

## TRADE POLICY DEVELOPMENTS

### GATT UPDATE

By: Susan M. Brown, Student-at-Law  
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On December 20, 1991, Arthur Dunkel, Director General of the GATT and Chairman of the Trade Negotiations Committee at the official level, released a document entitled *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*. This document is being presented as the long-awaited "final deal." Dunkel set a deadline of January 13, 1992 for the 108 members of the GATT to decide on the acceptability of the proposal. If all the GATT members accept the deal several months of negotiation over the legal text and technical details can be expected to follow.

Agriculture has been the *bête noire* of the Uruguay Round. The inability of the European Community and the United States to reach agreement on these issues precipitated the Dunkel compromise. Dunkel's agriculture proposal includes a number of elements. First, all existing access restrictions would be converted to tariff equivalents to be reduced by 36 percent between 1993 and 1999. This affects the quotas in place to support Canadian supply-managed commodities, discussed below. Furthermore import market access would be set at a minimum of five percent of domestic consumption by the end of the same period. Second, export subsidy spending would be reduced by 36 percent and subsidized volumes by 24 percent by 1999, using a base of 1986-90 for the reductions. Third, domestic supports that qualify as subsidies would be reduced by twenty percent by 1999, using 1986-88 as the base year. Finally, rules would be introduced to prevent the misuse of health and sanitary measures as trade barriers.

Supply management advocates are seriously disturbed by the proposals for tariffication without exception, predicting the ruin of Canada's egg

and milk producers. The Canadian government response, however, is that despite disappointment in not achieving clarification and enhancement of Article XI (an implicit exemption for supply management régimes), high initial tariffs and domestic programs would soften the blow. Grain farmers, on the other hand, welcome the proposal to reduce export subsidies, which could mean cuts in subsidized European wheat exports of up to 45 percent by 1999.

The other problematic element of the Dunkel proposal for Canada is the extension of drug patent protection to twenty years from ten years. This will effectively end the Canadian practice of compulsory licensing, a direction in which Canada had been moving since the introduction of Bill C-22.

Positive aspects of the proposal include a commitment to significant tariff reductions, the definition of what constitutes an unfair trade subsidy (overcoming difficulties encountered on this point during the Canada-U.S. free trade talks), the inclusion of textiles in the GATT and the establishment of a world trade organization.

The European Community was quick to condemn the agricultural proposals, but it will be necessary to wait for the outcome of the January meeting of the GATT members to determine whether the reports of the death of the Uruguay Round are, once again, premature.

### ECONOMIC WOES TRIGGER TOUGH TRADE LEGISLATION

By: Eleanor C. Shea & Michael A. Meyer  
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A continuing recession complicated by burgeoning budget and trade deficits has prompted a spate of legislation designed to retaliate against unfair trade practices abroad. Several bills have

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been introduced in Congress to revive and expand the "Super 301" provision of the *Omnibus Trade and Competitiveness Act* of 1988. Super 301, which expired in 1990, was strongly attacked by U.S. trading partners as a violation of the *General Agreement on Tariffs and Trade (GATT)*. Administration officials have also criticized the measure as denying the administration flexibility in trade negotiations. The fight by Super 301 proponents will focus upon the fundamental trade and economic policies of the United States, themes that will play a significant role in the 1992 presidential elections.

The Super 301 provision of the *Omnibus Trade and Competitiveness Act* of 1988 required the United States Trade Representative (USTR) to identify countries with the most egregious barriers to U.S. exports. Under Super 301, the USTR could retaliate against named "priority" countries if bilateral negotiations aimed at resolving the allegedly unfair practices failed. Super 301 was only in force for two years, expiring in 1990. In its first year of operation, the administration named Japan, Brazil and India to the priority list; in 1990, no priority countries were named.

The continuing recession and the faltering Uruguay Round of multilateral trade negotiations has prompted several bills in both Houses of Congress that are designed to bring back, and even strengthen Super 301. On October 22, Senators Max Baucus (D-Mont.) and John Danforth (R-Mo.) introduced S.1850 which would reenact Super 301. Senator Baucus is the chairman of the International Trade Subcommittee of the Senate Finance Committee. S.1850 extends Super 301 for a period of five years beginning in 1992. All provisions of the original Super 301 legislation would be extended, with a few amendments: the new bill extends the period for naming priority countries from one to six months after the release of the *National Trade Estimates Report* and the Senate Finance and House Ways and Means Committees would be authorized to request that the USTR conduct Section 301 investigations.

