GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

Spec(91)18/Add.1
11 June 1991

Working Party on the Free-Trade Agreement between Canada and the United States

Original: English

MEETING OF 26 AND 27 MARCH 1991

Chairman: H.E. Mr. D. Hawes (Australia)

Addendum

The following joint replies have been prepared by the delegations of Canada and the United States in response to additional questions raised during or after the first meeting of the Working Party on 26 and 27 March 1991 (Spec(91)18, Annexes I and II).

REPLIES OF THE UNITED STATES AND CANADA TO ADDITIONAL QUESTIONS RAISED AT THE FIRST MEETING OF THE WORKING PARTY ON THE CANADA-US FREE-TRADE AGREEMENT ON 26 AND 27 MARCH 1991

SECTION I-GENERAL

EC: comment on Answer I.1.4

The answer to Question I.1.4 indicates that the FTA in no way changes the rights and obligations of Canada and the United States towards third parties (contracting parties), and that should either of the FTA parties decide to settle a dispute within the framework of the General Agreement, the provisions and obligations of the General Agreement would be taken into account. However there seemed to be a contradiction between this reply and the attitude of one of the FTA parties in the context of a dispute with the other FTA partner over pork. One of the FTA parties blocked the adoption of this panel report arguing that a binational panel established under the FTA was also examining this matter. Could this be explained?

Answer

As stated in L/6739, the FTA does not affect the rights and obligations of Canada or the United States under the GATT with regard to third countries or each other. Any dispute pursued by the Parties under GATT Article XXIII will be decided according to the GATT or relevant Code. However, the United States believes that if similar issues are being addressed in dispute settlement under the GATT and the FTA, it is reasonable for either Party to consider how the results of FTA dispute settlement proceedings might bear upon the execution of its responsibilities under the GATT. Accordingly, the United States has asked that the GATT dispute settlement report on the application to pork from Canada of US countervailing duty laws not be considered by the Contracting Parties until the FTA proceedings have been completed. Canada considers that issues raised under Chapter 19 of the FTA and the GATT to be separate legal issues. Canada sees no legal basis for one issue to delay the other. Canada will continue to press for the adoption of the GATT Panel report.

Japan: Question on I.1.5

Reference has been made to the blocking by one FTA party of the adoption of a panel on a dispute with the other FTA party. We are concerned that the FTA might be made use of in this way, and about the impact this would have on the multilateral dispute settlement process.

Answer

US reply: See previous reply.

Hong Kong: Question on I.1.6

We are concerned about the fundamental question of whether, ultimately, multilateral or bilateral obligations will prevail with respect to the FTA parties. This concern relates specifically to Section XVII of L/6739 regarding the possibility of concluding a voluntary restraint agreement (VRA) under the FTA.

Answer

Strictly as between bilateral parties, the FTA partners have affirmed their existing GATT obligations; in the event of an inconsistency between the FTA and GATT, the FTA prevails between the two parties to the extent of the inconsistency unless otherwise specified in the FTA.

Japan: FTA Article 103

Article 103 of the FTA states that "the parties to this agreement shall ensure that all necessary measures are taken.... by state, provincial and local governments." This formulation is somewhat different from that in Article XXIV:12 of the General Agreement. Does Article 103 of the FTA intend to go beyond Article XXIV:12, or is it simply a question of saying the same thing with different words?

Answer

Under the wording of the FTA, the parties have the obligation to ensure that all necessary measures are taken in order to give effect to FTA provisions, including their observance by state provincial and local governments. Article 103 reflects the specific obligations incurred under the FTA. Article 103 did not alter federal jurisdiction on international trade.

SECTION II - RULES OF ORIGIN

Japan: Section II.12

The criterion stipulated in the FTA regarding circumvention seems to be simply to prevent instances "with the sole object to circumvent". What, in the view of the United States and Canada, is a situation where rules of origin are made use of "with the sole object to circumvent"? Unless clearer and more objective criteria exist beforehand, the clause "with the sole objective to circumvent" would be open to various interpretations which might adversely affect the trade interests of third parties. Do the FTA parties intend to do something about this clause?

Answer

The words "merely", "sole object", and "clearly justify" contained in Article 301.3(c) indicate that this clause is to be interpreted narrowly.

There are no instances where it has been applied. We have no plans to elaborate on this language, and each case will be dealt with on a case by case basis. Our previous response (II.12 of L/6739) provides specific examples.

