

January 1987

# Comments on the Current and Possible Future Role of the International Trade Commission and the Canadian Import Tribunal in the North American Competitive Context

Gary Horlick

Follow this and additional works at: <https://scholarlycommons.law.case.edu/cuslj>



Part of the [Transnational Law Commons](#)

## Recommended Citation

Gary Horlick, *Comments on the Current and Possible Future Role of the International Trade Commission and the Canadian Import Tribunal in the North American Competitive Context*, 12 Can.-U.S. L.J. 209 (1987)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol12/iss/24>

This Comment 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 Canada-United States Law Journal by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

## Comments on the Current and Possible Future Role of the International Trade Commission and the Canadian Import Tribunal in the North American Competitive Context

*by Gary Horlick\**

**I'm not going to do** any better or give you a better sports metaphor than simply to observe that we are all assuming that the stadium in which this game is going to be played is going to be both covered and heated. Now, neither of those would occur in the Hobbsian state of nature, which shows you automatically that there is a role for government, or at least some external force.

That, in fact, is what trade regulation is about. No one is saying there is no role for government. No one is saying that we should just let pure market forces occur, because you need monopoly laws, and similar laws. So what I want to do is to comment; although I have a problem as commentator because I am finding myself in agreement with virtually everything all three of the speakers have said, including my fellow commentator. Fortunately, however, since I knew the identity of the three speakers, I knew that I would be in agreement with all three of them, so I did bring along a few thoughts of my own.

Reviewing briefly the current situation, despite all of the disputes, what you have is actually a fairly good agreement between the United States and Canada on the general principles of government regulation of international trade. This is not some kind of historic accident. This is very simply a product of the GATT system. Because of successive rounds of GATT negotiations, there is actually general agreement on the main principles. It is a success that is seldom noted; people look at the exceptions.

Now, there are some differences in administration of those principles between the United States and Canada, as you have heard from Vice Chairman Brunsdale and Chairman Bertrand. The main differences, however, and the ones that get most attention are disputes over actual cases. These are not disputes over principles or over methods of administration. They are disputes over outcomes. You couldn't have a better example than the one that Chairman Bertrand cited about corn, where some parts of the United States can become very huffy when Canada starts applying the same principles to the United States that the United States has applied frequently to Canada. This is considered a matter of

---

\* Former Deputy Assistant Secretary of Commerce for Import Administration and International Trade Counsel for U.S. Senate Finance Committee.

great dispute, even though the principles are the same. In fact, I would observe that in the evaluation of subsidies, Canada was probably more conservative in evaluating the subsidies than the United States would be in a comparable Canadian case. The number would have been higher had the United States investigated the same Canadian programs—not by much, but by a little. Now, what you have are some differences, but below that, general agreement on principles, so we have to look at those principles just a little bit.

The basic problem is, as Vice Chairman Brunsdale pointed out, that you have these GATT definitions—this is a perceptive point. The only real definitions of unfairness attached to dumping and subsidies is very simply that there is no requirement of compensation. When you get below that surface, you quickly find out—I think most businessmen tell me that—the definitions of dumping, for example, are quite outmoded.

Just briefly, dumping is selling for less in one market than another. The unfairness of that is questionable, but it is certainly a different kettle of fish than when tariffs average 20 or 30%; and if one wiped out all tariffs, as is contemplated by the intrepid negotiators, query why you would have the differential pricing, except perhaps for commodities that are extremely transportation intensive.

The definitions of countervailing probably make more sense to the extent that they are followed and they are similar for both the United States and Canada, if you read the relevant decisions. There is a very important point which is made in Chairman Bertrand's paper. It is that the failure of the United States, and actually somewhat of Canada, to look at the true net benefits of subsidies. What you are looking at is a gross subsidy without a true economic accounting of the total favorable impact.

My guess is this would usually reduce the levels of countervailing duties, although in some cases it would raise them, if you looked at the true economic measure. I don't want to pursue that point too much further; as a former administrator, I can assure you it is impossible to do within any time frame assigned by any legislation. Now, there is also this interesting question about some differences in the definition of injury between the United States and Canada. Again, with all due respect to the respective tribunals, injury, unlike dumping or subsidization, will always be in the eye of the beholder. That's always going to be a problem and there will always be differences, as with horse races, because you wouldn't have any betting on a horse race if there weren't differences of opinion.

So I'm not sure that there's much you can do in tinkering with the standards that is ever going to remove disputes over the results. There is, in my view, an interesting problem raised by Vice Chairman Brunsdale about the way that the U.S. administration of these laws is split and I'm curious if it is true in Canada. As she pointed out, the ITC can only investigate the margins of dumping or the amounts of subsidization that

Commerce gives them. In practice this means that some things do fall between the cracks.

