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THE INTERNATIONAL AND DOMESTIC LEGAL FRAMEWORK

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I. BACKGROUND

By Order-in Council, P.C. 1997-1868, dated December 17, 1997, His Excellency the Governor in Council, on recommendation of the Minister of Finance, the Minister of Agriculture and Agri-Food, and the Minister of International Trade, pursuant to section 18 of the *Canadian International Trade Tribunal Act*[1] (CITT Act), directed the Canadian International Trade Tribunal (the CITT) to:

> (a) forthwith inquire into the matter of the importation of dairy product blends outside the coverage of Canada's tariff-rate quotas, namely by:
>
> (i) examining the factors influencing the domestic market for such products, and the implications of these imports for the Canadian dairy producing and processing industry and other segments of the Canadian food processing industry, including production and revenue levels;
>
> (ii) reviewing the legal, technical, regulatory and commercial considerations relevant to the treatment of imports of these products, as well as Canada's international trade rights and obligations under the North American Free Trade Agreement and the World Trade Organization;
>
> (iii) identifying options for addressing any problems raised by this issue in a manner consistent with Canada's domestic and international rights and obligations; and
>
> (b) to hold public hearings with respect to the inquiry and to report to the Governor in Council by July 1, 1998.

The purpose of this paper is to examine Canada's international rights and obligations under bilateral and multilateral trade agreements relevant to the treatment of imports of dairy product blends outside the coverage of Canada's TRQs. This paper therefore focuses on trade in agricultural products and the interrelationship between the *Agreement Establishing the World Trade Organization*[2](the WTO Agreement), the *General Agreement on Tariffs and Trade 1994* (the GATT 1994), the *WTO Agreement on Agriculture* (the Agreement on Agriculture), the *Canada-United States Free Trade Agreement*[3] (the FTA) and the *North American Free Trade Agreement*[4] (the NAFTA).

More specifically, this paper examines certain of the fundamental principles which underpin the international trading regime, including the principles of Most-Favoured Nation and National Treatment. It also provides a definition of tariff and non-tariff barriers and explains the notion of tariff bindings, as embodied under GATT Article II. Certain of the relevant provisions of the Agreement on Agriculture are also discussed, in particular, the tariffication by WTO Members of certain non-tariff barriers applicable to agricultural products into "tariff equivalents." This paper also provides an overview of rules applicable to trade in

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1. S.C. 1989, c. 47 (4th Supp.), as amended.
2. Signed at Marrakesh, April 15, 1994.
3. *Canada Treaty Series*, 1989, No. 3 (C.T.S.), signed on January 2, 1988.
4. *Canada Treaty Series*, 1994, No. 2 (C.T.S.), signed on December 17, 1992.

agricultural products under the FTA and NAFTA. The issue of tariff classification from an international and domestic perspective is also discussed. This paper then examines certain exceptions to the "general principles," and provides an overview of various trade remedies. Finally, this paper provides a description of the dispute settlement mechanisms at the World Trade Organization (WTO) and under NAFTA

II. INTERNATIONAL OBLIGATIONS

A. The World Trade Organization Agreements

On April 15, 1994, the *Final Act*[5] of the Uruguay Round negotiations was adopted in Marrakesh, Morocco, and entered into force on January 1, 1995. The *Final Act* opened the WTO Agreement for signature to all governments and the European Union who participated in the Uruguay Round negotiations and who were members of the *General Agreement on Tariffs and Trade 1947*[6] (GATT 1947). The Government of Canada signed the *Final Act* and the WTO Agreement on April 15, 1994, and on October 25, 1994, it introduced the *World Trade Organization Agreement Implementation Act*[7] (the WTO Act) in the House of Commons. The WTO Act was ratified on December 4, 1994 and entered into force on January 1, 1995.

The WTO Agreement established the WTO[8], a new institution responsible for governing international trade. The WTO provides the organizational framework within which members can pursue rights and obligations set out in some 30 separate agreements and 27 decisions and declarations appended to the WTO Agreement in four annexes. The *Final Act* was considered a single package of agreements, with the exception of the "plurilateral agreements" listed in Annexe 4 of the WTO Agreement. Accordingly, by signing the *Final Act* and the WTO Agreement, Members accepted all of the Agreements, except the "plurilateral agreements," which were optional.[9]

Annex 1A of the WTO Agreement lists 14 multilateral agreements on trade in goods, including the GATT 1994, the Agreement on Agriculture, the *Agreement on the Application of Sanitary and Phytosanitary Measures*, the *Agreement on Technical Barriers to Trade*, the *Agreement on Rules of Origin*, the *Agreement on Import Licensing Procedures*, the *Agreement on Subsidies and Countervailing Measures* (the Agreement on Subsides) and the *Agreement on Safeguards*. The *General Agreement on Trade in Services* is contained in Annex 1B, and the *Agreement on Trade-Related Intellectual Property Rights* is contained in Annex 1C. The *Understanding on Rules and procedures Governing the Settlement of Disputes* (the DSU), which creates a significantly improved state-to-state dispute settlement

5. Signed at Marrakesh, April 15, 1994.
6. (1947) *Basic Instruments and Selected Documents*, Volume IV, Geneva, March 1969.
7. S.C. 1994, c. 47.
8. The Ministerial Conference composed of representatives of all WTO Members carries out the functions of the WTO.
9. On 30 September 1997, the International Meat Council and the International Dairy Council agreed to terminate respectively the *WTO Bovine Meat Agreement* and the *WTO International Dairy Agreement* at the end of 1997. The parties to the respective agreements requested the WTO Ministerial Conference to delete the two agreements from the list of plurilateral agreements annexed to the WTO Agreement. The other two agreements are: the *WTO Agreement on Government Procurement* and the *WTO Agreement on Civil Aircraft*; *WTO FOCUS Newsletter*, Information and Media Relations Division of the WTO, Centre William Rappard, Geneva, Switzerland, October 1997.

mechanism is contained in Annex 2 and the *Trade Policy Review Mechanism* is contained in Annex 3.

i) The *General Agreement on Tariffs and Trade*[10]

The GATT 1947, which was originally negotiated by 23 countries[11] pertained exclusively to trade in goods. It established such fundamental principles as "Most-Favoured-Nation Treatment" (MFN),[12] and "National Treatment,"[13] which were intended to deal with the problem of discriminatory treatment accorded to imports both at the border and once they cross the border. Most specifically, the principle of MFN means, generally, that any tariff concessions, or other advantage, made by a Member to another Member must be extended immediately and unconditionally to like goods originating from all other Members. National Treatment means that imports must be accorded treatment no less favorable than that accorded to domestic like products in respect of all laws, regulations and requirements affecting their internal trade.

There are a number of important exceptions to the MFN principle. The most important exception is the creation of "free trade areas" or "customs unions" under GATT Article XXIV, which allows a Member effectively to "discriminate" between imports from different countries. Subject to two basic conditions (i.e. trade restrictions are eliminated with respect to "substantially all trade" between constituent territories, and customs duties are not higher after the formation of the free trade area or the customs union than the duties prevailing on average throughout the constituent territories prior to such formation), Members are permitted to establish more favourable duty and other arrangements amongst themselves than pertain to trade with non-member countries.

Since the GATT 1947 came into force, there have been eight rounds of negotiations which have both expanded and refined countries' international trading rights and obligations, with the most recent developments flowing, of course, from the Uruguay Round of negotiations concluded in 1994. The GATT 1947 is incorporated by reference into the WTO Agreement. Together with the provisions of certain legal instruments that entered into force under the GATT 1947, as well as a number of understandings on the interpretation of certain GATT provisions and the Uruguay Round protocol adopted in Marrakesh, the GATT 1947 is now referred to as the GATT 1994.

The text of the original GATT, which sets out general principles, continues to govern international trade in goods. However, those principles have now been expanded in a series of

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10. Unless a distinction needs to be made between the GATT 1947 and the GATT 1994, this paper will simply refer to the "GATT."
11. The signatories to the GATT 1947 were referred to as the Contracting Parties to the GATT. The signatories to the WTO are referred to as the Members of the WTO. Article 2(a) of the GATT 1994 provides that the references to "contracting party" in the provisions of GATT 1994 shall be deemed to read "Member." Article 2(b) of the GATT 1994 provides that the references to the Contracting Parties acting jointly in Articles XV, XXXVIII and the Interpretative Notes to Articles XII and XVIII shall be deemed to be references to the WTO. The other functions that the GATT 1994 assign to the Contracting Parties acting jointly shall be allocated by the Ministerial Conference.
12. GATT 1947, Article I.
13. GATT 1947, Article III.

multilateral agreements listed in Annex 1A of the WTO Agreement.[14] It is important to note that in the event of a conflict between a provision of the GATT 1994 and a provision of another agreement in Annex 1A of the WTO Agreement, the provision of the other agreement shall prevail to the extent of the conflict.[15]

ii) Tariff and Non-tariff Barriers

Imports can be restrained by governments through the use of tariff barriers and non-tariff barriers. A tariff is a tax or a customs duty imposed at the border on imported goods. Tariffs barriers are the most common import restraints and are permitted under the GATT. Tariff concessions negotiated under the auspices of the GATT, however, provide for multilateral reductions on the level of individual tariffs.

Non-tariff barriers include all other forms of import restraints. Quotas or quantitative restrictions are the most common of non-tariff barriers. A quota specifies the quantity of a particular good that a country will allow to be imported during a specified period of time at a specified tariff rate. A quota may be global, in the sense that it expresses the total amount that can be imported from all sources; or it may by divided into country quotas that specify import limits on goods from specific countries.[16] Once these limits have been attained, no more imports of the particular good covered by the quota are permitted.

A tariff-rate quota (TRQ), is a limitation placed on the quantity of goods that are entitled to a specified tariff treatment that may be imported in a specified period.[17] Under a TRQ, imports up to a certain annual quantity (the "in-quota quantity or in-quota imports") are admitted free of duty or at a low rate of duty (the "in-quota rate"). Imports above the in-quota quantity (the "over-quota quantity or over-quota imports") are subject to a higher rate of duty (the "over-quota rate").

GATT Article XI prohibits the use of quotas unless they can be justified under GATT Article XI:2. GATT Article XI:2(c)(i) provides a specific exception for agricultural products, where quotas are necessary for the enforcement of governmental measures that aim to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, a domestic product for which the imported product can be directly substituted.

A number of additional constraints, such as public notice of the total quantity or value of the product permitted to be imported during a specified period of time are also imposed on a Member wishing to avail itself of this GATT provision. Furthermore, GATT Article XIII requires that any quantitative restrictions imposed be applied in a non-discriminatory manner and sets out disciplines respecting the allocation of import quotas among GATT member countries. These requirements are supplemented by the *Agreement on Import Licensing Procedures* that sets out procedures to be followed in implementing import licensing systems.

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14. J.C. Castel, William G. Graham, Armand L.C. DeMestral, Susan Hainsworth and Mark A.A. Warner, *The Canadian Law and Practice of International Trade with Particular Emphasis on Export and Import of Goods and Services.* Second Edition. Toronto: Edmond Montgomery Publications Limited, 1997; at 26-27.
15. General Interpretative Note to Annex 1A of the WTO Agreement.
16. John H. Jackson, William J. Davey, Alan O. Sykes, Jr., *Legal Problems of International Economic Relations: Cases, Material and Text*. Third Edition. St. Paul: West Publishing Co., 1995; at 376.
17. *Customs Tariff*, R.S.C. 1985, c. 41 (3rd Supp.); s. 2.

In Canada, the *Export and Import Permits Act*[18] (the EIPA) provides authority for the establishment of import restrictions on agricultural products.

