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Richard S. Gottlieb

Debra P. Steger

Darrel H. Pearson

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Current and Possible Future International Rules Relating to Trade Adjustment Policies — Subsidies, Safeguards, Trade Adjustment Assistance: A View From Canada

*Richard S. Gottlieb**
*Debra P. Steger***
*Darrel H. Pearson****

I. INTRODUCTION

Achieving a balance in international trade between the benefits for a domestic economy arising from trade liberalization and the difficulties of adjustment for particular firms or industries is always difficult. The recent signing of the Canada-U.S. Free Trade Agreement ("FTA") has focused the attention of many Canadians on the adjustment implications for many industrial sectors of adapting to freer trade. The on-going tariff reductions resulting from successive General Agreement on Tariffs and Trade ("GATT") rounds, and proposals in the Uruguay Round to reduce non-tariff barriers in many areas, including agriculture, services and investment, are also contributing to fears about the ability of Canadian industries to meet increased import competition.

Structural change is never easily achieved in an economy, especially when it is required as a result of governmental action that opens up the domestic market to foreign competition. Governments seem to devote more attention to negotiating reductions in tariffs and non-tariff barriers than to developing non-distorting policy responses to the changes effected by trade liberalization. An unfortunate result of the general lack of foresight and planning for structural adjustment necessitated by new trade agreements is that governments often find themselves responding on an *ad hoc* basis to industries or firms clamoring for increased protectionism, shielding them from the impact of change. By not planning ahead and developing pro-active policies to deal with adjustment, governments are defenseless against pressures for specific relief measures.

A. FTA Treatment

The experience to date with the FTA is a case in point. Nowhere in the FTA is the issue of trade adjustment policies specifically addressed; nor was any agreement reached nor rules devised respecting government

* Partner, Gottlieb, Kaylor & Stocks, Montreal, Canada.

** of Fraser & Beatty.

*** of Fraser & Beatty.

assistance measures, generally. Chapter 19 commits Canada and the United States to establish a Working Party to develop a common system of trade laws applicable in both countries over the next five to seven years. The chapters on services and investment provide that the obligations contained therein, including the national treatment obligation, do not apply to the provision of subsidies by government, the creation of tax measures or incentives, or government procurement practices. With the exception of the above-noted provisions, the FTA is curiously silent on the question of government assistance to industries affected by freer trade.

Did the parties consider it best to leave the matter to be dealt with, for example, under countervailing duty laws, if applicable? Were the parties reluctant to create a precedent by excepting "adjustment assistance" from countervailable action? Aside from the issue of monetary assistance to affected industries, the FTA does, however, provide for "emergency actions," otherwise known as "safeguards" or "escape clause" measures. Safeguards are measures which a government may use to provide temporary import relief to a domestic industry seriously injured by a sudden increase in imports.

In this Paper, we propose to examine the possible adjustment policies available to governments and, in particular, to examine the mechanisms used by and options available to the Government of Canada. It is our view that the Canadian Government's response in the past has often been to react to protectionist pressures by imposing quantitative import restraints or temporary tariff protection or by creating new duty remission programs rather than developing adjustment assistance policies aimed at encouraging Canadian industries to become more competitive.

B. Framework Policies

Private firms respond to increased international competition by rationalizing or better organizing their productive resources. Generally speaking, industrial adjustment takes place within a complex set of laws and regulations designed to accommodate change. The Economic Council of Canada, in its 1988 statement, outlined two broad types of adjustment policies: "framework policies," which are of general application and economy-wide in scope, and "sector-specific policies," which are targeted at specific industries. National framework policies include unemployment insurance, worker training and mobility programs, regulations governing labour-management relations, competition policies, business and corporate laws as well as policies directed at the growth and level of output, employment and prices. International framework policies include the rules of the GATT. "Framework policies," observed the Economic Council:

facilitate the movement of labour and capital from slower-growing towards faster-growing industries. By providing an environment within

which market processes can function efficiently and effectively, framework policies let market signals indicate where returns are the highest and where they are the lowest, and thus where resources should be directed. For example, unemployment insurance and training programs enable individuals to find and enter the growth areas more easily. In the same way, programs designed to disseminate information on new technology and marketing niches make firms aware of new opportunities. In response to the pressures for change, these policies thus nudge the economy towards a new combination of output and employment in which overall economic activity can be maximized.¹

