TRADE POLICY DEVELOPMENTS

1992 TRADE BILL INTRODUCED

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Citing the need "to tackle our Nation's trade problems," Representative Dan Rostenkowski (D-IL), Chairman of the House Ways and Means Committee, introduced the *Trade Expansion Act of 1992* (H.R. 5100) on May 7. H.R. 5100 provides a wide range of amendments to current U.S. trade law that are designed to strengthen existing law and to target allegedly unfair foreign trade practices. The Administration has strongly criticized the bill, charging that it would "threaten U.S. exports rather than open markets abroad." Although Rep. Rostenkowski has touted the bill as bipartisan, many Republicans view it as election-year political manoeuvring designed to force a potentially embarrassing presidential veto.

H.R. 5100 includes market access, Customs modernization, import remedy and tariff provisions, many of which are aimed at the persistent U.S. trade deficit with Japan. In the market access area, the bill proposes the reinstatement of Super 301 authority for an additional five years. Super 301 requires the United States Trade Representative ("USTR") to identify and investigate the most egregious foreign barriers to U.S. trade. It was added to U.S. law in the *Omnibus Trade and Competitiveness Act* of 1988, but the provision expired in 1990. The Administration opposes the extension of Super 301, stating that it deprives U.S. negotiators of the flexibility "to use section 301 effectively at appropriate stages in negotiations." Section 301 gives the USTR discretionary authority to investigate foreign trade barriers. The USTR noted that the Sdministration has used section 301 eighteen times and has never rejected a section 301 petition.

H.R. 5100 also requires the USTR, within 45 days of enactment of the bill, to initiate a section 301 investigation of alleged Japanese barriers to automobile and auto parts trade. Further, it mandates the negotiation of a voluntary restraint agreement ("VRA") on motor vehicle exports from Japan. The USTR noted the counterproductivity of a mandated 301 investigation in light of the many market-opening pledges made to the United States during President Bush's January trip to Japan. The USTR further cited a joint study being conducted by the Commerce Department and the Japanese government on impediments to U.S. auto and auto parts sales in Japan as evidence that the mandatory 301 investigation provision of H.R. 5100 is unnecessary.

A USTR position paper strongly criticizes the trade bill's mandated VRA negotiations on motor vehicles, stating that "VRAs close markets, reduce economic growth, diminish job opportunity and open the door to retaliation." Proponents of the bill assert that a VRA is necessary to give the domestic industry "breathing space" in the domestic market while providing incentives for Japan to increase its imports of U.S. autos and auto parts. The bill allows the Japanese market share under the VRA to increase at the same rate that U.S. car sales increase in Japan.

H.R. 1500 also includes the popular provisions of the Customs Modernization bill (H.R. 3935). The Customs bill authorizes the full computerization of U.S. customs records and updates the record keeping, duty collection and penalty procedures of the Customs Service. H.R. 3935 has been very popular among industry leaders and customs brokers who have long sought an end to the archaic paperwork requirements of current customs law.

Many industry organizations have expressed concern that the passage of H.R. 3935 will be delayed because of its inclusion in H.R. 5100,

which has proven to be quite controversial. Industry leaders have requested that the customs provisions be severed from *H.R. 5100* and passed separately, since these provisions appear to have a better chance of enactment if standing alone.

The import remedy sections of H.R. 5100 focus on U.S. antidumping and countervailing duty laws. The bill establishes more stringent statutory deadlines for the completion of antidumping and countervailing duty administrative reviews, and amends the methods by which the International Trade Commission determines injury and the Department of Commerce determines foreign market value. The most controversial provision in the import remedy section concerns preventing circumvention of antidumping duty orders. The bill would include third-country parts within the scope of an original antidumping duty order when those parts are supplied by a traditional supplier, are assembled in the United States and have significant value. U.S. petitioners have long supported stronger anticircumvention provisions in U.S. law and have pressed the Administration to negotiate such provisions in the Uruguay Round of the *General Agreement on Tariffs and Trade.*

The USTR has stated that although it supports "effective anticircumvention provisions..., this bill's third country parts anticircumvention provisions are too broad and could be used against our own exporters." The Trade Representative noted that the bill "fails to establish any limits on what parts may properly be included, and thus would serve as a model for other countries to enact copycat provisions that target U.S. exporters." The Administration stressed that the Uruguay Round negotiations offer the most appropriate vehicle for resolving the circumvention problem.

