Independence Lost

How Mulroney and Harper Gave Control of Canada to the United States

MEL G. CLARK

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Foreword

Mel Clark (ret.) is one of Canada's most experienced trade negotiators. He led the teams negotiating an international wheat agreement, two international sugar agreements and was deputy head of the Canadian trade delegation which negotiated the Tokyo round of the General Agreement on Tariffs and Trade (GATT).

In this groundbreaking work, Clark turns an expert eye, and his formidable talent and experience, to a thorough examination of the 1989 Canada-U.S. Free Trade Agreement (FTA) and the 1993 North American Free Trade Agreement (NAFTA).

Clark is a pro-free trader, a negotiator who has spent his career working for freer trade between nations and had seen Canada thrive within the multilateral trading system. He saw the opening of negotiations for a bilateral Canada-U.S. trade agreement by the Mulroney and Reagan governments in the mid-'80s as a move away from genuine free trade, and a fundamental mistake, putting Canada in peril. This began his long pursuit, and documentation, of facts not easily available to the public.

The result is a meticulous analysis of Canada's most important trading relationship in powerful, no-nonsense language, a book which is both highly informative and readable, useful to the layman and trade specialist alike.

Trade is the life blood of nations, and Canada is one of the world's major traders. Clark, a patriot and a man who knows his business,

takes the reader through a valuable history of Canada's international trade relations and to a succinct presentation of the current situation, and the danger he sees ahead for our country.

A central part of the book examines the background to the FTA negotiations, spells out, and then systematically takes apart, the reasons given by the Mulroney government for entering the negotiations with the U.S. We are reminded that the government and its supporters subjected Canadians to a barrage of propaganda about the necessity to enter the FTA. Among other things, Canadians were told that a rising tide of U.S. protectionism was coming, which could cost Canada two million jobs, that the door to the U.S. market was about to slam shut, but that the FTA would give us guaranteed access to that market and create new, secure jobs in Canada. Clark demolishes each of these arguments, the "wall of humbug," he calls it, until nothing is left standing.

Clark also scrutinizes the lumber agreement covering one of Canada's largest exports and shows how that industry was offered up to the U.S. by both the Mulroney and Harper governments. He examines the claims that Canada has done better under the FTA and NAFTA and lays bare how the nation continues to be misled about the so called benefits of these agreements. He points out that in spite of all the concessions made by Canada to get the FTA, our trade with the U.S. is in reality less secure today, that Canada has lost rather than gained jobs and that the FTA and NAFTA actually increased U.S. trade barriers to Canada.

Clark points out that one of the most egregious provisions of NAFTA is the clause — unprecedented in any previous trade agreement — that allows U.S. private corporations to sue Canada for any law or regulation in the country that could affect their profits and which they feel breaches NAFTA's terms. U.S.

corporations have thus been given greater power in Canada than Canadian companies.

During the time Clark was working on this book, over thirty of these NAFTA lawsuits have been filed against Canada. The chilling effect has been drastic on Canada's sovereignty, including causing Parliament to reverse laws passed and modifying proposed legislation in federal, provincial and local governments across the country.

Mel Clark walks us through the details of some of these cases and sounds a warning that it is crucial for Canada's independence that we revert to trading with the U.S. in the company and strength of the world's other trading nations. He builds a convincing case for Canada's strength in the world arena and concludes that Canada should get out of the FTA and NAFTA which, he points out, can be done with a simple six-months' notice, upon which we would immediately revert to trading with the U.S. on a multilateral basis, under the rules of the WTO (formerly GATT).

Independence Lost is a must read for anyone who wishes to understand how Canada's trade agreements actually work and how they are affecting our daily lives, our economy, our environment and our country's sovereignty and place in the world.

David Orchard
Borden, Saskatchewan

David Orchard is the author of ***The Fight for Canada: Four Centuries of Resistance to American Expansionism****. He was active in the Progressive Conservative Party, running twice for its leadership, in 1998 and 2003, and leading the fight against its takeover by the Reform Alliance Party. After the PC Party's demise, he has been active in the Liberal Party. He farms in Borden, Saskatchewan.*

Preface

Two beliefs have shaped my views on trade policy for decades. The first is that freer trade is essential to generate the wealth needed to build a prosperous and compassionate country. The second belief is that Canadian governments — municipal and provincial as well as federal — must be free to establish and change policies to achieve national, political, economic, social, cultural and environmental objectives, i.e. they must be independent. And independence trumps freer trade when they conflict.

Faith in freer trade was acquired in the 1930s listening to discussions between my parents, relatives and friends in rural Saskatchewan. More often than not they agreed that tariff reductions would be good for them as well as Canada. By 1948, I was a disciple of free trade and supported economic union with the U.S. which *Life Magazine* urged Canada and the U.S. to negotiate in 1948. I believed, wrongly, that Canada would remain independent in such a union. This extreme view was reworked during the 1950s toward the position that Canada should seek the maximum amount of freer trade compatible with independence. Securing our independence required us to pursue freer trade under international trade law contained in the General Agreement on Tariffs and Trade (GATT).

In 1950, my work shifted from domestic to foreign issues — five years on the budgets and related matters of the United Nations and specialized agencies, then to tariffs, non-tariff measures (NTMs), the GATT, and trade negotiations. Three fundamental conclusions emerged from this international experience: power prevailed if it was not checked by law; multilateral trade law curbed the power of countries stronger than Canada, especially the U.S., the European Union and Japan; and an across-the-board bilateral agree-

ment with the U.S. would make us part of the American empire, and should be avoided.

These conclusions were reinforced by an additional 20 years experience in international trade commodity agreements and energy trade with the U.S. and are reflected in papers written after retiring, including the Liberal Party's trade policy for the 1988 election.

I would like to take the opportunity to thank Kevin Gore for his help in producing this book. Kevin and I were involved in the GATT Tokyo Round trade negotiations which were held in Geneva from 1975 to 1979. These were the largest successfully concluded trade negotiations in history; I was the deputy head of the Canadian delegation and Kevin was a senior representative of the Department of Finance for the duration of the negotiations. His negotiating experience and trade policy work with the Department of Finance and later with Foreign Affairs and International Trade enabled him to play an essential role in the creation of the book. I would also like to thank my friend and neighbour John Ford for his invaluable assistance in bringing this book to publication. He has my deepest gratitude.

Mel Clark
December 2012

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Chapter 1

Hegemony or Nation to Colony

Why was this book written? There are three reasons:

- First, Canada entered into preferential trade deals with the U.S. — the FTA (Canada–U.S. Free Trade Agreement), a lumber MOU (Memorandum of Understanding) and NAFTA (North American Free Trade Agreement). These agreements ceded to the United States vital powers used by Canadian governments to build an independent country serving the interests of Canadians. Many of these powers are now used by the U.S. to serve U.S. interests. The Greeks called it hegemony, and Arthur Lower might have described it as nation to colony;

- Second, an alternative trade system, the WTO (World Trade Organization), which has been tried and tested since 1947, was already in place, one that did not encroach on Canada's

vital powers and permitted Canada to continue building an independent country serving Canadian interests;

- Third, the Mulroney, Chrétien and Harper governments have worked assiduously to support and defend the Canada–U.S. trade deals, which we will refer to as NAFTA, masking their real contents from Canadians. Since John Turner resigned as leader of the Liberal Party, all opposition parties and much of Canada's media have collaborated.

The decision to write the book was influenced by two developments: the accelerated pace at which Canadian governments are transferring key vital powers to the Americans; and the incessant attempts of the politicians to hide the real contents of the NAFTA behind a wall of humbug. It is time to at least try to break through this wall.

What are the vital government powers NAFTA cedes to the U.S.? The paragraphs below answer this question by identifying them and by describing Canada's related rights and obligations under both the WTO and NAFTA. Evidence sustaining the answers is provided in subsequent chapters.

1.1 Water

Under the WTO, Canada has complete control of its water as well as the right to levy taxes for any purpose at any level for perpetuity, to limit or prohibit exports. Neither the U.S. nor any other country has any rights whatsoever to Canada's water. The only obligation Canada has to the U.S. is to levy a zero tariff if Canada imports U.S. water.

NAFTA transfers control of our water to the U.S. The agreement covers all natural water, gives Americans the same rights as Canadians to Canada's water, suspends our WTO right to levy taxes on exports to the U.S. as well as all other WTO rights, and overrides the constitutional right of a province to control water in its territory. Sooner or later the U.S. will invoke these NAFTA rights to import substantial amounts of water from Canada. Nowhere does NAFTA give the federal government, or a provincial government, the right to stop them.

1.2 Medicare

Under the WTO, Canadian governments are free to establish and maintain medicare and to finance it with grants, transfer payments or other subsidies. The WTO prohibits the U.S. from initiating a countervail action against any Canadian export on the grounds that its production was subsidized by medicare.

NAFTA reverses this situation by giving the U.S. the right to Americanize Canada's health system and to countervail Canadian exports benefitting from medicare. The right to countervail medicare gives U.S. health service corporations the power to force federal and provincial governments to permit them to operate in Canada. A corollary of implementing NAFTA is that either the Canadian government will Americanize the Canadian system or U.S. corporations will.

If the U.S. government were to overtly countervail medicare, it would cause the Canadian government acute embarrassment or worse. The government has managed this situation by covertly Americanizing our health system as quickly as it can be finessed past Canadians. The means used have been to reduce medicare to

the subsistence level by severely cutting its income and substantially increasing its costs thereby encouraging, if not forcing, privatization. The government's claim that medicare's income must be cut to eliminate the deficit does not ring true when it is recognized that Canada maintains, and may well have increased, the most lavish corporate welfare provided by any developed country.

1.3 Culture

Canada has WTO obligations that impinge on the cultural industries, especially obligations relating to the Canadian tariff, other border measures, national treatment and most-favoured-nation treatment. But Canada also has WTO rights which provide it with considerable freedom to sustain its culture.

NAFTA overrides Canada's WTO rights and gives the U.S. and its publishing, broadcasting, film and recording industries the power to manage and shape Canadian culture. This power is derived from:

- the unfettered right of the American cultural industries to sell their goods and services in Canada;

- the unfettered right of the U.S. government to retaliate against any Canadian cultural action which the U.S. decides is inconsistent with the agreements;

- the total denial of Canada's right to a panel to judge whether U.S. retaliation is justified and, if so, ensure the retaliation is commensurate with the offence;

- the suppression of Canada's provincial and WTO rights. NAFTA has transferred to Americans the power to act as accuser, judge and enforcer on all Canadian government cultural measures.

To date Americans have used this power to:

- force the Mulroney government to jettison Marcel Masse's 1985 Baie Comeau book publishing policy supporting a strong publishing and distribution industry, owned and controlled by Canadians. It was replaced by a very different policy, drafted with the president of the Association of American Publishers and a vice-president of Paramount Communications;

- persuade the Mulroney government to permit Paramount to rewrite Flora MacDonald's 1987 film policy, which had intended to strengthen the Canadian film industry by limiting the powers of American film distributors in Canada;

- compel the Chrétien government to eviscerate Sheila Copps' 1993 magazine policy to help the struggling Canadian industry survive. After each retreat the government has bought peace with the injured Canadian industry by giving it corporate welfare subsidies of one type or another.

1.4 Oil and Gas

The WTO gives Canada freedom to develop and use its oil and gas to serve Canadians. Canada, for example, not only has WTO rights to levy export taxes, maintain two-price systems, supply its

citizens before exporting and maintain reserves, but it has used these rights.

NAFTA strips Canadian governments of these powers and hands over to the U.S. control of our current and future oil and gas reserves, including a priority claim to Canadian supplies during shortages, even if Canadians go short. Canada agreed to never implement any policy which would require Americans to pay more than Canadians for any energy good. As was the case with water, Canada surrendered its WTO right to levy export taxes and provincial constitutional rights to control oil and gas development. Canadian oil and gas is now American oil and gas.

1.5 Corporate Rights

NAFTA gives American investors the unprecedented right to sue the Canadian government for damages if it, or any other level of government, breeches certain obligations. The scope of this right is very broad and many government measures are vulnerable to challenge. The definition of investors who can sue is also broad. Initiating suits does not cost a corporation very much but the cost to the government and Canadians can be formidable. There are a number of significant cases under NAFTA against the U.S., as well as Mexico and Canada, and claims range from $10 million to $10.5 billion.

Damages can include the repeal of laws enacted by Parliament, the cancellation of policies and regulations and even measures requiring the government to recant statements and apologize to the corporation and paying compensation. For example, the U.S. Ethyl

Corporation used its NAFTA rights to force the Canadian government to lift an import embargo on MMT (a gasoline additive, declared a health hazard in the U.S. and banned in California), which protected public health and the environment, pay the corporation $19.3 million and repudiate its own statements that MMT damaged health and the environment. (See more on MMT and Ethyl Corporation on page 138.)

Other American corporations have invoked NAFTA to sue Canada, and one suit involved water. Sun Belt Water, of Santa Barbara, California, is seeking $10.5 billion on the grounds that the BC Water Protection Act, which limits water shipments to water in bottles and tanker trucks, conflicts with certain of Sun Belt's NAFTA rights.

In contrast with the above, the WTO does not grant corporations the right to sue contracting parties for any reason whatsoever. If Canada still traded with the U.S. under the WTO, the MMT import embargo would be in place and the government would not face the $10.5 billion claim for the damage caused by the BC water export embargo.

1.6 National Treatment

Countries that are accorded national treatment by Canada have the same rights as Canadians in the areas of commerce covered by that treatment. These recipients can reach over the border and force Canadian governments to amend and cancel laws and regulations that discriminate against them. Inevitably, national treatment increases the power of countries receiving it and reduces the independence of the country granting it. National treatment, therefore, is one of the most important, if not the most important,

concession a country can make and it is of supreme importance to limit the scope of any such concession.

The WTO respects the fact that national treatment obligations reduce a country's independence. As a result, it limits national treatment obligations to those essential to preserve negotiated tariff concessions (i.e. only internal taxes and charges, laws, regulations and requirements affecting the internal sale of imported goods). This obligation is designed to prevent importing countries from using the above measures to increase border protection against imported goods, which would defeat the purpose of the negotiated tariff concessions. WTO national treatment obligations go no further. They do not accord foreign countries any rights to Canada's water, oil and gas, or to establish their medical systems in Canada, or control our cultural industries or to invest here or sue Canadian governments for damages.

In contrast, NAFTA national treatment obligations are unlimited and ubiquitous, although there are some exceptions. But there is no exception for water, oil and gas, culture or the obligation of Canadian governments to pay damages to American investors. There is an optical exception for health but it does not provide much, if any, protection for medicare. For practical purposes Americans have national treatment rights to all these vital Canadian interests and can reach into Canada and force governments to accommodate their interests by stepping aside or amending or cancelling laws, policies and regulations. Canadian governments have already made such accommodations and will continue to make them as long as Canada is a signatory to NAFTA.

1.7 The Provinces

NAFTA requires the Canadian government to ensure that all levels of government in Canada give effect to NAFTA provisions. This means, for instance, that NAFTA suppresses virtually all rights allocated to the provinces by the Constitution whenever they impinge on NAFTA rights accorded to Americans. Although some provincial activities are excluded from the Agreement, there is no exclusion for water, culture, oil and gas, or suits and damages for non-compliance with the agreement. And the exclusion for health is optical and meaningless.

A provincial government, for example, cannot use its constitutional right to manage water if it impinges on an American NAFTA right relating to water. Sun Belt Water's NAFTA suit asking for $10.5 billion damages was triggered by BC's 1995 embargo on water shipments except water in bottles and tanker trucks; the Canadian government and Sun Belt have been discussing it since late 1998. The fact that the Canadian government is conducting such discussion not only is evidence that NAFTA covers Canada's water and accords Americans rights to it, but that it also suppresses BC's constitutional rights to manage BC water.

Chapter 2

The Multilateral Trading System

2.1 Genesis

The GATT, the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (World Bank), and the United Nations (UN) with its specialized agencies are products of the Great Depression and the second World War.

Why the depression and war created them, especially the GATT and the IMF, is succinctly explained by Wynne Plumptre, a Canadian civil servant, in four paragraphs of his book *Three Decades of Decision.* Corroborating assessments are given by two U.S. public servants: Sumner Welles, Under Secretary of State, in a 1941 speech entitled "Post-war Commercial Policy" and Harry Hawkins, the State Department's Director of Economic Affairs, in a 1944 speech. All three men experienced the depression and participated

in events that produced GATT, the International Monetary Fund and other multilateral institutions.

Plumptre wrote:

> "To understand the nature of the plans for a new international economic order that were taking shape in 1943–45 it is necessary to recall the disorders of the Great Depression of the 1930s. The fear uppermost in the minds of the planners was that the world would relapse after the war into the international economic anarchy that had characterized the years from 1929 to 1939. War, with its toll of death and destruction, had been terrible, but from one point of view the Great Depression had been worse. The wartime armies at least had the satisfaction of serving a purpose, however unwelcome. But the peacetime armies of urban unemployed, millions of destitute farmers, and countless ruined business and professional people, had found themselves adrift in a purposeless, rudderless world. It was the doubt and disillusionment of depression that had made a leader like Hitler credible."

> "National governments, at a loss to know how to deal with such unprecedented economic disaster, grasped at the most familiar yet, from a world viewpoint, the most damaging of economic remedies. They hoped that, by cutting off unwelcome import competition from abroad, they could give respite and encouragement to domestic producers. Tariffs, quotas, import restrictions, exchange-rate manipulation — all these and other protectionist weapons were wielded indiscriminately. But while it might appear possible for each country to add to its production and employment at

the expense of all the rest, it was obviously impossible for all to do so. As trade dwindled all suffered."

"This dog-eat-dog, beggar-my-neighbour attitude was never to be repeated; such was the overriding objective of the wartime economic planners. Their hope, their belief, was that the Great War and the Great Depression together would have taught the peoples of the world that some sacrifice of sovereignty to newly established international institutions was in their own interest. It seemed reasonable to suggest that new institutions should embody new codes of behaviour for the conduct of international economic affairs."

"Few if any countries suffered more severely in the Great Depression than did Canada. The Canadians who took part — and it was a significant part — in the plans for a more orderly economic world were strongly motivated by the Canadian experience. The same grim recollections were in the minds of the members of Parliament and the public who, in due course, gave strong and almost unanimous support to the plans that emerged."[1]

Welles, in 1941, stated:

"Nations have more often than not undertaken economic discriminations and raised up trade barriers with complete disregard for the damaging effects on

[1] A.F.W.Plumptre, *Three Decades of Decision: Canada and the World Monetary System*, 1944–1975 (McClelland and Stewart, 1977), pp. 18–19. Although Wynne Plumptre's book primarily is about the world monetary system, it contains a superb description of the genesis of the multilateral trade and payments system and how GATT and the IMF worked together to obtain the abolition of discriminatory trade and exchange restrictions.

> the trade and livelihood of other peoples, and, ironically enough, with similar disregard for the harmful resultant effects upon their own export trade. . . "
>
> "The resultant misery, bewilderment, and resentment, together with other equally pernicious contributing causes, paved the way for the rise of these very dictatorships which have plunged almost the entire world into war."[2]

Hawkins, in 1944, said:

> "We've seen that when a country gets starved out economically, its people are all too ready to follow the first dictator who may rise up and promise them all jobs. Trade conflict breeds non-cooperation, suspicion, bitterness. Nations which are economic enemies are not likely to remain political friends for long."[3]

Prime Minister Churchill and President Roosevelt proclaimed in August, 1941, an eight point statement of war and post-war objectives known as the Atlantic Charter.[4] The Charter reflected the determination of Britain and the U.S. to prevent the recurrence of commercial anarchy, depression and war. The Charter set in motion years of intense work that produced the GATT, the IMF, the World Bank, the UN and its specialized agencies including the Food and Agriculture Organization (FAO), the World Health Organization (WHO), the International Civil Aviation Organization (ICAO), and the United Nations Education, Scientific and Cultural Organization (UNESCO).

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[2] John H. Jackson, *World Trade and the Law of GATT*, (Bobbs-Merrill, 1969), p. 38.

[3] Ibid, p. 38

[4] The Atlantic Charter text is printed on pp. 32–33 of Plumptre's *Three Decades of Decision*.

2.2 GATT

The central purpose of the GATT and IMF was to establish a rule of law for international trade and payments, and substantially reduce barriers to trade. The GATT agreements are contracts between signatory governments that comprise rights and obligations and many of them are precise.

GATT's basic rights and obligations are summarized below:[5]

- Non-discriminatory or most-favoured-nation treatment for imported and exported goods (Articles I, II, III and XIII);
- Import and export duties or customs tariffs are the legal means to protect domestic interests (Articles I and XI);
- Enter negotiations to reduce duties and then secure them from impairment (Articles XXVIII bis, II and III);
- The elimination of quantitative restrictions from imported and exported goods (Article XI);
- Certain other non-tariff measures are legal providing they are used to conduct fair trade and not misused to protect domestic interests (Articles VI, VII, VIII, IX, and X);
- The fundamental objective of the IMF was to build a system of stable exchange rates. The key related GATT obligations provide that members "shall not, by exchange action, frustrate the intent of the provisions of this Agreement, nor, by trade action, the intent of the provisions" of the IMF (Article XV). Every member is accorded the right to refer to

[5]Text of the *General Agreement on Tariffs and Trade, Basic Instruments and Selected Documents*, Volume IV, Geneva, 1969.

the governing body any action that it considers has nullified or impaired a benefit accruing to it and the governing body is obligated to promptly investigate the complaint and make recommendations (Article XXIII);

- A fundamental operating principle is that GATT provisions and the results of successful negotiations between two or more members establish a balance of advantages which, if disturbed, can be restored by restitution or retaliation.

These are the basic provisions that preside over GATT operations which, combined with members adherence to them, determine its successes, failures and other results in between. There are, however, many exceptions to the obligations that also affect GATT's performance. Two or more members can discriminate against other members if they form a free trade area or customs union (Article XXIV). Negotiated tariffs can be increased above the agreed level (Article XXVIII) with compensation for the increase. Members can impose quantitative restrictions on imports to safeguard their balance of payments (Articles XII to XIV).

Members can raise tariffs, impose quantitative restrictions and discriminate between exporting countries if increased imports from specified exporting countries cause or threaten serious injury to domestic producers (Article XIX). And a waiver can be obtained from an obligation in exceptional circumstances not covered by the Agreements (Article XXV:5).

Other exceptions include actions necessary to protect public morals; human, animal or plant life or health; products of prison labour; national artistic, historic or archaeological treasures; exhaustible natural resources; and obligations under any international commodity agreement (Article XX). There is also an exception for actions necessary to protect essential security

interests taken under the UN Charter (Article XXI). Exceptions also legalize the operation of the Canadian Wheat Board (Article XVII) and the dairy, poultry and egg marketing boards (Article XI).

Clearly, there are numerous exceptions to GATT obligations and it is important to place them in context. John H. Jackson, in *World Trade and the Law of GATT*, points out "No international agreement, or domestic law for that matter, can long exist without some provision, formal or informal, for relaxing legal norms in certain circumstances." Jackson suggests the exceptions may well have been essential to obtain acceptance of the provisions needed "to regulate the complex and politically sensitive subject of international trade."[6] The real question is to what extent were exceptions misused to retain or erect barriers to trade that eroded confidence in a particular obligation. This question will be answered later but two points can be made now: first, the GATT does not issue signed blank cheques for exceptions because all exceptions are subject to the principle that reciprocity should be maintained; and second, many exceptions are fenced-in with conditions which limit their application and, not infrequently, their duration.

2.3 Developments 1947–1984

GATT began operating in 1947. Prevailing trade barriers were shaped by the Great Depression, World War II and the immense and severe destruction the war caused. The prime purpose of the barriers was to create jobs and earn and conserve foreign currencies, especially American dollars. The barriers comprised every protective measure that could be devised by ingenious politicians and

[6]John H. Jackson, ibid, pp. 535–536.

civil servants. Most exporters to most countries had to penetrate four or five defence lines before delivering their goods to customers. The defence lines were first: escalated tariffs that discouraged imports of value added goods, reinforced by customs measures such as classification, valuation and trade marks; second, anti-dumping duties on dumped goods and to the U.S., countervailing duties on subsidized goods; third, quantitative restrictions; fourth, administrative protection; fifth, discrimination against one or more exporters. Since there were few if any contractual exporters' rights or importers' obligations and no credible dispute settlement, administrative protection was substantial, persuasive, covert and capricious.

Although the U.S. did not maintain quantitative restrictions on industrial goods to safeguard its balance of payments, it used just about every other weapon in the protectionist arsenal. The average 50 percent tariff for industrial goods was a product of free entry for non-indigenous raw materials, duties increasing to 100 percent for semi-manufactured goods and 150 percent for manufactured goods. American customs officers used various weapons to increase duties on imports such as reclassifying them to higher tariffs and/or invoking different means to jack-up the value of goods before calculating the duty. An American manufacturer still encountering import competition could request officials to initiate an anti-dumping and/or countervailing duty action. Even more onerous were the Buy America and National Security Acts which embargoed imports, and their product coverage could be adjusted to accommodate citizens seeking total protection. The U.S. was not import-friendly.

This general but not inaccurate description of 1947 trade barriers was the start line for GATT's drive to freer non-discriminatory trade. There was no doubt member governments would make substantial progress towards this objective if they respected their obli-

gations. Progress would be achieved when governments reduced tariffs to levels at which foreign goods could profitably be sold and secured non-tariff measures (NTMs) against impairing tariff access, thus encouraging business men to invest to export. It was clear progress would be modest or non-existent if governments misused exceptions to string out illegal protection. GATT's uncertain future was illustrated by two events on November 17, 1947: Canada's Prime Minister, MacKenzie King, speaking from London, told Canadians that GATT completed its first trade negotiation and praised the result; then, the Minister of Finance, Douglas Abbot, told Canadians the government was imposing quantitative restrictions on a wide range of imports to correct an adverse balance in our international payments. U.S. Senator Robert Taft probably expressed a view held by many in the late 1940s and 1950s when he said, "It seems to me that the complications are such that a lawyer could drive a four horse team through any GATT obligation that anybody has."[7] GATT's progress was uncertain.

