TRADE POLICY DEVELOPMENTS

GOVERNMENT ESTABLISHES PROCUREMENT REVIEW BOARD

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As part of the *Free Trade Agreement* (*FTA*) implementation legislation, Bill C-2, the federal government has created a new advisory tribunal known as the Procurement Review Board in order to implement the "bid challenge" provisions of the *Canada-U.S. Free Trade Agreement.* Initially, the jurisdiction of the Procurement Review Board will be quite limited covering only Canadian federal government procurements having a value above the threshold level at which the procurement chapter of the *FTA* begins to apply ($25,000.00 U.S.) and below the threshold at which the Procurement Code under the *General Agreement on Trade and Tariffs* (*GATT*) takes over in defining the parties' obligations to provide access to federal government contracts for each other's suppliers (about $171,000.00 U.S.).

In addition to the monitory jurisdiction limit, the Procurement Review Board is limited to reviewing complaints only with respect to purchases covered by the *FTA.* Most Canadian federal government departments are covered in this respect with some notable exceptions such as the departments of Communications and Transport, and the Fisheries and Environmental services branch of the Department of Fisheries and the Environment respectively. In addition, commercial crown corporations such as Canada Post Corporation and Air Canada and the Canadian Broadcasting Corporation are not covered. The Department of National Defence is included but only for purchases involving goods of a non-military nature such as tractors, service and trade equipment, construction and office equipment.

However, the Procurement Review Board is not limited to dealing with complaints from U.S. suppliers regarding Canadian federal government procurements— any potential supplier whether Canadian, American or from a third country may launch a complaint if it can be fitted within the Procurement Review Board's jurisdiction.

The *FTA* adopts provisions of the *GATT* Procurement Code for this extended range of Canadian and U.S. government purchases. This Code requires federal governments to provide national treatment (i.e. non-discrimination as between Canadian and U.S. sources of supply) to Code-covered products and suppliers. It also identifies the technical specifications, local preference requirements, off-sets or other devices which must not be used by governments to create unnecessary obstacles to trade. The *GATT* Code covers all tendering qualifications and contracting procedures of listed government departments and agencies. Each country is required to provide all potential suppliers in the other country with equal access to presolicitation information and equal opportunity to compete in the prenotification phases. All potential suppliers must be given equal opportunity to respond to tendering and bidding requirements.

The Procurement Review Board consists of a Chairman and up to four other members. To date the government has appointed only the Chairman: Mr. Gerald Berger, a federal public servant. Members are required to have knowledge and experience relating to public sector procurement. There are specific conflict of interest provisions preventing any member of the Board from participating in the work of the Board until the conflict is resolved.

The Board is restricted to receiving complaints, conducting investigations, making determinations respecting complaints, and making recommendations in writing to a governmental institution. However, the Board's recommendations can relate to any aspect of that institution's procurement.

Proceedings before the Board are to be conducted as informally and expeditiously as the

circumstances and considerations of fairness permit. Complaints to the Board must be in writing, identify the government institution that is the subject of the complaint, include copies of all relevant documents and contain a clear and detailed statement of the substantive and factual grounds of the complaint.

Complainants must act quickly. Where the basis of the complaint is known or should reasonably have been known prior to the bid opening or the closing date for receipt of bids, the complaint must be filed before the bid opening or the closing date. Further, a complaint must be filed no later than 10 days after the grounds for the complaint are known or should have been known by the complainant. Nevertheless, the Board may consider any complaint where it is determined that the complaint raises issues significant to the procurement process or where good cause is shown. Information provided to the Board by the complainant is to be kept confidential.

The Board is under strict time limits in the conduct of its work. Within 5 days of receipt of a complaint, the Board must determine whether the complaint discloses a reasonable indication that the procurement has not been carried out in accordance with policies, practices and procedures of the government. If the Board elects to proceed within that time, the Board must require the government institution to file a report with respect to the complaint that sets out all its findings, actions, and recommendations that responds to the allegations of the complainant. A copy of the report is to be sent to the complainant, which must then file its comments with the Board.

The report of the government institution must be filed within 25 days after the day on which a copy of the complaint was sent to it by the Board. The complainant is given 7 days from the day in which the government institution's report is mailed to it by the Board to provide its reply. The Board may elect to hold a hearing at the end of this written exchange of pleadings. Although the Board cannot technically change the results of the procurement, it can hold up the procurement pending its review.