H.R. 5100 is moving through Congress at a rapid pace. Although it was only introduced on May 7, the House Subcommittee on Trade scheduled the first hearing on the bill for May 14. Domestic industry representatives requested that the hearings be delayed so that they would have more time to review the bill, but the hearing was held as scheduled. An additional hearing was set for May 19.

No doubt the bill is moving quickly because of its powerful sponsors, House Ways and Means Committee Chairman Dan Rostenkowski and House Majority Leader Richard Gephardt. Regardless of whether the President will submit the *North American Free Trade Agreement* to Congress before the election, the Hill Democrats seem eager to amend U.S. trade laws this year.

International trade will be a central issue of the upcoming election as trade and budget deficits persist. Interestingly, however, many of the provisions of H.R. 5100 run contrary to the trade positions of Democratic presidential candidate Bill Clinton. In public, Governor Clinton has been very "free-trade" oriented; the bill seems to illustrate a lack of communication between congressional Democrats and the Democratic presidential candidate. H.R. 5100 will certainly provoke a showdown on trade policy between Republicans and Democrats, and may even become a disruptive issue at the Democratic National Convention this summer.

CANADA-U.S. BEER WARS LEAD TO VICTORY FOR CONSUMERS

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There has been a cease-fire in the main part of the beer war between Canada and the United States, and as this edition of the *C.C.P.R.* was going to press, a peace treaty was agreed to in principle. Minor skirmishes over dumping remain, but these are the subject of international arbitration. Both Canadian and American consumers stand to benefit, obtaining both lower prices and greater selection. Canadian consumers will get the added benefit of access to beer produced in other provinces.

As discussed in the last issue of the *C.C.P.R.*,[1] both Canada and the United States complained to GATT panels about restrictions to which beer produced by each was subject in the market of the other. The GATT panel ruling against Canada was made in September 1991, and accepted by Canada at a meeting of the GATT Council in November. The panel found that various provincial marketing practices were in violation of the GATT,

including lack of access to beer stores for imported products, and differential mark-ups. The GATT panel ruling against the United States came in February 1992. It impugned various federal and state practices over beer and wine, principally concerning the differential application of excise taxes as between foreign and domestic product.

The latter panel ruling would normally have been adopted at a meeting of the GATT Council on April 30. Although the United States announced at that time that it would accept the ruling, it asked that adoption of the report be deferred until the June Council meeting, as negotiations were still underway with Canada.

The beer war was at its hottest in mid-April. The U.S. Commerce Department threatened retaliatory duties against imports of Canadian beer because of Canada's alleged slowness in changing its practices to conform to the GATT. Then the Liquor Control Board of Ontario announced that it was ceasing all purchases of American beer. (American beer can only be sold in liquor stores, not beer stores, in Ontario and some other provinces. This is one of the American complaints.) Before the situation escalated, the various governments in Canada agreed in late April on a timetable for changes in provincial practices that was acceptable to the United States. Canadian provinces agreed to eliminate discriminatory mark-ups by June 30, 1992, and to allow American beer to have access to beer stores in Ontario and British Columbia, and to corner stores in Quebec, by September 30, 1993.

Negotiations then continued on changes to American practices. By mid-June, the United States accepted the GATT panel report, subject to a few aspects which it said were within the exclusive jurisdiction of the states under the U.S. Constitution. It agreed to make efforts to resolve almost all of Canada's complaints. In turn, at least one province, Ontario, agreed to allow U.S. beer to be sold in provincial beer stores three months earlier than the original date of September 30, 1993. Negotiations on the details of the arrangements are continuing.

Throughout the GATT proceeding against Canada, governments in Canada were conscious of the danger that foreign beer could end up with greater access to a given provincial market than beer brewed in another province. This is because of the historic "brew-at-home" policy of all provinces except Prince Edward Island, which has essentially prohibited trade in beer between Canadian provinces. The policy has forced beer companies to operate breweries in every province in which they wish to sell, at obvious cost to the consumer in terms of both higher prices and fewer choices. Of greater consequence than the mere embarrassment of the pending anomaly was the perceived necessity of allowing Canadian breweries to rationalize their operations before being subjected to open American competition.