2.4 Canada–U.S. FTA negotiations in 1948

Prime Minister Mackenzie King defended Canada's independence and kept it in the multilateral game when, in May 1948, he rejected a free trade agreement with the U.S. Canada faced a foreign exchange crisis in 1947 that was caused by the extreme damage which the war inflicted on Britain and west European countries, rendering their currencies non-convertible. Before the war, Canada incurred a trade deficit with the U.S. and paid it from surpluses earned from trade with overseas countries, especially Britain. In the early post-war years most overseas countries could not pay for Canadian

[7]John H. Jackson, ibid, p. 533.

goods with convertible currencies. To retain these traditional markets and full employment at home, as well as help valued allies, Canada, in 1946, loaned Britain $1.25 billion plus another $750 million to European countries (the British loan was more than 10 percent of GNP in 1946 and one-third the amount of the U.S. loan). Between June 1946 and November 1947, Canadian reserves declined from about $1.6 billion to a little more than $500 million.[8]

The King government responded to the foreign exchange crisis on November 17, 1947, by taking three steps: first, imposing restrictions on a wide range of imports along with other measures such as taxes on sales of automobiles and other durable goods; second, concluding the first GATT negotiations in which the U.S. substantially cut tariffs (e.g. U.S. lumber tariffs were reduced 50 percent); and third, authorizing two officials to secretly explore a free trade arrangement with the U.S.

The secret negotiations resulted in a proposed free trade agreement. According to a U.S. outline of the agreement, its key provisions were:

- The U.S. accorded Canadian goods duty and restriction-free access except for (a) goods the U.S. found had been dumped or subsidized when anti-dumping or countervailing duties would be levied, and (b) restrictions on imports of Canadian wheat and flour;

[8]Other developments contributed to the decline in Canada's foreign exchange reserves including the following:

- a sharp increase in Canadian demand for American goods that had been curbed during the war by controls, taxes, etc.;
- in July 1946, Canada increased the value of its dollar to parity with the U.S. dollar;
- Britain encountered severe economic problems and it drew down the Canadian loans faster than anticipated.

- Canada, in return, agreed to make its resources freely available to the U.S. and undertook to not impose taxes or controls on such exports except for goods in short supply when both countries would be treated equally (the U.S. undertook reciprocal obligations), as well as accord U.S. goods duty and restriction-free entry except for anti-dumping and countervailing duties and restrictions on seasonal imports of American fresh fruits and vegetables;

- Disputes would be addressed in consultations between the two governments;

- The agreement would be for an initial period of 25 years.

The Prime Minister initially supported the secret bilateral negotiations and the agreement that emerged from them. When the time came for him to decide whether to accept or reject the agreement, he rejected it primarily because it would lead to U.S. control of Canada. The essence of King's position and the strength with which he held it is captured in four events reported below.[9]

By March 30, 1948, the Prime Minister had made up his mind. "Mackenzie King explained his reasons to Hume Wrong at the embassy in Washington the next day. First there was simply not enough time available to permit such a momentous decision. Then there were the political risks involved in the issue, risks dangerous enough to involve the defeat of the government. And, finally, the customs union proposals could lead toward the fulfilment of the long objective of the Americans... to control this Continent." On April 21, 1948, Abbott, Howe, St Laurent, Lester Pearson, the

[9]The description of the four events is taken from a paper by Robert L. Cuff and J. L. Granatstein, "The Rise and Fall of Canadian-American Free Trade, 1947–8," *Canadian Historical Review*, Vol. LVIII No. 4, December 1977.

Under-Secretary of State for External Affairs, and Hector McKinnon met with the Prime Minister. King wrote in his diary "The two latter were anxious to get final word from the Government as to whether they could proceed." In the end only Pearson and McKinnon pressed King to move forward, and the Prime Minister flatly refused: "I stressed strongly that regardless of what the economic facts might be, the issue would turn on union with the states and separation from Britain."

On April 27, 1948, C.D. Howe suggested to U.S. officials that the Liberals should "put a plan in the party platform advocating not merely the reduction, but the complete removal of import duties on trade with other countries, provided this could be accomplished on a reciprocal basis in each case." If public opinion proved favourable, Howe said, then the plan could later be pursued after Mackenzie King's retirement. Although Howe explicitly disavowed the customs union idea in this conversation, he was nonetheless called before the Prime Minister when he returned to Ottawa to explain himself. Certainly Mackenzie King remained adamant on the issue. His diary records that on May 6: "I would never cease to be a Liberal or a British citizen and if I thought there was a danger of Canada being placed at the mercy of powerful financial interests in the U.S., and if that was being done by my own party, I would get out and oppose them openly."

The November 1947 crisis faded away about a year after it forced the government to impose import and exchange restrictions and seriously consider, for about four months, a free trade agreement with the U.S. Canada accumulated foreign exchange reserves throughout 1948 and at year's end they approached $1 billion, about double the crisis level. Restrictions were relaxed in 1949 and 1950, and removed entirely by December 1951.

2.5 International Developments under GATT, 1947–1984

Between 1947 and 1984 when Mr. Mulroney became prime minister, there were many developments in GATT and the world that had a profound effect on barriers against imports and international trade and of course Canada–U.S. trade. Developments included extensive balance of payments problems that required most countries to impose quantitative restrictions on most imported goods and later tariff surcharges instead of restrictions; approval of 46 waivers from obligations between 1948 and 1968; several regional arrangements, including the Canada-United States Automotive Products Agreement (Auto Pact); the comprehensive identification, examination and negotiation of non-tariff measures (NTMs) affecting trade; seven general tariff negotiations with virtually all members participating plus many other negotiations of limited scope; and fundamental changes in the adjudication of disputes. In addition, the Marshall plan and subsequent convertibility of currencies had immeasurable beneficial effects on GATT and international trade.

How did these developments work out for Canada and GATT, and especially Canada's access to the U.S. for its exports? The situation in 1984 is summarized below under six headings: quantitative restrictions, other NTMs, tariffs, dispute settlement, the Auto Pact and Employment Support Act.

2.5.1 Quantitative Restrictions

The quantitative limitation of imports was omnipresent until the early 1960s. Not only did all members except the U.S. and Canada use restrictions to safeguard their balance of payments, but initially

they applied them to most imports.[10] Apart from embargoes, import restrictions were the most trade destructive weapon in the protectionist arsenal. Since the restrictions eliminated or curtailed price competition, companies operating behind them lobbied for their retention, and too many governments complied until their delaying tactics became untenable in the IMF and GATT. During the 1950s, the European countries' economies and exports revived and the dollar shortage, the only legal reason for trade and exchange restrictions, began to disappear. Canada and the U.S. invoked GATT and IMF obligations as well as used general meetings, committees and working parties to press European countries to remove restrictions. By the early 1960s most quantitative restrictions were lifted, especially on industrial goods. "Thus, fifteen years after Bretton Woods (inception of the IMF) and thirteen years after the establishment of GATT, the main trading countries had closely approached the acknowledged goal of complete abolition of discriminatory trade and exchange restrictions on currency transactions."[11]

Without the IMF and GATT many of the restrictions would have been retained for many years, perhaps to this day, and that is not an exaggeration.

Lifting trade and exchange restrictions was a vital step towards freer trade and establishing the rule of law — possibly the most important step taken to date. European countries honoured their contractual obligations, albeit reluctantly, and paid the thousands of IOUs given to Canada and the U.S. in tariff negotiations. These actions confirmed the basic GATT principle that the tariff was the legal means to protect domestic interests.

[10] As reported elsewhere, Canada imposed restrictions on imports from late 1947 to 1969, and tariff surcharges in 1962. The U.S. levied tariff surcharges in 1971.

[11] A.F.W. Plumptre, ibid, p. 127.

Four developments related to quantitative restrictions should be noted before examining other non-tariff measures (NTMs):

- The U.S. obtained a waiver in 1953, permitting the restriction of imports of several agriculture goods which probably blocked more trade than any other waiver. The U.S. relinquished the waiver in 1980 as a Tokyo Round concession;

- In June 1962, Canada levied tariff surcharges of 5, 10 and 15 percent on about half of its imports to mitigate another decline in its exchange reserves. The surcharges were withdrawn nine months later;

- The U.S., in August 1971, faced a financial crisis and implemented a package of measures to deal with it. The measures included a 10 percent surcharge on approximately half of its imports and the Domestic International Sales Corporation (DISC) which offered tax benefits to American corporations that transferred production and employment from foreign operations to the U.S. These measures, especially DISC, raised fears that the Nixon Administration was reverting to the beggar-your-neighbour policy typified by the Smoot-Hawley tariff[12]. The U.S. removed the surcharges after four months and DISC in 1980 following a GATT panel decision which ruled that it was illegal;

- All industrialized countries have imposed quantitative restrictions on goods exported by developing countries, particularly textiles and clothing and some restricted imports of a relatively small list of goods (e.g. motor vehicles and parts) from Japan.

[12]Smoot-Hawley Tariff Act of 1930 that raised U.S. tariffs on over 20,000 imported goods to record levels.

2.5.2 Other Non-tariff Measures (NTMs)

The 1947 GATT contained obligations impinging on many NTMs which sovereign countries normally used to conduct international commerce and assembled them in eight articles. The first six rounds of negotiations concentrated on reducing tariffs and neglected NTMs, except for a 1967 Kennedy Round Agreement on rules dealing with the dumping of goods from one country into another. Four months after the Kennedy Round concluded, member countries decided to start intensive work on a wide-range of NTMs as part of preparations for another negotiation, subsequently named the Tokyo Round. The work moved through three stages: the collection of basic information, the identification of problems and negotiations. The work began by assembling an inventory of some 800 NTMs identified by exporting countries, placing the measures in 30 categories and classifying them under five headings. The assembly and examination of NTMs started in 1968 and continued until real negotiations began in January 1975.

The objective of the NTM negotiations was to eliminate them, or, where this was not possible, to eliminate their trade-protection effects and bring them under the rule of law. The negotiations produced seven agreements: anti-dumping duties, countervailing duties, valuation for customs purposes, standards, government purchasing, import licensing, and publication and administration of trade regulations. Another important related development was that all developed markets adopted a single tariff nomenclature (the Harmonized System) which curtailed reclassification of imports to higher duty categories and generally simplified exporting. A quantitative calculation of the impact these agreements had on trade is impractical. It is clear, however, that the eight agreements comprised another essential step to freer trade and expansion of the rule of law, perhaps second only to the elimination of most

trade and exchange restrictions in the 1960s.

2.5.3 Tariffs

Before Mr. Mulroney became prime minister in 1984, GATT members had participated in seven multilateral trade negotiations. Compared to pre-GATT tariffs, these negotiations plus several other negotiations arising from the accession of new members (e.g. Germany, Japan and Switzerland), substantially reduced tariffs, tariff peaks and tariff escalation which retarded the export of processed goods. After the seventh negotiation the weighted average tariffs of ten developed import markets on all industrial goods was 4.9%. Raw materials tariffs averaged 0.4%, semi-manufactures 4.1%, and finished manufactures 6.9%.[13] Industrial tariffs were probably lower than at any time since the 1870s. The risk that the lower tariffs would be nullified by illegal trade actions was greatly reduced by the convertibility of currencies, the Tokyo Round NTM agreements, and growing effectiveness and use of dispute settlement.

The magnitude of GATT tariff reductions can be further illustrated by summarizing the results of the Tokyo Round. In 1976 the most-favoured-nation imports of industrial products by the ten industrial markets totalled $190 billion. About $60 billion (32 percent) of them were already duty-free. The Tokyo Round reduced duties on $112 billion (86 percent) of the remaining $130 billion of imports. These reductions were of the order of 33 percent on a weighted duty-collected basis (38 percent on a simple arithmetical average of duties). Total duty-free imports increased to $66.5 billion (35

[13]This data was assembled from information in the report prepared by the Director-General of GATT on the Tokyo Round of Multilateral Trade Negotiations, April 1979.

percent). Virtually all the industrial tariffs of these ten countries are bound against increase in their respective GATT schedules. If all the tariff reductions had been implemented in one step (i.e. no phasing), the ten economies would have foregone more than $4 billion of tariff revenue a year.

2.5.4 Dispute Settlement

The contractual basis for settling disputes comprises a right reinforced by an operating principle. All members have the right to refer to the governing body an action by another member that it believes has nullified or impaired a benefit, and the governing body is obligated to promptly investigate and make recommendations. The operating principle is that GATT provisions plus tariffs annexed to it represent a balance of rights and obligations among members that should be maintained. Illegal action by a member is prima facie evidence that it has tilted the balance in its favour. Unless consultations or conciliation results in a settlement, adversely affected members are authorized to restore the balance by raising barriers against the offending member's exports. Although retaliation is infrequent, it is the ultimate sanction that normally persuades guilty but dilatory governments to honour obligations. Conversely, members who fail to use this authority simply invite more illegal barriers against their exports.

Panels are a key part of GATT's dispute settlement system. Since 1952, most disputes have been referred to panels to identify facts and make findings and recommendations. Panels are quasi-judicial bodies comprising three or five persons appointed by the Director General. Members are not citizens of countries that are parties to the dispute and serve in their individual capacities. Litigants are represented by civil servants and legal costs are zero. Panels

neutralize the disparity in power between litigants. A very high percent of panel recommendations are accepted and implemented. Before Mulroney, panels normally reported 11 to 12 months after receiving a case. A 1994 Uruguay Round decision accelerated the process and cut reporting time.

From 1952 to 1984, Canada requested, co-sponsored requests or presented evidence to several panels examining complaints against the European Community, Japan and the U.S. Most submitted reports and found in Canada's favour. Three of the panels adjudicated complaints against U.S. measures of which two found in Canada's favour and Canada subsequently won the "lost" case when it was retried. The U.S. implemented the recommendations made by the panels. In addition, in a fourth case, the U.S. lifted an embargo on Canadian tuna before the panel reported.

2.5.5 Canada–U.S. Automotive Products Agreement ("Auto Pact")

The Auto Pact was signed in January 1965, and effectively gutted in 1989 by the Mulroney government when it implemented the FTA. Before the Pact, the Canadian tariff on vehicles was 17.5 percent and the U.S. tariff was about five percent on automobiles and 25% on light trucks. Under the Pact, Canada lifted its tariffs on passenger cars, trucks, buses, tires and original parts for vehicle manufactures who met certain content provisions. The U.S. provided unconditional tariff-free entry for Canadian-made vehicles, tires and parts. Both countries agreed GATT provisions would apply to NTMs and dispute settlement.

The Pearson government's offer to Canada's American-owned vehicle manufacturers, especially General Motors, Ford and Chrysler

(The Big Three), of conditional tariff-free entry was the key to obtaining the economic advantages the Pact accorded Canada as well as securing U.S. approval of it and ensuring the vehicle manufacturers would meet Canadian content conditions. The Big Three restructured production to pick up the higher profits now available and substantially increased Canadian production, jobs and exports. At least as important, the Big Three used their very considerable political clout to persuade the Johnson administration and Congress to accept the Pact and obtain a GATT waiver permitting tariff-free entry for Canadian-made vehicles and original parts. By enlisting the Big Three and their power in the U.S., the Pearson government eliminated the power deficit Canada faces in bilateral negotiations with the U.S. The fact that Canada could restore the tariff on a vehicle manufacturer's imports was an effective lever that almost always obtained their compliance with Canadian content provisions. Prime Minister Mulroney "cancelled" the Auto Pact when he eliminated Canada's motor vehicle tariffs on imports from the U.S.

2.5.6 Employment Support Act

The Employment Support Act was a Trudeau government response to the 1971 U.S. import surcharge of ten percent. The Act authorized the government to provide "financial assistance to the Canadian manufacturing industry for the purpose of mitigating the disruptive effect of import surtaxes, or other measures of like effect where such measures could seriously affect employment." The government approved 769 grants totalling $19,832,337 in support of 21,944 jobs. The U.S. did not apply countervailing duties against these grants in 1971, and it would not do so today if we traded with it under the WTO because its officials know the WTO would find such duties illegal.

The Act has not been used since the U.S. removed the surcharge, and today the U.S. could legally countervail Canadian grants under the bilateral agreements. But the Act could still maintain the viability of manufacturers and employment where exports are subject to other foreign protection pending a WTO panel decision regarding its legality. Using the Act would signal foreign governments and producers that Canada will no longer accept decisions that impair its WTO rights, and be coerced into adopting measures to reduce the competitiveness of exports at no cost to foreign governments and companies.

2.5.7 Record of Achievements under the Multilateral Trading System

The record of the multilateral system from 1947 to 1984 proves beyond doubt that it established a rule of law for international trade and payments and substantially reduced barriers to trade, its central purpose. Equally important, member states, with some sporadic exceptions, increasingly obeyed the law and, after reducing trade barriers, kept them down.

The conclusion that multilateral trade law works is reinforced by the fact that the use of panels to resolve disputes has been increasing even when the disputes impinge on important national interests — which suggests governments believe they are neutral, just and effective. From 1947, when GATT members began using panels, to 1995 when the GATT morphed into the WTO about 100 panels were established. In contrast, during the next 17 years the WTO received over 450 requests for panels. Disputes covered a wide range of issues including the U.S.-German "chicken war," agricultural subsidies, export subsidies on civil aircraft, subsidies on Canadian wheat exports, U.S. duties on imports of off-shore

steel, U.S. duties on Canadian lumber, protection of intellectual property and bananas.[14]

John Weekes, a former Canadian Ambassador to GATT and chairman of its governing council as well as head of the delegation that negotiated NAFTA, recently wrote "What is significant is that governments of countries of all sizes and various levels of development have put their trust in the system as the best way of managing trade disputes. In my experience in government, referring a matter to WTO dispute resolution helped to defuse it as a politically contentious issue between governments. Parties to the dispute normally found it easier to fashion a solution after an impartial WTO finding. Neither party had to look as if it had backed down under pressure at the negotiating table. There was no shame in respecting the law."[15] Senator Taft's 1949 judgment that "a lawyer could drive a four horse team through any GATT obligation" was not sustained.

The rule of trade law, the substantial reduction of trade barriers and constraints on increasing them for protectionist purposes, was an indispensable condition for the rapid expansion of world trade and economic growth of industrial countries. World exports increased from some $54 billion in 1948 to over $140 billion in mid-1963 and $1.8 trillion by 1984. Gottfried Haberler made the three following pertinent points when he delivered the Presidential address to the American Economic Association in December 1963:

- For the first time in almost a hundred years world trade has grown faster than world production for a period of more than ten years;

[14]World Trade Organization, trade topics dispute settlement, www.wto.org, Geneva, 2013.

[15]John M. Weekes, Chairman of APCO Worldwide, Global Trade Practice in a presentation to the American International Club of Geneva entitled "The Doha Round; Can the WTO Succeed?" February 13, 2003.

- The rapid rise in world trade is the consequence of, but has also powerfully contributed to, the rapid growth of world production. The performance with respect to growth and stability of the majority of national economies of the world has, on the whole, been satisfactory — not in an absolute sense of perfection, but satisfactory compared first with earlier periods (not only the definitely unsatisfactory interwar period), compared secondly with what was expected by many economists 20 years ago, and compared thirdly, I dare say, with what one would gather from current statements of many experts, not to mention politicians, statesmen, and other laymen;

- The great improvement of the post-war years over earlier periods is, of course, the complete absence of deep depressions. This is common knowledge and it is, I think, fairly generally agreed now that there are excellent reasons for assuming that deep depressions are a thing of the past. I share this conviction and shall not repeat the well-known argument. But let us recall that this consensus, which now seems to extend even to Marxist economists, did not exist or was at least much less widespread only ten years ago.[16]

Although Haberler spoke in 1963, his observations were still true in 1984. During the intervening years there were additional substantial reductions of trade barriers and continued growth of world trade, production and the industrial economies. And there was no repeat of the severe 1929–1939 depression and related economic anarchy.

GATT still faced serious problems. Developing countries benefitted

[16]Gottfried Haberler, "Integration and Growth of the World Economy in Historical Perspective," *The American Economic Review*, March 1964, Volume LIV, No. 2, Part 1.

far less from the growth of world trade than the industrial countries. The industrial countries made the situation worse by limiting imports from developing countries of both industrial and agriculture goods, and then subsidizing farmers to produce competing goods and to export surplus production. Developing countries are now using WTO dispute settlement to start rolling back and to eventually remove illegal subsidies paid by industrialized countries that depress their export earnings, and have won two groundbreaking victories against EU sugar and U.S. cotton subsidies.[17]

2.6 Strategic Advantages from the GATT Multilateral Trading System

2.6.1 Canada and the U.S.A.

Since 1867, Canada has exported goods to the United States for approximately 80 years without a broad contractual agreement of any type. For 40 years after that, Canada–U.S. trade was governed mainly by the GATT. Now most of this trade takes place under the three preferential agreements: the FTA, NAFTA and the Memorandum of Understanding on lumber (lumber MOU).

For years, Canada accorded preferential access to commonwealth goods which, of course, discriminated against competing U.S. goods. In 1932, Canada and other commonwealth countries replied to U.S. protectionism reflected in the Smoot-Hawley tariff with the Ottawa agreements which, inter alia, increased tariffs against the U.S. During the mid-'30s, Canada and the U.S. negotiated two most-favoured-nation tariff agreements reducing tariffs on certain

[17] See Appendix C for media reports on sugar and cotton subsidies.

goods, and in the mid-'60s the Canada–U.S. Automotive Products Agreement gave Canada preferential tariff-free entry into the U.S. market.

Between 1947 and 1984, Canada participated in setting up the GATT, a GATT Review Session, seven general trade negotiations, with the seventh, the Tokyo Round, comprising a basic examination and negotiation of prevailing non-tariff measures (NTMs), several negotiations with individual countries acceding to GATT, negotiations adjusting tariffs and development of a system to settle disputes. The establishment of the GATT contract, combined with the negotiating sessions, substantially reduced U.S. barriers to Canada's exports. The U.S. Smoot-Hawley tariff on industrial goods was cut from an average of about 50 percent to one percent. Many American NTMs were removed and constraints were placed on the misuse of those that could not be removed such as countervailing and anti-dumping duties. The GATT dispute settlement system was insulated from national bias and eliminated the power disparity between Canada and the U.S. It found in Canada's favour when there was a good case.

Canada's exports to the U.S. increased from about one billion dollars in 1947 to $98 billion dollars in 1986. More important, compared to pre-war bilateralism, Canada's power vis-a-vis the U.S. also increased greatly from 1947 to 1984, and Canada's independence was secure. Work to further liberalize trade began in the mid-'80s and in 1994, with the Uruguay Round agreement, strong new controls were placed on the misuse of countervailing duties, the dispute settlement system was made even more effective and GATT was given a new name — the World Trade Organization (WTO).

Canada obtained five strategic advantages from trading with the world under the multilateral system — especially with countries

possessing much greater power such as the U.S., EU and Japan. The advantages were the rule of law, access to foreign markets, the method for balancing concessions agreed in negotiations, a substantial increase in Canadian power vis-a-vis the U.S. as well as the EU and retention of Canada's independence. The paragraphs above contain evidence supporting the conclusion and the paragraphs below bring together the following key points.

The first strategic advantage was the **rule of law**. Multilateral trade and payments law trumps national laws including U.S. trade laws. It is based primarily on the contractual rights and obligations set out in the GATT and IMF, the results of all negotiations conducted under the agreements and decisions taken by the contracting parties including those relating to disputes between members.

The second strategic advantage was **access to foreign markets**. In 1984, Canadian exporters had better access to the U.S. and other foreign markets — i.e. the composite of tariffs, non-tariff measures (NTMs) and dispute settlement — than at any time since Confederation. Negotiations over 37 years provided an opportunity for a wide range of Canadian industry to obtain the full benefit of specialization and scale. Cited below are pertinent facts about the U.S. 1984 tariffs, its NTMs and compliance with GATT dispute settlement decisions.

Tariffs: Before GATT, the U.S. tariff on industrial goods averaged 50 percent which reflected free entry for non-indigenous raw materials, duties increasing to 100 percent for semi-manufactured goods and 150 percent for manufactured goods. In 1984, the U.S. tariffs on industrial goods averaged one percent. Around 96 percent of Canada's exports entered at duties of five percent or less and 80 percent entered duty-free.

Products that entered the U.S. duty-free or at rates of five percent or less included a wide range of advanced manufactured products

containing substantial research and development, fully manufactured products and semi-manufactured products made from indigenous resources (e.g. civil aircraft and space craft and parts, avionics and flight simulators; professional and scientific instruments; office equipment; agricultural machinery and parts; automobiles and parts; a range of industrial machinery including pulp and paper machinery; asbestos products; semi-manufactured paper and wood products including prefabricated buildings; a range of semi-manufactured non-ferrous metals; and a range of inorganic chemicals and some petrochemicals).

In addition, the 1984 U.S. tariff provided Canadian industry with an incentive, in some cases substantial, to add value to a range of resource-based products prior to export. The incentive was provided when the duty on the fully or semi-manufactured product, or both was lower than the duty on the materials used in the production process. For example, the duty on cast aluminum and other products was 3.8 percent but if the aluminum was "cut to size or shape, or shaped for incorporation in civil aircraft," it entered duty-free.

Similarly, tariffs on key resins ranged from 10 percent to 12.5 percent, but the duties on plastics ranged from 3 to 7 percent, and if the plastic were further converted to a part for aircraft, agricultural machine or automobile it would be duty-free.

In fact, the 1984 U.S. tariff provided substantial protection for only a few industries such as rapid transit and railroad equipment, resins, textiles, apparel, footwear and certain ceramic articles.

Non-tariff Measures (NTMs): Before GATT, the U.S. was free to use any and every NTM in its arsenal to restrict or embargo Canadian exports. The 1984 GATT prohibited certain NTMs (e.g. export subsidies for industrial goods), partly liberalized others (e.g.

government purchasing) and placed conditions on the use of others (e.g. quantitative restrictions, anti-dumping duties, countervailing duties, valuation for customs purposes, standards, import licensing, the publication and administration of trade regulations). The U.S. pre-GATT freedom to use NTMs to restrict imports was curtailed under GATT although as with most countries, there still remain complaints about the maintenance of these barriers.

Dispute Settlement: Before 1984, Canada was winning disputes with the U.S. When we had a good case, the government referred them to GATT panels and, one way or another, the government made it clear it would retaliate if the U.S. did not implement panel recommendations. GATT dispute settlement did not cost Canadian exporters one red cent and government expenses were limited to the expenses incurred by civil servants working on the case.