For example, the U.S. statute requires that material injury occur by reason of the dumped imports and yet the ITC, in practice, doesn't have a very good handle on which imports are dumped and which are not. Again, there are some obvious administrative problems, but logically and frequently, for example, Commerce will find that about 60% of the imports are dumped at an average dumping margin of 40%. Commerce will then report that there is a weighted average dumping margin of 24%.

The ITC cannot actually get down and examine each importer (although Commerce already has for six months) to figure out which are dumping and which are not. In theory they should only be looking at the effect of the dumped imports, but in practice it just doesn't occur.

I think there could be better coordination. Proposals have been made to have a single agency. I think there is a lot to be said for that, although there are some difficulties. It is an interesting example of how administrative structures can have an effect on substance; while not particularly one that is embedded in the law. For all I know it is true in Canada as well. It's not something that people intentionally do. It is inevitable.

I think the suggestion that Vice Chairman Brunsdale made, that both sides should adapt the best of each other's practices, would be an excellent one. My personal view is that the Canadian Import Tribunal's procedures have a better way of finding truth than our own ITC. This may be a lawyer's reaction, because lawyers in Canada and the United States have this fondness for the adversarial process as a way of testing truth.

By contrast, many Canadians complain about the relative closeness of review in Canada. That has changed a lot in the last few years under the Special Import Measures Act (SIMA) and perhaps it would be helpful if the administrations on both sides of both of these issues got together more and exchanged experiences. Oddly enough, there is precedent for this. You will see a convergence of practice between the United States, Canada, the EEC and even Australia as a result of the GATT committees.

There are codes, anti-dumping codes and subsidy codes, and people meet every six months to discuss them. I was quite interested to find that this led to increasing convergence of practice, not because it was required by the codes, but because you simply met once every six months with people who had the same set of problems. If the United States had a completely novel issue in a dumping case or a countervailing duty case, who else would I call? Who else would the U.S. administrator call? There is no one else who could have possibly faced that problem, except for one person in Ottawa and one in Brussels, so you call them or you

run into them at meetings. It is an interesting example, again, of the fact of having this structure, not because of legal compulsion, but because it has created a great deal of convergence. It is very noticeable among everyone that has been involved in these.

Committees under the Free Trade Agreement (FTA) could well have some of the same effects. I want to turn now then to this FTA in this vision of the future. A point made by Jon Fried is very important. The reason for having an FTA is basically to provide rules for investors. There are trade disputes, but essentially what you are doing in the long run is setting up rules that allow investors to figure out what to do, what kind of plants they want to build, where they can sell, and so on. You are setting up rules that you are going to tell someone today where they can sell in ten years and under what conditions. That's the purpose of government, as I say, to provide this nice, heated, covered dome stadium, but then to not intervene, except to prevent the teams from literally killing each other.

In this point, I do get to use a sports metaphor. I reject this perfectly level playing field. The fact of the matter is the playing field will not be level; just as, for example, in a football match, the side that gets the wind is determined by a coin flip. There are random events that governments and businesses can't control and they are not all the result of someone else's unfairness. They are just life. Businesses have to plan for those, but governments are not supposed to be part of this problem. They are supposed to be part of the solution.

The purpose of these rules is to provide a stable environment, not one where the rules change every year so you cannot plan your business. Thus a stable environment is crucial for a FTA. That's the first point. The second point which derives from that is an assumption; because both of our countries run essentially on a neoclassical economic set of models, if we provide this stable environment, our businessmen on both sides will go out and do a better job. There will be more investment, more growth in the economies. We will all live better. This will help both of our countries' positions in world markets.

Now, in theory, the secondary effect of this negotiation is to provide a model and this has obviously been high on the U.S. agenda. The dumping standards and countervailing duty standards are far from perfect. The United States and Canada have a better chance than any other two countries possibly in the world to sit down and come up with rules that make sense; that is in the sense of letting business go about its business. That's why this is such a temptation for both countries.

Let me turn now to specifics about what you would do in the long-term. I'm going to focus on the contingency protection issue. As a long-term matter, you essentially are looking for equal treatment. A Canadian business doing business in the United States would be treated no differently than a U.S. business doing business in the United States and vice versa. I would suggest that this raises serious questions for busi-

nessmen on both sides. They better realize the impact that would mean eliminating the anti-dumping laws as they apply to imports from the other country.

Canadian imports into the United States and U.S. imports into Canada would be treated under existing competition policy. Eventually you would want to look at one market for the purpose of evaluating that competition. There are some interesting problems, because you would not have a common external tariff as the EEC does. So getting to a long-term goal of a single market might be a problem for the antitrust lawyers.

Certainly you would eliminate the anti-dumping laws as they apply to both sides; this is a serious question for both United States law and Canadian business. Implementation may be politically difficult; you would eliminate section 337 and section 232, which is national security, of the U.S. law, as it applies to Canada. Again, you would only have recourse to domestic intellectual property rights in both countries. Section 232 actually never affects Canada, but it should not be around as a threat. Anyhow, the United States and Canada operate as one joint defense protection base.

