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TRADE LAW MEMORANDUM

To: Our Clients and Friends

Re: SAFEGUARDS AND EMERGENCY RELIEF

Date: September 15, 2001

1. Like almost every other discipline, international trade law has its own jargon. Non-experts try to grapple with the endless array of acronyms, like WTO and GATT, and such things as MFN, TRIPs, GATS, TRQs, etc., etc. While each of these terms is apparent to the expert, they rightfully baffle the layman.

2. An example is the question of “safeguards”, otherwise known as emergency relief. While safeguards were off the radar screen for a while, they are back in the news, mainly because of recent actions in the United States.

3. In its last two years, the Clinton administration applied safeguard measures to protect U.S. lamb, wheat gluten and pipe producers. These investigations were begun under section 201 of the U.S. *Trade Act of 1974*. Hence, the frequent reference to “201” actions. Actually, many other sections in the *Act* come into play.

4. The Bush administration also seems ready to apply safeguards to a wider range of steel products, although the preliminary investigation by the International Trade Commission is still going on and no actual recommendations have been made as of yet.

5. What are safeguards? How do they work? How do they impact on Canadian exports? These are a few questions this short note will try to answer.

The Concept of Safeguard Action:

5. Safeguards are a form of temporary import relief allowed under the GATT and the WTO Agreement whereby countries can apply special quotas or tariff surcharges against imports that have caused that country's industry "serious injury".

6. Safeguard relief does not depend on the imports in question being unfairly traded – that is, dumped or subsidized. Safeguards are applied against *fairly-traded goods* that cause or threaten serious injury to the domestic industry. The rationale is to provide the domestic producers with temporary protection to enable them to adjust to this kind of competition.

7. Safeguards are applied across the board and not, as in the case of anti-dumping or countervailing duties, only against the unfairly traded imports. Safeguards therefore are a blunt instrument, applied on a global basis against *all* imports of the named product, regardless of source and regardless of terms of sale.

8. Finally, safeguards are exceptional because they deviate from the bound tariffs under the WTO Agreement. All countries negotiated market access by way of tariff reductions through a complexity of deals in the Uruguay Round. The same thing happened in the Tokyo Round, some 15 years earlier. Hence, the concept of "bound" tariffs under the Agreement.

9. Because they thwart these negotiated rights of access, the WTO Agreement allows other trading partners to retaliate against the government taking safeguard action. Retaliation typically is by withdrawing equivalent tariff concessions on imports from that country.

Stringent Pre-Conditions:

10. GATT Article XIX, in large part, governs these matters. The GATT is part of the WTO Agreement and Article XIX sets strict conditions before safeguard action can be taken.

- First, it must be shown that as a result of *unforeseen developments* in international trade, imports have increased in such amount as to result in serious injury to the domestic industry. It is not just a matter of a government just saying that there are such “unforeseen developments”. These unforeseen developments must be objectively proven.
- Second, there must be actual or threatened *serious injury* to the domestic producers of the same or directly competitive products. The concept of “serious injury” means a degree of injury that is deeper and more extensive than “material injury” -- which is the standard in cases of unfair trade, that is, dumping or subsidizing.
- Third, safeguard measures are only allowed *to the extent and for such time* as may be necessary to prevent or remedy the serious injury. They cannot be more stringent or in effect longer than necessary to remedy the immediate problem.

Additional Conditions under the WTO Agreement:

11. To bring even stricter discipline to the use of safeguards, additional requirements augmenting GATT Article XIX were incorporated into the 1994 WTO Safeguards Agreement. Among the main additions:

- “Serious injury” is now defined to mean a “significant overall impairment” of the industry concerned;
- To limit arbitrary or politicized decisions, governments have to show that they evaluated all relevant factors “of an objective and quantifiable nature” that bear on the industry concerned;
- Where safeguards are applied, imports cannot be reduced below the average of the most recent *prior three-year period* -- unless clear justification is provided to support lower limits.

NAFTA Exemptions:

12. The NAFTA contains provisions that attempt to shield the NAFTA Parties from the effect of safeguards. This is controversial internationally because it accords a preference to NAFTA countries vis-à-vis the rest of the world.

13. Under NAFTA Article 802, no NAFTA government can take global safeguard action covering the goods of another NAFTA government unless two conditions are met. First, the goods from each other NAFTA party, considered individually, must account for a *substantial share* of total imports. Secondly, even if that condition is met, imports from

other NAFTA parties, considered individually, must *contribute importantly* to the serious injury caused or threatened to the domestic industry.

International Litigation:

14. Under the GATT and its imperfect dispute settlement system it was very difficult to attack safeguard measures. If GATT parties objected to the acts of another member, they were left with the remedy of retaliation by withdrawing equivalent concessions. This was a sanction that could work in theory but usually proved impractical. Retaliation often did little for the exporters and, at the same time, could harm import interests.

15. Under the streamlined WTO Dispute Settlement Understanding (DSU), safeguard remedies now can be directly challenged before a WTO panel and that panel will determine whether each of the prior conditions, discussed earlier, have been properly applied. This is one of the most important changes in the multilateral trading system and the impact has been profound.

16. Take the U.S. safeguard actions referred to above. In each case, lamb meat, wheat gluten and now carbon steel line pipe, WTO panels have found that the U.S. government breached the conditions of both GATT Article XIX and the WTO Safeguards Agreement. These rulings show the extent to which WTO panels are prepared to scrutinize national decisions to ensure scrupulous compliance with international rules.

17. In the *Line Pipe Case* (where President Clinton ordered special quotas and tariffs in February 2000), a WTO panel reportedly found late in August (the decision has not yet been published) that, in taking these steps, the U.S. failed to establish that imports were “of such increased quantities” and the result of such “unforeseen developments” to justify safeguard action. As well, this panel is reported to have found that the import restrictions

went beyond the extent “necessary” to remedy the injury suffered by American line pipe producers.

18. Clarifying the earlier decision in *Wheat Gluten*, the panel also apparently agreed that the U.S. was allowed to exempt Canada and Mexico as not contributing importantly to the serious injury, as allowed under NAFTA Article 802.

19. The substantive finding in this decision, requiring safeguard relief to be supported with the necessary facts, plus the procedural finding allowing the NAFTA exemptions for Canada and Mexico, will have important ramifications for current U.S. section 201 investigation into a range of steel products. This is important for Canada. Beyond this, the decision reflects an approach by WTO panels that say that safeguard actions must be strictly implemented and will be reviewed in excruciating detail to ensure governments comply with WTO conditions to the letter.

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References:

United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, complaint by Korea to the WTO (WT/DS202/1). As a result of this complaint, the WTO’s Dispute Settlement Body created a panel to hear the dispute on 23 October 2000. The panel’s decision is to be made public in late September, 2001.

LLH/gdm
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