TRADE POLICY DEVELOPMENTS

CANADIAN TRADE UPDATE

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Canada - U.S. Trade

Panel established to review U.S. Countervailing Duty Determination against Canadian Pork

A bi-national panel has been established under Chapter 19 of the *Free Trade Agreement* (the *FTA*) to review the U.S. Department of Commerce's (DOC) final determination of subsidy in the countervail action against imports of Canadian fresh, chilled and frozen pork. The focus of the review will be on the legality of the DOC's determination that stabilization payments to Canadian pork producers automatically flow through to the final pork product. In the interim, countervailing duties of approximately 0.08 cents per kilogram have been imposed on all exports of Canadian pork to the American market.

Canada will adopt FTA Panel Report on Salmon and Herring

The Canadian government has indicated that it will adopt the *FTA* Panel Report on West Coast Salmon and Herring (see *Canada-U.S. Trade*, November-December 1989). The Panel held that Canadian landing regulations are a legitimate conservation measure but that they need not apply to 100 per cent of the catch, and that between 10 and 20 per cent of the fish should be made available directly to foreign buyers and processors without being landed. However, it should be noted that the Panel Report also recognizes Canada's sovereign right to ensure that any changes in the requirement not compromise its conservation objectives for the West Coast salmon and herring fisheries. The Canadian government is now developing an implementation plan on the basis of consultations with provincial and industry representatives.

Canada to Maintain Import Quotas on Ice Cream and Yoghurt

The *GATT* Council has adopted a *GATT* Panel Report which holds that quotas limiting the quantities of ice cream and yoghurt imported into Canada are not in conformity with Canada's obligations under the *GATT*. The Panel report found that Canada's import quotas on ice cream and yoghurt violated the prohibition of quantitative restrictions on imports in Article XI:1 of the *GATT*.

The Panel rejected Canada's argument that the quotas were justified under Article XI:2(c)(i), which allows import restrictions on imported agricultural products when they are necessary to the enforcement of government measures restricting quantities of like domestic products. Canada had argued that imported ice cream and yoghurt could displace Canadian ice cream and yoghurt, which would cause a domestic surplus of raw industrial milk. This, in turn, would make it impossible for Canada to manage the effectiveness of its supply management programme for industrial milk. The Panel rejected this analysis and held that ice cream and yoghurt did not meet the requirements of Article XI:2(c)(i) of "like products" to Canadian industrial milk because they did not compete directly with raw milk nor would their free importation be likely to render ineffective the Canadian supply management programme for raw industrial milk.

Canada has reiterated its support for its national supply management programme for industrial milk and has requested more time to study the Report. The Canadian government has announced that the Report will be considered only in light of the outcome of the Uruguay Round of Multilateral Trade Negotiations ("MTN"). This

is because the Panel Report concerns the interpretation of Article XI of the *GATT*, currently under negotiation at the MTN.

Import quotas for ice cream and yoghurt of 347 and 332 tonnes respectively are expected to remain until the MTN negotiations are concluded at the end of 1990.

U.S. to end Discriminatory Tax on Imported Oil

In 1987, the *GATT* Council adopted a Panel report which held that the United States' imposition of a discriminatory tax on oil imported from Canada was inconsistent with the *GATT*. In essence, the Panel Report held that the 11.7¢ (U.S.) per barrel oil tax was discriminatory because it was 3.5¢ per barrel higher than that levied on U.S.-produced crude oil. The U.S. government did not implement the panel report and Canada recently announced that it would retaliate by seeking authority from the *GATT* Council to raise tariffs on a selection of imported products from the United States (see *Canada-U.S. Trade*, July-August 1989 and November-December 1989).

Retaliation by Canada against a wide range of U.S. products will no longer be necessary as the American government has introduced new legislation removing the discriminatory tax. Under the new law, the superfund tax will be equalized at 9.7¢ per barrel, whether domestic or imported. The new law is expected to save energy producers in Western Canada an estimated $10 million per year.

U.S. to Prohibit Imports of Canadian Lobsters

The United States has introduced legislation that prohibits imports of live Canadian lobsters of the species *homarus americanus*, which are smaller than U.S. federal minimum size restrictions. The prohibition comes after complaints by Maine lobster fishermen that imported Canadian live lobsters depress prices in the New England market because they are smaller than those permitted to be caught by U.S. fishermen. The ban could affect 20 to 30 million of live Canadian lobster exports to the United States.

The Canadian government has announced that it is challenging the U.S. import restriction and has requested the establishment of a bi-national panel under Chapter 18 of the *FTA* to settle the dispute.

Canada, U.S. to Accelerate Tariff Reductions under FTA

The Canada-U.S. Trade Commission has announced that tariffs on nearly four hundred items traded between Canada and the United States will be eliminated by April, 1990. Trade in these items amounts to approximately $6 billion per year.

The announcement of the accelerated tariff reductions does not affect an earlier decision by the U.S. government to suspend scheduled tariff reductions on Canadian plywood until Canada has changed its building codes to allow for the use of American plywood in Canadian construction. Therefore, while tariffs on other products are being phased out under the *FTA*, plywood tariffs, 15 per cent in Canada and 20 per cent in the United States, will remain in effect until this dispute is resolved.

Meeting of Canada-U.S. Trade Commission

Recently, the Canada-U.S. Trade Commission met for a second time. The role of the Commission is to supervise the implementation of the *FTA*, resolve disputes and ensure that the evolution of the *FTA* is in the interests of both parties.

The Commission recommended to both the Canadian and American governments that the categories of business people who will be allowed easier temporary entry between the two countries be expanded. In particular, the Commission has recommended the amendment of eligibility requirements for temporary entry for professionals covered under Chapter 15 of the *FTA*.

The Commission has created an additional working group under Article 708 of the *FTA* to work toward the elimination of technical barriers to trade in fishery products. It also reviewed the progress of the original eight working groups whose objective is to eliminate technical barriers to trade in agricultural, food, beverage and certain related goods.

The Commission also approved the establishment of a Tourism Working Group under Chapter 14 of

the *FTA* in an effort to enhance cooperation between the two countries in this area.

