TRADE POLICY DEVELOPMENTS

DIRECTOR ADDRESSES CANADA - U.S. LAW INSTITUTE

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On April 3, 1987, the Director of Investigation and Research, Calvin Goldman, gave an address on "Competition, Antidumping and the Canada/U.S. Trade Negotiations" at the *Canada-U.S. Law Institute Conference on Competition and Dispute Resolution in the North American Context* in Cleveland, Ohio.

Mr. Goldman acknowledged the importance of the Canada-U.S. trading relationship for the economies of the two countries. Trade liberalization, he stressed, will have important implications for domestic laws and policies. With the elimination of tariffs and non-tariff barriers between Canada and the United States, attention will be shifted from trade to differences in domestic laws and policies that affect competition in the North American market.

Trade and competition policy are inextricably related and have many of the same objectives. However, there appears to be a growing conflict between competition laws and trade laws, particularly antidumping laws, that requires special consideration in the context of the Canada-U.S. trade negotiations.

There are three important issues that should be addressed in the bilateral negotiations, said Mr. Goldman:

(1) Is the maintenance of the existing antidumping regime compatible with trade liberalization under a bilateral agreement?

(2) Does competition law provide a more suitable alternative?

(3) Assuming that it does, what particular competition regime should be put in place to govern pricing practices between our two countries?

Antidumping laws, he stated, are fundamentally incompatible with the objective of free trade and would become largely unnecessary in a free trade environment. The primary objective of free trade is to remove barriers to trade which shelter domestic industries from international competition. Antidumping laws have often been used by domestic producers to protect themselves against foreign competition. As a result, the adjustment process in many cases has been retarded and the economy has been prevented from enjoying the benefits of trade liberalization.

Competition laws, in particular predatory pricing provisions, suggested Mr. Goldman, provide a more rational standard for dealing with injury to competition caused by price differentials. This is because competition laws, generally speaking, require proof of predation, that is, pricing below average variable cost with intent to discipline or eliminate a competitor. On the other hand, antidumping laws provide summary relief for domestic producers in cases where the export price is, generally speaking, lower than domestic price of a product and dumping has caused material injury to the complainants' industry.

Antidumping laws, stated Mr. Goldman:

> focus on injury to domestic competitors and not injury to the process of competition....While antidumping law has the effect of protecting domestic competitors whether they are efficient or not, competition law is aimed at the protection of the competitive process.

He suggested that competition laws are preferable to antidumping laws for the following reasons:

> ...the stricter requirements for the application of the competition law provisions make it more unlikely that they can be abused by complainants seeking relief from legitimate competition. Overall, the competition law standards foster the broader objectives of economic welfare and growth which, of course, are the underlying rationales for the current bilateral trade negotiations exercise.

As a solution, Mr. Goldman suggested that antidumping laws should be abolished as between Canada and the United States and replaced with domestic competition and antitrust laws in each country. This would require some degree of harmonization of Canadian and U.S. laws. Otherwise, the major differences which exist between Canadian and American laws, particularly with respect to substantive price discrimination provisions, enforcement procedures, the scope for private action and recovery of damages, could result in an unbalanced regime which might distort competition in the North American market.

Any new harmonized system, he suggested, should be designed to reflect the current "state of the art" economic thinking about price discrimination and predatory pricing to ensure that only anticompetitive practices are deterred. The new system should also be predictable and certain so that businesses can make important decisions on the basis of clear and unambiguous rules about pricing practices. Special attention should be paid to jurisdictional issues in the enforcement of domestic laws and the application of remedies against foreign firms.

Mr. Goldman discussed existing Canadian competition law provisions concerning price discrimination and predatory pricing and provided some suggestions with respect to how those laws could be dealt with in a new harmonized regime. Current Canadian and U.S. price discrimination and predatory pricing provisions in many cases act to deter practices that result from rigorous competition rather than anticompetitive conduct. Too stringent an approach, Mr. Goldman cautioned, "may stifle rather than enhance competition". He suggested that the new abuse of dominance provision in the *Competition Act* may provide a good starting point for discussion of how to resolve differences between the Canadian and U.S. price discrimination and predatory pricing laws.

Procedural differences between the two countries also should be studied, in Mr. Goldman's view, because that is where Canadian and U.S. price discrimination laws display their greatest divergence. The greater scope in the United States for private actions and the availability of treble damages could have the effect of distorting competitive advantage in a regime where domestic competition laws were the only means for disciplining abusive pricing practices. In any harmonized system, he suggested it would be important to recognize "that private actions are a useful and important element of the enforcement mechanism, but that the use of treble damages may be more questionable, at least in some circumstances".

Mr. Goldman summed up by reviewing his initial three questions. He suggested, first of all, that antidumping laws are not compatible with a freer trade environment. They "tend to protect competitors rather than the competitive process and thus represent a serious impediment to the play of market forces in a free trade area". Secondly, he suggested that competition laws, particularly the price discrimination and predatory pricing provisions, are preferable to antidumping laws. There are currently significant differences between the competition and antitrust laws of Canada and the United States. Thirdly, he suggested that a great deal of study is required into possible harmonization of Canadian and U.S. competition and antitrust laws, and, in particular, special consideration should be given to the extraterritorial aspects of the application of domestic laws.

U.S. TRADE LAW PROPOSALS

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It appears that a major trade bill will be passed by Congress this year. The House of Representatives passed an omnibus trade bill (H.R. 3), the *Trade and International Economic Policy Reform Act of 1987*, on April 30 by an overwhelming margin. The Senate Finance Committee has finished mark-up of S. 490, the *Omnibus Trade Act of 1987*. It is anticipated that the Senate will vote on its bill in July. Floor debate on the Senate bill is expected to begin in late June.

Because both the House and the Senate must agree on the text of any bill enacted into law, many key issues will have to be resolved in a Conference Committee composed of delegates from each legislative body in July or September. This Committee could adopt either the House or Senate proposals, or make changes in the proposals.

The outline below provides a summary of the status of proposed U.S. trade legislation affecting the antidumping and countervailing duty laws, tariff negotiating authority, Section 201 and Section 301, and foreign investment rules.

