1973

The Auto Pact: Precedent or Isolated Phenomenon

John Rehm

Follow this and additional works at: https://scholarlycommons.law.case.edu/jil

Part of the International Law Commons

Recommended Citation

Available at: https://scholarlycommons.law.case.edu/jil/vol6/iss1/13

This Speech is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.
The Auto Pact: Precedent or Isolated Phenomenon?

John Rehm*

Let me concentrate this afternoon on the Auto Pact and perhaps rephrase the topic of this discussion in terms of the question: Is the Auto Pact a precedent with some force and vitality for other similar arrangements between the United States and Canada, or should it be viewed rather as an isolated phenomenon? I appreciate the opportunity to discuss this question, and I thank Sidney Picker for raising it, because I was part of the American delegation that negotiated this arrangement in Montebello, a lovely resort in sub-zero weather. Also, I might add, there was a fiendish combination of ample food and liquid refreshment. I think some day I will write a minor footnote to history on how skillfully the Canadian government can use such things in a negotiation of this kind. To add to that, the building in which we were located became over heated (whether that was deliberate or not I'll never know), and every now and then the Canadians would say, "God it's hot in here," and they would throw open the windows totally. In sub-zero temperatures the winds would blow in upon us, and then the American delegation would be chilled to the bone, and we would close the windows and return to the negotiations. As part of the delegation I was also rather heavily involved in the process whereby our own government obtained the necessary implementing legislation to put the Auto Pact into effect.  

I must confess that since that time I really have done very little thinking about this topic, but I think the question as to whether it is precedent or an isolated phenomenon is a good one for us to think about. The genesis of the agreement was a very difficult situation that arose between the United States and Canada and almost resulted in a very serious confrontation. I think the United States would probably have been driven to the imposition of countervailing duties on automotive products from Canada, and I think in turn the chances were very good that Canada would have engaged in some sort of retaliation. A

* Busby, Rivkin, Sherman, Levy & Rehm, Washington, D.C.


rather serious unravelling process in terms of our trade relations might have begun. This pact was conceived as an attempt to overcome that difficulty, which was obviously overcome. I recall very vividly during the negotiations in Montebello the statement made on at least one occasion by a senior Canadian minister, made very openly to the two negotiating teams. I do not know how publicized this statement was in Canada or the United States. In essence I recall him saying that he saw this pact as the first in a series of free trade arrangements. Unless my memory is totally wrong, he thought there was a fair chance that by 1975, which would have been a decade away at that time, the two nations would agree to substantially free trade in all major industrial sectors. This statement was made by a minister of considerable experience, and I think it was a serious comment on his part. There certainly were suggestions of moving into other sectors; I recall aircraft parts being mentioned, and some literature that I read coming up in the plane suggested electrical appliances and even furniture might be subjects of negotiation. So certainly at the time there was some feeling, or some hope if you will, that perhaps the Auto Pact would lead to other similar arrangements.

Looking back, I am struck by a number of problems that affected the Auto Pact itself, even though it was enacted. Beyond that I am struck by an evolution — I think I would be more prone to say "devolution," if you will excuse the poor pun — in American trade policy that made similar arrangements of this sort considerably less likely and probably unlikely.

As to the arrangement itself, the United States was obliged to seek a GATT waiver because the United States was not enacting the pact on an MFN basis, but rather on a purely discriminatory basis in terms of products from Canada. I was not part of the effort, made largely in Geneva, to obtain the waiver,\(^3\) but I do know that it was obtained with considerable difficulty and in spite of a feeling of resentment on the part of other countries.\(^4\) I do not think they really felt the waiver was fully justified. As I recall, the United States tried to argue that the arrangement would have no trade impact on the GATT countries because Canadian products would not compete with other automotive products they exported to America, obviously having in mind their smaller cars. Our experience since then tells us that this was a somewhat disingenuous

\(^3\) GATT: 14 BISD 37 (1965).

argument. In any case the waiver was obtained, but not without some ill feeling as a result. I think the resentment by some of the GATT countries is an important element when considering a similar arrangement between the United States and Canada.

In Congress, the Auto Pact came under increasing attack, particularly in the Senate. The Ways and Means Committee in the House did not have much difficulty approving the necessary implementing legislation. Obviously the big three American automobile companies were for it, the administration was for it, and there was very little, if indeed any, opposition. The fact of no opposition at all, I think, alerted the Senate Finance Committee, and some of its members, particularly Senator Gore, who suggested that possibly the big three had discouraged certain elements of domestic industry, which might have objected or at least raised questions about the arrangement, from doing so.

