TRADE POLICY DEVELOPMENTS

LOBSTER DISPUTE SETTLEMENT PANEL READS "DO UNTO OTHERS" PRINCIPLE INTO GATT

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In a recent dispute settlement report under the *U.S.-Canada Free Trade Agreement* the majority appear to take the view that any restriction whatsoever on international trade is justifiable under *GATT* if the restriction applies to domestic trade in a way which does not offend the national treatment principle of *GATT*. In other words, so long as a country does to itself what it does to others, then what is done will not offend *GATT*.

This interpretation of *GATT* arises from the May 25, 1990 Final Report of the Panel established under the *FTA* to resolve a dispute between Canada and the United States over the trade in live lobsters harvested in Canada. The dispute arises from the December 12, 1989 amendment to the U.S. *Magnuson Act*. The *Act* had prohibited the sale in interstate commerce of lobsters harvested in U.S. federal waters if the lobsters failed to meet federal minimum size requirements. The prohibition did not apply to lobsters harvested in Canadian or state waters. The 1989 amendment extended federal minimum lobster size requirements to all lobsters entering into interstate or foreign commerce. As a result, Canadian lobsters which may lawfully be harvested in Canada below U.S. federal minimum sizes were prohibited from entering the U.S. market.

The Canadian side based its argument on the interpretation of Articles XI and XX of the *GATT* which are incorporated into the *FTA* by Articles 407 and 1201 of the *FTA* respectively. The U.S. side based its argument on Article III of the *GATT* incorporated into the *FTA* by Article 501.

GATT Article XI:1 enunciates a general prohibition on import restrictions. The general requirement of Article XI:1 is subject to a number of exceptions including the general exceptions contained in *GATT* Article XX. Canada argued that none of the exceptions were applicable except, possibly, that contained in Article XX(g). That exception relates to the conservation of exhaustible natural resources and requires that measures taken to restrict international trade be made effective in conjunction with restrictions on domestic production or consumption. The exception is subject to a general requirement in Article XX that measures taken under that Article not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or there is a disguised restriction on international trade. Canada argued that the 1989 amendment was a trade restriction which the U.S. was attempting to disguise as a conservation measure.

GATT Article III enunciates the "national treatment" principle. Article III:1 provides that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production. Article III:2 provides that the products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.

An interpretive note contained in the *GATT* states that any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in Article III:1 which applies to an imported product and to the like domestic

product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in Article III:1 and is subject to the provisions of Article III.

It was the U.S. view that, because U.S. and Canadian lobsters are subject to the same minimum size requirements, the U.S. law was an internal measure subject to Article III rather than a restriction applied solely to imports subject to Article XI. Canada argued that Article III applied to products which can enter a country but which may be required to comply with national regulations, such as labeling. In the present case, Article III had no application because small Canadian lobsters were not allowed into the country.

The majority view was that Article III establishes a no-discrimination or equal treatment principle for the purpose of safeguarding a competitive relationship for an imported product regardless of whether the measures are applied to the imported product at the border or in the internal market. The majority considered that, even if the 1989 amendment were imposed fully at the border, the amendment would apply to domestic and Canadian lobsters and would, therefore, be a non-protectionist measure of the kind covered by Article III. It did not matter that what was involved was a prohibition on undersized lobsters since the same prohibition applied to domestic lobsters. Nor was it necessary that a measure imposed under Article III meet the specific exemptions of Article XX. The majority concluded that Article III was structured to permit governments to impose internal regulatory measures whether or not such measures met the specific exemptions of Article XX subject only to the national treatment standard. It followed, that if Article III applied to a measure, then Article XI did not.

The minority view was that a measure could fall into both Article III and Article XI. The minority considered that the 1989 amendment was a prohibition which was effective and was instituted on the importation of lobsters and thus fell within Article XI.

The minority were also of the view that Article III did not apply to measures which involved the complete prohibition of an imported product. Article III applied to products that had already entered into the market of the importing country whereas the 1989 amendment constituted a prohibition on importation. Common sense suggested to the minority that a measure falls within Article III or Article XI, or conceivably both, depending on what it truly is rather than on the form of its enforcement.

