
January 1991

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Recommended Citation

William S. Merkin, *The Challenge of the F.T.A--Chapter 19*, 17 Can.-U.S. L.J. 19 (1991)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol17/iss1/11>

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The Challenge of the F.T.A.-Chapter 19

*William S. Merkin**

In considering the U.S. perspective of the Canada-U.S. Free Trade negotiations, I recall from a previous Case Western seminar that Robert Latimer asked whether the United States was prepared to negotiate a Canadian exemption from the application of U.S. trade remedy law. I replied, somewhat undiplomatically, that it was politically impossible. Robert's equally blunt response was, "In that case, there will be no agreement."

Certainly, one of the top Canadian objectives for those negotiations was to address the U.S. system of trade remedy law. Most likely, Rodney Grey first coined the term, "contingency protectionism" to describe what he felt was an insidious system of protecting U.S. interests. While it was an ongoing Canadian concern, it became more politically imperative during this period. The United States had a rather contentious countervailing duty case on softwood lumber at the time, which was quite frustrating for the Canadian government. The case put political pressure on the Canadian government to make U.S. trade remedy law a high priority in the FTA negotiations.

The United States considered these types of remedies to be legitimate ways of addressing unfair import competition. Many of us felt that they were fully consistent with U.S. obligations under the GATT at that time. From a political perspective, these laws are viewed by many members of Congress as a given right of U.S. industry and other domestic interests to protect themselves from unfair and import competition.

In all the consultations, meetings and briefings I had with Congress throughout the period prior to, during and after the negotiations, I cannot recall ever being encouraged to modify U.S. trade remedy laws. Indeed, the softwood lumber case also complicated the U.S. negotiator's task because the U.S. government was reluctant to take any action, and thus we were highly criticized for our efforts. Congress continually threatened to link this issue to the free trade talks and undermine our ability to proceed with the negotiations.

As U.S. negotiators, we were leery of addressing this issue to any great extent. Nevertheless, it became painfully clear that it was extremely important to Canada. Simon Riesman was not going to sanction any agreement that did not address this issue. However, the viability of receiving Congressional approval would be seriously threatened if it be-

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came public that we were having substantive discussions on changing U.S. trade remedy law. That left us with an obvious dilemma: How do we proceed when the two sides have completely different positions on one of the most important issues?

Ultimately, our strategy was based more upon attempting to delay an inevitable confrontation, rather than undertaking a serious examination of the problem. Most likely, this tactic led to more frustration on the Canadian side and some of the most painful discussions we had with Simon Riesman on the issue. Through these strategies, we attempted to negotiate as many issues as possible, while not making any firm commitments to the Canadian side on restructuring our trade remedy law. Perhaps we were somewhat disingenuous in our approach.

Many times, Simon would demand to know whether the United States was prepared to address Canadian concerns in this area. While we tried to explain the political difficulties involved with this issue, Simon was never told by anyone on our team that this could not be done. We simply wanted to keep the negotiations going. Peter Murphy became quite adept at giving non-answers. Clearly, these responses were intended to keep Simon at the table, while not committing ourselves to making any significant progress in the area. Ultimately, Simon's frustration reached a breaking point, probably earlier than the walk-out, but in September 1987, he walked out on the negotiations principally because of this problem.

I do not mean to give the impression that we did not make any substantive progress in this area. Eventually, a working group looked at the anti-dumping side of the equation, and some interesting technical work was undertaken during that period. Conceptually, the issue had some appeal and some precedent. Clearly, as both tariff and non-tariff barriers are eliminated, the potential for dumping decreases.

Nevertheless, the problem from the U.S. side was two-fold. First, the working group was established fairly late in the negotiations. Second, we were all trade negotiators. Our side was not familiar with competition law in either country. We felt uncomfortable with negotiating in areas that we did not fully understand. Moreover, we did not know what we were getting into. The U.S. side did not have the resources throughout the negotiations to address a number of issues, especially this one. All the United States was prepared to undertake at that late stage was a commitment to move in the direction of resolving the issue.

In comparing the relative importance to Canada of the U.S. trade remedy regime, countervailing reform was viewed as a much more important objective. To include in the FTA countervail a firmer commitment of having a replacement system for anti-dumping without some similar commitment on itself, appeared to be politically unfeasible for Canada. While we might have included further language in the FTA on anti-dumping, to do this without a similar program on countervail,

would not make political sense for Canada. Therefore, we ended up with the present FTA language.

Without diminishing the importance of today's exercise, I must emphasize that the political constraints that were in effect throughout the negotiations, in my view, have not changed. In fact, they may have become even more ingrained. For instance, this issue is quite controversial in the Uruguay Round. There continues to be a group of Congressmen that do not want to see any perceived weakening of U.S. trade remedy law, nor any limitations on access to that process by U.S. interests.

Depending on how the Uruguay Round comes out, these difficulties might be intensified in the Canada-U.S. context. A second complication is that whatever comes back to Congress in this area in a bilateral context, whether in conjunction with countervailing duties or subsidies, is much more isolated today than if we had dealt with it in the context of the comprehensive free trade agreement. With a comprehensive deal, many people will like certain aspects and will fight to have the agreement approved. If the focus is narrowed to one of the most controversial issues in the trade policy field, obtaining Congressional approval becomes extremely difficult.