Thus far, seven provinces have agreed to treat out-of-province Canadian beer in the same way as local beer by July 1, 1992. It is interesting to note that the date is the 125th anniversary of Confederation, and therefore the 125th anniversary of section 121 of the *Constitution Act, 1867* which was supposed to prohibit trade barriers between provinces. In any case, by early May, transplanted Maritimers in Ontario were heralding their first opportunity to buy Moosehead beer legally in Upper Canada. Moosehead was also on sale in British Columbia.

Meanwhile, British Columbia has been the location of a dumping complaint launched by Molson and Labatt against certain American beer imports. Revenue Canada made preliminary and final determinations of dumping in 1991. In October 1991, the Canadian International Trade Tribunal (CITT) made a finding of material injury to production in Canada because of the dumping.[2] The allegedly protectionist effect of provincial marketing practices was a significant part of the CITT proceedings, with the Director of Investigation and Research under the *Competition Act* intervening in part to argue that the presence of the American imports may actually have a beneficial competitive effect in the market that outweighs any injury to production caused by the dumping.

The CITT appeared to agree with the Director at least in part. In November, it recommended to the Minister of Finance that the imposition of the full amount of the anti-dumping duty would not be in the public interest. In an unusual move, the Minister referred the matter back to the CITT in March 1992 for more detailed consideration of all

aspects of the case, including "competition" and the "market structure of the domestic industry".

Naturally, the U.S. beer companies involved applied for review of both the finding of dumping and the finding of material injury. The reviews were conducted in early June in Ottawa by binational panels established under the *Canada-U.S. Free Trade Agreement* (*FTA*). Their decisions are due in August.

As a postscript, it is interesting to note that the whole GATT process arose because the beer industry was exempted from the requirements of the *FTA*, undoubtedly due to the same sorts of pressures that produced the "brew-at-home" policy in the first place. Consumers are now beginning to reap the benefits that they could have had three years ago.

Notes

[1] See S. M. Hutton & P. K. Lepsoe, "Beer, Canada, the Provinces, the United States, the GATT, and ..." (1992) 13:1 *C.C.P.R.* 26.

[2] See P. K. Lepsoe, "CITT finds U.S. beer causes injury, but not too much" (1991) 12:4 *C.C.P.R.* 26.

THE GATT STUMBLES AND THEN PICKS UP ITS FEET AT THE URUGUAY ROUND

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When Arthur Dunkel, the Director General of the GATT, called a general meeting in April for all 108 nations participating in the Uruguay Round of Multilateral Trade Negotiations, it was not to announce good news. In fact, Dunkel's message was that the talks were at a standstill and that there was little, if any, chance that a new agreement would be implemented in January 1993, as originally planned. Since then, the Director General's hopes that the talks would end by the end of this year have also been put on hold as it appears that disagreements on agricultural subsidy issues are still delaying the process.

These latest announcements follow a string of disappointments in the GATT negotiations. The Uruguay Round, which is now in its sixth year, failed to meet its original deadline of December 1990 and was extended to April 15, 1992. Now that this second date has passed and chances of meeting the third deadline are already threatened, questions are being raised over whether the talks will ever come to an end, as the parties continue to haggle over various details.

After Dunkel's announcement in mid-April, 120 world business leaders joined together in voicing their concern over the latest hitch in the GATT talks. Chief executive officers of such corporations as IBM, Sony and Mitsubishi all signed a letter petitioning political leaders to conclude the trade talks and implement the changes to the GATT as soon as possible.

The principal stumbling block to the successful conclusion of the Uruguay Round has been obtaining an agreement on the reduction of agricultural subsidies. The main combatants in this respect have been the European Community (EC) and the United States, whose initial differences were so great that Michael Wilson, Minister for International Trade for Canada, remarked that the outcome of the negotiations could depend on finding a resolution to this problem that was acceptable to both parties.

