

January 2010

## Canada-United States Trade Policy beyond North America

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### Recommended Citation

Elliot J. Feldman, Cyndee Todgham Cherniak, James P. McIlroy, and Donald B. Cameron Jr., *Canada-United States Trade Policy beyond North America*, 34 Can.-U.S. L.J. 437 (2008)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol34/iss2/20>

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# CANADA-UNITED STATES TRADE POLICY BEYOND NORTH AMERICA

*Session Chair – Elliot J. Feldman*  
*Canadian Speaker – Cyndee Todgham Cherniak*  
*Canadian Speaker – James P. McIlroy*  
*United States Speaker – Donald B. Cameron, Jr.*

## CANDIAN SPEAKER

*Cyndee Todgham Cherniak\**

MS. CHERNIAK: Good afternoon. I am going to talk about Canada's trade policy with respect to the Americas, but from a legal point of view, not from a government or government relations point of view. There is a document that can be located on the trade website entitled *Seizing Global Opportunities, a Global Commerce Strategy for Securing Canada's Growth and Prosperity*.<sup>1</sup> It's about a fifteen-page document. It does not say very much, but you can go look at it at your leisure. It does say that the Canadian government is going to support Canadian companies who are engaged in global commerce, which is your bread-and-butter-type of comment for companies that are selling or investing abroad and have formed partnerships with sup-

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<sup>1</sup> GOVERNMENT OF CANADA, *SEIZING GLOBAL ADVANTAGE: A GLOBAL COMMERCE STRATEGY FOR SECURING CANADA'S GROWTH & PROSPERITY* (2008), available at <http://www.international.gc.ca/commerce/assets/pdfs/GCS-en.pdf>.

pliers, producers, distributors, and innovators located around the world.<sup>2</sup> The Canadian government is going to do what it can to help those companies succeed and prosper in those foreign jurisdictions,<sup>3</sup> and one area that is a target area is the Americas. They say in that same document that they are going to boost Canadian commercial engagement and global value chains,<sup>4</sup> secure competitive terms of access to global markets,<sup>5</sup> increase FDI on a two-way basis,<sup>6</sup> and forge stronger links in the science and technology community and innovation networks.<sup>7</sup>

The reason for this is the concern in Canada of growing protectionism in the United States and around the world.<sup>8</sup> But, most importantly, in our number one trading partner.<sup>9</sup> If there is greater protectionism and policies of protectionism, we need to diversify. Just as my grandfather used to say to me in terms of investing, "diversify, diversify, diversify." So what we're doing at this point in time is looking around and seeing whether or not there are any opportunities to diversify because if there is protectionism, Canadian companies will survive if they have opportunities elsewhere and are not totally reliant on only one trading partner. This is where the Americas come in as a possibility.

I am going to discuss the free trade agreements, bilateral investment treaties, science and technology agreements, double taxation tax treaties, and air agreements that we've entered into recently and in the past few decades, and ask whether we have a trade policy that's focusing on the Americas or not. I think the conclusion is we are hot and cold with respect to the Americas. We are doing some things and we are being aggressive, but if you dig deeper on some of the other things, I think Canada can be doing more than it is doing, and there are opportunities to add to the agenda.

Looking at the free trade agreements in the Americas and those entered into by Canada and the United States, Canada currently has two free trade agreements in effect, Chile<sup>10</sup> and Costa Rica.<sup>11</sup> We also have agreements

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<sup>2</sup> See *id.* at 4.

<sup>3</sup> See *id.* at 5.

<sup>4</sup> *Id.* at 4.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See FRASER INST., THE FRASER INSTITUTE'S ANNUAL SURVEY OF CANADIAN EXPORTERS: GROWING CONCERN ABOUT PROTECTIONIST SENTIMENT IN THE UNITED STATES (2004), available at [http://www.fraserinstitute.org/Commerce.Web/product\\_files/FA-tradebarriers-final.pdf](http://www.fraserinstitute.org/Commerce.Web/product_files/FA-tradebarriers-final.pdf)

<sup>9</sup> See Stephen C. Nadler, *Navigating the Litigation Landscape in Canada: Securing Evidence and Enforcing Judgments*, 17 FEB. BUS. L. TODAY 41, 41 (2008).

<sup>10</sup> See Canada, Foreign Affairs and International Trade Canada, Canada-Chile Free Trade Agreement, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/index.aspx> (last visited Sept. 29, 2009).

<sup>11</sup> See Canada, Foreign Affairs and International Trade Canada, Canada-Costa Rica Free

under negotiation with the Dominican Republic,<sup>12</sup> Honduras,<sup>13</sup> El Salvador,<sup>14</sup> Guatemala,<sup>15</sup> and Nicaragua,<sup>16</sup> and the CARICOM countries.<sup>17</sup> When you look at the United States, there is a fair bit of overlap. A number of the agreements that we have under negotiation, the United States has already entered into.<sup>18</sup> What is particularly interesting is what the United States has under negotiation, or I like to think renegotiation, right now because there are side agreements with Panama<sup>19</sup> and Colombia,<sup>20</sup> but they have not been put through Congress yet.<sup>21</sup> There is a lot of overlap on the countries that we are both looking at in the Americas, and I think that Canada is now going to run a little bit further ahead because of the CARICOM countries and because Colombia will likely be put into effect in Canada.<sup>22</sup>

We started out with the Canada-Chile Free Trade Agreement.<sup>23</sup> That was Canada's second or third,<sup>24</sup> if you say that the Canada-United States Free Trade Agreement and the North American Free Trade Agreement (NAFTA) are two separate agreements, that is why I say second or third, and it is a comprehensive free trade agreement. It was really entered into because Chile was hopefully going to join NAFTA. And there were some interesting provisions in that agreement that have not been carried forward into subsequent free trade agreements that Canada has negotiated, but I thought that I would just point them out because it is something that Canada thinks about in its free trade agreement negotiations.

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Trade Agreement, <http://www.dfait-maeci.gc.ca/trade-agreements-accords-commerciaux/agr-acc/costarica/index.aspx?lang=en> (last visited Sept. 29, 2009).

<sup>12</sup> See Canada, Foreign Affairs and International Trade Canada, Canada-Dominican Republic-Free Trade Agreement Negotiations, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/dominican-dominicaine.aspx> (last visited Sept. 29, 2009).

<sup>13</sup> See *id.*

<sup>14</sup> See *id.*

<sup>15</sup> See *id.*

<sup>16</sup> See *id.*

<sup>17</sup> See Canada, Foreign Affairs and International Trade Canada, Canada-Caribbean Community (CARICOM) Free Trade Negotiations, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/caricom.aspx> (last visited Sept. 29, 2009).

<sup>18</sup> See Office of the United States Trade Representative, Free Trade Agreements, <http://www.ustr.gov/trade-agreements/free-trade-agreements> (last visited Sept. 29, 2009).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See Canada-Caribbean Community Free Trade Negotiations, *supra* note, at 17

<sup>23</sup> See generally Canada-Chile Free Trade Agreement, *supra* footnote 10 (indicating that the Agreement was Canada's first Free Trade Agreement with a South American country).

<sup>24</sup> See Canada, Foreign Affairs and International Trade Canada, Negotiations and Agreements, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agracc/index.aspx?lang=en#free> (last visited Sept. 29, 2009).

With respect to the Canada-Chile Free Trade Agreement, I do not think Americans would recognize this. We are not going to have anti-dumping cases or trade remedy cases between each other with respect to anti-dumping or countervailing duties.<sup>25</sup> That has been carved out in the free trade agreement.<sup>26</sup> Additionally, there is no dispute settlement mechanism in that agreement as there is in the NAFTA.<sup>27</sup> The other thing that is not in that agreement is that there is no prohibition of duty drawback.<sup>28</sup> NAFTA is the only free trade agreement Canada has that prohibits duty drawback from duty deferral.<sup>29</sup> The interesting thing for the Canada-Chile Free Trade Agreement and subsequent free trade agreements is that in the Rules of Origin, there continues to be the prohibition of transshipment.<sup>30</sup> This poses a problem when the United States is entering into similar free trade agreements because it would make sense that if a shipment was coming up from Chile or Peru or Colombia, goods would enter into the commerce of the United States and then be railed into Canada as opposed to the other way around.<sup>31</sup> The Rules of Origin do not allow preferential treatment if the transshipment occurs through the United States,<sup>32</sup> and that's something Canada needs to consider, and possibly change, with the Americas free trade agreements that they are entering into.

The Canada-Costa Rica Free Trade Agreement was entered into force in November 2002.<sup>33</sup> While it is a comprehensive free trade agreement, there are a number of chapters of NAFTA that are not in the Costa Rica Agreement. What I really want to discuss is the Canada-Peru Free Trade Agreement and the Canada-Colombia Free Trade Agreement, which are comprehensive free trade agreements, but each of them have some unique things that I just would like to point out. There is no IPR chapter in either of these two

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<sup>25</sup> See Daniel Daley, *Introductory Note*, Canada-Chile: Free Trade Agreement, Dec. 5, 1996, 36 I.L.M. 1067, 1069 (1997); see also *id.* at 1143.

<sup>26</sup> See *id.*

<sup>27</sup> See generally Andrea Miller, *The United States Antidumping Statutes: Can a Trade Agreement with The United States Be Both Free and Fair? A Case Study of Chile*, 54 CATH. U. L. REV. 627, 641 (2005) ("instead of using antidumping measures, Chile and Canada protect their domestic industries through the use of safeguard measures).

<sup>28</sup> See Daley, *supra* note 25, at 1070.

<sup>29</sup> See generally North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, 300 (article 303 restricts drawback and duty deferral programs).

<sup>30</sup> See Canada-Chile: Free Trade Agreement, Dec. 5, 1996, 36 I.L.M. 1067, 1099 (1997).

<sup>31</sup> See generally *id.* at 1094 (to get preferential treatment, goods must be wholly obtained or produced entirely in the territory of one or both of the Parties to the agreement); see also *id.* at 1098 (the goods may not undergo further production or any other operation while passing through the United States, other than unloading, reloading or any other operation necessary to preserve it in good condition or to transport the good to Canada).

<sup>32</sup> See Canada-Chile: Free Trade Agreement, *supra* note 30, at 1094.

