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Résumé de l'article

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Trade Liberalization Under the GATT, the NAFTA and the EU: Selected Topics

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Multilateral free trade has taken on increasing global importance with the passage of such agreements as the NAFTA, the EU, the GATT, and the recent transformation of the latter into the WTO. The underlying principle of each is progressive trade liberalization in all fields of economic activity, including those which are more prone to protectionist forces such as agriculture, financial services, and foreign direct investment. In aiming to promote progressive trade liberalization, the GATT, the NAFTA and the EU contain rules designed to guard against wrongful trade practices, for example an exporter "dumping" cheap products in a foreign market. This paper critically examines the degree to which these agreements reach their objective, and concludes that although they facilitate the removal of trade restrictions and other barriers, they do not go far enough in a number of specific areas. Examples are provided.

INTRODUCTION

The *General Agreement on Tariffs and Trade* (GATT)[1] bound the original 23 members to a multilateral free trade agreement which eventually culminated in the *Agreement Establishing the World Trade Organization.*[2] The objective of the GATT--the main legal and institutional framework for multilateral free trade--was to eliminate or substantially reduce trade tariffs and other impediments to trade, on the basis of reciprocity and mutual advantage. Although a great deal of substantive international trade law has changed since 1947, the GATT's cornerstone principle of progressive trade liberalization remains the same.

Implicit in this principle are four concepts which include:

(1) Most-favoured-nation (MFN) treatment, which prohibits discriminatory trade practices favouring one member state over another. In other words, if trade benefits are extended to one member by another, then they must be extended to all members.

(2) National treatment, which prohibits a member from employing domestic fiscal or administrative laws (e.g. taxes) to discriminate against another member. In other words, each member is required to treat goods or service providers of other member states no less favourably than its own. These first two concepts are the most important principles of non-discrimination underlying international trade law:

(3) Regional trading groups (e.g. EU, NAFTA, ASEAN), which are permitted to the extent that, as a whole, they do not discriminate against nations not belonging to the group.

(4) Remedies (e.g. antidumping and countervailing duties), which may be imposed unilaterally when members are found to be in violation of a GATT obligation.

The European Union was established by the *Treaty of European Union*, also known as the *Maastricht Treaty*,[3] originally consisting of twelve countries. Founded upon the elements of the European Community, a common foreign and security policy, and cooperation in the fields of justice and home affairs, the significance of the EU has arguably a greater political than legal dimension. This is reflected in the two main objectives contained in Article B: (1) "to promote economic and social progress which is balanced and sustainable [...] through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency [...]"; and (2) "to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy [...] which might in time lead to a common defence."

The operative section of the *Maastricht Treaty*, Article G(3) calls for "the elimination, as between Member States, of customs, duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect."

The *North American Free Trade Agreement* (NAFTA) is a trilateral trade agreement between Canada, the United States and Mexico concluded under the authority of Article XXIV of the GATT (concept #3 above). It was signed on December 17, 1992 and came into effect on January 1, 1994. To a significant degree, NAFTA extended the *Free Trade Agreement*[4] (FTA) between the United States and Canada by, for example, including provisions concerning foreign investment and services. NAFTA also incorporates by reference many provisions of the GATT.[5] It is notable that NAFTA was signed a full year before the Uruguay Round of the GATT was concluded (i.e. December 19, 1993), because the most significant issues the Uruguay Round dealt with were also the liberalization of trade in foreign investment, services and intellectual property. NAFTA was subsequently extended to include a provision dealing with intellectual property.

There are substantial differences between NAFTA members: the United States is a large trading partner of both Canada and Mexico, but the latter two are almost insignificant trading partners with each other. Canada and the United States are at a similar stage of economic development, while Mexico is considered a developing nation. This has caused a great deal of tension, particularly in the United States in matters concerning environmental protection and illegal immigration.

Other tensions arise as a result of the manner in which important trade law issues are dealt with under trade agreements: do regional trading blocks promote global trade liberalization? Are agricultural subsidization and antidumping duties consistent with the trade liberalization philosophy underlying the GATT, the NAFTA and the EU? The

questions are many, and this article does not purport to address them all. Rather, it focuses on international trade law within the context of the GATT, the NAFTA and the EU, as it applies to regional trading blocks, antidumping and countervailing duties, safeguards, services, foreign direct investment, agriculture and the environment.

REGIONAL TRADING BLOCKS

As a preliminary discussion, it is enlightening to briefly examine GATT XXIV which provides the legal basis for NAFTA and the EU. A regional trading block under GATT XXIV is a customs union *or* free trade area of member states which enjoy a preferential trading arrangement allowing for goods to be subject to only one external tariff upon entering the customs union or free trade area, and to circulate freely within. The difference is that under a free trade area, each member retains its own tariff policy for imported goods. The debate is whether regional trading blocks are antithetical to or consistent with the unconditional MFN principle in GATT I which stipulates that a trade advantage to one member must be extended to all others. Opponents of regional trading blocks criticize GATT XXIV as severely undermining the non-discriminating trading order GATT I requires (Dam, 1970: 274-295). Others are less critical (Trebilcock and Howse, 1995).[6] Generally, however, the literature supports the conclusion that regional trading arrangements promote global trade (Preusse, 1994). From a practical perspective, whether regional trading blocks assist or impede global trade seems to be a matter that is largely academic. Given that approximately seventy countries participate in regional trading arrangements, the real issue is perhaps more related to the dynamics of trading blocks and the role of the GATT in their management (Qureshi, 1993).

