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SAFEGUARDS:

POSSIBLE CANADIAN OBJECTIVES AND OPTIONS

IN A COMPREHENSIVE TRADE AGREEMENT

WITH THE UNITED STATES

Trade Policy Bureau
Department of External Affairs
26 February 1986

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SAFEGUARDS: Possible Canadian Objectives and Options in a Comprehensive Trade Agreement

The purpose of this paper is to consider the manner in which safeguards might be dealt with in the context of the negotiation of a comprehensive trade agreement with the United States. In this paper the term "safeguards" is meant to refer to emergency action against imports of particular products, which, while neither dumped nor subsidized, nor unfairly traded in any other manner, are deemed to be causing serious injury to domestic producers. The provision of an agreed discipline over the use of such measures is important to efforts to strengthen the security of access to markets. It is this "escape clause" provision in international trade agreements which can put fairly traded exports at risk simply because they are competitive. Such a provision, if not clearly reserved for extreme situations and for the provision of temporary relief from the forces of adjustment, may have a negative effect on investment decisions which should be taking advantage of the increased liberalization in trade in a new agreement.

2. The extent to which U.S. safeguards actions under S.201 of the Trade Act of 1974, as amended, constitute a threat to the security and predictability of access by Canadian exporters to U.S. markets can be gauged only in part, by reference to the history of s.201 actions since the current section's inception in 1975. (U.S. safeguards legislation of course dates back much earlier than this.) There have been to date (November 1985) fifty-four s.201 investigations in the United States of which ten have had actual or potential impact on Canada. Of these ten actions, two were aimed directly at Canada and three have had a trade impact on Canada although they were aimed primarily at other countries. In only one instance, that of U.S. safeguards action on specialty steel, did Canada exercise its rights to compensation/retaliation under GATT Article XIX. The volume of trade affected in that case has been estimated to be $14 to $20 million although the actual trade loss to Canada is difficult to calculate. (Since 1948, Canada has applied safeguards measures which have affected U.S. exports on sixteen occasions.)

3. Of course the government will need to focus not only on the sort of discipline it might wish to see the United States accept but also on the kind of discipline it is prepared to effect on Canadian practices. To a considerable extent, safeguard actions by governments concern the manner in which governments should respond to the concerns of their constituents, and the extent to which their constituents should be able to petition their elected representatives for action. What sort of system should be established to manage such pressures?

The decision to provide for no such relief would be a difficult one. The question at issue may rather be, therefore, the manner in which such recourse can be effectively tempered so as to ensure that the interests of particular individuals or companies are not given undue weight in the determination of government policy which will affect a much wider selection of the population. Clearly some international rules can be helpful to governments in collectively resisting pressures for action.

4. Traditionally safeguard actions have taken the form of either a quantitative limitation on imports or an increased tariff or surtax which has the effect of moderating the flow of imports. Another way of providing safeguards relief is through the negotiation of so-called "voluntary restraints" whereby the exporting country agrees to limit its exports to another country. In order to avoid unilateral imposition of a measure, perhaps in harsher form by the importing country and to retain the economic rents arising from quota allocations, these latter measures have become increasingly prevalent in recent years. It is this type of arrangement that has been used to restrict the flow of automobile exports from Japan to North America, and to control international trade in textile and clothing products.

BACKGROUND

Current Undertakings in Safeguards

5. Currently, GATT Article XIX establishes the basic rights and obligations of Canada, the United States and other GATT contracting parties regarding the taking of safeguard action affecting bilateral trade. As applied, Article XIX gives the right to a GATT Contracting Party to take a safeguards action provided it can demonstrate that the product against which the action is brought is being imported "in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products". The right to take safeguards action is only "to the extent and for such time as may be necessary to prevent or remedy such injury". Safeguard actions are only to be used in emergency situations and there is a requirement that such action will only be maintained for a limited time necessary to prevent or remedy the injury. There is a requirement for prior notification and consultation with those Contracting Parties "having a substantial interest as exporters of the product concerned", except in situations "where delay would cause damage which it would be difficult to repair" in which case action "may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action". The final key provision of Article XIX gives "affected contracting parties" the right to "suspend", "substantially equivalent concessions or other obligations". Furthermore, such suspension is required to be against only the country taking the safeguard action. This is in contrast to the requirement that the party invoking Article XIX itself do so in a

non-discriminatory manner against all imports of the product concerned. Article XIX is the only provision in the GATT which allows a contracting party the right unilaterally, without prior authorization of the Contracting Parties, to retaliate against only one country.