Japan: Answer II.15

We have taken careful note of this answer which reads in part, "The rules of origin should not cause goods of a third party to be treated less favourably than they were prior to the FTA." However, there already seems to have been certain activity related to changing the rules of origin under the FTA, for example, regarding automobiles. In our view there is a continuing need for surveillance to ensure that the rules of origin are not altered in the months and years ahead in such a way that third parties will receive less favourable treatment that they would have received prior to the FTA.

Answer

The rules of origin are entirely consistent with the Article XXIV requirement that no new barriers be raised to third parties. The rules of origin define the qualifying United States and Canada products entitled to certain preferences and erect no new barriers to third country trade.

Switzerland: Answer II.14

Does the reference to preferential treatment mean the establishment of tariff preferences or does it have a wider meaning?

Answer

In addition to the tariff preferences, the rules of origin described in Chapter 3 are also used in the operation of Articles 403.1, 701, 702, 704, 705, 707, 708 (schedule 3a), 901.1, 1005 and 1101.1.

SECTION III - BORDER MEASURES

Australia: Section III.2

We have noted the explanation that the customs user fee was not an import tax but a fee for services. However, if this is true, why has a particular party been exempted from it? We are concerned about the connection between the issue of compensation and the concept of the GATT that the fee is paid for services rendered. We question the consistency of this provision with Article I of the General Agreement.

Answer

As described in response III.2.3 of L/6739, the United States agreed, in return for concessions incorporated into the FTA, to waive the user fee on goods originating in and imported from Canada into the United States.

The United States considered these concessions to be sufficient "compensation" to warrant its decision to waive the user fee and to bear the expense of customs services required by trade with Canada. There is no relationship between the "compensation" and any particular measure, including a fee for service otherwise maintained by Canada. The United States believes that the waiver of the customs user fee with respect to Canadian trade is consistent with GATT Article XXIV.

Japan: Answer III.2.2

This answer indicates that the cost burden will not be transferred to other trading partners? How is this ensured?

Answer

The cost is based on the total number of entries filed and estimated minimum, maximum, and ad valorem fees. Because it is applied evenly across the board, no country will bear a disproportionate burden. Fees not collected as a result of the Canada FTA exemption will simply not be collected.

Collections for the first six months of Fiscal Year 1991 (after collection of the fee had been conformed with the GATT Panel report) have dropped by 32 per cent demonstrating that other countries are not paying a disproportionate share.

EC: Answer III.2.2

This answer states that the loss of earnings resulting from the non-collection of customs user fees on goods exported from Canada will not be compensated for and that the cost burden will not be transferred to other trading partners. However, how will the cost be evaluated? One of the conclusions of the GATT panel report on Customs User Fees (BISD 35S/245) was that such a fee was not unlawful per se but that it should be restricted to the approximate cost of the service rendered. How will the United States evaluate the cost of such fees for other trading partners?

Answer

US reply: See reply to previous question.

Japan: Answer III.2.3

This answer indicates that in exchange for the waiver of the user fee on goods imported from Canada "good and sufficient compensation for the waiver" was given. If this is a necessary fee to maintain customs services, how, in the US view, is the question of the customs user fee germane to the compensation? We would like clarification on this matter. Is the United States saying that this fee can be waived solely as it relates to the FTA?

Answer

US reply: See answer to the Australian question on Section III.2.

EC: Answer III.2.4

The new legislation of the United States does not seem to be fully compatible with the GATT Panel recommendation because this new legislation did not result in the imposition of a fee corresponding to the costs of the customs services rendered for individual transactions. We have already raised this question in the Council.

Answer

The United States believes that the modifications of the Customs and Trade Act of 1990 to its customs user fees have addressed the concerns raised in the GATT panel report. Customs collection are in line with commercial costs. Any fee schedule will not reflect individual costs, but average costs. These measures are now in compliance with the United States GATT obligations.

Japan: Section III.6

How exactly is the scheme regarding export licences for short supply or conservation reasons going to be administered? If an export licence is not filled within a certain pre-determined period of time, will it be allocated to other third countries? How exactly will this mechanism of guaranteeing traditional supplies be put into effect? How do the FTA parties justify such a scheme under GATT? Conversely, why is it that guaranteeing of export licences honouring past performance is not foreseen for third countries as well? Why was this distinction between the FTA parties and third parties made?

Answer

The FTA does not mandate any particular mechanism, such as export licences, to assure that short supplies are shared equitably by the Parties. We have not had to use these provisions since neither party has curtailed exports since the implementation of the FTA. So we have not established a "mechanism". Article XXIV:8(b) envisages that "the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Article XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all trade between the constituent territories in products originating in such territories". There is no requirement to extend this to third parties.

