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CANADA-UNITED STATES TRADE INITIATIVE:
RESEARCH PAPERS

INSTITUTIONAL PROVISIONS AND FORM OF THE PROPOSED CANADA-UNITED STATES TRADE AGREEMENT

THE INSITUTE FOR RESEARCH ON PUBLIC POLICY

DEPARTMENT OF EXTERNAL AFFAIRS
OTTAWA
JANUARY, 1986

The Institute for Research on Public Policy
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INSTITUTIONAL PROVISIONS AND FORM OF THE PROPOSED CANADA-UNITED STATES TRADE AGREEMENT

by

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Prepared for the
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November 1985

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INSTITUTIONAL ELEMENTS OF A POSSIBLE CANADA-UNITED STATES TRADE AGREEMENT

Introduction

The governments of Canada and the United States have made clear their intention to begin a process of negotiations aimed at the conclusion of a bilateral trade agreement to reduce or remove remaining barriers to cross-border trade and establish additional rules to govern this trade. Such a bilateral agreement would thus go beyond and supplement the existing trade agreement relationships which now exist, including those under the General Agreement on Tariffs and Trade (GATT). At their meeting in Quebec City in March 1985, Prime Minister Mulroney and President Reagan in a "Declaration Regarding Trade in Goods and Services", launched the initiative for such a bilateral agreement, in terms of "a joint effort to establish a climate of greater predictability and confidence for Canadians and Americans alike to plan, invest, grow and compete more effectively with one another and in the global market."

The potential benefits to both countries from the liberalization of bilateral trade and special rules to govern bilateral trade could be substantial. Prime Minister Mulroney, in announcing in the House of Commons on September 26, 1985, the government's formal proposal to the U.S. government for the initiation of bilateral negotiations, stated that Canada would be "made more confident and prosperous from a secure and dynamic trading relationship with our biggest customer, our close friend, and with all the world." The U.S. Trade Representative, Clayton Yeutter, in a presentation to the U.S. Senate Finance Committee on November 14 stated that a bilateral trade agreement with Canada "would dramatically enhance the growth opportunities of both countries as they enter the next century".[1] The expected economic benefits in each country include lower prices for consumer goods and for producers purchasing imported inputs, more secure access of producers in both countries to larger export markets which would result in lower costs and more efficient production and, in general, an improved allocation of resources in both countries. Moreover, the creation of a more open Canada-U.s. trade regime, with improved rules governing cross-border trade, would demonstrate to other countries the viability of trade liberalization on a broader basis, thereby contributing momentum toward the success of a new round of multilateral negotiations under GATT.

Despite the expected benefits to Canada from a bilateral trade agreement with the United States, there can be legitimate grounds for concern about how it would operate, in practice, in view of the disparities in the economic strength of the two countries. The agreement will therefore need to carry assurances of future observance by the U.S. of its obligations under the agreement at the level of both federal and state governments; that new trade rules established under it are applied impartially and effectively; and that disputes arising from its operation can be resolved fairly, equitably and without delay. For these reasons, there should be a special interest on the part of Canada in the creation of some form of joint institutional arrangements to assist in the operation of the trade agreement.

Canadians should also be concerned about the durability and permanence of a new bilateral trade agreement, and the risk that benefits under it could be whittled away by subsequent, conflicting U.S. legislation and policies at the federal or state level. In this regard, the nature and form of the agreement will require special attention, as will the process by which it is approved and implemented on the U.S. side.

This study addresses the two institutional and legal issues referred to above:

- the nature, structure and functions of new institutional arrangements created under the agreement; and
- the nature and form of the bilateral agreement.

The institutional elements of a future bilateral trade agreement, and its nature and form cannot be discussed in isolation from the purpose and objectives of the agreement, and the substantive provisions it is likely to contain. Accordingly, it is useful to set the discussion in the historical and contemporary context within which a Canada-U.S. trade agreement would be concluded, and in the context of the broad purposes and design of a bilateral trade agreement.

An Historical Perspective

It is remarkable that historically there have been so few legal and institutional arrangements between Canada and the United States of a bilateral nature in trade areas, in view of the massive scale, the complexity, and the closeness of their relationship in these areas, and the importance of two-way trade for each country. The Reciprocity Treaty of the mid-19th century, which removed tariffs on cross-border trade in so-called "natural products" but not generally manufactured goods, was short-lived and contained no provisions for joint institutions of any kind. After its abrogation by the United States in 1866, prompted in part by a resurgence of protectionist pressures in that country, no formal trade arrangement between the two countries existed for a period of almost 70 years.

United States trade policy was dramatically changed in the mid-1930s, following the adoption of the 1934 Reciprocal Trade Agreements Act under the Roosevelt administration. By this legislation, Congress authorized the Administration to enter into agreements with other countries for the reciprocal reduction of barriers to their mutual trade, on a most-favoured-nation basis. Canada quickly responded with a proposal to negotiate a Canada-U.S. agreement which was concluded in 1935 and renewed and extended in 1938. These negotiations, especially those in 1938, achieved a substantial reduction of the high tariffs on both sides which limited cross-border trade. The 1935 agreement established for the first time that the most-favoured-nation rule would govern bilateral trade, while allowing for continued Canadian preferences on imports from Commonwealth sources, thus bringing the bilateral relationship into line with the relationships of the two countries with their other trading partners. In 1938, the Canada-U.S. negotiations which took place in Washington over a seven-month period were blended with simultaneous negotiations of the

two countries with the United Kingdom concerning preferences in Canada-U.K. trade that the United States wished to have reduced or eliminated. This process of pre-war bilateral negotiations thus presents some interesting parallels with the current process of Canada-U.S. negotiations which has been launched. Neither agreement, however, established anything in the way of joint institutions to oversee or assist their operation.[2]

Following the second world war, the 1938 Canada-U.S. trade agreement was, in effect, suspended when the General Agreement on Tariffs and Trade (GATT) was established as an outcome of the failure of efforts to adopt the Havana Charter and to create the International Trade Organization.

The Multilateral Framework

Since 1948, the GATT has served as the main Canada-U.S. trade agreement, as well as the two countries' main trade agreement with all other GATT member countries. In addition to performing its central function as an evolving body of trade rules and a framework for trade liberalization, the GATT system contains quite well developed but uneven institutional elements for continuing consultations among member countries, for the resolution of disputes, and for carrying out analysis of international trade and trade policy. A very large part of Canada-U.S. trade relations has been managed, relatively successfully, within the GATT. Other multilateral institutions such as the OECD, the IMF and the World Bank have similarly served as frameworks within which Canada and the United States deal with a variety of economic issues of bilateral interest, as well as those of broader international interest.[3] By contrast, the strictly bilateral agreements and institutional arrangements in trade and economic areas are not only few in number, but provide for almost no mechanisms of any formal kind for the ongoing management of Canada-U.S. relations in these areas.

The GATT rules, supplemented by other less binding understandings and guidelines developed in the OECD and other international bodies, have served to govern the conduct of most Canada-U.S. cross-border trade. The tariffs of both countries on cross-border trade have been progressively lowered or eliminated as a result of seven successive rounds of GATT negotiations, in which Canada-U.S. negotiations usually played a large part. The almost non-stop series of GATT meetings in Geneva provide continuing opportunities for consultation between trade policy officials from Ottawa and Washington, and periodically at the ministerial level, on bilateral as well as global trade issues. To a lesser extent OECD meetings have provided parallel opportunities. Over the past decade, summit meetings have provided annual opportunities for consultations on trade issues, including bilateral issues, at the head-of-government level. More recently, quarterly "quadrilateral" meetings of trade ministers from the United States, Canada, the European Community and Japan have provided more frequent opportunities for consultations on trade issues of common concern, including bilateral trade issues.

Traditionally, bilateral disputes over trade and trade-related issues have tended to be dealt with by a process of negotiation directly between the two governments. But over the last few years, the two countries have agreed to

refer formally a limited number of bilateral disputes for resolution under GATT rules and procedures; several of these have been resolved successfully, for example, the Canadian complaint about the U.S. prohibition of imports of tuna and tuna products from Canada, and the U.S. complaint about "performance" requirements for foreign-owned firms under Canada's Foreign Investment Review Agency (FIRA).

GATT, and especially the OECD, the IMF, and the World Bank, possess considerable resources to conduct research and analysis into contemporary economic and trade policy issues. Their research and analysis, however, is primarily concerned with broader developments in international trade, and cannot be expected to focus on bilateral Canada-U.S. affairs.

