TRADE AND REGULATORY POLICY DEVELOPMENTS

U.S. AND EC RESOLVE MAJOR ISSUES BLOCKING URUGUAY ROUND PACT

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On November 20, the United States and the European Communities announced the resolution of several core issues of dispute that have blocked the successful conclusion of the Uruguay Round of multilateral trade negotiations for the past two years. With the threat of retaliation and counterretaliation looming over the talks, the negotiators forged a deal that, if implemented, would resolve the longstanding dispute over oilseed subsidies. The governments also announced that their major differences in three sectors of the Uruguay Round negotiations — agriculture, market access and services — had been sufficiently resolved to allow them to return to the bargaining table with the other GATT members. The U.S - EC agreement will not be officially concluded until it is approved by the EC member states, which could prove to be a formidable obstacle in light of France's staunch objections to the deal. The reduction of agriculture subsidies has long been the major stumbling block to the Uruguay Round's success. The next few months will prove whether or not the EC is serious about creating a stronger, more comprehensive GATT, which is expected to benefit tremendously the world economy.

Five years ago, U.S. oilseed producers filed a complaint under section 301 of the 1974 *Trade Act* against European subsidization of oilseed production. The U.S. producers claim that EC subsidization accounts for up to $2 billion in lost sales annually. In response, the U.S. government requested that a panel, formed under the auspices of the General Agreement on Tariffs and Trade, examine the GATT legality of the EC subsidies. In late 1989, that panel ruled in favour of the United States, and negotiations ensued to try to resolve the dispute.

After the failure of those negotiations, the United States requested, and in March 1992 won, a second GATT panel condemning the EC subsidies. After five years of failed negotiations, the United States announced on November 5, 1992 that 200% retaliatory duties would be assessed against EC exports of white wine, wheat gluten and oilseed products if the oilseeds dispute remained unresolved by December 5. The retaliatory duties would affect nearly $300 million in agricultural trade. The United States quickly put together a second retaliation list in case the first list proved not to adequately redress U.S. losses attributed to EC subsidies.

Under GATT rules, a country whose rights and benefits under the GATT are nullified or impaired by another member's policies or practices can withdraw GATT benefits from that member. Such action can only be taken with the consensus of the signatory parties. Despite having won two GATT panels against the oilseed subsidies, the United States failed to win the consensus of the GATT members when the EC blocked consensus by abstaining from the vote to allow U.S. retaliation. Without GATT approval for the retaliatory duties, the United States would technically violate rules by raising duties on EC products; the EC promptly announced that any punitive duties would be met with counterretaliation.

The oilseed dispute is part of the largest problem of agricultural subsidization that has plagued the Uruguay Round negotiations for the past six years. The United States and the 14 member Cairns Group countries set the reduction of agriculture subsidies as a primary goal of the Uruguay Round, without which no overall agreement could be reached. Although most countries subsidize their agricultural industries, EC subsidization has been particularly high, accounting for almost 70% of the EC annual budget. The United States and the Cairns Group have been pushing for cuts of up to 90% in

domestic and export subsidies to agricultural products.

Concerning the oilseeds dispute, the EC has reportedly agreed to limit future production to 12.662 million acres. That acreage will be reduced by 15% in one year and by at least 10% in the following year. The United States had originally sought to limit production by volume rather than by acreage, but Secretary of Agriculture Edward R. Madigan commented that the reduced acreage is expected to cut production from 13 million metric tons to between 8.5 and 9.7 million metric tons annually. The *Washington Post* noted, however, that oilseed production would still remain higher than the 7 million metric tons that U.S. farmers complained about 5 years ago.

The agreement also resolves differences between the United States and the European Communities on several issues that have stalled the Uruguay Round negotiations. On agriculture, the United States accepted a 21% reduction in export subsidies and a 20% cut in domestic subsidies over the next six years. The substance of the agreements in the market access and services sectors has not been made public, but a joint press release states that "the United States and the EC Commission have found the basis to achieve an ambitious result." It remains unclear whether the arrangement reached between the United States and the EC will be acceptable to other GATT parties or to the EC member states.

Although the U.S. - EC agreement opens the possibility that the Uruguay Round will be concluded, the Round still faces several obstacles. France has long resisted further cuts in agricultural subsidies due to violent opposition from its strong farm lobby. The U.S. - EC agreement must be adopted by the consensus of the EC member states. France could effectively veto the agreement upon "vital national interests" grounds. Such action could not only prove fatal to the Uruguay Round but could also have detrimental effects on European unity. Although France has called the U.S. - EC agreement "unacceptable," it has also stated that it would not exercise a veto until after it has had the opportunity to review any final Uruguay Round package. France is purportedly attempting to avoid having to support cuts in agricultural subsidies before the March 1993 elections.

