PANEL DISCUSSION: REGULATION OF FOREIGN INVESTMENT AND TRADE

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PROF. BARCELÓ: We will start with a discussion of Mr. Spence's paper on the Foreign Investment Review Act (FIRA) of Canada. The two panelists on my left, Professor Bischel of the Syracuse College of Law, and Mr. William Connell, Assistant General Counsel in the Legal Department of the Irving Trust Company, will address their remarks to Mr. Spence's paper, after which Mr. Spence may choose to reply. Thereafter, I have some comments to make about Mr. Gadbaw's paper on the trade law affecting U.S.-Canadian trade, after which Mr. Gadbaw may wish to make some comments. Then we'll open the discussion to the audience. Let me turn then to Mr. Connell for comments on Mr. Spence's paper.

MR. CONNELL: Thank you, Mr. Chairman. If my comments aren't too specialized, I thought I would try to give you the structure of the legal department of an international bank, particularly what we call a wholesale bank, as opposed to a retail bank. We deal mainly with corporations, especially banks, in specialized international areas. We have a nine-man legal department, and we do specialize. For instance, I specialize in Irving Trust's international investments, and in its acquisitions abroad. About two years ago, the chairman of the bank expressed an interest in expanding into Canada, and he wanted to go in as quickly and as expeditiously as possible. Of course, the chairman of any major bank or any major company hires his lawyers, and they go out and find out how it can be done. The chairman was not aware of, and I'll admit I was not aware of, the Foreign Investment Review Act. But we soon came upon it, and we realized that after many years of unrestricted opera-

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tions in Canada, things were changing. I think it should be noted that 200 U.S. banks operate in Canada, perhaps not all strictly as banks, but operating in Canada just the same, be it in a leasing company operation, merchant banking, finance companies, or other categories of activity. Canada has been very generous to the United States in that regard.

In the United States, on the other hand, and particularly in New York, branches and agencies of Canadian banks are under pretty tight regulation and supervision. There is not, however, national regulation of foreign banks in the United States.

So, with due deference to Canada's generosity over the years, we thought we would just plow ahead and invest, and set up a finance company in Ontario. We quickly found that we had to consider the impending Foreign Investment Review Act, and we didn't feel we could implement our plans early enough to establish this de novo, from the ground up, operation. We felt we couldn't establish it without going through the Review Board or the review process. After some consideration, we found one aspect of the law that was most vague. I refer to the "substantial benefit" test: will the proposed investment result in tangible benefits to the Canadian economy. We could not find any criteria or guidelines for further defining the test.

There were two legal issues that we found most interesting, and I might ask Jim Spence to comment on these in a little more depth. First were the comments on "expanding the business." I think the law is not quite clear on whether or not a business, once established, would have to present a new product line, or expanded activity, to the Board for review. Second, we found enough vagaries there, frankly Jim, so that we were very disappointed; we didn't think the tests were quite as explicit as we would have liked to have seen.

Another point, which didn't relate to Irving Trust as much, was this concept, which we found to be unique, best illustrated by an example: suppose General Motors decides to sell the shares of a company that it owns to IBM, and the company that GM sells has an affiliate or subsidiary in Canada. That means that the entire acquisition program, which would really be a U.S. acquisition, GM-IBM, would be subject to review in Canada. We found this ultimate form of long-arm jurisdiction to be most interesting and perplexing.

Those are the two areas of the law, and I'll go back to the first and ask if you've had any specific problems lately on the expansion into new areas. Have you developed any further tests, or have there

been any rumblings in Canada challenging your apparent authority to review expanded operations and new products, yet with no substantial guidelines, or are you developing new guidelines?

MR. SPENCE: On that point, guidelines were issued on the question of what constitutes a related business, and I can go back over the grounds for this. The rule in the Act relating to new businesses is that where a new business is established by foreign investors, that business is reviewable under the Act, unless it is related to a business which the foreign investor already has in Canada.[1] The question then of course becomes: on what basis can you establish relatedness between two businesses? The Act doesn't define this, and guidelines were issued to deal with this problem. That was done, first of all, by way of preliminary guidelines which were very brief. Four or five principles were itemized, and it was proposed that they be formulated in greater detail. Those more extensive guidelines were in fact published at the time that the second phase of the Act, dealing with new businesses, was announced. I believe the date of their publication was July 18 of last summer [1975].

MR. CONNELL: So, it wasn't in October, it was before October?

MR. SPENCE: They were published in advance, so that people could familiarize themselves with the rules before the actual effective date. Those guidelines are in effect now.

The comments you made about problems of vagueness, with the concept of relatedness, may still apply, even though we have replaced one page of text with something like seven or eight. What we've tried to do is to elaborate on each of the principles that I mentioned briefly, to give some examples of the kinds of things that we think are contemplated by the principles, and also to indicate some quantitative relationships between the existing business and the new business, which assist in assuring that the businesses are really related in a quantitative way.

To take an extreme example, we are faced with the problem of the investor who goes from a peanut stand to a national confectionary enterprise. They may be related in terms of product, but the scale of the operations may be so absolutely disproportionate that to the ordinary observer it's hard to believe that those are really related undertakings. So we had to try to devise some quantitative relationships, but in a very rough and general way. We weren't trying to lock people into exact numbers, so, for example, we stated

1. Foreign Investment Review Act, Can. Stat. c. 46, § 8(2) (1973).

that the new operation should ordinarily not be more than twice the size of the established operation, and the rule was stated in such rough terms that people could see that it was only kind of a pointer, and not an exact restriction. Even with the more detailed guidelines that we have, there are areas of vagueness within them. We felt that it was important to leave those areas of vagueness to avoid putting an inappropriate and unduly restrictive test upon business expansion. The general comment that has been made about the guidelines as they were finally published has been that they are relatively open guidelines. They have been commended by some sources for that, and they have been criticized by other sources.