Finally, the Commission reviewed the status and progress of the work of the Bi-national Committee on Plywood Standards and agreed to send a joint letter to the Committee urging it to submit recommendations for common standards no later than February 28, 1990.

Multilateral Trade Negotiations Update

U.S. Seeks Ban on Domestic Subsidies

The United States recently shocked the delegates at the Uruguay Round of the Multilateral Trade Negotiations when it proposed that existing restrictions on export subsidies under the *GATT* be extended to cover domestic subsidies. It is the American position that domestic subsidies distort trade as much as export subsidies, and should be disciplined in a similar way. Domestic subsidies would include those granted on the basis of production output or on condition that a domestic manufacturer use domestic inputs rather than imports.

Canada Proposes Reductions in Tariff and Non-tariff Barriers

Canada has proposed a one-third reduction in global tariffs at the MTN. The proposal recommends achieving that goal through a combination of tariff formula and bilateral "request and offer" negotiations. Global trade liberalization will assist Canadian industry in becoming more internationally competitive, and improved access to foreign markets will be of particular benefit to Canadian resource-based industries.

Update on Negotiations

The following negotiating groups have had meetings during the months of October and November 1989:

MTN Agreements Group

The group recently concentrated on the *Agreement on Anti-dumping Practices*. Singapore presented an outline of principles and objectives aimed at ensuring that anti-dumping rules are not used for protectionist purposes or disguised as safeguard measures, and do not operate contrary to the public interest.

Hong Kong's proposals to the *Agreement* were aimed at strengthening disciplines on importing countries using anti-dumping measures. The proposal recommended encouraging investigating authorities to take more account of the interests of the user industry, consumers and the overall economic cost of anti-dumping actions.

Recently, Canada submitted a proposal outlining its reforms to the *Anti-dumping Code*. The proposal urges that the rules be as clear and transparent as possible because of the effect that anti-dumping practices can have on trade. The proposal recommends:

(1) more specific guidelines on the minimum documentation required to initiate an anti-dumping complaint;

(2) a more specific definition of what constitutes the "domestic industry" in an anti-dumping complaint;

(3) that a preliminary determination be made after 60 days following the initiation of an action;

(4) clarification on the use of price undertakings;

(5) the amount of duties payable should be determined as near as possible to the time of entry of the subject good; and

(6) that the exporter be given 30 days to respond to an allegation of injurious dumping.

The proposal also contains detailed submissions for improving the standards for the application of anti-dumping measures.

Subsidies and Countervailing Measures Group

Some participants in the group urged stronger discipline on countervailing action, in particular the need for establishing a clearer causal link between subsidized imports and injury to a

domestic industry before the imposition of a countervailing duty. Many participants favoured a "sunset clause" whereby countervailing measures would be terminated five years after imposition.

Tariffs Group

The chairman of the group suggested a possible negotiating framework which specified a tariff-cutting formula supplemented by request-offer negotiations. Some participants agreed with this suggestion and others called for the formula to have a greater harmonization effect. Some others urged that the developing countries be given more flexibility in reducing tariffs.

Non-Tariff Measures Group

The United States has urged that the Customs Co-operation Council be asked to prepare technical studies on rules of origin, which would then be used as a basis for *GATT* negotiations.

The European Community proposed that a "Code of Good Practice" for non-governmental standardizing bodies be added to the *Technical Barriers to Trade Agreement.* The Code would require non-governmental testing bodies to be monitored and to report regularly on their activities. At present, the agreement imposes direct legal obligations only on central government standardizing bodies.

Agricultural Group

The United States submitted a comprehensive proposal regarding long-term global reform of agriculture. It covered import access, export competition, internal support and sanitary measures. The reform is designed to guide agricultural production and trade toward a more market-oriented system on the basis of more effective rules and to integrate agriculture more fully into the *GATT.* According to the United States, the cost to consumers of the distortions currently affecting agricultural trade exceeds U.S. $275 billion annually.

Intellectual Property Group

Three new proposals concerning the standards of intellectual property rights were introduced.

New Zealand suggested that parties should undertake to accord protection at least as adequate and effective as the standards contained in the principal international intellectual property conventions, in particular the *Paris Convention for the Protection of Industrial Property* and the *Berne Convention for the Protection of Literary and Artistic Works.* New Zealand was of the opinion that there was a need to keep a set of minimum standards to address the major causes of trade distortion.

The Canadian submission underlined the importance of adequate standards for international trade. Canada's position was that negotiations should be comprehensive, addressing all eight major property areas identified: patents, trade marks, geographical indications, copyright, neighbouring rights, integrated circuits, industrial designs and trade secrets. Canada is in favour of an enhanced effective level of intellectual property protection, with all countries moving towards a common adequate standard of protection but not necessarily detailed harmonization.

Canada has recommended that the enforcement of intellectual property rights should include procedures which ensure national treatment and unconditional most-favoured-nation/non-discrimination, fair and equitable treatment of affected parties, provision of judicial and/or administrative civil remedies with the possibility of compensation for injury as well as criminal sanctions and penalties for counterfeiting and copyright conspiracy, interim procedures to permit the detention of counterfeit or pirated goods by customs, and recourse to multilateral dispute settlement in the *GATT.*

Textile and Clothing Group

The group discussed modalities for the integration of the textiles and clothing sector into the *GATT.* The United States emphasized the need to ensure that the integration process addresses all trade-distorting measures. It

suggested that these measures be classified into six categories which could be integrated into the *GATT*: measures taken under the Multi-Fibre Arrangement or voluntary restraint agreements; measures taken outside the *GATT* by countries participating in the MTN, measures taken by non-*GATT* members participating in the MTN, safeguard actions, measures not subject to *GATT*'s disciplines, and preferential measures approved by the *GATT*.

Services Group

The group recently concentrated on financial services which include banking, securities-related and insurance services. The group recognized the importance of regulating the banking and securities-related services. However, because of the wider economic implications it was generally agreed that many regulations affecting the establishment and acquisition of domestic industries and operation of foreign-owned banks were often over-restrictive and could be subjected to discipline in a multilateral framework.

With respect to insurance services, some countries believed that the integrity of national insurance industries could be threatened by the application of too-liberal trading measures.

