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Register of United States Barriers to Trade

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FOREWORD

Canada and the United States are each other's principal trading partner, and have the largest two-way trading relationship in the world. In 1994, the value of goods, services and investment income flowing between Canada and the United States totalled C$403.2 billion. The bilateral relationship has been considerably enhanced through a series of trade agreements which have led to a reduction of barriers to trade and investment. Since the implementation of the Canada-United States Free Trade Agreement (FTA) on January 1, 1989, there has been a major expansion of 61% in two-way trade of goods, services and investment income.

On January 1, 1994, the North American Free Trade Agreement (NAFTA) was implemented and now governs the trading relationship between Canada, the United States and Mexico. The NAFTA improves the FTA in many areas and further reduces trade barriers that affect Canadian exports to the United States. During the first year of the NAFTA two-way merchandise trade between Canada and Mexico increased 21.3%. The expansion of trade with the United States also continued strongly, with two-way merchandise trade up by 22% in 1994. Under the NAFTA more than 30 trilateral Committees and Working Groups have been established to make further progress in areas such as technical standards, rules of origin and government procurement. The Working Groups on Anti-dumping and Subsidies/Countervailing Duties, for example, provide an opportunity to negotiate improved disciplines on the use of trade remedy measures.

On January 1, 1995, the World Trade Organization (WTO) came into effect as a result of the conclusion of the Uruguay Round of multilateral trade negotiations. The WTO will have a significant impact on Canadian trade with both the United States and the rest of the world. The OECD estimates that the quantifiable gains for Canada will be approximately $3.0 billion annually. The WTO is a breakthrough multilateral trade agreement, bringing the new trade areas of services and intellectual property, as well as agriculture under international trade disciplines for the first time. It strengthens the previous GATT rules on dispute resolution, and together with the NAFTA dispute settlement provisions, provides Canada with improved means to address bilateral trade barriers. In addition, the WTO will lead to substantial access improvements for Canadian exporters in many areas through new disciplines such as those on the use of anti-dumping and countervailing duty measures, and, for the first time, an internationally-agreed definition of subsidies.

Over the past year, Canada protected and improved access for Canadian exporters to the U.S. market through numerous consultations, negotiations and dispute settlement procedures. The following illustrate the range of issues dealt with:

- The successful pursuit of Canadian rights under Chapter 19 of the FTA resulted, in August 1994, in the United States revoking the countervailing duty on Canadian softwood lumber, and commencing the refund to Canadian exporters of more than $800 million in duty deposits collected since 1992.

- A dispute which could have reduced Canadian wheat exports to the United States to less than half their existing levels, was resolved through the negotiation of a bilateral Memorandum of Understanding on trade in grains. The MOU preserved Canadian access and established a "Joint Commission on Grains" to examine and make non-binding recommendations on grain marketing and support systems in both countries;

- Canadian government action, including through a successful GATT Panel challenge, ensured that Canadian tobacco exports would not be affected by U.S. domestic content and other trade restrictive requirements.

- Canadian and U.S. immigration and customs agencies developed a border accord to: promote international trade; facilitate the movement of people and goods across the border; and reduce costs; and

- Consultations under the NAFTA dispute settlement provisions were used to obtain assurances from the United States that the U.S.-Russian uranium anti-dumping suspension agreement would be implemented and administered in a way which should minimize its potential negative impact on Canadian uranium exports to the U.S. market.

Although the vast majority of Canadian trade with the United States proceeds unimpeded, there still remain obstacles to the free flow of goods, services and investment between Canada and the United States. This Register offers an illustrative compendium of the range and complexity of barriers that Canadian business people must cope with at the federal, state and local levels. The Canadian Government is working to reduce these barriers. The Department of Foreign Affairs and International Trade will continue to monitor closely the U.S. legislative and regulatory process, assessing the implications for Canada and making representations to U.S. authorities to influence developments where market access for Canadian companies is threatened. In cases where barriers are inconsistent with U.S. obligations under the WTO or the NAFTA, Canada will pursue their elimination within the framework of the dispute settlement provisions of these agreements. In other cases, such barriers will continue to be addressed bilaterally with the United States through consultations and negotiations.

I. SUBSIDIES

Canadian producers face competition from subsidized U.S. goods not only in the Canadian market but also in the United States and other export markets. Some U.S. federal programs that affect Canadian business prospects are set out below. State and local governments also offer incentives to attract investments that might otherwise locate in Canada. The subsidy disciplines in the WTO and domestic countervailing duty law, including, the introduction of the "serious prejudice" provision in the Uruguay Round Agreement on Subsidies and Countervailing Measures, provides a recourse against U.S. subsidies which may harm Canadian interests in the United States and other export markets.

Export Enhancement Program

The Export Enhancement Program (EEP) was introduced in May 1985 and is currently authorized under the U.S. Food, Agriculture, Conservation and Trade Act of 1990 (1990 Farm Bill). It authorizes the U.S. Department of Agriculture (USDA) to use Commodity Credit Corporation-owned stocks or cash payments to subsidize a range of U.S. agricultural exports to targeted markets. Initially, the U.S. justification for the EEP had been to protect its market share from erosion by subsidized European Union (EU) commodities, however, over time, the EEP has expanded first to include countries that have a small EU market presence, and now to countries where the EU has only the potential for future sales. As a result of the trade subsidy war between the United States and the EU, very few markets are not targeted under the EEP. This has caused a severe reduction in the overall world price and has resulted in devastatingly lowered returns to Canadian producers.

Although several agricultural commodities are eligible for export subsidies under the EEP, approximately 95% of EEP expenditures are used to subsidize grains, oilseeds and their products. Program funding for the 1994 fiscal year was US$800 million. It is expected that the Canada-United States Joint Commission on Grains will carefully examine the EEP and its effects on our traditional markets as part of its overall investigation of the Canadian and U.S. grain marketing and support systems.

Notwithstanding the export subsidy reduction commitments of the Uruguay Round, EEP has been recast as a "market promotion" program which will cover more value-added and finished products. The U.S. Administration has asked for US$ 959 million in EEP funding for 1996, which is the maximum allowed under the Aggregate Measure of Support (AMS) provision of the WTO Agreement on Agriculture.

Sugar

The United States operates a sugar price support program as well as import restrictions on sugar and certain sugar-containing products, which ensures that U.S. domestic prices remain at levels significantly above world market prices. In addition, the United States maintains re-export programs that allow U.S. exporters to import world price sugar for re-export as refined sugar and sugar-containing products. Without these re-export programs, U.S. exporters would be less competitive in world markets, due to the higher U.S. domestic price for sugar. These sugar programs are included in the recent complaint by the Canadian sugar industry seeking the imposition of anti-dumping and countervailing duties against sugar from the United States and other countries.

Market Promotion Program

The U.S. Market Promotion Program is authorized under the U.S. Food and Agriculture, Conservation and Trade Act of 1990 (1990 Farm Bill) and is administered by the USDA's Foreign Agricultural Service. The program was originally allotted $200 million annually from USDA's Commodity Credit Corporation for fiscal years 1991 through 1995 to finance promotional activities for U.S. agricultural products. Funding for the 1994 and 1995 fiscal years is estimated at $100 million and $75 million, respectively. Canadian industry has raised concerns about the impact of the program on the Canadian domestic market and on Canadian exports to third country markets. The U.S. Administration has asked for US$110 million in funding for 1996.

Defence and Research and Development

Preferential government procurement (which allows contractors to add overhead charges on the value of their sales to government departments or agencies) represents an excess payment for goods and services and constitutes a subsidy. For example, the Independent Research and Development Program allows contractors supplying NASA and the Department of Defense to apply additional charges to the selling price. The U.S. Manufacturing Technology Program provides capital assistance to defence contractors for general plant capacity increases and upgrades, unrelated to specific procurement contracts.

U.S. Inland Waterway Transportation Subsidies

Major inland waterways in the United States (e.g. the Mississippi-Missouri and the Tennessee-Tombigbee river systems) have been developed by and are maintained at the expense of the federal government, with services provided by the U.S. Army Corps of Engineers. There are no lockage fees or other user tolls. However, barge operators pay fuel taxes which are targeted for new construction only. This system of waterways, canals, and locks, and its maintenance, constitutes a subsidy to inland transportation. By reducing the cost of bulk transportation for products, significant benefits accrue to users of the inland waterways.

Intermediate-Term Export Credit Guarantee Program (GSM-103)

The GSM-103 program authorizes the Commodity Credit Corporation (CCC) to provide low interest loans to facilitate the sale of a wide range of U.S. primary and processed agricultural products. The CCC guarantees 98 percent of the principal and a portion of the interest accrued during the financing period, which may range from three to ten years. If importers or their banks default on these loans, the CCC honours the guarantee by paying to the exporter or the exporter's bank the amount of the principal and interested covered by the guarantee. GSM-103 sales distort trade due to the subsidized interest rates and the concessional nature of the loan terms, which exceed the normal commercial duration of 3 years.

