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The Impact of U.S. Federal Laws on Sectoral Integration

*by Peter O. Suchman**

I. INTRODUCTION

My subject deals with Federal laws and the impact they may have on a sectoral or comprehensive trade agreement with Canada. I will focus on four principle areas of U.S. law:

1. the negotiating authority itself, which can have a very substantial effect on the substance of an arrangement;
2. U.S. customs law, particularly the Rules of Origin, which will be a critical element of implementation of any agreement;
3. the trade remedy laws, including both "fair" and "unfair" trade laws; and
4. government procurement, focusing on the agricultural restrictions.

To begin it is necessary to understand that the principal difficulties with achieving sectoral or comprehensive integration between U.S. and Canadian industry are not legal but economic, commercial, and most importantly, political. Once it has been decided as a matter of policy by both governments to move toward integration and the creation of a North American market, the major task of both administrations will be to identify the likely commercial and economic consequences. Further, they will have to convince the legislatures that the overall gains outweigh the costs to such an extent that dislocations to individual enterprises and workers are worth enduring. Legal impediments to integration can then be quickly dealt with at the federal level, although the relationships between federal and local (i.e., state and provincial) governments under the constitutional systems of both countries may prove a problem. These problems will occur primarily in the areas of government procurement and trade in services, such as banking, insurance, and the professions.

In this paper I attempt to identify the most meaningful U.S. laws which would need to be scrutinized if U.S.-Canadian free-trade arrangements are to be pursued. I have largely ignored any distinction between sectoral and comprehensive integration because it does not appear the sectoral approach is favored by either government, and because the issues

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to be addressed would largely remain the same in either circumstance (although product specific issues, such as standards, could become troublesome within particular sectors).

Before exploring the U.S. statutes which might be impacted by a U.S.-Canada free-trade arrangement, it is worth noting that in 1984 Canada enjoyed a substantial bilateral trade surplus with the U.S., about \$20 billion, which constituted over 16% of the total U.S. trade deficit that year (\$123 billion). Until, or unless, there is a significant weakening of the U.S. dollar (which has been trading at all time highs against the Canadian dollar and most other currencies) it seems unlikely that there will be any improvement in the U.S. trade balance, either bilaterally with Canada or multilaterally.

In fact, further deterioration in the U.S. position remains distinctly possible. While most attention has thus far been focused on the Japanese trade surplus with the U.S. (\$37 billion in 1984), it is to be expected, should a U.S.-Canada arrangement become the focus of public attention during the present imbalance, that considerable pressure against any reduction in trade barriers will be generated. From the Canadian perspective, it might be best not to draw attention to Canada's current favorable bilateral position, by pursuing such an arrangement, until there is a return to equilibrium.

In a recent article on U.S.-Canada trade relations, the Canadian Minister for International Trade, Mr. James Kelleher, discussed the possibility of a comprehensive bilateral free-trade arrangement. He indicated that a thorough analysis concerning trade negotiating authorities, tariff and customs law, trade remedy and fair trade laws, and other import regulations, will first be required. What are those U.S. laws, regulations, and practices which have the greatest impact on Canadian market access to the U.S., and which will therefore become an important part of any negotiations for a U.S.-Canadian free-trade arrangement?

II. U.S. NEGOTIATING AUTHORITY

The Trade and Tariff Act of 1984¹ provides the President with authority to enter into agreements and to eliminate or reduce duties, non-tariff barriers, and other distorting practices on a bilateral basis. Most importantly, in amending section 102 of the Trade Act of 1974,² the 1984 Act provides for the "fast-track" Congressional approval procedure. (Foreign governments understand the President has inherent Constitutional authority to negotiate concerning matters of mutual interest. It is the implementation of an agreement through domestic law which causes difficulty for the Executive branch and trepidation on the part of other countries.)

The procedures in section 401 of the 1984 Tariff and Trade Act are

¹ Trade and Tariff Act of 1984, Pub L. No 98-573, 19 U.S.C.S. §1654 (Law. Co-op. 1985).

² Trade Act of 1974, U.S.C.S. §2112 (Law. Co-op 1985).

presently being utilized to implement the U.S.-Israeli Free Trade Arrangement, which provides for the staged elimination of all tariffs on Israeli goods imported into the United States. The importance of the "fast-track" legislative procedure is that it prevents particular interest groups and industries, who believe that they are being adversely affected by the agreement, from holding the legislation approving the agreement hostage to their demands. Since the legislation cannot be amended or bottled up in committee once formally submitted to the Congress, it guarantees the agreement will receive a straight up or down vote by the Congress. This is what happened with the legislation implementing the MTN, the Tokyo Round.

