# TRADE POLICY DEVELOPMENTS

## CANADIAN TRADE LAW DEVELOPMENTS: REVIEW OF RECENT ANTI-DUMPING DECISIONS

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Several recent investigations and inquiries pursuant to the provisions of the Special Import Measures Act (SIMA) have resulted in findings which are precedent setting. This reviews analyses decisions by:

1) The Canadian Import Tribunal respecting the definition of the industry engaged in the production of "like goods" in the inquiry into imports of subsidized boneless manufacturing beef from the EEC (EEC Beef CIT-2-86).

2) The Canadian Import Tribunal in its first inquiry under section 90 of SIMA to determine who is the importer of photo albums from China (Photo Albums IR-1-86).

3) The Canadian Import Tribunal's split decision on retroactive imposition of anti-dumping duties in drywall screws from Taiwan (CIT-1-86).

4) The decision of the Deputy Minister of Revenue Canada, Customs and Excise to terminate an anti-dumping investigation regarding pressure cleaners imported from the USA on grounds that dumping duties in the amount preliminarily determined would not have eliminated injury to production in Canada of like goods. (Pressure Cleaners 4255-61-September 2, 1986).

### EEC Beef

A central preliminary issue in this inquiry was to determine who were the producers in Canada of boneless manufacturing beef - the subject goods of the inquiry.

Before determining whether or not the subsidizing of imports of the subject goods was causing or was likely to cause material injury to the production in Canada of like goods, the Tribunal was required to rule on the issue whether the complainants, the cow-calf producers and feedlot operators represented by the Canadian Cattlemens Association (CCA) properly formed part of the industry producing "like goods".

It is generally accepted that producers accounting for a major proportion of production in Canada of goods "like" those being imported have standing to make a case for material injury. In dumping cases, subsection 42(3) of SIMA refers to Article 4 of the GATT Anti-dumping Code, incorporating into Canadian law in dumping cases paragraph 1 of the following direction:

1. In determining injury the term 'domestic injury' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products...

While a similar express statutory provision is not made for subsidizing cases, the Tribunal concluded that common sense dictates its acceptance.

The Tribunal in virtually all cases under SIMA, and under its predecessor the Anti-dumping Act had examined the impact of import competition on producers of like goods, or producers of the product which was "like" those imported. Like goods are defined pursuant to section 2(1) of SIMA as

> "like goods", in relation to any other goods,
> means
> (a) goods that are identical in all respects to the other goods, or
>
> (b) in the absence of any goods described in paragraph (a), goods the uses and other characteristics of which closely resemble those of the other goods.

In argument Counsel for the Canadian Cattlemen's Association focussed on what constituted production in Canada, claiming that it began with the cow and ended with boneless manufacturing beef, and that within the chain of production those engaged in a variety of activities could constitute a major portion of the production in Canada of the subject good. Counsel for importers and exporters attempted to convince the Tribunal that they should only be concerned about the producers in Canada of like goods, that is the final product, boneless manufacturing beef.

In the statement of reasons confirming that the CCA members represented a major portion of production in Canada. The Tribunal reviewed prior decisions on this issue by the Deputy Minister of Revenue Canada and Mr. Justice Strayer of the Federal Court. The Deputy Minister (DM) accepted the complaint concerning imports of subsidized boneless manufacturing beef from the EEC on the basis of the representations of the CCA that the production process for boneless manufacturing beef consists of a single continuous line of production starting with one raw material (the cow) which yields only one commercially significant end product, namely boneless manufacturing beef.

In the DM's Statement of Reasons accompanying the Notice of Investigation he found:

> Approximately 66 percent of low-grade beef produced in Canada is sourced from cows and bulls culled by cow-calf operators (represented by the CCA). At the wholesale level, the value of the live animal used to produce beef constitutes 66 per cent of the value of the beef sold. Consequently, the CCA represents 44 per cent of the Canadian industry producing low-grade beef. This is considered to be a major portion of the industry.

Upon review of these reasons the Tribunal commented:

> This is a novel approach to the identification of the industry concerned in the production of the like goods found to be subsidized. It involves acceptance of a joinder of disparate production functions into one industry. The problem is a new one for the Tribunal as well.