The minority considered that to interpret Article III as allowing an importing country to prohibit the sale of any imported product by prohibiting the sale of like domestic products contradicted the very purpose of Article XI which states that an importing country cannot prohibit the importation of a product unless the prohibition fits into the exceptions to Article XI.

The minority went on to consider the application of the exception contained in Article XX(g). The minority determined that to qualify for an Article XX(g) exemption:

- the measure must relate to an exhaustible natural resource;
- domestic production of the resource must be likewise restricted;
- the measure must not involve arbitrary or unjustifiable discrimination between foreign countries; and
- the measure must be primarily aimed at conservation.

The minority considered that the U.S. had not made the case strongly enough to support the conclusion that the 1989 amendment was primarily aimed at conservation. The U.S. had not addressed the reasons why its conservation objectives could not be met by special marking of Canadian small lobsters, requirements that lobsters be sorted by size prior to importation into the U.S., particular documentary requirements as to subsized lobsters of Canadian origin, increased penalties for the possession of subsized lobsters, more vigilant enforcement efforts, or possibly other requirements. Since the onus was on the U.S. to establish the application of the exception once Canada had established that the 1989 amendment was in conflict with Article XI, the absence of evidence on these issues led to the

conclusion that Article XX(g) did not provide an exception.

Canada and the U.S. differed as well on the trade effects of the 1989 amendment. The Canadian view was that the cumulative total trade effect would be $127 million over a three-year period beginning in 1990. The U.S. view was that the trade effect would be $52 million for the same period but that Canada would be able to mitigate this loss. The minority on the Dispute Resolution Panel were not able, based on the submissions of Canada and the U.S., to make findings as to the degree of adverse trade effect.

The Report of the Panel was delivered to the Canada-United States Trade Commission whose principal representatives are International Trade Minister John Crosbie and United States Trade Representative Carla Hills. The Commission is to consider the Report over a 90-day period. During this period, the Commission will attempt to reach a satisfactory resolution of the issue in consultation with interested parties including U.S. states, Canadian provinces, and the lobster industries of the two countries.

CANADIAN TRADE UPDATE

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Canada - U.S. Trade

Accelerated Tariff Elimination under the FTA

The federal government has announced that the agreement between Canada and the U.S. to accelerate the elimination of tariffs on more than 400 items under the *Free Trade Agreement* will come into effect on April 1, 1990. The reduction in tariffs will reduce the cost to Canadian manufacturers of inputs imported from the U.S. As well, the reduction in U.S. tariffs will assist Canadian exporters in selling their products in the United States. In total, the accelerated reductions will cover more than $6 billion in bilateral trade between the two countries.

Canadian exporters will benefit from duty-free access to the U.S. market in a number of areas, including juices, photographic film, telephone switching apparatus, methanol, aluminum products, printed circuits, diesel locomotives and telecommunication equipment.

A second round of accelerated tariff elimination consultations between the government and Canadian industry is currently underway.

FTA Panel Report on Red Raspberries Released

Recently, a panel established under Chapter 19 of the *FTA* found that the imposition of U.S. anti-dumping duties on exports of red raspberries from British Columbia was not supported by the evidence on the record. As a result of the panel report, the U.S. Department of Commerce has undertaken to refund anti-dumping duties imposed on red raspberries exported between June 1986 and June 1987.

FTA Panel Report on Lobsters Released

As reported above, a dispute settlement panel established under the *FTA* has recently found that the American rule setting the minimum size of Canadian lobsters exported to the U.S. market does not amount to a restriction on importation. The Canada U.S. Trade Commission will now consider the report and consult with the states, provinces and lobster industries.

Plywood Standards to be Established under the FTA

The Binational Committee on Standards is in the process of developing performance-based standards for plywood subject to the *Canada-U.S. Free Trade Agreement.* It is scheduled to submit draft standards to the national standards organizations in Canada and the United States by July 31, 1990. These organizations are scheduled to report back to the Committee on the results of their review by the end of October 1990.