Framework policies, however, do not always work and, when they do, they are often perceived as working too slowly. Therefore, governments often respond to demands from particular interest groups on an *ad hoc* basis by targeting specific programs at groups of workers, industries or firms that are adversely affected or by providing relief to particular industries in the form of quotas, tariffs or duty remission programs. Sectoral measures range from instruments of "positive adjustment" to the "new protectionism." "Positive adjustment attempts to accommodate, facilitate and promote adjustment along the path indicated by competitive pressures, while new protectionism arrests, thwarts, or retards the pressures from international competition."²

C. *Positive-Adjustment Assistance*

The Economic Council places special government assistance programs adopted to encourage re-employment, including worker training programs, and income compensation for selected groups, such as workers or shareholders, in the positive adjustment category. In Canada, there are many federal and provincial government financial assistance or incentive programs available to encourage investment in production. Not only are funds available to subsidize production in Canada, but remission of customs duties has been liberally granted on imported machinery and equipment, materials and components, to ease difficulties experienced by producers in the first few years of production or to make them more competitive with imports.

Quantitative import restraints applied as a safeguard measure and imposed only for a temporary period would also be considered positive adjustment mechanisms. However, quantitative or other import restrictions imposed for long or indefinite periods, industry or firm-specific subsidies used to shore up firms, and tariff measures or duty remission programs intended to reduce the impact of imports on an unproductive industry, are considered protectionist policies.

While there are established procedures in Canada for the imposition

¹ ECON. COUNCIL OF CAN., *MANAGING ADJUSTMENT — POLICIES FOR TRADE SENSITIVE INDUSTRIES* 2-3 (1988).

² *Id.* at 5.

of import restrictive measures, such as tariff surcharges or quantitative restrictions under safeguard laws, there is no provision in Canadian law for government agencies to recommend, or to direct the government to grant relief in the form of trade adjustment assistance to workers or firms as an alternative policy option. Also, there are no specific legislative guidelines to assist the federal government in selecting appropriate subsidy or labour adjustment programs in response to trade liberalization. The lack of legislative guidelines in these areas is part of the reason why the federal government appears often to respond in an *ad hoc* manner to specific political or interest group pressures. Moreover, the apparent failure of the Government of Canada to develop a comprehensive adjustment response, involving labour and firm adjustment assistance programs in the FTA, also demonstrates the lack of government attention to the specific problems of industrial adjustment to trade liberalization.

D. *Resort to Protectionist Trade Laws*

While the effect of Canadian trade laws can be rather severe and create a burden on exporters to and importers into Canada, the incidence of imposition of quantitative restrictions has been limited in recent years to textiles, clothing and footwear. By and large, the government has preferred that industry avail itself of anti-dumping and countervailing duty legislation.

Save for a short-lived surcharge on imported bicycles a number of years ago, we are unaware of any surcharge having been imposed on any product as a result of an injury type proceeding. However, a recent application by certain Canadian wine producers' groups under section 59(2) of the Customs Tariff Act seeks surcharge and quota relief. More frequently, Canadian producers have resorted to proceedings designed to bring about withdrawal of General Preferential Tariff status now held under the Customs Tariff Act. Also, there have been an increasing number of countervailing duty cases in recent years — mainly in the food, agriculture and steel sectors. The main target for these actions have been the European Community ("EC"), followed by Brazil, Spain and the United States.

Clearly and undisputably, the most frequently invoked Canadian trade law is anti-dumping legislation under the Special Imports Measures Act ("SIMA") and its predecessor, the Anti-Dumping Act. The main targets have been Korea, Japan and Taiwan. To a lesser, but not insubstantial, degree have been certain European countries: West Germany, Spain and Italy, and also the United States.

It is not surprising that it has been Canada which has been the most concerned during the FTA negotiations with amendment of trade laws on a bilateral basis. *Inter alia*, this was provoked by a number of proceedings launched against Canadian exports early in the Mulroney re-

gime as well as the potential effect on Canada of proposed U.S. restrictive trade legislation. The importance of accessing the U.S. market without possible invocation of U.S. trade laws was a key, if somewhat naive, objective of the Canadian negotiating team.

