

## CANADIAN COMPETITION RECORD

## REGULATORY AND TRADE DEVELOPMENTS

### **CRTC DISALLOWS DIVESTITURE OF RESIDENCE TELEPHONE INSIDE WIRE**

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In a Decision dated February 2, 1994 (Telecom Decision CRTC 94-2, BC Tel and Bell Canada Transfer of Inside Wire to Premises Owners Introduction of Line Guard Service), the CRTC disallowed applications of BC Tel and Bell Canada for tariff changes that were designed to cede ownership over their installed inside telephone wire plant to the owners of the residence and business premises in which the wire was installed, and establish hourly maintenance repair rates as well as a maintenance contract plan for the repair and maintenance of this wire. Coincident with the transfer to property owners of the inside wire, the two companies proposed to begin to write down the net book value of their single line inside wire plant; in Bell Canada's case over a five year period.

The principal reason advanced in support of the proposal by the companies was a desire to create a "clear boundary" for the regulated utility operations of telephone companies taking into account the increase in customer-owned inside wire in homes and businesses, for example, through customer installed extension lines. The companies

suggested that they wanted to avoid regulatory responsibility for the plan which they had not installed or did not own.

The principal concerns raised about the proposal did not focus on the appropriateness of divestiture per se but rather on the competitive advantages that might flow to the telephone companies in marketing maintenance service contracts (to be known as Line Guard in Bell Canada's case) in light of their existing marketing advantages taking into account the fact that an enormous part of the companies' installed base would be dropped in one instant into the laps of residence and small business subscribers who have no real knowledge as to the extent of competition in the supply of wire maintenance services. Some interveners suggested that the Line Guard product would be taken up by the vast majority of residential subscribers in order to protect the viability of their basic telephone service and that therefore this service should be regarded essentially as a local rate increase in disguise.

The Commission was also not persuaded that any ownership and regulatory uncertainties that might arise from customer owned but telephone company maintained inside wire were sufficiently widespread or serious to merit the divestiture of what has been to date regarded as an essential part of the public utility business of telephone companies.

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The Commission also agreed to an extent with interveners who were concerned about the marketing advantages the telephone companies would have in supplying Line Guard at the outset following divestiture. The Commission noted that the companies' evidence in support of their applications had disclosed that they would enjoy at least at the outset "a large share of the maintenance plan market and would realize substantial new revenues at the proposed rates". The Commission also noted that the telephone companies would also have a unique marketing advantage through the use of their billing systems and telephone directories that would further deter potential competitors from entering the market.

The Commission did not dismiss the concept of inside single wire divestiture out of hand. It appears to have signaled that a subsequent application might be approved if the Commission could be persuaded that the net result would not be in the application of additional charges for a large portion of residence subscribers with no apparent additional benefit to customers. It also appears that the Commission will need further evidence to support the proposition that such divestiture would lead to the growth of a viable competitive market. The Commission could not reach this conclusion based on the evidence based on this proceeding, however.

Finally, the Commission indicated that it agreed with some interveners that it was not established that under the specific proposals there would in law be a transfer of ownership of the inside wire.

In order to assist the development of a competitive market and thus test at some point in future the concerns raised with respect to prospective telephone company dominance in the maintenance market, the Commission indicated that it was prepared to

approve tariff revisions to remove barriers to competition in the installation and repair of new single line inside wire. With respect to existing inside wire, the Commission emphasized that, with the legal uncertainties with respect to the ability to transfer ownership of the plant to property owner, it is doubtful that premises owners would have any authority to maintain such wire. Hence, tariff revisions as proposed by the companies would not necessarily open the door to competition in the repair of existing inside wire. Accordingly, the Commission offered possible options in lieu of divestiture. One would be to authorize subscribers to repair existing as well as new single line inside wire. This would require tariff revisions providing that the subscribers are responsible for maintaining single line inside wire and that they maintain, modify and rearrange single line inside wire including any single line inside wire that the telephone company may have furnished.

The second option offered by the Commission would be the regime that provides for the possibility of competition in both installation and maintenance of all new single line inside wire and any existing single line inside wire that has been modified, rearranged, or added to. Here, premises owners acquiring new inside wire would ultimately be responsible for its maintenance. Premises owners with existing single line inside wire would not be responsible for its maintenance until such time as they modified, rearranged or added to it. This implies that premises owners would be willing to acquire ownership for such inside wire from the telephone company, if need be, in order to modify its structure, and that tariff revisions would provide customers with this kind of choice.