Support Levels for Canadian Grains Reached under the FTA

Article 7.05 of the *Canada-U.S. Free Trade Agreement* provides that import licenses are to be removed on oats, wheat, barley and their bi-products when U.S. government support levels for each grain are equal to, or less than, Canadian government support levels. To date, export licenses have been removed for U.S. oats and oat products. Import permits continue to be required for U.S. wheat, barley and their products because levels of government support for these grains are higher in the U.S. than in Canada.

THE GATT

Update on the Uruguay Round of the MTN

Recent meetings of the negotiating groups have been marked with many new proposals some of which are reviewed below.

MTN Agreements and Arrangements

Both Korea and the United States presented their proposals for amending the *Anti-dumping Code*. Korea emphasized the need to strengthen disciplines against offending exporting countries. The United States, on the other hand, emphasized the need to extend the *Code*'s coverage to practices used to evade anti-dumping duties. Its amendments proposed giving importing countries greater authority to deal with various types of circumvention such as establishing assembly operations in third countries, input dumping which is shipping parts for assembly in the importing country, and repeated dumping.

Tariffs

It was agreed to begin informal negotiations to reach a consensus on the method which participants will use to reach the goal of an average 33 per cent cut in tariffs decided in the mid-term review in Montreal more than a year ago.

Safeguards

The EC submitted a proposal for a selective safeguard regime applicable in special circumstances. The proposal would permit interim precautionary action against suppliers of products found to be causing serious injury to domestic producers as a result of a large increase in imports. Action to restrict imports from the supplier would be proportional to the injury suffered and would be removed after a maximum of eight months or at the end of an injury inquiry. If serious injury was found, the importing country would be able to apply safeguard measures selectively for a maximum period to be negotiated.

Trade-Related Investment Measures

The European Community in its proposal suggested that any new provision should build on existing provisions in the *GATT*. The EC identified the following investment measures affecting trade which are already subject to the *GATT*: export performance requirements; local content requirements; manufacturing requirements, manufacturing limitations on the use of components; exchange restrictions; and product mandating requirements.

The U.S. later submitted a draft agreement on TRIMs. The proposal recommended two sets of disciplines. First, a prohibition for those investment measures which inherently restrict or distort trade, such as requirements to use local content or to manufacture or export certain goods, and to transfer or licence technology. Second, for other investment measures such as exchange restrictions not conditional upon export performance, general commitments to apply them on a non-discriminatory basis and only if they do not cause adverse trade effects.

Agriculture

The Cairns Group presented its proposal which called for the long-term reform of agricultural trade over a ten-year period. The proposal recommended changes to trade distorting policies such as market price support measures, and direct payments to farmers. The proposal classified

internal support measures in three categories: prohibited, permitted subject to discipline, and permitted. The latter category could include, for example, measures taken for humanitarian purposes. The fundamental goal of the proposal was to phase out export subsidies by reducing them over time in accordance with an agreed schedule.

The proposal also recommended a prohibition on the use of all non-tariff measures not provided for in the *GATT* such as variable levies and minimum import prices, and the elimination of all voluntary restraint arrangements. Also proposed was the conversion of non-tariff measures to tariffs and their gradual elimination.

Other countries who presented their proposals for agricultural reform included Japan, the Nordic countries, Brazil, Columbia, Austria and the EC.

Tropical Products

The ASEAN countries tabled their proposal concerning tropical products. The recommendations included:

a) elimination of all duties on unprocessed tropical products;
b) reduction of duties on semi-processed tropical products by at least 75%; and
c) reduction or elimination of all non-tariff measures.

The proposal also recommended that developing countries take market-opening measures in a variety of product sectors.

Subsidies and Countervailing Measures

The United States and the EC were among the parties to present proposals concerning countervailing and subsidies measures.

While only export subsidies on industrial products are currently prohibited by the *GATT*, the U.S. proposal suggested that the prohibition be extended to all practices which result in trade-distorting effects, such as "trade-related" subsidies which encourage the use of domestic inputs in preference to imported inputs.

The proposal recommended that imported products benefitting from a subsidy be subject to a duty and to additional sanctions if the subsidy were not removed within a certain period.

The EC also presented its proposal which recommended extending the export subsidy prohibition to all government interventions which confer a benefit on a firm or industry contingent upon export performance.The failure to remove an offending subsidy could result in compensation or authorized retaliatory action.