<sup>33</sup> See Canada-Costa Rica Free Trade Agreement, *supra* note 11.

free trade agreements.<sup>34</sup> We are not covering IPR and are not really discussing it except, in the preamble we have a commitment to TRIPS, but we have no chapter.<sup>35</sup> We have inserted within the agreement chapters on labor and employment.<sup>36</sup> We also have a side agreement in addition to the chapters that are contained within the free trade agreement.<sup>37</sup> With respects to dispute settlement provisions there is a carve-out in the chapters on labor and employment. The dispute settlement mechanism within the free trade agreement does not apply to any dispute that arises under those provisions. Those are handled under the dispute settlement mechanisms in the side agreements.

There is a procurement chapter in both of these agreements.<sup>38</sup> What's interesting about that is that Peru is not a signatory to the World Trade Organization (WTO) agreement on government procurement<sup>39</sup> and neither is Colombia,<sup>40</sup> so these countries are being brought into government procurement on a bilateral-by-bilateral basis. Hopefully, when they get to the multilateral, the WTO, they will think about that a little bit more when there is an opportunity to be brought into the fold, but the world is not going to end, and their commerce is not going to fall apart by entering into a procurement chapter in

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<sup>34</sup> See Hon. Percy E. Downe, Senator, Statement to the Senate Regarding the Canada-Peru Free Trade Agreement Implementation Bill, (Jun. 9, 2009), *available at* [http://www.liberalsenateforum.ca/In-The-Senate/Statement/5240\\_CanadaPeru-Free-Trade-Agreement-Implementation-Bill](http://www.liberalsenateforum.ca/In-The-Senate/Statement/5240_CanadaPeru-Free-Trade-Agreement-Implementation-Bill); *see generally* Foreign Affairs and International Trade Canada, Canada-Colombia Free Trade Agreement, Table of Contents, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/Colombia-colombie/can-Colombia-toc-tdm-can-colombie.aspx> (last visited Sept. 29, 2009) (there is no Intellectual Property Rights chapter in the table of contents to the agreement).

<sup>35</sup> See Foreign Affairs and International Trade Canada, Canada-Colombia Free Trade Agreement, Preamble, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/Colombia-colombie/preamble-preambule.aspx?lang=eng> (last visited Sept. 29, 2009); *see also* SICE: Foreign Trade Information System, Canada-Peru Free Trade Agreement, Preamble, [http://www.sice.oas.org/TPD/AND\\_CAN/Final\\_Texts\\_CAN\\_PER\\_e/index\\_e.asp](http://www.sice.oas.org/TPD/AND_CAN/Final_Texts_CAN_PER_e/index_e.asp) (last visited Sept. 29, 2009).

<sup>36</sup> See Canada-Colombia Free Trade Agreement, *supra* note 34 at Table of Contents.

<sup>37</sup> See News Release, Foreign Aff. and Int'l Trade Can., Minister Day Introduces Legis. to Implement Colum. and Peru Free Trade Agreements (Mar. 26, 2009), *available at* [http://w01.international.gc.ca/MinPub/Publication.aspx?lang=eng&publication\\_id=386972&docnum=78](http://w01.international.gc.ca/MinPub/Publication.aspx?lang=eng&publication_id=386972&docnum=78).

<sup>38</sup> See Canada-Colombia Free Trade Agreement, Table of Contents, *supra* note 37; *see also* SICE, *supra* note 35.

<sup>39</sup> See *generally* Foreign Affairs and International Trade Canada, Parties to the Agreement, [http://www.international.gc.ca/about-a\\_propos/results-resultats.aspx?cx=007661858624964228382%3Az2cu4sbyz3i&cof=FORID%3A11%3BNB%3A1&ie=UTF8&q=WTO+agreement+on+government+procurements&sa=Search#1134](http://www.international.gc.ca/about-a_propos/results-resultats.aspx?cx=007661858624964228382%3Az2cu4sbyz3i&cof=FORID%3A11%3BNB%3A1&ie=UTF8&q=WTO+agreement+on+government+procurements&sa=Search#1134) (last visited Sept. 29, 2009) (Peru is absent from the list of countries that are parties to the Agreement on Government Procurement).

<sup>40</sup> See *generally id.* (Colombia is absent from the list of countries that are parties to the Agreement on Government Procurement).

a free trade agreement. So there will be some valuable lessons learned through the free trade agreement process.

The Canada-Colombia Free Trade Agreement is going to have a little bit more difficulty getting through the House of Commons because it's opposed by the NDP,<sup>41</sup> and because the United Steel Workers Canadian Director came out last week strongly opposing the Canada-Colombia Free Trade Agreement.<sup>42</sup> It is on our new model. Canada-Colombia is a precedent that I like to look at, or the one that I'm looking at these days to see what has changed and what has evolved because it has been a while since Canada negotiated a comprehensive free trade agreement. So it might be the new model especially for dealing with the developing countries in the Caribbean.

Just a few notable provisions are that the goods and tariff elimination schedules go up to seventeen years in the Canada-Colombia Free Trade Agreement.<sup>43</sup> In fact, they list some items as saying "E" items are excluded from any tariff reductions and any tariff eliminations.<sup>44</sup> I went looking for the "E's" and I found poultry,<sup>45</sup> some cheese,<sup>46</sup> some milk products,<sup>47</sup> and chocolate ice cream.<sup>48</sup> I do not think that I caught all the "E's" in the elimination schedule, but there are some items that are off limits.

The other thing that is very interesting in the goods chapter is it allows for increases in tariffs, so if Canada or Colombia agrees to faster elimination, they can bump it back up, and there is a provision that allows a bump-up to a previous tariff level.<sup>49</sup> There is a special safeguard transition period of ten

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<sup>41</sup> See NDP, Peter Julian: Member of Parliament Burnaby-New Westminster, Report of The Standing Committee on International Trade June 2008 Canada-Colombia Free Trade Agreement, <http://peterjulian.ndp.ca/node/750> (last visited Sept. 19, 2009).

<sup>42</sup> See Press Release, United Steelworkers, Steelworkers call on Liberals to Refuse Support for Harper's Colombia Trade Deal, Sept. 11, 2009, available at <http://www.usw.ca/program/content/6077.php>.

<sup>43</sup> Foreign Affairs and International Trade Canada, Canada-Colombia Free Trade Agreement, Chapter 2: National Treatment and Market Access for Goods, Annex 203, Section A-Tariff Schedule of Canada, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/Colombia-colombie/chapter2-chapitre2.aspx#B> (last visited Sept. 29, 2009).

<sup>44</sup> See News Release, Prime Minister of Canada Stephen Harper, Backgrounder: Canada's Free Trade, Labour Cooperation and Env't Agreements with Panama (Aug. 11, 2009), available at <http://www.pm.gc.ca/eng/media.asp?id=2731>.

<sup>45</sup> *Id.*

<sup>46</sup> See *id.*

<sup>47</sup> See *id.*

<sup>48</sup> See *id.*

<sup>49</sup> See Foreign Affairs and International Trade Canada, Canada-Colombia Free Trade Agreement, Chapter 2: National Treatment and Market Access for Goods, Article 203: Tariff Elimination, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/Colombia-colombie/chapter2-chapitre2.aspx> (last visited Sept. 29, 2009).

years,<sup>50</sup> so that if there is a surge that leads to serious injury because of the tariff reduction, if the safeguard case is brought within ten years for the Canada-Colombia, or seven years for Canada-Peru, special safeguards can be put in place.<sup>51</sup>

One interesting thing is that the evolution of the Chapter 11 provisions is different from the evolution of the Chapter 11 provisions that you see in the United States free trade agreements that we are writing in parallel to some of the language that's being used. It is quite interesting that when you compared the two, we are both trying to make improvements to some of the language where quite frankly, Canada has not adopted the United States language, and I wonder what does that mean for harmonization of a later point in time?

There's the Canada-CARICOM Free Trade Agreement that is under negotiation, and right now it is, I would not say that it is stalled, but there are some difficulties with that negotiation.<sup>52</sup> I'm looking forward to being able to effect some travel provisions.

One important thing is that Canada obtains the MFN waiver and WTO for CARICOM.<sup>53</sup> It is up in 2011,<sup>54</sup> and Canada has indicated that that waiver will not be renewed, so it kind of makes it something the free trade agreement focuses on.<sup>55</sup> Very recently, Dr. Baugh from Jamaica came up and said this has to be a development agreement.<sup>56</sup> We have to have more development type provisions in this agreement different from what Canada has negotiated in the past, and there is some hesitation on the part of the Caribbean

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<sup>50</sup> See Foreign Affairs and International Trade Canada, Canada-Colombia Free Trade Agreement, Chapter 7: Emergency Action and Trade Remedies, Article 707: Definitions, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/Colombia-colombie/chapter7-chapitre7.aspx> (last visited Sept. 29, 2009).

<sup>51</sup> See *id.*; see also Foreign Affairs and International Trade Canada, Canada-Peru Free Trade Agreement, Chapter VII: Emergency Action and Trade Remedies, Article 707: Definitions, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/chapter-chapitre-7.aspx> (last visited Sept. 29, 2009).

<sup>52</sup> See Foreign Affairs and International Trade Canada, Ongoing Negotiations, CARICOM, [http://www.international.gc.ca/trade-agreements-accords-commerciaux/cimar-rcami/2009/03\\_on-nc.aspx](http://www.international.gc.ca/trade-agreements-accords-commerciaux/cimar-rcami/2009/03_on-nc.aspx) (last visited Oct. 9, 2009).

<sup>53</sup> See Government of Canada, Highlights, WTO Renews Canada's Caribbean Waiver to Assist Commonwealth Caribbean Countries, [http://www.canadainternational.gc.ca/guatemala/highlights-faits/whats\\_new-quoi\\_de\\_neuf\\_8546.aspx?lang=eng](http://www.canadainternational.gc.ca/guatemala/highlights-faits/whats_new-quoi_de_neuf_8546.aspx?lang=eng) (last visited Oct. 9, 2009).

<sup>54</sup> See Office of Trade Negotiations Caribbean Community (CARICOM) Secretariat, CARICOM-Canada, Background to CARICOM's Trade Relationship with Canada, [http://www.crrm.org/index.php?option=com\\_content&view=article&id=51&Itemid=121&0872a8d70c6252b77261d45b4779477d=c2165ec8c43eefc92ad28e87589df66b](http://www.crrm.org/index.php?option=com_content&view=article&id=51&Itemid=121&0872a8d70c6252b77261d45b4779477d=c2165ec8c43eefc92ad28e87589df66b) (last visited Oct. 9, 2009).

