulroney in May 1987 blustered his intention to build ten nuclear powered submarines.[18] (U.S. Defense Department officials suggested that the Canadian plan was aimed more at closing seaways to the United States and the Soviet Union than at increasing NATO's naval power in the Arctic, but that the President had wanted the Canadians to step up their defense spending anyway).[19] White House Chief of Staff Howard Baker had stated in April that the U.S. would recognize Canadian sovereignty, as long as American ships had rights to free passage.[20] He further annoyed his hosts by denying that the Administration had committed itself to acid rain negotiations.

On the trade issue, the two leaders firmly agreed to present a proposal to Congress by the October 3rd deadline. In a speech to the parliament in Ottawa, Reagan reaffirmed his eagerness to complete ongoing negotiations for a free-trade agreement. "We shall commit ourselves and the resources of our administration to good faith negotiations that will make this visionary proposal a reality . . . on this, the Canadian people and Members of Parliament have my word."[21] On April 7, the *Wall Street Journal* summarized the demands cast upon the dawning agreement:

> Both Canada and the U.S. expressed optimism that they can reach a trade accord this year. U.S. negotiators want Canada to lift barriers to foreign capital investment and to scrap policies that infringe on U.S. drug patents and copyright laws . . . ["fast-track" negotiating authority] expires [Oct. 3], and both sides believe prospects for such an agreement in future years are slim if the deadline isn't met.[22]

Meanwhile, both administrations have been plagued by scandals far too complicated for inclusion here (though the Gotleib Affair, wherein the wife of Canada's Ambassador to Washington slapped her social secretary in front of soirée guests, begs brief mention). Acid rain and other issues continue to divide the $114 billion annual trading partners.[23] But with the two leaders finally committed, negotiations found momentum sufficient to meet the October 3rd deadline. The President and Prime Minister welcomed the accord, as special interests on both sides of the border geared up to influence or emasculate it.

Those who oppose the measure are united more by fear of its

18. N.Y. Times, May 3, 1987 at 1, col. 4.
19. N.Y. Times, May 4, 1987 at 14, col. 1.
20. N.Y. Times, April 7, 1987, at 7, col. 1.
21. N.Y. Times, April 6, 1987, at 1, col. 3.
22. Wall St. J., April 7, 1987, at 7, col. 1.
23. *Start of Something Big, supra* note 13.

effect on their own economic well-being than by ideology. Some observers assert that America's initiative to establish free trade with Canada depends on the "enlightened self-interest of the American public"—the understanding that a free trade arrangement would ultimately benefit the U.S. Others point out that American consumers would benefit directly from lower tariffs and prices. According to Washington D.C.'s National Planning Association, Canadians stand to gain higher incomes and full employment, and therefore have the most compelling reasons to reach an agreement.[24] Others, such as University of Western Ontario economist Randy Wigle, say that Canadians will benefit little from the proposal, but would suffer greatly from the increased protectionism that seems inevitable should Congress defeat it.[25]

Most experts believe a free trade area would injure certain sectors of the American economy, mainly agricultural, and that it would hurt certain Canadian businesses, mainly manufacturing. American winners will include high technology "sunrise industries"[26] such as telecommunications, computers, financial services, as well as small manufacturers "whose products range from broomsticks and camshafts to insect screens and plumbing fixtures" and who are now barred from the Canadian market. U.S. losers include "heavyweight groups of older industries, such as maritime, steel and mining, who have heavy clout in Congress."[27] Battles between such interests await the Senate floor, as the converse alliance emerges in Ottawa.

Many of the measure's proponents do not issue predictions of its deleterious effects, but simply draw upon a liberal philosophy of free trade to argue the measure's mutual benefits and absolute necessity. Philosophies and political realities notwithstanding, the question of whether or not free trade is "good," is simply too complex to answer with a simple yes or no. Its desirability depends on who one is.

A. The Liberal View of Trade

From the White House to the halls of the nation's liberal law schools, experts espouse the universal advantages of free trade as an article of faith. According to that view, the lower tariff and nontariff barriers stand, the more cross-border trading exists. Trade creation[28] is good, because it improves the allocation of scarce

24. [Current Reports] 3 Int'l Trade Rep. (BNA) at 520 (April 16, 1986).
25. *Id.*
26. *But Canada Deal Divides Industry*, N.Y. Times, Oct. 12, 1987, at 24, col. 5.
27. *Id.*
28. Thompson, *Reducing Barriers to Trade in Nontraded Goods and Services*, 10 CAN.-U.S. L.J. 35, 37 (1985).

world resources, makes nations less inclined to war, etc. Trade diversion does the opposite. But even among the trade liberals, opinions differ as to whether free trade areas, customs unions and the like impact world markets positively or negatively. Some argue that all regional forms of economic integration "are inherently discriminatory in their trade impact . . . they tend to simultaneously create trade among member states and divert trade between member states and the rest of the world."[29] Others see such arrangements as stepping stones to greater liberalization of trade. They point to the European Economic Community (EEC), which expanded from six original members to fifteen countries, including nearly all of Western Europe.[30] The General Agreement on Tariffs and Trade (GATT) approves of certain forms of regional integration while indirectly disapproving of others.[31]

Contrasting Free Trade Areas with other trade arrangements helps clarify the choices facing North America. An FTA is but one of several possible covenants the United States and Canada could establish. In an FTA, two or more nations agree to reduce or remove tariffs, quotas and other trade barriers, while retaining national barriers against third parties. In a customs union, not only are national barriers removed, but common barriers are erected against non-member nations. A bit more intensive than customs unions, common markets encourage the free movement of "production factors:" capital, labor, enterprises, and technology. Economic communities broaden common markets, harmonizing basic national economic policies by sectors, such as transportation, taxation, police, currency and regional growth. Economic unions completely coordinate such policies.[32] The European Economic Community is a customs union in which transnational unions regulate economic forces affecting the market.[33] North America will likely see nothing quite so radical, since such a curtailment of national sovereign powers would never be acceptable to either nation. But certain sectors of the economy, *e.g.*, coal, atomic energy, or wheat, would be integrated under the October proposal. Academics refer to this process as Sectoral Integration.

It should be noted that the Common Market grew out of such a sectoral accord. The European Steel and Coal Community Treaty of 1952 "ushered in a new epoch in European economic and polit-

29. R. FOLSOM, M. GORDON & J. SPANOGLE, JR., INTERNATIONAL BUSINESS TRANSACTIONS 949 (1986).

30. *Id.*

31. *See, e.g.* GATT article XXIV, which permits customs unions and free trade areas, and GATT article XIII which requires non-discriminatory treatment.

32. R. FOLSOM, *supra* note 29, at 948.

33. Smit, *The Relevance of the EEC Experience to Additional Prospective Sectoral Integration Between Canada and the United States*, 10 CAN.-U.S. L.J. 53, 55 (1985).

ical conditions,"[34] by providing not only a customs union, but a supranational structure to enforce the accord. Local autonomy has not denied the European Economic Community importance and vitality, as witnessed by Turkey's current enthusiastic push for EEC admission.[35]

An in-depth examination of the proposed free trade area naturally begins with the two nations' bilateral trade history. This article then contrasts the North American situation with other free trade arrangements, and discusses the proposal's predicted effects on Canada, the United States and third parties. Even without knowing the final form a signed treaty will take, it is possible to review other free trade agreements in light of the forces and questions confronting U.S. and Canadian legislators. After considering whether GATT will give its approval to the proposal, this article concludes with some general philosophical observations on free trade and politics.

B. Bilateral Trade History[36]

The Canadian government recently released a comprehensive account of Canada-U.S. trade relations titled, *The Issue That Will Not Go Away: Free Trade Between Canada and the United States*.[37] One would think that two culturally and linguistically similar neighbors, reportedly "the largest trading partners in the world,"[38] would have stumbled over time upon the reciprocal benefits of bilateral free trade. On the contrary, the history of free trade between the "two sons of a common mother"[39] is mainly a sorry saga of protectionism. In the 1840's, the British repealed the Corn Laws, turning from mercantilism to free trade—and turning from their North American colonies to Russian and Baltic grain and timber. Canadians were forced to look "south to the future," to America's rapidly growing population. The south did not soon reciprocate.

Canada's linkage of trade to North Atlantic fishing rights at last persuaded a lukewarm Congress to approve the Reciprocity Treaty of 1854, providing for duty free exchange of "natural commodities." Despite ten years of increasing exchange, the Americans

---

34. *Id.* at 54.

35. N.Y. Times, May 27, 1987, at 3, col. 1.

36. For this history the author acknowledges the Honorable Donald S. Macdonald, upon whose work he draws extensively. *See* Macdonald, *An Overview of the Prospects for Sectoral Integration: The View from Canada*, 10 CAN.-U.S. L.J. 3 (1985).

37. J. GRANATSTEIN, THE ISSUE THAT WILL NOT GO AWAY: FREE TRADE BETWEEN CANADA AND THE UNITED STATES (Study prepared for the Royal Commission on the Economic Union and Development Prospects for Canada), *quoted in* Macdonald, *supra* note 36, at 6.

38. *Start of Something Big, supra* note 13.

39. A quote often attributed to Franklin D. Roosevelt.

abrogated the treaty one year after their Civil War. Ironically, this termination provided an incentive for the British North American Colonies to approve the 1867 Confederation agreement, creating Canada and therefore reducing the need for trade with the U.S.

Until 1879, Canadian ministries sought a renewal of reciprocity. When the Americans proved uninterested, Sir John A. MacDonald embarked on a protectionist "National Policy" of building Canadian industry by means of high tariffs.[40] In 1911, when Washington finally agreed to a new comprehensive free trade agreement, the opposition (R.L. Borden's Conservatives) defeated candidates supporting Prime Minister Laurier under a slogan of "No truck nor trade with the Yankees." Canadian politicians regard the 1911 election "as proof of a fundamental proposition: never propose a closer trading relationship with the United States."[41] (Prime Minister Mulroney seemed to have forgotten this proposition, absolutely supporting a free trade agreement in spite of the cost to his popularity, until the latest 35% tariff on Canadian shingles forced him to reconsider.) Despite a close association forced by World War I, the two nations fell under the influence of anti-internationalism during the 20's and 30's—a philosophy that seeded the depression.

