REGULATORY AND TRADE DEVELOPMENTS

HOW RED IS JEAN'S LITTLE RED BOOK? A COMMENT ON THE FUTURE OF MARKET-ORIENTED REGULATION

By: N.J. Schultz
Fraser & Beatty, Ottawa

Changes in government mark crossroads in the public affairs of a country. The October 25, 1993 Canadian general election which marked the annihilation of the governing Progressive Conservative Party, the decimation of the New Democratic Party, the election of a strong Liberal majority, and the emergence of two strong regional parties, signals a number of possible turning points in Canadian politics. However, deos it mark a crossroads in the evolution of market-oriented economic regulatory policies? In this brief assessment, it is suggested that, whatever changes may be made, the basic direction which has been established in the last ten years will continue.

From the comfort of our 1993 armchairs and with the benefit of 20-20 hindsight, we can see the cross-currents affecting Canadian economic regulatory policy which were evident in the late 1970s and early 1980s. Loosening the bonds of regulation and opening markets to greater competition was a much-discussed subject with the United States already taking steps in that direction, first in the airline industry and then in the long distance telephone business. In Canada, the Economic Council nudged the debate forward. At the same time, government intervention in the economy reached its nadir with the National Energy Program (NEP).

The NEP brought together in one program a number of pressing political and economic concerns. Canadians' increasing concerns about foreign investment, particularly in strategic areas, fed the nationalistic objectives of the NEP. Canada's exposure to rising energy prices manipulated by the OPEC cartel would be addressed through made-in-Canada pricing and initiatives designed to promote energy self-sufficiency including substantial incentives for petroleum companies to explore Canada's frontier areas. Concern about the transfer of wealth between provinces would be addressed through a host of new tax measures. The projected revenues from the new taxes would resolve an emerging federal deficit problem. Lying at the heart of the NEP was a projection of oil prices which saw crude oil prices increasing steadily through the 1980s, quickly reaching prices two and then three times and more the prices of 1979-80. A number of energy mega-projects were foreseen as these oil prices drove development in Canada's frontier areas. Energy mega-projects were seen as an engine of growth in the Canadian economy. New government bureaucracies were created to manage this projected activity and the wealth which was to be created.

The NEP was a classic regulatory failure. This was not because of the objectives, it was because its success depended entirely on increasing oil prices and the forecast underpinning the program proved to be dramatically wrong. No sooner had the program been put in place than oil prices began to slowly nudge downward. The downward trend would continue inexorably until early 1986 when oil prices collapsed. Canada was not alone in placing too much faith in the shifting sands of oil fortunes, nor was Canada alone in suffering the consequences. Deficits continued to rise but at an accelerating rate reflecting not only a short-fall in projected energy sector tax revenues but also the effects of the recession of the early 1980s. The high price of Canada's natural gas exports led to sharply declining export volumes. By mid-1983, the Liberal Government recognized that it could not adhere to its strict export price regulations and made provision for volume incentive pricing. A year later, in the summer of 1984, the Liberal Government would move toward negotiated export prices. The pace of change would accelerate with the election of the Progressive Conservative Government in September 1984.

The new P.C. Government, with its strong base of support in the western producing provinces, moved quickly to dismantle the NEP. Oil prices were deregulated in the spring of 1985 and in the fall of that year the process of natural gas price deregulation was set in motion. By the time the Free Trade Agreement was negotiated in 1988, natural gas exports were being regulated in accordance with market-oriented procedures, natural gas export prices were being freely negotiated, and the inter-provincial natural gas pipelines were operating under open-access tariffs under which gas sales were unbundled from transportation rights and transportation rights were freely assignable. Substantial progress had been made in establishing a workably competitive, domestic natural gas market and the market share of the dominant interprovincial natural gas suppliers had been substantially cut, replaced by direct sales between producers and end users. The Free Trade Agreement with the United States locked in these changes in policy. The Free Trade Agreement also liberalized Canada's approach to foreign investment. Indeed, in the last ten years the focus of concern has shifted from foreign ownership to investment which will support continued high value activities in Canada. In 1993, the last vestiges of the NEP's foreign ownership restrictions were dropped.

Deregulation in the energy sector was being paralleled by regulatory developments in other sectors. The Canadian Transport Commission was replaced by the National Transportation Agency and a significant degree of loosened regulation and competition was introduced in the airline industry, although access to Canadian skies remains restricted. The CRTC introduced competition into the sale of telecommunications terminal equipment in 1982. Over the course of the decade, the rules restricting resale and sharing of telephone services were increasingly relaxed and a substantial resale business emerged. More recently, the CRTC has permitted facilities-based long distance telephone competition and is reviewing its regulatory policies in light of the evolution of competition in the telephone market. Like the airline industry, important restrictions remain. The new *Telecommunications Act* imposes restrictions on the ownership of Canadian telecommunications carriers. All Canadian overseas telecommunications continue to be carried, as a matter of Government policy, by Teleglobe.

Is there any indication that the new Government wishes to turn the clock back to an earlier era where fundamental market decisions were made by regulators? The answer to this question lies in considering what this would achieve. There is no clear market failure that the imposition of regulation would serve to correct. There is no evidence to suggest that a return to old ways of regulation would provide Canadians with greater benefits than are presently being achieved. By contrast, many Canadians have seen prices drop with choices and service offerings increasing as regulatory restrictions have been dropped.