Counsel for an importer and the Irish exporters took the position that the members of the CCA were not producers of boneless manufacturing beef, and consequently had no standing to bring a complaint of material injury to their production. The importer (Ronald A. Chisholm Ltd.) had referred the matter to the Federal Court of Canada (Trial Division) pursuant to section 18 of the Federal Court Act before the matter was heard by the Tribunal. The Application on behalf of Chisholm to quash the preliminary determination made by the Deputy Minister was dismissed.

On the particular issue of production in Canada Mr. Justice Strayer said:

> The applicant (importer) herein complains that the Deputy Minister focused on the raisers of livestock as the 'industry', rather that the processors of such beef, in considering 'material injury'. I need not determine if the Deputy Minister's approach is the best or the only one possible in the application of subsection 31(1), but I cannot see why it is not a permissible approach. By the definitions in section 2 of the Act the 'material injury' must be to the production in Canada of 'like goods'. If he must have regard primarily to the processing of meat in Canada, it appears to me quite relevant that anything inhibiting the raising or marketing of animals in Canada suitable for manufacturing beef will have the effect of reducing the amount of such beef processed here. Keeping in mind at all times that we are in this motion dealing with a decision to undertake an investigation, it is impossible for me to say that such considerations as are reflected in the Deputy Minister's reasons of October 18th are completely unrelated to the concepts in section 2 and section 31 of the Act...

The Tribunal also considered precedents of the United States International Trade Commission (USITC) in agricultural cases. The USITC, the Tribunal noted, appears to require, as conditions precedent to a determination of injury in agricultural cases, that two tests be satisfied: that the raw product being considered enter into a single line of production resulting in the processed product, and that there be a substantial degree of economic integration between growers and processors, with emphasis on the relationship between the two groups. (Of particular interest: Lamb Meat from New Zealand, USITC publication 1191, November 21, 1981; Frozen Concentrated Orange Juice from Brazil, USITC publication 1283, September 1982; Live Swine and Pork from Canada, USITC publication 1733, July 1985).

The Tribunal found merit in the comments, in a dissenting opinion, of Vice-Chairman Susan W. Leibeler (now Chairman) in pork from Canada where she expressed some criticism about the adoption of the second test. She said:

> In determining whether there is the requisite degree of economic integration, the Commission looks at the legal relationship between the growers and packers. This make little economic sense. The share of the injury incurred by the growers will depend on the share of their product that goes into the final product and the relevant elasticities of supply. It has nothing to do with the form of the contract between the growers and the packers. If the packers' supply curve is infinitely elastic, then all of the injury will be passed to the growers. Individuals combine into firms, and firms expand their operations into other areas for a variety of reasons. It is clear that these legal relationships have nothing to do with the incidence of the injury.

The Tribunal affirmed that reasoning of the Deputy Minister where he proceeded on the basis of a condition very similar to that of the first of the USITC tests. The second could not apply as in Canada there is no legal relationship between cow-calf operators and boners of cattle, although there is a close economic interdependency.

In reviewing a number of familiar Canadian court decisions which were cited on the question of what can constitute production for the purposes of the Excise Tax, the Tribunal acknowledged:

> There is little doubt that the boning operation can be considered "production" within the meaning of those decisions and for that purpose...
>
> Nor is there any doubt that the slaughtering operation can be considered a distinct production process.

In the determination of who constitutes the industry the Tribunal weighed the interpretation advocated by the importer, that only the boners are entitled to complain about the subsidized

EEC entries, and the contention of the complainant that slaughtering and boning are simple links in the chain of production.

On balance, the Tribunal favoured the position taken by the cattlemen as being more in accord with the purposes of the statute than the narrow interpretation urged by the importer. The Tribunal held:

> manufacturing grade beef is an intermediate agricultural product for processing into something else. It can be viewed as being cut from the beef carcass as grapes are taken from the vine, or sugar cane cut in the fields, or apples plucked from the tree. There has been no radical transformation of the raw product, as from grapes into wine, or sugar cane into refined sugar, or apples into cider. This transformation only takes place when the manufacturing grade beef has been processed.

## Photo Albums

In the Canadian Import Tribunal's first inquiry pursuant to section 90 of SIMA on the question:

> "which of two or more persons is the importer in Canada of the goods"

it held:

> The simple designation of a person in the customs entry form as the importer may make him the importer of record, but it is open to question whether he is, in reality, the importer.