The third strategic advantage Canada obtained from the multilateral system was the **method used to calculate reciprocity in trade negotiations**. In bilateral negotiations the U.S. would not accept Canadian concessions on tariffs and/or NTMs as adequate payment for matching American concessions. It would point to the fact the American market is ten times larger than Canada's and request substantial additional payment. Such payment, if made, would require concessions beyond trade related border measures then used in trade negotiations which would almost certainly impinge on Canada's vital interests.

Examples of benefits Canada acquired from negotiating with the U.S. multilaterally are summarized below.

Government Purchasing: A Tokyo Round Agreement lifted Canadian buy-national practices from about one billion dollars of government buying a year. The U.S. removed buy-American regulations from around $18 billion of annual purchases, a ratio that

favoured Canada by 18 to 1. The Americans bridged this gap by including the purchases other governments placed under the agreement.

Tariffs: In the Uruguay Round in 1990 Canada cut tariffs on imports valued about $28.4 billion a year. The U.S. reduced tariffs worth around $297.3 billion annually, or by a ratio of 10 to 1 in Canada's favour. The Americans balanced their books by taking account of the tariff cuts made by other participants.

The fourth strategic advantage Canada obtained was **increased leverage vis-a-vis other countries who possessed much greater power**, especially the U.S., EU and Japan. Two sources of our relative increased power were the rule of law and multilateral reciprocity. A third source of such power was the similarity of interest we have with other countries in reducing trade barriers which was mobilized and deployed in multilateral negotiations.

Virtually every U.S. NTM that restricts or distorts Canada's trade also restricts or distorts the trade of a least some other GATT members including the EU and Japan. This means Canada's interests in bringing U.S. NTMs under the GATT is shared by other important trading entities. This similarity of interests substantially increases Canada's leverage in GATT disputes relating to U.S. NTMs. In a bilateral agreement, Canada would be isolated in a one-on-one situation with the U.S. and cut off from the substantial additional leverage derived from a similarity of interests with other trading entities.

The value to Canada of channelling U.S. NTM issues to the GATT can be illustrated by noting that in the Tokyo Round, the U.S. made a number of important NTM concessions of value to Canada, which Canada either could not have obtained on a bilateral basis or for which Canada would have had to pay an exorbitant price. These multilateral U.S. concessions included:

- agreement to apply an injury test before levying countervailing duties;

- adoption of a new multilateral and much less restrictive system for establishing the value of imports for customs purposes;

- the abolition of the American Selling Price, Wine Gallon Assessment and Final List methods of valuing certain imports;

- lifting "buy-America" provisions from the civilian purchases of the National Aeronautic and Space Administration (approximately $400 million in 1976);

- undertaking not to attach "buy-America" riders to financial assistance to state and municipal governments for the purchase of civil aircraft and components;

- agreement that Domestic International Sales Corporation (DISC)-type subsidies be placed on the list of prohibited export subsidies.

The fifth strategic advantage Canada obtained from the multilateral system was that, **after 37 years of trading under it, our independence was intact**. We ceded our sovereign rights to raise tariffs above negotiated levels, to introduce certain NTMs and to use other NTMs to protect domestic interests. However, we retained total control over the vital sources of our independence, including water, oil and gas, the forests, and all other resources and medicare, as well as a large degree of control over nation building policies such as investment, banking and radio and television. In addition, GATT accorded private corporations no GATT right whatsoever. In 1984, Canada was independent.

Before Mr. Mulroney became prime minister in 1984, Canada, negotiating and trading in the multinational system, had made unprecedented progress in eliminating or reducing foreign barriers to its exports and, even more important, its independence was intact. Of course, there were still issues that should be addressed, but it was virtually certain another round of GATT negotiations, the eighth, would be initiated later in the decade, and they would provide the Mulroney government with opportunities to obtain even better access to many export markets, including the U.S., at prices Canada could afford. Obviously, Canadian priority objectives included defining domestic subsidies, codifying the GATT common law that regarded medicare grants as non-countervailable, and accelerating dispute settlement. The negotiations, later labelled the Uruguay Round, placed new strong limits on members' flexibility to use countervailing duties.

2.6.2 The United States

The U.S., more than any other country, is responsible for the multilateral system of trade and payments and its record. The non-discriminatory reduction of trade barriers entrenched in the Reciprocal Trade Agreements Acts was enacted in 1934, at the request of President Roosevelt and his Secretary of State Cordell Hull. The U.S. led other countries in converting the Atlantic Charter to the contractual rights and obligations contained in the GATT and IMF. It used the Lend Lease Agreement to obtain a commitment from Britain to accept post-war non-discriminatory trade. In the first five GATT negotiations, the U.S. cut hundreds of tariffs, many by substantial amounts, in return for payments delayed until national currencies were convertible. The Truman administration developed and financed the European Recovery Plan or Marshall Plan that gave large-scale aid to war-ravaged western Europe and

greatly assisted its economic recovery. Congress made possible in the Tokyo Round the large scale negotiation of NTMs for the first time, giving the president advance authority to reach agreements on such measures and foregoing its historic right to amend the result. On occasion the U.S. retreated a step or two but, over time, usually restored the lost liberalization. Of course, the U.S. pursued its national interest but it was an enlightened interest which, to a significant extent, coincided with Canada's.

Chapter 3

Selling Free Trade

Stripped to essentials, the case Prime Minister Mulroney deployed for a free trade agreement with the U.S. was based on an allegation and two promises, which also were negotiating objectives. He alleged that American protectionists' misuse of trade laws threatened more than two million Canadian jobs that only a free trade agreement would save.[1] He promised not only to retain these export jobs but to increase them by negotiating "assured access" to the U.S. He also promised to retain unimpaired our political sovereignty including control of our social, cultural and regional disparity programs.[2] The Prime Minister expanded on his allegation and two promises in an Address to the Nation on June 16, 1986, the day before his government began negotiating the FTA in Washington. After alluding to the American lumber industry's petition submitted May 1986, requesting countervailing duties on

[1] Don McGillivray, *Ottawa Citizen*, November 28, 1986.

[2] The Prime Minister's *Address to the Nation*, CBC, June 16, 1986, is the source of quotations in paragraphs 1, 2, 3, 4, 5, 8.

imports of Canadian lumber, the Prime Minister said "those vital markets are in peril" and warned "a door of protectionism is closing on us." The unstated charge embedded in Mr. Mulroney's allegation is that GATT had not and could not contain American protectionists.

Recall that the Prime Minister's first promise was to provide Canadian exporters with "secure access" to the U.S. He would keep this promise by seeking U.S. agreement to grant Canada unrestricted "national treatment" and establish "new and equitable mechanisms. . . to deal with the irritants that we have seen in recent weeks," i.e. the American petition for lumber duties or the levying of such duties. He explained national treatment would mean that "goods from Manitoba will be treated exactly the same as goods from Minnesota" and "Canadian companies will have the same standing in U.S. law as American companies — there will be a truly level playing field."

The Prime Minister went on to cite three more advantages his free trade agreement would give Canadians:

> "We seek a new deal with the Americans . . . that shields our trade from shifting political winds. . . that protects Canada from the vast arsenal of regulatory and legal weapons that can be used to restrict our trade. One that stimulates investment, productivity and, most important, jobs."
>
> "We want to ensure that Canadian fishermen, pork producers, lumbermen, tire manufacturers, and others are relieved of the tyranny of protectionist measures" and,
>
> "We want to recreate the success of the auto industry for other sectors and other regions of the country including forestry. . . in British Columbia."

The Prime Minister's second promise was to prevent any reduction of "our political sovereignty, our system of social programs, our commitment to fight regional disparities, our unique cultural identity, our special linguistic character..." He underlined this commitment with the statement "they are not the issue in these negotiations."

3.1 Reality

It is important to pin down what the Prime Minister was talking about. Who are the American protectionists and how do they operate? What is secure access? What trade laws did he have in mind? What is national treatment? It is even more important to ascertain if the Prime Minister's allegations were true: were American protectionists threatening to close the U.S. market to Canadian exports, and had GATT failed to contain them? And it is vital to know precisely how the government could nail down assured access and what it would cost.

To put it simply: most American trade restrictions begin with companies, trade associations and trade unions who seek to curb imports of the goods they produce. They obtain the support of elected representatives by various means which normally include financial contributions to campaign funds and sometimes endorsing certain candidates [3]. Members of the House of Representatives and Senate pass trade bills and the president turns them into laws as well as appoints hundreds of officials to interpret and administer the laws. And trade lawyers and lobbyists, who not infrequently worked for previous presidents, attempt to inject clients' interests

[3]The excerpts below illustrate the amounts of money U.S. corporations "give" politicians.

at every stage of the legislation and appointment process. These, then, are the protectionists and main players in the game called American trade politics. The Prime Minister's objective was to sequester their weapons, which was quite a challenge.

The Prime Minister and members of his government used the words "trade laws" and "trade remedy laws" as code for U.S. anti-dumping and countervailing duties. Much evidence suggested American protectionists believed countervailing and anti-dumping duties were the most valuable weapons in the arsenal. Recall that the U.S. retained the right to use such duties in the 1947 bilateral agreement, despite the fact that Canada agreed to share all natural resources with Americans. In GATT, the U.S. resisted for many years an obligation to limit its use of these duties to imports that were injuring, or would injure, a domestic industry. The U.S. also in GATT refused for more than 30 years to agree that all duties levied would be limited to the amount of the subsidy and/or dumping. The Prime Minister was asking the President to defy the protectionists, who were embedded in the administration as well as Congress, and put away their treasured weapons — a request not dissimilar to asking Ronald Reagan to give up nuclear weapons.

Secure access would guarantee that U.S. measures, municipal and state as well as federal, would not restrict imports of Canadian

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Business made a substantial investment in the Republican Party in the recent election. Corporations and executives contributed $146 million in "soft money" to national Republican Party committees in 1999–2000, compared with $81 million to Democratic groups. The money helped Republicans keep control of Congress, but the coup was the election of Bush, which eliminated the veto threat from a Democratic White House. . . Although Republicans clearly are the driving force, many congressional Democrats are also on board the business bandwagon, reflecting both the party's dependence on corporate money and a more centrist ideological shift. (From the *Washington Post/Weekly Guardian*, March 15–21, 2001).

goods and that this obligation is inscribed in a contractual agreement in clear words that could not be misunderstood or misinterpreted. The Prime Minister was asking the U.S. to treat Canada as the fifty-first state for trade and as a sovereign nation in other matters.

The unrestricted national treatment the Prime Minister asked the U.S. to give Canadian goods, services and citizens would, if granted, provide assured access and immunity from American countervail and anti-dumping duties. But he did not tell Canadians the U.S. price for this concession would be identical national treatment in Canada and what that would cost.

Neither the Prime Minister nor his Minister of Trade, or any other minister, cited credible evidence to sustain the double-barrelled allegation that the U.S. was closing its market to Canadian exports and that GATT could not stop it.[4] The U.S. did restrict our exports with measures that were illegal under GATT and Canada did not always invoke its GATT rights. But facts reported in the previous chapter reinforced by four cited in the following paragraphs prove beyond doubt that only a propagandist with total contempt for facts would even attempt to turn the evidence upside-down and

[4]The Right Honourable Joe Clark, Secretary of State for External Affairs, gave a speech in 1984, alleging a "new protectionism" was stalking world trade that "amounts to a serious erosion of the open multilateral trading system." James Kelleher, Minister for International Trade, tabled in 1984 a discussion paper "How to Secure and Enhance Access to Export Markets," that suggested the objective is a "comprehensive arrangement" with the U.S. that would provide Canada's exports with comprehensive national treatment. The speech and discussion paper are examined in some detail by the author in a paper he presented to a conference, "Canadian trade at a crossroad: Options for a new international agreement," sponsored by the Ontario Economic Council, April 1985, pp. 276–286. It suffices to note here that both distorted many facts, and did not sustain the government's allegation the U.S. was closing its market to Canadian exports and that GATT could not stop it.

tell us access to the U.S. was in "peril," that "a door of protectionism was closing on us" and that more than two million Canadian jobs were at risk. Worse, the Prime Minister did not report evidence that would have raised serious questions about the accuracy of his allegation and probably rendered it a mirage. The four examples of ignored evidence are summarized below.

First, U.S. interests can petition the administration to increase protection against imports because of dumping, subsidies, unfair import practices, unfair foreign practices, or violation of U.S. rights under trade agreements as well as to take emergency action against imports. During the six-year period from 1978 to 1983, Americans submitted 662 petitions for additional protection. Of these petitions, forty-four (6.6%) related to imports from Canada and only eight (1.2%) resulted in increased protection. The eight Canadian exports subjected to additional American barriers were clothes pins; bolts; nuts and screws of iron or steel; certain chlorides; methyl alcohol; optic-sensing systems; spring assemblies, selected components and production goods; stainless steel; and sugar and syrups. By January 1984, only four of these restrictions still applied. Did these restrictions jeopardize more than two million jobs?

Second, historically Canadian governments, provincial as well as federal, grant subsidies to private corporations totalling billions of dollars annually. But, during the years 1978 to 1983, Americans submitted only thirteen requests for countervailing duties on Canadian exports, and only one request resulted in the levying of such duties (optic-sensing systems). Did this one U.S. duty place Canadian access to the U.S. "in peril?"

Third, during the 1970s, Americans experienced "two substantial increases in oil prices, stagflation, the most severe recession since the Second World War, relatively high unemployment, a substantially overvalued currency, the largest current-account deficit in

history, intense import competition on some traditional industries that resulted in plant closures and the layoff of employees, two presidential elections, and four congressional elections." The 1971 import surcharges were lifted six months after they were levied, and the use of tax policy to direct jobs from foreign countries to the U.S. (i.e. DISC — Domestic International Sales Corporation) was cancelled by a GATT panel and the Tokyo Round. In the GATT Tokyo Round, the U.S. undertook many new onerous obligations to eliminate or limit the use of non-tariff measures and it honoured its GATT obligations. Was this the protectionist door closing on us?

Fourth, Prime Minister Mulroney alluded to American countervailing duties on Canadian lumber or a petition for such duties as evidence that the protectionist door was closing. A subsequent chapter examines the lumber file in some detail. For our purpose now it will suffice to note four facts: 1) for nearly forty years trading under the multilateral system, the U.S. did not levy countervailing or anti-dumping duties or impose any non-tariff measure on imports of Canadian lumber; 2) for five years before Mulroney, 90% of Canada's exports to the U.S. were also tariff-free with only a few duties above five percent; 3) for six years before Mulroney became prime minister, clothes pins were the only wood products the U.S. countervailed; 4)for the 20 years since Mulroney began preaching and practicing bilateralism, the U.S. has, except for short intervals, levied countervailing and/or anti-dumping duties ranging up to 27% on Canada's lumber, or in lieu of duties, Canada has imposed export taxes and quotas averaging around 15%. Before Mr. Mulroney became prime minister, there was no protectionist door closed to our lumber exports. As we shall see, he invited the Americans to make one and then he refused to use the defence of the Employment Support Act which the Trudeau government deployed to stop them from closing it.

3.2 Reality Plus

Recall that secure access would have required the U.S. to refrain from levying countervailing duties on imports from Canada, but that in reality formidable American industry pressure would prevent the U.S. from doing so. Beyond this, the U.S. would be most unlikely to exempt Canadian products from U.S. countervailing duty legislation unless Canadian governments agreed to stop granting subsidies, to refrain from granting subsidies in the future, and to accede to procedures that gave the U.S. enough control over federal and provincial policies to insure that subsidies were not granted in the future.

Such procedures are not without precedent. For example, the U.S.-Israeli free trade agreement provided that until December 31, 1990, Israel must consult with the U.S. before using infant-industry protective measures and, after that date, it must obtain U.S. permission before using them. Would the federal and provincial governments pay such a price for a blanket exemption to U.S. countervailing duties? Programs aimed at mitigating or removing regional disparities comprise large transfers of money from Ottawa to certain regions which, depending upon the money's use, the U.S. could decide were subsidies and require Canada to cancel the programs.

An additional obstacle is that U.S. governments spend many billions of dollars more than Canadian governments to subsidize a wide range of economic activities. These subsidies, like Canadian subsidies, are designed to meet perceived national and regional interests which sometimes diverge from or conflict with Canadian interests. It is unlikely that U.S. governments would agree to eliminate many such subsidies (e.g. those granted to high technology companies through defence programs, or to exporters of American

grain via the Mississippi system) and that Canada would wish to countervail them, or in the case of grain, to match them.

Anti-dumping duties are another insurmountable obstacle. Would either government exempt each other's imports from such duties? Dumping, unlike subsidizing, is initiated by the private sector, and it is difficult to envisage how either government could undertake that its private sector would not dump. As long as dumping is possible, both governments would wish to retain the right to levy duties against dumped goods that caused or threaten injury. Even in the hypothetical situation of the U.S. making an exemption, would Canada be willing to leave its domestic producers defenceless against injurious and possibly predatory dumping by American producers who generally have much greater resources than Canadians to cover the costs of dumping?

3.3 Supreme Reality

It is important to know your adversary's objectives. What did the Mulroney government know, or what should it have known, about U.S. objectives? History will be our guide. And history reports that from its beginning, the U.S. objective has been to own Canada or at least control it. A few examples:

- In 1775, before the Declaration of Independence, George Washington, commander-in-chief of the revolutionary army, ordered two columns to invade Canada and capture Montreal and Quebec City. One column occupied Montreal for four months and General Montgomery, its commander, ordered the citizens to convene a provincial convention "to elect

delegates to the Continental Congress, and declare Canada the fourteenth American colony."[5]

- In 1776, after the Continental Congress received reports that its troops had been defeated, John Adams, who became the second U.S. president, stated "The Unanimous Voice of the Continent is Canada must be ours . . . Quebec must be taken." Washington ordered another six thousand soldiers to capture it and told their commander, "I need not mention to you the great importance of this place [Quebec], and the consequent possession of all Canada, in the scale of American affairs. . . Then you will have added the only link wanting in the great chain of Continental union."[6]

- In 1783, Benjamin Franklin, Chief American negotiator in the post revolutionary war settlement known as the Treaty of Paris, told the British delegate the transfer of Canada to the United States would permit the Americans and British to be "perfectly reconciled" and prevent future wars.[7]

- In the mid 1800s, the U.S. Secretary of State, William H. Seward opposed the Canadian Confederation on the grounds that "Nature designs that this whole continent, not merely these thirty-six states, shall be, sooner or later, within the magic circle of the American Union."[8]

- In the 1860s, Seward "pledged not to interfere with the Fenian attacks on Canada" and "President Andrew Johnson,

[5]David Orchard, *The Fight for Canada: Four Centuries of Resistance to American Expansionism* (Stoddart, Toronto, 1993) p. 15.
[6]Ibid., pp. 17–18.
[7]Ibid., p. 19.
[8]Ibid., p. 48.

said he would recognize the establishment of a Fenian republic north of the border."[9]

- During October 1947, Julian Harrington, Counsellor at the U.S. Embassy in Ottawa, reported Douglas Abbott, the Minister of Finance, "... admitted to me that Canada is part and parcel of our economic orbit... We have long recognized the inevitability of Canada becoming closely integrated into the American economic sphere, but it was encouraging to hear Abbot's frank admission of it."[10]

- March 15, 1948 *Life Magazine* published an editorial entitled "Customs Union with Canada." The editorial began with the assertion that Canadians "need complete and permanent economic union with the U.S. The U.S. needs this too..." It concluded "political integration may be desirable, and welcome, someday, but it is not now an issue. Economic union makes sense now. It is urgent and desirable for both countries."[11]

- In the 1980s, during the FTA negotiations, the U.S. Secretary of State, George Schultz, told Prime Minister Mulroney's disarmament ambassador Doug Roche, "Look, let's get one thing straight. That land that you people occupy up there, north of the 49th parallel, geographically speaking, is part of the United States."[12]

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[9] Ibid., p. 48.

[10] Robert Cuff and J.L. Granatstein, "The Rise and Fall of Canadian-American Free Trade, 1947–8", *The Canadian Historical Review*, Vol. LVIII No. 4, December 1977, p. 471.

[11] *Life*, "Customs Union with Canada," March 15, 1948.

[12] George Schultz, U.S. Secretary of State, quoted by Frances Russell in "Blame Washington, Instead," *Winnipeg Free Press*, January 2, 2004.

There it is: from George Washington in 1775 to President Reagan's Secretary of State in the mid-'80s the U.S. objective was to own Canada. Bilateral negotiations may seem innocuous when contrasted with earlier U.S. comments, but they are nevertheless an important step in influencing the direction of Canada's independence.

How would Canada's negotiating power stack up in the bilateral negotiations the Mulroney government sought? The government made a grave strategic mistake when it ditched the 38 year-old GATT for a free trade agreement that not only did not exist but for which negotiations had not begun. It is hard to exaggerate the adverse consequences of the decision for Canada. The more important are summarized below:

- First, the Mulroney government tossed overboard the substantial power GATT gave Canada in negotiations with the U.S. as well as other countries such as the EU and Japan. (GATT power levers are identified and documented in chapter 8, Independence Lost.);

- Second, declaring GATT ineffective, combined with the assertion that only a free trade agreement would assure access to the U.S. locked Canada in a bilateral negotiation with the world's most powerful nation and deprived it of the leverage acquired from shared interests with other countries as well as an alternative;

- Third, abandoning GATT meant the Mulroney government could not take the logical position that a bilateral agreement must provide better access than the access GATT accorded or it would not be of value. The government wiped out Canada's bottom line;

- Fourth, the U.S. market is ten times larger than the Canadian market. In bilateral negotiations the U.S. would take the position that a symmetrical exchange of concessions for many trade barriers would not provide reciprocity and request additional payment. Such payment would require concessions beyond trade related border measures and risk impairing Canadian independence. This was not a problem in GATT negotiation because the U.S. balanced its books by including concessions made by other countries. But the Mulroney government discarded this key advantage.

Worse, whenever the move to bilateral negotiations weakened Canada's leverage, it strengthened U.S. power by a comparable amount.

How could the Mulroney government nail down assured access to the U.S. for Canadian exports and what would it cost? Unrestricted national treatment for Canadians doing business in the U.S. requested by the Prime Minister would assure access. But Mr. Mulroney did not tell Canadians that the U.S. would not give Canadians such rights unless Canada reciprocates. Unrestricted national treatment is code for political union. The supreme reality hidden in the Prime Minister's promise that free trade would assure access to the U.S. was that it required Canadians to become Americans.

This vital issue has been embedded in every free trade proposal placed before Canadians by an opposition party, government or considered by a government, since Confederation. Politicians advocating free trade did not acknowledge they were risking Canada's independence. Wilfred Laurier in 1891 and 1911, and Brian Mulroney in 1986, assured Canadians free trade could be obtained without any sacrifice of political sovereignty. But Macdonald, Borden, MacKenzie King, St. Laurent, Trudeau and Turner believed

free trade would lead to the U.S. dominating or absorbing Canada.

Edward Blake was also an exception. Blake led the Liberal Party from 1880 to 1887, served in Alexander MacKenzie's cabinet and was the second Premier of Ontario. Before the 1891 election Blake wrote the Liberal Association of West Durham, asking that his name be withdrawn as a candidate because he could not support the Party's policy to negotiate a free trade agreement with the U.S. Blake explained,

> "... Assuming that absolute free trade with the States, best described as Commercial Union, may and ought to come, I believe that it can and should come only as an incident, or at any rate as a well-understood precursor of Political Union; for which indeed we should be able to make better terms before than after the surrender of our Commercial Independence."
>
> "Then so believing — believing that the decision of the Trade question involves that of the Constitutional issue, for which you are unprepared, and with which you do not even conceive yourselves to be dealing — how can I properly recommend you now to decide on Commercial Union?"[13]

The Globe interpreted Blake's explanation to mean "He is for absolute free trade on the distinct understanding that it shall terminate in political union, without which it cannot be carried out, or even so much as obtained."[14]

[13] Edward Blake, quoted by Joseph Schull in *Laurier*, (Macmillan, Toronto, 1966), p. 253.

[14] *The Globe*, "Mr. Blake's letter", March 16, 1891.

3.4 Negotiations

The Prime Minister asked President Reagan to enter bilateral negotiations to establish a free trade area in 1985 and the President agreed.

The President and Prime Minister further agreed to a moratorium on trade barrier increases until the bilateral negotiations concluded. Four months after the moratorium was agreed, and about a year before the free trade negotiations concluded, the U.S. levied a countervailing duty of 15 percent on imports of lumber from Canada. This was a bullet to the heart of the Prime Minister's promise that a bilateral agreement would provide Canadian exporters with secure access to the U.S. and protect them from "the vast arsenal of regulatory and legal weapons that can be used to restrict our trade." To obtain such access now the government was required to persuade the Reagan administration to remove the lumber duties and then sequester them along with anti-dumping duties. And to keep his second basic promise, the Prime Minister had to obtain secure access without curtailing Canada's political sovereignty. The government also had the option of cancelling or suspending negotiations until the 15 percent duty was removed but did not use it.

The following chapters examine the three bilateral agreements the Mulroney government negotiated with the U.S. and identifies the consequences for Canada.

Chapter 4

Access to the United States, Fiction and Fact

Prime Minister Brian Mulroney's objectives before the FTA negotiations concluded:

> "Our highest priority is to have an agreement that ends the threat to Canadian industry from U.S. protectionists who harass and restrict exports through misuse of trade laws."

Prime Minister Brian Mulroney's report to the House of Commons on the FTA after negotiations concluded October 5, 1987:

> "Our main objective was to conclude a ... binding agreement that would guarantee and expand access to U.S. markets and would also have the effect of eliminating trade barriers... That is exactly what we have done."

> "We wanted an agreement that guaranteed fair and impartial application of U.S. trade remedy laws, and this agreement does all of those things."
>
> "We have agreed to... a unique dispute settlement mechanism with binding powers, one that guarantees predictable and impartial rules..."