Prices do not, of course, always follow an inexorable downward trend. Natural gas prices, for example, have bumped upward at times in the last year with spot prices doing what spot prices are supposed to do when conditions of tight supply prevail. However, long-term natural gas prices remain well below regulated prices of the 1985 period and consumers are quite capable of making necessary adjustments in their supply arrangements to avoid being caught short in periods when spot supplies are less abundant. More fundamentally, domestic natural gas prices are no longer made in Canada. Natural gas prices reflect the increasingly integrated nature of North American natural gas markets. In that regard, the major local distribution companies in Ontario have recently negotiated contracts which incorporate the NYMEX natural gas index. OPEC is no longer a force in driving up oil prices and oil prices have moved within a relatively flat range since 1986 and are projected to continue to do so for some time to come. Any concern in Alberta that a new NEP lurks just around the corner is more a reflection of ideological perception than the political and market realities which supported the old NEP.

Government in the mid-1990s must reflect current political and market realities which are not conducive to a return to interventionist programs and closed market sectors.

NAFTA SIDE AGREEMENT ON TRADE REMEDIES ADDS LITTLE

By: Paul K. Lepsoe
Fraser & Beatty, Ottawa

The side agreement or "supplementary understanding" to the North American Free Trade Agreement (NAFTA) announced on December 2 with respect to dumping and countervail measures appears to add little if anything to the overall agreement. It can be questioned whether Canada-U.S. trade relations are any closer to an abolition or rationalization of trade actions between the two countries, and in particular whether the so-called "replacement option", by which competition law would replace trade remedies or at least anti-dumping measures, is any closer.

The platform of the new government

The side agreement arose from long-standing criticisms by the Liberal party of both the Canada-U.S. Free Trade Agreement of 1988 (FTA) and NAFTA on the grounds that the agreements did not provide a system of rules or codes with respect to dumping and countervail actions. The Liberal manifesto from the 1993 election campaign, "Creating Opportunity" (commonly known as the "Red Book"), states as follows:

> One of the major problems...has been the lack of clear and agreed-upon definitions of subsidies and countervail.... Only with a mutually acceptable set of trade rules can Canada expect to enjoy anything resembling a "level playing field."
> ....
>
> A Liberal government will renegotiate both the FTA and NAFTA to obtain:
>
> - a subsidies code
>
> an anti-dumping code....

In a piece published during the campaign on October 12, then-Liberal trade critic and now Trade Minister Roy MacLaren wrote that "the great flaw in NAFTA — the black hole at its centre — is the continuing absence of a common set of trading rules and procedures."[1]

FTA provisions

Chapter 19 of the FTA establishes the binational panel system for the settlement of dumping and countervail disputes. The panels must apply domestic trade law. However, under Article 1907, Canada and the United States agreed to establish a "Working Group" as follows:

> 1. The Parties shall establish a Working Group that shall:
>
> (a) seek to develop more effective rules and disciplines concerning the use of government subsidies;
> (b) seek to develop a substitute system of rules for dealing with unfair pricing and government subsidization; and
> (c) consider any problems that may arise with respect to the implementation of this Chapter and recommend solutions, where appropriate.
>
> 2. The Working Group shall report to the Parties as soon as possible. The Parties shall use their best efforts to develop and implement the substitute system of rules within the time limits established in Article 1906.

(Article 1906 provides a time frame of five years, i.e. the end of 1993, extendable by two years.) Article 1907 is based on the well-founded assumption that trade actions between free trade partners should be abolished in order to realize the full economic potential of their free trade area. For instance, anti-dumping and countervail actions have been abolished between the countries of the European Community, and between Australia and New Zealand.[2]

In its official synopsis of Chapter 19 of the FTA, the Government of Canada stated that the goal was to develop a new regime that would

> "obviate the need for border remedies...for example, by developing new rules on subsidy practices and relying on domestic competition law. Thus the goal of the two governments remains the establishment of a new regime to replace current trade remedy law well before the end of the [seven year] transition period."

The working group was established, and, as I have previously written on this subject,

> [t]he working group began work on the technical feasibility of replacing the dumping regimes of each country with competition law, the so-called "replacement option". However, little progress was made before it was agreed in 1991 to defer the process pending the outcome of the GATT Uruguay Round. The current draft GATT text would introduce many reforms to the existing international subsidies and anti-dumping codes.[3]

The working group process may have come undone because of the great difficulty, in the absence of considerable political will, of fashioning a subsidies code that would be acceptable to Canada, and of creating any "retreat" from the American anti-dumping arsenal that would be acceptable in the U.S.[4]

NAFTA provisions

The equivalent NAFTA provisions on this subject are seemingly weaker and more tentative than those in the FTA. The NAFTA provisions are also contained in Chapter 19, which essentially provides for an extension of the FTA Chapter 19 binational dispute settlement process to include Mexico.

Article 1907 of NAFTA provides that the three countries:

> ... agree to consult on:
>
> (a) the potential to develop more effective rules and disciplines concerning the use of government subsidies; and
>
> (b) the potential for reliance on a substitute system of rules for dealing with unfair transborder pricing practices and government subsidization.