MR. CONNELL: Jim, could I for a moment focus on an issue that came up when we did think of going into Ontario, which may be of interest to the lawyers in our federal system? Our lawyer in Ontario said, "Well, you know there is an argument that this is a federal law which is being administered, but we are the provinces, with some of the old States' rights arguments, and we think that this whole Act may be unconstitutional because 'acquisition of property' should be left, perhaps by Canadian precedent, to provincial determination. It is an item that the federal government would be preempted or excluded from legislating about." Now that was bandied around, I recall, in a meeting. Have there been similar arguments raised in the provinces, and do they have any substance?

MR. SPENCE: At least one provincial Prime Minister, Mr. Hatfield of New Brunswick, has said, in effect, that if we try to lay our hands on any deal that's going on in New Brunswick, he'll have us in the Supreme Court of Canada in a flash. I don't think there has been occasion to join issue with him yet, but I think that is the position he has consistently taken.

The provincial argument, I believe, is essentially that under the British North America Act (the Canadian constitution) matters of property and civil rights are within the exclusive jurisdiction of the provinces,[2] and accordingly, the federal government is trenching upon provincial jurisdiction with this legislation. The argument from the federal point of view is likely to be founded on two principles. First of all, the British North America Act contemplates that the federal government may legislate for "the peace, order, and good government" of the country.[3] That is a power which has been exer-

2. British North America Act of 1867, 30 & 31 Vict., c. 3, § 92(13).

3. *Id.* § 91. For the purposes of this discussion, the following language of Section 91 is of interest:

cised on occasion, and which has had a rather stormy career in the Supreme Court. Clearly, the legislators or the draftsmen were at some pains to avail themselves of the potential argument under that clause, because the stated purpose of the Act indicates that the difficulties created by foreign investment are considered to be a matter of national concern. I see that as an effort to move towards, or bootstrap into, a "peace, order, and good government" argument. As well, I think there is a clear federal power over matters concerning aliens, and there would be an argument that investment subject to foreign control could come within the power to legislate in regard to aliens.

MR. CONNELL: Wasn't the Canada Corporations Act[4] restructured about two years ago, so that there is now a requirement that a majority or even all of the directors of a company in Canada be Canadian citizens? This is a subject that also came to our attention. We said, "Where are we going to get the Canadian citizens to be our employees, to be the directors or the managers of our business in Ontario?" We went through some last minute deliberations and decided that a voting trust, with directors who would be citizens of Canada, could be used. Is this a new requirement in your law?

MR. SPENCE: Every province has its own corporations act which deals with the incorporation of companies within that jurisdiction and prescribes rules, such as this kind of rule.[5] This kind of rule is fairly novel in each of the provinces. As well, the federal government has legislation enabling the incorporation of companies under the federal jurisdiction.[6] It also has requirements for Canadian membership on the board of directors.[7] I don't think I can give you a rundown on each of the provinces, but I think that the direction in which all of the provinces and the federal government have been moving in their legislation is to require that a majority of the board of directors be Canadians, and in the case of public corporations, that the Canadians be outsiders.[8]

It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada . . . . [T]he exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next herein-after enumerated; that is to say,—. . . . 2. The regulation of trade and commerce.

4. Canada Corporations Act, CAN. REV. STAT. c. C-32 (1970).
5. *See, e.g.*, Ontario Business Corporations Act, ONT. REV. STAT. c. 53, § 3 (1970).
6. Canada Corporations Act, CAN. REV. STAT. c. C-32, §§ 5, 7 (1970).
7. Canada Business Corporations Act, Can. Stat. c. 33, § 100(3) (1975).
8. *Id.* § 97(2).

As well, the Canadian legislation, both federal and provincial, has been moving in the direction of taking more seriously the responsibility of directors. It used to be said that so long as you stayed away, you couldn't be held liable. It looks now as if you'd better be there, and if you don't like what's going on you'd better say so. You can say it politely, but you'd better speak up in some way. I suppose this parallel development of a more serious responsibility cast upon the directors rather compounds the difficulty. I think that lawyers in private practice in Canada are well aware of the difficulty that foreign investors encounter with this. There is a real difficulty in finding appropriate people to have on the board of directors—qualified, experienced people who can be relied upon to serve the interests of the company.

QUESTION (Prof. Goldie): I'd like to ask Mr. Spence a question. The constitutionality issue is very interesting. It seems to me that the older interpretation of Section 92 of the British North America Act, the property and civil rights clause, lends more weight to retaining a residual power in the provinces than in the nation. For nearly a century, the Judicial Committee of the Privy Council ignored the power of general legislation—"peace, order, and good government"—and looked to the example clause in the grant to the nation.[9] Have things changed since the Privy Council appeal was abolished,[10] so that there is now seen what MacDonald and the draftsmen really wanted, a powerful central authority, not a vitiated one, as reinterpreted by the Judicial Committee? Second, have you thought about litigation from your States' righters, on the East Coast or the West, and I would have thought that the West Coast would be more independent-minded even than the East Coast, and that you might have a rather uncomfortable case postured by your opponent plaintiffs? Why not go into the Supreme Court for an advisory opinion and choose your own grounds?

MR. SPENCE: On the first point, I don't think I could say that things have really changed since appeals to the Judicial Committee were abolished, which was in 1949. I suppose it might be more appropriate to say simply that where there's life, there's hope, and

9. The example clause refers to the following language in Section 91 of the British North America Act: "[T]he exclusive legislative authority of the Parliament in Canada extends to all matters coming within the [31] classes of subjects next herein-after enumerated . . . ."