Protectionist Pressures Continue Among Nations

The Director General of the *GATT* recently released an *Overview of Developments in the International Trading Environment*. This report cites that there has been much progress toward trade liberalization since the current MTN began, but that protectionist pressures continue. The report strongly suggests that trade deficit nations cease to use protectionism to overcome their trade imbalances.

GATT Panel Ruling Issued on EC Subsidies on Soybeans

A *GATT* Panel report has been issued which condemns European Community ("EC") subsidies to soybean producers and processors as contrary to the rules of the *GATT*. The ruling comes two years after a complaint was issued by U.S. soybean producers and exporters in 1987. The American Soybean Association has estimated that approximately $1.5 billion (U.S.) in exports from the United States have been affected by the subsidies policies of the EC.

ANTI-DUMPING/COUNTERVAILING DUTY INVESTIGATIONS

By: Brenda Swick-Martin
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Mini-fridges from Poland

The Canadian International Trade Tribunal (the "CITT") has determined that imports of mini-fridges from Poland are not causing material injury to Canadian producers of mini-fridges.

The CITT found that the complainant and sole Canadian manufacturer of the subject refrigerators had solid orders booked in mid-summer 1988 for delivery late in the year or early in 1989. In addition, the complainant was found not to have suffered from price oppression due to dumped imports from Poland. Average selling prices provided to the Tribunal showed that not only was the complainant able to increase its prices during the period of review, but its increases were slightly superior to increases in the general industrial price index. As well, the Tribunal found improvements in the complainant's liquidity position and gross margins.

The Tribunal did not find a likelihood of material injury because of Poland's limited ability to supply the subject mini-fridges to Canada in the future. The CITT received testimony during the hearing that the Polish plant was old and inefficient and that there was no intention to expand the plant and/or increase shipments to Canada.

Landing Nets from the United States

On July 17, 1989, the Deputy Minister of National Revenue initiated an investigation under

the *Special Import Measures Act* (*SIMA*) into the dumping into Canada of landing nets produced by J. F. Pepper Company Inc. of the United States.

On August 14, 1989, the CITT received from Browning Sales Agency, on behalf of J. F. Pepper Inc., a referral under section 34 of the *Special Import Measures Act*. The referral was on the question of whether or not the evidence before the Deputy Minister disclosed a reasonable indication that the dumping of landing nets was causing material injury to the production in Canada of like goods.

The CITT found that the evidence before the Deputy Minister did disclose a reasonable indication that the dumping of landing nets was causing or is likely to cause material injury to Canadian production.

Following the CITT's finding on October 17, 1989, the Deputy Minister accepted an undertaking from the exporter. This undertaking will eliminate the margin of dumping on imported landing nets and, therefore, the anti-dumping investigation has been suspended.

Footwear from Brazil, China, Taiwan, Poland and Yugoslavia

The Deputy Minister of Finance has initiated an investigation into the dumping of women's leather and non-leather boots and shoes from Brazil, China, Taiwan, Romania, Yugoslavia and Poland. An investigation has also been initiated into the subsidization of women's leather boots and shoes from Brazil.

The Deputy Minister referred to the CITT the question of whether the evidence disclosed a reasonable indication that the allegedly dumped or subsidized goods have caused, are causing or are likely to cause material injury to Canadian production.

On September 24, 1989, the CITT advised the Deputy Minister that the evidence disclosed is a reasonable indication that the allegedly dumped and subsidized goods have caused, are causing or are likely to cause material injury to Canadian production. The Deputy Minister must now proceed with the investigation and issue a preliminary determination of dumping and/or subsidization. If the preliminary determination is positive, the question of material injury to domestic production of like goods will be referred to the CITT.

12-Gauge Shotshells

The CITT has rescinded two earlier decisions of the Anti-dumping Tribunal respecting 12-gauge shotshells from the U.S.S.R., Poland, Czechoslovakia, Hungary and Italy, Belgium, France and the United Kingdom.

Of major significance in the Tribunal's decision to rescind the findings was the replacement of imports from the countries under review with those from the United States. The major Canadian manufacturer, whose production alone represented over 90 per cent of domestic shotshell production, had ceased production. Thereafter, the remaining Canadian producers accounted for less than 15 per cent of the total domestic market. The void left in the Canadian market was found to have been filled by imports from the United States and not imports from the countries under review. The switch by Canadian customers to American sources of supply was primarily due to the ability of American suppliers to supply a brand name quality product on a timely basis.

Transit Concrete Makers from the U.S.A.

The Deputy Minister has announced that an undertaking has been reached with Rocket Mixer Inc. with respect to the dumping of certain transit concrete mixers. The undertaking will eliminate the margin of dumping and, as a result, the anti-dumping investigation concerning these products has been suspended.

Key Blanks from Italy

The CITT has found that the dumping in Canada of brass replacement key blanks from Italy has caused, is causing, and is likely to cause material injury to production in Canada of such goods. Parties are invited to submit presentations concerning the public interest in written form to the Secretary of the Tribunal by November 27, 1989.

Refill Paper from Brazil

The Deputy Minister of National Revenue has initiated an investigation into the dumping and subsidizing of refill paper from Brazil. Subsidizing occurs when a government provides assistance to an enterprise through such means as a preferential loan, grant or tax incentive which could have the effect of lowering the price of the goods exported to Canada.

Rescinded Decisions

The CITT has rescinded the following anti-dumping and/or countervailing duty determinations:

- brass-coated carbon steel wire for reinforcing high-pressure hose from Belgium and Spain;
- plate coils, fully or partially manufactured, from the U.S.A.;
- cold steel originating from the Federal Republic of Germany; and
- stainless steel strip in the AISI–400 series from the Federal Republic of Germany and France.

