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The Business Perspective: Cross Border Views

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I first became aware that the United States shares a common space with another country when I was thirty-four years old. I was hired by the U.S. Chamber of Commerce and my initial assignment was to update the statistics in a Chamber booklet entitled, "Are Canadians Really?" subtitled "Or for that Matter is Canada?" This booklet was humorous in format, but wonderful in substance. It contained cartoons of Rose Marie and the Royal Canadian Mounted Police, but most importantly, it described Canada to those who took the time to read it. The Chamber had printed and distributed over a million copies, and its largest single customer was the Canadian Embassy which used it worldwide as a document describing Canada.

Eight years later, I had a second experience impressing upon me that there was, in fact, a Canada. I was sitting in the Secretary of Commerce's office, and in walks a rather brash and pugnacious young man with his minister of industry, to complain about our examination of a Canadian tariff remission scheme. Canada, pursuant to our commission report, had provided that they would remit the twenty-five percent Canadian import tariff on engine blocks imported into Canada in return for Canadian producers shipping Canadian automotive products. It was a dollar for dollar deal. A U.S. producer could import a million dollars worth of engine blocks free by increasing the incremental exports from Canada by the same amount. From that tariff remission by Canada, the Canada-United States Automotive Products agreement was derived.

Today, I will discuss some personal experiences I have had in the anti-dumping area. First, let me tell you about the Emergency Committee for American Trade ("ECAT"). ECAT has been in existence for nearly twenty-four years. It is comprised of sixty-five large U.S. international corporations whose members are the CEO's of these companies. ECAT's members have worldwide sales of over a trillion dollars annually, and their worldwide employment is roughly six and one half million. They are large, substantial companies, perhaps among the Fortune 100.

ECAT has only recently become concerned with the issue of anti-dumping. While the U.S. anti-dumping statute has been periodically amended for years, ECAT did not take issue with the amendments. However, their cumulative effect has been quite drastic. In the United

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States, the domestic statute has been deemed unfair and arbitrary in terms of the criteria used in its implementation and administration. Many of our companies were even more concerned with the rash of anti-dumping statutes being initiated and implemented in other countries. They are concerned that their exports could be adversely impacted by capricious anti-dumping regimes. For this reason, ECAT undertook a study and proposed a series of recommendations to improve not our U.S. statute unilaterally, but the GATT anti-dumping code itself. We developed twenty recommendations, and allow me to mention three or four to give you an overview of what ECAT recommended. Keep in mind these proposed GATT anti-dumping amendments would be universally applicable to the extent which GATT membership has universal acceptance.

First, ECAT recommended a *de minimis* rule in the administration of the anti-dumping law. This recommendation was derived from the experience of a member who produces orange juice in Brazil and imports it into the United States. U.S. orange juice producers petitioned for an anti-dumping duty because they felt that the juice was being imported at a dumped price. An investigation was undertaken and a margin of six tenths of one percent or six one hundredths of one percent dumping was found. To process this one application, the member company spent over two million dollars in external legal fees, plus in-house legal counsel expenditures. Having witnessed this expensive process, ECAT considered whether an anti-dumping duty of six one hundredths or six tenths of one percent really has any impact on the flow of trade? I think the answer is perhaps, no. That being the case, ECAT thought that the GATT should be amended to provide a *de minimis* rule if the margin of dumping is two percent or less, but establish a standard below which petitions will not be accepted.

The second recommendation stated that if U.S. petitioners requested an anti-dumping investigation, there must be support from a substantial number of producers in that particular industry. There are cases where an investigation will be undertaken absent support of the petition by a majority in the particular industry. Therefore, ECAT suggested that worldwide, before petitions for anti-dumping investigations are accepted and undertaken, there should be some understanding that the petitioners do, in fact, have the force of a substantial number of the domestic producers of the particular product.

The third recommendation was that in cases where materials in the production process are in short supply domestically, anti-dumping duties should not be imposed against them so as to make the imported product more expensive. The fourth recommendation involved a sunset provision where anti-dumping duty cases would be limited to five years. The purpose of this finite period is to establish a point at which the anti-dumping duties will either be removed or liberalized, unless at the end of the period there is a reason to believe that the anti-dumping duty should be continued.

The reaction to ECAT's recommendations was immediate, drastic and severe. Johnson & Johnson's CEO received a letter from representatives of U.S. companies who wanted to preserve the status quo. In addition, ECAT's CEO's received letters from elected officials, including a senator who sent a letter questioning our patriotism. Therefore, when we think about creating a substitute for the present anti-dumping regime between the United States and Canada, it is a very difficult issue.

The Canadian objective in the Free Trade Agreement was to achieve exemption from the application of our unfair trade statutes, primarily anti-dumping and countervailing duty statutes. The special dispute settlement procedure in the Free Trade Agreement involves the appointment of panels to examine anti-dumping cases processed in each country. The purpose of the examination is to determine whether, in this case, the decision was appropriate based on the facts before Congress.

Of the twelve to fifteen cases that have been referred to these panels, roughly half have seen unanimous agreement that the U.S. application of the law was absolutely correct. The panels remanded the other half of the cases back to the United States with questions concerning the factual bases for the findings. It is my understanding that the U.S. actions following the remand in these instances satisfied the panelists. Overall, it seems to be a system short of exemption, but one that is working efficiently for producers in both countries.

If Canada becomes a full participant in the forthcoming bilateral free trade agreement talks between the United States and Mexico, the ensuing trilateral agreement will make it more difficult for Congress to effect any substantial changes in our anti-dumping and countervailing duty statutes. Indeed, such participation could make it difficult for Congress to maintain the present dispute settlement procedure between the United States and Canada. This is because Mexico has a legal system which is based on a civil code, unlike the Canadian and U.S. systems which are founded on common law principles. Also, the application is different in the Mexican judicial system. It is much more capricious; much less certain than the legal systems in either the United States or Canada. Mexico has only recently instituted its own anti-dumping regime. A number of cases have been brought against the United States in Mexico, and the Mexican anti-dumping administration is wholly unlike that of the United States. Some cases have been decided with an absolute lack of due process, an absolute lack of transparency. In a matter of days, anti-dumping cases have been accepted, processed and anti-dumping duties applied, without any opportunity for the parties to respond.

Negotiating a free trade agreement between Mexico and the United States will be much more difficult than the Canada-U.S. negotiations were. If a trilateral negotiation materializes, with respect to the unfair trade statutes in the United States, it will be very difficult to move beyond a bilateral system between Canada and the United States.