TRADE POLICY DEVELOPMENTS

GOLDMAN ADDRESSES COMPETITION AND LIBERALIZED WORLD TRADE

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On March 9, 1989, Cal Goldman, Director of Investigation and Research, attended the High Commission in London to speak at a seminar entitled "Beyond 1992: The Single Markets of North America and Europe". The Director's comments centered around the protection of competition in an environment of freer trade.

The Director described a modern world of falling tariff barriers, increased global trade, an increasing number of regional trading blocs including Canada and the United States in North America, and a world-wide escalation in mergers, take-overs and general consolidations. With respect to the latter the Director pointed out that the pace of merger activity in Canada has significantly increased from 1980 when there were 414 takeovers to 1987 when there were 1,092. This wave in merger activity in Canada and abroad was attributed to a period of sustained economic growth, in which 1987 marked Canada's sixth year of continuous economic expansion, and a global reduction of restraints on trade and liberalization of market forces.

The challenge facing domestic antitrust authorities in this era of increasing trade liberalization was described as the need to protect the competitive process without stifling Canadian industry in relation to foreign competition. Such a balance was reported to have been struck in the *Competition Act*, the objective of which is "to expand opportunities for Canadian participation in world markets, while at the same time recognizing the role of foreign competition in Canada."

The merger provisions in the *Competition Act* were cited as a specific example of where this delicate balance has been achieved. Under the *Act*, the primary issue with respect to mergers is whether their effect is to prevent or lessen competition substantially in Canada. The Director emphasized that both sides of the coin are examined in assessing the impact of a merger on competition. In addition to issues of market shares and concentration ratios, other factors such as the existence of foreign competition, tariff and non-tariff barriers and acceptable substitutes for the product are examined. As well, not only are the negative effects on competition assessed but also the offsetting gains of a merger in the form of significant increases in the value of Canadian exports and substitution of domestic product for imports. In addition, specialization agreements between companies who want to specialize in the production of a product are acceptable provided there is a likelihood that the gains they produce in efficiency will outweigh their negative effects on competition.

Another main theme of the Mr. Goldman's presentation was the existence of a broad range of flexible instruments to address competition problems in a realistic and effective fashion. The compliance-oriented approach of the Bureau of Competition Policy was described as giving every reasonable opportunity to businessmen to see the possibility of conflict with the law up front and to avoid it.

Parties planning a merger are entitled to request from the Director an assessment of the likely impacts on competition. If no competition issue arises, an Advance Ruling Certificate (ARC) is issued which allows the merger to proceed with statutory comfort. As of mid-February 1989, the Bureau had received 113 requests for ARC's, of which 83 have been granted.

The compliance-oriented approach makes full use of a range of remedies. In addition to advance ruling certificates, the compliance oriented approach provides for the issuance of advisory

opinions on the basis of a preclosing restructuring of the transaction or without the necessity of such; the acceptance of undertakings to take remedial action post closing; and monitoring the effects of a merger on competition for a three year period during which the merger may be challenged. The benefit of the latter is that it avoids having to stifle the transaction at birth.

The Director also cited some interesting statistics as proof of the law's effectiveness. From June 1986 to mid-February 1989, the Bureau reviewed 321 mergers or 10 percent of mergers that occurred in Canada. Of that number, 287 were acceptable under the provisions of the *Competition Act*; 18 were subject to monitoring; 9 were conducted with restructuring and 7 were voluntarily abandoned by the parties.

A factor not noted in these statistics was the effect of a growing awareness of merger laws by business and corporate counsel. The Director reported that, to his knowledge, a number of proposed merger transactions had been stopped or restructured at the preliminary stage in the realization that they were not consistent with the standards of merger review under the *Act*. However, at the same time the Director emphasized that the success of the Bureau's approach to concentrate on prevention rather than cure was very much dependent on the willingness of business to cooperate with the Bureau in merger enforcement.

The Director's final remarks emphasized the strong resemblance between the objectives of the *Canada—U.S. Free Trade Agreement* and the *Competition Act*. Both are concerned with the liberalization of market forces and share, as fundamental, the objective of industrial efficiency and a rational allocation of resources.