The EC proposed that domestic subsidies be actionable only once their negative effect on the interests of other member countries has been demonstrated. The subsidy would have to meet specified criteria, namely, it would have to confer a quantifiable benefit to the recipient, imply expenditure of public funds, and be specific to a firm or industry.

GATT Articles

Canada and the U.S. submitted a joint proposal concerning Articles XII, XIV, XV, and XVIII which deal with balance-of-payment problems. While acknowledging the necessity of allowing parties to have temporary restrictions to address serious problems in their balance-of-payments, the proposal recommended that the criteria for assessing trade restrictions be clarified and that guidelines be established outlining the types of actions that countries can take without requiring a decision of the Balance-of-Payments Committee.

Trade-Related Aspects of Intellectual Property Rights

The EC and Austrian proposals stressed the importance of having an efficient dispute settlement system. The importance of settling disputes through a multi-lateral process was widely stressed. The EC advocated that without sanctions such as suspension of a concession the dispute settlement process could not be effective.

Korea also submitted a proposal which recommended that specific standards be covered by agreements on trade secrets and on the enforcement of intellectual property rights.

Australia and the Nordic countries also presented proposals on enforcement, covering civil, administrative and criminal procedures which would allow action to be taken internally or at the border.

Natural Resource-Based Products

Australia presented its proposal which recommended a minimum one-third overall reduction in trade barriers to natural resource based products. The United States also presented a paper on the aluminum industry which emphasized that all producers of this metal would benefit from a reduction and/or elimination of trade restrictions.

Textiles and Clothing

The current *Multi-Fibre Agreement* (*MFA*) is due to expire on July 31, 1990 and many participants are calling for a quota-free market in the trade of textiles and clothing.

Canada recently submitted a proposal recommending that, effective July 31, 1991, all restriction on trade in textiles and clothing under the *MFA* be terminated. The proposal also recommends that during the transition period, trade in textiles and clothing should be governed by special safeguard measures under *GATT* Article XIX to be applied by importing countries. However, this special safeguard measure would be progressively liberalized during the transition period and eventually eliminated.

The ASEAN countries, Japan and the United States presented their proposals on textiles and clothing. The ASEAN countries submitted a proposal which recommended the phasing out of the *MFA* restrictions by the year 2000.

Japan proposed that the *MFA* be terminated on July 31, 1991, but that special measures be adopted during the transitional period to a quota-free market. Total elimination of the *MFA* would then be achieved by the end of 1999 at the latest. The transition measure would become more difficult to invoke year after year and the levels of restrictions would become increasingly more liberal year-by-year.

The United States proposed that a ten-year transition period, commencing January 1, 1992, the end of which would result in the total elimination of all restrictions under the *MFA*. During the transition period, the proposal recommended that two alternatives be considered:

1) a global-type quota system; or
2) a tariff rate quota system.

Trade in Services

Japan presented its proposal which called for a market access through negotiations and the application of rules. The proposal emphasized the use of national treatment as a means of market access and proposed a framework to adopt the most-favoured-nation principal.

Proposal for Tariff Reductions Filed by Canada

Canada recently filed its proposal for a reduction in tariffs at the current multilateral trade negotiations in Geneva. The proposal is conditional upon obtaining a reduction of trade barriers (non-tariff and tariff) maintained by other countries against Canadian exports.

The proposal requests that the Asia Pacific countries reduce barriers on resource products, such as agricultural, fish, wood and paper products, mineral and chemicals and petrochemical products, as well as telecommunication equipment and computers.

The proposal concentrates on securing improved access to the EC for agricultural, fish, forest and other resource products, particularly in their more processed forms. As well, the proposal seeks to reduce the scope for discriminatory regional product standards, testing and certification requirements for heavy electrical equipment, telecommunications and computer equipment.

The elimination of import prohibitions which impede Canadian exports (i.e. quotas and discretionary import licensing) is sought from the Latin American countries, as well as from Africa and the Middle East.

