REGISTER OF UNITED STATES BARRIERS TO TRADE

1993

Canada

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FOREWORD

Canada and the United States are each other's principal trading partner. The bilateral Free Trade Agreement (FTA) has considerably enhanced this relationship and reduced barriers to trade on both sides of the border. The FTA provides rules and procedures to deal with trade problems and allows the two countries to negotiate new benefits for their exporters and investors.

The FTA, however, did not deal with all trade restrictions. Some were left to later resolution in the Multilateral Trade Negotiations (MTN) or in other trade negotiations.

Obstacles to the free flow of goods, services and investment between Canada and the United States remain at the federal, state and local levels. This register offers an illustrative compendium of the range and complexity of barriers that Canadian business people must cope with daily.

The Canadian government is working to bring an end to these barriers. In some cases, the barriers are inconsistent with U.S. obligations under the FTA or the General Agreement on Tariffs and Trade (GATT), and their elimination is being pursued within the framework of these agreements (see Chapter XII). In other cases, they are being addressed in the Uruguay Round of Multilateral Trade Negotiations under the GATT.

The North American Free Trade Agreement (NAFTA), which is expected to come into effect on January 1, 1994, will lead to the curtailment, and in some cases elimination, of a number of U.S. barriers, once implementating legislation is enacted.

Several notable changes have been made to this year's *Register of United States Barriers to Trade*. A section has been added to highlight those measures having an extraterritorial effect. Several additional subsidies, namely the Sunflowerseed and Cottonseed Oil Assistance Programs and the U.S. inland waterway transportation supports, appear in the 1993 register, and the government procurement section has been reorganized to more clearly highlight the broad sweep of Buy American provisions. Two barriers in the technical and regulatory section of last year's edition have been removed to reflect the successful negotiation of bilateral agreements on meat inspection and potatoes. New U.S. barriers, pertaining to meat, poultry and newsprint recycling, nonetheless appear in this section. Finally, the investment section has been updated to reflect a recent amendment to the Exon-Florio Amendment.

I. SUBSIDY PRACTICES

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. practices that affect Canadian business prospects are set out below.

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 include the Mississippi-Missouri and the Columbia-Snake river systems. These 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. Tolls have never been charged and, on the Mississippi system, there are no lockage fees or other user tolls, although barge operators do pay fuel taxes.

This system of waterways, canals, locks and the dredging that has been required constitutes a subsidy to inland transportation. By reducing the cost of bulk transportation for products, significant benefits accrue to users of the inland waterways.

Export Enhancement Program

The Export Enhancement Program (EEP) is authorized under the U.S. Food, Agriculture, Conservation and Trade Act of 1990 (Farm Bill). It authorizes the U.S. Department of Agriculture (USDA) to use Commodity Credit Corporation-owned stocks or cash payments to subsidize U.S. agricultural exports to targeted countries.

Initially, the U.S. justification for the EEP had been to protect its market share from erosion by subsidized European Community (EC) commodities, and to encourage the EC to negotiate trade reform within the context of the Uruguay Round. Thus, the EEP was to be used in markets that had a strong EC presence. However, this has not always been the case, since the nature of the foreign competition is only one of the criteria determining whether EEP allocations will be issued.

Over time, the EEP program has expanded to include countries that have a small EC market presence, and then to countries where the EC has only had the potential for sales. As a result of the trade subsidy war between the United States and the EC, 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 low returns to Canadian producers.

As of January 1, 1993, the United States had spent *$5.2 billion on the EEP, 92 per cent of which was used to subsidize grains, oilseeds and their products. Program funding is budgeted at $1.2 billion for the 1993 fiscal year. However, there is currently no cap on EEP funding.

The 1990 Farm Bill includes a GATT trigger provision, which requires specific commodity and export program adjustments to be implemented or considered by the U.S. Secretary of Agriculture if the Uruguay Round did not reach a successful conclusion by June 30, 1992. These actions include a requirement that the Secretary increase export promotion programs by $1 billion during fiscal years 1994 and 1995, beginning on October 1, 1993.

Market Promotion Program

The U.S. Market Promotion Program (formerly the Targeted Export Assistance Program) is authorized under the Farm Bill and is administered by the USDA's Foreign Agricultural Service. The program allots $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 1993 fiscal year is $147.7 million. Canadian industry has raised concerns about the impact of the program on Canadian exports to third country markets.

