TRADE POLICY DEVELOPMENTS

THE U.S.-CANADA FREE TRADE AGREEMENT: TWO-YEAR ANNIVERSARY REVIEW

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On January 1, 1991, the *U.S.-Canada Free Trade Agreement* (*FTA*) celebrated its second anniversary with mixed, yet generally favourable reviews. Both Canada and the United States have carefully monitored the effects of the *FTA* over the past two years and, on the whole, the benefits appear to be outweighing any costs. On the eve of trilateral Free Trade Agreement negotiations between the United States, Canada and Mexico, it is appropriate to review the past two years of free trade between the U.S. and Canada.

In late January, President Bush submitted his biennial report on the *FTA* to Congress. The President's report praises the success and smooth transition of the *FTA* and expresses optimism for future benefits to both Canada and the United States.

Import data for 1989 show that two-way trade of goods and services between the United States and Canada exceeded $200 billion, an increase of $30 billion during the first year of the *FTA*. While 1990 data are not yet available, a further increase is expected. U.S. exports to Canada in 1989 totalled more than 20 per cent of the value of all U.S. exports.

One of the most successful achievements of the *FTA* has been the accelerated reduction of tariffs on approximately 400 products (roughly $6 billion bilaterally). While the *FTA* provides for the phase-out of tariffs over the first five to ten years of the *Agreement*, the Canadian and U.S. governments have accelerated the reduction process on numerous products. Products chosen for tariff reduction were selected from petitions submitted by Canadian and U.S. industries, and generally have received ample support on both sides of the border. A third round of tariff reductions is expected later this year.

The binational panel dispute resolution system created by the *FTA* also appears to have worked well. A total of 15 cases have been brought before binational panels under Chapter 19 of the *FTA* relating to antidumping and countervailing duty determinations. Of these 15 cases, ten have been settled to date. Three additional panels have been requested.

The panels thus far have proven to be fairly efficient. Article 1904 of the *FTA* requires that panels issue a decision within 315 days of the initial request for panel review. All panels have complied with this requirement. With U.S. and Canadian courts taking approximately one to five years to issue a decision, the *FTA* panel review process appears to be a more streamlined means of appealing antidumping or countervailing duty cases. The U.S. and Canadian binational panel Secretariats have solicited public comments concerning the workings of the binational panels. The two countries will likely revise the panel rules in the near future.

One of the least successful areas under the *FTA* has been discipline on subsidies. The issue of subsidies was so difficult during the negotiations that both governments agreed to establish the Subsidies Working Group under the *FTA* to study future methods of disciplining subsidization. The Group has met only twice since the inception of the *FTA* and has accomplished little more than initial consultations and background studies.

The successful completion of the Uruguay Round negotiations would have broad implications on the task before the Working Group. To some extent, it appears that the Group is awaiting the outcome of the Round before it defines its goals. While the Round could have a significant impact on global subsidization, the possible success of the Round remains questionable. If the Round fails, two and a half to three years would have passed under the *FTA* with no progress on eliminating subsidies.

The precarious state of the Uruguay Round negotiations has underscored the great value of the *U.S.-Canada Free Trade Agreement*. The transition to free trade has been fairly smooth and both sides have benefitted greatly from the pact. The U.S. initiative toward hemispheric free trade and Canada's recent announcement that it will participate in trilateral free trade negotiations with the U.S. and Mexico illustrate that both sides are satisfied with the progress under the *FTA*. Although a few wrinkles remain to be ironed out, the *U.S.-Canada Free Trade Agreement* receives high marks.

U.S.-CANADA FREE TRADE AGREEMENT

First Extraordinary Developments Challenge Slated for Pork Case

The National Pork Producers Council (NPPC) announced that it will seek extraordinary challenge proceedings under the *U.S.-Canada Free Trade Agreement* (*FTA*) to appeal the recent binational panel injury determination on fresh, frozen and chilled pork from Canada. After a second remand, the International Trade Commission (ITC) revoked its earlier decision that imports of pork from Canada injure the U.S. domestic industry. The determination lifted approximately $18 million of countervailing duties levied against Canadian exports of pork. In the second remand, the panel instructed the ITC not to expand its record beyond that existing at the time of the original final determination. The ITC complied with the panel's instructions, although with strong criticism of the panel decision from ITC Commissioners Rohr and Newquist. The United States Trade Representative has until March 29 to decide whether the U.S. will pursue the appeal.

U.S.-Canada Beer

Canada accepted a U.S. request for a *General Agreement on Tariffs and Trade* (*GATT*) panel to examine Canadian provincial beer practices. At the same time, Canada has begun *GATT* dispute resolution proceedings against U.S. state and federal measures which discriminate against Canadian beer and wine. Three Canadian breweries in British Columbia (Stroh's, Heileman, and Pabst) have filed dumping charges against three U.S. breweries.

Binational Panel Review of Oil Country Tubular Goods from Canada

The binational panel review of the ITA final determination and abolishment of an end-use certification procedure concerning oil country tubular goods from Canada has been terminated on procedural grounds. Stelco Inc. filed a notice of consent motion requesting termination of the panel after it learned that its original request for panel review fell outside the statutory deadline for requesting panel reviews. Article 1904(4) of the *U.S.-Canada Free Trade Agreement* requires that such requests be submitted within 30 days of publication of the final determination which is being challenged.

Softwood Lumber Memorandum of Understanding

Despite pressure from Canada, Deputy Assistant Secretary for Import Administration Marjorie Chorlins testified before a House Subcommittee that the administration stands firmly behind the U.S.-Canada Softwood Lumber Memorandum of Understanding (MOU). The MOU is the result of a 1986 ITA countervailing duty determination of 15 per cent subsidy margins, when the U.S. and Canada negotiated a settlement whereby Canada would impose a 15 per cent export tax on all softwood lumber exports to the United States. The Canadian government has called for the termination of the MOU, stating that changes in provincial pricing practices have eliminated any subsidies. Ms. Chorlins noted that if Canada decided unilaterally to discontinue the export tax, countervailing duties could not be automatically imposed; rather, duties could only be determined through normal ITA and ITC investigations.