Negotiations with interest groups occur, for the most part, prior to passage of the legislation authorizing "fast-track" approval, and during the consultation and notification periods prior to the formal signing of the agreement and submission of the implementing legislation to the Congress. Foreign governments can therefore be fairly certain that unless products are excluded from coverage in the original authorizing legislation, their negotiated duty reductions will in fact be implemented. Thus, the U.S. textile industry and unions, along with some other import sensitive industries, launched a major effort to exclude textile and apparel products from section 401 of the Trade and Tariff Act of 1984, when that legislation was before the Congress last year. They were unsuccessful in excluding those products, and as a result the U.S.-Israeli arrangement provides for the eventual elimination of all tariffs on Israeli imports (and, conversely, on U.S. exports to Israeli.)

However, we must be careful in looking at this "fast-track" procedure. It does not exclude the possibility that the U.S. implementing legislation, even under "fast-track" procedures, may deviate from the terms foreign trading partners believe they have secured. As noted, the consultation and notification periods required under this procedure do allow for the exertion of Congressional influence, in the formulation of the implementing legislation to be submitted by the Executive branch. This is especially true with regards to modifications to U.S. trade remedy laws or other domestic laws effecting imports, as opposed to straight tariff reductions. Since the concept of total elimination of duties on a bilateral basis for all products has been accepted, hopefully that issue is closed. This is not the case with regard to non-tariff barriers. The respective Congressional committees, (the Senate Finance Committee and the House Ways and Means Committee) feel that in order to fully exercise their oversight responsibilities, they will need to thoroughly sift through any proposed changes in U.S. law during the pre-submission consultations.

This is certainly what happened in 1979, when the Senate Finance Committee had a major role in formulating the legislation (which became the Trade Agreements Act of 1979) implementing the Tokyo Round codes on antidumping and countervailing duty laws. It can be argued

that the statutory language amending the U.S. antidumping and countervailing laws, particularly with regard to the definition of material injury, was not exactly what the trading partners of the U.S. had bargained for. For instance, it is generally believed that the intervention of representatives of the U.S. steel industry, during the consultation period before Congress, prevented clarification of the statutory language in regard to causality. As a result, a majority of the commissioners of the U.S. International Trade Commission (ITC), the body which applies the injury test in U.S. dumping and countervailing duty investigations, have refused to consider whether the amount of subsidization in a countervailing duty investigation has caused injury. They look only to whether the subsidized imports themselves have caused injury, despite specific assurance to the contrary by U.S. negotiators during the countervailing duty code negotiations.

On the whole, however, the "fast-track" procedures of the Trade Act of 1974, as amended by the Trade and Tariff Act of 1984, are far superior to the alternative means of implementing any bilateral arrangement. Under section 401 of the Act, in order to qualify for "fast-track" treatment the President must consult with the appropriate committees of Congress during the negotiating process, and notify Congress of his intention to enter into the agreement ninety days before doing so. At least sixty days before the formal notification, a pre-notification must be given, during which either Committee can disapprove of the proposed agreement. Finally, the President must submit the agreement and its implementing legislation to the Congress. The Committees must then report the bill out within forty-five days. Each House then has fifteen days to vote on the legislation without amending it.

As noted, while these procedures are cumbersome, the alternative is to negotiate an Executive Agreement which then must be implemented through the regular legislative process. This was the method attempted, with disastrous results, after the Kennedy Round, to implement the agreement on the elimination of American Selling Price and the Antidumping Code. But, it was also the method used successfully to implement the Auto Agreement. One can see that it has mixed results.