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 per cent 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 interest loss covered by the guarantee.

* Note: All dollar figures are United States dollars.

GSM-103 sales distort trade due to the subsidized interest rates and the concessional nature of the loan terms, which exceed the normal commercial limit of 3 years in duration.

Sunflowerseed and Cottonseed Oil Assistance Programs

The Sunflowerseed Oil Assistance Program (SOAP) and the Cottonseed Oil Assistance Program (COAP) were authorized by Congress in 1988 and 1989, respectively. Under the 1990 Farm Bill, combined program expenditures are authorized at $50 million for each fiscal year from 1991 to 1995.

The programs were designed to help U.S. exporters meet prevailing world prices for sunflowerseed oil and cottonseed oil in targeted markets. Under the programs, the USDA issues cash or commodity bonuses to U.S. exporters in the form of certificates. These certificates are valued at the difference between the higher U.S. cost of acquiring the oil and the lower world price at which it is sold. The SOAP has had a price-depressing effect that is of particular concern to the Canadian canola industry in the Mexican vegetable oil market.

Sugar

The United States operates a sugar price support program as well as import restrictions on sugar and certain sugar-containing products, which ensure 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.

II. TRADE REMEDY LEGISLATION

U.S. trade remedy laws allow for the imposition of anti-dumping or 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 allow the harassment of exporters to the U.S. market. Defending exporters' interests before the United States government is both expensive and cumbersome.

Initiation Standards

The GATT Codes on Anti-Dumping Practices, and Subsidies and Countervail Measures stipulate that an investigation shall normally be initiated upon a written request filed by a major portion of the domestic industry. The Codes envisage a verification by the investigating authorities that the complaining party does indeed represent either the whole industry or a major proportion of that industry. The U.S. authorities do not, however, conduct such a verification of a petitioner's standing before initiating an investigation. They reject a petition only if a major proportion of the industry comes forward to actively oppose the petition. As a consequence, a number of investigations have been initiated when a petitioner has represented a minor segment of the domestic industry.

The GATT rules also 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 Department of Commerce does not conduct before the initiation a substantive review or verification of the allegations of dumping or subsidization, of the presence of injury, or of a causal link between them.

Administrative Reviews

Administrative reviews of anti-dumping and countervailing duty orders, initiated on the anniversary date of an order, should normally be conducted within a 12-month period. Reviews which result in the application of higher rates of anti-dumping and countervailing duties are, however, usually completed more expeditiously than those which result in the application of lower duties. Such delays create considerable difficulties for Canadian exporters since they can continue to be assessed higher duties for several years on exports entering the U.S. market, based upon the findings of a previous administrative review period. There is no provision for review of original injury determinations in an administrative review. Finally, once reviews are completed and new margins assessed, exporters can face considerable difficulty in trying to recover duties overpaid during the review period. In the case of the 1985 countervailing duty order on live swine from Canada, for example, the annual administrative reviews represent a significant burden on the industry.

Sunset Provisions

There is effectively no sunset provision in U.S. law that would end anti-dumping or countervailing duty assessments after a certain time. As a consequence, U.S. actions can remain in effect indefinitely, even in those cases where the import no longer causes any injury. In contrast, Canadian legislation provides for automatic termination of an action after five years, unless it is extended following a review of the injury determination to determine the continuing justification for the application of duties.

Anti-Circumvention Provisions

The Omnibus Trade and Competitiveness Act of 1988 added a provision under which products, though not subject to dumping or countervailing duties, may be found to be circumventing the application of such duties. If circumvention is found, dumping or countervailing duties are applied without appropriate findings of dumping, subsidy or injury.

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 particular product from a particular country, including Canada, has been insignificant and at times negligible in terms of its share of the U.S. market. In many such cases, the U.S. administering authorities have refused to distinguish between Canadian and other foreign goods and have included all such imports in the subsequent investigation. This situation has created inequities for Canadian exporters who could legitimately claim that their exports were not the cause of injury to U.S. producers.