10. In civil matters, Privy Council appeals were abolished by the Supreme Court Act 1949, CAN. REV. STAT. c. S-19, §§ 3, 54(2) (1970).

jurisprudence can be an evolving thing. I do not know how clear and definite a position was taken on the constitutional matter at the time the Act was introduced. As I say, I perceive there to be an effort to take advantage of whatever argument is available on the "peace, order, and good government" power. Secondly, on the question of choosing your grounds, I'll take the suggestion back with me.

MR. CONNELL: Could I jump in here for a moment? Although I'm perhaps eight years behind on U.S. constitutional law and standing, I wonder if in Canada one can get what one might call an advisory opinion from the Supreme Court?

MR. SPENCE: I thought you couldn't, but the federal government is presently making an application to the Supreme Court of Canada for a decision on whether the current anti-inflation program in Canada is constitutional.[11] There were indications that various interest groups might challenge the constitutionality of that program, and it was felt that that possibility was such an important aspect of the effectiveness of the program that the government should move as quickly as possible to bring the matter into the Supreme Court for a resolution. I believe that's underway now. I'm looking at Mr. Clark. I don't know whether he wants to correct what I have said. I think I've got it right; I'm only relying on what I've read in the newspapers, so you never know.

MR. CLARK: You are right. It's not a traditional means of proceeding in Canada, but there certainly exists the possibility of seeking advisory opinions, and I would suspect that we're going to see more of that approach in the future.

PROF. BARCELÓ: I think it would be appropriate now for us to turn to Professor Bischel for his comments on the problems posed by the Foreign Investment Review Act.

PROF. BISCHEL: Thank you, John. Being primarily a tax man, instead of an investment professor as such, let me see if I can't interrelate some of the tax aspects of this and ask you a few questions with respect to this interrelationship. Along with FIRA, or I should say perhaps prior to it in 1972 and again in 1973, the Canadian tax system was changed rather radically, especially with regard to the operation of multinational corporations which were based in

11. Imposition of the anti-inflation program was subsequently held to be constitutional on the grounds that "peace, order, and good government" justified this intrusion into an area normally reserved for the provinces, Reference re Anti-Inflation Act, [1976] 68 D.L.R.3d 452.

Canada.[12] From the not-too-distant perspective of the United States, my view of the Canadian tax reform was always something like that of the attorney who wanted to see that his son was well-educated. He sent him abroad to learn British diplomacy, American know-how, and French cuisine. Much to his dismay, his son came back, and he had learned American diplomacy, French know-how, and British cuisine.

MR. SPENCE: May I interject. You know there is a variation on that, as to what Canada expected and what it got. At the outset, Canada might have expected to have British-style government, French culture, and American know-how; what it got was French government, British know-how, and American culture.

PROF. BISCHEL: With respect to the foreign taxing system in Canada, what the Canadians did in 1972 was to inject a concept, an anachronism known as FAPI, which stands for Foreign Accrual Property Income, which, with subsequent modifications, was more or less a counterpart to Subpart F in our own Internal Revenue Code.[13] It operated a bit differently in several respects, and one of the things that created a problem was that it imputed income back to a Canadian-based corporation, regardless of whether or not a dividend distribution had occurred, in several rather unusual types of circumstances.[14]

For instance, assume you've set up a foreign-based licensing corporation, which is not an unusual thing to do, and further assume you put it in the Netherlands Antilles. The licensing company is of course owned by a Canadian parent corporation. Let's also assume a licensing subsidiary has purchased patent or know-how rights from an Australian subsidiary and has licensed them to a British subsidiary. Under the original 1972 Tax Act, that would have triggered, because of the definition of foreign accrual property income,[15] a dividend to the Canadian corporation, regardless of whether or not a dividend was in fact distributed to it.

Another example with respect to intercorporate dividends is the situation in which Canada does not have a tax treaty with another

12. An Act to Amend the Income Tax Act, Can. Stat. c. 63, §§ 90-95, 115-16, 133-34, 190-91, 212-19 (1972); An Act to Amend the Income Tax Act, Can. Stat. c. 14, §§ 29, 37-38, 42-43, 68 (1973); An Act to Amend the Income Tax Act (No. 3), Can. Stat. c. 30, §§ 13, 25-27 (1973).

13. An Act to Amend the Income Tax Act, Can. Stat. c. 63, § 95 (1972).

14. *Id.*

15. *Id.*

nation, such as Switzerland. Let's assume you had an operating company in Switzerland, once again owned by a Canadian corporation. The withholding tax on that type of operation would be 30 percent, if in fact you were going to pay a dividend directly to the Canadian corporation.[16] So it was not unusual to run the dividend indirectly to Canada through a Dutch holding company for instance, because Canada and the Netherlands have a treaty exempting the dividend from withholding tax,[17] and Switzerland and the Netherlands have a similar treaty.[18] As a matter of fact, what you could have is a dividend straight on through to the Canadian corporation with no withholding tax at all. The FAPI concept, in essence, said as soon as you pay the dividend from the Swiss corporation to the Dutch holding company, you had a deemed dividend distribution to the Canadian corporation. This created quite a problem as well, with respect to dividend deferral. The net effect of all of this was that after the 1972 Tax Act was passed, in the two years before these particular provisions were to become effective, which I believe was in 1975, a number of multinational corporations took a very close look at Canada as a base of operations and decided to pack their bags, or certainly not to expand operations. As a consequence of that, in 1975, the Canadian tax law was changed once again to remove some of these provisions, especially the two I spoke about, and one or two more with regard to insurance companies.[19]

What I'm wondering is whether, in light of actual pressure with respect to the Foreign Investment Review Act, the Canadian government finds that there is a significant decrease in investment in Canada, and whether there will be some serious reconsideration of the features which discourage investment and thereby depress certain areas in the Canadian economy? In other words, will similar pressure perhaps be successful in that regard?

