

TRADE POLICY DEVELOPMENTS

TEXT OF CANADA-UNITED STATES FREE TRADE AGREEMENT FINALLY RELEASED

By: Debra P. Steger
Fraser & Beatty, Ottawa

The text of the Canada-United States Free Trade Agreement (FTA) was finally tabled in Parliament and released on December 11, 1987. It was delivered to the Prime Minister late the previous evening. There are some changes from the October 3rd *Preliminary Transcript: Elements of the Agreement*, but, for the most part, they are industry-specific and do not affect the substance of the FTA. The modifications appear to have been made as a result of industry consultations, and most of them enure to Canada's benefit.

The Canadian apparel and textile industries will benefit from important modifications of the *Preliminary Transcript*. For the apparel industry, a tariff-rate quota arrangement will be established such that apparel made in Canada from offshore fabrics will receive preferential FTA treatment into the United States up to a level of 50 million square yards for non-woolen apparel and 6 million square yards for woolen apparel. Apparel made wholly from Canadian or U.S. fabrics will qualify for preferential FTA treatment into the United States. The corresponding levels for apparel exported to Canada from the United States will be 10.5 million square yards for non-woolen apparel and 1.1 million square yards for woolen apparel. Above the specified levels, apparel made from offshore fabrics will be liable to pay duty at the Most-Favoured-Nation rates. However, duty drawbacks will be available. For the textile industry, fabrics made in Canada from offshore yarns and exported to the United States will receive preferential FTA treatment up to an annual level of 30 million square yards. The U.S. textile industry will not receive the same benefit.

The apparel and textile quotas will continue until the end of 1992 and will be reviewed within two years after the FTA comes into effect.

The provisions affecting automotive trade are clear and should resolve any ambiguities in the *Preliminary Transcript*. There are schedules indicating precisely which companies qualify for treatment under the Autopact or under other duty waiver and remission programs. Also, there are precise timetables for the phasing out of duty waiver and remission programs for offshore manufacturers. All Canadian manufacturers which qualify under the Autopact will continue to benefit from a duty waiver on vehicles and parts imported into Canada from anywhere in the world. The list of companies that will continue to benefit from Autopact safeguards is long and includes the new General Motors - Suzuki joint venture.

Other changes will benefit the Atlantic fishery and the Canadian publishing industry. The provincial restrictions on exports of unprocessed fish currently in effect in Québec, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland are exempt from the FTA. However, both countries have agreed to retain their rights and obligations under the *General Agreement on Tariffs and Trade (GATT)* with respect to existing fish processing restrictions. The British Columbia restrictions, recently the subject of a GATT panel ruling, will be dealt with under the GATT. In a change from the preliminary transcript, Canada will have no obligation to phase out its differential postal rates for U.S. magazines.

Existing regulation of beer or other malt-containing beverages is also exempt from the national treatment provisions of the FTA. Special provisions are contained in the final text to ensure that the distribution of locally-produced wine in private retail outlets such as Québec grocery stores and stores licensed in Ontario or British Columbia to sell cottage industry wine will be preserved.

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Important clarifications have been made in the chapters concerning energy and import and export restrictions. The text makes it abundantly clear that the intent of these chapters is to reaffirm both countries' obligations and commitments under the GATT. The prohibition on the establishment of minimum export-price or import-price requirements for all products, including energy products, is a restatement of the GATT rules. With respect to the regulation of energy exports by the National Energy Board (NEB), the text states that the only price test that the NEB will eliminate is the "least cost alternative test." In what appears to be a modification from the October 3rd document, the text indicates that either country may continue to administer a "surplus test." The *Preliminary Transcript* had said that Canada had agreed to limit application of its surplus test to a monitoring function.

The obligation of each country to continue to supply energy products to the other in circumstances of short supply has been clarified. The FTA provides that either country may restrict energy exports for reasons of short supply, conservation of finite resources or national security, but administration of such restrictions must be fair. In such circumstances, export restrictions may not reduce the proportion of the total export shipments of a specific energy product to the other country relative to the total supply of that product in the exporting country as compared to the proportion prevailing over the last three-year period. It has also been clarified in the investment chapter that the changes in the thresholds for review of U.S. acquisitions of Canadian businesses under the *Investment Canada Act* will not apply to uranium or oil and gas enterprises.

In the chapter relating to agriculture, special conditions have been provided under which the existing tariffs on fresh fruits and vegetables can be re-imposed after the end of the transition period. The general provision is that tariffs on fresh fruits and vegetables will be phased out in stages by 1998. However, there is an additional 10-year tariff "snapback" provision for fresh fruits and vegetables. This snapback provision will apply only if the average acreage for a particular product is constant or declining.

In the new areas, such as investment and services, it is clear from the text that the two governments have agreed to proceed cautiously to adopt new international principles. In both chapters, Canada and the United States have expressly provided that subsidy programs, new tax measures and government procurement practices will not be affected by the new obligations and commitments. Also, an important exception has been provided so that the federal government as well as provincial and local governments may continue to regulate for prudential, fiduciary, health and safety or consumer protection reasons.

The investment chapter includes a new provision permitting the imposition of Canadian ownership restrictions where a government-owned enterprise is privatized. This applies to enterprises owned, directly or indirectly, by the federal government, a provincial government or a Crown corporation. It also applies to the subsequent privatization of any business enterprise acquired or established by government in future. Cultural industries, transportation services, government procurement and financial services, with the exception of insurance, have been excluded from the investment chapter. The uranium and oil and gas industries will be excluded from the amendments to the *Investment Canada Act* thresholds for review. All existing investment restrictions, with the exception of certain changes to the Investment Canada thresholds for review, have been grandfathered.

In the financial services chapter, an important clarification has been made. The provisions of that chapter will apply only to federally-regulated financial institutions and not to provincially-regulated institutions. This means that provincially-regulated securities firms, trust companies, credit unions and near banks will not be affected by either the financial services chapter or the investment chapter. Therefore, provincial governments will be free to continue regulating financial institutions under their jurisdiction without the influence of the FTA.

The services chapter is both ground-breaking and cautious. It is ground-breaking because the FTA is one of the first international trade agreements to regulate services trade in a

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comprehensive manner. It is cautious because it applies only to services sectors that did not object to being included. Any sector that expressed reservations about the new regime has been left out. As a result of pressure from the U.S. marine lobby, the entire transportation industry has been excluded from the services chapter. In the preliminary transcript, transportation services were to be included in the general services provisions and in a specific sectoral agreement. Although designed to appease the U.S. marine industry, the exclusion of transportation services will also be welcomed by the Canadian trucking industry. The sectoral agreement concerning telecommunications and computer services has been amended to exclude any obligations concerning the establishment or operation of basic telecommunications transport facilities. Financial, legal, health, childcare and government services have been excluded from the services chapter. It has been clarified in the text that there will be no absolute right of establishment for U.S. services enterprises. The ability of U.S. firms to invest in Canada will be limited by the exceptions in the investment chapter, including those relating to the cultural industries, transportation and financial services.

The chapters relating to dispute settlement have been clarified and enhanced. With respect to the antidumping and countervailing duty provisions, private firms involved in a countervailing duty or antidumping dispute will be assured access to the new bi-national panel review procedure. Where a private party notifies its government that it would like to seek bi-national panel review of a final antidumping or countervailing duty order, the government concerned is required to initiate proceedings on its behalf.