The Baucus bill provides for the identification of priority countries under the same criteria as the original legislation—the extent of the trade barriers and the estimated U.S. exports that

would result if the barriers were removed. These criteria have been criticized as giving the administration too much discretion in naming (or *not* naming) priority countries. The administration's failure to name Japan to the 1990 Super 301 list is often cited as an example of this overly broad discretion. Additional legislation has been proposed in the House of Representatives that would eliminate such flexibility.

On November 4, Representatives Richard Gephardt (D-Mo.) and Sander Levin (D-Mich.) introduced H.R.3702 to extend and strengthen Super 301. The bill changes the criteria under which the administration would name a priority country by directing the President to initiate 301 investigations against all countries that account for 15 percent or more of the United States trade deficit if those countries have imposed barriers to foreign trade. The administration would also be required to investigate any countries with a ten percent or greater trade imbalance in a specific sector.

In introducing the bill, Gephardt and Levin noted that trade is *the* political issue of the day and claimed that the Bush administration has "failed miserably in combating closed markets." Levin stated that frustration over the economy will provide the necessary political will to pass this legislation. In fact, a similar but less expansive bill designed to extend Super 301 (H.R.787) passed the House Subcommittee on Commerce, Consumer Protection and Competitiveness on October 23. The Subcommittee action provides strong evidence that some form of legislation to revive Super 301 will be adopted by Congress in the next few months. Such legislation is likely to face a presidential veto, thus creating a contentious issue for the upcoming 1992 presidential election.

With the success of the Uruguay Round negotiations still in question, trade policy will be closely scrutinized over the next year. Senator Baucus has noted that if the administration rejects renewed Super 301 legislation, he will lobby against any agreements resulting from the Uruguay Round. In any event, the fight over Super 301 legislation will bring to the forefront the basic tensions in trade and economic policies that will figure prominently in the 1992 presidential election.

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**NATURAL GAS EXPORTS TO THE UNITED STATES THREATENED BY THE DOMENICI/WORTH AMENDMENT**

By: William T. Houston and Susan M. Brown  
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The recent defeat in the U.S. Senate of the *National Energy Security Act of 1991* (S. 1220) provided some relief for worried Canadian gas exporters concerned about the Domenici/Worth amendment. This amendment called for the transfer of jurisdiction over natural gas imports under section 3 of the U.S. *Natural Gas Act* from the Department of Energy to the Federal Energy Regulatory Commission (FERC). The amendment would have then required the FERC to condition imports to redress any alleged "anti-competitive" impacts on United States natural gas producers including, but not limited to, competitive disparities resulting from different rate designs applied to the pipeline transportation of domestic natural gas and the pipeline transportation of imported natural gas. In effect, Canadian competition with U.S.-based production was asserted to be anticipated *per se* because of differences in regulatory treatment of certain pipelines in the two jurisdictions.

The relief may be only of a passing nature. S. 1220 was defeated because of controversy over provisions which would have allowed oil and gas exploration in the Arctic National Wildlife Refuge and set corporate average fuel economy standards. The powerful lobby which fought for the Domenici/Worth amendment, the Independent Petroleum Association of America (IPAA), still contends that Canadian natural gas has a competitive advantage because of differences in rate design on the pipeline systems between Canada (which uses a full fixed-variable formula) and the United States (which employs a modified fixed-variable formula), called the "rate tilt" issue. The IPAA intends to continue to look for legislative remedies, and Senator Wirth has indicated that he may reintroduce his original *Natural Gas Act*.

The Canadian government vociferously opposed the Domenici/Worth amendment as contrary to the "letter and the intent of the

*Canada-U.S. Free Trade Agreement*" decriing it as "precisely the type of non-tariff trade barrier which the *FTA* sought to eliminate." Furthermore, Canada takes the position that, first, there is no proof that the "rate tilt" produces any competitive advantage for Canadian exports, and second, the FERC has shown that it is moving towards flexibility in rate design and is no longer adhering to a fixed notion of rate design.

**NEB CHANGES MARKET-BASED PROCEDURE**

By: William T. Houston and Susan M. Brown  
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In considering an application for an export licence, the National Energy Board (NEB) must take into account the requirements of section 118 of the *NEB Act*. These requirements include, generally, having regard to "all considerations that appear to be relevant" and, specifically, satisfying itself that the quantity of gas to be exported does not exceed the surplus remaining after "due allowance for Canadian requirements." The legal tests in the Act represent such a level of achievement in subjective draftsmanship that the NEB has, over the past five years, totally reformed the practical requirements to obtain an export license without Parliament enacting any significant changes in the governing legislation which prompted NEB action.