MR. SPENCE: I think your question really is whether the Foreign Investment Review Act is subject to the same kinds of pressures as have been brought to bear on taxes. My impression is that the

16. *Id.* §§ 212, 215.

17. Convention between the Netherlands and Canada for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, *done* April 2, 1957, arts. IV(5), VII, 285 U.N.T.S. 193 (effective Dec. 19, 1957).

18. Agreement between the Netherlands and Switzerland for the Avoidance of Double Taxation with respect to Taxes on Income and Property, *done* Nov. 12, 1951, art. 9, ad art. 9, 126 U.N.T.S. 173 (effective Jan. 9, 1952).

19. An Act to Amend the Statute Law Relating to Income Tax, Can. Stat. c. 26, § 59 (1975).

thing seems to be there and in place, and in terms of party politics it doesn't seem to be that much of an issue. I say that simply as a person reading newspapers, and looking to see what the opposition says about the Act. My impression at the time of the recent leadership convention of Canada's opposition, the Conservative Party, was that for most of the candidates for leadership of that party, the Foreign Investment Review Act was an accepted thing. There were certain comments made about how the administration of the Act might in various respects be refined, improved, or taken in certain directions, but, on the whole, my impression was that the Act was accepted by them. In that sense, it seems to me to have been removed from party political concerns in Canada. A different area is what foreign reactions are to the Act, and Mr. Clark will now discuss those reactions to the Act.

MR. CLARK: I would just like to add a footnote to what Mr. Spence has said. In associating myself with his remarks, I think the key element is the significance to Canada. If the situation you postulated were to develop, where in fact the flow of investment capital were to dry up, this would obviously cause a ripple effect and create problems in Canada. Clearly then the question would be asked whether the opening of the door to wider foreign investment would benefit Canada, and, if this were the case, then it would be allowed. So obviously, the trigger mechanism is already built in to take that kind of situation into account.

Second, I think it is fair to say that the whole framework and scope of operation of the Foreign Investment Review Act is something which is kept in constant review. I would think that after two or three years of operation, and certainly after five years of operation, the reports that are being put in by Mr. Spence's agency and interested parties, and the general knowledge accumulated in public, will be taken into account in deciding whether in fact some type of amendment or additional rules or regulations, or a relaxation of some of the existing rules or regulations should be considered.

MR. SPENCE: I agree with all of that. At the time that Phase 2 was announced, Mr. Gillespie, then the Minister of Industry, Trade and Commerce, said that it was quite apparent, and I suspect his words were carefully chosen, that, "We shall continue to need a great deal more investment in Canada by our friends abroad if we are to develop our full potential, as this government is determined to do."[20]

20. 119 PARL. DEB., H.C. 7712 (Can. 1975) (remarks of Minister Gillespie).

PROF. BARCELÓ: I don't wish to suggest that we have exhausted the topic of the Foreign Investment Review Act, but so that we get some balance in our discussion, I have the pleasure of inviting myself to make some remarks about Mr. Gadbaw's paper. What I would like to do is to take the opportunity to stake out a position of my own on some of the laws he has discussed, and see if I can persuade him to agree with me. Mr. Gadbaw has given us a very good review of the international and national laws that apply to trade between Canada and the United States, and in fact, with respect to all the trade of the United States, as well as that of Canada in some respects. The U.S. laws that he has described raise an issue that seems to me to be a major and important one. He's mentioned it himself: the issue of the consistency between a commitment to a liberal trade policy of the United States on the one hand, and of Canada for that matter since both have the same commitment, and the set of laws that he has described which have the effect of allowing domestic producers to protect themselves from import competition. Is there consistency between this commitment and these laws?

I would like to divide the laws themselves into two parts. First, those which apply to all imports into a country, and, in particular, the escape clause;[21] and second, those which apply only against what have been called unfair trade practice laws, the most important ones being the antidumping[22] and countervailing duties statutes.[23] These are laws that exist in roughly the same pattern in Canada and the United States, so the issue that I am posing seems to me to apply to both countries.

I'd like to address my remarks primarily to the problem of the unfair trade practice laws, since I think the issue of consistency between these laws and a commitment to liberal trade policy is most difficult and most sharply drawn. The problem becomes essentially one of defining what we mean by "unfair." If that definition is not drawn carefully, there is a danger that these laws may be used to oppose imports into a country which commits no other sin than to

21. Trade Act of 1974, § 201, 19 U.S.C. § 2251 (Supp. IV, 1974), *formerly* Trade Expansion Act of 1962, Pub. L. No. 87-794, § 301, 76 Stat. 883.

22. Trade Act of 1974, § 321, 19 U.S.C. §§ 160, 162-64, 170a(3) (Supp. IV, 1974), *amending* Antidumping Act of 1921, §§ 201-12, 406-07, 19 U.S.C. §§ 160-73 (1970).

23. Trade Act of 1974, § 331, 19 U.S.C. §§ 1303, 1516 (Supp. IV, 1974), *amending* Tariff Act of 1930, §§ 303, 516, 19 U.S.C. §§ 1303, 1516 (1970).

compete effectively with domestic production. My position, and in a sense my complaint with the Trade Act of 1974, the American legislation, is not with the changes that it has made. Rather, my major complaint is with respect to the definitional changes that the Act did not bring about in the law, changes I believe were necessary. Let me take up these laws in turn, starting with the antidumping laws.

