
January 2000

The Management and Resolution of Cross Border Disputes as Canada and the U.S. Enter the 21st Century

Donald S. Macdonald

Follow this and additional works at: <https://scholarlycommons.law.case.edu/cuslj>

Recommended Citation

Donald S. Macdonald, *The Management and Resolution of Cross Border Disputes as Canada and the U.S. Enter the 21st Century*, 26 Can.-U.S. L.J. 21 (2000)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol26/iss/8>

This Speech is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Canada-United States Law Journal by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

THE MANAGEMENT AND RESOLUTION OF CROSS BORDER DISPUTES AS CANADA AND THE U.S. ENTER THE 21ST CENTURY

*Hon. Donald S. Macdonald**

The theme of our meeting these next three days is the Canada/U.S. trading relationship over the past decade and where it may go during the 21st century. As always, the conference agenda has been admirably structured to create informed discussion by knowledgeable people on a series of specific questions: the disputes settlement process, the role of state and provincial governments in trade issues, defence trade and export controls, biotechnological and agricultural disputes, and telecommunications and culture.

Due to the quality of those panels, and the special experience they bring to them, I have chosen not to trespass into the bilateral area. What I would like to discuss is the prospect of renewed multilateral negotiations, and why I have arrived at the conclusion that there may be no new general agreement this decade.

A few words about American/Canadian relations on trade matters are appropriate. It is important for Canada that trade relations between Canada and the United States take place in as harmonious an environment as possible. Just how important is demonstrated in some interesting figures that emerge from a recent interview given by the Canadian ambassador to Washington, the Hon. Raymond Chrétien.¹ While Canada's share of the American market is barely one percent, that represents a very important part of Canada's external commerce: the increase in Canadian transactions with the United States in the year 1999 alone was more than fifteen times our total commerce with China, or twice that with the European Union.

While press accounts highlight the disagreements between our two countries, in fact, the amount of commerce involved in trade disputes between us has dropped from five percent in 1994 to only one percent today.

Disputes on each of the topics to which I have referred may be under way, but it is important to bear in mind the very large volume of cross border transactions that are not in dispute.

* Macdonald bio.

¹ *L'Actuality*, 15 Apr. 2000, at 20.

My first assumption is that there will be no comprehensive, multi-sector trade negotiations between Canada and the United States in the first decade of the new century. There are some hotly disputed bilateral issues. But the large, sweeping issues between the two countries, like tariffs, have been substantially dealt with.

The ambitions for better market access of both Canada and the United States relate to third party markets: the European Union (E.U.), the rest of the western hemisphere, and the larger emerging countries in Asia. As the owner of the largest market, and with its economic power, the United States is going to be the leading force in negotiating new agreements, with Canada as a beneficiary of market-widening actions between the United States and other large trading partners.

My second assumption is that, for reasons that I will defend during the course of this presentation, there will not be a general, multilateral round of trade negotiations under the World Trade Organization (WTO) this decade.

What I intend to address are the political factors in the United States, the larger economies of the developing world, and the E.U. that, it seems to me, will delay any comprehensive bargain in multilateral trade negotiations.

There are three questions I will try to respond to in turn:

1. In the post Cold War era, where is the United States going on international economic issues?
2. How will the more intensive involvement of the developing countries, the so-called Third World, affect the future sets of negotiations and the operation of the WTO?
3. Where are other developed, First World, countries going in trade, especially the E.U.?