Antidumping (AD) And Countervailing Duties (CVD)

Private Remedy For Injury Resulting From Dumping

The U.S. *Antidumping Act* of 1916 provides a private right of action for U.S. companies to obtain compensation for damages in dumping cases, if a court finds that dumping is committed with the intent of "destroying or injuring an industry in the United States". Section 166 of H.R. 3 as passed by the House provides a rebuttable presumption of "intent to injure" in cases filed under the *Antidumping Act of 1916* against "multiple offenders", which are foreign manufacturers subject to three or more dumping findings within 10 years. By putting the burden of proof (to establish no intent to injure) on the foreign manufacturer, this provision makes it more likely that U.S. companies will file complaints and win damage awards in dumping cases. It thereby heightens the risk of lengthy and expensive litigation for foreign producers who price competitively in the U.S. market. A similar provision was not included in S. 490.

Diversionary Input Dumping

The diversionary input dumping provisions as contained in Section 156 of H.R. 3, as passed, are aimed at preventing foreign manufacturers from circumventing quotas (e.g., under Voluntary Restraint Agreements) and AD orders, by incorporating a dumped component into a downstream product and exporting that product to the United States. Under this provision, a foreign manufacturer could have a dumping duty assessed against its product simply because it purchased an input subject to an AD order or an import restriction agreement.

For example, a German manufacturer could be subject to a dumping finding against its product because it purchased a Japanese input which was included in a trade agreement with the United States that resulted in the termination of a dumping investigation.

If producers do not know where their inputs came from, or are unaware of U.S. quotas or duties on these inputs, they will be at serious risk of diversionary input dumping when importing to the U.S.

A similar provision in S. 490 was dropped during mark-up of the Bill and replaced with a provision for monitoring diversionary practices resulting from significant AD or CVD duties on component parts.

Circumvention

Section 155 of H.R. 3 is aimed at preventing two different ways of "circumventing" antidumping or countervailing duties. First, circumvention may arise if a product subject to an antidumping

or countervailing duty, is shipped to a third country, assembled and completed there with minor real change, and then shipped to the United States as a product from that third country. Second, circumvention may occur if the parts or components of a product subject to antidumping or countervailing duties are imported to the U.S., where the product is then completed and assembled with minor real change.

The circumvention provisions would allow the Department of Commerce to include within the scope of an AD or CVD duty order either merchandise made in a third country or the parts or components of the dumped or subsidized product if:

(a) substantially all parts or components are imported from the country covered by the order;

(b) the value added in the U.S. or the third country is small in relation to the total value of the merchandise imported into or assembled in the United States; and

(c) the parts or components were produced or exported by a company related to the company performing the completion or assembly in the third country or the United States.

Under a substantially similar proposal adopted by the Senate Finance Committee, Commerce would also consider factors such as the pattern of trade, or whether shipments of the components have increased. However, the parts or components need not be produced or exported by a related company.

These proposals on "third country circumvention" do not indicate how they relate to (or are inconsistent with) the "country of origin" rules applied by Customs.

Downstream Product Monitoring

Section 164 of H.R. 3 establishes a procedure to monitor products that incorporate components that have been subject to an antidumping or countervailing duty of at least 15% during the last five years. This provision attempts to address the situation where duties are imposed on a component, and imports of the finished product (the downstream product) increase. For instance, dumping or countervailing duties of 15% or more may be imposed on steel, and imports of cars, boats and machinery containing steel may increase.

Under H.R. 3, a U.S. producer of an article that is "like a component part or a downstream product", may petition the Department of Commerce to designate a downstream product for monitoring. Within 14 days after receipt of the petition, Commerce must determine whether to direct the International Trade Commission (ITC) to monitor the product. In making its decision, Commerce will take into account:

(a) the value of the component part in relation to the value of the downstream product;

(b) the extent to which the component part has been substantially transformed as a result of its incorporation into the downstream product; and

(c) the relationship between the producers of component parts and producers of downstream products.

The decision by Commerce is not subject to judicial review.

International Trade Commission

The ITC has to analyze every increase of 5% per quarter of imports of the downstream product, and shall make quarterly reports to the Department of Commerce. Based on these reports, Commerce can decide whether to initiate an AD or CVD investigation against the downstream product.

Under this downstream monitoring provision, an AD or CVD investigation can be initiated against foreign manufacturers, not because they are exporting a dumped or subsidized product, but because the product contains a component from a company that Commerce found to be dumping or to be subsidized. The U.S. manufacturer of "the

article that is like a component part of a downstream product" is not required to allege or submit information indicating that the downstream product is dumped. Since a 5% increase in imports in any quarter from the previous quarter could lead to an investigation, this provision may give U.S. producers an easy remedy to chill import competition.

Sham Transactions

The sham transaction provision contained in Section 312 of S. 490, as amended at mark-up, attempts to ensure that when dumping duties are imposed, a commensurate price increase occurs. A "sham" transaction is defined as:

> an importation of merchandise by, or for the account of, a manufacturer, producer, seller, or exporter for the purpose of absorbing antidumping duties...on behalf of a United States purchaser.

If an importation is found to be a sham transaction, the U.S. purchaser can be considered the importer of record and held solely liable for the duties imposed.

In determining whether a transaction is a sham transaction, Commerce is to take into account the following factors:

(a) whether the manufacturer, producer, seller, or exporter had actual notice of an actual antidumping proceeding;

(b) whether the transaction is an unusual method of importation, by or for the account of the manufacturer, producer, seller or exporter; and

(c) whether the size and nature of the exporter's commercial operations with respect to the merchandise is not significant.

Multiple Offenders

The revised versions of S. 490 and Section 165 of H.R. 3 both provide for monitoring and investigating dumping by foreign companies that have been found to be dumping the same category product three times with a margin greater than 10%.

After a dumping margin is determined, an eligible domestic entity may petition Commerce to establish a "product monitoring category", consisting of products of similar description and use. Any eligible domestic entity may request the Department of Commerce to monitor the importation into the United States of a class or kind of products within the category by an offender who has been found dumping.

If Commerce determines that there is a reasonable likelihood that U.S. sales at less than fair market value (dumping) of such class or kind of merchandise may occur, it must monitor these imports.