Existing Bilateral Trade Arrangements

The few purely bilateral Canada-U.S. arrangements and institutions in trade and related areas comprise the following:

- the important Automotive Products Agreement of 1965 which led to the further integration of the North American automotive industry, removed U.S. tariffs on Canadian-produced vehicles and original parts, and removed tariffs on similar products imported into Canada by vehicle producers, subject to specified performance requirements and undertakings; this agreement, however, contains no institutional provisions beyond those governing the right to consult and to complain;

- the arrangements regarding defence production sharing, which originated in Canada-U.S. collaboration during the second world war and are managed by periodic meetings of officials from Ottawa and Washington;

- informal understandings with respect to cross-border trade in strategic goods which would require export licences if shipped to other countries;

- the 1984 "understanding" requiring bilateral consultations when either government introduces "safeguard" import measures that would affect exports from the other country;

- the 1984 "understanding" calling for bilateral consultations where either government plans anti-trust measures which would affect the interests of the other; this understanding elaborates earlier arrangements of this kind in effect since the 1960s;

- several joint working groups of officials and other similar bodies, such as the Trade Statistics Committee established in 1971 to reconcile differences between Canadian and U.S. systems for the collection and interpretation of trade data; and

- the operations of a Canada-United States Interparliamentary Group; its annual meetings usually cover bilateral trade and economic matters, as well as defence/security and environmental issues.

Mention might also be made here of the Joint Ministerial Committee on Trade and Economic Affairs created in the mid-1950s, which assembled annually until the early 1970s but has been inoperative since that time. This body is described in more detail below. To the above list could also be added a number of arrangements between governments of Canadian provinces and neighbouring states, which provide periodic opportunities for discussions of trade and economic issues of special regional interest, as well as other regional matters. In the private sector, several trade and industry associations on both sides, for example the two Chambers of Commerce, have well established cross-border links; and the C.D. Howe Institute and the National Planning Association have long collaborated in their Canadian-American Committee.

Inadequacy of Existing Arrangements

The GATT and other multilateral agreements and institutions have their limitations as frameworks for the management of the large and important Canada-U.S. bilateral economic and trade relationship, or for dealing with bilateral issues of special or unique importance to the two countries. The GATT rules, important as they are to both countries in governing cross-border trade, have permitted trade policies and practices on both sides which result in continuing bilateral frictions, block or threaten to block cross-border trade in many areas, and give rise to uncertainties and lack of confidence about the future use of trade restrictive measures. There are many recent and current bilateral conflicts which demonstrate a need for special rules to govern Canada-U.S. bilateral trade. A number of these involve measures on both sides, which may be perfectly legal under GATT rules, whose trade restrictive effects could be lessened under special bilateral rules. They include, among others: continuing government procurement and other policies at the federal and provincial/state levels which favour domestic suppliers; threats posed with increasing frequency by the U.S. countervailing duty and "safeguard" import systems to major Canadian exports of lumber, steel, fish, potatoes, hogs and pork; and the continuing farm support policies on both sides that can severely limit or block entirely large potential areas of bilateral trade, including the recent U.S. restrictions on imports of products containing sugar.

Similarly, the GATT tariff negotiations, successful as these have been in lowering and eliminating tariffs on bilateral Canada-U.S. trade, as well as globally, have left intact a surprising number of high tariffs on both sides of the border which limit opportunities for otherwise profitable and efficient trade. Notable examples are the tariffs of both countries in excess of 20 per cent on most clothing, footwear and many textile products, and tariffs on one side or the other in excess of 15 per cent on a longer list of goods such as many petrochemicals, furniture, household appliances and a variety of other consumer goods. It is misleading to point, as so many do, to the impressive percentage of bilateral trade that is duty free. The statistics mask those tariffs and other barriers which can greatly reduce bilateral trade flows or block it entirely.

The need has long been recognized for better, more effective arrangements for continuing consultations between the two governments on trade and trade policy issues, in the light of the large, important and intricate bilateral economic and trade relationships.[4] A number of efforts have been made to fill this need, including the arrangements, mentioned above and discussed in greater detail below, which existed from the mid-1950s to the early 1970s for annual meetings of the long dormant Joint Ministerial Committee on Trade and Economic Affairs. The succession of opportunities for consultations between the two sides in multilateral settings are not sufficient, since inevitably these meetings tend to focus on broader, global issues; and the U.S. participants at them tend to be preoccupied with their trade problems with Japan and the European Community, rather than with Canada-U.S. trade issues. In recent years the quarterly meetings between the Canadian Secretary of State for External Affairs and the U.S. Secretary of State have been helpful in this regard, but do not generally focus on bilateral trade policy issues in any detail. The meeting in Québec City in March 1985 between Prime Minister Mulroney and President Reagan was, of course, highly successful in establishing a framework and an agenda for future bilateral efforts to manage trade relationships, as well as to seek solutions to a list of current bilateral trade irritants; and the two leaders have agreed to meet annually to discuss important issues of common concern. But summit meetings of this kind, by their very nature, do not often come to grips with the range of particular trade issues and conflicts. Accordingly, the consultative element in the trade policy relationship has tended to consist of last minute, ad hoc efforts to cope with crisis situations, usually in the glare of media attention which is not always helpful, while neglecting more fundamental, longer term bilateral problems.

As well, a special need for more effective processes for resolving bilateral trade disputes has long been recognized. Quite specific proposals for creating a bilateral joint economic or trade commission to help resolve disputes were made in 1979 by the Honourable Donald Macdonald and in 1983 by Senator Mitchell of Maine.[5] In 1979, the Joint Committee of the Canadian Bar Association and the American Bar Association adopted a report which recommended new arrangements and procedures for the resolution of bilateral disputes.[6] The distinguished Canadian jurist, Maxwell Cohen, in a recent article analysed in considerable detail the need for better arrangements to help settle bilateral trade and the economic disputes, and proposed for this purpose the creation of a "Joint Economic/Administrative Commission."[7]

As noted above, both countries have in recent years made limited use of the GATT rules and procedures for dispute resolution to help resolve bilateral trade disputes. But the GATT Contracting Parties cannot reasonably or appropriately be asked to help resolve the continuing flow of Canada-U.S. bilateral trade issues. Moreover, the GATT process is generally restricted to issues which violate and come within the framework of the GATT rules, whereas difficult Canada-U.S. bilateral disputes often do not involve any violation of the strict letter of the GATT rules, or may fall outside these rules entirely. In this situation, bilateral trade frictions which are not resolved by Ottawa and Washington through the diplomatic process, such as the border broadcasting issue, can remain irritants for prolonged periods of time, and often they tend to

bunch up, creating an impression of serious crisis in the broader bilateral relationship.

There is also a growing appreciation of the need for better arrangements in both countries, as well as on a co-operative basis, for continuing and more structured research and analysis of economic and trade issues of common concern to the two countries. Internal government studies and reports do not serve this need adequately since they tend to consist of briefs and position papers prepared for negotiating and similar purposes, and are not often made available to the public. The 1985 Report of the Macdonald Commission, together with a number of studies prepared for the Commission, makes a major contribution to the analysis of contemporary Canada-U.S. trade policy issues and relationships.[8] Semi-independent agencies, such as the Tariff Board and the Canadian Import Tribunal in Canada, and the International Trade Commission in the United States, have made valuable contributions to a better understanding of bilateral issues, although their work is usually linked closely to legislative requirements in one or the other country, cast in a narrow perspective of national interest, or aimed at determining whether domestic producers are being, or threaten to be, damaged by imports.

Independent research organizations and the academic community also make a good contribution to the better understanding of bilateral trade issues. The Economic Council of Canada, the Institute for Research on Public Policy, the C.D. Howe Institute and other research bodies in Canada, as well as several research institutes in the United States have all published a number of studies of Canada-U.S. economic and trade relationships and may be expected to carry out further research and analysis in this area. But these efforts by research institutes and the academic community are sporadic, and not always focussed on policy issues; they depend on uncertain financial and other resources and often lack a continuing institutional base.

The Economic and Legal Environment

The need for new arrangements to govern Canada-U.S. trade reflects a number of underlying developments, both within the two countries and internationally.

One such development, especially over the past two decades, is the increased involvement in economic affairs of governments at various levels in both countries in pursuit of a range of economic, political, cultural and social objectives. The scope and nature of those government interventions, and their consequences for international and bilateral Canada-U.S. trade, have increasingly been subject to public questioning. Severe strains in the trade relationship have emerged from interventions by both governments. Examples include a variety of subsidy programs in both countries, Canada's NEP and FIRA programs, the tax advantages provided to U.S. exporters by the DISC program of tax incentives and its successor program, preferences in both countries for domestic suppliers under enlarged government purchasing, and massive government interventions in both countries in support of the agricultural sector.

This increased government involvement has paralleled an equally significant process of integration of the two economies, which has added to pressures for increased government intervention. As each separate economy becomes more sensitive to the internal as well as the external policies of the other, pressures emerge for new bilateral solutions to deal with domestic trade and economic problems.