Section 301

Section 301 of the Trade Act of 1974, amended through the Omnibus Trade and Competitiveness Act of 1988, is the principal instrument for redressing "unfair" trade practices of other countries. Section 301 empowers the United States Trade Representative (USTR) to determine whether other countries maintain "unjustifiable," "discriminatory" or "unreasonable" practices. It also provides authority for, and can also require, unilateral retaliation by the USTR in order to improve access to foreign markets for United States goods, services and investment, and for the protection of intellectual property rights.

Use of the unilateral retaliatory measures without the authority of the GATT, as occurred when the United States imposed a surtax on beer imports from Ontario and duties on softwood lumber from Canada, undermines both the GATT rules and the GATT dispute settlement procedure.

III. EXTRATERRITORIAL LEGISLATION

United States trade policy is supported by domestic legislation that can have an extraterritorial effect. Its existence outside of agreed multilateral or bilateral arrangements promotes uncertainty and instability in the international trading system. The following is an example of extraterritorial legislation that has been used against Canadian firms.

"Cuban Democracy Act"

Section 1706 (a) (1) of the U.S. National Defense Authorization Act of 1993, or the "Cuban Democracy Act", seeks to prevent U.S.-owned or controlled subsidiaries located in other countries from trading with Cuba. It would accomplish this objective by asserting jurisdiction over the conduct of corporations that are organized in foreign states, and owned or controlled by U.S. citizens.

IV. GOVERNMENT PROCUREMENT AND DOMESTIC PREFERENCE LAWS

Despite the GATT and the FTA, barriers in government procurement remain. The Buy American Act still affects federal contracts directly, whereas related legislation creates barriers that flow through federal funding to federal, state and local contracts. The Buy American Act indirectly discourages United States distributors from selling Canadian goods. Small business set-asides further prohibit Canadian bids.

Buy American Act

Canadian firms encounter the Buy American Act at the federal level in either construction contracts or contracts with certain departments. Canadian companies are also confronted by it at the state and local level in contracts, particularly for mass transit, telecommunications, and electrical equipment, that receive certain federal funds.

Certain agencies, including the Department of Energy and Transportation, the Bureau of Land Management and the Army Corps of Engineers, must apply the Buy American Act to all of their contracts. On contracts to supply goods, these purchasing agencies must buy domestic product unless it is determined that:

- the cost would be unreasonable in comparison with the proposed foreign good;

- use of domestic goods would be contrary to the United States' public interest;

- the products are unavailable in the United States in sufficient quality or quantity; or

- the products are to be used outside the United States, or resold in commissaries.

The United States may use alleged national security concerns to prohibit Canadian firms from bidding on certain defence contracts. Annual defence funding also contains various Buy American provisions, 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 any foreign construction of U.S. ships or foreign supply of major ship components.

The Buy American provisions on federal contracts with all agencies for the construction or repair of public buildings are a direct barrier to U.S. government contracts. They are also an indirect barrier to sales in the United States as a whole, because U.S. distributors and wholesalers may refuse to carry Canadian products that cannot be used on government projects.

Materials used in the construction, alteration 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 per cent of the cost of all of its components, except when:

- the head of the concerned agency determines that use of a particular domestic construction material would unreasonably increase the project cost, or would be impracticable; or

- the required materials are unavailable in sufficient quality or quantity in the United States. The individual agency determines whether any product meets that description for its purposes. There is no requirement to use a minimum per cent guideline in making such a determination.

Related Legislation

Large federal, state and local government projects receive federal funds authorized by laws that require significant U.S. content. These billions of dollars in federal funds extend the reach of the Buy American Act to state, municipal and private sector contracts. The use of U.S. materials is a condition of the grant; recipients must comply with Buy American requirements in order to be eligible for the funds. These projects are often in export sectors of key interest to Canada such as transportation and communications. Use of Canadian products in these projects is often difficult or impossible. Federal funding programs include:

The Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991 provides capital and operating funds granted by the Federal Transit Administration and the Federal Highway Administration for transportation projects, including urban mass transit, rail and highways. In general, it requires the use of U.S. materials unless the granting agency determines that an exception should be made.

The Federal Transit Administration grants funding on the understanding that all steel and manufactured products (except cement) used in the funded project -- even at the state or 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 American origin. There are detailed definitions for calculating American content in components and subsystems. On any grant made for the purchase of transit vehicles, the general prohibition does not apply if the cost of components produced in the United States is more than 60 per cent of the cost of all the components, and final assembly takes place in the United States.

