

RECENT DEVELOPMENTS IN THE LEGAL FRAMEWORK OF U.S.-CANADIAN TRADE

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I. INTRODUCTION

I welcome the opportunity to discuss the laws affecting U.S.-Canadian trade because I think these laws have a critical role in the future course of U.S.-Canadian trade relations. In this presentation, I would like to review recent trade law developments affecting U.S.-Canadian trade flows. Specifically, I would like to cover: (1) the General Agreement on Tariffs and Trade,¹ (2) the Agreement with Canada Concerning Automotive Products,² and (3) several provisions of U.S. law which directly affect U.S.-Canadian trade. Before beginning this survey, I would like to make some general comments about the overall economic setting. The events of 1975 have placed considerable pressure on the international trading system. The world is just now recovering from its most severe economic recession since the 1930's. The recession was marked by the first annual reduction in the volume of world trade since World War II, a reduction of six percent in 1975.³ Fortunately, the mistakes of the 1930's, competitive devaluations, beggar-thy-neighbor tariff hikes, and proliferation of nontariff barriers, for example, were not repeated. This achievement is a tribute to the international legal and financial institutions which have been erected since World War II to deal with international economic problems.

Canada did not escape the effects of the international recession. Real Gross National Product stagnated, unemployment rose, and Canada's balance of trade position worsened with both the United States and the rest of the world.⁴ In most years, Canada exports more than it imports, but in 1975, Canada registered a global trade deficit of \$1.7 billion and a bilateral deficit with the United States

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

2. Agreement with Canada Concerning Automotive Products, *done* Jan. 16, 1965, [1966] 1 U.S.T. 1372, T.I.A.S. No. 6093 (effective Sept. 16, 1966)[hereinafter cited as Automotive Products Agreement].

3. INTERNATIONAL ECONOMIC REPORT OF THE PRESIDENT 10 (1976).

4. *Id.* at 159, and Statistics Canada Daily, Feb. 27, 1976, at 2, 7.

of \$1.9 billion.⁵ Both exports and imports rose to record levels, but exports (up 2.1 percent from 1974 to \$32.9 billion) rose more slowly than imports (up 9.1 percent from 1974 to \$34.6 billion).⁶ The deterioration of \$2.5 billion in Canada's global trade balance from 1974 to 1975 is largely the result of the fact that the recession in the United States preceded that in Canada and was more severe and prolonged. As a result, the U.S. demand for Canadian goods fell sooner and to a greater degree than did Canadian demand for U.S. goods. Since Canada is still largely dependent upon primary goods exports, which tend to fluctuate strongly over the business cycle but with a long time lag, its exports still have not recovered their normal growth rate.

Despite the recession, the United States and Canada continued as each other's largest trading partner. U.S. exports to Canada, \$23.6 billion in 1975, are 22 percent of total U.S. exports, while Canada's exports to the United States, \$21.5 billion in 1975, are 66 percent of Canada's global exports.⁷ It follows that economic events and policies in either country have important effects upon the economy just across the border. These events and policies in turn are strongly influenced by national laws and international agreements.

II. GENERAL AGREEMENT ON TARIFFS AND TRADE

At the international level, the most important multilateral agreement is the General Agreement on Tariffs and Trade (GATT).⁸ The GATT is essentially a contract in which nations have agreed on a system of rules designed to coordinate national trade policies for the purpose of liberalizing trade. The GATT does not supersede existing national legislation.⁹ The GATT is based on the concept that tariffs should be the only method used to regulate trade and that these tariffs should be gradually reduced through trade negotiations, thereby permitting freer trade. In its 28 years, the GATT has been the framework for six rounds of trade negotiations through which the average tariff level among industrialized nations has been

5. MINISTRY OF INDUSTRY, TRADE AND COMMERCE, CANADIAN STATISTICAL REVIEW, March 1976, at 99-100.

6. *Id.*

7. *Id.* at 99; U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUSINESS, March 1976, at 34, table B2.

8. GATT, *supra* note 1. The GATT has never been submitted to the U.S. Senate for its advice and consent. It is, however, a valid executive agreement.

9. See note 82 *infra* and accompanying text.

reduced to about seven percent on dutiable items.¹⁰ The seventh round, the Tokyo Round, is now underway in Geneva. In this round, negotiations are focused on tariffs; on nontariff measures such as antidumping and countervailing duties laws, internal taxes, and quantitative restrictions; and on improving the framework for international trade.¹¹ At the economic summit meeting in Rambouillet in December 1975, a commitment was made to complete the negotiations in 1977.¹²

In these negotiations, new techniques are being used to negotiate further trade liberalization. In the field of tariffs, progress is being made toward agreement on a tariff negotiating formula. The Kennedy Round, conducted from 1964 to 1967, marked the first successful use of an automatic tariff reduction formula.¹³ In the Kennedy Round, agreement was reached on a linear tariff reduction of 50 percent, and negotiations proceeded on the basis of exceptions lists.¹⁴ The net result was an overall reduction in tariffs of about 36 percent on industrial products.¹⁵

In the Tokyo Round, an attempt is being made to accommodate the interests of those who favor this sort of straight linear device as well as those who favor harmonization, a concept involving larger percentage reductions for products with higher tariffs and smaller reductions for products which have low tariffs. In all probability, the formula which will be adopted will combine a linear reduction element with a harmonization element.