If the monitoring results in information indicating a "reasonable likelihood of the existence of dumping" Commerce, under section 165 of H.R. 3, is required to initiate a dumping investigation, unless a substantial proportion of the domestic industry of "the like or directly competitive" product requests that such an investigation not be initiated against a first offender.

When investigating these multiple offenders under Section 165 of H.R. 3, critical circumstances shall be presumed to exist, and the ITC, in determining injury, shall take into account injury caused by previous dumping.

In practice, these proposals impose an extra punishment on importers found dumping. Besides paying dumping duties, they risk monitoring of their imports above and beyond that already existing in the administrative review process. Also, this provision is easy for the American industry to use against foreign competitors, as the cost to start such monitoring is very low. This will place an extra burden on the importer found dumping.

Assessing Injury

Both H.R. 3 and S. 490 as passed by the Senate Finance Committee contain provisions enacting new rules for the ITC's assessment of "material injury" or "threat of material injury" in AD and CVD investigations.

The current statute requires the ITC, in determining material injury, to assess cumulatively the volume and price effect of imports of the product under investigation from two or more countries if such imports compete with each other and with the like product of the domestic industry. Cumulation is not required in assessing threat of material injury.

Proposals in the legislation would specifically require cumulation of findings under both the AD and CVD laws (cross-cumulation) in determining material injury as well as in determining the threat of injury. These proposals would require the ITC, in assessing material injury, to cross-cumulate not only imports currently subject to AD or CVD investigations but also imports subject to findings of dumping or subsidization within the past year.

In assessing material injury under Section 154 of H.R. 3, the ITC must cumulate the impact of imports from countries subject to:

(1) a CVD or AD investigation,

(2) suspension agreement, or

(3) quantitative restraint, within the past twelve months.

In assessing the threat of material injury, this cumulation requirement would apply, to the extent practical, to imports currently subject to an AD or CVD investigation.

Both H.R. 3 and S. 490 contain language requiring the ITC to consider, in determining threat of material injury, the existence of AD orders in foreign countries on the merchandise under investigation. If a third country dumping finding exists, the burden is on the foreign manufacturer to show that the U.S. industry is not threatened.

In determining threat of material injury, both bills would have the ITC take into account the extent to which the U.S. is the export target by reason of restraints on exports to, or imports into, third countries. No criteria define "export targeting".

The Senate Finance Committee also adopted a proposal (aimed at Airbus by Boeing) directing the ITC to consider the impact of dumped or subsidized imports on the industry's implementation of existing research and development plans in assessing injury and threat.

Prohibiting Exemption of Government Purchases from Antidumping and Countervailing Duties

Section 160 of H.R. 3 provides that merchandise imported by, or on behalf of, the U.S. government is not exempt from the imposition of antidumping or countervailing duties. The U.S. government has entered into various international agreements and Memoranda of Understanding (MOUs) that exempt government procurement of defence equipment from all customs duties, including antidumping and countervailing duties.

The same proposal was adopted during mark-up in the Senate Finance Committee, but contains two exceptions:

(1) if duties would be inconsistent with existing Memoranda of Understanding; and

(2) if there is no private market for such products.

Critical Circumstances

This provision, contained in S. 490, would authorize Commerce to make a preliminary determination of critical circumstances, prior to the time of the preliminary determinations of subsidization or less than fair value sales.

As amended during mark-up, suspension of liquidation on entries of the product under investigation would not occur until the preliminary determination of subsidization or antidumping. Liquidation is the final computation of duties accruing on an entry. When liquidation is suspended, Customs does not make a final assessment of the rate and amount of duty.

This early critical circumstances provision may well chill trade. Although the goods continue through to their destination, an importer would be subject to continuing uncertainty about the ultimate price to be paid.

Definition of Countervailable Subsidies

Under current U.S. law, the term "subsidy" includes export subsidies described in Annex A to the GATT Agreement on countervailing duties and various domestic subsidies:

> ...if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise....

Furthermore, domestic subsidies include, but are not limited to:

(a) the provision of capital, loans or guarantees on terms inconsistent with commercial considerations;

(b) the provision of goods or services at preferential rates;

(c) the grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry; and

(d) the assumption of any costs or expenses of manufacture, production, and distribution.

Both S. 490 and H.R. 3 are designed to codify the current practice of Commerce which is to evaluate the "de facto" availability as well as "nominal availability" of a program to determine whether it is generally available or whether it is "paid or bestowed on a specific enterprise or industry or group thereof". Under current U.S. law, only the latter, industry-specific type of benefit is countervailable. The House Report language indicates that H.R. 3 may go far beyond the current Commerce practice, and may include cheap energy (or U.S. irrigation water) as countervailable subsidies.

Tariff Negotiation Authority

As passed by the House, Section 153 of H.R. 3 provides that duty reductions on a particular article cannot exceed 60 percent if the International Trade Commission or the U.S. Trade Representative (USTR) determines that any greater reduction on that article would have a "probable significant adverse economic effect" on the domestic industry. In addition, the *Act* provides that the aggregate reduction on such articles will be phased-in over a 10-year period. The House Report accompanying the Bill explains that:

> ...the authority granted by Section 112 [to enter into and proclaim reductions in tariffs under reciprocal trade agreements] maximizes negotiating credibility and flexibility while ensuring an adequate opportunity for domestic industries to adjust to any loss of import protection through the requirements for staged reductions and by the reduction limit on highly import-sensitive articles.

S. 490 limits tariff reductions pursuant to multilateral agreements to 50 percent of existing rates (except for tariffs that are 5 percent or less). During mark-up of S. 490, the Senate Finance Committee adopted an amendment providing that the ITC, in advising the President regarding the probable economic impact of articles considered for modification of tariff treatment, must make particular note of any product or sector which is, or potentially may be import-sensitive and whether a tariff reduction would injure the domestic industry. The President would be required to take into account any information obtained from the ITC, from private sector advisory committees or through public hearings, with respect to import-sensitive and potentially import-sensitive products in deciding what type of modifications in tariff treatment, if any, would be appropriate. No limits are placed on reduction of tariffs in bilateral negotiations.