Another option is to seek advanced authority to negotiate and implement specific changes in U.S. law. This has been done traditionally with tariff reductions, but not with other modifications to U.S. law. It was attempted in 1973 (apparently to avoid the disastrous results of the Kennedy Round) when the Nixon administration sought advanced authority to eliminate the American Selling Price and Final List methods of customs valuation, and the Wine Gallon/Proof Gallon method of assessing excise taxes on imported spirits. The attempt failed. I believe that was the last (perhaps the only) time that the Executive branch has sought such advanced "non-tariff barrier" authority. It appears that the Congress is more comfortable agreeing in advance to the reduction or elimination of tariffs, where considerable precedent exists and the bargain is

more or less quantifiable, than it is authorizing the elimination or modification of a provision of law which impacts imports, such as a non-tariff barrier. In such an instance the Congress wants to see the deal before giving final approval. As a result, the "fast-track" method has evolved, and would appear the only likely procedure for implementation of a free-trade arrangement, whether sectoral or comprehensive. Basically, it seems the House Ways and Means Committee, and the House in general, would be very upset if a deal were worked out for a treaty which eliminated them from the approval process altogether.

III. CUSTOMS LAW AND ADMINISTRATION

Tariffs on approximately three-quarters of Canada-U.S. trade will be set at a zero rate after the Tokyo Round tariff cuts are completely implemented in January, 1987. However, duties in a number of important trade sectors, such as steel, will continue to be significant. Thus, a free-trade agreement eliminating all duties would have a major impact on certain industries. Although, since the industries with the most protection are the most import sensitive, pressure will be greatest to exclude from an agreement those products which have the highest duties. One question to be addressed is whether the increase in duty-free imports from Canada will affect the administration of U.S. Customs laws and procedures.

A U.S.-Canada free-trade agreement will likely increase the burden on Canadian exporters and U.S. importers to submit evidence of the country of origin for imports to the U.S. On the other hand, classification and value data will be of decreased importance to Customs. Typically, commercial products must be accompanied, when imported, by a bill of lading, invoice, and visa if the goods are subject to quota. At the time they enter the U.S., the importer submits a Form 7501 to Customs describing the goods and giving its TSUS classification item number. Customs then inspects some of the goods for compliance with all U.S. regulations, including trademark, copyright, and health and safety. The importer must submit a customs bond for payment of estimated duties at the time of entry. The import specialist has ten days to determine if the goods are properly classified, and submits a bill to the importer for duties due.

Customs administration, with regard to Canadian made products, will be simplified by a free-trade agreement because Customs will no longer be involved in the collection of duties. This would eliminate the need for submission of estimated duties and the goods conceivably could be liquidated at the time of entry. Importers would continue to submit the invoices and bills of lading to Customs for statistical purposes. However, there would undoubtedly be a requirement for the submission of a certification as to the country of origin, where goods are duty-free because of their Canadian origin.

This is an area where there has been a tremendous amount of heat, but very little light, in the United States recently. The certification of the country of origin is not a new problem to U.S. Customs, it is something that we are familiar with under the Caribbean Basin Initiative (CBI) and the Generalized System of Preferences (GSP) programs. Failure to present the appropriate form will mean, in the case of Canadian goods, that the merchandise will be treated as dutiable.

The country of origin issues involving duty free goods have been addressed in the CBI and GSP legislation and most recently in the statute authorizing the U.S.-Israeli Free Trade Arrangement. It is likely that country of origin issues would become the most significant aspect of Customs administration under a U.S.-Canada free-trade agreement. And, it is not unreasonable to conclude that an agreement of any sort would track these previous arrangements, most probably the CBI and Israeli Arrangement because they depart from the GSP procedure in one very important way.

In the CBI and Israeli Arrangement it is possible for up to 15% of the value added requirement to be met by U.S. content. Section 402(a)(1) of the Tariff and Trade Act of 1984, which contains the rules of origin for the Israeli Agreement, states:

[F]or the reduction or elimination of any duty. . .

(A) (the) article must be the growth, product or manufacture of Israel or . . . a new or different article of commerce that has been grown, produced or manufactured in Israel; (and)

(C) the sum of

- (i) the cost of value of the material produced in Israel, plus
- (ii) the direct cost of processing operations performed in Israel, is not less than 35% of the appraised value of such article at the time it is entered. If the cost or value of materials produced in the customs territory of the United States is included...an amount not to exceed 15% of the appraised value of the article at the time it is entered that is attributed to such United States cost or value may be applied toward determining the percentage. . . .

What this means in practical terms is, given a product the entered value of which is 100, 15 can be U.S. value, 20 can be Israeli value and the rest can come from Taiwan—it will still qualify as an Israeli good (if, under Section 402(a)(1)(A), it is “a new or different article of commerce that has been grown, produced or manufactured in Israeli,” *i.e.*, if a substantial transformation has been made).