Are regional trading blocks conducive to deeper economic integration and *inter-regional* trade liberalization? The answer is a tentative yes, for two reasons. First, regional trading blocks expand. Examples include membership in the EU increasing to fifteen in 1995 following the accession of Austria, Sweden and Finland, and the on-going negotiations to effect Chile's accession to the NAFTA (Longley and Wu, 1996).[7] Second, there are indications of incipient inter-regional trade liberalization. Mexico is a member of NAFTA, but it is also a member of the G-3 countries. Columbia and Venezuela, members of the G-3, are also members of the Andean Group. Arguably, the cumulative effect of these two points is that if regional trading blocks are conducive to expansion and inter-regional trade liberalization, they are *ipso facto* consistent with the principle of progressive trade liberalization.

ANTIDUMPING AND COUNTERVAILING DUTIES

The purpose of GATT VI is to provide a remedy to importing members where dumped[8] or imported subsidized goods cause or threaten to cause material injury to an established industry, or materially retard the establishment of a domestic industry. Thus, the critical elements are (i) dumping or subsidizing, (ii) causation, and (iii) material injury. The Uruguay Round successfully negotiated an Antidumping Code (Palmeter, 1996)[9] as well as a Subsidies Code[10] both of which, although far from answering all questions of interpretation, shed some light on the definitions of these three criteria.

To invoke a remedy under GATT VI, it is unnecessary to make an allegation of predatory pricing, i.e. pricing a good with the intent of driving the competition out of business, let alone have proof of it. Accordingly, when domestic producers invoke GATT VI, they do so frequently with the intention of *protecting* their relative market positions. Herein lies the dilemma. In view of the protectionist interest which antidumping and countervailing duties serve, in the case of subsidized imports, are these trade remedies consistent with the GATT's principle of progressive trade liberalization? Proponents of GATT VI argue that its rationale is, in a word, fairness. It would be unfair, they argue, to allow powerful multinational companies to export their goods at strategically low prices, perhaps even at a loss, with the objective of acquiring market share by effectively destroying the competition. Opponents, on the other hand, contend that antidumping and countervailing duties are "devoid of economic justification" and "remain powerful tools in the hands of protectionist interests" (Boddez and Trebilcock, 1993: p. v). On this basis, some authorities call for their abolition, or alternatively their replacement with domestic competition laws which focus on international predation.[11] Insofar as antidumping duties are concerned, the balance seems to tilt in favour of the opponents in this debate. Whether or not antidumping laws are one of the most "transparent but enduring intellectual hoaxes in international trade law" (Boddez and Trebilcock, 1993: 262), the majority view is that they are unnecessary to prevent predatory pricing (Hagelstam, 1991). One commentator even opined that antidumping laws "result in the opposite of trade liberalization: regulatory protection" (Stegemann, 1991: 377).

Countervailing duties may be imposed against a member which exported subsidized goods causing material injury to a domestic industry by authority of Part V of the Subsidies Code.[12] Proponents of subsidies argue that their usefulness in shaping domestic policy is reflected in such diverse socio-economic goals as encouraging exports, developing less economically advanced regions, supporting infant industries, preserving employment, and providing income support (e.g. to farmers). Opponents, on the other hand, criticize subsidies as creating trade distortion effects which ultimately decrease global welfare. The case against countervailing duties is not as strong as that against antidumping laws. As one commentator noted, with respect to the political feasibility of eliminating GATT VI remedies, "[s]ubsidies and countervailing duties are the hard case, both economically and politically. Antidumping duties are the easy case" (Trebilcock, 1996: p. 79).

Under NAFTA,[13] the rules in relation to antidumping and countervailing duties come almost verbatim from the FTA. NAFTA rules focus almost exclusively on review procedures for antidumping and countervailing decisions made by the administrative bodies of each country, including binational panel reviews established as an alternative to judicial review. In Canada, the Deputy Minister of National Revenue for Customs and Excise may make a preliminary finding of dumping or subsidization within 90 days of the initiation of an investigaton. If an affirmative preliminary finding is made, then provisional duties may be levied and the Canadian International Trade Tribunal (CITT) may commence a "material injury" inquiry. Under s. 43(1) of the *Special Import Measures Act*[14] (*SIMA*), legislation which governs antidumping and countervailing duty cases, the CITT has 120 days from the day of the Deputy Minister's affirmative

preliminary finding to make an order or decision respecting material injury. This order or decision may be appealed to the Federal Court of Appeal.[15] The Deputy Minister meanwhile may proceed to a final determination and, pursuant to *SIMA* s. 41, has 90 days from the date of the affirmative preliminary finding to do so.