Section 201

Serious Injury

As reported by the Ways and Means Committee, H.R. 3 provided that the ITC determination of "serious injury" be based,

among other things, on the inability of a significant number of firms to operate domestic production facilities at a reasonable level of profit. During mark-up, a provision was added requiring the ITC to consider the condition of the domestic industry over the relevant business cycle to assure that import relief could be available during a recession.

H.R. 3 also clarifies the conditions that the ITC must consider in making a finding of serious injury to a domestic industry. For example, the ITC would be allowed to disregard imports that are intended for geographically isolated markets which depend on imports for their survival, even though the same items imported to another part of the country might be injurious to the domestic industry.

In addition, H.R. 3 bifurcates the ITC determination of injury and relief in section 201 proceedings. It requires the ITC to determine within four months whether a petitioning industry has been harmed. The ITC then has an additional two months to recommend relief. Existing law grants the ITC six months within which to find both injury and recommend relief.

Domestic Industry

S. 490 and H.R. 3 both amend the definition of "domestic industry" to require the ITC to treat as part of such domestic industry only its domestic production. Currently the ITC has discretion to include domestic producers' imports as part of that industry. Also, if the domestic producer makes more than one article, H.R. 3 instructs the ITC to treat as the "domestic industry" only that subdivision of the producer which makes the like or directly competitive article.

These limitations on the definition of domestic industry would make it more likely that the industry is "seriously injured", since profitable operations could often be excluded from consideration.

Critical Circumstances

H.R. 3 provides an expedited process for granting provisional relief if substantial increases in imports over a short time threaten an industry, and waiting for a final ITC/USTR determination would create additional harm or limit the effectiveness of relief for the industry. Upon request, the ITC must determine within four months whether critical circumstances exist. If so, it will direct Customs to suspend liquidation and may direct Customs to require importers to pay cash deposits. Within sixty days, the ITC must determine what relief to provide and report this to USTR. If USTR decides to impose relief (three months after the critical circumstances determination), that relief is retroactive to the date of suspension of liquidation. On the other hand, if USTR does not provide relief, it will direct Customs to terminate the suspension of liquidation and refund any cash deposits within seven days.

Granting of Import Relief

H.R. 3 transfers authority to provide relief under Section 201 from the President to USTR. If the ITC determines (within 6 months) that an industry is seriously injured, USTR would have 30 days, 60 in certain circumstances, to decide if import relief is warranted. Relief would have to be granted unless USTR determines that import relief would threaten national security or not be in the national economic interest. USTR would have the same remedial options available to the President under existing law: increases in tariffs (not to exceed 50%), imposition of quotas, or negotiation with foreign countries to limit exports of the products involved to the United States. Relief would be limited to five years as under existing law.

USTR could also decide to negotiate with a foreign country to address the underlying causes of the increase in imports or to alleviate the injury caused by imports. If USTR decides either not to grant relief, to grant relief different from that recommended by the ITC, or to negotiate, Congress would have 90 days to enact a law to put into effect the relief recommended by the ITC.

Under the Senate bill the ITC may recommend relief for up to 10 years. The recommended relief would:

(1) enable an industry to compete successfully with imports after relief terminates, or

(2) provide for the orderly transfer of industry resources to other productive pursuits.

The ITC may not recommend relief greater than the amount necessary to prevent or remedy the serious injury.

S. 490 limits Presidential discretion to deny relief more than H.R. 3. It obliges the President to proclaim the equivalent of the import relief recommended by the ITC (ie., he can change the form but not the amount of relief or he can give relief through orderly marketing agreements). The President can reduce or deny relief only if he determines relief will endanger national security or will be a substantial cause of serious injury to another (downstream) domestic industry that consumes the products of the industry that is seriously injured.

Additional Remedies

Adjustment Plans

The Senate bill, as amended, requires the petitioner to submit a plan to promote positive industry adjustments. The ITC would seek confidential commitments from the firms regarding their individual efforts to assist such adjustments. The ITC would consider the plans and commitments in making its remedy recommendation.

Under H.R. 3, the petitioning industry would be allowed but not required to include a statement of proposed "adjustments" to be undertaken during the period of import relief to make the industry more competitive. The ITC and USTR must take such statements into account when determining whether, and in what form, relief should be granted.

Trade Adjustment Assistance

S. 490 also requires Trade Adjustment Assistance (TAA) as a remedy. Section 201 would require the President to qualify workers in an industry for TAA if the ITC:

(1) determines that imports are a substantial cause of serious injury to that industry, and

(2) recommends that the President provide TAA as a remedy.

Under H.R. 3, TAA would be granted to all affected workers and businesses within 48 hours of an ITC finding of injury to an industry, regardless whether import relief ultimately is granted.

Monitoring

Under the Senate bill, not more frequently than every three years, the ITC has to report to the President on developments with respect to the industry which was granted relief under Section 201. If the President determines that the members of the industry, taken as a whole, have not made an effort to achieve a positive adjustment, he may reduce or eliminate the relief. Alternatively, he may expand the relief if necessary to avoid circumvention tactics of foreign producers. The same monitoring provisions are applied at regular intervals thereafter.

Under S. 490, once relief ends, the same industry can benefit from Section 201 relief only after a period no shorter than the period for which relief was provided.

Under H.R. 3, USTR is required to monitor an industry that has been granted import relief to gauge its progress in becoming more competitive. The bill would authorize USTR to adjust the form and the amount of import relief to account for changed economic circumstances or to ensure the effectiveness of the prescribed relief. As under existing law, relief granted for 5 years would begin to phase out after 3 years, and relief could be extended once for a period of up to 3 years.

Section 301: Mandatory and Discretionary Retaliation

As passed by the House, H.R. 3 transfers authority from the President to the USTR to determine whether a particular foreign act, policy or practice is inconsistent with a trade agreement or unjustifiable and a burden on U.S. trade, and to decide whether responsive action is appropriate. However, Section 121 creates a loophole in the mandatory retaliation provision. The USTR must retaliate in certain instances, but "subject to the specific direction, if any, of the President". This language could have the effect of giving the President discretion as to whether to retaliate; "mandatory" retaliation by the USTR presumably would not be mandatory if the President issued a contrary specific direction.