The Reciprocal Trade Agreements Act of 1933 (RTAA) finally created mutually open trade. One commentator describes a significant difference between the depression trade agreement and the 1911 accord: "They were not 'free-trade' agreements, merely agreements to adjust tariffs, and as such they did not carry the emotional baggage that accompanied the 1911 Reciprocity Pact."[42] Proponents of the current free trade agreement would do well to note this public relations ploy. World War II overtook this agreement with wide-ranging co-operative measures, followed in the late 1940's by accession of the two nations to the GATT.

Prime Minister W.L. Mackenzie King originally supported a 1948 proposal to establish a Free Trade Area under Article XXIV of the GATT. But after losing his seat in the House of Commons he thought better of it, and the following two decades saw only sectoral agreements, such as the AutoPact and the Defense Production Sharing Agreement which are described below.

In general, attempts to build comprehensive free trade agreements over the last two decades have frozen as icily as the Yukon in winter. Current policies conflict even on topics of clear common interest, such as acid rain. Protectionist legislation also abounds, though most Congressmen "have yet to come down"[43] and an-

40. Macdonald, *supra* note 36, at 7.
41. *Id.*
42. *Id.* at 8.
43. . . . *But Canada Deal Divides Industry*, N.Y. Times, Oct. 12, 1987, at 24, col. 5.

nounce their position on the pact. Senator John Danforth's (R. Mo.) remark during debate over fast-track negotiating authority summarizes Congress' attitude: "We've existed for 210 years without free trade. We can wait a few more."[44] This attitude persists in spite of Canadian Ambassador Alan Gotlieb's prediction that "we will not see a Canadian government propose a similar initiative for closer trade arrangements with the U.S. for a couple of generations."[45]

II. TARIFF AND NON-TARIFF BARRIERS

A study of North American protectionist legislation reveals a pattern of distrust and conflict of interest that nothing short of radical integration can resolve.

A. American Protectionism

Many American statutes negatively impact the importation of specific Canadian products, sometimes in unintended ways. For example, section 207 of the Trade and Tariff Act of 1984 establishes country of origin marking standards for pipes, requiring that marking be by means of "die stamping, cast in mold lettering, etching or engraving." Canadian manufacturers complain that marking the product in this manner renders it unuseable for certain purposes, and therefore represents a non-tariff barrier. In other cases, Canada has responded constructively to American concerns rather than merely protesting. Instead of enacting protective tariffs, Canada negotiated a Voluntary Restraint Agreement with the United States in accordance with the Meat Import Act of 1979. Nevertheless, even well-intentioned regulations often constitute formidable non-tariff barriers. Under section 22 of the Agricultural Adjustment Act of 1939, no import may "materially interfere with" the implementation of any USDA price support program. There are health and welfare requirements for foods, labeling requirements for clothes, and inspection requirements for equipment and automotive parts, which must meet American standards. All these act as non-tariff barriers.

Buy America provisions at state and local levels, coupled with U.S. government procurement policies, have "incensed and insulted"[46] Canadians. At the federal government level, the Buy American Act (41 U.S.C. § 10 (1982)) mandates a "preference" for U.S. products. In order to win contracts, foreign products must be at least 6% cheaper than American products. In 1984, federal

44. Wall St. J., April 21, 1987, at 5, col. 1.

45. *Id.*

46. Morrissy, *Industrial Policies of North America and Their Implications for U.S. Trade and Investment Relations*, 7 N.C. J. INT'L L. & COM. REG. 331 (1982).

purchases of non-strategic goods totaled $85.5 billion, about $17 billion of which were subject to governmental procurement restrictions. The Surface Transportation Act of 1982 (23 U.S.C. § 101) dictates that only domestic materials may be used in federally funded highway and mass transit projects costing more than $500,000. This is especially objectionable to Canadians, who believe they possess a comparative advantage in the area of transportation equipment.[47] Other provisions, such as antidumping laws, countervailing duty procedures, and escape clause proceedings, have been exercised against our northern neighbors often enough to have provoked reactive legislation. As a selling point for the agreement, Mulroney emphasized the job creation potential generated by opening the U.S. government procurement market. In the end this proved to be in vain, as the final accord left Buy America provisions intact.[48]

Some American legislation contains exemptions designed specifically for Canada. The Export Administration Act authorizes the President to forbid export of anything detrimental to American security or economic interests, but exempts "any export to Canada, for consumption in Canada," except technology related to nuclear weapons.[49] In accordance with the GATT Procurement Code, the Trade Agreements Act of 1979 (19 U.S.C. § 160) authorized the President to waive government procurement codes with respect to GATT members who reciprocate. Thus, the Buy America Act does not apply to certain Defense Department, NASA, or Coast Guard purchases, if they are from approved Canadian sources. Canada's special status under U.S. procurement laws provides a precedent for a reciprocal free trade agreement. In contrast, the problem presented by state and local procurement legislation "does not seem easily resolvable."[50]

Canada just does not hold sufficient American public interest to warrant continued American government attention, unless that attention is deleterious (in this decade, the ITC began nearly 40 investigations of Canadian trade practices, and last year alone imposed duties on Canadian fish, iron castings, oil drilling pipes and timber).[51] If approved, the accord would sharply curtail both Canadian and American import tariffs. The pact will aid consumers on both sides of the border, and thus should garner the support it deserves.

---

47. *Id.* at 347.

48. *Two Nations Size Up Trade Pact, supra* note 4.

49. 15 C.F.R. § 370.3, *cited in* R. FOLSOM, *supra* note 29, at 595.

50. Suchman, *The Impact of U.S. Federal Laws on Sectoral Integration*, 10 CAN.-U.S. L.J. 141, 155 (1985).

51. *Start of Something Big, supra* note 13, at 27.

B. Canadian Trade Policy: Continuous "Canadianization"

Canadians have been guilty of protectionism almost as frequently as their southern cousins. In the 1970's, Canadians viewed themselves as having three alternative ways of trading with America. One involved seeking a "special relationship" through integration with the U.S.; the second called for maintaining the status quo. Canadians resolved to pursue their "Third Option:"[52] Soliciting trade with Western Europe and Japan, while spurring the development of domestic industry, and admitting U.S. trade only where advantages outweighed disadvantages. To this end, Ottawa recently established the Procurement Review Mechanism, through which the Treasury Board ensures that government purchases for goods and services over Canada $2 million and construction over Canada $10 million meet government objectives (in effect, a "Buy Canada" law).[53]

Since Prime Minister Brian Mulroney's 1984 landslide victory gave his Conservative party 211 of Canada's 282 Parliamentary seats, he has "dismantled many nationalistic, anti-business laws imposed during the Trudeau years," and "brought Canada back from the economic isolationism that was crimping the nation's growth, decreasing its employment, and depressing its standard of living."[54] He has already deregulated Canada's oil industry, and has started dismantling restrictions on the transportation industry, and on financial markets. Mulroney gutted the National Energy Policy (NEP), which had forced non-Canadian oil companies to forfeit billions of dollars in assets. He also managed to revoke the Foreign Investment Review Agency (FIRA), which had guaranteed that new foreign investment could enter only on Canadian terms.[55] FIRA had stunted foreign (and especially American) investment since its passage in 1974.

In the "Shamrock Summit" of March 1985, the two leaders issued a broad statement (The Quebec Declaration) on the need to lower North American trade barriers. One year later, Mulroney remarked in Washington that "no sector will be spared the negotiating table once talks are under way,"[56] demonstrating either the Prime Minister's courage, or his total ignorance of Canadian domestic political history. The proposed accord in fact exempts several powerful Canadian industries, such as the entertainment

52. Morrissy, *supra* note 46, at 333.

53. *Id.* at 346, *citing* P. MORICI, A. SMITH & S. LEA, CANADIAN INDUSTRIAL POLICY 122 (1981).

54. Finn, *supra* note 1, at 130.

55. Franck & Gudgeon, *Canada's Foreign Investment Control Experiment: The Law, the Context and the Practice*, 50 N.Y.U. L. REV. 76 (1975).

56. [Current Reports] 3 Int'l Trade Rep. (BNA) at 475 (April 9, 1986).

industry.[57]

Canada's restrictions on American cultural "imperialism" exemplify how cultural sensitivities can interfere with free trade. Canadians carry "a very strong feeling" that their artists do not enjoy equal access to the film and book publishing fields.[58] Investment Canada, a body set up by the Canadian government with the intention of liberalizing Canada's foreign investment policy, has instead identified four cultural areas subject to restrictions and review: books, music, cinema, and broadcasting (radio and television). For example, firms producing or distributing books in Canada must be at least 51% Canadian owned.[59] In March of 1986, Investment Canada approved the indirect acquisition of Prentice-Hall Canada by Gulf & Western Corporation, with a few reservations. The American conglomerate had to commit itself to selling 51% of Ginn Canada, a textbook publisher, to Canadians; to expanding Prentice-Hall's Canadian publishing program, and to continue sourcing Canadian goods and services at the current 90% level.

Americans counter that the Canadian consumer and not cultural colonialism dictates, for example, what television shows shall be watched (70% originate in Hollywood).[60] Yet culture is always an area of extreme sensitivity. Even the normally open and tolerant French have recently passed legislation to stem the influence of Americanisms on their language. As Ottawa's Consul General in New York said, "it is not only legitimate, but essential to enact policies in the cultural field that might not have applicability in other areas."[61] It is notable that Canada retains most of its publishing and cultural restrictions in the October 1987 proposal.[62]

Were culture the only area of Canadian restrictions on American trade, FTA advocates would probably raise few objections. But many Canadian protectionist measures, such as the Canadian Bank Act and the Procurement Review Mechanism,[63] remain in place. Canadian tariffs are, on average, almost double America's.[64] Conflicting trade policies represent a further barrier to trade (see be-

57. *Two Nations Size Up Trade Pact, supra* note 4.

58. [Current Reports] 3 Int'l Trade Rep. (BNA) at 445 (April 2, 1986). Consequently, one restriction dictates that a certain percentage of music played on Canadian airwaves must involve Canadian artists or recording personnel. But these cultural restrictions have helped to launch the career of several Canadian rock n' roll music stars, whose considerable talents might have been ignored in Hollywood: Joni Mitchell, Gordon Lightfoot, and Bryan Adams, among others.