EC: Section III.6.1

Regarding the conformity of Article 409 of the FTA with the General Agreement, how will the parties reconcile the answer in III.6.1 with GATT Article XX(j) which authorizes the use of measures in situations of shortages but provides that all contracting countries are entitled to an equitable share of the international supply of such products?

Answer

Restrictions meeting the exceptions of Article XX can be maintained in a free-trade arrangement under Article XXIV:8. Article 409 of the FTA

merely limits the scope of the application of these exceptions by the party maintaining the restriction.

EC: Textile Trade

It seems that under some textile arrangements in the FTA, 30 million square yards of fabric woven or knitted in Canada from yarns produced in third countries qualify for FTA treatment when exported to the United States for the first four years. What are parties' intentions regarding this quota? Will it be expanded or at least maintained in the future?

Answer

The 30 million square yard equivalent tariff rate quota (annex 301.2, section XI, para. 18) on Canadian exports of non-wool fabric and made-up textiles articles is scheduled to end on 31 December, 1992. The Parties agree to revisit the quantitative element of this agreement two years after its entry into force together with representatives of the industries to work out a mutually satisfactory solution, taking into account the availability of yarn in both countries.

SECTION IX - TRADE IN AUTOMOTIVE GOODS

Japan: Answer IX.2

Could Canada clarify what is meant by the statement: "The closing to new membership in the Auto Pact is similarly applied to both Canadian and foreign owned firms"? We have a number of doubts in this area. What Canadian firms are being closed out of this Pact and what other firms are being closed out? Is this in fact an m.f.n. situation?

Answer

Any Canadian or foreign company that qualified by the 1989 model year was eligible to join the Auto Pact. Since 1 January, 1989 more than 15 companies located in Canada have applied for and were denied Auto Pact status.

EC: Answer IX.1

Could the FTA parties be specific regarding to what extent the Auto Pact continues to, or will, be applied after 1998 given the fact that the duty remission scheme will be eliminated at that date?

Answer

The FTA does not affect the continuation of the Auto Pact after 1998.

EC: Answer IX.4

Does the elimination of the export-based duty remission scheme for automotive goods establish a situation that would be more restrictive than that which prevailed prior to the FTA? How do the FTA parties view this situation and its relation to their obligations under GATT Article XXIV:4 and XXIV:5?

Answer

Under Article XXIV:5(b) the applicable rate refers to the GATT bound rate; these rates have not changed.

SECTION XI - EXCEPTIONS FOR TRADE IN GOODS

Japan: Answer XI

Could the Parties clarify what is said in the second paragraph of this answer? Is there, or is there not an exemption for the Jones Act?

Answer

FTA Article 501 incorporates GATT Article III into the FTA with respect to bilateral trade in goods. Under Article 1202, however, those measures covered by sub-paragraph 1(b) of the GATT Protocol of Provisional Application are exempted from Article 501. The most recent US notification of legislation covered under the Protocol of Provisional Application included the Jones Act. It is on this basis that the Jones Act is exempt from FTA coverage in terms of trade in goods.

SECTION XII - GOVERNMENT PROCUREMENT

Sweden: Question XII:2

What are the rules of origin for the input of supplies from third countries? Are they the same as the rules of origin which apply to other areas of the FTA or are there particular rules in the procurement context?

Answer

The rule of origin requirements for government procurement are found in Article 1309.

SECTION XIII - SERVICES

Japan: Answer XIII

Article 1703, paragraph 2, of the FTA reads: "Canada shall exempt United States controlled Canadian bank subsidiaries, individually and

collectively, from the limitations on the total domestic assets of foreign bank subsidiaries in Canada..." How has this provision operated? What effects has it had or is expected to have with regard to the freer flow of services?

Answer

Prior to the introduction of the FTA, foreign bank subsidiaries were subject to an aggregate ceiling of 16 percent of total domestic assets of all banks. At the time that the FTA came into effect the actual share of all foreign bank subsidiaries (including those of US banks) was close to 12 percent. With the introduction of the FTA, the ceiling set in the Bank Act was lowered to 12 percent and US controlled Canadian bank subsidiaries were no longer subject to it.

Thus far the provision has had no apparent impact. Since the FTA was implemented, there has been little change in either the overall share of foreign bank subsidiaries in total domestic bank assets or in the relative shares of US and non-US banks.

SECTION XIV - INVESTMENT

EC: Answer XIV.2

Regarding local content requirements, did Canada, in drafting this answer, take account of the findings of the GATT FIRA panel report (BISD 30S/140) which found that certain Canadian requirements regarding local content were not consistent with the General Agreement.

Answer

Canada adopted the FIRA panel report in 1983 and is fully implementing the report as a matter of policy.