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**CRTC REVISES RESTRICTIONS ON  
RESALE THROUGH AFFILIATES**

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In a March 4 Decision (Telecom Decision CRTC 94-6, Affiliate Rule), the CRTC has somewhat modified its restriction on the resale of interexchange private line service capacity by a facilities based carrier to an affiliate for the purpose of providing long distance voice services through that affiliate. Such affiliate resale was originally barred in 1990 when the CRTC first allowed simple resale of interconnected private line services to provide long distance. At that time, the only facilities based carriers of concern to the CRTC were the Stentor companies and Unitel. The Commission barred the Stentor companies from affiliate resale in order to prevent predatory pricing by the dominant firms against newly emerging resale based long distance suppliers. The Commission also precluded Unitel from reselling through an affiliate in order to prevent facilities based long distance competition through the backdoor before such competition had been reviewed and authorized. This authorization subsequently was provided in 1992 when the Commission approved an application by Unitel (Telecom Decision CRTC 92-12) to use its interexchange facilities to provide long distance services in competition with Stentor through interconnection with Stentor members' local networks.

Having now opened the door to facilities based long distance competition, the rationale for precluding resale by affiliates of firms other than the dominant participants in the market had evaporated and the CRTC accordingly removed the affiliate resale prohibition from all non-dominant long distance

suppliers. However, the Commission elected to retain the bar against Stentor affiliate resale in order to preclude the telephone companies from offering unregulated long distance services through affiliates. These telephone companies can offer unregulated long distance services directly only if the Commission issued an Order approving this. The Commission also found that retaining the prohibition for Stentor members was necessary to minimize the potential for contribution avoidance by these established telephone companies.

With respect to the original predatory pricing concern, the Commission continues to be of the view that, in the absence of the affiliate rule, the potential would exist for the telephone companies to escape CRTC oversight against abuse of dominant position through the resale by affiliates. Accordingly, the Commission concluded that the competitive market place might be harmed through telephone company affiliates undercutting independent reseller competitors "since the return earned by the reseller affiliate would be immaterial to the combined return of the telephone company and the affiliate". In doing so, the Commission has opted for a single predatory pricing regime to apply to the telephone companies rather than a mixed regime of the Commission's jurisdiction of the *Telecommunications Act* and the *Competition Act*, with the latter applying to the competitive activities of unregulated reseller affiliates of telephone companies and the former applying to the telephone companies.

In order to preclude contribution avoidance by facilities based carriers such as Unitel, however, the Commission concluded that resellers affiliated with such companies must pay the same "contribution charges" to support low basic telephone rates as a facilities-based carrier regardless of whether the facilities in question are leased from the affiliated

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carrier or from other telephone companies. Pure resellers currently pay a discounted contribution charge for line side access compared to interexchange carriers.

Significantly, the affiliate resale prohibition was extended to Telesat and Teleglobe on the basis that they are affiliates of the telephone companies. Telesat is controlled by BCE which directly and indirectly controls a majority of Telesat shares. However, Teleglobe is not majority controlled by any domestic telephone company; its legislation limits Stentor's combined votes to 1/3 of the voting shares of the company and at present the only affiliate which has invested in Teleglobe, BCE, has less than a 30% position in that company.

For the purpose of this decision, the Commission also concluded that the definition of an affiliate should be altered to incorporate the concept of "related" companies and the threshold level to constitute affiliate status should be 20%. The effect of this definition is to ensure that an affiliate of an IXC acting as a reseller does not have a higher non-Canadian ownership position than is permitted to regulated IXCS under the *Telecommunications Act*.

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**RESULTS OF THE URUGUAY  
ROUND AGREEMENT:  
PROVISIONS TOWARD FURTHER  
GLOBAL MARKET ACCESS**

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On December 15, 1993 the 117 participants in the Uruguay Round Multilateral Trade Negotiations under the General Agreement on Tariffs and Trade

("GATT") approved a final act embodying the results of seven years of negotiations aimed at reducing tariffs and opening global markets. Upon the conclusion of the world trade liberalization accord, GATT General Director Peter Sutherland stated that "[t]oday the world has chosen openness and cooperation instead of uncertainty and conflict." The far reaching Uruguay Round Agreement not only covers tariffs and new areas which have never before come under the auspices of multilateral trading rules (i.e., agriculture, services, and intellectual property rights), but it also strives to improve upon already existing areas in the GATT such as antidumping, subsidies and countervailing duties, and dispute settlement.

As in previous GATT Rounds, participants negotiated further tariff reductions in order to increase global market access for exports. The total average tariff reduction was 40% for all of the 117 nations participating in the Uruguay Round.