On the facts of the photo albums from China case the Tribunal determined that the importer of record Climax Products Ont., was not the real importer. The domestic purchaser, London Drugs, which placed the purchase order with Climax, and which directly received the subject goods through customs agents, and which held title to the goods was found "in reality, (to) be the importer of the goods".

A brief review of the facts of this case will outline the context in which the Tribunal was called upon to determine the question of importer.

- On February 14, 1986, the Tribunal found that the dumping into Canada of photo albums from China has caused, was causing and was likely to cause material injury to the production in Canada of like goods.

- About October 29, 1985, a shipment of such goods originating in China was released from Canada Customs to London Drugs. The importer described in the documentation was Climax. London Drugs was identified by the Deputy Minister as the importer of the dumped goods.

- On April 2, 1986, a Customs officer informed London Drugs that it had been deemed, in reality the importer of the subject goods and was liable for payment of any anti-dumping duties which might be assessed.

The Tribunal took notice of judicial precedents cited by counsel for the Deputy Minister, in particular *Her Majesty the Queen v Andrée Denise Pharand*, an unreported judgement of Teitelbaum J. of the Federal Court of Canada, Trial Division of March 20, 1986. *In that case the point was made that with the enactment of the Special Import Measures Act in 1984, a definition of the word "importer" was introduced which stressed realities and which imposed the anti-dumping duty liability on the person who was drawing a competitive advantage domestically from trading in dumped goods. (Emphasis added).*

The Tribunal heard from the submission of counsel for London Drugs that the purchase order placed by London Drugs was placed with Climax Products and that a representative of Climax

assured London Drugs that Climax would act as the importer of record. According to the agreement London Drugs would not incur liability for the payment of anti-dumping duties in the event these became payable.

While Climax acted as the importer of record, the Tribunal found that the representative of Climax at times acted as a sales representative, never as a principal. Not only did he have no other place of business than his home, he never took title to goods, he did not buy to resell, nor did he operate an inventory. His efforts were simply rewarded with a commission.

In the reasons for judgment the Tribunal commented:

> To accept, as the importer of the goods in question, Climax would be to accept a fiction. To designate the representative personally as the importer of the goods on the basis of alleged misrepresentation or other misfeasance is not within the power of this Tribunal...
>
> In the present case, it is clear that when London Drugs placed its purchase order, it knew that the goods would be sourced in China... In all the shipping documentation the goods are identified or marked for London Drugs by its purchase order number, and at the end of the road the goods were received directly by London Drugs through customs agents. Title to the goods moved from the foreign vendor to the domestic purchaser, London Drugs. No person in Canada other than London Drugs could, in reality, be the importer of the goods, and the Tribunal so rules.

The Tribunal's statement in this case clearly indicates that in an inquiry on a question of fact the Tribunal will stress the realities of the transaction.

## Drywall Screws

In this inquiry the Tribunal was asked to determine whether the imports of drywall screws from Taiwan justified the imposition of retroactive duties pursuant to SIMA 42(1)(b).

In view of evidence on the record, that importers simply shifted their purchase to new sources as soon as anti-dumping duties were imposed on an existing source, counsel argued for the discipline of retroactive duties to discourage such "serial" dumping.

However, the majority of the panel was not persuaded that the retroactive duties provided for in the section should be imposed, even though it might accept that the importations from Taiwan can be considered massive.

Section 42 states:

> 42.(1) The Tribunal, forthwith after receipt by the Secretary pursuant to subsection 38(2) of a notice of a preliminary determination of dumping or subsidizing in respect of goods, shall make inquiry with respect to such of the following matters as is appropriate in the circumstances, namely,
>
> . . .
>
> (b) in the case of any dumped goods to which the preliminary determination applies, as to whether
>
> (i) either
>
> (A) there has occurred a considerable importation of like goods that were dumped, which dumping has caused material injury or would have caused material injury except for the application of anti-dumping measures, or
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> (B) the importer of the goods was or should have been aware that the exporter was practising dumping and that such dumping would cause material injury, and
>
> (ii) material injury has been caused by reason of the fact that the dumped goods
>
> (A) constitute a massive importation into Canada, or
>
> (B) form part of a series of importations into Canada, which importation in the aggregate are massive and have occurred within a relatively short period to time, and it appears necessary to the Tribunal that duty be

> assessed on the imported goods in order to prevent the recurrence of such material injury...