In terms of impact on exporters, the U.S. initiatives against Canadian exports have been more substantial than Canadian proceedings against U.S. exports. For example, in the period from 1980-86, there were thirty-one Canadian anti-dumping and one countervailing duty investigations initiated involving U.S. products and seventeen U.S. anti-dumping and thirteen countervailing duty investigations involving Canadian products.

II. SUBSIDIES AND DUMPING PRACTICES

A. *The GATT Position*

The extent to which governments may use subsidies as a trade adjustment policy or for other purposes is conditioned by the rules of the GATT. Article VI of the GATT recognizes the right of Contracting Parties to levy countervailing duties on imports of subsidized products which are causing or threatening to cause material injury to an established domestic industry. The Agreement on Interpretation and Application of Articles VI, XVI and XXIII of GATT (the "Subsidies and Countervailing Duties Code") signed as a result of the Tokyo Round in 1979, provides a two track system for international discipline of trade-distorting subsidization measures. Track I sets out the procedures and substantive rules to be followed by countries when applying their domestic countervailing duty laws. Track II provides certain multilateral obligations concerning the use of subsidy measures, notification of subsidies, and multilateral mechanisms for consultation, conciliation and dispute settlement.

The signatories to the Subsidies and Countervailing Duties Code were deliberately ambiguous about the types of subsidy programs which are to be considered trade-distorting and, therefore, worthy of international discipline, and the types of programs that are not. The only guidance provided by the signatories is contained in Track II, particularly in articles 8-11. The Code contains a commitment by the signatories to not grant export subsidies on products other than certain products. With respect to primary products, the signatories agreed not to grant export subsidies in a manner which results in the country granting the subsidy having more than an equitable share of world export trade in the product. With respect to domestic subsidies, i.e., those not designed to encourage, or conditioned upon, export of a product, the signatories recognized that such subsidies are often widely used as important instruments for promoting social and economic policy objectives. Of specific relevance to our discussion are the provisions of article II which include as such objectives: facilitating the restructuring, under socially accepta-

ble conditions, of certain sectors especially where this has become necessary by reason of changes in economic policies, including international agreements resulting in lower barriers to trade as well as sustaining employment and encouraging re-training and change in employment patterns.

The Code signatories also recognized, however, that domestic subsidies may cause or threaten to cause injury to a domestic industry of another signatory or may nullify other benefits occurring to another signatory as a result of the GATT. The signatories emphasized, therefore, that where domestic subsidies might adversely affect the "conditions of normal competition" or have "possible adverse effects on trade," such programs should be avoided.

B. Canadian Definition of Subsidies

Subsection 2(1) of SIMA defines subsidy as being:

any financial or other commercial benefit that has accrued or will accrue, directly or indirectly, to persons engaged in the production, manufacture, growth, processing, purchase, distribution, transportation, sale, export or import of goods, as a result of any scheme, program, practice or thing done, provided or implemented by the government of a country other than Canada, but does not include the amount of any duty or internal tax imposed on goods by the government of the country of origin or country of export from which the goods, because of their exportation from the country of export or country of origin, have been exempted to have been or will be relieved by means of refund or drawback.

As is apparent from the foregoing, the Canadian law visualizes virtually every possible governmental assistance program.

C. EC Treatment of Subsidies

In the Treaty of Rome, which established the EC, subsidies or "aids granted by States" are dealt with in the chapter dealing with competition rules. Article 92 of the Treaty provides that:

any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

In the EC Treaty and regulations made under it, specific rules are provided outlining the types of subsidy programs that are always compatible with the Common Market, those programs that *may* be considered to be compatible if approved by the European Commission, and those programs that are not compatible. A monitoring and enforcement mechanism is also established. The European Commission reviews proposed subsidy programs prior to their implementation, and when a mem-

ber state does not comply with an order of the Commission, the Commission may seek enforcement of its order in the European Court. The standard adopted in the Treaty of Rome concerning the acceptability of subsidy practices is essentially a competition standard.