Virtually all sectors were covered under the tariff provisions of the Uruguay Round Agreement. In the developed countries, tariffs on such items as construction equipment, agricultural equipment, medical equipment, steel, toys, beer, some distilled spirits, pharmaceuticals, paper, and furniture are either reduced or completely eliminated. Tariff cuts on some semiconductors, semiconductor manufacturing equipment, computer parts, and other electronic items range from 50%-100%. Finally, the Uruguay Round Agreement provides for the harmonization of tariffs in the chemical sector by developed countries and major developing countries at rates of 0%, 5.5%, and 6.5%.

These tariff reductions will be implemented in various stages. Elimination of tariffs in certain

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sectors such as pharmaceuticals, in which the Uruguay Round Agreement reduces tariffs to 0%, will occur when the Agreement goes into force. However, most tariffs will be reduced in equal annual increments over a period of five years. Additionally, the Agreement provides for a phase-out period of up to ten years for items in sensitive sectors such as paper and pulp.

As a result of the pressure upon the participants to meet the December 15 deadline, there were still several outstanding issues to be addressed in the market access area upon the conclusion of the Uruguay Round which needed further negotiation in order to be resolved. As a result, Quad partners (U.S., Canada, Japan, and the European Union (EU)) held market access negotiations at the end of January 1994. One of the issues which they addressed was the implementation of zero tariffs for steel. After meeting, the Quad partners finally agreed to phase out steel tariffs in equal installments over ten years. They also decided against tying tariff elimination provided for in the Uruguay Round Agreement to the conclusion of a Multilateral Steel Agreement (MSA) which aims to curb subsidies in the steel sector.

Other outstanding issues are in the wood and non-ferrous metals sectors. The U.S. is currently making an offer to eliminate tariffs on wood products, although this offer is conditional on other trading partners accepting tariff elimination in the wood sector. This increases pressure on Japan, which only offered a 50% reduction in this area. Additionally, Quad partners have been unwilling to support the U.S. proposal of elimination or harmonization of tariffs at a low level on non-ferrous metals (the EC refused to go to zero on aluminum, so Japan refused to go to zero on copper).

All tariff agreements reached during the market access negotiations of the Uruguay Round will be reflected in the tariff schedules of the participants. Therefore, governments have a deadline of February 15, 1994 to submit their final offers for opening markets (i.e., their draft final schedules). Then GATT will verify and prepare the final version of schedules until March 31, 1994.

The Uruguay Round accord reaches beyond just tariff reductions. It places several important areas under multilateral trading rules for the first time. After much negotiation between the U.S. and the EU, trade in agricultural products finally became one of those sectors making its first appearance under the global rules of the GATT accord. The GATT Agriculture Agreement provides for open market access by converting non-tariff barriers to farm imports into monetary tariffs which are then reduced. Thus, for example, U.S. quotas on imports of sugar, dairy, and peanuts will be phased out and replaced by tariffs. Also, after much negotiation, Japan and South Korea are lifting their bans on rice imports and Canada will have to reform its supply management system.

Overall, agricultural tariffs will be cut by 36% over six years in developed countries and by 24% over ten years for developing countries. The volume of subsidized exports will be reduced by 21% over six years. Additionally, income support for farmers must be reduced by 20% in developed countries and by 13.3% in developing countries. However, the EU gained exceptions in this area. Finally, the Agreement provides for initial market access into previously closed agricultural markets to equal 3% of domestic consumption.

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For decades, trade in the textiles sector has been governed by special rules of the Multifiber Agreement (MFA) which was established in 1974 as a system of textile quotas granted by developed countries to developing ones. However, the Uruguay Round accord has now brought the sector under global trade rules by providing for the phasing out of the MFA over a period of ten years. Thus, quotas on clothing imports will be phased out and replaced by less restrictive tariffs. Under the Agriculture Agreement, trade in textile products is brought under the World Trade Organization (WTO) which is replacing the GATT structure. This process will occur through three transitional phases which are scheduled to be completed by January 1, 2005. Thus, after ten years all textile products will be under WTO rules.

A third area which was addressed by GATT for the first time was trade related intellectual property rights (TRIPS). For years, trade in pirated goods such as computer programs, record albums, videocassettes, and prescription drugs was available in many developing countries. The Uruguay Round Agreement aims to prevent this by committing all countries to protect patents, copyrights, trade secrets, and trademarks.

The Agreement provides for twenty year protection for patents, although excludes from patent availability animal and plant inventions and biotechnological processes for their production. A fifty year protection for copyrights includes computer programs. Exclusive rental rights are also guaranteed for performers and producers of sound recordings and broadcasts.

National legislation of the GATT nations will implement rules on intellectual property right protection through various stages as provided for in

the TRIPS Agreement. Developed countries have one year to implement the Agreement, while developing countries such as India and Thailand have five years. Least developed countries (i.e. Bangladesh) are allowed 11 years.