U.S. Pension Benefits Guaranty Corporation

While its operations are apparently funded entirely through premiums, the underwriting of 100% of corporate pension liabilities would not be available but for this U.S. government program. There is no comparable private sector guaranty available, at least at PBGC premium rates. The backstopping of pension obligations effectively allows companies access to borrowings at lower rates than would otherwise apply. Moreover, in certain Chapter 11 proceedings, such as in the airline and steel sectors, pension obligations to the PBGC were settled on favourable terms.

II. U.S. TRADE REMEDY LEGISLATION

Anti-dumping and Countervailing Duties

The application of anti-dumping and countervailing duties on U.S. imports from Canada continues to be a concern for Canadian producers and exporters. In the last decade, the United States has initiated 25 anti-dumping and 13 countervailing duty investigations against Canada. On the dumping side, 12 of the investigations resulted in the application of anti-dumping duties, 12 were terminated and one other resulted in the conclusion of a suspension agreement. On the countervail side, 8 of the investigations resulted in the application of countervailing duties, 3 were terminated and two others were terminated by agreement.

U.S. trade remedy laws allow for the imposition of anti-dumping and countervailing duties on imports of dumped or subsidized goods respectively that cause or threaten injury to the domestic industry. U.S. industries seeking protection from import competition increasingly rely on trade remedy legislation. The U.S. system of law and practice also contains features that, in effect, allow U.S. producers to harass Canadian exports to the U.S. market. For an exporter, the defence of its interests before the United States government is both expensive and cumbersome.

The passage by the United States of the Uruguay Round Agreements Act and the entry into force of the Uruguay Round Agreements on January 1, 1995 resulted in a number of improvements with respect to the application of U.S. trade law. Nevertheless concerns remain. As a result, the conclusion of a meaningful North American regime regarding the application of anti-dumping and countervailing duties remains a high priority of the Government in the context of the Trade Remedy Working Groups established under the North American Free Trade Agreement. From a Canadian perspective, the creation of the NAFTA has changed the environment within which the North American private sector operates. Therefore, the NAFTA partners need to examine whether the current North American trade remedy regime is appropriate for developing globally competitive North American industries. Furthermore, in the context of the U.S. Uruguay Round implementing legislation, Canada will continue to make representations regarding the development by the U.S. Administration of regulations pertaining to the changes made to U.S. trade remedy law. Canada's initial comments, which were submitted to the U.S. Department of Commerce (DOC) on February 3, 1995, expressed concerns regarding the definition of subsidy and the use of the "effects test" and specificity in determining the countervailability of subsidy programs.

Some of the outstanding areas in U.S. legislation where Canada still has concerns are listed below.

Anti-Dumping

Anti-Circumvention

The U.S. Uruguay Round implementing legislation contains language which broadens the scope of the provision in the Omnibus Trade and Competitiveness Act of 1988 for the United States to take action against alleged circumvention of U.S. anti-dumping or countervailing duty orders. If circumvention is found, dumping or countervailing duties are applied without appropriate findings of dumping, subsidy or injury. Canada has long taken the position that any action taken further to U.S. anti-circumvention provisions without an appropriate investigation would be inconsistent with the United States' obligations under the WTO Anti-dumping Agreement.

Countervailing Duties

Definition of Subsidy

Although there is now an internationally agreed definition of subsidy in the WTO Agreement on Subsidies and Countervailing Measures, language in the U.S. Statement of Administrative Action accompanying the U.S. Uruguay Round implementing legislation creates concerns regarding the possible countervailability of natural resource measures and upstream benefits as indirect subsidies. In Canada's view, the application of such an approach on indirect subsidies would be inconsistent with WTO rules, as it evades the "financial contribution" requirements of the WTO Agreement on Subsidies and Countervailing Measures.

A further concern is language in the U.S. Uruguay Round implementing legislation which indicates that the DOC is not required to consider the "effect" of a measure in determining whether it is a subsidy. The United States' approach to the so-called "effects test" is a retrograde step in U.S. trade remedy law.

Specificity

Since "generally available" subsidies are not countervailable, any countervailing duty investigation requires a determination on the specificity of a subsidy. The WTO Agreement on Subsidies and Countervailing Measures sets out four individual factors to be taken into account in such a determination. The U.S. Uruguay Round implementing legislation, however, suggests that countervailability determination based on a single factor may be sufficient. In Canada's view, however, there may be circumstances in which use of the single factor test would frustrate the intent of the WTO Agreement by removing the possibility that other specificity factors could be used to contradict a finding of countervailability based on one factor.

Injury, Procedural and Institutional Issues

Initiation

The new GATT rules stipulate that an investigation may be initiated only where there is "sufficient evidence" of a subsidy or of dumping, of injury, and of a causal link between the subsidized or dumped imports and the alleged injury. Frequently, however, the DOC does not conduct before the investigation a substantive review or verification of the allegations of dumping or subsidization, of the presence of injury, or of a causal link between them. On the countervailing duty side in particular, it has been relatively simple for a potential U.S. petitioner to identify Canadian subsidy programs that were involved in previous investigations and then list them in a petition, without offering evidence of whether they were in fact used by a Canadian exporter of the target product.

Standing

While the new U.S. legislation provides improvements related to the verification of a petitioner's standing, Canada still has concerns as the U.S. Statement of Administrative Action provides that, where the management of a firm expresses a position in direct opposition to its workers with respect to a petition, the DOC will treat the production of that firm as representing neither support for nor opposition to the petition. The ability of workers to neutralize effectively industry opposition to a petition gives rise to a concern about multi-plant unions and petitioners acting in concert to artificially satisfy the new standing requirements.

Captive Production

The U.S. Uruguay Round implementing legislation contains a provision which excludes from the calculation of the total domestic market, the production in downstream operations by petitioners in trade remedy cases. This provision could lead to an increase in affirmative injury findings by disregarding this production when assessing the impact of imports on the total domestic market.

Cumulation

A number of investigations conducted by the United States involve the cumulation of imports from several countries. In some cases, the volume of exports of a product from Canada has been insignificant and at times negligible in terms of its share of the U.S. market. Some recent injury determinations by the U.S. International Trade Commission have moved away from the concept of mandatory cumulation and have acknowledged differences between product characteristics and specific markets. Nevertheless, Canadian exporters are still vulnerable to situations where exports that are not harming U.S. industry will be cumulated with exports from other countries which are. Both the WTO Anti-dumping, and Subsidies and Countervail Measures Agreements provide specific rules for the cumulative assessment of injurious effects.

Section 232 of the Trade Expansion Act of 1962

Section 232 of the Trade Expansion Act of 1962 empowers the President to take action to remove the threat to U.S. national security resulting from mass imports of certain products. For instance, in 1994, the Independent Petroleum Association of America filed a petition with the U.S. Department of Commerce (DOC) seeking to curb oil imports for national security reasons. In December 1994, President Clinton accepted DOC's recommendation that, while over-reliance on imported oil posed a national security threat, the cost of an import tariff would outweigh the benefits of trade action. Even if the United States had pursued oil import restrictions, Canada's position is that NAFTA Article 607 severely constrains the ability of the United States to use national security exceptions in NAFTA Article 2102 and GATT Article XXI against Canadian energy exports.

Section 332 of Tariff Act of 1930

Section 332 of the Tariff Act of 1930 provides general authority for the U.S. International Trade Commission (ITC), on request from the Administration or Congress, to conduct fact-finding investigations of the foreign trade practices of other countries and their effect on U.S. industry. While import action is not authorized under this section, such investigations can develop information that may be used in a countervailing duty investigation. This is in addition to the burden sometimes placed on foreign industries and government to supply information. Along similar lines, Section 409 (B) of the U.S. Free Trade Agreement Implementation Act of 1988 allows U.S. industry to request that the U.S. Trade Representative provide information on the subsidy practices of countries with which the United States has entered into free trade agreements. If used, the provision can create uncertainty and possibly disrupt trade and investment decisions.

Section 301

Section 301 of the Trade Act of 1974 gives the United States Trade Representative (USTR) authority, on his own initiative, or as a result of a petition from a private party, to conduct investigations into another country's trade practices. If those practices are found to be "unfair", the U.S. is authorized by this legislation to retaliate unilaterally by imposing sanctions against the offending country, after following a prescribed timetable.

"Super 301" was first introduced in 1988 and enabled the U.S. government to cite "broad and consistent patterns of unfair trade practices" by certain countries, and mandated the USTR to retaliate unilaterally against foreign countries for such unfair trade practices. It provided strict time limits for consultations with foreign countries and for the determination of retaliation measures. After lapsing, it was reinstated by Executive Order of President Clinton in March 1994. In September 1994, Canada was mentioned under the heading of "foreign country practices" on the basis of its border measures on dairy and poultry. Mention under this heading does not set in motion any steps towards possible retaliatory action.

