REGISTER OF UNITED STATES BARRIERS TO TRADE

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FOREWORD

Canada and the United States are each other's principal trading partners. 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 further bilateral negotiations envisaged under the FTA itself.

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, they 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 XI). In other cases, they are being addressed in the Uruguay Round negotiations of the GATT or in the North American free trade negotiations.

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 Defence 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.

Export Enhancement Program

The Export Enhancement Program (EEP) is authorized under the U.S. 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 (particularly in the grains and oilseeds sector) to targeted countries. EEP bonuses are currently being paid in cash.

The U.S. justification for the EEP has been to protect its market share from erosion by subsidized European Community 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 had 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, 1992, the U.S. had subsidized 117 million tonnes of U.S. grains, oilseeds and their products through the EEP since its inception in 1985. It has cost U.S. taxpayers US$4 billion. The President's 1993 fiscal-year budget proposal sets program funding at the same level as that in fiscal-year 1992, namely US$1.2 billion.

The United States Food, Agriculture, Conservation and Trade Act of 1990 (FACT) includes a GATT Trigger which would require specific commodity and export program adjustments to be implemented or considered by the United States Secretary of Agriculture if the Uruguay Round does not reach a successful conclusion by June 30, 1992. These actions include a requirement that the Secretary increase export promotion programs by $1.0 billion during fiscal years 1994 and 1995.

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 US$200 million annually from USDA's Commodity Credit Corporation for fiscal years 1991 through 1995 to finance promotional activities for U.S. agricultural products. 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.

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

Sugar

The United States maintains a sugar import tariff rate quota (TRQ) whereby imports above a specified level (1,383,344 metric tons in 1991/92) are subject to a prohibitive duty. In connection with the TRQ, the U.S. operates an import for re-export program under which U.S. sugar refiners may import sugar exempt from the prohibitive duty if an equivalent amount of sugar is re-exported. Since the original import for re-export program was introduced, U.S. exports of refined sugar have increased from 6,562 metric tons in 1982 to 71,738 metric tons in 1991. The FTA requires the elimination of such duty drawback programs for bilateral trade after January 1, 1994.

Canadian Actions

On many occasions, Canada has expressed its concerns to the U.S. government about the price-depressing and market-distorting effects of U.S. subsidy programs. Trade-distorting subsidy programs are one of the major issues under discussion in the Uruguay Round, and Canada is seeking significant reductions in these programs.

II. TRADE REMEDY LEGISLATION

U.S. trade laws allow for the imposition of anti-dumping or countervailing duties on imports of dumped or subsidized goods 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.

The GATT Codes on Anti-Dumping Practices, and Subsidies and Countervail Measures stipulate that an investigation may be initiated only if a written request is filed by a major proportion 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 of anti-dumping and countervailing duty orders, initiated on the anniversary date of an order, are usually conducted within a 12-month period. The reviews, the purpose of which is to determine the actual dumping or subsidy margin during the review period, are consistently late by as much as three or four years. Such delays create considerable difficulties for Canadian exporters since they can continue to be assessed higher duties several years after their exports have entered the U.S. market. Moreover, once reviews are completed and lower margins assessed, exporters can face considerable difficulty in trying to recover duties overpaid during the review period. It would appear that reviews which result in the application of higher rates of anti-dumping and countervailing duties are usually completed more expeditiously than those which result in the application of lower duties.

There is currently no effective 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 to determine the continuing need for the application of duties.

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.

Canadian Actions

Canada has actively pursued a number of avenues to counteract the most egregious elements of the U.S. anti-dumping and countervailing duty laws. In the first instance, Canada has pressed for tougher and clearer rules to govern the application of anti-dumping and countervailing duties during the Uruguay Round of Multilateral Trade Negotiations of the GATT. We have sought, through the Working Group on Subsidies and Trade Remedies established under the FTA, to develop more effective disciplines on the use of subsidies by both governments as well as a substitute system of trade remedies to deal with government subsidization and unfair pricing. This work was deferred, however, pending the conclusion of the MTN. Upon its conclusion, Canada will determine what future work may be required to develop more effective rules and disciplines as provided for under the FTA.

