

SUPPLY CHAIN SECURITY PROGRAMS AND BORDER ADMINISTRATION

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Abstract

Supply chain security programs raise several legal issues. This paper outlines some of those questions as applied to the border between Canada and the United States (US). As modern customs administrations adapt to take increasing account of security needs, international cooperation will be crucial, along with consultation with the business sector.

1. Introduction

After the attacks of September 11, 2001, Canada and the United States (US) signed a ‘Smart Border Declaration’ designed to enhance cooperation among their border officials on security issues while facilitating legitimate trade.² Given the commercial importance of this border, several commentators have suggested that the best way to address security concerns is to develop a common perimeter around either Canada and the US or the whole of NAFTA,³ with elimination of internal trade barriers and a common external regime presented to the outside.⁴ In my view, such a security perimeter would be too complicated and unworkable.⁵ Instead, it is suggested that Canada and the US should continue in the direction set in the Smart Border initiative and pursue administrative measures such as the programs discussed below to support both security and trade.

This paper describes the countries’ two main supply chain security programs and comments on the international legal framework and selected issues in domestic law. As this is a land border, the paper does not address maritime shipping container security, although Canada and the United States have entered into an arrangement on container security.

Supply chain security raises issues that highlight the need for cooperation as modern border administration adapts to deal with the evolving commercial context and current threats to security.

2. PIP and C-TPAT

Partners in Protection (PIP) is the supply chain security program of the Canada Border Services Agency (CBSA). It was first developed in 1995 and has been modified since that time, most recently in June 2008.⁶ PIP status is available for importers, exporters, carriers (highway, rail, marine or air), customs brokers, couriers, warehouse operators, freight forwarders and shipping agents. PIP members must own or operate facilities in Canada. US-based highway carriers do not need Canadian facilities if they are also members in FAST, the Canada-US/US-Mexico program for ‘Free and Secure Trade’ that offers priority clearances into each country. PIP applicants are asked to provide information on physical security and documentation of cargo, personnel, security training, and the selection of business partners along the supply chain from point of origin to destination. PIP members enter into a memorandum of understanding with the CBSA. According to the model memorandum available on the website, the PIP program is intended to assist CBSA ‘to enhance border security, combat organised crime and terrorism,

detect and prevent contraband smuggling and increase awareness' of security issues (paragraph 1.1). Also according to the model memorandum, CBSA will consider PIP members for front-of-the-line inspections and priority in emergency situations (paragraph 3.1). The model memorandum further states that it represents an administrative understanding that is 'not intended to be legally binding or enforceable before the courts' (paragraph 2.3).

The Customs-Trade Partnership Against Terrorism (C-TPAT) is the supply chain security program of US Customs and Border Protection (CBP). It is available for importers, carriers (highway, rail, sea or air), foreign manufacturers, customs brokers, port operators, freight consolidators and third party logistics providers.⁷ The territorial criteria for membership are wider than the criteria for membership in the Canadian program. To be eligible for C-TPAT, importers must have a business office staffed in the US or Canada. Highway and rail carriers must have a business office staffed in the US, Canada or Mexico.⁸ Foreign manufacturers must be incorporated in Canada or Mexico. Customs brokers and members in most of the other categories must have a business office in the US. Like PIP, C-TPAT members are assessed for physical security and documentation, personnel, security awareness and training, and security measures in the choice of business partners, including whether a business partner is certified in the supply chain security program of a foreign customs administration. Since many of the employees of C-TPAT members are outside the US, the criteria for several of the listed membership categories state that background checks are to be consistent with laws applying in the place of employment, including foreign laws. C-TPAT members have access to programs such as FAST and the possibility of fewer inspections or at least front-of-the-line status if they are directed to inspection.

On 28 June 2008, Canada and the US signed a mutual recognition arrangement acknowledging that the two countries' supply chain security programs use similar standards and site validations.⁹ The arrangement falls short of automatic mutual recognition of status for members, however. In a joint report in February 2008, the US Chamber of Commerce and the Canadian Chamber of Commerce argued for full recognition of status, so that companies would only need to be certified in one program, not both.¹⁰ In a follow-up report, the two Chambers of Commerce noted that while the two programs are now more closely aligned, membership status is still not mutually recognised.¹¹

3. GATT and NAFTA

At the land border between Canada and the US, the FAST program provides designated lanes for clearances of imported goods. For shipments to benefit from this treatment, the importers, carriers and drivers must all be approved under the country's supply chain security programs. Membership in a security program could produce some commercial benefit on its own. FAST approval offers the additional advantage of separate lanes for speedy, predictable clearances.

The major potential questions over compliance with World Trade Organization (WTO) and NAFTA obligations have to do with the requirement of facilities or offices in the country of import to qualify for membership.