As well, under Article 1504, it is agreed to establish a "Working Group on Trade and Competition". The Article provides as follows:

> The Commission shall establish a Working Group on Trade and Competition, comprising representatives of each Party, to report, and to make recommendations on further work as appropriate, to the Commission within five years of the date of entry into force of this Agreement on relevant issues concerning the relationship between competition laws and policies and trade in the free trade area.

The supplementary agreement

A release from the Prime Minster's Office on December 2 announcing both the new Liberal government's acceptance of NAFTA as well as the dumping agreement (accompanied by statements on water and energy) states in part:

> The three nations have agreed to continue work begun under Article 1907 of the FTA to establish an effective subsidy and anti-dumping code. Two working groups will be mandated to resolve these problems by December 31, 1995. The successful conclusion of these processes will result in improved dispute settlement.

The working group agreement itself consisted of a joint statement of the three governments, attached to the release. The full text of the brief agreement is reprinted as an appendix to this article.

A release accompanying the joint statement or agreement issued by the Office of the U.S. Trade Representative, Mickey Kantor, puts a different spin on the matter:

> The joint statement on future work on dumping and subsidies makes clear that all three NAFTA countries believe a successful Uruguay Round agreement is the most useful way to address common concerns on subsidies, dumping, and the use of trade remedy laws.

The release goes on to say that U.S. participation in the working groups "does not commit the United States to any particular outcome."

Meanwhile, the negotiation of the new GATT provisions on trade remedies, as part of the Uruguay Round, was scheduled to be finalized in Geneva a few days later. In any case, even if there is a successful GATT, there are to be three working groups set up by the NAFTA countries: two apparently under Article 1907 of NAFTA, as provided by the supplementary agreement, and another under Article 1504. According to Canadian officials, all three will be set up separately in 1994.

It seems that the Canadian government is not itself very optimistic about the outcome of the working group process. In a speech to a steel symposium in

Hamilton, Ontario on December 3, the day after Prime Minister Chrétien announced the NAFTA working groups on dumping and subsidies, Deputy Prime Minister Sheila Copps referred to the establishment of these groups. However, she did not offer them out to be any sort of a panacea for the recent flurry of Canada-U.S. trade actions in the steel industry. Ms. Copps went on to say that the government believed that a bilateral steel deal between the U.S. and Canada, outside a multilateral process, "remains the far sounder means of ending Canada-U.S. steel disputes."[5]

Notes

[1] Roy MacLaren, "Setting New Rules for NAFTA", *Globe and Mail*, 12 October 1993.

[2] The more general case for the replacement of anti-dumping measures by competition law is discussed in an article in this issue by Michael Trebilcock, *infra* at 75. It has also been treated in depth in previous articles in this journal and elsewhere, including Michael A. Meyer, "Do U.S. Anti-Dumping Actions Help the U.S. Economy?" (1993) 14:2 Can. Comp. Rec. 38; Michel P. Wylie, "What Role Anti-Dumping? A Competition Policy Perspective" (1993) 14:2 Can. Comp. Rec. 40.

[3] Paul K. Lepsoe, "Canada-U.S. Steel Trade Actions Highlight Lack of Dumping Alternatives" 14:1 Can. Comp. Rec. 48.

[4] The difficulty is illustrated in the U.S. implementing legislation for the FTA. The objective of Article 1907 is stated to be increased discipline over subsidies affecting trade. The legislation also provides that fast track authority will not apply to any agreement under Article 1907 unless the President notifies Congress that the agreement provides no less discipline over pricing practices than that provided in the GATT Antidumping Code. *United States - Canada Free Trade Implementation Act of 1988*, Pub. L. No. 100-449, 102 Stat. 1851.

[5] Hon. Sheila Copps, Remarks ("Steel in our Future" Symposium, sponsored by Dofasco, Stelco, U.S.W.A. Local 1005, the City of Hamilton and the Regional Municipality of Hamilton-Wentworth, 3 December 1993).

Statement by the Governments of Canada, Mexico and the United States

Future Work on Anti-dumping Duties, Subsidies and Countervail

The Governments of Canada, Mexico and the United States, to further their strong and mutually beneficial trading relationship, have agreed to seek solutions that reduce the possibility of disputes concerning the issues of subsidies, dumping and the operation of trade remedy laws regarding such practices.

- The three Governments note that these issues are under negotiation in the Uruguay Round and that a satisfactory result in those negotiations would be an important step in addressing their concerns in this area.

- Each Government intends to make the successful completion of the Uruguay Round of Multilateral Trade Negotiations in the coming weeks a top priority.

- In addition, the three governments will establish a trilateral working group on subsidies and anti-dumping duties. These groups will build as appropriate on the results of the Uruguay Round and on experience in regard to these issues.

- The working groups will continue efforts begun in 1989 by a working group convened under Article 1907 of the U.S.-Canada Free Trade Agreement and will be instructed to complete their work by December 31, 1995.

December 2, 1993

THE URUGUAY ROUND, NAFTA, AND APEC: TURNING POINTS FOR U.S. TRADE POLICY AND THE GLOBAL TRADING SYSTEM

By: Gary N. Horlick and Kristy L. Balsanek
O'Melveny & Myers, Washington, D.C.