On numerous occasions, Canada has raised its specific concerns related to U.S. practice or law in the GATT Committees on Anti-dumping Practices and Subsidies and Countervailing Measures. We have been quick to challenge particular U.S. actions in both the GATT and FTA dispute settlement forums, with considerable success.

III. GOVERNMENT PROCUREMENT AND DOMESTIC PREFERENCE LAWS

The GATT Agreement on Government Procurement and the Free Trade Agreement provide open and competitive access to a segment of federal government contracts in the United States. Nevertheless, a significant portion of federal, state and local procurement remains closed to Canadian businesses due to a range of "Buy American," "set aside" and other legislated exceptions to the GATT Agreement on Government Procurement. The most significant of these measures are outlined below.

Buy American Act

U.S. federal departments and agencies are required by the Buy American Act to favour suppliers based in the United States when buying goods and services. In some cases, the Act is overruled by U.S. international trade obligations. But,

generally, the Act demands that only domestic products be acquired for public use in construction, alteration or repair of public buildings or public works. This requirement must be observed unless:

(a) the product is not available domestically,
(b) the cost of acquisition exceeds the lowest acceptable foreign offer by more than 6 per cent, or
(c) the items are destined for use outside the United States.

In addition, businesses or agencies buying goods and services for the federal government may also set aside contracts for small businesses (see Small Business Act below) and for firms in regions of high unemployment, referred to as "labour surplus areas." Foreign bids may be rejected for reasons of national security or national interest.

For a product to qualify as domestic, final manufacture must take place in the United States, and at least 50 per cent of the value of the product must be American. In the case of construction contracts, the Act requires that only domestic construction materials be used unless they are unavailable in the United States or the cost of the domestic product is considered unreasonably high.

The Buy American restriction can have a negative impact on general commercial sales of foreign products, as U.S. wholesalers and distributors may refuse to carry product lines that cannot be used in government contracts.

The impact of the Buy American Act is seen in other legislation, in regulations that use this legislation as the authority and in a range of state and local practices. In some sectors using federal funds, in particular surface transportation and defence, the Buy American requirements are even more restrictive.

Intermodal Surface Transportation Efficiency Act

The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), which is guided by the Buy American Act, covers government procurement in a range of areas of interest to Canadian companies: urban mass transit, road and bridge construction, and rail projects. ISTEA, the most recent version in a series of surface transportation acts, provides a six-year funding authorization for highway and mass transit projects.

According to ISTEA, federal, state or local governments that receive federal funds for the purchase of steel, transport and construction equipment must give preference to U.S. suppliers. In the case of mass transit equipment, the local

transit authorities can accept bids 25 per cent higher than the lowest tender if the bidder is supplying only United States-made or -assembled equipment with a substantial local content requirement. As of October 1, 1991, ISTEA provisions call for a domestic content requirement of 60 per cent, and final assembly of vehicles must take place in the United States.

Other sectors covered by ISTEA include projects of the Federal Highway Administration (FHA). The Buy American provisions require that only domestically produced iron, steel and manufactured products be used in any FHA project.

The funding programs of ISTEA are not subject to the disciplines of the GATT or the FTA. This is because the funding programs themselves and the agencies receiving the grants are not covered by the procurement obligations under either Agreement.

Small Business Act

Various U.S. set-aside programs (small, disadvantaged, minority, labour surplus and female-owned businesses) under the Small Business Act of 1953 and a number of auxiliary acts of Congress represent a major impediment to Canadian firms in gaining access to the U.S. market.

The Small Business Act established the Small Business Administration in order to promote the interests of small and disadvantaged businesses. It does so in a number of ways. In 1989, 18 per cent of prime contracts and 39 per cent of subcontracts, representing a total value of $59 billion, were awarded to small businesses. Of these, approximately $13 billion in contracts were specifically designated by contract officers as being "set aside" and available exclusively to U.S. small business concerns. Such set-asides may be applied to contracts covered by the FTA and the GATT procurement provisions, as well as to contracts outside the authority of these international obligations.

Under the Small Business Administration, a small business is usually defined as one with up to 500 employees and $3.5 million annually in receipts, though companies may range in size up to 1 500 employees. Small business set-asides are a particular concern for Canadian industry since they occur within the range of contracts of primary interest to Canadian firms.

