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Observations on the Implementation of a U.S.-Canadian Free Trade Agreement

The Political and Legal Considerations**

by Alan Wm. Wolff*

I. INTRODUCTION

United States-Canadian exchanges have always been very frank. I remember a meeting in July 1977, in a little town on Lake Geneva. Our consultations were usually very quiet—just exchanging views. I looked down the table during the course of this frank exchange of views and one of our number, who was always a quiet, docile fellow was reaching across the table to slug one of the chief Canadian negotiators. We do, however, have some history between us; we understand each other rather well—we think. And friendship always has a way of coming back and dominating the relationship, even though there are some strains from time to time.

This conference is devoted largely to examining the question of managing trade frictions between the two countries, as well as expanding economic contacts to mutual advantage. In talks between government officials of the two countries, the Canadian point of departure is one of Canadian economic inferiority *vis-a-vis* the United States. This is not the view of the U.S. negotiator. I am reminded of the time when I was acting as head of the U.S. trade delegation in Geneva. When my permanent successor arrived, we went to look for a house for him. There was a very nice one overlooking the lake. But there was one peculiarity about it—it had a large mural of a mythical Swiss figure on one side. This picture, about fifteen feet high, happened to be of a man in a loin cloth. I said to him “Well, this is a good place for you, isn’t it?” and he said “No, a U.S. trade negotiator could never live in a house with a large picture of someone who has lost his pants.” Some would say that in most negotiations between the United States and Canada, American negotiators have lost their pants. I will not cite examples this morning. But I am always wary when a Canadian negotiator begins to talk about Canada’s disadvantaged position in dealing with the United States.

** Remarks given at Conference.

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II. THE CONTEXT

Turning to the substance of the question assigned to me this morning: If Canada and the United States were to become economically more integrated, through formal negotiated agreements, how might the integration process work from the U.S. point of view? It will involve a combination of politics and law—with a bit more politics than law. It might be useful first to review the setting in which this will have to take place, as we evaluate how the process could move forward from the U.S. perspective.

We had a trade deficit, we finally noticed, of (US)\$123 billion last year, and this year it may be as high as \$150 billion. The trade deficit with Canada was about \$21 billion last year. The sharpest adverse reaction in the United States over the trade deficit is obviously with Japan. There are a variety of reasons for this, such as the closed nature of the Japanese market and a long history of acrimony in trying to get into that market.

The deficit also shows up in terms of sectoral problems. The U.S. government is now trying to get agreements with many other countries to restrict steel trade into the United States. Textile legislation has been introduced, with a large number of co-sponsors in both the House and the Senate, to roll back textile imports to a significant degree. There are problems in wood products—legislation has been introduced to call upon the President to negotiate voluntary export restraints with Canada. And, there are problems in telecommunications that are becoming quite clear in a number of areas. This mood could not be described as one in favor of trade liberalization.

To this mix must be added the recent news that growth in U.S. gross national product (GNP) is declining. The economy is slowing and, if the current rate of growth continues, it will not be sufficient to keep the unemployment rate from rising. With today's trade deficit, rising unemployment, and slower economic growth, the United States will become subject to very strong pressures to become defensive.

With that as background, I will turn to the framework in the U.S. domestic context, both political and legal, by which we would implement any arrangement with Canada. It is often forgotten at home that there are two central actors in U.S. trade negotiations—the President and the Congress. When either party forgets that, a disaster occurs. The President can negotiate, Congress cannot; the Congress can implement, the President cannot. Fortunately, since 1930, the Congress has not exercised its legislative powers in the trade area very directly. It has granted authority to the Executive Branch; occasionally approved what the executive has done and often disapproved.

U.S. trade agreement history through 1979 is a history of non-implementation of agreements. During the Kennedy years there was the "American Selling Price Agreement." The Executive Branch had ad-

vance tariff authority, but in non-tariff areas—areas requiring legislation—it did not have authority. The Executive sent requests to Congress for implementation once a year for a number of years, before giving up.