A different kind of problem is posed in the second area of the negotiations, that of nontariff measures. Since nontariff measures include the whole range of administrative and regulatory devices

10. E. PREGG, *TRADERS AND DIPLOMATS: AN ANALYSIS OF THE KENNEDY ROUND OF NEGOTIATIONS UNDER THE GENERAL AGREEMENT ON TARIFFS AND TRADE* 223, table 13-11 (1970).

11. Whereas a contracting party is not required to lower tariffs in the absence of special agreement, the general principle with respect to nontariff barriers is one of immediate abolition. . . . [E]ach type of nontariff barrier is treated separately.

K. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 19 (1970).

12. Text of "Declaration of Rambouillet" Issued at the Conclusion of the Meeting in Rambouillet, France, Nov. 17, 1975, 11 *WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS* 1292 (1975).

13. See E. PREGG, *supra* note 10, at 42-43, 61, 79-80. The first proposal to use such a device was made by the French in the 1950's. See A New Proposal for the Reduction of Customs Tariffs, GATT/1954-1. See also GATT, B.I.S.D. 2d Supp. 67 (1954), and GATT Docs. L/210 (1954), SR8/15 (1953), IC/SR16 (1954).

14. Meeting of the Trade Negotiations Committee at Ministerial Level, GATT, B.I.S.D. 13th Supp. 109-10 (1965).

15. United Nations Conference on Trade and Development, *The Kennedy Round Estimated Effects on Tariff Barriers*, at 60-61, tables A.1, A.2, U.N. Doc. TD/6/Rev.1 (1968).

which are used to regulate or restrict trade, an attempt is being made to identify particular areas in which codes of conduct can be negotiated. With such codes, interested nations could establish international rules and procedures to restrict the aspects of national systems which distort trade. Specific areas which have been singled out for the negotiation of such codes include subsidies and countervailing duties, standards for government procurement, and safeguards.

III. U.S.-CANADIAN AUTOMOTIVE PRODUCTS AGREEMENT

Having reviewed some of the developments affecting multilateral trade, I would like to turn now to bilateral relations, where the most important agreement affecting trade is the Agreement with Canada Concerning Automotive Products (Agreement).¹⁶ In the 11 years that the Agreement has been in effect, considerable progress has been made toward accomplishing the objectives of the Agreement, which are stated in Article I as follows:

- (a) The creation of a broader market for automotive products within which the full benefits of specialization and large-scale production can be achieved;
- (b) The liberalization of United States and Canadian automotive trade in respect of tariff barriers and other factors tending to impede it, with a view to enabling the industries of both countries to participate on a fair and equitable basis in the expanding total market of the two countries;
- (c) The development of conditions in which market forces may operate effectively to attain the most economic pattern of investment, production and trade.

Since 1965, a boom year in both countries, bilateral automotive trade has increased from \$1.1 billion to approximately \$12 billion in 1975, a recession year in both countries.¹⁷ Considerable progress has been made in integrating what were two national industries, so that today there is but one. As a result, Canada now has a strong, efficient automobile assembly industry.

As important as the Agreement has been as an instrument for

16. Automotive Products Agreement, *supra* note 2.

17. SENATE COMM. ON FINANCE, 92D CONG., 2D SESS., FIFTH ANNUAL REPORT OF THE PRESIDENT TO THE CONGRESS ON THE OPERATION OF THE AUTOMOTIVE PRODUCTS TRADE ACT OF 1965, at 20 (Comm. Print 1972); U.S. Dep't of Commerce, United States-Canada Trade in Automotive Products 1923-1974, March 11, 1975 (unpublished).

promoting the integration and rationalization of the North American automotive industry, it has also made another significant contribution to U.S.-Canadian economic relations. The Agreement was designed in part to deal with the introduction by Canada in 1963 of its expanded duty remission scheme.¹⁸ This scheme in effect subsidized exports to the United States by rebating tariffs on imports to those Canadian producers who would increase their exports of assembled vehicles to the United States.

On April 15, 1964, the Modine Manufacturing Company of Racine, Wisconsin, a producer of automobile radiators, filed a petition with the U.S. Commissioner of Customs under Section 303 of the Tariff Act of 1930, charging that the export incentive scheme constituted a bounty or grant on auto parts exported to the United States and requested the imposition of a 25 percent countervailing duty on such imports from Canada.¹⁹ The Automobile Service Industry Association filed a brief with Customs in support of Modine's position.²⁰ On June 3, 1964, the Treasury instituted an investigation to determine whether the scheme constituted a bounty or grant within the meaning of Section 303.²¹

U.S. and Canadian negotiators met several times in an effort to hammer out an agreement in the period before January 12, 1965, when the Automobile Service Industry Association, together with four independent parts manufacturers, filed suit against the Secretary of the Treasury in the Federal District Court for the District of Columbia asking that a writ of mandamus be issued to compel the Secretary to levy countervailing duties.²² On January 16, 1965, four days after this suit was filed, the Agreement was signed and Canada dropped its duty remission scheme.²³ An important concern of the negotiators was the possibility that imposition of countervailing

18. The expanded duty remission scheme was put into effect by Order of Council, P.C. 1963-1/1544, Oct. 22, 1963. See also SENATE COMM. ON FINANCE, 94TH CONG., 2D SESS., REPORT BY THE INTERNATIONAL TRADE COMMISSION ON THE UNITED STATES-CANADIAN AUTOMOTIVE AGREEMENT: ITS HISTORY, TERMS, AND IMPACT 29, 75 (Comm. Print 1976)[hereinafter cited as ITC REPORT].