We've been told that there is pending in the United States an antidumping investigation against automobiles which are imported into the United States from Europe, Japan, and Canada.[24] Now that case will be successful if two determinations are made: first, that the price for which those automobiles are being sold in the United States is lower than the price they are sold for at home, and second, if it is determined that these low-priced imports are injurious to a domestic industry in the United States.[25] It's this second test, the injury test, that seems to me to be critical on this issue of consistency between liberal trade policy and the antidumping laws. The International Trade Commission of the United States, formerly the Tariff Commission, has in the past rendered a number of decisions in which it found "injury" on the basis of very minor market penetration of dumped imports, as low in some cases as one percent, and the most recent cases seem to me to find injury attributable to dumped goods where there is a very tenuous causal connection between the dumped goods and the injury experienced by domestic industry. The question I ask is: what is so offensive, what is so dangerous about price discrimination that we should be imposing antidumping duties in cases of that kind?

It seems to me that the only legitimate basis for imposing antidumping duties is to oppose predatory dumping—dumping which is aimed at driving out domestic competition so that the dumper monopolizes the domestic market. If that is the only legitimate basis, then the antidumping laws ought to define the injury necessary, consistent with that purpose. That could be brought about by having antidumping statutes aimed only at injury to competition as opposed to injury to competitors—the very test that is used in the domestic anti-price discrimination laws, like the Robinson-Patman Act, where, for example, it is stated that price discrimination which

24. The Treasury Department subsequently announced that it was ceasing its investigation. 41 Fed. Reg. 34,982-90 (1976).

25. Trade Act of 1974, § 321(a)(1), 19 U.S.C. § 160(a) (Supp. IV, 1974), *amending* Antidumping Act of 1921, § 201(a), 19 U.S.C. § 160(a) (1970).

has the effect of injuring or substantially lessening competition, or tends to create a monopoly, may then be countered.[26] However, the test is not one of injury to competitors, but one of injury to competition. This change would, I suggest, make an antitrust statute out of the antidumping law, instead of what I think is a statute which has protectionist potential in it as it is currently worded. The Trade Act of 1974 did not make that change. Instead, it made procedural changes which will, to a small extent, probably encourage a greater number of antidumping claims.

Now, I would also criticize the Trade Act of 1974 for not adopting the International Antidumping Code,[27] which is an Executive Agreement entered into by the United States at the end of the Kennedy Round in 1967, an agreement also entered into by Canada, and implemented in Canada by changes in the Canadian law.[28] This agreement does not go far enough, in my opinion, as it does not make an antitrust statute out of the antidumping laws. It does, however, at least provide minimum protections against the abuse of antidumping laws by requiring a showing of material injury and by requiring a substantial causal connection between the injury and the dumping.[29] The United States has not brought its law into line with the International Antidumping Code, and the decisions of the International Trade Commission have been in conflict with that Code in the past, and remain so.

In contrast to my view of the antidumping statutes, it seems to me that in the countervailing duty area, the issue is not primarily one of the injury test, which will surprise those who for a long time have criticized the U.S. law for not having an injury test with respect to dutiable products. We now know that the 1974 Act includes an injury test for nondutiable products to keep the U.S. law technically consistent with the GATT which Mr. Gadbaw correctly described.[30] The problem with the countervailing duty area lies with the definition of the kinds of government subsidies that can be countervailed against. The definition in the U.S. countervailing

26. Robinson-Patman Act of 1936, § 1, 15 U.S.C. § 13(a) (1970).

27. Agreement on Implementation of Article VI of the International General Agreement on Tariffs and Trade, *done* June 30, 1967, [1968] 4 U.S.T. 4348, T.I.A.S. No. 6431 (effective July 1, 1968) [hereinafter cited as International Antidumping Code].

28. Anti-dumping Act, CAN. REV. STAT. c. A-15, § 16(4) (1970), which states: "The Tribunal shall take into account Article VI, paragraph 4(a) of the International Anti-dumping Code."

29. International Antidumping Code, *supra* note 27, art. 3.

30. Trade Act of 1974, § 331(a), 19 U.S.C. § 1303(a)(2), (b)(1) (Supp. IV, 1974).

duty statute is very broad. It requires that countervailing duties be imposed against any products which benefit from a bounty or grant, very broadly phrased, on production or manufacture in the country of origin, or on export of those products from the exporting country.[31]

Now, what do I think should be done with this definition? It seems to me, first of all, there should be a distinction drawn between export subsidies and domestic subsidies. With respect to export subsidies, those being subsidies granted on the export of a product, importing countries should be allowed to impose countervailing duties, irrespective of injury to their local domestic industry. The reason for that is that export subsidies are, almost without exception, distortive of economic efficiency, the major objective behind a liberal trade policy. But one cannot say the same thing about domestic subsidies, those granted on things like production. A domestic subsidy might or might not be distortive of economic efficiency. A domestic subsidy, for example, could be granted to a depressed region in a country, and if it had the effect of offsetting the extra costs of establishing in that depressed region, it would not be distortive of economic efficiency. There could be other examples of domestic subsidies which merely offset a prior inefficiency. In this way one doesn't know from the beginning that a domestic subsidy is distortive of efficiency.

In addition, domestic subsidies are very widespread and commonplace in modern economies. They are used for what are generally considered to be legitimate governmental objectives, for example, public education, public transportation, or, as I mentioned, aid to depressed regions. If countervailing duties are widely imposed against domestic subsidies, virtually every product traded in international trade would be subject to a countervailing duty.

I believe that the only solution to the problem is for the trading nations of the world to enter trade agreements which will regulate the use of domestic subsidies in areas such as regional subsidies, with respect to particular industrial sectors, or with respect to aid to ailing firms. This is not the kind of problem that can be handled with a statute that broadly allows countervailing duties against governmental actions in the nature of domestic subsidies.