During the final months of 1993, the framework of the international trading system reached a critical point as the world's trading partners pursued negotiations through several different fora in an attempt to open global markets and reduce trade barriers.

Throughout 1993, the U.S. has pursued negotiations in three areas: the global arena through the General Agreement on Tariffs and Trade (GATT) Uruguay Round; Canada and Mexico through the North American Free Trade Agreement (NAFTA); and the Asia-Pacific countries through the Asia Pacific Economic Cooperation Conference (APEC). All of these negotiations reached major turning points during the final months of the year.

As the Uruguay Round seeks to reach a conclusion by December 15, many important obstacles in specific negotiating areas are blocking the Round's success. Meanwhile, the final countdown to NAFTA began in September as the U.S. Administration stepped up its promotion of the Agreement to counterattack its opponents with various side deals to make the trade agreement more attractive before the NAFTA vote by the House of Representatives on November 17. Finally, in mid-November at the Asia Pacific Economic Cooperation Conference in Seattle, the U.S. Administration sought stronger economic ties with the Asia-Pacific Region. The outcomes of these events will have lasting effects on U.S. trade policy as well as the world trading system.

After seven years of negotiations, Peter Sutherland, the Director General of the GATT, announced that the GATT countries had agreed on December 15, 1993 as the deadline for concluding the Uruguay Round which began in 1986. The purpose of the Uruguay round centred on reaching an agreement to reduce tariffs and apply GATT rules to agriculture, services, manufactured goods, and textiles. In September 1993, trade officials began the final three and a half month process to resolve the remaining differences in key areas by the December expiration date of U.S. fast track authority which requires Congress to vote on the Agreement without amending it. In recent months, however, several obstacles have risen which could prevent a successful conclusion of the Round. The major obstacle has occurred in agriculture, although some of the other issues have also met with difficulties.

In November 1992, a farm trade accord (the Blair House Accord) was concluded between the U.S. and the European Community (EC) in an attempt to revive the stalled GATT talks. One of the provisions in the accord cuts subsidies on exports of wheat and other farm products by 21% over 6 years. The deal was promptly rejected by the French. By the end of August, the French Government, under pressure from the powerful French farm lobby, went as far as stating that it would veto any GATT deal containing the current Blair House Accord. The French Government demanded "renegotiation and reopening" of the accord, but this language was later changed to "modifications and clarifications."

On September 1, the French released a position paper calling for changes in the US-EC farm accord which would reverse restrictions on the volume of subsidized exports. The U.S. opposes the French position and has consistently refused to discuss the Blair House Accord nor will it accept a Uruguay Round "mini-package" without agriculture as the French had suggested. As a result of the U.S.-French agricultural problem, the Uruguay Round has been in a stalemate.

Another area of contention is the services agreement. The EC has resisted on cultural grounds that audiovisuals be included in the services agreement. The U.S. has demanded unrestricted access to European film, video, and television markets. However, French movie producers, directors, and actors are angered over the Uruguay Round's proposals to liberalize the audiovisual sector since they believe that this will destroy France's movie industry. Again, the U.S. has rejected the demands by the French that audiovisuals be exempted from the services agreement.

However, in the maritime negotiations of the GATT, it is the U.S. which is facing pressure in the GATT negotiations to include and pursue liberalization of this sector. The U.S. might commit to changes involving auxiliary port and access services which include cargo handling and clearance and freight forwarders, but it is not prepared to liberalize rules covering international shipping. While U.S. law currently requires that movements between domestic ports be handled by American ships, other nations would like to compete for business. U.S. refusal to open oceangoing shipping to all comers has angered many shipping nations, particularly the Nordic countries.

Finally, in the area of tariff reduction, the U.S. is also under pressure by the EC to reduce its peak tariffs (those tariffs higher than 15%) on its textiles and apparel by 50%. In this respect, the EC has offered to cut its peak tariffs on textiles, footwear, and electronics by 50%. If the U.S. were to reduce its peak tariffs, it is hopeful that developing countries would reduce their tariffs on textiles and other goods, while the EC might reciprocate by reducing tariffs in areas such as wood and paper products, non-ferrous metals, and scientific equipment.

Not only has the U.S. Administration chosen to pursue the successful conclusion of the Uruguay Round in the global arena during the fall of 1993, it has also sought to achieve a free trade accord with Canada and Mexico. In order to accomplish NAFTA's successful passage through Congress, the Administration launched its campaign for NAFTA in the beginning of September. Its biggest obstacle was to counterattack NAFTA's opponents who charged that NAFTA would undermine U.S. environmental and health laws and cost jobs.

The U.S. Administration addressed that claim with the signing of the NAFTA Supplemental Agreements on the Environment and Labor on September 14, 1993. These Agreements provide for the effective enforcement of and compliance with domestic environmental and labor laws related to NAFTA commerce. Under these side agreements, a panel will convene to consider an alleged persistent pattern of failure by a NAFTA country to effectively enforce the relevant law. If the panel makes an affirmative determination, then the NAFTA countries must agree on a mutually satisfactory action plan to remedy the enforcement. If the country still fails to enforce the relevant law, then the panel could impose

a monetary penalty of a maximum $20 million dollars. Then, if this penalty is not paid, trade sanctions in the form of the withdrawal of NAFTA benefits would occur. These sanctions only apply to the U.S. and Mexico. In Canada, however, the monetary penalty would be enforced by a judgment of the Canadian courts.