Prior to natural gas deregulation the NEB controlled natural gas exports strictly, permitting them only when the applicant could prove that the export would not cause Canada's nationally established ratio of gas reserves to gas production to fall below an arbitrary ratio, which for many years was 25:1 (15:1 as of April 1986). Included in the restrictive tests were the "current deliverability" and "future deliverability" tests, which constrained export trade beyond the requirement for satisfying the reserves-to-production test.

In September 1987, the NEB released a new policy (*Review of Natural Gas Surplus Determination Procedures*, GHR-1-87), which

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moved Canada away from a "piggy-back" approach to protection of future needs that required producers to prematurely establish additional reserves and thus endure high carrying costs of this inventory, towards a more market-driven regulation that the NEB has called the "Market Based Procedure." This change aligned Canada's natural gas export policy more closely with the provisions and spirit of the *General Agreement on Tariffs and Trade (GATT)* with respect to international trade in energy goods.

There are three elements to the "Market-Based Procedure":

- i) the complaints procedure,
- ii) the export impact assessment, and
- iii) any other factors the NEB considers relevant to its determination of the public interest.

The complaints procedure gives Canadian gas users an opportunity to object to any export proposal on the ground that they have not had an opportunity to obtain supplies of gas under contract on terms and conditions, including price, similar to those contained in the sales contract(s) of the export licence application.

The export impact assessment (EIA) assists the NEB in determining whether a proposed export is likely to cause Canadians difficulty in meeting their future energy requirements at fair market prices. Export applicants have the option of using the Board's EIA or of preparing and submitting their own EIA as a basis for arguing whether the proposed exports would result in adjustment difficulties in Canadian energy markets. Application of this test in export hearings during the past two years has not led to denial of any applications.

The "other factors" the NEB takes into consideration as part of the public interest determination are gas supply factors and market, commercial and regulatory status factors. In its assessment of gas supply, the Board focuses on the adequacy of both reserves and productive capacity to support the applied-for exports. With respect to market, commercial and regulatory factors, the NEB reviews the broad range of arrangements underpinning a project, including the load factor at which the proposed export is anticipated to flow, transportation arrangements and the status of any regulatory authorizations.

Significant changes to the "Market-Based Procedure" followed the GH-1-89 decision (November 1989) to refuse export licences to four applicants based, in large part, on the Board's refusal to accept the benefit-cost analysis method submitted by the applicants. Most of the affected parties sought leave to appeal the NEB decision to the Federal Court of Appeal. The appeals were based on challenging the fairness of the procedure used by the Board in conducting its benefit-cost analysis in assessing the export applications, and arguing that the use of benefit-cost analysis to restrict exports is contrary to the *Canada-U.S. Free Trade Agreement (FTA)*.

In December 1989, the NEB decided on its own motion to review the role of benefit-cost analysis. In March 1990, it announced that it would no longer use benefit-cost analysis in considering gas export licence applications and that, with respect to contract flexibility, it would operate on the presumption that, where contracts are freely negotiated at arm's length, they would be in the public as well as the private interest. It is interesting to note that the NEB declined to respond to the arguments relating to the *FTA*, finding that the question of the Board's jurisdiction in light of the *FTA* was beyond the scope of the proceedings. The Board continued to rely on a broad interpretation of section 118 to justify the removal of the requirement for cost-benefit analysis.

Public hearings were held in March 1990 to review the applications denied in GH-1-89, and all were subsequently approved under the new policy (*Review of Aspects of the Market-Based Procedure*, GHW-4-89). All appeals to the Federal Court on the GH-1-89 decisions have been discontinued.

Most recently, in August 1991, the NEB, again relying on section 118, announced a number of proposed changes to the "Market-Based Procedure" (*NEB Requests Comments on Proposed Changes to its Market-Based Procedure for Assessing Natural Gas Export Applications*, News Release 91/50, 21 August 1991, and *Proposed Changes to the Application of the Market-Based Procedure*, GHW-1-91). With respect to the complaints procedure, the Board is proposing changes to the pre-hearing process to help ensure

that Canadian purchasers of natural gas have adequate time and information prior to a public hearing to assess the terms and conditions of gas export licence applications and to determine whether they may have grounds to file a complaint.

