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Trade Laws: A Canadian Perspective

by Robert E. Latimer*

I. INTRODUCTION

The idea of exploring the scope of Canada-U.S. trade liberalization on the basis of existing laws is a "made in the U.S.A." approach. In Canada we have not followed the practice of developing trade legislation to prescribe our perception of the appropriate ground rules for international trade, to define what we regard as fair or unfair trading practices, or to equip us with a judicious selection of carrots and sticks for a bargaining process designed to translate perceptions into international agreements.

Canadian trade laws have been less comprehensive, rather more *ad hoc*, and very much evolutionary—responding to particular issues as they arise. While we have not been diffident in declaring what we perceived as the right trade policy for the world, we have tended to stay clear of translating that into domestic law. Rather, we have tended to translate into domestic law the results of international negotiations only where this seemed necessary. Where it was not necessary, where there was no conflict between existing legislation and the negotiated agreements, we have relied on the agreements themselves to govern the conduct of our international trade relations.

Nor has Canada's trade legislation reflected the checks and balances of trade legislation, the circumscribing of the delegation of authority, that has followed from the separation of the executive and the legislative arms of government in the American system. Most of Canada's trade law is made either through enabling legislation, which provides for action through Orders-in-Council, or through the exercise of administrative discretion. We do, nevertheless, have a number of legislative instruments which, in the way they have evolved, in their structure, and in the way they are implemented, are reflective of the Canadian approach and the Canadian reality.

It is from this perspective that I propose to focus on the principle Canadian trade policy instruments: how they have developed and the factors and events that have affected that evolution. From this I hope to identify some of the present circumstances which influence the Canadian approach and some of the sensitivities that seem relevant in considering the future direction of Canada-U.S. trade relations.

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II. THE CANADIAN CUSTOMS TARIFF

The first consideration is the Canadian Customs Tariff. The Canadian Customs Tariff, by its genesis and adjustments over the years, has been a dominant factor in shaping the Canadian industrial structure and conditioning the debate on Canadian industrial and trade policy issues.

The Canadian high tariff policy, the National Policy of Sir John A. Macdonald introduced in 1879, followed from the abrogation by the U.S. in 1866 of the Reciprocity Treaty. Adjustment to this high tariff policy in Canada involved a major inflow of foreign capital from the U.S., to supply the Canadian market by producing in Canada behind the tariff—the makings of the Canadian branch plant manufacturing industry. Inevitably, these plants were located in southern Ontario and along the St. Lawrence in the Province of Quebec—the areas of concentration in terms of population. This locational response has been a major contributor to Canada's historic regional trade policy debate—free-traders in Western Canada and the Atlantic Provinces versus the protectionist interests in Central Canada.

Given the high tariff policy response to the U.S. abrogation of the Reciprocity Treaty, our history has been one of seeking, by various devices, to reconcile the conflict between those with an interest in continuing high levels of tariff protection and those with an interest in tariff free-trade. While this conflict is by no means unique to Canada, the limited size of the domestic market, the limited range of goods in our industrial production, and the fact that the “free-trade vs. protectionist” debate has a distinct geographic as well as sectoral base, have brought forth the maximum ingenuity to Canada's tradition of *ad hocery* and pragmatism.

In some parts of the tariff structure, a “made in Canada” system was applied to ensure that if an item was not produced in Canada the high tariff would not be levied. This was a type of “infant industry in reverse” approach. To get the tariff protection provided for in the tariff, the Canadian producer had to show his production was adequate to supply a certain percentage of the market. U.S. tariff negotiators have always had a difficult time reconciling themselves to accepting a tariff on an item when there was a “made” or “not made” split in the tariff. This is because simply by a “made in Canada” ruling, the tariff could be substantially increased without breaching the tariff obligation. In view of these concerns, it was agreed during the Tokyo Round to refer the question to the Canadian Tariff Board. It will decide whether the “made” or “not made” tariff items could be replaced by items differentiated by product description.