The Administration also put forth a worker training proposal in order to appease union opposition. The jobs plan involves close to $100 million in workers assistance for employees who lose jobs as a result of NAFTA. Specifically, it provides $4,000 in training and living expenses for each of the 22,500 workers which the Administration estimates will lose their jobs over the next 18 months. This plan is a temporary measure which would go into effect on January 1, 1994. After 18 months, these unemployed workers would be helped by a comprehensive job training program prepared by the U.S. Secretary of Labor.

In another step to appease charges regarding NAFTA's effect on the environment, the Administration put forth a funding plan for border cleanup and environmental protection. The North American Development Bank (Nadbank) would be limited to environmental projects at the border. The bank would also be a lending institution to support adjustment throughout the continent by funding projects in communities hit by job losses resulting from NAFTA. Nadbank would be funded by U.S. government programs, the World Bank, the Mexican Government and the Inter-American Development Bank. In order to provide a wide range of input into the loan granting process, the bank's advisory and review committee would include business and government representatives as well as individuals from various labor and environmental groups. Nadbank's board would consist of six representatives, three each appointed by the U.S. and Mexico. The advisory committee would also create a position which would be responsible for providing independent inspection of the bank's operations.

Another area of concern is over the U.S. budget. The U.S. Administration needs $2.3 billion over the next five years in order to "pay for" NAFTA and thus "offset" the Agreement's anticipated budget impact from lost revenues left by the tariff cuts associated with NAFTA. By law, U.S. federal budget rules require that any measure that loses revenues must include offsetting tax increases or spending cuts. The Administration wanted to fund NAFTA by raising federal fees on passengers entering the U.S. by plane and ship, but was not sure by how much. Finally, it was agreed that there would be an additional $1.50 increase on all passengers entering the U.S. Other funds to make up for lost tariffs would come from a reduction in agricultural support prices, additional enforcement of tax laws for imported products and quicker bank transfers of payroll taxes.

In another move, the Administration also completed last minute side agreements with the Mexican Government involving sensitive industries including sugar, citrus fruit and vegetables which would lengthen the phase-out of restrictions on the level of Mexican exports of these products into the U.S. Additionally, these agreements require the U.S. International Trade Commission to monitor both the volume and price of tomato and pepper imports for ten years and include a price-based snapback mechanism for frozen concentrated orange juice imports. The U.S. and Mexico also agreed to begin talks in January on accelerating Mexican tariff reductions on broomcorn brooms, wine, flat glass,

and home appliances. Also, the U.S. Administration agreed to seek limits on Canadian exports of peanut butter and wheat in sixty days unless Canada reduces its imports of peanut butter and reduces its subsidies on wheat. Additionally, the Administration promised to try to limit market-opening measures on textiles and orange juice in the Uruguay Round.

Finally, after much negotiating, this pro-NAFTA campaign by the Clinton Administration proved to be successful as the U.S. House of Representatives voted 234-200 on November 17 and the Senate voted 61-38 on November 20 in favour of NAFTA.

Additionally, the U.S. is committed to expanding trade with the Asia-Pacific region which it views as an important economic growth area. As U.S. Trade Representative Mickey Kantor wrote in a recent newspaper article, "[t]o the extent that the U.S. can move an issue forward in regional trade discussions when it is stalemated in global discussions, it will do so." One method towards accomplishing this is through the Asia Pacific Economic Cooperation (APEC). Founded in 1989 with a permanent secretariat in Singapore, APEC is an organization which consists of 15 members including the U.S., Canada, Australia, Brunei, China, Hong Kong, Japan, Indonesia, Korea, Malaysia, New Zealand, Phillipines, Singapore, Taiwan, and Thailand whose role is to facilitate trade and investment throughout the Asia-Pacific region by lowering trade barriers and also by supporting the multilateral trading system.

In mid-November, the day after the House of Representatives voted on NAFTA, President Clinton hosted a meeting in Seattle, Washington of foreign, economic, and trade ministers and APEC leaders in order to adopt the Declaration on an APEC Trade and Investment Framework. The provisions of the framework had been drafted by senior APEC officials at a meeting in September 1993 where a tentative agreement was reached which would be approved at the November meeting. The framework focuses on administrative measures to facilitate trade and investment flows throughout the region without actually creating a free trade area. Specifically, by adopting the framework, APEC endorsed the establishment of a Trade and Investment Committee to address issues, and provide for trade policy discussions in such areas as economic competition, civil aviation, energy cooperation, exchange of technical data, intellectual property rights, customs harmonization, standards, and the environment. APEC members also issued a statement calling for negotiators in Geneva to successfully complete the Uruguay Round with a comprehensive agreement by the December 15 deadline.

In order to provide additional pressure to complete the Round, APEC countries agreed to harmonize chemical tariffs and to reduce or eliminate tariffs on products not included in the July Quad Market Access Agreement in Tokyo such as electronics, non-ferrous metals, paper, wood, toys, scientific equipment and oilseeds. However, not all APEC members backed tariff reductions in all of these sectors.