Other proposed changes relate to deleting the requirement that the public interest determination include ensuring that export contracts contain provisions permitting adjustments to reflect changing market conditions over the life of the contract, and that exporters demonstrate that export arrangements provide reasonable assurance that the volumes contracted will be taken. The Board is also proposing to revise the Information Filing Requirements in light of the proposed changes to the "Market Based Procedure" which will require amendments to the *Part VI Regulations*.

The moves by the Board over the past five years have consistently been in the direction of encouraging competition in the production and marketing of natural gas and, to a limited extent, in the transmission of natural gas. The proposed changes are a further move in the same direction.

### **CITT FINDS U.S. BEER CAUSES INJURY, BUT NOT TOO MUCH**

By: Paul K. Lepsoe,  
Fraser & Beatty, Ottawa

Following a finding by Revenue Canada of dumping of U.S. beer into the British Columbia market during 1990 and 1991, the Canadian International Trade Tribunal (CITT) held hearings in August and September to determine if the dumping had caused or would cause material injury to production in Canada. The CITT so found, in reasons released on October 17, 1991.

An interesting aspect of the case is the effect of the intervention of the Director of Investigation and Research under the *Competition Act*. Counsel for the Director had argued at the CITT hearing that this was a case for the exercise of the CITT's discretion under section 45 of the *Special Import Measures Act (SIMA)* to recommend that the imposition of anti-dumping duties would not be

in the public interest (see (1991) 12:3 *C.C.P.R.*, pp. 7 and 21 for articles discussing the Director's intervention).

The Director argued that the B.C. beer market was essentially a regulated oligopoly consisting of Labatt's and Molson's. He contended that provincial practices with respect to listing, pricing, distribution and access to retail outlets amounted to a non-tariff barrier of about fifty percent on imported products (see p. 27 of this issue for a report on the GATT challenge to these types of practices.) In light of this, he argued, dumping was perhaps the only way in which the American product could compete. Most importantly, the imported product introduced an element of price competition into the B.C. market and thus aided consumers.

In separate reasons addressing section 45, which were only released on November 25, the CITT recommended to the Minister of Finance that it would not be in the public interest to impose the full amount of anti-dumping duties. This is the first time that the CITT has made such a finding since its creation in 1988.

The Tribunal made it clear that it did not fully accept the free market analysis of the Director, stating that "the public interest includes the protection of B.C. employment and investment in the subject industry." However, the imposition of the full rate of anti-dumping duties in this case would be higher than necessary to remove the material injury, and the majority of the CITT panel stated that "we are of the opinion that competition in the B.C. market and the consumer interest would be better served by reducing some of the anti-dumping duties from the full margin of dumping."

CITT member Michèle Blouin dissented, writing that "I do not believe that section 45 of *SIMA* should be invoked simply to promote competition or provide consumer benefits...*SIMA* exists first and foremost for the protection of producers."

The principal U.S. beer company involved, Heileman's, has requested a Binational Panel review of both the dumping finding of Revenue Canada and the material injury finding of the CITT. Those decisions are due in May and August 1992 respectively.

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**IMPORT QUOTA ALLOCATION REVIEW**

By: Paul K. Lepsoe,  
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Against the backdrop of pressure at the GATT negotiations in Geneva to abolish import protection for supply-management systems, the federal government's review of the methods used for allocating import quotas began in Ottawa in October 1991. The review, being carried out by the Canadian International Trade Tribunal (CITT), was announced by the federal cabinet in August (see (1991) 12:3 C.C.P.R., p. 21) using its power under the CITT Act to require the CITT to inquire into "any matter in relation to the economic, trade or commercial interest of Canada with respect to any goods or services."

The principal agricultural products subject to import quotas are cheese, ice cream, yoghurt, chicken, turkey and eggs. Quotas are currently allocated under the *Export and Import Permits Act* by several different methods. Quota is available to brokers, processors and distributors, but not directly to retail-level food suppliers.

The inquiry is concerned only with the allocation of the existing quota level, not with the more contentious overall level of quota. Participants therefore only have the opportunity to argue that existing rights to import should be differently shared, not that more imports should be allowed in order to lower input prices for Canadian processors. The inquiry will examine the current methods as well as possible alternatives, employing the following evaluation criteria: competitiveness, market responsiveness, transparency, equity, entry into the industry, predictability and economic efficiency.