You would eliminate safeguards as they apply to both countries, because you would not have searches from outside. You are talking about one market, so in the end you simply wouldn't have safeguards. Again, this is a problem because you need common safeguards, assuming you would want safeguards at all, under the GATT against third countries.

Finally, you would get rid of (distortive) subsidies, but who am I kidding? Subsidies exist because there are politicians who are democratically elected. They spread subsidies thinly over every writing in Canada and every congressional district in the United States, so you are not going to eliminate subsidies. That's why even in the long run you are going to have some sort of either discipline or countervailing duties. It is a given.

So as a long-term matter, you are going to have some sort of joint tribunal with binding powers either to eliminate the subsidy or impose a countervailing duty. I note Chairman Bertrand's suggestion of the need to look at import displacing effects of subsidies as well. They are not limited to export enhancing. That's the long-term future and what I would like to do very briefly at the end here is to look at some of the immediately attainable goals.

Immediately attainable goals require that some substantive changes be made. I don't want to go into great detail on them, but there are a large number of things for which the United States and Canadian businesses can jointly go out and lobby so as to reduce the harassment value of these cases. Just to give you an example, you can require that standing be shown affirmatively by petitioning industries. You could refuse to initiate cases where the offending import from the other country between the United States and Canada has less than 1% of the market.

There have been cases, certainly in the United States and probably

in Canada, where the relevant import from Canada or the United States was tiny. The real target was someone else. You can say that injury can never be found since less than half of the industry refused to answer the relevant questionnaire; this occurs with fair frequency. You could, for example, agree on distinct principles of what is countervailable and what isn't countervailable. I believe that is likely to happen.

The principles aren't too far apart and you can simply raise the de minimis standard. Right now the United States will apply subsidy or dumping margin if it is over five percent. Very few businessmen I have encountered who have "won a case" by getting a margin in their favor of six percent think they have won anything. It is just not worth it, so you probably could raise that to two or three percent and, again, eliminate a lot of the harassment notion. That I note, as opposed to the import penetration level, would require a full investigation.

One proposal is to adopt a differential subsidy approach. One of the fascinating things U.S./Canadian countervailing duty cases is that almost invariably the petitioning industry is subsidized. This isn't surprising, because the industrial structures are substantially similar or similar enough that an industry on one side of the border is likely to have extorted the same kinds of subsidies as is true on the other side of the border. If you go through the list of U.S and Canadian countervailing duty cases, it is likely you will find the petitioner was subsidized and is claiming unfair subsidies.

There's a long laundry list of those little things. The last thing is what you can do immediately on some sort of dispute resolution and Jon Fried has gone through that very well. Let me just give a few thoughts. First, you have to have private access. This has long been a bugaboo, as most of you know, in international law. With the exception of a few human rights commissions, there is basically no private access. Thus you are going to need private access to make the FTA meaningful. Businesses on either side of the border shouldn't have their access to some sort of decision controlled solely by their governments.

One proposal of which private businesses are always fond is some sort of private dispute resolution that can be done within antitrust laws; laws about which there is occasional insensitivity. I don't know if that's feasible, but there is something to be said for a weeding out process, whether it is done privately or at an initial stage with governments. The reason why is that a lot of the cases between the two countries simply aren't worth the trouble.

The United States recently imposed duties on \$200,000 worth of Canadian flowers. Canada wasn't the target. It was Columbia, the Netherlands, and maybe Israel. Canada just got swept in. Those sorts of cases certainly aren't worth the trouble and perhaps some sort of weeding out process can get rid of those cases. Again, the second aspect is the importance of private access. Most likely, the parties will have recourse to

their national laws first as a short-term matter; however, you need a binationally binding final decision.

The reason for this problem is not the principles; it isn't really their application in most cases; it is a perception that the process can be altered by one country or another. If the United States and Canada really are going to undertake the kind of joint economic effort that this agreement implies, you will need binational decisions on what is a subsidy, what is injury and things like that. There has to be some recourse to a binational decision.

The recent softwood lumber case is a perfect example. The problem, very simply, was the perception that the United States could decide what was a subsidy on political grounds. Basically you are talking about a marriage: if both sides don't trust each other then it will be a wrenching situation. Even some sort of binational binding dispute resolution between the two countries on those issues looks short-term.

Lastly, the method of dispute resolution has to be effective. Effective does not mean that you get the decision two years later; effective means that you get the decision as part of the actual dispute. You can't wait two years to find out whether you are going to impose \$600,000,000 in duties. With all that said, this is all one long lead-in to the panel on dispute resolution that I think we are all looking forward to later today.