The Federal Transit Administration may determine that an exception may be made if:

- use of American goods is contrary to the public interest of the U.S.;
- the materials for which the waiver is requested are not available in sufficient quantity and reasonable quality; or
- inclusion of American goods would increase the cost of the contract between the grantee and the supplier by more than 25 per cent.

The Federal Highway Administration interprets the Buy American Act provisions of ISTEA more narrowly. When it grants funds, it requires only that manufactured products made of iron or steel be made in the United States.

The Airport and Airways Facilities Improvement Act authorizes the Federal Aviation Administration to grant funds to state, local, and private organizations to build and improve airports and related facilities, navigation and communications equipment. The Act requires 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. This requirement is a barrier to Canadian suppliers of electronics, navigation, telecommunications, and computer equipment; microwave landing systems; road clearing and maintenance equipment.

The Rural Electrification Administration Act requires co-operatives that receive REA loans or grants to apply the Buy American Act to all equipment purchased for the provision of electrical services.

The Foreign Relations Act requires 55 per cent American content on all Voice of America modernization contracts, and has restricted the use of Canadian antennae, transmitters, and related telecommunications equipment.

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 will 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 require that recipient agencies purchase, wherever possible, only food products that have been produced in the United States.

New in 1992: the 102nd Congress included Buy American requirements in the:

- 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 restricts certain contracts to small and minority-owned United States businesses, notwithstanding various trade agreements. Canadian firms are not eligible for these prime contracts, and are also at a disadvantage when seeking subcontracts. 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. United States law requires that:

- 20 per cent of prime contract awards be made to U.S. small business;
- all contracts worth less than $25 000 are limited to small business;
- all contracts above $25 000 be set aside if the contracting officer can reasonably expect two or more bids from small business; and
- if only one bid from a small business is received, the small business be given a 12 per cent price advantage in evaluation.

In addition to these explicit set-asides, the U.S. government 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, $6.9 billion was set-aside for small business, $3.8 billion was awarded through the 8(a) program and $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.

Merchant Marine Act (The Jones Act)

The Jones Act of 1920 requires that cargo transported by water between points in the United States be carried on United States-built and registered vessels that are owned and primarily crewed by U.S. nationals. Although principally designed for commercial shipping and shipbuilding, the Jones Act (coupled with the defence-related prohibitions of the Byrnes/Tollefson Amendment), effectively prevents Canada from participating in the coastal and foreign 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.

A 1988 amendment to the Jones Act to include the coastal transportation of "valueless material" (sludge, weeds), the Transportation of Sewage Sludge Act, has barred Canadian manufacturers from selling to the United States small vessels designed for the collection and transportation of marine weeds.

A further amendment to the Jones Act in the same year, the Commercial Vessel Anti-Reflagging Act, 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.

V. CUSTOMS AND ADMINISTRATIVE PROCEDURES

Country of Origin Marking Requirements

Section 1304 of the Tariff Act of 1930 requires virtually all imported goods of foreign origin to "be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or container) will permit in such manner as to indicate to the ultimate purchaser in the United States the English name of the country of origin of the article."

U.S. Customs often applies the country of origin marking rules in an inflexible, uneven and arbitrary way. Frequently, country of origin marking requirements and their administration impede access and result in additional costs. For certain products, there is also uncertainty as to the method and location of marking.

The regulations even extend to items not sold but given away. For example, flyers and brochures that are distributed free of charge to consumers must identify the country of origin.

Customs Administration

Certain administrative procedures, including excessive invoicing and reporting requirements, slow down the entry of goods and services into the United States. This is due partly to limited resources for inspections, but perishable goods can spoil because of lengthy processing times. In addition, long laboratory testing procedures and limited ports of entry further slow the movement of Canadian products into the United States market.

VI. TECHNICAL AND REGULATORY BARRIERS

Standards and Testing

The United States has an estimated 44 000 standards jurisdictions which are the federal, state and local regulatory authorities that enforce the estimated 89 000 U.S. standards and technical regulations. This results in overlapping responsibility and redundant standards and regulations. In some cases, the products are regulated directly through inspection or testing programs, or both. In other cases, an approval body may have to certify that products meet standards set by a particular state or municipal government. This becomes a technical barrier in cases where many states and municipalities have regulations that apply different standards, or where certification requirements differ.