Mr. Mulroney five years after the FTA was implemented:

> "The massive and comprehensive agreement came into effect on January 12, 1989."
>
> "And what has happened since? In 1988, Canadian merchandise exports to the U.S. were $102.6 billion. Last year, Canadian exports to the U.S. totalled $145.3 billion. Simply put, in five years we have increased our exports to the U.S. by 42%." (*Montreal Gazette*, March 7, 1994)

Mr. Mulroney ten years after the FTA was implemented:

> "My view is, that after ten years during which our Canadian-American trading relationship has jumped to $757 billion a year in Canadian dollars, and with institutional arrangements that were a model for NAFTA... most people would consider it quite a significant success."
>
> "... to appreciate the value of anything you have to consider its absence. Where would Canada be today if Mr. Chrétien's and Mr. Turner's view had prevailed in 1988? There would be no free trade agreement with the United States, therefore, no NAFTA, therefore, no GST, because they all go together. If their view

> had prevailed, which was essentially a Luddite view of Canada, then I think that Canada would be very ill prepared for the new millennium and, indeed, would be playing catchup everywhere." ("Brian Mulroney on the FTA", *Policy Options*, June 1999)

The quotations contain the essence of the case made for the FTA and that is also used to defend NAFTA: the prime cause of the large increase in exports to the U.S. since 1989 is bilateral free trade, guaranteed access and impartial dispute settlement which guard Canadian exporters against American protectionists, the misuse of American trade remedy laws, harassment and import restrictions, i.e. a level playing field. To put it simply, the Mulroney government used the FTA to single-handedly disarm American protectionists — Mr. Mulroney's words — and boost exports, or so it was claimed. There was no alternative to NAFTA and opponents were protectionists and Luddites.

The NAFTA case stands or falls on the truth of these constantly recurring assertions. This chapter tests the accuracy of each assertion by examining the Agreement, digging out provisions that impinge on it and assessing whether it is true. The chapter then checks the assertions against our experience exporting to the U.S. under both NAFTA (13 years) and GATT (40 years). The chapter concludes by identifying the gains and losses resulting from Mr. Mulroney's Agreement.

What conclusions emerge from this examination of the case for NAFTA? First, the case is false. Not one of the claimed benefits can be reconciled with the test of the Agreement and our experience exporting under it.

Worse still, the case is perverse:

- Instead of Canadians receiving guaranteed access to the U.S., NAFTA guarantees Americans trade law protection against Canadian goods whenever they ask for it;

- Instead of a dispute settlement mechanism that guarantees impartial rules, NAFTA subjects Canadian exporters to American trade law, American interpretation, American administration of the law and American changes to the law;

- Instead of stopping American protectionists from using the trade laws to harass Canadian exporters, NAFTA releases them from WTO constraints and issues them with a licence to harass whenever they wish;

- Instead of a level playing field, NAFTA forces Canadians accused of selling dumped or subsidized goods to stop exporting, pull their competitive punches or ask a "neutered" panel to recommend removal of duties, which is a long and costly process with only a remote prospect of success;

- Instead of disarming American protectionists and sequestering their weapons, NAFTA equips them with more weapons than they ever possessed in GATT.

The third conclusion is that the king-sized increase in Canadian exports to the U.S. during the first decade of trading under NAFTA was caused by two concurrent but disconnected developments: first, the largest sustained growth of the American economy and stock markets in history; and, second, the largest devaluation of the Canadian dollar in history. Although these developments are well known it may help to illustrate their size and effect on exports. It took the American stock market "300 years to build a market worth $3 trillion at the end of 1990" but, fuelled by the economy, "just one decade to quintuple that to $15

trillion, as measured by the Wiltshire 5000 index which includes virtually every company based in the U.S."

Mr. Ian Boeckh, managing editor of the *International Bank Credit Analyst*, explains that this economic growth allowed corporations to dramatically increase their profit margins and, at the same time, Americans added to their stock market investments. "The resulting increase in consumer confidence and massive capital gains on equity portfolios sparked a consumer spending binge"[1] which in turn boosted the economy. The Canadian dollar declined from a NAFTA high of 89 cents (U.S.) in the fall of 1991 to about 62 cents (U.S.) in November 2001, which was its lowest level since it was created in 1858 and a loss of almost 30% of its value. Of course, the "great devaluation" helped our exports. There is no umbilical cord from NAFTA to export growth. But NAFTA supporters, including Mr. Mulroney, still refuse to recognize this fact and continue to cite, with almost religious zeal, that export growth justified NAFTA, and to make criticism sound almost blasphemous.

Fourth, the "no alternative" charge was trumped up. The GATT in 1988 and the WTO today place limits on the freedom of Americans to use their trade laws whereas the FTA and NAFTA removed these limits and left American industry unchecked. The U.S. has used NAFTA to increase protection against Canada's exports to levels well above the WTO level.

The last conclusion is that the Mulroney government imposed huge losses on Canada when it ditched the WTO for NAFTA. The most significant gain Canada obtained from NAFTA was the removal of U.S. tariffs from a very small percent of our exports that were not already tariff-free or dutiable at five percent or less. But the

[1] *Wall Street Journal*, reprinted by the *Globe and Mail*, October 10, 2000. Mr. Boeckh's comments were reported by Jacqueline Thorpe in *The Financial Post*, November 12, 2001.

gain was turned into a huge loss when the Mulroney government gave our American competitors the unfettered right to initiate anti-dumping and countervailing actions against any Canadian export. Increased American protection has reduced our exports and employment far below what would have been achieved under the WTO, although such losses have been partly hidden by the coincidence that U.S. economic growth and devaluation of our dollar paralleled NAFTA's first ten years.

But the most crippling loss for Canada is negotiating power vis-a-vis the U.S. NAFTA's access provision stripped Canada of the considerable power it possessed in GATT and increased U.S. power by a commensurate amount. This loss of power is resulting in creeping U.S. control of our affairs.

4.1 Clarifications

Before presenting the evidence that sustains these conclusions, it is important to pin down what Mr. Mulroney and NAFTA supporters were talking about. What U.S. trade remedy laws did Mr. Mulroney have in mind? What is access and guaranteed access? Who are the American protectionists and how do they operate? And what is a level playing field?

4.2 Trade Remedy Laws

Mr. Mulroney and other NAFTA supporters used the words "trade remedy laws" and "trade laws" as code for U.S. anti-dumping and countervailing duties.

4.3 Access

Access to the U.S. and other markets is the composite of tariffs, non-tariff measures (NTMs) and dispute settlement. Tariffs and some NTMs such as quantitative restrictions can be eliminated and secured against restoration. But other NTMs are not normally eliminated between independent countries because they are needed to prevent unfair trade practices. Anti-dumping and countervailing duties, for example, are required to prevent dumped and subsidized imports from injuring domestic industries. For these duties, independent countries have two options: they can leave each other free to use such duties as best suits their interests which was the situation before GATT/WTO; or they can enter an international agreement directed to limit their misuse, which WTO does and has achieved considerable success in doing this. Inevitably disputes arise and it is necessary to develop a means to resolve them in a manner that neutralizes power disparities between the litigants and is fair to both sides which WTO does, again with success.

4.4 Guaranteed Access

Guaranteed access requires that all trade barriers be eliminated, secured against resurrection and inscribed in a contractual agreement in clear words that cannot be misunderstood or misinterpreted. It is not possible to negotiate guaranteed access in the WTO because some trade barriers are not usually eliminated between independent countries and most WTO members are independent.

4.5 Anti-dumping and Countervailing Laws

U.S. trade laws most often used to increase protection against Canadian exports relate to NTMs, especially the anti-dumping and countervailing laws. All American trade laws are wrapped in detail (the nitty-gritty) that challenges the expert as well as the novice, but none more so than the anti-dumping and countervailing laws.[2] And the nitty-gritty always influences and frequently determines whether these laws are used.

Some pertinent points about countervail duties too often overlooked begin with the fact that the U.S. is the only country that frequently uses them and the only country to countervail Canadian exports. In addition, from the inception of GATT, the U.S. resisted international obligations limiting its use of countervail. But every country exporting to the U.S., including the EU and Japan, shared Canada's objective to obtain U.S. acceptance of obligations preventing the misuse of countervail. To this end, these countries combined their bargaining power and secured U.S. agreement in the GATT/WTO to the following obligations:

> 1947, no countervail duty shall be levied in excess of the subsidy on the imported product;
>
> 1979, no countervail duty would be levied before there was proof that the subsidy was injuring, or would injure, a domestic industry;
>
> 1994, a definition of a subsidy; also no countervail duty would be levied on (a) subsidies generally available, and (b) sub-

[2] "Understanding U.S. commercial laws was comparable to exploring the labyrinth at Knossos." Herman von Bertarb, a Mexican lobbyist, quoted by John R. MacArthur in *The Selling of "Free Trade": NAFTA, Washington, and the Subversion of American Democracy*, (Hill and Wang, 2000), p. 98.

sidies for research, regional development or for companies adapting to new environmental laws and regulations providing certain conditions are met. Non-countervailable subsides include federal and provincial grants for medicare and provincial taxes on trees harvested by forest product companies (i.e. stumpage).

An indispensable condition for guaranteed access to the U.S. would be that Americans are barred from using their anti-dumping and countervailing duty laws. Conversely, if Americans can use these laws, access is not guaranteed, and protectionists will contrive to harass Canadian exporters and restrict their goods to the extent permitted by the agreement.

4.6 The Protectionists

As pointed out earlier, the American trade protection game is a well-funded, well-oiled industry.

Every American trade measure can be used to restrict imports unless the politicians' hands are tied by international agreements. Visible examples of trade politics include the Smoot-Hawley tariff, some but not all countervail and anti-dumping duties and buy-American government procurement. Less visible political protection includes reclassifying imports under tariffs levying higher duties, arbitrary methods of valuing goods for customs purposes, health regulations, product standards and other technical barriers.

4.7 Level Playing Field

On a level playing field the U.S. would accord Canada's exports the same treatment they give American goods when offered for sale in the U.S. All American trade laws and border measures would be lifted and other laws and regulations affecting the sale, offering for sale, purchase, distribution or use of like national goods would apply equally to Canadian goods.

4.8 American Weapons

Next, the evidence that proves the conclusions that emerged from the examination of NAFTA summarized above. Recall that the evidence comprises contractual rights and obligations inscribed in NAFTA and our experience trading with the U.S. since 1947, under two very different agreements — i.e. unimpeachable evidence. Also recall that the evidence contains much detail because we cannot get a grip on the real NAFTA unless we dig out of the Agreement pertinent evidence which its defenders tend to gloss over.

First, NAFTA arms our American competitors with every weapon contained in their anti-dumping and countervailing duty laws. The Agreement gives the U.S. the right to apply U.S. trade laws to all goods imported from Canada (Article 1902:1). This right includes all components of these laws, such as definitions, the conduct of investigations, rules of evidence, exporters rights and the nitty-gritty regulations. The right extends to the two agencies that decide whether duties should be levied on Canadian goods: the Department of Commerce (DOC) which decides if Canadian exporters are selling dumped or subsidized goods, and the International Trade

Commission (ITC) which decides whether such goods are injuring or threatening to injure an American industry. Nowhere does NAFTA effectively restrict, limit or even constrain the U.S. from applying the full force of its trade laws to Canadian goods.

Second, NAFTA gives the U.S. (Article 1902:2) the right to amend its trade laws without Canada's agreement and it has invoked this right at least four times. A 1986 amendment, enacted during the FTA negotiations, made countervailable federal and provincial government grants to medicare and provincial taxes on trees harvested by lumber companies (i.e. stumpage).[3] In 1988, another amendment increased the opportunities for American companies and unions to harass and raise protection against Canadian exporters, by weakening the injury test and authorizing the use of a range of NTMs to stop alleged subsidized exports that would provide much more protection than a duty equal to the subsidy.[4] In 1994, the U.S. terminated a dispute between the ITC and lumber

[3]Section 1312(B) of the *Omnibus Trade and Competitiveness Act* of 1988 states "nominal general availability is not a basis for determining that the bounty, grant or subsidy is not, or has not been, in fact provided to a specific enterprise or industry, or group thereof." Before this section was enacted, U.S. law contained a "general availability" principle which the U.S. applied in the 1982–83 lumber case by deciding the alleged provincial stumpage subsidies, even if they existed, were generally available and therefore not countervailable.

[4]Section 409 of the *United States-Canada Free Trade Agreement Implementation Act* of 1988. This change made it even easier than under Chapter Nineteen for U.S. interests to initiate countervail action against imports from Canada and increase their prospects of obtaining increased protection in one form or another. The adverse implications of Section 409 can be illustrated by three examples: a) a firm, union or a group of workers can request the administration to compile information and decide whether action is appropriate under Section 301 or other legislation — i.e. harassment; b) the Section replaces the injury test with much softer criteria; and c) it permits the use of a range of non-tariff measures that could provide much more protection than a duty equal to the subsidy. The Section applies only to Canada and is least favoured nation treatment.

panels by changing the law to support the ITC's interpretation and protection.

The context of the 1994 amendment sends an especially ominous message to Canadians. A majority of the lumber panel — three Canadians — had recommended removing countervailing duties. The U.S. government appealed this decision to the Extraordinary Challenge Committee but a majority — two Canadians — dismissed the appeal. Subsequently the U.S. changed its law to sustain the ITC interpretation, and retain the duties until Canada restricted lumber exports. Contrast this with the GATT/WTO process where there are many other countries involved; here there are no other countries to counter U.S. power.

The U.S. Byrd Amendment (Continued Dumping and Subsidy Offset Act) in 2000, at least doubled the rewards Americans received from Trade law protection by instructing the administration to transfer collected duties to the U.S. companies requesting the protection. This legislation was appealed under WTO dispute settlement procedures by the EU, Japan, Canada, Mexico and others. It was ruled illegal by the WTO and withdrawn by the U.S. in 2005, after the WTO approved retaliation. (This demonstrates how effective the collective authority of the WTO is in keeping U.S. power in check.)

When the Mulroney government agreed that the U.S. could unilaterally amend its trade laws, it imposed on Canada unlimited liability that has cost Canada exports, jobs and income as well as increased pressure on subsequent governments, as we shall see, to privatize Canada's forests and medicare.

Third, NAFTA locks Canada and its exporters into American trade law by blocking effective recourse to the WTO. Article 103:2 states "In the event of any inconsistency between this Agreement and such

other agreements, this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement." NAFTA does not exclude anti-dumping and countervailing actions from this Article. If, therefore, Canada challenged in the WTO an American countervail duty that was legal under NAFTA and won, the U.S. could note that NAFTA prevails and continue to levy the duty. Canada could then accept the duty or invoke Article 2205 and withdraw from the Agreement. Canada did not challenge in the WTO American countervailing duties levied on lumber in the 1990s.

Americans who use NAFTA to restrict Canadian exports receive generous rewards. The companies, obviously, can use the protection to increase prices, sales, market share, cash flow, profits, and improve the balance sheet. Protection can also raise company share values, the CEO's remuneration and prestige, and appease fretful bankers.[5] The politicians who enacted the trade laws and greased the machine that approved protection, can receive millions of dollars from grateful constituents as well as votes. Lawyers and lobbyists can become millionaires.

NAFTA equipped American protectionists with powerful weapons and then offered them big incentives to use them. What defensive measures can Canadians take to defend exports against the misuse of such weapons?

[5]Pat Carney *Trade Secrets: A Memoir*, (Key Porter), p. 232, reports that in 1986, "U.S. Commerce Secretary Malcolm Baldrige coolly told me that Canada would lose key softwood lumber markets in the U.S. regardless of trade rules because U.S. southern lumber producers were in hock to their southern bankers."

4.9 Canadian Defences, the Binational Panels

NAFTA supporters in Canada trumpeted binational panels as the antidote to misuse of the trade laws. And the Agreement does give Canadians the right to convene panels to review complaints about trade law duties (Article 1904:2). But NAFTA then confines panels to (a) reviewing decisions made by the U.S. administrative agencies to ascertain if they correctly applied U.S. law (Article 1904:2 and 1904:3), and (b) supporting agency decisions or sending them back "for action not inconsistent with the panel decisions" (Article 1904:8). Combined with the U.S. unconditional right to amend its trade laws, these limitations render panels impotent and convert the American agencies that authorized duties in the first place into a de facto appeal court that examines Canadian requests for duty removal and decides whether to retain, reduce or lift them.

The much touted binational panels are not all that they are cracked up to be. Stripped to essentials, the panels were an American cosmetic concession to the Mulroney government which it used in 1988 to deceive Canadian voters. The panels have lured Canadian governments as well as exporters to initiate challenges to trade law duties that are always costly and that always enrich American trade lawyers but rarely remove restrictions.

Canadians can appeal panel decisions to an Extraordinary Challenge Committee providing they prove certain egregious behaviour by panelists or the panel. But examination of NAFTA detail reveals that the real situation is as follows: (a) if Americans appeal and win Canadians lose; (b) if appeals by politically powerful Americans are rejected, the U.S. will amend its trade law and Canadians still lose. If Canadians appeal and win, the Challenge

Committee either sends the case back to the original panel for "action not inconsistent with its decision" or abolishes the panel and a new panel is established, providing, of course, the U.S. does not amend the law. Canadians' right to appeal panel decisions is another situation where "heads Americans win and tails Canadians lose."

Other defensive rights — if they can be called that — accorded Canada are:

- The right to be "notified in writing. . . as far in advance as possible" of amendments to U.S. trade laws (Article 1902:2(b));

- The right to consultations with the U.S. regarding such amendments if Canada requests them (Article 1902: 2(c));

- The right to request a NAFTA panel for a "declaratory opinion" as to whether a U.S. amendment is "not inconsistent" with the WTO or the "object and purpose" of NAFTA. The U.S. can reject the panel's recommendations and, if it does, Canada can make a comparable amendment to its laws or terminate the Agreement (Article 1903).

Such are the measures NAFTA gave Canadians to defend exports against misuse of the powerful weapons it allows Americans to use. Has the defence worked?

The "Status Report of Completed NAFTA and FTA Dispute Settlement Reviews" published by the NAFTA Secretariat (Canadian Section) January 2000, contains information which, supplemented with data from other sources, permits an answer to this question. The data reports that, between January 1989 and January 2000, 36 panels requested by Canadians completed their work, and the American agencies removed duties from only two exports without

Canada replacing them with export restrictions. In 1989, anti-dumping duties were lifted from two raspberry exporters but maintained on a third. In 1990, anti-dumping duties were also removed from salted cod fish, apparently after the only American producer declared bankruptcy.[6]

Canadian exporters, as well as the federal and provincial governments and taxpayers, spend large amounts of money to obtain a panel decision, win or lose. These expenditures increase the cost of exporting to the U.S. and, raise by a commensurate amount, the protection provided by the trade law duties.

An inevitable cost of seeking a panel decision is loss of sales. If all goes well, almost two years pass before a panel makes a decision and submits it to the DOC and ITC for approval. The decision is then delayed for many months if the American administrators reject or amend it and return it to the panel, and there have been many such rejections and amendments. The decision is delayed even longer if the panel remains firm and sends it back to the American administrators, and this game of NAFTA tennis can continue for some time. An additional delay of a year or more occurs when a litigant refers the panel decision to the Extraordinary Challenge Committee, and three such referrals have occurred. Even the most loyal customers of Canadian exporters entangled in American trade law for two or more years will shift purchases to American companies to ensure the continuity of supplies.

Additional costs incurred by Canadians who fight trade law duties include the four listed below:

[6]The U.S. appears to have continued levying duties after the other panels made recommendations except for two lumber panels convened in 1992, when countervailing duties were lifted after the Canadian government agreed to replace them with export restrictions. In two other cases panel recommendations appear to have resulted in the agencies reducing duties on pork from eight cents to three cents per kilo and steel rail from 112.34 percent to 94.57 percent.

- Since Canadians are locked in American trade law they must hire American lawyers to present their case at every step in the process. The process begins when an American petitions the DOC and ITC for protection months before panels are established. Exporters are reticent about disclosing legal costs but it is known Canadian companies exporting lumber spent $10 million on lawyers in a 1986 countervail case that was aborted after ten months. And Mr. Fred Tellmer, Stelco CEO, reported the U.S. steel industry spent more than $100 million on lawyers to obtain duties on imported steel in the early 1990s[7], which suggests the Canadian exporters also spent huge amounts trying to lift the duties;

- American trade law and its administrators have a voracious appetite for information relating to Canadian companies and their exports. Stelco, for example, was required to submit a document comprising 60,000 lines and 3.6 million computer entries for just one product. Mr. Tellmer told a Toronto Empire Club audience "that providing such information constitutes an enormous expense;"[8]

- Canadian exporters must pay temporary duties or give U.S. Customs bonds in lieu of the duties from the time American administrators make a temporary finding that the goods are subsidized or dumped and threatening injury until the time that a final decision is made. The duties or bonds cost money;

- Executives quarterbacking an attempt to lift U.S. duties spend much time doing so, and at least some attempts have been directed by a CEO. The diversion of executives

[7]Mr. Fred Tellmer, Stelco CEO, Toronto Empire Club, February 12, 1996, and CBC Radio, *Sunday Morning*, June 16, 1996. (In 2007, Stelco was purchased by U.S. Steel.)

[8]Ibid.

from normal responsibilities increases a company's costs and could adversely affect its performance.

To put it simply, Canadian exporters incur substantial costs when they decide to fight trade law duties and ask a panel to recommend their removal. The costs comprise lost sales, legal fees, provision of information, paying duties or posting bonds and diversion of executives from normal work. These costs add several points to the protection provided by trade law duties, and reduce exports. Only large affluent companies and trade associations can play the panel game for very long.

What does NAFTA give Canadians for their money? Not much. If a panel recommends duty removal, the American administrators can and do decide to retain them, and Canadians lose. If a panel repeats its duty removal recommendation, the administrators can and do dig in until Congress amends the law to sustain their interpretation, and Canadians lose again. The NAFTA cards are also stacked against Canadians winning Extraordinary Challenge Committee appeals.

NAFTA's defence of Canadian exports today is no more effective than the Maginot Line's defence of France in 1940. Where does this leave Canadian exporters?

4.10 Canadian Exporters

Canadian exporters to the U.S. face two controlling facts: first, NAFTA gives their American competitors the unfettered right to initiate anti-dumping and countervailing actions against them, which almost always results in protection of one type or another; and second, NAFTA does nothing to defend Canadians from such

protection. What are their options? There appear to be three for companies that have either collided with protective duties or whose American competitors are likely to seek them.

The first option is: Don't export — either stop or do not begin. As we have seen, Canadian companies entangled in trade law duties incur costs that are always onerous and possibly crippling, with only a remote prospect of recouping them. Why run this risk?

Another option is to transfer production to, or place it in, the U.S., unless there are compelling reasons to produce in Canada, such as access to forests, minerals, oil and gas or the medicare subsidies (as defined by the U.S. and NAFTA, but not by the WTO). This option offers three obvious advantages: it eliminates the risk of American trade restrictions, goods would be produced in the larger market, and some of the goods could be exported to the smaller market with only a minimal risk that Canada would erect import barriers. This is an enticing option for Canadian companies as well as for American, European, Japanese and other foreign companies. NAFTA reinforces the historic case for producing in the U.S. and exporting to Canada that has bedeviled Canada since the beginning of manufacturing.

The third option is for companies anchored in Canada but which must export to the U.S. Several such companies have already had exports curtailed by trade law protection and paid the costs of one or more panels (e.g. lumber and steel companies). Sometimes these companies try to mitigate U.S. protection, and others try to avoid it by pulling their competitive punch such as by lowering export volumes — sometimes called "export monitoring" or "prudent selling" — and, at all costs, foregoing opportunities to reduce prices and/or increase their share of the U.S. market.

4.11 Steel Company of Canada

Stelco has the last word on NAFTA's effect on exports. Two chairmen, presidents, and chief executive officers, J.D. Allan and Fred Tellmer, made their views public about eight years apart. Mr. Allan wrote all Stelco employees November 30, 1987, to state his belief that the "pluses" of the FTA outweigh the "minuses" and that "Stelco jobs will, therefore, be preserved and enhanced." He said, "Access to the U.S. . . . is maintained and. . . the current threat for major reductions in our shipments. . . can be eliminated." He noted, "the trade remedy laws of both countries will remain in place," but assured employees "they will have no impact on Stelco jobs. . . because Stelco will continue its policy of not causing injury to other countries' steel industries through dumping."

A few weeks later Mr. Allan reinforced this message with an article in the *Stelco Newsletter*, which also reprinted his letter. Mr. Allan cautioned employees that "business as usual in the steel trade no longer exists." He reported that the U.S. Congressional Steel Caucus recently wrote the President's trade minister stating, "immediate steps must be implemented to unilaterally restrain all steel imports from Canada." He noted, "this demand comes at a time. . . where the steel mills in the U.S. are very busy and even when Canada is cooperating through its export monitoring system and prudent selling activities." He assured employees, however, that "once the Agreement (FTA) is ratified, Canada cannot be harassed. . . " and "the constant threat hanging over our heads for major reductions in our shipments to the U.S. will be eliminated."

During the next eight years, the FTA and NAFTA were ratified. American steel companies invoked their right to protection under the agreements and the U.S. levied anti-dumping duties on Canadian steel exports, including Stelco's. Canadian steel companies,

again including Stelco, requested twelve panels to recommend removal of duties but, in every case, the duties were retained, though some were reduced. By 1996, Stelco changed its assessment of the agreements from unconditional support to warning that they put Canadian exporters at risk.

Mr. Tellmer, after spending years in NAFTA trenches fighting American anti-dumping duties, outlined Stelco's new position to Toronto's Empire Club and the CBC's *Sunday Morning* audience. Mr. Tellmer said, "anybody who thinks" we have free trade with the U.S. is "living in a dream world." He cautioned, "anybody exporting to the U.S. who believes 'the FTA and NAFTA' gives them some kind of protection or special status in dealing with the U.S. trade laws is putting their company at risk." He reported that it took Stelco three years to obtain panel decisions on a 1993 request to lift anti-dumping duties, but then the U.S. industry used a "loophole" to appeal to the courts so the "whole process is hung up for another 18 months, two, maybe even three years'. He noted the process is "not cheap" and said, "we know that the U.S. steel industry" spent over "$100 million" for lawyers to obtain and retain anti-dumping duties. He reported that, "as a result of all of this process," Stelco cut exports from 35 percent to less than 20 percent of production. He noted that, for the first time, Stelco and other Canadian steel companies were included in American anti-dumping action against overseas companies.

Tellmer's assessment of the FTA and NAFTA and their consequences for Canadian exporters, acquired from seven years experience selling steel under the agreements, parallels and reinforces the conclusions that emerged from examining pertinent NAFTA rights and obligations.

Mr. Tellmer provided much evidence that his assessment of NAFTA was based on detailed knowledge of its anti-dumping provisions and

the way they work. He noted:

- "when we sell into the United States we're guilty [of injurious dumping] until we prove ourselves innocent;"

- The American interpretation of dumping "is extremely, extremely onerous. The laws are very specific and they just nitpick every single item;"

- The U.S. "works on special interest groups" and "the process. . . is run by lawyers;"

- "all the panels are empowered to do is decide whether the laws of the United States have been properly interpreted."