6. During the Tokyo Round of GATT negotiations, efforts began to negotiate a safeguards agreement elaborating the provisions of Article XIX. While considerable progress was made in developing rules and procedures which would provide greater discipline and clarity on the manner in which safeguards action is taken, the negotiations broke down because of disagreement on the question of "selectivity", i.e. the issue of whether safeguards action should be allowed against imports from only one or several countries which are considered to be the source of injury rather than required against all countries exporting a given product. This issue has been a dilemma in the use of the GATT safeguards provision since the 1950s. The Multifibre Arrangement dealing with trade in textiles and clothing products is a derogation from the provisions of Article XIX. It allows selective action to be taken in these product areas in exchange for more precise rules on the taking of such action and a system of multilateral surveillance. In other situations, countries have resorted to the use of voluntary export restraints which are a form of selectivity and which are concluded outside the purview of GATT.

7. While technically the negotiations on safeguards continue in Geneva as part of the GATT work programme, there seems to be little concerted political will at this stage to conclude such negotiations before the start of a new round of trade negotiations in the GATT. There is general agreement however, that concluding a safeguards agreement would be a key objective in a new round. It is probably not practical to think of realizing that objective prior to the conclusion of the new round of trade negotiations.

Canada-U.S. Discussions to Date

8. Both Canada and the United States have been frequent users of Article XIX. Fairly early on in the use of this article, a difference of opinion arose between Canada and the United States as to the circumstances under which a contracting party had the right to suspend substantially equivalent concessions under Article XIX, and consequently to use this right as a means of securing "compensation" -- usually in the form of reduced tariffs -- from the country which took the safeguard action. The Americans maintained that any safeguard action constituted an impairment of American GATT rights and therefore ought to be "paid for". The Canadian view was that if the article were properly applied, payment ought not to be necessary. The result of this situation was that in most situations where Canada took a safeguard action affecting American imports the United States insisted on receiving compensation, and usually did. On the other hand, Canada did not request compensation from the United States after

being satisfied that the safeguard action was in conformity with United States' GATT obligations. It was not until the recent action by the United States on specialty steel imports that the Canadian government ever actually used its rights to suspend concessions under GATT Article XIX. In this situation the suspension was revoked when the United States effected compensation in the form of removing cement from the buy-American provisions of the Surface Transportation Assistance Act.

9. Partly as a result of these different views over the interpretation of Article XIX, but more importantly to try and reduce the adverse impact of safeguard actions on the other party, discussions were undertaken between Canadian and American officials to try to work out an improved understanding on how safeguard actions by Canada and the United States ought to be managed in a bilateral context. A Memorandum of Understanding was eventually concluded and was signed on 17 February 1984 by the United States Trade Representative and the Minister for International Trade. The Understanding provides for a 30-day notification period if a party is considering taking a safeguards action. It was intended that this period of time could be used to try to moderate any adverse impact of the intended measure on the other party. Such moderation can be effected by techniques such as alteration of the product-coverage of the measure or through the use of "price breaks" which can be used to exempt goods above a certain value from a safeguards action. Such techniques help provide a de facto form of selectivity while remaining in legal conformity with GATT. A further incentive to tailoring the measure is provided by a provision in the Understanding that the adversely affected exporting party will not normally exercise its rights to suspend substantially equivalent concessions if there is no adverse impact of the safeguard measure on its trade.

Role of Canada/USA Bilateral Understanding

10. There has not been sufficient experience with the Canada/USA Memorandum of Understanding on safeguards to assess fully its role and value. In the period since the Understanding was signed in February 1984, the President has rejected action under Sections 201-203 following two USITC recommendations (carbon steel and copper) which would have had significant adverse trade implications for Canada if implemented. In both cases, there was intensive government-to-government consultation prior to the President's determination providing an opportunity to register fully Canadian views. On the other hand, the U.S. provided no advance notice and did not afford an opportunity to consult with respect to action under Section 22 of the Agricultural Adjustment Act of 1933 to restrict imports of sugar-containing products. Since February 1984, Canada has extended the Article XIX action on footwear and implemented an Article XIX action on beef. In the case of footwear, the U.S. was notified of the extension well in advance of the effective date of the extension but only after the government had taken its decision to extend the