H.R. 3 as introduced requires the President to retaliate (subject to limited waivers) if a country has an excessive trade surplus and if negotiations fail to achieve a reduction in that trade surplus within 180 days (extendable to 240). The USTR's authority to take action or waive certain actions is "subject to the specific direction, if any, of the President". Similar to the Section 301 provision, this language could provide the President some discretion as to whether to retaliate.

Like H.R. 3, S. 490 transfers Section 301 authority to the USTR. It provides for mandatory retaliation (with certain limited exceptions) against all unfair trade practices, even those which do not constitute violations of trade agreements. These practices would include:

(1) denial of internationally recognized workers' rights (discretionary in H.R. 3);

(2) toleration of anti-competitive activities, e.g., cartels (discretionary in H.R. 3);

(3) state trading enterprises, international purchases and sales which are inconsistent with commercial considerations (not in H.R. 3);

(4) export targeting practices (such as protection of the home market, export performance requirements, special restrictions on technology transfer imposed for reasons of commercial advantage, promotion or tolerance of cartels, subsidization, discriminatory government procurement or other actions limiting foreign competition); and

(5) unfair trade concessions requirements, the existence of which can be inferred without direct evidence.

The main exception is to permit USTR to avoid retaliation if it is impossible for the foreign government to remove the unfair practice and retaliation would not be in the U.S. national economic interest.

Foreign Investment Rules

A provision (the Bryant Amendment) in the House-passed trade bill (H.R. 3) would require foreign investors to register their U.S. holdings with the Department of Commerce if they exceed certain thresholds. Registration would be required if the investor owns or has equity interest exceeding five percent in any two or more U.S. businesses or real estate enterprises with assets exceeding $20 million or gross sales exceeding $40 million, or a U.S. property with assets exceeding $5 million or gross sales exceeding $10 million. Registration is also required if an investor has:

(a) any interest with a market value of $10 million or more in real property,

(b) equity or ownership interest in U.S. corporations with a market value in excess of $50 million, or

(c) controlling interest (25 percent or more) in a U.S. business that had assets exceeding $20 million or gross sales exceeding $20 million.

Another provision in H.R. 3 would give the President the authority to limit mergers and acquisitions involving foreign entities if national security or "essential commerce" is threatened.

In the Senate, a similar provision was dropped from the bill by the Senate Commerce Committee and replaced by a proposal that the Reagan administration finds less objectionable. The new proposal gives the President additional powers to act against foreign takeovers, mergers and acquisitions.

Conclusion

President Reagan has committed himself to support trade legislation this year, but he has threatened to veto any legislation he deems as "protectionist". Both the House and Senate bills include a number of provisions opposed by the Administration. President Reagan has stated that he would have no choice but to veto trade legislation if the Senate fails to change the bill passed by the House. Therefore, if trade legislation is to pass this summer, a trade bill that is either acceptable to the Administration or veto-proof will need to emerge from the Conference Committee.

FREE TRADE TALKS

The U.S. - Canadian free trade talks appear to be at a critical stage of the negotiations. Negotiators from both sides have expressed optimism that progress is being made, but they also acknowledge that there are still wide differences on some key issues to be covered in a comprehensive agreement.

For the U.S. negotiators, the main priority is to establish new rules for trade-in services and to gain unhampered access to Canada with regard to investment. Meanwhile, the Canadian negotiators are seeking exemption from U.S. trade laws through the creation of a binding binational dispute resolution mechanism.

A free trade agreement is expected to include the total elimination of tariffs within ten years through a three-part transition stage. Tariffs for healthy industries will be stripped away immediately. There will be a five year phase-in with a 20% tariff reduction annually for industries that are more sensitive. For the most sensitive industries, there will be a 10 year phase-in period. Section 201 restrictions on Canadian goods will likely be eliminated as well because eventually there will be no tariffs.

Clayton Yeutter, the U.S. Trade Representative, stated recently that there is "not much time to bridge those gaps", and that the bulk of the negotiations will have to be completed by the end of July. According to Yeutter, the U.S. plans to proffer definitive proposals on essentially anything, if not everything, in the free trade talks by the end of June.

The negotiations must produce a draft accord by early October, giving Congress a ninety-day review period until January 3, in order to remain within President Reagan's fast-track negotiating authority. If there are delays, Congress would be permitted to amend whatever proposals the negotiators recommend.

According to Yeutter, some very tough political decisions will have to be made in order to reach a comprehensive free trade agreement. He believes that the U.S. is "prepared to make them and hopes the Canadians are, too". In practice, both negotiators are emphasizing the difficulty of concessions on the other side's requests, but the negotiators are still moving along.

TRADE LAW ACTIONS

GATT Investigation of Corn Ruling

The Administration initiated a General Agreement on Tariffs & Trade complaint May 5, 1987, about a Canadian Import Tribunal ruling to impose an 85 cents per bushel countervailing duty on U.S. corn. On March 30, 1987, Congress passed a Concurrent Resolution expressing the sense of the Congress that the U.S. Trade Representative should investigate the ruling of the Canadian Import Tribunal involving

U.S. exports of corn to Canada to determine the legality of the ruling under GATT.

Certain Fresh Cut Flowers

On March 18, 1987, the Department of Commerce amended its final antidumping determination and order on certain fresh cut flowers from Canada as a result of the partial negative ITC injury determination (for miniature carnations) and a U.S. Court of International Trade decision which requires Commerce to recalculate the weighted-average dumping margin by excluding the portion of the margin attributable to the products for which the ITC makes a negative injury determination. Commerce found the weighted-average dumping margin for the products remaining in the scope of the investigation (standard carnations) to be 7.76 percent as compared to the previous margin of 6.80 percent which covered sales of all carnations.

Color Picture Tubes

The Department of Commerce postponed its preliminary determinations of whether sales of color picture tubes from Canada, Japan, Korea, and Singapore have occurred at less than fair value until June 24, 1987.

Line Pipes and Tubes

On March 30, 1987, the ITC preliminarily determined that the U.S. industry is not materially injured or threatened with material injury by reason of imports from Canada of line pipe and tubes that were alleged to be sold in the U.S. at less than fair value. Therefore, the Department of Commerce has terminated its antidumping investigation.