<sup>55</sup> See Peter Richards, *Region Cautious on Free Trade with Canada*, INTER PRESS SERV. NEWS AGENCY, Apr. 6, 2009, available at <http://www.spiceislander.com/?p=1005>.

<sup>56</sup> See Peter Kent, CARICOM Committed to Free Trade Negotiations with Canada, <http://www.peterkent.ca/EN/8128/87115> (last visited Oct. 10, 2009).



countries to enter into a free trade agreement with Canada because of the evenness.

Canada-Panama is something that came on the radar screen not too long ago, and the negotiations are going quite quickly from what I hear. They are hoping for a conclusion this year,<sup>57</sup> and maybe, part of it is because the United States agreement is stalled.<sup>58</sup> Another aspect is the Panama Canal and its expansion right now, as it is soon going to be an important transportation hub.<sup>59</sup> So it is important for Canada to have an agreement with Panama on a strategic partnership basis as well as an economic basis.

We also have to look beyond just free trade agreements to bilateral investment treaties and ask the question, with which Americas countries does Canada and the United States have free trade agreements? When I looked at this, I was struck by the fact that there are only four countries where both Canada and the United States have bilateral investment treaties (BITs) in place:<sup>60</sup> Argentina,<sup>61</sup> Ecuador,<sup>62</sup> Panama,<sup>63</sup> and Uruguay.<sup>64</sup> Additionally, there are a bunch of countries that either the United States has a BIT with or Canada does.<sup>65</sup> But considering the number of countries that are in the Americas, I was actually struck by the fact there are so few of these countries that we have entered into bilateral investment treaties with.

I have got a slide in my presentation as to when each of them was signed, and the Canada-Peru FIPPA is the closest one that points to what we are doing with our trade agenda, and it does not say a whole lot. I understand from a presentation by the Department of Justice that Bolivia and Cuba are countries that we might be considering entering into FIPPA negotiations with, but, you know, there is nothing that has been formally announced, and I do not think there is anything that has formally been discussed.

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<sup>57</sup> See News Release, Stephen Harper: Prime Minister of Can., PM and President Ricardo Martinelli mark conclusion of Canada-Panama free trade negotiations (Aug. 11, 2009), *available at* <http://www.pm.gc.ca/eng/media.asp?category=1&id=2730>.

<sup>58</sup> See Office of the United States Trade Representative, Panama Trade Promotion Agreement, Pending Congressional Approval, <http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa> (last visited Oct. 10, 2009).

<sup>59</sup> See generally Panama Canal Authority, Expansion Program, <http://www.pancanal.com/eng/expansion/index.html> (last visited Oct. 10, 2009).

<sup>60</sup> See Foreign Affairs and International Trade Canada, Canada's FIPA Program: Its Purpose, Objective and Content, [http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/fipa-purpose.aspx?lang=en&menu\\_id=43&menu=R](http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/fipa-purpose.aspx?lang=en&menu_id=43&menu=R) (last visited Oct. 10, 2009).

<sup>61</sup> See *id.*

<sup>62</sup> See *id.*

<sup>63</sup> See *id.*

<sup>64</sup> See *id.*

<sup>65</sup> See *id.*

In my mind this demonstrates that there is a lack of consideration of the Americas. I say this because what about Brazil, what about The Bahamas, what about the C4, what about the Caribbean countries, why are we not having those countries on our radar screen for entering into our foreign investment protection and promotion agreements?

Canada recently entered into a science, technology and innovation and cooperation agreement with Brazil.<sup>66</sup> It was announced in November 2008 when Mr. Day went down to Peru, but it only amounts to \$1.5 million over two years.<sup>67</sup> The purpose of the agreement is to increase efforts and research in science and technology and collaboration between Brazilian and Canadian firms. They say that it is for aerospace,<sup>68</sup> biotechnology,<sup>69</sup> renewable energies,<sup>70</sup> and agriculture.<sup>71</sup>

I do not know about the others in the room, but the question that comes to my mind is \$1.5 million figure for innovation in the aerospace industry.<sup>72</sup> Does not quite seem like enough. The house down the road cost more than that in the neighborhood in which I live. These days \$1.5 million does not buy a whole lot. So I am not really sure what Canada's commitment is to Brazil. They are listed as a priority country,<sup>73</sup> but if this is what we are doing when we have not announced a free trade agreement, I question from a legal perspective what this action is? But I do not think that there are enough actions to say that they are a top priority. But then again, we have had a couple of WTO cases look them over, aircraft, and, you know, maybe we have to work on our relationship first.

The other thing that I looked at was Canada's double taxation treaties.<sup>74</sup> This is actually the prevention of double taxation, but we called them double taxation treaties. I was struck by the fact that there are not many in the grand scheme of things. Colombia is a recent one.<sup>75</sup> Ecuador,<sup>76</sup> Peru,<sup>77</sup> and Venezuela<sup>78</sup> were relatively recently, but, you know, there's a very, very short

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<sup>66</sup> See News Release, Foreign Aff. and Int'l Trade Can., Can. and Braz. Sign Agreement on Sci., Tech. and Innovation Cooperation (Nov. 17, 2008), available at [http://w01.international.gc.ca/MinPub/publication.aspx?publication\\_id=386570&lang=eng&docnum=215](http://w01.international.gc.ca/MinPub/publication.aspx?publication_id=386570&lang=eng&docnum=215).

<sup>67</sup> See *id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> See *id.*

<sup>73</sup> See *id.*

<sup>74</sup> See, e.g., Department of Finance Canada, Status of Tax Treaties, [http://www.fin.gc.ca/treaties-conventions/treatystatus\\_-eng.asp](http://www.fin.gc.ca/treaties-conventions/treatystatus_-eng.asp) (last visited Oct. 10, 2009).

<sup>75</sup> See *id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

list.<sup>79</sup> It is only Argentina,<sup>80</sup> Barbados,<sup>81</sup> Brazil,<sup>82</sup> Chile,<sup>83</sup> Colombia,<sup>84</sup> Dominican Republic,<sup>85</sup> Ecuador,<sup>86</sup> Jamaica,<sup>87</sup> Mexico,<sup>88</sup> Peru,<sup>89</sup> Trinidad and Tobago<sup>90</sup> and Venezuela<sup>91</sup>, and then with a cap under negotiation, Costa Rica<sup>92</sup> and Cuba.<sup>93</sup> There are many more countries in the Americas. While one does not normally say that fiscal policy is part of trade policy, I think we need to have the taxation treaties as well so that countries who go down can have some certainty in getting the money back to Canada and how it is going to be taxed in both jurisdictions.

We have also been entering into air agreements with the Americas,<sup>94</sup> but still, there are not as many as I thought that there would be. We have the United States<sup>95</sup>, Mexico,<sup>96</sup> Barbados,<sup>97</sup> Panama,<sup>98</sup> Dominican Republic,<sup>99</sup> and then we have many other countries that have previously negotiated agreements.<sup>100</sup> So we are trying to get agreements so that our air carriers can go back and forth between Canada and other points in these foreign jurisdictions. People have to go there in order to engage in trained activities, so I look at that as okay, for the air agreements, we have them on the radar screen, we are thinking about it, but, you know, what is our commitment at the end of the day?

One final note, I am one of the few people that jump up and down and say that Canada should consider negotiating a free trade agreement with Cuba. I understand that would not be a popular move in the United States.<sup>101</sup> I can

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *See id.*

<sup>93</sup> *See id.*

<sup>94</sup> *See* Canadian Transportation Agency, Report of Bilateral Air Relations Between Canada and Other Countries, Bilateral Air Agreements and Designated Air Carriers, <http://www.cta-otc.gc.ca/doc.php?did=111&lang=eng> (last visited Oct. 10, 2009).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *See id.*

<sup>101</sup> *See* Ria Taft, *Canada: Embargo up to US, Cuba*, MIAMI HERALD, Apr. 19, 2009, avail-

understand the United States probably is not considering the same thing at the present point in time. The reason why I recommend this is because we have had a long trade relationship with Cuba, and we need to prepare for the evolution of that relationship. Canada can take advantage of the fact that it does have a good relationship with Cuba at this point in time, and that we can evolve our relationship, and the United States can catch up with us because often we are following in the footsteps of the United States.<sup>102</sup> Here is one opportunity where we get the agreements signed first. Thank you very much.

## CANADIAN SPEAKER

*James P. McIlroy\**

MR. MCILROY: Thank you very much. My name is Jim McIlroy, I am an international trade lawyer from Toronto,<sup>103</sup> and my topic today is Canada's Trade Policy with Europe, which is an issue that really has been evolving over the last four centuries.

As is often the case with this Annual Conference, the issue that we are discussing is a very timely topic. It is timely because only four weeks ago Canada's International Trade Minister announced on March 5, 2009, that Canada and the European Union have agreed on the areas to be negotiated in

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able at <http://www.miamiherald.com/870/story/1007159.html>.

<sup>102</sup> See Government of Canada, Canada-Cuba Relations, [http://www.canadainternational.gc.ca/cuba/bilateral\\_relations\\_bilaterales/canada\\_cuba.aspx?menu\\_id=7&menu=L](http://www.canadainternational.gc.ca/cuba/bilateral_relations_bilaterales/canada_cuba.aspx?menu_id=7&menu=L) (last visited Oct. 10, 2009).

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<sup>103</sup> See McIlroy & McIlroy Counsel on Public Policy, Expertise, <http://www.mcilroy.com/Expertise.htm> (last visited Oct. 10, 2009).

a possible comprehensive economic agreement, which are outlined in a joint report.<sup>104</sup> These areas include trade in goods and services as well as areas such as investment, technical barriers of trade, and regulatory cooperation.<sup>105</sup>

By using the phrase "a possible comprehensive economic agreement," last month's Ministerial announcement is noteworthy for several reasons. First, the word "possible" makes you think that perhaps someone is hedging their bets. The word "comprehensive" is noteworthy because it indicates that we are talking about a big deal. And finally, the words "economic agreement" raises the question of what kind of an agreement we are talking about. Is it a regional free trade agreement as defined under Article 24 of the General Agreement on Tariffs and Trade, (GATT), or is it something else? Before we deal with these three questions I just raised, I want to comment on the last paragraph in the March 5th press release, which described the Canada-European Union trading relationship as follows "In 2008, two-way merchandise trade, so we're talking about trade in goods, not services, between Canada and the European Union totaled \$90.1 billion,<sup>106</sup> up seven percent from 2007.<sup>107</sup> The European Union is Canada's second largest export market after the United States.<sup>108</sup> Canadian merchandise exports to the European Union were up 3.5 percent in 2008,<sup>109</sup> reaching \$36.1 billion."<sup>110</sup> I know we have government officials here, but I love reading government press releases. Not so much for what they say, but more for what they do not say. This release tells us that two-way trade in goods is ninety billion dollars,<sup>111</sup> which includes Canadian exports to Europe of thirty-six billion dollars.<sup>112</sup> The press release does not state that the European Union's exports to Canada are ninety billion<sup>113</sup> minus thirty-six billion,<sup>114</sup> which equals fifty-four billion dollars. In other words, last year Canada had a goods trade deficit with Eu-

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<sup>104</sup> See Foreign Affairs and International Trade Canada, Canada-European Union: Comprehensive Economic and Trade Agreement (CETA) Negotiations, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/can-eu-report-intro-can-ue-rapport-intro.aspx> (last visited Oct. 10, 2009).