Antidumping legislation in the EU parallels that under the GATT.[16] In referring to the *Agreement on Implementation of Article VI of the GATT*, the recitals of Council Regulation 3283/94 ("Regulation"), for example, state that, "... in view of the extent of the changes and to ensure an adequate and transparent implementation of the new rules, it is appropriate to transpose the language of the new agreements into Community legislation to the extent possible". Article 1 of the Regulation provides an overview of the four principles of antidumping law which apply in the EU. First, antidumping duty may be applied to any dumped product which, when circulating freely in the Community, causes injury. Second, a product is "dumped" if its export price to the Community is less than "a comparable price for the like product" in the exporting country. Third, a "like product" is a product which is identical in all respects to the product under consideration, or in the absence of such a product, another product which "has characteristics closely resembling" those of the product under consideration. Finally, fourth, the exporting country is usually the country of origin, but may be an intermediate country in some cases.

In the EU, responsibility for the administration of the antidumping system falls upon the Commission. It has authority to initiate proceedings if sufficient evidence justifying the same is found (Article 5 of the Regulation), launch an investigation covering both dumping and injury for a period not less than six months and not exceeding fifteen months (Article 6), impose provisional measures (Article 7) , and impose antidumping duty (Article 9). The Commission may also submit proposals to the European Council with respect to antidumping legislation. Finally, it is worth noting that the Regulation contains in Article 21 a "Community interest" test not found in either the GATT or the NAFTA antidumping provisions. In essence, it requires that the Community must make a decision to intervene based on "an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers".

SAFEGUARDS

Unlike antidumping or countervailing duties which are imposed because of an *exporter's wrongful* trade practice, a safeguard measure is imposed to protect a domestic industry when the *importing country* is *fulfilling* its trade obligations. It is an emergency action which "safeguards" the importer's industry from serious harm or the threat of it.

The safeguard measures mandated in GATT XIX are intended to permit members to withdraw or modify previous trade concessions due to the occurrence of an "unforeseen development"; an obvious requirement is that there be a causal link between the increase in imports and the safeguards adopted. Proponents argue that safeguards are an equitable remedy and that it would be unfair in their absence to compel domestic producers to shoulder the burden of changes in trade policy. They further contend that safeguards

represent positive adjustments, temporary in nature, which afford domestic industries time to make appropriate competitive adjustments.[17]

Opponents, on the other hand, criticize safeguards as constituting unwarranted government intervention. They state that where there is an absence of "clearly demonstrable market failure" (Holliday, 1995: p. 156) such intervention frustrates the normal operation of a free market, and point to the uncertainty respecting the requirement of an "unforeseen development", roundly criticizing it as "extraordinarily oblique", "hazy" and "difficult to appraise" (Jackson, 1969: p. 557-558). Following the GATT jurisprudence, this requirement has been interpreted very loosely,[18] and arguably implies that even variations in trade patterns caused by changes in international competitiveness could be actionable, in which case the dilemma arises that the GATT maintains the *status quo* more than it does encourage trade. Prior to the *Agreement on Safeguards* being concluded, there is the additional dispute as to whether safeguards should be imposed *selectively*, similar to other trade remedies including antidumping and countervailing duties which target specific countries, or whether the principle of non-discrimination should apply and all member nations should be affected. The EU argued for the right to apply GATT XIX selectively, while an opposing view was taken by developing nations who argued for non-discrimination in the application of safeguards. An impasse was reached during the Tokyo Round and it was only at the Uruguay Round that the issue was resolved.[19]

A number of the GATT safeguard provisions have been carried through into the NAFTA. For example, the NAFTA definition of "serious injury" (i.e. "significant overall impairment of a domestic industry") and its requirement that a "threat of serious injury" be established on the basis of evidence and not conjecture or remote possibility, are based on the Uruguay Round's *Agreement on Safeguards*. However, there are a few important differences between the safeguard provisions under the NAFTA and the GATT. For instance, NAFTA 801,[20] which permits bilateral emergency action against the imports of a member country when increases in imports "alone constitute a substantial cause of serious injury, or threat thereof, to a domestic industry producing a like or directly competitive good", does not mention the GATT's "unforeseen development" as a cause.

Additionally, NAFTA 801(1) limits safeguards to either suspending the further reduction of duty, or increasing the duty to a level not exceeding the lesser of the MFN rate then in effect and the MFN rate effective the day before the NAFTA took effect. However, neither GATT XIX nor the *Agreement on Safeguards* contains such a limitation. Finally, under NAFTA 801(4), the member taking the emergency action must provide to the affected member "mutually agreed trade liberalizing compensation" which will have substantially the same trade effects, or be the equivalent to the value of the duties, expected to result from the action. If the parties cannot agree on the compensation, the affected member is entitled to unilaterally take tariff action having trade effects "substantially equivalent" to those of the safeguard action. This positive obligation to compensate under the NAFTA is not found in GATT XIX or in the *Agreement on Safeguards*.