I also think there was a feeling, of particular sensitivity to the Senate Finance Committee that the arrangement was a kind of *fait accompli*; that is, while constitutionally permissible under our system, it was perhaps not too wise or desirable for the President to conclude through his agents an executive agreement and then return and say to the Congress: "We have an arrangement with another country. We think it affords benefits. We, of course, have entered into it subject to Congressional action, but you know you really should go along." I think that was a latent problem, particularly for the Senate, which has taken quite seriously in recent years (though it has not been able to do much about it) its function under the Constitution of advising on, and consenting to treaties. The inevitable tension between the President's use of executive agreements, on the one hand, and on the other, the Senate's preference for treaties to undertake international obligations, is a factor to be considered in determining whether this type of arrangement will be used in the future.

There was also the problem, which became more acute in terms of the trade statistics that the United States developed, as to whether the pact really was a genuine free-trade arrangement, given the condition that only qualified manufacturers could exercise the right of duty-free entry into Canada. The balance of trade began to swing. I will note parenthetically, although I have never delved into the specifics, that horrendous statistical problems arose between the Canadian and American statisticians. Only recently have the two sides finally agreed on a common method of determining the
balance of trade in the automotive sector, eight years after the conclusion of the agreement. Whether the figures were legitimately calculated or legitimately used is beside the point. The fact is that the Congress and particularly the Senate decided to make a great deal of this dramatic swing, whereby the United States fell from a net surplus position to a substantial net deficit position. It reached a point in the 1970 Trade Bill (which did not go anywhere, thank God, since it was a very bad bill indeed in my view) where the Senate Finance Committee wrote into its version of the bill a provision that may have actually required the repeal of the implementing legislation if a genuine free-trade arrangement were not achieved. At the very least, it called upon the President to seriously consider termination of the agreement, as he has the authority to do, if a genuine free-trade arrangement were not achieved.

In terms of American trade policy in the late 1960's and the early 1970's, it seems to me that there was a distinctly unpropitious environment for considering a similar arrangement, even assuming that there had been no substantial criticism of the Auto Pact itself. I suppose I would note two major developments in United States trade policy since the Kennedy Round. (Let me confess openly that I regard myself as a liberal Democrat who voted for McGovern. Therefore, if I say harsh things about the Nixon administration, you will know how to take them.) First, there was the tremendous protectionist surge that arose in Congress immediately after the conclusion of the Kennedy Round in the fall of 1967, when many bills were introduced to increase tariffs and impose import restrictions.

The lobby with which the delegation had to contend was primarily the textile lobby, surely the most potent in those years and I would guess it still is today. It almost became an annual ritual whereby the Senate, as it has the right to do under the Constitution, would take a so-called revenue bill passed by the House and attach to it a quota on textile imports. The fact that the textile quota had nothing to do with the revenue bill passed by the House did not stop the Senate. The Senate is rather famous, or infamous if you will, for attaching non-germane riders to a revenue bill returning to the House. I might note that the Ways and Means and Finance Committees have a rather extraordinary tradition concerning their conference committee, which is the most critical part of the American legislative process and in which the House and Senate through their agents work out the differences between the two versions of
a bill. These two committees permit representatives of the executive branch to attend conference committee meetings to provide essentially technical advice. We certainly took advantage of the opportunity to tell the conferees how very bad and serious and damaging we thought it would be if these textile quotas were enacted into law. We did not so advise primarily because of President Johnson's conviction on this matter. You may recall at one point in a public speech he literally pounded the podium and said, "I will never sign a bill with textile quotas in it." I would also note the responsible behavior of the House Ways and Means Committee, and particularly Chairman Mills, in deleting these riders.

There were many other aspects of this protectionism. The Johnson administration tried to put forward a very modest trade bill in 1968 which got nowhere. Among other things, it would have discharged an obligation we assumed in the Kennedy Round, eliminating the American selling price system. This is an obligation that the United States still has not discharged, very much to America's discredit.

