

## In the crunch of the free trade talks: inside the making of a historic deal

Derek H. Burney

With the clock ticking toward midnight and a Congressional deadline to negotiate a free trade agreement between the United States and Canada, US Treasury Secretary James Baker burst into his own boardroom and announced the vital concession on Canada's deal breaker — a dispute settlement mechanism. Only two days earlier, Derek Burney had led a Canadian delegation to Washington to inform the Reagan administration that "the deal we wanted, we do not see; the one we see, we do not want." As chief of staff to Prime Minister Mulroney, he played a critical role in breaking the deadlock, resulting in the Canada-US Free Trade Agreement. Later, as ambassador to the United States from 1989 to 1993, he was equally involved in the NAFTA negotiations in Washington in 1992. In this exclusive excerpt adapted from his memoir, *Getting It Done*, Burney takes readers inside the room in the tense final days of the free trade talks in October 1987.

L'échéance fixée par le Congrès américain pour conclure un accord de libre-échange entre le Canada et les États-Unis allait tomber quand James Baker, le Secrétaire du Trésor américain, a fait irruption dans la salle de son propre conseil pour annoncer ce compromis décisif : un mécanisme de règlement des différends. Deux jours plus tôt, une délégation dirigée par Derek Burney se trouvait à Washington pour prévenir l'administration Reagan : « Nous ne voyons pas l'accord que nous voulons, et nous ne voulons pas de celui que nous voyons. » Alors chef de cabinet de Brian Mulroney, Derek Burney a joué un rôle clé pour sortir les négociations de l'impasse. Ambassadeur aux États-Unis de 1989 à 1993, il collaborerait ensuite de façon tout aussi importante aux négociations de l'ALENA menées à Washington en 1992. Dans ce passage exclusif de ses mémoires intitulés *Getting It Done*, il nous fait revivre la tension des derniers jours des pourparlers de l'ALE, en octobre 1987.

**O**n April 23, 1986 a group of about twenty officials from the Prime Minister's Office, the Privy Council Office, the Trade Negotiations Office, and External Affairs gathered in the Langevin boardroom to await the verdict from the US Senate Finance Committee on whether the administration would receive authority to begin negotiations with Canada. The atmosphere was upbeat and excited. Preparations were being made for a statement by

the prime minister welcoming what was presumed would be a positive outcome.

By late morning the mood had become more subdued as word trickled in from our embassy in Washington that the vote was not a sure thing. Senator Daniel Patrick Moynihan had alerted our ambassador that games were being played. Some senators on the committee were, of course, opposed. The Democrats had the majority but were divided.

The Republicans had been expected to be supportive, but some had decided to use the vote to "send a message" to the administration on issues completely unrelated to Canada-US trade. Republican senator Malcolm Wallop of Wyoming, for instance, was going to vote no to register his concern about the lack of administration action against "slave labour in the Soviet Union." Such is the nature of politics in Washington. Clayton Yeutter, the US trade representative



(USTR), had done little advance work, assuming, incorrectly, that the resolution would pass easily. Sensing failure at the last minute, our ambassador and Yeutter scrambled furiously to rally support. Senator Matsunaga was reminded pointedly about the importance of Canadian visitors to Hawaiian tourism. He decided to vote in favour.

There was clearly little appreciation in Washington of the enormous risk our prime minister had taken over free trade. Time and again, we tried to raise attention at the political level in the American capital. I wrote and spoke to the president's chief of staff, Howard Baker, and urged a higher priority to the negotiations. Our ambassador, Allan Gotlieb, was relentless in making similar efforts. On every possible occasion, the prime minister broached the issue with the president.

By this time the mood in the Prime Minister's Office had become eerie. We began sombrely to prepare a draft statement for the prime minister in the event that the committee voted against the initiative. At about 4:00 p.m., the vote in Washington was concluded — a ten-to-ten tie. In the US Senate, a tie goes to the affirmative. It was a near-run victory at the very beginning, which served as an ominous prelude to the negotiations themselves. We now realized fully the extent to which the priority for free trade was vastly different in the two capitals. Free trade had become an all-consuming issue in Canada, debated intensely, heatedly, and in highly partisan fashion nationally, provincially, and even municipally. In Washington it barely raised a ripple. The biggest problem we had was trying to get the US administration to recognize the political priority of the issue for the Canadian government and to treat it accordingly.