A further pressure for improved arrangements to manage the bilateral trade relationships has emerged as a result of the increasingly legalistic body of trade legislation--in both countries as well as within the broader international trade system--governing both "standing" measures for import protection and measures of a "contingent" kind to deal with short-term import problems. Domestic legal and administrative systems which govern trade have now become so extensive and complex that only full-time specialists can understand them; they have become correspondingly open to manipulation by powerful, special interest groups and at times can operate with unpredictable results. The growing complexity of these domestic trade policy systems generates pressures for international rules to govern their use.[9]

Further pressures for change in the bilateral trade relationship arise from the surge of proposals in the U.S. Congress for the introduction of trade restrictive measures of one kind or another. These current pressures reflect in large part the overvalued U.S. dollar, which is mainly responsible for the large and growing U.S. trade deficit. While the strength of the U.S. dollar may be a short-run problem, longer-run changes in patterns of world production and trade have also contributed to continuing high levels of unemployment in certain "smokestack" industrial sectors, and to low world prices for many farm products. Many of the demands for protection in the United States reflect problems in particular commodity sectors, such as steel and automobiles, rather than overall imbalances in the trade account. Longer-run shifts in comparative advantage are also at work, in addition to macroeconomic trends and changes in the value of the U.S. dollar. Some of the current proposals to limit imports into the United States are aimed selectively at Japan, the European Economic Community and some of the newly-industrialized countries, but if implemented, they could also severely damage Canadian economic and trade interests, for example if a surtax were to be imposed on imports. Other protectionist proposals are directed squarely at Canadian exports. One such proposal would amend U.S. legislation in order to redefine subsidies in ways that could pose new threats to Canadian exports of softwood lumber.

Still further pressures for change in the bilateral trade relationship arise, especially on the Canadian side, from the growing interest of provincial and state governments to participate more directly in the formulation and operation of trade policies. Canada-U.S. trade arrangements and issues have been high on the agendas of successive meetings of First Ministers and meetings of provincial Premiers over the past year, as well as on the agendas of regional meetings of provincial Premiers and Governors of neighbouring U.S. states. This greater interest and involvement of the Canadian provinces in trade policy areas has led to the establishment of more structured arrangements for regular federal-provincial consultations on Canada's trade policies at the level of First Ministers, trade ministers and officials. Pressures may be expected for the further

evolution of structures for federal-provincial consultations on trade policy in the context of Canada's participation in bilateral and multilateral negotiations.[10]

Another set of incentives for new bilateral Canada-U.S. trade arrangements arises from the perception that the GATT system has faltered since the end of the Tokyo Round and has become too cumbersome to deal effectively with contemporary trade problems facing Canada and the United States. The delays, difficulties and uncertainties surrounding the prospective next round of GATT tariff and trade negotiations, to which both Canada and the United States are giving strong support, have provided additional incentives for opening bilateral negotiations between Canada and the United States aimed at a new, more open trade relationship. While this process would doubtless be difficult and take considerable time, it can be predicted that a further round of GATT negotiations would be even more prolonged and might not deal adequately with major issues in Canada-U.S. bilateral trade.

The results of recent economic research and analysis of the costs and benefits of further bilateral trade liberalization, especially on the Canadian side, have reinforced interest in reducing and removing barriers to Canada-U.S. trade, as well as on a broader basis, as a means of stimulating the Canadian economy and improving the efficiency and productivity of Canadian industry. This prospect has greatly influenced the recent public debate in Canada over negotiating new, more open trade arrangements with the United States as well as the succession of studies and pronouncements by federal and many provincial leaders on the subject. On the political level, new and improved bilateral trade arrangements are viewed as urgently needed in both countries as a means of establishing a more harmonious Canada-U.S. relationship in general. As noted above, the desire to improve, liberalize and strengthen the bilateral trade relationship emerged clearly in the Quebec "Declaration on Trade". An interim report by the Joint Parliamentary Committee on Canada's International Relations in August 1985 called for the immediate opening of comprehensive, in-depth bilateral discussions of trade issues and arrangements.[11] An even more positive endorsement of new bilateral trade arrangements was contained in the report of the Macdonald Commission on Canada's future economic prospects.[12] In October 1985 an interim report by an Ontario Select Committee on Economic Affairs, Ontario Trade Review, gave general approval, with several reservations, for negotiations "to reduce or eliminate barriers to trade between our two countries in a mutually beneficial manner".[13]

A decisive Canadian initiative has now been taken to launch negotiations for a Canada-U.S. bilateral trade agreement. At the beginning of October Prime Minister Mulroney sent a formal proposal to President Reagan which established a basis for the President to seek the required authority from Congress to engage in the negotiations.

Canadian and U.S. Objectives

Among the Canadian objectives in the negotiations the following may be expected to be high on the list:

- to reduce and remove U.S. tariff and non-tariff barriers to Canadian exports of goods and services, so as to gain improved access to the large U.S. market;

- to impose greater restraints on the use by the United States of policies and measures which injure Canadian trade interests, especially those offering preferences to domestic producers in government purchasing and those imposed or threatened under so-called "trade remedy" systems; and

- to establish effective joint institutional arrangements for resolving trade policy disputes and generally managing the bilateral trade relationship.

To secure these objectives, Canada would of course have to make its contribution by reducing or removing its own barriers to imports from the United States, by accepting new disciplines over its trade and related policies as they affect U.S. interests, and by cooperating in the creation and operation of new joint institutional arrangements.

On the U.S. side it may be expected that the main objectives in the negotiations would include the following:

- to reduce and remove Canadian tariff and other barriers to U.S. exports of goods and services;

- to limit in some way the subsidization of Canadian production of goods and services which adversely affect U.S. trade interests;

- to liberalize and establish rules governing trade in the services sector; and

- to reduce barriers to U.S. capital investments in Canada and secure "national treatment" for U.S. investments in Canada.

Canadian and U.S. objectives of this kind are not, on the face of it, mutually exclusive; rather, it is likely that each country will have a different list of priorities. Canada also has an interest in access for investment to the U.S., in limiting U.S. subsidy schemes which affect Canadian interests, and in the export of services to the U.S. The United States may be less interested than Canada in creating new joint institutional arrangements, but will not necessarily be negative towards such arrangements.

Most of these objectives, and the process for achieving them, are not new. Some of them have been pursued for half a century under the pre-war trade agreements and within the GATT. They can and should continue to be pursued within the GATT and under a further round of GATT negotiations; indeed, the agenda for a new round of multilateral trade negotiations is broadly similar to the bilateral agenda. However the objectives of Canada and the United States can be advanced farther and more quickly under a new bilateral agreement than will likely prove possible under the prospective GATT round.

Any new bilateral trade agreement with the United States should be designed to build upon and complement the GATT and its supplementary codes, which would remain the basic trade agreement between the two countries. A new bilateral agreement is not an alternative to the GATT and should not be seen as replacing the GATT. From a Canadian perspective, it is essential that the United States continue to be obligated to adhere to the GATT rules in its trade with Canada--rules which have been painfully negotiated over the post-war period, and which will preserve at their lower levels U.S. tariffs that have been bargained down in successive rounds of GATT negotiations.

On this basis, a new bilateral agreement might include the following main elements:

- It could embody and secure the results of negotiations to reduce or remove remaining tariffs and other barriers to cross-border trade on a comprehensive basis, beyond the reductions likely to be achieved in further GATT multilateral negotiations, with agreed phase-in periods tailored to suit each country; these would probably be different on each side and also differ among product sectors.

- It could contain new and tighter rules, beyond those in the GATT, to govern the trade policies of the two countries as these affect cross-border trade. These new rules could apply to the use of such measures affecting bilateral trade as anti-dumping and countervailing duties, and the use of "safeguard" import measures; and they could govern government procurement policies. Better rules are also needed to govern cross-border trade in agricultural products, which is restricted by barriers of various kinds, especially in sectors where governments on both sides have established domestic support programs. New rules might also be needed to cover issues which are not now subject to the rules of the GATT, including those governing trade in services.

- The agreement might establish special arrangements for continuing consultations between the two governments on the operation of the new agreement, and generally on the bilateral trade and economic relationship.

- The agreement could establish, as proposed below, a quasi-independent Joint Trade Commission, which would assist in the operation of the new bilateral trade agreement, help resolve trade disputes, carry out fact finding and monitoring in trade and economic areas, and be assigned other related tasks.

A bilateral agreement along these lines would probably require the amendment of certain existing trade legislation in both countries. On both sides, and especially in Canada, the implementation of a new agreement might well require supplementary arrangements between the federal governments and the provincial and state governments. Canadian provinces would need to be closely involved from the start in the negotiating process--even if they are not represented at the negotiating table--and participate in the subsequent

operation of the agreement. On the U.S. side Congress would undoubtedly be closely involved. It would appear that existing U.S. trade legislation is sufficient to launch negotiations for an agreement with Canada. Congress must, however, be consulted before negotiations are opened and further Congressional approval is required for the agreement emerging from the negotiations, including any necessary implementing legislation. Whether the outcome of the negotiations, in U.S. terms, should be in the form of a formal treaty or an "executive agreement", is discussed below. The objective should be to ensure that a new agreement would receive favourable and rapid consideration by Congress, that it would be durable and stable, and that benefits for Canada would not subsequently be legislated away piecemeal by Congress.

