

January 1988

## Discussion Following the Remarks of the Honorable Donald S. Macdonald and Mr. William Merkin

Discussion

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

 Part of the [Transnational Law Commons](#)

---

### Recommended Citation

Discussion, *Discussion Following the Remarks of the Honorable Donald S. Macdonald and Mr. William Merkin*, 10 Can.-U.S. L.J. 19 (1985)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol10/iss/9>

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.

**Discussion Following the Remarks of  
The Honorable Donald S. Macdonald and  
Mr. William Merkin**

*QUESTION, Professor Henry King, Jr.:* Mr. Macdonald, how does one factor in the question of emotion that exists in terms of the relationship between Canada and the United States? How strong a dimension is it, how much weight do you give it? Do you think it's so strong that it would interfere with putting into effect an agreement that was good from an economic standpoint?

*ANSWER, The Honorable Donald S. Macdonald:* I think it's very strong indeed. I think there are two principal elements involved. The first is the perceived loser. The furniture industry in Canada, for example, can readily identify itself as a loser on any kind of an arrangement which removes the tariff that is now protecting it. People who have investments and jobs present some clear arguments that they will suffer from this kind of relationship. They will be organized and they will be able to campaign against it; that's important.

The second one is much more intangible. It's one that is felt viscerally by many Canadians who do not know what a non-tariff barrier or contingent protectionism is. They feel threatened by all this. People, who have no obvious connection with the industries affected, talk about their concern in this regard. For those who will have the responsibility, in due course, to come to terms with this strongly felt concept, it's going to be a very difficult political task. There is a wide-spread visceral concern in Canada that there is something of value at risk in what is otherwise perceived as purely an economic agreement.

*QUESTION, Professor King:* Mr. Merkin, one of the countries I assume would be affected adversely by a U.S.-Canada agreement would be Japan. Has there been any reaction on the part of Japan to these initiatives?

*ANSWER, Mr. Merkin:* We heard from a number of our trading partners as soon as this came out in 1983. The Japanese have been the strongest in warning about the implications, for the multilateral system, of bilateralism.

We focus too much on winners and losers—on one side of the border or the other. I think what we're going to see is some areas where both sides come out ahead to the disadvantage of third countries. If we reduce bilateral barriers and make it easier for North American companies to compete, who is that going to effect?

It will effect those who are still facing barriers, especially procure-

ment barriers. If we just open up the U.S. procurement market to the Canadians, by giving them national treatment, that won't do a thing for the Japanese. But, it would be very difficult for Japan to complain too much, given the political sensitivities right now.

*QUESTION, Professor King:* These sectors are seen as units. Can you split the sectors? In other words, is there any division of products between sectors by which you can reach a compromise?

*ANSWER, Mr. Merkin:* Yes, there are such divisions. For example, in the paper industry there are subsectors. The Canadian industry has something to gain in some product areas; the U.S. industry has something to gain in others. That might help with the difficulty of a balance within a sector, but it still doesn't address the GATT question, which is the biggest roadblock in the sectoral approach.

*QUESTION, Mr. Philip Trezise:* Mr. Merkin, you're perfectly correct in your remarks about the Congress and its power in the trade field, but I did not hear you mention the provision in the 1984 bill that, in effect, invites Canada to come forward with a proposal for free trade. Is this an open invitation?

*ANSWER, Mr. Merkin:* That's about all it is, an invitation. The important provision of the bill is that it allows the Administration to utilize the "fast track" approval procedures of the Congress once such a proposal has been made. That is, if a trade agreement is brought in under section 102 of the 1974 Trade Act, Congress has to act upon it within a set period of time and cannot amend the agreement.

This can be used in a bilateral U.S.-Canada arrangement. There is a provision in the bill enacted last year that allows us to go to the Congress sixty days before we want to enter negotiations and inform them of our interest. We go to the Ways and Means Committee in the House and the Finance Committee in the Senate. If they do not disapprove of entering into negotiations, then we can use the "fast track." But Congress, both in its negative approval process before negotiations are entered, and later, when an agreement is brought back for final approval, can question about all the sensitive points of the relationship.

*QUESTION, Professor Robert Hudec:* Mr. Merkin, it's been said for many years that the reason GATT Article XXIV requires governments which have a free-trade area or a customs union to include in them substantially all commerce is that, if they are allowed to pick sector by sector, the ones picked will inevitably be the ones which involve trade diversion—where one country will gain at the expense of a third country. Could you give us a general idea of the context to which trade diversion—the losses to third countries or gains at their expense—has been perceived?

*ANSWER, Mr. Merkin:* I can answer that very simply: we haven't looked at it. For the most part, we have been wrestling with very narrow sectors, trying to identify the barriers and to gauge the impact bilaterally.

We have gotten some advice from the International Trade Commission on what they think the economic impact will be on a series of sectors, but so far we have not done much consideration of third country diversion. I think our trading partners are thinking about that more than we are.