In an effort to break the impasse at the end of May, the EC agreed to implement the most radical overhaul to its Common Agricultural Policy (CAP) in the last thirty years and challenged the United States to make similar cuts in its own farm price support. Planned changes to CAP include significant cuts in cereal prices sufficient to have a ripple effect on prices in other areas, quotas on agricultural production, and elimination of export subsidies by 1996-97.

While the U.S. response to this latest EC proposal has been favourable, American trade officials are still demanding cuts in EC government subsidies and agricultural import restrictions. The EC's position, however, is that the CAP reform package is a "take it or leave it" deal and that any further concessions are unlikely. Negotiations on these issues continue as political

forces seek an acceptable solution that fits current recessionary times.

To complicate matters, other countries have provided their own twists to the GATT agricultural debate. While Canada formally supports the application of tariffs to all agricultural programs, domestic political pressure from dairy, egg and poultry producers has forced trade representatives to lobby for the retention of supply management schemes so that Canadian farm marketing boards may survive. These boards would be phased out under new proposals at the Uruguay Round because they conflict with plans to convert all existing border restrictions among the 108 GATT countries to tariffs. The response of GATT officials has been that such an exemption may be possible if Canada agrees to phase out import restrictions on dairy, egg and poultry products and if the marketing board structures can be changed to meet the requirements of the new rules.

In the meantime, talks on various other matters for the new GATT have progressed at a respectable pace. Generally speaking, consensus on issues involving intellectual property rights, textiles, manufactured goods, services and dispute resolution mechanisms has already been reached. Thus, at this point, it is still the agricultural issue that is holding up the conclusion of the Uruguay Round. It is difficult to predict whether the newest proposals will result in the breakthrough necessary to allow the talks to end.

It is now clear that any new agreement will probably not be implemented until late 1993, since the results of the Uruguay Round must be presented to the U.S. congress at least six months before this November's presidential election in order for the members to have enough legislative days to ratify the suggested agreement this year. As negotiations have dragged on, this deadline too has come and gone.

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.

EUROPEAN COMMUNITIES

European Economic Area

In late October 1991, the EC and the European Free Trade Association (EFTA) agreed upon a far-reaching treaty to create a European Economic Area. This agreement, which has not yet been officially initialled, was submitted under Article 228 of the EEC Treaty of Rome to the European Court of Justice (ECJ) for its opinion as to the compatibility of the European Economic Area Treaty with the provisions of the Treaty of Rome. The ECJ delivered its opinion on December 14, 1991 declaring certain aspects of the European Economic Area Treaty inconsistent with the EEC Treaty. The future of the European Economic Area is now uncertain.

EEC-Mexico

In October 1991, the EC and Mexico reached a Framework Agreement for Cooperation which came into force on November 1, 1991. The Agreement foresees various areas for cooperation including economic, industrial, trade, technological, agricultural, environmental and transportation cooperation.

GATT Airbus

A GATT Panel has found that the German exchange rate guarantee scheme constitutes an export subsidy within the meaning of the GATT Subsidies Code to Deutsche Airbus Industrie, as no premium was being charged to cover the costs of the exchange rate scheme. At the time of publication, the Panel's report has not yet been adopted by the GATT Contracting Parties. From an EC law standpoint, the decision is particularly interesting in that the export subsidy found to exist was on German components exported to France, both EC Member States and signatories

of the GATT Subsidies Code, thus raising questions as to the implications of GATT and Code rights and obligations between EC Member States.

US-EC Oilseed

In 1989 a GATT Panel found that the EC support regime for oilseed impairs benefits that the U.S. had negotiated with the EC back in 1962. In October 1991, the EC Farm Ministers discussed reform measures that, according to the U.S., would still leave a very high level of subsidy in place. The U.S. has now asked that the original GATT panel be reconvened to examine whether the EC's planned measures will bring the oilseed support program into conformity with the GATT Panel's 1989 ruling.