The second development is the Nixon Administration. I suppose in my kinder moods I would say that it has seriously compromised the liberal trade policy; in my harsher moods I would say the current administration has been out-right protectionist. First and foremost, the textile quota arrangements were finally negotiated, after much effort, activity and unfortunate bitterness, with Japan and other Far Eastern suppliers of textile products. There was a renewal of the steel arrangements, which were first negotiated in the Johnson administration and continued under the Nixon administration. There was what I regard — and as a private practitioner I have seen this first hand — a protectionist administration of our Anti-Dumping Act, in terms of how the Treasury Department and the Tariff Commission acted upon it. Reference was made this morning to the International Anti-Dumping Code, and I acknowledge that the action Canada took in adhering to the Code and changing its own legislation to permit implementation of the Code was a major step forward. I am afraid that the United States has moved backwards. If you look at the decisions in the United States in this field, you have difficulty squaring those decisions with our obligations under the International Anti-Dumping Code. Nor am I happy with the administration of the countervailing duty stat-

---

I think the *Michelin* decision was clearly wrong, as a matter of law and as a matter of policy. Therefore, when one analyzes the post-Kennedy Round period, I think one sees, on the one hand, a defensive effort on the part of the Johnson administration to deal with imports which were clearly increasing and on occasion causing problems and, on the other hand, what in my view is the unenlightened, ill-advised, and dangerous policy of the Nixon administration to cope with the substantial political problems that are created by increased imports. I shall not begin to tell you how I think those problems should have been resolved, since that is not relevant to my discussion. The question is whether the Auto Pact could have led to other arrangements. As I see it, the cards were stacked against its extension into other areas, perhaps for some of the reasons that Bob Hudec has mentioned, but certainly for the reasons I have given, those being the Auto Pact itself and the changes in U.S. trade policy since that time.

A major trade bill is now before Congress. There have been forceful, even eloquent, expressions by this administration that it is genuinely interested in the liberalization of trade and the reduction of tariff and non-tariff trade barriers. There is a commitment on the part of the United States, the EEC, and Japan to commence negotiations this September in a Nixon Round, if you will, and to make a parallel effort in the monetary field. Looking ahead there to, I would ask if there is any reason to believe that, either as part of this effort or as an ancillary aspect of it, another arrangement like the Auto Pact will emerge between the United States and Canada? I think the answer is quite clearly "no," and I will be brief in giving my reasons for this conclusion: A preferential arrangement would be very unlikely for several reasons. The United States policy against preferences benefiting developed countries is a major impediment, the very strong, and in my view correct, position taken by the United States against so-called reverse preferences when dealing with preferential arrangements between developing countries and developed countries. A key example is the reverse preferences granted by a number of African countries to products from Western Europe. There would also be a difficult problem to overcome if the United States were to try to move ahead in terms of another preferential arrangement with Canada in another sector. I do not think the United States would get a sympathetic

---

audience from our GATT partners. It is all too true that the effectiveness of the GATT has been seriously diluted, in large part because of American behavior in recent years. Nevertheless, I think the GATT argument would be made, and it would have some force. Further, I know of no authority in the trade bill that the administration has proposed which would permit this preferential arrangement. I say that because, while there is authority in the bill to eliminate tariffs, I read it in conjunction with the most-favored-nation provision of that bill, so that any elimination of tariffs would have to be on an MFN basis. Finally, if one conceives of the possibility of a new preferential arrangement being negotiated and then submitted by the executive branch to the Congress for implementing legislation, as in the case of the Auto Pact I see very serious problems. I think that it would raise anew many of the fears and concerns on the issue of executive, right or wrong, that existed in the Congress and Senate when the Auto Pact was enacted.

Of course, there is the possibility of an MFN arrangement that might emerge from the Nixon Round which would eliminate duties on an MFN basis and benefit trade in a given sector between Canada and the United States. I do not think the administration will get the authority to eliminate duties. At best it will be very circumscribed. When I say circumscribed, I am not sure what I mean, but my instinct is that the inevitable psychological difficulty that Congress will have with the notion of an across-the-board authority to eliminate duties will certainly play a role. Moreover, I think the question concerning the kind of authority that the Congress should delegate to the President under this bill will loom larger and larger. In addition, even if one conceives of an MFN arrangement, I am not sure the authority in the bill will be there; in any key sector of trade I doubt very much that the European Economic Community is really prepared to consider in any significant way a duty-free arrangement. I sense a resistance to that.

I also feel that the non-tariff barrier problem will preoccupy the negotiators, and indeed I think it should. In my view, tariffs should be the minor aspect of the forthcoming negotiations. I do not think anyone really know what will emerge from the non-tariff barrier negotiations. I myself see essentially codes of conduct, as were mentioned this morning. My hope is that there will be no intensification of trade barriers coming out of the negotiation. That may sound paradoxical but I really am concerned, for some of
the very reasons given this morning, that the three economic superpowers are on a mercantilist bent. It is not inconceivable that the three might conclude arrangements that they would view in their own best interests which would not involve a net reduction in trade barriers.

In summary, looking to the future strictly in terms of United States trade policy, American trade legislation, and what I see as the results of the Nixon Round, I see very little chance for a successor to the Auto Pact. I think it is an isolated phenomenon.