What is “substantial transformation”? The application of the term “substantial transformation” to the country of origin tests in these statutes may be dramatically affected by the textile rules of origin recently promulgated as regulations by the U.S. Customs service.³ If, in fact,

³ 43 Fed. Reg. 8,710 (March 5, 1985).

these rules are applied to all imported products, as some U.S. Customs officials have hinted, the test to determine whether products qualify for duty-free treatment under these statutes (and, presumably, under any U.S.-Canadian agreement) would be radically altered.

The rules provide that, in the case of an article which consists in whole or in part of materials which originated or were processed in another foreign country (or territory), the article must have been substantially transformed in the latter country to be deemed a product of that country. That is not new; that has always been the test and I believe that is the test in Canada as well. The problem is in the definition of "substantial transformation."

The new regulations provide the following specific criteria for the operations necessary to substantially transform an article to apply, *i.e.*, for it to become a "new or different article":

- (1) A new and different article of commerce will usually result from a manufacturing or processing operation if there is a change in:
 - (i) commercial designation or identity; or
 - (ii) fundamental character; or
 - (iii) commercial use.

But these are not new, either. This is the standard definition of "substantial transformation." What is new is the following:

- (2) In determining whether merchandise has been subjected to a substantial manufacturing or processing operation, the following will be considered:
 - (i) the physical change in the material or article as a result of the manufacturing or processing operations [in each foreign territory or country, or insular possession of the United States];
 - (ii) the time involved in the manufacturing or processing operations [. . .];
 - (iii) the complexity of the manufacturing or processing operations [. . .];
 - (iv) the level or degree of skill and/or technology required in the manufacturing or processing operations [. . .];
 - (v) the value added to the article or material in each foreign territory or country, or insular possession of the United States, compared to its value when imported into the United States.

These textile rules impose a new and additional precondition that must be met, in addition to the traditional test of "substantial transformation," before merchandise grown or produced in one country and processed in a second country can be considered as having its origin in the second country. In addition to the tests evolved through court interpretations of the regulations, which defined "substantial transformation" on the basis of whether the *product* has been transformed into a new and different article of commerce, the Customs Service proposes to add a requirement that the *process* by which an article is transformed into a different product must meet an independent standard of "substantiality."

This latter test, in simplistic terms, is a quantitative comparing of the costs and complexities of the manufacturing process to the value of the article at the time that it is first subjected to that process.

No one is quite certain what these new criteria will mean if and when they are applied to all products, and it is safe to anticipate a period of great uncertainty, which will be troublesome at a time when internationalization of industry has become commonplace. The establishment of a U.S.-Canada free-trade arrangement would unquestionably lead to the rationalization and restructuring of some industries. The uncertainty caused by the application of new country of origin rules by U.S. Customs will slow that process down whenever it involves the use of third country imports or very significant U.S. manufacturing processes.

It would be possible under these new rules for a Canadian manufacturing process which adds 20% or more to the value of U.S. produced imports, and which meets the substantial transformation test by producing a new and different product, to fail to meet the new substantial processing test. These goods then become dutiable. The solution, of course, is to make sure when this agreement is negotiated that U.S. content should not be considered dutiable under any circumstances.

The zeal of the Customs Service in seeking to analyze manufacturing and processing operations under the standards set forth in these regulations, and the extent to which the rest of the U.S. government allows Customs to exercise its discretion in the administration of these rules will, in large measure, determine whether the natural economic consequences of integration are to be at least partially frustrated.

IV. TRADE REMEDY LAWS

It is arguable that the most significant legal barriers to trade between the U.S. and Canada for most products are the trade remedy laws of the respective countries. Certainly, neither has been hesitant to take strong and frequent action to protect its domestic producers from "injurious" imports of one sort or another from its neighbor across the border. In the past twenty years, the U.S. has issued antidumping orders on thirteen Canadian products.⁴

⁴ The following have been the U.S. antidumping duty determinations against Canadian products:

- Carbon steel bars/Structural shapes (1964);
- Choline chloride (1984);
- Elemental sulphur (1972);
- Ice cream sandwich wafers (1971);
- Methyl alcohol (1978-81);
- Pig iron (1969);
- Potassium Chloride (1967);
- Racing plates (1973);
- Self-propelled bituminous paving equipment (1977);
- Steel jacks (1965);

In 1984, imports of these products, with most of the orders still in place, amounted to over \$900 million. Obviously, these imports would have been at a much higher level but for the threat of antidumping duties and the administrative burdens imposed by an outstanding dumping finding. Let me illustrate. In 1977 U.S. imports of methyl alcohol from Canada were about 54 thousand gallons. In 1978, imports were 51 thousand gallons. In 1979, there was a finding of dumping, with a margin of 59.2%. Imports that year dropped to 35 thousands gallons, to 21 thousand in 1980, and 11.7 thousand in 1981. The antidumping order was revoked in August, 1981, and imports the next year rose to over 45 thousand gallons.

