TRADE POLICY DEVELOPMENTS

CANADIAN TRADE UPDATE

By: Brenda Swick-Martin
Fraser & Beatty, Ottawa

FTA Panel Established for Lobster Trade Dispute

The Canadian and U.S. governments have selected a five-member Panel to resolve the dispute over U.S. restrictions on Canadian live lobster exports. The Panel is being formed pursuant to Chapter 18 of the Canada-*U.S. Free Trade Agreement.* The Panel's report is scheduled to be released on May 15, 1990.

Accelerated Tariff Elimination under the FTA

On February 3, 1990, the Canadian government announced its intention to seek submissions from Canadian businesses for a second round of accelerated tariff elimination under the *Canada-U.S. Free Trade Agreement.* As a result of the first round of tariff elimination last year, agreement was reached on accelerated elimination of duties on some 400 tariff items covering approximately $6 billion in bilateral trade.

The agreement reached last year to accelerate the elimination of certain tariffs is scheduled to be implemented on April 1, 1990.

The federal government will be conducting extensive consultations with the domestic industries concerned, as well as individual companies, major industry associations, labour, provincial governments, the International Trade Advisory Committee, and the Sectorial Advisory Groups on International Trade.

Interested Canadian exporters and importers must submit their proposals for accelerated tariff elimination to the federal government by March 30, 1990.

Canada and U.S. Reach Meat Accord

Canada and the United States have entered into an agreement which will facilitate trade in beef, pork and poultry between the two countries. Under the agreement, each country agrees to allow entry of shipments of imported meat if they pass the meat-inspection standards of the importing country.

This agreement will be implemented this spring for one year on an experimental basis. If it is mutually acceptable at the end of the experimental period, the two countries will proceed with the legislative requirements to make the accord permanent.

Update on the GATT

Canada Proposes Rules on International Product Certification

The Canadian government has submitted a proposal to the current round of Multilateral Trade Negotiations (MTN) on methods for streamlining the rules on international product certification under the *GATT* Standards Code. The proposal recommends clearer product performance requirements and mutual recognition of testing and inspection results. The proposal would ensure the acceptance of a product in the importing member country once certified in any one member country.

Highlights of Recent Meetings of the Negotiating Groups at the MTN

MTN Agreements and Arrangements Group

Korea proposed that the *Anti-dumping Code* be amended to require administering authorities to consider the benefits of low-priced imports.

The U.S. proposal expressed its concern over foreign practices used to evade anti-dumping duties. It submitted amendments which would give importing countries greater power to deal with circumvention (such as establishing assembly operations in third countries), input dumping (where parts are shipped into the importing country for assembly) and repeated dumping.

The United States also submitted proposed changes to the *Agreement on Technical Barriers to Trade*. It submitted that lack of acceptance of laboratory test data between countries has been a barrier to trade. As such, it proposed amendments that would grant equal treatment to results of local and foreign laboratories.

Agriculture Group

The Cairns Group set forth its proposal for the long-term reform of agricultural trade. The reform process would require all contracting parties to be committed to a complete liberalization of all measures affecting agricultural trade. Commitments from all contracting parties would be required to change trade-distorting policies such as market price support measures and direct payments to farmers. New export subsidies would be prohibited and existing ones would be phased out by reducing them in accordance with an agreed time-table. The Cairns Group recommended that developing countries be given a longer time-frame for implementing their reform commitments, together with smaller commitments on market access and reduction of internal support.

Trade-Related Investment Measures

Both the EC and the Nordic countries emphasized the sovereign right of countries to formulate investment policies. The EC recommended that negotiations should not question national investment policies and that any new disciplines should build on existing *GATT* provisions. It noted that certain *GATT* Articles already apply discipline to the following trade-related investment measures:

- local content requirements;
- trade balancing requirements;
- exchange restrictions;
- product mandating requirements;
- export performance requirements;
- manufacturing requirements; and
- domestic sales requirements.

The EC suggested that further provisions should only be necessary in cases where the *GATT* does not adequately deal with the trade distortions caused by these trade-related investment measures.