<sup>105</sup> *Id.*

<sup>106</sup> See News Release, Foreign Aff. and Int'l Trade Can., Minister Day Announces Crucial Step Forward on Canada-EU Comprehensive Econ. Agreement (Mar. 5, 2009), available at [http://w01.international.gc.ca/minpub/Publication.aspx?lang=eng&publication\\_id=386908&docnum=60](http://w01.international.gc.ca/minpub/Publication.aspx?lang=eng&publication_id=386908&docnum=60).

<sup>107</sup> See *id.*

<sup>108</sup> See *id.*

<sup>109</sup> See *id.*

<sup>110</sup> See *id.*

<sup>111</sup> See *id.*

<sup>112</sup> See *id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

rope that amounted to eighteen billion dollars.<sup>115</sup> The press release also states that Europe is Canada's second largest export market. However, the flip side of the coin is that Canada is only the European Union's eleventh largest export market.<sup>116</sup> To keep things in perspective, let us look at how Canada's number two trading relationship with Europe compares to our number one trading relationship with the United States. In 2007, Canada's bilateral merchandise trade with United States was \$576 billion.<sup>117</sup> That's six times larger than the ninety billion dollar bilateral goods trade with the European Union. Lets drill down a little more. Canadian merchandise exports to the United States were \$356 billion<sup>118</sup> while imports were \$220 billion.<sup>119</sup> So Canada's merchandise exports to the United States of \$356 billion were almost ten times greater than our thirty-six billion dollars of goods exported to Europe. Canada's exports to the United States are equivalent to about twenty-three percent of our GDP,<sup>120</sup> gross domestic product, which indicates that Canada's exports to Europe would be about a tenth of that, so we're talking about three percent of GDP.<sup>121</sup>

In addition, Canada's \$356 billion in exports to the United States exceeded our \$220 billion of imports of American goods by \$136 billion. This \$136 billion goods trade surplus with the United States stands in stark contrast with Canada's eighteen billion dollar goods trade deficit with Europe.<sup>122</sup> Not to bore you with all these stats, but you will agree with me that Canada's second-largest trading relationship with Europe is not in the same league as the Canada-United States trading relationship. They are number two, but they are fairly far behind number one.

Canada's trade relationship with the United States dwarfs all of our other trade relationships, that is what those numbers tells us. The purpose of this proposed agreement with Europe is to increase Canada's European trade, and

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<sup>115</sup> See *id.*

<sup>116</sup> See Trade Issues, Bilateral Trade Relations, Canada, [http://ec.europa.eu/trade/issues/bilateral/countries/canada/pr161008\\_en.htm](http://ec.europa.eu/trade/issues/bilateral/countries/canada/pr161008_en.htm) (last visited Oct. 9, 2009).

<sup>117</sup> See generally Foreign Affairs and International Trade Canada, Canada's International Market Access Report – 2008, Chapter 6: Opening Doors to North America, [http://www.international.gc.ca/trade-agreements-accords-commerciaux/cimar-rcami/2008\\_06\\_08.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/cimar-rcami/2008_06_08.aspx?lang=eng) (last visited Oct. 10, 2009) (United States Merchandise exports to Canada for 2007 amounted to \$356.0 billion; imports of Canadian Merchandise was \$220.4 billion; the sum total of bilateral merchandise trade between the United States and Canada for 2007 would equal \$576.4 billion).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> See generally *id.*; see also OECD, OECD ECONOMIC SURVEYS: CANADA 2008 7 (2008) (Canada's GDP for 2007 amounted to \$15.3 trillion; Canada's exports to the United States were \$356.0 billion).

<sup>121</sup> See *id.* (indicating that Canada's exports to Europe for 2007); see also OECD, *supra* note 120 (indicating that Canada's GDP for 2007 was \$15.3 trillion).

<sup>122</sup> See OECD, *supra* note 120.

thereby grow and diversify Canada's trade in goods and services. Now, this is not the first time Canadian trade policy has attempted to increase exports to Europe. For example, over three decades ago, the government of Prime Minister Pierre Trudeau adopted a policy which came to be known as the Third Option.<sup>123</sup> In 1976, Canada and the European community signed an agreement on commercial and economic cooperation.<sup>124</sup> Notwithstanding this trade policy, which was driven from the top by our Prime Minister, Canada's trade with the United States continued to grow both absolutely and relatively.

The 1976 Third Option was eclipsed by the Canada-United States Free Trade Agreement, which entered into force a couple of decades ago in 1989.<sup>125</sup> This raises a fundamental question. If the 1976 Third Option did not produce the desired results, is there any reason to believe that the negotiations that are about to get underway with Europe will not suffer the same fate? This brings us back to those four words in that March 5, 2009 press release, "possible," "comprehensive," and "economic agreement."

Let us deal first with the word "comprehensive." When I look up this word in my trusty thesaurus, I see words like "complete," "all inclusive," and "across the board." However, I doubt very much that Canada will negotiate an all-inclusive agreement with the European Union. To understand why I have my doubts, you have to understand one of Canada's longstanding dirty little trade secrets, agricultural trade. Under Canada's supply management system, Ottawa imposes tariffs in the range of 200 to 300 percent on poultry and dairy imports,<sup>126</sup> including French cheese.<sup>127</sup> Canada is not alone in erecting barriers to agricultural trade. The United States has its farm bill<sup>128</sup> and Europe has its Common Agricultural Policy<sup>129</sup> fondly referred to as the

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<sup>123</sup> See generally Foreign Affairs and International Trade Canada, Canada and the World: A History, 1968-1984: The Trudeau Years, The Third Option and Economic Nationalism, <http://www.international.gc.ca/history-histoire/world-monde/1968-1984.aspx?lang=eng> (last visited Oct. 10, 2009).

<sup>124</sup> See Government of Canada, Trade & Investment, [http://www.canadainternational.gc.ca/eu-ue/policies-politiques/trade\\_invest-commerce\\_invest.aspx?lang=eng](http://www.canadainternational.gc.ca/eu-ue/policies-politiques/trade_invest-commerce_invest.aspx?lang=eng) (last visited Oct. 10, 2009).

<sup>125</sup> See Government of Canada, The Canada-U.S. Trade and Investment Partnership, [http://www.canadainternational.gc.ca/washington/commerce\\_wa/trade\\_partnership-partenariat\\_commerce.aspx?lang=eng](http://www.canadainternational.gc.ca/washington/commerce_wa/trade_partnership-partenariat_commerce.aspx?lang=eng) (last visited Oct. 9, 2009).

<sup>126</sup> See MIKE GIFFORD AND BILL DYMOND, THE DOHA ROUND OF WTO NEGOTIATIONS: IMPLICATIONS FOR THE CANADIAN DAIRY PROCESSING SECTOR 8 (2008), available at <http://www.carleton.ca/ctpl/documents/DohaRoundofWTOAgriculturalNegotiationsJune5-FINAL.pdf>.

<sup>127</sup> See generally *id.* at 8, 11, 16 (discussion imports of foreign cheese).

<sup>128</sup> See generally United States Department of Agriculture, 2008 Farm Bill Main Page, [www.usda.gov/farmbill](http://www.usda.gov/farmbill) (last visited Dec. 20, 2009) (discussion farm bills within the United States).

<sup>129</sup> See European Union: Delegation of the European Commission to Japan, The EU Com-

CAP.<sup>130</sup> In the ongoing saga that is known as the World Trade Organization (WTO) Doha round of multilateral trade negotiations that were launched in 2001, both Canada and the European Union have consistently fought to maintain their protectionist agricultural trade policies.<sup>131</sup> I find it hard to believe that all of a sudden Canada is going to change its mind and negotiate a bilateral agreement with the European Union that liberalizes dairy and poultry trade. Remember, this is a highly political issue, particularly in the province of Quebec.<sup>132</sup> The government of Canada led by Prime Minister Harper does not have a majority, and history shows that minority governments tend to duck tough political issues.<sup>133</sup>

It is likely that a Canada-European Union trade deal will not be all encompassing, and there will be exceptions. But if dairy, poultry, and other sectors are not included in the deal that raises the question of whether this so-called comprehensive economic agreement is a regional free trade agreement as defined by Article XXIV of the GATT.<sup>134</sup> Article XXIV of the GATT allows countries to conclude bilateral and regional trade agreements that depart from one of the fundamental nondiscrimination principles under the WTO, the MFN principle, most favored nation.<sup>135</sup> Article XXIV allows the country to discriminate and treat some countries more favorably than others if it creates a free trade area,<sup>136</sup> "where the duties and other restrictive regulations of commerce are eliminated on substantially all the trade between the constituent territories in products originating in such territories."<sup>137</sup> Now, what does "substantially all" mean? What does that requirement require? It means that Canada and Europe must be careful about how many items they take off the table. There are limits to what can be excluded.

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mon Agricultural Policy, [http://www.deljpn.ec.europa.eu/union/showpage\\_en\\_union.afs.agriculture.php](http://www.deljpn.ec.europa.eu/union/showpage_en_union.afs.agriculture.php) (last visited Oct. 12, 2009).

<sup>130</sup> *Id.*

<sup>131</sup> See generally Terence Corcoran, *Canada Don't Want too Much Doha*, FIN. POST, Nov. 5, 2005, available at <http://www.financialpost.com/scripts/story.html?id=f0c380e5-c2be-420e-b977-0286c50fc329&k=75663&p=1> (discussing Canada and the European Union's resistance to reduce agricultural tariffs at recent Doha round of the World Trade Organization talks).