The majority of the Tribunal was of the view that, given the finding of material injury against Taiwan and given that imposition of a dumping duty in the margins found would, in all likelihood close the domestic market to Taiwanese drywall screws, it did not appear to them necessary that the retroactive duty be assessed "in order to prevent the recurrence of such material injury."

In a partial dissent, Member Perrigo reviewed the facts of the instant case noting:

> During 1985, imports from Taiwan increased by 310 million screws, by itself an amount significantly greater than total Canadian production and total Canadian sales volume in that year. This increase almost doubled Taiwan's market share in that year. Furthermore, Taiwanese screws climbed from market share parity with the Canadian industry in 1984 to a share 2 1/2 times as large as that of the Canadian industry in 1985. The scale and the rapidity of market penetration in 1985 was substantial. Accordingly, for the purpose of subparagraph 42(1)(b)(ii), I am persuaded that dumped imports from Taiwan "form part of a series of importations in Canada, which importations in the aggregate are massive and have occurred within a relatively short period of time", and that these imports caused material injury.

Member Perrigo, concluded that:

> It appears necessary ... that duties be assessed on the imported goods to prevent the recurrence of such material injury.

This provision of the Act (section 42) contemplates circumstances in which there is a likelihood of a recurrence of material injury. Also, it provides for a penalty to discourage that recurrence, namely, the imposition of additional (i.e. retroactive) anti-dumpting duties on importers.

Perrigo focusses on the purpose of the discipline of the imposition of retroactive duties pursuant to section 42. Perrigo offers a reasoned case for the application of this section to Taiwanese imports as a preventative measure to the continuing offshore sourcing of dumped goods. He stated:

> With respect to the likelihood of a recurrence of material injury, I am persuaded that there is a clear prospect of this. It is noteworthy that there is already a pattern of recurrence of material injury to this industry, both actual and prospective. Immediately after a finding of material injury against drywall screws from Japan and Singapore, imports from Taiwan surged, and after only one year of recovery, the Canadian industry once again faced injury, this time from dumped product from Taiwan. More recently, immediately following the commencement of the Deputy Minister's investigation respecting the dumping of Taiwanese screws, there was a noticeable shift to Korean screws on the part of some importers. The Tribunal's perception of the threat from Korea and of the vulnerability of the Canadian industry has been sufficient to persuade it to direct the Deputy Minister, pursuant to section 46 of the Act, to cause an investigation to be initiated with respect to that source.
>
> So far, the industry's concerns have focussed first on Japan and Singapore, then on Taiwan, and now Korea. However, these are not the only offshore sources of drywall screws. Importers have already demonstrated their alacrity in switching to other lower-cost sources after anti-dumping measures have been applied or threatened against their established suppliers--not once, but twice. Accordingly, there is good reason to anticipate that importers will continue to "play musical chairs", i.e. switch to new low-cost sources of screws, unless penalized to a greater degree than in the usual run of anti-dumping cases. This measure of prevention is necessary in order to permit the Canadian industry to achieve the recovery that I believe is contemplated by the Act.

The implications of this decision will be far reaching, as importers may seek out new sources, benefiting from "one free bite" in each source.

## Pressure Cleaners

The issue of a causal relationship between the dumping of imported goods and injury to the Canadian producer was considered in some detail by the Deputy Minister, Revenue Canada, Customs and Excise in pressure cleaners from the USA.

The Deputy Minister in his statement of reasons in support of terminating the investigation concluded:

> Citation's (the Canadian complainant) injury as evidenced by loss of sales and market share and underutilization of capacity is continuing. However, there is a lack of evidence that such injury is due to the dumping. It is understood from DSS (the Department of Supply and Services, the Federal Government's procurement agency) that in the evaluation and award process pertaining to these goods, the lowest bid is accepted from those tenders which have been judged as satisfying the technical specification with no other criteria for award being considered. On this basis, had the margin of dumping found in respect of the sale of the subject goods been added to the importer's acquisition cost, the resulting bid would still have been such as to preclude the awarding of the contract to the complainant.
>
> **It is suggested that the complainant's inability to compete with Alkota (the US exporter) with respect to the subject goods is due to factors relating to production and pricing as opposed to the dumping.** *(Emphasis added).* Given the lack of evidence of a causal link between the margin of dumping and the injury sustained by the complainant, it is the Department's intention to terminate the investigation on the basis that the evidence does not disclose a reasonable indication that the dumping has caused, is causing or is likely to cause material injury or has caused or is causing retardation.