Prior to establishment of the WTO and the conclusion of the Agreement on Agriculture, a number of contracting parties, including Canada, in reliance on GATT Article XI:2(c)(i), maintained quantitative restrictions on imports in order to protect their domestic supply management regimes in respect of certain agricultural products, including dairy products. The applicability of this GATT provision by Canada to ice cream and yoghurt to protect the production and marketing of raw milk was successfully challenged by the United States before a GATT Panel.[19] In short, the GATT panel held that as ice cream and yoghurt were not "like products" or "products directly competitive" to raw milk, the quotas could not be justified under GATT Article XI:2(c)(i).

iii) Tariff Bindings

Each Member's tariff commitments or "bindings," which are the result of eight major rounds of negotiation, are contained in GATT schedules. GATT Article II provides that a Member is prohibited from increasing its customs duty on a particular product above the bound tariff rate in its GATT Schedule for that product, and from imposing other duties or charges in connection with importation, except for a charge equivalent to an internal tax consistent with GATT Article III, an antidumping or countervailing duty consistent with GATT Article VI, or fees or other charges commensurate with the cost of services rendered. Safeguard measures consistent with GATT Article XIX, the general escape clause, would constitute another exception to the application of GATT Article II. Certain of these exceptions are explored more fully below.

As noted earlier, the WTO incorporates the provisions of the GATT 1947 by reference and refers to this version of the General Agreement as the GATT 1994. The results of the market access negotiations, in which participants made commitments to eliminate or reduce tariff rates and non-tariff measures applicable to trade in goods are recorded in national schedules of concessions which are annexed to the *Uruguay Round Protocol to the General Agreement on Tariffs and Trade 1994* (the Protocol). A Member's schedule becomes a Schedule to the GATT 1994 on the day on which the WTO Agreement enters into force for that Member (i.e. January 1, 1995 for most Members, including Canada). Subject, of course, to certain detailed exceptions, Members are prohibited from increasing their customs duty on a particular product above the bound tariff rate in their Schedule[20].

The Protocol has five Appendices. Appendix I contains Part I, Section IA of each Member's Schedule which lists tariff concessions on an MFN basis on agricultural products[21] and Part I, Section IB of each Member's Schedule which lists tariff-rate quotas on agricultural

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18. R.S.C. 1985, E-19.
19. *Canada - Import Restrictions on Ice Cream and Yoghurt*, Report of the Panel, adopted at the Forty-fifth Session of the Contracting Parties on December 5 1989, L/6568.
20. For Canada, the tariff concessions are contained in Schedule I to the WTO Act, *supra*, note 7.
21. Article 2 and Annex 1 of the Agreement on Agriculture define agricultural products as those products which are classified in chapters 1 through 24 of the *Harmonized Commodity Description and Coding System* (except for fish and fish products) and including a few other products. The same definition is found in NAFTA Article 708.

products. Appendix II contains Part I, Section II of each Member's Schedule which lists tariff concessions on an MFN basis on other products.

Appendix III of the Protocol contains Part II of each Member's Schedule which lists preferential tariffs, if applicable. Appendix IV contains Part III of each Member's Schedule, which lists non-tariff concessions and Appendix V contains Part IV of each Member's Schedule, which lists commitments limiting subsidization on agricultural products. Section I lists each Member's total Aggregate Measure of Support (AMS) commitments in domestic support programs, Section II lists each Member's budgetary outlays and quantity reduction commitments in export subsidies, and Section III lists each Member's commitments limiting the scope of export subsidies (a more detailed discussion of Appendix V and the Agreement on Agriculture is provided below).

The tariff reductions agreed upon are to be implemented in five equal rate reductions, except as may be otherwise specified in a Member's Schedule. The first such reduction is to be made effective on the date of entry into force of the WTO Agreement. Each successive reduction is to be made effective on January 1 of each of the following years, and the final rate will become effective no later than four years after the date of entry into force of the WTO Agreement, except as may be otherwise provided. However, Members may implement reductions in fewer stages or at earlier dates than those indicated in the Protocol, if they so wish.[22] Canada's exceptions to this timetable are: (1) products subject to immediate tariff elimination (e.g. toys and certain pharmaceuticals); (2) agricultural products which are subject to a six step reduction schedule; (3) beer which is subject to an eight step reduction schedule; and certain goods which are subject to a ten step reduction schedule (e.g. paper and paper products and most steel products)[23].

In order to implement MFN tariff reductions for all products, including agricultural products, agreed to by Canada as contained in Canada's Schedule, the WTO Act amended various provisions of the *Customs Tariff*. The reductions were outlined in Schedule I to the WTO Act, which sets out the base and final rates[24] of duty for (a) tariff items in Schedule I[25] to the *Customs Tariff*, subject to tariff reduction, (b) codes in Schedule II[26] to the *Customs Tariff* subject to tariff reduction and (c) the rate at which these reductions were to be implemented. Schedule I to the WTO Act also introduced, where necessary, new tariff items and codes to accommodate rates of tariff reduction agreed to with Canada's trading partners.[27]

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22. The Protocol, Article 2.
23. *World Trade Organization Agreement Implementation Act - Clause-by-Clause Guide to Bill C-57*, Department of Foreign Affairs and International Trade, November 1994, *Customs Tariff*, Clauses 74-100.
24. The Clause-by-Clause Guide provides that for purposes of the WTO Act, the "base rate" is defined as the "MFN rate of duty applicable to a good at the time of the coming into force of the WTO Act. The "final rate" is defined as the rate of duty applicable to a good when all tariff reductions under the WTO Act have been implemented.
25. The Clause-by Clause Guide explains that Schedule I to the *Customs Tariff* sets out the tariff, or rate of duty, including the free rate, that applies to all goods upon their importation into Canada. The rate of duty applied to goods depends upon their classification and their country of origin.
26. The Clause-by-Clause Guide explains that Schedule II to the *Customs Tariff* provides, through items known as codes, for the entry of goods at reduced or duty-free rates rather than higher Schedule I rates, if certain conditions are met. Such conditions often include the subsequent use of the imported goods in domestic manufacture.
27. Clause-by-Clause Guide, *supra*, note 23.

As part of the Agreement on Agriculture, WTO Members agreed to abandon a wide range of non-tariff barriers or prohibitions such as quantitative import restrictions and discretionary import licensing maintained on imports of agricultural goods and to replace them with tariffs. Members also agreed not to resort to or revert to any of those measures except in certain limited circumstances.[28]

Under the Agreement on Agriculture, each Member would ensure that, where it currently restricted, prohibited or otherwise controlled the import of agricultural goods, imports of those goods at low rates of duty would be permitted in amounts equal to at least 3% of the domestic consumption of those goods. These would be known as "minimum access commitments." Beyond these minimum access commitments, existing non-tariff barriers and prohibitions for agricultural imports would be converted into customs duties ("tariff equivalents") set out at levels which broadly reflected the difference between the domestic and world prices of those goods. This conversion of agricultural non-tariff barriers into tariffs is known as "tariffication."[29] The combination of these minimum access commitments and the process of tariffication created a system of TRQs for agricultural products. As noted earlier, a TRQ is essentially a two-tier tariff where a lower rate of duty applies to imports within the quota, while a higher rate applies above the quota.

For agricultural goods subject to tariffication, the WTO Act amendments to Schedule I to the *Customs Tariff* implemented the "tariff equivalents" of current agricultural import prohibitions, restrictions and other controls, as well as the agreed-upon phased reductions to the within and over-quota duty rates applicable to these goods. Within-quota duty rates apply to those goods described as "within access commitment", while over-quota duty rates (i.e. the tariff equivalents) apply to those goods described as "over access commitment."

The WTO Act also amended various provisions of the EIPA[30] to facilitate the implementation of Canada's access commitments under the Agreement on Agriculture. Section 5.3 was added to the EIPA providing the Governor in Council the authority to place agricultural products which were tariffied on the Import Control List (the ICL). Goods on the ICL may only be imported under the authority of import permits, which are obtainable through the Department of Foreign Affairs and International Trade. All over-quota imports are imported under a General Import Permit.[31]

Each Member's Schedule to the Protocol to the GATT 1994 contained the quantities of agricultural products that would be allowed access at a lower rate of duty. The EIPA was amended to provide for the administration of these commitments within a regime for "import allocations." Under new EIPA provisions, the Minister of Foreign Affairs and International Trade was given the authority to determine import access quantities or a basis for calculating them, to establish a method for allocating import access, to issue import allocations subject to

28. Agreement on Agriculture, Article 4.
29. Clause-by Clause Guide, *supra*, note 23.
30. The EIPA provides authority for the establishment of controls on exports and imports of designated goods, such as certain supply-managed agricultural products (for example dairy products) by the addition of items to the Export Control List or the Import Control List by Order in Council.
31. Clause-by Clause Guide, *supra*, note 23.

terms and conditions and to consent to the transfer of allocations. Through this process, quotas were established in Canada for the period 1995 to 2000.[32]

iv) Suspension or Renegotiation of Tariff Concessions

Certain GATT provisions enable tariff concessions or bindings to be suspended temporarily, while others enable a particular tariff binding to be changed permanently. For example, tariff concessions can be withdrawn or modified temporarily by way of a safeguard measure imposed under GATT Article XIX or as a form of retaliatory action by the prevailing Member in a dispute when a non-conforming Member refuses to comply with the recommendations of a WTO Panel or of the Appellate Body. These two types of measures are discussed more fully in other sections of this paper.

Members may also apply to the Ministerial Conference for a waiver of their obligations under GATT Article XXV. Such waivers may only be granted in exceptional circumstances.[33] Furthermore, Article IX of the WTO Agreement sets out strict rules concerning the approval of waivers.[34] The *Understanding in Respect of Waivers of Obligations Under the GATT 1994* provides that any waiver in effect on the date of entry into force of the WTO Agreement shall terminate on the date of its expiry or two years from the date of entry into force of the WTO Agreement, unless extended in accordance with the provisions of Article IX of that agreement.[35]

Finally, although tariff concessions or bindings are usually negotiated during one or another of the so-called rounds of negotiations, there are provisions under the GATT, which entitle a Member to reopen a matter and substitute another commitment in place of the one which it desires to remove. The formation of a customs union or a free trade area under GATT Article XXIV is one such provision. Also, GATT Article XXVIII provides that every three years (as of January 1 1958)[36], and at any time, in special circumstances[37], with the authorization of the WTO Ministerial Conference, a Member may enter into negotiations with another Member or Members in order to modify or withdraw tariff concessions. The Member must however negotiate and agree on "compensatory adjustment" with the Member with which such concession was initially negotiated, and any other Member determined to have a

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32. See, *Staff Report on Import Regime*, at 5-6.
33. There is no definition of "exceptional circumstances" in either the GATT or the WTO Agreement. In practice; however, waivers have been granted for various reasons. For example, the United States was granted a waiver in 1955 in connection with import restrictions imposed under section 22 of the *United States Agricultural Adjustment Act (of 1933)*.
34. Article IX of the WTO Agreement provides that the practice of decision-making by consensus applies to a request for a waiver. However, if consensus cannot be reached, any decision to grant a waiver shall be taken by three fourths of the Members. It also provides that any waiver granted for a period of more than one year shall be reviewed by the Ministerial Conference not later than one year after it is granted, and thereafter annually until the waiver terminates. In each review, the Ministerial Conference shall examine whether the exceptional circumstances justifying the waiver still exist.
35. As a result of the coming into force of the WTO Agreement, the 1955 U.S. waiver for import controls was terminated.
36. The question of timing of the three-year reopening of concessions is dealt with in the Interpretative Note to GATT Article XXVIII.
37. Paragraph 4:1 of the Interpretative Note to GATT Article XXVIII provides that any request for authorization to enter into negotiations shall be accompanied by all relevant statistical and other data.