59. *Id.* at 446.

60. *Id.* at 445.

61. *Id.*

62. *Two Nations Size Up Trade Pact, supra* note 4.

63. Morrissy, *supra* note 46, at 346.

64. *Start of Something Big, supra* note 13, at 27.

low). Overall, Canada may have passed less protectionist legislation than the United States, but while most American barriers are not directed at Canada, much of Canada's protectionist legislation was passed with the U.S. in mind, a fact which bodes ill for regional integration.

C. Sectoral Integration and Cooperation: The Auto Products Trade Agreement of 1965 (AutoPact)

History records a few clear examples of American-Canadian sectoral integration. Ironically, the closest current trade cooperation, the "AutoPact," arose from a potential exercise of United States countervailing duty laws against Canada—just as the October 1987 proposal itself followed the January 1987 countervailing duties on Canadian softwood. Notably, the proposed accord leaves the AutoPact untouched, to the chagrin of America's United Auto Workers.[65]

In November 1962, the Canadian government granted automobile makers operating in Canada tariff rebates on auto parts, in return for increased exports of autos or parts. U.S. auto manufacturers protested the Canadian measure, alleging export subsidies and attempting to invoke countervailing duty laws. This would have required assessment of countervailing duties against Canada, possibly igniting a trade war.

Even before Canada's alleged subsidies, automobile exportation between the two nations had been less than free. The American government assessed duties of 6.5% on finished vehicles and 8.5% on parts; Canada's duties were 17.5% on finished vehicles and up to 25% on parts. To negotiators, automobiles seemed one area where free trade possessed obvious and overwhelming benefits for both sides. Costs of plants, equipment and research and development must be spread over a large number of units for crucial economies of scale to take effect. For this reason, Canadian consumers paid more (an average of U.S. $1,000) than Americans for inferior versions of American cars.[66]

Other factors favored sectoral integration. Most Canadian production concerns were subsidiaries of American corporations. Moreover, Canada was then the major export market for American automotive products (as it is now the major market for all American exports). Negotiators completed the agreement early in 1965.[67]

---

65. *Two Nations Size Up Trade Pact, supra* note 4.

66. *Background Information on the United States-Canadian Trade Agreement on Automobile Products*, 111 CONG. REC. 1038 (Jan. 1965) (statement of Sen. Philip A. Hart), *reprinted in* R. FOLSOM, *supra* note 29, at 799 [hereinafter cited as *Background Information*].

67. Agreement Concerning Automotive Products Between the Government of the

Critics quickly assailed the AutoPact:

> This agreement has been sold to Americans as free trade. It is not. It removes tariffs, not generally, not even with one nation, but only for a chosen few automobile manufacturers. The Canadian duty for American automobiles is not removed. . . Parts may be imported duty free [into the U.S.] only if they are going to an automobile manufacturer. . . This is not free trade and it does not benefit American consumers . . . only a few automobile manufacturers.[68]

Today, some Canadians still criticize the AutoPact, denigrating its significance. University of Toronto economist Leonard Waverman dismissed the importance of domestic content safeguards included in the AutoPact, saying that "Canada has become merely an assembly operation at the expense of the parts manufacturing sector,"[69] which runs an increasingly large deficit with its American counterpart. Even if Canada had sacrificed the AutoPact for the sake of a more comprehensive agreement, that would be of little importance. Rapid growth of the Canadian auto market since 1965 would have produced all the benefits of the AutoPact even without it.

But time proved the agreement profitable, at least for American manufacturers (who own virtually all shares in their Canadian subsidiaries), Canadian workers, and Ottawa's tax coffers. "Canada's car industry is one of the brightest spots in the country's economy," reported the *New York Times* in 1984, twenty years after the agreement.[70] In 1983, the auto industry reportedly accounted for one third of Canada's $719 million trade surplus. Advocates of freer trade point to the Pact as a clear example of the benefits accruing to both sides from freer access to each other's markets. Protectionists can still argue that completely free trade would result in benefits for one side only.

Canadian unions apparently convinced the Mulroney Administration that without the AutoPact, automobile manufacturers would have abandoned Canada. The AutoPact remains unchanged by the new accord.[71] Just as the U.S.-Canada Automobile Agreement constitutes less than free trade, any agreement acceptable to both national legislatures necessarily includes safeguards for local, inefficient employers. Importers on either side of the border must

United States of America and the Government of Canada, 111 CONG. REC. 1037 (Jan. 22, 1965), *reprinted in* R. FOLSOM, *supra* note 29, at 801.

68. REPORT OF SENATE FINANCE COMMITTEE ON H.R. 9042, S. REP. NO. 782, 89th Cong., 1st Sess. 39 (1965), *reprinted in* Metzger, *The United States-Canada Automotive Products Agreement of 1965*, 1 J. WORLD TRADE L. 103, 106 (1967). The quotation is from the "minority views" of Senators Ribicoff, Hartke and Gore.

69. [Current Reports] 3 Int'l Trade Rep. (BNA) at 521 (April 16, 1986).

70. N.Y. Times, Oct. 17, 1984, at 27, col. 3.

71. *Two Nations Size Up Pact, supra* note 4.

guard against a flood of industry promoted restrictions undermining the measure.

Before the October proposal, the province of Ontario, Canada's primary auto producer, worried that free trade negotiators might abrogate the 1965 treaty "under which American car companies make as many cars in Canada as they sell there."[72] This fear seemed unrealistic, considering that Canada sent south U.S. $11.9 billion worth of cars containing at least 60% Canadian components. Such fears seemed to end in January of 1987, when Canadian International Trade Minister Pat Carney announced that Canada would not agree to any significant revisions of the AutoPact. Opposition parties and Ontario politicians had attacked Prime Minister Mulroney for allegedly permitting negotiations to include the Pact despite the P.M.'s assurances. Ironically, the same Canadian interests (mainly in Ontario) benefitting from current sectoral integration number among the most potent enemies to more wide ranging links.

The maxim "if it works, don't fix it" would apply not only to the AutoPact, but to the other existing bilateral arrangements, commissions, and mutual defense pacts that attest to the potential for sectoral and regional integration. Several different arrangements provide for seasonal sale of electricity, to power U.S. air conditioners in the summer, and meet Canada's peak winter demand for heat and light.[73]

D. Extent and Nature of U.S.-Canada Trade

Reviewing today's comprehensive and extensive trade between the U.S. and Canada compels the question of why the two nations have not heretofore achieved more complete integration than the AutoPact. Various sources estimate the share of Canadian exports accepted by the United States at 66% to 80% of total Canadian exports.[74] Canada buys more from the United States than any other nation, fueling and perhaps justifying fears of Yankee domination. American direct investment in Canada exceeds U.S. $41 billion. Canadians have reciprocated by investing U.S. $7 billion in their southern neighbor's economy. Two million Canadians, or 16% of the country's workers, owe their jobs to U.S. exports.[75] "Clearly, what Canada wants from trade talks is free and guaranteed access to the U.S. market,"[76] a need driven by the limits of

---

72. *Start of Something Big*, *supra* note 13.
73. Morrissy, *supra* note 46, at 347.
74. The lower figure is provided by Morrissy, *supra* note 46, at 332, *citing* Background Study of the Economic and International Trade Patterns of the Countries of North America, Central America and the Caribbean, USITC Pub. 1176 (1981). The higher figure is provided by Finn, *supra* note 1, at 134.
75. Finn, *supra* note 1, at 134.
76. *Id.*

Canada's home market. Canada has the smallest population (26 million) of any major industrialized nation. Yet it has the second largest territory of any country. The potential of these "enormous complementary assets"[77] cries out for its development, respecting, of course, Canadian fear of American domination and legitimate environmental concerns. Surely United States capital, labor and technology could assist in opening up some of the resources therein, to the benefit of all North Americans.

One Canadian trade advantage lies in the relatively low value of the maple leaf dollar.[78] Curiously, the American dollar has fallen against every major currency save the Canadian. Some analysts attribute this to investor concerns over Canada's economy, and over its commitment to expensive "socialist" policies. Mulroney's latest budget calls for a 16% reduction in the deficit for fiscal 1986-7. "[T]he financial world showed its approval, keeping the Canadian dollar firmly at 72 U.S. cents."[79] For weeks before he announced the new budget, "skepticism on Mulroney's budget-cutting resolve had pushed Canada's dollar below 70 U.S. cents."[80] The two currencies had been almost interchangeable as recently as five years ago. Many economists consider the Canadian dollar undervalued; kept artificially low by worries over the Canadian budget deficit, high even by American standards. Proportionately, Ottawa runs a deficit 30% higher than Washington.

On the other hand, an undervalued currency is not without advantages, as Japan and other countries have discovered. "The U.S. deficit in trade with Canada is second only to that with Japan."[81] Currency values have helped establish a very favorable balance of trade for America's northern neighbor. Some American investors buy shares of Canadian corporations, "both to participate in the strong economy and to benefit from what they hope will be a higher Canadian dollar."[82] As with Japan in 1985, the "quirk in exchange rates" may have heightened tensions:

> The U.S. dollar has fallen sharply in the last year against the West German mark and the Japanese yen, making imports from those countries more expensive. But industries competing against Canada have enjoyed no such benefit. The U.S. dollar has remained nearly unchanged against the Canadian dollar; and even auto dealers in Aroostook County [Maine] complain they

---

77. Morrissy, *supra* note 46, at 332.

78. Note that the new Canadian Dollar coin features a flying loon, and is therefore known as the "loony dollar."

79. Finn, *supra* note 1, at 132.

80. *Id.*

81. *Reagan's Bid for Free-Trade Pact with Canada Upsets Farmers, Lumbermen Along U.S. Border*, Wall St. J., May 7, 1986, at 64, col. 1 [hereinafter cited as *Reagan's Bid Upsets Farmers*].