D. Subsidies Under the FTA

Unfortunately, in the FTA the rules on subsidies were not worked out. Although there was some discussion in the negotiations about abolishing the anti-dumping laws and moving to a domestic price discrimination and predatory pricing standard, no specific commitments were made in this regard. Although Canada and the United States have agreed to develop a new system of trade rules over the next five to seven years, there is no specific statement in the FTA that the objective should be to work toward a competition standard. As tariff and non-tariff barriers are reduced in the free trade area, greater emphasis should be placed on the effect of certain private pricing practices or government assistance programs on competition in the North American market. The focus of the trade laws, historically, has been on protecting domestic producers rather than encouraging competition in the economy as a whole.

E. How Can a Rationalized Canadian Producer Be Protected?

An issue of some interest is whether or not it is possible to protect, in Canada, a Canadian producer who is part of a "rationalized" industry or entity, or a Canadian producer whose goods are primarily sold in foreign markets. Rationalization can take place in one of two ways. The company may rationalize itself so as to produce as much of its product as is possible in the cheapest (cost of production) location and, in such a fashion, it divides its production, locating it in more than one country. Alternatively, the company may fully rationalize producing all of its product in one location and export a larger or greater share of its production to the other country. In either case, under SIMA, and given the small size of the Canadian market, difficulties arise in making a case of material injury caused by imports into Canada.

Consider the North American automotive industry. Certain people would question the claim that North American automobile producers are truly rationalized. More than eighty percent of Canadian production is exported and more than seventy-five to eighty percent of Canadian demand is satisfied by imports. As a result, it was argued in the recent *Hyundai* case that the impact of third country exports (whether or not dumped or subsidized) could have little impact on Canadian production destined for export. At the same time, such exports could have a considerable impact on imports of Canadian producers designed to serve Canadian market demands.

An extension of this situation occurs when virtually no Canadian market need is being supplied by Canadian production but, rather, all of

Canadian production is exported to, *inter alia*, countries served by the same exporters accused of disrupting the Canadian market. This may have meaning within the context of capital goods cases.

Article 12 of the Anti-Dumping Code appears to provide a remedy for situations where two countries are being affected or, more notably, where a second country's production is affected by exports into a first country. Country *A*, whose production is affected by imports into Country *B*, may petition Country *B* to conduct an investigation and consider the effects of the alleged dumping on the industry concerned in *A*, as well as the effects on the producers in Country *B*. At this time, however, Canadian law has not adopted these provisions of the GATT.

It would be interesting to see whether Canada and the United States will seek to modify their respective legislation to deal with rationalized industry matters since the FTA will surely lead to more rationalization.

III. SAFEGUARDS

A. *Tariff Surcharges or Quotas Under the GATT*

Another important trade adjustment mechanism is the use of safeguard measures, such as tariff surcharges or quotas, as sanctioned under article XIX of the GATT. Article XIX provides an "escape hatch" or emergency mechanism for releasing governments from their GATT obligations when there is a need to alleviate serious adjustment difficulties encountered by domestic producers as a result of trade liberalization. Article XIX was intended to apply only to situations where an increase in imports was occasioned by tariff reductions or other concessions made in the GATT. Measures are supposed to be applied in a nondiscriminatory manner against imports from all countries. Furthermore, article XIX provides that foreign suppliers may retaliate or be compensated for loss resulting from restricted market access.

Article XIX, however, has rarely been applied in the way in which it was intended. In the first case, the *Hatters' Fur* case involving an action by the United States against Czechoslovakia, the GATT panel ignored the causal link between injury and concessions made in the GATT. Article XIX is applied in practice in cases where imports are increasing and are causing or threatening to cause serious injury to a domestic industry.

A second major criticism that has developed from practical experience with article XIX is that it has been applied in a selective manner against specific countries rather than against imports from all sources. The issue of selectivity has been a major stumbling block in recent GATT negotiations. One of the major disappointments of the Tokyo Round was that the Contracting Parties were not able to agree to a new Safeguards Code. A committee was established at the close of the Tokyo Round with the objective to develop new rules and procedures to provide greater uniformity and certainty in implementing article XIX. Develop-

ing a comprehensive Safeguards Code is a major subject in the Uruguay Round.