Although Uruguay Round participants concluded negotiations in several areas for the first time, they were not able to conclude an extensive agreement on services which has never before been covered under GATT rules. The Uruguay Round Agreement only covers such services as tourism, construction, professional services and consulting. Many areas remain unresolved. As one GATT negotiator commented, the GATT Agreement is a "foundation...to work from in future rounds."

In the area of audiovisual services, the U.S. and EU (especially France) engaged in a dispute regarding European limits on foreign programming shown on European television and the use of taxes on movie tickets and blank video cassettes to subsidize the French film industry. The Europeans desired to protect their film and television sectors on the grounds of protecting their local culture. Negotiators were unable to resolve this contentious issue and thus audiovisual services was dropped from the Agreement.

Another sector not included in the Agreement was maritime services. Upon refusal by the U.S. to accept broad market opening liberalization in the ocean shipping sector, the U.S. and EU decided to take maritime services out of the Uruguay Round negotiations. In addition, developing countries refused access for financial services; negotiations will continue for at least 18 months.

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One of the last issues which needed to be settled in the Uruguay Round negotiations was antidumping. Thus, much of the discussion during the last few days focused on the GATT Antidumping Code. The negotiators addressed allegations by various participants that as tariff barriers diminished, antidumping legislation would take over as a substitute. They also sought to provide "balanced benefits" for both exporters and import sensitive industries through antidumping measures.

The U.S. came to the negotiations with a document detailing eleven proposed amendments to the Uruguay Round Antidumping Code text. They included efforts of insuring an easy defence against "dumped" goods exported through third countries (anticircumvention), allowing U.S. trade unions to have the power to initiate antidumping actions, and abandoning the proposal to force "sunset" on dumping orders after they have been in force for five years. Since a majority of GATT countries opposed these changes, the U.S. became isolated during the negotiations in many of its proposals to dilute the force of multilateral restraints on antidumping rules. However, by the end of the negotiations, other GATT parties reluctantly agreed to accept over half of the proposals put forth by the U.S.

The Agreement on the Implementation of Article VI of the GATT ("Antidumping Code") provides contracting parties the right to apply antidumping measures. In the area of injury, the Antidumping Code strengthens the causal link which must be established between a claimed injury and allegedly dumped imports. Additionally, it allows injury to be assessed cumulatively in certain circumstances. Cumulation is the current practice in the U.S. and

EU. Investigating authorities are required to disregard short term fluctuations in exchange rates and instead should grant exporters sixty days to adjust prices to conform to sustained currency movements. In the U.S. and EU these types of exchange rate changes can create or increase an antidumping margin.

During the negotiations there were calls by newly-industrialized nations to limit the ability of industries in importing countries to initiate "harassment" proceedings. Thus, investigation authorities are required by the Antidumping Code to make a prima facie finding of dumping and injury prior to initiating a proceeding. Although all interested parties may be given the opportunity to file a petition, an investigation may not be initiated without the express support of producers accounting for at least 25% of domestic production. Additionally, the initiation of an antidumping proceeding on behalf of the "domestic industry" now includes the right of labor unions to initiate or support these proceedings.

The Antidumping Code also increases the de minimis levels needed to obtain an order. Thus, antidumping proceedings must be terminated by investigating authorities in three instances. First, if they determine that there is no dumping or injury by the imports under investigation. Second, if the alleged dumping is de minimis or below 2% of the export price (previously, the percentage for de minimis had been 0.5%.) Finally, if the volume of dumped imports is determined to be negligible or less than 3% of total imports for any originating country, then proceedings would be terminated. However, if countries that individually have less than 3% of the volume collectively have over 7%, then they need not be considered negligible.

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One of the issues which was lost by the U.S. was the sunset clause. Many U.S. trading partners were concerned that over 10% of the United States' 300 outstanding dumping duties have been in place for close to twenty years. Thus, the sunset clause requires that antidumping duties expire after five years unless authorities initiate a review on their own initiative or upon a request and find it likely that the expiration of the duty would lead to continued or renewed dumping or injury. This clause holds significant ramifications in the U.S. At present, there are no statutory time limits for the validity of dumping findings.

Finally, in the area of dispute settlement in antidumping determinations, there had been proposals of new GATT powers to re-examine not just the handling of the case but the facts presented. However, import sensitive industries did not want GATT panels to hear new evidence or omit other evidence which had been previously admitted in the original case. The U.S. also adamantly opposed the re-examination of the facts of a case and in the end, the U.S. won a victory on this issue. The Uruguay Round Agreement on Dispute Settlement establishes that GATT panels which examine results of a dumping investigation will not be allowed to re-examine the facts of the case, but will be able to look at how the case was handled by the investigating authorities. Also, GATT panel decisions are now binding and may no longer be blocked by one Party as before. Finally, countries have a new right of appeal of panel verdicts to a new GATT appellate tribunal.