Also, it has been clarified in the FTA that any decision of a bi-national panel concerning an antidumping or countervailing duty order will be final and binding. A new extraordinary challenge procedure will be established to review bi-national panel decisions in cases where a member of the panel was guilty of gross misconduct or bias or where the panel manifestly exceeded its powers. This extraordinary procedure was created to deal with the United States' concerns about the integrity of the panel

procedure. By agreeing to this new supra-national challenge procedure, Canada has avoided a U.S. request that bi-national panel decisions be reviewable in the U.S. courts.

CANADA-UNITED STATES FTA FORGES NEW PATHS IN INVISIBLES AREAS

In addition to the traditional measures contained in a free trade agreement concerning trade in goods, the Canada-United States Free Trade Agreement (FTA) forges new paths in areas not covered by the *General Agreement on Tariffs and Trades (GATT)*. The FTA includes new disciplines in the areas relating to trade in energy, services, trade-related investment and temporary entry of business persons. The United States, recognizing that trade in services and trade-related investment are becoming increasingly more important in the world economy, has been encouraging the development of new international rules in those areas. Services and investment are on the agenda of the Uruguay Round. The Canada-U.S. FTA represents a significant step towards the goal of achieving a system of multilateral rules in the invisibles areas.

Energy

Now that the text of the FTA has been released, a great deal of the confusion surrounding the energy chapter has been cleared up. A major objective of the United States in the bilateral negotiations was to ensure that, in future, energy exports to the United States would not be priced higher than the domestic products. In other words, the United States wanted an assurance that Canada would never again impose a two-price system for oil and gas exports like the system established under the National Energy Program. Canada's main objective in this area was to obtain secure access to U.S. markets for energy products free from discriminatory regulatory policies or countervailing duty actions which could threaten or inhibit exports. In 1985, Canada exported more than \$10 billion in energy

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products. Some of these exports were limited or threatened by U.S. restrictions and regulatory actions including restrictions on exports of enriched Canadian uranium, discriminatory price controls on natural gas, import fees on crude oil and threatened restrictions on electricity.

The United States sought initially to resolve the discriminatory pricing problem by imposing special obligations on natural resource pricing in a subsidies code as part of an agreement on trade laws. However, when the negotiations broke down on the subject of subsidies and dispute settlement, the United States decided that a specific chapter on energy was needed.

As a result, Canada and the United States have reaffirmed in the FTA their commitments and obligations under the GATT concerning trade restrictions on energy products. The products covered by this chapter are oil, gas, electricity, coal and uranium. The two countries have agreed not to impose new quantitative restrictions (or quotas) contrary to the GATT, export taxes and minimum import or export price requirements. Subject to the above limitations, both countries will remain free to determine whether and when to allow exports and may continue to monitor and licence exports.

In addition, Canada and the U.S. have reserved the right to impose restrictions, in accordance with the GATT, in periods of short supply to prevent exhaustion of a finite energy resource or for national security reasons. If such measures should prove necessary, both countries have agreed not to reduce the proportion of the total export shipments of a particular energy product to the other country relative to the total supply of that product in the exporting country as measured against the proportion prevailing over the last three years. Canada and the U.S. have agreed as well to consult on energy regulatory actions which could directly result in discrimination inconsistent with the principles of the FTA. Current Canadian ownership restrictions in the uranium, oil and gas areas will be preserved. As well, Canada will be permitted to provide incentives for oil and gas exploration, development and related activities in order to maintain a reserve base for energy resources.

Both countries have agreed to change some existing policies and practices to make them consistent with the purpose and objectives of the FTA. In particular, the United States has agreed to exempt Canada from the provisions of the *Atomic Energy Act* which allow the U.S. to restrict imports of Canadian uranium for enrichment and sale in the United States. The U.S. has also agreed to allow exports of Alaskan oil to Canada, up to 50,000 barrels per day, subject to the condition that such oil be transported from Alaska in U.S. flag vessels. Canada has also agreed to eliminate its requirement that uranium exports be upgraded to the maximum extent possible in Canada prior to export (the "further processing policy"). It has been clarified in the text that the only price test administered by the National Energy Board relating to energy exports to be eliminated is the "least cost alternative test."

Investment

To ensure security of access to each other's markets in future, Canada and the United States have agreed to grant each other's investors national treatment with respect to the establishment of new businesses, the acquisition of existing businesses and the conduct, operation and sale of established businesses. The FTA will prohibit the two countries in future from adopting policies requiring minimum levels of equity holdings by nationals in domestic firms or requiring forced divestiture. It will also require that fair standards for expropriation and compensation be established as well as free transfers of profits and other remittances subject only to a standard balance-of-payments clause.

The FTA provides that Canada and the United States will not impose export, local content, local sourcing or import substitution requirements on investments by nationals of another country and will not place such requirements on third country investors when any significant impact on Canada-U.S. trade may result. These principles will apply only to future legislative or regulatory measures. Canada and the United States have agreed that all existing laws, regulations and published policies and practices not in conformity with any of the obligations established

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in the FTA will be grandfathered. This means that all current Canadian restrictions on foreign ownership, including the requirements that broadcasting entities and uranium companies be 100% Canadian-owned, will continue. In the oil and gas area, existing restrictions that no foreign company may acquire more than 50% of a healthy Canadian company will be preserved.

Especially important is that Canadian cultural industries will be exempt from the FTA. Therefore, Investment Canada will continue to review any new investment in the cultural area and may continue its current stated policy of requiring divestiture where such an entity is not 50% Canadian-owned. A "cultural industry" is defined as any of the following activities:

- the publication, distribution or sale of books, magazines, periodicals or newspapers;
- the production, distribution, sale or exhibition of film or video recordings;
- the production, distribution, sale or exhibition of audio or music recordings;
- the publication, distribution, sale of music in print or machine readable form; or
- radio communication in which the transmissions are intended for direct reception by the general public, including all radio, television and cable television broadcasting undertakings and all satellite programming and broadcast network services.

The businesses of printing or typesetting are not included as a cultural industry.

Canada has also agreed to make some changes in the Investment Canada review process concerning U.S. investment proposals. Review of indirect acquisitions of Canadian firms by U.S. investors will be phased out entirely by 1992. The gross asset threshold for Investment Canada review of such acquisitions will be increased effective January 1, 1989, to \$100 million, to \$250 million by 1990 and to \$500 million by 1991. With respect to direct acquisitions of Canadian firms by U.S. investors, the current gross asset threshold for Investment Canada review will be increased in stages to \$150 million by January 1, 1992, and will remain at that level in constant 1992 dollars thereafter. In

the interim, the threshold for review of direct acquisitions by U.S. investors will be raised effective January 1, 1989, to \$25 million, in 1990 to \$50 million, in 1991 to \$100 million and finally in 1992 to \$150 million. Investment Canada review of proposed acquisitions of Canadian firms by U.S. investors will, therefore, be limited to significant direct investments by 1992.

Trade in Services

Canada and the United States have reached a framework agreement concerning trade in services that is both detailed and wide-ranging. It will apply to future laws, regulations and policies in many "covered service" sectors. For political reasons, financial services have been dealt with in a separate chapter of the FTA.