Safeguards are used only rarely for two principal reasons. First, they must be applied on a non-discriminatory basis to *all* countries that are substantial sources of imports. Second, they are considered risky due to the possibility of retaliation. Consequently, members will often use other trade remedies, usually antidumping and countervailing duties which have a lower standard of application.[21] What, then, is the usefulness of safeguards under the GATT and the NAFTA in achieving progressive trade liberalization? The quick answer is not much. Upon reflection, however, they may yet serve a role of greater importance in the future for the two reasons that one, the affected country is not permitted to retaliate for the first three years against a safeguard, and two, selective measures may be applied on a discriminating basis provided that imports from the affected country have increased "disproportionately". As such, the disincentives from using safeguard measures are fewer, although still existant.

SERVICES

Trade in services is regulated under the *General Agreement on Trade in Services* (GATS)[22] and, although it is analogous to the GATT, there are many structural differences between them. An important deficiency of the GATS is that many of its obligations are triggered *only* when a member schedules a specific commitment.[23] This seems to make little sense considering that many of its obligations have general application, including the transparency requirement that members publish all relevant laws and regulations affecting trade in services within their domestic markets. An additional deficiency concerns the scope of the GATS. Drawing a distinction between goods and services is key to understanding the way in which services fit into a general theory of international trade. Sometimes, however, the distinction is difficult to make, or appears ambiguous when it is made, especially when the good and the service appear to be one and the same, e.g. a telephone book (a good) and the information contained in it (a service). Future negotiations of the GATS will undoubtedly have to provide greater clarity in exploring the scope of the GATS and the parameters which delineate its boundaries.

More positively, the GATS includes a provision according MFN status to all of its members. The wide scope of the MFN provision[24] is tempered somewhat by two categories of exceptions: universal exceptions which can be invoked by any member,[25] and exemptions which allow a member to maintain a measure inconsistent with the MFN obligation provided it is listed in the Annex on GATT II exemptions and meets its conditions.[26]

A central problem of liberalizing trade in services is simply that it is not achievable by following the same approach that characterized the GATT's liberalization of trade in goods. For instance, the GATT enshrines the right to national treatment while the GATS does not. In the GATS, national treatment[27] applies only to the extent that it is allowed according to the terms and conditions of a member's schedule of commitments in respect of specified service sectors. In other words, the degree of liberalization is reflected in the number and nature of restrictions in a member's schedule. This defect of the GATS represents one of the most significant obstacles to achieving greater liberalization of trade

in services. Nevertheless, the basic recognition of services as requiring an agreement which regulates their trade underscores the greatest accomplishment of the GATS to date--the provision of a basis upon which multilateral, legally binding progressive liberalization of trade in services may be pursued.

The GATS had a substantial impact on the regulation of trade in services under NAFTA.[28] For instance, GATS I is the origin of the concept of "cross-border provision of a service" underlying NAFTA Chapter 12. Additionally, concerning excluded services, NAFTA incorporates the GATS concept of reservations that each member list the services which will be non-complying following NAFTA becoming effective; services related to government procurement and subsidies, however, are automatically exempt. Unlike the GATS, however, NAFTA does not apply to the provision of a service by an investment (e.g. a subsidiary) of a foreign investor. Finally, NAFTA service provisions incorporate the principles of national treatment (NAFTA 1202) and MFN treatment (NAFTA 1203), and requires that the better of these must be extended to NAFTA members (NAFTA 1204).

In the EU, liberalization of trade in services is essentially covered in Articles 59-66 of the *Treaty establishing the European Community as amended by Subsequent Treaties*, signed in Rome on March 25, 1957. Article 59 provides that restrictions on the freedom to provide services within the EU are to be progressively abolished.[29] Upon a resolution of a majority of its members, the Council may extend the application of Article 59 to nationals of a third country who are established and who provide services within the EU. Article 60 defines services as including services provided for remuneration which are not governed by provisions relating to freedom of movement for goods, capital and persons. In particular, services includes activities of an industrial and commercial character, as well as the activities of craftmen and professions.

FOREIGN DIRECT INVESTMENT

There is a great deal of debate as to whether foreign investment poses a problem of sovereignty for host countries, particularly with respect to the ability of their governments to set fiscal and monetary policy.[30] Irrespective of the outcome of this debate, what is often overlooked is the importance of having a regulatory framework for foreign investment which is consistent with the principle of global trade liberalization. Most issues relating to investment liberalization in the context of the GATT are dealt with in the *Agreement on Trade-Related Investment Measures*[31] and the GATS, the latter of which contains commercial provisions relevant to drawing out the importance of investment to trade in services (Sauvé, 1994).

As a preliminary point, TRIMs are controversial. Developed countries consider them to be barriers to freer trade because they distort trade patterns by influencing the decisions of multinational corporations, while developing countries consider them to be useful tools in developmental policy and effective guards against practices of multinational corporations perceived to be discriminatory. There is little debate, however, that certain TRIMs do effectively distort global trade patterns, particularly those relating to local

content, export performance, and trade balancing requirements, and consequently breach the national treatment principle. However, the TRIMs Agreement prohibits any member from applying any TRIM which is inconsistent with GATT III (national treatment) or GATT XI (quantitative restrictions).