82. Finn, *supra* note 1, at 132.

are losing business from local customers who travel across the border to buy cars.[83]

III. POTENTIAL BILATERAL BENEFITS VERSUS SOVEREIGNTY

Potential benefits as well as threats loom larger for those living under the maple leaf flag. Former Prime Minister Trudeau has been quoted as saying, "we are a mouse in bed with an elephant."[84] An overstatement; Canada is not Iceland. But Canadian sovereignty may indeed suffer. Industrial jobs in government promoted industries such as lumber may disappear, yet expanded agricultural and industrial markets, plus new capital available for industrial development, could more than make up the difference. While any generalizations at this time may prove premature, observers generally predict Canadian industry will suffer in the face of America's huge industrial capacity; while agriculture, lumber and cottage industry will benefit, especially if Ottawa maintains its traditional industrial supports.

Canada's size precludes its domestic consumer market from lifting it out of depression without access to outside markets. "Canada's population will remain too small, and its industrial productive capacity too specialized, to permit a significant reduction in foreign trading activity without severely reducing the Canadian standard of living."[85] Accounting for three-quarters of Canada's export sales, the United States has become overwhelmingly Canada's most important export market. Canadian exports to the U.S., including those under the AutoPact, exceed exports to Canada's next most important market by a factor of 14. Growth in the U.S. market for exports in 1984 exceeded the total of Canadian exports to Europe and Japan. "Virtually the whole breadth and range of Canadian production, in all regions of Canada, are involved in exports to the U.S."[86]

For its part, America stands to gain jobs, wider industrial and consumer markets, and access to its expansive northern neighbor's enormous complementary resources. America has less to gain proportionately, and also less to risk. Yet the potential cannot be denied. Canada already accounts for fully one-fifth of U.S. exports. In 1983, U.S. exports to Canada were 66.3 billion Canadian dollars; exceeding U.S. exports to Japan by 11 billion dollars. This was four times greater than U.S. sales to either Germany or the United King-

83. *Reagan's Bid Upsets Farmers, supra* note 81.
84. *Id.*
85. Canadian Government Trade Policy Review of 1983, quoted in Dymond, *Canada-U.S. Trade Options: A View from the Canadian Side*, 10 CAN.-U.S. L.J. 27, 28 (1985).
86. *Id.* at 29.

dom. Slow economic growth in Europe, a traditional export market for both North American nations, suggests that the two nations must look elsewhere; to each other, and across the Pacific to Asia, with its high economic growth rate. "Whatever bilateral options may be adopted in Canada-U.S. trade, the government will attach high priority to the Pacific Rim. Canada, like the U.S., faces the challenge"[87] of competing in and exploiting the Pacific Basin's exploding opportunities. Joint ventures, less under-cutting of commodity prices, and a North American market made more attractive by its size, could improve North America's trade balance and performance.

Political scientists who question whether a union of two large, sovereign nations is natural or unnatural might consider whether the Canadian confederation is itself unnatural. Canada's land mass stretches northward nearly 3000 miles across the tundra to the Arctic circle, but living space for the majority of its population is limited to the narrow band of territory within 200 miles of the U.S. border. Economic efficiency dictates that firms from both countries interact across the frontier. Few plants can exhaust their economies of scale by supplying a market area with a 100 mile radius; few can minimize transportation costs if they serve Canada's attenuated market area, measuring 200 miles deep by 3500 miles long.[88] Moreover, geographical barriers in North America, such as the Mississippi River and the Rocky Mountains, tend to run north-south. Though this does not increase costs today, it has a psychological effect.[89]

Much of Canada's "socialism" stems from the attempt to impose a union upon this vast area. One example is the monopoly granted to Air Canada in exchange for providing subsidized flights to remote, isolated towns (at the expense of the Canadian consumer—a ticket from Toronto to Montreal costs several times the cost of a flight from New York to Washington, a similar distance). Why should Vancouver trade with Toronto and Québec, thousands of miles to the east, when it can trade 120 miles south with Seattle?[90] Culturally, the Canadian provinces have little more in common with each other than they do with the U.S. "When you ask a Canadian what rich Alberta ranchers have in common with poor Maritime fishermen, he will stutter, then come dangerously close to saying 'they both admire full length Chevrolets, and watch reruns

87. *Id.*

88. Morrissy, *supra* note 46, at 342.

89. *See generally* J. GARREAU, THE NINE NATIONS OF NORTH AMERICA (1981). The north-south orientation of rivers and mountains is believed to be one reason why the South could not win the U.S. Civil War.

90. *See generally* Garreau's discussion of the Pacific-Northwest, *id.*

of M*A*S*H.' "[91] One Canadian Union official cringes at the thought that the October accord will set Canada on course for "a Rambo, dog-eat-dog society with no ability to maintain our social programs or to structure our own economy."[92]

A. Softwood: A Dispute Averted

Many benefits can only be achieved by reconciling divergent national trade policies. Timber once threatened to quash all bilateral negotiations, as demonstrated by the recent dispute over Canadian shingles. The dispute centered on the Canadian government pricing system for forested land, and threatened to expand to all forestry products.[93] Whereas America auctions government forest land to the highest bidder, Canada sets its prices administratively. Canadian lumbermen pay $35 to $50 less for 1,000 feet of lumber than their southern counterparts, according to the Coalition for Fair Lumber Imports, the American industry's lobby group. During the decade ending in 1986, Canada's share of the U.S. lumber market increased from 18% to 33%.[94] When Ottawa won a 1983 U.S. court battle and prevented imposition of countervailing duties on Canadian timber,[95] the American industry vowed to press the President to invoke Section 301 of the Unfair Trade Practices Act. Mr. Mulroney, facing increasing anti-American anger over these moves, warned that they could precipitate Canadian withdrawal from the trade talks.

Around the clock negotiations culminated in January 1987, when the United States accepted Canada's offer of a 15% export levy on Canadian softwood lumber. This ended the American 15% countervailing duty (CVD) measure and proved the ability of the two sides to co-operate constructively in regulating bilateral trade. The Coalition for Fair Lumber Imports, the U.S. group that brought the original CVD complaint, continued to argue that Canadian "subsidies" amount to 20% or more. The Coalition denounced the agreement as "a protectionist handout"[96] that will not improve the competitiveness of the U.S. lumber industry, while the Canadian Forest Industries Council denounced it as a $600 million penalty on the Canadian softwood industry—more than all Cana-

91. *Id.* at 367. One wing of the Consevative Party has suggested that Canada ask Queen Elizabeth II to name her second son, Andrew, the Prince of Canada (in the same manner that Prince Charles is the Prince of Wales).

92. *Canada Split on Accord; Nationalism an Issue*, N.Y. Times, Oct. 6, 1987, at 29, col. 4 [hereinafter cited as *Canada Split on Accord*].

93. N.Y. Times, May 8, 1986, at D1, col. 3.

94. *Id.*

95. *Id.*

96. [Current Reports] 4 Int'l Trade Rep. (BNA) at 6 (Jan. 7, 1987).

dian forestry producers earned in 1986. Compromise agreements cannot please everyone in either country.

On the positive side of the ledger, settlement of the dispute shows that both governments, weakened as they are by scandal and public opinion polls, can still make the compromises necessary to sign a treaty. Mulroney chose the lesser of two evils: a loss in his popularity among some Canadian lumbermen, rather than American protectionist legislation which would affect all Canadians. The agreement may even have effects directly beneficial to Canada, if shipments of Canadian wood products to Asia increase. Meanwhile, import duties that would have gone to the U.S. treasury will go instead to Ottawa, to pay for reforestation or other employment projects.

The Reagan Administration warned that revenues the Canadian government collects from the new duties must be used for reforestation, not as rebates or low interest loans to Canadian lumber concerns.[97] This infuriated Canadian nationalists, perpetually sensitive to Yankee domination. "We've turned not only our resource and taxation policies but in a sense our regional development and employment policies over to another sovereign country. It's a dangerous precedent,"[98] said Ontario Premier David Peterson. Noting that commodity export taxes fueled "violent" disputes between former Prime Minister Trudeau and Alberta's former Premier, Peterson told the P.M. "if you bring in an export tax it says you don't understand the history of this country."[99] Peterson warned that the issue could go to the Canadian Supreme Court (though he held off threatening such an action himself).

The Canadian provinces in many respects associate with one another as sovereign states, and this complicates any U.S.-Canadian accords. Alberta Premier Don Getty refused to collect the tax unless based on a provincial-federal agreement.[100] One Canadian professor scoffed that American demands to monitor how Canada spends tax revenues shows "the atmosphere of suspicion in Washington is not restricted to East-West relations."[101] Opposition members of Parliament demanded that the Prime Minister rescind the accord. "Mulroney is clearly negotiating on his knees"[102] claimed a Liberal Party M.P., while Canadian Minister of Energy, Mines and Resources Marcel Masse called the whole dispute a mere "annoyance,"[103] a minor trade tiff diverting attention from the

97. *Id.* at 7.
98. *Id.*
99. *Id.* at 44 (Jan. 14, 1987).
100. *Id.* at 9 (Jan. 7, 1987).
101. *Id.* at 8.
102. *Id.*
103. *Id.*

broader goal: a North American FTA.

B. Sovereignty and the Meech Lake Accord

Provincial reaction to the agreement demonstrates the two-headed hardship that Canadian sovereignty concerns cast on any sweeping bilateral agreement. Negotiators must take into account both Canadian sovereignty and the sovereignty of Canadian provinces. But in an unexpected victory for the embattled Canadian P.M., a ten hour talk at Meech Lake in the Québec woods turned into a rudimentary agreement for Canadian constitutional reform. The five point agreement provides for written recognition of Québec's status as "a distinct society"[104] within Canada, seemingly thwarting the Parti Québécois' push for independence. It also grants the provinces unprecedented power over immigration, plus veto power over changes to Parliament, federal institutions, and appointments to the Supreme Court.

The Meech Lake Accord carries significance for the proposed FTA for two reasons. First, it proves that, even with Canada's post-Trudeau trend toward decentralization, the provinces can cooperate in sweeping accords. Second, it bolsters Brian Mulroney, the FTA's prime booster in Canada. Thirty-one months of "indecisive fumblings and petty scandals" had dropped his Conservatives into third place, "far behind the New Democrats as well as the Liberals. They were in urgent need of an eye-catching success. The Meech Lake agreement should meet that need"[105] and save not only Brian Mulroney, but Canada itself. Obviously, the vitality of both the Canadian nation and its leader must be assured if an FTA has any hope of final approval.