Mr. Tellmer went on to report that "what's happening in Canada is — as we develop new businesses and they stick their toe into the water of exporting — they get slapped down. . . But they don't have the resources that we do to deal with all of their bureaucracy and legal fees and so forth. And, quite frankly, what happens often is that the minute they get slapped, they back away." He continued, "so why should you hassle yourself here? Why don't you just move across the border? And we have seen a lot of people do that."

Mr. Tellmer then summarized his assessment of NAFTA's effect on exporters:

> "And quite frankly, as I've said earlier, I think Canadian producers are at risk and the one thing that we want to ensure is that we have a base here that will allow us to produce things of value that will pay taxes, that will create jobs, that will maintain jobs — which is even, at the first part of this thing, even more important, because we've lost a lot of jobs as people just threw up their hands and closed their business here and

reopened in the United States, or particularly some of these branch operations. Why make it in two places when you can do it in one?"[9]

4.12 No Alternative

But there is one piece of unfinished business that must be addressed before turning to gains and losses. The case made by NAFTA's supporters included the conventional escape hatch "there was no alternative," usually a sure sign they did not quite believe their own assertions. Assessing the accuracy of this assertion requires us to compare access to the U.S. for Canadian exports provided by NAFTA with that accorded by the WTO under the three key components — tariffs, anti-dumping and countervailing duties and dispute settlement. Since considerable related information under this heading has been provided, we need only summarize it.

4.13 Tariffs

When the Mulroney government asked the U.S. to enter an FTA, the situation was dominated by two facts and a probability:

- 80 percent of Canada's exports were duty-free and about five percent were subject to duties of five percent or less. The U.S. also charged custom user fees which averaged less than one percent;

[9]This section, dealing with the Steel Company of Canada is based on comments by Mr. Fred Tellmer, Stelco CEO, Toronto Empire Club, February 12, 1996, and CBC Radio, *Sunday Morning*, June 16, 1996. (In 2007, Stelco was purchased by U.S. Steel.)

- WTO's adoption of the Harmonized System tariff nomenclature and the Customs Valuation Agreement, made access more secure by reducing opportunities for Americans to increase protection by tariff related measures such as reclassification and establishing artificial values for duty purposes;

- The odds were that GATT would initiate its eighth round of negotiations in 1986, which would again cut U.S. tariffs (seven negotiations had previously cut the average U.S. duty on industrial goods from fifty to four percent on dutiable items).

4.14 Anti-dumping Duties, Countervailing Duties and Dispute Settlement

One way to pull together information pertinent to these issues is to ask and answer the seven questions below.

First: *What are the related NAFTA and WTO laws and who makes them?* NAFTA law is U.S. law made by the Congress and the president. WTO law is international law made by member countries including Canada.

When Canada traded with the U.S. under WTO law, WTO law overrode U.S. law. Now, for all WTO members, except Canada and Mexico, WTO law overrides U.S. law. U.S. law has no status or effect of any kind on WTO law. But NAFTA law "prevails" over WTO law where they are "inconsistent."

The U.S. has two laws for countervailing and dumping: one for Canada and Mexico, and a second for other WTO countries. NAFTA authorizes the U.S. to accord Canada and Mexico second

class or least-favoured-nation treatment. But WTO requires the U.S. to grant WTO members first class or most-favoured-nation treatment.

Second: *Who has the power to amend NAFTA and WTO law covering the application of countervailing and anti-dumping duties on Canada's exports?* NAFTA law can only be amended by the U.S. congress and president, and WTO law by member countries including Canada. The U.S. cannot unilaterally amend WTO law.

Third: *What limits do NAFTA and the WTO place on U.S. misuse of anti-dumping and countervailing duties?* NAFTA places no limits whatsoever on American competitors of Canadian companies requesting duty protection and almost always getting it one way or another. WTO limits misuse of these duties in several ways such as defining dumping and subsidies and prohibiting imposing countervail duties on subsidies generally available (e.g. medicare and stumpage) and for research, regional development and companies adapting to new environmental laws and regulations providing certain conditions are met.

Fourth: *Who has the power to judge and decide Canadian requests for lifting duties?* NAFTA gives these powers to the DOC and ITC, the agencies who initially ordered that the duties be levied. Binational panels are restricted to making recommendations to the DOC and ITC on whether they correctly applied U.S. trade law. For practical purposes the WTO gives adjudicating power to panels whose recommendations are almost always approved by the Dispute Settlement Body and implemented by litigants.

Fifth: *How much time elapses between the establishment of panels to examine requests for lifting U.S. duties and decisions?* NAFTA time ranges from about two to three years or longer depending on differences between the DOC and/or ITC on the one hand and

panels on the other, and appeals to the Extraordinary Challenge Committee. WTO time is normally ten months if the panels decisions and recommendations are not appealed to the Appellate Body, and eleven months if appealed.

Sixth: *How much does it cost Canadian exporters to press a duty removal request to a decision?* As regards NAFTA, no exporter is known to have published the total cost of obtaining a decision. For legal costs — only one component of costs — two figures and a general estimate are available. As noted, in 1986, Canadian lumber exporters spent $10 million on lawyers in a case the Mulroney government terminated after eight months. In the early 1990s, American steel producers paid lawyers over $100 million to help obtain anti-dumping duties on imported steel[10] and the Canadian exporters' legal bill must also have been immense. Robert Howse, who was an assistant to a Canadian panelist on the early 1990s lumber case that took almost three years to work its way through the panel and an Extraordinary Challenge, reports the "costs can be great... involving enormous expenses on legal resources." Professor Howse explained, "the lawyers briefing material on the case was so voluminous that it resulted in his university office being declared a fire hazard."[11] In WTO litigation, federal civil servants represent Canada with zero cost for exporters.

Seventh: *Has NAFTA and WTO dispute settlement resulted in the U.S. lifting duties without Canada's replacing them with export restrictions?* NAFTA has removed duties in two cases (raspberries and salt cod) out of 36 requests pressed to a conclusion. In the WTO, Canada has not pressed a dumping or countervailing com-

[10]Mr. Fred Tellmer, Stelco CEO, Toronto Empire Club, February 12, 1996, and CBC Radio, *Sunday Morning*, June 16, 1996. (In 2007, Stelco was purchased by U.S. Steel.)

[11]Robert Howse, "Setting Trade Remedy Disputes: When the WTO Forum is Better than the NAFTA," *C.D. Howe Institute Commentary 21*, 1998.

plaint to a conclusion since negotiation of the FTA began despite the fact it could have won a lumber case at any time and lifted U.S. duties. Why? The short answer is (a) a WTO victory in the 1986 lumber case would have undercut the Mulroney government assertion the WTO was not an alternative and the government aborted it and (b) since 1989, Article 103.2 has stopped Canada from using WTO to override NAFTA.

For very different reasons Canada did not ask GATT panels to remove U.S. anti-dumping and countervailing duties before the FTA. Trade law duties were not levied on important Canadian exports which were vital to certain regions, cities and towns such as lumber and steel. Despite the fact that Canadian provincial and federal governments granted subsidies to producers totalling billions of dollars annually, the U.S. levied countervailing duties much less frequently then it does under NAFTA. During the six year period of 1978 to 1983, there were only thirteen petitions requesting such duties and only one petition was approved (optical-sensing systems).

It should be recalled that before the FTA, eight GATT panels adjudicated complaints against U.S. measures and six found in Canada's favour, and we subsequently won one of the "lost" cases when it was retried. The U.S. implemented the recommendations made by these panels, including lifting an embargo, removing a discriminatory tax and reducing customs user fees. This record is evidence that GATT/WTO dispute settlement neutralized the power disparity between Canada and the U.S., and that it would remove American protection if Canada had a good case.

The answers to all seven questions comprise evidence that the WTO was and still is not only an alternative to the FTA/NAFTA for limiting the misuse of U.S. trade law duties, but that it was and is a much better alternative. And this conclusion is reinforced when

we recall the considerable increase from 1958 to 1988 in Canadian exports to the U.S. Again, an integral part of the NAFTA case fails to survive examination, and is also perverse.

4.15 Gains and Losses

Establishing that the WTO was and is an alternative to the FTA/NAFTA provides the basis for identifying the gains and losses that have resulted from Mr. Mulroney's bilateral agreement. The most significant gain for Canada was removal of U.S. tariffs on about 15 percent of our exports that were not already tariff-free plus a customs user fee of less than one percent. This gain was turned into a huge loss when the Mulroney government gave American competitors the unfettered right to initiate anti-dumping and countervailing actions against any Canadian export and almost always obtain protection which, of course, nullified the zero tariff. The resulting net loss of access reduced our exports and employment far below what would have been achieved under the WTO.

It is often suggested that because most Canadian exports to the U.S. enter free of countervailing and anti-dumping duties, Canadians should not be disturbed by those that are levied. This view not only dodges the fact that American protection has hurt some very large industries as well as smaller ones, but also ignores three additional pertinent facts and the consequent risks they raise.

The first is that many exports are sheltered from American protectionists by other Americans who have even more political power and want to continue buying them at the lowest possible price. For example, the U.S. is a large net importer of many goods essential

for the well-being of its citizens and/or industry (oil, gas, electricity, nickel, potash, pulp and newsprint), which were imported protection-free for years and often decades before the FTA was implemented. Another example is the goods made in Canada and sold in the U.S. by large and powerful corporations (General Motors, Ford and Chrysler). Canada also exports goods the U.S. does not produce and are not directly competitive with U.S. production (certain types of aircraft).

Second, factors affecting the demand, supply, competition and production of goods change. It is not possible to predict whether companies that now accept unfettered competition from Canadian goods will, in the future, seek trade law protection. It is easier to read the past than the future.

Third, NAFTA accords every American company the right to initiate an anti-dumping and/or countervailing action against Canadian goods but leaves the Canadian exporters defenceless. And their right covers all goods exported from Canada. There are no exceptions.

But the most crippling loss for Canada is power vis-a-vis the U.S. Our power was much greater when we conducted trade relations with the U.S. under the WTO. This conclusion is sustained by evidence set out above and summarized in three examples below.

First: As already noted Canada's interest in limiting the misuse of U.S. trade laws is shared by other WTO members, and this similarity of interests substantially increases our leverage. The WTO Uruguay round and NAFTA negotiations were concurrent. In the Uruguay round, Canada, the E.C., Japan, Norway, Switzerland, Brazil, India, plus others, retained all constraints previously imposed on the use of countervailing duties and added rigorous new limits including the definition of a subsidy, a list of subsidies that

are exempt from countervailing duties as well as naming other subsidies that are not countervailable unless certain conditions exist. In the NAFTA negotiations Canada not only failed to replace or mitigate the total rule of U.S. trade law canonized in the FTA, but also failed to obtain U.S. agreement to include the countervailing obligations the U.S. accepted in the WTO.

Second: The WTO dispute settlement system eliminates power disparities between litigants and the weaker power wins providing it has a good case. Decisions are based on WTO law and panels are insulated from national bias. Canada's record in GATT litigation with the U.S. sustains these conclusions. But NAFTA gives the U.S. control over Canadian exports by stipulating that complaints about trade law duties be settled on the basis of American law as interpreted by American officials. The result, as we have seen, is Canadians win on raspberries and salt cod but lose on lumber and steel.

Third: The Mulroney government's agreement that NAFTA sanctify U.S. trade law and the unconditional right of Americans to amend it greatly reduced Canada's power and increased U.S. power. Since WTO law is made by member countries, especially the big traders, including Canada, and can only be changed by them, it curtails U.S. power.

The real NAFTA forces us to conduct our affairs with the U.S. without contractual rights and power. Americans, of course, are taking advantage of this situation with predictable results. Increasingly, a fictitious sovereignty clothes the reality of rule by the U.S. Mr. Mulroney's attempt to single-handedly disarm American protectionists resulted in a catastrophic defeat.

Brian Mulroney and his government are responsible for the FTA and NAFTA, and that is simply not arguable. But Jean Chrétien

and his government are also guilty. Recall that Mr. Chrétien implemented NAFTA after speaking and voting against it in the House of Commons and promising Canadians that he would not do so until he renegotiated the "bad parts," including the subsidy and dispute settlement provisions.

Chapter 6 continues the search for the real NAFTA by examining access to the U.S. for Canadian lumber exports before and after the FTA.

Chapter 5

Corroboration One

The late Senator Lloyd Bentsen, Chairman of the U.S. Senate's Finance Committee, agreed with Mr. John Turner, leader of the Liberal Party and Official Opposition, on fundamental FTA characteristics.

Mr. Turner and Senator Bentsen met in Ottawa after the FTA was published but before Parliament or Congress approved it. Mr. Turner was leader of the Liberal Party which also was the official opposition in the House of Commons. Senator Bentsen was a democratic senator from Texas and Chairman of the Senate's finance committee.[1] The finance committee's approval, along with that of the House of Representatives Ways and Means committee, was required before Congress would approve the FTA. Senator Bentsen was accompanied by five other senators — two Democrats

[1]Senator Bentsen was the Democratic Party's vice-presidential candidate in the 1988 presidential election and Secretary of the Treasury, 1993–94, in the Clinton administration.

and three Republicans. They met Prime Minister Mulroney during the morning and were Mr. Turner's guest for lunch.

Mr. Turner said he had read the FTA, reached conclusions, and proceeded to summarize five:

- The agreement will not result in free trade;
- The agreement does not define a subsidy;
- The agreement does not include provisions to prevent the misuse of countervailing duties;
- The agreement does not contain provisions to prevent the misuse of anti-dumping duties;
- The agreement does not limit the president's use of his discretionary power to change it.

Senator Bentsen replied, "You got that right, my friend."

Mr. Turner summarized two additional conclusions he had reached: Canada's exports are subject to U.S. trade laws, and the U.S. had the right to amend its trade laws without Canada's agreement.

Senator Bentsen again said, "You got that right, my friend." Senator Bentsen continued to state, "The United States Congress will never, and I repeat never, yield its control of trade policy."

A republican senator then told Mr. Turner, "I liked your conclusions very much and they are correct. But I liked Senator Bentsen's comments even better."[2]

[2]The information reported in this chapter was provided by the Right Honourable John Turner.

Senator Bentsen's agreement with Mr. John Turner on the meaning and consequences of seven controlling parts of the FTA drove a stake through the heart of the Canadian case for bilateral free trade with the United States.

Chapter 6

The Canadian Lumber File

The essence of the lumber file comprises six facts and a conclusion that emerges from them:

- The Canadian lumber industry, and its predecessor, the square timber trade, have made an enormous contribution to Canada for nearly two centuries. For many years exports to the U.S. contributed to the industry's prosperity. The industry has a huge comparative advantage and is more productive than the American industry;
- During the 37 years Canada traded with the U.S. under the multilateral GATT, the U.S. never levied a single countervailing duty or an anti-dumping duty, or imposed any other non-tariff measure on its imports of Canadian lumber. Seven rounds of GATT negotiations cut U.S. tariffs from Smoot-Hawley levels to zero on 90% of Canada's lumber exports, and to 5% or less on most of the remainder;

- From 1986 — after Prime Minister Mulroney had zealously promoted bilateral free trade with the U.S. for more than a year — until today, American lumber producers, except for a few short intervals, have had protection against imports from Canada. This protection includes countervailing duties reinforced at times by anti-dumping duties that have risen to 27 percent, as well as export taxes and quantitative restrictions that are administered by Canada. The Harper government extended such protection to 2015 and agreed to consult with the U.S. before that time to determine whether a further extension is desirable; (*Foreign Affairs and International Trade Canada Press Release*, November 20, 2012.)

- Twenty years of restrictions on Canadian lumber exports have imposed immense costs on Canada and its citizens. These costs escalate every day that our exports are restricted. Prime Minister Harper's agreement ensures the costs will pile up unless the agreement is terminated. The true cost of the restrictions is incalculable;

- The prime cause of the restrictions on Canada's lumber exports is a combination of American companies' exploitation of an opportunity to increase profits, and the infinite willingness of the Mulroney, Chrétien, Martin and Harper governments to sacrifice Canadian interests to accommodate the U.S.;

- It is important to report that American lumber companies have two objectives: first, protection against imports from Canada and the higher the better; and second, ownership of Canada's forests or at least control of its lumber production. It is even more important to report that not only have four Canadian governments given the Americans virtual perpetual protection and extraordinary control of Canadian lumber production, but they also have paid American trade lawyers

hundreds of million of dollars in an attempt to hide their behaviour from Canadians as well as trick them into believing that the governments were fighting to advance Canadian interests. Worse, there is no evidence that any of our governments examined alternatives to bilateralism. Incredibly, the Chrétien, Martin and Harper governments accepted Mulroney's sales pitch that there was no alternative to bilateralism.

A conclusion that emerges from these facts is that it is essential that Canada return to trading with the U.S. under the WTO and cancel the FTA and NAFTA as well as Harper's lumber deal (see Chapter 7). All three agreements can be revoked without paying any penalty whatsoever six months after giving notice for FTA and NAFTA termination and 23 months for Harper's agreement. The moment the bilaterals are rescinded, WTO law would again cover all Canadian trade with the U.S., including lumber. The WTO would terminate American control of Canadian production and pressure to sell them Canada's forests as well as make it much more difficult, if not impossible, for them to levy countervailing and anti-dumping duties.

6.1 Lumber and the Economy

As noted, the lumber industry has made an enormous contribution to Canada since before Confederation. If, today, Statistics Canada could measure the total contribution industries made to the well-being of Canadians and Canada, lumber would be at or near the top. A few statistics support this observation. In 1999, thirteen years after the Mulroney government initiated non tariff

measure (NTM) protection limiting Canada's exports, the lumber industry, including related logging, employed 212,000 persons; paid them $6.3 billion in wages and salaries; spent $2.5 billion on new mills, equipment and repairs; operated 11,246 mills and logging establishments; sustained 1,200 communities; produced goods worth $38.3 billion; and exported lumber valued at $12.6 billion[1].

Exports, especially to the U.S., are now essential if the industry is to prosper. During 2001, about 66% of Canada's lumber production was exported to the U.S., 26% consumed at home and 11% sold overseas. U.S. demand was remarkably strong from 1995 to 1999, and in 2001 the Federal Reserve engineered a perfect environment for housing starts with its record-low interest rate policy. Despite strong U.S. demand, the substantially devalued Canadian dollar and the demonstrated competitive advantage of Canadian lumber, exports have been limited to about 34% of consumption since restrictions were imposed in 1986.

6.2 American Objectives

American lumber companies' first objective is to persuade their government to protect them from Canadian exports. Protection would reduce or eliminate Canada's comparative advantage as well as permit American companies to increase prices and sales, especially if protection is accompanied by sufficient harassment of Canadian companies, to convince U.S. customers to pay a premium for secure domestic lumber. Protection can give a company other

[1]All figures given except "1,200 communities" were taken from a *Compendium of Canadian Forestry Statistics* published by, Pierre Pettigrew, the Canadian Council of Forests Ministers, May 3, 2002. The Minister of Trade mentioned 1,200 forest dependent communities in speeches made in the House of Commons, May–June 2002.

benefits, including increased income to purchase new timber rights, equipment and mills; to pay higher dividends and/or higher profits; and to raise share prices. Such benefits are raw meat for CEOs, executives and directors because they permit them to pad personal remuneration. The second American objective is to own Canada's forests or, at a minimum, control lumber exports to the U.S., and cripple Canadian competition. The Americans have not publicly stated this objective in plain words but have conveyed it to Canadians many times in code which can be deciphered. The objective was encoded by lawyers — possibly assisted by an economist or two — and transmitted in the first petition for trade law protection against Canadian lumber in 1982, and repeated, one way or another, many times.

In plain language, the Americans alleged that Canadian government participation in the timber market grants a subsidy. This allegation comprised two parts: (a) provincial governments grant subsidies to lumber producers by selling them timber at a price less that its "true market value;" (b) true market value is established by "competitive bidding or arms length negotiations between mills" for available timber. The yardstick for identifying and measuring a subsidy, therefore, is a price set by competition between buyers free of government interference. The implicit but inescapable conclusion is that government participation in the timber market grants subsidies. The message is clear: sell us your forests or pay countervailing duties.

The U.S. is playing for very high stakes but, for Canada, the costs of losing control of its forests would be incalculable. Accepting U.S. terms would lift countervailing and anti-dumping duties from our lumber exports. But what would American owners do to our forests and the vital lumber industry? Would American owners export logs instead of lumber? Would they use their control of logs to force Canadian lumber companies to sell their mills to them at fire

sale prices? What would happen to the more than 200,000 Canadian employees: How many would lose their jobs? Would their pay be cut to that of non-unionized American workers? What would happen to the hundreds of communities sustained by these workers and their salaries? How would American owners manage our forests? Answers to these and other pertinent questions should take account of the fact that NAFTA — especially the provisions that give Americans unlimited national treatment and Chapter Eleven rights according private corporations the power to obtain compensation from the federal government for breach of the NAFTA contract — sharply curtails the power of Canadian governments to limit American ownership rights.

NAFTA protection is the lever American lumber companies are using to acquire ownership of Canada's forests. Since the protection pays huge benefits to American companies and imposes onerous costs on the Canadian lumber industry, the Americans can play an attrition game until Canadian governments agree to sell.

The American lumber companies did not advance one inch towards buying Canada's forests during the thirty-seven years our lumber exports to the U.S. were covered by GATT. A WTO panel, examining the legality of U.S. countervailing duties on Canadian lumber in 2002, noted "that using the U.S. methodology for determining a benefit from the provision of government-owned resources that are not in themselves tradable across borders and not sold at public auction, would lead to the virtual automatic determination of the existence of subsidization in a resource-rich export country, even where the perceived price difference was simply a reflection of the exporting country's comparative advantage in the product.[2] Americans would not be able to use the WTO to force Canadians to sell their forests.

[2] *WTO Panel Report, United States — Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, 2002, p. 79, note 26.

6.3 Smoot-Hawley

Before GATT, Canadian lumber exporters to the U.S. encountered Smoot-Hawley tariffs, reduced somewhat in 1935 and 1938. They were also vulnerable to every non-tariff measure (NTM) that could be devised by American lobbyists, politicians and civil servants. American lumber producers had the best of all possible arrangements: generous tariffs that could be reinforced by one or more NTM when they sniffed competition, real or imagined.

6.4 GATT

In 1980, 33 years after the inception of GATT and four years before Mr. Mulroney became prime minister, more than 90% of Canada's lumber exports to the U.S. were tariff-free with only a few duties above five percent (e.g. prefabricated buildings 5.1% and plywood 20%). This access was secure and predictable, because all U.S. lumber tariffs, except shakes and shingles, were guaranteed by GATT against tariff increases, unless the U.S. renegotiated them and paid Canada compensation by reducing other tariffs of equal value to us. This access provided many opportunities to add value to wood exports and create even more jobs and wealth in Canada. In addition, such access was largely harassment-free because the U.S. made only one serious attempt to impose an NTM (i.e. marking regulations directed to placing part of our exports under the Buy America Act), but ceased when it was proved that such regulations were prohibited by a pre-GATT most-favoured-nation trade agreement. Canadian lumber increased its share of the U.S. market.

Another fact is that the U.S. did not levy countervailing or anti-dumping duties on imports of Canadian lumber until Mr. Mulroney

was prime minister, and for all practical purposes, had ditched GATT.

A further fact is that U.S. lumber companies did not petition for countervailing duties until 1982, and the Commerce Department rejected the petition because the alleged subsidies, even if they existed, were "generally available" and not countervailable under U.S. law. American administrators knew there was a high probability that the Trudeau government would invoke Canada's GATT rights and that a GATT panel would find the American duties illegal. It was accepted in GATT that generally available subsidies were not countervailable, and U.S. law reflected that view.

The Trudeau government could, and probably would, have used the Employment Support Act to maintain the viability of the lumber industry until a GATT panel had announced its decision and the U.S. duties were removed. Recall that the Act authorized the government to provide "financial assistance to the Canadian manufacturing industry for the purpose of mitigating the disruptive effect of import surtaxes, or other measures of like effect where such measures could seriously affect employment." Also, recall that the Trudeau government used the Act to offset the adverse effects of President Nixon's tariff surcharges.

Before Brian Mulroney became prime minister, GATT access to the U.S. for lumber was about as good as it could get in cases where our exports compete with goods produced by a politically powerful industry. Canadian lumber was sheltered from U.S. countervailing and anti-dumping duties as well as other NTMs. Ninety percent of our exports were duty-free and, except for a few products, the rest were dutiable at five percent or less. This access was achieved in GATT negotiations and embedded in a multilateral contractual agreement, underwritten by a government that would use Canadian contractual rights to retain it, and insured by the

Employment Support Act. For lumber exporters access was secure and predictable, and virtually harassment-free.

6.5 Mr. Mulroney

World War II Britain had hundreds of signs warning "Loose Lips Sink Ships." The Prime Minister's loose talk torpedoed Canadian lumber's GATT access to the U.S. The torpedo was a virtual invitation from Mr. Mulroney to American lumber companies to again petition for countervailing duties on imports of Canadian lumber. The invitation consisted of the assertion that misuse of U.S. trade law had put at risk more than two million jobs that could only be saved by a bilateral free trade area, and especially his unstated corollary that GATT was ineffective. Rejection of GATT meant Mulroney not only exposed Canada to the full force of American power, but that he locked himself in a position where he had no alternative but to accept U.S. trade law and forego use of the Employment Support Act.

American lumber companies, their lawyers and trade law administrators noted this about-turn in Canadian policy and acted: the lumber companies again requested countervailing duty protection against Canadian exports and, this time, the administrators agreed, fixed the rate at 15% and broke the law they cited for rejecting a similar request in 1982.

The Mulroney government responded by first obtaining a GATT panel to judge the legality of the U.S. duties; then aborting the panel after reading a summary of its findings; and finally capitulating by signing its first bilateral trade agreement with the U.S., titled the "Memorandum of Understanding (MOU)," commonly referred to as the lumber agreement.

Obtaining a GATT panel to judge the legality of U.S. countervailing duties contradicted the government's campaign to persuade Canadians that GATT was useless. What explains this contradiction? Is it possible the Prime Minister was annoyed by President Reagan's apparent breach of the Quebec City summit agreement to forego protectionist measures during FTA negotiations? Or did the government believe its propaganda, and expect GATT to find the U.S. duties legal, which it would then broadcast from St. John's to Victoria and back as proof of the necessity to obtain the FTA.