19. ITC REPORT, *supra* note 18, at 76.

20. *Id.*

21. *Id.*

22. *Id.* If the Secretary of the Treasury determines that an imported product has received a bounty or grant, then he is authorized to impose a duty in addition to the usual duties, which will be equal to the net amount of such bounty or grant. Tariff Act of 1930, § 303, 19 U.S.C. § 1303 (1970).

23. Motor Vehicle Tariff Order, Order of Council, P.C. 1965-99, SOR/65-42, Can. Gaz., Jan. 27, 1965, at 143. See also ITC REPORT, *supra* note 18, at 77.

duties by the United States would lead, by a sequence of stroke and counterstroke, to a trade war between the two countries.

The Agreement dispelled this concern in a very creative way. Under the Agreement, Canada undertook to extend duty-free treatment to formerly dutiable parts and automobiles from the United States in exchange for duty-free treatment in the United States for parts and automobiles from Canada.²⁴ In negotiating preferential treatment for bilateral trade in automobiles and parts, the two parties followed different approaches to reconciling conflicts between their undertakings under the Agreement and their international obligations under the GATT.

Each nation had to confront the basic problem of conforming the Agreement to the provisions of the unconditional most-favored-nation (MFN) clause in Article I of the GATT, which requires that all benefits extended by a contracting party to any one country must be extended unconditionally to any other contracting party.²⁵ The United States sought and obtained a waiver of the provisions of this clause for the Agreement under Article XXV(5) of the GATT.²⁶

Canada utilized a somewhat different approach in implementing its part of the Agreement, and thereby successfully avoided having to obtain a waiver under the GATT. Duty-free treatment was accorded to specified new motor vehicles and original equipment parts on an MFN basis to all automotive manufacturers with production facilities in Canada which met certain criteria.²⁷ As a result, Canada did not consider it necessary to obtain a GATT waiver, and did not apply for one.

Despite the success of the Agreement, there is dissatisfaction on both sides of the border with it. Some critics of the Agreement erroneously view trade under the Agreement as a zero-sum situation, instead of one from which both sides can benefit. The Automotive Parts Manufacturers Association of Canada would like to have the Agreement amended so as to provide more protection for the

24. Automotive Products Agreement, *supra* note 2, art. II, annex A.

25. GATT, *supra* note 1, art. I(1). *See also id.*, preamble, art. II(1)(a).

26. *See* GATT, B.I.S.D. 14th Supp. 37, 181 (1965). Article XXV of the GATT, *supra* note 1, states in pertinent part:

5. In exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement; *Provided* that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties.

27. Order of Council, P.C. 1966-1509, SOR/66-370, Can. Gaz., Aug. 24, 1966, at 1075.

Canadian parts industry and to ensure that Canadian products will capture a larger share of the North American market.

In the United States, a report prepared by the International Trade Commission (ITC)(formerly the Tariff Commission) concerning the Agreement was released by the Senate Finance Committee.²⁸ In this report, the ITC concluded that “[t]he agreement as implemented by Canada is not a free-trade agreement, and it has primarily benefited the Canadian economy.”²⁹ The report criticized the Agreement on the following grounds: (1) Canada failed to remove the transitional provisions which imposed certain limitations on duty-free entry;³⁰ (2) the actual commitments made by Canada did not involve any real concessions, but rather in effect continued the preexisting system without substantial change;³¹ and (3) the trade surplus in favor of the United States was due to the weakness of the U.S. economy in the past few years, so that as the economy improved, the surplus would decline.³²

In response to these criticisms, the United States and Canada recently have agreed to initiate in-depth studies of the long-term outlook for the North American automotive industry. These evaluations could provide a basis for consideration of options for future policies.

IV. TRADE LAWS OF THE UNITED STATES

A. Trade Act of 1974

The discussion of national laws for the regulation of foreign trade will concentrate on U.S. laws. The most important recent development in the United States was the passage of the Trade Act of 1974.³³ This law revamped the entire system by which U.S. trade policy is formulated and implemented. Among other things, the Trade Act: (1) provides authority for the President to negotiate and enter into bilateral and multilateral trade agreements,³⁴ (2) establishes new procedures for congressional enactment of bills to implement trade agreements dealing with nontariff barriers,³⁵ (3) estab-

28. ITC REPORT, *supra* note 18.

29. *Id.* at 51.

30. *Id.* at 32-34.

31. *Id.* at 50.

32. *Id.* at 49.

33. Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (codified in scattered sections of 5, 13, 19, 26, 28, 31 U.S.C.).

