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Chios Carmody

The University of Western Ontario

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THE IMPACT OF INTERNATIONAL LAW ON
THE PRACTICE OF LAW IN CANADA

L'INFLUENCE DU DROIT INTERNATIONAL
SUR LA PRATIQUE DU DROIT AU CANADA

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Public Participation in Canadian Unfair Trade Action

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KLUWER LAW INTERNATIONAL

PANEL BI - TRADE LAW REMEDIES: THE CHALLENGE OF PRIVATE PARTY PARTICIPATION

**Clearly Canadian:
Public Participation in Canadian Unfair Trade Action**

Chi Carmody¹

In many countries today administrative law divides foreign trade regulation into three categories: *dumping*, *subsidization*, and *unfair trade*. *Dumping* traditionally occurs when a company sells its products abroad for less than their normal value at home. The typical response is an antidumping duty. *Subsidization* occurs when a government subsidizes production of a good in some way so that a company is able to sell it below cost in foreign markets. Here, the typical response is a countervailing duty. Finally, the residual category of *unfair trade legislation* targets all other discriminatory behaviour, such as the application of technical or sanitary regulations as trade barriers, or restrictive investment or customs measures. Where such behaviour is found, governments can retaliate by raising tariffs or revoking trade concessions. The progressive lowering of tariffs worldwide, minimization of government activity in the marketplace, and proliferation of non-tariff barriers has meant an increase in the importance of this last category of regulation.

Canada has at least two statutes that allow for retaliation against foreign unfair trade practices, but neither yet provides for *direct* public participation in the decision to do so. Why? One explanation is that foreign affairs have traditionally been considered a matter of Crown prerogative. International trade is similarly regarded. For this reason the decision to launch an unfair trade action is as much an act of executive discretion as it is one of law. Commenting on the prevalence of discretionary behaviour in the trade field Paterson and Band note that "[m]uch of the difficulty in the past may have arisen from the fact that lawyers traditionally played only

¹ LL.B. (Ottawa, 1992), LL.M. (Michigan, 1997), currently S.J.D. Cand., Georgetown University Law Center, Washington, D.C.. The writer would like to thank Prof. Donald McRae of the Faculty of Law, University of Ottawa, for his assistance with this topic.

a tangential role in the functioning of a system that also involves politicians, diplomats, domestic and international civil servants, customs brokers and businessmen ...²

International law and dispute settlement over unfair trade practices were given renewed impetus by the conclusion of the *WTO Agreement* in April 1994. The *WTO Agreement*³ created the World Trade Organization (WTO). It also contained the *General Agreement on Tariffs and Trade 1994* and at least a dozen multilateral sectoral agreements in fields as diverse as textiles and phytosanitary standards. One of these agreements, the *Dispute Settlement Understanding*⁴ (DSU), provides for a system of dispute settlement over government measures thought to be inconsistent with the accords. The clear terms of the DSU have made it an early favourite for the resolution of unfair trade complaints between WTO member countries and for giving meaning to the often vague treaty language contained in the *WTO Agreement*. Otherwise there appears to be little enthusiasm for mustering the high majorities now required to definitively interpret the *WTO Agreement*.⁵

The new trading order, then, is one developing on the basis of dispute settlement, but it is one into which Canada fits uneasily. Canada is sometimes referred to as a "middle" or "principal" power due to its moderate economic stature. Awareness of this stature makes Canada reluctant to assert its economic interests internationally. A basic premise of Canadian foreign policy has always been that "given that Canada's international clout is limited, it must avoid unilateral action."⁶ Canada does not apply any trade embargoes other than those decided by the UN Security Council, nor does it support the use of economic sanctions to enhance basic labour standards or environmental protection in other countries.⁷

Canada's Department of Foreign Affairs and International Trade (DFAIT) has been active in asserting Canadian interests in the era of WTO dispute resolution, but the recommendation made here is that DFAIT could be still more effective by allowing *direct public participation* in the form of petitions to initiate unfair trade action. The issue of public participation is particularly important today given that the Canadian government has expended significant effort in negotiating improvements in market access with Canada's trading partners in the WTO. However, it has not provided Canadian entities with any *direct* recourse against foreign denials of access. The only possibilities now open to Canadian companies are to lobby the Canadian government or to participate in one of DFAIT's Sectoral Advisory Groups on International Trade (SAGIT). Lobbying is a time-consuming and expensive process, particularly for small or medium-size enterprises. SAGIT focuses on sectoral trade policy, not the identification and remedying of specific unfair foreign trade practices.

Even where a representation is made, the government retains absolute discretion as to whether it will pursue a matter in the WTO or not. There is no requirement for the government either to proceed or to give reasons for not proceeding. The situation persists even though competitors of Canadian business in the United States and the European Union ("EU") have

2 R.K. Paterson and M.N. Band, *International Trade and Investment Law in Canada* (2nd ed.) 4-2ff (1994).

3 33 I.L.M. 1144 (1994).

4 33 I.L.M. 1226 (1994).