The appointment of Peter Murphy as the US negotiator in January 1986 had not been encouraging. While a very able textile negotiator, Peter was a second-level USTR official. He was tall and Simon Reisman short; in every other sense, their stature was the

reverse. Simon thought big and acted even bigger. He wanted a historic free trade agreement that would be a legacy for all time. He knew he had the full support and confidence of the prime minister in virtually all he did and said, although there were some exceptions on the latter, notably when he branded those he saw lying about free trade as "Nazis." He had negotiated

multilateral trade rounds, as well as the Auto Pact, successfully with some of the best and best-known American trade negotiators. Peter Murphy, on the other hand, was not well known, even in Washington. He was not connected to the president or to anyone in the White House. Simon Reisman had a full team of some of our very best trade officials dedicated exclusively to the negotiation, whereas Murphy drew his support primarily from many who had other day jobs. It was a high common denominator from Ottawa versus a low common denominator from Washington.

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Same pitch, same sympathetic response, but little momentum at the negotiating table. Free trade with Canada was just not a priority in Washington. We lacked a political champion there, someone who would deliver for the president.

In fact, after sixteen months of palaver, very little tangible progress had been achieved by the negotiating teams. This was partly tactical. Both sides refrained from engaging on the major issues because both knew clearly from the beginning what those were — trade remedy and dispute settlement for Canada; investment restrictions for the United States. Equally, both sides understood that nothing would be agreed until as much as possible was agreed.

The US administration had until October 4, 1987 to signal to Congress its intention to conclude an agreement with Canada. As the deadline approached, we decided to make yet another overture at the political level. Having failed in our missives to the president's chief of staff, we acted on Allan Gotlieb's suggestion and asked for a meeting with Treasury Secretary James Baker on the eve of the IMF fall session on September 19 in Washington.

Accompanied by Finance Minister Mike Wilson and the ambassador, I met Secretary Baker and said, in effect, that it would be peculiar if the United States could strike an arms reduction agreement with the USSR (as it was in the process of completing SALT II negotiations) but fail to conclude a trade agreement with its neighbour and close ally. Baker acknowledged that the trade agreement was more significant in legacy terms than the arms agreement but seemed otherwise unimpressed by our representation. He urged attention to "underbrush" issues (i.e., the list of irritants), leaving the major issues (Canada's priorities) "till the end." But for Canada, there was

little distinction between his underbrush (investment) and our fundamentals (trade remedy). Even though Baker was seen by most as the man to go to in Washington in order to get things done, he was not really responsible for trade. However, investment was within his mandate and that was the United States' top priority.

Simon, meanwhile, had decided to make one last effort at a breakthrough on trade remedy at the negotiating table. Otherwise, it had been

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decided by the prime minister and cabinet in advance that he would walk away, that is, formally suspend the negotiations. On September 23, Simon and his senior associates met their US counterparts in Washington. When nothing ensued, he walked. His action was inconsequential in political Washington, but was traumatic in Canada. Nevertheless, the prime minister and his cabinet had accepted the view that "no deal was better than a bad deal." Canada would not settle for something that fell short of the prime minister's basic instruction "to secure an agreement that made the trade relationship significantly better."

Many in Washington perceived the suspension as a bluff or a stunt by Canada. President Reagan's chief of staff, Howard Baker, called me and asked us to return to the table. I said that there was no point reconvening if there was nothing on the table that responded to our principal demands. I added that a call without substance "could be fatal." He quickly handed the reins to Jim Baker. At this point, in Ottawa, there was probably as much relief that the talks had failed as there was frustration, and little

enthusiasm to try to re-engage. Certainly, those most closely involved, including me, were annoyed by the lack of priority and flexibility on the part of Washington. We sensed that the Americans had been convinced that Canada would accept virtually anything in order to proclaim success. Our immediate challenge was to disabuse them of that notion.

Intense efforts began, primarily in Washington, to restart the negoti-

ations. In Ottawa our focus had shifted more to containing the fallout from a failed negotiation. New American proposals on trade remedy were examined carefully but rejected politely. Forging a consensus for our replies was rarely easy. By then, there were some on the Canadian side who would have preferred simply to stand down. Others, including notably our ambassador in Washington, were anxious to go "the extra mile" to try to secure an agreement. I was in the middle, struggling to keep our negotiating effort together but ready for either scenario.

