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STUDY NO. 23:

Possible institutional arrangements for a Canada-U.S. trade agreement. (Dept. of External Affairs. September 1985)

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POSSIBLE INSTITUTIONAL ARRANGEMENTS FOR A CANADA/U.S. TRADE AGREEMENT

Issue

In pursuing a trade agreement with the U.S., it will be important for Canada to identify the trade management functions required to implement its overall objectives and to negotiate an institutional framework to meet these needs. The underlying assumption is that in all instances such institutional arrangements will be binational in nature in order to provide both symbolically and in practice a management regime that reinforces Canadian sovereignty. Third countries would not be affected by the provisions of the bilateral agreement.

The paper does not address the question of domestic arrangements (e.g., federal-provincial and federal-state) which either country may find desirable in the implementation of the agreement.

Purpose

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[EXEMPT Sec. 15(1)]

The substructure or staff, would be common to both operations.

This paper identifies the trade management functions an agreement should incorporate as fourfold, namely:

1) common fact finding and dispute avoidance,
2) dispute management (consultation and negotiation),
3) dispute settlement (good offices, mediation, conciliation and arbitration); and
4) implementation.

[EXEMPT Sec. 15(1)]

It is assumed that Canada desires a "hands on" approach. In fact, dispute settlement may be a misnomer if we recognize that what we may actually be looking for are instruments of binational resolution in the trade field.

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Moreover, Canada, being the smaller partner, has a particular interest in ensuring that institutional arrangements invoke joint management of the agreement and joint resolution of disputes in order to dilute the assymetrical economic relationship.

Background

I Intergovernmental Mechanisms

There are a number of historical intergovernmental dispute settlement precedents:

1) The GATT (Articles XXII and XXIII) contains dispute settlement procedures which have been elaborated through formal decisions of the Contracting Parties and through precedents established in the handling of actual disputes. The essential elements of the GATT mechanism are:

a) Requests by one party to a dispute for consultations with, and judgements from, the GATT, cannot be blocked indefinitely by the other; (i.e. timing)

b) Findings related to the interpretation of GATT articles are made, in the first instance, by representatives of countries other than those which are parties to the dispute but who are acceptable to these parties; (predefined methods of selection for dispute panels)

c) The GATT as an organization can recommend corrective action to a party to a dispute; (advisory role)

d) Failure to comply with such a recommendation could lead to the other party retaliating but in a manner which must itself be approved in advance by the GATT as an organization; (discipline in rule making and implementation)

In practice, a Canada/U.S. comprehensive trade agreement would require a dispute settlement system integral to the agreement. Nonetheless, the principles of the GATT dispute settlement system can be employed.

2) The Canadian-American Committee in its 1965 Possible Plan for a Canada/U.S. Free Trade Area suggested an elaborate institutional structure:

a) A Council which would meet at the level of Ministers and Heads of Permanent Delegations;

b) A Secretariat;

c) A permanent Appeals Board to gather and evaluate facts and to make recommendations on complaints referred by one party;

d) An Adjustment Assistance Board to "coordinate policies" in aiding industries;

e) A Canada/U.S. Investment Bank which would finance restructuring by public and private ventures in response to free trade; and

f) A Joint Parliamentary/Congressional Committee.

This paper contends that some form of a council, secretariat, appeals board and joint Parliamentary-Congressional Committee would be applicable whereas adjustment assistance and investment for restructuring are appropriate responsibilities of individual governments and the private sector.

3) The Economic Council of Canada's 1975 report, Looking Outward, identified the necessity of appropriate institutional machinery, and particularly the concept of joint administration. Institutions themselves were not specified although their functions included prior consultation on changes in trade and balance-of-payments policies, joint surveillance of nontariff barriers and periodic efforts to lower them, and continuing "adjudication" of disputes arising from the application of a free trade regime. The Council further suggested that the International Joint Commission might serve as an example of a useful co-operative mechanism.