A preliminary public hearing was held in Ottawa on October 10 and 11. It concerned only a discussion of the planned inquiry process and research program. The substantive issues will be addressed at two sets of public hearings in Ottawa in 1992. The first set will take place from January 20 to February 7. At this time, the parties will be able to present expert testimony and cross-examine the expert witnesses of other parties. The parties will also be able to examine the

reports of the CITT research staff, and will be able to question the CITT consultant who by that time will have produced an economic model/analytical framework to measure the various quota allocation methods.

The second set of hearings will be held in Ottawa from June 8 to 19. Their purpose will be to allow the parties to comment on the final research of CITT staff and consultants, and to make final submissions to the CITT panel.

Thus far, over seventy parties have filed submissions with the CITT. Most of the participants, particularly those represented by counsel, are supporting the maintenance of the *status quo* and their current quota entitlements. The participants include the National Dairy Council, the National Cheese Company Limited, Cara Operations Limited, the Canadian Restaurant and Foodservices Association, Kentucky Fried Chicken, the National Farmers' Union, McCain Foods Limited, the Canadian Egg Marketing Agency, the Dairy Farmers of Canada, the Canadian Association of Regulated Importers, the Canadian Dairy Commission, the International Cheese Council of Canada, the Saskatchewan Department of Agriculture and Food and S.A.A. Limitée.

The CITT is to report on October 13, 1992.

**STEEL TRADE ACTION CONTINUES**

By: Paul K. Lepsoe  
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Several trade actions launched by the beleaguered Canadian steel industry against imports from various countries continue to wind their way through the system, which is proving to be receptive to the complaints.

On June 21, 1991, Revenue Canada made a final determination of dumping with respect to the importation into Canada of carbon steel welded pipe from Argentina, India, Romania, Taiwan, Thailand and Venezuela. The piping is used for the conveyance of various liquids and gases in

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plumbing and heating systems. After hearings in Ottawa in June, the Canadian International Trade Tribunal (CITT) found that the dumped imports had caused, were causing or would likely cause material injury to production of like goods in Canada, thus confirming the levy of anti-dumping duties on the imported products.

The CITT released its reasons for this finding on August 12, 1991. One of the foreign producers affected, Tate Iron and Steel Co. of India, subsequently filed an appeal of the decision in the Federal Court of Appeal. However, the C.C.P.R. has learned that this is unlikely to be pursued.

On September 20, 1991, the CITT released its reasons for a material injury finding concerning the importation of stainless steel welded pipe from Taiwan. Revenue Canada had made preliminary and final findings of dumping on May 8 and August 2, 1991, respectively.

Meanwhile, on September 25, Revenue Canada announced the termination of price undertakings and a finding of dumping with respect to carbon steel welded pipe imported from Brazil, Luxembourg and Yugoslavia. A complaint of dumping was originally filed by Stelco in 1987. The subsequent Revenue Canada investigation was suspended in January 1988 after undertakings by the companies to maintain acceptable pricing. The undertaking was terminated by Revenue Canada after a determination that the product was being sold in Canada at prices below the undertaking. Revenue Canada also made a finding of dumping with respect to imports of the product from Poland and Turkey.

The CITT will conduct a material injury hearing in Ottawa on December 16. In light of the trend of CITT decisions concerning steel, some importers and foreign producers have apparently decided that they will not bother to participate.

**INTERNATIONAL TRADE LAW**

*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).*

**AUSTRALIA**

## Tariff Concession System

In March 1991, the Industry Commission issued its report on the tariff concession and by-law systems. It found no case for disbanding commercial tariff concessions but found a strong case to improve its operations. It recommended that the granting of commercial tariff concessions be simplified; commercial tariff concessions be irrevocable; decisions of the Australian Customs Service on the granting of commercial tariff concessions be reviewable by the Administrative Appeals Tribunal.

House of Representatives Report into  
Customs Administration

In April 1991, the House of Representatives Standing Committee on Finance and Public Administration issued its report on the administration of the Australian Customs Service (ACS). The report was highly critical of aspects of customs administration. It recommended: a review of the "automatic penalties" system; reconsideration of penalties for innocent error; and the drafting of appropriate legislation in advance of electronic data interchange (EDI) to overcome current legal difficulties inherent in EDI.