The reduction of trade barriers will be of particular interest to Ontario producers who have export interests in such products as metals and minerals, rubber and plastic products, chemicals, office and automatic data processing machines, telecommunications and electrical transmission equipment, motor vehicles and parts.

Anti-dumping and Countervailing Duty Update

Four-Wheel Drive Tractors

The Deputy Minister of National Revenue, Customs and Excise (Deputy Minister) has initiated an investigation into the dumping of four wheel drive tractors from the Federal Republic of Germany. The investigation follows from a dumping complaint filed with the Deputy Minister by Trackless Vehicles Limited of Courtland, Ontario.

Dry Dog Food

The Deputy Minister has also initiated an investigation into the dumping of certain dry dog food exported from the United States and produced by, or on behalf of, Ralston Purina company. Within ninety days the complainants, Park City Products Ltd. and Champion Petfoods, will receive a decision by the Deputy Minister on whether or not the case will be terminated or a preliminary determination of dumping will be made.

Refill Paper

The Deputy Minister has made a preliminary determination of dumping and subsidizing of refill paper from Brazil. The determination follows a complaint by Franco Products Inc. that the dumped and subsidized imports are causing injury to domestic production in the form of lost sales, suppressed prices, and lost market share.

The Canadian International Trade Tribunal will now decide whether or not the dumped and subsidized refill paper is causing material injury to Canadian production of refill paper.

Women's Leather and Non-Leather Footwear

The Canadian International Trade Tribunal recently found that the dumping and subsidizing in Canada of women's leather and non-leather footwear has caused, is causing, and is likely to cause material injury to the production in Canada of like goods. The countries subject to the finding are Brazil, the Peoples' Republic of China, Taiwan, Poland, Romania and Yugoslavia. The finding does not include certain specialized footwear such as sandals, slippers, sports footwear, waterproof footwear and safety footwear.

Appointments to the Canadian International Trade Tribunal

The federal government recently announced the appointments of Kathleen E. Macmillan as Vice-Chairman and Michele C. Blouin and Charles A. Gracey as members of the Canadian International Trade Tribunal (CITT).

Inquiry into Textile Tariffs

In early February 1989, the Minister of Finance directed the CITT to provide advice to the Government on the reduction of textile tariffs to levels which would be more in line with those of other industrialized countries, particularly the United States. After a year long inquiry, the CITT concluded its hearings and submitted its report to the Minister on February 28, 1990 to be tabled in the House of Commons at a later date.

The recommendations in the report apply to those sectors in the textile industry which produce fibres, yarns, fabrics and specialty products, and which generally serve as inputs into the manufacture of other products. The report recommends that Canadian textile tariffs be gradually reduced to a maximum level of 5 percent for fibres, 10 percent for yarns, and 16 percent for woven and knitted fabrics. It is recommended that the tariff rates for specialty textiles be reduced by 33 percent because of their variety and distinctiveness. All tariffs on fibres, yarns and fabrics whose rates are below the recommended maximum levels will not be changed. This exemption applies to approximately 117 of the 568 items subject to the inquiry.

Implementation of these tariff reductions will reduce Canadian textile tariffs by an average of 26 percent. However, most products will continue to receive more tariff protection than those in the U.S., E.C., and Japan. The CITT reports that this new tariff structure will improve tariff relativity within textiles as well as between textiles and downstream products and will provide higher protection for the clothing industry.

The report proposes that the target tariff rates be achieved by annual reductions of one percentage point. This pace of implementation will result in maximum tariff levels being obtained in up to four years for most fibres, up to three years for most yarns, and up to nine years for most fabrics, including specialty textiles.

The recommendations for tariff reductions are expected to benefit the clothing industry and parts of the textile industry that import textiles and yarns for further processing. Consumers should also benefit from the reduction in the form of lower prices for clothing.

Reductions in textile tariffs are to be delayed until the completion of the Uruguay Round of multilateral trade negotiations in 1991.

Temporary Expiry of Safeguard Measure

The CITT has issued a Notice of Expiry of the temporary safeguard measure for all imports form the Republic of Korea of spandix filament yarns. The order will expire on October 31, 1990 unless the CITT receives a petition for the continuance of the order and the Minister accepts a recommendation of the CITT to continue the order.