The Director concluded by noting that the *Free Trade Agreement* provides for the creation of a Working Group to look at the development of a substitute regime to replace existing trade remedy laws within the next five to seven years. In this context, the use of domestic competition laws instead of anti-dumping laws to regulate anti-competitive practices, such as dumping, in transborder trade, may be the best means of achieving the objectives of economic welfare and growth underlying the *Free Trade Agreement*.

TREATMENT OF PARTS IN ANTI-DUMPING PROCEEDINGS

On April 28, 1989, the Canadian International Tribunal found that the dumping and subsidizing of polyphase induction motors and parts had not caused past, present or future material injury to Canadian production.[1]

In this case, the subject goods included both complete motors and motor parts. Specifically, the Deputy Minister of National Revenue for Customs and Excise defined the subject goods as:

> Polyphase induction motors of an output exceeding 200 horsepower or 150 kilowatts, including motors and motor parts in a knocked-down or incomplete condition....
> For greater clarity, a motor exported in knocked down or incomplete condition consists of most of the major parts and sub-assemblies necessary to assemble the motor....[2]

The case raises an interesting issue with respect to the treatment of parts in anti-dumping proceedings: the circumvention of anti-dumping duties on manufactured products by the importation of parts later assembled in so called "screwdriver" operations in the country of importation.

Unfortunately, in its Statement of Reasons, the Tribunal failed to address the circumvention argument raised by the Canadian complainants during the proceedings.[3] The complainants argued that if the Tribunal failed to make an affirmative injury determination in respect of motor parts in a like manner to complete motors, other producers would attempt to circumvent the Tribunal's affirmative finding in respect of complete motors by importing dumped parts.

In the past, the Tribunal has dealt with the circumvention argument in simplistic terms and only with respect to the use of imported dumped parts in simple assembly operations in Canada. For example, in *Bicycles and Bicycle Components from the Republic of Korea and Taiwan*, the subject goods were bicycles and bicycle frames, forks, steel handle bars and wheels.[4] The Tribunal found that the dumping of bicycles had caused past, present and future material injury. With respect to the components, the Tribunal found that the volume of imports was not such to have caused past or present injury but found that there was a likelihood of injury in the future.

The Tribunal's rationale for its finding with respect to components is found on page 13 of its decision:

> It must be stated, as a general rule, that where it is found that dumping of an article has caused, is causing and is likely to cause material injury, then, in all likelihood, where there is production in Canada of the major components of that article, continued dumping of these components will also cause material injury. This rule must find its application where, in the opinion of the Tribunal, the purpose and effectiveness of the anti-dumping measures levied against a complete article would otherwise be frustrated, as the Tribunal believes to be the case here, where the feasibility of simple assembly has been demonstrated.

The distinguishing factor between *Bicycles* and *Induction Motors* is that the latter did not involve a simple assembly operation whereby imported parts represented a major component of the finished product in terms of value and were simply incorporated into the finished product. Unfortunately, the Tribunal has yet to address the circumvention argument in those cases where imported parts are used in the manufacture, rather than assembly, of the subject goods. In such cases, to impede the importation of parts by the imposition of anti-dumping duties would have the anti-competitive effect of retarding the establishment of production facilities in Canada and protecting the market shares of existing Canadian producers.

Canada does not have a circumvention provision in its anti-dumping legislation. However, the European Community and the U.S. have recently introduced legislation with respect to the circumvention of anti-dumping duties on manufactured products. The rationale underlying the implementation of such legislation is that the dismantling of products into a few components that are easily reassembled can constitute an unfair trade practice.

On June 22, 1987, the Council of European Communities adopted a new circumvention rule contained in Regulation (EC) No. 1761.[5] The new provision provides for the imposition of anti-dumping duties if three conditions are met.

First, production must be carried out by a party which is related to or associated with any of the manufacturers whose exports of like product are already subject to a definitive anti-dumping duty. Second, the assembly or production operation is to have been initiated or substantially increased after the opening of the anti-dumping investigation. Third, the value of the parts or materials used in the assembly operation and originating in the country of exportation of the products subject to the anti-dumping duty is to exceed the value of all other parts and materials used by at least 50%. In addition, factors to be considered in defence of the imposition of the circumvention rule include research and development expenditures and the variable costs incurred in the assembly or production operations of the Community country.