The strongest forces for freer trade have been generated by the elements necessary for the development of Canada's natural resources. The development of our agriculture, fisheries, forestry and mineral wealth has depended on access to foreign markets and meeting world competition. The “end use” provisions in the Canadian tariff have in large part been

designed to allow for reduced or zero tariffs on imports of machinery and equipment required by our resource development and processing industries.

The foreign ownership and control issue arises here as well. Much of the development of Canada's resources has been undertaken through direct investment of foreign based companies interested in securing raw material for their domestic operations. The Canadian commercial and industrial development policy response to the export of raw materials (the "rocks and logs" syndrome) has been to seek, through international negotiation, the reduction and elimination of tariffs on the processed product—to encourage further processing in Canada. Here it should be noted that a tariff that provides for free entry for the raw product—and even a low tariff on the semiprocessed item—can be highly restrictive of trade, since the level of protection should appropriately be measured in terms of the added value through further processing.

The issue has also begged the question, in the Canadian trade policy debate, whether it would not be reasonable to link security of access to resources with secure and unrestricted access to markets for the further processed product. This thought has its expression in the Export and Import Permits Act, where there is a provision allowing for the imposition of export controls "to ensure that any action taken to promote the further processing in Canada of a national resource that is produced in Canada is not rendered ineffective by reason of the unrestricted exportation of that natural resource." (That provision has, incidentally, never been invoked.)

A more recent response to changing competitive pressures, and the need for changes in Canada's industrial structure to meet those pressures, has been the adaptation of a tariff remission system. While provision for remission of duty is of long standing, recently the remission (or waiving) of the duty, in whole or in part, has been linked to performance commitments by the Canadian producer-importer with respect to his Canadian operations.

Here, the system has not been driven by the need to find a means of reconciling conflicting interests between the free-trader on the one hand and the protectionist on the other, but to allow the Canadian manufacturer to achieve economies of scale through specialization. In return for an undertaking to maintain a level of production in Canada, directly and/or through purchases of Canadian goods relevant to his operations in Canada, he is relieved from the payment of duty on imports required for his Canadian production (or required to fill out the range of related products he could offer for sale on the Canadian market). Essentially this is the instrument of the AutoPact, which runs into a lot of counter-vail subsidy preoccupation in Washington.

I have mentioned these programs not in order to defend or condemn them, but to illustrate the kind of selective approach which has been developed to accommodate diverse interests within Canada. It has been

product and sector selective, not driven by a grand design but in response to particular interests, concerns, and developments. It has been a very Canadian kind of issue-oriented approach which will inevitably continue to be reflected in our approach to trade issues because it responds to a reality in the Canadian economic and political scene.

My review of the elements affecting the Canadian Customs Tariff has, so far, been primarily in terms of its use as a legal instrument for the pursuit of Canada's industrial development. An even greater force which has shaped the Canadian tariff in the postwar period has been its use as an instrument of commercial policy.

There has been a broadly based consensus in Canada that negotiating reductions in tariffs, to improve Canada's export opportunities, was in the overall national interest. The proviso, of course, was that we gave away no more than we got in terms of increased trade opportunity—and less if possible. This was a peculiar acceptance of mercantilist economic theory that seems to be the guiding principle of most international trading nations.

The main preoccupation in assessing the result of a trade negotiation, apart from concern that the overall tariff bargain was a fair deal for Canada, was that there should be some reasonable balance between the gain and pain within each sector and each region of the Canadian economy. I do not believe any individual sector or region ever agreed that this was achieved, but collectively the results of international tariff negotiation have been received with a reasonable degree of equanimity. In Canada/U.S. terms it is worth noting that, based on the practice of negotiating concessions on particular tariff items with the principle supplier, post-war tariff bargaining has been primarily with the U.S. As a result, the Canada-U.S. tariff relationship has already been, in large measure, tailored to the facts of Canada-U.S. trade patterns and sensitivities.