<sup>132</sup> See News Release, GO5: Coal. for a Fair Farming Model, Supply Mgmt., Agric. Negotiations at the WTO the Gov't of Can. Must Object Quickly to the Draft Agreement Discussed at the WTO (July 29, 2008), available at [http://www.go5quebec.ca/en/communiqués\\_290708.php](http://www.go5quebec.ca/en/communiqués_290708.php).

<sup>133</sup> See Canada Looks Poised for Third Parliamentary Election in Four Years, N.Y. TIMES, Sept. 1, 2008, at A13.

<sup>134</sup> World Trade Organization, General Agreement on Tariffs and Trade, Art. XXIV, [http://www.wto.org/english/tratop\\_e/region\\_e/regatt\\_e.htm#top](http://www.wto.org/english/tratop_e/region_e/regatt_e.htm#top) (last visited Oct. 12, 2009).

<sup>135</sup> See John C. Thomure, Jr., *The Uneasy Case for The North American Free Trade Agreement*, 21 SYRACUSE J. INT'L L. & COM. 181, 192 (1995).

<sup>136</sup> See *id.*

<sup>137</sup> See *id.*



I would like to conclude with another issue that will be critical to the success of the Canada-Europe trade negotiations, and that arises out of the fact that we have a federal state just like the United States, and we have the thorny issue of provincial government procurement. In the "Joint Report on the European Union-Canada Scoping Exercise," which Canada and the European Union agreed to on March 5, 2009,<sup>138</sup> it was agreed that "any agreement should substantially improve access to public procurement markets aiming to achieve full coverage of central and subcentral government procurement in all sectors to ensure inter alia, treatment no less favorable than that accorded to locally established suppliers."<sup>139</sup> Essentially they are going to apply the national treatment principle to the provinces. The term "subcentral government" refers to Canada's ten provinces and three territories. The March 5th press release states that Ottawa is pleased to have found a way to directly involve them in the negotiations. It is going to be very interesting to see exactly how Ottawa will directly involve the 13 provinces and territories in this international trade negotiation and whether this will create a precedent for future negotiations. It also raises the question of who speaks for Canada on the international stage.

It will also be interesting to see where the provincial procurement negotiations will end up in light of the following three facts. First, Canada's provinces have still not agreed to fully open up their procurement to each other.<sup>140</sup> Second, Canada's provinces have never agreed to sign on to the WTO's Government Procurement Agreement.<sup>141</sup> And last but not least, only nine of the ten provinces have committed to the negotiation of a comprehensive economic agreement with the European Union.<sup>142</sup>

As a result of these thorny agriculture and procurement issues, it is not surprising that the Minister's March 5th press release merely referred to a possible agreement. It is still early days for this latest Canada-Europe trade initiative, but if history is any guide, it is safe to say that a comprehensive economic agreement between Canada and Europe is by no means a foregone

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<sup>138</sup> See Foreign Affairs and International Trade Canada, Canada-European Union: Comprehensive Economic and Trade Agreement (CETA) Negotiations, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/can-eu-report-intro-can-ue-rappo-rt-intro.aspx?lang=eng> (last visited Oct. 12, 2009).

<sup>139</sup> See JOINT REPORT ON THE EU-CANADA SCOPING EXERCISE 6 (2009), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Canada-EUJointReport2009-03-05.pdf>.

<sup>140</sup> See David Hale, *Canada Isn't Blameless in the 'Buy American' Dispute*, FIN. POST, July 6, 2009, available at <http://www.financialpost.com/m/story.html?id=1764716>.

<sup>141</sup> *Id.*

<sup>142</sup> See Peter O'Neil, *N.L. won't stop Canada-Europe trade talks: EU*, CANWEST NEWS SERVICE, Feb. 22, 2009, available at <http://www.canada.com/Business/stop+Canada+Europe+trade+talks/1320863/story.html>.

conclusion. So my advice is stay tuned, but do not hold your breath. Thank you.

## UNITED STATES SPEAKER

*Donald B. Cameron, Jr.\**

MR. CAMERON: In general, it is fair to say that there is a fear that the Obama Administration will be far more protectionist than the Bush Administration.<sup>143</sup> I am not sure I buy that. I agree that congressional pressure has become more protectionist, but that's been happening for twenty to twenty-five years. Most protectionist pressures are now accentuated by the fear generated by the current economic crisis. The question going forward is: who is going to drive trade policy? Another question is, exactly what is the point of reference? Is it the free trade policies of the Bush Administration? I would just like to remind you that within one year of assuming office, the Bush Administration self-initiated global steel safeguards against all steel products,<sup>144</sup> and against all countries, including Canada and Mexico.<sup>145</sup>

At the time they were initiated, steel imports were at a five-and-a-half year low point,<sup>146</sup> and the real problem faced by the steel industry was the legacy cost burden of integrated steel producers that made those producers uncompetitive with their global competition and, most importantly, with the

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\* Donald B. Cameron, Jr. has more than three decades of experience representing multinational businesses, foreign governments, and foreign trade associations. Mr. Cameron practices regularly before the U.S. Department of Commerce, the U.S. International Trade Commission, the Office of the U.S. Trade Representative, the U.S. Court of International Trade and the U.S. Court of Appeals for the Federal Circuit. Mr. Cameron has extensive experience in dispute settlement proceedings before the World Trade Organization, the General Agreement on Tariffs and Trade, World Trade Organization Panels and the WTO Appellate Body. He has also defended clients in NAFTA Chapter 19 proceedings and has argued before NAFTA Panels. Mr. Cameron also co-advised the Government of Korea in the successful WTO challenges to the U.S. safeguard actions on line pipe and certain steel products. Mr. Cameron received his J.D. (1974) from Vanderbilt University and B.A. (1971) from Kenyon College. He received his LL.M. (1975) from the Vrije Universiteit, Brussels, Program on International Legal Cooperation in Brussels.

<sup>143</sup> See Daniel Ikenson & Scott Linicombe, *Paying the Price for Obama's Lack of a Trade Policy*, L.A. TIMES, July 24, 2009, at Opinion, available at [http://www.cato.org/pub\\_display.php?pub\\_id=10378](http://www.cato.org/pub_display.php?pub_id=10378).

<sup>144</sup> See *Testing His Metal—and His Motives: Bush's Steel Tariffs Spark an Uproar*, KNOWLEDGE @ WHARTON, Mar. 13, 2002, available at <http://knowledge.wharton.upenn.edu/article.cfm?articleid=529>.

<sup>145</sup> *Id.*

<sup>146</sup> See *id.*

many mills in this country.<sup>147</sup> Steel safeguards resulted in increased tariffs on most steel products for two years.<sup>148</sup> Canada and Mexico were generally exempted.<sup>149</sup> The World Trade Organization (WTO) basically found that the safeguards were illegal under the WTO, and they were dismantled.<sup>150</sup> The Bush Administration also gave us Lumber IV,<sup>151</sup> which is hardly the hallmark of free trade. Now, this is not to say that the Bush Administration was a "protectionist administration." I'm not saying that; it is just to say that these labels really do not tell you very much.

Going forward, the most important trade policy question may be the extent to which the administration serves as a moderating influence on Congress. The first trade action we have already seen has been the Buy American provisions that were inserted into the stimulus bill.<sup>152</sup> These provisions were strongly opposed by companies like Caterpillar,<sup>153</sup> which depends heavily on exports and is quite mindful that other countries are quite capable of taking similar actions. If you do not believe that, take a look at what's happening in the trucking dispute with Mexico. Mexico has now attached a real cost to a breach of the North American Free Trade Agreement (NAFTA) by the United States.<sup>154</sup>

In the case of Buy American, the Administration has assured its trading partners that the United States will comply with its WTO obligations under the Government Procurement Agreement.<sup>155</sup> But the concerns over protectionism with respect to Buy American remain real. And how does that relate

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<sup>147</sup> *Id.*

<sup>148</sup> See Proclamation No. 7529, 67 Fed. Reg. 10553 (Mar. 7, 2002) (President Bush's Proclamation "To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products").

<sup>149</sup> *Id.*

<sup>150</sup> See Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, AB-2003-3 (Nov. 10, 2003); see also David E. Sanger, *Backing Down on Steel Tariffs, U.S. Strengthens Trade Group*, N.Y. TIMES, Dec. 5, 2003, available at <http://www.nytimes.com/2003/12/05/national/05ASSE.html?pagewanted=1>.

<sup>151</sup> See Sarah E. Lysons, *Resolving the Softwood Lumber Dispute*, 32 SEATTLE U. L. REV. 407, 422 (2009).

<sup>152</sup> See David E. Sanger, *Senate Agrees to Dilute 'Buy America' Provision*, N.Y. TIMES, Feb. 4, 2009, at Politics, available at <http://www.nytimes.com/2009/02/05/us/politics/05trade.html>.

<sup>153</sup> See Louis Uchitelle, *'Buy America' in Stimulus (Good Luck With That)*, N.Y. TIMES, Feb. 20, 2009, at B1, available at [http://www.nytimes.com/2009/02/21/business/21buy.html?\\_r=1&scp=4&sq=caterpillar%20opposes%20buy%20america%20provision&st=Search](http://www.nytimes.com/2009/02/21/business/21buy.html?_r=1&scp=4&sq=caterpillar%20opposes%20buy%20america%20provision&st=Search).

<sup>154</sup> See Daniel Ikenson & Scott Linicome, *Paying the Price for Obama's Lack of a Trade Policy*, L.A. TIMES, July 24, 2009, at Opinion, available at [http://www.cato.org/pub\\_display.php?pub\\_id=10378](http://www.cato.org/pub_display.php?pub_id=10378).