The following principles for regulating services trade will be included in the FTA:

- National Treatment – this will require that imported services receive treatment equivalent to domestically-produced services with respect to all taxes, regulations, legislation, policies and practices of the host country;
- Right of Commercial Presence – this would provide a limited right of establishment (i.e. a right to establish some form of commercial operation in the other country) which may be limited by domestic law (e.g. Schedule B Banks or agency offices);
- Transparency – this is a requirement to notify the other member country of existing or proposed measures, policies or practices that might have an effect on trade; and
- Dispute Settlement – this would include provisions for consultations or resolution of disputes where questions arise concerning government policies, practices or other measures which may affect services trade.

In addition to the general framework agreement, special annexes to the FTA will mandate legislative and regulatory changes to existing laws and practices in certain services sectors. Specific sectoral agreements have been

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negotiated concerning architecture, tourism, and telecommunications and computer services. As a result of pressure from the U.S. marine lobby, the transportation industry has been exempted from the general services chapter, and a specific sectoral annex will not appear. Canada and the United States have agreed to negotiate further sectoral services agreements in the future.

The sectoral agreement on computer services and telecommunications network-based enhanced services has been clarified to make it clear that the establishment or operation of basic telecommunications transport networks are not covered. The obligations include national treatment, right to establish a commercial presence and security of existing access for the provision of enhanced telecommunications services and computer services.

A separate chapter of the FTA deals with financial services. That sector will not be affected by the general services chapter or the investment chapter. The financial services chapter will not apply to provincially-regulated financial institutions such as securities firms, trust companies, credit unions or near banks. With respect to financial services, Canada has agreed:

- that U.S. nationals and U.S.-controlled firms will receive treatment as favourable as persons of Canada with respect to the ability to purchase shares of Canadian-controlled financial institutions;
- to exempt U.S. bank subsidiaries, individually and collectively, from the limitations on the total domestic assets of foreign bank subsidiaries in Canada; and
- not to use review powers governing the entry of U.S.-controlled financial institutions in a manner inconsistent with the objectives of the FTA.

The United States has agreed to permit domestic and foreign banks to deal in, underwrite and purchase debt obligations backed by the Government of Canada or provincial governments. The U.S. has also agreed not to adopt or apply any measures that would accord treatment less favourable to Canadian banks and financial institutions than that accorded currently under the *International Banking Act of 1978*. With respect to future

amendments to the *Glass-Steagall Act* and associated legislation regulating financial institutions in the United States, the U.S. has agreed to accord national treatment to Canadian financial institutions. Both countries have also agreed to consult and extend further regulatory liberalization to each other's financial institutions on a national treatment basis.

Temporary Entry of Business Persons

There cannot be free movement of goods and services across a border unless there is also some degree of free movement of persons. To eliminate what has been a significant non-tariff barrier to trade between Canada and the United States, the two countries have agreed on a number of specific measures to facilitate temporary entry of their citizens into the other country for business purposes.

Canada and the U.S. have agreed not to diminish the scope of existing temporary entry measures. The two countries have agreed to a list of business visitors and professional persons who will be eligible to enter either country temporarily without need of prior approval procedures, petitions or labour certification tests. As well, both countries have agreed not to require labour certification tests or similar procedures for temporary entry of intracorporate transferees. Supplemental visas or equivalent prior application procedures will be established to provide added certainty for temporary entry of certain traders and investors. Finally, Canada and the U.S. have agreed to the establishment of a new consultative mechanism to address the implementation of these undertakings and to allow for further facilitation of temporary entry.

D.P.S.

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DOES THE CANADA-UNITED STATES FTA DISPUTE SETTLEMENT PANEL PROCEDURE REALLY REPLACE JUDICIAL REVIEW?

By: Peter Clark,
Grey, Clark, Shih and Associates, Ottawa

One of the important gains in the Canadian assessment of benefits of the Free Trade Agreement with the United States is that a bi-national panel will replace existing judicial review systems in antidumping and countervailing duty actions. This perception is, apparently, shared by some U.S. observers as well.

However, a careful examination of Chapter 19 of the FTA text (released December 11, 1987) suggests that continuing access to existing judicial review systems will, in fact, be possible.

This is, of course, a matter to be addressed in each party's implementing legislation. But it appears that access to existing systems will not be precluded.

First, one should examine Article 1904(1) of the Agreement. It states:

A final determination shall not be reviewed under any judicial review procedures of the importing Party if either Party requests a panel with respect to that determination within the time limits set forth in this Article. Neither Party shall provide in its domestic legislation for an appeal from a panel decision to its domestic courts.

This paragraph could be interpreted to mean that if neither party has sought a panel within the time frames established in Article 1904(4), a request for judicial review can proceed.

This interpretation is supported by the wording of 1904(12) which states that the provisions of Article 1904 (which relates to review of final Antidumping and Countervailing Duty Determination) shall not apply where:

- a) neither Party seeks panel review of the final determination;
- b) a revised final determination is issued as a direct result of judicial review of the original final determination by a court of the importing Party in cases where neither Party

sought panel review of that original final determination.

These provisions contemplate referrals to the normal court system when "neither side sought Panel review" - precisely the situation envisaged in Article 1904(11).

If a private party wishes to seek domestic judicial review of a final determination, it must meet the notification requirements of Article 1904(15)g which requires that:

- each Party shall amend its statutes or regulations to ensure that:
- i) domestic procedures for judicial review of a final determination may not be commenced until the time for requesting a panel under paragraph 4 has expired, and
 - ii) as a prerequisite to commencing domestic judicial review procedures to review a final determination, a Party or other person intending to commence such procedures shall provide notice of such intent to the Parties and to other persons entitled to commence such review procedures of the same final determination no later than ten days prior to the latest date on which a panel may be requested.

The time for requesting a panel in paragraph 4 is within 30 days following the date of publication of the final determination in question in the Federal Register or the *Canada Gazette*.

Decisions of the Canadian Import Tribunal must normally be appealed to the Federal Court within 10 days, but there is scope under 28(1) of the Act to extend that time limit.

United States Section 516A 2(A)1 of the U.S. *Tariff Act of 1930* provides that an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade, within 30 days after the date of publication in the Federal Register of, *inter alia*, a final negative determination by the administering authority or the Commission on antidumping actions.

U.S. petitioners seeking to appeal a negative determination would appear to be precluded by the provisions of Article 1904(15)g from using the domestic judicial review system because of the existing 30-day time limit for commencing appeals. But this assumes that the time frames in Section 156A of the *Tariff Act*

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of 1930 will not be amended. That may be a very large assumption given Congressional reluctance to deny U.S. citizens access to their own judicial system.

The negotiators may have been trying to find a soft way to deny petitioners access to the domestic courts if they lose an action. Congress would no doubt react negatively to a blunt statement denying such access. But the net effect of these provisions will not likely be lost on Congress.

In light of paragraph 12(b) of Article 1904, if Congress does amend the time limits for appeals of final determinations, could Canada claim that an early amendment was inconsistent (either prior to or after the implementation of the Agreement) with the Standstill promises reflected in the Elements of the Agreement or a later amendment inconsistent with the objects and purposes of the FTA?