Defense Appropriations Act

Annual defence appropriations contain a number of provisions restricting purchases outside the United States. Among the more significant are:

- **"The Berry Amendment,"** which restricts the Department of Defense's procurement of food, clothing, fabrics and specialty metals not grown or produced in the United States;

- **"The Byrnes/Tollefson Amendment,"** which prohibits the construction in foreign shipyards of U.S. Navy ships, including major ship components; and

Emergency Food Assistance Act

The Emergency Food Assistance Act provides food for the needy, school lunch programs and other child nutrition programs, the elderly, charitable institutions, and disaster relief. Buy American provisions require that recipient agencies purchase, whenever possible, only food products which have been produced in the United States.

Rural Electrification Act

The Rural Electrification Act (REA) of 1938 authorizes loans and loan guarantees for the procurement of equipment by utility companies providing electricity and telephone services in rural areas. Loan recipients must apply the Buy American Act to all items purchased with REA financing.

Federal Aviation Act

This Act provides for the funding of airport and airway improvement projects, and includes Buy American provisions similar to those in the ISTEA. Canadian industries affected include the manufacturers of electronics, navigation systems, microwave landing systems and road maintenance equipment.

Clean Water Act

To qualify for funds under the Clean Water Act for the construction of treatment works, the proposed facility must use materials or manufactured components "mined, produced or manufactured" in the United States.

Foreign Relations Act

Buy American restrictions are applied to goods or equipment such as transmitters and antennae purchased through the Voice of America modernization program (about $100 million per year for the next 10 years). Affected Canadian industries include manufacturers of electronic and transmission systems.

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) has barred Canadian manufacturers from selling to the United States small vessels designed for the collection and transportation of marine weeds.

Canadian Actions

Negotiations are currently under way in the context of both the Uruguay Round and the North American Free Trade Agreement (NAFTA) to reduce U.S. procurement barriers.

IV. 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. In some cases (bricks, for example), the prescribed markings render some of the product unfit for sale or use.

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.

Canadian Actions

Canada is seeking greater clarity and precision in U.S. country of origin marking requirements and customs procedures through the North American Free Trade negotiations.

V. 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.

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 U.S. Food and Drug Administration's (FDA) 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.

Trade in meat is hampered by the unnecessarily stringent application of meat inspection requirements by the United States. In February 1990, Canada and the U.S. reached an agreement providing for the elimination of border re-inspection. The agreement was founded on the principle that the two countries have equivalent inspection systems. In September 1991, however, the United States decided that it could not implement the agreement. As a result, in September 1991, Agriculture Canada also implemented spot check re-inspection of U.S. meat at designated facilities.

The U.S. Farm Bill requires the United States Department of Agriculture (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.

Many exporters find it difficult to ensure that their products meet the 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.

Interstate milk shipments in the United States are governed by the National Conference on Interstate Milk Shipments (NCIMS). The basis for NCIMS membership is compliance with the U.S. Pasteurized Milk Ordinance (PMO). A state that is a member of the NCIMS can receive only milk or milk products from NCIMS-participating states, or from a state that has equivalent regulations. No provisions under the NCIMS pertain to imports from other countries. A specific example of the disruptive nature of this ordinance can be seen in the recent 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. The requirements for issuance of such permits are complex and have effectively precluded imports from Canada.

Futures Contracts

The Commodity Futures Trading Commission approved, on November 26, 1991, a Chicago Board of Trade proposal for a "buyers call option" which allows the buyer of futures contracts for wheat, corn, soybeans, soybean oil or soybean meal the option to request delivery of products of "U.S. origin only." This option was effective with September 1992 contracts.

The buyers call option discriminates against Canadian commodities, especially soybeans, delivered against U.S. futures contracts. In particular, warehouses will likely be reluctant to handle Canadian soybeans because of the small volumes exported to the United States. This option is expected to limit market access to the United States, and to lower Canadian soybean prices.

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.

Gas Exports to California

In line with its policies of deregulation of the gas trade, the California Public Utilities Commission has ruled that the pipeline carrying gas from Alberta and British Columbia to northern California should be opened to direct purchases from Canadian producers by institutional consumers in California. The decision would enable California to undermine existing long-term supply contracts. The CPUC's actions are inconsistent, in a number of respects, with the provisions of the FTA.