measure. The U.S., with some justification, regarded this approach as being inconsistent with the spirit, if not the letter, of the Understanding. On the other hand, the Canadian measures on footwear have, over the years, been tailored so as to minimize adverse effects on U.S. export interests and the U.S. has not exercised its rights under Article XIX to suspend concessions. In the case of beef, the U.S. was given advance notice (less than the thirty days envisaged by the Understanding) of the government's decision to restrict imports but again was not afforded an opportunity to consult while the safeguard action was under consideration. However, the Canadian measure was subsequently tailored so as to minimize adverse effects on U.S. export interests and in this situation also the U.S. has not exercised its Article XIX rights to suspend concessions.

The Safeguards System in Canada and the United States

11. Canadian legislation provides various ways in which safeguards action can be taken. It should be noted at the outset that, with the limited exceptions of the textile and clothing sector and of petitions by an affected industry for removal of the general preferential tariff, there is no right of direct petition in Canada for the imposition of safeguards measures by companies, unions or private individuals. This factor renders the Canadian system much simpler than the U.S. system in administrative terms. Section 8 of the Customs Tariff Act permits the Governor-in-Council to impose a surtax on imports for a maximum of 180 days, pursuant to a report by the Minister of Finance that, in his judgement, goods are being imported into Canada under such conditions as to cause or threaten serious injury to Canadian producers of like or directly competitive goods. Such a surtax may be extended with the consent of both Houses of Parliament or following a finding of injury by either the Canadian Import Tribunal or the Textile and Clothing Board. (A surtax may also be imposed immediately upon the basis of an injury finding by either of these two bodies.) Any surtax has a maximum duration of three years and a reimposition of safeguards measures in respect of the same sector can only be done on the basis of a new finding of injury by the Canadian Import Tribunal. The government may also choose to introduce tariff rate quotas (i.e. procedures which provide for a higher tariff once a specified quantity has been imported).

Section 5 (2) of the Export and Import Permits Act permits the Governor-in-Council, on the recommendation of the appropriate minister, to impose quotas on imports based on a finding by the Textile and Clothing Board or the Canadian Import Tribunal that goods are being imported or are likely to be imported so as to cause or threaten to cause serious injury to Canadian producers. The 1982 Meat Import Act provides for limits on imports of fresh, chilled, and frozen beef and veal whenever the government determines that circumstances in both the domestic and world markets combined are likely to cause injury to domestic producers.

Description of the U.S. System

12. The U.S. has in place a highly legalistic system for providing import relief, direct access to which is available to U.S. producers and labour. In addition, the threat of legislated trade restrictive action by Congress can be as damaging as legal action itself in terms of its impact on the investment climate in Canada and the level of exports to the USA.

13. The principal trade remedy legislation for providing relief from injurious fair import competition is contained in Sections 201-203 of the Trade Act of 1974 as amended. Additional relevant legislation includes Section 22 of the Agricultural Adjustment Act of 1933 as amended, the Meat Import Act of 1979, and Section 232 of the Trade Expansion Act of 1962 (national security). Moreover, there is a range of product/sector specific legislation providing authority to impose import restrictions, e.g. sugar (headnote authority for quotas), uranium (Atomic Energy Act) and steel (Steel Import Stabilization Act).

14. Section 201 provides for the initiation of an injury investigation by the USITC at the request of an industry, the Administration or the Congress. The USITC must determine whether imports have increased such as to be a substantial cause ("a cause which is important and not less than any other cause") or threat of serious injury to the U.S. industry producing a like or competitive product. The USITC has taken a relatively rigorous approach in Section 201 determinations resulting in a number of no-injury findings.