The Conservatives are hoping that the October accord will augment Conservative party fortunes before the September 1989 elections. Predictably, Liberal Party leader John Turner said Mulroney had "put Canada up for sale," while New Democratic Party head Edward Broadbent accused the P.M. of trying to make Canada "a satellite of the United States."[106] Support for the proposal also broke down along geographic lines, with Québec Premier Robert Bourassa calling the agreement "excellent,"[107] and Ontario unions registering reservations.

104. *Monstrous Miracle at Meech Lake*, ECONOMIST, May 9, 1987, at 40.

105. *Id.*

106. *Canada Split on Accord, supra* note 92.

107. *Id.*

IV. EXISTING FREE TRADE AREAS—A COMPARISON

A. The U.S.-Israel Free Trade Area

A brief examination of the complex U.S.-Israel and Israeli-Common Market agreements indicates the sort of considerations that shape such accords, as well as the political obstacles that can be surmounted. The U.S.-Israel Free Trade Area Agreement went into effect in September of 1985. It will ultimately eliminate virtually all duties and other restrictive regulations of commerce between the U.S. and Israel over a ten-year span. The agreement may represent the greatest trade liberalization the United States has ever embarked upon. Anti-socialists hail it as a shining example of how governments can avoid the process, "increasingly popular abroad,"[108] of government intervention through national export strategies and subsidies. However, certain reservations contained in over 100 articles, limit the scope and effect of the FTA.

Section 406 of the 1984 Trade Act states that the FTA must not affect in any way "the application to Israeli articles" of U.S. laws providing relief from injury caused by imports. Thus, countervailing duty and anti-dumping laws will continue to be applied against Israel. Escape Clause proceedings under section 201 of the Trade Act of 1974 may be applied to restrict imports of Israeli products substantially causing or threatening serious injury to a domestic industry. However, relief consisting of suspending Israel's FTA benefits will be granted when the International Trade Commission determines that injury arose because of the FTA's duty reductions.

Israel requested an exemption from U.S. trade remedy laws, but failed "despite general agreement on the improbability of any Israeli trade harming American producers."[109] Congress apparently thought granting such an exemption would set a bad precedent for future free trade talks with other nations. "If Israel can't get that exemption, it's going to be very difficult for Canada to do it," predicted Yale Law School Professor Harold Koh.[110] It is too early to tell if the arbitration panel since agreed to by the United States and Canada amounts to such an exemption, but such seems to be the case.

Israel needed an FTA with America much more than the Americans or Canadians need one with each other. For nationalistic reasons, Canada may continue to insist that the laws be softened, generating increased American sentiment to ditch the proposal.

108. Herzstein, *A New Departure in Trade Policy: The U.S.-Israeli Free Trade Area*, 32 FED. B. NEWS & J. 132 (1985).

109. [Current Reports] 3 Int'l Trade Rep. (BNA) at 519 (April 16, 1986).

110. *Id.*

Some also question whether an arrangement viable with Israel, a small country, would function as well with Canada. Answering affirmatively, one observer writes:

> The U.S. and Canada have the largest bilateral trading relationship in the world; a large percentage of U.S. trade with Canada is already duty-free. This strong bilateral trading relationship is reinforced by similar laws and cultures, a long common border, and a tradition of economic interaction. Although the question of [an FTA with the U.S.] is now under discussion, Canada probably is not politically ready for such a move.[111]

The *New York Times* reports that two years after America's first FTA ever, U.S. exports to Israel and Israeli exports to the U.S. have each increased 10%. "Israel has shifted some of its trading focus from Europe to the United States, and the United States may be starting to look upon Israel more as a serious trading partner and less as a charity case."[112] Israeli exports include bathing suits and oil drilling equipment. The *Times* notes Canadian and Mexican interest in the U.S.-Israel accord.

B. The Israel-EEC Accord

While the U.S. and Canada have a longer history of trade, the Israel-EEC accord resulted from twenty years of trial, treaties, tribulations, and negotiations. Almost as soon as the Common Market came into being, Israel began to seek some sort of special trade arrangement. Given the nation's proximity to Europe, prevailing trade patterns, and relative isolation, such an arrangement seemed inevitable, natural, and necessary. In 1960, the Israeli foreign ministry submitted a memo to the EEC stating that such an accord would comply with article 238 of the Treaty of Rome, and that Israel's chief products (then agricultural, such as grapefruit and avocados) would complement and not compete with European products. The EEC responded that it was more interested in Greece joining the Community than in a special association with Israel.[113]

Nevertheless, negotiations that opened in 1962 resulted in sectoral agreements as early as July 1, 1964. Upon the treaty's expiration in 1967, Israel presented a formal demand that it be replaced with an agreement of association. The European Commission, while favoring complete liberalization of trade, suggested tariff preferences due to the political situation prevailing in June, 1967. Five of the six EEC members wanted to pursue greater links with

---

111. Herzstein, *supra* note 108, at 135.
112. N.Y. Times, Oct. 6, 1987, at 19, col. 3.
113. Langer, *The Israel-EEC Free Trade Agreement: An Analysis of the Agreement and Its Effect on Investments*, 9 SYRACUSE J. INT'L L. & COM. 63, 65 (1982).

Spain.[114]

Negotiations between the EEC and Israel culminated on May 11, 1975, in a comprehensive trade agreement that would scale down customs duties and eventually establish a free trade area. The agreement declared Israeli industrial exports entirely duty free as of July 1, 1975, subject to quota limits until June 1977. The EEC reserved the right to control the import of certain sensitive products, such as petrol, textiles and chemical products, by means of annual tariff ceilings or quotas. Israel enjoyed immediate tariff reductions covering 70% of agricultural products. By 1975, several Arab countries also seeking special relationships with the EEC had substantially improved their financial positions through oil. Israel's general economy was by then in a severe recession, affecting its balance of payments. Such political considerations as the power and importance of the Arab nations caused many Europeans to question the value of an accord with Israel.

When Arab nations "expressed concern,"[115] the EEC replied that its Mediterranean Policy invited all countries. Trade agreements more advantageous than the one with Israel had already been concluded or at least envisaged with several Arab nations. Maghreb (Algeria, Morocco and Tunisia) and Mashreb countries (Egypt, Jordan, Syria and Lebanon) actually enjoyed lower tariffs, while concessions granted to Israel were both limited in size and applicable only to a certain range of products. The EEC calmed Arab wrath, arguing that Israel had the first comprehensive agreement merely by "coincidence." In its agreements with Arab states, the EEC has insisted on clauses outlawing discrimination among nationals, companies or firms of the Common Market.[116] The Arabs have issued letters of reservation, which the EEC politely declined to accept (except in accordance with article XXI of the GATT, on the basic security of nations). One would hope that the U.S. and Canada, whose foreign relations are far less complex and hostile than those of the Middle East, could sidestep such obstacles just as deftly.

Certainly much could be said about this complicated agreement, but the most significant fact is that it exists at all. Despite the participation of over a dozen governments, each subject to internal (not to mention external) political pressures, a mutually beneficial agreement was reached. Perhaps, however, an international organization such as the EEC, formed for the very reason of achieving compromise among nations, makes a better negotiating partner than does Congress. Another major contrast with the North Amer-

114. *Id.* at 69.
115. *Id.* at 85.
116. *Id.*

ican situation was Israel's enthusiasm. In contrast to America's apathy and Canada's ambivalence, Israel considered the agreement essential to its existence, doggedly pursuing it for twenty years, willingly conceding issues when necessary. No agreements, international or otherwise, can be achieved without willingness and courage to compromise.

V. PREDICTED EFFECTS OF A FREE TRADE AREA ON CANADA

Despite its fears, most observers predict that Canada has more to gain from free trade than the U.S. This stems from the relative size of the two nations, and the relative health of the American economy. "[T]here is the need to restructure Canadian industry, eliminating companies that have grown fat behind the armor of protective tariffs. . . . The winners generally will be oil, chemicals, and other natural resource companies."[117] Expected losers include Canada's clothing, textile, shoe and furniture industries. In an ironic contrast to the historic apprehension with which Canada viewed trading with the Yanks, it was Prime Minister Mulroney who first suggested negotiating an agreement. His offer was prompted in part by fear that congressional efforts to block imports from other countries would also damage Canadian business interests--fear that the United States will go protectionist against the world, including Canada, a concern not altogether unfounded considering our latest round of Japan and Korea bashing.

A. Effects on Agriculture

Canada, an agricultural powerhouse, will likely export increased quantities of certain products to the U.S. There will be inevitable exceptions. Canada's family egg producers cannot compete with America's large-capacity egg facilities. Due in part to Canada's "stringent supply arrangements"[118] (*i.e.*, production quotas), egg production is one of the few thriving Canadian agricultural sectors. While other Canadian agricultural sectors stand to gain from greater access to the U.S., Canada is the largest foreign market for U.S. eggs, while few Canadian eggs find their way to American tables. Canadian producers therefore dread a massive invasion of American eggs. On April 8, 1986, the Canadian Egg Marketing Agency (CEMA) swore "emphatic" opposition to any free trade arrangement with the United States. Not surprisingly, the United Egg Producers (UEP), its American counterpart, proclaimed that it "has always been free trade oriented." Still, the UEP complains

117. Finn, *supra* note 1, at 134.
118. [Current Reports] 3 Int'l Trade Rep. (BNA) at 475 (April 9, 1986).

that while import tariffs are the same on both sides of the border (3.5 U.S. cents per dozen), Canada's overall import quota blocks the entry of American eggs, thereby supporting prices. While American lumbermen fear that open borders would mean "unfair competition" from subsidized Canadian loggers, American egg producers who receive U.S. farm subsidies espouse just as vocally the benefits of free trade. When ideology meets the pocketbook, political realities inevitably triumph.