The TRIMs Agreement has a number of shortcomings. First, it only deals with measures affecting trade in *goods*--it does not apply to measures affecting trade in *services*. Arguably, this creates an arbitrary distinction between goods and services. Second, because of the lag time in phasing out investment measures,[32] the TRIMs Agreement effectively allows members to temporarily deviate from their obligations under the GATT to which they are already bound. Third, the TRIMs Agreement does not alter the substance of the trade law as it applies to foreign investment, but merely codifies existing GATT jurisprudence. That said, these points should not undermine the most significant accomplishment of the TRIMs Agreement, namely, that it provides an investment regulatory regime generally consistent with the principle of progressive and multilateral free trade.

The GATS had a moderate impact on the regulation of investment under NAFTA. For instance, the GATS concept of schedules of commitments is followed in the NAFTA concept of liberalization commitments. Additionally, similar to its provisions on services, NAFTA adopts the GATS reservations approach that members list the particular investments which will be excluded from it.[33] As between the NAFTA provisions on services and its provisions on investment, one important difference is that investments are to be accorded, as a minimum standard, "fair and equitable treatment and full protection and security".[34] The NAFTA provisions on services do not contain this protective clause.

Apart from these points, the standard international trade principles apply: NAFTA 1102 accords national treatment to investors and investments of investors; NAFTA 1103 accords MFN treatment; NAFTA 1104 requires that investors receive the better of national treatment or MFN treatment; and finally, NAFTA 1106 prohibits performance requirements, e.g. those relating to export level or domestic content, in connection with "the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor."

In the EU, all restrictions on the movement of capital between member states, and between member states and third countries were abolished by Articles 67-73[35] of the *Treaty establishing the European Community as Amended by Subsequent Treaties*, signed in Rome on March 25, 1957. Article 73c qualifies this, however, by providing that the Council may adopt measures "on the movement of capital to or from third countries involving direct investment--including investment in real estate--establishment, the provision of financial services or the admission of securities to capital markets."[36] The Council may adopt such measures by majority vote on a proposal from the Commission. But measures "which constitute a step back in Community law as regards the liberalization of the movement of capital to or from third countries" requires unanimous adoption by the Council. These provisions were not changed in any substantive sense with the enactment of the *Maastricht Treaty*.

AGRICULTURE

The agricultural sector is perhaps the most controvertial in trade regulation. There is one basic question: what is the justification for allowing export subsidies in the agricultural sector (GATT XVI) but not in any other, and how do agricultural export subsidies further the principle of progressive trade liberalization, if at all?[37] This question underlies a great deal of tension--indeed it caused the Uruguay Round to break down in 1991. Politics and social policy often favour agricultural subsidies, but freedom of trade is in strong opposition. *Prima facie*, the subsidization of exported agricultural products seems to fall under GATT VI for which countervailing duties should be levied.[38]

Most authorities agree that the agricultural sector is anomalous and that special treatment for farm commodities is untenable. They suggest that many of the traditional reasons supporting agricultural subsidization are no longer compelling, and recognize the global trade distortion effects that agricultural subsidies cause. As *The Economist* recently affirmed, farm protection is "the most regressive, wasteful and persistent folly in modern history" (*Economist*, 1992: p. 1). As such, the real issue is not whether agricultural subsidies should be eliminated, but rather *how* they ought to be eliminated. Some commentators favour a gradual reduction approach to ensure that affected persons are not too shocked by the imposition of a new, more stringent regulatory scheme. That approach may be the most politically expedient, but it is unlikely that affected groups of people will view the liberalization of agricultural trade as any kind of "promising new beginning" (Trebilcock and Howse, 1995: p. 214).

Agriculture provisions under NAFTA are some of the most complex, due in large measure to the fact that NAFTA members did not adopt a trilateral approach to negotiations, but instead settled on a series of bilateral agreements. As between Mexico and the United States, most tariffs and quantitative restrictions on agricultural products will be removed by 2003, and all will be by 2008. Canada chose not to join these talks, and is accordingly stuck with the FTA *status quo* which includes a host of protectionist problems stemming from non-tariff barriers (e.g. export subsidies and domestic support programs) which neither the Uruguay Round *Agreement on Agricultural* (see below) nor NAFTA does anything to resolve. As between Canada and Mexico, NAFTA reduces non-tariff barriers for some goods but maintains tariff and non-tariff barriers for others. Only as between the United States and Mexico does NAFTA go any significant distance in eliminating non-tariff barriers on agricultural products.

The *Agreement on Agriculture* provides a regulatory framework to address the issues concerning trade in agriculture, and has influenced a number of related NAFTA provisions. For example, the definition of "agricultural product" under NAFTA 708 and the *Agreement on Agriculture* covers the same products. But there are some differences. The *Agreement on Agriculture* requires that each member submit a schedule of commitments to reduce domestic support programs, but NAFTA does not go as far with respect to either domestic support programs or export subsidies. As well, the *Agreement on Agriculture* provides for "special" safeguards which may be invoked upon the volume of imports exceeding a trigger level, or the price of imports falling below a certain price.

NAFTA, however, does not provide for "special" safeguards as between Canada and the United States. As between NAFTA and the FTA, the latter went much further because it completely eliminated export subsidies on primary products between Canada and the United States. NAFTA, of course, did not.