From the outset, Canada's goal had been to increase and better secure access to our most important market. The basic economic rationale for free trade was significant in itself, but there was a need to improve and stabilize Canada's position as a magnet for investment on a footing at least equivalent to that of the United States. With increased investment would come increased production in Canada and, of course, jobs — good jobs based on market demand, not government pump-priming. In particular, we wanted security against capricious rulings

by US trade agencies. Experiences with shakes and shingles, softwood lumber, and steel in the early 1980s had driven this lesson home in spades. Our exports to the United States were too vulnerable on too many fronts.

Improved productivity by Canadian firms was seen as a clear by-product of trade liberalization, and there was confidence that Canadian industry and exporters could compete effectively in the US market, provided the ground rules were clear and fairly administered. Moreover, if Canadian firms expected to succeed in global markets, it was essential that they be able to compete and win in the market next door. These had been the basic economic factors behind Canada's decision to enter negotiations.

For the Americans, the negotiations were much less vital and certainly less divisive, except for some in the border states. The Reagan administration and Republicans generally were free traders at heart, if not always in practice. Congress reflected many attitudes, most of them parochial, but was still inclined, at decisive moments, to tilt in favour of trade liberalization. American officials and politicians were frustrated by the lack of progress toward a new multilateral trade round and saw some strategic merit in moving regionally in order to kick-start global negotiations. In Washington, therefore, the motivation for free trade with Canada reflected some strategic global concerns, but a cluster of bilateral trade irritants underpinned most of the US negotiating position, reflecting the "all politics is local" tenor of the times.

The interrelated issues of dispute settlement and trade remedy relief had been addressed many times by the negotiators and many formulas had been contemplated — for example, competition law to address anti-



PMO Photo

PMO Chief of Staff Derek Burney looks on as Prime Minister Brian Mulroney signs the Canada-US Free Trade Agreement on January 2, 1988. If only it were that easy. In Canada, as Burney writes, the political battle was just beginning.

dumping rules and “safe harbour,”\* “red light,” “green light” codes to categorize acceptable, as opposed to unacceptable, subsidies, in an effort to defang countervail (duties). Apart from US reluctance to “surrender” any trade remedy leverage, the fundamental problem was that, because of the highly disproportionate weight of trade in the two economies, any imaginable formula on trade-distorting subsidies would result in more bite or political pain in Canada than in the United States. Canada was and is far more dependent on trade than the United States, which relies for much of its economic growth on its own huge domestic

market. Whereas virtually all Canadian government programs had a potential impact on our exports, the same was not the case for US programs. And, of course, national security provided a highly convenient umbrella for much subsidized research and development in the US, which indirectly supported exports but could not be captured under any “export” subsidy disciplines. With minimal defence expenditures, Canada did not have a similar shield.

**C**ongressman Sam Gibbons, a Democrat from Florida and chairman of the House Trade Subcommittee, was an ardent free

trader — unusually so for a Democrat. He was also well disposed toward Canada, as were most Florida representatives, and for good reason, given that some two million Canadians spent much of the winter in their state. Gibbons had suggested that the two countries simply develop a binational dispute settlement mechanism to oversee the implementation of each side’s existing trade rules and ensure that the rules were being respected on their merits. It seemed simple enough, even though it fell short of the larger objective — agreed rules on competition and government subsidies that would obviate the need for the highly discriminato-

ry and capricious trade remedy regime. And, of course, it had not yet been vetted by lawyers!

Ambassador Gotlieb had proposed Sam Gibbons's idea to Secretary Baker, who then took a few soundings of his own on the Hill, including specifically with Dan Rostenkowski, Democratic chair of the powerful House Ways and Means Committee, which would ultimately have jurisdiction over any trade agreement, as well as with members of the Senate Finance Committee. But his initial soundings were inconclusive.

**A**t the end of September, we really thought it was all over and on October 1, I was dispatched by the prime minister, along with Mike Wilson and Trade Minister Pat Carney, to confirm formal termination of the negotiations face to face at the political level in Washington. When the Americans first heard we were coming, they thought that we were resuming negotiations. Even Ambassador Gotlieb was unaware of what was happening. The embassy had assembled a fleet of cars to transport our "delegation." However, when they saw us arrive without the negotiating team, they knew that one car would suffice.