The GATT Agreement on Subsidies and Countervailing Measures (the "Subsidies Code") establishes clearer rules and stronger disciplines in the subsidy area by making a more uniform

determination of what is a prohibited subsidy that can be the subject of a countervailing duty or measure. For the first time in GATT, the Subsidies Code of the Uruguay Round defines the term "subsidy". The Subsidies Code provides the definition of a subsidy on the basis of a "financial contribution by a government or any public body" which confers a benefit.

Additionally, the Subsidies Code establishes three categories of subsidies. Prohibited subsidies cover export subsidies which are designed solely to protect domestic over imported goods. A second category, actionable subsidies, covers subsidies that the GATT deems to have adverse effects towards other GATT countries, i.e., injury to the domestic industry, nullification or impairment of benefits, or "serious prejudice" towards the interests of other signatory countries. Finally, non-actionable subsidies covers subsidies, such as assistance to industrial research and precompetitive development activity, and disadvantaged regions, which are immune from trade action.

Other provisions of the Subsidies Code set out disciplines on the initiation of countervailing cases, investigations by national authorities, and rules of evidence to ensure all interested parties can present information and argument. Additionally, the Subsidies Code provides guidelines for treatment of subsidies in countries transforming into market economies. These countries have a period of seven years to eliminate prohibited subsidies.

All of the texts in the Uruguay Round Agreement are scheduled to take effect on July 1, 1995. Yet, certain components of each text may take effect after that date or over a specific period of time. Additionally, in order to ensure that governments

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treat legislation implementing the accord as a top priority, there has been increased support by the GATT countries to move the effective date from July 1, 1995 to January 1, 1995.

U.S. Trade Representative Mickey Kantor along with representatives from the other GATT countries will sign the accord on April 15, 1994 at a ceremony in Marrakesh, Morocco. President Clinton may submit legislation implementing the Agreement to Congress for approval at any time after that date. Congress will then have 90 legislative days to consider and vote on the Agreement without amendment. However, Congressional approval for the Uruguay Round Agreement will come easier than the debate on the North American Free Trade Agreement last year since opposition to the Agreement is not as broad or emotional.

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### INTERNATIONAL TRADE LAW UPDATE

*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

##### Customs Australia

In a report just issued, a Review Committee ("Committee") appointed by the federal government has recommended the abolition of the Australian Customs Service and its replacement with a new organization to be called "Customs Australia". The government has generally accepted the recommendations in the report.

The Committee found that there was wide ranging and consistent criticism of the Australian Customs Service in its internal policies and practices. It noted there were claims of intimidation, inconsistency in dealing with companies, inefficiencies, secrecy, lack of commercial judgment, poor communication, inflexibility, confusion of purpose, lack of specialist skills, ineffectual leadership and lack of accountability for actions.

The Committee considered that by improving its relationship with industry, by emphasizing consultation rather than confrontation, Customs now has the opportunity to provide real and valuable assistance to Australia, not only in the delivery of policy but in contributing to the effectiveness of industry.

The Committee made numerous recommendations concerning strategic directions for Customs in Australia, customs law, (abolishing the right for customs officers to seize commercial goods), people management, market research and a number of other management issues, industry assistance, technology.

#### EASTERN EUROPEAN COMMUNITIES

##### European Economic Area

The EEA Agreement ("Agreement") between the EC and the EFTA States (with the exception of Switzerland) came into force on January 1, 1994. The Agreement creates a uniform market between the twelve EC States and six of the EFTA States. The EEA goes much further than the textbook example of a free trade zone in that it creates a large body of uniform law and a number of decision-making institutions. In the future, countervailing duties and measures against illicit commercial practices attributable to third countries shall not be

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applied in relations between the parties to the Agreement unless it specifies otherwise. Those anti-dumping duties, as well as undertakings accepted by the Commission concerning EFTA States effective at the time that the Agreement came into force, have been suspended as of January 1.

### **Introduction of Time Limits for Anti-dumping and Anti-subsidy Cases**

In order to reduce the amount of time often required for anti-dumping and anti-subsidy cases, the Commission has submitted a proposal to the Council to impose time limits on anti-dumping and anti-subsidy investigations. According to the proposal:

- the Commission must notify the complainant within one month after the complaint is filed that the complaint does not contain sufficient evidence to justify initiating an investigation;

- an investigation must be concluded either by termination or definitive action at the latest within 15 months after its initiation; and

- the decision to impose provisional anti-dumping duties must be made within nine months of the initiation of the investigation.