4) The Senate Foreign Affairs Committee, in the section of its 1978 report on Canada/U.S. Relations dealing with the institutional framework also identified the need for special joint mechanisms. It explored the possibility of using the International Joint Commission as a model for other binational commissions but opted instead for the direct "ad hoc" approach to economic issues, including trade and balance of payments issues. The Committee remarked that the Joint Ministerial Committee on Trade and Economic Affairs and the Canada/U.S. Balance of Payments Committee of the 1960's had served useful functions as channels of communication, consultation and co-ordination but had never

undertaken common investigation. The report points to the benefits of common fact-finding as a successful device in mitigating or narrowing bilateral disputes of a technical nature. The International Joint Committee has used such techniques in its long history of investigative boards. Moreover, the Canada/U.S. Trade Statistics Committee which was established in 1971 subsequent to the Nixon August economic measures, reconciles figures on bilateral merchandise trade. Such common fact-finding and reconciliation procedures would seem to lend themselves relatively easily to a binational regime governing antidump, countervail, and dispute settlement generally.

There are seven European agreements of relevance, i.e., those that Norway, Sweden, Iceland, Finland, Austria Switzerland, and Liechtenstein have individually with the EC. These free trade area agreements have institutional arrangements that are essentially consultative in nature. There is no common secretariat nor binding dispute settlement mechanisms. Bilateral free trade agreements, with the exception of the U.S./Israeli Free Trade Agreement, do not incorporate dispute settlement procedures other than consultative mechanisms to be triggered at the request of one party.

5) The U.S./Israeli Free Trade Agreement is unique both because it is the most recent such agreement negotiated by the U.S. and because it incorporates fairly elaborate dispute settlement provisions. Article 17 establishes a Joint Committee as the management authority for the implementation of the agreement. As such, the Joint Committee:

a) reviews the functioning of the agreement;

b) holds consultations with respect to any matter affecting the operation or interpretation of the agreement;

c) reviews the results and effects of the agreement.

Article 18 institutionalizes mechanisms for advance written notice on measures affecting bilateral trade and on reductions in trade barriers vis-à-vis third countries. This article also authorizes consultations on such measures. In special circumstances action may proceed provided that notice and consultations take place as soon thereafter as practicable.

Article 19 provides that disputes (the imposition of antidumping or countervailing duties are expressly excluded) should be settled through consultations, if possible. Should these fail, either party may refer the dispute to a Joint Committee. If, within 60 days, the Joint Committee cannot resolve the dispute, the matter may be referred to a conciliation panel of three members: one each to be chosen by each party, these in turn would select a Chairman. The panel would seek to resolve the dispute within three months through agreement of the parties but failing this would present the parties with a report containing its findings of facts, determinations and proposals for settlement. The report of the panel is non-binding but after its presentation "the affected party shall be entitled to take any appropriate measure".

6) On two separate occasions and most recently, on August 1, 1985, Sen. Mitchell of Maine has introduced legislation seeking to amend Section 612 of the Trade Act of 1974. His bill would authorize the US President to negotiate an agreement with Canada establishing an International Joint Economic Commission. This body would be designed to conduct common fact-finding to resolve trade and economic disputes, to provide advisory opinions or recommendation on issues referred to it by both

governments, and to arbitrate disputes, again on a referral basis. The model referred to is the IJC under the Boundary Waters Convention. While broader in mandate both in scope and powers than what this paper argues is desirable under a bilateral trade arrangement, this US Congressional initiative might be referred to during the course of negotiation.

7) The Macdonald Commission recommended that Canada negotiate a bilateral arrangement that incorporated the following institutional aspects:

a) For measures governing "fair" trade (such as safeguard action) and "unfair" trading practices (such as antidumping and countervailing duty proceedings), enforcement to be shifted from national administrative tribunals to a new Canada-U.S. intergovernmental body established under the arrangement; this body would be known as the "Canada-U.S. Trade Commission" (CUSTC).

b) The formation of a three-tiered Canada-U.S. intergovernmental institution to provide basic executive and administrative decisions; technical staff services; adjudication of complaints and

appeals under the agreement. Such an institution should have the following mechanisms:

-A committee of national officials at the ministerial level to be responsible for the enforcement of the agreement's obligations

-A supporting body of officials known as the "Canada-U.S. Trade Commission" (CUSTC) to manage non-tariff barriers, but subject to appellate review by the Ministerial Committee

-A standing arbitral panel with binding powers as a board of last resort, to resolve disputes arising from conflicting interpretations of the agreement. Such a panel would consist of two Canadians, two Americans and one neutral member to be chosen by the members of the panel.