Antidumping Developments

Antidumping cases were initiated with respect to bicycles from Taiwan and China, magnesium oxide from China, seamless steel tubes from Hungary, Poland, Czechoslovakia and Yugoslavia and certain electronic weighing scales from Singapore. Provisional antidumping duties have been imposed on thermal paper (i.e., telefax paper) from Japan and on polyester yarns from Taiwan, India, China, Turkey and Indonesia. Definitive antidumping duties were imposed on polyester fibres in yarns from Turkey, video tapes in cassettes from China, gas-fuelled non-refillable pocket lighters from Japan, China, Thailand and Korea, oxalic acid from China and India and dihydrostreptomycin from China.

European Court of Justice

In *Detlef Nolle v. Hauptzollamt Bremen-Freihafen* (decided on October 22, 1991) the ECJ annulled the Council's antidumping regulation imposing definitive duties on certain brushes from China because it found that Sri Lanka was not an appropriate reference country to use as surrogate for Chinese normal value calculations. The ECJ was not convinced that the Sri Lankan and Chinese production methods and salaries were sufficiently comparable to use Sri Lanka as a reference country.

In *BEUC v. Commission* (Decided on November 28, 1991), the ECJ ruled that the right to inspect the Commission's file in an antidumping proceeding is limited to the complainant, importers and exporters concerned and the representatives of the exporting country. The ECJ took the view that as antidumping regulations do not directly concern consumer organizations, such as the Bureau Européen des Unions de Consommateurs, these organizations have no right to have access to the Commission's file, including documents which do not contain confidential information. The Commission, however, will consider written submissions by such organizations and hear their views.

JAPAN

Amendment to Securities Exchange Act

A new amendment to the *Securities Exchange Act* was enacted October 5, 1991, which strictly regulates discretionary accounts and prohibits compensation by securities firms if the loss is sustained by its customers in securities transactions ("Sonshitu-Hoten"). Prohibition of compensation is sanctioned by criminal punishment. Subordinate ordinances were promulgated in December, 1991. Claims for damages by customers arising from torts or breach of contract by the securities firms can also be filed. However, in view of the difficulty in discerning such legitimate payment of damages from illegal compensation of loss, the new law and subordinate ordinances have given the Minister of Finance (MOF) the power to decide whether any particular payment is payment of damages or illegal compensation. Except for payments ordered by court decision or agreed by settlement at court, MOF's confirmation ("Kahunin") is required before any payment can be made. This means out of court settlements for torts or breaches of contract relating to securities transactions between securities firm and customers will not be effective and even illegal without MOF's approval. MOF has been successful again in expanding its power in the wake of the recent securities scandal.

NEW ZEALAND

Dumping
Kiwifruit

The California Kiwifruit Commission (CKC) has filed a petition with the International Trade Commission (ITC) alleging dumping by New Zealand's Kiwifruit Marketing Board (KMB). Preliminary findings of kiwifruit sales at less than fair market value and of material injury were issued by the U.S. Commerce Department and the ITC.

In arriving at its preliminary finding the Commerce Department compared the price of New Zealand kiwifruit in Japan with the price of New Zealand kiwifruit in California. The Department considered that the New Zealand domestic market was too small to conduct a comparison with the Californian market. The KMB has objected to the comparison with Japan on the grounds that Japanese food prices are notoriously high while U.S. food prices are amongst the lowest in the world.

Automotive Batteries

The Ministry of Commerce has imposed various rates of antidumping duties on motor vehicle batteries originating in Singapore, Malaysia, Taiwan, Korea and Indonesia. The Secretary of Commerce has initiated an investigation into alleged dumping of primary cell batteries originating in Korea.

Tires

The Secretary of Commerce has initiated an investigation into alleged dumping of new car tires originating in Japan, Korea and Taiwan. The Ministry of Transport has bowed to industry criticism and withdrawn proposals to impose a 7 year age limit on tires imported into New Zealand and to prevent the deletion of brand names on tires after they have passed through Customs.

Footwear

Concern by footwear manufacturers that foreign footwear, particularly from China, is being dumped on the New Zealand market has prompted the Footwear Manufacturers Federation to investigate ways of reducing the time and expense of initiating an investigation under New Zealand's antidumping legislation.