Further, 1904(1) states the parties shall replace judicial review of final antidumping and countervailing duty determinations with bi-national panel review. This appears limited by the preceding clause "As provided in this Article," and the article appears to contemplate access to domestic judicial review.

Indeed, Article 1904, paragraph 12 cites three circumstances in which the provisions of Article 1904 will not apply. These tend to support the view that the text contemplates access to domestic judicial review procedures regardless of the negotiators' intent.

The amendments required to U.S. and Canadian legislation by Article 1905(15) do not seem to preclude referral of final determination to domestic judicial review.

There have been suggestions by Senior U.S. Trade lawyers that the notification procedures under Article 1904(15)g(ii) will permit either party to preclude the possibility of domestic judicial review by requesting a panel. But how would this work in a case where, for instance Canada had prevailed at the International Trade Commission, and the U.S. industry notifies its intention to seek domestic judicial review?

Would the U.S. Administration seek a panel when its citizens clearly want to use the

domestic courts and when access to the domestic judicial review system appears to be contemplated by the Agreement? If this is what the negotiators intended, why does not the Agreement say so?

The other alternative in the above example would be for the Canadian Government to launch a pre-emptive strike by seeking confirmation of the ITC decision from a panel. But what grounds would Canada rely on in its application for review? Having won its case at the ITC would it then claim that a panel should review the decision because it was, in the words of Section 516A(b) the *Tariff Act of 1930*:

- unsupported by substantial evidence on the record; or
- otherwise not in accordance with the law?

This seems unlikely. However, some U.S. observers consider that, given Canadian suspicions of the Court of International Trade, the Canadian Government might seek panel review to avoid the use of U.S. domestic procedures. Some U.S. observers consider that nothing in the FTA would legally preclude a Canadian referral to a panel for the purpose of confirming the validity of the final determination.

Appealing wins may become the norm.

SUBSIDIES IN CANADA-UNITED STATES FREE TRADE

The elements of the Canada-United States Free Trade Agreement provide that in respect of domestic antidumping and countervailing duty laws:

The investigating authorities of each Party shall continue to enforce domestic antidumping and countervailing duty laws within their jurisdiction.

That these laws will remain in place has been seen as a major deficiency of the agreement. This may be a mis-impression caused by unrealistic expectations. The stated objective of gaining exemption from U.S. trade laws was not attainable.

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Both dumping and subsidization are "unfair" but are frequently used trading practices which are condemned by *GATT*. However, they are actionable by imposing additional duties only when they are injurious to the producer in the country of import. The only way that the U.S. would have agreed to exempt Canada from countervail would have been if Canada had agreed to eliminate all subsidies except for a very short list. Canada should seek to avoid disciplines on its right to grant industry and firm specific assistance. While thousands of firms may benefit from this assistance over the course of a year, very few will be challenged under United States CVD law.

As a practical matter, very few Canadian subsidies cause problems to U.S. producers. Broad constraints on Canada's ability to subsidize would go much too far. While there may be some attractions in eliminating subsidies to finance ministers and treasurers, others do not want to lose their ability to tailor assistance to political and economic needs.

One of the most controversial and complex issues in international trade, and one to be considered intensively by the U.S. and Canada under the new FTA, is the issue of subsidies and countervailing duties. Many Canadian interests are particularly concerned about potential limitations on regional development subsidies. This is also one of the most emotional issues since when one government imposes a countervailing duty, it attacks the internal policies of another. Furthermore, the target government considers that its financial resources (the subsidy) are being transferred to the importing nation's treasury when an offset duty is imposed.

Few will deny that the granting of export subsidies by industrialized countries constitutes unwarranted government interference in trade which should be actionable. Except in the case of developing countries, there is a wide body of opinion that export bonuses, bounties and grants should be actionable without having to prove injury.

Subsidies which are not export subsidies are a different matter. Article 11 of the *GATT* Subsidies and Countervailing Measures Code recognizes that subsidies are used by governments to promote important objectives of

social and economic policy including "the elimination of industrial, economic and social disadvantages of specific regions." Here is our *GATT* right to provide regional development assistance. Canada fought hard to maintain this right in the Tokyo Round. We must not lose it. The FTA does nothing to affect such assistance as long as part of the assistance package does not involve the use of performance-related duty waivers.

However, the Code also recognizes that the provision of such subsidies "may cause adverse effects with the interests of other signatories."

Furthermore, signatories to the Code, including Canada, have agreed in Article 8(3) to "avoid causing, through the use of any subsidy, injury to the domestic industry of another signatory."

Under existing international trade laws, subsidies may be offset by countervailing duties if they cause or threaten injury to producers in the importing country. However, there is no definition of a countervailing subsidy in either the *GATT* or the Subsidies and Countervailing Measures Codes. In practice, countervailing duties are imposed on both export subsidies and those which are granted for domestic purposes in the country of export.

Regional subsidies consist mainly of financial assistance designed to offset the disadvantages of locating in depressed or economically disadvantaged areas within a country. The definition also includes financial assistance which is not generally available throughout the entire country (or in the case of provincial assistance, the province). They are domestic, not export subsidies.

In U.S. countervail practice, the program must be available in 100% of the country (or province, if a provincial program) to be exempted from countervail. Thus, the U.S. has found a Québec program available in the entire province, except in Montreal, to be regionally targeted and therefore countervailable.

The Canadian criteria for countervailing regional development subsidies are less restrictive than they are in the United States. The Subsidies Appendix in the recent Revenue Canada Customs' preliminary determination of subsidization in respect of *Drywall Screws* from

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France states:

In determining whether a program is originally targeted within the jurisdiction of the granting authority, consideration is given to the reasons why the program is directed only to certain segments of that jurisdiction. If a program is directed to a certain region within the granting authority's jurisdiction because that region is the only one which could reasonably benefit from that type of program or that region possessed certain characteristics which are unique in the jurisdiction, then the program may not be considered to be targeted.

In *Drywall Screws*, Revenue Canada Customs found that preferential loans to the French producer from the European Steel and Coal Community was considered to be targeted "as it is available only to industries located in ECSC zones."

In another recent case, *Grain Corn from the USA*, Canada again adopted a more relaxed approach than the United States standard. Canadian authorities found that the U.S. Economic Development Grants for public works and development were not regionally targeted because "approximately 81 per cent of the United States population live in such areas" (those who could benefit from the grants). The U.S. would have countervailed in those circumstances because the program did not reach 100% of the country.

On the other hand, the U.S. Great Plains Conservation Program which was available "to farmers in 510 counties and 10 states" was considered by Canada to be targeted "due to its regional nature."

As a practical matter, locational or "regional" subsidies do not weigh heavily in the calculation of total subsidy margins.

Take, for example, a \$40 million plant which produces \$150 million of sales annually and receives a 25% regional development grant which is quite high. If this grant is allocated over total sales and amortized over a 15 year period (the expected annual life of the plant), the subsidy is equivalent to 0.44 per cent of the export price which is not a significant impediment to the majority of industries.

It is rare that regional development subsidies to aid plant construction are very large when allocated over production during the useful life of

the plant. In no countervailing case by the U.S. against Canada or Canada against the U.S. since 1980 have total regional subsidies reached one per cent of the export price.