Tropical Products

The Asian contracting parties proposed that developed countries undertake to: eliminate all duties on unprocessed tropical products; apply a formula of their choice to eliminate or substantially reduce by at least 75%, duties on semi-processed and processed items; further reduce or eliminate duties through the request-offer approach; and reduce or eliminate non-tariff measures through negotiations.

Subsidies and Countervailing Measures

The U.S. submitted its proposal on subsidies and countervailing measures. The U.S. proposal envisaged three categories of subsidies. With respect to the first category of subsidies, export subsidies, it suggested that the present prohibition on export subsidies on industrial products be extended to other subsidies such as trade-related subsidies which encourage the use of domestic inputs over imported inputs and those domestic subsidies that have a distorting effect where they exceed a certain percentage of total sales. For the second category, actionable subsidies, duties could be imposed where imports cause or threaten material injury to the domestic industry. It recommended that the third category of subsidies, ie. unemployment benefits, adjustment assistance etc., be non-actionable but could become actionable in certain circumstances.

GATT Articles

Canada and the United States submitted a joint proposal to improve the operation of Articles XII, XIV, XV, and XVIII which deal with matters relating to balance-of-payment problems. The proposal aims at clarifying the criteria for assessing trade restrictions, applied for balance-of-payment purposes, provides guidelines for the kinds of unilateral actions that countries are facing serious balance-of-payment problems are entitled to take.

Natural Resource-Based Products

Australia proposed at least a one-third overall reduction in trade barriers to natural resource products.

Anti-Dumping and Countervailing Duty Update

CITT Releases Public Interest Report on Grain

On March 16, 1987, the Canadian Import Tribunal (CIT) found that the subsidizing of importations into Canada of grain corn in all forms, with some exceptions, from the United States was causing and was likely to cause material injury to Canadian production of grain corn. On February 4, 1988, the Minister of Finance announced that the level of countervailing duty on imports of grain corn from the U.S. would be set at CAN$0.46 per bushel and that the Tribunal consider the public interest aspect of the imposition of this duty in approximately 18 months.

On October 19, 1989, the Minister of State (Privatization and Regulatory Affairs) issued a letter of reference to the Canadian International Trade Tribunal requesting it to conduct a preliminary examination as to whether any new evidence disclosed a reasonable indication of a material change in circumstances from October, 1987, that would necessitate a second comprehensive inquiry into the matter. The reference was made pursuant to section 19 of the *Canadian International Trade Tribunal Act* which requires the Tribunal to inquire into and report to the Minister on any tariff-related matter, including any matter the Minister refers to the Tribunal for inquiry.

Interested parties were invited to submit submissions to the Tribunal which issued its report on December 29, 1990. In its report, the Tribunal concluded that, although a number of circumstances affecting corn producers and users have changed since 1987, none of these changes were sufficiently material to warrant a review of the original finding. The Report concluded that, except during the drought of 1988-89, the countervailing duty had little, if any, impact on corn prices. The Tribunal forecasted that normal crop and market conditions would prevail this year and in the near term, and that during this period the duty is expected to have little or no effect on prices paid by agricultural and industrial users and by consumers of corn-based products. However, the Tribunal did suggest that if, contrary to current forecasts, short supply conditions were to recur in the near future, a reconsideration of the appropriate level of countervailing duty may be warranted.

U.S. FOREIGN TRADE ZONES

By: Gary N. Horlick and Michael A. Meyer
O'Melveny and Myers, Washington

In response to a 58-page Congressional Committee report entitled *Foreign Trade Zones Program Needs Restructuring*, the U.S. Department of Commerce has issued proposed regulations which would essentially overhaul the Foreign Trade Zones (FTZ) program. The report, published after a year-long study by the Government Operations Subcommittee on Commerce, Consumer and Monetary Affairs, charges that the FTZ program fails to promote the original intent of the *Foreign Trade Zones Act* of 1934. Facing the threat of "comprehensive legislation" to bring about the recommended changes, the Foreign Trade Zones Board proposed a major revision of its regulations, including 30 new or rewritten sections. This extensive overhaul is designed to clarify the application process, limit the use of

zones for manufacturing, and strengthen Departmental monitoring of the program.