34. Trade Act of 1974, § 101, 19 U.S.C. § 2111 (Supp. IV, 1974).

35. Trade Act of 1974, § 151, 19 U.S.C. § 2191 (Supp. IV, 1974).

lishes new rules and procedures for relief to U.S. industries which are injured by increased imports³⁶ or the unfair trade practices of foreign nations,³⁷ (4) establishes a new framework for trade with the socialist countries,³⁸ and (5) extends the Generalized System of Preferences to the developing countries.³⁹

This review of U.S. law will focus on four specific provisions which have aroused some concern about the U.S. commitment to a liberal trade policy. They are: (1) the "escape clause,"⁴⁰ (2) Section 301,⁴¹ (3) the countervailing duty law,⁴² and (4) the antidumping law.⁴³

Most of the recent cases have been brought under the antidumping, countervailing duty, or escape clause provisions. These measures, now modified by the Trade Act of 1974, have been in force for many years, and are explicitly recognized in international agreements of the United States as legitimate grounds for intervening in trade. Of the more than 50 cases initiated under these laws in 1975, dumping duties were imposed in only one case and countervailing duties in five cases.⁴⁴ Thus, in only six cases out of 50 was relief granted to a domestic industry. No relief was granted under escape clause legislation in 1975. From this record of the first full year under the Trade Act, it is fair to conclude that these provisions have not been used to impose unwarranted protectionist measures. The following review will examine the operation of these provisions and highlight the important changes made by the Trade Act. Trade cases with special importance for U.S.-Canadian trade will also be analyzed.

36. Trade Act of 1974, §§ 201-03, 19 U.S.C. §§ 2251-53 (Supp. IV, 1974), formerly Trade Expansion Act of 1962, Pub. L. No. 87-794, §§ 301-02, 76 Stat. 883-85.

37. Trade Act of 1974, §§ 301-02, 19 U.S.C. §§ 2411-12 (Supp. IV, 1974).

38. Trade Act of 1974, §§ 401 *et seq.*, 19 U.S.C. §§ 2431 *et seq.* (Supp. IV, 1974).

39. Trade Act of 1974, §§ 501 *et seq.*, 19 U.S.C. §§ 2461 *et seq.* (Supp. IV, 1974).

40. 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.

41. Trade Act of 1974, § 301, 19 U.S.C. § 2411 (Supp. IV, 1974).

42. 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).

43. 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).

44. Antidumping duties were imposed on Birch 3 Ply Doorskins from Japan, 41 Fed. Reg. 7389 (1976) (to be codified in 19 C.F.R. § 153.43). Countervailing duties were imposed on: Float Glass from Italy, 41 Fed. Reg. 1274 (1976) (to be codified in 19 C.F.R. § 159.47(f)); Footwear from Taiwan, 41 Fed. Reg. 1298 (1976) (to be codified in 19 C.F.R. § 159.47(f)); Leather Handbags from Brazil, 41 Fed. Reg. 1741 (1976) (to be codified in 19 C.F.R. § 159.47(f)); Nonrubber Footwear from Korea, 41 Fed. Reg. 1588 (1976) (to be codified in 19 C.F.R. § 159.47(f)); and Castor Oil Products from Brazil, 41 Fed. Reg. 11018 (1976) (to be codified in 19 C.F.R. § 159.47(f)).

B. *Import Relief*

Section 201 of the Trade Act replaces the provisions of the Trade Expansion Act of 1962⁴⁵ with a new escape clause provision.⁴⁶ Essentially, this provision permits the President to restrict importation of any product which causes, or threatens to cause, serious injury to a domestic U.S. industry. Although this involves the suspension of obligations undertaken in the GATT, such action is permissible under Article XIX of the GATT, provided the injury is caused by increased imports which are "a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement."⁴⁷

The Trade Act makes several important changes in the prior U.S. escape clause provisions:

1. It is no longer necessary to establish a link between concessions granted under trade agreements and increased imports.⁴⁸

2. The increased imports need no longer be the major factor causing serious injury to the domestic producer. Rather, they need only be a substantial cause, defined as "a cause which is important and not less than any other cause."⁴⁹

3. Import relief may be granted for a five-year period, with one extension for three years, if necessary. However, relief is, to the extent feasible, to be phased down no later than after the first three years.⁵⁰

4. In the event the President decides on import relief other than that recommended by the ITC, or refuses to provide any relief, the Congress may override that decision and impose the ITC recommendation by a concurrent resolution of both Houses.⁵¹

There have been 15 actions brought under the escape clause

45. Trade Expansion Act of 1962, Pub. L. No. 87-794, § 301, 76 Stat. 883 (repealed by Trade Act of 1974, Pub. L. No. 93-618, § 602(d), 88 Stat. 2072).

46. Trade Act of 1974, § 201, 19 U.S.C. § 2251 (Supp. IV, 1974).

47. GATT, *supra* note 1, art. XIX(1).

48. Compare Trade Act of 1974, § 201, 19 U.S.C. § 2251 (Supp. IV, 1974), with Trade Expansion Act of 1962, § 301(b)(1), 19 U.S.C. § 1901(b)(1) (1970).

49. 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) (repealed 1974).

50. Trade Act of 1974, § 203(h)(1), (3), 19 U.S.C. § 2253(h)(1), (3) (Supp. IV, 1974). The 1962 Act provided a four-year period of relief, with an extension of up to four years available, with no provision for a phase-down. Trade Expansion Act of 1962, § 351(c)(1)(B), (2), 19 U.S.C. § 1981(c)(1)(B), (2) (1970) (amended 1974).