Additionally, the APEC summit allowed member countries the opportunity to discuss the future role of APEC, specifically, whether a formal structure should be created in order to achieve a free trade area or whether the organization should follow a more informal approach. By the end of the summit, it appeared that APEC members envisioned the forum more as a means of cooperation rather than an economic community. The members failed to

agree to the Eminent Persons Group Report which proposed a free trade area and included a 1996 deadline and timetable to establish a free trade bloc. However, by adopting the framework, the APEC countries demonstrated their commitment to lower trade barriers and increase investment in the region, yet they are not quite prepared to create an Asia-Pacific trade bloc.

Even though all of the negotiations involving the Uruguay Round, NAFTA, and APEC are concerned with three different areas in the global arena, they are all linked together through the framework of the international trading system. The outcomes of these negotiations effect each other and the future role of these forums in international trade policies. During the final months of 1993, the U.S. chose to concentrate its efforts on the passage of the NAFTA. The Clinton Administration's success in achieving its passage proves U.S. support for free trade and open markets and gives more credibility to U.S. negotiators. Thus, the NAFTA vote allowed President Clinton to pursue an enhanced role in APEC while a rejection by Congress would have contradicted the U.S. Administrations's stated free trade policy.

Both the passage of NAFTA and the APEC Summit have placed pressure for movement towards a successful conclusion of the Uruguay Round. Now that the NAFTA vote is over, U.S. attention which was previously devoted to NAFTA can now be directed at the GATT negotiations. Additionally, APEC places pressure on the Europeans to finish the Uruguay Round since if the Round fails, APEC could expand trade measures on its own, effectively leaving out the Europeans. Thus, the conclusion of the Uruguay Round is one way for the Europeans to respond to APEC.

As a result of these linking negotiations and policies, both U.S. trade policy and the framework of the international trading system have reached now one of their most crucial points in their postwar histories. The outcomes of these various events will have a profound effect on the movement towards either a more open or closed trading system.

INTERNATIONAL TRADE LAW UPDATE

The following articles are reprinted with permission from the November 1993 issue of *Update*, a newsletter published by the Antitrust and Trade Law Committee of the International Bar Association's Business Law Section.

AUSTRALIA

Some Developing Country Preferences to be Removed

The government has decided to remove developing country preferences for all but member countries of the South Pacific Forum and certain least developed countries. It is not intended to increase existing preference rates for other countries that are presently considered "developing". Instead, the rates for those countries will be fixed at their pre-July 1, 1993 level until the general rate of duty reduces to that level. Thereafter, the general rate of duty will apply to those countries.

Dumped Goods: Determination of "Normal Value"

The Federal Court has set aside a decision made by the Minister on normal value. The "normal value" (ordinary domestic price in the country of export) of dumped goods had been set by the Minister when accepting undertakings from the exporter. Subsequently the Minister purported to re-ascertain the normal value of goods based on a report of the Australian Customs Service. There had been no change in the factors that are statutorily relevant to the determination of the normal value. The Court found that the power held by the Minister to re-ascertain normal values was limited to cases where there was such a change and was not intended to apply where the Minister was simply dissatisfied with the previously determined normal value.

The Determination of Normal Value and Monopolies

In a recent decision, the full Federal Court found that the mere existence of a monopoly would not make domestic prices "unsuitable for use" for the purposes of determining the normal value (ordinary domestic selling price in the country of export). One problem in the case was the lack of evidence as to what respect the market in the country of export was effected by the monopoly.

Valuation

Ordinarily, interest payable on the price does not form part of the customs value if, amongst other things, the interest is payable in return for permission to delay the payment of the price. In the present case, the relevant agreement allowed the importer to extend credit terms from 30 days to 180 days but was required to pay interest in respect of the extra period. The Administrative Appeals Tribunal held that interest is only deductible if it is payable for delayed payment. In the present case, because the credit terms were extended, there was no delayed payment.

Imported Food

Legislation has recently come into force which modified the rules pertaining to imported foods. All food imported into Australia is now liable to inspection and testing by the Australian Quarantine and Inspection Service. Previously, only certain high risk foods were subject to inspection. All imported foods must also meet Australian standards for food and for labelling.

Quotas for Textile, Clothing and Footwear

All tariff quotas on the importation of textile clothing and footwear have now been abolished. Textile, clothing and footwear products are now subject to tariffs in the normal manner.

CANADA

NAFTA - Labour/Environment Side Agreements

Canada, the United States and Mexico recently concluded two side-agreements to the North American Free Trade Agreement ("NAFTA"): an Agreement on Environmental Cooperation and an Agreement on Labour Cooperation. Both agreements encourage cooperation between the three Signatories and the effective enforcement of each signatory country's own labour or environmental legislation.

The Environment Cooperation side-agreement affirms the right of each Signatory to establish its own levels of environmental protection but requires each country to ensure its laws provide for high levels of protection and strive for the continued improvement of those laws. Each country has agreed to enforce effectively its environmental law through appropriate government action.