Special 301 directs the USTR to identify those countries which deny adequate and effective protection of intellectual property rights. In 1994, Canada was cited in a new "Special Mention" category for current and proposed policies relating to magazine publishing. This category does not trigger a statutory requirement for an investigation and subsequent determination by USTR.

The United States has indicated that it intends to use its Section 301 authority in a manner consistent with its international trade obligations, including using the WTO dispute settlement process, in making determinations of whether foreign practices violate WTO obligations.

The only current Section 301 investigation related to Canadian interests was launched on February 6, 1995, when the USTR initiated a Section 301 investigation against Canada based on a petition filed by Country Music Television (CMT). CMT had been removed by the Canadian Radio and Telecommunication Commission (CRTC) from the list of foreign cable services eligible for distribution in Canada.

III. GOVERNMENT PROCUREMENT AND DOMESTIC PREFERENCE LEGISLATION

Although a significant amount of government procurement is covered by the GATT and the NAFTA, many barriers remain. The Buy American Act still affects some federal contracts, and related legislation creates barriers that flow through federal funding to state and local contracts. The Buy American Act indirectly discourages U.S. distributors from selling Canadian goods, since it might require separate inventories of goods eligible for public contracts and those ineligible for this use. Small business set-asides further prohibit Canadian bids. In addition, state and local governments apply a wide variety of discriminatory provisions in support of local business.

Buy American Act

Canadian exports are impaired by application of the Buy American Act (BAA) in U.S. federal contracts for goods which involve entities not covered by the NAFTA, and in construction services contracts valued at less than the NAFTA threshold (U.S.$6.5 million). Materials purchased under construction services contracts, valued at less than U.S.$6.5 million, for the construction or repair of any public building or public work in the United States must be of U.S. origin or manufacture, and the cost of American-origin components must exceed 50% of the cost of all components.

There are a number of specific "Buy American" restrictions in U.S. legislation, including:

- the "Berry Amendment", which requires the Department of Defense to buy food, clothing, fabrics and specialty metals that are products of the United States; and
- the "Byrnes-Tollefson Amendment", which prohibits foreign construction of U.S. ships or foreign supply of major ship components.

In addition, Canadian exports are impaired by protectionist provisions in state and local government contracts. Procurement by these levels of government is not covered by the GATT Procurement Code or the NAFTA.

Related Legislation

U.S. state and local governments, and private sector entities, often receive federal project funding on condition that procurement be restricted to U.S. suppliers. As a result, the use of Canadian products in such projects, which are often in sectors of significant interest to Canadian exporters such as transportation and communications, is frequently difficult or impossible.

Restrictions attached to federal funding of transportation projects (including urban mass transit, rail and highways) generally require the use of U.S. materials and equipment unless the granting agency determines that an exception should be made.

For example, in order for U.S. states to receive federal funds from the Urban Mass Transit Administration, contracts for mass transit equipment must specify a price preference of 25% for tenders supplying U.S. made or assembled equipment containing at least 60% local materials. Federal Highway Administration grants require that manufactured products made of iron or steel be made in the United States. Furthermore, all federal procurement of steel products, rolling stock and power-train equipment for rail passenger service is required to be from U.S. suppliers.

The Federal Transit Administration grants funding on the condition that all steel and manufactured products (except cement) used in the funded project - even at the state of local level - be produced in the United States. All of the manufacturing processes for the product must take place in the United States and all items or materials used in the product must be of U.S. origin. However, grants made for the purchase of transit vehicles require that the cost of components produced in the United States be at least 60 per cent of the cost of all components, and that final assembly take place in the United States.

Federal Aviation Administration grants to state, local and private organizations to build and improve airports and related facilities and equipment require that all facilities and equipment purchased with such funds contain a minimum of 60 per cent U.S. materials, and final assembly of the goods or systems must take place in the United States.

Other examples of U.S. federal Buy American requirements include:

- The Foreign Relations Act requires 55 per cent American content on all Voice of America modernization contracts.
- The Foreign Assistance Act prohibits use of U.S. funds (including foreign military sales) for procurement from foreign sources unless the President determines that such procurement would not adversely affect the U.S. economy or industrial base.
- The Emergency Food Assistance Act, and other legislation related to government support of human feeding programs, requires that recipient agencies purchase to the extent possible U.S.-produced food products.

Buy American requirements are also included in a number of other statutes, including:

- U.S. Technology and Pre-eminence Authorization Act;
- Small Business Credit and Business Opportunities Enhancement Act;
- Department of the Interior and Related Agencies Appropriations Act;
- NASA Authorization Act;
- High Performance Computing Act of 1991; and
- Waste Isolation Pilot Plant Land Withdrawal Act.

Small Business Set-Asides

The United States government, and several state and local governments, restrict certain contracts to small and minority-owned U.S. companies. Canadian firms are not eligible for these prime contracts. They are also at a disadvantage when seeking subcontracts, since U.S. prime contractors are required to provide a specified level of subcontracting to U.S. small and minority businesses. The definition of "small" varies by industry, but may involve up to 1500 employees in a manufacturing firm, or annual revenue of up to $18 million for a services firm. U.S. law requires that:

- 20 per cent of the total value of U.S. government prime contract awards be made to U.S. small business;
- all contracts worth less than $100,000 be reserved for small business;
- all contracts above $100,000 be set aside if the contracting officer can reasonably expect two or more bids from small businesses; and
- if only one bid from a small business is received, the small business given a 12 per cent price advantage in evaluation.

In addition to these explicit set-asides, the Small Business Administration (SBA) provides loan guarantees and business assistance for small and minority-owned businesses, and acts as prime contractor to government for those who take part in its "8(a)" program. It also actively encourages subcontract awards to small business, and rewards prime contractors who exceed their small business subcontracting goals. Subcontract awards to Canadian firms, regardless of size, would not help a prime contractor to meet such goals.

The effect of set-asides is far-reaching. In 1991, a total of $189.6 billion was awarded in contracts worth more than $25,000. Of those large contracts, $6.0 billion was set-aside for small business and $3.8 billion was awarded through the 8(a) program. $21.1 billion was awarded in contracts worth less than $25,000. In total, $31.8 billion in contracts was completely inaccessible to Canadian firms.

IV. TECHNICAL AND REGULATORY BARRIERS

Standards and Testing

Numerous U.S. jurisdictions impose widely varying requirements on products in technical regulations in the areas of consumer protection, public health and safety and the environment. About 44,000 jurisdictions, at federal, state and local level, enforce requirements in about 89,000 technical regulations. This complex regulatory environment often operates as an institutional barrier to market access. Procedures for assessing conformity of products are not generally uniform and approval bodies must sometimes certify compliance of products under widely varying requirements in several state, municipal and other local jurisdictions.

State, regional and local regulations governing laboratory recognition and accreditation can also impede market access. In many industrial sectors, national accreditation or recognition of laboratories requires separate acceptance of most states, numerous local jurisdictions, regional code organizations and federal agencies. For example, according to the National Institute of Science and Technology, "laboratories desiring to be accredited nationwide to conduct electrical safety-related testing of construction materials have to gain the acceptance of 43 states, more than 100 local jurisdictions, three building codes..., [and] a number of federal agencies, as well as several large corporations".

These difficulties are compounded by the fragmented and disparate system for establishment of standards by reference in U.S. regulations. The U.S. standards system continues to operate without national coordination or uniform rules in most areas. A similar situation exists with regard to the system for establishment of procedures for product approval, certification, testing and inspection which are also used for determining regulatory compliance. This makes it difficult, particularly for small and medium sized exporters, to identify the authority responsible for required approvals. It also leads to frequent and costly delays in obtaining multiple approvals under varying conformity assessment procedures.

Many exporters find it difficult to prove that their products meet the U.S. Food and Drug Administration (FDA) requirements for quality and labelling. This is because of a lengthy decision-making process and the absence within the FDA of a mechanism for approval of exporters' labels in advance of shipment. These deficiencies create uncertainty for exporters and difficulties at border points.

The 1990 U.S. Farm Bill requires that USDA to conduct, for grading purposes, random spot checks of potatoes entering through ports of entry in the northeastern United States. Canada considers these checks to be unnecessary since, through reciprocal arrangements with the USDA, Agriculture Canada inspects and certifies all Canadian exports of potatoes to the United States as meeting USDA grading requirements.

Health and Sanitary Requirements

Shipments of agricultural products, including beef and livestock, are occasionally subject to long delays due to health and sanitary inspections at the U.S. border. A pilot project to resolve these issues is under way and meat products are currently moving across the border without delays. Delays resulting from the FDA's procedures to monitor pesticide residue have raised concerns among exporters. This type of delay can be damaging to perishable fresh fruits, vegetables or dairy products and may impose an additional cost on the exporter.

