SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Canada-United States Law Journal

Volume 10 | Issue | Article 33

January 1988

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Recommended Citation
Discussion, *Discussion following the Remarks of Professor Earl Fry and Professor John Quinn*, 10 Can.-U.S. L.J. 221 (1985)
Available at: https://scholarlycommons.law.case.edu/cuslj/vol10/iss/33

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Discussion Following the Remarks of Professor Earl Fry and Professor John Quinn

QUESTION, Professor Henry King, Jr.: Professor Quinn, what are the indications, if any, that the Canadian government is considering the type of agreements you've discussed?

ANSWER, Professor Quinn: The present government's position is one of caution. The only paper on the subject has been the Kelleher Discussion Paper (*How to Secure and Enhance Canadian Access to Export Markets*). The Royal Commission Report should be published this summer and the consultation process which Minister Kelleher has been conducting should also be finished. I think any decision about a framework for U.S.-Canada negotiations will be made late this summer. No one in the government has yet said anything publicly about these questions.

QUESTION, Mr. Alan Wolff: Professor Quinn, how do you avoid the consultation process from resulting in a "lowest common denominator" approach made to minimize the exposure of the provincial officials? Also, how can you keep the process from losing momentum and the result being less than expected?

ANSWER, Professor Quinn: There is an analogy here to the debate over whether to have a sectoral or a comprehensive framework for negotiating on trade barriers. A comprehensive framework facilitates trades across provincial interests. A narrower framework results in each province only looking at its own costs and benefits and not at the national gains.

Concerning momentum, there is a point in trade negotiations when a momentum is achieved and suddenly the deal is made. But in a process in which each province has a *de facto* veto this momentum might not be achievable—the provinces can renege at any time, which makes such an agreement risky. Provincial premiers might find ways to avoid the obligations of the agreement. That is a risk, although generally a province will not want to be seen as obstructive to an agreement which benefits everyone. Institutional changes are important in that they would prevent such *sub rosa* actions.

QUESTION, Mr. Frank Stone: Professor Quinn, this is not a new problem—the Canadian government signing international agreements which it cannot necessarily implement because of provincial jurisdiction—why has it suddenly become so important?

ANSWER, Professor Quinn: It is true the provinces have always had the power to decide whether or not they will implement the treaties

that fall within their areas of legislative jurisdiction. But it is only since the 1970's that non-tariff measures, which fall within provincial jurisdiction, have been the subject of trade negotiations. It's not that the law has changed, but that the issues on the international negotiating agenda have changed, and many of them are now within provincial jurisdiction.

I'm in favor of a strong institutional body to enforce free-trade agreements, preferably a judicial dispute resolution body. But that may not solve the problem, since a judicial decision aimed at the government in Ontario will not affect the internal problem of provincial jurisdiction. A strong supernational body will not solve the internal constitutional problem.

QUESTION, Professor Thompson: Professor Quinn, I believe there are some areas where an institutional arrangement, to deal with the problems you've identified, is unnecessary. It's not necessary to specify procedures for domestic procurement because they already exist. All of the provinces and municipalities in Canada have public bidding and abide by the standards set up by their auditors. It is the law at the provincial level that makes discrimination in this area possible and there is authority to change these laws and eliminate most discrimination.

Secondly, regarding price discrimination, the solution there is simply to amend the Anti-Combines Act to permit private actions and private remedies. Could you comment on these points?

ANSWER, Professor Quinn: The problem with a general prohibition on discrimination is that, unless the system is clear regarding the objective criteria used to decide who wins a contract, it's very difficult to know whether the government purchaser is discriminating or not. Further, the divisions of power in the Canadian Constitution impose severe constraints on what the federal government can do to get compliance from the provinces. In the area of product standards, for example, the federal government could pass a general statute prohibiting discriminatory product standards, but it could probably not implement Canada's treaty obligations by homogenizing product standards throughout the country.

Regarding a private right of action for price discrimination, there is an implied exemption in the anti-combines law for provincially owned or regulated businesses. In the late 1950's the federal government tried to prosecute the very concentrated brewing industry, which is provincially regulated. The court stated that provincial regulation of the industry was constitutionally permissible and that the industry was exempt from the federal anti-combines law. It seems unlikely, therefore, that a court would allow a private right of action where it does not allow a public one.