Furthermore, as Canada is now relying more heavily on loan guarantees or preferential loans to achieve regional development objectives (as opposed to large transfers of funds), the subsidy value may be even less. Indeed, in *Drywall Screws*, the benefit calculated by Revenue Canada Customs was 0.07 French francs per thousand screws at an approximate export price of 15 francs per thousand.

Based on the numbers, it is interesting that the U.S. Congress seems so concerned about regional development subsidies (which are also available at the state level in the U.S.) and Canadians are so concerned about such assistance being attacked. The threat of injury to U.S. producers is clearly negligible and the impact of countervail almost non-existent.

This reality does not mean there should not be a major concern over existing countervailing practices. It does mean the real impact on Canadian firms lies elsewhere in:

- the cost of compliance with DOC's initial investigation and period reviews;
- the uncertainty created by the publicity attached to the investigation;
- uncertainty about the changing definition of subsidy in U.S. trade law; and
- the nuisance and disruption of the process.

There has been a great deal of heat over this matter. Perhaps it is time to sit back, reflect, try to understand each other's concerns and address what is real and important in the relationship, not what is imaginary and optical.

Canadians understand that if one stops to brush away every black fly that lights, one will never get any fishing done.

Philosophies about subsidies are so different that it was unlikely that any reasonable ground could be reached at least in the short term. The importance that Congress attaches to subsidies often far outweighs their properly allocated significance to the recipient.

A major Canadian concern was that our ability to grant regional development subsidies (which are also important to many U.S. states for

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the same reasons they are to Canadian governments) would be impaired, and there would be no exemption for income support programs for agriculture from countervail despite the fact that both Ambassador Yeutter and Agriculture Secretary Lyng argued that U.S. subsidies of the same nature should not be countervailed when Canada did so in *Grain Corn*. These programs have not been prohibited. True, they could be subject to the imposition of countervailing duties, but this will only happen if such subsidies cause or threaten material injury to U.S. producers. As noted above, this will not happen irrespective of the majority of assistance granted in Canada. Even when such subsidies are investigated, allocation methodology minimizes the impact of any potential countervailing duty.

Antidumping

Some commentators and academics argue that international price discrimination (like the home grown variety) should properly be addressed under antitrust or anti-competition laws. Their view is that such practices should be examined in the light of their impact on competition rather than their impact on competitors. It has been suggested that trade laws may be used by industries like steel and heavy electrical equipment to remove rather than to encourage competition. Different petitioners regularly co-operate or form coalitions to have these laws invoked.

It will be some time before changes to the existing antidumping philosophy area will gain broad political acceptance. An important U.S. argument against the competition-based approach to dealing with international price discrimination is that North American firms are denied access to other markets through very high tariffs or non-tariff measures. Producers in these countries can earn high profits in their sheltered home markets and price at low-levels for export into markets where the local producers are largely limited to their own market. It is hard to refute demands for protection from differential pricing or government-assisted competition in this situation.

Canada probably needs an antidumping law in FTA trade more than the U.S. within the FTA because surplus production in the U.S. of many products can be very large in relation to Canadian demand. There must be an effective discipline against it being disposed of in Canada in a manner which causes material injury to Canadian producers.

While it may be difficult to change the basis of systems designed to address price discrimination, the negotiators should try to eliminate some of the abuses which have crept into the systems in order to meet the needs of special interest groups. The most obvious is the use of constructed cost by both countries as a means of determining dumping. There is a place for this approach but it should be more limited than it has become.

Some consider that Canada and the U.S. should return to the original GATT Article VI approach to subsidies, to address only export subsidies and then only when these subsidies result in lower export than domestic prices (when the subsidized exports create a dumping situation). This would largely eliminate the need for a CVD law. The United States is not likely to accept this view because it focuses on more than export subsidies. U.S. concerns about targeting are focused on the domestic incentives to produce or to export created by the subsidy.

P.C.

REVENUE CANADA'S PRELIMINARY DETERMINATION OF DUMPING IN HYUNDAI

There has been much controversy over Revenue Canada Customs and Excise's preliminary determination (P.D.) in cars exported by, or on behalf of, Hyundai Corporation. The statement of reasons in support of Revenue Canada's P.D. is very clear and very detailed. It suggests Customs tried to play the investigation strictly by the book. It does not suggest arbitrariness other than the use of estimates required because of inadequate co-operation.

If the Customs' reasons accurately record the investigation, it might be concluded that if Hyundai ended up with a higher preliminary

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dumping margin than it might have otherwise, it was, in part, its own fault.

Customs appears to have tried to act fairly in this case. The immediate referral by the Deputy Minister to the Tribunal for a decision on injury was an indication that he may have had some concerns about the quality of the injury data or the novel approach to injury adopted by petitioners. However, the Tribunal's injury test at the preliminary injury stage is not a high threshold test. It can be argued that the Tribunal tends to allow the petitioner to go through the process unless the complaint is devoid of any reasonable evidence of injury. At this stage the evidence required is *prima facie* evidence. But a preliminary injury finding by the Tribunal does not ensure a final affirmative determination.

It is crucial in *SIMA* actions to recognize the importance of early and detailed attention to the preliminary Customs investigation. Because Hyundai is such a complex case, this becomes even more important. Revenue Canada recognized the complexity of the case by extending the period of investigation from 90 to 135 days.¹

Revenue Canada conducted two verification visits at the exporter's premises in Seoul, each lasting for a week. It also did back-up verification at Hyundai Canada over a 10-day period. Such extensive verification procedures are unusual. Yet Customs still referred to delays in the investigation which prevented it from verifying all information submitted, particularly costs.²

It is essential in these investigations to co-operate with Customs. The Department is for the most part prepared to accept arguments by exporters for favourable adjustments if they are based on sound evidence and financial data. Customs is particularly attentive to cost allocation methodology. It must also be convinced that the allocation and costing is consistent with accounting practices and principles in the country of export. If an exporter does not co-operate with Customs, or is not able to produce supporting evidence, Customs will rely on the best information available.³

Customs did a great deal of estimating at the P.D. in Hyundai. However, it appears from the Statement of Reasons supporting the Preliminary Determination that it may not have had much choice.

Customs noted, for example, that:

...It was determined that Hyundai's method of allocating costs to production shops was such as to result in a substantial shift in the costs of the Excel models to the Pony, Stellar and other models.⁴

This means that Customs was not satisfied with Hyundai's allocation methods so it did its own. This probably resulted in higher margins than if Hyundai's allocations had been proven to be acceptable.

The Department also notes:

...since the outset of the investigation, the Department has maintained that propane vehicles are not comparable to the gasoline powered vehicles shipped to Canada. Propane vehicles require substantially different equipment (carburetor, fuel system and emission system) than gasoline vehicles. Therefore sales of propane vehicles have not been included for purposes of establishing normal values.⁵

It would appear that Hyundai considered that propane vehicles would offer a more favourable comparison to its export models (leading to lower dumping margins). Customs, however, normally looks for the most comparable model.

The Department concluded "that all domestic sales of Presto and Excel models have been deemed to be unacceptable"⁶ because they were sold at prices which did not reflect recovery of what the Department estimated to be fully absorbed cost. This is normal Customs' practice.