The Sovereignty Issue

It is difficult to see how a new Canada-U.S. trade agreement of the kind discussed above would lead to any erosion of Canada's sovereignty or independence, although it could well lead in the future to a greater harmonization of policies and programs in the two countries in certain areas, for example, those designed to support agricultural prices and farm incomes. Indeed, an agreement which further constrains the use by the United States of trade policy measures that can damage Canadian interests would give new protection to Canadian sovereignty, and not weaken it. Canada would, of course, accept new disciplines over its trade policy, but only in exchange for equivalent constraints accepted by the U.S. government and approved by Congress. In this sense, a bilateral trade agreement of the kind discussed above would be in line with Canadian trade policies and objectives over the past half century. Much of the debate in Canada over the impact on Canadian sovereignty and independence of a trade agreement with the United States appears to reflect misunderstandings of the nature of such an agreement, as well as fears and uncertainties of earlier periods in Canadian history. Moreover, the decision whether or not to enter into an agreement is, in itself, an expression of sovereignty by Canada.[14]

Canada has of course entered into a great many agreements with the United States and other countries not only in trade areas but also in areas such as taxation, transport and communications and environmental pollution. Under these agreements Canada, acting in its own self interest, has accepted constraints on its freedom of action in exchange for the acceptance of comparable constraints by other countries. Also, there can be positive as well as negative effects from constraints on a country's freedom of action under international agreements, for example by limiting policies and programs which may be in place to serve favoured special interest groups, but which may not serve the broader public interest. It is sometimes easier to change such policies, or adopt new policies which serve broader interests, in the context of international agreements.

In any event, both sides may be expected to withhold from full liberalization certain sectors of their economies which are particularly sensitive, or which are regarded as requiring special protection for broad political, economic or social reasons. It is to be hoped these sectors will be few in number, and not selected simply to protect favoured sectors from outside

competition. The process of liberalizing cross-border trade may well require adjustment in domestic legislation and programs on both sides. For example, as noted above, legislative changes would no doubt be needed if trade barriers were to be removed or reduced in sectors of agriculture where support programs exist. This does not in itself imply any erosion of sovereignty and could have positive effects by opening the way for reform of subsidy and other programs in both countries that have long been the subject of criticism for a variety of reasons. Benefits on both sides could also emerge from the removal or reduction of internal barriers to trade and economic activity in both countries in order to implement a new comprehensive Canada-U.S. trade agreement. Again, changes of this kind would not represent an erosion of sovereignty but rather could lead to the more efficient functioning of the economies of both countries, to the benefit of each.

The possibility of threats to Canadian sovereignty would also be reduced by the operations of a Joint Trade Commission, as proposed below. It is a common view that over the years the long established International Joint Commission has served to adjust the imbalance in the size of the two countries in managing the boundary waters and environmental issues. A new Joint Trade Commission could be expected similarly to help adjust the bilateral imbalance in efforts to deal with bilateral trade issues.

Proposed Joint Institutions

It is proposed here that the agreement should contain provisions which would create two kinds of joint institutional arrangements. One would consist of representatives of the two governments and be designed to facilitate consultations and negotiations between them regarding the implementation of the agreement, the interpretation of its provisions, and ways of improving it in response to new circumstances. The other would be the proposed Joint Trade Commission--a permanent, independent body modelled on the long-established International Joint Commission--designed to investigate bilateral trade problems and issues, to provide objective advice to the parties on how to deal with them, to help resolve particular trade disputes and to play a key role in the operation of "trade remedy" systems as these affect bilateral trade.

Intergovernmental Arrangements

The Macdonald Commission has suggested the creation of a joint "Committee of Ministers" to interpret the agreement and generally oversee its implementation, assisted by a panel drawn from the private sector to help resolve disputes. This Committee, it is suggested, might be composed on the Canadian side of the Ministers of External Affairs, Finance, International Trade and Regional and Industrial Expansion and, on the U.S. side, of the Trade Representative and the Secretaries of Commerce, State and the Treasury.[15]

An arrangement of this kind should be approached with caution, in light of past experience. It would represent, in effect, a reactivation of the long-dormant Joint Ministerial Committee on Trade and Economic Affairs which was created in 1953. This body met almost annually for many years but has not

been assembled since 1970, by tacit agreement of the two governments, because of problems surrounding its operation.

It is recognized that this Joint Ministerial Committee was originally conceived as an informal mechanism for exchanges of views, and not for negotiations and decision making, let alone to oversee the operation of a bilateral trade agreement. Nevertheless the problems of operating a new or refurbished joint committee of this kind could very well parallel those which led to the suspension of meetings of the earlier body. These problems were described in a report of the Standing Senate Committee on Foreign Relations, issued in 1981 after an investigation of the institutional framework for the Canada-U.S. relationship. The following are excerpts:

> More and more time was spent on preparation of the joint communiqués which were in themselves reactions to the press demand for decisions. The encounter became increasingly a platform for predictable, set speeches from each side. Formal position papers were drawn up and exchanged. Each minister was accompanied by a battery of civil servants. The informal frank discussions of the original meetings were lost. At a time when the bilateral issues were becoming enormously more complex and more specialized, the meetings began to appear more futile with the discussions adding little to mutual understanding.
>
> Another drawback has been that too much publicity has nullified the original exploratory and consultative purpose of this channel.
>
> . . .the task of bringing the eight or ten U.S. Secretaries and Canadian Cabinet Ministers together for two or three days once a year has become an almost impossible one in the 1970s.
>
> The Committee would like to see a revival of the original pattern of informal discussions which characterized the early meetings of the Joint Ministerial Committee. Unless this could be done, which seems doubtful, the Committee has concluded with regret that this joint institution, in the structured form it has recently taken, serves no constructive purpose and may even be counter-productive in the conduct of relations between the two countries."[16]

It is proposed here that if a large joint committee at the ministerial level is created--or reactivated--it would be desirable for arrangements to be made for it to meet at the level of deputies, and for it to function largely through sub-committees or working groups to deal with particular issues. Further, meetings at the ministerial level would need to be carefully planned so as to avoid confrontation and conflict in the glare of publicity.

A preferred arrangement, however, would be for the agreement to assign political-level responsibility for its operation to the Canadian Minister of International Trade and the U.S. Trade Representative. More easily than a large group of Ministers and Secretaries, they could keep in close and regular contact, and consult together at short notice on emerging problems and issues. Also, by focussing political-level responsibility more narrowly for the operation of the agreement, consultations on both sides with provincial and state authorities as well as with the private sector would be facilitated, and reporting lines for sub-committees and working groups would be much clearer.[17]

In designing arrangements for bilateral consultations at the government level under the proposed agreement, it should be borne in mind that over recent years there has been an increase in opportunities for discussions relating to trade and economic issues by Canadian Minsiters with their United States counterparts in a variety of other settings. These opportunities include, among others, annual meetings between the Prime Minsiter and the President, quarterly meetings between the Secretary of State for External Affairs and the United State Secretary of State, annual meetings of the Summit countries, annual meetings of the International Monetary Fund and World Bank, and regular meetings between the Minister of Agriculture and his United State counterpart. Moveover, by the nature of the bilateral relationship, Canadian Ministers and United State Secretaries have easy access to each other when occasions arise which call for less formal meetings and discussions between them.

Whatever the composition and functions of a new or refurbished intergovernmental committee, it is suggested below that quite separate arrangements should be made, under the proposed Joint Trade Commission, for the resolution of disputes relating to the operation of the agreement.

Moreover, no matter what new institutional arrangements are put in place under the new trade agreement, much of the daily management of the Canada-U.S. trade and economic relationship, will no doubt continue to be dealt with by traditional diplomacy. This process has long involved, and is certain to continue to involve, not only the Department of External Affairs and the State Department, but a great many other departments and agencies in Ottawa and Washington (as well as Parliament and Congress) and also the governments of the Canadian provinces and many of the U.S. states. Further, whatever new bilateral agreements and joint institutions are created at the federal government level, the network of links between provincial and state governments, and between private sector industries and trade associations in the two countries, can be expected to grow and flourish.

Proposed Joint Trade Commission

In addition to some form of inter-governmental arrangements to oversee the operation of the agreement, it is proposed that the agreement should contain provisions for the creation of an independent joint commission to assist in its implementation and operation, and perhaps also assist to in the management of other trade-related issues outside the strict confines of the agreement. The need for such a body, as noted earlier, has been proposed by several authorities in recent years.[18] Its creation would be in line with well established and unique

patterns of Canada-U.S. cooperation in other areas, as exemplified in the International Joint Commission (IJC) whose functions, structure and procedures could serve as a model.

The proposed bilateral trade agreement, which would establish a new, broad framework for bilateral cooperation in trade and related areas, would provide a solid legal underpinning for the creation of new joint institutional arrangements which would serve to assist the two parties in the implementation of the new agreement, and would have an important symbolic significance as well. Its creation would represent an additional demonstration of the move by the two countries away from an older concept of dealing with bilateral trade and related issues by confrontation and bargaining towards a concept of cooperative efforts to reach common solutions.