The Board's procedural rules provide that it may grant leave to any potential supplier or representative of the government of Canada or any person having a material and direct interest in any proceedings before it to intervene in a proceeding by making representations in the course of the proceeding.

In making a decision on a complaint the Board must consider all the circumstances surrounding the procurement or proposed procurement including the seriousness of the deficiency in the procurement, the degree of prejudice to all interested parties or to the integrity and efficiency of the competitive procurement system, the good faith of the parties and the extent of performance of the contract to which the performance relates. Although the Board's Rules of Procedure suggest that its review should be confined to determining whether existing procurement policies have been complied with, these mandatory considerations, on the other hand, suggest that it may be possible for the Board to make recommendations to change federal government procurement policies to improve competition for federal government business.

A Board determination must be made within 90 days of the filing of the complaint. However, under exceptional circumstances, the Board may extend the time limit and if it does so it is required to set out in writing the exceptional circumstances of the complaint that justify that extension.

The Board's Rules of Procedure also allow a 45 day time limit to be set for Board determinations on request of the complainant, the government institution, or any intervener.

Finally, the Board may elect not to proceed with the complaint if the subject matter of the complaint is already subject to litigation before a court of competent jurisdiction unless the court requests that the Board make a determination on the complaint. The Board is obliged to dismiss a complaint if the subject matter has already been decided on the merits by the courts.

The extent to which the Procurement Review Board will actually be utilized by potential suppliers is uncertain. The current limited monetary jurisdiction effectively eliminates major government equipment procurements and public works from review by the Board. On the other hand, the power of the Board to suspend a procurement for up to 90 days may well prove to be a useful remedy for businesses which have not been invited to tender (in the event that they become aware of the tender) at least to get up to

speed with other parties prior to the closing of bids.

ANTIDUMPING/COUNTERVAILING DUTY ACTIONS

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Sour (Tart) Cherries and Delicious Apples

The Canadian International Trade Tribunal (CITT) has issued findings of past, present and future material injury against importation of sour (tart) cherries and delicious apples from the United States of America.

Polyphase Induction Motors

The CITT has initiated an inquiry into the dumping and subsidizing of polyphase induction motors of an output exceeding 200 H.P., including motors and motor kits from Brazil, France, Japan, Sweden, Taiwan, the United Kingdom and the United States. A public hearing will be held April 3, 1989, to determine whether or not the dumping and subsidizing of such motors is causing material injury to the production of like goods in Canada.

Textile Tariff Inquiry

The Minister of Finance has issued a reference to the CITT, directing it to provide advice on the government's plan to reduce tariffs on textile products. The specific terms of reference are:

- assess the economic impact of bringing Canada's textile tariffs down to a level comparable with those of our major industrialized trading partners;
- make recommendations on the level and pace of tariff reductions that will maximize the economic gains to Canada without causing undue hardships to domestic suppliers of textile products and, in this latter regard, indicate whether there are specific textiles on which the tariff should not be reduced;
- make specific recommendations on the ultimate level to which textile tariffs should be reduced over the next 10 years, bearing in mind Canada's objectives in the Uruguay Round of Multinational Trade Negotiations (MTN) currently underway;
- make recommendations on what should be the pace of the tariff reductions and specifically, whether the tariffs on some fabrics and yarns could be reduced at an accelerated pace without causing injury to textile producers;
- make recommendations on the scope for accelerated bilateral reductions of the textile tariff under the *Free Trade Agreement* with the United States; and
- assess and make recommendations on the level of relativity that should exist in the tariff protection at the various levels of the manufacturing chain (i.e., from fibre and yarns through fabric to finished product).

The CITT will hold a preliminary hearing on March 6, 1989, to discuss the methodology to be used. Formal submissions and appearances before the CITT will commence on June 6, 1989. The CITT will issue a preliminary statement on October 16 and its final report on December 31, 1989.

Fabric-Covered, Padded, Wooden Clothes Hangers (CITT-4-88)

The Deputy Minister of National Revenue for Customs and Excise has issued a preliminary determination of dumping respecting fabric-covered, padded, wooden clothes hangers from Taiwan and the United States.

The Canadian International Trade Tribunal will conduct a public hearing on March 3, 1989, to determine whether or not the dumping of the clothes hangers has caused, is causing, or is likely to cause, material injury to domestic production in Canada.

Mini-Refrigerators

The Deputy Minister of National Revenue, Customs and Excise has initiated an antidumping investigation with respect to the certain absorption-type mini-refrigerators, in finished or knocked down condition, originating or exported from Poland.