In the antidumping area we are faced with the precedent of the Antidumping Code. Then Senator Javits introduced an amendment which said in effect: “to the extent this Agreement calls upon our agencies to do anything other than what they otherwise have been doing, what they have been doing will prevail.” That was not seen by our trading partners as full and effective implementation by the United States in good faith of our new obligations. What they were trying to achieve in a negotiation was a change in our procedures. The next attempt to receive approval for an agreement involved the U.S.-U.S.S.R. Trade Agreement, it also failed to be implemented due to inaction and requirements imposed by the Congress.

In the 1974 Trade Act we negotiated using “fast track” procedures. We knew we could not get the Congress to approve, without amendment, anything that an Executive Branch official might negotiate—unless it was extraordinarily modest. And any minority that felt strongly about something could bottle up the bill in legislative committee, or amend the bill on the floor. Amendments may not seem such a serious problem, but even if the amendment is relatively minor it probably would require a re-negotiation of the deal.

This was an impossible situation—always coming back to the table with the deal restructured or rejected at home. The “fast track” procedure that was adopted provided a solution. It requires positive approval by Congress and allows no amendments. A minority has no ability to bottle up the implementing legislation in committee or to filibuster it on the floor through endless discussion. A vote for or against must be taken within a limited period of time.

The result, due in large part to the procedures we now had available, was that in 1979 we brought back the Tokyo Round Agreement, and it was approved by the Senate 90-4 and by the House 296-7. That was totally unprecedented. And, it was due not only to the genius of the system, but also to the political acumen of then United States Trade Representative Bob Strauss. There was also the essential element of strong Presidential leadership.

III. THE PROCESS

How does the domestic process work and how would it work with respect to a Canadian-U.S. sectoral or comprehensive agreement? First, one has to get advice from the U.S. International Trade Commission. The Commission is an independent body of six commissioners serving staggered terms of nine years (so as not to be subject to Executive Branch pressure). The Commission is a creature of the Congress, although on occasion it is not as responsive as Congressmen would like. The Com-

mission will hold public hearings and give an enormous volume of information and advice to the Executive.

Additionally, the Office of U.S. Trade Representative will hold public hearings. The Congress will also hold hearings. There is an inter-agency structure in which several relevant agencies gather and are part of the process. Furthermore, the Congressional staff plays an increasing role in the system. In the Tokyo Round negotiations (and, I would presume, in any bilateral negotiations) cable traffic is turned over routinely to a cleared Congressional staff. They are in the middle of the process and even invited into the negotiating room on occasion.

And there are the industry advisors. In the Tokyo Round there were forty-five sectoral advisory committees; now there are forty-seven. One is the Advisory Committee for Trade Negotiations, an overall committee in which all types of interests are represented: industry, agriculture, labor, the states, small business, minorities, etc. There are four policy committees: industry, labor, agriculture, and services, which look at the broad interests of their particular sectors of the economy.

In addition, there are two industry functional advisory committees for customs and standards. There are three labor functional committees to watch over government procurement standards and unfair trade practices. And, there are the Labor Steering Committee and the Intergovernmental Policy Advisory Committee for working with state and local governments. The negotiators must report back to these committees. The advice of the committees is given to Congress and the failures to follow that advice are reported to Congress.

This structure presented an appalling prospect in 1974, but the odd thing is it was a great strength for us. We knew more of what we were doing than most of the other negotiators. Some of our major trading partners simply did not know where their interests lay. We knew—because we had to spend so much time working with the private sector in such great detail. This also produced political support for the agreement reached. We knew, before we went before Congress, where the industry was and whether it was for or against the agreements.

In 1984 the “fast track” process was made applicable to bilateral free-trade areas. This was done for the Israel Free-Trade Agreement, but with Canada distinctly in mind. The following is a review of the nuts and bolts of how one gets from the beginning of the process to the end:

- 1) As set forth in the statute, Canada makes the request to initiate the process;
- 2) the U.S. holds preliminary talks with Canada;
- 3) the President gives notice to the House Ways and Means and the Senate Finance Committees that negotiations are under way;
- 4) he consults with them;
- 5) there is a 60 day period of delay before the President can make a decision to enter into an agreement;

6) during this time either committee may object to the plan, in which case the Executive cannot proceed;