The prime minister had instructed me to lead our trio, and I had rehearsed my message carefully with him at the airport before leaving. The Americans had proposed that we simply conclude a deal on tariff reductions and claim victory. What I said, in response, was that "the deal we wanted, we do not see; the one we see, we do not want." A deal on tariffs alone was not only lopsided (our tariffs being higher generally, we had more to give than to get), but it fell short of what we had set out to obtain in terms of relief from the application of US trade remedy laws or some form of

"binding dispute settlement." We were more frustrated than bitter, but simply saw no acceptable basis for a resumption of negotiations.

After so informing the Americans, I reported from our embassy to the PM, who was in Toronto speaking to a Bilderberg Group dinner, and we discussed how to handle "the politics of failure," placing the onus squarely on the US. But by the time both of us returned to Ottawa later that evening, Baker phoned me with a four-point plan for resumption. His soundings on

When nothing had emerged by about 7:00 p.m. that evening, I telephoned the prime minister and advised him that we had still failed to get an agreement on this key point. "So be it," he replied. He then instructed me to tell Baker that he wanted to telephone the president to confirm that the negotiations were over. This decision was not intended to cajole the president at the last moment, though that may have been how it was interpreted. In any event, when I conveyed the message to Baker, he asked that we not disturb the president for a while (because, as he put it, Reagan was watching a movie at Camp David).

Capitol Hill had presumably been more positive on Gibbons' suggestion for dispute resolution. He added that he would be directly involved. This was a critical move in itself. Jim Baker was known for his ability to deliver on key items of President Reagan's agenda. We knew that we needed someone like Baker to make it happen. Mike Wilson and I went to 24 Sussex late that night, described Baker's proposal as "a breakthrough," went over all the outstanding issues with the prime minister, and returned to Washington the next morning, but this time with the full TNO team.

Upon our return to Washington on October 2, our negotiating team was stationed at the USTR office, but the core team — Wilson, Carney, Gotlieb, Reisman, Gordon Ritchie (Reisman's deputy), Stanley Hartt (Wilson's deputy), Don Campbell (from External), and I — were located in the Treasury building, on the other side of the White House complex. While the negotiations might be about trade, the responsibility of USTR, the final drama would take place in Secretary Baker's boardroom. To that end, we were allocated a small office right across from Baker's own office.

In addition to Reisman, Ritchie, and Hartt, I had added Don Campbell to our inside team deliberately. Campbell was the assistant deputy minister for US affairs at External (my old job) and one of my closest associates in that department. What you need most from colleagues in times of crisis management are trust and competence. Campbell consistently delivered both.

**W**e met in plenary at the Treasury department and established basic rules of procedure. Representatives from each delegation reported jointly to the plenary sessions on the state of play for each segment of the potential agreement, summarizing what was agreed and what was not. As each reported, a determination would be made by the principals on how or whether to deal with outstanding elements. Some differences were simply set aside, and others resolved at the plenary table. Some were relegated to private sessions involving the key negotiators. We all knew what the crunch issues were. From time to time, there were also private sessions involving one or two principals from each side. The first plenary session was in fact quite stormy, reflecting the frustration and annoyance that had permeat-

ed both negotiating teams. We saw flashes of anger from Baker, directed crudely and personally at Mike Wilson over financial services. I returned the fire on intellectual property.

Despite the occasional theatrics at the plenary table, we made steady progress on most issues, and the elements of an agreement gradually began to take shape. But we had heard nothing specific on dispute settlement other than Baker's sketchy reference to Sam Gibbons's idea. Allegedly, the US legal team and possibly some in Congress were balking at the "compromise to US sovereignty" that any binational panel structure would entail. Given acute sensitivities in Canada to the erosion of "sovereignty" from free trade of any description, this US concern was more than ironic.

As with all the issues, once the principals had signaled the basic elements of agreement, the negotiators went to work to craft mutually acceptable language to go into the document, setting out what had been agreed. On trade remedies, two groups of lawyers and officials had been hard at work over at the Winder Building, the home of USTR, trying to put flesh on the Gibbons proposal. Unfortunately, US perceptions of that proposal differed markedly from Canadian perceptions, and even within delegations there were sharp differences on what would be involved in a fully articulated version of the Gibbons proposal. The Canadian team had brought in US counsel to help them through the maze, as both sides were forced to do staff work in a few hours that usually takes weeks or months.