<sup>155</sup> See Michael D. Shear, *Obama Hoping to Reinforce U.S. Trade Relationship with Canada*, WASH. POST, Feb. 19, 2009, at Politics, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/18/AR2009021803297.html>.

to Asia? Well, countries such as Korea are signatories to the Government Procurement Agreement just like Canada is, but China and Russia are not, and they essentially will be excluded by the Buy American provisions.<sup>156</sup>

When you talk about protection, you are generally talking about China these days. Some congressional action will be predictable with respect to China, some others will be out and out dangerous, and if I may say so, idiotic. On the category of predictable, it's likely that Congress will ratify the current policy that permits the imposition of both countervailing duties and anti-dumping duties on China.<sup>157</sup> It is important to note that this is not a new policy; it's a ratification of a policy change implemented by the Bush Administration one year ago.<sup>158</sup>

The issue arises because in nonmarket economy countries such as China, United States policy for the past twenty-five years or so has been to assume that because the economy was centrally controlled and directed,<sup>159</sup> all prices and costs are basically subsidized.<sup>160</sup> Therefore, the United States ignores those prices and costs and creates surrogate costs based upon costs in India or another country. Therefore, the subsidy is basically accounted for by this constructed surrogate market cost, and I will add, I do not think that it is coincidence that those anti-dumping rates that emanate from these surrogate methodologies are extraordinary. If you believe that people can dump by 200 percent and stay in business, okay, but I actually do not believe that. But as a result, the United States did not impose countervailing duties on the alleged domestic subsidies because of the double counting of the subsidies until coated three-sheet paper.<sup>161</sup> Now, that was about a year-and-a-half ago. Now there are a number of anti-dumping and countervailing duty actions against China with predictable results.<sup>162</sup> China has appealed these results to the WTO.<sup>163</sup>

<sup>156</sup> See World Trade Organization, Parties and Observers to the GPA, Parties to the Agreement, [http://www.wto.org/english/tratop\\_e/gproc\\_e/memobs\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm) (last visited Oct. 13, 2009).

<sup>157</sup> See Press Release, U. S. Depar't of Commerce, Commerce Applies Anti-subsidy Law to P.R.C. (Mar. 30, 2007), available at [http://www.commerce.gov/NewsRoom/PressReleases\\_FactSheets/PROD01\\_002950](http://www.commerce.gov/NewsRoom/PressReleases_FactSheets/PROD01_002950).

<sup>158</sup> *Id.*

<sup>159</sup> See *U.S. to Impose New Duties on Chinese Goods*, N.Y. TIMES, Mar. 30, 2007, at Business, available at <http://query.nytimes.com/gst/fullpage.html?res=9400E2D71130F933A05750C0A9619C8B63>.

<sup>160</sup> See *id.*

<sup>161</sup> See Coated Free Sheet Paper from the PRC, 72 FR 60645 (Oct. 25, 2007).

<sup>162</sup> See Vivian Wai-yin Kwok, *China Fears More Protectionism*, FORBES, JULY 31, 2009, at Markets, available at <http://www.forbes.com/2009/07/31/china-trade-protectionism-international-economy-wto.html?feed>.

<sup>163</sup> See Office of the United States Trade Representative, United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (DS379), <http://www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute->

Now, the question is: is congressional action on this issue going to be bad? Well, probably. Is it going to be the end of the world? I would say no, it is not. It is basically going to be exactly what we have right now. But to those who say, well, there is no other solution than to allow the United States to do this, that I would say is not correct. The problem goes away if you treat China as a market economy in the dumping case. And then, of course, if there is no double counting with subsidies, China can then be treated "fairly" like Canada was with lumber, right, where you get those subsidies and dumping all together and trade lawyers have a feast.

That said, this solution is not going to happen because the real duties and the real bite in China trade disputes is in the dumping cases and in the surrogate methodology.<sup>164</sup> So the part about adding domestic subsidies to this, in my opinion is pure greed, but it is a reality that we are going to deal with for some time. Another issue that has been floated for some time is that of currency valuation, that it should be treated as a countervailing subsidy, and that we should have currency valuation issues dealt with by the Commerce Department on a case-by-case basis.<sup>165</sup> Now I will tell you that if this legislation passes and is enacted, you will know that we have entered a totally new era of trade.

This same idea was proposed years ago when Japan was the great boogie man.<sup>166</sup> Then as soon as Korea became a player on the world stage, it was tried against Korea.<sup>167</sup> So it is not a new idea. And I say that because it is generally recognized that currency issues are quite complicated, and that is especially so when the country that you want to attack on currency holds much of your dollar denominated debt. The Treasury Department will strongly oppose any efforts on this score, but it is something to look at. The reason is that these issues have to be looked at on a macroeconomic basis. They are not the simple issues, and they certainly do not lend themselves to case-by-case special pleading by domestic industries which are seeking to get special duties. But if this changes, then you better watch out. Parenthetical-

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settlement/definitive-anti-dump-1 (last visited Oct. 17, 2009).

<sup>164</sup> See News Release, Embassy of the P.R.C in the U.S., US Trade Policy Holds Double Standard (Dec. 3, 2004), available at <http://www.china-embassy.org/eng/xw/t72954.htm>; see also News Release, Embassy of the P.R.C in the U.S., US Urged to Be Fair in Trade Problems (Nov. 26, 2003), available at <http://www.chinaembassycanada.org/eng/xwdt/t50494.htm>.

<sup>165</sup> See generally WAYNE M. MORRISON & MARC LABONTE, CONG. RESEARCH SERV., CHINA'S CURRENCY: ECONOMIC ISSUES AND OPTIONS FOR U.S. TRADE POLICY 39-40 (2008), available at <http://www.fas.org/sgp/crs/row/RL32165.pdf>

<sup>166</sup> See DICK K. NANTO, CONG. RESEARCH SERV., JAPAN'S CURRENCY INTERVENTION: POLICY ISSUES 19 (2007), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl33178.pdf>.

<sup>167</sup> See MARK E. MANYIN, CONG. RESEARCH SERV., SOUTH KOREA-U.S. ECON. RELATIONS: COOPERATION, FRICTION, AND FUTURE PROSPECTS 12 (2004), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA461688&Location=U2&doc=GetTRDoc.pdf>.

ly, the Treasury Department's latest report on currency valuation is due out on April 15th.<sup>168</sup>

The last thing to look for in the case of China under the Obama Administration is a renewed commitment to the WTO in terms of dispute settlement.<sup>169</sup> I think that is accurate, and I think that China will be a target of many of these actions. I do not, however, consider this necessarily to be a bad thing. The dispute settlement mechanism multilateralizes disputes, which is a good thing in general.

The other thing that is going to happen with China is that the United States and this administration is going to use Section 421 of United States Law. Section 421 provides for special safeguards that are country specific to China.<sup>170</sup> This was provided for and consented to by the Chinese government in its accession agreements although they did not really mean it then and they do not really like that fact.<sup>171</sup> Under the Bush Administration there were six separate special safeguard actions.<sup>172</sup> The ones that had been approved by the ITC were all turned down by the President.<sup>173</sup> President Obama has committed to change that. Now, China's position in these cases is that the special safeguards are discriminatory against China, which is true, and that they will retaliate, and that is probably also true.

That being said, this is an area that really does need to be looked at again. And the reason I say that is twofold. Number one, the political pressure is mounting against China, and this is going to continue. But the second is that while these actions are highly discriminatory, you should take a look at what the results of the anti-dumping/CVD actions are against China right now. They are not only discriminatory because of the methodology, but they are exclusionary in terms of the rates.<sup>174</sup> The China safeguards action is going to be a mechanism under which there will still be the possibility of trade. So it

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<sup>168</sup> See United States Department of the Treasury, Statement by Treasury Secretary Timothy Geithner on Release of Semi-Annual Report to Congress on International Economic and Exchange Rate Policies (Apr. 15, 2009), available at <http://www.ustreas.gov/press/releases/tg90.htm>.

<sup>169</sup> See Press Release, Office of the U.S. Trade Rep., Transcript: Press Conference on WTO Case Against P.R.C Over Export Restraints on Raw Materials (June 23, 2009), available at <http://www.ustr.gov/about-us/press-office/speeches/transcripts/2009/june/transcript-press-conference-wto-case-against-ch>.

<sup>170</sup> See MORRISON & LABONTE, *supra* note 165, at 40.

<sup>171</sup> See *China's Hu Tells Obama to Curb Trade Safeguards*, REUTERS, Sept. 23, 2009, at Special Coverage, available at <http://www.reuters.com/article/reutersComService4/idUSTRE58M5ZO20090923>.

<sup>172</sup> See MORRISON & LABONTE, *supra* note 165, at 40.

<sup>173</sup> See *id.*

<sup>174</sup> See Committee on Ways and Means, Hearing Archives, Statement of Retail Industry Leaders Association, <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=6567> (last visited Oct. 17, 2009).

is something that can be explored as a constructive way to address trade policy, so we will see, but I think it is going to happen. How it plays out, we will have to see.

One final issue I would like to discuss in the couple minutes remaining is the issue of the FTA with Korea. It has been negotiated, but its fate is unclear.<sup>175</sup> I have heard predictions that it is going to be ratified by the end of the year. Personally, I do not happen to believe it, but it is really the only significant FTA agreement that the United States has actually negotiated since NAFTA.<sup>176</sup> It really involves two significant trade partners, and it involves real trade. The other significance of the Korea FTA negotiation is that the trade is going to benefit the United States. But the United States that really is putting in the roadblock.

At the beginning of the negotiations my partner and I had a lot of discussions with high-level Korean officials, and we asked them, "Well, why do you want this agreement with the United States?" Is there some market access that we are not aware of? Of course the answer was no, and then they said, well, you know, "maybe it will increase foreign investment." We said, okay. That is possible, but I submit to you that the real improvement in increase in foreign investment, the credibility that Korea achieved in foreign investment occurred after the Asia financial crisis when, first they were able to rebound in three years from essentially a huge depression,<sup>177</sup> and second they reformed their financial system.<sup>178</sup> It is not perfect, but it is a dramatic change. They have done this, I think the Korean motivation is domestic policy, but think about this negotiation. The negotiation was the Koreans on the one side negotiating principles: well, I would like to have this agreement, what are you going to get? Well, you are not getting much in access because you already have access. You're going to get duty rates? What duty rate are you going to get? Duty rates in the United States are very low.<sup>179</sup> They are not any impediment to the Korean trade, and in many significant areas such as steel there are not any duties. What, are we talking about the two-and-a-half percent on automobiles? I mean, please, this is not serious. They were negotiating principles, and they were giving up tons, yards of cloth, quotas,

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<sup>175</sup> See Office of the United States Trade Representative, Free Trade Agreements, <http://www.ustr.gov/trade-agreements/free-trade-agreements> (last visited Oct. 18, 2009).

<sup>176</sup> See Office of the United States Trade Representative, Korea-U.S. Free Trade Agreement, <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta> (last visited Oct. 17, 2009).