The Deputy Minister must decide by April 19, 1989, on whether or not to issue a preliminary determination of dumping.

Tropical Tariffs

The Canadian government has announced that it intends to postpone the implementation of the agreement on tropical products reached at the Ministerial Meeting of the Uruguay Round of the *GATT* in Montréal last year. That agreement called for the elimination or reduction of barriers to most tropical products such as coffee, cocoa, rubber, tea, spices, fruits, nuts and cut flowers.

In addition to Canada, both the United States and European Community (EC) have chosen to postpone implementation, while Japan, Australia, New Zealand and Austria will proceed with the implementation of the agreement.

Free Trade Agreement To Go Before The GATT

Canada and the United States submitted the *Free Trade Agreement (FTA)* to a regular session of the *General Agreement on Tariffs and Trade (GATT)* in early February.

Review of the agreement by the *GATT* is the last step in the process of gaining international acceptance of the bilateral agreement. *GATT* approval could take between 6 to 18 months.

Free-trade zones are permitted under Article 24 of the *GATT*, as long as they are found not to discriminate against third parties.

GATT members with a particular interest in the agreement will form a working party to examine the deal. Countries that feel their rights are somewhat abrogated by the agreement can direct a series of questions at its two principals. Some could assert that a certain tariff or measure is unfair.

The European Commission, which has stated its general approval of the deal, has been pouring over the agreement for months and intends to fully exploit its right of examination.

Canada Acts Under FTA Dispute Settlement

The federal government recently announced that Canada is taking the initial steps under the Dispute Settlement Provisions of the *FTA* with respect to trade in plywood and wool.

The government's action is based on the failure of the United States to implement the *FTA*'s tariff reductions on soft wood, plywood and certain related wood-panel products and on differences between the two countries over the definition of wool for tariff purposes.

The Canadian government considers the U.S. decision to delay the agreed tariff cuts on plywood, waferboard and particle board to be inconsistent with U.S. obligations under the *FTA*. As a result of the U.S. decision, Canada has suspended tariff reductions on plywood and the related products and now will seek a satisfactory resolution to the issue under the dispute settlement provisions of the *Free Trade Agreement*.

Rubber Footwear To Be Protected Three More Years

The Canadian rubber footwear industry has been given another three years of protection from imports of developing countries.

The Department of Finance has announced that a tariff of 20 to 22.8 per cent will continue to be placed on footwear from developing countries until at least 1991.

EC/U.S. War Over Hormone-Treated Meat

The European Community foreign ministers recently approved a list of U.S. products worth $100 million (U.S.) on which the EC would impose prohibitive duties in retaliation for U.S. sanctions after the Community banned hormone-treated meat imports. However, the Community will resort to these measures only if diplomatic channels fail to produce results at the *GATT* or in bilateral negotiations with the U.S.

Update on Beer Trade Rules

Provincial and federal officials met in Montréal during March, 1989, in an attempt to reach a settlement on the removal of bans on importations of beer. The negotiations are pursuant to Canada's pledge to seek an end to discriminatory mark ups on importations of European beer.

Changes to Wholesaler Licence Provisions Postponed

Wholesaler licences are considered to be valuable business assets, since they allow qualifying entities to defer the incidence of federal sales tax by purchasing goods exempt of federal sales tax. Furthermore, when the goods are ultimately sold under taxable conditions, wholesalers are required to pay tax only on their acquisition cost.

To qualify for a wholesaler's licence, an applicant must sell at least 50 per cent of his taxable goods under exempt conditions in the three months preceding the application and post a bond.

Draft legislation had been released on September 6, 1988, to change the criteria for qualifying for wholesaler licences. However, Parliament was dissolved on October 1, 1988, before a bill could be tabled for enactment and the government announced in December, 1988, that the implementation of the proposed new provisions for wholesaler licences has been postponed.

Canada/EC Seek To End Dispute On Beer Pricing

The Canadian government has pledged to the European Community to seek an end to discriminatory pricing that restricts the importations of European beers.

The pledge to end discriminatory pricing follows a ruling last year by the *GATT* upholding a European complaint that the provincial listing, pricing and distribution systems for beer, wine and spirits in Canada were unfair trade practices because they discriminated against foreign products.

The three-paragraph Canadian letter signed by Daniel Molgat, Canada's Ambassador to the EC, says that Canada recognizes its obligation under the *GATT* to correct beer pricing practices and will move to do so once interprovincial trade barriers affecting beer are removed. However, no timetable for ending price discrimination against foreign beer is given.