In a recent article on safeguards in the Uruguay Round, Gary Sampson observed:

Article XIX in many ways holds the key to the success or failure of the Uruguay Round. Governments will not roll back existing trade barriers and stand still in the face of demands for new ones if there is no safety valve to permit them to deal with seriously injured producers in a politically acceptable manner.³

Not surprisingly, Sampson recommends in his article the adoption of a general competition standard rather than the objective of protection of domestic producers. He summarizes his message as follows:

Whether governments protect producers from serious injury has little to do with GATT. The decision is a national choice that has to be made, and governments should take it bearing in mind all interests not just those of injured producers. In this process, it is possible to strengthen the hand of government (make it more politically palatable) in resisting pressures for protection (and public assistance more generally). This could be done if the decisions were taken after public scrutiny of a "balance sheet". . . . There would be very few protective actions if serious injury referred to national interests rather than those of injured producers. On compensation, there is a case for compensating foreign suppliers that goes beyond equity considerations. While the payment of compensation is not in the interest of the country considering the safeguard action, the obligation to pay compensation strengthens the hand of importing country government over the electorate in resisting claims for protection. The idea of retaliation (compensation) by the exporting country's raising its trade barriers to products originating in the country experiencing injury (Article XIX) is tantamount to shooting oneself in the foot.⁴

B. Tariff Surcharges or Quotas Under Canadian Law

In Canadian law, the Governor in Council may provide temporary relief where imports are causing or threatening to cause serious injury to Canadian producers of like or directly competitive products under section 60 of the Customs Tariff Act or section 5 of the Export and Import Permits Act. On the recommendation of the Minister of Finance, after a report has been made by the Minister of Finance, and an inquiry by the Textile and Clothing Board under the Textile and Clothing Board Act, the Governor in Council (or the Cabinet) may order that a surtax in the form of an additional duty or a tariff-rate quota may be imposed on goods of any kind that originate in any country, which are being im-

³ G. SAMPSON, *THE URUGUAY ROUND — A HANDBOOK ON THE MULTILATERAL TRADE NEGOTIATIONS* 144 (1987).

⁴ *Id.*

ported into Canada under such conditions as to cause or threaten to cause serious injury to Canadian producers of like or directly competitive goods. Orders made under that section may remain in effect for not more than three years under the Customs Tariff Act, but indefinitely under the Export and Import Permits Act, and are to be designed only to prevent further serious injury or threat thereof. Usually, the Governor in Council will impose safeguard measures only after an injury inquiry by the Canadian Import Tribunal or the Textile and Clothing Board. Where the Governor in Council makes an order pursuant only to a report of the Minister of Finance, and no injury inquiry has been made by a tribunal, the order is to expire after 180 days unless it is either approved by a resolution adopted in both Houses of Parliament, or the Canadian Import Tribunal or the Textile and Clothing Board conducts an inquiry and reports to the Governor in Council that the goods are still being imported in such a manner as to cause or threaten to cause serious injury to Canadian producers.

Subsection 5(2) of the Export and Import Permits Act provides the Governor in Council with the authority to impose a quantitative restriction on imports of goods upon the recommendation of Minister of Finance after an inquiry has been made by the Textile and Clothing Board or the Canadian Import Tribunal into whether or not such goods are being imported or are likely to be imported into Canada at such prices, in such quantities and under such conditions as to cause or threaten to cause serious injury to the production in Canada of like or directly competitive goods. The Governor in Council also may, under subsections 5(3) and (4), place imported goods on the Import Control List for the purpose of monitoring and collecting information in order to ascertain whether or not their importation is causing or threatening to cause injury to the production in Canada of like goods.

The Canadian Import Tribunal is given general powers in section 48 of SIMA to inquire into and report to the Governor in Council on any matter in relation to the importation of goods into Canada that may cause or threaten to cause injury to, or that may retard the establishment of, the production of any goods in Canada, or the provision, by persons normally resident outside of Canada, of services in Canada that may cause or threaten to cause injury to, or that may retard, the provision of any services in Canada by persons not normally resident in Canada.