Time is the Uruguay Round's worst enemy since under U.S. trade law, the Uruguay Round must be completed by March 1, 1993, the last day for the President to submit the agreement under the fast track procedures. Any attempt by France to delay the Round until after its March elections could jeopardize U.S. participation and thus the success of the Round. United States Trade Representative Carla Hills expressed hope that the U.S. - EC pact would allow GATT negotiations to begin again in late November. Negotiators are reportedly returning to Geneva at the time of this writing. Despite the fact that the United States and the EC have agreed on major issues, there is no indication as to whether these agreements will be acceptable to the 106 other GATT members. Furthermore, numerous issues remain unresolved, such as Japan's and South Korea's opposition to the tariffication of rice imports. With a sagging global economy, world leaders recognize the importance of the Round. The Uruguay Round is expected to increase world production by $5.25 trillion, $1 trillion of which is expected to benefit the United States. The question that remains is whether negotiators can hammer out an agreement in time.

FEDERAL COURT DENIES TELEPHONE COMPANY APPEAL OF CRTC LONG DISTANCE COMPETITION DECISION

By John F. Blakney
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The Federal Court of Appeal has denied the appeal of the telephone companies required by the CRTC to provide Unitel Communications Inc. and others access to their local networks to permit those others to offer conventional long distance service of comparable quality to the telephone companies' own long distance service.[1] The appeal was opposed by Unitel, B.C. Rail/ Lightel, and the Director of Investigation and Research under the Competition Act.

The appeal was based on two fairly narrow grounds relating to the monetary conditions under which Unitel might obtain interconnection with the telephone companies to compete in the long distance market. The telephone companies did not contest the basic decision of the Commission that interconnection of the nature ordered to permit long distance service competition was in the public interest. Nor did the telephone companies attempt to argue that the CRTC had made a legal error in requiring them to provide a number of collateral services to Unitel and other competitors, such as operator services, in addition to system interconnection in order to put new entrants on a comparable competitive footing more quickly. Nevertheless, in order to provide a unifying theme to their appeal, the telephone companies contended that, at least with respect to the grounds of the appeal, the CRTC had disclosed an intention to "control" or "manipulate" competition which, they submitted, was a purpose not contemplated in the applicable legislation, the *Railway Act* (the Act).

The first ground of appeal was that the CRTC had misinterpreted the Act, and thus erred in law, in not requiring Unitel and any other carriers interconnecting in similar fashion to pay the telephone companies the full cost incurred by them in converting their networks to provide for the quality of network interconnection sought by Unitel and authorized by the CRTC. The CRTC had decided that the telephone companies should absorb 70% of these costs, with Unitel and other similar carriers absorbing 30%. This split was based on the CRTC's estimate of the future relative market shares of the telephone companies and Unitel-type competitors. The implication of the split is that the switch conversion cost recovery exposure of telephone company long distance customers and those of competing carriers should be about the same, long distance service competition having been found to be in the public interest.

The telephone companies argued that the power of the Commission to impose interconnection conditions including "compensation" must be read as requiring the telephone company to be paid full compensation. This argument was based on certain case law, the contention that forced interconnection amounts to expropriation, and the legislative history of the provision.

Parties opposing the appeal submitted that there was no basis to insert the word "full" before compensation. They contended that there is no inherent right to full compensation even in an expropriation, which the observance of a regulatory obligation could not be characterized to be in any event. They also observed that such an interpretation would run against the rules of statutory interpretation because it would amount to indirect repeal of other elements of the CRTC's power. Under section 336 of the Act, the CRTC is authorized to award such compensation "if any", as it deems "just and expedient". It was argued that the CRTC therefore has the clear discretion to award no or some compensation.

The court agreed with the arguments of the respondents and found in particular that the peculiar legislative history of the enabling provision provided little assistance. The court found:

> The appellants have conceded that section 336 of the *Railway Act* empowers the Commission to order them to permit interconnection to and use of their networks. It is our view that the section allows the Commission, in making such an order, to decide whether or not, as one of the terms of its order, to award any compensation at all.