Customs does not accept that sales at less than full cost "are in the normal course of trade." Indeed, the statute precludes it from taking account of home market sales "at prices which do not provide for recovery in the normal course of trade and within a reasonable period of time of the cost of production of the goods, the administration and selling costs with respect to the goods and an amount for profit."⁷

Customs had this to say about quality and material adjustments in the normal value calculation.

Therefore, adjustments for qualitative differences were computed under regulation 5(a) in determining normal values. The qualitative difference varied by model and by the time period. The adjustment on a weighted average basis for the combined sales of the Pony and Stellar was an upward adjustment.⁸

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This means that the estimated cost of production for export models was higher than for domestic models. This increases the normal value.

Customs also found:

...the warranty associated with export sales was found to be of a greater duration. Therefore, an upward adjustment to the price of like goods was made pursuant to regulation 5(b) to take into account this warranty difference. The adjustment, on a weighted average basis, for the combined sales of the Pony and Stellar resulted in an upward adjustment.⁹

This means that the extra cost of warranty incurred on exports increased the normal value. Once again, this is normal Customs' practice.

Hyundai did not provide adequate detail about domestic credit costs.¹⁰ Customs deemed them to be cash sales (a bit arbitrary). It added the cost of credit on the export sales to the normal value. This was done pursuant to regulation 5(d). If Hyundai can provide credit information by the Final Determination, the margins may be reduced.

Customs noted *inter alia*, in respect of manufacturing cost data:

- ...the exporter's submission was subjected to an intensive audit and as a result, major areas relating to the cost of production were found to be deficient and inaccurate.¹¹
- The costs presented by HMC were found to be unreliable.¹²
- Costs presented in some instances were not actual costs but rather reflected prices expected to be negotiated in the future.¹³
- The costs shown on the bill of material for parts sourced from the same supplier were different for domestic and for export models in some instances. The explanations provided were not conclusive.¹⁴
- HMC did not provide data which would allow the estimation of variances between standard and actual costs.¹⁵
- No information was provided to demonstrate that the components acquired from related suppliers reflected fully absorbed costs.¹⁶

This latter point is important for an integrated company like Hyundai. Customs will not accept acquisition cost of parts and materials purchased from related suppliers at less than cost.

Customs went on to note:

HMC allocated costs over all models without regard for the fact that costs, in many instances, were maintained separately for the different models. In one instance, costs incurred were predominantly for the Excel but were allocated over production costs of all vehicles. Therefore, it appeared that these costs were being shifted from the Excel to other models.¹⁷

Clearly, Customs took a hard look at allocations. It is not unusual for exporters to try to rationalize its allocations in a way which will minimize dumping margins. It may also be consistent with Korean accounting practice to allocate in this way in respect of certain GS&A expenses.

Customs also noted:

No start up costs were provided in spite of several requests and only limited information was available on preproduction costs. HMC believed these costs were not relevant because they were incurred prior to the period of review. Pursuant to regulation 11, such costs must be considered as part of the cost of production.¹⁸

Customs is correct in its interpretation of Regulation 11. When an exporter refuses to provide information, he is forcing Customs to use the best information available. This raises questions about how Customs actually estimates these costs. Often it is on the basis of information provided by petitioners.

Hyundai may have some defenses based on Korean accounting standards. Deferred development expenses in Korea "carried in the balance sheet at the year-end preceding the fiscal year of the effective date of the Standards should be amortized within five years beginning with the fiscal year of the effective date."¹⁹ These standards also note that "pre-operating costs should be amortized at an equal amount each fiscal year within three years starting from the fiscal year of the start of operations."²⁰

Customs also considered that:

Sufficient information was not provided for technical assistance and training and spare parts royalties, resulting in an understatement of royalty costs.²¹

It must be assumed that Customs used some method of estimating the understatement of royalty costs. As noted, it normally relies on information supplied by petitioners. This would

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probably have only a minor influence in the calculation but it would raise the normal value.

Customs then expressed concerns about allocation of depreciation. The P.D. states:

Depreciation was spread over all production with no regard given to the equipment requirements of the different models and the concomitant depreciation expenses. This distorts expenses as a model with a higher standard labour rate is allocated more depreciation, e.g. the Pony is allocated more depreciation than the Excel.²²

Customs' judgment on this subject may be wrong. It may not be taking account of practices which may be acceptable in Korea. However, it is not evident from the Korean accounting standards consulted for the purpose of this paper whether or not Hyundai's methods are consistent with normal Korean practice.

All of the deemed deficiencies in Hyundai's submission led to the conclusion that: "HMC's costing system does not appear to reflect actual costs."²³

This is Customs' cover for using estimates. Hyundai was also forced into a constructed cost mode because Customs concluded:

Profitable sales of other like goods cannot be used to determine normal values as it is impossible to make the appropriate quality adjustments pursuant to regulation 5 due to the lack of verified cost information. It is also not possible to estimate normal values pursuant to paragraph 19(b), again due to the lack of verified costs.²⁴

The increases in normal values were exacerbated by reductions in the export price. SIMA provides that the export price is the lesser of the amount paid by the importer or received by the exporter.²⁵ Customs reduced the export price paid by Hyundai Canada which resulted in widening the margin of dumping because it determined that:

The review of the reliability of the export prices by model indicated that the selling prices were not sufficient to absorb all costs and expenses incurred by HACI on the sales in Canada of the subject goods and an amount equal to the industry profit on sales in Canada of goods of the same general category, during the July, 1986 to December 1986 period.²⁶

Customs concluded:

Since the export prices of the subject goods were deemed to be unreliable, export prices were estimated pursuant to paragraph 25(c) of the SIMA.²⁷

Customs determined that Hyundai Canada did not earn a profit in Canada. Since this is dealing with related companies, this results in an adjustment (downward) in selling price to a level which would permit Hyundai Canada to cover all costs plus a 7.6% profit.²⁸

In calculating the profit margin Hyundai Canada should have earned, Customs concluded:

The weighted average amount for before-tax profit on sales in Canada by Canadian vendors during the period of review was found to be 3.32%.²⁹

This is a more liberal approach than Customs has used in other cases where it employs a 7.6% minimum profit.³⁰

Revenue Canada was not as restrictive with Hyundai as it has often been in other cases.

If Hyundai provides the information required by the Department, there could be a significant downward movement in the margins. Customs, in the P.D., notes the following possibilities:

Regulation 5(d) - Terms and Conditions of Sale
The regulation 5(d) adjustment to normal value does not reflect domestic credit activity. An adjustment reflecting the above would decrease the margin of dumping.³¹

Regulation 9 - Trade Level

In the case of expenses relating to payroll benefits, no adjustment was allowed because the portion of the expenses related to direct selling could not be isolated from the overall payroll and benefit expenses. An adjustment reflecting the above would decrease the margin of dumping.³²

Regulation 10 - Drawback of Taxes and Duties

HMC provided documentation which indicates that some components, which are sourced outside of Korea and are introduced into the exported cars, are subject to drawback of Customs taxes and duties. However, no evidence was provided to the Department to substantiate that the like goods which are sold domestically in fact contain these same components and that the costs of the import taxes and duties are reflected in the domestic selling prices.³³

Regulation 4 - Quantity Adjustment

We believe the adjustment which might be considered is one that would result from reductions in selling and distribution costs were HMC to sell to large distributors in Korea of a size equivalent to HACI.³⁴

Expenses Incurred by Hyundai Corporation

However, no information regarding HC's expenses was provided or obtained during the verification exercise.³⁵

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Allocation of HACI's GS&A Expenses

Hyundai Auto Canada Inc. did not provide suitably documented information supporting the allocation of advertising and incentive program expenses to specific models.³⁶

The onus is on Hyundai, particularly the Korean exporter, to be more co-operative with Revenue Canada if it wishes to obtain a reduction in the dumping margins in the final determination.