State regulations governing laboratory accreditation also act as barriers to trade. As stated in a National Institute of Science and Technology publication, "Laboratories desiring to be accredited nationwide to conduct electrical safety-related testing of construction materials have to gain the acceptance of at least 43 states, more than 100 local jurisdictions, three building codes ..., [and] a number of federal agencies, as well as several large corporations." In other words, it is common for a testing organization to need multiple state and local government accreditation to conduct similar testing.

The U.S. voluntary standards systems are still intact after several attempts to impose greater government control. The lack of one central standardizing body further exacerbates problems for exporters to the United States, particularly small and medium-sized companies.

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 U.S. Farm Bill requires the 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.

Marketing Orders

The Agriculture Marketing Agreement Act establishes marketing orders that provide for grade, size, quality and maturity standards for horticultural products. 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.

Health and Sanitary Requirements

Shipments of agricultural products are occasionally subject to long delays due to health and sanitary inspections at the U.S. border. 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. Canadian livestock exporters have also been inconvenienced by limited quarantine facilities for live animals at U.S. border crossings.

Four counties in the United States maintain regulations prohibiting the sale, at the retail level, of meat that has not been graded by the USDA. The practical impact of these ordinances is that most wholesalers in these counties carry only USDA-graded meat, thereby reducing market opportunities for Canadian meat exporters.

Interstate milk shipments in the United States are governed by the FDA's Procedures Governing the Cooperative Federal-State Program for Certification of Interstate Milk Shippers. These procedures require that milk and milk products shipped between U.S. states must be produced and pasteurized under regulations that are substantially equivalent to the 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.

Milk and cream imported into the United States are subject to the 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.

Standards applied to imported products by one agency can differ from standards applied by that same or another agency to the same or similar 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 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.

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 these small volumes exported to the United States. This option limits market access to the United States, and lowers affected Canadian commodity prices.

Gas Exports to California

The California Public Utilities Commission (CPUC) continues to pursue regulatory policies that are detrimental to the interests of many Canadian natural gas producers. By introducing incremental tolling on the new Pacific Gas & Electric expansion line and a crossover ban between new and existing customers, the CPUC has reduced the attractiveness of the expansion. The CPUC has also allowed discounting on transportation from the U.S. Southwest, but has denied the same rights to Canadian gas.

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. Other measures relate to beer with an alcohol content of less than 3.2 per cent (typically produced by U.S. brewers but not by Canadian).

Several U.S. states require that imported beer and wine be sold through an in-state agent or middleman, whereas local breweries and wineries can sell product directly to retailers. Some states require that foreign beer be transported exclusively by private transport companies, while locally produced domestic beer can be shipped directly to retailers by the breweries themselves. Various other state measures impose higher licensing fees on foreign beer and dictate uniform prices for imported beers and wines for the entire U.S. market. 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 and beer. Finally, the federal government and several state governments maintain tax measures designed to benefit local beer and wine producers.

Minimum Size Restrictions

U.S. federal legislation places limits on the size of live lobsters and various groundfish imported from Canada. Numerous states apply minimum size restrictions to imports of live lobsters, frozen lobsters and lobster products.

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 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

Several U.S. states have established programs to promote recycling newsprint. These programs are either voluntary or mandatory in nature, and specify the levels of recycled paper to be contained in newsprint. The recycling programs are intended to lead to the reduction in the amount of waste paper being collected in landfill sites. While the purpose of recycling programs is laudable, the effect may be discriminatory.

VII. QUANTITATIVE RESTRICTIONS

Section 22 of the Agricultural Adjustment Act of 1933 allows the United States to impose quotas or fees on imports when it determines that these imports interfere with domestic price support programs. In 1955, the United States obtained a waiver of certain GATT obligations for actions taken under Section 22. (Canada voted against the waiver request.)

Currently, the United States maintains Section 22 import quotas on a wide range of products affecting Canadian exports of dairy products and certain sugar-containing products.

For certain dairy products, such as ice cream and some cheeses, Canada has no quota allocation and is therefore prohibited from entering the U.S. market. In addition, the United States maintains a Section 22 import fee on imports of refined sugar.