For Canada, the work of such an independent Commission would have special advantages because, as demonstrated by the work of the IJC, its operation would help adjust the imbalance in size between the two countries, and lessen the disadvantage often faced by Canada in dealing with bilateral issues through a process of negotiation with its larger partner. Moreover, the creation of such an independent Commission at this time would involve a new recognition of the large and complex pattern of cross-border trade and investment, which will doubtless become even larger and more complex as a result of the agreement; the large and substantial involvement of the interests of provinces and states; and the myriad of linkages between the private sectors in both countries. These conditions call for some special mechanisms for bilateral cooperation, beyond those traditionally provided by exchanges and linkages between the two federal governments.

It could be argued that a joint independent commission of the kind proposed is needed whether or not it is created under a new Canada-U.S. trade agreement, or that such an institution should be created independently of a new bilateral trade agreement. These possibilities could be pursued in the event that negotiations for a bilateral trade agreement become protracted or break down. But it seems preferable to embody provisions for the establishment and operation of a commission in the envisaged bilateral trade agreement, and link its principal functions to other exchanges of rights and obligations in the agreement. The provisions of the agreement covering the proposed commission would in this way become an important integral part of the new trade agreement and would provide an additional attraction for its adoption by the two countries, as well as providing additional assurances that its provisions would be respected on both sides.

Functions of Commission

The proposed Joint Trade Commission would function primarily as an investigative and advisory body, with an additional mandate to help resolve bilateral trade disputes, and with no supra-national or regulatory functions except, as suggested below, those that may be assigned to it under the future agreement in connection with the determination of injury to domestic producers under the "trade remedy" systems of the two countries. Its main tasks would be assigned to it under references which it would be given by the two federal

governments jointly, although provision might also be made in the agreement for references to be sent to the Commission by a single party in exceptional circumstances. The agreement might indicate the kinds of issues which the Commission would be asked to investigate. These issues could be confined to matters covered by the provisions of the agreement; preferably, they would include a broader range of issues in trade and related areas, so as to enable the Commission to investigate new issues outside the agreement as they emerge. In response to a request by the two governments, the Commission would then organize and carry out a process of collection of data, verification of facts and impartial analysis, and submit its conclusions and recommendations to the two governments.

The Joint Trade Commission might also be given one or more "standing references" by the two governments, which would assign to it responsibility for the continued monitoring and reporting on developments in legislation, policies and practices in the two countries in particular trade and related areas, for the monitoring of private sector activities in particular areas, and for keeping under review changes in the pattern of bilateral trade and related developments in production and investment in the two countries.

Thus, the Commission's primary role would be directed at the avoidance of disputes in bilateral trade and related areas, and at helping the two countries resolve them when they arose, rather than serving as an instrument for the resolution of disputes. Nevertheless, it is proposed below that the agreement might also provide for the Commission to perform a dispute resolution function, in the event the two governments from time to time wished it to perform such a role. In addition, it is proposed below that the agreement might assign to the Commission a quasi-judicial, quasi-regulatory function in connection with the operation of the "trade remedy" system of the two countries as these apply to bilateral trade, i.e., those governing the use of countervailling duties, anti-dumping duties and "safeguard" measures to limit imports which are determined to cause or threaten injury to domestic producers.

Structure of Commission

Following precedents established by the 1909 Boundary Waters Treaty and the International Joint Commission created by this Treaty, the proposed Joint Trade Commission might be composed of six Commissioners, three appointed by each federal government on the basis of their qualifications to deal with trade and related issues, including both the economic and the legal aspects of these issues. However, in the light of experience with the IJC, the Commissioners should preferably be appointed for fixed periods of three to five years, with the appointments staggered so as to avoid prolonged vacancies; as well, they would all probably need to serve on a full-time basis, in the light of the volume of work they might be expected to perform. The Commission would doubtless need to be headed by Canadian and U.S. co-chairmen and to maintain separate offices in the two capitals, although consideration might also be given to establishing at a future date a single office at a centre near the boundary. While this latter arrangement would lend additional encouragement to a collegial approach in the

Commission's work, it would have the negative effect of removing the Commission from continuing, close contacts with federal government departments and ministers responsible for trade and related issues; further, it might be difficult to agree on a suitable boundary area location.

The co-chairmen, following the IJC precedent, would need to be authorized by the agreement to appoint permanent professional and other staff, who could be relatively small in number but would need to be well qualified to deal with trade, economic and related legal issues. The main resources for conducting the Commission's work, however, and again following the IJC precedent, would be provided by a standing Joint Advisory Board.

The members of such a standing Joint Advisory Board would consist of specialists appointed by the Commissioners and drawn from departments of the two federal governments, from provincial and state governments and the from private sector in the two countries. The Board need not be large in number--say, eighteen in total--but its membership should be balanced on the two sides and should be representative of the various functional, sectoral and geographic interests involved in the Canada-U.S. trade relationship.

The Joint Advisory Board would be assigned responsibility for investigating and analysing particular bilateral issues, as these are referred to the Commission by the governments, and advising the Commission on how these issues should be resolved, as well as on recommendations which it might make to the two parties. Examples of the kind of issues which the two governments might refer to the Commission, and which it would request its Board to investigate, could include patterns of bilateral trade in fish products, and domestic support programs for the fishing and processing industries of the two countries; issues surrounding production and bilateral trade in forest products; barriers to trade in certain agricultural sectors, such as the dairy sector, and related domestic support programs on each side; or measures taken by the two countries in response to subsidies by the European Economic Community on exports of grain.

As suggested above, the Commission might also be given a "standing" reference to monitor and report on relevant legislative and policy developments in the two countries, as well as relevant developments in economic conditions, production and bilateral trade, in addition to periodic references to investigate particular bilateral trade and related issues. A general mandate of this kind would probably require regular meetings of the Commission's Advisory Board, say, on a quarterly basis for a period of a week. These regular meetings would, in themselves, serve to ensure a continuing process of consultation within the Board among responsible officials at the federal and provincial/state levels and between them and private sector members. Like the Commission itself, the Advisory Board would presumably need to be headed by Canadian and U.S. co-chairmen either selected by the Board or chosen by the Commissioners. The Commission's staff in Ottawa and Washington could serve as a secretariat for the Board, and would need to be equipped to serve this particular function.

In conducting investigations under references from the governments, the Commission should be authorized by the agreement to order, if necessary, the production of documents from federal, provincial and state governments, and

possibly also information of a non-confidential nature from private sector sources. The agreement should also require the release and dissemination to the public of all reports by the Commission and its Advisory Board, and it should authorize the Commission to conduct public hearings on issues referred to it, so as to encourage additional public understanding and debate regarding them.

As will be evident, the work of such an Advisory Board would be central to the operation of the proposed Commission. The contribution that such a body could make to the overall management of the Canada-U.S. trade relationship is brought out clearly in the following account by Maxwell Cohen of the role of IJC advisory boards of this kind, in a 1981 review of the IJC:

> ". . .at the very heart of the Commission's approach to its work has been the principle of common fact-finding by teams of experts chosen from the most competent members of the public services of both federal governments, the states, and the provinces. The mandate of these control boards. . .has always been to operate as a single body with the same obligation to maintain a bi-national, unitary, and impartial perspective as the Commission itself. If the Commission has any claim to having made a contribution to the operational side of the functioning of international organizations, it is this determined approach to shared fact-finding by joint Canada-United States teams. 'Commanded' to obtain the facts, and to present their evaluations to the Commission, these teams try to ensure a non-national view of the data. Only in this setting can an authentic, impartial, bi-national perception evolve at the board level as it does at the Commission level itself. Facts are freely shared, and the IJC has the authority to order the production of documents from all governments, an authority it rarely has had to exercise. Although some compromises are made at the board level in order to achieve unanimity in their. . .reports, this sensitivity to national interests is a safeguard against the crude side of compromise, just as the high target of impartial dispute-settlement is the positive side of the same compromise, within both boards and the Commission itself.
>
> One further effect of this process has been the creation of a bi-national pool of hundreds of public servants who have learned to work together. Their expertise is shared in a bi-national forum, and this creates a mood and a framework that allows the IJC to rely upon this approach to bi-nationalism."[19]

Judge Cohen also noted that from its creation to 1981 only two reports by its boards have divided along national lines, only four of the reports by the IJC to the governments had carried dissenting opinion, and only two of these were along national lines. Also he noted that more than three-quarters of the

recommendations by the IJC arising from its investigative and advisory function had been adopted by the governments in one form or another.[20]

There are of course well established precedents, both in Canada and the United States, for the creation and operation of domestic, independent bodies with mandates to investigate, report and advise governments on trade and other issues. In Canada the Tariff Board, the Canadian Import Tribunal (formerly the Anti-dumping Tribunal) and the Textile and Clothing Board are regularly requested by the federal government, under relevant legislation, to advise on sensitive issues in Canadian import policy. In the United States the International Trade Commission performs similar functions. In both countries there is also a long history of permanent bodies of this kind in other policy areas.