GENERAL AGREEMENT ON TARIFFS AND TRADE

U.S.-EC Airbus Dispute

The United States has requested that the *General Agreement on Tariffs and Trade* (*GATT*) investigate EC member state subsidization of Airbus Industrie. Airbus is a four-nation aircraft manufacturing consortium comprised of France, Germany, Spain and the United Kingdom. The U.S. complaint arises from the alleged exchange rate guarantee subsidies (which amounted to approximately $270 million in 1990) paid by the German government, and research and development subsidies of almost 75 per cent paid by all consortium members to Airbus. Almost two years of negotiations between the trading partners collapsed when the EC failed to cut exchange rate guarantees and reduced research and development subsidies to 45 per cent.

U.S. TRADE LAW

Flat Panel Displays from Japan

The International Trade Administration (ITA) has made a preliminary determination that flat panel displays imported from Japan are being sold in the United States at less than fair value. Flat panel displays are computer screens commonly used in lap-top computers. The preliminary dumping margins range from 0 to 4.6 per cent. The ITA also announced that its final determination has been postponed until July 8, 1991.

Coated Groundwood Paper from Austria, Belgium, Finland, France, Germany, Italy, The Netherlands, Sweden and the United Kingdom

The International Trade Commission (ITC) has issued its preliminary determination that imports of coated groundwood paper from Belgium, Finland, France, Germany and the United Kingdom injure the domestic industry. The ITC negative vote as to The Netherlands, Austria, Sweden and Italy terminated the investigation of those countries. The Commerce Department has initiated its investigation of sales at less than fair value with a preliminary determination due by June 6, 1991.

Sodium Thiosulfate from Germany, China and the United Kingdom

In its final ruling, the ITC has determined that imports of sodium thiosulfate from German, China and the United Kingdom injure the U.S. industry. The ITC final determination paves the way for dumping duties of 100.4 per cent for Germany, 25.57 per cent for China and 50.13 per cent for the United Kingdom on all imports of sodium thiosulfate from those countries.

CANADIAN TRADE UPDATE

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Canada and the GATT: Overshadowed by Agriculture War But Back on Track

In a year in which the Western world sat on the sidelines watching with awe the events in Eastern Europe, and in which our attention was riveted on the war in the Persian Gulf, perhaps the most crucial change in world order occurred in Brussels, almost unnoticed by the popular media. In December 1990, the *General Agreement on Tariffs and Trade* (*GATT*) stalled on the issue of agricultural subsidies. This has enormous implications for Canadian farmers, exporters and politicians as everyone feels the pinch of failure during a recessionary period.

Canada entered the October 1990 *GATT* negotiations seeking five goals over a ten-year period:

- the elimination and prohibition of export subsidies;
- a clarification and strengthening of Article XI of the *GATT*;
- a 50 per cent reduction in trade-distorting internal subsidies;
- a one-third reduction of normal tariffs, plus a tariff ceiling of 20 per cent; and
- the conversion of all[1] border measures (non-

tariff barriers or NTBs) to tariff equivalents, and a 50 per cent reduction of these.[2]

The principal impediments to Canada succeeding in these respects came from the United States and the European Community (EC).

On the major issue of eliminating export subsidies, the Americans were suggesting a 90 per cent reduction over ten years,[3] while the EC, facing stiff domestic political opposition to ny subsidy reduction, called for a 30 per cent reduction over a ten-year period beginning in 1986 (in reality a 15 per cent reduction in the remaining five years).[4] It was this gap, and the intransigence exhibited by both sides, that resulted in the eventual suspension of the Uruguay Round in December 1990. Unfortunately Canada, along with many other agricultural exporters, will pay dearly if the subsidy war between the U.S. and the EC continues unabated. And with some governments in the EC always just about to face an electorate strongly influenced by farmers in support of subsidies, coupled with an American populace convinced the U.S. is losing its competitiveness, there is no reason to hold out hope that the subsidy war will end–unless, that is, the billowing American deficit renders continued American export subsidization untenable.[5]

Canada's second major agenda item at the so-called final meeting of the Uruguay Round was its March 1990 proposal[6] for clarification and strengthening of Article XI of the *GATT*, specifically Article XI: 2(c) in respect of quantitative restrictions necessary for the enforcement of effective government measures toward domestic marketing or supply management. Article XI allows countries to control imports in this regard, but an adverse *GATT* Panel decision last year in an ice cream/yogurt dispute with the U.S.[7] prompted Canada to seek a clarification of Article XI.

Canada's proposal would allow Article XI to be applied only if domestic production or marketing does not exceed a preset level, there are penalties for exceeding this level, and virtually all domestic production is under supply management. Canada also sought to strengthen Article XI through an interpretative note which would define the term "wholly or mainly" (Canada suggests at least 50 per cent) in determining the product coverage of controls on processed products. Import restrictions could only be applied on those products which meet the minimal content rule to qualify as a product "wholly or mainly" made from a fresh product under effective domestic supply control.

The Canadian proposal conflicts with the American position that Article XI should be curtailed or eliminated in favour of tariff equivalents to the allowable quantitative restrictions which would then be reduced over time. That conflict never did get a proper airing because of the more important deadlock on the issue of export subsidies.[8] This is, perhaps, fortunate for Canadian politicians who otherwise would have had to make some difficult choices if gains on Article XI (on which Canada's extensive supply management system depends) had to be played off against gains on the elimination export subsidies. This would require choosing between two powerful political constituencies–grain farmers in Western Canada who favour the elimination of export subsidies, as against dairy farmers in Eastern Canada whose business practice depends on the retention of supply management under Article XI.

After the set-back with respect to agriculture, the *GATT* negotiations are once again gradually gaining momentum. On February 26, 1991, the Trade Negotiations Committee (TNC) announced its decision to restart the negotiations. TNC Chairman Arthur Dunkel has proposed a work program which provides the basis for restarting the negotiations in which differences remain outstanding. The target date for concluding the Round will be allowed to emerge in the process of negotiations. Agreements have been achieved on continuing negotiations in textiles and clothing, services, rule-making, trade-related investment measures, trade-related aspects of intellectual property rights, dispute settlement and market access.