In general, the United States has applied its countervailing duty law in a manner consistent with these suggestions. The statute has been used almost exclusively against export subsidies. But an

31. Trade Act of 1974, § 331(a), 19 U.S.C. § 1303(a)(1) (Supp. IV, 1974), *amending* Tariff Act of 1930, § 303, 19 U.S.C. § 1303 (1970).

important exception to this policy occurred in the 1973 decision to countervail against Michelin tires from Canada which benefited from a regional aid program for Nova Scotia, where the tire plants were located.[31.1] The Treasury was influenced by Michelin's plans to export 75 percent of its output to the United States. Still, this seems to have been merely a spillover effect of a genuine regional aid plan not designed as a disguised export subsidy, since the subsidies were not restricted only to manufacturers who promised high exports. An agreement between Canada and the United States on the proper use of regional aids would have been a preferable resolution of this dispute. In the absence of such an agreement, countervailing duties would seem to have been appropriate only if American tire manufacturers were, or were likely to be, injured by the Michelin tire imports—a determination not required under the U.S. statute.

Now, let me say one final word about the escape clause, and then I'll see if I can persuade Mr. Gadbaw. The escape clause is not an unfair trade practice law; it is recognized, or at least there are grounds in the GATT to recognize, that a nation may withdraw from its tariff concessions, where a domestic industry has been seriously injured.[32] I have no quarrel with that aspect of the escape clause. The 1974 Act did, however, liberalize the standards for gaining escape clause benefits,[33] and that is somewhat troublesome. There were very few cases of relief granted under the escape clause and the adjustment assistance provisions of the 1962 Act.[34] A much stronger case could be made for liberalizing the adjustment assistance provisions, instead of the escape clause provisions. Adjustment assistance consists of direct government subsidies in the nature of loans, tax benefits, or technical assistance to individual firms injured by import competition. That does not involve increased tariffs, which could give benefits to prosperous firms that are not injured. It does not involve increased prices to the consumer, nor does it require the

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31.1. X-Radial Steel Belted Tires from Canada, 38 Fed. Reg. 1018 (1973). An appeal of the Commissioner of Customs' decision brought by importers is now pending, *Michelin Tire Corp. v. United States*, No. 75-9-02467 (Cust. Ct., filed Oct. 6, 1975).

32. General Agreement on Tariffs and Trade, *done* Oct. 30, 1947, art. XIX, 61 Stat. A3 (1948), T.I.A.S. No. 1700, 55 U.N.T.S. 187 (effective Jan. 1, 1948) [hereinafter cited as GATT].

33. Under the Trade Act of 1974, the increased imports need only be a "substantial cause" of the injury; they need no longer be the "major factor." *Compare* Trade Act of 1974, § 201(b)(1), (4), 19 U.S.C. § 2251(b)(1), (4) (Supp. IV, 1974), *with* Trade Expansion Act of 1962, § 301(b)(3), 19 U.S.C. § 1901(b)(3) (1970).

34. Trade Expansion Act of 1962, §§ 311 *et seq.*, 19 U.S.C. §§ 1911 *et seq.* (1970).

United States to renege on its tariff concessions and to negotiate new compensating tariff concessions, which is the scheme in GATT.[35] All around, the adjustment assistance provisions seem preferable, from a liberal trade perspective, to the escape clause provisions. So, what I would hope and suggest is that a strong preference be established for adjustment assistance relief in place of escape clause relief. I think it's too early to determine how the International Trade Commission, the President, and the Congress will come out on the question, since each of them has a role under the escape clause provisions. My hope is that there will emerge a strong preference for adjustment assistance as opposed to escape clause relief.

So, to summarize, my position on antidumping laws is that they should be transformed into antitrust laws instead of the current, somewhat ambiguously defined, laws that they are. Currently, antidumping laws are being used in cases where there are no real threats to competition. Hence, there is a kind of protectionist potential being exercised in the antidumping area. Countervailing duty laws should be applied against export subsidies without requiring that injury in the importing country be shown. With respect to domestic subsidies, the nations of the world should enter into agreements in which they define the limits within which such subsidies may be used. In the absence of such agreements, countervailing duties should be allowed against domestic subsidies, but only, in this case, if injury can be shown. The escape clause ought to be available for very extreme cases of total industry-wide injury, but a strong preference should be established for adjustment assistance relief. Have I been persuasive?

MR. GADBAW: I think you have focused very well on the overall issues that are involved with regard to some of the particular points on these particular laws. I would, however, like to make a few comments which I think are important to keep in mind in considering the difference between the sort of real world that we have and the ideal world we would like to have. We are in a situation in which, generally speaking, the U.S. system in regulating trade is an extremely open one. It is one that does have the kinds of built-in procedures dictated by law, which are the responsibility of the executive branch to administer. And so, to some extent, there are, on the one hand, provisions of law that have been enacted by Congress in which the Executive does not have much administrative discre-

35. GATT, *supra* note 33, art. XXVIII.

tion. On the other hand, we also have to address ourselves to the international situation, in which the practices and systems of other countries, which impact on U.S. trade, are formal considerations in the way in which the United States has to conduct itself in regulating its trade. Let me go down the list and perhaps bring to bear some of these points in each of the areas that you've raised.

In the area of antidumping, I'm not entirely in agreement with the points you raised regarding the International Antidumping Code. I believe it is the position of the U.S. Government that we are in fact parties to this Code, that we are bound by the Code, and that our actions are in fact consistent with the Code. It is true that there is a congressional resolution that says, to the extent that the Code is inconsistent with U.S. antidumping law, the provisions of U.S. law shall apply,[36] but I don't believe that we accept the proposition that we cannot apply the Antidumping Code within the parameters of the law that we administer. I think it's important to recognize that we have an international code which is administered and brings countries together, so that they can try to work out internationally agreed rules and procedures. This is an important step in the direction of achieving in a coordinated way, the kinds of forward-looking trade policies that I think we'd all like to see.