"principal supplying interest."[38] The withdrawing Member must also consult with other Members determined to have a substantial interest.[39]

The parties to the negotiation must endeavour to maintain the general level of tariff concessions provided in the GATT. If agreement cannot be reached, then the withdrawing Member may go ahead with its modification or withdrawal. Then, the other non-agreeing Members may, after 30 days' written notice, withdraw substantially equivalent concessions initially negotiated with the withdrawing Member. Members are urged to conduct their negotiations with the greatest possible secrecy in order to avoid premature disclosure of details of prospective tariff changes. Paragraph 6 of the *Understanding on the Interpretation of Article XXVIII of the GATT 1994* provides that when an unlimited tariff concession is replaced by a TRQ, the amount of compensation provided should not exceed the amount of the trade "actually affected" by the modification of the concession. The Understanding also provides details of the basis for the calculation of compensation.

B. The FTA and the NAFTA

The formation of free trade areas is permitted under GATT Article XXIV. Under GATT Article XXIV:8, a free-trade area is defined as "a group of two or more customs territories in which the duties and other restrictive regulations of commerce [subject to certain exceptions] are eliminated on substantially all the trade between the constituent territories in products originating in such territories."

The FTA created a free trade area between Canada and the United States, which came into being on January 1, 1989. In accordance with the FTA, tariffs on almost all goods were to be eliminated as of January 1, 1998.[40] Canada and the United States agreed that neither Party would increase existing, or introduce new, customs duties on most originating goods.[41] When NAFTA, which created a free trade area between Canada, the United States and Mexico, came into force on January 1, 1994, the governments of Canada and the United States agreed to suspend the FTA. This means that if NAFTA is terminated or if one of Canada or the United States withdraws, the FTA will resume. However, some parts of the FTA were incorporated

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38. Paragraph 1:4 of the Interpretative Note to GATT Article XXVIII provides which Member should be considered to have a principal supplying interest. Essentially, a Member will be considered to have a principal supplying interest if it has, over a reasonable period of time prior to the negotiations, a larger share of the market of the withdrawing Member than a Member with which the concession was initially negotiated or would have had such share in the absence of discriminatory quantitative restrictions maintained by the withdrawing Member. The *Understanding on the Interpretation of Article XXVIII of the GATT 1994* provides that "for the purposes of modification or withdrawal of a concession, the Member which has the highest ratio of exports affected by the concession (i.e. exports of the product to the market of the Member modifying or withdrawing the concession) to its total exports shall be deemed to have a principal supplying interest if it does not already have an initial negotiating right or a principal supplying interest as provided in paragraph I of Article XXVIII.

39. Paragraph 1:7 of the Interpretative Note to GATT Article XXVIII provides that the expression "substantial interest" is not capable of a precise definition; however, is intended to be construed to cover only those Members which have, or in the absence of discriminatory quantitative restrictions affecting their exports, could reasonably be expected to have, a significant share in the market of the withdrawing Member.

40. FTA Article 401:2 established a three-stage regime for the progressive elimination of tariffs on originating goods. In accordance with FTA Article 201(1), originating goods meant goods qualifying under the rules of origin set out in FTA Chapter Three.

41. FTA Article 401:2.

into NAFTA. For instance, as between Canada and the United States, NAFTA Annex 302.2 incorporates the FTA Tariff Schedules for tariff elimination purposes. Consequently, tariff elimination was completed between Canada and the United States on January 1, 1998. NAFTA Tariff Schedules as between Canada and Mexico and the United States and Mexico provide for the elimination of tariffs on virtually all goods within fifteen years, i.e. as of January 1, 2008.

In respect of trade in agricultural products, Canada and the United States set out particular arrangements in FTA Chapter 7; however, Chapter 7 did not contain any provision respecting dairy products. Although the Parties agreed to prohibit, subject to certain exceptions, the imposition of quantitative restrictions in respect of the import of some goods notably meat, grain, grain products, poultry and eggs, FTA Article 710 provided that the Parties preserved their rights under GATT Article XI:2(c)(i). Canada wanted to ensure that its domestic supply management regimes in respect of certain dairy, poultry and egg products, imposed in reliance on GATT Article XI:2(c)(i) could be maintained. The United States wanted to ensure acceptance under the FTA of the 1955 waiver granted to it pursuant to GATT Article XXV:5[42]

Import restrictions, including in some cases quotas, on dairy products therefore remained in place as between Canada and the United States. Where there was a quota, the in-quota rates were bound and therefore subject to elimination under the Canada-US tariff schedule. FTA Tariff Schedules having been incorporated into NAFTA, as of January 1, 1998, along with other tariffs, in-quota tariff rates on dairy products fell to zero. NAFTA did not change the situation under the FTA between Canada and the United States.

The tariffication process that resulted from the WTO Agreement on Agriculture, in relation to over-quota imports, was the subject of a complaint by the United States to a dispute settlement panel under NAFTA Chapter 20.[43]

Pursuant to an obligation under the Agreement on Agriculture to tariffy non-tariff barriers, Canada imposed tariff equivalents on previously restricted U.S. originating agricultural products, including dairy products, in the period after December 31, 1994. The United States argued that by applying such tariffs, Canada had acted contrary to its commitments under NAFTA (i.e. its commitments not to raise tariffs, not to impose new tariffs and to phase out all tariffs).[44] In reply, Canada did not deny the existence of the tariffs, but rather argued that they were justified under the Agreement on Agriculture[45]. Canada argued that the Parties had agreed within NAFTA that over-quota trade in agricultural goods between Canada and the United States would be governed by the arrangements that would emerge from

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42. *IN THE MATTER OF: Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products*, CDA-95-2008-01, Final Report of the Panel, December 2, 1996; at 8.
43. *Ibid.*
44. The United States invoked NAFTA Article 302(1) and (2) which provide as follows:
    1. Except as otherwise provided in this Agreement, no Party may increase any existing customs duty, or adopt any customs duty, on an originating good.
    2. Except as otherwise provided in this Agreement, each Party shall progressively eliminate its customs duties on originating goods in accordance with its Schedule to Annex 302.2.
45. In particular, Canada invoked Article 4:2 of the Agreement on Agriculture which provides as follows: Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties (including quantitative restrictions), except as otherwise provided in Article 5 (Special Safeguard Provisions) and Annex 5.

the Uruguay Round negotiations. Consequently, Canada argued that tariffication of existing non-tariff barriers with respect to U.S. origin goods was consistent with Canada's commitments under NAFTA.[46]

The Panel ruled in favour of Canada. In the Panel's view, Article 4:2 of the Agreement on Agriculture taken by itself or, in conjunction with the rest of the Agreement, did not impose an obligation on Members to tariffy. However, the Panel found that Members had a "right" to establish "tariff equivalents" in place of their non-tariff barriers. The Panel reached this conclusion by looking beyond the text of Article 4, and by taking into account supplementary means of interpretation such as the objective of the negotiations in relation to agricultural trade as set out in the *Punta del Este Declaration* of September 20, 1986[47], the proposals put forward by the United States in 1988 to convert non-tariff barriers to "tariff equivalents", a proposal which was later outlined in the Dunkel Draft[48] and the Modalities Document[49]. The Panel noted that, in fact, both the Dunkel Draft and the Modalities Document contained the following mandatory language: "tariffs equivalents shall be established …" In the Panel's view, these latter documents formed part of the *travaux préparatoires* of the Agreement on Agriculture and could be properly taken into account when interpreting international agreements in accordance with Articles 31 and 32 of the *Vienna Convention on the Law of Treaties 1969*.[50]

In its final analysis, the Panel ruled that FTA Article 710 did not contemplate the bringing into NAFTA of complete GATT or WTO rights and obligations; however, it did allow for the incorporation of tariffs resulting from the process of tariffication. The Panel found that, in respect of products formerly subject to quotas, the result was that in quota tariffs applying between the United States and Canada in respect of agricultural products would be those established under NAFTA, and tariffs on over-quota imports would be those established under the WTO Agreement. The Panel was of the view that to the extent that there was a conflict between NAFTA Chapters Seven and Three, the provisions of Chapter Seven prevailed.

As between Canada and Mexico, paragraph 6 of NAFTA Annex 703.2B provides that the Parties incorporate their respective rights and obligations with respect to agricultural goods under the GATT and agreements negotiated under the GATT, including their rights and

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46. In particular, Canada invoked FTA Article 710, incorporated into NAFTA by NAFTA Annex 702.1. FTA Article 710 provided:

> Unless otherwise specifically provided in this Chapter, the Parties retain their rights and obligations with respect to agricultural, food, beverage and certain related goods under the *General Agreement on Tariffs and Trade* (GATT) and agreements negotiated under the GATT, including their rights and obligations under GATT Article XI.

Canada also relied on NAFTA Note 5 which provides that "Article 302(1) and (2): paragraphs 1 and 2 are not intended to prevent a Party from maintaining or increasing a customs duty as may be authorized by any dispute settlement provisions of the GATT or any agreement negotiated under the GATT" in support of its argument that the Parties agreed that "tariff equivalents" would be applied to agricultural goods for quantities beyond those granted preferential or in-quota access under the FTA or NAFTA.

47. BISD 33S/19.

48. *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* - Section L of which contained a "Text on Agriculture" -circulated on December 20, 1991 by the Chairman of the Trade Negotiations Committee, Arthur Dunkel.

49. *Modalities for the Establishment of Specific Binding Commitments under the Reform Program*, MTN.GNG/MA/W/24.

50. Int. Leg. Mat. 679.

obligations under Article XI of the GATT. Paragraph 7 of NAFTA Annex 703.2B provides that, notwithstanding paragraph 6, the rights and obligations of the Parties under Article XI:2(c)(i) shall apply with respect to trade in dairy, poultry and egg goods as set out in NAFTA Appendix 703.2.B.7. Paragraph 7 also provides that with respect to such dairy, poultry and egg goods that are qualifying goods, either Party may adopt or maintain a prohibition or restriction or a customs duty on the importation of such good consistent with its rights and obligations under the GATT.

II. CUSTOMS CLASSIFICATION

A. Tariff Classification - General

Because tariffs vary from product to product, goods, when imported, must be located in the correct product category to receive proper tariff treatment. Each country is responsible for the administration of its customs laws and the classification of imported goods. In Canada, tariff schedules are set out in great detail in the *Customs Tariff*, running into several thousand items. The following tariff rates often exist for a given item: (1) the MFN tariff rate; (2) the Canada-U.S. rate; (3) the Canada-Mexico rate; (4) the General rate (for non-WTO Members; (5) the Commonwealth Caribbean Countries rate; (6) the Australia rate; (7) the New Zealand rate; and (6) the General Preferential Tariff rate for some developing countries.

The procedure that must be followed in Canadian law to classify imported goods is set out in the *Customs Act*[51] and in the *Customs Tariff*. In brief, section 12 of the *Customs Act* provides that any person importing goods into Canada or any person for whom that person acts as agent or employee must report the goods to the nearest customs office in Canada. There are certain exceptions to this general rule. For example, subsection 12(4) of the *Customs Act* provides that goods that are reported prior to importation at a customs office outside Canada do not need to be reported to a customs office in Canada at the time of importation unless an officer requires otherwise. Section 32 provides that no goods shall be released until they have been accounted for by the importer and all duties have been paid. Calculating the duty involves a number of tasks: valuing the imported goods; locating the goods in the appropriate product classification; and identifying the goods' country of origin.