It is suggested that an Advisory Board of the kind proposed above would not itself be charged with a basic research function, although its operations, by their nature, would necessarily involve the generation of a good deal of data and analysis. The Advisory Board, however, might be expected to identify issues and areas where basic economic and legal research on issues of common concern is needed, and to suggest where and in what manner such work might be pursued in universities, by research institutes or elsewhere in the private sector. The Commission, with the advice of its Advisory Board, could then organize and commission any needed independent research efforts, and would need to be given the resources to have these undertaken.

If the Commission and its Advisory Board are to perform an effective and credible function of investigating and advising on bilateral issues, it seems important that they should operate as collegial bodies, and not along national lines. The Commission should not become another body for bargaining and negotiation, but rather for the tendering of impartial, objective advice on issues in the bilateral trade relationship. This basic principle of collegiality should be observed by the two governments in drafting the relevant provisions of the agreement, in making appointments to the Commission, and in conducting their business with it; for its part, the Commissioners would need to follow this principle in adopting procedures for their own work and the work of the Advisory Board, and in conducting their day-to-day business. The success of the all-important Advisory Board would depend, in large part, on the ability of its members to serve not as representatives of the departments and organizations from which they are drawn, but to pool their knowledge and talents in joint efforts to deal with problems of common concern.

Dispute Resolution

The operation of an effective Canada-U.S. institution for joint fact-finding and analysis along the lines proposed above could be expected to lessen bilateral conflict over trade and related issues and foster a process for reaching common solutions to bilateral conflicts where these arise. Moreover, the GATT rules and procedures for dispute resolution would remain accessible to both countries where disputes which fall within the scope of the GATT. However, as noted above, several prominent legal and other authorities in Canada and the United States have in recent years proposed the creation of more formal bilateral arrangements for dispute resolution in trade areas as well as in other areas. The

need for such arrangements is likely to be increased by the conclusion of a bilateral trade agreement which would establish a whole new set of rules governing cross-border trade and enlarge the body of rights and obligations between the two countries in trade and related areas.

Traditionally, the most common method or resolving trade disputes between Canada and the United States has been through negotiation and direct consultation between the two federal governments although, as noted earlier, the two countries have also made use of the GATT procedures to resolve several disputes. The two countries have generally been reluctant to make use of third party arbitration or refer their differences for settlement by independent judicial tribunals, and it appears that no disputes over trade matters have been settled by such means. It is relevant, in this connection, that Article X of the Boundary Waters Treaty provides a procedure for the arbitration by the IJC of "any question" in dispute between the two countries, which presumably could include disputes in trade and related areas. On the U.S. side, however, agreement to enter into binding arbitration by the IJC in each case would require the "advice and consent" of a two-thirds majority of the U.S. Senate. To date not one case has been presented to the IJC under Article X.[21]

It is suggested that it would not be necessary for the two governments to attempt to establish under the prospective trade agreement a process of arbitration which would raise difficult constitutional and legal issues in both countries, including difficulties on the Canadian side pertaining to federal-provincial jurisdiction. Rather, the trade agreement might establish within the framework of the Commission procedures analagous to those in GATT Article XXIII, involving the establishment from time to time, as the need may arise, of Joint Dispute Panels composed of specialists, say three or five in number, appointed by the Commission in consultation with the two governments, to investigate and make recommendations regarding the resolution of particular disputes. As has been the experience in GATT, the successful operation of such procedures would of course involve the willingness of the two sides to make use of such procedures, to cooperate in the selection of panels, and to respect the findings and recommendations of the Joint Dispute Panels.

Joint Injury Determinations

Some of the most difficult bilateral trade issues, especially for Canada, arise from the application of anti-dumping, countervailing duty and "safeguard" import systems to cross-border trade. These have led to trade restrictive measures, or the threat of them, with serious consequences for production and trade. These systems probably now represent the most important barriers to cross-border trade; they increase the risk of exporting, discourage exporters and potential exporters from seeking new international markets, and can distort decisions on the location of investment. While their use may be quite compatible with the obligations of each country to the other under existing GATT rules, the threat of the imposition of import relief measures of this kind can lead to severe strains in bilateral relations and to costly efforts by governments, as well as on the part of the exporters concerned, to head off their application.

From a Canadian perspective, the best outcome of the negotiations would be agreement that neither side would in the future apply anti-dumping duties, coutervailing duties or safeguard measures on imports of goods and services from the other country; and it is assumed that proposals of this kind will be pursued in the negotiations. It may be unrealistic, however, to expect Congress to approve arrangements which, in effect, would exempt Canadian exports from U.S. trade remedy laws. On the Canadian side, as well, objections might well be raised against proposals to exempt U.S. exports from Canadian anti-dumping, countervailing duty and safeguards measures. Short of such exemptions, however, the agreement could include a variety of other provisions which would lessen the likelihood that these trade remedy systems would be applied to cross border trade.

For one thing, it may be supposed that under conditions of free trade opportunities for dumping would be reduced, and the threat of anti-dumping duties on cross-border trade would be correspondingly minimized. Also, under a new bilateral trade arrangement, it may be possible to reach understandings on the use of permitted subsidy programs on either side, so as to limit the use of countervailing measures. There may be other possibilities for agreeing on definitions of dumping and subsidies, and on interpretations of domestic law in these areas, including interpretations of injury to domestic producers, which would help to reduce bilateral problems and conflicts. It may be more difficult, however, to reduce by such means problems and conflicts arising from the use, or threat of use, of safeguard import measures under the existing legislation of either country. The existing bilateral "understanding" on the use by either country of safeguard measures affecting exports from the other is valuable in providing for advance consultations on the introduction of safeguard measures affecting cross-border trade and in clarifying each country's rights to compensation. It does not, however, limit the right of either country to apply safeguard measures to bilateral trade.

In addition, there are particular features of the existing import relief systems in both countries that might become subject to special rules under a future Canada-U.S. trade agreement. These are the requirements and procedures for the determination of injury to domestic producers. Under the GATT rules, anti-dumping and countervailing duties, as well as safeguard measures, may be applied only in circumstances where the imports of the product concerned are causing, or threaten to cause, injury to domestic producers. The relevant legislation in Canada and the United States sets out elaborate, but not identical, procedures for arriving at such determinations. On the U.S. side, this involves a process of public hearings and analysis by the quasi-independent International Trade Commission. In Canada, investigations into injury are conducted by the quasi-independent Canadian Import Tribunal and the Textile and Clothing Board or, in the case of safeguard measures, the government itself may in certain circumstances make its own determination as to whether domestic producers are being injured by imports.

On both sides, a positive determination of injury relating to dumped or subsidized imports leads automatically, with limited exceptions, to the application of anti-dumping duties or countervailing duties on the imported goods concerned. In the case of safeguard measures, however, the governments of both

Canada and the United States retain a good deal of discretion. A positive determination of injury by the U.S. International Trade Commission may lead to recommendations by it to the President to restrict imports of the products concerned, but the President has discretion as to whether or not to impose restrictions. Similarly, in Canada, the government retains the authority over the imposition of safeguard measures which may be recommended by the Canadian Import Tribunal or the Textile and Clothing Board.

What is proposed here is that a new Canada-U.S. trade agreement should contain provisions which would require in all cases a joint determination of injury as a condition for imposing anti-dumping, countervailing duties or safeguard measures on exports of goods or services from one country to the other. This would involve the establishment of a Joint Injury Panel drawn from the International Trade Commission and the Canadian Import Tribunal, which could conduct public hearings and carry out their own analysis of whether or not exports of the products concerned from one of the parties are causing or threatening injury to producers in the other country. The trade agreement would require that anti-dumping, countervailing duties, or safeguard measures could be applied only when the joint panel came forward with a positive finding of injury. Following the precedents in the domestic legislation of the two countries, determinations of injury by the Joint Injury Panel in regard to dumping and countervailing duty cases might be "binding" and automatically lead to the imposition of such duties on a definitive basis; on the other hand, positive determinations of injury in regard to safeguard cases could be "advisory" and could leave to the government concerned, as now is the case, the final decision as to whether to impose safeguard measures.