### **Commission's 11th Annual Report on Anti-dumping and Anti-subsidy Activities**

The Commission submitted its 11th Annual Report ("Report") on anti-dumping and anti-subsidy activities to the Council. Compared to earlier reports, the latest Report provides a relatively extensive overview of the activities of the Commission in 1992. In 1992, the Commission initiated 39 anti-dumping and anti-subsidy investigations, almost double the number initiated in 1991. Provisional duties were

imposed in 18 cases in 1992, but only one definitive duty was imposed.

### **Decision of the European Court of Justice ("ECJ") in Rima v. Council**

In an important anti-dumping case concerning the evidentiary requirements for opening an investigation, the ECJ annulled the Council regulation imposing an anti-dumping duty on imports of Brazilian ferro-silicon by Rima Electrometalurgia ("Rima"). In 1987, the Council imposed definitive anti-dumping duties on several Brazilian exporters of ferro-silicon with the exception of Rima. In response to a request made by the other Brazilian exporters for a review of the decision to impose the duties, the Commission also sent Rima a questionnaire and conducted verifications at Rima's offices. As a result of this investigation, definitive anti-dumping duties were imposed on ferro-silicon originating in Brazil, including exports by Rima.

The ECJ held that the Commission was required to have sufficient evidence of dumping and injury to open an investigation irrespective of whether this is a new proceeding or a review. Although sufficient evidence need not be present for each exporter since anti-dumping proceedings are directed at certain categories of products originating from a third country and not a specific business, the Commission lacked sufficient evidence in the present case. In particular, the Commission could not rely, regarding Rima, on the submissions of the other producers in requesting the review because those exporters had no intention of showing dumping, but on the contrary, of showing that no dumping had occurred.

### **New Anti-dumping Procedures**

Anti-dumping cases were initiated with respect to imports of microwave ovens originating in China,

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Korea, Thailand and Malaysia and with respect to imports of certain welded tubes of iron or non-alloy steel originating in Romania, the former Yugoslavia, Turkey and Venezuela.

### **Provisional Anti-dumping Duties**

Provisional anti-dumping duties were imposed on imports of hematite pig iron originating in Brazil, Poland, Russia and Ukraine as well as on imports of fluorspar originating in China.

### **Definitive Anti-dumping Duties**

Definitive anti-dumping duties were imposed on imports of dead-burned magnesia originating in China and on imports of photo albums in bookbound form originating in China.

## **GATT**

### **On the Road to Marrakesh**

It's official. In the evening of December 15, 1993, GATT Director-General, Peter Sutherland, brought his gavel down on seven years of negotiations, calling the successful conclusion of the Uruguay Round "a defining moment in modern economic and political history". Whatever the diverging opinions of the final package and on the prognosis for the future of the world trading system, all agree that the Uruguay Round has been a truly global negotiation, producing a truly global result. Altogether, 117 countries participated directly in the negotiations, with another 10 acceding countries associating themselves with the process. And for the first time, a negotiation under GATT auspices has covered virtually every sector of world trade.

Participants agreed to the creation of a new multilateral body to oversee the results, to be named the World Trade Organization ("WTO"). In addition

to agreeing to a significant market access package in the traditional goods areas, with tariff reductions averaging 40% and a substantial increase in tariff bindings, participants established new regimes for trade in agricultural products, textiles and services and developed new trade rules covering intellectual property and investment. They also signed on to stronger institutional rules for dispute settlement and a regular procedure for the review of trade policy developments in member countries.

The Trade Negotiations Committee agreed upon an intensive work programme for the post-Round period leading up to entry into force of the WTO Agreement, optimistically slated for January 1, 1995. Among matters to be addressed is that of the many acceding countries (including Algeria, China and the Russian Federation) that hope to become original members of the WTO. Delegations and the GATT Secretariat are actively preparing for the road to the Ministerial Meeting in Marrakesh, where in mid-April of this year representatives will formally adopt the Final Act embodying the results of the Uruguay Round.

## **JAPAN**

### **Recent Filing of Anti-dumping Complaint**

The Japanese Cotton Spinning Industry Association ("Japanese Association") recently filed an anti-dumping complaint with the Minister of Finance on December 20, 1993 that cotton yarn manufacturers in Pakistan have been causing injury to the Japanese fibre industry by selling their products at dumped prices.

The Japanese Association, composed of 51 cotton spinning firms, claims that for the year beginning June 1992 more than 200 manufacturers in Pakistan sold in Japan No. 20 count cotton yarn products,

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which are used primarily to make towels, at prices 30% lower than their domestic prices in Pakistan.