Senate Enquiry into Australia's Anti-Dumping and  
Countervailing Legislation

In June 1991, the Senate Standing Committee on Industry, Science and Technology reported on Australia's anti-dumping and countervailing legislation. It recommended:

the improvement of procedures for assisting local industry in preparing applications;

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the government continue its efforts through the GATT to amend the definition of "domestic industry" to allow producers of raw agricultural products to be treated as part of the domestic industry;

the ACS develop computer-based industry models to assist in the calculation of material injury;

the sunset period for termination of dumping notices be extended from three years to five years;

the ACS be empowered to conduct confidential examinations of dumping complaints using confidential information; and

applicants only be required to provide information reasonably available to them and the ACS be given power to supplement that information.

## Origin

In a recent, landmark decision (*Eveready Australia Pty Limited v. Collector of Customs*, August 28, 1991), the Federal Court held that where a (genuine) two-phased process had been used in the manufacture of batteries, the output of the first phase represented the "materials" for the second phase. It rejected the arguments of the Australian Customs Service that the "materials" were the inputs for the first phase. As the materials were then wholly of Singapore origin, the final products were entitled to Singapore preference rates.

## EUROPEAN COMMUNITIES

The GATT secretariat published a rather critical review of the EEC's trade practices on April 18, particularly its preferential trading arrangements and its network of bilateral agreements. The report is part of a series of reviews that the GATT secretariat is undertaking with respect to each of its members.

The dialogue between the EEC and the U.S. on Airbus has collapsed. The EEC has rejected the U.S.'s request for bilateral consultations regarding the dispute over subsidies to Airbus. The affair will most probably go to a GATT dispute settlement panel.

The EEC Commission has initiated an inquiry into illicit practices under Regulation 2641/84 regarding piracy of community sound recordings in Thailand. The complaint was lodged by the International Federation of Phonographic Industry which alleges that 90 percent of recordings sold in Thailand are pirated, resulting in a loss to the EC industry of approximately 200 million ECUs over the last ten years.

## European Court of Justice

There have been two important ECJ judgments during the last several months regarding anti-dumping procedures. In the *Extramet* judgment (May 1991) the ECJ clarified which parties may seek annulment of an anti-dumping regulation. In the *Al-Jubail* case (June 1991), the Court annulled the Council regulation imposing anti-dumping duties, deciding that the Commission had not placed at the applicant's disposal all of the information which would have enabled them to effectively defend their interests.

The Commission commenced investigations on Chinese polyolefin bags and compact disc players from Japan and Korea under Article 13(11) of its anti-dumping regulation. Article 13(11) provides for the imposition of additional anti-dumping duties where the exporter is bearing the duty already imposed.

Anti-dumping cases were initiated with respect to ferrosilicon from Egypt and Poland, woven polyolefin bags from China, gas-fueled, non-refillable pocket lighters from Japan and pig iron from Turkey and the U.S.S.R.

Definitive anti-dumping duties have been imposed on ferrosilicon from Brazil, audio-tapes and cassettes from China and Korea, aspartame from Japan and the U.S.A., espadrilles from China and small screen colour televisions from China and Hong Kong.

Provisional duties have been imposed on video tapes and cassettes from China, gas-fueled, non-refillable pocket flint lighters from Japan, China, Korea and Thailand, polyester fibres and yarns from Turkey, oxalic acid from Czechoslovakia and dihydrostreptomycin from China.

Undertakings were accepted with respect to ferrosilicon from Brazil, welded wire-mesh from

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Yugoslavia and asbestos cement pipes from Turkey.

Anti-dumping proceedings were terminated regarding audio tapes and cassettes from Hong Kong and thin polyester film from Korea.

**JAPAN**

The confidence of foreign traders and investors could be shaken again by the latest securities scandal in Japan. Among other things, it has been revealed that Japanese securities companies reimbursed their important Japanese clients for losses they suffered in the decline of the Japanese stock markets. No foreign investor was reported to have been compensated and no foreign securities company operating in Japan has reported to have made payments. At the end of July 1991, and in early August, the lists of many of the names of clients of major securities firms who received compensation were made public. For example, the "big 4" securities firms admitted the following compensation:

Nomura:	49 clients, 27 billion yen;
Daiwa:	57 clients, 22 billion yen;
Nikko:	59 clients, 33 billion yen;
Yamaichi:	66 clients, 45 billion yen.

Other second level securities houses followed with more client names and amounts of compensation. Some of the clients so compensated claimed that they were not aware of being compensated. As implausible as this may sound, the deniability arises from the practice of the securities firm selling the customer discounted bonds and then repurchasing the bonds shortly thereafter at an inflated price as the means of compensation. While the total amount of compensation is uncertain, it exceeded US\$1 billion.