The animal health status for ostriches is the same in Canada and the United States. The United States, however, does not recognize the Canadian animal health status as equivalent, and therefore, does not permit the importation of Canadian adult ostriches. Requirements related to premises approval for farms of origin, size of bird and quarantine in a USDA facility (the wait for which can take up to two years) restrict export possibilities for young birds.

Standards applied to imported products by one agency can differ from standards applied by that same or other agency to an equivalent domestic product. In the USDA regulations, the definition of "poultry" does not include game birds; consequently, inspection of imported game birds falls outside USDA jurisdiction and is carried out by the FDA. Whereas the USDA considers salmonella to be an unavoidable contaminant in poultry carcasses and concludes that proper cooking normally eliminates any health hazard, it is the policy of the FDA to consider imported food containing salmonella to be adulterated and to prohibit such products from entering the United States. There is no evidence that the same policy is applied to game birds produced within the United States.

To detect the presence of listeria in cold smoked fish, canned lobster and ready-to-eat seafood, the United States has a trade restrictive policy of a zero tolerance level for listeria combined with a more rigorous sampling regime than is required. Canada considers the U.S. policy to be unnecessarily severe given the low level of risk resulting from a minimal listeria presence in these fish products. Instead, Canada uses and advocates a policy of good manufacturing practices which put into place process controls to reduce or eliminate the presence of listeria.

Milk and cream imported into the United States are subject to the U.S. Federal Import Milk Act. Under the Act, milk or cream may be imported only by the holder of a valid import permit issued by the FDA. To obtain a permit, a number of health and sanitary requirements must be met. These requirements effectively preclude imports. Interstate milk shipments in the United States are governed by the National Conference of Interstate Milk Shippers (NCIMS). NCIMS requires that milk and milk products shipped between U.S. states must be produced and pasteurized under regulations that are substantially equivalent to the Grade "A" Pasteurized Milk Ordinance (PMO) and have been rated by a state milk sanitation rating officer certified by the FDA. There are no provisions that pertain to imports from other countries. A specific example of the disruptive nature of this ordinance can be seen in the termination of Canadian ultra high temperature (UHT) milk shipments to Puerto Rico and the restrictions on imports of yogurt.

Alcoholic Beverages

Federal and state legislative measures have established several barriers to imports of Canadian beer, wine and cider into the U.S. market. Such measures include state-mandated distribution systems that impose added costs on importers of Canadian products by requiring that imported beer and wine be sold through an in-state agent or middleman, whereas local breweries can sell product directly to retailers. Some states require that foreign beer and wine be transported exclusively by private transport companies, while locally produced product can be shipped directly to retailers by the producers themselves.

Various other state measures impose higher licensing fees on foreign beer and wine and dictate uniform prices for out-of-state beers and wines. Local producers, on the other hand, have the advantage of lower fees and the opportunity to be more price-competitive in local markets. Some states maintain listing practices which discriminate against imported wine. Canada challenged the United States on these measures at the GATT. The 1991 GATT Panel report concluded that these U.S. measures were inconsistent with their international trade obligations. (In addition see Taxes on Alcohol in Section X and Canadian Actions under the GATT in Section XII.)

Marine Mammal Protection Act

The Marine Mammal Protection Act of 1972 prohibits the taking and importation of endangered marine mammals and marine mammal products, subject to some exceptions. The prohibition has been applied to products of species that are not endangered. In addition, the ban does not apply to marine mammals taken by the Alaskan Aboriginal Peoples for subsistence or for the purpose of creating and selling authentic native articles of handicrafts and clothing. There is no such exception providing similar treatment for Canadian Aboriginal Peoples.

Newsprint Recycling Requirements

Since 1988, a number of states have established programs to promote the recycling of newsprint. These programs are either voluntary or mandatory in nature and typically specify levels of recycled paper to be contained in newsprint. While newsprint recycling legislation has not been adopted so far in the Congress, certain measures have been proposed including content requirements, taxes on virgin materials and tax incentives to purchase recycling equipment. The only U.S. Administration measure on recycling affecting the paper sector has been the Executive Order announced October 20, 1993 by President Clinton calling for minimum recycled content in federally procured paper (20% in 1995 increasing to 30% in 1999). While the objective of the recycling programs is laudable, they should not be implemented in a trade-restrictive manner.

Reformulated Gasoline Regulations

On June 30, 1994 the Environmental protection Agency (EPA) issued a final rule requiring that 30% of the oxygenates in reformulated gasoline (RFG) used in the United States be derived from renewable sources. The main beneficiaries of this requirement would be producers of ethanol from corn. The measure runs contrary to the concept of fuel neutrality, and would affect negatively the use of methanol, a significant Canadian export, as a constituent of RFG.

In addition, ethanol production subsidies are paid to producers in Iowa, Minnesota, Nebraska and South Dakota (20 cents per gallon, and North Dakota (40 cents per gallon). The subsidies reduce the price of ethanol, making it more competitive with other fuel sources such as regular gasoline and natural gas-based methanol

Gas Exports to California

A dispute in past years between the California Public Utilities Commission (CPUC) and Canadian interests regarding the restructuring of the Alberta & Southern supply was resolved earlier through total decontracting. However, there are several outstanding issues which continue to affect Canada's natural gas trade with California. The application of incremental tolling by the CPUC on the expansion of Pacific Gas & Electric in California and the imposition of a crossover ban have made it difficult for expansion shippers (predominantly Canadian producers) to secure markets in California. Incremental tolling on large integrated pipeline systems results in wide rate differentials for similar service and undermines a long-term fair market structure. The CPUC has also allowed discounting on transportation from the U.S. Southwest but has denied the use of discounted contracts on deliveries of Canadian gas.

Permanent Paper Standards

U.S. Government paper permanence standards, set by the Joint Committee on Printing of the U.S. Congress, serve as *de facto* national standards for the production of permanent paper in the United States. These standards use maximum lignin content and production process specifications rather than performance-based specifications for strength and brightness. The effect of these specifications is to limit access for certain Canadian pulp exports.

V. CUSTOMS AND ADMINISTRATIVE PROCEDURES

U.S. import requirements and their administration by border agencies, such as the U.S. Customs Service and the U.S. Food and Drug Administration (FDA), affect all Canadian exports to the United States and can often impede access to the U.S. market. Canada seeks to resolve border-related problems through various means, including direct discussions with U.S. authorities on specific problems and broader initiatives.

The NAFTA promotes uniform interpretation and application of its rules of origin, establishes a common origin certificate, uniform regulations for certain Customs procedures and provides for cooperation between Customs services in enforcement and in harmonizing documentation. The NAFTA also facilitates the temporary entry of persons for business and professional purposes. NAFTA working groups, such as the origin rules group (and its Customs sub-group) and the temporary entry working group are working to make rules and procedures more compatible.

Canadian and U.S. immigration and customs agencies have developed an accord which establishes common objectives for a joint approach to the management of the Canada-United States border. The objectives are designed to promote international trade; to facilitate the movement of people and goods across the border; to provide enhanced protection against illegal activity and to reduce costs.

Country of Origin Marking

U.S. Customs law requires that imported goods be marked in a conspicuous place in order to inform the ultimate purchaser in the United States of the English name of the country of origin. This broad and long-standing requirement historically has frustrated Canadian exporters, leading to rejections or delays at the border and additional costs for Canadian exports vis-a-vis U.S. domestic products which are not required to be marked.

In many cases, the U.S. Customs Service administers the country of origin marking requirements in an inflexible and excessive manner. For example, in 1994, the U.S. Customs Service continued its attempts to require that retail packages containing imported frozen produce (including imported produce packaged in the United States) be marked with the country of origin specifically on the front of the package with a minimum type-size and two specific type-styles. This overly strict requirement would adversely affect Canadian exporters of frozen produce. Following objections from Canada and other sources, the Customs Service is initiating anew the regulation-making process.

In the past, the Customs Service has administered the key marking concept of "substantial transformation" unevenly and on a case-by-case basis, leading to uncertainty for Canadian exporters. Following the NAFTA, the Customs Service introduced marking rules based on changes in tariff classification, a more objective standard. In addition, Annex 311 of the NAFTA establishes disciplines for marking requirements. These two developments should lead to greater clarity and consistency for Canadian exporters. However, the basic requirement to mark Canadian exports with the country of origin continues to create difficulties for Canadian companies.

Border Administration

Certain U.S. entry procedures complicate the entry of Canadian exports leading to delays and additional costs.