With respect to the thorny issue of agriculture, participants have agreed to conduct negotiations to achieve specific commitments in the areas of domestic support, market access and export competition. A tentative agenda for consultations has been established. In the area of domestic support, negotiations will take place on a means of determining policies to be excluded from the reduction commitment, and on the role of the

Aggregate Measure of Support and equivalent commitments. With respect to market access, the modality and scope of tariffication, the modalities of a special safeguard for agriculture, the modalities of a minimum access agreement and the treatment of existing tariffs remain to be negotiated. In the area of export competition, the definition of the term "export subsidies" remains to be negotiated.

However, it is not at all certain that the negotiations will lead to a consensus on agricultural support. It remains to be seen whether the European Commission, which negotiates on behalf of the twelve EC member nations, can successfully negotiate specific reductions in export subsidies and import controls and improvements to market access. To date, the EC's official mandate allows it only to negotiate reductions in agricultural subsidies of 30 per cent over a ten-year period from 1986. This raises questions as to whether the EC has the flexibility to negotiate acceptable reductions in export subsidies and import controls. France is one of the key opponents to any attempts to extend the Commission's negotiating mandate.

Lobsters: Canada/U.S. Agreement Rejected

American taste runs towards large lobsters, whereas Canadians have little aversion to scooping small ones off the sea floor for the dinner table. So when the American government moved to ban the importation of lobsters smaller than the American catch requirement,[9] the Canadian government sought a binational panel ruling under Chapter 18 of the *Canada-U.S. Free Trade Agreement* (*FTA*). The ruling was to determine whether the U.S. law was inconsistent with the *FTA* Article 407 prohibition of import or export restrictions (which incorporates the equivalent *GATT* Article XI prohibitions) and, if so, whether the U.S. law came within an *FTA* Article 1201 exception which incorporates Article XX of the *GATT*.

The Canadian argument was that the American ban was in fact a disguised trade barrier contrary to *GATT* Article XI:1. The U.S. claimed it was a permissible conservation measure[10] or an acceptable internal regulation (since national treatment was afforded to both American and Canadian fishermen).[11] The Canadian position was that *GATT* Article III did not apply because it dealt with "imported" (meaning already in the country) products, whereas the American law was prohibiting the "importation" of the product. On the issue of conservation, why, the Canadians argued, should the American government be permitted to legislate for the conservation of Canadian lobsters? The Americans argued that not only was the application of the size restriction on imported lobsters not contrary to the *GATT* or the *FTA*, it was required so that there was equal treatment of both imported and domestic lobster; otherwise, imported lobster would be treated more favourably that domestically-landed lobster.

In reality it was the dire economic consequences of the American ban on Canadian lobster fisherman that prompted the Canadian alarm. Exports to the U.S. account for 74 per cent of all sales of live lobsters in Canada. Of this total, Canada estimates between 18 and 34 per cent are smaller than the American size requirement, and the ban would amount to a loss of a $127 million market during the 1990–92 period.[12]

The American-chaired panel split along national lines and found that *GATT* Article III applied and that Article XI was inapplicable. Further, the panel split along the same lines to find in favour of the U.S. on the Article III issue, holding that the American size restrictions were laws affecting the internal sale of products.[13] Although the majority claimed not to have made a decision on the "national treatment" issue, there is an undercurrent running through their decision suggesting they felt there was indeed national treatment because the size requirement applied equally, irrespective of the nationality of the fisherman. The majority relied heavily on the International Trade Organization (ITO) Havana Conference discussion of "internal taxes", and the importance placed on whether the measures applied *exclusively* to imports.[14] On an ancillary issue, the panel held that it does not matter whether the measure is a prohibition or just a restriction.

After the panel decision, a 90-day negotiation period began during which industry representatives worked towards a compromise agreement, which was reached on July 18. The

industry proposal was for Canada to adopt the same size requirement as the U.S., except in the Gulf of St. Lawrence region, in exchange for the U.S. agreeing not to increase its size requirement for a period of three years and for some joint market development in the U.S. However, in November the Canadian government rejected the industry proposal.[15] The Canadian government preferred to safeguard domestic sovereignty, so instead of exporting the lobsters to the U.S. the emphasis will be on searching overseas for markets for the small but tasty crustaceans.

Induction Motors: Once More 'Round the Block'

Imported electrical motors ranging from one horsepower to two hundred horsepower, for use in fans, pumps and machine tools, have been an ongoing problem for Canadian producers for many years. In 1983, the Anti-dumping Tribunal (ADT) made a finding of material injury in an "integral horsepower induction motors" dumping case;[16] in 1985, the Canadian Import Tribunal (CIT) made a similar finding with respect to dumped and subsidized polyphase induction motors.[17]

The territory was revisited in 1990 by the Canadian International Trade Tribunal. Under the provisions of section 76(2) of the *Special Import Measures Act* (*SIMA*) and pursuant to section 76(4) of that *Act*, the Tribunal upheld, with certain exceptions, the decisions in the two earlier hearings. The Tribunal found that material injury, caused by the dumping or importation of subsidized motors would likely resume, for all the previously listed countries except Mexico, if antidumping duties were rescinded.[18]

But the saga does not end here. In the *FTA* era, American exporters can and have availed themselves of panel review under Chapter 19. On October 31, 1990, Baldor Electrical Company (an electrical motor exporter based in Arkansas) and others made an application under *FTA* Article 1904 for a binational panel review of the Tribunal's recent review decision upholding the 1983 ADT finding.[19] The timetable for this panel review is for oral argument to begin on June 20, 1991, with a decision due by September 11, 1991.[20]

Procesed Pork: The *Extraordinary* Challenge

Processed pork has presented plentiful problems for producers these past two years. The fight between Canadian and American producers went through several rounds and was fought in several different fora.