7) if there is no objection, the President informs the full House and Senate of his intent to enter into a free-trade agreement;

8) notice is published in the *Federal Register*;

9) the President consults with the other committees having jurisdiction (which, in the case of some agreements, may be quite a number of committees);

10) 90 days after notice of intent to go forward has been given to Congress, he may enter into the agreement if Congress has not indicated a negative view;

11) he submits to the Congress: a) the text of the agreement; b) a statement of any Administrative action that will be necessary to implement the agreement; and c) a statement of how the implementing bill and Administrative actions would affect existing law; (The implementing bill submitted to Congress is not always drafted by the Executive Branch, but often by the Congress in what is called a "mark-up session". The bill has, in fact, been prenegotiated.)

12) the Congress then has 60 legislative days to act—to get the legislation through with no delay and no amendment;

13) the Congress acts;

14) the President signs the bill;

15) there is an exchange of letters between the two governments that the arrangements are complete.

That is just the mechanics. The question is: how do you really make this work? You have to create a political mosaic to get something of any size through the Congress. In 1979, the textile industry lobbied to attach to a little bill (the Carson City Medal Bill) some legislation which would have prevented any reduction of duties on textiles. That would have scuttled the multilateral negotiations then in progress. We could not have said we were taking textiles out of all possible agreements. We spent the first forty-five days and nights of 1979 negotiating with the textile industry. The result, the Carter White Paper on Textile Policy, promised some things to the industry which were not entirely trade liberalizing. The textile industry has 1.2 million workers, strong unions, and is very well organized.

With respect to the dairy industry, we negotiated a deal with the industry which increased the number of products that would be subject to quota. The steel industry was interested in trade remedies and greater automaticity in antidumping and countervailing duties. We also exempted a number of other products, such as shoes, from the negotiations. Someone discovered that we had included the small business and minority set-asides in the government procurement code. That caused approximately eight hours of anguish while we removed those items from our

offer. It would have been a disaster to try to have left those issues in the Tokyo Round negotiations.

What we offered to the Congress, and to American industry and agriculture, was the promise of export access. This was of broad philosophical interest to the country, as well as specific interest to industries that supported us, such as the paper industry. There was contingent protection in the implementing bill which gave some assurances that injury would be avoided in the trade liberalization; for the more significant interests, this was attended to by sector. Occasionally some interests had to be overridden because their problems could not be solved.

But we had strict political balance. We had prenegotiated with everyone that anybody knew would be affected by what we were doing. There had been full notice to everyone—that is why the agreements passed by the margins they did. Any Congressman could say “Well, sure the tariff on fishnets was reduced, but look at the huge benefits to the country and besides, there were several other things that were of interest to my constituents and to the country as a whole.” He could explain to any constituent why he had acted in favor of the agreement.

IV. A U.S.-CANADIAN AGREEMENT

I will now discuss the Canada-U.S. free-trade area idea, whether on a sectoral, functional, or comprehensive basis. Note, the narrower the deal, the more difficult it will be to make trade-offs and the more difficult it will be to resolve problems. The fishnets just mentioned are not something that a Senator from Maine or Pennsylvania would consider a humorous example. In the 1984 Trade Act, one of the main problems of getting the bill through Congress was solving the fishnet problem. Trying to negotiate a single tariff is very difficult; but sensitive questions are exactly those one wants to address in any negotiation. Presumably, the key problems are the ones that need to be resolved. And the best way to get resolution is not to isolate them, but to put them into a broader context. For either country, Canada or the United States, implementation is as much a question of politics as it is a legal question.

A. Sectoral Agreements

Let's look at a few hypothetical sectoral agreements (*i.e.*, something less than a comprehensive agreement). How would they be implemented under the U.S. system? For agricultural implements and certain chemicals used in agriculture there is no great opposition to a free-trade agreement. There would be a clearance process, probably through a single industry sector committee and a single labor sector advisory committee. Such an agreement would affect only the direct interests involved, and is not important to the international trading system.