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 Canadians).

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.

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 certain marine mammals and marine mammal products, subject to certain exceptions. The prohibition 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.

Canadian Actions

Many of these issues are being addressed in the Uruguay Round and the NAFTA negotiations, as well as on a bilateral level. Canada has brought the U.S. alcohol measures before a GATT panel.

Regarding the CPUC decision on Canadian gas exports, the Canadian National Energy Board and the Government of Alberta have acted to defend Canadian interests by ensuring that gas exports take place only in compliance with existing contractual relationships. In December, 1991, negotiations on a solution to the dispute began between the CPUC and the provinces of British Columbia and Alberta, under the aegis of the Canadian and U.S. governments.

VI. 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.

Canadian Actions

United States import quotas are being addressed in the context of the Uruguay Round.

VII. 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. Recently, some members of Congress have introduced a number of amendments to Section 5021 that would broaden the definition of security to encompass economic security. The Exon-Florio Amendment has led to a significant increase in the review by the CFIUS of foreign acquisitions in recent years.

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.

Canadian Actions

Trade related investment measures are being addressed in the context of the Uruguay Round and the NAFTA.

VIII. 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 to 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 fifteen 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 will be permitted in Canada once the new federal financial institutions legislation is enacted. This new law could 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.

Canadian Actions

The federal government is pursuing liberalization in a number of these areas through the NAFTA.

IX. 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.

Canadian Actions

Canada seeks to eliminate the discriminatory elements of U.S. laws and practices related to the acquisition of patent rights within the context of the Uruguay Round and the North American Free Trade negotiations.

X. 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.

Canadian Actions

Non-resident corporation-related tax measures are currently under discussion with U.S. officials, while alcohol taxes were the subject of a recent GATT panel established at Canada's request.

XI. CANADIAN RESPONSES TO U.S. BARRIERS

As noted in each of the chapters above, Canada is taking specific action at the multilateral and bilateral levels to remove U.S. barriers to trade. The Uruguay Round and the North American Free Trade negotiations provide prospects for the elimination of measures that constrain Canadian exports. In addition, the Canadian and United States governments regularly meet at the ministerial level under the FTA Commission, and consult on an ongoing basis to seek the resolution of individual trade problems.

Canada also defends its interests with respect to trade actions by the United States through agressive use of the dispute settlement provisions of both the GATT and the FTA. Canada has invoked GATT dispute settlement procedures regarding the current U.S. countervailing duty investigation against softwood lumber and the anti-dumping and countervailing duty investigations against magnesium. It has indicated its intention to pursue, if necessary, binational review under Chapter 19 of the FTA once final determinations are made in each case. Canada has also commenced the FTA dispute settlement process by requesting consultations under Chapter 18 of the FTA regarding the U.S. interpretation of the rules of origin in respect of Honda Civics manufactured in Alliston, Ontario. Should these consultations fail to produce an acceptable solution, Canada will request a panel to resolve the matter.

A chronological listing of specific Canadian actions is presented 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:
  Canada is challenging the U.S. interpretation of non-mortgage interest in the FTA rules of origin. The panel was established in January, 1992.

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.

Canadian Actions Under the GATT

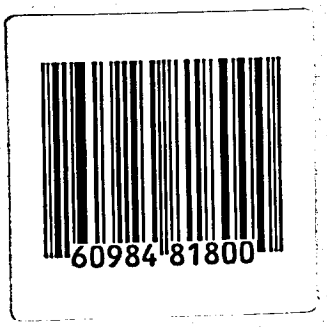
Since January 1, 1989, the following GATT panels have been established at Canada's request to examine and rule on U.S. trade practices.

- Federal and State Measures Concerning Alcoholic and Malt Beverages: Established in March, 1991, the findings of the panel will be made public at the end of April, 1992.

- 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.

- Initiation of Countervailing Duty Investigation on Magnesium: Established in January, 1992, the panel is to report in late summer, 1992.

- Initiation of Countervailing Duty Investigation on Softwood Lumber: Established in December, 1991, the panel is expected to report its finding in July, 1992.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