Round One of the fight consisted of the ITA imposing an eight-cent per kilogram duty on imports of subsidized Canadian pork,[21] and of a September 1989 split decision by the ITC that subsidized imports of fresh, chilled, or frozen pork from Canada were causing or threatening material injury[22] to American producers.[23] Canada initiated Round Two, a review of these American actions, through two *FTA* Chapter 19 Panels pursuant to Article 1904.[24] In August 1990, an *FTA* binational panel concluded that the ITC's finding of material injury was based on questionable statistics, especially statistics with respect to Canadian pork production. The panel remanded the matter back to the ITC for reconsideration within 60 days.

In September 1990, the second binational panel remanded most of the elements of the ITA decision on the imposition of a countervail duty.[25] The ITA was given 60 days to review its decision. End of Round Two.

Round Three: On October 23, 1990, the ITC released its decision[26] reaffirming its earlier finding of material injury to American pork producers due to Canadian subsidization of the industry. The ITC decision on remand acknowledged that the amount of Canadian penetration into the U.S. market would be substantially less than determined in their earlier decision, but decided that even at a lower level there would be a threat of material injury to U.S. pork producers. The test the ITC applied was whether the Canadian subsidized imports would contribute, even minimally, to the threat of material injury to American producers. While the ITC found that other factors, such as large cycles in the industry, contribute more to a threat of material injury, it reaffirmed its earlier decision.

However, on January 22, 1991, the *FTA* binational panel once again disagreed with the ITC's findings, this time claiming that the ITC considered evidence outside the scope of its

jurisdiction and that there was inadequate evidence to support the ITC's finding of product-shifting and causation. The panel decision instructed the ITC to limit the supplemental record gathered on remand to data on the three issues stipulated in the public notice and to consider no new legal or economic arguments not raised in the first decision. The Chapter 19 panel was also of the opinion that there was no substantial evidence of a threat of imminent material injury and that, absent underselling, the ITC was precluded from making a finding of price suppression. Further, the panel felt that their authority limited them to remanding the matter for a second time and that they could not impose a final decision on the substantive issue, despite the language "final determination" in Article 1904(8) of the *FTA*. The panel again sent the matter back to the ITC for reconsideration for a period of 21 days.[27]

The ITC issued its second remand determination on February 12, 1991. Reluctantly it held that the industry in the U.S. is not being materially injured or threatened with material injury by reason of subsidized imports of fresh, chilled and frozen pork from Canada.

The ITC was irritated, to say the least, at having to reach the conclusion which it did. It held that the panel's remand decision had precluded it from considering relevant evidence as to both U.S. and Canadian pork production, and from considering product-shifting as a basis for a threat determination. The ITC also considered that its discretion on remand had been further circumscribed by the panel's ruling that Canadian exports to the U.S. would not gain a higher relative share of the U.S. market when U.S. production declines. The ITC concluded by stating that it believed that the restrictions imposed by the panel were contrary to the facts and law, and that they were only accepted because they were binding on the Commission. The ITC concluded that it had no choice but to make a "no injury" determination. However, it was careful to state that notwithstanding its ruling, it considered the panel decision to have violated the fundamental principals of the *FTA* and to contain egregious errors of law. On page 5 of the decision the ITC wrote:

> Notwithstanding this determination, this Second Panel violates fundamental principles of the United States Canada Free Trade Agreement and contains egregious errors under U.S. law. Had this decision come from the Court of International Trade, unlikely in light of the numerous CIT authorities contrary to the Panel's holding, we would have directed counsel to appeal it to the Court of Appeals for the Federal Circuit. This avenue, however is not available to us in light of the provisions of the *FTA*. At a minimum, however, we find many aspects of the Panel decision to lack intrinsic persuasiveness and, thus, we will not change our practice or procedure to conform with those aspects of the Panel opinion discussed below.

In its second remand decision, the ITC alleges that the *FTA* panel itself is not adhering to the provisions of the *FTA*, especially with respect to the standard of review of the administrative record and *FTA* Article 1902(2), which permits the imposition of domestically determined and administered countervail and antidumping duties. The ITC also cautioned against using the binational panel decision in this case as persuasive in future cases.

This decision is probably most important for indicating the nature of interaction between domestic regulatory agencies and *FTA* Chapter 19 panels, and was in fact a harbinger of things to come. Indeed, on March 29. 1991 the USTR announced that an Extraordinary Challenge Committee of U.S. and Canadian judicial experts will be convened to review the binational panel decision.

The panel's decision is the first panel decision to be subjected to the extraordinary challenge procedure under Article 1904.13 of the *FTA*. Under that provision a party may challenge a panel decision before an extraordinary challenge committee on the grounds that the Panel has seriously departed from a fundamental rule of procedure or manifestly exceeded its authority under the *FTA*, and that these actions have materially affected the panel's decision and threaten the integrity of the binational panel review process.

Elsewhere, the ITA in its December 7, 1990, remand decision[28] held that subsidies to pig farmers were not 100 per cent subsidies to pork producers, because other commercial products

were being produced from the pigs as well. To allocate the subsidy benefits, it was decided that the benefits should be divided by the value of the products derived. In the absence of the information required to perform such a calculation, the ITA asserted that 95 per cent of the benefits to pig farmers were bestowed upon pork producers. The ITA went individually through numerous Canadian federal and provincial farm stabilization and support programs, finding that some did and some didn't confer a benefit on pork producers. In summation, the panel held on remand that the countervail duty on Canadian pork should be reduced from eight cents per kilogram to 6.6 cents per kilogram.

Another battle took place on the *GATT* front. In November 1989, Canada requested a *GATT* Article XXIII anel investigation of American countervail duties levied against imports of Canadian pork. The decision came in October 1990, with the panel upholding the Canadian complaint that countervailing duties levied against Canadian pork producers[29] were contrary to *GATT* Article VI:3.[30] The nub of the debate was that Canada provides subsidies to pig farmers which, the U.S. asserted, were passed through to pork producers to the tune of eight cents per kilogram. If so, they should be subject to countervail duties. The panel held that the American countervail contravened Article VI:3 because the U.S. calculation of a subsidy to pork producers was not in accordance with *GATT* provisions, the inference being that the American countervail duty exceeded any subsidy which was passed on to pork producers. The panel recommended that the U.S. roll back its countervail duties accordingly and reimburse Canadian pork exporters for the duty collected. The United States is apparently unwilling to adopt the panel decision until after the conclusion of the Uruguay Round. Canada is pressing the U.S. to agree to the adoption of the *GATT* panel report.