Similarly, Canadian antidumping determinations have been important barriers to U.S. exports. In the past ten years Canada has imposed antidumping duties on twenty U.S. products.⁵ In 1984, U.S. exports of these products, again at presumably a much lower rate than would have otherwise been the case, totaled \$346 million, despite the continued existence of a majority of the dumping orders. I do not know what this seeming disparity in the level of affected trade in each country means. It may well mean that Canadian antidumping remedies are more effective than U.S. antidumping remedies.

The antidumping remedy laws in both countries address the practice of selling goods for export at prices which are below their home market price, or some arbitrary "foreign market value" if home market price is not useful for one of several reasons. These sales must cause material injury to an industry in the importing country.

Steel reinforcing bar (1963);

Sugar & Syrups (1980).

⁵ The following have been determinations under the Antidumping Act of Canada against the United States:

Artificial decorative brick (1975-79);

Gasoline powered chain saws (1975-80);

Gymnasium equipment (1976-80);

Textured/bulk polyester filament yarn (1976);

Disposable electrodes (1976);

National color acrylic fiber (1976-81);

Maleic anhydride (1977-82);

Slate-bed billiard tables (1977);

Integral induction motors (1978);

Polypropylene, homopolymer and copolymer resins (1978);

Radioactive diagnostic reagents (1978);

Custom wheel rims (1979);

Citric acid & sodium citrate (1979);

Vehicle washing equipment (1980);

Organic peroxide (1980);

Multi-link key telephone system intercoms (1980);

Bottoming materials (1982);

Band saw blades (1982);

Pipe & tubing (1983);

High voltage insulators (1984).

Other U.S. trade remedy statutes which have had significant effects on trade (although insofar as U.S.-Canadian trade is concerned, none of the others have in the past matched the antidumping statutes) include: the countervailing duty law (CVD), which is used to offset foreign subsidy practices causing material injury; Section 301, which can be used to retaliate against "unjustifiable, unreasonable or discriminatory trade practices by foreign countries"; and Section 201, the so-called "Escape Clause" or "Safeguard Provision" of U.S. law, which can be used to provide temporary relief to U.S. industries suffering "serious injury," a "substantial cause" of which is increased imports of the article under scrutiny. There are also provisions of law concerning threats to national security and violations of intellectual property rights, but they have not, in the past, proved to be major impediments to Canadian exports.

In recent times, there have been four countervailing duty determinations against Canadian products, all of which have been revoked.⁶ In addition, there is now pending a U.S. investigation concerning live swine and pork products, which involves over \$400 million in 1984 imports from Canada into the U.S. While CVD investigations such as this one can effect significant amounts of trade, they generate even more international friction because of the nature of the inquiry they involve and their threat to whole sectors and industries.

In the pork case, the U.S. Commerce Department has preliminarily determined that Canadian price support programs, including price stabilization payments under the Agricultural Stabilization Act, are subsidies. These programs are applied to a number of other agricultural products in Canada. Over the years, U.S. investigations of Canadian products have looked at: regional development assistance to industries provided by both federal and provincial agencies; fishing boat construction loans and programs; the operation of the Canadian national railroads; and the prices charged to private lumber companies for stumpage owned by the Canadian government, to name just a few.

Obviously when fundamental economic and social programs such as these are being questioned by a foreign government the potential for cross-border acrimony is extremely high and not necessarily related to the amount of trade involved. Furthermore, governments rightly fear that a finding that one or more programs are "subsidies" will open a whole range of exported products, which benefit from the same programs, to countervailing action. One has only to look at what has happened to U.S. trade with Brazil, which has been very heavily impacted by a series of countervailing duty laws based upon the Brazilian subsidies practices.

⁶ These have been:

Fish (1977-80);

Glass beads (1975-81);

Optic liquid sensing systems (1978-81);

Michelin X radial steel belted tires (1975-82).