Upcoming Reviews

Pursuant to section 76 of the *Special Import Measures Act*, the CITT will be reviewing the following anti-dumping/countervailing duty findings:

- certain carbon steel welded pipe from the Republic of Korea;
- whole potatoes with red or russetted skin from the U.S.A. for use in the province of British Columbia;
- whole potatoes from the U.S. for consumption in the province of British Columbia;
- stainless steel bars and stainless steel wire from Brazil, the Federal Republic of Germany, France, Japan, the Republic of Korea and Spain;
- certain vinyl-coated knitted fabrics from the Republic of Korea;
- certain carbon steel plate and alloy steel plate from Belgium, Brazil, Czechoslovakia, the Federal Republic of Germany, France, the Republic of South Africa, the Republic of Korea, Romania, Spain and the United Kingdom;
- certain carbon steel plate and alloy steel plate from the Netherlands;
- hydraulic turbines for electric power generation from the U.S.S.R.;
- alternating current electric generators for use with hydraulic turbines or water wheels from Japan;
- alternating current electric generators from Italy;
- hydraulic turbines or original equipment components thereof from the People's Republic of China and Japan;
- alloy tool steel bars, plates and forgings from Brazil, the Federal Republic of Germany, Japan, the Republic of Korea, Austria, Sweden and the United Kingdom; and
- canned ham and luncheon meat from Denmark and the Netherlands.

Public Interest Issues respecting Grain Corn

The CITT will be conducting a preliminary investigation to determine whether there is a reasonable indication of material change in circumstances to warrant a comprehensive inquiry concerning the subsidization of grain corn from the U.S.

The Tribunal is initiating this preliminary examination in response to a request from the federal government pursuant to section 19 of the *Canadian International Trade Tribunal Act*. No public hearings are scheduled in connection with the preliminary examination. Parties having an interest in the matter are invited to make written submissions pertaining to whether or not there has been a material change in circumstances from October 1987 which would warrant a second comprehensive inquiry into the issue.

INSTITUT MERIEUX SA PURCHASES CONNAUGHT BIOSCIENCES INC.

By: Brenda Swick-Martin
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On December 14, 1989, the Honourable Harvie André, Minister responsible for Investment Canada announced the regulatory approval of two separate foreign bids to acquire Connaught BioSciences, Inc. of Toronto, the holding company of Canada's largest developer and manufacturer of vaccines.

Under the *Investment Canada Act*, the Minister can approve a reviewable investment to acquire control of a Canadian company only if it is likely to be of net benefit to Canada.[1]

Key government concerns in the sale of Connaught were centered around the protection and promotion of an internationally competitive Canadian biotechnology industry. Undertakings secured from both of the foreign bidders, Institut Merieux SA and JV Vax Inc., included ten-year and indefinite covenants to ensure research and development spending in Canada, Canadian participation in the ownership and control of the company, minimum levels of employment and production in Canada, assurances that the company will have a world product mandate for existing and subsequently developed products, and covenants to financially support and cooperate in research programs with Canadian universities, particularly the University of Toronto.

Following federal approval, a $37.00-per-share offer by the Institut Merieux SA of France to purchase all common shares of Connaught BioSciences Inc. commencing September 28, 1989, won out over a competing bid by a U.S.-Swiss undertaking, JV Vax Inc.[2] The winning offer came as a response to a $30.00-per-share bid announced in early September by JV Vax Inc. to purchase Connaught, and replaced a proposal to merge Connaught with the human health business of the Institut Merieux SA.

The decision ends a takeover suit that has spanned more than two years. In 1988, the Institut Merieux SA attempted a hostile buy-out of Connaught which was then opposed by its Board of Directors. Proceedings were launched in the United States alleging competitive harm from the proposed acquisition. In Canada, the Director of Investigation and Research made the first application before the Competition Tribunal to enjoin the French company from purchasing shares of CDC Life[3] until the pre-notification provisions of the *Competition Act* had been complied with. It was, however, the negative decisions arising from a joint hearing of the Québec and Ontario Securities Commissions that resulted in Merieux dropping its initial bid to gain control of Connaught. This original offer was later replaced by the proposal to merge Connaught with the human health business of the French company. The successful cash bid was endorsed by the Board of Directors of Connaught.

The successful French offer raises concerns not posed by its rival. The Institut Merieux SA is a corporation indirectly controlled by the French government and has a product overlap of over 80 per cent with Connaught, raising concerns that it will severely rationalize Canadian operations following the takeover. In contrast, the U.S.-Swiss private undertaking would have brought leading technology and financial backing from an applicant seeking to use the Canadian company as a means to enter the vaccine industry. The JV Vax bid, arguably more advantageous to Canada, stood little chance in the marketplace against a rival offer of $7.00-per-share higher.

Notes

*Prepared with the assistance of David Edwards, Student-at-Law, Fraser & Beatty, Ottawa

1. Factors considered in the Minister's determination of whether the investments were likely to be of net benefit to Canada are enumerated in section 20 of the *Act*. They include the effect of an investment on technological development, product innovation and product variety in Canada, compatibility of an investment with national industrial economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected, and the contribution of an investment to Canada's ability to compete in world markets.
2. JV Vax Inc. is a consortium created by Ciba Geigy of Switzerland and Chiron Corp. of California.
3. In 1972 the University of Toronto sold

Connaught Laboratories Ltd., now a subsidiary of Connaught BioSciences Inc., to the Canada Development Corporation, which was subsequently privatized.

HEARINGS FOR CABLE RETRANSMISSION TARIFFS CONTINUE

By: Brenda Swick-Martin
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Paragraph 1 of Article 2006 of the *Canada-U.S. Free Trade Agreement* (*FTA*) provides that each country will provide the other with "a right of equal and nondiscriminatory remuneration" for any retransmission to the public of programmes originally intended for free over-the-air reception. This means that, in the future, Canadian cable companies will be required to pay a fee for retransmitting television signals from U.S. stations picked up from satellites.

Retransmission fees are new to Canadian cable companies who, up to now, have never had to pay them. Since 1954, they have been picking up U.S. signals off the airwaves and retransmitting them to their customers without paying retransmission fees. Canadian cable companies are likely to seek to recapture such royalties by raising their fees to customers.

The Copyright Board has been charged with the task of holding hearings to determine the amount of royalties to be paid. Hearings commenced on November 20, 1989, with two collectives presenting their claims for royalties for the retransmission of programming. The Canadian Copyright Collective (CCC) presented its case first. It represents three major U.S. television networks. The CCC was followed by the Canadian Retransmission Collective, which represents the Association of Canadian Film and Television Producers, the Canadian Film and Television Association and the Public Broadcasting System in the U.S.