CANADA TO PARTICIPATE IN CANADA-U.S.–MEXICO FTA NEGOTIATIONS

In early February 1991, the Canadian government announced its intention to participate in the negotiation of a Canada-U.S.–Mexico free trade agreement.[31] The decision comes after months of consultation with the provinces and business and labour representatives, and a series of studies which concluded that it would be in Canada's best interest to participate in the trade talks.

The federal government cited two reasons for its decision to participate. First, it was considered necessary to get involved in the negotiations to achieve the gains, such as job-creating investments, associated with liberalized trade. Second, the negotiations are expected to lead to improved market access for Canadian exports, especially in the areas of mining technology and equipment, agriculture, telecommunications and transportation. After all, with the inclusion of Mexico in addition to the U.S., the market for Canadian producers would increase from 272 million customers to 360 million, making it larger than the EC's market.[32]

Formalized trade with Mexico is not a new initiative for Canada. Over the last decade, Canada's trade with Mexico has grown and bilateral agreements have been concluded in several areas including customs administration, agriculture and livestock, forestry, environment, tourism and taxation. At present, Canada's exports to Mexico are largely composed of agricultural products (e.g., grains and oilseeds) and telecommunications and transportation equipment. Canadian imports from Mexico are mostly manufactured goods and agricultural products. Automotive goods, electronic equipment, appliances, office machines and data processing equipment account for over half of Mexican shipments to Canada.[33]

Mexico has traditionally been a closed economy. However, the Salinas government has introduced numerous reforms to Mexico's trade, economic and investments policies. These are geared towards liberalizing trade by removing restrictive government procurement policies, lowering trade barriers and creating an overall more favourable environment for foreign investment and imported goods. The move towards a free trade agreement is seen by the Mexican government as a powerful tool to modernize its economy.

The Mexican economy is slowly beginning to expose itself to foreigners. For example, since

joining the *GATT* in 1986 the Mexican government has modified its import regulations and has significantly reduced tariff and other barriers to trade.[34] As well, direct foreign investment has historically played an insignificant role in Mexican economic development. Now the Mexican government is encouraging foreign ownership in high-priority areas such as heavy machinery, high-tech and electronic equipment.[35] However, investment in areas such as ocean and air transportation, radio and television and most financial services are restricted to Mexicans and certain other areas such as oil production are controlled by the state.[36]

One government study has reported that Mexico has the potential to become an important export market for Canada in the future. Trade between the two countries is expected to reach five billion dollars in the 1990s.[37]

CITT Inquiry into Canadian Horticultural Industry

The Canadian International Trade Tribunal is currently inquiring into the competitiveness of the Canadian fresh and processed food and vegetable industry. The inquiry is in response to a letter of reference issued by the Governor General in Council directing the Tribunal:

- to develop a representative profile of the domestic industry on a regional and national basis, including trends and conditions respecting the structure of the industry, production, consumption, marketing and trade patterns;
- to conduct an examination of Canadian and U.S. government intervention which has a direct impact on the competitive conditions for the fresh and processed fruit and vegetable industry, including regulations, production and trade programs and tax legislation at the federal and sub-federal levels;
- to determine factors which contribute to the differences in the competitive position of Canadian and foreign production both in the Canadian market and in EC export markets, particularly with respect to the U.S. market; and
- to provide an overall assessment based on the above of the challenges and opportunities facing the industry in the coming years, including the identification of factors which may improve the viability of the sector.[38]

The purpose of the inquiry is to assess the competitiveness of the production and processing of fruit and vegetables in Canada, particularly *vis-à-vis* the United States. The inquiry will cover 30 fruit and vegetables.

Regional hearings were conducted across Canada from December 1990 to March 1991. The inquiry will now focus on the final hearing, to be held in Ottawa from June 10 to June 14, 1991. The purpose of this hearing is to present all staff papers and consultant reports including individual profiles on crops, industry profiles on the processing fruit and vegetable sector and studies on entry and exit into the marketplace. In addition, parties not heard during the regional hearing will be given an opportunity to make presentations to the Tribunal. The Tribunal is required to issue its report by end of the year.[39]

GATT Beer Panel Created

In October 1987, a *GATT* panel was established at the request of the European Community to examine the practices of Canadian provincial liquor boards with respect to imported alcoholic beverages. The panel found that certain liquor board practices with respect to the pricing, listing and distribution of imported alcoholic beverages did not accord with the provisions of the *GATT*.

While the panel's findings required non-discriminatory treatment between imports and domestic products, they did not preclude the maintenance of a provincial liquor board system, nor did they affect the right of the provinces to collect revenues through mark-ups. As well, the panel report did not impinge on the provinces' ability to control the distribution and sale of alcoholic beverages for such reasons as health and safety.

In December 1988, Canada negotiated a bilateral settlement with the EC, taking into account the panel's findings. The agreement provided for the elimination of discriminatory mark-ups over a specified period of time. The settlement did not require changes to existing

beer distribution practices in Canada, but did cover measures related to the listing of beer for sale, and stated that the existing differential price mark-ups on beer would be increased.

On December 12, 1990, the U.S. requested the *GATT* parties to establish a *GATT* panel to examine the listing, pricing and distribution practices of provincial liquor boards with respect to beer. In February 1990, the *GATT* Council established a panel to examine practices maintained by Canadian provincial liquor boards with respect to the importation, distribution and sale of beer. The establishment of the panel is in response to the United States' allegation that Canada has not only failed to remove practices found to be inconsistent with the *GATT* by the 1988 liquor board panel, but that several Canadian provinces have since instituted new discriminatory practices.