To the extent that the system that we now have is not perfect, I think we at least have some of the institutional provisions for moving in the direction of an improved system. In the area of countervailing duties, it's important, I think, to note that we are moving in the direction of a code. The U.S. position is that it's important to link the problem of countervailing duties, with the problem of subsidies. Certainly we are criticized for imposing countervailing duties, and it's said that this is a form of unilateral action restricting trade. I think this can be turned around, however. In fact, foreign countries are subsidizing our taking unilateral acts which are, in effect, distorting the trade relations between them and other countries. On the specific point raised with regard to regional development agencies, as in the *Michelin Tire* case,[37] I think that the distinction between a production subsidy and an export subsidy is a valid one. I'm not sure, however, that it's entirely correct to assume that production subsidies do not have very distorting effects on

36. Although each chamber introduced a similar resolution, S. Con. Res. 38, 90th Cong., 1st Sess., 113 CONG. REC. 20894 (1967), H. Con. Res. 447, 90th Cong., 1st Sess., 113 CONG. REC. 21174 (1967), no agreement was reached, so there did not result a binding resolution.

37. X-Radial Steel Belted Tires from Canada, 38 Fed. Reg. 1018 (1973). An appeal of

international trade. I think that the position in *Michelin Tire* was not that we had a situation in which the subsidy was directed toward offsetting locational costs. Rather, I think that the case may have involved a situation in which, in fact, the subsidy involved more than was necessary to offset the locational costs, and that may have been much more important in our consideration of imposing subsidies in that case. There have been other cases in which regional development aids have not been countervailed against. Of course the considerations which you raised, that is, the percentage of production which was exported, the size of the subsidy and its relation to overall costs, and the actual relationship of the subsidy to the difference in locational costs were important.

Finally, in the area of the escape clause, again, I would agree that adjustment assistance is an important aspect of our approach to liberalizing trade and to reaping the benefits of comparative advantage by moving out of industries in which we do, in fact, not have such an advantage. I think that in this respect the 1974 Act did make an important step forward. Adjustment assistance is not a very old program; I think it originated in the United States only in the 1962 Act.[38] It's a program that in the 1974 Act was significantly expanded,[39] and in which I think we can anticipate more recognition that this is indeed the more forward-looking way of dealing with problems of particular industries adjusting to imports.

However, it's also true that in some circumstances, adjustment assistance simply is not adequate. Where we do take import action, we have moved to a recognition of the need that this be a temporary action, and that it be phased out. These are very important steps in the direction of moving toward a system in which trade is indeed liberalized, of course, recognizing that we don't have a perfect world. In an overall framework, the fact that we're focusing on these particular issues, rather than looking at very general issues such as the overall level of tariff and trade restrictions, is an indication that we have indeed come a long way, and I think it's important to recognize that it is a dynamic situation. Unless we continue to move forward at the international level to try to find solutions to some of these particular problems, and continue to work at eliminating these various trade barriers, there is a great risk that countries will

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the Commissioner of Customs' decision brought by importers is now pending, *Michelin Tire Corp. v. United States*, No. 75-9-02467 (Cust. Ct., filed Oct. 6, 1975).

38. Trade Expansion Act of 1962, §§ 311 *et seq.*, 19 U.S.C. §§ 1911 *et seq.* (1970) (amended 1974).

39. Trade Act of 1974, §§ 221 *et seq.*, 19 U.S.C. §§ 2271 *et seq.* (Supp. IV, 1974).

slide back and lose some of the benefits of liberalized trade that they now have.

So, to the extent that I can, I share the views that you've expressed. I would add a certain amount of caution and say that it's terribly difficult in this atmosphere to be overly ambitious, and we have to move somewhat carefully and cautiously, and with that caveat, I would agree with many of the points that you've raised.

PROF. BARCELÓ: There's a question here.

MR. RUDDY: I've got two questions for Mr. Spence. The first is really a point of information, and the second is a request for his comments. You mentioned, in the context of your discussion of the Foreign Investment Review Agency, various statistics about investment in Canada and I think that raises for somebody like myself a kind of *post hoc ergo propter hoc* argument, and in view of Mr. Connell's comments about the attitude of Irving Trust, for example, in deciding not to go forward, I was wondering how you would evaluate the effects that the Agency has had in terms of enterprises that may have been discouraged from making an entry. Just to take the position of the devil's advocate, could it be argued that this kind of investment existed not because of, but in spite of, something like the Foreign Investment Review Agency?

The second question I have is this: I was very interested in your comments on the undertakings that could be required by the Agency, the possibility of the undertaking not being fulfilled, and thus the mergers being rendered nugatory. As a lawyer, and as somebody who is brought in at that nugatory phase, I believe this to be a lawyer's nightmare. You've got something analogous to a gift subject to a condition subsequent, and I would think that, from the business point of view and from a legal point of view, this would create a nightmare situation when these things are rendered nugatory. I don't really know how to explain this question, because I'm hit with a kind of a kaleidoscope of disasters when that nugatory effect takes place, and I just wondered how you, as a lawyer, and how other lawyers have reacted to this kind of provision.

MR. SPENCE: I'm not sure I dare take the second question first, but I'll try. I don't know of anybody who's very comfortable with the nugatory power. On the other hand, it is, I think, arguable that it is the most appropriate kind of enforcement power to have. There's not much point in having whopping penalties. This is not an act imposed in order to bring funds into the federal coffers from defaulting parties. The nugatory order seems to be consistent with the intent of the Act, which is that the investments ought to go forward only where they have been approved, and if they haven't been ap-

proved then they should not be underway in Canada. The nugatory order is an attempt to implement that.