<sup>177</sup> See JAHYEONG KOO & SHERRY L. KISER, FED. RESERVE BANK OF DALLAS, RECOVERY FROM A FINANCIAL CRISIS: THE CASE OF SOUTH KOREA 27 (2001), available at <http://www.dallasfed.org/research/efr/2001/efr0104c.pdf>.

<sup>178</sup> See *id.* at 34.

<sup>179</sup> See David A. Gantz, *The "Bipartisan Trade Deal," Trade Promotion Authority and the Future of U.S. Free Trade Agreements*, 28 ST. LOUIS U. PUB. L. REV. 115, 147 (2008).

and duty rates. They were giving up tangibles in exchange for principles. It is a very difficult negotiation.

So at the end that's where the concessions were made. The concessions had been made by the Korean government, and the United States is complaining that it is not enough. I do not know, we'll see how all of this plays out. But it is useful to note that two important things were already achieved. Number one, the Koreans already made their concession on beef,<sup>180</sup> which at the base was a bottom line issue for the United States, the United States already got it.<sup>181</sup> The Koreans got something. They got the Visa waiver,<sup>182</sup> which was something that was actually very important to them.<sup>183</sup> That was achieved again initially, but to the extent that the focus of this administration is on market access to other countries, you ought to look closely at the United States-Korea Free Trade Agreement. This is a very real benefit for United States trade, and in the exchange, the United States has given up very little because the Koreans already have access and the United States did not have to give up much. Thank you very much. I think we are done.

#### DISCUSSION FOLLOWING THE REMARKS OF CYNDEE TODGHAM CHERNIAK, JAMES P. MCILROY, AND DONALD B. CAMERON, JR.

MR. FELDMAN: We started about twelve minutes late, and so I think we should take another twelve minutes unless our organizers raise some objections.

I wanted to put one observation and question into play before I open things to the floor. I deduce from the three presentations that world trade still revolves around the United States. Cyndee's remarks essentially report Canada following the United States in country after country and sometimes trying to grab an advantage. The United States already started talking with Chile, but with respect to and access to NAFTA. When those talks stalled, Canada jumped in, and therefore she finds a parallel or a consistency in most countries, with one exception, Cuba. And in the Cuban case, if Canada does not hurry up and get out front, the United States is probably going to lap there, too.

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<sup>180</sup> See Choe Sang-Hun, *South Korea and U.S. Reach Deal on Beef Imports*, N.Y. TIMES, June 22, 2008, at World, available at <http://www.nytimes.com/2008/06/22/world/asia/22korea.html>.

<sup>181</sup> *Id.*; see also Gantz, *supra* note 179 (indicating that "beef is a centerpiece of the Free Trade Agreement to the extent that it covers agriculture).

<sup>182</sup> See, e.g., Embassy of the United States Seoul Korea, Visa Waiver Program, [http://seoul.usembassy.gov/visa\\_waiver\\_program2.html](http://seoul.usembassy.gov/visa_waiver_program2.html) (last visited Oct. 18, 2009).

<sup>183</sup> See WILLIAM H. COOPER & MARK E. MANYIN, CONGRESSIONAL RESEARCH SERVICE, THE PROPOSED SOUTH KOREA-U.S. FREE TRADE AGREEMENT (KORUS FTA) 28 (2007), available at <http://www.fas.org/sgp/crs/row/RL33435.pdf>.



And Jim finds with a smile 400 years of effort to expand the relationship with Europe, and all the numbers only go up from the Third Option with the United States. And then Don tells us that dealing with Korea or dealing with China is always on United States terms. So what would you do about it? Is there anything to be done about the fact that world trade is on American terms, and that Canada in particular is dependent on the United States despite its efforts to diversify, whether in Latin America or with Europe, and that the United States will set the terms probably for Canada as well in Asia? What can you do about it?

MR. CAMERON: Well, there are two things. First of all, I do not necessarily agree with the premise that the terms are always set by the United States. Let me give you two examples. Number one, in the case of China, the United States actually takes China seriously. One of the reasons that they did not do Section 421 was not because they had any purity on safeguards, the United States self-initiated steel safeguards. They did not do it because of the threat of retaliation by China and it was credible.<sup>184</sup> Now, going forward, that may or may not continue because the Chinese may or may not decide that this makes sense. And the United States has other issues as well, and they may say, well, okay, you can retaliate if you want and we will see what happens. Secondly, there is the Korean-United States FTA. First of all, it was on United States terms. Why? Because Korea is the one who actually wanted the FTA more than the United States, and the United States in that sense, has the marbles. Having said that, the Koreans also now have a free trade negotiation going on with the Europeans.<sup>185</sup> That agreement, depending upon what happens with the United States-Korean negotiations, may actually lap it.

Now, if the Europeans get favored access to Korea over the United States, that would be a tragedy for the United States, but the United States would not be setting those terms. So, I think you are right, that if you have the largest market, you generally can set terms, and I think that is not a surprise. It is true that multilateral trade negotiations to the extent that the United States is not the leader in multilateral trade negotiations, they do not go anywhere. And part of the reason is because the United States has the market, but part of the reason is because nobody else wants to lead on trade liberalization. I mean, as many complaints as I have of United States trade policy, which is

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<sup>184</sup> See generally *Obama's Trade Test: The President Faces His Steel Tariff Moment*, WALL ST. J., Aug. 4, 2009, at Review & Outlook, available at <http://online.wsj.com/article/SB10001424052970203609204574318201692908082.html> (indicating that the Bush administration learned to resist Section 421 appeals and the Obama administration should follow suit or risk further retaliation from China).

<sup>185</sup> See European Commission, Trade Issues, South Korea, [http://ec.europa.eu/trade/issues/bilateral/countries/korea/index\\_en.htm](http://ec.europa.eu/trade/issues/bilateral/countries/korea/index_en.htm) (last visited Oct. 19, 2009).

generally on a daily basis depending upon what case we are dealing with, the reality is that the United States is generally the leader in trade liberalization on these issues. And when the United States decides that multilateral negotiations are not that important to them and that they would rather pursue other things such as bilateral agreements, guess what, the MTN negotiations fade into the background, and we start to go the bilateral way. Make of it what you want.

MR. McILROY: I would like to just say that I still think that the United States is the biggest game in town. You know, there has been a meltdown and problems with the financial system. I think that that must be dealt with. But from Canada's perspective it is a large internal market. You have a very large internal market. Sure, Europe is big, they have twenty-seven countries,<sup>186</sup> but they are spending a lot of time trying to knit the whole thing together. It is still not as cohesive a market as the United States.

The second thing is the United States is a very affluent market.<sup>187</sup> Sure, you can go into a lot of developing countries, but a lot of them do not have the dough, and we essentially have to give stuff away or give it away with soft financing through the export development corporation.<sup>188</sup>

And I think the third thing that is important is that it is a relatively open market. As Don indicated, United States industrial tariffs are not very high.<sup>189</sup> I mean, we have had all these rounds in the GATT, and the tariffs are actually quite low.

I think the fourth thing that's very, very important from Canada's perspective is that we are close geographically, and in Just-In-Time, I think that's important. And I think that the distance that we have had between Canada and Europe geographically, that has played a very important role. The fact of the matter is that Canada was settled 400 years ago by the French.<sup>190</sup> We have a very small trading relationship with the French.<sup>191</sup> After that, we were

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<sup>186</sup> See Europa, The EU at a Glance, Member States of the EU, [http://europa.eu/abc/european\\_countries/index\\_en.htm](http://europa.eu/abc/european_countries/index_en.htm) (last visited Oct. 19, 2009).

<sup>187</sup> David Leonhardt, *United States Economy*, N.Y. TIMES, Aug. 13, 2009, available at [http://topics.nytimes.com/top/reference/timestopics/subjects/u/united\\_states\\_economy/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/u/united_states_economy/index.html).

<sup>188</sup> See News Release, GAOR, Developing Countries, Hardest Hit by Global Fin. Crisis, Urgently Need Pledged Assistance, Assembly's Econ. Comm. Is Told (Oct. 15, 2009), available at <http://www.un.org/News/Press/docs/2009/gaef3248.doc.htm>.

<sup>189</sup> See Gantz, *supra* note 179.

<sup>190</sup> See The Canadian Encyclopedia, France, <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=U1ARTU0001275> (last visited Oct. 19, 2009).

<sup>191</sup> See News Release, Foreign Aff. and Int'l Trade Can., Minister Day Promotes Canadian Trade in Fr. (June 26, 2009), available at [http://w01.international.gc.ca/Minpub/publication.aspx?publication\\_id=387319&lang=eng&docnum=179](http://w01.international.gc.ca/Minpub/publication.aspx?publication_id=387319&lang=eng&docnum=179); see also Helena Guergis, Parliamentary Sec'y to the Minister of Int'l Trade, Notes for an Address at the Pub. Policy Forum Conference on Canada-U.S. Relations (Apr. 27, 2006), available at <http://w01.international.gc.ca/>

very close with the Brits; we were part of the Commonwealth.<sup>192</sup> Once the British Empire started to fade and once the Brits joined the E.U., we lost our trade with the Brits.<sup>193</sup> So I believe very, very strongly the United States is still Canada's most significant partner.

Let me just close by talking about the BRIC, Brazil, Russia, India, and China. I do not see a lot of action there in the near term. Brazil, all we seem to do with them is to get into trade wars over, they have got an aircraft industry and we have one, too. And we both subsidize them like crazy, and we both go to the WTO and every time there is a decision, we both claim we won. I do not see a lot there. They also have an agriculture industry, and we are trying to keep out their agriculture.

Russia I would argue, may be on its way to becoming a failed state. I do not think it is a safe place to invest. India and China, I do not think have a lot of domestic consumption.<sup>194</sup> I think they have built their economies on an export market oriented economy.<sup>195</sup> They want to sell us stuff. Maybe they want to buy some raw resources, but I do not think they want to buy a whole lot of other things from us. So in answer to your question, Elliot, I think the United States is still the game in town simply because it is the biggest internal market, it is the most affluent, and it is the most open.

MS. CHERNIAK: And, Elliot, you know that we are really good friends, but I think we were looking at this picture from two different angles because when I listened to the three panel discussions, I saw Jim and I talking about opportunity and positive opportunity on a going-forward basis for Canadians to invest abroad and for other countries to invest in Canada. And, you know, unfortunately, Don's topic was Asia, which, you know, got into trade reme-

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Minpub/publication.aspx?publication\_id=383942&lang=eng&docnum=2006/3.