5 Article IX:2 of the *WTO Agreement* provides for definitive interpretations of the treaty by a vote of three-quarters of the WTO membership.

6 J. Prévost, *For Effective and Appropriate Sanctions*, DFAIT Policy Planning Staff Paper No. 93/04, 45 (1993).

7 See World Trade Organization, *Trade Policy Review: Canada -1996* 28, 147 (1997).

access to formal processes by which they can bring potential trade violations to the attention of their governments. Relevant authorities in each jurisdiction must take action or provide the petitioner with written reasons why action is not being taken. These same authorities have not been reluctant to use WTO dispute settlement procedures against Canada.⁸

The proposal for a Canadian public participation mechanism in statutory form would demonstrate commitment to the rule of law, promote transparency, and accord with recent initiatives that recognize non-state participation in other spheres of Canada's international relations. At a time when rights and obligations provided under the *WTO Agreement* are being defined through dispute resolution it is imperative for Canada to make the most of this process, both for its own purposes and for the progressive articulation of international trade law. A formal mechanism would better alert DFAIT to opportunities in this regard.

A review of unfair trade legislation in the U.S. and EU demonstrates that public input does not detract from traditional considerations of state in the contemplation of trade action. Instead, it *adds* to them. Of course "adding to" also implies adding to the burden of the bureaucracy. But if one of the principal reasons for *not* having such a statutory mechanism is that DFAIT does not hear from aggrieved Canadian traders at present, then this concern should be minimal – at least in the short term. Additionally, a participation mechanism would serve as a reminder to Canadians that a formal and transparent process is available. It could be designed as a "clearly Canadian" mechanism tailored to take account of uniquely Canadian interests.

The U.S. *Trade Act of 1974*⁹, the *Uruguay Round Agreements Act*¹⁰ (URAA), and the EU's *Trade Barrier's Regulation*¹¹ (TBR) attempt to inject public participation into the contemplation of trade action at various points. Section 302(a)(1) of the *Trade Act* allows "any interested individual" to file a petition requesting that the United States Trade Representative take action. There are a number of other provisions within the *Act* promoting consultation with the petitioner. These are now supplemented by Subtitle C of the URAA, which provides for public input into the initiation, maintenance, and termination of unfair trade actions under the *WTO Agreement*. The URAA also contains explicit commitments to transparency and public access. The TBR is a more limited regulation. Complainants can only be made by industries in EU markets or by EU enterprises doing business in third countries. Decisions to initiate investigations of foreign trade practices are made on the basis of whether there is "sufficient evidence" and whether an investigation is "necessary in the interest of the Community". Whereas the U.S. scheme emphasizes consultation, the EU's examination is quasi-judicial, more akin to the detailed factual inquiry made in antidumping or countervail actions. The EU Commission subsequently makes a report to a separate Advisory Committee that may then decide to take action against the offending country. A comparison of the EU and American models suggests that the European mechanism is based on *adjudication* involving the balancing of explicit

8 As of mid-January 1999 four WTO dispute settlement panels were active against Canada, the same number as against the United States. Information is available from the *WTO Dispute Settlement State-of-Play*, available at www.wto.org/wto/dispute/bulletin.html (site visited January 15, 1999).

9 *Public Law* 93-618 (1975).

10 *Public Law* 103-465 (1994).

11 O.J. L349, p. 71 (E.C. Council Reg. 3286/94) (Dec. 22, 1994).

factors, while its American equivalent attempts to achieve *consensus* among various political and administrative interests.

Having reviewed foreign experience, the question can then be asked: if Canada were to have a public participation mechanism for WTO actions, what would it look like? Commitment to democracy and the rule of law suggest Canada's preference for an adjudicative model. The job of making an initial determination could be assigned to the Canadian International Trade Tribunal (CITT), which could eventually recommend action to DFAIT. This assignment would be consistent with the CITT's adjudicative mandate in the trade field. In some respects it might also be akin to the CITT's current role in receiving and adjudicating upon complaints regarding the federal government procurement process under the *North American Free Trade Agreement*, the *Agreement on Internal Trade*, and the *WTO Agreement on Government Procurement*. Where a positive determination is arrived at, the Tribunal has the power to recommend various remedial options against the Canadian government. In the proposal here, some modifications would have to be made to account for the fact that adjudication would be taking place over foreign, as opposed to Canadian, government measures.¹²

To the extent that CITT determinations were arrived at openly and according to objective criteria, they would depoliticize the decision to take action under the WTO DSU. A thorough review might also compel a foreign government to settle early on, given that all relevant facts would be on the table. In the end the ultimate decision would be left to DFAIT, with government possessing an independent power to initiate WTO action where necessary in the national interest.

The foregoing proposal would be consistent with public participation in other Canadian trade statutes, international agreements, and foreign practice. It would also help to infuse new legal values in a key area of Canada's contemporary international relations.

12 Under CITT regulations the government of any country mentioned in a report, complaint or extension request is defined as an "interested party" and entitled to notice in various situations. See *Canadian International Trade Tribunal Regs.*, SOR 89-35, s. 3(e).