I am not maintaining that those were unjustifiable determinations, but it does illustrate the point. Once a program or a series of programs which affect a large area of trade have been exposed, American petitioners are quick to seize upon the advantage. I believe that attempts at an international understanding on subsidies and countervailing duties (which were a major part of the Tokyo Round) leave much to be desired.

The U.S. continues to be the only major trading nation to make extensive use of its countervailing duty law, with little international discipline on how it uses it. While the addition of a material injury requirement to the U.S. law, as a result of the Tokyo Round, has defused some criticism, the fact remains that of all the world's trading nations, the U.S. (at least conceptually) is the least interventionist. As a result, the potential for conflict over foreign government assistance to industry remains very high.

As regards the safeguard provision, Section 201, it has been used rather sparingly over the years, because it gives the President complete discretion, and because exporting countries can demand compensation for measures taken under this provision to contain imports, unlike actions taken under the GATT for dumping or CVD, where no compensation or retaliation is possible.

Restraints have been imposed by the President eleven times over the past ten years. The most troublesome to Canada has been the quantitative restrictions on specialty steel, imposed in 1983, resulting from an escape clause action. These restrictions have remained a source of irritation since that time. Orderly marketing agreements however, outside a formal action under the law, are becoming more common. For example, export restraints on Japanese autos, and carbon steel products from eight countries, have been negotiated outside the processes of 201.

There is a growing tendency in U.S. trade remedy administration to blur the distinction between "fair" and "unfair" trade practices. There is the case of the automobile restraints, for example. There was a 201 finding, but the investigation by the ITC resulted in a finding of no injury—and the President went and negotiated voluntary restraint arrangements with the Japanese. In the 1984 case of carbon steel, there was an ITC finding of injury, but the President decided not to apply it. He refused to agree with the ITC finding and then went and negotiated voluntary restraint arrangements.

In 1982, in a case well known in Canada, concerning specialty steel, there was a very strange series of events. Originally, an action was filed under section 301, which is an unfair trade practice remedy. After a year had passed, the Executive branch decided it did not want to take action under 301 and sent the matter over to the ITC saying "this really is not an unfair trade practice case." The ITC found injury under 201, the safeguard provision, and then the President, in implementing the relief under 201, made it clear that he was doing so based upon unfair trade practices. The whole distinction between the fair and unfair trade stat-

utes has become very blurred. It is almost inevitable now that, when a petitioner files a section 201 fair trade practice case, the first thing he does is allege unfair trade practices.

Section 301, as amended, provides the President with more or less unlimited authority to retaliate against actions by foreign governments which restrict or burden U.S. commerce, including services. He may take action against the services or products of a specific country, or on a non-discriminatory basis. Fortunately, 301 action has remained discretionary with the President and, as a result, thus far actions have been few and far between.

There have been four cases in recent years involving Canada. One has been terminated (a 1976 case involving eggs), two are pending (one on front-end loaders and one on soybeans, both initiated in 1982), and one resulted in the only retaliation under section 301 that has ever been taken against any country. This was the so-called "border broadcasting case," which resulted in the U.S. Congress adopting legislation that mirrors the Canadian legislation (which started the whole thing in the first place).

Section 403 of the Tariff and Trade Act of 1984, which authorized the Israeli arrangement and which would presumably be the authority for a U.S.-Canadian agreement, specifically provides that the section 201 process would continue to apply. The President may suspend the reduction or elimination of the duty as part of section 201 Escape Clause process. Further, the U.S. International Trade Commission shall specifically address the issue of whether such reductions or eliminations have contributed to any serious injury suffered by a domestic industry.

Section 404 provides, also, for "fast-track" relief when perishable products (defined by section 404(e)) are involved. Under this procedure, duty reductions provided through an agreement can be withdrawn by the President within twenty-one days of the filing of the petition. Furthermore, this provision of law specifically says that the authority is not to be used by the President to negotiate any modification in the trade remedy laws in the United States. Although this provision applies only to the Israeli Agreement, it is safe to say that something similar would be in the minds of the Congress when it came to U.S.-Canadian arrangements.

The conventional wisdom is that it will not be possible to obtain major revisions in these U.S. statutes as part of any U.S.-Canada free-trade agreements (or reciprocally, in their Canadian counterparts). I believed the attempt should be made, however, given the increasing reliance of the U.S. on these measures, which indicates a trend to legalistic or procedural protectionism (what has been termed contingency protectionism).

