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For Canadians, it is perhaps easier now to gauge the industrial policy of the near future than it has been at any time over the past several decades, but it is perhaps easiest to speak in terms of what the industrial policy is not.

The Canadian industrial policy is not (it is tempting to say no longer) one of ensuring a Canadian market for whatever Canadians seek to produce, nor of seeking out Canadians to produce that for which there seems to be a Canadian market. The lessons of the real world have taught those in government to realize the great cost associated with such gerrymandering of normal market forces, though perhaps not yet to lose altogether the nostalgia for the days when a measure of closure to the outside world, especially the United States, was seen not only as good economic planning but even as necessary to the fostering of a Canadian identity.

Some would say that the old "family-oriented" policy was successful and that its success has brought its own superfluity. It is true that there are many Canadian successes anxious now to play on a world-wide playing field and that the old policies, which arguably nurtured them, would now be hindrances. It is also true, though, that these same successes, however they came about, must now face the world as it is and that, more and more, they cannot survive unless they survive on the world scene.

Be that as it may, the purpose of this paper is not to judge the old industrial policy of Canada, nor the new one, but simply to take as a fact that Canadian markets and industries are going to be left more and more to their own devices and to move from there to explore the trade policy implications of what is slowly emerging as a new Canadian attitude towards international competition and unregulated markets: that they are good things.

It is sensible to take this development as a fact and as a near certain aspect of the next several decades. The Free Trade Agreement ("FTA") was a symptom of the change, a result of what can only be described as a sea-change in industrial policy, but it was also, and is more and more, an obstacle to any retreat. Too many bridges have

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The following text was compiled from the transcript of the remarks made by Mr. Potter at the Conference.

been burned, and more are falling with every passing joint venture and distributorship contract, for there to be any easy reversal. Free trade opponents in Canada lament this.

More importantly, neither the governments nor the economies of Canada or of its provinces can afford to put up barriers rather than to take them down. Two provincial budgets of recent days have justified their cost-cutting and their retreat from interventionist strategies on credit rating agencies' effects on the interest the provinces must pay on their debt. Standard & Poor's has four Canadian provinces on "negative outlook", a warning of imminent downgrades in ratings. Ontario's credit rating has been cut twice in the past two years. All provinces, of whatever current political stripe, will cut cost and try to bring their economies into line with the competitive environment now inescapable.

Free-traders may indeed have the governments' debt load to thank for the fact that there seems to be no thought of returning to interventionist strategies of the past. The total debt of the Canadian government and of all the provinces was fifty-four percent of the Canadian Gross Domestic Product ("GDP") in 1981.[1] In 1992 it was ninety-two percent.[2] The provinces' debt was just over ten billion dollars in 1981 but is now just over $250 billion.[3] Not only are the governments themselves strapped, but the economies they run have little room for maneuver. The idea of a return to policies which are meant to help Canadian production, but result in Canadians' paying more for what they buy than what their American friends buy, will not sit well.

Other forces are clearly at work, too. As Jagdish Bhagwati points out, trade continued obstinately to grow from 1973 to 1983 despite an increase in protectionist pressures and an increase in the numbers of non-tariff barriers.[4] It seems clear that the world is simply getting smaller, and the flows of information faster and faster, so that small markets are being smashed apart faster than protectionism can glue them together. Lines of supply are unavoidably multiplied and rendered impermanent. For Canada, the conclusions to draw are evident: it cannot expect that any one industry will supply itself exclusively within Canada and must arrange the world in such a way as to win at least as much abroad as it loses at home.

It is true that the party in power in Ottawa may change in the next few months[5], and that those in power in various provinces may

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[1] Bernard Simon, *Canada's Provinces Get the Borrowing Habit: Capital Markets are Concerned at Ever-rising Deficits.*, FIN. TIMES, April 14, 1993, at 6.

[2] *Id.*

[3] *Id.*

[4] JAGDISH BHAGWATI, PROTECTIONISM 54 (1988).

[5] At the time of publication, the Liberal party, led by Jean Chretien, defeated the party in power, the Progressive Conservatives. Clyde H. Farnsworth, *Governing Tories in Canada Routed by Liberal Party*, N.Y. TIMES, Oct. 26, 1993, at A1. [Editor's note].

change in the next several months after that, but none of the opposition parties will campaign on a return to policies which are now seen for what they are: costly to governments and costly to their citizens.

What does all this mean for trade policy?