In Secretary Baker's anteroom, we were given only occasional and somewhat sketchy reports on all this toing and froing. By early evening it was clear that the US side was distinctly uncomfortable with the full implications of the Gibbons proposal, particularly after some US lawyers had raised concerns about its "constitutionality," which we took to be code for concerns about sovereignty. Secretary Baker, for his part, found himself in the uncomfortable position of having authored a return to the negotiating table on the basis of a proposal that seemed politically acceptable on the Hill but was now running into trouble among the experts.

I met Baker alone on Saturday morning, October 3, reviewed the balance sheet, and stressed the need for a



PMO Photo

The trade talks team: (L to R) Deputy Trade Negotiator Gordon Ritchie, the author, Mulroney and Chief Negotiator Simon Reisman in the PM's office in October 1987 — all smiles after returning from Washington with an 11<sup>th</sup> hour free trade agreement with the United States.

more positive focus. I signalled our willingness to move on investment and financial services (Baker's priorities), but only if and when the dispute settlement issue — the deal-breaker for Canada — was resolved to our satisfaction. Time was running out. Over and over again during the course of Saturday's meetings, I emphasized to Baker that a binding dispute settlement provision on trade remedies was a *sine qua non* for Canada. When nothing had emerged by about 7:00 p.m. that evening, I telephoned the prime minister and advised him that we had still failed to get an agreement on this key point. "So be it," he replied. He then instructed me to tell Baker that he wanted to telephone the president to confirm that the negotiations were over. This decision was not intended to cajole the president at the last moment, though that may have been how it was interpreted. In any event, when I conveyed the message to Baker, he asked that we not disturb the president for a while (because, as he put it, Reagan was watching a movie at Camp David).

At about 8 p.m. I called the prime minister again, and he said he would leave Harrington Lake, proceed to the Langevin Building, and make a statement to the media announcing that the negotiations had failed. Everyone knew the deadline was imminent. Under the fast-track authority, the administration was obliged to report to Congress by midnight, October 3, on its intent to conclude a trade agreement in order to subject such an agreement to fast-track procedures, that is, a straight yes or no vote, with no amendments, within prescribed time limits. We sat in our caucus room at Treasury, dejected and exhausted. At about 9 p.m. Secretary Baker burst in and flung a piece of paper on the table. "All right, you can have your goddam

dispute settlement mechanism. Now can we send the report to Congress?" Baker had finally knocked heads together on the United States' side and produced a text that met our fundamental needs.

We huddled together and I telephoned the prime minister urgently. "It seems like we may have a deal after all," I reported, "including binding dispute settlement." He was pleasantly sur-

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prised and no doubt profoundly relieved. He asked whether we all agreed that the agreement met his basic objective — that Canada would be "significantly better with it than without." I polled my group of eight and they were unanimous. Then Mulroney stumped me: "So Derek," he asked "how will it play in Drumheller?" For a minute, I couldn't respond. Finally I said, "Well, it is very good for Canada on energy and red meat, so I assume it will go down well in Drumheller." (I really didn't have a clue.) "That's great," he said and then conveyed his thanks to each team member individually.

We were exhausted but elated, and slowly the historical significance of what was being achieved and the satisfaction of "getting it done" captured the mood. Mike Wilson went out and gave the Canadian media a thumbs-up through the Treasury office window. He also assembled the exhausted troops and thanked them for their magnificent performance in bringing the agreement together. Well after midnight, we adjourned to the embassy residence, where the ambassador's hospitality ran into the early hours of the morning.

But the struggle was far from over. We had very little on paper

other than summary drafts on each chapter and a verbal commitment on dispute settlement. First thing the next morning, new problems arose. Don Campbell and I raced to USTR to resolve a dispute on lumber. Meanwhile, Konrad von Finckenstein, TNO's senior legal adviser, was reporting yet another deadlock on the dispute settlement mechanism. The American lawyers remained con-

cerned about a potential constitutional challenge against what had been agreed. Specifically, they wondered what would happen if a panel member were found to have acted improperly. They insisted that there had to be an appeal body on top of the panels with authority to rule in such instances. Otherwise, the whole mechanism would, they claimed, be vulnerable to constitutional attack.