The Most Favoured Nation Treatment of the *GATT* requires that any treatment a *GATT* member party gives to one member it must also give to other members. In the present context, this means that Canada must accord the same treatment to the European Community and the United States on importations of beer. In effect, the rule of national treatment could make it easier for American breweries to push for unfettered access to Canadian markets.

SECTION 301 AT A CROSSROADS

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In the Bush administration's first public response to the new *Trade Act's* upcoming series of deadlines for tougher actions, the Office of the United States Trade Representative (USTR) submitted to Congress, on February 21, 1989, a "priority list" of countries maintaining strict market barriers to U.S. telecommunications equipment. This is seen as a harbinger of the new administration's use of Section 301 generally.

The U.S. trade in telecommunications equipment will show a deficit of over $2.7 billion and the trade in communications services a deficit of around $2 billion in 1988, according to Commerce Department estimates. The figures confirm the loss of the U.S. lead in the high-tech industry.

In response to this situation, and in keeping with the administration's plans for a tougher trade policy, the *Omnibus Trade and Competitiveness Act of 1988 (Trade Act)* stipulates that foreign countries must open their markets to telecommunication imports from the U.S. in keeping with the access their companies enjoy in the U.S. market.

The new *Trade Act* requires the USTR to begin negotiations within 30 days with the targeted countries – in this case the European Community (EC) and South Korea – to encourage them to open their markets to telecommunications imports. If the countries make substantial progress in the talks, they will receive a 2-year extension to eliminate barriers. If the trading partners do not take steps to improve access to

their markets, or if they refuse to come to the bargaining table, the administration can retaliate under Section 301 of the *Trade Act* by imposing trade sanctions, such as a ban on government purchases of a country's telecommunications product.

According to Section 1374 of the *Trade Act*, five factors must be taken into account when identifying "priority foreign countries" for negotiations:

(1) the nature and significance of the acts, policies and practices that deny mutually advantageous market opportunities to telecommunications products and services of United States firms;

(2) the economic benefits (actual and potential) accruing to foreign firms from open access to the United States market;

(3) the potential size of the market of a foreign country for telecommunications products and services of United States firms;

(4) the potential to increase United States exports of telecommunications products and services, either directly or through the establishment of a beneficial precedent; and

(5) measurable progress being made to eliminate the objectionable acts, policies or practices.

Foreign governments, such as West Germany, lobbied the administration for months to avoid being designated as priority countries for their market-access restrictions on telecommunications. USTR sources said they targeted the EC and South Korea because of the high volume of their exports to the U.S., strict barriers to telecommunications imports that limited potential U.S. sales, and restrictions on investment.

Trade barriers within the EC varied from "relatively open access to almost completely closed," according to the USTR. EC market restrictions cited by U.S. officials included government purchasing practices and standards, investment restrictions, and provisions for value-added services. France and West Germany topped the EC list.

Recent U.S. trade office documents show a \$4.9 billion West German telecommunications market in 1986, which was projected to grow to \$5.7 billion in 1988. In 1986, the U.S. exported \$109 million of telecommunications equipment to West Germany and \$38.5 million to France, whose telecommunications market totals about \$3 billion a year. Nevertheless, EC Commissioner Frans Andriessen expressed "a certain surprise" that the EC was designated a priority country. Andriessen pointed out that the U.S. and EC were already engaged in market-opening talks, as part of the effort to remove internal barriers in 1992, and that these consultations had been "quite constructive."

South Korea was cited as having the same market restrictions as the EC, as well as foreign import tariffs of 15% to 20% on telecommunications equipment. These policies encourage domestic purchases and have offered the U.S. virtually no opportunity to sell telecommunications equipment. The Korean telecommunications market was estimated at \$1.3 billion in 1985 and is projected to rise to \$1.8 billion by 1990. Talks aimed at keeping South Korea off the list collapsed on February 17, 1989, when Korean negotiators failed to make concessions. In a February 21 statement, the Korean government expressed "deep regret" at being named a priority country.

The administration will specify goals for telecommunications negotiations with the EC and South Korea by the end of next month. In addition, the administration is monitoring two other countries—Canada and Japan—and has asked the domestic telecommunications industry to report, by March 1, 1989, whether the two trading partners are complying with their market-access commitments.