The main General Agreement on Tariffs and Trade (GATT) provision to consider is Article I, providing for most-favoured-nation (MFN) treatment. Assume, first, a shipment of tomatoes from the US imported into Canada by an importer resident in Canada, using the FAST lane since the importer and carrier are members of PIP and the driver is approved under FAST. Compare this shipment to an importation of tomatoes from Mexico that undergoes a lengthy and more expensive clearance process into Canada because the importer of record does not have facilities in Canada and the FAST lane is therefore not available.¹² In the words of Article I, the clearance would be a formality in connection with importation, and the question is whether the US tomatoes have received an advantage, favour or privilege not accorded to the Mexican tomatoes. The answer is debatable, since the importer of the Mexican tomatoes

presumably is not prevented from setting up an office in Canada to qualify for PIP. The requirement for local facilities could be questioned, however. Is there otherwise a commercial reason for a trader to have offices in every country with which it does business?

Within NAFTA, there could be further questions over both investment and services. The definition of investment in NAFTA is very wide, including certain loans and profit-sharing arrangements¹³ that might not result in owning or operating an office in Canada. If one investor qualifies for the FAST lane while another does not, is there a breach of MFN treatment, contrary to NAFTA Article 1103? A possible but less likely argument is that the difference amounts to a prohibited performance requirement, imposing a preference for local office rental services, contrary to Article 1106(1)(c). A stronger argument over the prohibition on imposing performance requirements on investment relates to the preference for domestic service providers such as customs brokers, couriers, freight forwarders, consolidators and other third parties, who may need local offices to be acceptable business partners. Chapter 11 of NAFTA is not simply about establishing or selling a foreign investment, but applies to management, conduct and operation of the investment as well.

Chapter 12 of NAFTA on services has wide coverage and contains both MFN and national treatment obligations.¹⁴ It relates to measures respecting presence of a service provider in the territory (Article 1201(d)) and states that no Party may require residence or a local office as a condition for the cross-border provision of a service (Article 1205). Several potential arguments – particularly the national treatment obligation in Article 1202 – are available for customs brokers, freight forwarders and various service providers based in the NAFTA territory, unless reservations apply. Canada has reservations from Articles 1202 and 1205 for customs brokers, duty free shops, air transportation, truck transportation and water transportation.¹⁵

It is not clear that breaches of GATT or NAFTA are present in the supply chain security programs, but if any are found, would the national security exemption provide justification? The exemption, in nearly identical wording, is in GATT Article XXI and NAFTA Article 2102. It permits a Party to take any action that ‘it considers necessary for the protection of its essential security interests... taken in time of war or other emergency in international relations’. This is quite wide and the self-judging language gives a Party obvious leeway in the interpretation of the exemption, although it may be argued that the deference to Party views only relates to the necessity of the action and not to whether an ‘emergency in international relations’ is present. Countries may hesitate to devalue this exemption by using it as a way out of their trade obligations on a permanent basis.¹⁶ Canada, for example, might not want to argue that all of its PIP goals, including the prevention of organised crime and border smuggling, have become emergencies. If the GATT or NAFTA exemption is not suitable, countries could still turn to general public international law for some defences to state responsibility,¹⁷ although these are not likely to be more generous than the GATT/NAFTA exemption.

Public international law raises the further issue of extraterritoriality. By their nature, supply chain security programs relate to acts, property and inspections outside the territory of the importing state. By establishing these programs, are states attempting to extend their regulatory or enforcement jurisdiction too far? The protective principle is an accepted basis for extraterritorial regulatory jurisdiction for vital interests such as security, protection of the currency and immigration.¹⁸ It could be a sufficient foundation for matters relating to border security, but might not stretch so far as to include the control of ordinary criminal activity. Since the programs are voluntary, applicants for membership consent to site validations as part of enforcement. There may be a question whether such extraterritorial inspections are intrusions into the territory¹⁹ and thus require consent from the country where they are to take place, although they are not exactly analogous to enforcement of legal requirements imposed on imports. The mutual assistance treaty of 1985 between Canada and the US could have some relevance, but it does not provide for extraterritorial inspections by foreign officials operating on their own, independently of domestic officials.²⁰ As a practical matter between most trading nations, consent would be forthcoming,

since a country would not want to see its traders disqualified from membership in supply chain security programs. As security concerns become a permanent feature of modern customs administrations, they will likely produce a tendency for some extraterritoriality and a corresponding need for cooperation.