The *Omnibus Trade and Competitiveness Act* of 1988 also contains a provision with respect to the prevention of circumvention of anti-dumping and countervailing duty findings.[6] Section 1321 of the *Act* provides that if merchandise sold in the United States is subject to an anti-dumping or countervailing duty finding, and if assembled in the United States from parts produced in the foreign country with respect to which such finding applies, the International Trade Commission may include within the scope of the finding the imported parts that are used in the assembly of the merchandise in the United States. In determining whether or not to include the parts in the finding, the Commission is directed to consider such factors as the pattern of trade, whether the manufacturer or exporter of the parts is related to the person that assembles the merchandise in the United States and whether imports of such parts have increased after the issue of the finding.

Unfortunately, the Tribunal did not take the opportunity in *Induction Motors* to comment on the circumvention of anti-dumping duties and provide a set of criteria which could be used to distinguish bona fide investment from operations merely seeking circumvention. It is imperative to the operation of a competitive and efficient economy that the anti-dumping laws be applied to ensure that investments with high added value and investments revealing a long-term commitment through local research and development are not penalized. The EC and the U.S. have recognized that such a distinction must be made and have introduced legislation which clearly serves only as a tool for curbing circumvention of anti-dumping proceedings.

Certain Canadian industries may feel threatened by imports, and even more so by foreign competitors setting up genuine production in Canada in hope of gaining access to an increasingly large North American market by virtue of the *Canada–U.S. Free Trade Agreement*. Consequently, the need for a circumvention rule in Canadian anti-dumping law to ensure that bona fide investment in Canada is not discouraged becomes increasingly necessary. Otherwise, a form of protectionism will prevail in Canadian anti-dumping law which will be very harmful to the operation of an efficient and competitive economy in Canada.

Notes

1. *Polyphase Induction Motors*, CITT Inquiry No. CIT-5-88, Apr. 28, 1989.
2. Statement of Reasons to Final Determination of Dumping and Subsidizing Respecting Polyphase Induction Motors of an Output Exceeding 200HP, Department of National Revenue (Customs and Excise), March 29, 1989, p. 1.
3. Statement of Reasons to Accompany the Findings issued on April 28, 1989, respecting Polyphase Induction Motors originating or exported from Brazil, France, Japan, Sweden, Taiwan, the United Kingdom, and the United States of America, Ottawa, May 12, 1989.
4. *Bicycle and Bicycle Components from the Republic of Korea and Taiwan* (ADT-11-77) June 5, 1977.
5. The EC circumvention rules are contained in Council Regulation (EEC) No. 1761/87 and have been added as a new paragraph 10 to Article 13 of Council Regulation (EC) No. 2176/84 on protection against dumped or subsidized imports from countries not members of the EEC. (27 *O.J. Eur. Comm.* [No. L 201] [1984] as amended 27 *O.J. Eur. Comm.* [No. L 227] 35 [1984]).
6. The *Omnibus Trade and Competitiveness Act* of 1988, Pub. L-100-418, Aug. 23, 1988, 102 Stat. 1107 et seq.

B.S.M.

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

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As a result of several claims by the U.S. lumber industry that Canadian exporters are falsely labelling their products to avoid a tax on lumber destined for the U.S., the Commerce Department is urging Canada to increase its enforcement of a 1986 Memorandum of Understanding (MOU). The MOU requires Canada to impose a 15% tax on U.S.-destined lumber. In a May 16, 1989, letter to the Commerce Department, the entire Washington state congressional contingent voiced support for the U.S. lumber industry and asserted Canadian evasion of the export tax occurs in a number of forms:

(1) lumber from provinces subject to the tax is reported as coming from British Columbia, which is not subject to the tax;
(2) high grade lumber is misrepresented as being of a lesser grade and thereby subject to a lower tax; and
(3) softwood lumber is reported as non-taxable hardwood or fencing.

The U.S. indicated, at the end of May, that it will turn down a Canadian request to drop a Section 301 case filed against Canada for salmon and herring conservation measures that ban exports. An *FTA* dispute resolution panel has been formed to resolve the conflict. The panel is expected to hold its first meeting by June 23, 1989. Public comments submitted to the Office of the U.S. Trade Representative (USTR) are "still relevant," according to a USTR source. If the matter is not resolved by the September 1 target date, the U.S. could take retaliatory steps.