A Commission on Environmental Cooperation will be established to oversee the goals and objectives of NAFTA as it relates to environmental concerns. A consultation and dispute mechanism process is established through the Commission to resolve matters relating to operation of the Environmental Cooperation side-agreement or the persistent failure by one Signatory to enforce its environmental laws. Should it become necessary, the Environmental Cooperation side-agreement provides that sanctions can be taken against a Signatory that fails to enforce its own environmental law. Sanctions could include an action plan to remedy the problem, monetary enforcement assessment on the non-complying Signatory, court enforcement proceedings, or the suspension of NAFTA benefits.

The objectives of the Labour Cooperation side-agreement include the improvement of working conditions, living standards and compliance with and enforcement of each Signatory's own labour laws. A Labour Commission will be established to deal with the achievement of this side-agreement. The Labour Commission will be involved in the dispute resolution process when Signatory countries, through consultations and an independent expert evaluation process, are unable to resolve a dispute. Sanctions against a Signatory that fails to enforce its labour law could include monetary assessment, action plans, court enforcement proceedings, or the suspension of NAFTA benefits.

Dispute Settlement under the Canada-U.S. Free Trade Agreement

Canadian Milk to Puerto Rico: A dispute settlement Binational Panel established under the Canada-U.S. Free Trade Agreement ("FTA") has issued an opinion on a dispute relating to milk from Québec and its importation, distribution and sale of milk into Puerto Rico. The trade dispute involved the manner in which a U.S. health regulation was being applied, effectively prohibiting the importation into Puerto Rico of milk from Québec. The Binational Panel, while affirming that the setting of standards is a significant prerogative of a state, determined that the U.S. had nullified and impaired benefits that Canada could reasonably derive from the FTA by closing the market in Puerto Rico to ultra-high temperature milk from Québec while negotiations were under way concerning the equivalency of standards governing the production of this milk in Québec. The Binational Panel's view was that bilateral discussions should have continued to a proper determination of equivalency. The Binational Panel therefore recommended that the equivalency study be done without delay and that if Canadian standards are found to have the same effect as the standards sought to be imposed, milk from Québec should be re-admitted and permitted to be sold in Puerto Rico.

EUROPEAN COMMUNITIES

European Economic Area

The EEA Agreement, expected to come into force in July, still requires the ratification of the EEA Treaty and the Protocol of March 17, 1993 by France, Spain and the United Kingdom. These ratifications are expected during October.

EC/Bananas

The new banana market organization regulation which has been adopted by the EC Council of Ministers on February 13, 1993 entered into force on July 1. The regulation provides for duty free imports of bananas from ACP countries up to 0.878 million tonnes a year. Additional imports from ACP states and third countries are subject to a tariff quota of 2 million tonnes. Within this framework, third country imports only are subject to customs duties of 100 ECU/ton. Imports of quantities exceeding this quota from non-traditional ACP states or third countries are exposed to high customs duties of 750 ECU/ton and 850 ECU/ton, respectively.

Under the new market regulation, EC demand cannot be satisfied. The effect: banana prices have gone up since July.

The German government has lodged an application of annulment of the regulation before the European Court of Justice. Interim measures applied for by Germany to suspend the entry into force of the new market regulation (based upon violation of EC competition and agriculture rules, the principle of non-discrimination and the GATT rules), have been refused by the Court on July 1, 1993.

The Latin American producers requested a GATT dispute resolution panel, challenging the GATT-compatibility of the EC's preferential banana import regime for developing country members of the ACP states.

New Anti-dumping Procedures

Anti-dumping cases were initiated with respect to electrolytic capacitors from Korea and Taiwan, camera systems from Japan, unwrought aluminium from CIS, refectory chamottes from China, as well as urea ammonium nitrate from Bulgaria and Poland.

Provisional Anti-dumping Duties

Provisional anti-dumping duties have been imposed on imports of certain ball bearings (external diameter not exceeding 30 mm) originating in Thailand but imported to the Community from another third country; on imports of bicycles from China; ferro-chrome (with a carbon content by weight of max. 0.5%) coming from Kazakhstan, Russia and Ukraine; certain magnetic disks (3.5" microdisks) from Japan, Taiwan, China; certain electronic weighing scales from Singapore and Korea; and on ethanolamine from the U.S.A.

Definitive Anti-dumping Duties

Definitive anti-dumping duties have been imposed on imports of synthetic fibres of polyesters from India and Korea; outer rings of tapered roller bearings coming from Japan; DRAMs from Korea; certain electronic weighing scales from Japan; seamless pipes and tubes, of iron or non-alloy steel, from Hungary, Poland and Croatia; magnesium oxide from China; and on electronic typewriters from Japan.

JAPAN

Another Japanese Anti-dumping Action?

In a previous recent issue we reported on some anti-dumping developments initiated on the Japanese side against foreign products imported into Japan, noting that what might seem to be anomalous could be the start of a trend. Considering the high prices of virtually everything in Japan, in terms of the Japanese yen/foreign currency conversion rates, it may come as a surprise that any company or country would need to resort to dumping to overcome their Japanese competition.