Potassium Chloride

The ITC preliminarily determined that there is a reasonable indication that the U.S. industry is materially injured by reason of imports from Canada of potassium chloride that were alleged to be sold in the U.S. at less than fair value. Commerce will make its preliminary decision by July 20, 1987.

Sugar and Syrups from Canada

On June 5, 1987, the Department of Commerce announced the final results of its antidumping duty administrative review on sugar and syrups from Canada. Commerce determined that no dumping margin exists for the period under review. Accordingly, the Customs Service will no longer assess antidumping duties on all appropriate entries.

Elemental Sulphur

The Department of Commerce published on June 19, 1987, the preliminary results of its antidumping duty administrative review and tentative determination to revoke in part for one producer, and intent to revoke in part for five producers. Commerce will issue its final results in December.

Instant Potato Granules

The Department of Commerce published on June 19, 1987, the preliminary results of its antidumping duty administrative review and intent to revoke. Commerce will issue its final results in August.

Adjustment of U.S. Export Figures to Canada

The Department of Commerce reported that U.S. merchandise trade exports to Canada may be understated by approximately $10 billion a year due to U.S. under reporting of U.S. exports. U.S. and Canadian officials are scheduled to release their annual reconciliation of trade statistics in June, based on an exchange of export data, and Commerce will likely readjust their merchandise trade figures soon thereafter.

THE RETROACTIVE APPLICATION OF ANTIDUMPING DUTIES PRIOR TO THE TIME OF THE PRELIMINARY DETERMINATION

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Broadly defined, the concept of "rule of the law" means that fines and punishment may be imposed only in accordance with law which is certain, unambiguous, and not retroactive. The retroactive application of legislation, or the effects of legislation, is generally not the rule in Anglo-American legal systems (particularly in the areas of criminal law and the law of taxation) because it is tantamount to "changing the rules in the middle of the game". However, under Anglo-American legal principles, legislatures can and do legislate and apply the effects of legislation retroactively by providing clear wording in their legislation to rebut the presumption of non-retroactivity.

The purpose of this commentary on recent Canadian trade law developments is to analyze the provisions of the *Special Import Measures Act,* S.C., 1984, c.25 (*SIMA*) which permit the retroactive application of antidumping duties prior to the time of Revenue Canada's preliminary determination, and to examine the Canadian Import Tribunal's (CIT) most recent applications of these provisions. This analysis will be set out under the following headings:

1. The Recent History of and the Rationale for the Retroactive Application of Antidumping Duties
2. The Canadian Statutory Framework and Recent CIT Practice
3. Conclusion

The Recent History Of And The Rationale For The Retroactive Application Of Antidumping Duties

In order to understand the history and the rationale for the retroactive application of antidumping duties, one must understand the relevant provisions of the General Agreement on Tariffs and Trade (GATT). Article 11 of the 1979 *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* (GATT Antidumping Code) states:

> 1. Antidumping duties and provisional measures shall only be applied to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 8 [imposition of antidumping duty] and paragraph 1 of Article 10 [provisional measures after a preliminary affirmative finding], respectively, enters into force, except that in cases:
>
> (i) Where a final finding of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final finding of threat of injury, where the effect of the dumped imports would, in the absence of the provisional measures, have led to a finding of injury, antidumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied.
>
> If the antidumping duty fixed in the final decision is higher than the provisionally paid duty, the difference shall not be collected. If the duty fixed in the final decision is lower than the provisionally paid duty or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.
>
> (ii) Where for the dumped product in question the authorities determine:
>
> (a) either that there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury, and
>
> (b) that the injury is caused by sporadic dumping (massive dumped imports of a product in a relatively short period) to such an extent that, in order to preclude

> it recurring, it appears necessary to levy an antidumping duty retroactively on those imports,
>
> the duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures. (emphasis added)

As a general rule, a GATT Contracting Party may impose antidumping duties only if it has been established that:

1. goods are being dumped;
2. there is material injury to an established industry in the territory of the Contracting Party, or material retardation of the establishment of a domestic industry;
3. the dumping is causing the material injury or material retardation.

In effect, Subparagraph 11(1)(i) of the GATT Antidumping Code permits the retroactive application of antidumping duties to a period of time in which two of the three constituent elements of the offence have not as yet been finally established: material injury, and causation of material injury. There must, however, be a final finding of injury or, a final finding that the effect of the dumped imports would, in the absence of the provisional measures, have led to a finding of injury. In other words, causation and past and/or present material injury must be established before antidumping duties may be retroactively imposed to replace the provisional measures imposed following the preliminary determination of dumping. These retroactively imposed antidumping duties may not be greater than the provisional measures imposed.

Subparagraph 11(1)(i) of the GATT Antidumping Code limits the period of time to which retroactive antidumping duties may be applied to the period for which provisional measures, if any, have been applied. Paragraph 10(3) of the GATT Antidumping Code limits the imposition of provisional duties to,

> as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved to a period not exceeding six months.

However, this period of time of retroactive application of antidumping duties may be expanded to include a period of 90 days prior to the date of application of provisional measures (ie. the preliminary determination) if the conditions set out in Subparagraph 11(1)(ii) are satisfied. In *The Development of The Canadian Antidumping System*, (Canadian Economic Policy Committee, 1973), Rodney de C. Grey has described the 1968 Tokyo Round version of the GATT Antidumping Code and in so doing provides some insight into the negotiating history of the present Subparagraph 11(1)(ii) provisions. It should be noted that the current 1979 GATT Antidumping Code version of Subparagraph 11(1)(ii) is essentially the same as the 1968 version, except that it uses the less onerous term "injury", whereas the 1968 version used the more onerous term "material injury". Mr. Grey states at pages 57-58:

> The Canadians had been concerned that the Code should enable them to deal effectively with sudden large-scale dumping that might do great damage to Canadian producers. It was believed that there was a particular risk of this in the textile and garment trades. The proximity of U.S. producers and marketing centres to Canadian centres and the ease with which business could be transacted between American merchants and Canadian importers make it particularly attractive for producers in the United States to dump excess merchandise in Canada. The quantity that might be exported could be quite small in relation to the U.S. market; in the smaller Canadian market, it could be injurious. Early in the negotiation it was agreed that this problem was real--if not of economic importance--and that, while it might not now occur between countries other than the United States and Canada, it might develop in Europe and therefore should be provided for in the Code....
>
> Thus, in case of such injurious "sporadic" dumping, the authorities concerned with the investigation must reach a preliminary decision on the fact of dumping in no more than ninety days from the date the dumped imports were entered if they are to provide a basis for this provision being invoked. It was assumed by the Canadians that the existence of such a provision in Canadian law, with the sanction of the Code, would discourage sporadic dumping, particularly if it were realized by importers that the Code does not preclude "massive" dumping being the sum of various

importations by different importers. This means that a series of relatively small imports of dumped goods by different importers might be found to be "massive" in total, thereby exposing importers to a penalty long after the imports had been sold. This was a case in which the scheme of national law was evolved at the international negotiating table.

The Canadian Statutory Framework And Recent CIT Practice

Section 42 and Section 5 of *SIMA* set out the Canadian statutory framework regarding the retroactive application of antidumping duties. Paragraph 42(1)(b) states:

> 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, 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
>
> (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 importations in the aggregate are massive and have occurred within a relatively short period of 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; (emphasis added).

Section 5 of *SIMA* states:

> There shall be levied, collected and paid on all dumped goods imported into Canada
>
> (a) in respect of which the Tribunal has made an order or finding after the release of the goods that
>
> (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 antidumping measures, or
>
> (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 importations in the aggregate are massive and have occurred within a relatively short period of time,
>
> and in order to prevent the recurrence of such material injury, it appears necessary to the Tribunal that duty be assessed on the imported goods, and
>
> (b) that were released during the period of ninety days preceding the day on which the Deputy Minister made a preliminary determination of dumping in respect of the goods or goods of that description,
>
> an antidumping duty in an amount equal to the margin of dumping of the imported goods. (emphasis added).

The predecessors of Section 42 and Section 5 of *SIMA* were similar to the present provisions and were contained in Section 16 and Section 5, respectively, of the *Antidumping Act*, R.S.C. 1970, c. A-15.

The Canadian Import Tribunal (CIT) has recently interpreted the *SIMA* retroactive antidumping duties provisions in the following four cases:

1. Photo Albums With Self-Adhesive Leaves Originating In Or Exported From The People's Republic Of China [CIT-10-85] (Photo Albums)

2. Rubber Hockey Pucks Originating In Or Exported From Czechoslovakia And The German Democratic Republic [CIT-12-85] (Hockey Pucks)

3. Drywall Screws Originating In Or Exported From Taiwan [CIT-1-86] (Drywall Screws/Taiwan)

4. Drywall Screws Originating In Or Exported From The Republic Of Korea [CIT-8-86] (Drywall Screws/Korea)

In both the Photo Albums case and the Hockey Pucks case, the CIT did not impose retroactive dumping duties because they did not find that the importations of the subject goods were "massive". In both of these cases, the CIT's decisions were largely based on factual considerations and did not deal extensively with legal considerations *per se*.

In Drywall Screws/Taiwan, however, the majority of the panel (Chairman Bertrand and Member Bissonnette) stated at page 7 of the Statement of Reasons that it was not persuaded that retroactive antidumping duties should be imposed "...even though it may be accepted that the importations from Taiwan can be considered massive".

The majority further stated at page 8 of the Statement of Reasons:

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

In his dissenting opinion, Vice-Chairman Perrigo argued that retroactive antidumping duties should be imposed for the following reasons:

> The Tribunal has in its foregoing reasons determined that the dumping of the subject goods has caused material injury to production in Canada of like goods. Moreover, with a share of market that was very much larger than that of the Canadian industry in 1985, I consider that the Taiwanese imports in that year constituted a 'considerable importation'. Accordingly, the conditions set out in Subparagraph 42(1)(b)(i) have been satisfied.
>
> 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 2.5 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 into 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.
>
> Finally, I consider that 'it appears necessary...that duty be assessed on the imported goods in order to prevent the recurrence of such material injury'. This provision of the *Act* 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 (ie. retroactive) antidumping duties on importers.
>
> 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 focused 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 antidumping 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', ie. switch to new low-cost sources of screws, unless penalized to a greater degree than in the usual run of antidumping 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*.

Notwithstanding Vice-Chairman Perrigo's views in Drywall Screws/Taiwan, he refused to retroactively impose antidumping duties eight months later in Drywall Screws/Korea, in spite of:

1. Evidence of considerable and massive importations within a relatively short period of time.

At page 7 of its Statement of Reasons, the CIT found that:

> During the period January 1, 1986, to September 30, 1986, the Korean product made some very impressive inroads into the Canadian market, taking 32 per cent of the market and accounting for virtually three times the market share held by the Canadian producers. An examination of quarterly data reveals the accelerating rate and mounting scale of penetration. Korean import volumes during the first three quarters of 1986 were respectively 53 million, 156 million and 384 million screws, amounting to 11, 51 and 69 per cent of all imports of the subject goods.

2. Evidence of "musical chairs".

Once again, importers demonstrated their alacrity in switching to other countries to source dumped product after antidumping measures were applied or threatened against their established suppliers. After switching from Japan and Singapore to Taiwan, and from Taiwan to Korea, the CIT found that importers were now switching to France, and once again directed Revenue Canada to initiate an antidumping investigation against the new source of dumped product. The CIT also directed Revenue Canada to initiate a countervailing duty investigation regarding alleged subsidies provided to a Japanese company by the Government of France. At page 10 of its Statement of Reasons, the CIT stated:

> Imports from France first appeared in the Canadian market during the third quarter of 1986. In volume, they were not insignificant for they amounted to about 7 per cent of imports from all sources....Considering that Yamashiro, the Japanese parent company of Yuko-Europe S.A., has directed the sourcing by two leading Canadian importers from Korea to France and considering the capacity of the French plant, the Tribunal is of the opinion that the evidence discloses a reasonable indication that the dumping or subsidizing of drywall screws from France is likely to cause material injury to Canadian production.