51. Trade Act of 1974, § 203(c)(1), 19 U.S.C. § 2253(c)(1) (Supp. IV, 1974). This provision essentially restated that in the Trade Expansion Act of 1962, § 351(a)(2), 19 U.S.C. § 1981(a)(2) (1970).

since January 1975, of which four have resulted in negative determinations.⁵² In two cases, there were tie votes in the ITC.⁵³ Under the procedures of the Tariff Act of 1930, as amended,⁵⁴ the President chose to consider the ITC decision a negative one in both cases and thereby refused to impose import relief on the grounds that the imports did not substantially cause injury to domestic producers.⁵⁵

Of the remaining cases, the most important involve specialty steel and footwear. On January 16, 1976, the ITC reported to the President its determination that the domestic producers of stainless and alloy tool steel were eligible for import relief because they met the criteria set forth in the Trade Act.⁵⁶ U.S. imports of these products were about \$200 million in 1975, principally from Japan, Sweden, and the European Economic Community.⁵⁷ The ITC recommended import relief in the form of remedial quotas for five years, with their level based on the 1970-74 average imports.⁵⁸ On March 16, President Gerald R. Ford announced his decision to order the Special Representative for Trade Negotiations to attempt "to negotiate orderly marketing agreements with supplying countries."⁵⁹ If such agreements could not be negotiated, the President would then impose "import quotas for a period of three years to take effect on or before June 14, 1976."⁶⁰ President Ford also announced his decision to negotiate a sector agreement on steel in the Multilateral Trade Negotiations at Geneva.⁶¹ Agreement was subsequently

52. Negative injury determinations were issued on: Birch Three-Ply Door Skins from Japan, 41 Fed. Reg. 2690 (1976); Wrapper Tobacco, 40 Fed. Reg. 52668 (1975); Bolts, Nuts, and Screws Made from Iron or Steel, 40 Fed. Reg. 55721 (1975); and Work Gloves, 41 Fed. Reg. 10965 (1976).

53. Tie votes occurred with Asparagus, Fresh, Chilled or Frozen, 41 Fed. Reg. 3787 (1976); and Slide Fasteners, 41 Fed. Reg. 8433 (1976).

54. Trade Agreements Extension Act of 1953, § 201, 19 U.S.C. § 1330(d)(1) (1970), amending Tariff Act of 1930, § 330, 19 U.S.C. § 1330 (1970).

55. Asparagus Imports: Presidential Determination of No Injury, 41 Fed. Reg. 10976 (1976); Slide Fasteners and Parts: Imports not a Substantial Cause of Injury to the U.S. Industry, 41 Fed. Reg. 17829 (1976).

56. U.S. INTERNATIONAL TRADE COMMISSION, STAINLESS STEEL AND ALLOY TOOL STEEL; REPORT TO THE PRESIDENT ON INVESTIGATION NO. TA-201-5 UNDER SECTION 201 OF THE TRADE ACT OF 1974, at 3 (1976)[hereinafter cited as REPORT ON STAINLESS STEEL].

57. Office of the Special Representative for Trade Negotiations, Press Release No. 220 and Fact Sheet, March 16, 1976. Of total imports of specialty steel, 51 percent by volume comes from Japan, 18.6 percent from the European Economic Community, and 14.8 percent from Sweden. U.S. Customs, Publication IM 146, Dec. 1975.

58. REPORT ON STAINLESS STEEL, *supra* note 56, at 4-6.

59. Memorandum of March 16, 1976, Import Relief Determination Under Section 202(b) of the Trade Act, 41 Fed. Reg. 11269 (1976).

60. *Id.*

61. *Id.*

reached with Japan to limit imports; however, as no agreement was reached with other countries, import relief was imposed against them under Section 203 of the Trade Act in the form of quantitative import restrictions.⁶²

The other important escape clause decision involved imports of non-rubber footwear. On February 20, 1976, the ITC announced its affirmative determination of injury covering 1975 imports of \$1.12 billion.⁶³ President Ford had until April 20 to make his decision regarding relief under the 60-day limit of Section 202(b) of the Trade Act. He decided that adjustment assistance to firms, rather than import relief, was the appropriate remedy, since the latter would have lessened competition and raised prices.⁶⁴

C. *Unfair Trade Practices*

Title III of the Trade Act of 1974 sets out a number of different procedures for dealing with what are referred to as unfair trade practices.⁶⁵ Three of the most significant developments involve: (1) Section 301,⁶⁶ (2) the countervailing duty law,⁶⁷ and (3) the anti-dumping law.⁶⁸

1. SECTION 301

Section 301 of the Trade Act gives the President new authority to respond to unjustifiable or unreasonable foreign restrictions on U.S. trade, including trade in goods and services. Section 301 was intended to replace Section 252 of the Trade Expansion Act of 1962,⁶⁹ under which the President had only limited authority to retaliate against "unfair" practices of foreign countries, and which was used only once, in the infamous "Chicken War."⁷⁰ Among the

62. Pres. Proc. No. 4445, 41 Fed. Reg. 24101 (1976).

63. U.S. INTERNATIONAL TRADE COMMISSION, FOOTWEAR; REPORT TO THE PRESIDENT ON INVESTIGATION NO. TA-201-7 UNDER SECTION 201 OF THE TRADE ACT OF 1974, at 3 (1976).

64. Memorandum of April 16, 1976, Import Relief Determination Under Section 202(b) of the Trade Act, 41 Fed. Reg. 16545 (1976).

65. Trade Act of 1974, §§ 301-31 (codified in scattered sections of 19 U.S.C.)

66. Trade Act of 1974, § 301, 19 U.S.C. § 2411 (Supp. IV, 1974).

67. 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).

68. 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).

69. Trade Expansion Act of 1962, Pub. L. No. 87-794, § 252, 76 Stat. 879 (repealed by Trade Act of 1974, Pub. L. No. 93-618, § 602(d), 88 Stat. 2072).