TRADE REMEDY LAWS

Jagdish Bhagwati writes that antidumping and countervail measures should be seen not as non-tariff barriers but as tools of fair free trade, as long as they are used well and not abused.[6] This sounds terribly simplistic but is perhaps a more realistic view[7] than that which suggests that it would be an easy thing to do away with antidumping and countervail remedies.

"It is impossible to reconcile them with any coherent theory of liberal trade. And, as the experience of Europe and Australia shows, no well-integrated free trade area can contemplate the retention of these regimes, in their present form, over the long term."[8]

It is a theme which has been a favorite in academic circles for some time now. Indeed, it lies behind the Free Trade Agreement's Articles 1906 and 1907 which set a seven-year sunset on Chapter 19's binational panel system of judicial review of antidumping and countervail determinations, and required a Canadian-American Working Group to develop rules and disciplines for the use of government subsidies and a substitute system for the dealing with unfair pricing and subsidization. That is, all trade remedy laws were to be replaced.

Michael Hart, a member of Canada's free trade negotiating team, wrote then that

> the two governments agreed to continue to work toward a new regime, obviating the need for border remedies by the development of new rules on subsidy practices and by relying on domestic competition laws. Thus the goal of the two governments remains the establishment of the type of new regime envisaged in the original Canadian proposal.[9]

We have moved slightly away from Michael Hart's goal in that NAFTA would do away with the sunset clause and make the binational panel system a permanent feature of the trade remedy laws of Canada, the United States and Mexico, prompting Professor Trebilcock to write that the "prospect of a trilateral pact should not preclude

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[6] *Id.* at 45.

[7] Particularly taking into account the doubtful political will to do away with trade remedies, a question which Bhagwati does not deal with.

[8] Michael Trebilcock & Thomas Boddez, *Unfinished Business: Reforming Trade Remedy Law in North America*, March 1993 (a study written for the C.D. Howe Institute).

[9] Michael Hart, *Trade Remedy Law and the Canada-United States Trade Negotiations*, 1988, ABA Nat.Inst. on the F.T.A.

increased trade liberalization between Canada and the U.S."[10] If it cannot be done right away for the three North American countries, it should be done for the northernmost two.

The reasons given by Professor Trebilcock are compelling, and there are many more besides. The use of current trade remedy laws is burdensome, costly, uncertain and generative of friction. From 1980 to 1990, more than half of all the world's countervailing actions arose in the United States; more than half of the world's antidumping cases arose in Canada or the United States.[11] From 1985 to 1987, Canada and the United States accounted for seventy-five percent of all definitive antidumping findings; the United States alone accounted for ninety-two percent of all definitive imposition of countervailing duties and Canada accounted for all the rest.[12]

In a true free trade environment, it would be the competition laws which would apply to the dumping of gyproc from the American Southwest into Canada just as it applies to the dumping of that same gyproc into the American Northwest. In such an environment, the recent Canadian antidumping case involving gyproc from the United States would not have happened, nor would the sorry spectacle of the near-simultaneous American and Canadian complaints that the Canadian steel mills are dumping steel into the United States and that the American steel mills are dumping steel into Canada with consequent material injury alleged to be caused on both sides.

But, is it a realistic prospect that Canada and the United States would, from one day to the next, simply leave to their domestic competition and antitrust laws, including their predatory pricing provisions, the job of responding to the dumping of overcapacity from one part of North America to another?

Would this involve, as Professor Trebilcock writes, "only minor adjustments"[13] to the domestic law, to allow it to cover predatory practices of foreign competitors? If it is only minor adjustments that are contemplated, are we not really talking about simply letting Canadians and Americans dump into each others' markets? Would this not be more feasible than asking the Canadian Parliament to authorize an extraterritorial reach of America's antitrust laws? Rather than do that, would it not be more politically promising and more effective in the long run to create a supra-national body of competition law and a supra-national body to police it?

These questions are not yet face-to-face with their answers and I pose them only to explain my view, whatever the policy preferences or

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[10] Trebilcock, *supra* note 8.

[11] Simon, *supra* note 1.

[12] Alan M. Rugman & Samuel D. Porteous, *Canadian and U.S. Unfair Trade Law*, 16 CAN.BUS. L. J., 16-18 (1990).

[13] Trebilcock, *supra* note 8.

academic debates, that the new industrial policy of Canada is not yet so all-encompassing and universally approved that we can expect soon to be rid of the application of trade remedy laws to Canada-United States trade.

In short, the trade remedy laws are, in a free trade environment, costly and perhaps even counterproductive but, for the short and medium term, we are stuck with them.