According to industry officials, Pakistani products account for 96% of all No. 20 count cotton yarn imports, and these imports led the Japanese manufacturers' domestic share to 14.9% in the 12 months from June 1992, down by 3.9% from two years before. The domestic production of No. 20 yarn in the first five months of 1993 also fell 33% from the same period in 1991, and Japanese producers are operating at loss, the officials said.

The dumping complaint is the third filed by the Japanese fibre industry following a complaint against South Korean cotton yarn manufactures in 1982 and another against South Korean knitted sweater manufacturers in 1988, both of which were withdrawn.

The Ministry of Finance, in consultation with the Ministry of International Trade and Industry, will decide, within two months as a target, whether to initiate a dumping investigation. If the investigation is initiated, it will be the second anti-dumping proceeding following the case against ferrosilicomanganese from China, Norway and South Africa, in which anti-dumping duties were imposed on Chinese imports in February 1993.

## MEXICO

### **Issues of Sale Price into Mexico determined by the Secretariat of Commerce and Industrial Development ("SECOFI") in Anti-dumping Proceedings under Mexican Law**

Article 30 of the Foreign Trade Law ("FTL") of July 27, 1993 states that importations under price

discrimination are "the introduction of merchandise in Mexico at a price less than its normal value". Article 31 of the same law defines normal value as the "comparable price of identical or similar merchandise in the country of origin in the course of normal commercial operations".

When there exist no sales in the country of origin of similar or identical merchandise, or when such sales do not allow a valid comparison, normal value will be defined administratively.

Article 32 of the FTL defines "normal commercial operations" as those commercial operations that reflect the market conditions in the country of origin and that have been realized on a regular basis or within a representative period among independent buyers and sellers. The FTL further provides that normal value cannot include sales in the country of origin or exports from same to a third country that would include considerable losses, both of which are defined as those resulting from transactions whose prices do not allow to cover production costs and general expenses incurred during normal commercial operations in a reasonable period of time, which can be more extensive than the period of investigation. In the event that operations in the country of origin generate profits insufficient to qualify them as representative, the normal value must be determined in accordance with the reconstructed value.

In addition, art. 35 of the FTL provides that when, in the judgment of SECOFI, the export price is not comparable with the normal value, said price can be calculated on the basis of the price at which imported merchandise is resold for the first time to an independent buyer in Mexico.

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### NEW ZEALAND

#### New Cabinet

Following the re-election of a National Government (by a slim majority) in November 1993, Mr. D.C. McKinnon, the Deputy Prime Minister, has been appointed Minister of Foreign Affairs and Trade and Mr. P.R. Burdon has been appointed Minister of Commerce, Industry, Trade Negotiations and Associate Minister of Foreign Affairs and Trade.

#### Sanctions on South Africa Removed

From October 1993, existing sanctions on imports from South Africa, other than military vehicles, arms and ammunition, have been removed pursuant to the Customs Import Prohibition (Sanctions) Order 1987, Amendment No. 3.

#### Anti-dumping - Final Determinations and Investigations

The Minister of Commerce has announced the continuation of anti-dumping duty on refined sugar from Germany, Malaysia, Thailand, Netherlands, Belgium, and Denmark. The raw sugar price is to be determined by reference to the New York Coffee, Sugar and Cocoa Exchange, rather than the London Futures and Options Exchange. The anti-dumping duties imposed in 1988, 1989 and 1990 have been increased.

The Minister of Commerce has removed the requirement for an undertaking by a Korean company relating to the pricing of primary cell batteries as the batteries are no longer also manufactured in New Zealand.

The Minister of Commerce will review the need for an anti-dumping duty (imposed in December 1991)

on lead acid automotive replacement batteries for passenger motor vehicles and marine applications, which are imported from Indonesia, Malaysia, Korea, Singapore and Taiwan.

#### Customs

The High Court has noted that there is no settled pattern of penalties for fraudulent evasion of customs duty and has imposed total fines on a respondent amounting to 27% of customs duty evaded (*Collector of Customs v. Irvine Merchant Holding Limited*, Tipping J., High Court Christchurch, AP 236/93).

#### Tariff and Excise Duties

With effect from November 1993, import (but not excise) duty on the following goods no longer manufactured in New Zealand has been removed: cigars; cheroots and cigarillos containing tobacco; and rubber gloves, other than surgical and household gloves.

Excise duties on tobacco products have been adjusted by the Excise Duty (Tobacco Products Indexation) Amendment Order (No. 2) 1993 over the two quarters ending June 30, 1993 and September 30, 1993 in line with consumers price index movements.