Section 58 of the *Customs Act* provides that an officer[52] may determine the classification of imported goods at any time before or within thirty days after they have been accounted for. Pursuant to subsection 58(5), where an officer does not make such a determination, in respect of goods, a determination of the tariff classification shall be deemed to have been made thirty days after the time the goods were accounted for or in accordance with any representations made at that time in respect of the tariff classification by the person accounting for the goods.

Subsection 60(1) of the *Customs Act* provides that the importer or any person who is liable to pay duties on imported goods may within 90 days, or where the Minister of National Revenue deems it advisable, within two years after the determination was made or was deemed

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51. R.S.C. 1985, c. 1 (2nd Supp.).
52. The term "officer" is defined in subsection 2(1) of the *Customs Act* as "a person employed in the administration or enforcement of the [*Customs Act*] or the *Special Import Measures Act* and includes any member of the Royal Canadian Mounted Police.

to have been made in respect of the goods, request that a designated officer re-determine the tariff classification of the goods. A designated officer may also re-determine the tariff classification of the goods on his or her own initiative if certain conditions are met in accordance with section 61. Further requests for re-determination of the tariff classification may be made to the Deputy Minister of National Revenue within certain prescribe time limits under section 63 and re-determinations of the tariff classification may be made by the Deputy Minister on his or her own initiative in certain circumstances under section 64.

Pursuant to section 67 of the *Customs Act*, a person who deems his or herself aggrieved by a decision of the Deputy Minister with respect to a re-determination of the tariff classification of goods imported into Canada may appeal from that decision to the CITT. Decisions of the CITT can be appealed to the Federal Court of Appeal pursuant to section 68 of the same act, and, finally, the decision of the Federal court of Appeal can be appealed to the Supreme Court of Canada. The same procedure applies to the valuation of the imported goods and the identification of the goods country of origin.

In addition, it is to be noted that pursuant to section 19 of the CITT Act, the Minister of Finance may request the CITT to inquire into any tariff-related matter, including any such matter involving Canada's international rights and obligations.

The Customs Cooperation Council (CCC), now called the World Customs Organization (WCO), which was established in 1950, was given the mandate to develop and harmonize customs systems around the world. The result of the CCC's work was the *Harmonized Commodity Description and Coding System*[53] (the Harmonized System), which became law in Canada on January 1, 1988 and forms part of the *Customs Tariff*. *General Rules for the Interpretation of the Harmonized System*[54] (the General Rules) were adopted by the CCC and, in Canada, also form part of the *Customs Tariff*.

Classification of imported goods into Canada under a heading, subheading or tariff item in Schedule I to the *Customs Tariff* must be determined in accordance with the General Rules and four additional Canadian Rules.[55] The basis of the Harmonized System is that all imported goods, including new goods, can be classified.[56] Furthermore, they should only be classified by their essential or intrinsic nature (i.e. by what they are and not by how they are used) and should only fall into one category.[57] The nomenclature consists of a mandatory six digit classification system that is used by all signatories. Countries who find the classification too imprecise for their needs may use up to four more digits, as Canada has done. The ninth and tenth digits are however only used for statistical purposes.

The Harmonized System Committee (the HS Committee) meets regularly, under the auspices of the CCC, to consider specific classification problems and review the operation of the Harmonized System and update it and the *Explanatory Notes to the Harmonized*

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53. Customs Co-operation Council, Nomenclature Committee, 38th Session, Brussels, February 18, 1977.
54. *Customs Tariff*, *supra*, note 17, Schedule I.
55. *Customs Tariff*, *supra*, note 17, s. 10.
56. Jackson, Davey and Sykes, *supra*, note 16, at 386, where it is also stated that "goods not falling specifically within a heading of the Nomenclature must be classified under the heading appropriate to the goods to which they are most akin."
57. Michael J. Trebilcock & Robert Howse, The Regulation of International Trade. London and New York: Routledge, 1995; at 88.

Commodity Description and Coding System[58] (the Explanatory Notes), which have also been adopted by the CCC, as necessary. Following the meetings of the HS Committee, the CCC adopts and issues Classification Opinions, which are published in the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*[59] (the Classification Opinions). Section 11 of the *Customs Tariff* provides that in interpreting the headings and subheadings in Schedule I of the *Customs Tariff*, regard shall be had to the Classification Opinions and the Explanatory Notes, as amended from time to time, published by the CCC.

B. Tariff Classification - Agricultural Products

Tariff classification determines whether any given imported agricultural product is covered by a TRQ. If the imported product is classified in a tariff item that is listed in Section 1B of Canada's WTO Schedule, then it will be subject to a TRQ. If not, then, the MFN rate will apply, unless, of course, the product is imported from countries who are beneficiaries of a preferential rate, for example, the United States and Mexico.

The goods subject to this reference are defined as "dairy product blends outside the coverage of Canada's TRQs." Dairy blends are mixtures of dairy products and other food substances for use in the preparation of products such as ice cream, confectionery and bakery goods.[60] Imports of a specific mixture containing roughly 49% butteroil (a product obtained by extracting the water and non-fat content from butter or cream) and 51% sugar (butteroil blend) has been classified by Revenue Canada under tariff item No. 2106.90.95[61] of the *Customs Tariff*[62] as "other [food] preparations, containing in the dry state, over 10% by weight of milk solids, but less than 50% by weight of dairy content."[63] This tariff item No. is not included in Section 1B of Canada's WTO Schedule. This means that it is outside the coverage of Canada's TRQs.

The tariff classification of "butteroil blend" under tariff item No. 2106.90.95 of the *Customs Tariff* has never been subject to a re-determination under sections 60 or 63 of the *Customs Act* or an appeal before the CITT pursuant to section 67 of the Act. However, there have been informal reconsiderations of this tariff classification by Revenue Canada, which have confirmed that "butteroil" is properly classified under tariff item No. 2106.90.95.[64]

In early 1996, the Dairy Farmers of Canada (the DFC) asked Revenue Canada to reclassify "butteroil blend" under tariff item No. 2106.90.33 or 2106.90.34[65] of the *Customs Tariff* as "[food] preparations containing more than 15% by weight of milk fat but less than

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58. Customs Co-operation Council, 1st ed., Brussels, 1986.
59. Customs Co-operation Council, 1st ed., Brussels, 1987.
60. Order-in Council, Backgrounder.
61. This tariff item No. came into force on January 1, 1995, as of result of *WTO Technical Amendments Order, No. 2*, dated December 20, 1994.
62. See, for example, Preliminary Submissions of International Dairy Ingredients Inc., January 21, 1998, at 2.
63. As of January 1, 1998, the tariff rate for this tariff item No. for imports from the United States or Mexico is zero. The MFN rate is 9.5%.
64. Letters from the Dairy Farmers of Canada to Members of the CITT dated February 10, 1998.
65. These tariff item Nos. came into force on January 1, 1995, as part of the amendments made to Schedule I of the *Customs Tariff* by the WTO Act.

50% by weight of dairy content, suitable for use as a butter substitute."[66] Revenue Canada took the view that "butteroil blend" was not a "butter substitute" and, on this basis, denied the DFC's request for a reclassification under tariff item No. 2106.90.33 or 2106.90.34.[67] Subsequently, the DFC attempted to have "butteroil blend" reclassified under tariff item No. 0404.90.10 or 0404.90.20 of the *Customs Tariff* as "products consisting of natural milk constituents, whether or not containing added sugar or other sweetening matter, not elsewhere specified or included."[68] In denying the DFC's request, Revenue Canada relied on a Classification Opinion of the CCC dated November 7, 1997 that a similar butteroil/sugar blend was classifiable under subheading 2106.90 of the Harmonized System.[69]

III. EXCEPTIONS AND TRADE REMEDIES

A. GATT Article II: Internal Taxes

As noted earlier, GATT Article II prohibits a Member from increasing its customs duty on a particular product above the bound tariff rate in its GATT Schedule for that product, and from imposing other duties or charges in connection with importation, except for a charge equivalent to an internal tax consistent with GATT Article III (i.e. the National Treatment provision). GATT Article III:2 provides that imported products shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. It also provides that internal taxes must not be applied to imported products in a manner contrary to the non-discrimination principle in GATT Article III:1 (i.e. so as to afford protection to domestic production). The Interpretative Note[70] to GATT Article III:2 provides that a tax which conforms with the first sentence of that provision will be considered to be inconsistent with the second sentence if the imported products and the domestic products are directly competitive or are substitutable products in competition with each other. Furthermore, the directly competitive or substitutable imported products must not be similarly taxed.

Recently, the imposition by Canada of an excise tax under Part V.I of the *Excise Tax Act* on imported "split-run" periodicals[71] was successfully challenged by the United States

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66. The within-access rate for this tariff item is 7.5%. The over-access rate is 224%, but not less than 2.23/kg. No quota has been allocated to this tariff item.
67. *Supra*, note 64.
68. The within-access rate for this tariff item is 9%. The over-access rate is 285.5%, but not less than $3.33/kg. A quota of 4,345 tonnes has been allocated to these two tariff items.
69. *Supra*, note 64.
70. The interpretative notes are found in Annex I to the GATT. GATT Article XXXIV provides that "the annexes to [the GATT] are hereby made an integral part of [the GATT]."
71. Subsection 35(1) of the *Excise Tax Act* defines "split-run periodicals" as an edition of a periodical:
    (a) that is distributed in Canada,
    (b) in which more than 20% of the editorial material is the same or substantially the same as editorial material that appears in one or more excluded editions of one or more issues of one or more periodicals, and
    (c) that contains an advertisement that does not appear in identical form in all those excluded editions.

Subsection 35(1) defines an "excluded edition" as "an edition of the issue the circulation of which in Canada, if any, is less than its circulation outside Canada …"

before a WTO Panel (the Panel)[72]. The decision of the Panel was upheld by the Appellate Body.[73] The Panel found that imported "split-run" periodicals and domestic "non-split-run" periodicals constituted "like products", and that, in light of the fact that the excise tax was applied with respect to only imported "split-run" periodicals, Canada had subjected these goods to an internal tax in excess of that applied to domestic "non-split-run" periodicals.

The Panel's decision on the first point was made on the basis of a hypothetical import, as Canada maintained an import prohibition under Tariff Code 9958 of Schedule II to the *Customs Tariff* against "split-run" periodicals, which effectively blocked the importation of such products into Canada and prevented the Panel from making a comparison of actual imports of "split-run" periodicals and domestic "non-split-run" periodicals. The Panel compared the two editions of the same magazine, one Canadian and one U.S. and found that they were like products because they had common end uses, very similar physical properties, nature and qualities.[74]

With respect to the latter point, the Panel did not accept Canada's argument that the tax did not apply "indirectly" to a good within the meaning of GATT Article III:2. The Panel acknowledged that the tax was not "directly" applied to periodicals in that it was levied on the value of advertisements, and not on the value of periodicals *per se*. However, it noted that it was clear that the tax clearly applied in respect of each "split-run" periodical on a "per issue" basis. The Panel therefore held that the tax applied "indirectly" to periodicals within the ordinary meaning of the terms in GATT Article III:2.[75] Accordingly, the Panel found that the measure imposed by Canada on imported "split-run" periodicals was contrary to the first sentence of GATT Article III:2. Having so found, the Panel stated that it did not need to examine whether it was consistent with the second sentence of that provision.[76]

The decision of the Panel was appealed by the Canadian government to the Appellate Body on several grounds, one of which was that the Panel had erred in law by finding Part V.I of the *Excise Tax Act* to be inconsistent with the first sentence of GATT Article III.2. In particular, Canada argued that the Panel had erred in law in finding that imported United States "split-run" periodicals and Canadian "non-split-run" periodicals were "like products"; and in failing to apply the principle of non-discrimination that is embodied in the first sentence of Article III:2.