The second ground of the appeal was that the CRTC had stepped outside of its jurisdiction

when, in its reasons for providing an initial discount on the "contribution charge" payable by Unitel, it referred to the current dominant market position of the telephone companies. The contribution charge is a payment made by Unitel and other competitors designed to offset the long distance revenue surplus lost by the telephone companies as a result of market share loss, which revenue surplus would be used to keep local rates low. The contribution payment is therefore designed to keep the telephone companies whole in relation to this regulatory local rates policy. The telephone companies submitted that the discount disclosed an improper intention to "equalize" competition and contended that the Act did not contemplate the CRTC influencing market structure.

Parties opposing the appeal submitted that the CRTC had the power to ensure that a form of competition found to be in the public interest could get started. The parties noted that the very purpose of a forced interconnection power is to affect the relative competitive position and customer access of telecommunication carriers. They noted the short duration of the discount and the fact that Unitel and other competitors would not be able to obtain the equivalent quality of network access enjoyed by each telephone company for an indefinite period.

Again, the court agreed stating that the CRTC's conditions were aimed at ensuring that competition, and the benefits which would flow from it, became "a reality" and that there was "nothing in the Commission's order to suggest that it acted for any other purpose than the promotion of the public interest".

The telephone companies have stated that they will not seek leave to appeal to the Supreme Court of Canada and that they will proceed expeditiously to implement the interconnection measures that had been stayed by the Federal Court of Appeal pending its determination.

Notes

[1] *Bell Canada* v. *Unitel Communications Inc.* (23 December 1992), A-900-92 (F.C.A.). Mr. Blakney participated in the appeal as counsel to the Director of Investigation and Research.

QUEBEC APPEALS COURT RULES LOCAL TELEPHONE COMPANY SUBJECT TO FEDERAL JURISDICTION

By John F. Blakney
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In a unanimous decision upholding a lower court ruling[1], the Quebec Court of Appeal has held that the business of Téléphone Guèvrement, a small local telephone company supplying 5400 customers in St. Rosalie and Notre- Dame-du-Bon-Conseil, was an interprovincial undertaking and, therefore, subject to exclusive federal regulatory jurisdiction (i.e. CRTC regulation).

Writing for the court, Madame Justice Rousseau-Houle noted that while Téléphone Guèvrement was not a Stentor member, it offered national and international long distance services through contractual arrangements with Bell Canada, a Stentor member. Many services which the company provided are available only because of its arrangements with Bell and Stentor including universal credit card calling, conference calling, and interbank data services. The court observed:

> "Téléphone Guèvrement profite en matière des télécommunications du tous les acquis de Bell Canada qui lui assure le compatibilité avec les réseaux nationaux et internationaux."

The court found that the absence of management and ownership of identifiable interprovincially-oriented facilities (such as those of Stentor members which influenced the Supreme Court in its 1989 *AGT* decision[2]) was not sufficient to avoid characterizing Téléphone Guèvrement as integrally related to an interprovincial undertaking (Stentor/Bell). The court took into account that all of the company's facilities were used for interprovincial business to some degree and that the company was contractually bound up in Stentor traffic and revenue sharing and service supply arrangements. The court also noted the continuing necessary physical involvement of the company's system in the completion and supervision of national and international calls originating or terminating in the company's

territory, and the fact that the company could not provide many services in the absence of its arrangements with Bell Canada. Bell in effect provided the computer and network facilities for billing and call management needed for these services on behalf of Téléphone Guèvrement. The court found this degree of functional integration analogous to that existing between cable distribution businesses and over-the-air broadcasters, which relationship had formed the basis for the conclusion of the Supreme Court of Canada in *Capital Cities* v. *C.R.T.C.*[3] that cable TV was a federal undertaking because it was integral to the distribution of broadcasting.

The effect of the decision, if it is not reversed by the Supreme Court of Canada, will be to bring every local telephone company including *edmonton telephone* and the numerous small companies regulated by the provinces of Ontario and Quebec, under CRTC jurisdiction since all such companies provide services to the customers through contractual arrangements with Stentor members in essentially the same way as does Téléphone Guèvrement. The same logic would appear to hold true for paging companies. This would leave the telephone companies serving Saskatchewan and Manitoba as the only telephone companies in Canada not subject to CRTC jurisdiction and this only by virtue of their Crown agency status.

Notes

1 *Procureur général du Québec* c. *Téléphone Guèvrement* (8 December 1992), 200-09-00578-911 (Que. C.A.).

2 *Alberta Government Telephones* v. *C.R.T.C.*, (1989), 61 D.L.R. (4th) 193 (S.C.C.). See (1989) 10:3 C.C.P.R. 15.