In another step to further improve access to foreign markets, the administration announced it will hold telecommunications talks with countries where U.S. suppliers face telecommunications barriers. Brazil has already been asked to participate in talks and, according to government sources, Sweden and Taiwan may be next. In 1989, the U.S. supplied equipment worth about \$286 million to Brazil's \$815 million telecommunications market. Nevertheless, U.S. firms face difficulties because Brazilian tariffs range from 30% to 185% and access to rental of telephone lines is limited.

Some domestic industry officials were reportedly unhappy that only two countries were

identified as "priority" targets for negotiations, and two others, Canada and Japan, were targeted for monitoring only. They said the administration was not pressing the market-access initiative with sufficient energy. Some Commerce Department officials suggested the *Trade Act* was not adequately specific on retaliatory measures to be applied when negotiations fail. Members of Congress also expressed doubts that the *Trade Act* gave the U.S. sufficient leverage to open foreign markets to U.S. telecommunications equipment.

CANADA-U.S. FREE TRADE AGREEMENT (FTA)

The first meeting of the *Canada-U.S Free Trade Agreement (FTA)* Commission, which will oversee implementation of the *FTA*, has been set for March 13, 1989. U.S. Trade Representative (USTR) Carla Hills and Canada's Trade Minister John Crosbie will meet that day to discuss possible solutions to the disputes over wool and plywood. If the negotiators fail to reach an agreement on plywood, the controversy could be taken before the *FTA*'s dispute settlement panel. The Senate Finance Trade Subcommittee has scheduled oversight hearings on the *FTA* for April 7, 1989. Lumber is expected to be the main issue on their agenda.

On February 15, 1989, the U.S. International Trade Commission (ITC) agreed, by a vote of 3 to 2, to investigate charges that Canadian producers are circumventing a countervailing duty on live hogs by exporting increasing quantities of subsidized fresh, chilled and frozen pork to the U.S. and thus injuring the domestic pork industry. The case is the first to be filed against Canada since the *FTA* came into effect on January 1, 1989.

In other developments, the U.S. textile industry has asked the administration to challenge Canada's ruling on apparel items eligible for preferential treatment under the *FTA*. The agreement's provisions allow apparel goods made in the U.S. or Canada to be traded duty-free between the two countries. According to the industry, Canada's definition of North American-made apparel products allows too large a percentage of the fabric to be foreign-made.

G.N.H.

U.S. - CANADA TRADE LAW CASES

Steel Rail

On March 2, 1989, the Department of Commerce issued its preliminary affirmative countervailing duty determination of new steel rail, except light rail, from Canada. Commerce estimated the net subsidy to be 103.55% for all manufacturers, producers and exporters, except for one producer who was excluded from the investigation.

Red Raspberries

On February 13, 1989, Commerce announced the results of its final antidumping administrative review of red raspberries from Canada. Commerce found the dumping margins for the period June 1, 1986 to May 31, 1987, to be 2.59%, 5.21%, 9.15% and 3.67% for each of the producers and exporters.

Pork

On February 3, 1989, the Department of Commerce initiated a countervailing duty investigation of fresh, chilled and frozen pork from Canada. Commerce will issue its preliminary determination on or before March 31, 1989.

Choline Chloride

On January 31, 1989, the Department of Commerce announced it was conducting an antidumping administrative review investigation of choline chloride. The review will cover the period December 1, 1987 through November 30, 1988. Commerce intends to issue the final results of this review no later than January 31, 1990.

Elemental Sulphur

On January 31, 1989, the Department of Commerce announced that it was conducting an antidumping administrative review investigation of elemental sulphur. The review will cover the period January 9, 1988 through October 31, 1988. Commerce intends to issue the final results of this review no later than January 31, 1990.

Appliance Plugs

The Department of Commerce issued on December 31, 1988, its affirmative determination that thermostatically controlled appliance plugs and internal probe thermostats are being sold at less than fair value. Commerce found the estimated dumping margins for the period November 1, 1987, through April 30, 1988, to be 29.27% *ad valorem*. The International Trade Commission issued a negative final determination on January 27, 1989.

Live Swine

The Department of Commerce published on January 9, 1989, the results of its countervailing duty administrative review of live swine from Canada. Commerce found the dumping margin for the period April 3, 1985, through March 31, 1986, to be *de minimis* for slaughter sows and boors and Can. $0.022/lb. for all other live swine.

Cephalexin Capsules

The International Trade Commission determined, on December 21, 1988, that imports of cephalexin capsules from Canada are not materially injuring, nor do they threaten material injury, to a U.S. industry.

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