

November 10, 2017

The Honourable Chrystia Freeland
Minister of Foreign Affairs
Global Affairs Canada
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario. K1A 0G2

RE: NAFTA Consultations - New Perishable/Seasonal Trade Remedy Provisions

Dear Minister Freeland,

I am writing on behalf of the Ontario Fruit and Vegetable Growers Association (OFVGA) to express our membership's concern regarding a recent U.S. proposal tabled during the NAFTA negotiations for new trade remedy authorities to address perishable and seasonal goods. The U.S. has also proposed the elimination of recourse to NAFTA Chapter 19 bi-national panels.

These two developments, along with U.S. criticism regarding the ongoing oversight role of World Trade Organization (WTO), suggests a concerted effort to establish trade remedy and dispute settlement processes under the revised NAFTA that preferences U.S. domestic law over international trade rules. If successful, the direction of these proposals would serve to extinguish any sense of objectivity or fairness in the enforcement proceedings established under a revised NAFTA.

New Perishable/Seasonal Trade Remedy Provisions

We understand that this is not a new proposal. The U.S. first raised this matter formally in 2006 during the World Trade Organization (WTO) Uruguay Round negotiations. At that time, the US entered a submission advocating for special trade remedy provisions for perishable and seasonal agricultural products, arguing that producers were uniquely challenged to obtain meaningful relief from injurious dumping or counter-vailable subsidization.¹

¹ *Definition of Domestic Industry for Perishable, Seasonal Agricultural Products*, Communication from the U.S. to the Negotiating Group on Rules, World Trade Organization, TN/RL/GEN/129, 24 April 2006.

We presume that the recent U.S. NAFTA proposal is similar to the 2006 WTO submission, which sought to create a special fast-track process for investigating fruit and vegetable imports. The proposed provision would allow seasonal growers to qualify for standing despite not representing 51 percent of the defined industry, where production is sold raw and the marketing season does not last longer than eight weeks after harvesting.

Our key concern is that acceptance of this proposal would offer regional grower organizations greater ability to trigger anti-dumping (AD) and countervail duty (CVD) investigations, thereby allowing greater latitude for frivolous and harassing investigations based on narrow, regionalized circumstances.

It appears that in bringing this proposal forward, the U.S. negotiating team is reacting to pressure from Florida, Georgia, and California growers seeking greater protections from import competition on such goods as tomatoes, avocados, bell peppers, watermelons, strawberries and blueberries. The target of this initiative appears to be Mexican product. There is a concern, however, that the availability of expanded AD/CVD investigative provisions involving seasonal and perishable products would establish a trade remedy tool available to all, and may invite similar protectionist considerations (and reactions) in other areas of trade involving fresh fruit and vegetables.

Allowing expanded trade remedy powers and authorities to be triggered at the whim of a small group of regional producers has the potential to be severely disruptive to the intricate supply chain networks between producers, distributors, wholesalers and retail that have evolved under the existing NAFTA.

U.S. Dispute Settlement Proposals

The perishable/seasonal trade remedy proposal should be considered in combination with the U.S. proposal to dilute the dispute settlement mechanisms of the current NAFTA. Of particular concern is the U.S. proposal to eliminate NAFTA Chapter 19, which provides for independent bi-national panel review of AD and CVD decisions.

NAFTA Chapter 19 offers an important avenue to appeal the results of domestic AD and CVD determinations before an independent binational panel. This is preferable to resorting to the U.S. domestic court system for review, given that NAFTA Chapter 19 panels consider international law and international precedents whereas the U.S. courts tend to be more focused on consistency with U.S. law.

An example of the stark difference that can result depending on venue choice is the differing approaches between NAFTA panels and the U.S. courts when reviewing the

U.S. Department of Commerce's practice of "zeroing" out non-dumping margins when calculating whether dumping has occurred over the course of an investigation period. The World Trade Organization (WTO) has found the DOC practice to be inconsistent with international trade obligations; NAFTA panels tend to follow international precedent and have tended to reverse U.S. agency determinations of this nature. Only the U.S. courts tend to uphold the practice of 'zeroing'.

Conclusion

The U.S. proposal for new perishable and seasonal trade remedy provisions risks providing select U.S. growers with greater opportunity to launch frivolous, politically-driven AD/CVD investigations. The simple announcement of an AD/CVD investigation alone tends to cause a chill on trade flows, offering a win in-and-of-itself for protectionist interests.

The lack of objective scrutiny to review U.S. AD/CVD determinations against international trade obligations through a bi-national panel only adds to the perception that the U.S. is seeking to rig the dispute settlement features of a revised NAFTA to heavily favour U.S. producer interests.

Since there is no recognition of special perishable/seasonal trade remedy provisions in existing WTO trade remedy law, acceptance of the U.S. proposal would potentially place NAFTA 2.0 at odds with international trade obligations. It is therefore conceivable that the new NAFTA would include a specific reference to supersede the WTO agreements or bar resort to the WTO for review or appeal purposes.

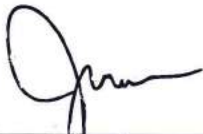
Taken together, the concern is that the combination of these U.S. proposals and potential direction to insulate trade remedy calculations and enforcement from accepted international practice, injects a glaring lack of objectivity and fairness in how trade relations are to be governed under a revised Agreement. It would be completely counter to advancing ongoing sector-wide competitiveness if critical components of the revised NAFTA were weighted to heavily favour the interests of a select group of regional U.S. growers.

We ask that the Government of Canada be very cautious in contemplating each of these proposed changes, with particular attention to the aggregate effects that would result if all were accepted. If considered against the principle of "do no harm", it is our position that the proposals discussed above along with any marginalization of WTO oversight should be flatly rejected.

Thank you for considering our concerns regarding these recent developments in the NAFTA negotiations. The OFVGA would be pleased to meet with you and provide further information on any of the above issues as required.

I and members of my executive have had the good fortune to meet with members of your very able NAFTA negotiating team in Ottawa on October 25th. We look forward to continuing these strong working relations with your office.

Sincerely,



Jan VanderHout, OFVGA Chair

cc. The Honourable Lawrence MacAulay
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NAFTA Consultations

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About the OFVGA

The Ontario Fruit and Vegetable Growers Association (OFVGA) was established in 1859, which makes it one of Ontario and Canada's oldest farm commodity organizations. As the voice of Ontario's fruit, vegetable and greenhouse farmers, the OFVGA is a nationally recognized not-for-profit association that advocates on behalf of Ontario fruit and vegetable farmers and the edible horticulture industry.

The sector supports 30,000 farm-based, non-family jobs in Ontario, as well as a further 8,700 jobs specific to horticulture and specialty crops. Over 125 different fruit and vegetable crops are grown in Ontario, registering an estimated annual farm gate value of \$1.6 billion (2013).