B. Effects on Canadian Industry and Manufacturing

If the FTA is approved, outside investors would have access to one of the world's largest markets (the U.S. and Canada), merely by investing in one of the two partners. American investors wishing to establish foreign direct investments need no longer be as concerned about the vagaries of "foreign" political jurisdiction (although worries such as expropriation have never really applied to Canada). On the other hand, much investment in Canada exists because tariff walls had to be circumvented—this is especially true of American firms with separate Canadian factories and subsidiaries. If the rationale for American investment disappeared with the abolition of tariffs, "boardroom prejudice" could lead U.S. firms to close their Canadian plants.[119]

To Canadian corporations, the FTA would represent perhaps the greatest business opportunity of all time. They would have easy access to a market of 265 million people, greater than any in the free world except the EEC's 330 million. The U.S. currently buys 80% of Canada's exports. How much more Canada could export into a completely open market is uncertain but certainly vast.

One corporate example of the benefits presented by the American market is Moosehead Breweries, Ltd., located in Saint John, New Brunswick. Within Canada, Moosehead is deterred by Canadian law from expanding beyond New Brunswick and Nova Scotia. The alternative lay southward. As any American beer drinker can tell you, Moosehead launched a major advertising campaign in the U.S. in 1978. In 1985, Moosehead sold 144 million bottles of beer in America, almost as much as it sold in Canada.[120] Unfortunately for the 21% of the Province's labor force now unemployed, American breweries managed to exempt their industry from the October proposal.[121]

---

119. Macdonald, *supra* note 36, at 9.

120. Finn, *supra* note 1, at 134.

121. *Two Nations Size Up Trade Pact, supra* note 4.

C. Effects on Canadian Unions and Consumers

Canadian unions will naturally protest the loss of jobs in inefficient industries. "The impact of American competition might be temporarily shielded by phase-in arrangements, but ultimately Canadian firms would face the necessity of either adjusting or going out of business."[122] "Adjusting" means firing workers or lowering wages set artificially high. The effect on Canadian consumers, however, will be far more desirable. Lower tariffs mean lower prices on U.S. goods. Removing tariffs on parts for manufacturers would lower the price of finished items manufactured in Canada. Sale of Canadian manufactured goods to the U.S. would produce economies of scale, lowering prices further.[123]

We detail elsewhere the positive effects Mulroney predicts an FTA would bring the Canadian economy, and the disaster the opposition says it would cause. Since these are not disinterested observers, we will not repeat their arguments at this point.

Some observers feel an accord would affect the Provinces unevenly. This issue is further developed in Sovereignty Concerns, *infra*.

VI. PREDICTED EFFECTS OF A FREE TRADE AREA ON THE U.S.

A. Effects on American Agriculture and Timber

Prognosticators predict that a free trade agreement would negatively impact American agriculture, especially if the Canadian government maintains policies such as regional subsidies directed at improving the Maritimes' perpetually poor economy. The potato farmers and lumbermen of northern Maine blame Canadian imports for their seemingly endless depression. After all, the U.S. deficit in trade with Canada is second only to that with Japan. The free trade talks have only heightened the suspicions. As Maine Senator William Cohen pontificates, "I greatly fear for the health and well-being of all U.S. industries potentially affected by a free trade agreement with Canada."[124] One Maine potato farmer blames Canadian government subsidies for his farm's failure. "It's us against their government, and our government is letting us wither on the vine."[125] In Aroostock County, 80 of 900 potato farmers went bankrupt in 1985. Local potato industry representatives foresaw 140 failures in 1986.

American objections to an FTA exist not only along the bor-

122. Macdonald, *supra* note 36, at 9.
123. *Background Information, supra* note 66, at 800.
124. *Reagan's Bid Upsets Farmers, supra* note 81.
125. *Id.*

der, but throughout the country. Arkansas hog farmers, Georgia sawmill owners, Missouri drug makers and California software companies all have complaints with Canada's trade practices.[126] Political realists recognize the extent to which these concerns are motivated not by a rational understanding of trade realities, but by xenophobia. The same ugly impulse directs Detroit's attention not toward its own outmoded and inefficient production methods, but against Japan and its government. Overproduction and generally depressed commodities markets probably have more to do with farm problems than with Canada. But American farmers peering over the northern border to see government assistance to lumbermen and farmers naturally direct their rage against not only Canada, but the Reagan Administration.

American lumber companies, "already bludgeoned by inexpensive Canadian imports"[127] have raised cain over the proposal. Lumber company and farmer lobbying nearly kept the Senate Finance Committee from approving "fast track" negotiations, considered a prerequisite to success. The 10-10 tie vote over fast track authority in the Senate Finance Committee indicates how strong is the sentiment that, in the words of Arkansas Senator David Pryor, "the Canadians are coming to us with unclean hands."[128] Administration officials counter farmers' fears, asserting that free trade negotiations will provide an opportunity to register grievances over Canadian practices. Perhaps the Administration also supported the recent shingle tariff partly to placate lumber industry protests over the proposed association with Canada.

B. Effects on American Corporations, Unions and Consumers

As in Canada, the main American beneficiaries of an FTA would be consumers, as greater variety and lower prices on lumber, produce and other products appear. American unions, who have seen their strength diluted in recent years due in part to foreign competition, would not welcome the agreement. American protectionists running the gamut from agriculture to Silicon Valley software companies will oppose any measure, unless it includes safeguards for their sectors (an exception might be the already integrated automobile industry). But protests would be even stronger against agreements covering only one industry. It is relatively easy for the American United Egg Producers to rally UEP members around a provision exempting eggs from free trade, and therefore aimed directly against the interests of egg farmers. The UEP's voice would not be heard as readily, were it railing against a com-

126. *Id.*

127. Finn, *supra* note 1, at 134.

128. *Reagan's Bid Upsets Farmers, supra* note 81.

prehensive agreement benefiting other sectors of America's economy.

The UEP President admits that a small percentage increase in U.S. shipments—while beneficial to U.S. producers—could devastate the Canadian egg industry.[129] But he does not consider that alarming. The long term concerns of Canada, and ultimately the United States, simply do not apply to its members. In explaining why a sectoral approach such as the AutoPact "simply will not work politically" in the U.S., one Canadian economist notes that "[t]here is not enough time nor is there the political patience in Washington to accommodate the deeply held fears of Canadians. [These] fears would give rise to different forms of safeguard requirements for almost any industry sector that you would choose to negotiate on."[130]

VII. PREDICTED EFFECTS ON THIRD COUNTRIES

A. Japan and the Common Market

Canada and the U.S. already trade more with one another than any other pair of nations. A free trade area would cause the two nations to trade more with each other and less with third nations, an effect that could devastate far-flung economies. In 1985, Common Market imports from Canada totaled $4.8 billion, while the EEC's Canadian exports totaled $7.4 billion. The EEC's Canadian sales would surely decline under the impact of a U.S.-Canada FTA. Japan, whose high standard of living exists largely because of its lucrative North American market, must entertain similar fears. Japanese imports from Canada total U.S. $4.2 billion, slightly less than its exports of $4.4 billion.[131] Already under assault by protectionists in Congress, Japan can only gaze across the Pacific with ironic opposition to an "expansion" in free trade that threatens to exclude it from its most vital export market.

B. Mexico

There is a definite precedent for Mexico-U.S. cooperation. Canada and the U.S. currently have no effective counterpart to the U.S.-Mexican Joint Committee on Commerce and Trade, or the

129. [Current Reports] 3 Int'l Trade Rep. (BNA) at 520 (April 16, 1986).

130. Beigie, *Macroeconomic Perspectives of Canada-U.S. Trade Agreements*, 10 CAN.-U.S. L.J. 131 (1985).

131. Of course, the Japanese and Koreans would suffer greatly if the United States and Canada started to buy automobiles and finished products from each other rather than from Mitsubishi and Hyundai. American auto manufacturers would probably only be slightly more competitive if their factories could produce for Canada as well as the U.S. However, if the price of Canadian raw materials decreased, this might have a positive impact. This would also be true of other manufactured items, such as electronics.

Border Industries Program. The best equivalent is the Joint Canada-U.S. Committee on Trade and Economic Affairs, operating at the cabinet level. Its infrequent meetings mainly concern balance of payments. More than Canada, Mexico has been compelled by poverty to seek greater trade with its powerful neighbor.

The Border Industries Program is essentially a U.S. tariff concession to encourage development south of the U.S. border. It permits certain plants (listed in sections 806.30 and 807 of the U.S. Tariff Schedule) to import U.S. products, reprocess them, and re-export them to the U.S., paying duty only on the value added in Mexico. In the 1970's, exports under the plan increased ten-fold, while plants multiplied five-fold. Over 130,000 Mexicans were employed by such plants, decreasing emigration, and diffusing population from overcrowded Mexico City.[132] This proved consistent with Mexico's Urban Development Plan. Former U.S. Ambassador to Mexico Abelardo Valdez strongly advocates an expanded program, perhaps in the form of a free trade zone extending 200 miles on either side of the border.

Mexico possesses both a large population and oil reserves, while the U.S. and Canada possess markets, technology and capital. But Mexican trade policy has traditionally been isolationist. Mexicans resent American domination and intrusion into their affairs. The country also sees itself as a spokesman for the developing countries, and so might feel that joining a U.S.-Canada arrangement would compromise its independence. In 1980, Mexico refused again even to join the GATT. President Portillo said "we must not allow that which is woven in one part of our development to be unwoven in another."[133] Mexico could have benefited by sharing with the U.S. tremendous energy reserves discovered during the 1970's. "[U]nmoved by U.S. energy security needs, viewing U.S. dependence on Mexican oil as a threat to its own sovereignty,"[134] Mexico limited exports of petroleum, emphasizing instead its own industrial development.

There is little reason to believe Mexico would quickly change its independent attitudes and policies to join a trilateral accord more extensive than the Border Industries Program. Nevertheless, the Reagan Administration will soon sign an agreement with Mexico setting up trade dispute resolution panels, and opening talks to curb trade and investment barriers.[135] Trade talks with Canada spurred the U.S. to seek similar agreements with Mexico.

132. Morrissy, *supra* note 46, at 348.

133. State of the Union Address by President José Lopez Portillo (Sept. 1980), *cited in* Morrissy, *supra* note 46, at 336.