The Appellate Body reversed the Panel's finding that Part V.I of the *Excise Tax Act* was inconsistent with the first sentence of GATT Article III:2; however, concluded that the measure was inconsistent with the second sentence of GATT Article III:2. In brief, the

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72. *Canada - Certain Measures Concerning Periodicals*, Final Report of the Panel, WT/DS31/R, 14 March 1997.
73. *Canada - Certain Measures Concerning Periodicals*, Report of the Appellate Body, WT/DS31/AB/R, 30 June 1997.
74. *Supra*, note 72, at 76.
75. *Supra*, note 72, at 76-77.
76. The Panel stated that it did not need to examine the applicability of Article III:1 separately, because, as the Appellate Body stated in its recent report on *Japan - Taxes on Alcoholic Beverages* (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, the first sentence of Article III:2 is, in effect, an application of the general principle embodied in Article III:1. Therefore, if the imported and domestic products are "like products", and if the taxes applied to the imported products are "in excess of" those applied to the like domestic products, then the measure is inconsistent with Article III:2, first sentence; *supra*, note 72, at 74.

Appellate Body disagreed with the Panel's "like product" analysis. The Appellate Body held that the example utilized by the Panel was technically incorrect, because it involved a comparison of two imported "split-run" periodicals produced by the same publisher rather than the required comparison of an imported "split-run" periodical and a domestic non-split run periodical.[77] Because of the limitation of the Appellate Body's mandate in Articles 17.6 and 17.13 of the DSU to only review issues of law covered in the Panel Report and legal interpretations developed by the Panel, the Appellate Body held that it could not proceed to a determination of the "like products" issue because such a determination was a process by which legal rules had to be applied to facts.[78]

The Appellate Body did however go on and consider the second sentence of GATT Article III:2. The Appellate Body held, in part, that "as the legal obligations in the first and second sentences are two closely-linked steps in determining the consistency of an internal tax measure with the national treatment obligations of GATT Article III:2, [it] would be remiss in not completing the analysis of GATT Article III:2."[79] The Appellate Body held that, in making a finding with respect to the second sentence of GATT Article III:2, it was appropriate to examine "competition in the relevant markets as one among a number of means of identifying the broader category of products that might be described as "directly competitive or substitutable."[80] The Appellate Body found that the very existence of the excise tax provided proof that imported "split-run" periodicals and domestic non-split run periodicals constituted competitive products.[81] It also relied on numerous quotations from Canadian sources, including government officials and Ministers, as to the competitiveness of these products, in making its finding. The Appellate Body was of the view that the test in the second sentence of GATT Article III:2 was not one of "perfect substitutability," such a test falling more appropriately within the first sentence.[82]

The Appellate Body concluded that imported "split-run" periodicals and domestic non-split run periodicals were directly competitive or substitutable products in so far as they were part of the same segment of the Canadian market for periodicals. This meant, for instance, that a periodical containing mainly news would not be directly competitive with a periodical dedicated to gardening. However, news periodicals such as *Time Canada* and *Maclean's* would be considered directly competitive or substitutable.[83] The Appellate Body agreed with the Panel that because Canada subjected only the "split-run" periodicals to the eighty percent excise tax, it did not similarly tax imported "split-run" periodicals and domestic non-split run periodicals.[84] Finally, the Appellate Body held that based on the magnitude of the differential taxation, which, in its view, was beyond excessive and indeed prohibitive, and the evidence of the Government of Canada's objective in introducing the tax, the measure was such as to afford protection to domestic periodicals.[85]

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77. *Supra*, note 73 at 21.
78. *Supra*, note 73, at 22.
79. *Supra*, note 73, at 24.
80. *Supra*, note 73, at 25.
81. *Supra*, note 73, at 26.
82. *Supra*, note 73, at 26-28.
83. *Supra*, note 73, at 28-29.
84. *Supra*, note 73, at 29.
85. *Supra*, note 73, at 30.

B. Safeguards

i) GATT Article XIX, the *WTO Agreement on Safeguards* and NAFTA

GATT Article XIX, together with the *Agreement on Safeguards*, permits a WTO Member to take emergency action to respond to a situation where the volume of imports from other Members, as a result of tariff concessions or other trade liberalizing concessions, has increased so as to cause or threaten to cause serious injury to domestic producers of like or directly competitive products. Article XIX is referred to as an "escape clause" because it allows Members to temporarily "escape" from their obligations and provides domestic producers with a window within which to adjust to increased levels of imports. This is referred to as a "global safeguard" measure. In addition, NAFTA provides a comparable "bilateral" safeguard remedy.

Both the *Agreement on Safeguards* and NAFTA provide that, subject to certain exceptions, a safeguard measure may only be applied following an "investigation" by a "competent authority."[86] Article 6 of the *Agreement on Safeguards* provides, in part, that measures may be applied prior to an investigation by a competent authority in "critical circumstances where delay would cause damage that it would be difficult to repair."

Canada has implemented its rights and obligations under GATT Article XIX, the *Agreement on Safeguards* and NAFTA in the CITT Act, the *Customs Tariff* and the EIPA. The CITT Act provides the CITT with the jurisdiction to conduct safeguard investigations, which are called "inquiries."

An inquiry may be initiated by the CITT pursuant to a "reference" by the Governor in Council or pursuant to a "complaint" by domestic producers. Before initiating an inquiry pursuant to a complaint, the CITT must be satisfied that the complaint, among other things, discloses a reasonable indication that the imports in question are causing or threatening serious injury; and, is made by or on behalf of domestic producers who produce a major proportion of the domestic like or directly competitive goods. Once an inquiry is initiated, whether pursuant to a reference or a complaint, the process and applicable legal principles are the same.

The object of a global safeguard inquiry is to determine whether imports of a given good from all sources are being imported into Canada in such increased quantities and under such conditions as to be a "principal" cause of serious injury or threat, to domestic producers of like and directly competitive goods. The object of a bilateral inquiry conducted under NAFTA is to determine whether, as a result of the tariff reductions provided for in the Agreement, a particular product is being imported from the United States or Mexico, in such increased quantities and under such conditions such as to alone constitute a principal cause of serious injury to domestic producers of like and directly competitive goods.

The CITT Act defines "serious injury" as a "significant overall impairment in the position of domestic producers." Under the Act, a "principal cause" is an important cause that is no less important than any other cause of injury. In considering the question of injury, the *Canadian International Trade Tribunal Regulations*[87] (CITT Regulations) direct the CITT to

86. *Agreement on Safeguards*, Article 3(1); NAFTA Article 803(2).
87. SOR/89-35, 27 December, 1988, as amended.

consider, among other things, the volume of goods imported into Canada; the effect of the imported goods on prices of like and directly competitive goods; and the impact of the imported goods on domestic producers of like and directly competitive goods. In examining the impact of the goods on domestic producers, the CITT Regulations direct the CITT to examine, among other things, actual and potential changes in levels of production, employment, sales, market share, profits and losses, capacity utilization and employment.

Safeguard measures may take the form of a "surtax" on imported goods or a quota, which limits the quantity of goods that may be imported. It is important to note that it is the Governor in Council and not the CITT that ultimately decides whether or not to apply a safeguard measure. That decision is generally made after the CITT has conducted a safeguard inquiry and reported to the Governor in Council. However, in certain circumstances, such as where "critical circumstances" exist, provisional safeguard measures in the form of a surtax may be applied prior to the CITT conducting its inquiry. It should also be noted that the *Agreement on Safeguards* and the free trade agreements contemplate that when a safeguard measure is applied, the country applying it will provide the trading partner against whose exports the measure has been applied, "trade compensation" in the form of "concessions."[88] The object of this compensation is to, in effect, re-balance the trade equation between the parties.

If in a global safeguard inquiry the CITT determines that increased imports are causing or threatening injury and some of those imports originate in a country with which Canada has a free trade agreement, it must also determine whether those imports represent "a substantial share of total imports" and whether they "contribute importantly to the serious injury or threat thereof." If the CITT determines that either of these conditions is not satisfied, the Governor in Council must exclude imports from that country from any safeguard measure it applies.

The Governor in Council may apply a global measure for an initial period of up to four years. Safeguard measures can generally be extended once for up to four years, if the CITT determines that the measures continue to be necessary to remedy serious injury and that there is evidence that domestic producers are adjusting to the import competition. The *Agreement on Safeguards* also provides that safeguard measures are to be progressively liberalized during their period of application.

Bilateral measures may be applied during the transitional period of tariff reductions under the terms of the free trade agreements. They are limited to the temporary suspension of tariff reductions or restoration of tariffs to MFN levels. Measures may be applied for up to three years, followed, in some cases, by a phasing out period of one year.

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88. Under Article 8(1) of the *Agreement on Safeguards*, Members proposing to apply a safeguard measure are required to enter into consultations with the exporting Member against whose exports the measure is to be applied, with a view to agreeing on the trade compensation to be provided. If no agreement is reached between the Members, Article 8(2) provides that the exporting Member may suspend "substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure… ." However, Article 8(3) provides that the right of suspension under Article 8(2) shall not be exercised for the first three years that a measure is in effect, provided that the measure has been taken as a result of an absolute increase in imports.

ii) "Special" Safeguards

Article 5 of the Agreement on Agriculture provides for a "special" safeguard mechanism pursuant to which a Member may impose additional duties on a given agricultural product, notwithstanding the tariff bindings committed to by that Member. However, the mechanism may only be used in respect of agricultural products which, pursuant to Article 4 of the Agreement on Agriculture, are now subject to a TRQ. Moreover, additional duties may only be applied on the "over-quota" portion of imports within the TRQ. Article 5 specifies two circumstances where a Member may impose such additional duties.

The first circumstance is volume-based and arises where imports of a given agricultural product in any calendar year exceed a certain "trigger" volume. In general terms, the trigger is activated if the volume of imports of the product in a given year exceeds by a certain margin, the average volume of imports of that product in the three previous years. On reaching the trigger volume, an additional duty equal to up to one-third of the bound tariff for the product may be levied on imports of that product for the balance of the year.

The second circumstance is price-based. Where any shipment of a product is imported into the territory of a Member and the price of that product is below the "trigger price," the Member may impose additional duties. The trigger-price for a product is based on the 1986-1988 reference price for that product.[89] The amount of the additional duty which may be imposed increases as the gap between the trigger price and the import price widens.

NAFTA adopts the concept of a special safeguard as between Mexico and each of Canada and the US, but not between Canada and the US. Pursuant to NAFTA Article 703(3), the relevant Parties may adopt or maintain a safeguard measure in the form of a TRQ on any of the agricultural products listed in their respective sections of Annex 703.3. Canada's section to that Annex lists flowers and certain limited varieties of vegetables. In addition, FTA Article 702, incorporated into NAFTA pursuant to NAFTA Annex 702.1, allows Canada and the United States to apply a special "temporary duty" on certain fruits and vegetables.

C. Subsidies

GATT Articles VI and XVI set out the general principles governing the use by WTO Members of domestic and export subsidies. GATT Article VI contains general rules governing the application of countervailing duties.[90] In addition to containing general rules on subsidies, GATT Article XVI prohibits the use of export subsidies on all products except primary products.[91] The only restriction imposed on export subsidies on primary products is that the subsidy not result in the subsidizing Member having "more than an equitable share of the world export trade" in the subsidized product. The WTO Agreement on Subsidies sets out more detailed rules and procedures. Furthermore, the WTO Agreement on Agriculture creates

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89. A footnote to Article 5(1) of the *Agreement on Agriculture* provides that the reference price is, in general, the average c.i.f unit value of the given product.

90. "Countervailing duties" are defined as "a special duty levied for the purpose of offsetting any bounty or subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise."