Notwithstanding this evidence of "musical chairs" and evidence of importations that were more considerable and massive than the importations in the Drywall Screws/Taiwan case, the majority of the CIT refused to retroactively apply antidumping duties.

In an Appendix to the Statement of Reasons, Vice-Chairman Perrigo and Member Bissonnette agreed that:

> ...notwithstanding what may have been said on this issue in previous decisions, the retroactivity provisions of the statute are limited to cases of sporadic dumping, that is to say, massive importations which may, or may not, recur. (emphasis added)

After considering the constituent elements of *SIMA's* retroactive antidumping duty provisions, Vice-Chairman Perrigo and Member Bissonnette further stated:

> Where the dumping is continuous, as in this case, and a likelihood finding is made, as in this case, and dumping duties will be collected on all future dumped importations from the source in question, it is not then necessary to invoke the retroactivity provisions in order to prevent the recurrence of the material injury caused by the dumping of the goods which are the subject of the inquiry (see also paragraph (a)(ii) of Article 11 of the 1979 revised Antidumping Code under GATT, and Grey, *The Development of the Anti-dumping System*, 1973, pages 57 and 58).

Article 11 and Rodney Grey's comments are set out in the first section of this analysis.

In sum, Vice-Chairman Perrigo and Member Bissonnette refused to retroactively apply antidumping duties in Drywall Screws/Korea, notwithstanding Vice-Chairman Perrigo's earlier views in Drywall Screws/Taiwan, and notwithstanding evidence of "musical chairs" and massive importations within a relatively short period of time.

Chairman Bertrand agreed with the majority that antidumping duties should not be applied retroactively, but departed significantly from the majority's reasons for declining such relief. In his dissent, he stated:

> As I understand the position of Members Perrigo and Bissonnette, they rely on the fact that the material injury will not recur when and if a likelihood finding is made, since the collection of duties would eliminate the injurious effect of the dumping. In their view, Section 42 is directed exclusively at 'sporadic' dumping which may, or may not, recur when there is absence of evidence supporting a conclusion that the dumping is likely to cause material injury. Respectfully, I do not share their view. Admittedly, the provision in question in Section 42 of the *Special Import Measures Act* owes its origin to the 1969 Anti-dumping Code, which provision was further included in the revised Code of 1979, in which the corresponding articles refer to sporadic dumping. It does not follow, however, that in interpreting the statute adopted by Parliament, pursuant to its international obligations, the most restrictive interpretation has to be given to the Canadian statute, and that its application should be limited by referring to a specific term, namely, sporadic, which has not been used at all in Section 42. Parliament was cognizant of the expression used in the Agreement, but it chose instead to construct the relevant section around the concept of massive dumped imports of a product in a relatively short period, rather than referring to the term sporadic. Canadian negotiators may have had in mind a specific problem, but it does not follow that Parliament subsequently, in enacting the corresponding legislation, intended to cover only that specific situation when the wording used supports a broader application.
>
> From the fact that subsection 5(a) and the corresponding provision of Section 42 refer to a finding in which it is found that the dumping 'has caused' material injury as one condition for the imposition of retroactive duty on goods released during the period of 90 days preceding the date of the preliminary determination of dumping, it does not follow that such retroactivity measures cannot be imposed where the Tribunal finds that the dumping is likely to cause material injury in addition to finding past injury.
>
> In my view, the expression 'such material injury' as used at the end of paragraph 42(1)(b) refers to the injury caused by reason of the fact that the dumped goods constitute a massive importation or form part of a series of importations which in the aggregate are massive rather than to the material injury caused by the dumping referred to in clause 42(1)(b)(i)(A).
>
> In my opinion, what the statute intends to deter is not only the sporadic dumping but also the massive importation of dumped goods from a different country, and, consequently, the penalty provision should be applicable even when a finding of likelihood of material injury is made in order to discourage an importer from switching sources to defeat the purpose of the *Act*. I also think that the statute can be invoked when an importer has made a massive importation preceding the preliminary determination of dumping to avoid the payment of provisional antidumping duties.
>
> I am of the opinion however, that in the present case, it is not necessary to impose duty retroactively on an extended basis, because two findings in quick succession involving the same product should be a sufficient warning to the importers to avoid importations of goods at dumped prices on a massive scale from another country.
>
> For that reason, it is not necessary to deal with the issue that the importer was aware or should have been aware that the exporter was practising dumping.

Conclusion

The CIT's most recent pronouncement on the retroactive application of antidumping duties prior to the time of Revenue Canada's preliminary determination is noteworthy for the following reasons:

1. A majority of the Tribunal wiped the slate clean in their opening remarks ("notwithstanding what may have been said on this issue in previous decisions") and restricted the scope of *SIMA's* retroactive antidumping provisions to cases of sporadic dumping where there is no finding of a likelihood of future injury.

2. By adopting a restrictive interpretation of *SIMA's* retroactive antidumping provisions, a majority of the CIT has restricted the arsenal of Canadian producers against repeat dumping from various countries to the Section 46 provisions regarding CIT directions to Revenue Canada to initiate investigations.

3. In interpreting provisions contained in the recently enacted *SIMA* and its predecessor, the *Antidumping Act*, a majority of the CIT went behind the words of the Canadian statute and not only looked to a GATT Code for interpretive guidance, but also went behind the GATT Code and looked at the negotiating history of the GATT Code. In looking at the negotiating history of the GATT Code, a majority of the CIT did not look at official GATT negotiating documents or reports, but rather looked to a book written in 1973 which contained the recollections and analysis of the senior Canadian official who negotiated the Code.

4. Since the CIT is a commission of economic inquiry with little statutory guidance as to what constitutes injury, it has not been unusual for it to refer to the drafting history of the GATT Codes for such guidance. However, *SIMA* contains statutory guidance regarding the CIT's power to retroactively impose antidumping duties prior to the time of Revenue Canada's preliminary determination. *Quaere* whether the CIT is moving away from the traditional British approach to statutory analysis and towards a more American approach which will permit counsel to cite House of Commons debates, Committee Reports, and other primary sources of Parliamentary consideration of legislation to assist the CIT with issues involving the interpretation of *SIMA* provisions.