Under section 17 of the Textile and Clothing Board Act, that Board may conduct an inquiry and report to the Minister of Finance on whether textile and clothing goods are being imported at such prices, in such quantities and under such conditions as to cause or threaten to cause serious injury to the production in Canada of any textile and clothing goods. The Board is required under section 17 to make a written report to the Minister setting out the results of its inquiry and containing a recommendation as to whether special measures of protection should be implemented. In its inquiry, the Board is required to evaluate produ-

cers' plans outlining the adjustments that they propose to make in their operations in order to increase their ability to meet international competition. In making its recommendation for relief, the Board is directed to take into account a number of domestic concerns including relevant manpower and regional considerations in Canada; the provisions of the GATT, the Arrangement Regarding International Trade in Clothing and Textiles, and any other relevant international agreements; the effect of any proposed measures of protection on consumers; and the principle that special measures of protection are not to be implemented for the purpose of encouraging the maintenance of lines of production that have no prospect of becoming competitive with foreign goods in the Canadian market.

C. *Bill C-110*

Bill C-110, the Canadian International Trade Tribunal Act, was introduced in Parliament on February 12, 1988. It proposes to amalgamate the three agencies responsible for international trade in Canada: the Canadian Import Tribunal, the Textile and Clothing Board and the Tariff Board. In section 20 of Bill C-110, the Canadian International Trade Tribunal will be given the authority to make an inquiry and report to the Governor in Council on any matter that may merit the granting of temporary relief. Under section 19, the Tribunal may also inquire into and report to the Minister of Finance on any tariff-related matter that the Minister refers to it.

Bill C-110 provides an entirely new procedure in Canada for domestic producers to file a private complaint with the Tribunal to initiate a safeguard investigation. Currently, any Canadian producer of textile and clothing goods may file a notice of complaint with the Textile and Clothing Board alleging that the importation of textile and clothing goods is causing or threatening to cause serious injury to that company's production in Canada of any textile and clothing goods. However, similar procedures do not exist for private complaints in other safeguard cases. It is noteworthy that Bill C-110 provides a mechanism by which *any Canadian producer of like or directly competitive goods* or any person or association acting on behalf of such a producer, can file a written complaint with the Tribunal. This complaint would allege that the imported goods are imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers of like or directly competitive goods. Previously, the inquiry by the Tribunal or its predecessors was based on a reference by the Minister or the Cabinet. The Tribunal is required to commence an inquiry upon receiving a properly documented complaint where it is satisfied that the information provided by the complainant discloses a reasonable indication that the basic injury and causation criteria are met. The complaint must be made on behalf of domestic producers who produce the majority of domestic production of like or directly competitive goods. The Tribunal must con-

sider whether the goods under investigation are being imported in such increased quantities and under such conditions as to be a principal cause or threat thereof to domestic producers.

After completing its inquiry, the Tribunal is required to report to the Governor in Council and the Minister of Finance concerning the results of its inquiry. There is no specific authority in the Bill for the Tribunal to make a recommendation to the Minister of Finance or to the Governor in Council for a particular form of relief. The Tribunal is to make a report to the Minister of Finance, and the Minister of Finance is, in turn, to make a report and recommendation to the Governor in Council. It is ultimately the Minister of Finance and the Governor in Council who will have the discretion to recommend and decide whether to provide relief and what form that relief should take.

Although Bill C-110 reforms the area of a private party initiation of a safeguard investigation, it does not set out specific criteria for recommending relief. What is missing in Canadian law regarding safeguards measures, generally, is any direction to the Minister of Finance or Governor in Council to consider, in addition to tariff surcharges, tariff-rate quotas, or quantitative restrictions, the alternative of providing trade adjustment assistance in the form of worker re-training programs or assistance to firms to encourage them to adjust to new competitive realities. Thus, the whole focus of the Canadian safeguards laws could be seriously criticized as providing only relief in the form of measures of protection, rather than directing that trade adjustment assistance measures are a preferable policy response.

It is not entirely clear what relief may be granted under this legislation. It is apparent, however, that the Canadian Import Tribunal will provide a report to the Minister and then to the Governor in Council in which it will express its opinion as to whether relief should be forthcoming.