The end result of the post war tariff negotiations is that, with a few exceptions, the Canadian tariff is (or will be when the Tokyo Round results are fully implemented) at such a level that non-tariff measures are probably more significant in determining the distribution of production, employment, and trade between Canada and the U.S. than are the tariff levels. The point should not be overdrawn, however. The remaining tariff levels are still important both in terms of their effect on the import costs of many Canadian producers and on consumer prices.

In domestic terms, the balancing of these elements will continue to be an important issue. In international terms, the customs tariff is by no means irrelevant to the further consideration of Canadian-U.S. trade relations, and more important to Canada than the U.S. At the same time, with the effective demise of the national policy of Sir John A. Macdonald, there is a compelling need to seriously address the non-tariff elements relevant to Canada's future industrial development.

III. THE SPECIAL IMPORT MEASURES ACT

The next piece of legislation I want to refer to is the Special Import Measures Act. This act, passed at the end of 1984, in large part gathers together and brings up to date, in one piece of legislation, the instruments and processes relating to contingency protectionist measures. It is the beginning of the codification of Canadian trade legislation—something of a departure from Canada's past practice—and the domestic response to codification in international negotiations.

The content of the Special Import Measures Act deals most extensively with antidumping and countervailing duties, and the procedures relating to their application. Canada's preoccupation over dumped imports dates back to 1904, when the first antidumping regime was put in place. Proximity to the United States, and the disparate size of the two economies, made the possibility of facing sudden and massive imports from the U.S. at dumped prices a very present and real threat to Canadian producers. The scope for selling at dumped prices, in quantities minimal in terms of volume of production and sales in the U.S., but massive in terms of the size of the Canadian market, makes sales at less than the U.S. fair market value a practical business proposition.

Because of this perceived risk, in the 1968 Kennedy Round Negotiations, Canada introduced an injury test as a condition for the imposition of antidumping duties. This was not without protest from Canadian manufacturers. However, it was argued at the time that it did not make sense to deny consumers the benefit of low priced imported goods, either as a result of dumped or subsidized imports, if it did not cause injury to Canadian producers. The debate continues, however, whether the injury determination process can move quickly enough to avoid irreparable damage to the Canadian producer.

The provision in the Special Import Measures Act for price undertakings is the most recent adjustment to Canada's antidumping regime. This allows for the suspension of an antidumping investigation, in return for an undertaking by the exporter to adjust his prices to eliminate the margin of dumping. While the provision is surrounded by all kinds of caveats, it does introduce a new dimension for dealing with problems related to concerns about price competition arising from dumped imports. This is allowed for in the antidumping code negotiated in the Tokyo Round.

In contrast to the antidumping regime, the countervailing duty provisions of Canada's trade legislation are relatively new and have rarely been invoked. The use of subsidies as an instrument of industrial policy has not been regarded as a *sin per se*. Indeed they have had a significant place in Canada's economic development policy. The concern has been about disruptive import prices; whether they were the result of dumping or subsidies has been of marginal importance.

IV. THE EXPORT AND IMPORT PERMITS ACT

The third piece of legislation to mention is the Export and Import Permits Act. This act contains the principle provisions which allow for the ultimate instrument of protectionism—quantitative restrictions. It had its genesis in various measures, put in place during World War II, for the control of the international movement of goods in relation to supply availability and the export of strategic items. It is the legislative authority for the implementation of Canada-U.S. cooperation with respect to strategic export controls and the exemption of cross-border trade from quantitative controls in accordance with the Hyde Park Agreement of 1941.

As an instrument of protectionism, the Export and Import Permits Act allows for the imposition of quantitative restrictions, and establishes procedures for their implementation in accordance with Canada's rights and obligations under Article XIX of the GATT. Apart from a time limit for the application of quantitative restrictions introduced through the Special Import Measures Act, Canadian legislation neither falls short of, nor goes beyond, the language of Article XIX. The legislative provision is also strictly enabling, there is nothing mandatory about its application. Indeed, except for inquiries by the Textile and Clothing Board, even the initiation of an investigation into alleged threats of injury requires Ministerial decision.