70. The "Chicken War" was the first major dispute between the United States and the European Economic Community (EEC). The dispute centered on the EEC's Common Agri-

practices covered by the new law are foreign subsidies of exports to third-country markets which compete unfairly with U.S. exports,⁷¹ and unreasonable restrictions on access to supplies of food, raw materials, or manufactured or semimanufactured products.⁷² There were five pending Section 301 investigations at the time of this Symposium.⁷³

In an important development under Section 301, the only case involving trade with Canada was successfully terminated on March 4, 1976. This case gives some indication of the pattern which these cases are likely to follow. On July 17, 1975, the United Egg Producers filed a petition with the Special Representative for Trade Negotiations, charging that the Canadian quota on the import of eggs from the United States was an unfair trade practice under Section 301 of the Trade Act.⁷⁴ Public hearings were held on the complaint. After bilateral efforts to resolve the dispute failed, the United States asked for an advisory opinion from the GATT. A GATT working party, formed at the request of the United States, decided in December 1975 that the quota appeared to be consistent with Article XI, although it stated that a more representative base period could have been used in setting the quota level.⁷⁵ The working party declined to speculate whether tariff agreements had been nullified or impaired. Bilateral negotiations were resumed, and the United States and Canada finally reached an agreement whereby the im-

cultural Policy (CAP). The United States complained that the CAP violated U.S. rights under the GATT by restricting imports of frozen chickens without regard to tariff concessions which West Germany had granted prior to the formation of the EEC. The complaint was considered by a GATT panel which authorized the United States to retaliate against \$26 million worth of trade from the EEC by suspending the application of benefits of a trade concession agreement with the EEC. See 1 A. CHAYES, T. EHRLICH, & A. LOWENFELD, *INTERNATIONAL LEGAL PROCESS* 249-306 (1968); Walker, *Dispute Settlement: The Chicken War*, 58 *AM. J. INT'L L.* 671 (1964); Lowenfeld, *Doing Unto Others . . . The Chicken War Ten Years After*, 4 *J. MARITIME L. & COM.* 599 (1973). The most recent dispute of this nature resulted in a similar suspension for brandy imports, followed by the imposition of an import duty. Pres. Proc. No. 4478, Nov. 26, 1976, 12 *WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS* 1692 (1976).

71. Trade Act of 1974, § 301(a)(3), 19 U.S.C. § 2411(a)(3) (Supp. IV, 1974).

72. Trade Act of 1974, § 301(a)(4), 19 U.S.C. § 2411(a)(4) (Supp. IV, 1974).

73. Of these, the Delta Steamship Lines investigation was terminated at the request of the petitioner on June 29, 1976. The petitioner had alleged that Guatemala was engaged in discriminatory cargo preference practices. 41 Fed. Reg. 26758 (1976). No decision has yet been reached in any of the other four cases, all involving trade policies of the EEC.

74. 40 Fed. Reg. 33749 (1975).

75. 41 Fed. Reg. 9430 (1976).

port quota was enlarged to 100,000 cases of shell eggs, approximately twice the level originally imposed.⁷⁶

2. COUNTERVAILING DUTIES

Section 331 of the Trade Act makes some important changes in the U.S. countervailing duty law. Under this provision, the Secretary of the Treasury is required to determine whether imported articles are the recipients of a bounty or grant.⁷⁷ If this is determined, countervailing duties must be imposed on such imported items in the amount of the bounty or grant.⁷⁸

The amendments made by the Trade Act include the imposition of strict time limits for countervailing duty determinations. A preliminary determination must be made within six months after an investigation is initiated, and a final determination must be made within one year.⁷⁹

A second change has made the law applicable for the first time to duty-free imports, provided a finding of injury to an industry in the United States is made by the ITC.⁸⁰ It is important to note that this injury finding is necessary to make U.S. law consistent with our GATT obligations. Under Article VI of the GATT, an injury determination must be made before countervailing duties can be imposed.⁸¹ However, this provision does not apply to the United States with respect to dutiable items because the relevant provisions of the Tariff Act of 1930 predate the GATT, and by the terms of the Protocol of Provisional Application, the GATT is applied only insofar as it is consistent with existing national legislation.⁸²

76. *Id.*

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

78. *Id.*

79. Trade Act of 1974, § 331(a), 19 U.S.C. § 1303(a)(4) (Supp. IV, 1974).

80. Trade Act of 1974, § 331(a), 19 U.S.C. § 1303(a)(2), (b)(1), (3) (Supp. IV, 1974).

81. Article VI(6)(a) of the GATT states:

No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

82. "No GATT Contracting Party applies GATT 'definitively.' . . . GATT is applied by the Protocol of Provisional Application or a similar commitment (through succession or protocol of accession) and, consequently, portions of GATT are subject to 'existing legislation.'" J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 799 (1969). In the case of the United States, "existing legislation" refers to legislation in existence on October 30, 1947. Under Paragraph 1(b) of the Protocol, Part II of the GATT (including antidumping and countervail-

A third significant change in U.S. law is designed to encourage the negotiation of a code to restrict the use of subsidies.⁸³ The Secretary of the Treasury is authorized to suspend the application of countervailing duties during the four-year period ending January 3, 1979, provided: (1) adequate steps have been taken to reduce substantially or eliminate the adverse effect upon domestic producers of the bounty or grant,⁸⁴ (2) there is a reasonable prospect that trade agreements on nontariff barriers will be entered into under Section 102 of the Trade Act,⁸⁵ and (3) the imposition of countervailing duties would be likely to jeopardize seriously the satisfactory completion of such negotiations.⁸⁶

The fourth change in U.S. law expressly provides for judicial review of negative ITC determinations by the Court of Customs and Patent Appeals.⁸⁷ This change was a specific response to the 1971 decision of the Court of Customs and Patent Appeals in *United States v. Hammond Lead Products, Inc.*,⁸⁸ where it was held that judicial review of negative countervailing duty determinations was not available to domestic producers, as the duty constituted a penal sanction which Congress did not intend the courts to impose.