It is unusual for the Deputy Minister to terminate an investigation when the subject goods are found to be dumped. In the instant case the estimated margin of dumping was 11.71 percent of the normal value, which is far from insignificant. However, in recent months, the Deputy Minister's statements of reasons have become much more detailed than in the past (notably CTV from Korea and Spandex Yarn from Korea), particularly when denying complainants what they have sought.

## U.S. TRADE LAW DEVELOPMENTS

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### Legislative Trends

A recent U.S. study found that 782 trade bills and resolutions had been introduced in Congress by the end of June, 1986. The study revealed that the bills containing trade protectionist measures exceeded those proposing liberalizing measures. Almost one-third (248) of those bills contained explicit protectionist language while 184 claimed to liberalize trade. In addition, the study revealed that one out of every four bills contains trade restrictions for political rather than economic purposes (e.g. South Africa).

Canada and Japan were found to head the list of countries that would be most affected by the trade bills. The measures affecting Canada included 70 bills with explicit protectionist provisions, plus another 70 bills that would threaten a number of natural resource-intensive manufactured goods with countervailing duties, 34 trade liberalizing bills, and bills regarding negotiating authority. While many of these protectionist bills are not meant to be passed, several have received serious consideration, and others could be attached to other measures swept along on the current tide of protectionist pressure.

## Omnibus Trade Legislation

Although the Senate Finance Committee held hearings regarding omnibus trade legislation in August, it now seems clear that no trade bills will pass this year. The likelihood of passing a trade bill this year diminished significantly as Congress put more attention on passing a tax bill. All trade legislation appears to be dying as this Congress is about adjourn without taking action. Senate Majority Leader Bob Dole (R-KA) does not believe a trade bill will pass this year, but he feels the pressure on the Administration will continue. It is likely that all the trade-related proposals will be considered when the new Congress convenes in January, 1987.

Because time was running out for action this year on omnibus trade legislation, several members of the Senate Finance Committee had been considering a "watered-down" or less controversial version of the current Bill (S 1860) which would be acceptable to the Senate and the Administration. The Administration may have to make some concessions towards protectionist legislation to extend authority for the U.S. to negotiate a new round of multi-national trade talks. Senate sources doubt that Senator Dole will send a trade bill to the floor unless it is clear that it would pass in a few days. Although the Senate Finance Committee will probably report out a bill, the chances of getting a bill to the floor appear to be fading.

Nevertheless, anything can happen quickly in Congress and the Senate could approve a trade bill in a short time if it wishes. The record high trade deficit will continue to place pressure on Congress for protectionist legislation, particularly in a mid-term election year.

With respect to the trade deficit, Department of Commerce figures indicate that the U.S. foreign trade deficit reached $14.17 billion in June 1986 despite an increase in U.S. exports. This deficit roughly equals the level reached the previous month. Notwithstanding the recent devaluation of the U.S. dollar, Commerce analysts predict a deficit between $160 and $170 billion this year compared to last year's deficit of approximately $150 billion.

## Section 301

Appearing before the Senate Finance Committee July 22, USTR Clayton Yeutter criticized proposals contained in the House of Representatives' omnibus trade legislation (HR 4800) to amend Section 301 of the *Trade Act of 1974*. These proposals call for mandatory retaliation and self-initiation, transfer of administrative authority, and expansion of the list of actionable unfair practices. Yeutter stated that these provisions would harm U.S. interests by reducing the President's flexibility in solving trade disputes. Several Committee members contended that the proposed changes are necessary to guarantee that the rights of U.S. industries are protected and criticized the Administration's record with regard to the use of Section 301.