Of a somewhat different order are the provisions of the Act in support of Canada's agricultural policy measures. These measures—most notably the Agricultural Stabilization Act, the Agricultural Marketing Agencies Act, and the Meat Import Act—are a reflection of what has been an increasing preoccupation with stabilizing farm incomes, either through price support or supply management. Agricultural policies, on both sides of the border, have their own peculiar sets of issues and instruments of protection that will need to be accommodated in a trade agreement. In a process of further integration, the agricultural relationship will be important to both countries.

V. CONCLUSIONS

I will end with some observations and some conclusions. The above analysis of Canadian legislation affecting international trade is neither comprehensive nor detailed in the particular. It has been more of an exercise of wandering through past experiences and noting the issues and sensitivities that have been encountered on the way. The process may throw some light on the elements relevant to the consideration of future Canada-U.S. trade and economic cooperation. At the same time, to examine the issues solely from a legal framework is in many ways too constraining. It is certainly less than adequate for an identification and understanding of the challenges and pitfalls on the way ahead. Given that reservation, and taking a few liberties, I would like to conclude with

the following observations, which only partly derive from a consideration of Canada's legislation relating to international trade.

First, international trade issues bring intimately together economic and political considerations. These tend to have their reflection in the mix of trade policies, laws, practices and procedures of the individual country. A disposition to compare and contrast the two trade regimes from a strictly legal perspective is a very inadequate basis of analysis. To measure Canada's trade regime in terms of how it approximates that of the U.S., inevitable as that disposition may be, is to miss the appreciation of the circumstances and sensitivities of Canada that is necessary for the constructive and amiable pursuit of further trade liberalization.

Secondly, Canadian legislation relating to trade does not derive from a grand design which is susceptible to drastic change as new perspectives are brought to bear. Rather, it has been a response to particular issues and circumstances as they have arisen—and the dictum: "if it works don't fix it." In Canada there has tended to be a wide gulf between the level of abstraction where there is a broad national consensus ("exports are good") and the level of specificity where agreement can be reached on a particular issue ("no tariff on newsprint"). The narrowing of that gulf, or broadening of the consensus, in terms of trade and industrial policy has been a slow process. We are not the child of a revolution, we are like a juvenile growing up. And in many ways we have suffered from not being a child of a revolution.

Thirdly, trade and industrial policy issues in the Canada-U.S. dimension, at least from the Canadian perspective, are intimately linked. This reality has been brought into sharper focus by the reductions negotiated in the Canadian post-war tariff bargaining. There is now broad acceptance, in my view, of the need to respond to international competition through increased efficiency and a more internationally competitive Canadian industrial economy. Consideration of the possibility of achieving rationalization of production and improved efficiency through economies of scale, in the context of Canada-U.S. relations, is a logical consequence of the progressive adjustment in the rates of the Canadian customs tariff and the recognition of the need for adjustment in the industrial structure.

Lastly, the legislative constraints on the possibilities for further integration of the North American economy rest much more in U.S. law than in Canadian law. If Canadian production is to be further adjusted to an even more integrated market, Canadian investors will need reasonable assurance that they can continue to count on unrestricted access to the U.S. market.

Past experience has not been all that comforting. Recourse to safeguard action, or threats of such action in the category of so-called contingency protectionism, has had particular impact on Canada's resource sectors—lead and zinc, iron and steel, copper, lumber and fish, to name some items. In the absence of some reasonable assurance that unrestricted access will be maintained, any sensible business enterprise, in

contemplating new investment to supply the North American market, would locate production on the U.S. side of the border. The real question is whether, under U.S. law and legal processes, the necessary assurances can be provided.

Thank you.