In 1994, the U.S. Customs Service introduced the National Compliance Measurement Program. The program aims to measure the extent to which shipments comply with all U.S. import laws. On a product basis, over the course of each year, Customs is conducting a specified number of random intensive examinations of shipments and import documents, including the complete unloading of shipments at the border. Importers (often the Canadian exporter) must absorb all related costs and delivery delays. For example, several examinations of Christmas tree shipments (a duty-free product) at Maine and Vermont entry points resulted in delays and unexpected costs representing 25% of the value of the shipment. Although the shipments selected undergo a more rigorous inspection, on a national basis, the annual number of inspections will actually decrease significantly. Exporters and industry sectors which establish high compliance records can expect to receive fewer inspections in the future.

In certain border areas, Canadian exporters have complained of delays in obtaining U.S. Food and Drug Administration (FDA) decisions to release food products (i.e. imported food products cannot be released into U.S. commerce until the FDA has decided whether to sample the shipment). In addition, when samples are drawn at the border, the laboratory analysis process can introduce delays which are costly, in particular if perishable products are involved. U.S. domestic products are not subject to shipment-by-shipment approvals. The gradual introduction of an electronic interface between Customs and the FDA may alleviate some of these delays.

User Fees

The NAFTA specifically exempts originating goods imported from Canada from the U.S. Customs merchandise processing fee. Canada has opposed attempts by the United States to charge fees as a means of financing not only enhanced but also basic mandatory services, since they can undermine efforts by both countries to facilitate cross-border movements and can result in additional burdens for Canadian exporters. For many years, U.S. Customs has applied a commercial vehicle fee to finance Customs overtime inspections. For its part, the Food and Drug Administration has proposed to charge user fees on imports for inspection services. At the beginning of 1994, the United States began to apply its existing entry fee on persons arriving by air and sea to passengers arriving from Canada and Mexico via the same modes (Canada and Mexico were exempt previously). More recently, the U.S. Administration proposed to Congress, as part of the budget process, to impose a fee on persons entering the United States at land border crossings from Canada and Mexico. Following opposition from Canada and domestic interests, the Administration modified its proposal to provide individual states the option to have the fees applied at their own border points. This amended proposal remains a concern to Canada, and is still subject to debate in the U.S. Congress.

VI. EXTRATERRITORIAL LEGISLATION

The extraterritorial application of United States domestic legislation, outside of agreed multilateral or bilateral arrangements, promotes uncertainty in the international trading system, and can threaten legitimate Canadian economic interests.

The 1917 Trading With The Enemy Act provides the President very broad powers to act against foreign interests, in times of national emergency, by intervening in foreign purchases of U.S. assets or in the activity of foreign-owned entities in the United States. This authority is the basis of the Cuban Asset Control Regulations, which imposes the U.S. trade embargo against Cuba. Under U.S. law - Section 1706(a)(1) of the U.S. National Defense Authorization Act of 1993 (the "Cuban Democracy Act") - the embargo provisions purport to assert jurisdiction over the conduct of foreign subsidiaries of U.S. companies, including those incorporated in Canada.

In addition, legislation currently before both houses of the U.S. Congress, the Cuban Liberty and Democratic Solidarity (LIBRDAD) Act of 1995, would expand the ambit of the Cuban embargo. The bill contains a number of measures to discourage foreign investment in Cuba, by proposing measures against investors who take an interest in property that was expropriated from U.S. citizens. The bill would also deny access to the U.S. sugar market for those countries that import sugar from Cuba. Many of the bill's proposed measures are extraterritorial in effect and would have a direct impact on Canada. These measures are contrary to the methods and procedures available under international law for the settlement of international claims.

VII. AGRICULTURE BARRIERS

Sugar and Sugar Containing Products

The United States continues to maintain quantitative restrictions on the importation of a wide range of sugar containing products (SCPs) through tariff rate quotas (TRQs). On January 1, 1995, the United States added crystal drink mixes, previously unrestricted, to the list of products subject to the "basket" TRQ for SCPs. The effect of this measure is compounded by the fact that the United States had reduced the level of this TRQ in 1994 from 76,203 to 64,773 tonnes to accommodate concessions made to Mexico in the NAFTA. Canada is the main exporter to the United States of SCPs, including crystal drink mixes, and these new measures will lead to a 40 to 50% reduction in Canada's exports of these products to the United States.

Also, on January 1, 1995, the United States imposed an 8,000 tonne limit on imports of refined sugar from Canada between January 1 and September 30, 1995. On October 1, 1995, the United States intends to continue import restrictions through the creation of a new tariff-rate quota (TRQ) of 22,000 tonnes for refined sugar. Since 1991 Canada's exports of refined sugar to the United States averaged 35,000 to 38,000 tonnes yearly.

On February 10, 1995, Canada requested NAFTA Chapter 20 consultations with the United States concerning the trade restrictions affecting Canadian exports of refined sugar and SCPs.

Peanut Butter

Effective January 1, 1995, as part of its Uruguay Round implementing legislation, the United States imposed new quantitative restrictions on Canadian exports of peanut butter and peanut paste in the form of an annual TRQ of 14,500 tonnes. This measure will restrict any future growth in Canadian exports, which had increased from 4,281 tonnes in 1991 to 14,546 tonnes in 1993.

Wheat End-Use Certificates

On February 27, 1995, the United States implemented an end-use certificate requirement for imports into the United States of wheat from countries that, as of April 8, 1994, require end-use certificates for U.S. imports. As Canada is the only country requiring such certificates, the regulation will only apply to imports from Canada. The U.S. end-use certificate requirement was contained in the U.S. NAFTA Implementation Act. Canada will monitor carefully the U.S. regulation to ensure that U.S. end-use certificates are not applied in a trade restrictive manner. The end-use certificate requirements in both countries are to be reviewed by the Joint Commission on Grains established as part of the bilateral MOU on grains which took effect on September 12, 1994.

State Wheat and Barley Check Off Fees

In April 1994, Minnesota extended its one cent per bushel wheat and barley checkoff fee to cover out-of-state and foreign grain as well as grain produced within the state of Minnesota. The check off fee is used to fund Minnesota wheat and barley research and market promotion councils. An exemption may be granted if it can be demonstrated that a fee with a "comparable purpose" is paid in the home jurisdiction. Canada has implemented its own check off system as of January 1, 1995, and has applied to Minnesota for an exemption. There are also concerns about the operation of check off programs in other U.S. states such as Montana and North Dakota.

UHT Milk

Since December 31, 1991, when Puerto Rico joined the National Conference of Interstate Milk Shippers, exports of UHT (ultra high temperature) milk from Québec to Puerto Rico have been banned as a result of Puerto Rico applying the regulations governing the production of fluid milk of the U.S. Grade A Pasteurized Milk Ordinance (PMO). An FTA Chapter 18 Panel recommended on June 3, 1993, that a study be undertaken on equivalency of UHT milk standards between Québec and Puerto Rico, and completed within a reasonable time. It further recommended that should equivalency be established, exports of Québec UHT milk to Puerto Rico should be readmitted "forthwith". U.S. Food & Drug Administration (FDA) officials have completed their re-inspection of UHT milk producers and supplying farms in Quebec, and is in the process of finalizing the equivalency report. Canada continues to press for a prompt conclusion of the equivalency study to permit the re-entry of Québec UHT milk to Puerto Rico.

Yoghurt

The administration of U.S. technical restrictions on the importation of yoghurt has presented difficulties for Canadian exporters. As a result of unclear and sometimes conflicting interpretations of the regulations of the U.S. Federal Import Milk Act and the Grade A Pasteurized Milk Ordinance, several Canadian companies have been unsuccessful in their attempts to obtain the required permission to distribute their yoghurt products in the United States.

Section 22

Under Section 22 of the Agricultural Adjustment Act of 1933, as amended, the United States has maintained import quotas on a wide range of products, affecting Canadian exports of dairy products and certain sugar-containing products. In 1955, the United States had obtained a waiver of certain GATT obligations for actions taken under Section 22. Over the years, investigations and the threat of quantitative restrictions under Section 22 have created great uncertainty for Canadian exporters of agricultural products.

In January, 1994, the United States initiated an investigation under Section 22 of imports of wheat, wheat flour and semolina from Canada. In July 1994, the U.S. International Trade Commission (ITC) provided its findings and recommendations to the President. While there was not consensus among the ITC commissioners as to whether Canadian imports "materially interfered" with the U.S. wheat price support program, several commissioners recommended the imposition of quotas which could have cut back Canadian exports to less than half their existing levels. In order to avert the imposition of a highly restrictive U.S. trade action, Canada negotiated a one year Memorandum of Understanding (MOU) on trade in grains, which took effect on September 12, 1994. The terms of the MOU permit the Canadian Wheat Board (CWB) to export 1.5 million tonnes of wheat to the United States in 1994/95. Canada succeeded in obtaining U.S. agreement to exempt wheat flour, semolina and white winter wheat from the quota. The MOU also established a Joint Commission on Grains (JCG) which is examining Canadian and U.S. grain marketing and support systems and the effect of those systems on the Canadian and U.S. markets, and on competition between the two countries in third country markets. The Commission is to provide its findings and non-binding recommendations to the two governments by September 11, 1995.