What has been the experience under the law in 1975? Of the 38 cases initiated, nine countervailing duty cases involving 1974 trade values of \$585 million resulted in affirmative decisions. Of these, countervailing duties were actually imposed in five cases involving 1974 trade volume of \$200 million.⁸⁹ In four cases, countervailing duties were waived under the Secretary's authority to do so pending negotiations.⁹⁰

ing duties, Article VI; national treatment, Article III; and subsidies; Article XVI) is to be applied only where "not inconsistent with existing legislation." Protocol of Provisional Application of the General Agreement on Tariffs and Trade, *done* Oct. 30, 1947, 61 Stat. A2051 (1948), T.I.A.S. No. 1700, 55 U.N.T.S. 308 (effective Jan. 1, 1948).

83. Trade Act of 1974, § 331(a), 19 U.S.C. § 1303(d)(1)(Supp. IV, 1974).

84. Trade Act of 1974, § 331(a), 19 U.S.C. § 1303(d)(2)(A) (Supp. IV, 1974).

85. Trade Act of 1974, § 331(a), 19 U.S.C. § 1303(d)(2)(B) (Supp. IV, 1974).

86. Trade Act of 1974, § 331(a), 19 U.S.C. § 1303(d)(2)(C) (Supp. IV, 1974).

87. Trade Act of 1974, § 341(a), 19 U.S.C. § 1337(c) (Supp. IV, 1974), *amending* Tariff Act of 1930, § 337(c), 19 U.S.C. § 1337(c)(1970).

88. 440 F.2d 1024 (C.C.P.A. 1971).

89. For the five cases in which countervailing duties were imposed, see note 44 *supra*.

90. The Secretary exercised his waiver authority in: Dairy Products from the EEC, 40 Fed. Reg. 21720 (1975) (to be codified in 19 C.F.R. § 159.47(f)); Cheese from Austria, 41 Fed. Reg. 1275 (1976) (to be codified in 19 C.F.R. § 159.47(f)); Cheese from Switzerland, 41 Fed. Reg. 1468 (1976) (to be codified in 19 C.F.R. § 159.47(f)); and Canned Hams from the EEC, 40 Fed. Reg. 55639 (1975) (to be codified in 19 C.F.R. § 159.47(f)).

Several of these cases directly involved trade with Canada. A case involving oxygen-sensing probes was terminated.⁹¹ In another case, involving glass beads, a final determination which imposed countervailing duties was made on September 2, 1976.⁹² This case involved the important issue of regional development aids, which aroused a great deal of controversy in the case of imports of Michelin radial tires to the United States from Canada.⁹³

A number of negative determinations appear to be headed for challenge under procedures available to domestic producers. There are presently six actions pending in the Customs Court. The most significant is the suit commenced by U.S. Steel Corporation, which challenges the Treasury's decision not to impose countervailing duties to counteract rebates of value-added taxes on steel products from Belgium, France, Italy, Luxembourg, the Netherlands, the United Kingdom, and West Germany.⁹⁴

This suit questions a 70-year old Treasury policy that rebates of indirect taxes directly related to the exported product do not constitute bounties or grants. There are several billion dollars in trade which would be directly affected by this case. Moreover, because of the prevalence of tax rebate practices, the implications of the case are even broader. It should be noted that there are some niceties in the procedures of the Customs Court which permit U.S. Steel Corporation to commence its action by filing a summons.⁹⁵ U.S. Steel now has up to two years to file a complaint, but as yet it has not done so.

The seriousness of the problem posed by different national policies on subsidies and countervailing duties has led to renewed efforts by the United States to negotiate an international code which

91. 40 Fed. Reg. 57813 (1975).

92. 41 Fed. Reg. 37103 (1976)(to be codified in 19 C.F.R. § 159.47(f)).

93. X-Radial Steel Belted Tires from Canada, 38 Fed. Reg. 1018 (1973). In this case, Michelin Tire Manufacturing Co. of Canada, Ltd. received grants and tax benefits provided by the government of Canada and obtained grants and loans from the province of Nova Scotia. Michelin exported a large proportion of its output to the United States. The U.S. Commissioner of Customs determined that these exports benefited from bounties or grants within the meaning of Section 303 and imposed countervailing duties. An appeal of the decision by importers is now pending, *Michelin Tire Corp. v. United States*, No. 75-9-02467 (Cust. Ct., filed Oct. 6, 1975).

This administrative decision is not to be confused with the case of *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), which tested the validity of a local ad valorem property tax imposed on imported tires by a county in Georgia. See notes 106-12 *infra* and accompanying text.

94. *U.S. Steel Corp. v. United States*, No. 76-2-0045 (Cust. Ct., filed Feb. 18, 1976).