3. Domestic law (Canada)

The main area of possible friction between supply chain security programs and domestic law relates to privacy and human rights issues in employment law. If the security program is drafted on the basis of the domestic law of the importing country, it could push employers to ask for and then report information they cannot legally demand or provide in the country of employment.²¹ The reporting of personal data raises particular concerns if the information will be held outside the territory.²²

In addition, if employment opportunities are conditional on distinctions that are not permissible in the country of employment, employers risk violating domestic human rights law. In a different context, Canadian firms have experienced this issue in the application of certain US export control regulations that restrict access to information by persons holding a citizenship other than US or Canadian, as national origin is a prohibited ground of discrimination in Canadian human rights law.²³ Deference to the law of the place of employment is a way to avoid these problems, but such deference may conflict with strong competing public policies in the other involved country.

The 2009 report by the US Chamber of Commerce and the Canadian Chamber of Commerce noted that participating companies could be ejected from a supply chain security program for even just one security incident. The report recommends that such expulsions be limited to situations where either the company or the driver was in some way complicit.²⁴ For security incidents relating to documents and customs formalities, the recommendation would be in line with GATT Article VIII which limits penalties for infractions committed without fraudulent intent or gross negligence. GATT Article X:3(b) requires that Members maintain a system of independent judicial or tribunal review of administrative actions relating to customs. The Federal Court of Canada has already ruled in favour of one driver who had his FAST card and Commercial Driver card confiscated for failure to declare a small bottle of scotch whisky, which would not have been dutiable had it been declared. The confiscations were overruled and the matter returned to the Minister for reconsideration. A three-year ban on reapplication by the driver was also overturned, since the relevant regulation did not allow for a suspension beyond 90 days.²⁵ Similar cases can be anticipated in other countries, as supply chain security programs are accepted as a usual feature of customs administration.

4. Conclusions

International harmonisation efforts are very demanding. One response to enhanced security concerns across the Canada-US border has been to argue for a common security perimeter that would involve significant harmonisation of domestic standards and a level of integration that, I suggest, is unrealistic. A better alternative is to focus on techniques of border administration, which will still present challenges to be resolved in light of differences in domestic policies. On security issues, it cannot be expected that it will be easy for countries to share risk management and enforcement efforts. As between Canada and the US, it has not been possible to achieve mutual recognition of membership status in supply chain security programs, a result that is understandable given the high volume of trade between the two countries. As the World Customs Organization has noted, it will take time to achieve a global system for mutual recognition of Authorised Economic Operator status in such programs.²⁶ Even if recognition is unavailable, using similar techniques and asking for similar information can make the procedures of international trade easier for commerce.

Since supply chain security programs are voluntary, businesses must be convinced that they produce sufficient benefits to justify the cost of qualifying for membership. Companies that still experience a high rate of inspections and little reduction in wait times may decide that the expense is too high. The US Chamber of Commerce and Canadian Chamber of Commerce note that a major limit on the current usefulness of PIP and C-TPAT membership is that a FAST lane may only be provided in the access area just before the inspection booth.²⁷ Any border congestion prior to that point slows down all vehicles equally. As modern customs administrations adapt to the new security environment, it is crucial to consult with commercial interests in order to encourage private sector participation, especially in difficult economic times.

Endnotes

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- 2 The Smart Border Declaration: Building a Smart Border for the 21st Century on the Foundation of a North American Zone of Confidence, 12 December 2001, viewed 7 August 2009, www.dfait-maeci.gc.ca/anti-terrorism/declaration-en.asp. The declaration was accompanied by an action plan: Action Plan for Creating a Secure and Smart Border, 12 December 2001, viewed 7 August 2009, www.dfait-maeci.gc.ca/anti-terrorism/actionplan-en.asp.
- 3 In January 1994, Canada, the US and Mexico launched the North American Free Trade Agreement (NAFTA) and formed the world's largest free trade area.
- 4 Wendy Dobson 2002, 'Shaping the future of the North American economic space: a framework for action', The Border Papers, Commentary No. 162, April, CD Howe Institute, Toronto; Danielle Goldfarb 2003, 'Beyond labels: comparing proposals for closer Canada-US economic relations', The Border Papers, Backgrounder No. 76, October, CD Howe Institute, Toronto; *Building a North American community* 2005, Report of an Independent Task Force, co-chaired by John P Manley, Pedro Aspe & William F Weld, sponsored by the Council on Foreign Relations with the Canadian Council of Chief Executives and the Consejo Mexicano de Asuntos Internacionales, Council on Foreign Relations, New York.
- 5 The challenges involving domestic regulatory convergence and political issues are examined in Maureen Irish 2009, 'Regulatory convergence, security and global administrative law in Canada-United States trade', *Journal of International Economic Law*, vol. 12, no. 2, pp. 333-355.
- 6 Information is taken from the website of the Canada Border Services Agency, viewed 7 August 2009, www.cbsa-asfc.gc.ca.
- 7 Information is taken from the website of Customs and Border Protection, viewed 7 August 2009, www.cbp.gov.
- 8 Except for Mexican long haul carriers that transport cargo destined for the US, but do not cross into the US.
- 9 US Customs and Border Protection 2008, 'Canada, US sign arrangement to align security standards for cross-border business', CBP News Release, 30 June.
- 10 US Chamber of Commerce and The Canadian Chamber of Commerce 2008, *Finding the balance: reducing border costs while strengthening security*, February, ('Chambers of Commerce 2008') at 8.
- 11 US Chamber of Commerce and The Canadian Chamber of Commerce 2009, *Finding the balance: shared border of the future*, July, ('Chambers of Commerce 2009') at 10.
- 12 The example is taken from remarks by Greg Kanargelidis, 'The world's longest undefended border: gateway or checkpoint?', Canada-United States Law Institute Conference, forthcoming, 2008-09, *Canada-United States Law Journal*, vol. 34.
- 13 NAFTA, Article 1139.
- 14 NAFTA, Articles 1202, 1203, 1204.
- 15 NAFTA Annex I, Annex II, Canada. There are other potential WTO and NAFTA categories for analysis that are not examined here: sanitary and phytosanitary measures (SPS), concerning contaminants or toxins in imports; technical barriers to trade (TBT), concerning packaging or production methods for goods and operating methods for land transportation services in NAFTA. As well, this paper does not address immigration controls and the NAFTA chapter on temporary entry for business persons (see Chambers of Commerce 2009 at 13-14).
- 16 See remarks by Cyndee Todgham Cherniak, 'The world's longest undefended border: gateway or checkpoint?', Canada-United States Law Institute Conference, forthcoming, 2008-09, *Canada-United States Law Journal*, vol. 34.