As a result of the entry into force of the WTO, the United States' GATT waiver for Section 22 is terminated and the United States cannot apply any new quantitative import restrictions or fees on products from WTO members, nor extend under Section 22 the import restriction level on Canadian wheat negotiated in the bilateral MOU on grains.

Marketing Orders

Under Section 8(e) of the Agriculture Marketing Agreement Act of 1937, over 20 agricultural commodities are subject to federal marketing orders, which include inspection requirements, as well as minimum size, grade, quality and maturity standards. Federal marketing orders apply to products grown in the United States within a designated area. In the case of some marketing orders, imports of fruits and vegetables into all regions of the United States must meet the standards established under the order, even though competing U.S. producers in areas excluded from the order are not subject to the same standards.

Futures Contracts

The Commodity Futures Trading Commission (CFTC) approved, on November 26, 1991, a Chicago Board of Trade (CBOT) proposal for a "buyers call option", which allows the buyer of futures contracts for wheat, corn, soybeans, soybean oil and soybean meal the option to request delivery of products of "U.S. origin only". The CFTC also approved a Kansas City Board of Trade regulatory change, similar to that of the CBOT, for Hard Red Winter Wheat.

The buyers call option discriminates against Canadian commodities delivered against U.S. futures contracts. In particular, warehouses are reluctant to handle Canadian soybeans because of the increased costs and inconvenience associated with the small volumes exported to the United States. This option limits market access to the United States and lowers affected Canadian commodity prices.

VIII. INVESTMENT

There are numerous U.S. federal laws and regulations that limit foreign investment in the United States. Canadians can invest only with restrictions in U.S. radio and television, air carriers, ship building, banking and insurance, maritime transport and fisheries, natural resource industries, communications and defence-related sectors. Federal and state research and development programs sometimes contain regulations that prevent Canadian firms from becoming members of consortia.

A few examples of the legislation and programs affecting Canadian investment are: the **Federal Aviation Act of 1958**, which mandates that air transportation between two points in the United States be carried out only by U.S. companies with at least 75% U.S. ownership, and two-thirds of the management of the board must be U.S. citizens; the **Atomic Energy Act of 1954**, which restricts foreigners or foreign corporations from operating in the nuclear energy industry; and the **Advanced Technology Program**, which denies eligibility to foreign firms unless the parent company of the foreign firm is based in a country that grants national treatment and effective intellectual property protection to U.S. firms. (Other examples are cited in Section IX on Services.)

The United States justifies its federal restrictions almost exclusively on the grounds of national security (only in the fishing industry are federal restrictions on foreign investment based on criteria other than national security). For purposes of investment, the term "national security" has never been publicly defined. In a few industries, such as banking and insurance, treatment given a foreign firm in the United States depends on the treatment given a U.S. firm operating or desiring to operate in the same industry of the foreign company.

The broadest provision governing foreign direct investment in the name of national security is Section 721 of the Defense Production Act of 1950 (commonly referred to as the "Exon-Florio" provision). Since 1975, the Committee on Foreign Investment in the United States (CFIUS) has reviewed foreign investments that, in the judgement of the Committee, might have implications for the U.S. national interest. More recently, Section 5021 (the Exon-Florio Amendment) of the Omnibus Trade and Competitiveness Act of 1988 empowered the President to suspend or prohibit any acquisition merger or takeover by a foreign person on national security grounds. As a result of a 1992 amendment to the Exon-Florio provisions, the President is now required in the context of his review to take into account the potential effect of a transaction on U.S. technological leadership in critical defence areas. "Defence critical technology" has not been defined. Also, CFIUS investigations are now required in all transactions involving entities controlled by or acting on behalf of a foreign government. Furthermore, the President must submit written reports to Congress on each case referred to him by CFIUS.

State governments place restrictions on foreign ownership, particularly in real estate (some 30 states maintain restrictions on non-resident foreigners or foreign corporations), banking, insurance, mining and utilities.

Antitrust Law Exemptions

U.S. antitrust law provides for specific exemptions to the application of U.S. laws. Certain sectoral exemptions may constitute a violation of the principle of national treatment and give rise to investment distortion effects. The practical effect of these types of exemptions is that exporters to the U.S. may be subject to antitrust liability for anti-competitive practices while their U.S.-based competitors will not.

On the 10th of June 1993, the President signed into law the National Cooperative Research and Production Act (NCRPA) of 1993. This statute amends the 1984 National Cooperative Research Act (NCRA) by extending the more favourable antitrust treatment given to R&D joint ventures to manufacturing joint ventures as well. One important difference between the NCRPA and the NCRA is that the 1993 Act contains reciprocity conditions that the 1984 act does not. Moreover, in order to receive the 1993 law's antitrust benefits, the joint venture's principal facilities must be located in the United States.

To the extent that U.S. antitrust law plays a role in investment-location decisions, the availability of such exemptions for only U.S.-based enterprises may produce an investment distortion effect.

IX. SERVICES

Basic Telecommunications

The Communications Act provides the Federal Communications Commission (FCC) with broad discretionary powers regarding the licensing and foreign ownership of telecommunications services. The test normally applied by the FCC when deciding the exercise of this discretion is the "public interest, convenience and necessity test" (PCN). The criteria are not defined, providing the FCC the administrative leverage to deny service applications by foreign telecommunications service providers in a manner which could constitute a barrier to these foreign companies.

Section 310 of the Communications Act prohibits direct foreign ownership in common carrier radio licensees greater than 20%. While the statute gives the Federal Communications Commission (FCC) the discretion to allow greater than 25% "indirect" foreign ownership in the parent of a licensee, the FCC has never exercised this discretion to the extent of allowing foreign control. This effectively precludes substantial foreign investment in the U.S. local exchange (mobile and microwave licenses) and long distance (microwave and satellite licenses) markets. Foreign ownership limitations apply to common carrier radio licenses needed to provide long distance service.

A U.S. carrier engaged in international long distance services and controlled by a foreign carrier is subject to full dominant carrier regulation (eg. the same as AT&T) unless it can satisfy the FCC that its foreign affiliate is unable to discriminate against unaffiliated U.S. carriers in its home market. All other carriers (eg. MCI, Sprint) are subject to streamlined regulation only.

In February 1995, the FCC proposed new rules to increase competition in the United States and to open foreign communications markets to U.S. industry. These new rules would enable the FCC to consider whether effective market access is, or soon will be, available to U.S. carriers seeking to provide basic telecommunications carrier services in the home country of the carrier seeking entry to the United States when deciding whether companies from those countries will be allowed to own or invest in U.S. communications companies.

Maritime Transport

Several U.S. programs and legislation serve to benefit the U.S. shipping, and shipbuilding and repair industries. For example, an operating differential subsidy (ODS) is paid to some U.S.-flag vessels in international shipping services to improve their competitiveness with respect to foreign-flagged vessels. Under the Capital Construction Fund (CCF) and the Construction Reserve Funds (CRF) tax deferral benefits are available to operators and owners of American vessels to construct, reconstruct or acquire vessels which have been constructed in the United States. In November and December 1994, regulations enacted under the Oil Pollution Act (OPA 90) introduced U.S. requirements for insurance certificates of financial responsibility and tug escorts for tankers transiting short sections of U.S. territorial waters in the Strait of Juan de Fuca on voyages into B.C. ports. These examples, along with the more significant legislation described below, serve to restrict access to the U.S. market for Canadian shipping and shipbuilding companies.

Merchant Marine Act (Jones Act)

The Merchant Marine Act of 1920 ("The Jones Act") requires that cargo transported by water between points in the United States be carried on vessels which are U.S. registered, built and crewed. Moreover, U.S. citizens must hold at least 75% equity interest in partnerships or corporations which own the vessel. Under other legislation, similar restrictions apply to the domestic carriage of passengers. Foreign rebuilding of a vessel permanently forfeits domestic privileges as does foreign registration for any period during the life of the vessel.

The Jones Act (coupled with the defence-related prohibitions of the Byrnes/Tollefson Amendment), effectively prevents Canada from participating in the domestic shipping trade of the United States, from investing in the U.S. shipbuilding industry, and from supplying shipbuilding components and related services to the U.S. market.

Another extension of the Jones Act, the Commercial Vessel Anti-Reflagging Act of 1988, restricts the activities of foreign-built vessels over five net tonnes in the fishing industry to the transportation of fish. The Act also prohibits vessels built or rebuilt outside the United States from engaging in coastal shipping and the fishing industry.