VIII. INVESTMENT

Numerous U.S. federal laws and regulations limit Canadian investment in the United States. Canadians cannot invest in nuclear energy, and can invest only with restrictions in radio and television, domestic aviation, 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.

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

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.

Since 1975, the Committee on Foreign Investment in the United States (CFIUS) has reviewed foreign investments that, in the judgment of the Committee, might have had implications for the U.S. national interest.

More recently, Section 5021 (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 further amendment, introduced in October 1992, to the Exon-Florio Amendment, the President is now required in the context of his review to take into account the potential effects of the 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.

The United States maintains, at both federal and state levels, a number of reporting requirements for corporate activities that apply only to foreign-owned businesses. These apply not only to subsidiaries of foreign companies but also, in the case of banks, to branches.

IX. FINANCIAL SERVICES

Canadian financial sector reform has significantly outpaced that of the United States. Accordingly, many aspects of laws and regulations governing U.S. financial services, while not in all cases discriminating against foreign financial institutions, result in significantly less comparable access to the U.S. market than that enjoyed by U.S. financial institutions in Canada.

For example, compared to Canada, the United States has a variety of geographic restrictions on banking within and across state boundaries.

- The Bank Holding Company Act prohibits a bank holding company or its subsidiary from acquiring the voting shares or substantially all of the assets of any bank located outside the state where the bank holding company's banking subsidiaries conduct their principal business (i.e. essentially where the deposit base is largest) unless the acquisition is specifically authorized by the laws of the particular state.
- The International Banking Act prohibits a foreign bank from establishing federal or state branches or agencies outside its home state, unless permitted by the laws of the state which the bank wishes to enter. The Act also provides that acquisition of any number of voting shares or of substantially all of the assets of a bank located outside the home state of the foreign bank is not permitted, unless such acquisition would be permitted by a bank holding company.

- The McFadden Act provides that a national bank may, with the approval of the Comptroller of the Currency, have branches within the state where the bank is located, if such branching is permitted to state banks by the law of the state in question, and subject to any restrictions imposed by the law of the state on state banks.

States impose many restrictions on foreign banks. Approximately 15 states treat foreign banks in a more restrictive manner than they do domestic banks, thereby resulting in reduced competitive opportunities for foreign banks. For example, some states prohibit foreign banks from establishing branches within their borders or from taking deposits, or impose special deposit requirements.

The Glass-Steagall Act prohibits all banks that are members of the Federal Reserve system, domestic and foreign, from being affiliated with organizations that are "principally engaged" in the securities business. The Board of Governors of the Federal Reserve system has interpreted this Act to allow a bank to own a securities subsidiary whose corporate securities business does not exceed 10 per cent of its total revenues, measured over a two-year period.

Since the beginning of 1991, four Canadian banks have received approval to underwrite and deal in corporate debt and equity through a subsidiary. Since Canadian law has permitted banks to own securities dealers since 1987, the largest Canadian securities dealers have become affiliated with banks. The effect of the Glass-Steagall Act is, therefore, to limit the range of corporate securities activities in which dealers were engaged before becoming affiliated with banks.

Also in the area of securities, non-residents are generally restricted by the Securities and Exchange Commission (SEC) to providing investment advice and other securities services to U.S. residents through a registered broker-dealer located in the United States. This limits the scope for cross-border provision of securities services.

Affiliation between banks and insurance companies are prohibited in the United States, but are permitted in Canada with the passage of new federal financial institutions legislation. This new law may create significant operational problems for a Canadian bank wishing to acquire a Canadian insurer with U.S. operations.

A variety of state restrictions are also imposed on foreign insurance companies. For example, some states impose different deposit requirements on insurance firms, depending on their place of incorporation. Special deposit and asset pledge requirements are imposed on non-resident insurers by certain states.

X. INTELLECTUAL PROPERTY

Section 337 of the Tariff Act

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. Section 337 gives the U.S. intellectual property owners a major advantage over foreign competitors. Applied as a border measure, it provides a more effective remedy against alleged violators than do U.S. domestic courts. Foreign firms, under this measure, may face expensive litigation and the threat of harassment. This legislation has been ruled by a GATT panel to be in contravention of the GATT. The United States has thus far refused to implement remedial legislation.