Closer Economic Relations (CER) with Australia

The CER agreement with Australia is to be reviewed in July 1992. Following the achievement of a single trans-Tasman market in goods on July 1, 1990 specific areas have been targeted for the review. These include industry assistance, the 50% country of origin rule, a common external tariff, harmonization of business and taxation laws, recognition of professional qualifications, shipping, aviation and investment.

Intellectual Property

The government announced that the compulsory licensing provisions for patents are to be repealed this year. Compulsory licenses would have allowed local manufacturers to replicate patented products of international pharmaceutical or food companies. Manufacturers of generic drugs saw this as an opportunity to produce the equivalent of patented pharmaceutical products at a cost which would substantially undercut branded products being sold into the New Zealand market. This opportunity has now been removed.

GATT

Over the past year there has been a more than ten-fold increase in the number of active panels under the GATT and the Tokyo Round Agreements. While in 1990 there was only one panel, currently there are twelve panels active, with several more in the pipeline. Either there are more trade disputes or Contracting Parties are more willing to subject their disputes to resolution in the GATT. Or is it that Contracting Parties are using panels as a bargaining chip in the Uruguay Round negotiations? Maybe it is a combination of all of the above.

Meanwhile, the pressure is on for a final conclusion in the Uruguay Round by mid-April of 1992. The Director-General, as Chairman of the

Trade Negotiations Committee, released a compromise Draft Final Act embodying the results of the Uruguay Round negotiations on December 20th. There is hope that a successful conclusion to the Round will include acceptance of the entire package as a single undertaking and the creation of a new Multilateral Trade Organization to replace the GATT. But a successful outcome still hangs in the balance, particularly in view of the conflict between the United States and the European Communities over the extent to which agricultural export and production subsidies should be curtailed.

VENEZUELA

GATT

Venezuela's participation in the Uruguay Round has focused upon access to markets, antidumping and subsidy rules, investments, intellectual property, dispute settlement and trade in services.

With respect to the mechanism to resolve commercial disputes, Venezuela's intention is that they be as transparent, objective and automatic as possible in order to guarantee that the law, and not individual interests, is the instrument used to solve these disputes.

Relations with the EEC

The relations with the EEC where adversely affected by the exclusion of Venezuela in the community regime of Preferential Duties applied during 1990 to the exportations of the other members of the Cartagena Agreement. This regime contemplates the elimination of the quotas granted to industrial textile products and of the duties for a list of agricultural products whether fresh or processed. This regime was created by the EEC as a support in the fight against the production of drugs and their traffic in the Andean sub-region.

Venezuela has expressed before the EEC Commission its wish that this discrimination end. Venezuela obtained a favourable response with a guarantee that any situation which could adversely affect Venezuela would be eliminated.

Finally, during 1992, a new cooperation agreement between the EEC and the Andean Group will be signed.

The Andean Group

The Andean Pact has achieved the following:

- The establishment of a free trade zone which was completed on January 1, 1992 with only a reduced number of products subject to exemptions that will finally be eliminated from the list as of January 1, 1993.
- The adoption of the common external tariff system which, as from January 1, 1994, the tariff levels will be reduced to five (5%), ten (10%) and fifteen percent (15%).
- Elimination of exportation incentives as from January 1, 1993. It includes the elimination of the subsidies to exports, financing and fiscal matters in the sub-region.
- Elimination of tariff franchises.
- The adoption of legislation on antidumping, subsidies and practices restricting free competition.
- Elimination of the maritime freight reserve within the sub-region.
- Equal treatment for national and foreign investments.
- Revision of the industrial development problems in the petrochemical, steel and metal-mechanic sectors.
- Open skies policy establishing a common air space.
- Community regime in industrial property matters, in favour of the transfer of technology and investments.

The Group of Three

The objectives of the G-3 formed by Columbia, Mexico and Venezuela go beyond the commercial aspects and contemplate political cooperation and assistance to Central American and Caribbean countries. As for the commercial consolidation, the G-3 proposed to form a free trade zone among these three countries within a term which was initially proposed as from January 1, 1994.

Chile

Negotiations with Chile are intended for the formation of a free trade zone. In this sense the Agreement contemplates a program for the total liberalization of the Mutual Trade Regulations between 1992 and January 1, 1996.