Canada has responded by requesting consultation with the United States under *GATT* Article XXIII:1 on a range of U.S. federal and state measures which allegedly discriminate against the sale of Canadian beer. For example, Canada has cited the U.S. *Omnibus Budget Reconciliation Act* as providing exclusive excise tax advantages to small U.S. producers of beer, wine and cider.

Canada's Quantitative Restrictions on Imports of Ice Cream and Yogurt

Article XI of the *GATT* allows countries to control imports in support of effective domestic production or marketing control programs for agriculture. It provides that no prohibitions or restrictions, whether made through quotas or import licences, shall be instituted on the importation of products. Article XI:2(C) contains an exemption for all import restrictions on any agricultural or fisheries product imported in any form necessary for the enforcement of governmental measures which operate to restrict quantities of like domestic product permitted to be produced.

In early 1988, Canada set quotas for imports of ice cream and yogurt products by adding them to the Import Control List. (Canada restricted a number of dairy products in connection with its domestic milk supply management program for raw milk.) In December 1988, the U.S. requested that a *GATT* panel be established to examine whether Canada's requirement for import permits for ice cream and yogurt products was in violation of its obligations under Article II:1 of the *GATT*.

Canada maintained that the actions taken to place quantitative import restrictions on ice cream and yogurt were consistent with its obligations under Article XI. The panel held that the Canadian restrictions were not consistent with the *GATT* provisions.

The panel found that ice cream and yogurt do not meet the requirements of Article II 2(c)(i) for "like products in any form" to Canadian raw milk because they do not compete directly with raw milk nor would their free importation render ineffective Canadian measures on raw milk production. The panel recommended that Canada terminate restrictions or bring them into conformity with *GATT*. To date Canada has not implemented the *GATT* panel report.

Recently the United States indicated that it is increasingly concerned about Canada's refusal to comply with the panel report. It has submitted to the *GATT* Council a preliminary list of products which would be the basis of withdrawing concessions from Canada. In response, Canada has reiterated that it is waiting until the end of the Uruguay Round to determine whether to implement the panel report and to remove ice cream and yogurt products from the Import Control List.

Multi-Fiber Arrangement

Canada imposes bilateral or unilateral restraints on textiles and clothing imported into Canada under the Multi-Fiber Arrangement (MFA). The essential condition for the imposition of restraint measures under the MFA is the existence of "market disruption" in the importing country in the form of either actual or threatened injury to the domestic industry or injury that is caused by a significant increase in imports at prices that are substantially below those prevailing for similar goods in the importing country.

The MFA expires on July 31, 1991; however, no agreement on its replacement has been reached due to the incompletion of the Uruguay Round

negotiations. It remains to be seen whether the MFA will be extended, modified or discontinued.

Agriculture Canada Import Monitoring Programs

Agriculture Canada is considering strengthening its controls on food products being imported to Canada. The imported foods to be affected by the enhanced control measures would be fresh fruit and vegetables, processed products, honey, maple products, dairy products and eggs and egg products. The initiative would involve the implementation of two programs by Agriculture Canada. The Import Control Program would limit the entry points for imported products and require importers to give notification to inspection staff of importations. The Foreign Country Accreditation Program would require exporters to have an inspection system substantially equivalent to Canada's in order to be certified to export products to Canada. Agriculture Canada has already identified numerous countries as exporters of the subject products and has requested information on the accreditation systems of those countries.

Dumping Finding with respect to Padded Hangers Reconfirmed

Last year the Federal Court of Appeal ordered the Canadian International Trade Tribunal to reconsider its finding of April 14, 1989, that the dumping of padded hangers from Taiwan was not causing and was not likely to cause material injury to Canadian production. In its reasons for judgement, the Federal Court of Appeal indicated that the Tribunal had made an erroneous finding of fact with regard to the profitability of the subject goods produced by Canadian producers, and that the conclusion reached by the Tribunal on price suppression could not be rationally supported.

On remand, the Tribunal confirmed its earlier finding of no material injury. In its statement of reasons, the Tribunal held that during the investigation period Canadian products quickly replaced U.S. imports, and by the end of the period they had captured a large proportion of the medium- and high-priced market segments. Although Taiwanese imports increased rapidly during the investigation period, the Tribunal found that these imports competed in the lower end of the market, a segment in which Canadian producers were inactive. The Tribunal found that the greater part of the price suppression was the result of the intense price competition between the producers' products and the imports from the United States. Little price suppression was found to be attributed to Taiwanese imports.

Tribunal to Hear Backlog of Tax Appeals

The Canadian International Tribunal has a backlog of appeals under the *Customs Tariffs and Excise Tax Act*. The Tribunal has announced that it has begun to review the cases in the backlog with a view to purging those that appellants no longer wish to pursue and to setting hearing dates for older cases. Once hearing dates have been set, the Tribunal will require very cogent reasons before allowing a postponement. In future, the Tribunal will be streamlining its procedures for hearing appeals and will set deadlines for published decisions. Once the Tribunal has heard all remaining appeals on the former federal sales tax, its appeals work will be limited mainly to the *Customs Act* and the *Special Import Measures Act*. Appeals on the goods and services tax will be heard by the Tax Court of Canada.

Initiation of a Dumping Investigation Respecting Beer

On March 6, 1991, the Deputy Minister of National Revenue, Customs and Excise initiated a dumping investigation with respect to malt beverages (commonly known as beer) from the United States of America by or on behalf of Pabst Brewery Company, Inc., G. Heileman Brewery Company Inc., and the Stroh Brewery Company for use or consumption in the province of British Columbia. The complaint has been filed by Labatt Breweries of British Columbia, Molson Breweries (B.C.) and Pacific Western Breweries of Vancouver. The investigation was initiated after Canada requested consultations with United States under the *GATT* concerning federal and state discrimination against Canadian alcoholic beverages. A decision on whether to make a

preliminary determination of dumping or to terminate the investigation will be issued by the Deputy Minister in June 1991.