We were neither impressed nor amused by this last-minute wrinkle, but Konrad convinced us that the legal concern was justified. It elicited what became the "dead judges" provision of the agreement. A roster of US and Canadian judges was established to serve on appeals. No offence to the esteemed judges who were appointed, but we were assured by the US team that this appeal mechanism would never be invoked and was simply a "constitutional cover." — hence the appellation "dead judges."

Meanwhile, both teams were scrambling to get the pieces together for signatures and for a mid-day press conference. After that, we headed for home. Little did we know how much more remained to get done and how politically charged the

whole issue would become in Canada. The hectic three days in Washington had been filled with emotional highs and lows, but the overall mood was decidedly upbeat. The prime minister, in particular, was rejuvenated and very appreciative.

What had made it happen was that political will ultimately galvanized both sides. There was push and pull on many issues and no shortage of acrimony. Tensions ran high between the delegations, and toward the end, the key players were tired and running on pure adrenaline. I had been adamant that no deal was preferable to a bad deal. Equally, I had insisted on unanimity within the Canadian team

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on approving or rejecting each key element. We all knew what was at stake. We had been given unusual latitude by the prime minister in arriving at decisions. We had been instructed to conclude a deal if it was good for Canada but otherwise to limit the damage of failed negotiations. In the end, it was a “near run” thing. For me personally, it was a singularly demanding experience, one that served as a benchmark of sorts for all subsequent career challenges, none of which matched the pressure, the stress, and the enormous responsibility of concluding that agreement.

**B**ut even with an agreement in place, there was still more to do. What we had concluded was, in business parlance, a “Term sheet.” It now needed a full legal text — in other words, the actual agreement. Over the course of the next twelve weeks, Konrad von Finckenstein for Canada and Chip Roh for the United States

worked away with their legal colleagues to translate the term sheet into a legal text. Some of this was quite straightforward and built on the months of staff work and effort in the individual working groups. Other issues proved problematic and could not be resolved on the basis of legal drafting alone.

After several rounds of discussion between Reisman and Murphy, it became clear that concluding a final deal would again need intervention at the political level. This time it was held in Ottawa, in December, and we had all the TNO resources at our disposal. More importantly, the political imperative was by now actively driv-

ing both teams, not just one. Peter McPherson, Baker’s deputy, and Alan Holmer, one of Yeutter’s deputies, led the American team. I led the Canadian team — Simon, Gordon Ritchie, Gerry Shannon (our deputy minister of Trade), Don Campbell, and Konrad von Finckenstein, along with others. We worked our way through each chapter following a similar routine to the one adopted in Washington.

The toughest nettles I recall during the “legal text” phase involved North American content provisions on autos, complicated provisions on sugar-containing food products, and the issue of simulcasted TV signals, notably the advertising restrictions applied by Canada to ensure local Canadian ads on programs being simulcast from US networks via cable to Canadian audiences. There were moments of high tension even within the Canadian delegation, as Gordon Ritchie’s memoir, *Wrestling with the*

*Elephant*, illustrates. Simon was never far below the boiling point, and his wrath was not directed exclusively at the Americans.

**T**here were lighter moments, too. The Americans were customarily in direct contact with industry representatives for advice, and this was specifically the case on autos. They were in hourly contact with Detroit and were pressing for a higher percentage on content — 60 percent rather than the 50 percent that had been agreed. We resisted primarily because the issue had already been settled but also to keep open the possibility of increased Japanese investment in the Canadian auto industry. At one point I asked “Why aren’t we consulting anyone?” “Because,” replied Gerry Shannon, “the guys they are consulting [i.e., the Big Three auto manufacturers] in Detroit, are our guys!” The “rule-of-origin” language enshrining the percentage was drafted in

haste and was less than precise. As a result, a few years later, we faced a major hassle with the Americans on the content of Honda Civics assembled in Canada. In NAFTA the Americans did get the higher content percentage and the ambiguous FTA treaty language was clarified.

Ultimately, the legal documents were finalized, and on January 2, 1988 the prime minister and the president officially signed the agreement. There was no elaborate ceremony. The prime minister signed in his House of Commons office, and the president separately at his ranch near Santa Barbara, California. They spoke briefly by phone. It was a high point for all concerned, but in Canada the real battle had only just begun.

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