8) There are some relevant non-trade arrangements that are also of note:

a) The International Joint Commission has dealt with over 100 references since its creation in 1909. It has six commissioners, four of whom are part-time, and a very small permanent staff, divided into U.S. and Canadian sections. This permanent staff provides the necessary

continuity. The IJC has limited quasi-judicial power. This notwithstanding, it has been largely successful in technical fact-finding. The IJC refers each question to a study group, composed of nationals of both countries, which attempts to agree on a technical assessment of the question. It draws heavily on existing governmental expertise, borrowing qualified pesonnel from various government departments. On the basis of the study group's report, the IJC makes a recommendation.

A 1979 study undertaken by the American and Canadian Bar Associations indicated that 80% of recommendations have been accepted and used to resolve the dispute. This study supported the informality of the six-member IJC and the relative ease with which it has reached consensus throughout its history. The study suggested that part-time Commissioners were valuable precisely because they were able to maintain genuine links with the constituencies they represent. However, the Commissioners could be supplemented by the appointment of teams of "deputy Commissioners" with technical expertise as well as the

establishment of a permanent joint secretariat. Professor Maxwell Cohen, in a recent article "Canadian and the U.S. -- new approaches to undeadly quarrels" underlined the usefulness of the IJC, not only as a common fact-finder but also as a potential Ombudsman.

b) The 1984 Memorandum of Understanding on notification, consultation and cooperation with respect to the application of national antritust laws sets out detailed procedures for dealing with possible conflict between the Canadian and U.S. governments in the areas of anti-trust, combines and competition policy and interests. Both governments have undertaken to notify the other of pending investigations or proceedings and the party notified has a set period in which to respond. Although there is an illustrative list of indices requiring notification, in practice governments have tended to err on the side of caution. Resulting consultations are designed to avoid problems and to achieve compromise. This process is, in and of itself, of mutual interest to both governments. It may not amount to dispute

avoidance but it does contribute to damage control.

c) Appended to the March 18, 1985 Canada/U.S. Legal Assistance Treaty is an interesting exchange of notes that institutionalizes the continuation of informal subpoena working groups. Officials of the competent departments of the two governments are to meet as necessary "to improve the use of cooperative avenues" and "to give prompt and full consideration to proposals to lessen or eliminate potential conflicts or problems". Moreover, both governments recognize the principle of prior notification as a facilitator in cooperation and the minimizing of potential conflicts.

These examples suggest that a binational institutional regime is indeed a negotiable objective, and that Canada and the U.S. have a successful track record in using such mechanisms, be it in the area of boundary waters, the reconciliation of merchandise trade statistics and more recently in issues surrounding extraterritoriality.

II Canada - U.S. Interparliamentary Group

The Canada - U.S. Interparliamentary Group meets annually, with 42 legislative representatives, 21 from each side. There are three subgroups, one of which deals with trade. The last meeting of the Interparliamentary Group agreed to hold ad hoc meetings of a specific nature. This decision was the authorizing mandate for the recent Parliamentary visit to Washington on the softwood lumber case.

At the Quebec Summit, the Prime Minister and President Reagan agreed to increased legislative exchanges. Plans are now underway to implement this decision. What is envisaged are monthly visits (one every two months) to Washington to sensitize Congressmen to Canadian political interests in specific bilateral irritants of the day. For the moment these tend to be trade issues.

Obviously the parliamentarians are not, and should not, be servants of the government. They represent their constituents and come from all three parties. From a Canadian perspective, interparliamentary meetings serve a very useful function, particularly when they are single

issue meetings and parliamentarians are adequately briefed in advance. Participants then have a political interest directly fuelled by their constituents. Over time such meetings sensitize larger numbers of congressmen to Canadian concerns, stimulating congressional interest not only in the negotiation of a trade arrangement and its maintenance thereafter but also in the avoidance of trade disputes in a mutually satisfactory political fashion.

The effectiveness of this group is largely influenced by its ad hoc nature. It, therefore, should continue down a separate track to the institutional framework governing the implementation of a trade arrangement. However, its educational function should be encouraged.