3 *Capital Cities Communications Inc.* v. *C.R.T.C.*, (1977), 81 D.L.R. (3d) 609 (S.C.C.).

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

Anti-Dumping

Australia's parliament has passed legislation to implement the proposals mentioned in the previous edition of this newsletter. The Minister for Customs has written to the Anti-Dumping Authority expressing the view that there does not need to be a change to the law to permit the Australian Customs Service and the ADA to deal with the problem of "country hopping" without holding a fresh inquiry. In other words, the Minister's view is that where the ACS or ADA has held an enquiry into the dumping of goods from one country, the local manufacturers may rely on the results of that enquiry in claiming the dumping of similar goods from another country. The full implications of this view are not dealt with by the Minister. The Minister's view cannot override legislation although it is certain to influence the conduct of enquiries by the ACS and ADA.

Tariff Concessions

Parliament has passed legislation to implement the proposals mentioned in the previous edition of this newsletter.

Rules of Origin

The possible change to Australia's rules of origin has not been progressed in any way since the previous edition of this newsletter.

Customs Value of Goods

The Australian legislation (the *Customs Act*) allows the ACS to include royalties and licence fees in the customs value of goods in a wide variety of circumstances. However, in a recent decision of the Federal Court, the Collector of

Customs failed in his attempt to have licence fees included in the customs value of goods. The Collector's claim relied on, and the court's decision was based on, the technical drafting of the complex valuation provisions of the *Customs Act*.

GATT

Uruguay Round

With the Uruguay Round negotiations still in low gear, trade law activities in Geneva have centred more on the regular GATT agenda in recent months. In June the GATT Council adopted two panel reports concerning United States trade measures. The first found that various U.S. federal and state measures discriminated against imports of Canadian beer, wine and cider. The second ruled that the U.S. had failed to grant MFN treatment to Brazilian non-rubber footwear in a countervailing duty action. At the July Council meeting a new panel was established to examine the U.S.'s secondary embargo on the imports of tuna from the European Community. The Council also established working parties to examine new free-trade agreements between the EFTA countries and the Czech and Slovak Federal Republic and between Sweden and Estonia, Latvia and Lithuania. Meanwhile, GATT consultations between the European Community and a number of Latin American banana producing countries have failed to resolve a dispute over proposed EC import restrictions on bananas.

GATT Membership

Mozambique became the 104th Contracting Party at the end of July. The GATT Council granted observer status to Albania, Armenia, Estonia, Moldavia, Turkmenistan and the Ukraine, and established a working party to examine Slovenia's application for accession. It is expected that the Council in September will establish a working party on Taiwan's request for GATT accession as a separate customs territory. Following such a decision, work may proceed fairly quickly on membership for both China and Taiwan.

UNITED STATES

NAFTA

The United States, Canada and Mexico completed negotiations in August on the *North American Free Trade Agreement* ("NAFTA") to establish a free trade zone. The agreement covers trade in goods, technical barriers, government procurement, investment and services, intellectual property and other matters.

NAFTA will be submitted to Congress for approval next year. Under the fast-track procedure in U.S. law, Congress must either approve or reject the agreement (no amendments permitted) within 90 session days of Congress. Several Democratic congressmen have already criticized the agreement because of concerns that it fails to protect the environment and does not provide sufficient adjustment assistance for displaced workers.

Eastern Europe and the Former Soviet Union

The United States has approved the extension of Most Favoured Nation tariff treatment to Albania and the former Soviet republic of Kyrgyzstan in bilateral trade accords. MFN status will take effect after parliamentary approval by these countries.

Import Relief Proceedings

In June, the U.S. steel industry filed 84 countervailing duty and anti-dumping petitions covering four product groups from many countries. This followed the expiration of the bilateral Voluntary Restraint Agreements and the breakdown of the Multilateral Steel Agreement negotiations. The International Trade Commission has issued an affirmative preliminary injury determination on most products.

The U.S. government imposed a 6.5 percent countervailing duty on softwood lumber imports from Canada based on two types of provincial programs — the pricing of stumpage (the right to harvest timber) and log export restrictions. This was the first self-initiated countervailing duty investigation by the U.S. government and followed

CANADIAN COMPETITION POLICY RECORD

Canada's termination of a bilateral understanding on softwood lumber. The findings are currently under appeal before binational panels under the *U.S.-Canada Free Trade Agreement.* Canada has also challenged the initiation of the investigation under the GATT Subsidies Code.