134. Morrissy, *supra* note 46, at 339.

135. N.Y. Times, Oct. 7, 1987 at 25, col. 1.

C. Israel

The United States-Israel Free Trade Area came into effect in September of 1985. As a result of its FTA's with the EEC

and the U.S., Israel enjoys unique duty-free access to the two biggest markets in the developed world. Obviously, this has made Israel a most attractive site for manufacturing.[136] The EEC and the U.S. each bought about a third of Israel's exports in 1985. Access by means of the EEC to third parties (*e.g.*, Argentina and New Zealand) presents one of the larger benefits Israel derives from the agreement. A North American FTA would expand Israel's North American market still further. On the other hand, Canadian manufacturing concerns would have greater access to American consumers, perhaps displacing more distant Israeli suppliers.

Just as the United States and Canada did not negotiate an agreement free of reservations, the U.S.-Israel free trade agreement contains many exceptions among its 23 articles. Countervailing duty laws, escape clause proceedings, and anti-dumping legislation continue to be applied against Israel, as do Escape Clause Proceedings under Section 201. Before the President can invoke section 201 of the Trade Act of 1974 against Israel, the ITC must first determine that serious injury to U.S. producers arose from the reduction of tariffs due to the Israel-U.S. FTA. Furthermore, the Act contains rules of origin provisions, stating that goods Israel exports to the U.S. may not be the products of a third nation.

D. Lesser Developed Countries

A comprehensive Canada-U.S. pact might replace tariff concessions granted third world nations, such as the Generalized System of Preferences (GSP), or the Caribbean Basin Initiative (CBI).[137] If the GSP and CBI continue, however, this FTA might benefit such nations. A free trade area would permit "back-door" entry of goods into either the U.S. or Canada—possibly even from countries the United States, but not Canada, officially boycotts, such as Cuba. On the other hand, the continued commitment of the U.S. to the GSP, and its efforts to enhance integration of Lesser Developed Countries (LDCs) into the world trading system, may inhibit enhanced sectoral integration. For example, the GSP provides preferential treatment and a competitive advantage to LDCs in certain articles that Canada may also wish to export to the U.S.[138]

Another school of thought simply denounces the CBI and GSP

136. N.Y. Times, Oct. 12, 1987 at 26, col. 1.

137. *See generally* de Kieffer, *External U.S. Commitments Affecting Possible Additional Products for Sectoral Integration*, 10 CAN.-U.S. L.J. 101 (1985).

138. *Id.* at 103.

as chimeras, and so discounts any effect the Canada-U.S. accord might have on Lesser Developed Countries. Through the Caribbean Basin Initiative, the fragile economies of the Caribbean's smaller LDCs are theoretically permitted unreciprocated, duty-free access to the American market. Actually, at the CBI's birth, lobbyists gained exemption for every major industry, including textiles, footwear, luggage, and rum.[139] One pundit says that "Grenada is reduced to making hockey pucks right now. And, as soon as the Grenada hockey puck industry reaches a point where it is a threat to either Canada or the United States, hockey pucks will become exempt as well."[140] Although flawed, the CBI and the GSP enrich the economies of several Lesser Developed Countries. If the proposed pact between the U.S. and Canada causes the U.S. to renew its commitment to the CBI, as well as the GSP, then LDCs will of course benefit from the expanded market and renewed commitment. If not, then they may find themselves shut out of a new, more self-enclosed North American customs union.

VIII. STATUS OF THE MEASURE AND OTHER CONCERNS

If no agreement is reached before the end of President Reagan's term, the moment will have passed for this generation. The coincidence that conservative men of Irish extraction lead both nations may help achieve compromise, but leadership commitment is even more essential. One professor remarked in 1985 that, "if you made up a list of [Reagan's] ten top priorities. . . free trade wouldn't be on it. Gorbachev would be on it. Quaddafi would be on it. But not free trade with Canada."[141] Reagan's need for a foreign policy success has impelled him to pursue the free trade measure. Events as unforeseeable and unimaginable as the Iran-Contra affair forced the President to look elsewhere for foreign policy success, and forced cynics such as this writer to reassess an FTA's chances.[142] Ironically, it also diminished the President's influence in Congress, and as he fades into "lame-duck-dom" the chances for any sectoral integration fade with him.

We have already noted the parallel difficulties of the President's Canadian counterpart, which have been only partly alleviated by the Prime Minister's victory at Meech Lake. Canadian politics forced Mulroney to reassess his unconditional support of the mea-

139. de Kieffer, Remarks at the Conference on the Legal Aspects of Sectoral Integration Between the United States and Canada (April 19-21, 1985), *reprinted in* 10 CAN.-U.S. L.J. 108 (1985) [hereinafter cited as Remarks].

140. *Id.*

141. [Current Reports] 3 Int'l Trade Rep. (BNA) at 520 (April 16, 1986).

142. When I began writing this paper in 1986, I intended to title it *The U.S.-Canada Free Trade Area: A Victim of Special Interests.*

sure, leading him to oppose, for domestic political reasons, a tariff that Reagan was forced to enact for domestic political reasons. But this did not impel him to renounce his support for free trade. In March he announced that Canada's "highest priority . . . [is to end] the threat to Canadian industry from U.S. protectionists who harass and restrict our exports through the misuse of trade remedy laws."[143] Prime Minister Mulroney has sold an FTA as if it were snake-oil. During parliamentary debate in March 1987, the P.M. said that if Canada were to capture one percent of the government procurement market in North America, it could result in the creation of 75,000 new Canadian jobs.[144]

Still, not everyone has bought into the proposal. Opposition Liberal leader John Turner grumbled that Canadians knew nothing more about their Government's negotiating stand in March of 1987 than they did two years before. "The government has no mandate to negotiate a free trade agreement. There was no mention of this during the [1984] election campaign. . . I do not believe we would feel comfortable in Fortress North America."[145] Turner introduced a motion calling for a less inclusive agreement that would limit use of U.S. contingency protection laws, restore the status quo with respect to lumber, and demand the cessation of "harrassment" of Canadian agriculture, energy, fish, potash, and steel.

Trade Minister Patricia Carney promised to send a first draft of the final bilateral agreement to Canadian television by the end of June for broadcast on the Canadian television program "Question Period." She also outlined broadly Canada's stand on specific issues: regional development programs, cultural policies, and social programs would not be open to negotiations. Tariffs, however, were negotiable

> because history has shown that tariff reductions have benefited the Canadian economy. Even the Canada-U.S. auto pact includes provisions for tariff reductions, and duties on vehicles have dropped from 17.5 percent to 9.2 percent . . .
>
> The negotiations must also deal with the proliferation of non-tariff barriers. Although some of these barriers are transparent. . . many others are unclear, using technical or health standards for protectionist rather than legitimate purposes.
>
> Subsidies will also play a key role. . . [a]lthough some subsidies are necessary for regional development, under current trade laws it is impossible for the Canadian government to know which subsidies can be used without spurring American trade actions.[146]

143. [Current Reports] 4 Int'l Trade Rep. (BNA) at 368 (March 18, 1987).
144. *Id.*
145. *Id.* at 369.
146. *Id.*

A. One Model

The shape of an ideal accord is open to speculation. The University of Maryland's Paul Wonnacott[147] suggests that an ideal agreement would:

1. Phase out tariffs on all non-agricultural, and some agricultural products over a five-to-ten year period;
2. Narrow U.S.-Canadian differences on trade remedy laws, and eliminate Canadian auto duty rebates;
3. Provide equal access to national government procurement, with limited access to provincial and state procurement, and replace "Buy America/Buy Canada" restrictions with "Buy North America" language;
4. Generate freer competition in services like finance and transportation;
5. Agree not to screen foreign investment simply to create a preference for local producers; and
6. Create a permanent bilateral commission, with authority limited to advising the two governments on settlement of future disputes.

Wonnacott proclaims that such a pact would raise the Canadian Gross National Product by over 5%, and would expand U.S. exports by almost 7%. One marvels at the breadth of these six simple points, omitting only the cultural arena so sacrosanct to Canadians. One also wonders how painfully disruptive a five year transition would be. A thorough examination of the elements which will make up the accord more properly awaits Congress' consideration of the October Proposal.

B. Canadian Sovereignty Concerns

Academics may debate theoretical benefits and side-effects, but political considerations will ultimately dictate whether the two governments ultimately pass the measure. Particularly from the Canadian side, the overriding issue is whether Canada can or should endure a possibly extensive infringement of its sovereignty. Canadian critics raise essentially three fears:

1. That Canada's policies might have to coincide with America's;
2. That, if Canada indeed stands to gain more from the agreement, it would also stand to lose more if the agreement were later terminated. America could thereby compel Canada to support its foreign policy; and
3. That the agreement would diminish Provincial contact across Canada, and hence, Canadian nationhood.

The final agreement will certainly address these concerns, per-

147. P. WONNACOTT, THE UNITED STATES AND CANADA: THE QUEST FOR FREE TRADE (Instit. for Int'l Economics Study), *quoted in* [Current Reports] 4 Int'l Trade Rep. (BNA) at 344 (March 11, 1987).

haps with a clause specifically guaranteeing the independence of Canadian and American foreign policies. Toronto and Vancouver's cultural sovereignty have been ensured, at the expense of Hollywood and Madison Avenue. But it may be more difficult to guarantee American forebearance of the use of compulsion against Canada, since no one can foresee future crises, nor bind unborn generations. Over the last twelve years, however, withdrawal from the AutoPact has not been used to threaten Canada. By way of analogy, even with its loud Libyan boycott, the Reagan Administration has quietly granted exemptions to permit certain American oil companies to operate in that country. The U.S. would certainly be reluctant to abrogate an arrangement as valuable as an FTA. Besides, Canada is no Libya.[148]

C. Inter-Canadian Sovereignty Issues

While Canada is not Libya, it is also not the United States, and serious concerns exist as to whether the country can unite in agreement on such a sweeping measure. Some observers suggest free trade would affect the provinces unevenly. "Ontario and Québec provinces have the largest number of protected industries," and hence, the most people protesting the proposed FTA. Meanwhile, consumers in British Columbia pay an extra $301 million a year for goods and services because of protective tariffs that benefit Ontario and Québec more than themselves.[149]

Québec, whose electorate once "rebelled" against domination by English-speaking Canadians, might have seemed the most likely province to resist an accord. During the mid-1970's, rumblings of independence reportedly caused 100 major companies, including the Bank of Montreal, to relocate.[150] The leader of that near mutiny, former Premier René Lévesque, has since said that free trade, a Québec welcoming foreign investment, and less government spending are the real hope of Québécois nationalism: "An independent Québec made up of a new generation of go-getters, of marketing connoisseurs roaming throughout the world, needs a Québec completely opened up."[151] Lévesque was forced from office as provincial premier largely because unemployment in Québec had reached 13.9% during his tenure. When writing his memoirs, Lévesque decided that free trade rather than isolationism was the key to success for Québec and for Canada.[152] Still, Québec industries (mainly agriculture and natural resources) are likely to drill loop-

148. Canada, after all, has not abandoned NATO, despite the North-West Passage/Nuclear Submarines issue.
149. Finn, *supra* note 1, at 134.
150. *Id.*
151. *Id.* at 136.
152. *Id.* at 134.

holes through any FTA agreement. Bilingualism, forced on Canada by Québec, may prove one of the most resistant non-tariff barriers dividing the two nations, despite the current Québec Premier's enthusiasm for a free trade agreement.