95. Cust. Cr. R. 3.2(a).

would limit the use of subsidies and revise the rules and procedures for countervailing duties. Proposals to this effect are being discussed in Geneva and could result in a subsidies and countervailing duty code in the near future.

3. ANTIDUMPING

The last measure of note against unfair trade practices is the amended Antidumping Act of 1921.⁹⁶ Essentially, dumping is price discrimination between national markets. Dumping is usually defined as the practice of charging less for export sales than for the same goods sold domestically. Under U.S. law, a domestic industry that is injured by such a practice can obtain relief in the form of a duty which is equal to the difference between the price on the U.S. market and the price on the domestic market.⁹⁷

The Trade Act tightens the provisions of the Antidumping Act by imposing time limits for determinations of dumping by the Secretary of the Treasury.⁹⁸ An initial determination must be made within six months after the publication of notice of an antidumping proceeding (nine months for complicated cases), and a final determination must be made three months thereafter. The Trade Act provides U.S. manufacturers, producers, and wholesalers with an automatic right to appear at antidumping hearings,⁹⁹ and provides for judicial review of negative Treasury determinations.¹⁰⁰

There have been 18 cases initiated under the Antidumping Act since January 1975, covering a total of \$7.52 billion in import trade.¹⁰¹ One of these, the largest import dumping case in history, could have had significant implications for U.S.-Canadian trade. This case was initiated by a petition from Congressman John Dent and the United Auto Workers, and charged that automobiles from Western Europe, Japan, and Canada were being dumped in the United States. The total import value of trade at issue was \$7.49 billion, including \$3.0 billion in imports from Canada.¹⁰² However,

96. 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).

97. Antidumping Act of 1921, § 202, 19 U.S.C. § 161 (1970).

98. Trade Act of 1974, § 321(a)(2), 19 U.S.C. § 160(b) (Supp. IV, 1974), *amending* Antidumping Act of 1921, § 201, 19 U.S.C. § 160 (1970).

99. Trade Act of 1974, § 321(a)(2), 19 U.S.C. § 160(d)(1)(A) (Supp. IV, 1974).

100. Trade Act of 1974, § 321(f)(1), 19 U.S.C. § 1516(d) (Supp. IV, 1974).

101. See SENATE COMM. ON FINANCE, 94TH CONG., 2D SESS., UNITED STATES INTERNATIONAL TRADE POLICY AND THE TRADE ACT OF 1974, at 31-32 (Comm. Print 1976).

102. *Id.*

the Treasury Department announced on August 18, 1976 that it was discontinuing its investigation.¹⁰³ In another antidumping case affecting Canada, an action was commenced in December 1975 involving industrial vehicle tires. Imports from Canada in 1974 amounted to \$500,000.¹⁰⁴ The Treasury Department issued a determination on August 18, 1976 that the tires were not being sold at less than fair value, so no import relief was granted.¹⁰⁵

V. MICHELIN TIRE CORP. V. WAGES

Finally, I would like to refer briefly to the recent United States Supreme Court case of *Michelin Tire Corp. v. Wages*,¹⁰⁶ which demonstrates the importance of state and local laws in affecting trade flows between the United States and Canada. The Supreme Court held that the State of Georgia could impose, without violating the Import-Export Clause of the Constitution,¹⁰⁷ a nondiscriminatory ad valorem property tax on tires imported from France and Canada which were held in a warehouse for distribution.

In this case, a county in Georgia assessed an ad valorem property tax against imported tires in Michelin's inventory in a wholesale distribution warehouse from which 300 dealers in six states were serviced. The question presented to the Court was whether this tax assessment was contrary to the constitutional prohibition that "[n]o State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws . . ."¹⁰⁸ Twenty-five percent of the tires came overland from Canada; the remainder came by ocean container from France and Canada.¹⁰⁹ At the warehouse they were sorted by size and stacked in inventory for distribution.

The Court held that the tires were no longer in transit.¹¹⁰ The warehouse was operated no differently than a distribution warehouse utilized by a wholesaler dealing wholly in domestic goods. Under the circumstances, the tax, which did not discriminate

103. Automobiles from Belgium, Canada, France, Italy, Japan, Sweden, United Kingdom, and West Germany, 41 Fed. Reg. 34982-90 (1976).

104. SENATE COMM. ON FINANCE, *supra* note 101, at 32.

105. Industrial Vehicle Tires From Canada, 41 Fed. Reg. 34990 (1976).

106. 423 U.S. 276 (1976).

107. *Id.* at 279.

108. U.S. CONST. art. I, § 10, cl. 2.

109. 423 U.S. at 280.

110. *Id.* at 302.

against imports, was not prohibited by the Import-Export Clause.¹¹¹ In so holding, the Court overruled the century-old decision in *Low v. Austin*.¹¹²

The decision of the Court is entirely consistent with the international obligations of the United States, which require only that national treatment be accorded to imports and exports. While the decision may prompt some states to extend the application of certain taxes to cover imports, the net effect should not adversely affect the competitiveness of imports in the U.S. market.

VI. CONCLUSION

This review of the national and international laws affecting U.S.-Canadian trade has clearly illustrated the dynamic and complex system of laws through which national economic policies are implemented. While great progress has been made in the reduction of trade barriers, there are still a number of serious problems which need to be addressed. I am convinced that success in solving these problems will depend in large part on the ability of lawyers to devise principles and techniques for furthering economic cooperation.

111. *Id.* at 279.

112. 80 U.S. (13 Wall.) 29 (1871).