Indeed, Professor Trebilcock seems to recognize this and recommends that, if the politicians cannot find the spine to do what is required, they must at least make permanent the binational panel system of Chapter 19, by ratifying NAFTA.

In the context of present-day reality, with the little likelihood of arriving any time soon at an agreement that Americans and Canadians can dump and sell their subsidized goods with impunity anywhere in Canada or the United States, we must consider the negotiation of a permanence for the binational panel system to be a victory for common sense.

Competition Laws

Though it is an unlikely prospect that we will be able to do away with trade remedy laws in the near future, this is no reason not to explore ways in which North American competitors could settle their competition-related disputes without having to have recourse to protectionist trade remedies.

This could be done by a variety of measures of varying scope. Canada's Competition Act could easily be amended to make it clear that a plaintiff or a complainant in a matter of abuse of dominant position or predatory pricing need not be a Canadian or even carrying on business in Canada, and that the definition of the markets relevant to judge the effect of the reviewable practice could be partially or even exclusively outside Canada. This would allow the Competition Tribunal to render orders, executory in Canada, designed to stop practices having an anticompetitive effect in the United States.

Similar changes might be brought to the United States Law. This would effectively allow the aggrieved competitor in one country to opt for application of the law of the other country.

However, much more daunting changes would be required to allow for extraterritorial reach of some competition laws. Canada's Competition Act makes it a defence to a charge of anti-competitive conspiracy that the conspiracy was designed to sell Canadian product exclusively outside Canada. Could Canada amend its law to say that it would be a crime to conspire as regards sales to the United States but not as regards sales to, say, Europe?

On this question, as a matter of principle, there is no obstacle to Canada's leaving all competition-related disputes to competition law

rather than to trade remedies for both Europe and the United States. As long as there is open access to the other market, and the goods reaching Canada through an unfair trading practice can always go back, or as long as the aggrieved Canadian competitor could always respond in kind, those who say that there is no need for trade remedies in North American trade must explain why it is needed in trans-Atlantic trade or in trade with any partner willing to offer as open a market as is found in Canada.

BINATIONAL PANELS

Arguably more than any other single institution, the binational panel system, for all its flaws and for all its detractors, has made a signal contribution to confidence in the Canada-United States trading relationship, surely the prime goal of anyone seeking to foster trade-liberalizing policy. If greater freedom of cross-border competition is the new industrial policy, and it is, greater confidence in the rules under which that competition operates is essential.

The binational panel system not only bolsters, in itself, that confidence, but operates as a pressure towards the changes in practice and procedure which also contribute to that confidence. I believe that most commentators agree that the binational panel system has played this role rather well.

The binational panels' role is inextricably tied to the declared purposes[14] of the FTA, one of which is "TO CONTRIBUTE to the harmonious development and expansion of world trade and to provide a catalyst to broader international co-operation."[15]

It plays that role, so far, only in relation to trade remedy laws, either as to their amendment or as to their application[16] or as to the arbitration of trade-related disputes between Canada and the United States.[17]

Leaving aside the question of whether binational panels in their current form or in some other form might be better suited to the job, it would seem that an industrial policy calling for broader and broader markets would be helped by a trade policy putting to broader and broader use the proven mechanism of binational or even tri-national panels.

In matters of environmental problems, infringement of intellectual property rights, preferential procurement policies, and so on, whether

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[14] "Lofty" purposes, to use the adjective of the Extraordinary Challenge Committee, (ECC-93-1904-01 USA, p.9.), which reviewed the two decisions rendered by a binational panel in Live Swine from Canada, (USA 91-1904-03).

[15] *Id.*

[16] FTA, NAFTA Chapter 19

[17] FTA Chapter 18, NAFTA Chapter 20.

or not the matter is now covered by the FTA or NAFTA, the positive experience had with binational panels in the area of trade remedy laws could be transplanted.

There is another reason, as a matter of trade policy, to favor the use for the binational panel system. For the time being, it is clear that neither the United States nor Canada is ready for supra-national tribunals or for law-making bodies which would bind the two countries. Traders and investors on each side of the border need to have confidence in the workings of the law on the other, in a variety of fields, and they need to move to a greater harmonization or compatibility of the rules on both sides.

Binational panels, by their nature, (and though their mandate is to apply the domestic law and not to change it), come with slightly new approaches to problems which are themselves new or for which the domestic law offers no unambiguous solution. The rulings binational panels make, within this framework, move the law ahead and, to the extent that both Canadian and American problems come before the panels, both the Canadian law and the American law is being moved ahead more or less in tandem.