*QUESTION, Professor King:* What about the role of technology in the sectoral area? It seems that once you establish a superiority in the high technology industry on one side of the border then, since it has a competitive edge, the industries on the other side tend to have difficulty getting the research money to develop new technology.

*ANSWER, The Honorable Donald S. Macdonald:* I think certainly one of the factors that has developed recently is that technology has very substantially discounted the nature of comparative advantage that a country like Canada would have. Substitution and downsizing have been needed to meet the drop in the demand for some of Canada's natural products as a result of the impact of technology. In terms of relations with the United States, this has to be a matter of concern from Canada's standpoint.

Apart from the technological strength of the United States, and the substantial financial assets brought to bear within the university system for technological research, there has to be concern that with a very large defense budget, American manufacturers have a built-in comparative advantage. What is also of great concern is the effort by the American Administration, either for security or for trade-advantage reasons, to confine technological research to American firms.

*QUESTION, Mr. Peter Suchman:* One issue that is never really addressed directly is how an agreement, whether sectoral or comprehensive, affects the multilateral trading system. The U.S. Trade Representative's position has been that if we can't make headway multilaterally, then do it bilaterally. It seems this is a premise that needs to be more fully debated, whether it's in a U.S.-Canadian, U.S.-Mexican or U.S.-Asian country context.

Is it really valid to say that this is all going to lead to multilateral liberalization in the end? Maybe we're going in the opposite direction, towards regionalism.

*ANSWER, Mr. Merkin:* Assuming the Administration line hasn't changed, we still believe that we can be moving in tandem. The basic problem we're having with the multilateral approach is that we're dealing with over a hundred countries which are now part of the GATT. To get an agreement between that many countries to move in any particular direction entails the least common denominator concept—maybe we will have a little movement there, after years and years of negotiation.

Now we have a situation where the two largest trading countries in the world basically are prepared to see all the barriers between the two countries reduced and eliminated. That was clear from the Shamrock (Quebec) Summit. There is a political willingness to move. How and

when still remains to be sorted out, but it is the Administration's position that we should be taking advantage of this, because we'll never be able to go as far as we're prepared to go now in a multilateral agreement. And, by getting the two largest trading partners moving in this direction, it's got to get the attention of other countries.

The Japanese have been saying for years that they're prepared to match what everybody else is doing; this will put a little pressure on them. I don't know if it's going to have any impact on Europe, but I don't think they could ignore it. It's not our feeling that we are going to regionalism. The other countries are going to have to join in eventually; it's going to have to have an impact on the multilateral process.

*ANSWER, The Honorable Donald S. Macdonald:* Multilateral arrangements have been important to Canada since 1947, since the GATT, and they continue to be so. The Canadian perception, though, is a little different from the American.

In 1947, when the GATT was negotiated, there were a limited number of countries of relatively the same size (except for the United States). That was a multilateral community in which, from the Canadian standpoint, there was opportunity of negotiating some advantages. Two important things have happened since: the emergence of Japan, which wasn't even at the table in Geneva and Havana; and the European Economic Community.

GATT has ceased to be the type of multilateral organization it was. As far as Canada is concerned, there are two or three big battalions which are inclined to make the deals and then come back and tell us what the results were. Not only do we have difficulty getting our issues on the agenda, but after a deal has been made we hear: "well, we took care of this with the United States, is that OK with you?" That's not a negotiating process, if you're a Canadian with a different viewpoint. Are we abandoning the multilateral system? No, we're not, but I'm not sure whether the system may not have abandoned us.

*COMMENT, Mr. Simon Reisman:* There has been reference to the relationship between the multilateral approach on the one hand and the customs union/free-trade approach, which is provided for in Article XXIV of the GATT, on the other. This is the basis, presumably, of the consideration being given to a possible comprehensive bilateral deal between Canada and the United States.

I was personally involved in the negotiations in Geneva in 1946 and then in Havana in 1947, when Article XXIV was formulated. It had been part of the Havana Charter and was taken out of that and put into the GATT as one of the supporting provisions. There was, from the very beginning, the possibility of inherent contradictions between the two approaches.

The Havana Charter/GATT approach was Most Favored Nation treatment, and it was to be nondiscriminatory. The customs union/free-

trade idea seemed to contradict that, in the sense there would be almost preferential arrangements between groups or pairs of countries. These contradictions are more apparent today.

The Europeans, anticipating that they might wish to do something among themselves, insisted that there be an article like Article XXIV. In the first instance they were talking customs union only, the free-trade part was added later. It was thought of in terms of creating a large unit within which all barriers are removed and then trade takes place between that larger unit and other large units. There are all kinds of opportunities for trade enhancement in that type of arrangement.

The United States saw it that way, I believe. The U.S. did not resist the BENELUX approach, did not resist the Common Market, did not resist EFTA (European Free Trade Area). I think the United States encouraged those arrangements.

But, the contradictions are apparent. When other countries say Canada and the U.S. should not make their own free-trade area, it contradicts the history and development under that whole approach. And, if one looks in terms of trade enhancement, and not trade restraint, these approaches are not really contradictory at all.