Endnotes

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| <ol style="list-style-type: none"> 1. RCCE, Preliminary Determination Cars from Korea, (P.D.) Statement of Reasons, File 4264-41, November 24, 41 at 2. 2. P.D. at 3. 3. See <i>SIMA</i> 29(1) Customs in fact "estimates" at preliminary determination. They estimate using the information available - at the time the estimate is made - <i>SIMA</i> 38(a)ii. Section 29 is reserved for final determinations. 4. PD at 4. 5. PD at 5. 6. PD at 6. 7. <i>SIMA</i> 16(2)b. 8. PD at 7. | <ol style="list-style-type: none"> 9. PD at 7. 10. PD at 8. 11. PD at 8. 12. PD at 8. 13. PD at 8. 14. PD at 8. 15. PD at 8. 16. PD at 9. 17. PD at 9. 18. Financial Accounting Standards in Korea, Chapter IX, Addendum 1, Note 3. 19. <i>Ibid.</i>, Article 98:2. 20. PD at 9. 21. PD at 9. 22. PD at 9. 23. PD at 9. 24. <i>SIMA</i>, Section 25. 25. PD at 11. 26. PD at 11. 27. <i>SIMA</i> Regulation. 28. PD at 11. 29. <i>SIMA</i> Regulation. 31. PD at 28. 32. PD at 13. 33. PD at 13. 34. PD at 13. 35. PD at 13. 36. PD at 13. |
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P.C.

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U.S. TRADE LAW PROPOSALS

By: Gary N. Horlick
O'Melveny & Myers, Washington

It appears highly unlikely that omnibus trade legislation (H.R.3) will be enacted by Congress this year. Democratic leaders in both the House and Senate conceded in the latter part of November that passage was no longer likely. The delay is attributed to the involvement of the Senate Finance Committee and the House Ways and Means Committee in budget deficit reduction talks with the Administration and to the press of other business.

Key issues yet to be resolved between the House and Senate versions concern section 201, trade adjustment assistance and miscellaneous trade issues, the extent of presidential discretion and language on section 301 and antidumping and countervailing duty laws. The Administration remains opposed to provisions requiring 60 days advance notification to workers of plant closings, the registration requirement for foreign investment, denial to the President of tariff proclamation authority and tighter regulations regarding "sham transactions," diversionary input dumping and application of AD/CVD laws to imports by government entities.

This article describes the key provisions and the differences in the House and Senate versions of the bill.

Trade Negotiation Authority

The House-Senate conference on the omnibus trade bill agreed on October 22, 1987, to extend Presidential negotiating authority for multilateral and bilateral trade agreements. The move represents the first substantive progress on reconciling the two versions of the trade bill.

The extension would give the President "fast track" authority to May 31, 1993, unless there is some disapproval by Congress in which case the extension would be until May 31, 1991. It gives the President authority to take part in bilateral, multilateral and non-tariff

negotiations. Conferees also agreed to a staff recommendation calling for implementation of the harmonized system in which the U.S. will join most other nations in using a new international code of tariff nomenclature by January 1, 1988.

No agreement has been reached, however, on the extension of the President's tariff authority. There is some disagreement as to whether the President should receive proclamation authority in lower tariffs or whether he must get fast track approval for such actions from Congress. The proposal in the House bill would give the President authority to negotiate and proclaim tariff reductions for five years (from January 3, 1988, through January 2, 1993) with no product exclusions. Duty reductions on import-sensitive articles are subject to a ten year phase-in, and the maximum depth of cut is 60 per cent of the existing level. In the Senate bill, tariff and non-tariff agreements are treated alike. Tariff agreements under this provision would be submitted to Congress for fast track approval.

Senator Lloyd Bentsen, (D-Texas), initially said he will push for the fast track method as a means of getting Congress involved in the process but may accept the proclamation authority as part of a larger compromise. However, U.S. Trade Representative Clayton Yeutter has said the proclamation approach would be in the best interests of Congress as well as of the President since a fast track approach would put pressure on lawmakers. These provisions have been deferred until a later meeting. A provision in the Senate bill that called on the President to initiate negotiations to conclude trade agreements with Mexico, Caribbean Basin countries and Canada to provide for the eventual elimination of tariff and non-tariff barriers was abandoned. There was no comparable provision in the House bill. Also abandoned was a House provision that would have authorized the President to enter into reciprocal duty reduction arrangements with Canada.

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Antidumping and Countervailing Duties

Diversionsary Input Dumping

The House bill includes a provision relating to diversionary input dumping by which a producer incorporates into imports to the United States a product purchased at less than fair market value or which has been subject to an antidumping order. The bill requires the Department of Commerce to investigate whenever it has reasonable grounds to believe diversionary dumping is occurring and to take appropriate remedial action. The Senate trade bill makes no direct provision for diversionary input dumping except where related practices are covered under the downstream monitoring provisions. The Administration opposes these House proposals on the grounds that the remedies violate the *GATT*.

Prohibiting Exemption of Government Purchases from AD/CVD Duties

Contrary to current administrative practice in which U.S. governmental importations are not subject to regular customs duties, the House bill provides that imports by and for the use of a Government agency will not be exempt from the applicable duties imposed under antidumping and countervailing duty laws. The Senate version is similar to that of the House except that it exempts merchandise imported by, or for the use of, the Department of Defense (DOD) that is subject to DOD Memorandums of Understanding and where there is no private market for the products. However, the Senate provision does not allow the DOD to renew existing MOU agreements nor does it allow for the negotiation of new ones. A compromise may pick up those problems.

Circumvention

Section 155 of H.R.3 contains new measures to prevent circumvention of antidumping findings and countervailing duty orders. It provides that AD/CVD orders may cover:

- 1) the importation of parts or components to be assembled in the U.S. into merchandise covered by the order, and
- 2) the importation of an unfinished article to be completed in the U.S. by means other than assembly into merchandise covered by the order. The House version requires, in such cases, that:
 - (a) substantially all the parts are imported from a country subject to the finding;
 - (b) that value added in the U.S. is small; and
 - (c) that parts or components are produced by a company related to the company performing the U.S. operations.

The Senate version is similar but broader in application in that it drops provisions "a" and "c" cited above.

Downstream Product Monitoring

Section 164 of H.R. 3 adds new procedures for monitoring imports (on a volume basis) of downstream products in order to identify potential diversionary practices resulting from AD or CVD duties. The House bill authorizes domestic producers of component parts of downstream products to petition the DOC to designate a downstream product for monitoring. In the bill, the ITC would monitor and report on the volume of trade. The DOC must then consider the ITC reports when deciding whether or not to initiate an AD or CVD investigation. The Senate bill is similar to that of the House but limits monitoring to cases where:

- there is an existing monitoring program for the component product;
- there are a larger number of cases on related products from the same country; or
- there have been two or more cases against the same company on products which are similar in description and use.