Foreign Trade Zones are designated areas which are considered to be outside the host country's customs territory. Foreign goods may be brought into the FTZ for storage, exhibition, assembly, manufacturing or other processing without paying duties until the products enter the customs territory for domestic consumption. At this time importers usually may choose to pay either the duty rate of the original material or the duty rate of the finished product. Domestic goods may be moved into a zone for export and considered exported. FTZ status may make available certain excise tax rebates and duty drawback as well as provide lower tariffs if manufacturing occurs in the zone that would make the product subject to a higher tariff rate.

The *Foreign Trade Zones Act* of 1934 was intended to "create and retain domestic economic activity, especially employment, through the promotion of exports and transhipment trade." The public policy goal behind establishing the FTZ is to create and maintain jobs by encouraging operations in the United States which might have been carried out abroad due to Customs requirements. The number of U.S. zone projects has increased from 10 to 58 since 1970 with the value of goods entering zones increasing from $100 million (U.S.) to more than $50 billion (U.S.), 85 percent of which consists of manufacturing activities.

Criticism of the FTZ program has covered both ends of the spectrum. FTZ proponents have called for greater access and flexibility so that they can increase exports and better compete with imports of finished goods. U.S. manufacturers benefit from FTZ's by entering unfinished products into a zone, finishing or transforming them, and exporting the products or returning them to the domestic market at either the tariff rate of the original product or that of the finished product, whichever is lower. Proponents argue that greater access and flexibility would improve their competitive stance both domestically and abroad.

The Commerce Department has also been urged to make the zones more restrictive for non-export (especially manufacturing) activities. Opponents charge that manufacturing in the zones has contributed to the trade deficit and has actually had a negative impact on U.S. employment since they encourage imports (of components). In the case of the automobile industry, where inverted tariffs are a concern, foreign producers enter auto parts into an FTZ, assemble the automobile, and introduce the finished product into the domestic market at the lower tariff rate for finished cars rather than at the higher rate for parts. Opponents claim that the lost jobs in the domestic parts industry outweigh the increases created by foreign manufacturing in the U.S.

In response to requests for greater access, the FTZ Board has attempted to streamline the application process. The application form has been revised with the number of required exhibits being reduced from 13 to 5 and the regulations clarify the type of information requested. The Board also revised the procedures for modifying and expanding existing zone projects, simplifying the procedure for minor changes. The examiners committee, charged with reviewing applications and making recommendations to the Board, has been narrowed to a single examiner working with Customs and Army Engineer officials as advisors, thus slimming the process further.

The new regulations also attempt to satisfy the opponents of manufacturing zones (especially steel and auto parts) The Board has created a two-tiered test for granting manufacturing zones: (1) the threshold provision and (2) an examination of economic factors. Under the threshold provision, the Board examines the public policy factors which affect the FTZ. The Board must determine that:

(a) these proposed activities are not inconsistent with U.S. trade and tariff policy;
(b) the use of the zone program will not diminish the effectiveness of any U.S. international trade program; and
(c) in the case where the items involve inverted tariffs, there is no net increase in imports of items because of a reduction of tariffs received through the zone program.

Once the threshold provisions have been met, the Board will examine various economic factors including, among other things

(a) the overall employment impact;

(b) the extent and nature of foreign competition in relevant products; and
(c) the impact on the related domestic industry.

The new regulations have created a greater burden of proof on the applicants for information and evidence in support of their proposals.

The FTZ Board has also tightened the procedures for monitoring existing FTZ programs. The regulations establish periodic reviews of zone activities which would allow the Board to restrict or revoke zone programs if the public interest criteria are not met. Zones would be approved only if they are located in, or adjacent to, a port of entry. The proposed regulations define "adjacent" as either 35 miles from the outer limits of a port of entry or if the zone can be reached within one hour's driving time from the nearest customs office. This new requirement will facilitate monitoring by locating the zones closer to Customs offices but will also limit the use of the zone.