The hearings adjourned for the Christmas period but resumed on January 4, 1990 to enable other collectives, such as the Canadian Association of Broadcasters and the Canadian Broadcasting Corporation, to present their case. Thereafter, objectors to the retransmission fees will be given the opportunity to present their case. At present, the three objectors are the Canadian Cable Television Association, representing 95% of Canadian cable companies, CanCom and C1 Cable Systems. The objectors estimate the total retransmission fees to be approximately $18M per year. This figure differs remarkably from the figure of $80M per year estimated by the collectives.

UPDATE ON CANADA/U.S. DISPUTE OVER UNPROCESSED SALMON AND HERRING

By: Brenda Swick-Martin
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For several years Canada has implemented regulations which prohibit the export of unprocessed herring and pink and sockeye salmon. These restrictions have been an integral part of the conservation and management programme for herring and salmon stocks in the waters off the coast of British Columbia.[1]

The United States has voiced strong opposition to the export restrictions since the beginning of 1986. After bilateral consultations with Canada to remove the restrictions failed, the United States requested, on February 20, 1987, that a *GATT* Panel be established to examine the matter.

The Panel found that Canada's export prohibitions on unprocessed salmon and herring were inconsisted with the *GATT*. In its report, the Panel found that the prohibitions were contrary to paragraph (1) of Article XI of the *GATT*, which provides that "contracting parties shall not institute or maintain prohibitions or restrictions on the exportation or sale for export of any product destined for the territory of any other contracting party."[2]

The Panel did not find that the prohibitions were justified under either Article XI:2(b) of the *GATT*, permitting "export prohibitions...necessary for the application of the standards or regulations for the classification, grading or marketing of commodities in international trade ..." or Article XX(g) of the *GATT* permitting measures

"relating to the conservation of exhaustible natural resources ...". The Panel concluded by recommending that Canada bring its measures affecting exports of certain unprocessed salmon and herring into conformity with the *General Agreement.*[3]

After the Panel report was adopted by the *GATT* Council in March 1988, Canada failed to take any action to remove the inconsistent regulations. Angered by such recalcitrance, the United States Trade Representative (USTR) issued a public announcement that Canada's export prohibitions on unprocessed salmon and herring constituted an unfair trade practice under section 304 of the 1974 *Trade Act.* The Section 301 Committee was then directed to conduct a public hearing on April 26, 1989, on possible U.S. retaliatory action under section 301 of that *Act.*[4]

One day prior to the Section 301 Committee public hearing, in a bid to stop the United States from retaliating against Canada for an unfair trade practice, the Canadian government announced the enactment of new regulations implementing a *GATT*-consistent landing requirement for Pacific salmon and herring.[5] The new regulations required that 100 per cent of all commercially caught Pacific salmon and herring be landed in Canada and delivered to provincially licensed buying stations for fisheries conservation and management information collection. However, under the new landing requirements, both American and Canadian buyers had equal access to purchase unprocessed fish caught in Canadian waters. American processors could purchase raw fish after it had been landed in Canada.

In response to the new Canadian regulations, the United States initiated dispute settlement proceedings pursuant to Chapter 18 of the *Canada-United States Free Trade Agreement* (*FTA*). Chapter 18 allows disputes arising under the *GATT* and the *FTA* to be referred to a bi-national panel for resolution.

The issue before the Panel was whether the 100 per cent landing requirement was a restriction prohibited by Article XI of the *GATT* and, if so, whether the restriction is exempt under Article XX(g) of the *GATT.*[6]

In its report, the Panel concluded that Canada's landing requirement is a restriction on "sale for export" within the meaning of Article XI:1 of the *GATT* and therefore incompatible with Article 407 of the *FTA.* The Panel's rationale for making such a finding was that "a number of potential export buyers would find direct shipment by water more economical, and that for most of these buyers the extra expense of making an unwanted landing in Canada would be significant."[7]

With respect to the exemption in Article XX(g) of the *GATT*, the Panel had to determine whether the landing requirement satisfied the condition that it be a measure "relating to the conservation of" the exhaustible natural resources in question. The Panel followed the interpretation given by the *GATT* Panel in its 1987 report that the measure in question had to be "primarily aimed at" the conservation of an exhaustible natural resource to be considered as a measure "relating to" conservation within the meaning of Article XX(g).[8] The Panel held that the test for assessing whether a measure is "primarily aimed at" the conservation of a natural resource is whether the measure would have been adopted for conservation reasons alone.

The Panel concluded that "the conservation benefits and other advantages that would have been derived from a landing requirement applicable to 100% of the salmon and herring catch would not have justified its adoption as a conservation measure alone."[9] The Panel's decision was influenced by the probability that unlanded export volumes of that size occurring in a high percentage of salmon and herring fisheries was remote. The Panel also found that the conservation objectives of the landing requirement could have been accomplished by structuring it in a more selective manner.[10] The Panel therefore concluded that:

> because it is applicable to 100% of the salmon and herring catch, the Canadian landing requirement cannot be said to be "primarily aimed at" conservation and thus cannot be considered a measure "relating to the conservation of an exhaustible natural resource" within the meaning of *GATT* Article XX(g) and hence not a measure subject to an exemption under Article 1201 of the *FTA.*[11]

The Panel recommended that one way in which the landing requirement could be considered "primarily aimed" at conservation under Article XX(g) of the *GATT* would be if provision were made to exempt from landing 10 to 20 per cent of the catch. This percentage of the catch could be made available directly to foreign buyers without first being landed.

The Panel report is now before the Canada-U.S. Trade Commission for final resolution of the dispute.