III Governors/Premiers

State governors and provincial premiers have been meeting regionally for several years. The recent Boise Conference represented the first time that the National Governors Association has invited all provincial Premiers to attend (seven did). As with the Interparliamentary Group, meetings between governors and premiers are a useful educational device, and if the Boise Conference serves as any indication, can play a role in lowering the

temperatures of those with direct responsibility in trade matters. Again, as with the Interparliamentary Group, this paper recommends against the formal inclusion of this channel in any binational institutional framework. Instead, governors and premiers should continue to report to their own federal governments, in recognition of constitutional provisions on both sides of the border for international trade. At the same time the potential educational and elucidatory role of such meetings should be recognized and reinforced.

IV Private Sector

For some years now, individuals, associations, and/or committees have been suggesting greater predictability in the reconciliation of trade disputes. Process, rather than substance, tends to be the essential focus. Two schools of thought tend to emerge; reformatting of the IJC or a wise men's council.

a) A reformatted IJC:

In 1980, Mr. Donald Macdonald proposed the creation of a Canada - United States Trade Commission, which would have quasi-judicial power to resolve bilateral trade disputes as well as

those arising from the GATT codes that emerged out of the Tokyo Round. The suggested composition was binational, ie six commissioners with three from each country. Its principal functions would be common fact finding and non-binding proposals for resolution, in essence a conciliation procedure. This suggestion found its way into the Macdonald Commission report in a more elaborate formulation. This paper contends that whereas a reformatted IJC would have the powers of moral suasion, to be effectively binational, it requires "hands on" involvement at the Cabinet level to ensure political equity.

b) A group of Wise Men:

The notion has emerged periodically that a group of corporate wise men from both countries serve as a court of first instance in the resolution of bilateral trade disputes. This idea was most recently put forward by the Canada - U.S. Relations Committee of the U.S. and Canadian Chambers of Commerce. The Committee recommended that "Canada and the U.S. should assemble a joint body, comprised of senior private sector representatives, to act as an advisory body, on

bilateral trade issues in order that major irritants could be eliminated without further recourse to restraints on trade by either country or to provide a basis on which the two governments could resolve issues in a mutually satisfactory manner, in accord with the Quebec Declaration." Such a proposal suggests that the need for education and elucidation rests with the private sector as well as with parliamentarians and provincial and state leaders. To the extent that knowledgeable businessmen can resolve trade disputes amongst themselves, the idea should be encouraged. Its impact might evolve into the role of a corporate ombudsman, and, as a practicality, there is nothing that prevents the Joint Chamber from establishing such a body now. Its role in terms of moral suasion would increase to the extent that goverments gave the body recognition.

Canadian businessmen can have influence on U.S. trade decisions provided it is recognized that they will have little impact on the U.S. political process as Canadian citizens. Their impact can be felt in an educational manner to the extent that they work with U.S. domestic forces,

i.e. by activating fellow CEO's, customers, suppliers and employees, in Washington, as well as in states where they have a corporate interest. Canadian business has vital interests at stake in the U.S. and should be fully informed and participate actively in U.S. trade policy-making. A joint body of wise men such as that suggested by the Chambers is a step in that direction. However, it is doubtful that governments would be prepared to provide such a group with the unique advisory mandate for representing business, particularly with the ISAC system in the U.S. and the emerging system of Trade Advisory Committees in Canada. Joint business bodies can fulfill a useful educational function but should be seen as neither the court of first nor last resort. Their role is conciliatory and advisory.

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Sec. 15(1)

The process and procedures would need to be established incorporating four trade management functions, namely common factfinding and dispute avoidance, dispute management, dispute settlement and the monitoring of the dispute solution. The process of dispute management should remove the capriciousness and unilateralism that currently prevail in the bilateral trade relationship.

EXEMPT
Sec. 15(1)

Furthermore, from the Canadian perspective, a binational regime should be bound by treaty in order to harness the U.S. Congress.

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Sec. 15(1)

1) Joint Committee of Ministers

[EXEMPT Sec. 15(1)]

a) Working groups

The Joint Committee should have the power to establish working groups and the discretion to delegate authority to these working groups.

[EXEMPT Sec. 15(1)]

would monitor the workings of the agreement in addition to their normal responsibilities. They

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