On May 8, 1989, Sen. Pete Wilson (D-CA) asked the administration to postpone U.S. concessions to Canada until Canada's provinces end their discriminatory practices on imported wine. According to Wilson, British Columbia's and Québec's price mark-ups and "administrative charges" on imported U.S. wine violate terms of the *FTA*. Wilson also claimed that Ontario's recent lowering of price mark-ups on wine (to

19%) did not meet *FTA* terms, which require a 25% differential.

SUPER 301 AND THE OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988

Getting on a priority list may sound like a privilege, but not to Japan, Brazil and India. These are the countries that the Bush administration named, on May 25, to the "Super 301" list of countries with trade practices that have caused the severest damage to U.S. exporters. The administration also placed eight countries on a "priority watch list" of trading partners that fail to protect U.S. patents, trademarks and copyrights.

Under the Super 301 provision of the *Omnibus Trade and Competitiveness Act of 1988* (*Trade Act*), the Office of the United States Trade Representative (USTR) must list "priority" countries it finds to have significant trade barriers and designate specific practices causing the most injury to U.S. trade. According to USTR Carla Hills, identification of priorities was based on a number of considerations including the potential to increase U.S. exports, the number and pervasiveness of significant barriers to U.S. exports, the likelihood that a Section 301 investigation would help U.S. efforts to eliminate these practices, and the compatibility of these investigations with U.S. objectives in the Uruguay Round of negotiations under the *General Agreement on Tariffs and Trade (GATT)*.

The USTR has 12 to 18 months to negotiate the elimination of trade barriers with Japan, Brazil and India. Once the trading partner agrees to remove the barrier, Congress will receive a review on the progress of the removal of the barrier in each of the next three years. If no agreement can be reached, the USTR must decide whether the practice is unfair. If it is, the administration could retaliate with such measures as increased tariffs, import quotas, fees and withdrawal from existing trade agreements.

Japan was singled out for exclusionary government procurement practices in the satellite and supercomputer sectors, which bar foreign suppliers, and for technical barriers to trade in the forest products sector. India was targeted for trade-related investment measures that "prohibit or burden" foreign investment and for the closure of its insurance market to foreign insurance companies. Brazil was named for its bans on imports, quantitative import restrictions and restrictive licensing.

By June 16, the USTR must initiate Section 301 investigations of every practice and every country singled out. These investigations could include fact-finding, consulting with affected U.S. companies and trading partners, and using dispute settlement procedures under existing trade agreements.

The European Community (EC), Korea and Taiwan narrowly avoided designation as "priority" countries. The U.S. and EC made some progress in mid-May when both sides agreed to follow *GATT* procedure to resolve U.S. complaints about EC oilseed subsidies and EC complaints about U.S. sugar quotas. In addition, the EC bluntly informed the U.S. it would not negotiate with the U.S. under the Super 301 framework. South Korea avoided being targeted after concluding a bilateral agreement with the U.S. in which it undertook to remove several trade barriers. The agreement promises the erosion of barrier closure provisions and the extension of national treatment for foreign investors. Taiwan is negotiating an agreement with the U.S. to reduce tariffs on a number of manufactured items of interest to U.S. exporters.

Although it named only six priority practices, the U.S. identified other practices it said were important factors to be negotiated. These "trade-distorting practices," said Hills, "will be better pursued at this time outside of Section 301, especially through multilateral extensions in the Uruguay Round." They include EC subsidies on farm products and variable levies on agricultural imports, Japanese import barriers on rice, and EC financial supports for Airbus plane production. The USTR plans to assess the progress made in these discussions in the context of next year's 301 process.

The "Special 301" intellectual property provisions of the *Trade Act* call on the USTR to identify priority countries and to develop an overall strategy to ensure adequate and effective protection of intellectual property rights. Because

of what Hill termed "significant progress made in various negotiations," the USTR decided not to identify any priority countries under Special 301. Instead, 25 countries whose practices in intellectual property protection "deserve special attention" were singled out. Seventeen of these countries (including Canada) were placed on a "watch list," while the eight remaining trade partners—Brazil, China, India, Korea, Mexico, Saudi Arabia, Taiwan and Thailand—have been placed on a "priority watch list."