Notes

1. For a review of the legislation and regulations imposing such export restrictions, see the *Fisheries Act*, R.S.C. 1985, c. F-14, s. 34(j); *Pacific Herring Fishery Regulations*, C.R.C. 1978, c. 825, C. Gaz. 1984.II.1693.
2. *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, Report of the Panel, L/6268, 20 November 1987 (adopted by the *GATT* Council in March 1988).
3. *Ibid.* at 16.
4. Notice of Section 304 Determination; Notice of Public Hearing and Request for Public Comments on Possible U.S. Action in Response to Certain Canadian Unfair Trade Practices: Office of the United States Trade Representative, 28 March1989.
5. *GATT-Consistent Landing Requirement for West Coast Salmon and Herring Announced* (Canada, Department of External Affairs, News Release no. 093, 25 April 1989).
6. Article 407 of the *FTA* incorporates *GATT* Article XI. Paragraph (1) of Article 407 provides:
Subject to the further rights and obligations of this Agreement, the Parties affirm their respective rights and obligations under the *General Agreement on Tariffs and Trade* (*GATT*) with respect to prohibitions or restrictions on bilateral trade in goods.
GATT Article XI is headed "General Elimination of Quantitative Restrictions." Paragraph (1) provides:
No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.
Article 1201 of the *FTA* ("General Exceptions") provides:
Subject to the provisions of Articles 409 and 904, the provisions of Article XX of the *General Agreement on Tariffs and Trade* (GATT) are incorporated into and made part of this Part of this Agreement.
GATT Article XX ("General Exceptions") provides:
Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in the Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:...(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
7. *In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring.* Final Report of the Panel, 16 October 1989, at 25.
8. *Supra*, n. 2, at 15 (paragraph 4.6).
9. *Supra*, n. 7, at 51.
10. *Ibid.* at 52.
11. *Ibid* at 54.

GATT'S NEW HOT TOPIC: RULES OF ORIGIN

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The scheduled conclusion of the Uruguay Round of the General *Agreement on Tariffs and Trade* (*GATT*) in December 1990, has prompted numerous proposals from various signatory countries. Proposals on rules of origin could become the hottest topic in the Non-Tariff Measures Negotiating Group as the United States, prompted by recent EC changes in its rules of origin, submitted a proposal in late September governing the regulation and application of rules of origin.

Rules of origin are the regulations used to identify the country of origin of internationally traded goods. These rules play a crucial role in determining duties paid on goods imported under any non-MFN rule, including preferential tariffs

for goods originating in developing countries, country of antidumping and countervailing duty cases, and other trade proceedings. Each country is free to establish its own rules of origin for each type of program, and thus a multitude exists. All nations recognize the importance of rules of origin as a fundamental element of the trade process but uniform, multilaterally accepted standards for their regulation and application have not been developed.

The test for determining country of origin used by the United States for normal customs purposes is "substantial transformation." A product which passes through country X must undergo some significant change in that country before it will be classified as having X origin. "Substantial transformation" is a highly subjective standard and importers have criticized the U.S. for using such a vague principle as its primary rule for determining origin. (By contrast, the U.S. and Canada, in their *Free Trade Agreement*, negotiated objective rules of origin based on changes in classification or percentage of value added.) Other methods used in the U.S. and other countries include "value of components", "value added by processing", and many others.

In February, 1989, the EC announced new rules of origin for integrated circuits. Previously the EC classified integrated circuits as being a product of the country in which it had last been assembled or tested. The new rule determines the origin as being the country in which diffusion takes place. (Diffusion is a highly technological process which requires substantial investment in production facilities.)

The EC has recently proposed a new regulation on the origin of photocopiers as well. The new rule provides that assembly, coupled with various manufacturing processes, does not establish origin since it does not constitute the "last substantial operation." The negative structure of the rule increases uncertainty for exporters to the market since the rule does not enumerate the processes that do constitute the "last substantial operation."

Although the new EC regulations were aimed at Japanese exports, they have had an impact on U.S. exports as well, thus prompting criticism from U.S. Trade Representative Carla Hills. Integrated circuits assembled and tested in the EC will no longer qualify under EC origin unless they are diffused in the EC. The products of U.S.-based companies, which are diffused in the U.S. but assembled in the EC will not only be subject to a 14 percent duty, but will also be disqualified from EC-origin status. However, most integrated circuits manufactured by EC-based companies will now be considered to be of EC origin since they are diffused there as well. USTR Carla Hills has protested the change (although the rule of origin for semiconductors in the U.S.-Canada *FTA* is not significantly different).

Most countries agree that the ambiguous, arbitrary procedures for the establishment and application of rules of origin can be detrimental to international trade. Although many trade officials generally support the idea of harmonized rules of origin, it is clear that harmonization cannot be accomplished during the time left in the Uruguay Round. The alternative, then, is to establish principles and procedures under the GATT by which rules of origin can be established, amended and regulated. In addition, a *GATT* Working Group could be formed to negotiate harmonized rules of origin after the Uruguay Round.

Structural possibilities for standardizing rules of origin abound, but trade officials should follow these basic guidelines during the negotiating process:

(1) rules of origin should be clear and technically based;
(2) the rules should be positively stated;
(3) although it is often conceded that different rules of origin will exist for different programs (e.g., preferential tariffs for developing countries will generally have looser rules of origin than normal tariffs), the rules should be applied on a Most-Favored-Nation basis within those programs.

The permanent trade policy review groups, established by the Functioning of the GATT System (FOGS) negotiating group to conduct ongoing reviews of the trade policies of each *GATT* member on a rotating basis, should ensure that the application of rules of origin by each country are consistent with the *GATT* guidelines. Finally, disputes concerning rules of origin should be subject to judicial or arbitral review by a competent authority within each country.

Rules of origin would be unnecessary in the perfect free-trade or MFN system; yet, the world trading system is far from perfect and rules of origin are a fundamental part of that system. U.S. officials hope to eliminate trade restrictive rules of origin by hammering out multilaterally acceptable rules in the *GATT*. The U.S. should be aware, however, that a multilateral agreement could affect U.S. practices significantly.

Fish Landing Requirements Dispute Panel

Canadian Fisheries Minister Tom Siddon announced that Canada will adopt the *FTA* binational panel report concerning Canadian fish landing requirements. The panel decided that Canadian regulations that require all Pacific salmon and roe herring caught in Canadian waters to be landed in Canada before exportation violate the *Free Trade Agreement*.

The ruling has been called a victory by officials of both the U.S. and Canadian governments. While U.S. government and fishing industry officials praised the ruling for recognizing that the regulations inhibit free trade, Canadian officials heralded the panel's recognition of Canada's conservation efforts. The panel disallowed the regulations because they were applied to 100% of the catch, but added that some percentage of the catch could be subject to landing requirements for conservation purposes. Consequently, there remains some questions as to how (and how rapidly) Canada will implement the ruling.