- 17 A country might argue necessity or *force majeure*, for example. See Malcolm N Shaw 2003, *International law*, 5th edn, Cambridge University Press, pp. 710-713; Ian Brownlie 2003, *Principles of public international law*, 6th edn, Oxford University Press, pp. 448-449; James Crawford 2002, *The International Law Commission's articles on state responsibility: introduction, text and commentaries*, Cambridge University Press, pp. 170-173, 178-190.
- 18 Rosalyn Higgins 1994, *International law and how we use it*, Clarendon Press, Oxford, p. 74; Vaughan Lowe 2003, 'Jurisdiction', in Malcolm D Evans (ed.), *International law*, 1st edn, Oxford University Press, p. 342.
- 19 Antonio Cassese 2005, *International Law*, 2nd edn, Oxford University Press, p. 51.
- 20 *Agreement between Canada and the United States of America regarding Mutual Assistance and Cooperation between their Customs Administrations*, Can. T.S. 1985, No. 3, signed at Quebec 20 June 1984, in force 8 January 1985. For comparison purposes, note the requirement of notification to the local customs administration before an origin verification is conducted, pursuant to NAFTA Article 506(2). Similarly, the WTO Anti-dumping Agreement provides that verification investigations in foreign territory require notification to and lack of objection from the foreign government (*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, Article 6.7).
- 21 See *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5.
- 22 Office of the Privacy Commissioner of Canada, 'Bank's notification to customers triggers PATRIOT Act concerns', PIPEDA case summary #2005-313, 19 October 2005; Office of the Privacy Commissioner of Canada, 'Canadian-based company shares customer personal information with U.S. parent', PIPEDA case summary #2006-333, 19 July 2006; Office of the Privacy Commissioner of Canada, 'Responsibility of Canadian financial institutions in SWIFT's disclosure of personal information to US authorities considered', PIPEDA case summary #2007-365, 2 April 2007; Office of the Privacy Commissioner of Canada, 'Law School Admission Council Investigation', PIPEDA case summary #2008-389, 22 August 2008; Office of the Privacy Commissioner of Canada, 'Outsourcing of canada.com e-mail service to U.S.-based firm raises questions for subscribers', PIPEDA case summary #2008-394, 19 September 2008.
- 23 Ontario Human Rights Commission, 'Human rights settlement reached with General Motors of Canada Ltd. with respect to workers with citizenships other than Canadian or American', Press Release, 5 July 2007; Commission des droits de la personne et des droits de la jeunesse, 'A settlement is reached with Bell Helicopters following a complaint to the Commission des droits de la personne et des droits de la jeunesse', Press Release, 17 January 2008. See Craig Forcese 2008, *National security law: Canadian practice in international perspective*, Irwin Law, Toronto, pp. 343-350.
- 24 Chambers of Commerce 2009, at 7, 11.
- 25 *Grewal v. Canada (Solicitor General of Canada)*, [2007] F.C.J. No. 1637, 2007 FC 1263.
- 26 World Customs Organization 2007, *WCO SAFE Framework of Standards to Secure and Facilitate Global Trade*, June, p. 36.
- 27 Chambers of Commerce 2009, at 12.

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