Notice of Expiry of Injury Finding on Dumping of ABS Resins

The Canadian International Trade Tribunal has given notice that the finding of the Canadian Import Tribunal dated October 15, 1986, concerning ABS Resins from the Republic of Korea is scheduled to expire on October 14, 1991. Under the *Special Import Measures Act*, findings of material injury expire five years after the date of issue unless a review has been initiated. A review will not be initiated unless the Tribunal decides there is sufficient information to indicate this is warranted.

Interested parties requesting or opposing the initiation of a review of the finding should file written submissions to the Tribunal not later than March 28,1991. If the Tribunal decides to initiate a review, all parties will be advised and will have the opportunity to participate in the review. If the Tribunal decides that a review is not warranted, an order with reasons will be issued.

Notice of Review of Dumping Decision Concerning Boneless Manufacturing Beef

The Canadian International Trade Tribunal has given notice that it will review the finding of the Canadian Import Tribunal of July 25, 1986, concerning boneless manufacturing beef from the European Economic Community. On the basis of the representations received, the Tribunal is of the opinion that a review of the finding is warranted. The Tribunal also received representations opposing a review of the finding on the grounds that the Canadian Cattleman's Association, the Canadian complainant, does not have standing because it does not represent producers of of "like goods" and therefore is not part of the domestic industry that produces boneless manufacturing beef. The Tribunal has notified the parties that it will consider this matter during the review.

A public hearing will be held on May 21 to hear evidence and representations by the parties.

Tariff Reduction Talks Begin

Under the *FTA*, all tariffs between Canada and the United States are to be phased out by 1998. However, there is a provision to accelerate tariff cuts each year, provided there is industry support for the tariff reductions in each country. In the first round of accelerated tariff reductions which took place last year, tariffs were reduced on goods representing approximately $6 billion in trade between the two countries.

The second round of accelerated tariff reduction negotiations (on approximately 1900 proposed tariff items) has begun. Approximately 500 applications for accelerated tariff reductions have been received to date. The aim of the negotiations is to agree on a proposed final consolidated list of tariff items subject to accelerated reductions. The proposed list will then be put before the U.S. Congress and the Canadian Cabinet for approval in early spring of 1991 and implementation by July 1991.

In a related matter, the Canadian International Trade Tribunal has recommended an accelerated phase-out of tariffs under the *FTA* on over 40 parts and materials used to manufacture finished goods in the furniture, disposable diaper, automatic dishwasher detergent, pressure vessel and air cleanser industries. The Tribunal's recommendations directly affect about $153 million of imports annually, and indirectly about $93 million of domestic sales including the steel. tubing, hardware, textiles, plastic and chemical industries. The Tribunal estimates that, if adopted, the reductions would result in cost savings of about $20 million for manufacturers of finished goods over the next three years.

Undertaking Negotiated for Dumped Wedge Clamps

On February 12, 1991, the Deputy Minister of National Revenue accepted an undertaking from Reliable Power Products, Inc. which will eliminate the margin of dumping found on aluminium wedge clamps exported to Canada. The investigation into the dumping of the goods was thereafter suspended.

The Department only found a technical margin of dump of 6.47 per cent of normal value. The exporter in this case was precluded from presenting evidence to the Department on the issue of whether such a minor level of dumping was causing material injury to the Canadian complainant because of the Tribunal's earlier ruling on a reference from an interested party that the evidence submitted by the complainant demonstrated a reasonable indication of material injury.

Massive Injury Finding Issued

The Canadian International Trade Tribunal recently held that the dumping of photo albums from Indonesia, Thailand and the Philippines has caused, is causing and is likely to cause material injury to Canadian production of like goods. The Tribunal also issued a rare finding that the dumped goods constitute a massive importation and assessed retroactive duties to prevent the recurrence of material injury caused by massive importations. The evidence revealed that the dumped goods captured 24 per cent of the Canadian market and 40 per cent of the total value of the Canadian complainant's domestic sales for the same period. Such importations were also five times larger than in the corresponding period in 1989, and this was sufficient evidence for the Tribunal to issue a massive importation finding.

Lint Rollers not Injuring Canadian Producers

The Canadian International Trade Tribunal has held that the dumping of lint rollers and accessories from the U.S. has not caused past, present or future material injury to Canadian production of like goods. The complainant was unsuccessful in its argument before the Tribunal that the dumping of the goods was the cause of its lost sales, lost profits and margins, and lost jobs.

Nickel Tubing and Stainless Steel Pipe Dumping Decisions Rescinded

The Canadian International Trade Tribunal has recently rescinded two material injury findings with respect to nickel tubing and stainless steel pipe.

On June 11, 1985, the Canadian Import Tribunal found that the dumping of certain nickel and nickel alloy tubing imported form Japan was causing material injury to Canadian production. Late last year the CITT rescinded this finding. In its decision the CITT stated that the finding was rescinded because of a lack of future demand for the subject goods in the Canadian market. Such a lack of demand would therefore result in no imminent threat of materially injurious dumping from Japan.

The CITT also rescinded the dumping finding pertaining to certain stainless steel pipe from Japan, the United Kingdom, Sweden, the United States of America, the Federal Republic of Germany and the Republic of Korea. The Tribunal found no persuasive evidence that the exporters in the subject countries would resume dumping should the finding be rescinded. Evidence showing low Canadian prices and strong demand in their home markets suggested that exporters in the subject countries would find the Canadian market unattractive in the future. The evidence also did not suggest that the domestic industry would be materially injured if a resumption of dumping were to occur.

Notes

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1 Except those import controls on supply managed products, see discussion of *GATT* Article XI, *infra*.

2 "Canada Tables Offer for Agricultural Trade Reform in Multilateral Trade Negotiations", *Government of Canada News Release*, Ministry of External Affairs and International Trade, October 15, 1990.

3 7 *I.T.R.* 1564, October 17, 1990.

4 7 *I.T.R.* 1747, November 14, 1990.

5 Nevertheless, there are recent indications coming from the EC that some movement may be occurring on the issue of production limits as a means of putting the *GATT* talks back on track. As of the time of writing, some low-level talks have taken place between the EC and the United States, but no imminent breakthrough can be foreseen.