The proposed rules are a complete revision of Section 400 of Title 15 of the *Code of Federal Regulations*. By overhauling the regulations, the FTZ Board has not only clarified its procedures but also has codified its practices. Substantively, the proposed regulations would probably reduce the grant of zone status for manufacturing, without affecting existing zones. Comments are due by March 12, and final regulations are expected later in 1990.

U.S.-CANADA FREE TRADE AGREEMENT

Bituminous Paving Equipment from Canada

A binational dispute settlement panel, established under the *U.S.-Canada Free Trade Agreement* (*FTA*), recently upheld a U.S. Department of Commerce scope determination on Replacement Parts for Bituminous Paving Equipment from Canada. It is the second case to be decided under the *FTA* dispute resolution system.

The case arose from a 1989 Commerce decision that replacement parts for Allatt Paving Company equipment were "of the class or kind of product described in the antidumping duty order published in 1977." The decision excluded replacement parts for attachments from the scope. The petitioner, Blaw Knox Construction Equipment Corporation, requested review of the exclusion of replacement parts for attachments while the respondent, Ingersoll Rand Canada, Inc., appealed the inclusion of replacement parts for Allatt equipment. The panel also upheld the Commerce Department's refusal to investigate injury allegations during the scope review.

SUPER 301

The United States Trade Representative (USTR) has requested public comments concerning the second round of "Super 301" negotiations. Approximately 40 submissions have been made naming specific countries as having restrictive market access practices. South Korea received the most complaints with approximately 20, Japan followed with 14, the European Community received 8 complaints, while India, Brazil and Taiwan each received 7. The USTR must initiate market access talks with all countries making the Super 301 list. The 1989 list included Japan, India and Brazil.

In a related matter, Senator Max Baucus (D-MT), Chairman of the Senate Finance Trade Subcommittee, announced his plans to introduce a bill that would force the administration to retaliate against Japan if the 1989 Super 301 trade talks fail. The bill would force the President's hand to retaliate against countries that do not alter their discriminatory trade practices following market access negotiations. Baucus noted that Japan's barriers to U.S. trade in wood products alone cost the U.S. industry $1 to $2 billion in lost exports and over 10,000 lost jobs.

USTR Carla Hills commented that such a bill could actually "erode the leverage of U.S. negotiators" since "negotiations are often more successful when there is more flexibility than less." She added that she hoped to "render [the bill] moot by achieving satisfactory results within the time frame afforded us."

SECTION 337 PATENT PROTECTION LAW

The USTR requested public comments on the revision of Section 337 of the *Tariff Act* of 1930. The revision comes as a result of the United States' acceptance of a *General Agreements on Tariffs and Trade* (*GATT*) ruling that the law does not conform with *GATT* principles because it requires a more arduous review process for foreign products than for domestic products.

On February 1, the USTR asked for public comments on a 17-page document outlining various proposals for the revisions. The proposals included the creation of a specialized patent trial to handle claims against both foreign and domestic producers, and creating a new patent division of the Court of International Trade. The USTR now seeks public suggestions to supplement those outlined in its paper before making its recommendations to Congress.

ANTIDUMPING/COUNTERVAILING DUTY CASES

Battery Covers from West Germany

The United States International Trade Commission has initiated an investigation of pressure sensitive polyvinyl chloride battery covers from West Germany. The petition was filed by National Label Company against Zweckform Etikettiertechnik GmbH of West Germany as the manufacturer and against Eveready Battery Company, Matsushita Ultra Tech Company, Hemisphere Services Inc., and Power Plus of America, as importers of the product.

The petition alleges that the battery covers are being sold at less than fair value in the U.S. market. The Commission is scheduled to announce a preliminary determination of injury by March 5.

Revocations

The International Trade Administration (ITA) has announced plans to revoke antidumping and countervailing duty orders on eight products: racing plates from Canada, birch doorskins from Japan, calcium panthothenate from Japan, melamine from Japan, expanded metal from Japan, potassium permanganate from China, cotton yarn from Peru, sheeting and sateen from Peru. Most of the cases have been in effect since the early 1970s. The ITA cited lack of interest by both foreign suppliers and competing domestic suppliers.