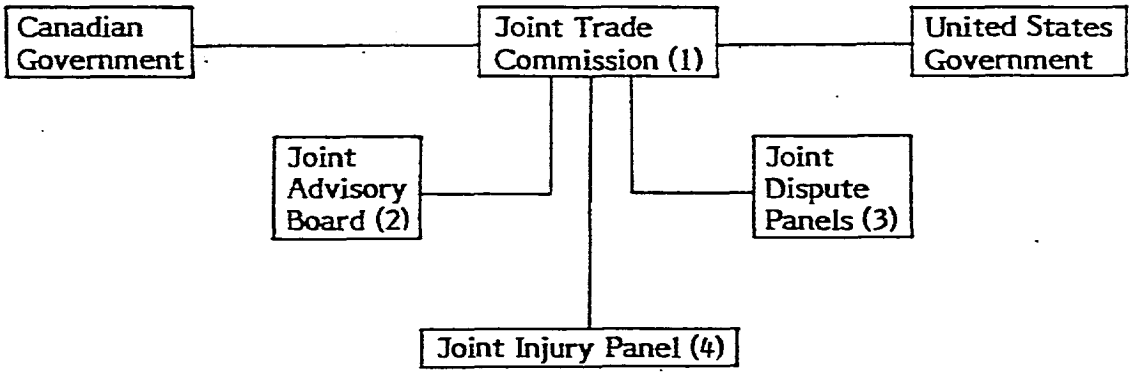
It is proposed that the agreement should provide for the establishment within the framework of the Joint Trade Commission of such a Joint Injury Panel and set out the procedures under which it would operate. The process should involve public hearings by the Joint Panel to which interested exporters, importers and others would be invited, under procedures analogous to those followed by the Canadian Import Tribunal and the U.S. International Trade Commission. Following its investigation, the Joint Panel would submit its findings and recommendations to the Commission, which the Commission would transmit, with its own comments and recommendations, to the two governments. By this process, the outcome of the investigations by the Joint Panel would be translated into findings and recommendations by the Joint Trade Commission to the two governments.

The implementation of provisions of this kind in a future trade agreement would presumably require amendments to existing laws and procedures on both sides. For one thing, it would seem necessary to assign to the Joint Injury Panel exclusive responsibility for injury determinations in regard to import relief measures affecting cross-border trade, so as to avoid the possibility of conflicting determinations by the U.S. International Trade Commission or the Canadian Import Tribunal. Also, there would presumably be a need to establish firmly in domestic law the status and responsibilities of the joint panel and the legal status of its determinations and recommendations. Amendments to domestic U.S. and Canadian legislation of this kind, however, might meet with less resistance than more ambitious proposals to exempt goods in cross-border

trade from the application of import relief measures. Such amendments would be sought, moreover, in the context of a comprehensive new trade agreement with provisions for more open bilateral trade and improved rules governing bilateral trade. Further, any necessary changes in domestic law to cover the establishment and operations of a joint injury panel would presumably be part of a larger package of legislation in each country to implement the new agreement.

The chart below shows the structure of the Joint Trade Commission and its sub-bodies, as proposed above.

STRUCTURE OF
JOINT TRADE COMMISSION



1. The Commission would maintain offices in Ottawa and Washington, with supporting professional and other staff who would serve the Commission and would also serve as secretariats for the Advisory Board, the Injury Panel and Dispute Panel.

2. The Joint Advisory Board would be a standing body, and might consist of 18 members appointed by the Commission and drawn from officials from the two federal governments, provincial and state governments and the private sectors in the two countries. The Board would investigate and report to the Commission on issues referred to it by the two governments, under standing references or under specific references.

3. Joint Dispute Panels could be established when both governments agreed to refer a particular dispute to the Joint Trade Commission for resolution; panels might consist of 3-5 members appointed by the Commission in consultation with the two governments.

4. The Joint Injury Panel might consist of four members, two drawn from the Canadian Import Tribunal and two from the U.S. International Trade Commission, with one of the Commissioners serving as chairman on a rotational basis.

Form of Bilateral Trade Agreement

The form of the agreement is important from a Canadian perspective for a number of reasons. A basic Canadian objective will be to ensure maximum security of an agreement against future unilateral abrogation by actions of the U.S. Congress or the President, or the piecemeal whittling away of benefits to Canada by subsequent U.S. legislation. A second objective will be to facilitate smooth and rapid approval by Congress of the agreement and any implementing legislation. A futher objective will be to minimize controversy in Congress and among the U.S. public which would inevitable fuel parallel uncertainty and controversy in Canada. Finally, the form of the agreement should be such that it will inspire confidence in the Canadian Parliament and the public, and also on the U.S. side, with respect to its durability and stability.

These objectives are best attained by casting the agreement, on the U.S. side, in the form of an "executive agreement" rather than a treaty, on condition that the executive agreement is pursued under so-called "fast-track" procedures, as provided for in the 1974 Trade Act and the 1984 Trade and Tariff Act.

Fast-Track Procedures

The fast-track procedures apply to executive agreements, rather than treaties, and were put into place following the Kennedy Round specifically to facilitate the ratification by Congress of trade agreements. These procedures were used effectively at the conclusion of the Tokyo Round to secure Congressional approval for the new GATT codes and the results of the Tokyo Round, and also to ensure the adoption of the necessary U.S. legislation to implement the agreements entered into by the U.S. negotiators during the Tokyo Round. The fast-track process was also used successfully in 1984 to approve and implement the bilateral trade agreement between the United States and Israel.

It seems clear that under existing U.S. legislation, the executive branch has authority to launch, negotiate and conclude a trade agreement with Canada, but only with the approval of Congress at various stages in the process. The 1974 Trade Act granted limited authority for the executive branch to negotiate and conclude agreements on a bilateral or multilateral basis covering non-tariff measures. The 1984 Trade and Tariff Act extended this authority to cover tariffs as well, but only under bilateral agreements concluded as a result of a request by another country. In both cases, this authority applies only to executive agreements negotiated and concluded under fast-track procedures.

There are two essential features of the fast-track process. One is that the executive branch must consult both Houses of Congress in advance of and during the negotiating stage. The second is the obligation of Congress to take rapid action to approve or disapprove the outcome of the negotiations once the agreement has been signed, and to adopt any necessary implementing legislation

without amendments or delay. Specifically, in the case of an agreement with Canada:

- The President must give advance notice to and consult with the Chairmen of the House Ways and Means Committee and the Senate Finance Committee of his intention to conclude an agreement with Canada covering tariff and non-tariff measures.

- Unless the chairmen of these Committees disapprove within a period of 60 days, the executive branch may proceed with the negotiations; this could involve the participation of members of these committees or other members of the Congress as observers on the U.S. negotiating team.

- Following the conclusion of the negotiations, the President would give Congress at least 90 days' prior notice of his intention to enter into the agreement with Canada and during this period he must consult with the House Ways and Means Committee and the Senate Finance Committee, as well as other Congressional committees with jurisdiction over matters covered by the agreement; at the expiry of this period, the President would submit the agreement to both Houses of Congress, along with any draft legislation needed for its implementation.

- The House and Senate committees concerned (principally the House Ways and Means Committee and the Senate Finance Committee) must then report out within 45 days the necessary legislation to approve the agreement and implement it.

- Within 15 days the two Houses must approve or disapprove the agreement and the implementing legislation.

- No amendments to the proposed legislation are permitted either during the committee stage or on the floor of either House, and there are time limits on the debates[22].

The use of the fast-track process thus expedites the ratification by Congress of trade agreements, and reduces the possibility that Congress might not approve of agreements entered into by the executive branch, as has happened several times in the past to the embarassment of the executive branch and the other countries concerned. Further, by associating key members of Congress with the negotiations, the durability and stability of the agreement and the implementing legislation are better assured. The process does not guarantee against the subsequent adoption by Congress of legislation which would conflict with U.S. obligations to Canada under the trade agreement (these obligations would remain intact as a matter of international law) but the process reduces the possibility of subsequent conflicting legislation being adopted.

It might be argued that an agreement in the form of a "treaty" on the U.S. side, would carry greater prestige and authority, and hence a higher level of

guarantee against subsequent abrogation, or against piecemeal erosion of its benefits to Canada. It seems clear, however, that a treaty carries no greater assurances in these respects than an executive agreement. Both have the same force under the U.S. constitution in terms of overriding state legislation and previous federal legislation; furthermore, both may require the adoption by both Houses of Congress of implementing legislation[22]. The executive agreement has a further appeal from the Canadian perspective, since from the start this process requires the involvement of the House of Representatives, whereas the treaty process involves only the Senate. It would seem essential that an agreement as important to both countries as a Canada-U.S. trade agreement should carry the support and confidence of the House of Representatives. Moreover, a treaty on the U.S. side requires the "advice and consent" of a two-thirds majority in the Senate, whereas an executive agreement requires the approval of only a simple majority.

For all the above reasons, therefore, the outcome of future bilateral trade negotiations should be cast on the U.S. side, from the first, in the form of an executive agreement pursued under fast-track procedures.

Summing It Up

It is remarkable that there have been so few Canada-United States institutional arrangements concerned with trade and trade policy, considering the massive scale, the complexity and the closeness of bilateral relations in these areas.

Since the second world war the General Agreement on Tariffs and Trade (GATT) has served as the basic trade agreement between Canada and the United States (as well as the trade agreement of both countries with other GATT members), supplemented by a relatively few purely bilateral arrangements governing cross-border trade, including the important Automotive Agreement.

A new Canada-United States trade agreement would supplement the GATT, as it applies to cross-border trade, but would not replace the GATT.

A new bilateral trade agreement should be designed (a) to achieve a higher degree of cross-border trade liberalization than is likely to be achieved in the prospective round of multilateral GATT negotiations; (b) to establish new and improved rules governing cross-border trade beyond those likely to be agreed on a multilateral basis in the prospective GATT negotiations; and (c) to create new institutional arrangements both between the two governments and in the form of an independent Joint Trade Commission.