The evolution of the unfair trade laws, in 1974, 1979, and to some degree in 1984, has made them more and more protectionist and less and less discretionary within a particular branch of the government. Logi-

cally, some modification is called for. The differing views of the U.S. and Canada regarding government participation in commercial enterprises would seem to doom any attempt to redefine the meaning of "subsidy" for CVD purposes—and the Escape Clause and the 301 provisions are currently viewed as sacrosanct. It would, however, be worthwhile with regard to CVD to attempt to negotiate an agreed list of practices so that those which both governments engage in would not be treated as subsidies.

A strong argument can be made on economic terms that the application of antidumping duties, after the creation of a "North American market" by the elimination of duties, makes no sense, and that the integration of U.S. and Canadian industries must be considered in *every* action. Given the proximity of the principal markets in the two countries, price discrimination practiced by eastern Canadian producers in the eastern part of the U.S. would probably be less troublesome than similar practices by U.S. producers from California. With the non-taxed flow of goods across the border a producer in Toronto who dumps in Detroit would soon be competing in his home market with his own lower priced exports. To the degree that the Canadian (U.S.) manufacturer behaves as a domestic producer in the U.S. (Canadian) market, he should be considered as such in determining whether his products are injurious.

It is unrealistic to expect Congress to agree that the Antidumping Act, or any of these other statutes, should not apply to Canadian goods. However, it might be possible to agree to modifications in the material injury tests of the antidumping and CVD laws. Congress should require that the ITC explore, in the initial stages of the investigation, the effects of Canadian and U.S. sales on this binational marketplace; and give consideration to geographic factors to a far greater extent than is now their practice. If producers from Ontario and New England are "dumping" in the U.S. southeast, and the Canadians are acting no differently than American producers, they ought not to be penalized. The industry in the U.S. should be defined as including Canadian producers who behave like domestic producers, and U.S. producers should be treated similarly in Canada.

Escape clause and 301 actions are largely discretionary, and any actions by the President can be tailored to recognize the new economic relationship between the U.S. and Canada, although obviously it would be desirable if the statutes could be amended so as to take account of economic and commercial integration. For instance, in section 201 cases, a requirement that Canadian imports be an identifiable cause of serious injury might be added, along with an instruction to the ITC to determine whether a truly integrated North American industry exists. If it does, Canadian goods should be excluded from any relief.

V. GOVERNMENT PROCUREMENT

The Buy American Act,⁷ as implemented by Executive Orders No. 10582 and No. 11051, provides for a "preference" of 6% for U.S. products, when purchased by U.S. federal agencies. That is, foreign products must be at least 6% cheaper, on a duty paid basis, than the U.S. product, in order to obtain the contract. A 12% preference is generally applied to bids by small or minority owned businesses (or those located in labor surplus areas, as designated by the Secretary of Labor). The Department of Defense uses a 50% differential for certain of its purchases.

The Surface Transportation Act of 1982⁸ requires that, for federally funded highway and urban mass transportation projects costing over \$500 thousand, only domestic materials can be used, unless costs are increased by more than 10% by doing so or if U.S. materials are unavailable. Various Defense Department appropriation acts prohibit the purchase of certain specific non-U.S. items by that agency. These include hand-tools, articles of cotton or wool clothing, food products, and silk yarn for cartridge cloth. Other statutes prohibit the purchase of foreign built naval vessels.

There are certain exceptions to these prohibitions. The implementation of the GATT Government Procurement Code in the Trade Agreements Act of 1979⁹ authorized the President to waive, on a reciprocal basis, U.S. laws limiting procurement with respect to products from countries which are parties to the Code. Furthermore, the Buy American Act does not apply to certain products purchased by the Dept. of Defense, NASA, or the Coast Guard, if they are from approved Canadian sources.

Total federal purchases of goods in 1984 were \$85.5 billion. Based on a study of purchases for 1979,¹⁰ it appears that in 1984 about \$17 billion of non-strategic goods purchased were subject to government procurement restrictions. Obviously, these laws remain significant barriers to the U.S. market, even for Canadian producers who enjoy a preferential status *vis-a-vis* other foreign suppliers.