First then, let us look at the United States and trade negotiations. An observation, expressed by more than one foreign journalist, is that there is little enthusiasm, either in official circles in Washington, nor among the public, for new foreign economic initiatives. As one correspondent has put it:

The most startling contradiction in world affairs is that having triumphed in the 60-year campaign for global hegemony, the world's last superpower has never been so utterly integrated into the global economy, nor so reluctant about its implications...Not since the 1930s has the United States appeared so ready to turn inwards again...²

Americans may take great pride at the achievements of successive administrations in the half-century, which ended with the collapse of the Soviet system. It would be a natural reaction of ordinary Americans that after

² Martin Walker, *A New American Isolationism?*, 52 INT'L J. 391, 400 (1997).

that sustained effort and leadership, they should feel entitled to look inwards, to concern themselves primarily with the affairs within their own country, to concentrate on their interests as ordinary citizens. The spectre, for foreigners, and in particular Canadians, is that ordinary Americans would change their focus inward and leave to an isolationist minority the formulation of U.S. foreign policy responses; as was done in the inter-war period, when the United States rejected its role in the League of Nations, and left international economic policy to the likes of Smoot and Hawley.³

The concern is genuine, but, on the facts, the suspicion is unfounded and obviously unfair. U.S. involvement on a broad range of issues continues around the world. In Kosovo, in Senator Mitchell's role in Ireland, in the evident bi-partisan concern about relations between China and Taiwan, the United States maintains a strong presence and a leadership role.

Because of the communications age in which we live, I do not think the old kind of isolationism will win widespread support, Mr. Pat Buchanan to the contrary notwithstanding. We are now living in the "global village" of modern communications anticipated by Marshall McLuhan.⁴ Sixty seconds of television coverage showing violence against the poor and helpless around the world is quick to evoke sympathy from ordinary Americans and demands for their government's involvement. Rebounding from television crisis to television crisis is a poor substitute for the kind of sustained policy direction that the United States pursued and led with its allies during the Cold War.

If the United States will probably be a decisive factor on security and humanitarian questions, it may not be so on the kind of issues that concern this meeting – issues of trade and economic relations. Economic disputes do not evoke the same kind of sympathetic and positive public reaction. In the absence of public concern, the direction of American foreign economic policy may be left to a more parochial leadership. In the economic sector, damaging actions against American allies and trading partners by special interest groups normally do not draw the attention of the general audience, nor the reaction of Congressmen with broader goals in mind. Frequently the maxim is proved: "for the ill-intentioned to succeed, the well-intentioned need merely do nothing."

There are a number of issues currently in Canada-U.S. relations which are in that category: of significant importance to a limited number of people on both sides of the border, but not of sufficient importance to the vast majority of the population in the United States, that is largely indifferent to them. One of these Ambassador Blanchard knows very well from his own experience as

³ Pub. L. No. 71-361, 49 Stat. 590 (codified as amended in scattered sections of 14 U.S.C.).

⁴ MARSHALL MCLUHAN, *THE GUTENBERG GALAXY* (1962).

Governor of Michigan and that is, Section 110 of the U.S. Illegal Immigration Reform and Immigrant Responsibility Act of 1996⁵ which, if fully applied, would create chaos between Detroit, Michigan and Windsor, Ontario. Another such issue is the increased scrutiny by U.S. officials of aerospace and military transactions with NATO allies and other friendly nations in response to congressional criticism.⁶ I assume this is the subject of the panel tomorrow morning and will say nothing further. Of course, an old friend returning again to the agenda – the question of softwood lumber exports from Canada to the United States.

During the Cold War, at least on the first two issues, it would have been inconceivable that elements of the U.S. government would be put in a position to create confrontations with close allies. Hostile actions, such as those cited, or Helms-Burton,⁷ not only sour alliance relations in their particular sectors, but also have a negative impact generally on American relations with allied countries.

A second concern for foreigners about the willingness or ability of the United States to offer continued leadership is captured in an article which appeared in the January 2000 issue of *Foreign Affairs*, under the title *The Bullied Pulpit: A Weak Chief Executive Makes Worse Foreign Policy*.⁸ The thesis of the author, a member of the editorial staff of the *Washington Post*, is captured in the following paragraph:

Nonexecutive Chief Executive

A cutthroat legal culture, an obstructionist Congress, relentless media criticism, and endless polls – all have combined to weaken the executive's ability to lead, on domestic as well as on foreign issues. A president distracted by lawsuits will not focus on policymaking. A staff filled with temporary appointees will coast along rather than take strong initiatives. An administration that lives in fear of negative polls and "gotcha" television shows is bound to be cautious. Time and again, foreign policy analysts call on the president to show more leadership: to make the case for freer trade or U.N. dues, to explain that air power alone cannot be counted on to win the next war, or to enunciate a doctrine of intervention and then stick to it. Yet, hemmed in from all sides, the modern presidency is more equipped to follow

⁵ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, H.R. .