There are some anomalies in the language of the Bill. For example, the report should identify the "principal cause of injury" whereas it suffices that the complaint indicates increased quantities or the existence or conditions which cause or threaten to cause serious injury. By way of contrast, quotas can be imposed under the Export/Import Permits Act when goods are imported in such quantities and under such conditions as to cause or threaten to cause serious injury. A surtax may be imposed under the Customs Tariff Act when goods are being imported into Canada under such conditions as to cause or threaten to cause injury.

The relief contemplated by Bill C-110 may also be available when the Tribunal reports pursuant to a reference by the Governor in Council or the Minister. These situations would include inquiries on any matter in relation to the economic, trade or commercial interests of Canada; inquiries into any tariff-related matter, including any matter concerning the international rights or obligations of Canada; and most notably, in-

quiries into the importation of goods into Canada that result in an import-relief action.

Canadian producers may find the complaint provisions in Bill C-110 to be rather attractive since:

1. There is no need to establish dumping or subsidization. In fact, if such is found to be the cause of the injury or threat of injury alleged in the complaint, the Tribunal must refer the matter to the Deputy Minister of National Revenue for Customs and Excise for consideration under SIMA.

2. It is only necessary to allege that the imported goods are being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury (not material injury). The complaint is to document this by providing reasonable details of the facts on which the allegations are based, an estimate of the total percentage of Canadian production that is produced by the domestic producers by whom or on whose behalf the complaint is filed and whatever else is considered useful by the complainant(s). The Tribunal may seek other information, including that from other interested parties, prior to determining whether or not to commence its inquiry.

It remains to be seen how frequently recourse will be had in the future to the remedies contemplated by Bill C-110, the Customs Tariff Act and the Export and Import Permits Act provisions (under Bill C-110).

IV. THE CANADA-U.S. FREE TRADE AGREEMENT

In the FTA, Canada and the United States have agreed to substantive and procedural changes in the safeguard laws applied by either country under article XIX of the GATT. Under their domestic laws, the United States or Canada can impose border measures, including duties and quotas on imports of a product from foreign countries where imports are increasing in such a manner as to cause or threaten to cause serious injury to a domestic industry. They are intended to provide a domestic industry with temporary relief, an "escape hatch," where imports are increasing to such an extent as to create serious and unforeseen adjustment difficulties for that industry.

In the FTA, Canada and the United States have agreed to a new two-track system for safeguard actions. A special bilateral track will be established to deal with increases in imports caused by a reduction of duties made in the FTA. Where increasing imports of a product from the other country alone are found to contribute to a substantial cause of serious injury to a domestic industry, the importing country may suspend reduction of any duties on that product under the FTA, or increase the duty to the lower of the current most-favored-nation rate to pre-FTA levels. The imposition of safeguard relief measures under the bilateral track is limited to a period of three years, may be taken only in the tran-

sition period (i.e., until 1998), and may be taken only once for any particular product.

Substantial changes affecting safeguard actions involving imports from several countries have been made in the FTA. Currently, Canadian and U.S. domestic laws permit the imposition of measures, such as duties or quotas, on imports of a particular product from several countries where a sudden surge in those imports is causing or threatening to cause serious injury to domestic producers. The FTA provides that in a global safeguard case, imports from Canada or the United States are to be excluded unless they are "substantial" and "contribute importantly" to the serious injury or threat thereof caused by imports from all sources. For imports from either country to be "substantial" in such a case, they must represent more than five to ten percent of total imports. Also, where safeguard measures are imposed on imports from the other country they must not restrict the flow on imports from that country below the trend of those imports over a reasonable recent base period with an allowance for growth. These new standards should reduce the number of bilateral safeguard cases between Canada and the United States.