Multiple Offenders

The provisions in both the House and Senate bills would allow a domestic industry to petition the Department of Commerce to monitor imports from a foreign producer whose products have been subject to a previous antidumping finding. The bill allows Commerce

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to initiate an antidumping investigation when monitoring indicates continued dumping and would require monitoring of second offenders and of related product categories of third offenders.

Private Remedy for Injury Resulting from Dumping

Section 166 of H.R. 3 amends the *Antidumping Act of 1916* (which permits the award of damages in a private right of action against defendants who dump with the intent to destroy an industry). It would establish a rebuttable presumption of "intent to injure a U.S. industry" for purposes of that Act against offenders with three or more dumping offenses within 10 years. Under the House bill, the presumption of intent would be available only when the plaintiff is a U.S. manufacturer of a like product. The Senate version includes no provisions relating to the current right of action against dumping. The Administration opposes the provision as a violation of GATT and because of the threat of mirror legislation against U.S. exports.

Material Injury/Threat of Material Injury

The new bill in both the House and Senate versions clarifies the criteria by which the ITC makes determinations of material injury to domestic producers and requires the ITC to explain more fully the reasons for its determination. The Senate version additionally requires the ITC to determine the actual and potential negative effects of dumping on efforts of domestic producers to develop and produce products derived from an earlier type of product.

Actions to Evade Payment of Antidumping Duties (Sham Transactions)

The Senate version requires the DOC to treat an importation as a sham and the purchaser as the party liable for duties in cases where merchandise is imported into the United States by a foreign exporter through a U.S.

subsidiary created to absorb antidumping duties on behalf of the producer.

Critical Circumstances

This provision, contained in the Senate provisions, would authorize the DOC to request that Customs compile statistics on an expedited basis on the volume and value of imports subject to investigation if it suspects critical circumstances leading to injury. Commerce would have authority to make a preliminary determination of critical circumstances at any time after the initiation of an investigation. The injury criteria would also apply to attempts made to circumvent AD/CVD proceedings by importing large quantities of a product prior to a preliminary determination or to instances where foreign economic conditions create a likelihood of a recurrence of dumping.

Section 201 (Import Relief)

There has been some opposition to the Senate's Section 201 provision on import relief because it mandates, with a few exceptions, that the President grant relief if the ITC finds an industry has been hurt by imports. While the White House opposes part of the House 201 provision, the House language is considered to be the more acceptable of the two. Some Senators are opposed to granting import relief to industries under Section 201 of the Act, unless these industries are willing to take steps necessary to improve competitiveness. Senator Lloyd Bentsen (D-Texas) and chairman of the Senate Finance Committee stressed that Section 201 should not be used to protect American industries that refuse to modernize, but rather to make these industries more competitive.

According to House sources, Section 201 is one of the next major provisions to be addressed. Reaching a compromise on these provisions, however, will require major decisions by members of Congress on key issues, such as the extent of Presidential discretion, before the staff can do the work on compromise language.

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Section 301 (Retaliation)

The Administration is taking the view that some of the Section 301 amendments in the trade bill would be "helpful" in the fight against unfair trade practices by foreign countries and could increase U.S. leverage in international negotiations. U.S. Trade Representative Clayton Yeutter emphasized the Administration is against the curb on Presidential discretion in the trade bill. The bill transfers from the President to the USTR the authority to determine whether certain actions by foreign countries constitute barriers to, or distortions of, trade. It would also give the USTR the authority to make an estimate of the trade-distorting impact of such actions on U.S. commerce. The Administration opposes the House language in the bill, sponsored by Rep. Richard Gephardt (D-MO), that would require foreign countries to cut their trade surplus with the U.S. In addition, it opposes the comparison legislation in the Senate trade bill. Sources say that the Gephardt amendment to the House bill has no chance of passing. The October stock market crash virtually assures that controversial provisions emphasizing protectionism, such as the Gephardt amendment which would cause upheaval in the market if it were to become law, have no chance of passing the conference.

U.S.-CANADA FREE TRADE TALKS

After long and difficult negotiations, United States and Canadian negotiators successfully concluded free trade talks just before the midnight deadline on October 3, 1987. The agreement is still subject to the approval of Congress and the Canadian Parliament.

The agreement would create five-member bi-national dispute resolution panels to settle trade disputes, would liberalize conditions for investment and would eliminate all bilateral tariffs by 1989. Some tariffs would be eliminated immediately, others in annual stages over a period of five or 10 years.

The agreement prohibits each country from restricting imports of fairly traded goods from the

other country unless such goods are a substantial cause of injury to domestic production. Under current laws, Canadian or U.S. goods can be subject to quotas or special tariffs in the other country, even if they are only a small part of global import volumes causing injury in the importing country.

The U.S. and Canada are to agree on a roster of possible panelists, one-half to be suggested by the United States and one-half to be suggested by Canada. Each panel would then choose two panelists from the roster. The fifth member would be selected by both parties or, if they are unable to reach an agreement, by the other four panelists. The five-member panel will have the sole power to review final AD and CVD decisions by either the U.S. or Canada. In addition, they will be subject to a deadline of 300 days which is shorter than the time taken by the U.S. Court of International Trade to obtain a decision. Cases will be decided on the basis of the law of the administering country. The existing antidumping and countervailing duty laws will continue to apply, but final changes in these laws can be applied only after prior consultation, only if Canada (or the U.S.) is specifically mentioned in the legislation, and would be subject to binding dispute resolution under the panel procedure.

The provisions of the formal accord will not become effective until enacted into law in both the U.S. and Canada. During the next few weeks, the Administration will consult with Congress on the language of the agreement. After the President signs the agreement, which must occur by midnight January 2, 1988, he will send Congress legislation to implement the accord. Congress then has 60 legislative days (90 in certain circumstances) to vote on the agreement without amendments. This is unlikely to occur before March or April 1988.

G.N.H.

CANADIAN COMPETITION POLICY RECORD

TRADE LAW ACTIONS**Potassium Chloride ("Potash")**

The Department of Commerce postponed until January 8, 1988, its final determinations of whether sales of granules of potassium chloride from Canada have occurred at less than fair market value.

Steel Jacks

On September 1, 1987, the Department of Commerce announced the final results of its antidumping duty administrative review on steel jacks from Canada. Commerce found the dumping margin for the period September 1, 1983, through August 31, 1985, to be 23.35 per cent. The final results of the review are unchanged from those presented in the preliminary review.

Elemental Sulphur

The Department of Commerce published on October 29, 1987, the final results of its antidumping duty administrative review and

tentative determination to revoke in part the antidumping finding on elemental sulphur from Canada. The final results were unchanged from those in the preliminary results of the review.

Sugar and Syrups

On November 16, 1987, the Department of Commerce announced the preliminary results of its administrative review of an antidumping duty order on sugars and syrups from Canada. The review indicates no dumping margin, and Commerce intends to revoke the order with respect to the exported merchandise.

Color Picture Tubes

The Department of Commerce announced on November 18, 1987, its final determination that color picture tubes from Canada are being, or are likely to be, sold in the United States at less than fair value (a dumping margin of 65%). The U.S. International Trade Commission (ITC) will issue its final determination on December 22, 1987.

G.N.H.