What did the GATT panel find and recommend and why did the Mulroney and U.S. governments cancel it? Since the panel decision was not published we must base conclusions on circumstantial evidence. Such evidence suggests the panel decided the U.S. duties were illegal and recommended that they be removed. If the panel had found in favour of the U.S., we can be certain the Americans would have exercised their right to insist the panel discharge its mandate and publish a complete report. Such a finding would have been a decisive and permanent victory for American lumber producers over Canadian exporters and would have established a precedent other industries could use to obtain protection against imports from overseas as well as Canada. Conversely, a panel decision favouring Canada would be inimical to American interests and should be censored. The fact the U.S. proposed, or agreed, to terminate the panel is convincing evidence the panel found in favour of Canada and against the U.S.

It has been suggested that a GATT decision that the U.S. duties were legal would have been used by the Mulroney government to reinforce its claim that a bilateral agreement was essential. It follows that a decision favouring Canada would discredit the government's propaganda and, worse, prove that John Turner, Leader of the Liberal Party and Official Opposition, was right when he advocated continuing trading with the U.S. under GATT and cancelling the

FTA negotiations. Of course a decision favouring Canada would provide huge long term benefits for the lumber industry, its employees, the communities they sustain and the economy generally. But there is not much evidence the government gave priority to Canada's interest in any of the three bilateral negotiations with the U.S. The fact the Mulroney government was a party to terminating the panel and burying its decision is additional evidence the decision favoured Canada.

The lumber agreement was replaced by the FTA in 1989, which was superseded by NAFTA in 1993. We have seen how the FTA/NAFTA provisions impinge on Canada's exports to the U.S. of all goods, not only lumber. It will suffice, therefore, to report in this chapter that the lumber agreement levied a 15% export tax on Canadian lumber shipped to the U.S., gave the Americans control of key parts of our forest policies and practices, imposed immense costs on Canada, and provided Canada with no benefits whatsoever.

Listed below are some of the costs Prime Minister Mulroney's bilateral lumber agreement imposed on Canada:

- Threw away Canada's natural competitive advantage in lumber;

- Gave American lumber companies a lever to force provincial governments to sell them Canada's forests;

- Cut our exports of lumber and, of course, export earnings;

- Lost Canada thousands of jobs. Treasury Board President Robert de Cotret said "I must admit that jobs will be lost," although he wouldn't estimate how many. The *Toronto Star*

reported "the lumbermen say as many as 15,000 of the 70,000 jobs in the industry are in jeopardy;"[3]

- Rendered the Employment Support Act non-operational and, therefore, blocked his government from using it to help Canadian companies and their employees injured by American protection;

- Imposed heavy costs on Canadian lumber companies;

- Adam Zimmerman, President and Chief Operating Officer of Noranda and Chairman of the Canadian Forests Industries Council, noted the "increased costs" of paying the 15% U.S. duty or Canadian export tax amounted to well over $500 million per year, an amount which represents the entire profit of the Canadian lumber industry;"[4]

- Transferred a chunk of Canadian sovereignty to the U.S. Zimmerman said a consequence of ceding American companies the right to control the Canadian industry meant "we are going to be run by the American industry and producing according to their dictates;"[5]

- Zimmerman added that the agreement "established an appalling precedent with ominous overtones for the whole range of Canadian resource industries. It can be said that a foreign state can dictate Canadian resource disposal policies and prices. Our sovereignty in these matters is substantially eroded and even though industry efficiencies may become as good as they are in lumber (on average Canadian producers

[3] *Toronto Star*, editorial, January 1, 1987.

[4] Adam Zimmerman, "Our Forest Industries a Pawn in the Game", *Financial Post*, December 15, 1986.

[5] Ibid.

are over 40% more productive than Americans), we will be hobbled by added duties or tariffs, or whatever is deemed necessary to give U.S. competitors an edge;"[6]

- Wiped out the substantial progress Canada made in GATT negotiations to open the U.S. market for highly processed — i.e. value added — wood exports.

Mr. Zimmerman raised a fundamental issue when he said the agreement permits a foreign state to dictate Canadian resource disposal policy and prices. Zimmerman's conclusion is proven beyond doubt by the agreement itself and a second time by a letter written by U.S. Commerce Secretary Malcolm Baldrige and Trade Representative Clayton Yeutter interpreting the agreement for American lumber companies.[7] Relevant parts of the agreement and interpretation letter were quoted by the *Globe and Mail* editorial, titled "A bully's victory," January 3, 1987, and are repeated below.

> The agreement states, "The Government of Canada will take no action, and will take all reasonable steps to ensure that no other governmental body in Canada takes any action, directly or indirectly, which has the effect of offsetting or reducing the export charge..." The letter says the United States will "monitor closely the operation of the agreement to ensure that the amounts collected through the export charge or replacement measures are not returned to or otherwise used to benefit producers or exporters of Canadian softwood lumber."

[6]Ibid.

[7]Baldrige and Yeutter did not ask Canadian ministers if they agreed with the U.S. interpretation of the lumber agreement. In addition,the Reagan administration gave the letter to American lumber companies without copying it to the Mulroney government. It appears the Canadian media obtained the letter and reported its contents before the Mulroney government knew it existed.

> The agreement states that Canada may reduce or eliminate the export charge if other fees are placed on lumber production. But Canada can do this only "subject to further consultations *and agreement* between the two governments." (Our italics.) The letter says that "the U.S. government would have to approve any changes in the export charge or calculation of the value of any replacement measures.
>
> The agreement states that, every three months, Canada "will provide the Government of the United States of America with a report on a province-by-province basis containing, at the minimum, the following: the quantity of softwood lumber products exported, the value on which the tax was paid, and the total tax collected for the quarter." The letter says the U.S. government "will consult closely with (U.S. lumber producers) concerning implementation and operation of this agreement and provide information to assist the Coalition to evaluate the operation and enforcement of this agreement."

It would be impossible to compensate Canada for such losses. Nevertheless, the question must be asked: What payment did the Mulroney government obtain from the U.S.? The answer is: None.

The Mulroney government cancelled the lumber agreement in October 1991, but it did not mean much because the government had placed lumber in the FTA. President Bush I immediately invoked U.S. FTA rights, ordered American trade law administrators to initiate another countervailing duty investigation of lumber imported from Canada and another 15 percent duty was levied on such imports. The Mulroney governments management of the lumber file ended about where it began — the U.S. was protecting its lumber

companies against imports from Canada with a 15% countervailing duty.

6.6 Defeat

The lumber negotiation was the first time Canadians saw their new prime minister and government in action on the American front when vital interests were at stake. What did they see? They saw the Mulroney government suffer total defeat and the U.S. win total victory. Canadians also saw their government exchange GATT access that was free of NTMs and virtually free of tariffs and harassment for bilateral access comprising never-ending harassment and a 15 percent levy on Canadian exports to the U.S. The Prime Minister did not redeem even one promise he made in his Address to the Nation on June 16, 1986. Worse, the government not only retreated from GATT access but it compounded the damage by releasing the U.S. from GATT anti-dumping and countervailing obligations which returned Smoot-Hawley rights for such duties to American lumber companies. The Mulroney government drove backwards at a reckless speed.

Three mistakes by the Mulroney government made total defeat inevitable. The first mistake was taking Canada into a bilateral negotiation on the basis of an inaccurate assessment of the situation.

The second mistake was throwing the alternative, GATT, overboard and locking Canada into a one-on-one negotiation with the world's most powerful nation, which, from its inception, nourished the objective to conquer or at least control Canada. The Mulroney government's third mistake was that it failed to withdraw from the

negotiations as soon as it was clear they were not serving Canada's interest.

The prime cause of Canada's defeat was that the Mulroney government was highly sensitive and responsive to U.S. requests, but impervious to Canada's interests, and simply cast them aside. This lemming-like compulsion to satisfy the U.S. was helped by the fact that Mulroney the negotiator bypassed reality as diligently as Mulroney the salesman.

The unrestrained appeasement of the U.S. and the calculated deception of Canadians that marked the Mulroney government actions from the beginning to the end of its first bilateral negotiation was captured by a *Globe and Mail* editorial, titled "Selling out on Lumber," and two sentences will suffice:

> "Ms. Carney has capitulated on lumber as part of a strategy to win a comprehensive trade treaty with the United States — something the Mulroney government has always denied doing — offering up weaknesses in the name of self-interest."
>
> "If she had returned from Washington on a plane, Patricia Carney might have waved the deal on Canadian softwood lumber exports to the U.S. and said 'Peace in our time.' Peace is her goal: appeasement is her policy."[8]

The government tried to justify the defeat by claiming the lumber issue was a barrier to free trade negotiations that must be removed. Ms. Carney, Trade Minister and Chairperson of the Cabinet Trade Executive Committee, told the House of Commons "... we are seeking... to resolve this bitter dispute and get it behind us, so that

[8] "Selling out on Lumber," *The Globe and Mail*, January 1, 1987.

we can proceed with the trade talks. . . ."[9] Fourteen years later she wrote, "This nasty dispute occurred prior to the FTA negotiations and threatened to derail them."[10] Neither the Prime Minister nor the Trade Minister explained how accepting a 15% duty on Canadian exports to the U.S. and ceding control of our exports to the U.S., would lead to secure free trade between the two countries in all sectors, including lumber.

The Trade Minister was also suggesting, implicitly, that the lumber negotiations were distinct from free trade negotiations and would not influence them. The government's bilateral negotiating objectives were stated by the Prime Minister in his Address to the Nation on June 16, 1986, and they covered all goods exported to the U.S. Recall that within wall-to-wall bilateral free trade the Prime Minister stated the government would seek "secure access", "a new deal with the Americans. . . that protects Canada from the vast arsenal of legal weapons that can be used to restrict our trade. . . that stimulates investment, productivity and, most important, jobs." Inside these overriding objectives, the Prime Minister made two specific promises relating to lumber: "to ensure that Canadian. . . lumbermen. . . and others are relieved of the tyranny of protectionist measures;" and "to recreate the success of the auto industry for other sectors and other regions of the country including forestry. . . in British Columbia."[11] The Prime Minister did not tell Canadians lumber would be detached from his objectives and that he would swallow American protection and management of our exports while he sought free secure access for all other exports.

The U.S. prime objective was to obtain maximum control of all matters under negotiation and it did not distinguish between lumber and other Canadian exports, although sometimes it used dif-

[9] Ibid.
[10] *Trade Secrets: A Memoir*, p. 314.
[11] *Financial Post*, Editorial, December 15, 1986.

ferent measures to achieve control. The Reagan administration pursued this objective across-the-board.

Another consideration is that the Mulroney and Reagan governments called the shots for the three bilateral negotiations. This meant that both governments could pursue their objectives across-the-board, i.e. Canada should have insisted that all product sectors including lumber had to be negotiated in the FTA and not in a lumber MOU.

The bilateral negotiations produced a wide-ranging and detailed set of rights and obligations covering access to the American and Canadian markets. The rights and obligations were worked out in three phases with the results of one phase folded into the next phase. The third phase, NAFTA, implemented in 1994, completed the process. Lumber was an integral part of each agreement: MOU, FTA and NAFTA.

6.7 American Appraisal

Negotiation of the lumber agreement was the first serious encounter between the Reagan and Mulroney governments. Since the agreement was the first of three bilateral agreements it may be asked how the Americans appraised the Prime Minister and his Trade Minister and what conclusions they might have carried into the next bilateral negotiation which was labelled free trade. A confidential assessment is not available but it is possible to identify certain pertinent facts that were just as obvious in January 1987 as they are now and suggest the conclusions that the U.S. took from them. The U.S., for example, would note the fact that the Mulroney government consistently rejected the multilateral option for bilateralism even when it cost Canada: virtual free entry to

the U.S. for lumber; a 15% duty on exports; thousands of jobs; the use of the Employment Support Act; the loss of sovereignty; and down the road, ownership and control of Canada's forests and lumber. Americans would also note that the Prime Minister and Trade Minister granted every request the U.S. lumber industry made which a U.S. trade lawyer concluded "would take care of all the U.S. industry's problems and guarantee the future as well."[12] The Americans would further note that they paid Canada zero for the vital concessions it made, despite the fact that Canada had paid a substantial price in GATT negotiations for both the zero tariffs and countervail constraints.

From these facts, the Americans would reach strategic conclusions that might well have influenced their position in the FTA negotiations: first the Mulroney government had confined itself to bilateral negotiations and they could deploy total U.S. power with only a minimum risk that the Prime Minister would abandon the negotiations and return to GATT, as MacKenzie King did in 1948; and second, the Prime Minister was desperate for a deal and would pay a high price to get one, including surrendering sovereignty.

Turning to tactics, U.S. officials would certainly note the Mulroney government's "no" meant "yes." They would recall that in 1985, ministers told the House of Commons the government would not negotiate lumber with the U.S. A few months later the Trade Minister decided to negotiate. They would also recall the Trade Minister made a "final offer," indicated the U.S. could take-it-or-leave-it and insisted there was nothing more to discuss, but continued to talk. They would further remember the Minister rejected an export tax but later levied one. The conclusion was obvious: don't accept "no" as the final answer, keep "leaning" on Mulroney and Carney, and they will cede whatever the U.S. requests.

[12]Ibid.

And it would be surprising if at least some Americans did not observe, with much satisfaction, that Mulroney was not Turner, Trudeau, St Laurent or King, and conclude that the road to de facto control of Canada was open.

6.8 Deep Hole

Strategically and tactically, Prime Minister Mulroney's first venture in bilateral negotiations with the U.S. placed Canada in a deep hole at the start line for the comprehensive free trade negotiations. Comments by media observers of the government's actions reinforced the explanation already given of how the hole was dug as well as illustrating its depth. (Excerpts from columns written by Don McGillivray and Jeffrey Simpson in Ottawa, Giles Gherson in Washington, and editorials printed by the *Globe and Mail* and *Toronto Star* are contained in Appendix B.)

Chapter 7

Corroboration Plus: The Bush–Harper Lumber Agreement

The lumber file Prime Minister Harper inherited from Mr. Martin should have described the immediate problem, placed it in context, and outlined Canada's options.

Problem: Since 2000, the U.S. had collected duties on imports of lumber from Canada. By mid-2006, the amount collected exceeded five billion dollars and it increased daily. To comply with the Byrd Amendment, the duties were held in escrow to be given to American lumber companies when litigation ceased.

A bilateral panel found the U.S. duties illegal, recommended they be removed and that all duties collected be returned to the Canadian companies that paid them.

The U.S. rejected the panel's recommendation and proposed a "bilateral negotiated settlement."

Context: From the inception of GATT in 1947 to Prime Minister Mulroney's 1986 lumber agreement, the U.S. did not impose countervailing duties or any other non-tariff measure on imports of Canadian lumber. From 1986 onwards, except for short intervals, Canadian lumber exports have been restricted by the U.S. or Canadian governments serving as agents of the American lumber lobby.

In 2002, a WTO panel ruled that the Byrd Amendment was illegal. When the U.S. refused to terminate Byrd, the panel authorized affected members to retaliate and several did. The U.S. congress and President Bush then enacted legislation and terminated the amendment in 2006. Canada was involved in this WTO action against the U.S., but retaliation from the EU, Japan and others was instrumental in pressuring the U.S. to cancel the illegal legislation, thus demonstrating the importance of dealing with the U.S. in the WTO and not bilaterally.

Options: The government had a choice at that time: accept the U.S. proposal to negotiate another bilateral settlement or invoke Canada's WTO rights.

Bilateral negotiations would free the Bush administration to deploy maximum U.S. power, unconstrained by legal obligations, and reduce Canada's leverage to worthless "good will," which Mr. Harper might believe he had deposited in Washington. The likely result of bilateral negotiations would be another agreement, incorporating the basic interests of American lumber companies, combined with cosmetic provisions to help the government persuade Canadians that it is a good deal.

Invoking Canada's WTO rights would have required that the Canadian government take three steps expeditiously and concurrently:

a) Prepare a retaliation list and obtain WTO authority to use it. The list would be tailored to compensate for the damage inflicted by the countervailing duties. An important purpose of retaliation would be to give American companies making a lot of money selling goods to Canadians a vested interest to coalesce to neutralize the lumber lobby's power. Accordingly, the retaliation list would have comprised goods exported by companies with clout in Washington, and the import measures applied to their exports would have been felt by them;

b) Request the WTO to establish a panel to examine the policies and methods used by Quebec, Ontario, Manitoba, Saskatchewan, Alberta and British Columbia to sell logs to Canadian lumber companies; advise if they are consistent within Canada's WTO rights and obligations; and, if not, recommend the changes required to make them consistent; and then persuade the provinces to adopt any recommendations. This step would almost certainly ensure that WTO panels would find U.S. duties illegal, authorize Canadian retaliation if necessary, and stop the U.S. government from rubber stamping lumber lobby petitions for protection;

c) Make the Employment Support Act operational and use it to maintain the viability of lumber producers and other companies whose exports have been hit by trade barriers judged illegal by the Canadian government under the WTO, until the barriers are removed. This step would not only make it more difficult for foreign companies to intimidate Canadian exporters but also caution the American lumber lobby, other industry lobbies and the American government, that illegal restrictions will be challenged in the WTO.

If these three steps had been taken at that time, there would be a high probability that the WTO option would have obtained reimbursement of more than five billion dollars the U.S. had been collecting in illegal duties plus interest, stopped the American lumber lobby from obtaining countervailing duties in the future, and reinstated the virtual free access (both tariff and non-tariff measures) which Canadian lumber was accorded on entry into the U.S. before Prime Minister Mulroney's bilateral agreements.

The Harper government rejected the multilateral option and decided to accept the Bush administration's suggestion to settle the issue bilaterally which, of course, discarded multilateral trade law, maximized U.S. power and reduced Canada to ceding American requests in return for a few optical concessions. The essence of the agreement is contained in six commanding rights and obligations.

Five commanding provisions are described below:

> **First**: Mr. Harper constructed a competition-free zone for American lumber companies when the U.S. price is below $355.00 (U.S.) per thousand square feet, by restricting Canadian exports and making the restrictions more severe as the U.S. price declines (Article VII, "Export charge and export charge plus volume restraints"). Mr. Harper agreed to punish Canadian companies whose exports exceeded the contractual level by more than one percent in a month, by applying retroactively an additional export tax equal to 50 percent of the prevailing tax (Article VIII "Surge mechanism"). By October 2006, U.S. housing construction, the creator of demand for lumber, had spiralled down. When Mr. Harper accepted the framework of the Agreement in April 2006, the U.S. lumber price was between $360 and $380 (U.S.) per 1,000 square feet and exporters would not pay an export tax. By September 16, 2006, when the Agreement came into effect, the price

was substantially below $315.00 and exporters paid a 15 percent tax.[1] If and when regional exports increased by more than one percent the export tax would increase to 22.5 percent;

Second: The Harper Government pledged it would not give financial or other assistance to Canadian lumber companies that would help them circumvent the border measures limiting exports (Article XVIII). The contract states, "no Party or any public authority of a Party shall take action to circumvent or offset the commitments set out in this Agreement" (Article XVII.1). The contract explains that "Grants or other benefits provided by a Party or any public authority of a Party shall be considered to offset the border measures if they are provided on a de jure or de facto basis to producers or exporters of Canadian softwood lumber products" (Article XVII.2). Mr. Harper hog-tied the federal government as well as the governments of lumber exporting provinces;

Third: The Harper government agreed to provide the U.S. and, of course, its lumber lobby with an extraordinary

[1] Paul Waldie, "House Sells for Less Than the Price of Latte," *The Globe and Mail, Report on Business*, October 2, 2008, reported on the U.S. housing crisis. The article explained that the buyer who paid $1.75 for the house would "have to come up with at least $850.00 to cover some of the back taxes and clean-up costs but the price marks a new low in the U.S. housing market." "With foreclosures reaching record levels in many parts of the United States, the Internet has become a handy tool to sell distressed properties. eBay had more than 4000 U.S. properties for sale yesterday, although only 64 were foreclosures. Prices ranged from $10 to $850,000. Some companies specialize in buying up dozens of vacant properties from lenders or through sheriff sales, and then unloading them, usually for a small profit, through eBay and other web sites. . . ." "Ohio-based Best Buy Properties Inc. has sold hundreds of foreclosed houses on eBay since 2000. 'Our staff is constantly searching the United States for bank foreclosures, tax foreclosures and other sources of distressed properties' the company said in a statement."

amount of exceedingly detailed information covering virtually every phase of Canadian lumber production. This information permits American companies to keep Canadian competitors under comprehensive and microscopic surveillance and, obtain much information relating to costs, prices, etc., that companies normally classify secret. Since the scope and depth of this obligation has to be read to be believed, four key parts are quoted in Appendix A;

Fourth: Both GATT/WTO and FTA/NAFTA contain obligations that members who collect illegal duties from foreign exporters return them with interest. The U.S., it will be recalled, collected more than five billion dollars from Canadian lumber exporters to offset alleged injurious subsidies and dumping. NAFTA panels examined the issue and decided the U.S. duties were illegal, should be lifted and all collected duties returned to the Canadians. The Bush–Harper lumber agreement ignored all bilateral and multilateral obligations and, inter alia, gave American lumber companies one billion dollars belonging to Canadian companies, $500 million was paid to American companies and the rest placed in a fund under their control (Annex 2A:4). The Prime Minister robbed Canadian companies of one billion dollars to pay a performance bonus to their American competitors for obtaining illegal duties that imposed onerous costs on virtually every part of Canada's lumber industry as well as on Canada. Worse, the Prime Minister established a perilous precedent that gives American companies the green-light to tax directly as well as indirectly Canadian competitors, provided the tax is disguised as a countervailing or anti-dumping duty;

Fifth: Prime Minister Harper cancelled all Canadian WTO cases that challenged the legality of U.S. lumber duties and persuaded 14 Canadian companies or trade associations to

terminate all litigation in the U.S. Court of International Trade (Annex 10 bis).

Mr. Harper invited the American lumber lobby to acquire sizeable protection to increase the hefty amount he contracted to provide. The invitation comprises his failure to obtain from the Bush administration a commitment to prohibit administrative protection. U.S. customs officials are famous for the creative ways they use the laws and regulations they administer, to harass, impede and discourage imports. The lumber lobby has marched down this historic road to protection and persuaded the U.S. Congress to "finalize a bill" that would force U.S. customs officials to "verify" that lumber importers can prove their supplier has met all international trade obligations. Importers would face fines and other penalties for violating the law."

Mr. Barrie McKenna, a *Globe and Mail* reporter, explains, "Home Depot and other U.S. lumber importers will have to prove their Canadian suppliers have fully paid their export taxes before getting the product into the country. The measure is the latest bid by the U.S. lumber industry to enforce the contentious 2006 Canada-U.S. softwood lumber agreement. It could be a costly bureaucratic headache for lumber companies."[2]

In return for Prime Minister Harper's acceptance of the obligations to serve American lumber lobby interests, the Bush administration offered Canada three concessions which the U.S. can cancel unilaterally. The three temporary concessions are:

a) remove anti-dumping and countervailing duties (Article III);

[2]Barrie McKenna, "Softwood Dispute Shows NAFTA Sits Atop Rotten Joists," *The Globe and Mail, Report on Business*, August 15, 2006.

b) dismiss lumber company petitions requesting anti-dumping and countervailing duties and not to "self-initiate" such petitions (Article V);

c) suspend the "operation and application of Section B of Chapter Eleven of the NAFTA" with respect to any matter covered by the Agreement (Article XI.2).

Mr. Harper also received an optical concession from the U.S. The "concession" comprised agreement to replace the bilateral dispute settlement mechanism with arbitration conducted by the London Court of International Arbitration under its rules, with three ominous additions: neither party shall initiate litigation or dispute settlement regarding lumber, including in the WTO; an arbitration tribunal shall give sympathetic consideration to domestic law, e.g. U.S. trade law; and if the U.S. loses an arbitration case it can terminate the Bush–Harper agreement immediately. These de facto amendments to the International Arbitration rules certainly reduce, if not eliminate, the prospect it will render fair decisions. If the court rules against the interests of the American lumber lobby, the U.S. can cancel the agreement and return to Mr. Mulroney's bilateral agreements. The right to cancel gives the American lumber lobby a powerful lever to wring more concessions from a compliant Harper government. This was the sixth commanding obligation Mr. Harper imposed on Canada.

In January 2012, the U.S. agreed to return the $5 billion in duties provisionally collected from Canada on lumber exports to the U.S. up until about 2006, thus complying with earlier panel decisions. Additionally, both countries agreed to extend the terms of the lumber agreement until October 2015.

Where has the Bush–Harper agreement left Canada and its lumber industry? The answer is: In an extremely dangerous situation.

When the Harper government signed the bilateral agreement it committed Canada, for practical purposes, to serve as an ally of the American lumber industry in its predatory campaign to obtain ownership of the Canadian industry lock, stock and barrel. This is the logical and inevitable result of signing a bilateral trade agreement with a much more powerful country.

The astute CEO, foreign as well as Canadian, examining the Bush–Harper agreement, will be astonished. How could the Canadian government fleece its companies and citizens to reward foreign competitors who broke every contractual obligation in the book and nourish objectives inimical to Canada's interests? Why should his or her company invest in Canada to export goods to the U.S. if there is a risk an American competitor will seek bilateral protection against the goods?

Chapter 8

Independence Lost

Canada was an independent country before it enacted the FTA in 1989. From 1947 to 1988, GATT rights and obligations encased in multilateral trade law reinforced our independence. GATT was Canada's trade contract with the U.S.

Prime Minister Mulroney assured Canadians three times that the FTA did not affect our sovereignty: first, when he informed the House of Commons that he had asked President Reagan to enter negotiations which his government directed to establish a Canada-United States free trade area; second, when he addressed the nation on television and radio the night before negotiations began in Washington; and, third, when he described the FTA to the House of Commons the day after his government had signed it. Then, after accepting the FTA, the Prime Minister gave members of parliament the assurance quoted below.

> "Mr. Speaker, our political sovereignty, our system of social programs, our commitment to fight regional dis-

> parities, our unique cultural identity, our special linguistic character — these are the essence of Canada. They are not at issue in these negotiations. That is what I said two years ago and, Mr. Speaker, this agreement delivers on that pledge exactly. These vital questions were not and are not affected by the negotiations."