The FTA also requires each country to notify, and where requested, consult with the other country prior to imposing a safeguard measure against imports of the other country. Where one country objects to a duty, quota or other safeguard measures imposed by the other country, the dispute settlement mechanism of the FTA may be invoked. The two countries are to attempt first to resolve the matter by government-to-government consultations. Where they are unable to do so, the country affected may apply to the Canada-U.S. Trade Commission for the establishment of a binding arbitration panel to determine the matter. Any decision made by a bi-national arbitration panel concerning a safeguard measure is final and binding on both countries and their agencies. The ability of an international panel to review and make binding decisions concerning a country's application of safeguard measures under article 19 of the GATT is unprecedented international trade law.

V. CONCLUSION

There are several ways in which the Government of Canada could improve its current trade adjustment policies. First, we agree with the Economic Council of Canada that subsidies and special import measures selected to assist industries in adjusting to new competitive conditions caused as a result of trade liberalization should lean towards the "positive adjustment" end of the policy spectrum. The purpose of adopting particular government assistance measures or imposing temporary emergency relief measures should be to encourage and to promote adjustment in the Canadian economy as a whole, and not to protect or cushion particular firms or industries from the impact of increased import competition for an extended period of time. In our view, there has been too little

emphasis in Canada, particularly with respect to the FTA, on consideration of appropriate labour adjustment measures and firm and industry subsidies to facilitate adjustment. All too often in the past, the response of the Canadian government has been to impose quotas or duties, or to provide special duty remission programs for Canadian industries, all of which are trade-distorting measures. In the FTA, in particular, there has been a surprising lack of discussion about adjustment policies, and in particular, subsidies and programs for re-training or compensating workers.

Canadian legislation providing for the imposition of safeguard measures also does not specifically address the alternative of providing adjustment assistance to workers, firms or industries. The general policy thrust of the Canadian government, in our view, ought to be toward encouraging adjustment assistance programs, particularly for workers, to enable industries to restructure and become more competitive in the face of increasing international competition.

Second, with respect to safeguard measures, we would recommend that there be a return to the original GATT article XIX principles. Safeguard measures are intended as temporary relief to provide a breathing space to industries injured by increased competition from imports caused by tariff reductions or other concessions made as a result of international trade agreements. The emphasis should be on temporary relief, and relief that is imposed in a "most-favoured nation" manner, not selectively against particular countries. Where a quota is selected as a temporary relief measure, it should be global, not bilateral; temporary, not permanent; degressive, not constant; and subject to a specific termination date. The normal procedure, whereby the Government of Canada refers an injury inquiry to the Canadian Import Tribunal or the Textile and Clothing Board before a new quota or temporary measure is imposed, is a commendable practice. In future, privately-initiated safeguard investigations before the Canadian International Trade Tribunal, the Tribunal should be directed to receive presentations from all sectors of the Canadian economy, rather than just the domestic producers of like products. One option would be to provide a procedure similar to that provided in section 45 of SIMA, whereby the Canadian International Trade Tribunal could conduct a public interest hearing concerning a safeguards investigation after the injury inquiry had been held. In that manner, the recommendation for relief ultimately made by the Minister of Finance in such a case would reflect the possible impact of any relief measures on the Canadian economy as a whole, and not only on the domestic industry concerned. Also, consideration should be given to allowing for adjustment assistance relief, in appropriate cases.

Third, also with respect to safeguard measures, we would recommend that Canada continue to work in the GATT Uruguay Round to develop a comprehensive multilateral agreement on safeguards. We

agree with the basic objectives in the negotiating plans for safeguards in the Uruguay Round, which are that the agreement on safeguards:

- shall be based on the basic principles of the General Agreement;
- shall contain *inter alia* the following elements: transparency, coverage, objective criteria for action including the concept of serious injury or threat thereof, temporary nature, degressivity and structural adjustment, compensation and retaliation, notification, consultation, multilateral surveillance and dispute settlement;
- shall clarify and reinforce the disciplines of the General Agreement and should apply to all contracting parties.

With respect to subsidies, it is extremely important that the Canadian Government work, both within the GATT and in negotiations with the United States, to develop a workable system of subsidies rules. In particular, clear, objective definitions of countervailable or actionable subsidies are urgently required. This will be a very difficult task. The issues are not simple, but the Government of Canada must devote sufficient resources and energy to the task of developing workable, mutually agreeable rules so that both governments and exporters may be assured in future of greater certainty and security in their trade relations.