QUESTION, Mr. Jacques Roy: Professor Fry, how difficult is it going to be for the United States federal government to impose its views on the states regarding government procurement, to abolish the "Buy

State" or "Buy American" state provisions and possibly open their markets to Canadian bids?

ANSWER, Professor Fry: I think the federal government could legally and constitutionally impose its will on the states regarding procurement, but I don't think the Administration will expend the political capital needed to do so unless the trade agreement involved something very substantial, such as comprehensive free-trade. Such an effort would not be made simply for the sake of a sectoral arrangement. Furthermore, it would be necessary to perceive a willingness on the part of the Canadian provinces to adhere to such a non-discriminatory procurement program.

COMMENT, Robert Latimer: I've spent the last four years consulting with the Canadian provinces about their role in the international trade market and found that there is beginning to develop an ability to form a consensus among them. Further, I believe the provinces have the ability to respond substantively and with consensus to an international relationship with the United States in a more promising way than is evidenced by the fifty states.

COMMENT, Professor Robert Hudec: There is some interesting background on the relationship of the Congress and the states over the problem of international agreements affecting the states. When the GATT was negotiated in 1947, in order to get it through Congress, it was necessary for the State Department to advise the Congress that the agreement would not touch the states. In 1958, a Hawaiian territorial court had the first case involving the GATT and state law and it decided the GATT superseded the state law. The State Department wrote a memorandum explaining what it had said to Congress in 1947, but the petition for rehearing was turned down.

When the Tokyo Round agreements were brought back to the Congress there were two central issues. One was whether a standards code would be applied to the states; it was decided such a code would be encouraged by the federal government, but not imposed. The second was government procurement; it was decided the Code did not apply to the states.

There is a tremendous political problem involved when you ask the Congress to override state legislation. The Federal government has the power to override the states, but politics makes this very difficult.

COMMENT, Mr. Jon Fried: The description of the consultative process in Canada needs further elaboration. Canadian negotiators are well aware of the divided responsibility for treaty implementation in Canada and this has been built into the treaty negotiation process. The provinces are consulted from the initial stages of negotiation. This sensitivity on the part of the federal government usually has led to a smooth transition at the implementation stage. The observation that the ten provinces are probably more able to form a consensus on an international

treaty than the fifty states is seemingly correct. Canada has about 11,000 international treaties or agreements, over a 1,000 of which are with the United States. Half of these impinge on provincial jurisdiction but there has rarely been a problem in this regard.

QUESTION, Mr. Stephen Lyons: I wonder whether Mr. Latimer was correct in his assessment that the U.S. government would have a more difficult time convincing the states to let down their trade barriers than the Canadian federal government would have with the provinces. Professor Fry, are there any instances where the U.S. government wasn't able to convince the states to follow it where something of national interest was involved?

ANSWER, Professor Fry: There are some examples. The President has issued a strong declaration in support of foreign investment activity in the U.S. Several states, however, continue to impose unitary taxation, a system of taxation which discourages foreign investment. Thus far, Washington has chosen merely to ask the states to reconsider this form of taxation. Perhaps, though I don't believe this to be the case, the federal government was foresighted enough to realize that intense competition for foreign investment would eventually convince many of the states to discard the unitary formula of taxation by their own volition.

QUESTION, Mr. Jon Fried: Professor Fry, what are your views on regulated services, in terms of price discrimination upon entry into the United States? What will be the impact, particularly of American antitrust law, on an industry or sector in which the Canadian government is involved, either through regulation or control?

ANSWER, Professor Fry: The major problem in this area is that Americans do not understand how different the Canadian system is from our own. The United States considers its system to be *laissez-faire* oriented, which in many cases it is not. On the other hand, the level of government intervention in the economic sector is definitely much greater in Canada than in the United States. The Canadians are not going to change their system, nor should they. There may be some major problems ahead if American business and government leaders think that the influence of Crown corporations will diminish, either at the provincial or federal level, or that Canada will move towards wholesale deregulation.

The solution for avoiding these problems is better education in the United States and a recognition that the Canadians are not going to drastically change a system they overwhelmingly support. U.S. policymakers will be required to understand the nature and extent of government activity in the Canadian economy and work for a bilateral agreement which will minimize frictions between the two quite different North American political and economic systems.