I agree that when one starts to hypothesize in general terms about what could be involved, one perceives all sorts of difficulties on all sides of the thing. I don't know that I can say anything more until we see a case and see how the thing gets resolved. I'll be interested to see what reaction the court has to the whole thing. I think that there will be an onus on the government, when such a case arises, to submit to the court a very responsible and carefully devised plan for the enforcement in the particular case which accords as much protection as possible to all of the interests that have been established. I don't know that I can be more specific than that on that one, and I might try to dodge the first question entirely by telling you that I wasn't quite sure which kind of investment it was that had perhaps occurred, I forget the way you put it—quite independently of the Act, or in spite of the Act, rather than because of it.

MR. RUDDY: From what you've said and from what I've gathered in looking at Lorne Clark's paper, we get the history of the Foreign Investment Review Agency, we get the history of various investments since that time, and we get a percentage of denials, all of which makes this Agency look very attractive, and indeed it may very well be functioning as you suggested. But one thing that was left out, for example, was the amount of investment that may have been discouraged in the manner suggested by Mr. Connell. This would have an effect on the statistics quoted.

MR. SPENCE: Well, I agree. I don't think we know about the transactions that didn't come forward to us, and we don't know, therefore, how those transactions would change the box score, as I call it.

MR. RUDDY: I think that answers my question.

MR. CONNELL: Could I interject a point here? This is something that Jon Bischel and I discussed last evening. Although one never can gauge the disincentive effect that it may have had, for example on my bank, I did note that U.S. investment has been lagging worldwide. There was an article in the *New York Times* just a few days ago on that.[40] We anticipate that it will also lag this year. However, in Canada, U.S. investment will be increasing 13 percent.[41] We still find American companies investing in Canada and cutting back in other portions of the world. I think this shows that

40. Dale, *U.S. Investment Abroad Lagging*, N.Y. Times, April 1, 1976, at 43, col. 3.
41. *Id.* cols. 4-5.

the entrepreneurial zeal of Americans to go into Canada hasn't been dampened.

PROF. BARCELÓ: Are there other questions? Over here.

MR. KOEHLER: I might comment first on U.S. investment in Canada. Historically, in the last five or six years, investment in Canada has declined dramatically over what it was in 1955. I would like Mr. Spence to expand his comments on the potential extraterritorial reach of the Foreign Investment Review Act as it might affect non-Canadian takeovers of the parent company. Someone hypothesized the takeover of General Motors. I wonder if you could expand on that?

MR. SPENCE: I think that's the same point that Mr. Connell raised earlier. I mentioned in my remarks that there's a provision in the Act which says that a parent corporation is deemed to carry on the business of its subsidiary.[42] Accordingly, where the shares of the parent corporation are purchased, that corporation which is being acquired, which may be a U.S. corporation, may be a corporation anywhere, and the effect of that acquisition of those foreign shares under the Act, it is argued, is to give rise to a deemed acquisition of the Canadian business which is carried on by the Canadian subsidiary. That would mean in effect that if control of the U.S. parent corporation is acquired by someone else, and it has interests in various places throughout the world, including Canada, then by reason of the Canadian business enterprise being part of its worldwide operations, that transaction is, to that extent, subject to review under the Act.

I mentioned earlier that where such transactions are reviewed, there is really no interest taken in the other arrangements except as they form part of the information about the prospects for the way in which the business may be carried on in Canada. The interest is really only in the Canadian aspect of the deal. I suppose one of the difficulties that this provision has for investors is that frequently the Canadian aspect of the transaction is minor, to overstate it, in comparison with the entire package. From the perspective of the purchaser, it may look like the tail is wagging the dog. For that reason people have frequently suggested that this application of the Act is, to put it mildly, not a good thing.

However, I think there is a different view that can be taken from a Canadian perspective, which is that if it is accepted that the

42. Foreign Investment Review Act, Can. Stat. c. 46, § 3 (1973).

acquisition of an operating Canadian business is a matter of concern under the statute, then it's arguable that it should apply whether that operating business is already part of a multinational network or happens to be a freestanding or a separate business. I think there are two views on the thing.

PROF. BARCELÓ: We'll take time for one more question, and then I think we'll have to adjourn.

MR. RUSSELL: I don't want to ask a question, but rather I'd like to make a comment along the lines of Mr. Ruddy's remarks. I think it's uncontested that the creation of the Foreign Investment Review Agency has dissuaded some foreign investment in Canada. I would like to observe, perhaps somewhat crudely, that that is the very purpose of the exercise. The Foreign Investment Review Agency is not an agency designed to promote investment in Canada. In fact, its purpose is quite to the contrary. It has been designed to dissuade those investments in Canada which the Agency deems undesirable under the criteria of the statute. I suppose the answer to Mr. Ruddy's question is: yes, there has been some deterrent to investment in Canada by persons whose situation under the terms of the Act is very questionable. I suppose that Mr. Spence would feel that if someone is in a very questionable situation, then that is an investment that Canada would be better without. If his situation is ambiguous, I think Mr. Spence's agency would encourage people to contact the Agency and find out what the law is with respect to these, confidentially and without the loss of prestige that Mr. Connell referred to.

I would just make one further comment, if I may make a small criticism, and that is that it strikes me that some of the statistics the Agency has put forward, with regard to its accomplishments as to capital that has come into Canada, the number of jobs created, are somewhat disingenuous in that to a certain extent . . . (MR. SPENCE: That's the nicest way that's been put.) . . . one could argue that those statistics would be a lot higher were it not for the Agency. I think what's really needed is a statistic which tells people about investments that were allowed, which increased the number of jobs over what would have been created had you not had the effect that you had, and what you have done which increased the capital investment as opposed to the way it was intended to be structured, were it not for the effect of your Agency.

PROF. BARCELÓ: Thank you.