The agreement should provide for a Ministerial level committee consisting of the Canadian Minister of International Trade and the United States Trade Representative, to help ensure cooperation between the two governments in implementing the agreement, interpreting its provisions and improving it in the light of changing circumstances.

The proposed Joint Trade Commission should be built on the precedent of the long-established International Joint Commission. The Commission would not be a negotiating body, but would be designed to operate in a collegial manner to assist the two countries in implementing the new agreement, and to assist generally in the management of the bilateral trade relationship. The Commission might consist of six Commissioners with offices in Ottawa and Washington.

The Commission should be authorized by the agreement to establish and appoint a Joint Advisory Board consisting of perhaps 18 qualified people drawn from departments of the two federal governments, provincial and state governments and the private sectors in the two countries, who would investigate and report to the Commission on trade and related issues referred to it by the two governments, under standing references and under specific references.

The Commission should be authorized to establish and appoint from time to time Joint Dispute Panels to help resolve particular bilateral disputes arising in trade and related areas, when requested by the two governments; these panels might consist of 3-5 members, whose investigations and reports would be the basis for recommendations to the two governments by the Commission regarding the resolution of a bilateral dispute.

The Commission should be authorized to establish and appoint a Joint Injury Panel, drawn from the Canadian Import Tribunal and the United States International Trade Commission, to investigate and report to the Commission on injury to domestic producers in either country arising from imports from the other country in connection with the use of anti-dumping duties, countervailing duties and safeguard import measures, as a basis for recommendations by the Commission to the two governments on the imposition of such measures on particular imports of goods and services by one country from the other.

On the United States side, the trade agreement should be cast in the form of an "executive agreement", approved by Congress along with any needed implementing legislation in accordance with the "fast-track" procedures under the 1974 Trade Act and the 1984 Trade and Tariff Act.

NOTES

1. United States Embassy, Ottawa. Text, "U.S.T.R. Yeutter Suggests Alternatives If GATT Talks Fail" (Yeuter Congessional Testimony), November 11, 1985.

2. This account of the 1935 and 1938 Canada-U.S. trade agreements is drawn from L.D. Wilgress Canada's Approach to Trade Negotiations. Montreal: Private Planning Association of Canada, 1963, pp. 9-13. For a recent historical account of the free trade issue in Canada-United States relations, see Simon S. Reisman, "The Issues of Free Trade" in (ed.) Edward R. Fried and Philip H. Trezise, U.S.-Canadian Economic Relations: Next Steps?, papers presented at a conference at the Brookings Institution, Washington D.C., April 10. 1984.

3. An account of the General Agreement on Tariffs and Trade and the trade activities of other multilateral organizations, from a Canadian perspective, is in the author's Canada, the GATT and the International Trade System. Montreal: Institute for Research on Public Policy, 1984.

4. The need for effective mechanisms for consultation was emphasized in the 1965 report to the two governments by A.D.P. Heeney and Livingston T. Merchant, Canada and the United States: Principles for Partnership. It was also emphasized in a Report of the Standing Senate Committee Foreign Affairs, Canada-United States Relations: Volume 1, The Institutional Framework for the Relationship, Ottawa: Information Canada, 1975.

5. Mr. Macdonald's proposal is in "Enforcing the MTN Codes: A Proposal for a Canada-United States Joint Commission", John Quinn, Philip Slayton, (editors), Non-Tariff Barriers After the Tokyo Round, Institute for Research on Public Policy, Montreal, 1982. Senator Mitchell's bill is in S. 2228 dated January 27, 1984; for an explanation of the proposal see the statement by Senator Mitchell in Congressional Record-Senate, January 27, 1984, p. S 299.

6. In 1979 the American Bar Association and the Canadian Bar Association adopted a report, which it sent to the two governments, regarding third party arbitration of bilateral disputes; see American Bar Association and Canadian Bar Association, Settlement of International Disputes Between Canada and the United States, September 20, 1979. For a detailed discussion of this report and the issues involved, see Eric B. Wang, "Adjudication of Canada--United States Disputes," in The Canadian Yearbook of International Law, Vol. XIX, 1981, University of British Columbia Press, Vancouver, B.C.

7. Maxwell Cohen, "Canada and the U.S.--New Approaches to Undeadly Quarrels" in International Perspectives. Ottawa: March/April 1985.

8. Report of the Royal Commission on the Economic Union and Development Prospects for Canada. Ottawa: Minister of Supply and Services, 1985; see especially Volume One, Part II, Section 6, "Free Trade with the United States". Valuable contributions to an understanding of Canada-U.S. trade policy issues and relationships were also made in the late 1950s by the report of the Royal Commission on Canada's Economic Prospects (the Gordon Commission) and in several of the studies prepared for it, notably the study by Irving Brecher and S.S. Reisman Canada-United States Economic Relations (1957). For a pre-war perspective, see the landmark study by W.A. Mackintosh The Economic Background of Dominion Provincial Relations, prepared for the Royal Commission on Dominion-Provincial Relations. Ottawa: King's Printer, 1939.

9. This more legalistic approach to trade policy, especially in the United States, has been analysed in several studies by Rodney de C. Grey. See his "The General Agreement After the Tokyo Round" in John Quinn and Philip Slayton, eds., Non-Tariff Barriers after the Tokyo Round. Montreal: Institute for Research on Public Policy, 1982; Trade Policy in the 1980s: An Agenda for Canadian U.S. Relations. Montreal: C.D. Howe Institute, 1981; and United States Trade Policy Legislation: A Canadian View. Montreal: Institute for Research on Public Policy, 1982.

10. Since 1982 federal and provincial ministers concerned with international trade have met together on a regular basis to exchange views on international trade policy issues and developments. While the discussions generally cover a broad range of issues, Canada-U.S. trade negotiations have been at the top of the agendas of recent meetings; the communique issued after the May 1985 meeting in Vancouver stated it have been agreed that there is "an urgent need for a comprehensive agreement to secure and expand our access to the U.S. market" (Department of External Affairs, Communiqué, May 29, 1985).

11. Special Joint Committee on Canada's International Relations, Interim Report, August 23, 1985 One of the Committee's recommendations was that there be immediate bilateral trade discussions with the United States (p. 56); another was that "the negotiations include the formulation of an effective mechanism for ongoing administration of any bilateral agreement or agreements, including the settlement of disputes" (p. 60).

12. See note 8 above.

13. Ontario Legislative Assembly, Select Committee on Economic Affairs, Ontario Trade Review: Interim Report. Toronto: Queen's Park, October 1985. The report includes a dissent by the New Democrat members of the Select Committee.

14. The Macdonald Commission Report, on pages 350-357 of Volume One, contains a refreshing, contemporary perspective of the much-debated question of the impact on Canadian sovereignty and independence of a new trade agreement with the United States.

15. Report of the Royal Commission on the Economic Union and Development Prospects for Canada, Volume One, pp. 320-322.

16. These excerpts are from pages 21-22 of Volume I of the Report of the Senate Standing Committee on Foreign Affairs, referred to in note 2 above.

17. W.R. Hines makes a strong case for focussing more narrowly and clearly departmental responsibility for the formulation and operation of Canadian trade policy, in his study Trade Policy Making in Canada: Are We Doing It Right? Montreal: Institute for Research on Public Policy, 1985.

18. Notes 5 and 7 above.

19. Maxwell Cohen, "The Commission from the Inside", in Robert Spenser, John Kirton and Kim Richard Nossal, The International Joint Commission Seventy Years On. Centre for International Studies, University of Toronto, 1981, pp. 112-113.

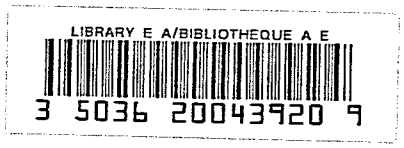
20. Ibid, note 4 and p. 111.

21. An historical account and analysis of methods of bilateral dispute settlement is contained in a section entitled "Canadian-United States Practice in Dispute Settlement", contained in the report by the American Bar Association and the Canadian Bar Association referred to in Note 6 above.

22. The discussion in this section of the "fast track" procedures is drawn largely from statements by several American participants at a conference held on April 19-21, 1985 by the Canada-U.S. Law Institute in Cleveland, Ohio, on "The Legal Aspects of Sectoral Integration Between Canada and the United States". See Alan Wm. Wolff, "The Case for a U.S.-Canada Free Trade Agreement" in Canada-U.S. Law Journal, Case Western Reserve Journal of International Law, Cleveland, Ohio, 1985, pp. 225-227.

23. An unpublished memorandum prepared for the Canadian Government by a Washington legal firm contains the following statement:

> "There are two principal ways in which the President may enter into an international agreement such as an FTA (free trade agreement) -- by treaty or by "congressional-executive agreement." U.S. treaties and "congressional-executive agreements" have equal status under both international and domestic law."



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