### SOUTH AFRICA

#### An Introduction

Although a founding member of the GATT, South Africa has not been a disciplined member, tending to be protectionist in nature. South Africa has pursued a policy of import replacement since 1922, which was exacerbated by sanctions and balance-of-payments problems. However, with the major political changes, South Africa is being re-accepted into the international trade arena, and has had to review seriously its trade policies.

## CANADIAN COMPETITION RECORD

South Africa has come under severe pressure from its trading partners to fall in line with GATT philosophy. In the Uruguay Round, South Africa has been pressured to make a substantial move to open its markets.

South Africa was not a signatory to the 1979 GATT Anti-Dumping Code. Although anti-dumping legislation has been on the statute books for decades, it was hardly ever utilized, as there were simpler and more effective mechanisms available to local producers. However, as South Africa's trading policies are placed under the spotlight, many of these protectionist mechanisms are being dismantled, and there has been a greater focus on anti-dumping legislation.

South Africa introduced new anti-dumping legislation in May 1992 which provides for a great deal of discretion by the authorities, and is less in line with GATT principles than the previous legislation. The legislation and procedure have come under criticism, both at home and abroad, and the government has indicated that new legislation will be introduced in the foreseeable future in line with GATT. No anti-dumping decision has yet gone on review to the Supreme Court.

South Africa underwent its first review under the TPRM in June 1993. During the discussions in Geneva, South Africa sought developing country status within GATT. This was refused, but South Africa has been granted the status of an "economy in transition", which allows longer adjustment periods in respect of phasing out certain protectionist policies, and in liberalizing tariffs in certain sensitive industries.

### UNITED STATES

#### NAFTA

In November 1993, Congress approved the North American Free Trade Agreement ("NAFTA"). Mexico will now join the United States and Canada in the creation of the world's largest free trade zone. The NAFTA provides for the elimination of tariffs between the three countries within 15 years and sets rules for technical barriers to trade, government procurement, investment, trade in services, intellectual property, and dispute resolution. It also adopts the innovative system of binational panels used in the Canada-U.S. Free Trade Agreement ("FTA") for appeals of anti-dumping and countervailing duty determinations by national authorities. Three side agreements on labour, the environment and import surges were not subject to formal Congressional approval under the fast-track procedure, but were an essential element of the package. The NAFTA superseded many, but not all, provisions of the Canada-U.S. FTA. It entered into force January 1, 1994.

#### Export Controls

In a landmark decision, the Coordinating Committee on Multilateral Export Controls ("COCOM") member states agreed to abolish the organization by April 1, 1994. A new export control regime, which will include Russia, will replace the 44 year old organization. It will focus on monitoring exports of conventional weapons and corresponding dual-use goods.

In December, the Treasury Department amended implementing regulations which relax U.S. sanctions against Vietnam, but only slightly. U.S. firms are now permitted to participate in multilaterally

## CANADIAN COMPETITION RECORD

financed development projects, subject to registration with the Treasury's Office of Foreign Assets Control. This move reflects further progress in talks on the missing in action of the Vietnam war, but reflects the caution with which the U.S. government has approached this subject.

On November 23, 1993, President Clinton signed into law legislation lifting federal economic sanctions against South Africa. Numerous states and cities have followed the federal government's lead, abolishing their sanctions as well. The United States also signed an agreement with South Africa permitting insurance and financing of U.S. investments by the Overseas Private Investment Corporation.

### **Eastern Europe and the Former Soviet Union**

In November 1993, U.S. trade agreements with Romania and Tajikistan became effective. Both accords extend most-favoured-nation treatment by the U.S. to products originating from those countries. Also, Kyzgystan was designated as a beneficiary of the U.S. Generalized System of Preferences.

### **Trade Disputes**

On December 17, 1993, a binational panel formed under the Canada-U.S. FTA ordered the Department of Commerce to issue a negative final determination in the countervailing duty investigation of softwood lumber from Canada, a major bilateral dispute. The panel made three landmark decisions:

1) Based on the theory of "economic rent", it found that the provincial stumpage programs do not distort the price of lumber, a finding with significant implications for the treatment of natural resources under U.S. trade laws;

2) Upheld the Department's determination that the provincial restrictions on exports of logs can constitute countervailable subsidies under U.S. law, raising the question whether other border restraints, such as voluntary restraint agreements and even tariffs, might be countervailable;

3) The provincial programs under attack (stumpage programs and log export restrictions) were not provided to a specific industry or group of industries within the meaning of U.S. law (a requirement for countervailing domestic subsidies), reasoning that the benefits were limited only by the nature of the programs themselves and the programs were available to all potential users.

Appeals of binational panel decisions are available only on very narrow grounds. As of this writing, the U.S. government had not yet decided whether to appeal. Panel decisions are not legal precedent under U.S. law, but the panel's reasoning could be persuasive in future cases.

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