This is so even though the panel which hears one case is not necessarily the same as the panel which hears another: there is an institutional memory from one case to the next, panels do have a tendency to cite each other[18] and the simple fact of having Americans judge Canadian cases and vice versa necessarily has at least a small harmonizing effect.

In the Binational Panel regarding machine tufted carpeting from the United States[19], the panel performed an exhaustive review of the Canadian law regarding the standard of review applicable to the Canadian International Trade Tribunal's findings of fact. The majority came to the conclusion that, though the Canadian law was to the effect that no finding of fact should be challenged on judicial review unless it is "patently unreasonable", ". . . we must attempt to ascertain whether there is any evidence in the record capable of supporting the necessary conclusion. . . ."[20] This sounds suspiciously like the American standard of review.

If the binational panel system can be used to help the law, on both sides of the border, progress along similar paths, or at least not in opposite directions, would be a healthy contribution of trade policy to the overall industrial policy.

From a Canadian perspective, there is an additional merit. Binational panels are just that, binational. To the extent that they do have

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[18] Even the second Extraordinary Challenge Committee judgment of April 8, 1993, ECC-93-1904-01 USA, cited extensively the first, ECC 91-1904-01 USA.

[19] CDA-92-1904-02, April 7, 1993.

[20] *Id.*

any influence on the law or on the course of the law on either side of the border, the binational panel system ensures that the influence, in this regard, is not unduly weighted to one side of the border.

TRANSPARENCY OF PROCEEDINGS

One of the benefits which has come from the binational panel system is the greater transparency of the proceedings governing trade remedies. That greater transparency is a boon to traders and cross-border investors as well as to the general climate in which this trading takes place. It could be brought to bear elsewhere, whether through binational panel review or otherwise.

Revenue Canada and the Canadian International Trade Tribunal now maintain their files and records and deliver them for review in quite a different manner from that which prevailed five years ago. Confidential material is handled differently and the stress which is placed on having public versions of whatever is filed confidentially is now heavy indeed. This did not all come form the threat of binational panel review but it was definitely hastened thereby.

Similarly, the way in which judgments are rendered, determinations made, explanations given and justifications advanced, is immeasurably more open now than it used to be. In the machine tufted carpeting case the panel remanded the injury determination of the Canadian International Trade Tribunal because the panel's majority could not find in the Tribunal's determination more than a conclusion that there was a causal link between the admitted dumping and the admitted injury; the panel instructed the Tribunal to proceed to a detailed analysis of the facts surrounding this causal link.[21] John Richard, in the minority, wrote, "The drawing of inferences is part of the raison d'être for the existence of the Tribunal, which has the necessary experience and expertise to draw the requisite conclusions. It is its most important function."[22] If the majority view holds, we need no longer simply trust that the conclusions are being drawn correctly, but can insist on "an analysis in detail"[23] and a thorough explanation of the basis on which those conclusions are drawn.

This will make the Tribunal's task more burdensome and the drafting of its determinations more intricate, and presumably the use of expert analysis at its hearings more widespread, but it will also make the work of the Tribunal more understandable to the trader and investor who has to take the Tribunal's determinations, or the threat of them, into account.

Whether by the use of something analogous to binational panels or

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[21] *Id.*
[22] *Id.* at 74.
[23] *Id.*

by some means more direct, a similar pressure towards greater transparency could be brought, with similar confidence-building effect, in other areas: public procurement,[24] Investment Canada decisions, decisions regarding landing rights at airports, and so on.

CONCLUSION

It is a difficult and, to many parts of the economy, wrenching thing to go from the old industrial policy to the new one.

This does not make the progress any less desirable but it is a call to those who believe the progress is too slow: speeding the move to a trade-remedy-free trading zone, to a zone in which the lines are blurred between domestic laws, extraterritorial application of those laws and international rules, may risk the whole exercise.

The progress has already been good, with confidence-building measures building confidence and credibility just as they were intended to, and with each successive step bringing us along the path of progress rather than away from it.

Steady as she goes, with the adjustments called for by changing circumstances and the gradually awakening public awareness of the stakes of the game, is the best prescription.

That said, it is undeniable that the trade policy so loudly declared in the FTA has been and will continue to be an essential tool and basis for the industrial policy of which that Agreement or its successor, NAFTA, is both the result and, for the future, the guarantor. Having survived the move to a free trade zone, and possibly to the first enlargement of it by the inclusion of Mexico, there is no reason not to make every market-broadening improvement which the Agreement allows.

[24] Now subject to review by a tribunal in limited cases.