What would happen if we tried to do the AutoPact today, under this procedure? First of all, the transitional arrangements would come under

severe question. The "side letters", like the question of investment performance requirements, would be a serious issue. There would be a question about the linkage to national trade policies: would our trade policies be entirely independent *vis-a-vis* third countries? If we were doing the AutoPact today, might not Japan be able to satisfy Canadian demand instead of the U.S. producers? What provisions would be made?

The questions which arise go beyond tariff elimination. If what we were designing was "Fortress North American" *vis-a-vis* the rest of the world, how would we get a GATT waiver for that approach? And if we are not designing "Fortress America," how do we get a new Auto Agreement through our own domestic political systems and achieve implementation?

Steel is a current example of the issue of sectoral "liberalization," or security of access. The U.S. generally approves of more free-trade, but does not want it in this sector at this time. If you sat down and discussed steel today, safeguard agreements would be a major issue on both sides, and with differing objectives. What is the trade policy linkage? If Canada were to be allowed free access to the U.S. market, the question would arise: what is Canada going to allow in from third countries with respect to steel? Would there be unlimited imports into Canada in addition to unlimited Canadian production going south of the border? That would not be acceptable. Canada could not be open to third-country trade and the U.S. closed.

Other questions would occur: a) Free-trade yes, but at what exchange rates? If the Canadian dollar were further depressed against the U.S. dollar, would there be a balance of payments safeguard provision?; b) If the U.S. eliminated the possibility of countervailing duties, would there be any subsidy commitments?; c) Could the U.S. get rid of antidumping actions? Would there be a pledge of no dumping in return; and if so, from whom?

These may not seem to be the major issues, but they affect implementation because one cannot get something through the Congress, even through the advisory process, unless it is distinctly seen as being in the national interest. Domestic policies, not just trade policies, with respect to Canada and the rest of the world, would become an issue in any negotiation.

B. Government Procurement

That leads to the area of government procurement. There is a very strong system of preferences on both sides of the border. We had occasion to do a study of Canadian procurement practices and they are something to behold. Ontario has wonderful brochures trumpeting its "Buy Provincial" policies. There is a lot of very informal protectionism that goes on at the federal level under the Treasury Board Order. At the

provincial level, protectionism even goes beyond the specific margins of preference in the legislation.

On the U.S. side, implementation would also be complicated by protectionist issues. There are many committees in Congress that would be involved because of the different areas of procurement. State procurement would also be a problem. One can preempt the states in this area by federal statute, but Constitutional authority is not the issue; the political problem is the real concern.

The Senate and the House do not, in a sense, represent the States on this issue. What would be required would be a huge consultative process. The States are not that wedded to "Buy American" policies that they would not consider giving them up, but for what? The States would need to see a very broad package which was clearly in the national interest and be sold on it with a great deal of leadership from Washington in order to have their statutes preempted.

V. WHERE DO U.S.-CANADIAN RELATIONS STAND IN THE SCHEME OF THINGS?

In conclusion, the current U.S. trade priorities are:

- 1) the budget deficit (and perhaps a tax to bring down the volume of the dollar);
- 2) the trade deficit;
- 3) Japan and how it impacts upon the United States balance of trade;
- 4) the new round of negotiations; and
- 5) sectoral problems.

I did not mention Canada-U.S. bilateral free-trade as one of the nation's top trade priorities. The country has not been and is not now interested in free-trade with Canada as a major issue. But I think it is nevertheless important. It may be the most important thing that the United States could do with respect to its trade relations with any country or set of countries.

To change U.S. national priorities would require strong Presidential leadership—that is essential. And it will not be possible to get a President to lead on a sectoral agreement—it will have to be a full agreement. The conclusion of the Israel Agreement did not herald the United States being poised to launch into a series of free-trade area agreements with other countries. It mainly stood for the proposition that an election was immanent and that it was a popular thing to have a free-trade area with Israel, regardless of whether it had any economic sense to it.

If one is going to motivate the President to act, someone has to get him interested. And this interest will have to be awakened by Canada. Thus, by statute and as a practical matter, a Canada-U.S. free-trade area has to be a Canadian initiative—however quiet and informal. The United States will not act on this matter on its own. It is going to require

active interest on both sides and strong political leadership. I happen to think that it can be done—and I hope that it is.