<sup>192</sup> See generally The Canadian Encyclopedia, Commonwealth, <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0001798> (last visited Oct. 19, 2009).

<sup>193</sup> See OXFORD HISTORY OF THE BRITISH EMPIRE COMPANION SERIES: CANADA AND THE BRITISH EMPIRE 113 (Phillip Buckner ed., 2008) (indicating that Canadian trade with Britain declined as the Empire declined after WWII); see also J.L. GRANATSTEIN & ROBERT BOTHWELL, *PIROUETTE: PIERRE TRUDEAU AND CANADIAN FOREIGN POLICY* 337 (University of Toronto Press 1990) (Canadian trade with the United Kingdom further declined with the United Kingdom's entry into EEC in 1973).

<sup>194</sup> See Amar Bhidé, *Learning to Consume*, N.Y. TIMES, Oct. 1, 2009, at Opinion, available at <http://roomfordebate.blogs.nytimes.com/2009/10/01/chinas-next-stage-spreading-the-wealth/#amar> (indicating that China has difficulties getting its citizens to consume); see also *Foreign Steel Makers Look to India for Expansion*, N.Y. TIMES, Sept. 28, 2009, at Global Business, available at <http://www.nytimes.com/2009/09/29/business/global/29iht-steel.html> ("Per capita consumption is very low, so the potential is very high").

<sup>195</sup> See Susumu Yoshida, *The Globalization and Changing Industrial Dynamics in Asia*, 3 J. INT'L BUS. & L. 53, 61 (2004).

dies, but was more a negative discussion of how do we stop trade, and how do we –

MR. CAMERON: I'm a negative guy, sorry.

MS. CHERNIAK: But I look at it, you know, from my perspective, I saw the two Canadian presentations on what opportunities are out there for Canada to engage in trade and to seek more partnerships and to make new friends and do more on a going-forward basis as opposed to erecting trade barriers and starting trade remedy cases, which I would not mind.

MR. GROETZINGER: Don, what do you see the future in Congress from the Colombia Free Trade Agreement? We have produced some friends in middle America.

MR. CAMERON: Yeah. Well, if you listen to the Columbians, they think it is very good. I know that it has a lot of support from companies like Caterpillar, and they have made reforms down there.<sup>196</sup> I think that if there are going to be agreements, Columbia is right there and it is first in line. I think that it will pass. I think that it will pass before the United States-Korea Free Trade Agreement. I mean, again, you have the opposition of labor, but labor has other issues on the table right now, too. Let us think about it. I mean, health care reform. Health care reform is big for labor. And there is the auto industry, the whole issue of how things are going to get settled there.

So are they really going to spend all their capital on free trade agreements that are not going to have very much impact on them? I do not think so. So I think that is a question. The Korean issue is going to be different in that the politics of Korea and Asia are a bit different. I think that anybody who looks at it will understand that's really where the money is for the United States, that is where we are going to make money, the United States-Korea free trade agreement. But I mean, whether people agree with that, that is another matter.

MR. KRUPP: I have a question for Cyndee. On one of your slides you talk about transshipment. Is that for platforming that prohibition that was on your slide? You covered it briefly, but I'm assuming that was for platforming.

MS. CHERNIAK: It is not necessarily for platforming. In the Rules of Origin it says that preferential treatment will not be granted unless there is direction and then into Canada.<sup>197</sup> So by transshipment, I mean that there would be a drop in, the goods will be delivered into a United States port and then shipped via rail or truck, you know, going to, part of the shipment going

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<sup>196</sup> See James Pethokoukis, *Susan Schwab on the Colombian Trade Deal: The Latest Free-trade Agreement is Caught in the Crossfire*, U.S. NEWS & WORLD REPORT, Mar. 26, 2008, at World, available at <http://www.usnews.com/articles/news/world/2008/03/26/susan-schwab-on-the-colombian-trade-deal.html>.

<sup>197</sup> See North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, 353 (1993).

to the United States destination and part of the shipment coming up to Canada. And if that happens, the shipment that comes into Canada is disentitled to preferential tariff treatment under the Rules of Origin, and I think that is something that Canada needs to revisit given that, you know, if goods are coming up from Colombia, Peru, Panama, Chile, I would think that it is reasonable that the ship would have more than just Canadian goods or goods destined for Canada, and that some of the Canadian goods will go through a United States port and come up, and it's unfortunate that the rule would disallow preferential tariff treatment.

MR. CRANE: First, a quick observation because you need a sense of humor in all of this. When Cyndee was saying that we have to diversify today because Canada fears United States protectionism, in the 1980s we were told we had a free trade agreement with the United States because of the fear of protectionism, and so that seemed to have gone full circle. It was mentioned that the United States is a key figure and if it decides to go bilateral, one of the consequences of that is that other people go bilateral as well. So now we see an Asian trade pact developing. The Japanese for years resisted doing any bilateral deals.<sup>198</sup> They watched the United States, what it was doing, and they decided to do so as well.<sup>199</sup> Now we have full-fledged Asian BLOC, not just trade, investment, swap agreements, but all kinds of things happening.<sup>200</sup> That is a consequence of another powerful country abandoning the multilateral system. It seems that is the real issue.

MR. CAMERON: Well, I think you bring up a good point that gets to a much more fundamental issue that we do not have time to discuss here, which is, are FTAs pro-trade or are they actually a violation of the most fundamental principle of free trade which is the MFN principle? I do not know. How many rules of origin do we have floating around right now because of the proliferation of free trade agreements?

That being said, part of the reason that we evolved into FTAs was that people got frustrated with the multilateral system, people wanted to have, it is almost low hanging fruit, right? And observations that have been made here, you know, for all of the years that I have been coming, which are accurate, relating to the fact that free trade agreements do not create the trade, they follow the trade.<sup>201</sup> They follow the necessities that were created. Can-

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<sup>198</sup> See RAYMOND J. AHEARN, CONG. RESEARCH SERVICE, JAPAN'S FREE TRADE AGREEMENT PROGRAM 1 (2005), available at <http://www.nationalaglawcenter.org/assets/crs/RL33044.pdf>.

<sup>199</sup> *Id.*

<sup>200</sup> See Michael Schuman, *Fortress Asia: Is a Powerful New Trade Bloc Forming?*, TIME, Sept. 7, 2009, available at <http://www.time.com/time/world/article/0,8599,1920867,00.html>.

<sup>201</sup> See generally Daniel Schwanen, *NAFTA Revisited: NAFTA's Economic Effects: Plus or Minus – A Canadian Perspective*, 23 CAN.-U.S. L.J. 47, 47-48 (1997) (discussing the creation of NAFTA as a result, not because of, trade).

ada and the United States that agreement evolved because trade had evolved that way. Mexico had other issues with respect to investment.

You look at the Korean agreement. Well, I do not know. So why are the Koreans doing it if they do not need the tariff break? I mean, what kind of tariff break are we talking about? Are you talking about, what, a one percent advance per year on a MFN duty rate? I mean, these do not really make any sense unless you are looking at other priorities and you want to use a free trade agreement, for instance, to help you to institute domestic policies.

But to your point, it was all fine as long as it was just Canada and the United States, we'll do this, hey, maybe we'll get the Mexicans involved; it's okay because that will be just fine. But the Asians? My God. You are going to actually have the Asians have their own FTAs? What is next? Well, I do not know. Maybe we will have to go back to a multilateral solution.

MR. FELDMAN: I'd like to suggest two other dimensions to this proposition. The first is that after President Clinton was denied trade promotion authority and his trade representative had nothing to do, she focused on agreements that perhaps could be consummated without that negotiating authority, which were bilaterals.<sup>202</sup> And secondly, and triggered by, so you have first, a political motivation in the United States. And secondly from what Don was saying about Korea is also true of the parade of other countries. These are countries that have come to the United States asking for agreements.<sup>203</sup> They have their own political reasons. Most of these agreements are not very economic at all. They are for political reasons, and they are driven either for domestic purposes or because no one wants to be left out and not have engagement with the United States. So the more there are, the more needed. And the queue continues to lengthen. So it becomes a process that's very hard to arrest, and it's very attractive. After all, the President now does not have trade promotion authority, or trade negotiation authority either. And so the continuation of the process of bilateral agreements becomes very attractive if you want to appear active and aggressive on trade. Cyndee, do you want to say something?

MS. CHERNIAK: Just to add to what everyone else has said, in 2007, I actually did a project for the Asia Development Bank, and I looked at a hundred free trade agreements as part of that project, and I have written a long report that hopefully they will be publishing soon as an e-book.

In looking at the various free trade agreements, it struck me that a number of countries had entered into government procurement chapters where they

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<sup>202</sup> See David Firestone, *Senate Grants Bush Authority on Trade Deals*, N.Y. TIMES, Aug. 2, 2002, at A1, available at <http://www.nytimes.com/2002/08/02/world/senate-grants-bush-authority-on-trade-deals.html>.

<sup>203</sup> See e.g., FREE TRADE AGREEMENTS: US STRATEGIES AND PRIORITIES IX, X (Jeffrey J. Schott ed., 2004).

were not a party to the agreement on government procurement. So these countries are evolving their thinking and may be ready at a future point in time at the WTO once the agricultural issues get resolved. Secondly, when you look at the service chapters that show up in many of these free trade agreements, and some of the trade agreements are just services agreements that Article V of the GATT requires that there be a liberalization of substantial trade in substantially all sectors,<sup>204</sup> so you have a number of countries actually changing their domestic regulations and their domestic laws and liberalizing so that they realize that, you know, the sky is not going to fall if the WTO, they liberalize further.

In addition, you're finding through the negotiation that their countries are talking about dispute settlement in the anti-dumping arena, some of the areas that are irritants between the two countries; they are talking about how we are going to resolve these on a bilateral basis. But it kind of sets a precedent for the negotiations on a going-forward basis on how to use the best information available and dealing with zeroing, that these issues can be resolved between countries. So you are seeing that there is an evolution on the bilateral basis that can be incorporated at the WTO at a future point in time should we get over the stumbling block, that being the agricultural discussions.

MR. FELDMAN: I am glad I see no hands because we have run our time. This is my opportunity to thank the organizers. This is the last session of this kind I think for this conference. There are an astonishing number of people here at this hour. So thank you all very much, thank you organizers, and we're adjourned.

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<sup>204</sup> See World Trade Organization, The General Agreement on Tariffs and Trade (GATT 1947), Article 5: Freedom of Transit, [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm) (last visited Oct. 19, 2009).