91. The Interpretative Notes to GATT Article XVI indicate that "primary products" include "farm products."

special rules with respect to the use of domestic and export subsidies in agricultural trade, which are addressed below.

A "subsidy" is defined, in part, as "a financial contribution (i.e. a direct transfer of funds) by a government of a country that confers a benefit to persons engaged in the production, growth, processing, purchase, distribution, transportation, sale, export or import of goods." Excluded from the definition is "the amount of any duty or internal tax imposed on goods by the government of the country of export from which the goods, because of their exportation have been exempted or will be relieved by means of a refund or drawback."[92]

There are three forms of subsidies: actionable, non-actionable, and prohibited. Non-actionable subsidies include, for example, subsidies for industrial research assistance, assistance to disadvantaged regions and assistance for research activities conducted by institutions of higher education and independent research establishments.[93] There are two kinds of subsides which are prohibited: export subsidies (i.e. subsidies contingent, in whole or in part, upon export performance), and subsidies that are contingent, in whole or in part, on the use of goods that are produced or that originate in the country of export. Subsidies that are neither prohibited nor non-actionable are considered actionable subsidies.[94]

Actionable or prohibited subsidies can distort trade in the following three distinct ways: by causing or threatening material injury to the domestic industry of another Member; by nullifying or impairing benefits other Members might enjoy in the subsidizing country's market, in particular tariff concessions under GATT Article II; and by causing or threatening serious prejudice to the export interests of a Member in either the subsidizing country's market of a third market.

i) GATT Article VI and Part V of the *WTO Agreement on Subsidies*

Countervailing duties can only be applied against actionable or prohibited subsidized imports when they cause or threaten to cause material injury to the domestic industry or material retardation of the establishment of a domestic industry in the territory of an importing Member. GATT Article VI and Part V of the Agreement on Subsidies govern the application of countervailing duties. In short, an investigation must be conducted to determine whether goods have been subsidized and, if so, whether the subsidized goods have caused or are threatening to cause material injury or retardation to the domestic industry in the territory of an importing Member.

Canada's obligations relating to the imposition of countervailing duties are implemented in SIMA, which gives Revenue Canada the authority to conduct the first part of the investigation (i.e. whether goods have been subsidized), and the CITT the authority to conduct the latter part of the investigation (i.e. whether the domestic industry has suffered material injury or material retardation or will suffer threat of material injury and whether there is a causal link between such injury or retardation or threat of injury and the subsidized

92. Agreement on Subsidies, Article 1; and *Special Import Measures Act* (SIMA), R.S.C. 1985, c. S-15, as amended; ss. 2(1) and (1.6).
93. Agreement on Subsidies, Article 8; and SIMA, ss. 2(1) and 2(7.1) to (7.4).
94. Agreement on Subsidies, Article 3; and SIMA, ss. 2(1).

imports). SIMA is designed primarily to provide a right of private action (i.e., countervailing procedures) for domestic producers.

ii) GATT Article XVI and Parts II and III of the *WTO Agreement on Subsidies*

All three situations outlined above can form the basis of government to government dispute settlement procedures under the WTO. Article 4 of Part III of the Agreement on Subsidies provides that whenever a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member, such Member may initiate dispute settlement proceedings against that Member. If the matter is eventually referred to the Dispute Settlement Body and the measure in question is found by a WTO panel to be a prohibited subsidy, the panel must recommend that the subsidizing Member withdraw the subsidy without delay.

Article 5 of the Agreement on Subsidies provides that no Member shall cause, through the use of an actionable subsidy adverse effects to the interests of another Member by causing or threatening material injury to the domestic industry of another Member[95]; by nullifying or impairing benefits other Members might enjoy in the subsidizing country's market, in particular tariff concessions under GATT Article II; or by causing or threatening serious prejudice to the export interests of a Member in either the subsidizing country's market or a third market. Article 6.3 of the Agreement on Subsidies describes situations where "serious prejudice" may arise, such as where the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member, or where the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market.

iii) The *WTO Agreement on Agriculture* and Domestic Support Reductions

Under the Agreement on Agriculture Members agree to limit the amount of domestic support which they provide their agricultural industries. Article 3 provides that Members may not provide support which exceeds the levels specified in their schedule. Section I of Part IV of Canada's Schedule sets out Canada's commitments in respect of the reduction of domestic support for agricultural products. These commitments are expressed in terms of "Total Aggregate Measurement of Support" (AMS)[96], and "Annual and Final Bound Commitment Levels." Certain domestic support measures are not subject to reduction and are not required to be included in the calculation of a Member's AMS. The criteria for determining whether certain measures are exempt are set out in Article 6 and Annex 2 of the Agreement on Agriculture.

Article 6 provides that a Member shall not be required to reduce product-specific domestic support, where such support does not exceed 5 per cent of the value of that Member's total value of production of a basic agricultural product during the relevant year, and

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95. Article 11 of the Agreement on Subsidies provide that the provisions of Part II or III may be invoked in parallel with the provisions of Part V; however, with regard to the effects of a particular subsidy in the domestic market of the importing Member, only one form of relief (either a countervailing duty, if the requirements of Part V are met, or a countermeasure under Articles 4 or 7) shall be available.

96. AMS is the sum of all product-specific support and non-product specific support to the agricultural sector generally.

non-product specific support, where such support does not exceed 5 per cent of the value of a Member's agricultural production. In addition, direct payments under production-limiting programmes are not subject to the commitment to reduce domestic support if: (i) they are based on fixed price and area yields; (ii) they are made on 85 per cent or less of the base level of production; or (iii) livestock payments are made on a fixed number of head.

Domestic support measures for which exemption from the reduction commitments is claimed under Annex 2 must meet the fundamental requirement that they have no, or at most minimal, trade-distorting effects on production. Accordingly, all measures for which exemption is claimed must meet two criteria: that they are taxpayer, rather than consumer, financed; and that they do not provide price support to producers. General service programs, such as research, extension, provision of rural infrastructure (except on-farm improvements), inspection and disease control and market promotion that does not provide funds that could be used to lower selling prices or confer benefits to purchasers, are considered exempt under Annex 2.

In addition, programs offering direct payments to producers may be exempt if they meet the specific criteria established for each type of program. For example, investment aids are exempt provided that eligibility is based on clearly defined criteria in government programs designed to facilitate the financial or physical restructuring of a producer's operations in response to objectively demonstrated structural disadvantages, provided that payments are not based on prices or production in any year after the base period, and that they are limited to the amount required to compensate for the structural disadvantage. Furthermore, the program must not direct production decisions, except to require no production of a particular product. Programs involving direct payments to producers, other than those listed in Annex 2, may be exempt provided that the amount of payments is not related to, or based upon, prices, production, or resource use in any year after the base period, and no production is required to receive payments.

iv) The *WTO Agreement on Agriculture* and Export Subsidies

Pursuant to their obligations under the Agreement on Agriculture, each Member undertakes not to provide export subsidies except in accordance with the export subsidy reduction commitments specified in Sections II and III of Part IV of their Schedule. In each Member's Schedule, products are divided into 22 different categories, such as cheese and vegetables. For those export subsidies that are permissible, Members are required to reduce subsidies in annual increments over the 1995/1996 to 2000/2001 period.[97] For each product category, each Member's Schedule specifies the maximum allowable amount of export subsidy, both in terms of monetary expenditures and the volume of a particular agricultural product eligible to receive a subsidy for each year. A Member is permitted to use an export subsidy provided it does not exceed its level of commitment for that subsidy.

Article 9 of the Agreement on Agriculture defines the export subsidies subject to reduction. They include direct government-funded subsidies contingent on export performance; disposal of government stocks at lower prices for export than for domestic sales; payments on exports funded by producer levy systems; subsidies for marketing, transport and processing

97. Members have agreed to reduce export subsidy expenditures by 36 per cent and volumes eligible for export subsidies by 21 per cent from 1986-1990 average levels.

costs (except widely available export promotion and advisory services); differential internal freight charges for exports; and, subsidies on agricultural ingredients in processed products which are conditional on the export of the processed product. Among the export subsidies subject to Canada's reduction commitments, are export subsidies provided by the Canadian Dairy Commission that are funded through production levies.

It is important to note that FTA Article 701(2) eliminated export subsidies on trade in agricultural products between Canada and the United States. FTA Article 701 was incorporated into NAFTA by NAFTA Annex 702.1 and, therefore, still applies as between these two countries.

v) The *WTO Agreement on Agriculture* and the Use of Trade Remedies

During the implementation period[98], Article 13 of the Agreement on Agriculture restricts the use of certain trade remedies which could otherwise be used in response to the provision of domestic or export subsidies. More particularly, domestic support measures that conform fully to the provisions of Annex 2 of the Agreement on Agriculture, that is, domestic support measures that qualify for exemption from reduction commitments, are exempt from WTO panel actions and the imposition of countervailing duties.

In addition, domestic support measures that conform fully to the provisions of Article 6 of the Agreement on Agriculture, that is, each Member's domestic support reduction commitments for agricultural products or total AMS contained in Part IV of its Schedule, are subject to the imposition of countervailing duties if subsidized imports are found to be causing or threatening material injury to the domestic industry producing like products in the importing country. Due restraint must however be shown in initiating any countervailing duty investigations. However, such measures are exempt from WTO panel proceedings alleging that they cause nullification or impairment of the benefits of tariff concessions accruing under GATT Article II or serious prejudice to trade interests of other countries, provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year.

Finally, export subsidies that conform fully to the provision of Part V of the Agreement on Agriculture, that is, export subsidies subject to reduction commitments specified in a Member's Schedule, continue to be subject to the imposition of countervailing duties provided that are shown to cause or threaten material injury to the domestic industry producing like products in the importing country. Due restraint must however be shown in initiating any countervailing duty investigations. They are exempt from WTO panel proceedings based on the serious prejudice provisions of the Agreement on Subsidies.

D. International and Domestic Standards

i) International

GATT Article XX provides a number of exceptions to the application of the general rules of the GATT, however, such exceptions may not be applied in a manner which is

98. Article I of the *Agreement on Agriculture* defines "implementation period" for the purposes of Article 13 as the nine-year period commencing in 1995.

arbitrary or unjustifiably discriminatory, or amounts to a disguised restriction on international trade. With those limitations, GATT Article XX provides that Members may adopt measures necessary, among other things, to protect human, animal or plant life; and, to secure compliance with laws or regulations which are not inconsistent with the provisions of the GATT, including those relating to customs enforcement.

The WTO *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS Agreement) and Part B of NAFTA Chapter 7 deal with sanitary and phytosanitary (SPS) standards. The WTO *Agreement on Technical Barriers to Trade* and NAFTA Chapter 9 deal with technical standards.

a) Sanitary and Phytosanitary Standards

The provisions of Part B of NAFTA Chapter 7 in large measure parallel those of the SPS Agreement. The following discussion references the relevant provisions of the SPS Agreement; however, the corresponding NAFTA provisions are cross-referenced in the footnotes.