## Antidumping Law: Private Right of Action for Damages

The Senate Finance Committee considered a proposal for a private right of action for damages against dumping at a hearing July 18, 1986. The proponents claimed that damages are necessary to not only offset the injury caused by dumping, but also to serve as a deterrent. The opponents emphasized that such a proposal would permit the recovery of damages against foreign suppliers for behaviour (sales below fully allocated cost, but not necessarily sales at predatory levels) not the subject of

damages against U.S. producers, and also emphasized the prospects of retaliation (since U.S. companies are among the leading subjects of anti-dumping charges in Europe, Canada and Australia.)

Senator Arlen Specter (R-PA) plans to take his private remedy bill (S 1655) to the floor after the summer recess. Lawmakers in both parties give Specter's bill little chance to pass for they consider it too wide-ranging in the way it treats private remedies and incomplete in its exclusions of a multiple offender title.

Meanwhile, it appears that a bipartisan proposal is currently being drafted. Congressional sources claim that the Administration finds this approach to be "less objectionable" because it makes the private right of action dependent on a third conviction for dumping within a 10 year period. In addition, the drafters are attempting to address the Administration's objection that a private right of action is illegal under GATT. Senator Danforth (R-MO) proposes to restrict private party remedies to cases where predatory pricing is involved. He asserts that this would be legal under the GATT because it merely extends domestic law internationally. Senator Specter has not accepted this proposal.

The draft legislation, like all other trade legislation appears to be finished for this Congress, but will be considered by the new Congress in January 1987.

## The Fairness in Competition Act

On July 31, 1986 Rep. Thomas N. Kindness (R-Ohio) introduced a bill (HR 5304) which could allow U.S. companies who are harmed by foreign export subsidies to sue foreign exporters of subsidized goods for injunctive relief and treble damages. Kindness stated that the measure is necessary to enable private parties "to assert their right to a level trading plan.

The bill would amend the *Clayton Act* by adding a section forbidding imports or sales of subsidized foreign goods that would cause or threaten "material injury" to industry or labour or would prevent "the establishment or modernization of any industry" or "would result in a monopoly or restraint of trade." In addition, the bill would prevent a foreign government from claiming immunity by arguing that a subsidy is an "act of state."

Under this bill, the definition of subsidy would include rebates, repayments, offsets of, credits against, taxes or tax liabilities levied or assessed or the value of articles "made by reason of the exportation of those articles". The bill would address the common practice of rebating the 'value added tax' on products for export.

## Anti-Mercantilism Act

On July 21, 1986 several members of the Senate Finance Committee introduced legislation (S. 2660, the *Anti-Mercantilism Act*) which addresses the problem of non-commercial unfair trade by state enterprises. In a Senate Finance International Trade Subcommittee hearing, proponents of the bill claimed that the problem is growing and that the rules under GATT do not effectively deal with the practice.

The bill provides that state trading practice which burden U.S. trade or commerce is actionable under Section 301 of the *Trade Act of 1974*. It also gives the President discretion to impose quotas on imports by or from state trading firms if the ITC finds that the U.S. industry has been harmed and that the state trading firm has not acted solely in accordance with commercial considerations as spelled out in the bill (which appears to go beyond Article XVII of the GATT).

Although the Administration acknowledges that there is a problem, it will not support the bill as it is currently drafted. The Administration is especially opposed to any provision which deals with non-market economy trade. In addition, the Administration contends that the bill could violate U.S. obligations under the GATT.

The Subcommittee considered marking up the bill, but no action was taken. This legislation will likely be considered by the new Congress as well.

### National Security Trade Act

On August 13, Senator Robert Byrd (D-WVA) and Senator William Roth (R-Del) introduced a bill (S 2755) which would tighten provisions of the national security trade statute, (Section 232 of the *Trade Expansion Act of 1962*) in an attempt to ensure that America's dependency on foreign imports does not threaten U.S. national security. The Senators contend that the current law is not adequate to ensure that U.S. projected national defense requirements are met by domestic production. The bill would establish deadlines of six months for the Commerce Department and 90-days for the President for actions in Section 232 cases, as well as formalize the role of the Secretary of Defense in this process. In early August, Byrd tried unsuccessfully to attach a similar provision to the 1987 Defense Department authorization bill.