Mulroney, at least, realizes that preservation of his nation lies not in struggle with the monster to the south, but in forging free trade with it:

> [The free trade] measure is designed on behalf of all people of Canada, from the people who are hurting in Alberta to the people of Newfoundland and the people of the interior of British Columbia who need help. This measure is designed to ensure that those areas of the country get their kick at the can through enhanced bilateral trade.[153]

Opinions vary as to whether the Meech Lake Accord will strengthen Prime Minister Mulroney's hand, by settling some inter-Canadian problems, or weaken him, by granting the provinces increased autonomy.

IX. THE GATT—WILL IT APPROVE, AND WHO CARES ANYWAY?

The General Agreement on Trade and Tariffs (GATT), an organization devoted to free trade among its member nations, approves of free trade arrangements, considering them steps down the path to fully free trade. Article XXIV of the GATT agreement provides for GATT approval of specific FTA's, upon fulfillment of four conditions:

1. Members of the free trade area must eliminate virtually all tariffs with each other and the agreement should cover substantially all trade between them;
2. The free trade agreement must be fully implemented within a reasonable length of time;
3. Customs union tariffs applied against third countries must be no higher than before the agreement; and
4. The agreement should contain reasonably explicit rules of origin.

The proposed American-Canadian accord seems to satisfy these vague GATT standards. Of course, the GATT does not have any power to enforce its criteria; there is no GATT jail. But since the two countries are both signatories of the GATT, negotiators for both the U.S. and Canada will undoubtedly take article XXIV into account when shaping the final arrangement.

In the past, GATT has been generous about approving such arrangements. The Lomé convention and Africa Caribbean Pacific (ACP)-EEC Agreement were approved, though they clearly did not

153. [Current Reports] 4 Int'l Trade Rep. (BNA) at 369 (March 18, 1987).

meet these restrictions. In contravention of the GATT articles requiring non-discrimination in the granting of tariff preferences, the United States has developed differing levels of tariffs, creating in effect more than seven different classes of trading partners. The Israel-U.S. FTA does not adhere strictly to the GATT, since arguably it does not cover "substantially all trade."[154] Eastern European nations do not have Most Favored Nation status, in contravention of the GATT. The latest round of steel negotiations exemplify the many special arrangements with different countries. Different nations are also treated differently with regard to Section 201 Escape Clause proceedings. The GATT was not even notified when the U.S. and Canada signed the 1965 AutoPact (though the GATT later issued a waiver).[155] Of course, the United States is not alone in ignoring the GATT. The European Economic Community does not find it necessary to have the GATT approve of its preferential treatment areas. One economist suggests that:

> outside of law review articles, Article XXIV has been moribund, because the GATT itself is an institution of gentlemen's agreements more than of confrontation. . .
>
> I think that we are unlikely to see serious challenges made to sectoral integration between the United States and Canada as regards the GATT. . .[t]he fact is, much of the sectoral integration will be done as a matter of practice. . .[and] enhanced by capital flows and by the way companies, rather than countries, conduct their business.[156]

X. CONCLUSIONS

If such a complex and difficult agreement can be successfully implemented between the U.S. and Canada, it would certainly encourage free trade agreements with other trade partners, on this continent and others. In North America, an invitation to Mexico would be a logical next step, for Mexico possesses two "complementary assets" that Canada and the U.S. lack: oil and cheap labor.

Former U.S. Ambassador to Australia Brock has proposed that an FTA be established between the U.S. and ASEAN countries. Perhaps New Zealand and Australia (which already have special arrangements with Canada) would want to join in a sort of American sponsored commonwealth, though the recent abrogation of ANZUS calls this into question (the United Kingdom, which would have to sacrifice EEC commitments, would probably decline). Some observers are more cautious:

154. Herzstein, *supra* note 108, at 134.

155. Decision of the GATT Contracting Parties on the Canadian/United States Agreement on Automotive Products, GATT Doc. L/12528, 13th Supp. BISD 112 (July 1965), *reprinted in* R. FOLSOM, *supra* note 29, at 810.

156. de Kieffer, Remarks, *supra* note 139, at 109.

> Forty years of the GATT, seven rounds of multilateral trade negotiations, and greatly increased economic interdependence have not, with few exceptions, led to sound two-way trade relations between the U.S. and other nations which can form the foundations of further trade areas (beyond U.S.-Israel, and U.S.-Canada). My own view is that this depends on the perceived success of capitalism among third world nations, the perceived wisdom of such measures among an apathetic American electorate, and of course the vitality of the FTA's themselves.[157]

Despite current progress and good intentions, political realities foreclose the possibility of a fully integrated North American Common Market. It is thoroughly unreasonable in a democracy to even hope that special interests will not speak up and be heard. Nor, in a democracy, is it desirable that they remain silent, much as this would increase government efficiency. If the perspective of the economist always favors free trade, politicians must argue for sovereignty, independence and uniqueness as national goals (even Canadian intellectuals converse openly of the dangers of "Yankee Imperialism"). A fickle Canada might cause Congress to table the entire topic of freer bilateral trade, especially since it is already opposed by numerous special interests. But clearly uniqueness must be based on something other than sheltered inefficiency. Mulroney's Conservatives seem to concur in this philosophy.

Canada's uniqueness transcends its inefficiency. Common wisdom (Yankee wisdom, anyway) proclaims that no two nations could possibly be more similar, a belief many in Canada remain anxious to disprove. Outsiders often consider Canada an American appendage. The Soviets call their "think tank" on America "the Institute of U.S.A. and Canada." But in fact, it has long been the most salient feature of Canada's identity that it is not American. From 1776, when Tory dissenters fled north to live their lives under the Crown, through the years of the underground railroad, and continuing with the influx of Vietnam draft resisters in the 1960's, Americans who dissent from their own government's policies have found a haven there. The people and government of Canada frequently maintain attitudes at variance with those of its powerful southern neighbor. French became a national language of Canada in part because Québec's culture distinguishes Canada from the U.S. more than any other feature of Canadian life. A longing not to be perceived as American makes Canadians leery of any association such as a Free Trade Area, a feeling that may combine with old-fashioned American special interest lobbying to emasculate or defeat the proposal.

This paper begins with the assumption that virtually all academics accept "as a given" the necessity for and value of free trade.

157. Herzstein, *supra* note 108, at 135.

Economics Professor Mel Watkins of the University of Ontario is a rare exception:

> To be an economist and to oppose free-trade is tantamount to heresy. Nothing is more central to orthodox economic theory than the case for free-trade based on comparative advantage without impediments from tariffs or other barriers. . . But theory hardens into ideology, and intellectual paradigms become monopolies of knowledge whose practitioners are intolerant of dissent. (I have tenure and do not have to worry about my heresy).
>
> It is, nevertheless, intellectually legitimate to have doubts and to dissent. In fact, there have always been doubters and dissenters amongst economists about free-trade. Nor is it politically illegitimate to have such doubts. In the present election campaign in Ontario, the three major political leaders are all opposed to free-trade.
>
> Economists need to remind themselves that the mighty John Maynard Keynes published an article in 1933. . .entitled *National Self-Sufficiency*, in which he questioned the virtues of interdependence. His subsequent role at Bretton Woods. . .may reflect a change of mind, or it may signify the inevitable corruption of the intellectual by power.[158]

The question "is free trade good?" begs another question: "good for whom?" For wood chippers producing shakes and shingles in the Pacific Northwest, America's experience with free trade was a disaster and the retaliatory tariff, heaven-sent. Two thousand jobs reportedly vanished in the face of Canadian competition. Since the shingle tariff, "shingle mills along the Olympic Peninsula have been hiring more workers, competing with each other for wood and turning away potential customers for their products while they raise their selling prices."[159] The French say, "we have our hearts on the left, and our pocketbooks on the right." For manufacturers, workers and consumers, the effects of free trade differ, as they also differ by sector. In this part of the twentieth century, people have become intensely conscious of their own interests in the making of important political decisions. Few see anything wrong in ignoring the collective, national good when making such demands. Any legislation that passes Congress and Canada's Parliament will more reflect angry voices shouted from the galleries and the voices of lobbyists alert to their own interests, than the quieter voice of long-range national interests.

When considering the likelihood of successful realization of a free trade agreement, one must consider the American public's complete lack of interest in the issue. As one Maine farmer said, the only way for the issue to command national attention "would be

158. Watkins, *The Case Against United States-Canada Free Trade*, 10 CAN.-U.S. L.J. 89, 90-91 (1985).

159. Seattle Times, June 20, 1986, at 1, col. 3.

to secede and call ourselves freedom fighters."[160] Potato farmers in Maine simply do not command much attention from a public that bought over two million tickets to the movie *Rambo: First Blood,* President Reagan's recent attentiveness to the free trade issue notwithstanding. Yet the free trade measure's importance to the future of all North Americans should not be underestimated. It is a miracle that some sort of agreement now seems more than likely.

160. *Reagan's Bid Upsets Farmers, supra* note 81.