Federal Maritime Commission (FMC)

Under the Foreign Shipping Practices Act of 1988, the Federal Maritime Commission (FMC) is authorized to take unilateral action to address foreign shipping practices affecting U.S. carriers. The FMC may also take action against restrictions on non-liner vessels and port and onward transit services. Possible remedies include the imposition of fees; cargo restrictions; suspension of a carrier's operating rights; restrictions on sailings to and from U.S. ports; denial of entry to U.S. ports or waters, and detention of vessels.

Procurement

U.S. military supplies being transported by sea must be transported by U.S. vessels. In addition, 50% of government non-military cargoes and 75% of certain agricultural commodities (e.g., food and humanitarian aid shipments) must normally be transported by vessels of U.S. registry. As well, cargoes being shipped under U.S. export programs must normally be carried by U.S. vessels. (Up to 50% of such cargoes may be carried by vessels of the recipient country if the recipient country does not discriminate against U.S. vessels.)

<u>Financial Services</u>

Since 1980, Canadian financial sector reform has significantly outpaced that of the United States. Accordingly, many aspects of laws and regulations governing U.S. financial services result in significantly less access to the U.S. market than that enjoyed by U.S. financial institutions in Canada.

One of the key barriers is the variety of geographic restrictions on banking within and across state boundaries created by the MacFadden Act. Amendments in late-1994 have resulted in some improvements, but still offer no certainty that Canadian institutions will be able to operate freely across state lines.

The amendments (the Riegle-Neal Interstate Banking and Branching Efficiency Act) allow acquisition of a bank across state lines by the Autumn of 1995. However, beyond this basic right, the federal government has deferred to states to decide the degree of liberalization. Specifically, by June 1997, states must decide if they want to prevent consolidation and merger of banks acquired across state lines. As a result, banks could be faced with maintaining separate legal entities on different sides of state borders. At the same time, states must decide if they will pass legislation to allow *de novo* establishments, the preferred way to establish a presence. Early indications are that most states will not permit this.

Foreign banks will be charged a fee for examinations beginning July 25, 1997 unless the delay imposed by the Riegle-Neal Interstate Banking and Branching legislation is extended beyond the current three year moratorium, putting foreign banks at a disadvantage relative to domestic banks.

The Glass-Steagall Act prohibits all banks, domestic and foreign, from being affiliated with organizations that are "primarily engaged" in the securities business. The Board of Governors of the Federal Reserve system has, in recent years, interpreted this Act to allow banks to generate not more than 10% of their gross revenues from dealing and underwriting in securities other than bank-eligible securities (generally government securities) over any two year period.

The Canadian law was amended in 1987 to permit banks to own securities dealers, and as a result, the largest Canadian dealers have become affiliated with banks. So far, four Canadian banks have received approval to underwrite and deal corporate debt and equity through a subsidiary. Therefore, as the Glass-Steagall Act limits the range and the extent of corporate securities activities in which dealers can be engaged in once they became bank owned, it will have a significant impact on the investment of Canadian banks in the Untied States.

Also in the area of securities, foreign broker-dealers are generally restricted by the Securities and Exchange Commission (SEC) to providing investment advice and other securities services to a limited range of major institutional clients in the United States. In many cases, the business must be conducted through a registered broker-dealers located in the United States. This limits the scope for cross-border provisions of securities services. Moreover, where SEC rules do not permit access to the U.S. market by non-resident broker-dealers, the broker-dealer must also comply with state securities laws, which are sometimes more restrictive. This contrasts with the Canadian market, where U.S.-based securities firms have very wide scope for offering services to sophisticated investors.

Affiliation between banks and insurance companies is prohibited in the United States, but is permitted in Canada.

X. TAX MEASURES

Non-Resident Corporations

The United States has enacted various tax measures applicable to non-resident corporations conducting business in the United States. These measures deter Canadian life insurance corporations from doing business through branch operations. Internal Revenue Code Section 842 (b) states that Canadian companies must report a minimum amount of "effectively connected" net investment income to their branch operations. Canadian companies find these rules to be punitive and not reflective of the realities of their U.S. operations. As a result, some have moved their U.S. branch business to U.S. subsidiaries to avoid the rules.

Internal Revenue Code Section 842 (c) and regulation 882-5 provide a formula for allocating interest that is deductible by a foreign corporation for U.S. tax purposes. This differs from interest actually paid to generate income in the United States. Canadian life insurance companies are concerned that the application of this regulation will result in the disallowance for U.S. tax purposes of significant amounts of customer liability expenses on their guaranteed income certificate business. Internal Revenue Code Section 884 imposes a branch profits tax on U.S. branches of foreign corporations. Canadian life insurance companies are concerned that the computation is inconsistent with Section 842 (b) and 882 (c).

Selective Tax Measures

Selective tax measures confer subsidies in the form of special benefits to specific domestic firms, industries, activities or regions and have the potential to distort international trade. Some of the more generous selective tax measures for U.S. industries are provided through tax-deferral measures such as the Foreign Sales Corporation Program which permits the permanent deferral of income taxes on a portion of export profits. Several U.S. states provide fuel tax rebates, and property tax reductions and exemptions to agricultural land uses. By assessing agricultural lands at less than fair market value, these programs reduce operating costs for agricultural land owners by lowering property taxes.

Taxes on Alcohol

The Omnibus Budget Reconciliation Act of 1990 provided substantial excise tax exemptions for most U.S. beer and wine producers. In addition, several states also grant substantial excise tax exemptions for local producers. The cumulative effect of such measures for small New York breweries, for instance, is equivalent to a tax rebate of over $17 per barrel of beer. Canadian brewers and wineries shipping to the United States must compete against such subsidies.

Excise Tax on Recycled Halon

U.S. legislation (the Budget Reconciliation Act of 1989, s4681) provides for an exemption from U.S. excise tax for halon recycled in the United States. This denies national treatment, in a manner inconsistent with U.S. NAFTA obligations, to recycled halon imported from Canada and has the effect of restricting such imports. The application of this discriminatory measure has resulted in commercial losses for Canadian exporters.

XI. INTELLECTUAL PROPERTY

Section 337 of the Tariff Act of 1930

Under Section 337 of the U.S. Tariff Act of 1930, imported products that allegedly violate United States intellectual property rights can be barred from entry into the United States. Complaints under Section 337 are made to the U.S. International Trade Commission (ITC), and generally involve allegations of infringement of intellectual property rights, i.e. patents, trademarks or copyrights. Relief, in the form of an exclusion order (import prohibition of a specific article) or a cease and desist order (an order prohibiting a party from importing) or both, may be granted to the successful complainant.

Section 337 gives U.S. intellectual property owners a major advantage over foreign competitors, who face expensive litigation and the threat of harassment. Section 337 provisions contain more direct remedies against alleged violators than available against alleged domestic violators in U.S. domestic courts. Foreign firms also face more onerous administrative procedures in the ITC than in U.S. domestic courts.

A 1989 GATT Panel determined, *inter alia*, that Section 337 violated U.S. GATT obligations by providing different procedures for claims against foreign defendants than were provided for domestic defendants. U.S. commitments under the TRIPS Agreement and the NAFTA, in addition to reflecting those in the GATT, provide for administrative procedures to be in conformity with principles equivalent in substance to those provided in judicial proceedings.

The U.S. Uruguay Round implementing legislation has reduced some of the inconsistencies with U.S. obligations, by:

- preventing simultaneous ITC and District Court proceedings involving the same issues;
- providing for counterclaims;
- requiring the complainant to post a bond when seeking cease and desist orders;
- providing for indemnification of aggrieved defendants; and
- restricting the authority to issue exclusion orders.

The legislation and new ITC regulations, however, do not remove the threat of discriminatory treatment for non-U.S. defendants who will continue to face the risk of an additional burden.

XII. CANADIAN RESPONSES TO U.S. BARRIERS

Canada defends its interests with respect to U.S. trade barriers through representations, negotiations, consultations and dispute settlement proceedings on a bilateral basis or multilaterally through international trade agreements such as the NAFTA and the WTO. Throughout the year, Canada monitored the implementation of specific U.S. regulations which were required to give effect to the various provisions negotiated in the NAFTA. The NAFTA improves upon the terms of the FTA and provides for the discussion of further progress on trilateral trade issues through the establishment of more than 30 NAFTA Committees and Working Groups in such areas as technical standards, rules of origin and government procurement. The Working Groups on Anti-dumping and Subsidies/Countervailing Duties, for example, provide an opportunity to negotiate improved disciplines on the use of trade remedy measures. There is also an ongoing work program under the WTO, including multilateral negotiations on services and government procurement.

Regular bilateral consultations at the level of Ministers or officials to address individual trade problems have been instrumental in preventing issues from escalating into full-blown disputes or in resolving them when they do. The dispute settlement provisions of both the WTO and the NAFTA provide a last resort when negotiations and consultations fail. Canada has made aggressive and effective use of the dispute settlement provisions to protect Canadian trade interests as will be seen from the list of panel proceedings below.