*QUESTION, Mr. Jon Fried:* Mr. Merkin, my question relates to what has been referred to as "contingency protectionism." On the one hand, in the Quebec Declaration there is no explicit mention of contingency protectionism. On the other hand, secure and enhanced access should mean, in the ideal world, that traders do not have to look over their shoulders in fear of countervail and antidumping, or other trade action, once they have access to markets. Is there any likelihood of the Congress making any concessions or movement in this area?

*ANSWER, Mr. Merkin:* I have difficulty in talking about removing the ability of any firm, whether Canadian or American, from taking action against an unfair trade practice. Both countries have defined the dumping of goods, and unfair subsidization of goods for export, as illegal practices. Both countries have countervail and antidumping laws. I don't see any way the U.S. Congress, under a trade enhancement agreement, would do away with a company's ability to take countervail or antidumping measures against a Canadian company.

There is a very strong perception in Congress, whether or not in fact, that there are a great number of subsidies granted in Canada. The lumber industry, the fishing industry, the pork industry—industry after industry is blaming its trading problems on some sort of unfair practice. As long as that perception remains, it is not possible to ask Congress to abolish countervail or antidumping laws.

On the question of escape clauses, I think there may be more flexibility on the part of the Administration. Why should an action aimed at Japan hit Canada if we have got a free-trade area (or vice-versa)? We have a better chance of convincing Congress of the wisdom in changing

the escape clause actions than changing the countervail or antidumping rules.

*ANSWER, The Honorable Donald S. Macdonald:* Safeguards are, of course, a great concern. After all, the GATT itself recognizes that both dumping and export subsidies are unfair trading practices. What causes Canadians concern is the procedure in the United States that can be used for harassment. What should be looked for, in that context, is a procedural code to guarantee that these questions would be dealt with expeditiously and fairly between the two countries. While countervailing duties have not been used extensively in Canada, I think it's conceivable that they could be of concern to American manufacturers.

*COMMENT, Mr. Merkin:* A related point that came up in the hearings we held on sectoral free-trade is the idea of a process in which success in a countervail or antidumping action would apply equally to the opposite side. There are legal problems with this idea, since injury would only be proved in one country and not the other. The point is, should such a system be considered?

*QUESTION, Mr. Robert Latimer:* Mr. Merkin, the idea that you would deal with the issue of countervailing duties and antidumping outside the GATT system seems to me a little dangerous. You have to look at that very carefully and weigh the concept of injury, because dumping is not unfair if there is no injury. If you reject categorically the idea of dealing with contingency protectionism in some way, such as antidumping or countervailance, then I think you will have a lot of trouble, don't you?

*ANSWER, Mr. Merkin:* First of all, the subject has never been raised by the Canadian government. Until it's raised and we see what kind of proposals are being talked about, we're obviously receptive to any discussion. From a political realist viewpoint, if we go to the Congress and say we're waiving countervail and antidumping, I think the Congress would throw us out. It's one issue that must be supportable before Congress would even listen.

*QUESTION, Professor Virginia Leary:* Mr. Macdonald, could you elaborate on the question of the implications of a free-trade agreement on social policy?

*ANSWER, The Honorable Donald S. Macdonald:* There would be a concern, in the most general terms, about a necessity to harmonize social policies in the two countries to get them as identical as possible, so as to harmonize the cost bases for industries. It may, for example, be necessary to depart from the government prepaid medical care in Canada and move to a situation similar to the United States. The concern is that the larger market is going to dictate the cost inputs.

There is also a related question of regional development policies. (By the way, what Canada does through articulated regional development policies, the United States does by way of the defense budget.) We

have a stipulation in the Constitution Act of 1982 that we're going to equalize regional development opportunities across Canada. Therefore, another part of the Canadian social policy is to meet that national criterion. And, these efforts to bring firms in the periphery of Canada up to competitive levels with those in the center of Canada are going to be regarded as export subsidies and, therefore, hit with a countervail when those products go into the United States.

*QUESTION, Professor King:* In terms of Canada and the impact on workers, has there been any factoring in of the labor point of view on this type of initiative? What type of reaction is there and what are the concerns on protection of workers if this type of trade agreement is adopted?

*ANSWER, The Honorable Donald S. Macdonald:* In general terms, the Canadian Labor Congress regards without enthusiasm the notion of moving any closer on trading relationships or anything that will bring down barriers. That kind of adjustment will be very difficult for union membership. The question has been much debated and by mid-summer, when the Royal Commission report is published, these questions will be more fully canvassed.

*ANSWER, Mr. Merkin:* On the U.S. side, the labor movement is not particularly enthusiastic about removing barriers to trade coming into the United States. And, given the fact that our market is ten times the size of the Canadian market, I think they will not particularly support a bilateral approach. Up until now, the input of the Labor Department into trade policy decisions had been minimal, but I think the new Secretary, Bill Brock, will have more to say on these matters.