Article 1(1) of the SPS Agreement provides that the agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade.[99] Measures may take the form of laws or regulations governing such things as end product criteria; processes and production methods; testing, inspection, certification and approval procedures; sampling procedures and methods of risks assessment; and packaging and labelling requirements directly related to food safety.[100]

Article 2(1) of the SPS Agreement provides that Members may take SPS measures to protect human, animal or plant life or health.[101] Article 2(2) provides that SPS measures may be applied only to the extent necessary to attain that objective and must be based on scientific principles and evidence.[102] In addition, SPS measures must not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail and may not be applied in a manner that constitutes a disguised restriction on international trade.[103]

Article 3 of the SPS Agreement deals with the harmonization of SPS measures. Article 3(1) states that to harmonize their measures, Members shall base them on international standards, guidelines or recommendations where they exist.[104] Annex A of the SPS Agreement provides that for "food safety" those standards, guidelines or recommendations are as established by the *Codex Alimentarius* Commission.[105] Under Article 3(2), SPS measures that

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99. NAFTA Article 709.
100. NAFTA Article 724.
101. Annex A to the *SPS Agreement* defines an SPS measure to be, among other things, any measure to protect: human or animal life or health from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or foodstuffs; or to protect human life or health from risks arising from diseases carried by animals, plants or products thereof. See also NAFTA Article 712(1).
102. SPS Agreement, Article 2(2); NAFTA Article 712(3)(a), (b) and 712(5).
103. SPS Agreement, Article 2(3); NAFTA Article 712(4) and (6).
104. NAFTA Article 713(1).
105. NAFTA Article 724. It should be noted that Volume XVI, *Codex Alimentarius* 1984 contains a *Code of Principles* concerning milk and milk products, international standards for milk products and individual standards for cheeses. Volume IX of the second edition of the *Codex Alimentarius*, dealing with milk and milk products is to be issued sometimes in 1998.

satisfy the *Codex Alimentarius* Commission standards, are "deemed" to be necessary to protect human, animal or plant life or health.[106] However, a Member may introduce SPS measures which result in a higher level of sanitary and phytosanitary protection that would be achieved by measures based on the relevant international standards, if there is a scientific justification or if the Member has concluded pursuant to an "assessment" under Article 5 of the SPS Agreement, that such measures are appropriate. [107]

Article 4(1) of the SPS Agreement provides that an importing Member shall accept the SPS measures (i.e. standards) of an exporting Member as "equivalent", even if those measures differ from its own, provided that the exporting Member objectively demonstrates that its measures achieve the importing Member's level of SPS protection.[108]

Article 7 of the SPS Agreement requires Members to notify other Members of changes in their SPS measures in accordance with Annex B to the SPS Agreement. Annex B sets out detailed notification guidelines aimed at ensuring that measures adopted and the reasons for their adoption are fully transparent. In addition, where no international standard exists with respect to a particular SPS matter or a proposed SPS measure is not substantially the same as the relevant international standard, and the measure may have a "significant effect on trade of other Members", Members must follow detailed notification procedures and provide other Members with the opportunity to comment.[109]

Finally, Article 11 of the SPS Agreement provides that GATT Articles XXII and XXIII and the DSU apply to the settlement of disputes under the agreement.

b) Technical Standards

The provisions of NAFTA Chapter 9, in large measure, parallel those of the WTO *Agreement on Technical Barriers*. The following discussion references the *Agreement on Technical Barriers*; however, the corresponding NAFTA provisions are cross-referenced in the footnotes.

The *Agreement on Technical Barriers to Trade* governs Members' conduct in adopting, maintaining and enforcing "technical regulations." The Agreement provides that a "technical regulation" is a document which lays down product characteristics or their related processes and production methods. Technical regulations may also include "terminology, symbols, packaging or labelling requirements as they apply to a product, process or production method."[110]

The *Agreement on Technical Barriers to Trade* obliges Members, in respect of technical regulations, to accord national treatment and MFN treatment to the products of other Members.[111] In addition, Members must ensure that technical regulations are not "prepared,

106. NAFTA Article 713(2).
107. SPS Agreement, Article 3(3); NAFTA Articles 712(2),(3) and 713(3).
108. NAFTA Article 714(2)(a).
109. NAFTA Article 718.
110. *Agreement on Technical Barriers to Trade*, Annex 1(1); NAFTA Chapter 9 applies to all "standards-related measures" of a Party; NAFTA Article 915(1) provides that "standards-related measure" means "a standard, technical regulation or conformity assessment procedure."
111. *Agreement on Technical Barriers to Trade*, Article 2.1; NAFTA Article 904(3).

adopted or applied with a view or with the effect of creating unnecessary obstacles to international trade" and "shall not be more trade restrictive than necessary to fulfil a legitimate objective." [112] Legitimate objectives include things such as national security, the prevention of deceptive practices and the protection of human life.[113]

Article 2.4 of the *Agreement on Technical Barriers to Trade* provides that where international standards exist or are imminent, Members shall, subject to certain limited exceptions, use them as a basis for their technical regulations.[114] Under Article 2.5, Members preparing or adopting technical regulations which may have "a significant effect on trade" are required, on the request of another Member, to explain the justification for the regulation.[115]

Where a Member proposes to introduce a technical regulation which may have a significant effect on trade and a relevant international standard does not exist or the proposed technical regulation is not in accordance with the relevant international standard, the Member is required to notify other Members of the proposed regulation and provide them with its "objective and rationale."[116] Members may then make comments with respect to the proposed regulation and engage in discussions with the Member proposing the regulation.

Article 3.1 *Agreement on Technical Barriers to Trade* obliges Members to take "such reasonable measures" to ensure that "local governments and non-governmental bodies" comply with Article 2.[117]

Article 4 requires Members to ensure that their agencies which set standards, referred to as "standardizing bodies,"[118] to comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards set out in Annex 3 of the *Agreement on Technical Barriers to Trade.* Article 5 requires Members to ensure that their conformity assessment procedures are applied in a non-discriminatory manner and are not designed or applied with the effect of creating unnecessary obstacles to trade.[119]

Article 10 requires Members to ensure that an "enquiry point" exists to respond to enquiries concerning, among other things, technical regulations which have been adopted or proposed.[120]

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112. *Agreement on Technical Barriers to Trade*, Article 2.2; NAFTA Articles 904(4), 907(2).
113. *Agreement on Technical Barriers to Trade*, Article 2.2; NAFTA Article 915(1)
114. NAFTA Article 905(1).
115. NAFTA Article 909(1); It should be noted that Article 909(1) does not contain the "significant effect on trade" requirement provided for in Article 2.5 of the *Agreement on Technical Barriers to Trade*.
116. *Agreement on Technical Barriers to Trade*, Article 2.9; NAFTA Article 909(2); It should be noted that Article 909(1) does not contain the "significant effect on trade" requirement provided for in Article 2.9 of the *Agreement on Technical Barriers to Trade*.
117. NAFTA Article 909(3); It should be noted that Article 909(3) only obligates NAFTA Parties to seek to ensure, with respect to the adoption of a technical regulation by state or provincial governments, that notice and a copy of same are made available and an opportunity to provide comments and engage in discussions is provided.
118. *Agreement on Technical Barriers to Trade*, Annex 3, paragraph B.
119. NAFTA Article 908(3).
120. NAFTA Article 910.

Finally, Article 14 of the *Agreement on Technical Barriers to Trade* provides that GATT Articles XXII and XXIII, as elaborated and applied by the DSU, apply to the settlement of disputes under the agreement.[121]

(ii) Domestic Legislation

In Canada, the *Canada Agricultural Products Act*[122] (the Agricultural Act) governs, among other things, the importation of agricultural products. Section 17 of that Act provides that no person shall "market an agricultural product in import, export or interprovincial trade," except in accordance with the Act or regulations.

The *Dairy Products Regulations* (DPR) were enacted under the Agricultural Act. Section 2 of the DPR defines "milk product" as including, *inter alia*, milk, cream whey, butter and butter oil. Section 2 provides that a "'dairy product' means milk or a product thereof, whether alone or combined with another agricultural product, that contains no oil or fat other than that of milk." Section 2 of the Agricultural Act defines an "agricultural product" as, *inter alia*, a plant or plant product.[123]

Section 48 of the DPR sets out technical standards for butter oil. It provides that butter oil shall be the product prepared from butter or cream and resulting from the removal of most of the water and solids-not-fat content, and shall contain not less than 99.3 per cent milk fat and not more than 0.5 per cent water.

Section 2.2(1) of the DPR provides that no person shall market a dairy product in import, export or interprovincial trade as food unless the dairy product is not adulterated, is not contaminated, is edible, is prepared in a sanitary manner, and meets all other requirements of the *Food and Drugs Act*[124] and the *Food and Drug Regulations* with respect to the dairy product.[125] The terms "adulterated" and "contaminated" are defined in section 2 of the DPR. Those definitions incorporate by reference technical standards contained in the other legislation.[126] Section 2 of the DPR defines edible to mean "fit for use as food."

For a dairy product to be prepared in a sanitary manner, it has to be prepared in accordance with the requirements set out in section 11.1 of the DPR. That section establishes a number of requirements relating to the operation and maintenance of the plant or facility where the dairy product is made. These requirements cover such things as refuse removal, minimum illumination of the work area, hands cleaning and the design of outer clothing worn during the preparation of a dairy product.

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121. A dispute arising with respect a matter to which NAFTA Chapter 9 applies, may be dealt with under the dispute settlement scheme provided for in NAFTA Chapter 20.

122. R.S.C. 1985 (4th supp.), c. 20.

123. Section 2 of the Act defines "agricultural product" as:

> a.an animal, a plant or an animal or plant product,
> b.a product, including any food or drink, wholly or partly derived from an animal or a plant, or
> c.a product prescribed for the purposes of this Act; (produit agricole)

124. R.S., c. F-27.

125. The *Food and Drugs Act* and the *Food and Drug Regulations* requirements in large measure mirror the requirements of the DPR.

126. *Food and Drugs Act, Food and Drug Regulations, Pest Control Products Regulations and Canada Environmental Protection Act*.

Subsection 26(1) of the DPR provides, in part, that no person shall import any dairy product unless the dairy product originated in a country that has grade requirements and standards for dairy products that are at least equivalent to those set out in these Regulations, and a system of inspection for dairy products and for establishments that prepare dairy products that is at least equivalent to that in Canada. Furthermore, the dairy product must meet the grade requirements and standards for a similar dairy product that is produced in Canada; and be prepared under conditions at least equivalent to those required by these Regulations.

Subsection 26(2) of the DPR provides that where a dairy product does not meet the requirements of paragraphs 26(1)(a) and (c), an importer may still import the dairy product if it provides evidence that the requirements of section 2.2 have been satisfied (i.e. the dairy product is not adulterated or contaminated, is edible, is prepared in a sanitary manner[127], and meets all other requirements of the *Food and Drugs Act* and the *Food and Drug Regulations* with respect to the dairy product.)