⁶ See *Regulations Stifle U.S. Aerospace Sales*, WALL ST. J., Mar. 16, 2000, at A2.

⁷ Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996. Pub. L. No. 104-114, 110 Stat. 785, 804-05 (codified at 22 U.S.C.A. §§ 6021-6091 (1996), H.R. 2202.104th Cong. §

⁸ Sebastian Mallaby, *The Bullied Pulpit: A Weak Chief Executive Makes Worse Foreign Policy*, 79 FOREIGN AFF. 2 (2000).

than to lead. If it senses stiff opposition on any issue, it capitulates preemptively. America has arrived in the era of nonexecutive presidency.”⁹

The question which comes to a foreign reader is: is this a basic structural change or only a reflection of the current relations between one president and a hostile Congress. There are two new, strong candidates contending for the White House. Will success of one or the other restore presidential leadership on the issues before this meeting? Americans present can answer that question much better than I can as a foreigner, but the doubt that lies behind the question creates anxiety for those of us most affected by the exercise, or the misapplication, of its power by the United States.

As a foreigner I can see reasons which argue in favour of a positive U.S. response to international questions: on Chinese entry into the WTO, on renewing fast-track authority for trade negotiations, both with the Americas and under the WTO, on a new initiative in institution building to modernise the IMF-World Bank system, or in creating new institutions to achieve wider consensus on labour, environment, and other questions which interface with trade.

Our concern is that, either because of want of interest in international questions, or systemic breakdown in government structures, the United States may be unwilling or unable to play the kind of leadership role in foreign affairs demonstrated with such general benefit from the 1940s on. The absence of that positive involvement has an immediate cost for the closest allies of the United States, but in the longer-run, an important cost for ordinary Americans as well.

My second concern about obstacles to continued progress in international trade regulation is not, happily, a criticism of the United States, but one which Canadians and Americans share. Because of the phenomenon of globalization, developing countries which have for a long time been participants, first in the General Agreement on Tariffs and Trade and in the WTO negotiations, such as Brazil, India, and Indonesia, and other countries which have joined more recently, will be taking far more aggressive advantage of their role in trade negotiations. It is fair that they should do so and it should be expected. Their participation means not only that there will be an increase in the number of aggressively presented viewpoints around the bargaining table, but that they will be bringing to the negotiations sets of issues which past negotiations, primarily between developed countries, had not presented.

In the past two decades, we have seen a number of national economies in the Third World emerge from among the less fortunate and advance quickly

⁹ *Id.* at 6.

down the road to industrial nationhood. As competitors, they have successfully challenged the existing industrial nations. They will no longer be passive observers to trade debates between developed countries. They will be strong protagonists for Third World interests.

An important factor in negotiations with developing countries will be the so-called "Seattle message" which is now being put forward by the labour movements in developed countries. As the chair of the AFL-CIO International Affairs Committee has written:

"... if the global market is to survive, it must work for working families. A first step toward that goal is building labour rights, environmental protection, and social standards into trade accords and the protocols of international financial institutions – and enforcing them with the same vigour now reserved for property rights."¹⁰

Despite the eloquence of the arguments put forward by that spokesman for the labour movement and others, inevitably developing countries are going to see those conditions as bringing unwanted interference into their domestic affairs by the WTO, and perhaps as disguised efforts by industrialized nations to put obstacles before their industrial progress.