Copyright and Trade Mark Infringement

U.S. Customs may detain goods for up to 30 days for laboratory examination to determine their compatibility with registered U.S. copyrights and trade marks. Until Customs determines whether an infringement exists, the importer cannot dispute the charge. The procedure can result in lost sales for Canadian exporters and considerable inconvenience for their U.S. customers.

Patents: Critical Date

In determining the person entitled to a patent, where there are conflicting claims, the United States favours the American inventor over the foreign inventor. This occurs as a result of the United States giving preference to inventors who have first demonstrated the practical applicability of the invention ("reduction to practice"). Under Section 104 of the U.S. patent law, foreigners are granted patents on the date of filing, whereas U.S. residents' patents are dated from the moment of invention.

XI. TAX MEASURES

Non-Resident Corporations

The U.S. 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 U.S. 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 882 (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 unwieldy and not consistent with Sections 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 certain export-related income.

Taxes on Alcohol

The federal Omnibus Budget Reconciliation Act of 1990 provided substantial excise tax exemptions for most U.S. beer and wine producers. 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.

XII. CANADIAN RESPONSES TO U.S. BARRIERS

Canada defends its interests with respect to U.S. trade barriers through negotiations, consultations, and dispute settlement proceedings.

The recently-concluded North American Free Trade Agreement improves upon the terms of the FTA and provides for the development of new liberalizing measures through further negotiations on government procurement and through the establishment of numerous working groups on technical standards and other matters. Still other barriers are being addressed in the Uruguay Round of GATT negotiations.

Negotiations are complemented by regular consultations to address individual trade problems, through meetings at the level of officials or of ministers, including in particular the Canada-U.S. Trade Commission. These interventions 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 GATT and the FTA provide a last resort when negotiations and consultations fail. Canada has made aggressive and effective use of these provisions, 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 instigated at Canada's request under the Free Trade Agreement since January 1, 1989.

Chapter 18 Panels

- Minimum Size Requirements for Imported Lobster:
  Established in January 1990, this 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.

- UHT Milk:
  Formed in March 1993. The panel decision is pending.

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 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 Department of Commerce's adjustment for Canadian taxes in calculation of a dumping margin.

- Anti-Dumping Determination on Salted Codfish:
  Established in April 1989, the panel review was terminated with the consent of both parties because the anti-dumping order was revoked.

- Amendment to 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 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 Department of Commerce recalculating its countervailing duty, lowering it from 112.34 per cent to 94.57 per cent.

- Anti-Dumping Duty Determination on Imported Steel Rails:
Established in September 1989, the panel upheld the Department of Commerce's use of "best information available" in calculating its dumping margin.

- Injury Determination in Countervailing Duty Case on Imported Steel Rails:
Established in October 1989, the panel consolidated this request with the following panel review.

- 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 exporter.

- Injury Determination on Fresh, Chilled and Frozen Pork:
Established in October 1989, the panel review resulted in the International Trade Commission issuing a negative injury finding, terminating a duty imposed on Canadian pork. This panel decision was appealed by the United States to an Extraordinary Challenge Committee, which subsequently denied the appeal.

- Anti-Dumping Determination on Imported Parts for Paving Equipment:
Established in June 1990, the panel review is still in process.

- 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 Department of Commerce issued a decision excluding the goods from the anti-dumping order.

- Anti-Dumping Duty 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 is still in process.

- Countervailing Duty Determination on Imported Live Swine:
  Established in October 1991, the panel review is still in process.

- 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 May 1992, the panel review is still in process.

- Injury Determination on Countervailing Duty Case on Imported Softwood Lumber:
  Established in July 1992, the panel review is still in process.

- Countervailing Duty Determination on Imported Magnesium:
  Established in August 1992, the panel review is still in process.

- Anti-Dumping Determination on Imported Magnesium:
  Established in August 1992, the panel review is still in process.

- Injury Determination in Countervailing Duty Case on Imported Magnesium:
  Established in September 1992, the panel review is still in process.

- Injury Determination in Anti-Dumping Case on Imported Magnesium:
  Established in September 1992, the panel review 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 the United States had violated the GATT by assuming 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 U.S. bring these measures into conformity with its GATT obligations.

- 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. The panel report has not yet been adopted by the Subsidies Committee.

- 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 the Canadian company and the U.S. government.