The USTR will review the status of the countries on the "priority watch list" no later than November 1 of this year. An annual review under Special 301 is mandatory, but the USTR can designate a trading partner as a priority country, or remove a country from the priority status list at any time.

Although Hills has assured trading partners that administration of the Section 301 statute will not be protectionist and will conform with *GATT* regulations, *GATT* officials and the three countries targeted under Super 301 say the U.S. action could undermine the Uruguay Round of *GATT* talks.

Government officials in Japan, India and Brazil expressed anger at being targeted. They were quick to claim that the U.S. has its own trade barriers. U.S. trade deficits, remarked some of these officials, derive from poor U.S. fiscal policy rather than from foreign trade barriers.

USTR Hills said, in a May 25, 1989, press statement, that progress on each of the areas identified as trade liberalization priorities—whether through Super 301, Special 301 or the ongoing bilateral and multilateral negotiations—"will not only advance the economic interests of the United States, but will contribute to global trade expansion and sustained economic growth."

Analysts take two somewhat differing views of the likely impact of these U.S. actions. Some argue that, if the U.S. takes unilateral trade reprisals under Super 301, then other countries may retaliate. U.S. import restrictions have been growing rapidly in recent years, although these analysts agree that U.S. restrictions on imports are less harsh than those of its main trading partners, particularly Japan.

Other analysts assert that restrictions (or the threat of restrictions) can help to open foreign markets. For example, the fear of protectionism was a major factor, they argue, in persuading Canada to negotiate the *Free Trade Agreement (FTA)* with the U.S. Fear of being targeted under the new trade act also helped open markets in such nations as Korea and Taiwan, they say.

G.N.H.

CANADA—U.S. TRADE CASES

FTA Cases

The Commerce Department announced, May 18, 1989, that it had received requests for *FTA* panel reviews in cases involving dried heavy salted codfish and polyphase induction motors. Binational panels will be formed to review the cases by early July.

The U.S. and Canada named, on May 23, 1989, the first binational *FTA* panels to review Commerce Department rulings in anti-dumping cases on Canadian red raspberries and replacement parts for bituminous paving equipment. The requests for review were filed on April 26, 1989. Each panel must reach a final decision within 315 days of the review request.

AD/CVD Cases

Pork

On May 8, 1989, the Department of Commerce issued its preliminary affirmative countervailing duty determination of fresh, chilled and frozen pork from Canada. Commerce estimated the net subsidy to be Can. $0.035/lb. for all producers and exporters. A final determination will be issued by July 17, 1989.

Paving Equipment

Commerce published, on May 8, 1989, the final results of its administrative review of replacement parts for bituminous paving equipment. Commerce found dumping margins of 1.39% for the period September 1, 1986, through August 31, 1987.

Construction Castings

On April 28, 1989, the Department of Commerce announced it was conducting an administrative review of iron construction castings. The review will cover the period March 1, 1988, through February 28, 1989. Commerce intends to issue the final results of the review by March 31, 1990.

Cephalexin Capsules

On April 12, 1989, Commerce issued its preliminary affirmative anti-dumping determination of generic cephalexin capsules. Commerce found dumping margins of 9.43% for all manufacturers and producers. A final determination will be issued by June 19, 1989.

Salted Codfish

Commerce issued, on March 31, 1989, the final results of its anti-dumping duty order of dried heavy salted codfish from Canada. Commerce found weighted average dumping margins of 4.20%, 3.42%, 2.29%, 1.82%, 0.73% and 0% for distributors and exporters during the period July 1, 1986 through June 30, 1987.

Steel Rail

On March 13, 1989, the Commerce Department published its preliminary anti-dumping determination of new steel rail except light rail, showing dumping margins of 2.72%. Commerce will issue the final results of this determination by July 26, 1989.

Brass Sheet and Strip

Commerce announced, on May 8, 1989, the initiation of an administrative review of Canadian brass sheet and strip. The review will cover the period from January 1, 1988 to December 31, 1988. Commerce will publish the final results of this determination by February 28, 1990.

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