Canadian Actions under the Free Trade Agreement

The following are the binational panels that have been established at Canada's request under the FTA since January 1, 1989.

Chapter 18 Panels

Minimum Size Requirements for Imported Lobster:

Established in January 1990, the panel upheld the U.S. minimum size requirements imposed on imported live lobster.

Non-Mortgage Interest as Territorial Content in the FTA Rules of Origin:

Established in January 1992, the panel upheld the Canadian challenge of the U.S. interpretation of the treatment of non-mortgage interest in the FTA rules of origin. The United States amended its interpretation accordingly.

UHT Milk:

Established in March 1993, the panel agreed that Canadian interests have been damaged by closing the market in Puerto Rico to UHT milk from Quebec and recommended that an equivalency study of milk production standards be conducted. The study is still in process.

Chapter 19 Panels (Anti-Dumping/Countervail Cases)

Anti-Dumping Determination on Imported Red Raspberries:

Established in March 1989, the panel review resulted in the U.S. Department of Commerce having to recalculate the dumping margins against Canadian exporters. This recalculation resulted in a finding that there was no evidence of dumping.

Anti-Dumping Determination on Paving Equipment:

Established in March 1989, the panel upheld the U.S. Department of Commerce finding that parts for Canadian paving equipment are covered by a dumping order, and therefore eligible for duty.

Anti-Dumping Determination on Paving Equipment:

Established in April 1989, the panel upheld the U.S. Department of Commerce's adjustment for Canadian taxes in calculation of the dumping margin.

Anti-Dumping Determination of Salted Codfish:

Established in April 1989, the panel review was terminated with the consent of both parties because the anti-dumping order was revoked.

Anti-Dumping Determination on Paving Equipment:

Established in June 1989, the panel consolidated this request with the panel review of April 1989, regarding the same issue.

Countervailing Duty Determination on Fresh, Chilled and Frozen Pork:

Established in August 1989, the panel resulted in the U.S. Department of Commerce recalculating its countervailing duty, lowering it from eight to three cents per kilogram.

Countervailing Duty Determination on Imported Steel Rails:

Established in September 1989, the panel review resulted in the U.S. Department of Commerce recalculating its countervailing duty, lowering it from 112.34 percent to 94.57 percent.

Anti-Dumping Duty Determination on Imported Steel Rails:

Established in September 1989, the panel upheld the U.S. Department of Commerce's use of "best information available" in calculating its dumping margin.

Injury Determination in Countervailing Duty Cases on Imported Steel Rails:

Established in October 1989, the panel consolidated this request with the following panel review, which upheld the U.S. International Trade Commission's finding of injury against the Canadian producer.

Injury Determination in Anti-Dumping Case on Imported Steel Rails:

Established in October 1989, the panel upheld the U.S. International Trade Commission's finding of injury against the Canadian producer.

Injury Determination of Fresh, Chilled and Frozen Pork:

Established in October 1989, the panel review resulted in the U.S. International Trade Commission issuing a negative finding, terminating a duty imposed on Canadian pork. This panel decision was appealed by the United States to an Extraordinary Challenge Committee, which subsequently refused the appeal.

Anti-Dumping Determination on Imported Parts for Paving Equipment:

Established in June 1990, the panel review resulted in the U.S. Department of Commerce recalculating its dumping margin three times before it was affirmed by the panel at a rate of 17.97 percent. The original rate was 9.47 percent.

Scope Determination on Imported Oil Country Tubular Goods:

Established in November 1990, the panel review was terminated by joint consent of all parties.

Anti-Dumping Determination and Cancellation of Suspension Agreement on Imported Sheet Piling:

Established in December 1990, the panel review was terminated by joint consent of all parties.

Scope Exclusion Determination on Imported Oil Country Tubular Goods:

Established in May 1991, the panel review was terminated by joint consent of all parties after the U.S. Department of Commerce issued a decision excluding the goods from the anti-dumping order.

Anti-Dumping Determination on Imported Iron Construction Castings:

Established in June 1991, the panel review was terminated at the request of the complainant.

Countervailing Duty Determination on Imported Live Swine:

Established in July 1991, the panel review resulted in the recalculation of the countervailing duty rate on live swine for the 1988/89 review period, lowering it to 0.51¢/lb from 4.49¢/lb. The panel decision was appealed by the United States to an Extraordinary Challenge Committee which subsequently denied the appeal.

Countervailing Duty Determination on Imported Live Swine:

Established in October 1991, the panel review resulted in the U.S. Department of Commerce recalculating its countervailing duty rate on live swine for the 1989/90 review period, lowering it from 9.32¢/lb to 9.27¢/lb.

Anti-Dumping Determination on Paving Equipment:

Established in October 1991, the panel review was terminated at the request of the complainant.

Countervailing Duty on Imported Softwood Lumber:

Established in July 1992, the panel review resulted in a negative subsidy determination on remand by the U.S. Department of Commerce. The United States appealed the panel decision to an Extraordinary Challenge Committee, which subsequently denied the appeal.

Injury Determination on Countervailing Duty Cases on Imported Softwood Lumber:

Established in July 1992, the panel review was terminated after the negative finding of subsidy was upheld by an Extraordinary Challenge Committee.

Countervailing Duty Determination on Imported Magnesium:

Established in August 1992, the panel review resulted in the maintenance of the countervailing duty.

Anti-Dumping Determination on Imported Magnesium:

Established in August 1992, the panel review resulted in the U.S. Department of Commerce recalculating its anti-dumping duty, lowering it from 31.33 percent to 21 percent.

Injury Determination in Anti-dumping and Countervailing Duty Cases on Imported Magnesium:
Established in September 1992, the panel review resulted in the affirmation of the U.S. International Trade Commission's finding of injury.

Anti-Dumping Determination on Cold Rolled Carbon Steel Flat Products:
Established in July 1993, the panel review is stayed pending the outcome of proceedings in the U.S. Court of International Trade on the injury determination.

Anti-Dumping Determination on Hot Rolled Carbon Steel Flat Products:
Established in July 1993, the panel review is stayed (as at March 16, 1994) pending the outcome of proceedings in the U.S. Court of International Trade on the injury determination.

Anti-Dumping Determination on Corrosion-Resistant Carbon Steel Flat Products:
Established in July 1993, the panel review is still in process.

Anti-Dumping Determination on Cut-to-Length Carbon Steel Plate:
Established in July 1993, the panel review is still in process.

Injury Determination on Corrosion-Resistant Carbon Steel Flat Products:
Established in September 1993, the panel review is still in process.

Canadian Actions Under the NAFTA

The following are the panels that have been established at Canada's request under the NAFTA since January 1, 1994.

Chapter 19 Panels (Anti-Dumping/Countervail Cases)

Countervailing Duty Determination on Imported Live Swine:
Established in March 1995, the panel review for the 1990/91 review period is still in process.

Canadian Actions Under the GATT

Since January 1, 1989, the following GATT panels have been established at Canada's request to examine and rule on U.S. trade practices.

Countervailing Duty Determination on Fresh, Chilled and Frozen Pork:
Established in August 1990, the panel found that the United States had violated the GATT by presuming that subsidies on the production of live swine were completely passed on to the exporters of processed pork. Duties paid by Canadian pork exporters were subsequently refunded.

Federal and State Measures Concerning Alcoholic and Malt Beverages:
Established in May 1991, the panel found that two U.S. federal excise taxes on wine and beer and 60 measures in 39 states and Puerto Rico discriminated against Canadian wine and beer. The panel requested that the United States to bring these measures into conformity with its GATT obligations. To date, the United States has failed to take any significant action to comply.

Initiation of Countervailing Duty Investigation on Softwood Lumber:

Established in December 1991, the panel found that the United States had not met its obligations under the Subsidies Code when it imposed interim duties on imports of softwood lumber from Canada prior to a preliminary determination of subsidy. The panel also found, however, that the United States had met its obligations of sufficient evidence under the Code when it self-initiated its countervailing duty investigation. On October 19, 1994, the USTR published in the U.S. Federal Register a notice to terminate the Section 301 action, and to release the existing bonds.

Initiation of Countervailing Duty Investigation on Magnesium:

Established in January 1992, the panel process was terminated before the panel could complete its deliberations, as a result of satisfactory discussions between Canada and the United States.

U.S. Limits on the Use of Foreign Tobacco:

Established in January 1993, the panel to examine the compatibility of the tobacco provisions of the U.S. Agricultural Reconciliation Act of 1993 with the GATT, found that certain provisions of U.S. tobacco laws were inconsistent with U.S. obligations under the GATT. In its Uruguay Round implementing legislation, the United States amended its tobacco laws to conform with the ruling of the Panel.

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