### Intellectual Property Rights

According to Senator Frank Lautenberg (D-NJ), the Senate will likely pass legislation (S 1869) which will remove the injury requirement of Section 337 of the *Tariff Act* and bar imports of products made abroad with a process patented in the U.S. Lautenberg asserts that infringement of intellectual property rights is injury in and of itself because U.S. exports are hurt when a second country exports a U.S. -patented product to a third country. According to Lautenberg, the U.S. "must withdraw trade benefits from nations that deny adequate and effective intellectual property rights protection".

## Trade Law Actions

### Canada

The Department of Commerce is currently investigating alleged subsidies of softwood lumber products and fresh cut flowers from Canada. Commerce will make its preliminary determination for lumber products by October 16, 1986 and for flowers by October 20, 1986.

In addition, Commerce is investigating alleged dumping of fresh cut flowers and brass sheet and strip for Canada. Commerce will make its preliminary determination on flowers by October 28, 1986. In its preliminary determination dated August 18, 1986, Commerce found that Canadian producers of brass sheet and strip were dumping by a margin of 1.56 -11.89%. Commerce will make its final determination by October 31, 1986.

### Japan -- Semiconductors

On July 31, the Reagan Administration announced an agreement with Japan to enhance the sale of U.S. semi-conductors to Japan and to prevent dumping of chips by the Japanese in both U.S. and third markets. The Administration suspended the pending antidumping cases and the Section 301 investigation as a result of the agreement.

The agreement is remarkable in two respects. First, the Japanese government in effect has guaranteed a share of private Japanese companies' purchases of semiconductors to private U.S. companies -- it remains to be seen how that guarantee can be made good if not accomplished by market forces.

Second, and more far-reaching, the U.S. and Japanese governments have agreed to set the price levels at which Japanese semiconductors will be sold in the U.S. and all third countries. This raises interesting competition policy questions for those third countries. The European Economic Community has already expressed its concern about both the "market share" and "third country" aspects of the agreement.

## U.S. - Canada Trade Talks

U.S. and Canadian negotiators stated that they were pleased with the progress made at the third preliminary round of free trade talks held at Mont Tremblant in Québec on June 29-31. Neither side publicly discussed the talks in any detail but it was understood that the U.S. raised agricultural issues, and Canada's immediate concern was "contingency protection" -- a means to protect Canadian exports from U.S. trade sanctions.

Peter Murphy, the chief negotiator for the U.S. met with two House Subcommittees on August 12 to discuss the progress that has been made in the free trade talks since they opened last spring. Murphy emphasized that so far the negotiations have only dealt with general approaches to the trade negotiations, but he soon expects to deal with substantive issues. He asserted that no issues are exempted from consideration, and said he hopes to produce a final product that is acceptable to both the Congress and to the U.S. private sector, but warned that if an agreement is not reached with Canada, "we will be in the worst possible situation".

The Administration is under great pressure to complete negotiations by September 1987 to ensure that both countries have time to approve an agreement before January 1988 when the Administration's fast-track authority runs out. If fast-track authority runs out, it would be quite difficult to achieve an agreement because any agreement made could be altered unilaterally by Congress; whereas with fast-track authority, Congress can only approve or reject such an agreement. Therefore, the President would probably have to ask Congress to extend fast-track authority for another year. To get Congressional approval, the Administration would then probably have to make concessions on protectionist legislations.

Sources close to the negotiations doubt that such a comprehensive agreement can be completed within a year. Many observers point out that the two countries have not yet even come up with an agenda and that serious negotiations won't even start for several months. In addition, USTR negotiators are waiting for an analysis by the ITC on the economic impact of a free trade agreement which will not be ready until the end of the year.

Two more preliminary rounds of talks which occurred in late August and September were designed to put a detailed framework in place for the start of hard specific negotiations, expected to begin this fall.

Meanwhile, the United States Trade Representative and the International Trade Commisssion have both scheduled hearings on the effects of a U.S./Canada Agreement.

## USTR and ITC Hearings

On July 10, 1986, the United States Trade Representative ("USTR") published in the Federal Register a "Notice of United States-Canada Trade Negotiations, of Articles which May Be Affected by Such Negotiations, and of Public Hearings Relating to Such Negotiations". The Notice indicated that USTR was requesting advice from the International Trade Commission ("ITC") which would entail hearings, and announced that the USTR. Trade Policy Staff Committee would hold hearings on September 8, 9, and possibly 10, 1986.