This assurance was of overriding importance to Canadians.

In the party leader's debate before the 1988 election, John Turner told Canadians as well as Brian Mulroney, "I happen to believe that you have sold us out." After repeated interruptions by Mulroney, Turner said,"We built a country east and west and north. We built it on an infrastructure that deliberately resisted the continental pressure of the United States. For 120 years we've done it. With one signature of a pen, you've reversed that, thrown us into the north-south influence of the United States, and will reduce us, I am sure, to a colony of the United States, because when the economic levers go the political independence is sure to follow." Mulroney replied the FTA was "a commercial document that could be cancelled on six months' notice." Turner replied, "Commercial document? That document relates to every facet of our life." These absolute opposite descriptions of the FTA raise the vital question — who told Canadians the truth, Mulroney or Turner?

FTA rights and obligations transferring control of vital Canadian assets from Canada to the U.S. government are identified, examined and assessed below. Proving these claims requires the deployment of much detail. The alternative is retreat to assertions which prove nothing.

Evidence extracted from the FTA proves beyond doubt the agreement made Canada a colony of the U.S. John Turner was right and Brian Mulroney was wrong. John Turner, in addition, was right

when he told Canadians the FTA affects every part of our life, and Brian Mulroney was duplicitous when he said the agreement was a commercial document and, more important, when he assured the House of Commons our independence was intact.

Refer to Chapter 5 for a record of brief but relevant comments on this issue between Mr. Turner and several U.S. senators.

Prime Minister Mulroney and his government transferred control of vital Canadian assets to the U.S. government, and stripped us of our decision-making powers. Increasingly a fictitious sovereignty cloaks American rule. When Americans invoke their bilateral rights they gnaw away at our remaining independence like a flesh-eating disease. A law of diminishing Canadian independence is embedded in the FTA.

8.1 Canadian Government Power Yielded to the U.S. Government

The FTA made two fundamental changes to Canadian's trade contract with the U.S., and NAFTA made a third. The first change gave the U.S. complete control of imports of Canadian goods by (a) replacing WTO multilateral trade law and dispute settlement with U.S. trade law and dispute settlement, (b) agreeing that the U.S. had the right to unilaterally amend its trade law and agreeing that bilateral dispute settlement restricts panelists to deciding if American officials correctly interpreted American law. The detailed changes that brought about the sharp deterioration in Canada's access to the U.S. have been identified, documented, examined, assessed and corroborated in Chapter 4, "Access to the United States, Fiction and Fact."

The second fundamental change transferred from Canada to the U.S. control over the seven vital assets: water, medicare, all energy goods, all other resource goods, culture, grain exports and publicly owned forests and, in addition, the contractual right to prohibit or limit exports of water, all energy goods and resource goods.

8.2 National Treatment

Countries yielding national treatment under the WTO undertake four commanding obligations that apply to trade:

- forbid the use of laws, taxes or other charges, regulations and measures to protect national producers and products from foreign producers and products;
- prevent discriminatory treatment against foreign producers or goods in favour of national producers and products;
- agree to relinquish independence commensurate with the amount of national treatment yielded;
- endow foreigners, inside Canada, with the same rights which Canadians possess.

WTO national treatment obligations apply solely to imported goods and exclude services. For goods, the obligation is restricted to prohibiting the federal government and provincial governments from using internal taxes, regulations and requirements to protect domestic goods from imported goods. Relinquishing these powers under the WTO results in a loss of independence. But the same powers were ceded by other WTO countries (now over 150) and industry in all of these countries acquired the right to export to

each other without encountering such pernicious barriers. WTO national treatment provisions are an indispensable foundation stone for building the huge increase in Canadian and world trade that has occurred since 1947, and more important, the obligations they impose on Canada do not reduce Canada's control of its vital assets.

The FTA radically increased U.S. national treatment and control in Canada, and made a commensurate reduction in the freedom of Canadians to act in their own interest. Instead of WTO obligations limited to American goods exports and Canadian internal taxes and regulations, we are saddled with the requirement to accord the U.S. comprehensive national treatment for services as well as goods, with few exceptions.

FTA unrestricted national treatment for industrial goods gives Americans the same rights in Canada that Canadians possess for such goods under Canadian law. The American rights cover, inter alia, all of our national resources including water, oil, natural gas, electricity, forests and minerals.

Services placed under the FTA are identified in Chapter Fourteen and include:

- "any measure of a Party related to the provisions of a covered service by or on behalf of a person of the other Party within or into the territory of the Party;"

- Four categories of services:

  i- the production, distribution, sale, marketing and delivery of a covered service and the purchase or use thereof;

  ii- access to, and use of, domestic distribution systems;

iii- the establishment of a commercial presence (other than an investment) for the purpose of distributing, marketing, delivering or facilitating a covered service;

iv- subject to Chapter Sixteen (Investment), any investment for the provision of a covered service and any activity associated with the provision of a covered service (Article 1401 para 2).

- Architecture, tourism and computer services (described in Annex 1404);

- Sixty services "broadly identified" in Annex 1408.

Cataloguing the services covered by the FTA would be an onerous job and the results would be revealing. One example: the fifty seventh service identified in Annex 1408 comprises five words; "Health care facilities management services." Discovering the health care facilities placed under the FTA necessitates obtaining three pieces of information.

First: Examine about one hundred three-digit Standard Industrial Classification (SIC) numbers included in the Canadian part of the Schedule to Annex 1408. It is necessary to use the SIC, fourth edition, 1980, because it was the edition used when the FTA was negotiated.

Second: Examine the forty-two four-digit numbers linked to the seven three-digit numbers that related to medical services. The SIC description of the services covered by the forty-two four digit numbers occupies seven pages.

Third: Neither the FTA or SIC defines "management services." It is necessary, therefore, to check the *Oxford English Reference Dictionary, Second Edition*, Revised, to establish the real meaning

of manage and management. The Dictionary, inter alia, states manage means to "organize, regulate, be in charge;" management means "the process of managing, being managed;" and a manager is "a person controlling or administering a business or part of a business." A large majority of Canadians reading such a catalogue item would conclude the FTA applied to Canada's health services or medicare.

Unrestricted national treatment is the most dangerous concession Canada could have made to the U.S.

8.3 Export Rights and Obligations

National resources are essential for the well-being of Canadians and their country. Water is necessary to sustain all life — human, animal and plant. Water-generated electricity, natural gas and oil are required to keep us warm in winter and cool in summer, and the electricity and gas are needed to cut the carbon released in the atmosphere. The production of resources and goods made from them make an enormous and irreplaceable contribution to the Canadian economy, including the creation of thousands and thousands of jobs. Exports of resources and resource based products pay our international accounts.

It is of the utmost importance that all trade agreements which Canada enacts empower it to prohibit or limit the export of any good, charge a price for the exported good that is higher than its domestic price and, in short supply situations, to meet Canadian needs free of obligations to provide export markets with minimum or proportional amounts. Two fundamental unambiguous facts are: the GATT/WTO meets these needs, the FTA/NAFTA does not.

The GATT Article 1:1 and XI:1 accord contracting parties the right to levy duties or taxes on any goods at any level for any period of time on condition the tax does not discriminate against a member. Taxing exports is the only means which GATT/WTO provides members to permanently control or prohibit exports. The right to tax exports contains the linked right to charge a higher price for exported goods than is charged in the domestic market. There is no obligation to provide the importer with a portion of previous exports. The Trudeau government levied taxes on oil exports to the U.S. in the 1970s, and the price of the exported oil was higher than the Canadian price. The U.S. did not challenge in GATT/WTO the export taxes or lower Canadian price.

FTA Chapter 14, especially Articles 902, 903 and 904, prevents Canada from levying export taxes and invoking any other right to prohibit or limit the export of any goods as well as using double pricing for goods exported to the U.S. If Canada applies export restrictions in short supply situations it is required to provide Americans proportional amounts even if Canadians go without.

Sidetracking GATT/WTO to trade under the FTA moved control of Canada's resources to the U.S. Embedded in the transfer are two extremely dangerous and eventually fatal consequences: Canada lost control of its resources and the U.S. acquired that control.

8.4 Cultural Industries

FTA Article 2005:1 transferred control of Canada's cultural industries to the U.S. The U.S. is given the right to retaliate against Canada for "actions" which the U.S. decides are "inconsistent" with the agreement (Article 2005:2). This right empowers the U.S. to charge Canada with breaking FTA law, then prosecute Canada,

proceed to judge if Canada is guilty and, if guilty, to set and enforce the punishment — a replica of King Charles' Court of Star Chamber. A U.S. government decision to retaliate will be made, or is heavily influenced, by American cultural industries. The possibilities for covert arm twisting of Canadians, including the government, are endless.

Canada is defenceless. FTA Article 2011:2 cancels Canada's right to consultations, dispute settlement and arbitration (Articles 1804, 1805, 1806 and 1807), unless the U.S. agrees.

The WTO does not grant the U.S. or any other country the unfettered right to retaliate against Canada. If the U.S. believes a Canadian cultural measure impairs WTO rights, the U.S. can ask a panel to examine the measure and make recommendations. When Canada traded with the U.S. under the WTO it was free to act to nourish the cultural industries, providing it did not impair tariff concessions.

Prime Minister Mulroney and his government, on behalf of Canada, evacuated the advantageous and strong WTO position, retreated to the 1930s and agreed that the free trade agreement would include one of the most pernicious weapons in the beggar-your-neighbour policies that plagued trade during that miserable decade — the unconditional use of retaliation. Again, ditching the WTO and replacing it with Mr. Mulroney's version of free trade, strengthened U.S. hegemonic power and weakened Canadian independence.

8.5 Canadian Government Powers Bestowed on American Corporations

The WTO does not accord private corporations contractual rights, in any way, shape or form, and leaves intact federal and provincial government powers to direct, limit and prohibit foreign investment. The WTO is a contract between governments only. Corporations raise grievances with their governments who might or might not pursue them in the WTO.

NAFTA is the complete opposite of the WTO. Chapter Eleven grants private American, Canadian and Mexican corporations contractual rights that override other member countries' national, provincial or state laws. For practical purposes Chapter Eleven is the fourth agreement Prime Minister Mulroney and his cabinet negotiated and signed with the U.S.

In a nutshell, the fourth agreement consists of American corporate rights, Canadian government obligations, plus arbitration available to any American corporation believing that the Canadian government breached an agreement obligation that caused the corporation damage. The rights and obligations cleared the way for an extensive range of American corporations to enter Canada and buy domestic companies or establish subsidiaries, without federal or provincial government intervention. Arbitration equipped American corporations with an armoured train to clear their investment track of government interference.

Mulroney negotiated NAFTA but Prime Minister Chrétien converted it to Canadian law. NAFTA would be an occasionally reviewed paper in the archives if Mr. Chrétien had not enacted it. Chrétien is also responsible for NAFTA and its consequences for Canada which are a heavy black mark on his legacy.

8.6 Corporate Rights

Corporations obtain the rights identified below from the bilateral agreements:

> First: All significant powers which the Mulroney government surrendered to the U.S. government in the FTA, are included in NAFTA one way or another;
>
> Second: New and additional powers placed in NAFTA, apart from Chapter Eleven that corporations can use, as well as the power corporations could acquire from the more detailed list of services entitled to national treatment contained in NAFTA Chapter Twelve;
>
> Third: NAFTA Chapter Eleven powers which are tailor-made for American corporations.

Five dominant Chapter Eleven rights tailor-made for American corporations, and their reciprocal Canadian government obligations, are described below:

> First: Canada shall accord American investors the same treatment it accords Canadian investors regarding "the establishment, acquisition, expansion, management, conduct, operations and sale or other disposition of investments." "For greater certainty," Canada cannot require that its nationals hold "a minimum level of equity" in an American corporation; or require an American corporation to sell or otherwise dispose of its investment "by reason of its nationality;"

Second: Before the bilateral agreements came into effect, Canadian governments had the unconstrained right to provide and regulate services "such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health and child care." NAFTA gives Canadian governments the right to continue to provide these services on condition their actions are "not inconsistent" with Chapter Eleven. This substantially reduces the services under Canadian control and increases their vulnerability to American corporate control whenever it fits a corporate plan;

Third: Canadian governments cannot "enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation" on American corporations;

Fourth: Canadian governments, "cannot impose or enforce" any of seven meticulously worded performance requirements on American corporations. This prohibition applies to exports, domestic content, domestic purchases, links between imports and exports or foreign exchange inflows associated with American investment, restrictions on sales of goods or services in Canada, transfers of technology, and American corporations acting as exclusive suppliers of the goods they produce or services they provide;

Fifth: American corporations are granted more protection from Canadian governments' interference by articles covering standards of treatment, financial transfers and dividends, expropriation and compensation, and appointments to senior management and board of directors.

8.7 Corporate Arbitration

American corporations have the unconditional bilateral right to sue the Canadian government for damage caused when the federal government or any other level of government breaks the NAFTA contract. American corporations, in addition, own the unconditional bilateral right to have damage claims settled by arbitration. Arbitration panels comprise three persons: one appointed by the American corporation, another by the Canadian government, and the third by agreement between them. Panel decisions are binding.

During the seventeen years between the Chrétien government enacting the NAFTA and October 1, 2010, twenty seven American corporations established arbitration panels or stated an intention to do so. Canada lost five of the cases, two as a result of arbitration decisions and three from out of court settlements, won three, seven are classed as active, eight as inactive and four claims were withdrawn by American investors. American corporations claim Canadian laws protecting the environment, preventing bulk water exports and sheltering medicare from competition, breeched their NAFTA rights. The number of American corporation claims on Canada has increased sharply during the past five years. Following is a partial list of American corporations that initiated arbitration panels against the Canadian government along with related information:

> Health and Environment. Ethyl Corporation asked arbitrators to assess a claim for $250 million damage caused by a Canadian government embargo on imports of MMT, a gasoline additive said to be a cause of cancer. Canada settled out of court on terms that included lifting the embargo and paying Ethyl Corporation $19.3 million;

Health and Environment. V.G. Gallo, an American investor, gave notice of intent to ask arbitrators to rule on a claim for $355.1 million damage. Gallo said the damage was caused by the federal government's failure to meet its NAFTA obligation to stop the Ontario government from vetoing Gallo's plan to dump Toronto garbage in an excavated open-pit located in northern Ontario. (Intention to arbitrate claim started October 2006.);

Health and Environment. Chemtura Corporation, an American agro chemical company, invoked its right to arbitration to judge a claim for $100 million damage caused by the Canadian government's embargo on the sale and use of the pesticide and fungicide Lindane. Lindane is a neurotoxic pesticide and suspected carcinogen which, in March 2007, was banned in more than 50 countries, including the U.S. and Canada. (Chemtura initially gave notice of arbitration November 2001 and a panel was addressing the claim in 2008.);

Canada Post. United Postal Service of America asked arbitrators to rule on its claim for $160 million from the Canadian government caused when it alleged the government broke NAFTA law by continuing Canada Post's limited monopoly of letter and parcel service in Canada. The arbitrators decided Canada Post's monopoly was legal under NAFTA;

Culture. Contractual Obligation Productions, an American animation production company, initiated arbitration to adjudicate a claim for $20 million damage inflicted by the Canadian government twice breaching NAFTA obligations. First, it made American corporations ineligible for the tax credits available to companies employing Canadian citizens; and, second, Canadian immigration and work rules prevented U.S. citizens from working on Canadian film and

television projects. Notice of intent to arbitrate claim was given June 2004;

Dairy Supply Management. Great Lakes Farms, an American agribusiness corporation, invoked its NAFTA right to arbitration to judge its claim for $78 million damage caused by the Canadian and Ontario governments breaking NAFTA obligations by restricting imports of milk into Canada and requiring milk producers to obtain production quotas from the Dairy Marketing Board. Notice of intent to arbitrate the claim was made February 2006;

Expropriation of Property. Claiming rights to water, timber and a hydro-electric power station, Abitibi Bowater Inc. established arbitration to judge a damage claim of $500 million. Bowater states the damage was caused when the Canadian government broke NAFTA obligations by allowing Newfoundland to expropriate corporation property, including timber and a hydroelectric power plant. The corporation's intent to initiate arbitration was made public February 2010;

Oil and Gas. Mobil Investments Inc. and Murphy Oil Corporation gave notice of intent to invoke their right to arbitration to obtain damages from the Canadian government caused when it breached NAFTA obligations. The intent to arbitrate a damage claim was submitted in August 2007;

Lumber. Pope & Talbot, a U.S. lumber company, initiated arbitration to rule on its claim that quantitative restrictions, which the Canadian government imposed on Canadian lumber exports to the U.S., broke NAFTA obligations and damaged the company. The arbitrators ordered Canada to pay Pope & Talbot $480,000 (U.S.) to cover damages, interest

and legal costs. So, Canada implemented the provisions of the Lumber Agreement, as negotiated with the U.S., and a U.S. company claims damages from Canada under NAFTA.

Nineteen Canadian corporations have claimed damage caused by the U.S. government breaking NAFTA obligations. To date no Canadian corporation has won its case from arbitration or out of court. Six claims have been dismissed by arbitrators or other U.S. legal procedures, three claims have been withdrawn, four claims are inactive. There were six active claims on October 1, 2010. Canadian damage claims were made by a funeral home, real estate developer, steel contractor, three forest products companies, manufacturers of industrial hemp products, an investor in the disposal of radioactive wastes in the sea, a numbered company operating three subsidiaries in Florida that sold or leased bingo halls, a gold mining company engaged in open-pit mining in California, a native manufacturer of tobacco products, cattle producers, and a pharmaceutical company.

As of March 2013[1], there have been no new NAFTA Article 11 claims by Canadian firms against the U.S. government beyond those listed above. However, the following claims have been made by U.S. firms against the Canadian government:

Detroit International Bridge Company claimed $3,500 million arguing that Canadian law constitutes expropriation of its investment (the Ambassador Bridge) and violates its right to a minimum standard of treatment. Notice of intent to arbitrate was made April 2011.

John R. Andre, a Montana investor, filed a claim in March 2010 that the Northwest Territories government expropriated

[1]Source: Table of Foreign Investor-State Cases and Claims under NAFTA and other U.S. Trade Deals, March 2013, Public Citizen, Washington, DC, www.citizen.org

his investment through its caribou conservation measures. Action never began.

St. Mary's VCNA, LLC. This Brazilian company with a U.S. subsidiary and a Canadian company complained in May 2011 that government actions slowed the permit process resulting in a deprivation of its interest in quarrying activities. The case was settled in the amount of $15 million.

Mesa Power Goup in July 2011 challenged an Ontario government buy-local policy and related measures, claiming $775 million. This case is pending.

Mercer International claimed in April 2012 $250 million from Canada on the grounds that the government of British Columbia and BC Hydro discriminate against Mercer's Canadian subsidiary by extending lower input electricity rates to its BC-based competitors. This case is pending.

Windstream Energy LLC in October 2012 claimed $475.2 million on the grounds that the government of Ontario has contravened Canada's obligations under NAFTA by declaring a moratorium on its planned offshore wind production. This case is pending.

Eli Lilly and Company notified Canada in November 2012 that it intends to launch a case against the decision of Canadian courts to invalidate the company's patent for Strattera, claiming $100 million. The case is pending.

Lone Pine Resources Inc. filed a claim for $250 million in November 2012 because the Quebec government imposed a moratorium on hydraulic fracturing for natural gas, thus contravening NAFTA's protection against expropriation and for fair and equitable treatment. This case is pending.

Random published information suggests a Canadian government forced into arbitration by American corporations incurred large costs:

- The government paid Ethyl Corporation $19.3 million and Abitibi Bowater $130 million;

- An American forest products company, Merrill Ring, requested arbitration which cost $959,500. Canada won the case but was ordered to pay 50 percent of the cost or $479,750. In the Merrill case, the chairman of the arbitration panel was paid $365,200;

- Arbitrators normally charge $3,000 per day plus expenses. The company appointed arbitrator received $169,675 and the Canadian government arbitrator collected $235,895;

- From the beginning of bilateralism in 1989, no government has told Canadians how much of their money has been spent paying lawyers for advice and other assistance relating to countervailing and anti-dumping duties and arbitration. The Mulroney, Chrétien, Martin and Harper governments decided that withholding such information served their interests, and taxpayers be damned. Random evidence, including that cited above, indicates legal fees have been substantial and are increasing. The lumber chapter, for example, estimates Canadian governments and lumber companies paid trade lawyers more than $200 million for assistance in attempts to lift U.S. countervailing and anti-dumping duties. These nearly always failed;

- An arbitration panel terminated adjudicating a damage claim because the American Centurion Health Corporation did not pay the initial deposit of $100,000 (U.S.). The Canadian

government paid its share of the advance, also $100,000. The money was not refunded.

8.8 Ethyl Corporation

Ethyl was the first American corporation to sue the Canadian government for damages and initiate arbitration to obtain payment.

Ethyl made MMT, exported it to Canada, sold it to petroleum refineries who added it to gasoline. MMT contains manganese. The *Globe and Mail* reported "Manganese is an essential trace element found throughout the body. It is associated with the formation of connective and boney tissue, carbohydrate metabolism and reproduction. Excess amounts of airborne manganese — which is more readily absorbed by the brain than dietary manganese — are toxic. High levels are known to cause speech and movement disorders similar to Parkinson's disease. Diagnosed in the early stages these effects can be reversed. White blood cell counts are greatly reduced; haemoglobin count rises. Miners exposed to excess manganese have a high rate of psychosis, severe neurological disease and premature death."[2]

In 1991, the Leader of the Liberal Party, Jean Chrétien, urged the Mulroney government to embargo the use of MMT on the grounds that it is "an insidious neurotoxin." In a letter to a Mulroney minister, he explained that "some of our leading neurotoxin scientists, as well as studies and documents from medical schools and universities, in addition to other institutions, outline in detail the truly horrific effects that allowing continued use of this neurotoxin could have on the Canadian people."

[2]Shawn McCarthy, "Threat of NAFTA Case Kills Canada's MMT Ban," *The Globe and Mail*, July 20, 1998.

In 1996, the Chrétien government introduced Bill C-29 to embargo the import of MMT. Environment Minister, Sergio Marchi, said MMT was a hazard to public health and the environment. He reported that automobile manufacturers believed MMT "damaged emissions control equipment." Parliament approved Bill C-29.

The U.S. Ethyl Corporation, claimed Canada's embargo conflicted with Ethyl's rights under NAFTA Chapter Eleven and said it would establish an arbitration panel to examine the claim. The government said it would oppose Ethyl in NAFTA.

Instead of fighting Ethyl in NAFTA the Chrétien government backed down and settled out of court. The government lifted the MMT embargo, paid Ethyl $19.3 million and repudiated the government's position that MMT was "an insidious neurotoxin" that could have "truly horrific effects" on Canadians as well as damaging the environment. The Minister of Environment, Christine Stewart, also repudiated the government's position in a statement she gave Ethyl that said, "Current scientific information fails to demonstrate that MMT impairs the proper functioning of automotive on-board diagnostic systems," and "furthermore, there is no new scientific evidence to modify conclusion drawn by Health Canada in 1994 that MMT poses no health risks."[3]

Before surrendering to Ethyl the Chrétien government must have known the U.S. Environmental Protection Agency banned MMT but the U.S. Court of Appeal ruled the Agency exceeded its authority. The government should have noted the U.S. court did not find the Agency science wrong.

The Chrétien government should also have known the U.S. Environmental Protection Agency supported research on MMT by

[3]Shawn McCarthy, "Failed Ban Becomes Selling Point for MMT," *The Globe and Mail*, July 21, 1998.

Donna Mergler, a neurotoxicologist at the University of Quebec at Montreal. Although Ms. Mergler had not completed her research, she concluded "that in large concentrations airborne manganese does pose a risk to human health. What we don't know is at what level does it not pose a risk. There remain a lot of questions about manganese and we should know a lot more about it before we use it."[4]

The Chrétien government would certainly know that 30 vehicle manufacturers from North America, Europe and Asia, meeting in Brussels, advocated the production of high-quality gasoline, including the removal of MMT. Mark Nantais, President of the Canadian Motor Vehicle Manufacturers Association, explained that 80 percent of the manganese in MMT stays in the catalytic converter and "gums up the system." While vehicle makers are urged to reduce polluting emissions, "nothing is happening on the fuel side. We can't get there from here with this poison in the gasoline. It's garbage in, garbage out."[5]

Following the Chrétien Government's surrender, the Minister of the Environment said the government would continue monitoring the health and environmental evidence regarding MMT and would ban it directly if evidence warrants such action. The Minister was asked in a letter by the author, dated January 20, 1999, quoting the *Globe and Mail* report above, that "I would appreciate knowing precisely what NAFTA provision or provisions give Canada the right to reimpose the MMT embargo when you have sufficient scientific evidence on which to base a case?" The Minister did not reply.

Two vital facts and three damaging and humiliating results are embedded in the Ethyl versus the Chrétien government case. The

[4]Ibid
[5]Ibid

first fact is that when arbitrators decide in favour of an American corporation or the government settles out of court, the Canadian government disappears and the corporation is in control of the issues arbitrated. The second fact is that the Chrétien government capitulated. The results are that Ethyl cancelled a law enacted by Parliament which had protected Canadians from breathing air containing MMT, and paid itself nearly $20 million from the Canadian treasury.

8.9 Abitibi Bowater

Fourteen years after the Chrétien government grovelled to Ethyl Corporation, the Harper government surrendered to Abitibi Bowater and paid it $130 million to settle a damage claim the corporation submitted to arbitration. Abitibi Bowater was one of the world's largest pulp and paper producers.

In 2008 and 2009, Abitibi Bowater announced it would close permanently its pulp and paper mill in Newfoundland and Labrador, declared it was bankrupt and did not pay severance benefits to 800 employees. The provincial government reacted by paying severance benefits to the 800 unemployed workers, enacting legislation to make the corporation return water and timber rights to the province, and expropriating certain corporate lands and assets associated with water and hydroelectric rights. Abitibi Bowater invoked NAFTA rights, claimed $467 million in damages and referred the claim to a panel of arbitrators. The Harper government capitulated and gave the corporation $130 million — the largest payment a Canadian government has made to an American corporation under NAFTA.