IV. DISPUTE SETTLEMENT

Before concluding this paper, it is helpful to provide an overview of the dispute settlement provisions established under the WTO Agreements and the NAFTA as these could be invoked by governments of countries to those agreements. For example, they could be invoked where a measure adopted by another WTO member or NAFTA Party appears inconsistent with that member's or Party's obligations under the WTO Agreements and/or the NAFTA, or where a measure allegedly nullifies or impairs benefits under those agreements.[128]

A. World Trade Organization

As part of the Uruguay Round, Contracting Parties to the GATT negotiated the DSU which significantly improved upon the dispute settlement process that had evolved under the GATT. It was hoped at the time of the negotiations that the new system would provide binding, effective and enforceable dispute settlement so that WTO members would refrain from using less legitimate means of resolving disputes, such as by unilateral retaliatory action. Indeed, Article 23 of the DSU requires WTO members to resort exclusively to, and abide by, the rules and procedures of the DSU for settling disputes arising under the WTO Agreements, including the Agreement on Agriculture.[129] By means of a variety of mandated multilateral determinations, Article 23 aims to preclude WTO members from taking unilateral action. Specifically, the DSU mandates multilateral determinations in respect of violation, nullification or impairment, in addition to the "reasonable period of time" within which recommendations and rulings must be implemented, as well as the appropriate level of retaliation.[130]

Similar to the GATT system, the DSU encourages parties to reach a mutually satisfactory solution to a dispute before resorting to formal dispute settlement.[131] However, if consultations fail, the DSU provides recourse to a dispute settlement panel. A request for the

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127. In this case, the mention of "sanitary manner" should not be taken to imply a reference to the rules of s. 11.1 DPR.
128. GATT 1947 Article XXIII and NAFTA Article 2004.
129. Certain covered agreements include special or additional provisions in respect of dispute settlement that apply to disputes arising specifically under those agreements. See DSU Article 1:2.
130. Castel, Graham, DeMestral, Hainsworth and Warner, *supra*, note 14;at 671.
131. DSU Article 3:7.

establishment of a panel may be made if 60 days lapse since the formal request for consultations was made and the matter has not yet been resolved.[132] Unlike the GATT system, however, the establishment of a panel is automatic unless the Dispute Settlement Body[133] decides by consensus against it.[134] Once the panel is established, it is expected to issue a report on the matter within six months. Expedited consultations and accelerated proceedings are, however, contemplated where the dispute is urgent, such as where it concerns perishable goods.[135] In such cases, the panel is expected to issue its report within three months. In no case, however, is the process to go beyond nine months.[136]

It should be noted that even where a panel has been established the parties may at any time voluntarily agree to the use of good offices, consultations or mediation for help with resolving the matter.[137]

The panel process is adjudicatory in nature. Parties are provided with an opportunity to make submissions to the panel in both written and oral form, and to comment on the other party's submissions. Each stage in the process is governed by very strict timeframes in order to ensure that the panel completes its examination and issues its report within the specified timeframe. The parties to the dispute may comment on the descriptive sections of a draft panel report circulated for their review and, later on, submit comments on an interim panel report, which includes both the descriptive sections as well as the panel's findings and conclusions.[138] The final report is then circulated to all WTO members who may file written reasons objecting to the report prior to the meeting of the DSB at which it will be considered.[139]

Even though the Dispute Settlement Body is given time to consider the report, adoption of the report is automatic unless the Dispute Settlement Body decides by consensus to reject it, or a party notifies the Dispute Settlement Body of its intention to appeal the report to the Appellate Body.[140] That WTO members must unanimously agree *not* to adopt a report in order for it to be rejected contrasts markedly with the GATT system under which all Contracting Parties had to agree unanimously to *adopt* a report, otherwise it was rejected. The old requirement of consensus often resulted in the non-conforming party to the dispute blocking the adoption of the panel report.

The Appellate Body provides a second level of review of the matter on questions of law or legal interpretation. Similar to the panel process, the appeal process is expected to be concluded expeditiously. The timeframe for completion of the appeal process is not to exceed 60 days or at the outside limit, 90 days.[141] Similar to the panel report, the Appellate Body's report is expected to be adopted unconditionally by the Dispute Settlement Body. Under the

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132. DSU Article 4:7.
133. The Dispute Settlement Body is established by the General Council and is composed of representatives of all WTO Members. Its function is to administer all dispute settlement procedures. DSU Article 2:1.
134. DSU Article 6:1.
135. DSU Article 4.
136. DSU Article 12:9.
137. DSU Article 5.
138. DSU Article 15.
139. DSU Article 16.
140. *Ibid*.
141. DSU Article 17.

appeal procedures, the report is to be adopted (or rejected) within 30 days of its release to all WTO members.[142]

Unlike the GATT system, the DSU provides both detailed monitoring and enforcement mechanisms.[143] If a non-conforming party does not comply with the Dispute Settlement Body's recommendations and rulings, it must either provide compensation or face retaliatory action by the prevailing party. First in a succession of provisions governing enforcement is the obligation on the non-conforming party to notify the Dispute Settlement Body within 30 days of the adoption of the report of its intentions with regard to the implementation of the recommendations and rulings. Where that party fails to implement the recommendations and rulings within a reasonable period of time, the prevailing party may seek from it mutually satisfactory compensation, failing which, the prevailing party may, with the authorization of the Dispute Settlement Body, suspend the application of concessions or obligations to the non-conforming party.[144]

The scope of concessions that may be suspended is hierarchical. First, an effort must be made to suspend concessions within the same sector in which the non-conforming measure exists. However, if suspension in that sector is not practical or effective, concessions or obligations in other sectors, under the same agreement, may be suspended. Where neither of these options is practical or effective, the DSU permits cross-retaliation into other agreements. In any event, the level of suspension may only be equal to the level of nullification or impairment induced by the non-conforming measure and not greater.[145] Where the level of suspension is disputed, the matter may be referred to arbitration.[146]

B. NAFTA

NAFTA's Chapter 20 dispute settlement procedures may be invoked for certain disputes arising under NAFTA, including where a NAFTA Party considers that an actual or proposed measure of another Party is or would be inconsistent with that Party's obligations under the NAFTA or cause nullification or impairment of any benefit reasonably expected to accrue to it under certain parts of the Agreement.[147]

NAFTA Chapter 20 carries on the basic model of dispute settlement established under the FTA with consultations constituting the first stage of the process. Similar to the DSU, cooperation and consultations are encouraged in order for the disputing NAFTA Parties (the parties) to arrive at a mutually satisfactory resolution of the dispute without having to resort to formal dispute settlement procedures.[148] However, if the matter has not been resolved in 30 days after delivery of a request for consultations (or 45 days where a third NAFTA party has joined in), the parties can proceed to the second stage by formally requesting a meeting of the Free Trade Commission.[149] The Free Trade Commission is empowered to extend a wide range

142. *Ibid*.
143. DSU Article 21.
144. DSU Article 22.
145. DSU Article 22:4.
146. DSU Article 22:5.
147. NAFTA Article 2004.
148. NAFTA Articles 2003 and 2006.
149. NAFTA Article 2007. The Free Trade Commission is comprised of cabinet-level representatives of each NAFTA Party or their designees, pursuant to NAFTA Article 2001.

of good offices, conciliation or mediation services to the disputing parties, call on technical advisers, or make recommendations with the objective of resolving the dispute.[150] If at the end of 30 days, however, the matter has not been settled the parties may proceed to the third stage, namely to request the establishment of an arbitral panel.[151]

Similar to the DSU, the NAFTA dispute settlement procedures contemplate an expedited process where the matter is in respect of perishable agricultural goods.[152]

A panel is generally expected to present an initial report of its findings to the parties within 90 days after the panelists have been selected.[153] This initial report should contain the panel's findings of fact, its determination as to whether the measure in issue is inconsistent with a Party's obligations under NAFTA or else nullifies or impairs benefits, as well as its recommendations.[154] Parties are then given an opportunity to comment on the report. After considering the parties' comments, the panel is expected to present a final report to the parties within 30 days of its initial report.[155] That report is then expected to be transmitted by the parties in confidence to the Free Trade Commission for subsequent publication.[156]

On receipt of the final report, the disputing Parties are expected to "agree to the resolution of the dispute," which normally means conforming with the determinations and recommendations of the panel. Implementation of the panel's report normally consists of removing the measure that does not conform to the NAFTA, although compensation is an option.[157] Where the offending Party does not implement the determinations and recommendations set out in the report and the parties cannot agree on a mutually satisfactory resolution of the matter, the prevailing Party may, within 30 days of receiving the report, suspend the application of benefits of equivalent effect until an agreement to resolve the dispute is reached.[158]

Similar to the DSU, the suspension of benefits is hierarchical. The prevailing Party should first seek to suspend benefits in the same sector (or sectors) affected by the measure in issue, but if that Party does not consider that practical or effective, it may suspend benefits in a different one.[159] The Free Trade Commission may establish a panel, at the request of one of the disputing parties, to determine whether the level of benefits is manifestly excessive.[160]

Since NAFTA came into force one dispute has been resolved by virtue of Chapter 20 panel procedures, namely, *Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products*, discussed above.

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150. NAFTA Article 2007.
151. NAFTA Article 2008.
152. NAFTA Article 4.
153. NAFTA Article 2016.
154. *Ibid.*
155. NAFTA Article 2017.
156. *Ibid*.
157. NAFTA Article 2018.
158. NAFTA Article 2019.
159. *Ibid.*
160. *Ibid*.

C. Relationship Between the WTO and the NAFTA Dispute Settlement Systems

Subject to certain exceptions, disputes arising under both the WTO Agreements and the NAFTA may be settled in either forum at the discretion of the complaining NAFTA Party.[161] Some of the exceptions include where the dispute concerns environmental issues, sanitary or phytosanitary standards, or standards in general. In such cases, the responding Party can insist on the resolution of the dispute under Chapter 20 procedures to the exclusion of the WTO.

Once chosen, the dispute shall be resolved in that forum to the exclusion of any other.[162] However, prior to initiating dispute settlement proceedings at the WTO on grounds that are substantially equivalent to those available to the complaining Party under NAFTA, that Party must notify any third Party of its intentions. If the third Party objects to the WTO as the choice of forum, the Parties must consult with a view to reaching agreement on the forum. If the Parties cannot agree, then the NAFTA mechanism will govern the resolution of the dispute.[163]

V. SUMMARY

The Order-in Council directs the CITT to identify options for addressing any problems raised by the importation of dairy product blends outside the coverage of Canada's TRQs in a manner that would be consistent with its domestic and international rights and obligations. It is of course for the CITT to "identify" options following the public hearing in its inquiry. Hence, this paper did not identify "options." Rather, it provided an overview of the international and domestic legal framework established under bilateral and multilateral international trade agreements such as the WTO Agreement, the GATT, the FTA, NAFTA and the WTO Agreement on Agriculture, in order to give the context from which options must be derived.

This paper discussed measures such as suspension or renegotiation of tariff concessions. Under GATT Article XXV, a WTO Member may apply to the Ministerial Conference for a waiver of its obligations. A Member may also enter into negotiations with another Member in order to modify or withdraw tariff concessions. This paper also discussed customs classification. It explained that Canadian law provides for a process whereby an importer of a given product may challenge the tariff classification of that product by Canadian authorities. If a challenge is successful, the product in question will be classified within the tariff item number advocated by the importer. This paper also examined some of the conditions that must be met under the GATT/WTO in order for an importing country to apply internal taxes on imported goods.

This paper also provided an overview of the international and domestic rules applicable to safeguard measures. In short, Canadian law and international agreements provide that where imports of a particular good are causing serious injury or threat thereof to domestic producers of like and directly competitive goods, the Governor in Council may impose a surtax on, or limit the quantities of, such imports. In addition, there exists "special" safeguard mechanisms

161. NAFTA Article 2005.
162. NAFTA Article 2005:6.
163. NAFTA Article 2005:2.

pursuant to which countries may impose “additional” duties on a given agricultural product, notwithstanding their tariff bindings. The mechanism established pursuant to the WTO Agreement on Agriculture may only be used in respect of agricultural products which are subject to a TRQ.

The use of domestic and export subsidies by countries which have the effect of distorting trade was also examined. In brief, objectionable subsidies can be challenged at the domestic level in order to impose countervailing duties and at the WTO level when such measures are causing adverse effects or serious prejudice to another WTO Member’s trade. In addition, an overview of the domestic and international standards was provided. Under the WTO SPS Agreement and the WTO *Agreement on Technical Barriers to Trade*, as well as under NAFTA Chapters 7 and 9, WTO Members, or NAFTA Parties, as the case may be, may apply SPS measures and technical standards for purposes of, among other things, the protection of human, animal or plant life or health.

Under both the WTO agreements and NAFTA, where international standards exist for a given product, Members or Parties are generally required to utilize those standards in developing their own domestic standards. It must be emphasized that under the WTO agreements and NAFTA, measures and standards applied must generally be based on scientific principles and must not constitute a disguised restriction on international trade.

Finally, this paper provided an overview of the dispute settlement mechanisms under both the NAFTA and the WTO.