In the EU, agricultural policy is discussed in Articles 38-47 of the *Treaty establishing the European Community as Amended by Subsequent Treaties*. Article 39(1) lists the objectives of the Common Agricultural Policy which include ensuring "a fair standard of living for the agricultural community, *in particular by increasing the individual earnings of persons engaged in agriculture*" [emphasis added], and stabilizing markets. In practical terms, these objectives translate into ensuring that high-cost French and German farmers would not be put out of business when lower-cost producers in the EU entered the market. This was achieved not by applying production restrictions, but by fixing a minimum price at which each kind of agricultural product would be sold. Lower priced imports from outside the EU were charged a variable import levy which equalled the difference between the world price and the EU price for any given agricultural product. Therefore, to maximize personal wealth, EU farmers expanded production and enormous surpluses soon resulted which the EU undertook to purchase at the high EU prices. As both price and sale were virtually guaranteed, EU farmers continued to expand production. In order to help EU producers sell their product on the world market, the EU undertook to pay exporters the difference between EU prices and world prices, a system which has been scathingly criticized as constituting an export subsidy -- particularly as the EU systematically underestimates world prices of agricultural products.

THE ENVIRONMENT

The importance of linking the principle of progressive trade liberalization with global environmental protection finds support in the preamble of the *Agreement Establishing the World Trade Organization*,[39] and is fully canvassed in the literature (Dunoff, 1995; Staffin, 1996). The principal concerns are that economic growth will be achieved at the cost of environmental degradation, and that what are in reality protectionist measures will be adopted under the banner of environmentalism.[40] The latter concern that environmental measures necessary for the conservation of living or non-living exhaustible natural resources may constitute a "disguised restriction on international trade or investment" is explicitly recognized in NAFTA 1106(6).

Should trade restrictions apply against a member which breaches an environmental standard? The quick answer is yes, subject to the important qualifier that the trade restrictions not be used as a competitive advantage (Rege, 1994). However, upon further consideration, the question is not so straight-forward because neither the GATT nor NAFTA[41] permits trade restrictions based on goods produced using environmentally unsound processes. Could it be argued that countries having low environmental standards are exploiting an unfair competitive advantage and thus a countervailing duty should be levied because the failure to maintain adequate environmental standards amounts to a subsidy? The answer is probably no for the simple reason that such a duty would contradict commitments under the GATT and NAFTA to eliminate duties.

Linking trade and the environment raises another interesting question. *Should* developed counties enter into free trade agreements with developing nations, and what is the risk in so doing? Considering that developing nations constitute 80% of GATT membership and that the "GATT is no longer the fief of the industrialized world" (*Economist*, 1994: p. 72), entering into such agreements appears necessary. The risk, as noted above, is that members relax environmental standards in order to encourage foreign investment and economic development, a fear from which NAFTA members could not initially escape. Indeed, NAFTA 1114 states that "it is inappropriate to encourage investment by *relaxing* domestic health, safety or environmental measures."[42] [Emphasis added] This provision was included to prevent Mexico from exploiting its lower environmental standards as a competitive advantage in attracting foreign investment. The irony of this does not go unnoticed because under the FTA and earlier versions of the GATT, the United States took the position that trade agreements were not the proper vehicle for solving environmental problems. Canada, as is well known, took the opposite position. The United States only became interested in environmental issues during its NAFTA negotiations with Mexico as a result of which the *North American Agreement on Environmental Cooperation*[43] was concluded.

In the EU, environmental protection is reflected in the recitals of the *Maastricht Treaty*,[44] as well as in *Council Directive of 15 July 1975 on waste (75/442/EEC)*[45] and in *Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (85/337/EEC)*.[46] These Directives require that the cost of disposing waste be borne by the holder who has the waste handled by a waste collector, or by previous holders or producer of the product from which the waste came, and that environmental impact assessments be prepared for "projects" as that term is defined in the legislation.

THE FUTURE OF TRADE LIBERALIZATION

The GATT, the NAFTA and the EU facilitate global multilateral free trade by removing trade restrictions and other barriers. However, dangers of disguised protectionism lurk under, *inter alia*, the use of antidumping and countervailing duties, safeguards or emergency action, and laws purporting to protect the environment. The international trading community must be alert to them.

The call is for fair trade, and the reluctance of governments to embrace free trade indicates a fear of inadequate protection against effects perceived as potentially damaging to national interests. Herein lies the dilemma: the greater the fear, the greater the likelihood of governments passing legislation to protect "national interests", and consequently the less "free" the trade becomes. Yet when trade is not free, it is all the more inherently unfair-one need only consider the Darwinian survival-of-the-fittest rule in the context of nation states of different levels of economic development. As well, from the perspective of developed nations, there is, arguably, no reason why developing nations should be able to enjoy MFN treatment until they offer the very advantages they themselves claim. In this light, the gap between free trade and fair trade vanishes, and the principle emerges that free trade does not contradict national interests but is coincident to

them, and that on a global scale, it is fair. The international trading community has come a very great distance since 1947; the challenge now lies with the WTO to provide an institutional structure within which the principle of progressive trade liberalization may be vigourously pursued.