More ominous, Prime Minister Harper warned provincial governments that "if some future action by a province inflicts upon the federal treasury significant trade litigation damages, a mechanism will be created to recover the money from the province in question." Mr. Harper, in effect, told provincial governments to obey NAFTA law and liquidate cases now being arbitrated, or pay the costs. If provincial governments obeyed, B.C. would lift the embargo on the export of bulk water; Newfoundland and Labrador would remove the requirement that energy companies operating in off-shore oil and gas development invest in provincial research and development; and the Ontario government would permit the dumping of garbage in a former open-pit mine in Northern Ontario. There is a high risk American corporations will accelerate arbitration cases, including cases directed to importing Canadian water and exporting American private health services.

Some or all of the provinces could reject the Prime Minister's order. The Constitution states that the federal government is responsible for trade policy and the federal government negotiated, signed and enacted the FTA and NAFTA, not the provinces. Why should the provinces be responsible? Would citizens of the provinces agree that their governments should accommodate Mr. Harper and American corporations at immense and endless cost to them?

To sum up, Prime Minister Mulroney and his government made Canada a colony of the U.S. when they negotiated, signed and enacted the FTA. Prime Minister Chrétien and his government accelerated colonization when they enacted NAFTA. Part of Canadian independence is lost and U.S. control of Canada is expanded when bilateral litigation decides in favour of the U.S. government or an American corporation, or Canadian governments settle out of court as the Chrétien government did with Ethyl Corporation. The law of diminishing Canadian independence is built into the FTA and NAFTA.

8.10 Locked in the American Empire

By invoking WTO rights, Canada could regain possession of WTO access to the U.S., plus the seven commanding powers transferred to the U.S., including water, medicare and energy. But the Mulroney government agreed with the U.S. to block this Canadian escape route. Returning to trading under the WTO would also wipe out American corporate rights in Canada, but the Chrétien government chose bilateralism.

The road block consists of FTA Article 104:2 and NAFTA Article 103:2. The Articles state "In the event of any inconsistency between this agreement and such other agreements, this agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this agreement." No FTA or NAFTA provision or combination of provisions permit Canada to use WTO law to override bilateral law as it applies to access to the U.S., the seven provisions that transferred our vital assets to the U.S., and American corporate rights. Canada cannot invoke its WTO rights unless the U.S. agrees. The Mulroney and Chrétien government agreed to lock Canada in the American Empire and to give the U.S. government the key.

Chapter 9

Observations and Conclusions

This book documents the dangers to Canada's sovereignty in continuing to trade with the United States under bilateral rules and administrative procedures, effectively written by and for the benefit of that country. It suggests that these U.S. initiatives are driven by powerful commercial and political interests that will always outmuscle Canadian interests when both countries deal with commercially sensitive trade issues on a one-on-one basis. The overall conclusion is that a far more sensible approach for Canada is to conduct these sorts of negotiations under WTO multilateral rules. The WTO and its predecessor GATT have a proven track record in ensuring fairness and consistency of decisions, regardless of the participant's power or size. Also, rules and procedures have been drafted and introduced gradually over time by all participants, thus preventing a large power from running roughshod over the rights of smaller countries.

The book examines the rationale which led to the establishment of GATT after the Great Depression and World War II, sets out GATT's provisions and discusses the advantages of the multilateral system over bilateralism. It documents the positive developments enjoyed by the U.S., Canada and other GATT participants in multilaterally negotiating reduced barriers to trade. The point is also made that Canada and the United States worked assiduously and successfully in GATT/WTO negotiations to get trade barriers down from 1947 up until the time of the FTA negotiations, and it suggests that proponents of the FTA/NAFTA exaggerated benefits and downplayed costs in the process of selling the bilateral approach to Canadians.

In negotiating the FTA/NAFTA, the book shows that important elements of Canada–U.S. trade were effectively transferred from the multilateral WTO contract to the Canada–U.S. bilateral regime. The case for this approach began with the assertion that U.S. protectionists had put two million Canadian jobs at risk by threatening to use American trade remedy laws. So the rationale for the FTA/NAFTA was that it would resolve the trade remedy law barriers, thus not only ending the job loss threat but also creating thousands of new jobs. This would be done while protecting Canada's sovereignty in the process. The book demonstrates that this was nothing more than wishful thinking.

An examination in this book concludes that FTA/NAFTA ***increased U.S. trade remedy law barriers*** against Canadian exports — the very barriers (anti-dumping and countervailing duties) Canada was out to eliminate. These are much more targeted, insidious and destructive to Canadian investment, production and employment than the low customs duties which the U.S. did in fact remove in the FTA/NAFTA. The bilateral deals also did the opposite of protecting Canadian sovereignty; they ***reduced decision-making powers of Canadian governments*** — federal and all

other levels — and ***transferred much of this Canadian power to the U.S.***.

So, the concern this book has about the outcome of the bilateral negotiations is that the very issues that Canada had targeted for removal (trade remedy laws) and for protection (Canada's sovereignty), were made considerably worse. Added to this, Canada did not obtain very much in other areas of the negotiations. The most significant benefit Canada might have achieved was the elimination of tariffs, but it was not a big deal. Before the agreements were negotiated, about 96 percent of Canadian exports of industrial goods already entered the U.S. at duties of five percent or less with 80 percent entering the U.S. at the duty-free rate. Even here, tighter rules of origin were targeted by the U.S. against some of Canada's manufacturers, preventing them from moving their traditional manufactured products to the U.S. on a duty-free basis.

The book strongly suggests a return to trading with the U.S. under multilateral trade law, constructed, adjudicated and applied by the WTO. When abrogation occurs, Canada's trade would be covered by the WTO, and the bilateral rights under the FTA/NAFTA would be cancelled and Canada's independence restored. U.S. non-tariff barriers to Canadian exports would be lower and access much more secure, even if the U.S. were to restore some of its small U.S. tariffs. And Canadian power vis-a-vis the U.S. would increase, because benefits acquired from the time-proven multilateral system would be infinitely greater than the cost of abrogating or worse, continuing the bilateral regime.

The book focuses on the bilateral agreements and their consequences. But it does not address the question why? Why did the perpetrators and collaborators saddle Canadians with the free

trade agreements? Since the reasons given do not stand up under examination, it would be interesting to know the real reasons. What were their motives? Who influenced them? How are other countries beyond North America being influenced by the continuation of these discriminatory preferential deals, and what impacts will Canada have to bear as they, too, move to similar regional trading blocs? Answering such questions would require another book.

Parts of the book are pessimistic because of the concern that carrying on bilaterally will likely lead to deeper and wider control by the U.S. in Canada, until Canada is little more than a convenient source of supply for U.S. resource requirements. To be fair to the U.S., it saw the opportunity to resolve two long-standing issues it had with Canada — American business community complaints about Canada's tariff and customs regime and the U.S. desire to gain stable and controlling access to Canada's resources — and used the bilateral agreements to get these. It certainly succeeded. Canadian politicians, not American, should be held accountable for agreeing to such a lop-sided outcome.

Other parts of the book offer hope by explaining that Canada can retrieve its independence by returning to trading with the U.S. under the WTO, as permitted under the agreements which both countries, and Mexico in the case of NAFTA, signed. While Canada would be required to abrogate the agreements, Canada would make it clear that each of our respective regional trading interests could be negotiated adequately under WTO multilateral rules, recognizing that over the long term the WTO provides all participants with the best means to accomplish broad-based freer trade objectives. A single organization with a single set of rules applying equally to all signatories, large and small, helps equalize the balance of power and, equally important, ensures that negotiated concessions are available to all participants, thus preventing the spread of regional

trading blocs, something even the U.S. should be concerned about for the future.

Appendix A

Bush–Harper Lumber Agreement

Excerpts from Articles XV, XV1 and XX1

Article XV Information Collection and Exchange, paragraphs 1, 2, 7, 9, 13, 14, 15, 16

"Canada shall place Softwood Lumber Products on the Export Control List under the Export and Import Permits Act, as amended, require a Federal Export Permit for each Exportation to the United States of Softwood Lumber Products, and require any person to which such a permit is issued to keep records relating to its issuance for sixty (60) months after the date of issuance of the permit."

"In connection with the issuance of an Export Permit under the Export and Import Permits Act, as amended, or any successor law, Canada shall require exporters to the United States of Softwood Lumber Products to furnish to it the:

a) Manufacturers identification number;

b) name of exporter;

c) Region of origin;

d) Customs Tariff (Canada) classification and product description;

e) quantity in board feet, cubic meters, or square meters in nominal terms;

f) the Export Price;

g) U.S. port of entry;

h) anticipated U.S. entry date;

i) name of importer;

j) mode of transportation;

k) Export Permit number;

l) Canadian shipment date; and,

m) Maritime Lumber Bureau Certificate of Origin number if applicable.

USCBP (United States Customs and Border Protection) will provide to Canada on a monthly basis, the following information on U.S. imports of Canadian Softwood Lumber Products, by shipment:

a) manufacturer identification number;

b) Province (Region of first manufacture or first mill manufacture);

c) 10-digit HTSUS Code and product description quantity in board feet, cubic meters, or square meters in nominal terms, as required by the HTSUS;

d) Appraised Value (USD) as defined by USCBP);

e) U.S. port of entry;

f) U.S. CBP entry number;

g) U.S. entry date;

h) name of importer;

i) mode of transportation; and,

j) Export Permit number.

Canada shall provide to the United States, on a monthly basis, data on the total charges assessed pursuant to this Agreement covering the preceding calendar month and the year to date, broken down both by Region and by type of charge (export charges, surge penalty charges, and refunded charges), including any revisions.

Where USCBP has reason to believe that an exporter has failed to obtain an Export Permit as required or has made a false declaration with respect to any of the information requirements of paragraph 2, USCBP shall require additional information from the importer to support the claim. If necessary, USCBP may submit a request to the Bureau (The Export and Controls Bureau of the Department of Foreign Affairs and International Trade) to visit the premises of the manufacturer(s) of the goods at issue, in order to ensure compliance with the Export and Import Permits Act, as amended, or any successor law. The Bureau shall conduct the visit following consultations between the Parties to define the nature of

the problem and to agree on the information required. The Bureau shall share information relating to any such visit with USCBP.

Within 90 days of entry into force of this Agreement, Canada shall provide to the United States a list of the companies that have qualified under the process described in Annex 6 as independent re-manufacturers. Canada shall notify the United States in writing of any changes to the list within 15 days of the change.

Canada shall provide the United States notice of any new, or any amendment to a federal, provincial, or territory law, regulation, order-in-council, or other measure governing stumpage charges or forest management systems related to Softwood Lumber Products, within 45 days after such measure is adopted. This information shall not be treated as being confidential under Article XV1. Each Party shall respond to requests from the other for information that is relevant to the operation of this Agreement. This paragraph does not apply with respect to the Maritimes, Nunavut, Yukon and the Northwest Territories.

Canada shall disclose to the United States any changes to its systems or other actions that it maintains are covered by Paragraphs 2(a), 2(c), 2(d), or 4 of Article XV11, together with an explanation of why they are covered, including any evidence showing that such changes improve the statistical accuracy and reliability of a system or pricing. As to the MPS, Canada shall provide the complete Softwood Saw timber auction results data sets used to derive the market modeling regressions and coefficients and spreadsheets used for the calculation of the Average Market Price and all information needed to monitor updates or modifications under this article, paragraph 1(b).

Article XV confidentiality paragraph 16. 2

Canada shall, based on sufficient information that it obtains, certify to the United States each quarter that it has no basis to believe that:

a) the timber pricing and forest management systems of the provinces and territories have been modified other than as notified in paragraph 4; and,

b) the provinces and territories are collecting revenues at levels lower than called for under those systems.

The sufficiency of the information that Canada obtains shall not be subject to dispute resolution.

Article XX1 Definitions paragraphs 24, 36 and 40.

Export price means:

a) if the product has undergone only primary processing, the value that would be determined FOB at the facility where the product underwent its last primary processing before exportation;

b) if the product was last re-manufactured before exportation by an Independent Remanufacturer, the value that would be determined FOB at the facility where the softwood lumber used to make the re-manufactured product underwent its last primary processing;

c) if the product was last re-manufactured before exportation by a re-manufacturer that is not an independent re-manufacturer, the value that would be determined FOB at the facility where the product underwent its last processing before exportation; or,

d) for a product described in paragraph (a), (b), or (c) in respect of which an FOB value cannot be determined, market price for identical products sold in Canada at approximately the same time and in an arm's length transaction, determined in one of the following three ways, listed in order of preference: (i) at substantially the same trade level but in different quantities; (ii) at a different trade level but in similar quantities; or, (iii) at a different trade level and in different quantities.

"Market Pricing System" or MPS means (1) in the case of the B.C. Coast, the timber pricing policies and procedures in the Coast Appraisal Manual in effect on the coming into force of this Agreement; and the description of the system in the paper Market Pricing System - Coast (January 16, 2004); and (2) in the case of the B.C. Interior, the timber pricing policies and procedures in the Interior Appraisal Manual in effect on the coming into force of this Agreement; its accompanying papers Specifications: Calculation of the Interior Stumpage Rates (both dated July 1, 2006); and the description of the system in the papers Market Pricing System — Interior (June 1, 2006), Interior Market Pricing System — Average Market Price (June 5, 2006), Interior Market Pricing System — Tenure Obligation Adjustments (June 5, 2006), Interior Market Pricing System — Specified Operations (June 5, 2006). For greater clarity, the Coast and Interior appraisal manuals in effect on July 1, 2006 are: (a) in the case of the B.C. Coast, the manual dated February 29, 2004 and including all subsequent amendments up to and including July 1, 2006; and (2) in the case of the B.C. Interior, the manual dated November 1, 2004 and including all subsequent amendments up to and including July 1, 2006. The MPS includes any MPS updates.

"MPS Updates" means any periodic revision to the Market Pricing System in accordance with the methods and procedures described in the documents referenced in the definition of "Market Pricing

System." The MPS Updates to the Market Pricing System in the B.C. Interior and in the B.C. Coast, as described in the documents referenced in the definition of "Market Pricing System" in paragraph 2 above, use substantially the same methods and procedures. MPS Updates will come into force as amendments to, or new versions, of the Coast Appraisal Manual or the Interior Appraisal Manual MPS Updates shall not be considered "modifications or updates" as set forth in Article XV11, paragraph 2(a), of this Agreement.

Appendix B

Media Comments on Canada's Lumber Negotiations

"Fumbling Jeopardizes Free Trade Hopes"
Don McGillivray, *Ottawa Citizen*, November 24, 1986.

> It's time to take a new look at the free trade talks in the light of the lumber fiasco and President Reagan's Iran imbroglio.
>
> Canadians have not been told what is going on in the talks themselves. And we are not supposed to ask...
>
> But whether a deal is possible — and what kind of deal — are affected by events such as the incompetent handling by the Mulroney government of lumber tariff threat...

The Mulroney government's jittery approach, including the frequent statements by the Prime Minister warning that "at stake are more than two million jobs that depend directly on Canadian access to U.S. markets" has led to the belief in Washington that Canada is desperate to make a deal.

This is a weak bargaining position to start, further undermined by the naive, bumbling way the lumber tariffs have been handled...

"Sawdust Strategy"
Jeffrey Simpson, *The Globe and Mail*, January 1, 1987.

Absolutely nobody comes away from the softwood lumber negotiations with the United States with an enhanced reputation for competence.

What we now have is conclusion of a strategy — negotiations — that the Canadian government insisted could never be countenanced, and a solution — an export tax — that the same government once argued was out of the question.

So many zig-zags characterized the Mulroney government's approach to the softwood lumber problem that its general analytical skills are thrown into serious doubt. And those of the industry and certain provinces, notably British Columbia, were hardly any better.

Last June, when the softwood lumber matter was raised in the Commons, ministers insisted we would not negotiate. We had resisted successfully a petition from U.S. lumber producers for a countervailing tariff in 1983,

and would do so again. Much was made of the "quasi-judicial," almost sacrosanct, nature of the trade dispute mechanisms in the United States.

A few months later, with Pat Carney installed as Minister of International Trade, we decided to negotiate. Why? In part, said Ms. Carney, because the Canadian lumber industry was begging for negotiations.

Strange that, because ever since Ms. Carney made her first "take-it-or-leave-it" "final" offer, industry spokesmen have bitterly criticized the very idea of negotiating.

Anyway, having made an initial "final" offer and having insisted there was nothing further to negotiate, the Canadian government proceeded to do just that, to negotiate. And what we have now accepted — an export tax — is precisely what Ms. Carney, vacationing in Hawaii through the last round of negotiations, insisted the federal government could not, would not impose.. . .

We have been beaten, if you'll pardon the expression, into a pulp in the lumber dispute by the Americans. They placed a foot on our neck by spuriously changing their own 1983 findings against allegations of Canadian subsidy, and kept applying the pressure until the Canadian government yelled uncle.

Now, the American government is crowing that any subsequent adjustments in Canadian stumpage fees must be sanctioned by Washington, a direct contradiction of what the Canadian government is saying to Canadians.

The Americans have cleverly got the Mulroney government to yield on a range of bilateral trade irritants before the free trade talks end. They've lived up to their reputation as Yankee Traders. But what do we call our gang?

"Playing by America's Rules"
Giles Gherson, *Financial Post*, January 5, 1987.

Out of the tangled, still-explosive Canada-U.S. lumber dispute, and last week's partial settlement, comes an overriding new trade reality: Canadian industries with big exports to the U.S. will increasingly be forced to drop made-in-Canada policies and play by U.S. rules.

U.S. trade officials contend a free-trade agreement between the two countries would likely ensure even greater "harmonization" of Canadian and U.S. regulations and standards governing industry and services. Food packaging standards, provincial liquor board listing rules, trademark, patent and copyright laws, and professional qualifications standards are all areas where the U.S. wants to see changes.

U.S. trade experts say that in the protectionist U.S. environment this is the price for large-scale trouble-free access to the world's biggest and most affluent consumer market. Says Peter Morici, vice-president of Washington-based National Planning Institute, a policy think-tank: "Industries such as natural resources, automobiles and electricity where Canada has a major participation in the U.S. market will be under fire if Canadian policies differ substantially from U.S. policies."

> The issue is not conformity for its own sake, but the increasing need to accommodate the perception within U.S. industries battered by import competition that different Canadian rules somehow confer hidden competitive advantages.
>
> In this view, prudent Canadian trade policy means taking steps to eliminate or alter controversial policies, such as Ottawa's automobile duty remission program, before they become the focus of a nasty bilateral trade dispute. "The skill that has to be exercised in Ottawa is to bring about conformity without making it look like capitulation to the U.S.," says Washington trade lawyer Shirley Coffeld. "That was the problem in the lumber mess."

"Lost in the Woods"
Editorial, *The Globe and Mail*, November 22, 1986.

> On the lumber issue, Canada appears to have prostrated itself on the way to a humiliating rejection by American producers. What is going on?
>
> When the United States imposed a 15-per-cent duty on Canadian softwood lumber exports last month, International Trade Minister Patricia Carney said Canada "will fight this all the way... Today it's lumber. Tomorrow it could be any number of issues." Prime Minister Brian Mulroney said Canada would "take strong and vigorous action, hopefully to reverse this action."...
>
> A few days after the U.S. lumber ruling, on October 21, Miss Carney reaffirmed that Canada would not negotiate until all other channels had been exhausted

— which will not occur until next spring. There was unanimity on this strategy among lumber-producing provinces, companies and unions, she said. "We all agreed (with) this strategy among lumber-producing provinces, companies and unions," she said. "We all agreed that this ruling is deplorable, artificial and contrived, and does not stand up to extensive analysis." The U.S. Action "strikes directly at the sovereign right of a government to manage its own natural resources," and negotiations would only condone the precedent. "First, we will fight to reverse this verdict."...

...On Nov. 18, Miss Carney emerged from a meeting of lumber-producing provinces to say that B.C. and Quebec now favored some kind of negotiated settlement with the Americans. An incensed Ontario Premier David Peterson restated Miss Carney's original mind on the matter: "What (a negotiated settlement) would basically say is that the United States could dictate Canadian resource policy, with a very serious threat to our sovereignty and our ability to develop independent policies."...

We have made a mess of things and the Americans, true to form, are putting the boot in.

"Some Sideshow"
Editorial, *Toronto Star*, January 3, 1987.

On New Year's Day, in a desperate effort to defend the indefensible, the Canadian government pushed forward three normally nameless and faceless bureaucrats to tell the press that the U.S. government has it all wrong in its interpretation of the infamous softwood lumber deal.

The U.S. interpretation was contained in a separate letter from Secretary of Commerce Malcolm Baldrige and Trade Representative Clayton Yeutter to the American lumbermen. One of the Canadian bureaucrats — Don Campbell, who was this country's chief negotiator in the deal — called the letter "an unfortunate sideshow."

One is tempted to ask why bureaucrats and not politicians were fronting for the government on this deal. Are they so embarrassed by the deal that they want to distance themselves from it?

But let's consider the core of the letter that Ottawa finds so offensive. In it, Baldrige and Yeutter state: "It is the understanding of the U.S. government that the U.S. government would have to approve any changes in the export charge (to be put on Canadian lumber under the deal) or calculation of the value of any replacement measures (such as a hike in Canadian stumpage fees)."

This sentence has been seized upon by critics of the deal as signifying that Ottawa, in its haste to appease the Americans has surrendered its sovereign right to determine the level of taxes it levies. Campbell, speaking for the Canadian government, says he did no such thing and that the reason the negotiations dragged on so long is that he resisted such intrusions on Canadian sovereignty.

Section 5 (b) of the deal itself suggests otherwise. It clearly states: "Calculation of the value of any replacement measures in relation to the export charge will be subject to further consultations and agreement between the two governments." That seems to say what

Baldrige and Yeutter say it says: That the U.S. government would have to approve any move to lower the export tax and raise stumpage fees by a corresponding amount.. . .

If this is the best Canada's negotiators can do in negotiations over a single sector, then what is going to happen at the free trade talks, where the whole range of economic dealings between the two countries is up for grabs?

"Time for Carney to go"
Editorial, *Toronto Star*, January 7, 1987.

One can only presume that, before she fled to Hawaii, International Trade Minister Pat Carney instructed her officials to do whatever was necessary to get the Americans to settle the softwood lumber dispute. While Carney basked in the sunshine, her negotiators capitulated every step of the way. They gave the Americans the final say on our resource policies, on our tax policies and on how the proceeds from this settlement can be spent. Distant and silent while our sovereignty was being bargained away, Carney had the audacity to come home and claim that the deal "was negotiated on our terms."

If she believes that, then we're really in trouble as long as she's in charge of the free trade talks. Although lumber has now been dealt with separately, there's really no substantive difference between it and all the other goods and services that are part of the free trade talks. In every case, our goal is access to the U.S. market. If the U.S. simply wanted improved access to our market,

then all might be well and good. But, as the lumber settlement illustrates, what the U.S. wants is control over our internal affairs. As Adam Zimmerman, chairman of the Canadian Forest Industries Council, summed up the settlement: "We are going to be run by the American industry and producing according to their dictates."
...

Comprehensive free trade negotiations won't in any way change that fact. If we willingly surrender every domestic program and policy that the U.S. objects to, it will be capitulation all the same....

Appendix C

Media Reports on Sugar and Cotton Subsidies

Guardian Weekly, April 1–7, 2005, Editorial (Agriculture Subsidies)

A little bit of history was made last week when the government finally published details of the £1.7bn ($3.2bn) in support payments that farmers and agricultural companies in England receive from the taxpayer. The most glaring subsidy was more than £120m received by Tate and Lyle in a single year. According to Oxfam, this was mainly in export subsidies, which enabled the company to dump excess production on world markets, thereby preventing poor countries from competing. Other recipients read like a roll-call from Debrett's: The Duke of Westminster (£799,000 over two years), the Duke of Marlborough (£1m over the same period) and the Duchy of Cornwall (£30,000).

Two questions arise. The first is why payments of this kind by the taxpayer to subsidize agriculture were ever regarded as secret. In

the U.S. such details can be read on an official website. The second, more important, question is why are we paying these subsidies at all? Globally, governments shell out $350bn a year — equivalent to 32% of farming revenues — to get domestic farmers to grow crops that often could be produced more cheaply by poor countries, generating huge job opportunities.

One of the worst abuses is Europe's sugar regime, from which the likes of Tate and Lyle earn big profits. According to Oxfam, the EU spends £3.30 to export sugar worth £1, a 300% subsidy that would be laughed out of court if applied to any other industry. The World Bank says that sugar costs 25 cents per pound to produce in Europe compared with 8 cents in India and 5.5 cents in Malawi. If Europe gave up sugar production, then everyone would gain, not least some of the poorest nations in Africa.

The Globe and Mail, March 4, 2005. Report on Business, "WTO strikes down United States cotton subsidy appeal"

The United States suffered total defeat yesterday in a row with Brazil over cotton subsidies which has sent waves through global free trade talks.

The World Trade Organization's (WTO) Appellate Body upheld core findings last year by trade judges who ruled U.S. subsidies to cotton farmers broke trade rules, depressed world prices and hurt Brazilian producers.

"The Appellate Body recommends... the U.S. to bring its measures, found to be inconsistent (with trade rules), into conformity with its obligations," it said in a published ruling.

The row, which echoes wider complaints by developing countries against rich nation farm policies, goes to the heart of efforts to

reform global farm trade — a crucial part of the WTO's Doha round of free trade negotiations.

The United States was studying the report and would "work closely with Congress and our farm community on our next steps," Rich Mills, spokesman for the U.S. Trade Representative, said in a brief statement. But he reaffirmed the U.S. view that such issues were best handled within the Doha talks aimed at addressing "market access, export competition and domestic support, including cotton."

Activists say U.S. policy costs cotton producers in poor African states such as Benin and Chad, where cotton is a vital crop, hundreds of millions of dollars a year because subsidies drive down world prices.

According to Oxfam, the United States spends more on propping up its 25,000 cotton farmers than it does in aid to the whole of Africa in a year.

Mel Clark is a true Canadian in every sense. He experienced the reality of growing up in Saskatchewan during the Great Depression, went on to serve Canada in the infantry during World War II and spent his career with the Canadian government in trade policy and other advisory roles supporting freer trade initiatives. This experience led to his appointment as Deputy Head of the Canadian Delegation to the GATT Tokyo Round multilateral trade negotiations which began in Geneva in 1975 and were successfully concluded in 1979.

Mel's intimate knowledge of international trade agreements and the problems caused by the disparity in power between trading countries has enabled him to write this clear and concise analysis of the costs and benefits to Canada of multilateral freer trade under GATT/WTO rules versus preferential freer trade under FTA/NAFTA rules.

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