Surprisingly, the Ministry of Finance (MOF) of Japan, which has the duty to regulate the securities industry, has taken the position that there has been no violation of the Japanese securities laws. The reasoning seems rather *facile* and is as follows. While Article 50-1-3 of the *Securities Exchange Act* (the *Act*) explicitly prohibits offering compensation for losses in conjunction with solicitation for the sale of securities,

compensation without an agreement to compensate is merely a violation of Government Circulation (Tsutatsu)(MOF Circulation of December 26, 1989). In the present case, it is an accepted fact that there were no prior compensation agreements (at least no direct evidence has been revealed, and apparently circumstantial evidence is not acceptable, no matter how overwhelming).

However, there are arguments that such conduct falls within the broad coverage of Article 58 of the *Act*, which provides that no person shall employ any device, scheme or artifice to defraud in connection with the purchase or sale of securities. The securities firms were discriminating between big and small clients. Also, the creation of fair market value of the securities is distorted by brokers offering to bear part of certain investors' risks.

One group of lawyers in Japan has announced that it is considering filing a damage claim on behalf of investors who were not compensated. Also, it has been reported that some U.S. institutional investors are preparing an action asking for damages in "the tens of millions".

The U.S. SEC has reportedly started an investigation of U.S. subsidiaries of some of the Japanese securities firms.

The MOF has announced it will enhance inspection and supervision of securities practices. MOF is proposing a bill to amend the *Act*, the contents of which are reported to be prohibiting compensation (with or without agreement) with punishment and disgorgement of compensation. Further, some parties have called for the introduction of a U.S. SEC type agency to supervise securities transactions. Another idea that has recently surfaced is the ending of the fixed commission system for brokers. Although fixed commissions were terminated many years ago in the U.S. and elsewhere, the Japanese securities industry has maintained this protection for brokers.

**MEXICO**

Mexico has executed a Free Trade Agreement with Chile. Although the current figures of

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commercial interchange between the two countries is not significant, it is predicted that such interchange will probably triple its size by the end of 1996. This agreement is, apparently, the first FTA executed by two Latinamerican countries. The rules of origin have not been currently disclosed, but references had been made to a 35 percent regional integration percentage.

The current administration is pursuing opening the Mexican economy to international markets at an accelerated pace. Different opinions have arisen as to the implications that this FTA will have on the NAFTA currently being negotiated with the United States and Canada. An overwhelming majority sees this FTA as an initiation that is coherent with the United States' Initiative of the Americas.

## NEW ZEALAND

### Tariff Reduction Review

The government has recently reviewed the process of tariff reduction previously instituted by the Labour Party. The review will generally see tariffs cut by one third between 1992 and 1996. For some sectors of the economy, this is a more rigorous tariff reduction than Labour's original plan which was to reduce tariffs to a standard level of 10 percent. Nearly 1,000 of the 2,600 tariff items currently above 10 percent will be reduced to or below that mark under the new régime. The most significant difference under the government review is on textiles and carpets which Labour planned to reduce to the 10 percent tariff level. Labour planned to leave clothing, footwear and motor vehicles as the only exceptions to the general tariff. Duties on carpets will now be reduced to match Australian rates. Tariffs on knitted and woven textiles will be reduced gradually to 20 percent. Tariff cuts for some household textiles have been shelved.

### Dumping

The Minister of Customs has been asked to undertake an investigation into alleged dumping

of motor vehicle batteries originating in Singapore, Malaysia, Taiwan, South Korea and Indonesia.

Officials have been asked by government to review anti-dumping and other trade remedy measures. This has prompted concern from some industry sources which regard officials as having obstructed bids to bring anti-dumping action against imported textiles and garments from Fiji.

## TAIWAN

### GATT

In January 1990, the Republic of China (ROC) applied to join the *General Agreement on Tariffs & Trade (GATT)*, as the "Taiwan, Penghu, Kinmen, and Matsu Customs Territory". Despite Taiwan's status as the world's thirteenth largest trader, its accession has been complicated by Mainland China's attempts to join the organization itself. Of late, the prospects for Taiwan have grown brighter with the emergence of three important events: (1) President Bush's letter to Senator Baucus concerning the China situation (July 19, 1991); (2) the Pacific Economic Cooperation Council's (PECC) backing for Taiwan's entry into the GATT; and (3) Taiwan's Asian-Pacific Economic Cooperation tentative entrance.