ENDNOTES

1. Came into effect on January 1, 1948.
2. Came into effect on January 1, 1995.
3. Signed on February 7, 1992 and entered into force on November 1, 1993, [1993] O.J. L293/61.
4. Came into effect on January 17, 1992, but was voluntarily suspended by the parties upon NAFTA becoming effective.
5. For example, NAFTA 301 (shorthand for "Article 301 of the NAFTA") on the national treatment principle incorporates GATT III (shorthand for "Article III of the GATT"); NAFTA 309 on the prohibition against import/export restrictions incorporates GATT IX; and NAFTA 2101 on the environment incorporates the exceptions of GATT XX.
6. "Compared to the world trading system that actually prevails ... the case against regional trading blocks is not so clear." (p. 92). But the same authors also wrote, "... most regional trading blocs will not be conducive to deep economic integration. We believe the EU is a *sui generis* case." (p. 95).
7. At the December, 1994 Summit of the Americas, the NAFTA countries agreed, in principle, to extend NAFTA to include Chile. Meanwhile, Canada and Chile signed a bilateral trade agreement on November 18, 1996, which is to take effect in June, 1997. The United States has so far not entered into a similar trade agreement.
8. Dumping occurs when goods are exported at a price that is below the "normal value" in the country of export (GATT VI). If there is no domestic price, then the price of a "like good" for export to a third country is used. The margin of dumping is the excess of the normal price over the price at which the good is dumped.
9. The *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*. It applies in lieu of GATT VI.
10. The *Agreement on Subsidies and Countervailing Measures*.
11. See Boddez and Tribilcock (1993: p. 258) for sound reasons why harmonized domestic antipredation laws should replace antidumping laws. Indeed, in recognition of the contradiction in supporting antidumping duties while also calling for greater trade liberalization, the *New Zealand Australia Closer Economic Relations-Trade Agreement* eliminated antidumping laws in the free trade area it created (Johnson, 1994: 513).
12. The Subsidies Code defines a subsidy as either a transfer of funds, foregone government revenue (e.g. taxes), goods or services provided by the government, or payment by the government to a funding mechanism. It further creates two categories of subsidies, specific and non-specific, either of which can be either prohibited, actionable or non-actionable. Prohibited subsidies are those which are applied to non-agricultural products meant for export. Specific actionable subsidies cause adverse effects to the interests of other members by injuring their domestic industry or causing serious prejudice. Non-actionable subsidies are those which are applied to research and pre-competitive development activities, and others which assist disadvantaged regions.

Actionable subsidies may either be challenged under the multilateral dispute resolution path (Track II of the Subsidies Code), or dealt with unilaterally by the imposition of countervailing duties (Track I of the Subsidies Code) (Zampetti, 1995).
13. See Chapter Nineteen, "Review and Dispute Settlement in Antidumping and Countervailing Duty Matters". Of importance, NAFTA 1902(1) provides that each member has the right to apply its own antidumping and countervailing duty law which, pursuant to NAFTA 1902(2)(d), must be consistent with the GATT.
14. R.S.C., 1985, c. S-15, as amended.
15. *SIMA*, s. 96.1(1)(g). Decisions can be appealed on a question of law only (*SIMA*, s. 62), and the standard of review is that provided under s. 28(1)(e) of the *Federal Court Act*, R.S.C. 1985, c. F-7, as amended.
16. The European Council has adopted *Council Regulation (EC) 3283/94 of 22 December 1994 on protection against dumped imports from countries not members of the European Community*, OJ 1994 L 349/I, which implements the Uruguay Round *Agreement on Implementation of Article VI of the General Agreement of Tariffs and Trade 1994* (Vermulst and Waer, 1995).
17. The *Agreement on Safeguards*, concluded during the Uruguay Round, stipulates that safeguard measures are limited to 8 and 10 years for developed and developing countries, respectively.
18. The *Hatter's Fur Case* in 1951, which held that a change in style of women's hats constituted an "unforeseen development", is a good example of the very low threshold of this requirement (Trebilcock and Howse, 1995: p. 165).
19. Article 5, *Agreement on Safeguards*.
20. Canada opted out of bilateral emergency actions under NAFTA 801, and decided instead to maintain a similar provision in FTA 1101.
21. For a country to apply safeguard measures, the imports must cause "serious" injury to domestic producers, defined as "a significant overall impairment in the position of the domestic industry" (Article 6, *Agreement on Safeguards*). The test for antidumping or countervailing duties to apply, however, is much lower: it is sufficient that the imports cause "material injury" to the domestic industry, generally interpreted as injury from imports that is "not inconsequential or unimportant".
22. The GATS, included as Annex 1B of the *Agreement Establishing the World Trade Organization*, comprises six Parts, eight Annexes, and nine Ministerial Decisions which are appended and integral to it.
23. The GATS Schedules of Specific Commitments are undertakings by each member to provide a national schedule guaranteeing market access in specific sectors subject to any conditions or limitations. They are legally enforceable, and can be renegotiated only in such a manner as is consistent with the principle of progressive trade liberalization. The Schedules are appended to the GATS and are integral to it (Sauvé, 1995: p. 132).
24. The MFN clause in GATS II reads as follows: "With respect to *any measure* covered by this Agreement, each Member shall accord *immediately and unconditionally* to *services* and *service suppliers* of any other Member treatment no less favourable than it accords to like services and service suppliers of any other country" [Emphasis added] (Wang, 1996).
25. Examples include national security (GATS XIV bis), social order (GATS XIV), and government procurement (GATS XIII).