SECTION XV - DISPUTE SETTLEMENT

Sweden: Section XV generally

We know that in the FTA the Parties are trying to arrive at an automatic and enforceable arbitration system. Will the awards of the arbitration panel be nationally enforceable without having to be translated into national legislation in the country concerned?

Answer

Chapter 18 provides for binding and non-binding panels. In neither case is there a requirement that the rulings of Chapter 18 panels be "translated into national legislation". Binational panel decisions taken under Chapter 19 of the FTA are legally binding decisions in both the United States and Canada.

SECTION XVII - TRADE IN STEEL (STEEL VRA)

Japan: Answers in Section XVII

Judging from answers, the parties to the FTA seem to be of the view that since there is no current need for a VRA, it has not been sought. This statement suggests that should the need arise, such a VRA could be sought and concluded. As GATT Article XXIV calls for the "elimination of the restrictions of commerce", are the FTA parties of the view that VRAs are not a restriction of commerce in the sense of Article XXIV, and that therefore there is no obligation under Article XXIV not to enter into a VRA, or to eliminate existing VRA's?

Answer

GATT has no rulings on VRAs and to that extent it is open to interpretation whether a VRA is a restriction of commerce as defined in the context of Article XXIV. There are no existing VRAs between Canada and the US.

SECTION XVIII - OTHER QUESTIONS

EC: Answer XVIII.1

Could the United States elaborate further on the last part of this answer, that is, the manner in which the United States intends to apply the provisions of its Section 301 legislation to Canada in a manner consistent with its FTA obligations?

Answer

Under Section 301 of the Trade Act of 1974, any dispute under an international agreement (such as the FTA) is to be pursued under the dispute settlement provisions of that agreement. Under the FTA, if the United States prevails in dispute settlement and Canada fails to take steps to eliminate the measures in dispute or to provide adequate compensation, then the United States may withdraw equivalent concessions. Accordingly, Section 301 is entirely consistent with its FTA obligations.

REPLIES OF THE UNITED STATES AND CANADA TO ADDITIONAL QUESTIONS SUBMITTED SUBSEQUENT TO THE FIRST MEETING OF THE WORKING PARTY ON THE CANADA - UNITED STATES FREE-TRADE AGREEMENT ON 26 AND 27 MARCH 1991

1. We note that the response to question I.1.8 in L/6739 does not directly address the matter of quantitative restrictions, for example on dairy products. Could the parties clarify how the absence in the FTA of a provision to eliminate QRs complies with the requirements of Article XXIV:8(b)?

Answer

Article XXIV:8 is explicit in permitting measures under Article XI to remain in effect.

2. The answer to I.1.8 states that the FTA is fully consistent with Article XXIV:8(b), as substantially all trade between the Parties will be free by the end of the ten annual steps. In reaching this judgement, i.e. that the standard of "substantially all trade" would be met, can the Parties clarify what value of "trade foregone" for dairy they factored in?

Answer

See answer to the previous question.

3. How do the FTA partners intend to ensure in bilateral disputes, that their obligations in GATT are fully met?

Answer

The FTA deals with bilateral trade issues. All parties to the GATT retain their GATT rights.

4. Where GATT procedures have been used to investigate a dispute between the FTA partners, how do Canada and the US intend to ensure that the subsequent invocation of FTA procedures does not cause further delay?

Answer

See reply to the question by the EC concerning Comment on Answer I.1.4.

5. Do the FTA partners believe that third country interests in a bilateral dispute taken to GATT should await the results of a FTA panel before redress is granted?

Answer

See reply to the question by the EC concerning Comment on Answer I.1.4.

6. How would any new GATT requirements resulting from agreements in the Uruguay Round be implemented at sub-national level?

Answer

This is a matter for the Uruguay Round.

7. Compiling a comprehensive list of the standards related activities of all sub-national authorities is unfeasible. However, in the interests of transparency, would the FTA parties consider listing the general areas in which such standards setting is likely to apply?

Answer

At the sub federal level, such a listing would encompass every category of technical standards regulated at the sub-federal and local levels. It is not possible to itemize all such categories. However the major items include electrical standards, housing standards, product safety standards, food safety standards and other categories. Signatories to the Agreement on Technical Barriers to Trade (TBT) and other interested Contracting Parties are able to obtain information on specific standards-related questions pertaining to sub-federal and local government activities via the respective enquiry points established under the terms of the TBT agreement.

8. With reference to the provinces which apply a cost-of-services differential is it intended that in order to provide for a complete transparency these audits will in future be carried out by an independent body?

Answer

The audits have been carried out in every case by an independent body.