### The USTR Hearings

The Notice stated that parties wishing to testify orally at the hearing must provide written notification of their intention by August 18, 1986, and that parties presenting oral testimony must submit 20 copies of a complete written brief by August 26, 1986.

The Notice further provided that written comments should be submitted in 20 copies no later than September 15, 1986 in conformity with Trade Policy Staff Committee regulations for written submissions.

### The ITC Hearings

In its July 10, 1986 Notice in the Federal Register, USTR stated that it was requesting advice from the ITC in the following terms:

> In connection with these negotiations, the USTR is requesting the ITC to conduct an investigation, pursuant to Section 131 (b) of the Trade Act of 1974, and provide advice within six months, with respect to each item listed in the Tariff Schedules of the United States, as to the probable economic effect of providing duty free treatment for imports from Canada on industries in the United States producing like or directly competitive articles and on consumers.
>
> Pursuant to section 131 (c) of the Act, the USTR is requesting ITC advice as to the probable economic effects on domestic industries and purchasers and on prices and quantities of articles in the United States if the U.S. non-tariff measures listed in Annex 1 to this notice were not applied to imports from Canada.
>
> Pursuant to Section 332 (g) of the Tariff Act of 1930, the USTR is requesting the Commission's assessment of the degree to which U.S. exports to Canada may be expected to increase and U.S. industries to otherwise benefit if imports into Canada of all products of the United States were free of duty and not subject to the Canadian non-tariff measures listed in Annex II.

In its Federal Register Notice dated August 20, 1986, the ITC advised that its hearings will take place September 9-10, 1986.

### ITC Hearing on Services

On August 7, the International Trade Commission instituted a Section 332 investigation to assess the implications of a free trade arrangement with Canada in services at the request of the United States Trade Representative. The ITC will examine the magnitude of U.S.-Canada trade and operations in selected service industries, the competitive positions vis-à-vis Canadian services industries, major problems and concerns of these service industries with non-tariff measures, and U.S. service industries priorities in such negotiations. In addition, the ITC will assess the potential trade benefits and impact for U.S. service exporters should those obstacles be removed. The ITC is accepting written submission from interested parties until November 5, 1986 and is expected to submit its analysis to the USTR by the end of the year.

## Future Developments

### Canadian Duty Remission for Auto Parts

In response to Rep. John Dingell's (D-MI) request for an analysis of the legality of a Canadian duty remission program for auto parts, the office of the USTR informed Congress in an August 11, 1986 letter that some aspects of a Canadian tariff rebate scheme constitute an export subsidy for auto parts and therefore is illegal under GATT. In addition, USTR asserts that the program violates Article I of the U.S./Canada auto pact. USTR is most concerned with the program that gives foreign car makers a remission on duties for cars sent to Canada in exchange for buying Canadian auto parts for export. The U.S. auto parts industry claims to be shut out of the parts market because Japanese companies buy Canadian auto parts and export them to the U.S. for their assembly plants. Congressional pressure along with a memo on the subject from Governor James Blanchard of Michigan forced the Administration into making it a subject in the U.S./Canada free-trade talks.

In an August 19, 1986 letter to Ambassador Clayton Yeutter, Rep. John Dingell (D-MI) criticized USTR's plan to end Canadian duty rebate through the U.S./Canada free trade talks. According to Yeutter, the quickest way to address the matter is through the talks. Meanwhile, Dingell urged USTR to fight the program by initiating an unfair trade action such as a CVD case.

Because of the increased Congressional concern over the tariff rebates, the Administration may consider taking action. USTR sources assert that this issue will be a major source of contention in the upcoming free trade negotiation and could lessen the likelihood of forming an agreement.

### Steel Restraints

The chairman of the House and Senate steel caucuses are seeking to set up a meeting between Cabinet officials and chief executive officers of major steel companies in order to come up with a plan to restructure the steel industry and reduce imports. The chairmen then plan to meet with President Reagan to step up pressure to curb steel imports. The Administration is concerned with the increase in the market share of finished steel by countries who do not have a Voluntary Restraint Agreement ("VRA"). Canada has the greatest market share of the non-VRA countries and the chairmen have asked the Administration to reduce Canada's market share. Congressional sources doubt that steel quota legislation will go through this year, but these meetings are intended to increase pressure on the Administration to take action.