15. Since 1975, 53 investigations have been initiated of which 22 have resulted in no-injury determinations.

16. The USITC must submit its findings and, if affirmative, recommendations for import relief to the President, within six months of the date of commencement of the action. The President then has 60 days within which to accept, reject or modify the Commission's recommendations. Section 203 authorizes the President to provide import relief in the form of increased tariffs, tariff rate quotas, quantitative restrictions, orderly marketing arrangements or any combination of such actions. There are statutory limitations on the duration of import relief and provision for Congressional over-ride of Presidential action which differs from the USITC recommendation. Import restrictions can be imposed on a selective basis but as a practical matter have been applied by the U.S. on an MFN basis except in cases where the Administration has sought voluntary export restraints from foreign countries. The President is also required under s.202 to evaluate the extent to which adjustment assistance is available to workers and firms in the industry and may direct expeditious consideration of petitions for such assistance.

17. The quasi-judicial Section 201 process is expensive for both petitioners and foreign producers. Some major Section 201 investigations have involved millions of dollars in legal fees. Moreover, from the perspective of the domestic petitioner the results are uncertain both with respect to an injury finding and the discretionary authority which rests with the President.

18. The USA/Israel Free Trade Area agreement and the Caribbean Basin Economic Recovery Act provide for import relief action with respect to imports of products in such increased quantities as to be a substantial cause of serious injury or threat thereof. In the case of the Caribbean Basin legislation, covered products are exempted from Section 203 measures unless the USITC makes an affirmative determination that injury is directly attributable to imports eligible for duty-free treatment under the agreement. There is provision for exempting Israeli products from import relief measures of general application if the U.S. considers that imports of the product in question from Israel are not a significant cause of the serious injury. The USITC must include in its Section 201 report to the President, advice on whether and to what extent its injury findings and recommended relief apply to imports from Israel. In addition, under both the Caribbean Basin and Israel agreements, there is a special fast track procedure permitting emergency action by the Secretary of Agriculture with respect to perishable agricultural products pending the results of a full scale investigation under Sections 201-203 of the Trade Act of 1974, as amended.

Handling of Safeguards in Other Bilateral Free-Trade Agreements

19. The provisions of the Stockholm Convention of 1960 which created the European Free Trade Area (EFTA) are of some relevance to the discussion of Canada-U.S. free trade. Article 20 of the EFTA Convention of 1960 dealing with difficulties in particular sectors, establishes a mechanism for the taking of safeguard actions in trade between EFTA countries. The article was revised in 1980 to require prior concurrence by the EFTA Council before measures can be applied. There have been few cases under the article and it has not been invoked recently. EFTA officials suggest however, that where inter-EFTA trade does create pressure on a sensitive sector, there are usually bilateral "corridor discussions" that "resolve or contain the situation", for example, "through the exporting-country government influencing its private sector". In the case of EFTA it would seem, therefore, that while there is provision for the taking of safeguard action in the free-trade agreement, informal means are more frequently used to resolve such problems.

20. Free-trade agreements between the individual EFTA countries and the European Community do contain a provision for the taking of safeguard action normally following consultations in the Joint Commission established to administer the agreement, or preceding such consultations, in cases of urgency. There is provision for compensatory action for the adversely affected party.

21. The Agreement on the Establishment of a Free Trade Area between Israel and the United States provides, under Article 8, for consultation in the event that either party takes a safeguards action affecting the trade of the other party. There is also a provision preventing safeguards from being applied to tariff reductions unless such reductions caused serious inquiry or the threat thereof to domestic producers. Most importantly, Article 5(3) provides for exemption of each party from safeguards measures taken by the other party where the first party is not a significant cause of or threat of, serious injury.

22. The Australia-New Zealand Closer Economic Relations Trade Agreement provides, under Article 17, for the possibility of either party imposing safeguards in a variety of strictly defined circumstances. During the transition period, there is a provision requiring the parties to invoke safeguards only as a last resort. After the transition period is over, the right to impose safeguards is further restricted by the imposition of mandatory consultation with the other government and referral of the market disruption issue to a government advisory board for a report. The right to take safeguards measures only exists in relation to defined types of injury including injury arising directly from trade liberalization occurring as a result of operation of the agreement and injury arising from government incentives to export. There are also general obligations including a duty not to restrict trade in the application of safeguards measures whenever possible and an obligation not to impose more onerous safeguards on the other party than are applied to similar goods from third countries. Safeguards measures can only be applied for a maximum of two years and the parties are directed to resume trade liberalization after termination of the safeguards measures.

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THE HORTICULTURAL SAFEGUARD PROBLEM [redacted]

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1/ USTR "Annual Report on National Trade Estimates", November 1985

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