In fact, of course, it is not as simple as that. The pressure groups on the streets of Seattle, from the labour unions, to the environmentalists, to some of the more esoteric causes, did not represent Western governments. Quite the contrary, many of the groups there find their normal position to be in opposition to elected governments. But for the developing world, it is the same thing. Whether access to First World markets, or to advance technology or to private capital is denied out of motives of plain protectionism, or as sanctions to enforce political objectives on the Third World, the consequence is the same. The opportunities to grow Gross Domestic Product in the developing world and to improve the living standards of their people are hindered. Neither the governed nor the governing in those countries gains.

In the absence of effective trade agreements, and of effective action by dispute resolution proceedings under the WTO, everybody loses: developed and developing, working people and the environment. We should not be surprised if Third World governments resist the introduction of non-trade issues to the trade regulation process. Nor that, as a consequence, multi-lateral negotiations become more difficult, if not impossible, to advance.

A final concern, which I feel may cloud future trade negotiations, is based on my experience during my time as High Commissioner of Canada to the United Kingdom. From that experience I came away with the feeling that

¹⁰ Jay Mazur, *Labour's New Internationalism*, 79 FOREIGN AFF. 79 (2000).

the E.U. is more effective at playing a negative rather than a positive role in international economic dealings. It has a structural problem arising from the incomplete political institutions of the Community. Major trade bargains require domestic authority to give concessions in order to get benefits. The history of the Common Agricultural Policy of the E.U. is an example of how hard it is to gain a “yes”; it is much easier to mobilize a “no” against foreigners.

The European Community has made remarkable progress from its first limited steps in December of 1957, in eliminating barriers between the Member States, to subsequent agreement on concerting aspects of economic policy and in particular, in establishing the Community’s currency, the Euro. To cite them is to remind how hard they were to attain.

The E.U. continues to lack the mechanisms for concerting domestic policy which federal states such as the United States and Canada enjoy. There are some questions upon which it is very difficult to get Member States of the E.U. to agree and many of those will be involved in the future agenda of negotiations. Europe, expanding as it is in both economic strength and the number of Member States within the Community will be fully absorbed in its internal affairs. There will be little energy for time left over for international statesmanship.

The foregoing analysis is pessimistic, but I believe realistic. Early success in a new round of negotiations under the WTO seems improbable. This will not be the first time that there has been a prolonged delay in a general round of multi-lateral trade negotiations. Twelve years passed between the Kennedy Round and the Tokyo Round, and fourteen years passed between Tokyo and the WTO agreement. There have been starts and stops before but in the long perspective, the accomplishments have been manifold. While there is great appeal to the broadest possible negotiations which can yield agreement comprising disparate national interests, I think that we are going to be looking at a series of negotiations on specialized questions for some time before the parties come together again to do a major general renegotiation of the WTO.

In the light of that gloomy opinion what then to do? I believe this background makes the Free Trade Agreement of the Americas (FTAA) all the more important. In a real sense the FTAA would be a warm-up session for a WTO Round, just as the Canada-U.S. and North American Trade Agreements were for the WTO. Many of the major issues will be present in a hemispheric negotiation:

- (a) the negotiation between the NAFTA partners and those of Mercosur will be a quintessential North-South negotiation in the developed-developing markets sense as well as the geographical,

(b) access to technology vs. intellectual property rights will be substantially at stake,

(c) but especially the issue of environment, labor, and social standards will be of major importance.

Canadians are prepared to accept President Clinton's commitment to FTA, but to get serious negotiation going, two initial things must be done: an encompassing fast-track authority must be conferred by Congress, and the legislators, particularly in Canada and the United States, must conduct an extensive canvass of public opinion, and provide a clear statement of what "environmental, labor and social standards" mean – to convert that phrase from a slogan to a coherent policy that our negotiating partners to the South can assess.

Those two are formidable political tasks for the leadership, but unless they can be achieved there will be no hope of either a hemispheric or global negotiation succeeding.