However, it seems that a precedent already exists for the preferential treatment of Canada. Canada has been granted special status under U.S. procurement statutes, and there is precedent for seeking to expand that status to one of total exclusion, on a reciprocal basis, in the context of a comprehensive free-trade arrangement. Presumably, product specific exclusion could be considered if sectoral integration were pursued. Of course, these concessions will not be easily extracted from the United

⁷ The Buy-American Act, 41 U.S.C. §10 (1982).

⁸ Surface Transportation Assistance Act of 1982, 23 U.S.C. §101 (1982), 49 U.S.C.S. §1602 (Law Co-op. 1985).

⁹ Trade Agreements Act of 1979, 19 U.S.C.S. §160 (Law. Co-op. 1983).

¹⁰ See P. Morici & L. Megna, *U.S. Economic Policies Affecting Industrial Trade: A Quantitative Assessment*, NATIONAL PLANNING ASSOCIATION, REPORT NO. 200 (1983).

States. There is also the problem with local government procurement which does not seem easily resolvable.

VI. OTHER PERTINENT STATUTES

There are a myriad of other statutes which affect the importation of certain products. Some of these can be extremely significant. For example, section 207 of the Trade and Tariff Act of 1984, which establishes certain country of origin marking requirements for pipes and pipe fittings, requires that the marking be by means of "die stamping, cast-in-mold lettering, etching or engraving." This requirement has caused a major flap in U.S. relations with several trading partners, including Canada, because of claims that marking the product in this way renders it unuseable for some purposes. Efforts have been made in the Congress to have the statute amended.

Many of these laws are directed at agricultural products. The Meat Import Act of 1979¹¹ requires the imposition of quotas, or the negotiation of voluntary restraint arrangements (VRA) with major supplying countries. In 1982 and 1983, VRAs were in fact negotiated with Australia, New Zealand and Canada. Sugar quotas are imposed under Presidential proclamation as part of the U.S. implementation of the Kennedy Round Agreement on Sugar.

In addition, quotas and/or fees may be imposed under section 22 of the Agricultural Adjustment Act of 1938¹² in order to prevent imports which "render or tend to render ineffective, or materially interfere with" any U.S. Department of Agriculture price support or similar program or "reduce substantially the amount of any product processed in the United States from any agricultural commodity or product" which is the subject of such a program. In recent years, import quotas and/or fees have been placed on cotton, certain dairy products, peanuts, and sugar as a result of section 22 actions.

The Agricultural Marketing Act of 1937¹³ provides for marketing orders issued by U.S. producers through the Dept. of Agriculture. It regulates the quality and quantity of particular commodities which can be marketed regionally in the U.S. during specific time periods. Commodities imported from Canada which are subject to these orders (\$48.7 million, in 1984) include onions, potatoes, tomatoes, grapes and raisins.

There are a number of other statutes which are intended to protect the consumer's health and welfare from unsanitary or dangerous imports. There are labeling requirements, intended to provide the consumer with information about the product. And, there are inspection requirements for equipment and automotive products, which must meet U.S. standards.

¹¹ Meat Import Act of 1979, 19 U.S.C.S. §1202 (Law Co-op. 1985).

¹² Agricultural Adjustment Act of 1938, 7 U.S.C. §1281 (1982).

¹³ Agricultural Marketing Act of 1937, 7 U.S.C.S. §601 (Law Co-op. 1985).

VII. CONCLUSION

Many of these federal statutes are not going to be affected by the negotiation of a free-trade arrangement, whether sectoral or comprehensive. However, several ought to be, if the two countries are to move toward real industrial integration, rather than simply tariff cutting. It can be argued that, for the most part, tariffs are not particularly significant anyway. 75% of the trade between the U.S. and Canada is (or will be by 1987) duty free and duties on the remainder are relatively insignificant in a flexible exchange rate world. Of course, some high tariffs remain on import sensitive products and these do have commercial effect.

Certainly, it would be a major step in the direction of true integration if each party could agree to granting the other special consideration in determining whether to impose additional tariffs or quotas under certain of these laws. Modifications could be made in the antidumping and countervailing duty laws. A bilateral agreement to reduce the scope of the trade remedy laws of the United States might be the opening wedge in an effort to have them reconsidered globally and help reverse the trend toward legalistic protectionism, so prevalent in the United States and to some degree in Canada.

It remains to be seen whether sufficient political will exists on both sides of the border to turn any agreement into more than a tariff cutting exercise.

Thank you.