In a White House reply letter of July 19, 1991 to Senator Baucus, President Bush stated that he too shared the Senator's interest in Taiwan's access to the GATT and has a firm position of "supporting the accession of Taiwan to the GATT on terms acceptable to GATT contracting parties". The White House has taken this position because of its clear preference for a free trade world, and because it is now in a position, having fought for Most-Favoured Nation trade status for Mainland China, to force Beijing to back down from opposing Taiwan's entry to GATT.

On August 23, 1991, the participants at PECC reached a consensus that Taiwan should enter the GATT. Nineteen countries attended (plus the U.S.S.R. as an observer) giving Taiwan a foothold in organizing a GATT "working committee", a requirement for any new applicant to the GATT.

Late in December, APEC will hold its annual ministerial-level meeting in South Korea and one

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of the main topics to be discussed is the entrance of ROC, the People's Republic of China (PRC) and Hong Kong, in which Hong Kong would enter as a full member, the PRC as an official observer, and Taiwan as an unofficial observer.

## UNITED STATES

## "Fast Track"

On May 24, Congress granted the President's request to extend fast-track negotiating authority for two years. That extension enables the United States to proceed with both the *GATT Uruguay Round* negotiations and negotiations for the proposed *North American Free Trade Agreement (NAFTA)* with Canada and Mexico.

## NAFTA Negotiations

Following fast-track re-authorization, the United States entered negotiations with Canada and Mexico for a *North American Free Trade Agreement*. So far, the negotiating partners have reviewed more than half of the customs categories under the Harmonized Tariff System to determine applicable rules of origin, and agreed that a shift in Harmonized Tariff System classification should be the major factor in determining eligibility for duty-free treatment under the proposed agreement.

Other issues currently under discussion as part of the *NAFTA* negotiations include data exchange, market access, tariff phaseouts, and the establishment of transitional safeguards to protect adversely affected industries. Moreover, the United States has specifically proposed that import-sensitive items, including textiles and apparel, glassware, and citrus products, be subject to the longest permissible phaseout period for tariffs under *NAFTA*. Labour and environmental impact issues are also important topics of discussion on the negotiating agenda.

## Trade with Caribbean Nations

In July, the United States and the thirteen member states of the Caribbean Community

(CARICOM) entered into an agreement to establish a United States-CARICOM Council on Trade and Investment for the promotion of commercial relations. The agreement, which was originally proposed as part of the Enterprise for the Americas Initiative, requires the Council to promote the expansion of trade and investment relations between the United States and CARICOM.

## U.S. Export Control Laws and Trade Sanctions

In August, the Commerce Department's Bureau of Export Administration published two sets of regulations which implement major changes in the United States' export control laws. First, new regulations were released to implement a major revision of the U.S. Commodity Control List under the U.S. *Export Administration Regulations*, based on the recent multilateral COCOM "core list". The new list removes controls on many items but imposes new controls on some items, such as certain computers.

The Commerce Department also published regulations implementing a new set of export controls to further the Bush administration's "non-proliferation" policy, which is designed to prevent the proliferation of chemical and biological weapons and missile delivery systems. The controls extend to U.S. persons in third countries including foreign branches of U.S. corporations. They do not apply, however, to foreign subsidiaries of U.S. corporations.

## Foreign Investment in the U. S.

In August, the U.S. enacted legislation extending the Exon-Florio amendment to the *Defense Production Act (DPA)*, effective retroactively to October 1, 1990, the date on which it lapsed. Exon-Florio authorizes the President to review foreign investments in the United States that raise national security concerns. The new legislation expressly exempts Exon-Florio from termination under the *DPA*.

## GATT Panels

In August 1991, a *GATT* panel determined that a U.S. embargo against imports of tuna from

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Mexico, Venezuela, and the Republic of Vanatu constituted an impermissible trade barrier under the *GATT*. The United States had imposed the embargo under a U.S. law enacted to protect dolphins against certain types of fishing practices. The panel also found that the extraterritorial reach of the law imposing the ban was contrary to U.S. obligations under the *GATT*.

## U.S.-Canada FTA

In June 1991, the U.S. government's "extraordinary challenge" to the Chapter 19 *FTA*

panel decision concerning imported pork products from Canada was unanimously defeated. The proceeding represented the first time that the *FTA*'s extraordinary challenge procedures had been invoked in connection with the process of panel review provided under that *Agreement*. The Extraordinary Challenge Committee, consisting of one U.S. and two Canadian judges, dismissed the challenge for failure to satisfy the standards set forth for an extraordinary challenge under the *FTA*.