The ruling was the first test of the binational panel dispute resolution system created under the *FTA*. When a trade dispute arises between the U.S. and Canada, a panel may be created to investigate the claims and determine whether or not the policies in question violate *FTA* or *GATT* rules. Aside from the Fish Landing Requirements dispute, there are presently five binational panel disputes in progress.

Durum Wheat

The Office of the United States Trade Representative has determined that Canadian rail transportation subsidies are not prohibited by the U.S.-Canada *FTA* nor by the Subsidies Code of the *GATT*. The determination is the result of a Section 305 investigation requested by the U.S. Wheat Association who claimed that the rail subsidies acted as export subsidies for Canadian durum wheat.

U.S. growers of durum wheat are examining the option of filing a countervailing duty case against Canadian durum wheat exports, but U.S. industry officials have stated that they lack the resources necessary to pursue such trade actions. However, House Ways and Means Committee Chairman Dan Rostenkowski has requested that the International Trade Commission (ITC) investigate the effect of increased Canadian durum exports on the U.S. industry. If the ITC investigates and reports that Canadian durum exports could potentially injure the U.S. industry, the U.S. growers would most likely file a CVD case with the ITC report as its basis.

General Agreement on Tariffs and Trade (GATT)

Farm Trade

The United States has submitted a major working paper on farm trade to the Uruguay Round working group on agricultural trade. The U.S. paper calls for the removal of all non-tariff barriers and their replacement with tariffs that would be reduced and bound during a 10 year transition period. The plan also seeks to phase-out export subsidies and all waivers and exemptions from *GATT* rules (including the U.S. waivers for dairy and sugar products). As a response to the EC ban on hormone treated beef, the U.S. has also proposed worldwide scientific consensus as a guideline for health and safety standards that block imports.

The U.S. plan has met with mixed reactions. While U.S. officials have noted "overwhelming" support by numerous delegations, the EC delegation has condemned the paper as being "inconsistent" with previous understandings. EC Agriculture Commissioner Ray MacSherry stated that the U.S. proposal is an inappropriate basis for negotiations because it questions the

agreements made in Geneva in April. He added that the EC will support negotiations that are based on those previous agreements.

The U.S. had originally proposed an end to all "trade-distorting" subsidies that was rejected by the EC. In April, the delegations agreed to "substantial progressive reductions in agricultural supports and protection". The EC claims that the U.S. proposal questions the validity of the previous agreements; the U.S. disagrees.

Patents

The United States has accepted a *GATT* panel ruling that Section 337 of the U.S. trade laws violates the *GATT* by discriminating against imported goods. The U.S. has blocked *GATT* council approval since the ruling in February. The panel found that under section 337, intellectual property imports faced a tougher standard of investigation than domestic goods because they are subject to review by the U.S. district courts and the International Trade Commission while domestic products are only subject to review by the district courts.

Although the U.S. has accepted the ruling, USTR Carla Hills has stated that the U.S. will continue to enforce Section 337 until changes are enacted by Congress administration and congressional officials agree that the changes will not be made until the end of the Uruguay Round because the Congress would not accept a "watered-down" version of Section 337 without a global patent agreement.

GATT officials praised the U.S. acceptance of the panel report but expressed concern over the possible delay in implementing the ruling. U.S. officials expressed hope that its decision will facilitate negotiations and encourage a global patent agreement.

PROGRESS REPORT ON THE EUROPEAN SINGLE MARKET, 1992

By: Brenda Swick-Martin
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The integration of the European Market by 1992 is yet another step toward the globalization of international trade. By 1992, Europe's trading partners will be doing business with a large, unified European market, comprised of over 320 million consumers, unhampered by national obstacles to the free movement of people, good, services and capital.

The European Commission has prepared 279 pieces of legislation to remove all physical, technical and fiscal barriers between member states. The features of some of these pieces of proposed legislation, and their effect on Europe's trading partners, are outlined below.

- *Removal of quantitative import restrictions and the adoption of unified import rules in respect of non-Community countries*

The Community has recently proposed in the Uruguay Round of Multinational Trade Negotiations to remove national import quotas on a range of goods.

- *Elimination of all internal tariffs and the adoption of one common tariff system*

- *Removal of technical barriers to trade involving technical rules, standards, tests or certification, by harmonization or mutual recognition*

With respect to mutual recognition of technical rules, any product which is imported into the Community and satisfies the legislation of the importing country will be entitled to free circulation throughout the Community.

The removal of these technical barriers to trade will be of great benefit to exporters, who will be able to sell into a single market with a generally uniform set of product standards and testing and certification procedures. It will no longer be necessary for exporters to comply with twelve

different sets of requirements or intra-Community border controls.

- *Liberalization of public procurement in the public works, supplies and services sectors*

At present, public procurement rules heavily favour national suppliers to suppliers throughout the Community. In addition, competition in public procurement may be extended to the telecommunications, energy, transport and water sectors.

Under the new rules for government procurement, European subsidiaries of foreign firms will have the same access to the government purchasing and contracts as any European Community company. Exporters not established in the Community will continue to be governed by the *GATT* code on government procurement, which provides that signatories accord to each other mutual non-discriminatory access to public procurement controls in specified sectors.

- *Liberalization of the services industry, including the financial, telecommunications, television, transport and information services sectors*

The provisions aimed at the liberalization of financial services include the adoption of several measures concerning banking, insurance and investment services. The general approach of the provisions is that financial service institutions which are approved in one member state will be allowed to operate under similar conditions throughout the community. In the banking sector, it is proposed that reciprocal access be given to new entrants into the Community banking industry.

With respect to television services, the Community directive on trans-national broadcasting of television programmes is in the process of being completed.

There are currently numerous bilateral transportation agreements between member states and non-member countries. The provisions aim at replacing these bilateral agreements with Community agreements in aid of a common transportation policy. To date, there have been directives proposed on the liberalization of maritime transportation agreements with non-member countries, and the liberalization of EC air transport.

Information services will benefit from a single market since those currently sold in a single-member state will have access to the entire Common Market. Common external arrangements with respect to market access by exporters will be established by 1992.