26. There are 61 exemption lists appended to the GATS, each of which can be maintained "in principle" for a period not exceeding 10 years.
27. GATS XVII, Part III.
28. NAFTA's provisions pertaining to trade in services are general in application -- this represents a significant extension of the scope of services covered by the FTA under which services which were not listed were not covered.
29. The *General Programme for the abolition of restrictions of freedom to provide services*, OJ, Sp. Ed., Second Series, IX, p. 7, provided a long list of ristrictions which it abolished, including any measure laid down by law, regulation or administrative action by a member state which directly prohibits the provision of a service, or indirectly makes the provision of the service more costly through taxation or other financial burdens, or through the removal of equipment needed to be supplied in the course of the service. The *Council Directive of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of member states with regard to establishment and the provision of services* (73/148/EEC), OJ 1973 L 172/14, marked the next stage in the liberalization of trade in services in the EU. It was followed by *Council Directive of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services* (77/249/EEC), OJ 1989 L 19/24, and the *First (and Second) Council Directive of 12 December 1977 (and 15 December 1989) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (and amending Directive 77/780)*, 77/780/EEC, OJ 1977 L 322/30 (89/646/EEC, OJ 1989 L 386/1).
30. "Unfortunately, both the FTA and NAFTA have circumscribed Canada's sovereignty to an unwarranted degree by giving the U.S. government, to all intents and purposes, the right to determine the legitimacy of government policies in Canada" (Lazar, 1993: p. 22).
31. Negotiated during the Uruguay Round, and hereinafter referred to as the "TRIMs Agreement". Broadly speaking, TRIMs are government measures applied as conditions precedent to foreign investment in the host country. Examples include local content requirements, foreign exchange restrictions and domestic sales requirements.
32. The TRIMs Agreement recognizes in its preamble the trade-restrictive and distorting effects of investment measures, and incorporates in an Annex an Illustrative List of TRIMs which are inconsistent with the GATT. As such, Article 5 of the TRIMs Agreement requires that *all* TRIMs be eliminated within two, five and seven years for developed, developing and least-developed members, respectively. The lag time will presumably afford members time to phase out what has perhaps become excessive dependence on their investment measures.
33. Government procurement (NAFTA 1108(7)(a)), subsidies and grants (NAFTA 1108(7)(b)), and cultural identities (NAFTA 2101) are general exceptions to the NAFTA investment provisions.
34. NAFTA 1105.
35. Replaced by Articles 73b, c, d, e, f and g as of January 1, 1994.
36. Curiously, the liberalization of banking and insurance services connected with movements of capital was to be effected in step with the liberalization of movement of capital, pursuant to s. 61(2) which falls under chapter 3 which describes the liberalization of trade in services.
37. GATT XVI prohibits all export subsidies *except* those meant for primary products.

The only restriction on export subsidies applied to primary products is that they must not result in the exporting member gaining "more than an equitable share of the world export trade" in relation to other members over "a previous representative period".
38. As *National Corn Growers* v. C.I.T., [1990] 2 S.C.R. 1324 has shown, Canadian courts are not shy in upholding the imposition of countervailing duties against imported subsidized agricultural produce which cause or are likely to cause material injury to Canadian production.
39. The preamble states that: "... relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, *while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment* and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development ...' [Emphasis added]
40. As one commentator stated, environmental 'standards can be potent protectionist weapons and the objective of trade policy is to distinguish between measures that protect the environment and those that protect domestic producers from foreign competition' (Johnson, 1994: p. 253-254).
41. NAFTA 2101 incorporated the environmental controls of GATT XX. GATT XX(b) justifies the use of 'measures necessary to protect human, animal or plant life or health', and GATT XX(g), 'measures relating to the conservation of exhaustible natural resources.' GATT XX is traditionally interpreted narrowly in order to minimize any adverse impact environmental protection measures may have on progressive trade liberalization.
42. NAFTA 1114, however, has been criticized for using permissive, not mandatory, language: 'A Party *should* not waive or otherwise derogate from ... such measures as an encouragement for the establishment, acquisition, expansion or retention ... of an investment of an investor.' [Emphasis added]
43. This Agreement, which came into force on January 1, 1994, is unique in international environmental agreements. Its most important contribution is the establishment of a dispute resolution process for *persistent* failure by a member to enforce its environmental laws, the penalty for which can range from monetary damages to withdrawal of NAFTA benefits. The scope of the Agreement is confined primarily to issues of enforcement, and does not extend into substantive environmental law (Thomas and Tereposky, 1993).
44. 'The Heads of State [...] DETERMINED to promote economic and social progress for their peoples, within the context of the accomplishment of the internal market and of reinforced cohesion and *environmental protection* [...]' [Emphasis added].
45. OJ 1975 L 194/47, as am. by Div. 91/156/EEC, OJ 1991 L 78/32.
46. OJ 1985 L 175/40.

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