6 "Canada Tables Proposal for Strengthening and Clarifying *GATT* Article XI in Support of Supply Management Programs", *Government of Canada News Release*, Ministry of External Affairs and International Trade, March 14, 1990.

7 GATT Panel Decision, September 12, 1989. The *GATT* panel found that ice cream and yogurt do not meet the requirements of *GATT* Article XI: 2(c)(i) for "like products in any form" to Canadian raw milk because they do not compete directly with raw milk nor would their free importation render ineffective Canadian measures on raw milk production. The panel recommended that Canada terminate restrictions or bring them into conformity with *GATT*. Canada is waiting until the end of the Uruguay Round to decide whether to remove these food products from its Import Control List.

8 As of the time of this writing (February, 1991) the Uruguay Round was still moribund, with *The Economist* reporting that the European Commission may not reach a decision on farm subsidy reform for a year or more ("The GATT Negotiations: Almost High Noon", Feb. 9, 1991, p. 70).

9 *1989 National Oceanic and Atmospheric Administration Ocean Coastal Programs Authorization Act*, 16 U.S.C. §1857(1)(J), dated December 12, 1989, which amends §307(1)(J) of the *Magnuson Act*.

10 These would be acceptable as per *GATT* Article XX(g), which, as discussed above, is incorporated into the *FTA*.

11 Acceptable because it abides by the "national treatment" provisions of *GATT* Article III, which are incorporated into the *FTA* through *FTA* Article 501.

12 Canadian Presentation at the Oral Hearing for Panel USA-89-1807-01, p. 26

13 *FTA* Binational Panel Decision, USA-89-1807-01, May 25, 1990.

14 Havana Reports, E/CONF.2/C.3/A/W.30, p. 2, as reproduced in the *GATT Analytical Index*, Fourth Revision (*GATT*/LEG/2. section Article III, p. 3).

15 "Fish Minister Wins Battle Over Lobster Deal", *Report on Free Trade*, Nov. 19, 1990.

16 Inquiry No. ADT-8R-78 (April 15, 1983).

17 Inquiry No. CIT-6-85 (October 11, 1985).

18 CITT Review No. RR-89-013 (October 10, 1990).

19 *The Canada Gazette, Part I*, Vol. 124 (1990), at 3893.

20 Canada-United States *FTA* Binational Secretariat Registry System, Timeline for Request for Panel Review/Article 1904, CDA-90-1904-01, as of October 31, 1990.

21 ITA Final Determination, 54 Fed. Reg. 3077 (July 24, 1989).

22 Pursuant to 19 U.S.C. 1677(7)(F).

23 *Fresh, Chilled, or Frozen Pork from Canada*, 57 Fed. Reg. 37,838, Investigation No. 701-TA-298 (Final), USITC Publication 2218, September 13, 1989.

24 The Article 1904 panel reviews were divided into two discrete panels. USA 89-1904-06 reviewed the imposed countervail duty (54 Fed. Reg. 3077 (July 24, 1989) and USA 89-1904-11 reviewed the ITC decision with respect to the finding of material injury (57 Fed. Reg. 37,838, September 13, 1989).

25 Canada-United States *FTA* Binational Secretariat, *Fresh, Chilled, and Frozen Pork From Canada*, USA-89-1904-06, September 28, 1990.

26 United States International Trade Commission, *Fresh, Chilled, or Frozen Pork From Canada*, Investigation No. 701-TA-298 (Views on Remand) USITC Pub. No. 2218 (October 1990) (remand determination).

27 Canada-United States *FTA* Binational Secretariat, *Fresh, Chilled, and Frozen Pork from Canada*, USA-89-1904-11, January 22, 1991.

28 United States Department of Commerce, *Remand Determination of Final Countervailing Duty Determination on Fresh, Chilled and Frozen Pork from Canada*, December 7, 1990, USA-89-1904-06.

29 Levied in July 1989 by the U.S. Dept. of Commerce pursuant to section 771B of the *Tariff Act of 1930*, 19 U.S.C. §1677-2 (West Supp. 1990).

30 7 *I.T.R.* 1541, October 10, 1990; "Canada/United States: U.S. Countervailing duties on fresh, chilled and frozen pork from Canada", 75 *Focus: GATT Newsletter* 4, October, 1990.

31 "Statement by the Minister For International Trade, John C. Crosbie, on Canada-U.S.-Mexico Free Trade Negotiations", *Government of Canada News Release*, Ministry of External Affairs and International Trade, February 5, 1991.

32 "Canada-U.S.-Mexico: A New FTA", *Government of Canada Newsletter*, Investment Canada, Winter 1990.

33 "Canada's International Trade Minister to Lead Trade Mission to Mexico", *Government of Canada News Release*, Ministry of External Affairs and International Trade, April 19, 1990.

34 "Statement to the House of Commons Standing Committee on External Affairs and International Trade by the Honourable John Crosbie, Minister

for International Trade Regarding Canada's Participation in North American Free Trade Talks With Mexico and the United States", *Government of Canada News Release*, Ministry of External Affairs and International Trade, October 9, 1990.

35 Sanderson, S.W. and R. W. Hayes, "Mexico–Opening Ahead of Eastern Europe", *Harvard Business Review*, September-October 1990.

36 "Mexico-U.S. Free Trade Talks", Royal Bank of Canada, *Econoscope*, Special Edition, September 1990, p.4.

37 "Notes for a Speech by the Minister for International Trade. John C. Crosbie, at a luncheon in honor of the Secretary of Trade and Commerce in Mexico, Dr. Jaime Serra", *Government of Canada Release*, Minister of External Affairs and International Trade, September 25, 1990, p.4.

38 "An Inquiry into the Canadian Horticultural Industry", *Government of Canada News Release*, Canadian International Trade Tribunal, July 4, 1990.

39 "Inquiry into the Competitiveness of the Canadian Fresh and Processed Fruit and Vegetable Industry", *Government of Canada News Release*, Canadian International Trade Tribunal, October 24, 1990.