The rules for international trade with respect to the services sector are currently being negotiated at the Uruguay Round of the MTN. Therefore the ability of exporters to obtain access to the European services market will inevitably depend on the outcome of these negotiations.

- *Introduction of new provisions to control large-scale mergers and takeover bids and to govern cross-frontier company mergers*

- *Liberalization of capital movements*

The objective is the complete liberalization of all financial transactions providing for the complete freedom of movement for all financial instruments. The directive liberalizing long-term capital movements is in force, while the directive liberalizing short-term movements will come into force in 1990. A single European market in 1992 will inevitably affect Canada–EC trade. The EC is Canada's second-largest trading partner and its second-largest source of investment capital. Canada is the EC's eighth-largest export market, and its tenth-largest source of imports.

The new European market may make it more difficult for Canadians to compete in the European market. However, at the same time, Canadian exporters will have the benefit of exporting into a larger single market with no internal barriers to trade.

The following articles are taken from "Update", a newsletter published by the International Bar Association's Business Law Section (Committee on Antitrust and International Trade Law).

AUSTRALIAN TRADE UPDATE

The Australian Government has accepted the recommendations of the Anti-Dumping Authority. Formal directions are to be issued by the Minister to the Anti-Dumping Authority to assist in the definition of "material injury". The term "material" is to be interpreted in terms of its opposite, i.e. not immaterial, insubstantial or insignificant. Injury must, therefore, be greater than that likely to occur in the normal ebb and flow of business before it can be considered "material."

The Government has noted that material injury will only rarely be taken as proven when an Australian industry has not suffered a substantial reduction of profits or lost a significant share of the Australian market to the dumped imports.

The term "extended period of time" will also be defined by formal directions. In relation to goods being sold at a loss on the export's market for "an extended period of time" that period will usually be taken to be at least twelve months.

The Government has prepared legislation, currently before the Parliament, to provide that in cases where the cost to make and sell the goods in the country of export is being calculated as the normal value because goods have been sold at a loss over an extended period of time, no profit margin will be included. In all other cases where the normal value is to be constructed, a profit margin may be included.

BELGIAN TRADE UPDATE

Anti-Dumping Duties

Anti-dumping activity in the EC has slowed down considerably, due partly to a booming industry, and possibly also due to heavy external criticisms. Definitive duties were imposed on calcium metal from China and the Soviet Union, provisional duties on CD players from Japan and Korea, small screen colour TV receivers from Korea, and chemical substance and welded tubes from Eastern Bloc countries. Undertakings have been accepted concerning imports of dicumyl peroxide from Japan and certain acrylic fibres from Mexico. The proceeding concerning mica from Japan was terminated for lack of material injury.

Anti-Circumvention Measures

Duties were extended under the "screwdriver" provision, and some undertakings accepted, regarding certain dot-matrix printers assembled in the EC by Japanese producers. Proceedings have been initiated concerning VCRs assembled in the Community.

GATT

The EC is likely to resist proposals in Uruguay Round negotiations on Article VI of *GATT* and of the *Anti-Dumping Code* which may undermine the effectiveness of the present EC rules which are criticized as being contrary to the *GATT*. Proposals from EC industry to make anti-dumping proceedings faster, fairer and more efficient are being reviewed for presentation by the EC.

JAPANESE TRADE UPDATE

Settlement of Bidding Problem in Yokosuka Naval Base

In May of 1989, the U.S. Justice Department demanded a total of $5 billion in compensation from 140 construction firms belonging to the business group "Seiyukai". This group has been accused of illegal pre-bidding negotiation in connection with a public works project at the U.S. Naval Station in Yokosuka, Japan.

On November 17, 1989, ninety of the firms agreed to pay about $4.7 billion while fifty of them refused to pay settlement money on the grounds that it is unreasonable to request compensation from companies that did not actually make bids

or from parent companies of firms that took part in the illegal negotiation.

Pushbutton Telephones: U.S.A.

On November 21, 1989, the United States International Trade Commission found that the exportation of pushbutton phones to the United States by several Japanese companies constituted dumping. These companies have sought to minimize dumping problems by moving their factories to the United States so that they may manufacture and sell domestically.

Forklift Trucks: U.S.A.

On November 29, 1989, the U.S. Trade Department made a provisional decision that four Japanese companies manufacturing forklift trucks in the U.S.A. are not violating the Avoidance of Dumping Tax Provision in the *Omnibus Trade and Competitiveness Act of 1988*.

$1-Bid Agreement in Japan

On December 4, 1989, Hiroshima City agreed to cancel Fujitsu Ltd.'s $1 contract for the design of a waterworks computer program for that city. This follows the November decision by Nagano Prefecture to cancel Fujitsu's $1 software design contract. Hiroshima City also disqualified Fujitsu from bidding on any of their contracts for the next two years.

Fujitsu asked the city to abrogate the $1 contract after the low bidding practices of Fujitsu and NEC came to light in October. The practices of the two companies drew criticism at home and from abroad as examples of the unfair business practices which hinder foreign access to the Japanese market.

NEW ZEALAND TRADE UPDATE

New Zealand and Australia have agreed to remove margins of tariff protection under the *Closer Economic Relations Agreement* between the two countries. Under the CER, Australia and New Zealand have maintained margins of preference for each other. Now a 5% duty on over 700 tariff items in New Zealand will be removed. The decision is expected to be followed by the removal by Australia of margins of preference for New Zealand.

Australian and New Zealand manufacturing groups have called on both countries' governments to defer plans to drop anti-dumping rules between the two countries in 1990. Suggested abolition of anti-dumping measures between Australia and New Zealand are planned to take effect from July 1, 1990 and to be reconsidered in a general trade review in 1992. Under the proposed changes, whenever either an Australian or New Zealand entity sells a product to the other country, a "price precedent" will be set and an outside player will be free to enter the market at that price. Once the price precedent is set, no action can be taken against the outside player. This has alarmed manufacturers in both countries, who are lobbying against the change.

A preliminary determination imposing an anti-dumping duty under the *Dumping and Countervailing Duties Act 1988* has been made in respect of plasterboard from Thailand, while an investigation carried out as to the possible application of an anti-dumping duty in respect of canned cat food imported from Australia has been terminated.