According to Nikkei Shimbun (July 15, 1993), the Association of Japanese Cotton Spinning & Textile Industries are preparing to file a dumping action against Pakistani cotton yarns and Chinese textiles. The share of the Japanese market held by Pakistani cotton yarns was approximately 75% in 1992. The share of the Japanese market held by Chinese textiles was reported to be 36.3% in 1992. The Japanese Industries were encouraged to prepare their petition by MITI's decision in February, 1992 on customs duties for Chinese ferro-silicon-manganese which is a raw material of steel. The Japanese Industries say that they gathered the evidence to prove the difference between the respective countries' domestic prices and export prices of the above products.

MEXICO

The new Mexican Ley de Comercio Exterior (the "Foreign Trade Law") was finally published in the Diario Oficial ("Diario") on July 27, 1993. This law now supersedes the previous foreign trade law published in the Diario on January 13, 1986, as well as the law regulating the exportation of gold published in the Diario on December 30, 1980.

In the transitory provisions, there is a clear statement to the effect that until the new regulations enter into effect, all current rules and regulations related to (1) unfair trade practices, (ii) importation and exportation of goods subject to previous approval, as well as (iii) the organization and functions of the Comision de Aranceles y Controles al Comercio Exterior (Commission on Tariffs and Controls to Foreign Trade) will still be in effect.

The new Foreign Trade Law is divided into the following sections: (1) General Provisions, (2) Authority of the Federal Executive Power, the Ministry of Trade and Industrial Promotion and Auxiliary Commissions, (3) Origin of Goods, (4) Tariffs and No-Tariff Restrictions and Regulations to Foreign Trade, (5) International Unfair Trade Practices, (6) Safeguard Measures, (7) Procedures on International Unfair Trade Practices and Safeguard Measures, (8) Promotion of Exports, and (9) Violations, Sanctions and Remedies.

All current procedures followed on dumping and countervailing duties shall continue to be resolved in accordance with the procedures provided for under the past law. The new legislation will only be applicable to any procedure or investigation initiated after July 28, 1993.

A brief description of the differences between the legislation will be provided in subsequent reports.

NEW ZEALAND

Anti-dumping—Final Determinations and Investigations

In May, 1993 the Minister of Commerce made a final determination that home brew beer kits from the United Kingdom do not require an anti-dumping duty to be imposed, although provisional duties had been imposed. Plaster of Paris bandages imported from Germany did not have provisional duties imposed on them, but a decision has since been made that they were dumped.

The Minister of Commerce will be reviewing the need for an undertaking relating to the dumping of primary cell batteries from Korea set in June, 1992. The sole New Zealand manufacturer is to cease manufacturing primary cell batteries in New Zealand from September.

"Country of Origin" Labelling

"Country of origin" labelling for clothing and footwear became mandatory under regulations made under the Fair Trading Act, 1986. The Consumer Information Standards [Country of Original (Clothing and Footwear) Labelling] Regulations 1992 were effective from July 1, 1993 and apply both to imported and domestically produced goods.

Consumer Guarantees Act

The Consumer Guarantees Act 1993 comes into effect on April 1, 1994 and establishes a set of statutory guarantees to be implied into all contracts for the supply of consumer goods and services. The guarantees replace the various implied conditions contained in the Sale of Goods Act 1908. The Act sets out a number of statutory guarantees which are implied into consumer transactions for the supply of goods and trade. The failure to comply with any of the statutory guarantees gives the consumer rights of redress against the supplier and/or against manufacturers. The rights against manufacturers include the right to seek the repair or replacement of the goods (if the manufacturer has expressly guaranteed this) or to seek damages, both for the reduced value of the goods themselves and for any other foreseeable damage resulting from the failure. The Act also provides that third parties who receive goods from a consumer have the same rights of redress against the supplier or manufacturer of goods which fail to comply with statutory guarantees as the original consumer.

UNITED STATES

NAFTA

The United States, Canada and Mexico reached NAFTA side agreements on the environment, labour, and import surges. They provide for panel review and sanctions in the event of noncompliance with the agreements.

Export Controls

On August 26 the Clinton administration imposed new restrictions for two years on exports of missile technology items to the People's Republic of China and Pakistan for alleged transfers of items subject to the multilateral Missile Technology Control Regime. These controls were imposed pursuant to the National Defense Authorization Act which requires sanctions against foreign persons who transfer missile equipment or technology to a country that is not an adherent to the MTCR.

Trade with PRC

President Clinton issued an executive order on May 28 renewing most favoured national trade status for the People's Republic of China for one year, conditional on human rights improvements. He indicated that China must make significant progress in the areas of release of political prisoners, prison labour, humane treatment of prisoners, relations with Tibet, emigration, and permission of international radio and television broadcasts in order to retain MFN status next year.

Trade Disputes

On July 26, a binational panel under the U.S.-Canada Free Trade Agreement remanded the U.S. International Trade Commission determination that softwood lumber imports from Canada, which had been found by the Commerce Department to be subsidized, had caused material injury to the U.S. industry. The panel found that the Commission relied solely on the volume of the subject imports and that this did not constitute substantial evidence that imports from Canada were a cause of injury. An earlier binational panel in the same case had remanded the Department of Commerce's affirmative subsidy determination in softwood lumber for correction of legal and factual errors.

U.S. Trade Laws

The International Trade Commission has prepared a draft reorganizing U.S. trade laws. The purpose of the reorganization is to eliminate duplicative and illogical provisions, and arrange the trade laws in a more accessible fashion, without making substantive revisions.