Backgrounder

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U.S. OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988: ITS IMPLICATIONS FOR CANADA

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INTRODUCTION

After more than three years of effort by both the Senate and House of Representatives to reinforce U.S. trade legislation, on 23 August 1988 President Reagan signed into law the omnibus trade bill (HR 4848). The bill was identical to another version (HR 3), vetoed by the President on 25 May 1988, except that it eliminated two provisions to which the President had objected. The first provision required companies to give 60 days' notice before laying off workers as a result of plant closures, while a second would have limited the amount of refined petroleum that could be exported from Alaska. The version which President Reagan signed was less protectionist than early drafts of the trade bill proposed by the Senate and House of Representatives. Not incorporated were some of the more objectionable provisions from a Canadian standpoint. These included:

- the Gephart amendment, a requirement that the U.S. Trade Representative (USTR) impose tariffs or quotas on or revoke trade concessions with countries which maintain "excessive" bilateral trade surpluses with the U.S. and are found to engage in unfair trade practices; such retaliation would have yielded 10% annual reduction in the offending country's bilateral trade surplus with the U.S.;
- unilateral redefinition of the specificity test used to determine the availability of a foreign subsidy; this would have resulted in increased application of countervailing duties to the relevant imports;

- use of a commercial pricing benchmark to measure foreign subsidy programs; this would have imposed an arbitrary value on government-owned goods such as natural resources;
- prohibition of the deduction of indirect selling expenses from the foreign market value in dumping cases involving related parties; loss of this deduction would have resulted in unreasonable price comparisons;
- a presumption, in civil lawsuits, that repeat offenders were guilty of dumping; this would have made it easier for U.S. producers to obtain damages against offenders;
- a requirement that the U.S. take unilateral action against countries that might be manipulating their currencies;
- a requirement that the President must retaliate against countries refusing to open their markets to foreign suppliers of telecommunications;
- development by the U.S. Federal Communications Commission (FCC) of an international regulatory model to be used to measure other countries' telecommunications practices;
- extension back to 31 October 1977 of the period for duty drawback on U.S. sugar exports.

This paper will now go on to summarize the major provisions that were included in the Omnibus Trade and Competitiveness Act and to examine the implications of the Act for Canada in light of the Free Trade Agreement with the U.S.

MAIN PROVISIONS OF THE OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988

A. Trade Negotiating Authority

The Act provides the U.S. President with the authority, until 31 May 1993, to negotiate bilateral and multilateral tariff and non-tariff agreements. Tariff reductions of up to 50% may be proclaimed by the President without Congressional approval. When tariffs are less than 5%, they may be reduced to zero by presidential authority alone.

Until 31 May 1991[1] the President is authorized to negotiate bilaterally with respect to tariff and non-tariff trade barriers and multilaterally with respect to non-tariff barriers under the so-called "fast track" congressional approval procedure. The fast track approval procedure may be extended for an additional two years, providing that the President requests an extension and both the House and the Senate agree. A new provision in the omnibus Act permits Congress to withdraw fast-track approval procedure if the United States Trade Representative (USTR) does not consult with Congress on the progress of trade negotiations. (termed "reverse fast track").

The President is required to determine before 1 June 1993 whether any major industrial country with a trade agreement with the U.S. has failed to provide competitive opportunities in its market substantially equivalent to those offered by the U.S.

The President must also determine whether major state trading enterprises in other countries "unduly burden and restrict, or adversely affect, the foreign trade of the United States, or the United States economy." If so, the President reserves the right to withhold extension of U.S. GATT obligations to that country.

B. Unfair Foreign Trade Practices (Section 301 of the Trade Act of 1974 as Amended)

1. Previous Legislation

Section 301 actions are unlike those taken under most other trade remedy laws, such as anti-dumping and countervailing statutes; because they are not primarily aimed at protecting U.S. domestic industries from unfair import competition. Instead, section 301 authorized the President to take actions against unfair foreign trade practices that limit U.S. access to foreign markets.

Section 301 provides a greater degree of freedom to take action than is provided in the more defined U.S. anti-dumping and

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(1) Under the "fast-track" approval procedure, congressional debate is limited, there are mandatory deadlines for approval, and no amendments are permitted.

countervailing duty statutes. Under section 301, action could be taken against any act, policy or practice of a foreign country that the President determined:

i) is inconsistent with the provisions of, or otherwise denies benefits to the United States under any trade agreement, or

ii) is unjustifiable, unreasonable or discriminatory and burdens or restricts United States commerce;

The term "unjustifiable" means, in general, "any act, policy, or practice which is in violation of, or inconsistent with, the international legal rights of the United States."

Under the previous legislation the term "unreasonable" meant "any act, policy, or practice which, while not necessarily in violation of or inconsistent with the international legal rights of the United States, is otherwise deemed to be unfair and inequitable. The term includes, but is not limited to, any act, policy, or practice which denies fair and equitable -

A) market opportunities;

B) opportunities for the establishment of an enterprise; or

C) provision of adequate and effective protection of intellectual property rights."

The term "discriminatory" includes "any act, policy, or practice which denies national or most-favored-nation treatment to United States goods, services, or investment."

Section 301 actions may be initiated either as a result of private petitions by U.S. firms or, as amended by the Trade and Tariff Act of 1984, by the USTR. If the USTR accepts the petition or unilaterally decides to initiate an investigation, it then undertakes consultations and dispute settlement under the applicable agreement (i.e. GATT) with the offending foreign government. If the issue was not resolved within the timetable provided under section 301, the President was authorized to:

1) suspend, withdraw, or prevent the application of, or refrain from proclaiming, benefits of trade agreement

concessions to carry out a trade agreement with the foreign country or instrumentality involved;

2) impose duties or other import restrictions on the goods of, and, notwithstanding any other provision of law, fees or restrictions on the services of, such foreign country or instrumentality for such time as he determines appropriate.

The President was also empowered to retaliate against countries that bar U.S. firms from investing in their service sectors. Such retaliation may restrict the terms and conditions or deny the issuance of any access authorization (i.e. licence, permit, order) to the U.S. market.

2. Significant Changes in the Omnibus Trade and Competitiveness Act

- The Act transfers from the President to the USTR the authority to decide on the fairness of foreign trade practices and to take action although such action remains subject to the direction of the President.
- Action by the USTR is now mandatory (but subject to the direction of the President) where it determines that the rights of the U.S. under any trade agreement are being denied or that an act, policy or practice of a foreign country is inconsistent with a trade agreement or is "unjustifiable" and burdens or restricts U.S. commerce. (Previously, action was discretionary in these cases.)
- Action by the USTR remains discretionary where it determines that an act, policy or practice of a foreign country is "unreasonable" or "discriminatory" and burdens or restricts U.S. commerce. However, the definition of an "unreasonable" act, policy or practice is expanded to include export targeting, denial of internationally recognized workers' rights, or systematic anti-competitive activities by private firms (i.e. cartels and restrictive distribution systems).
- Stricter deadlines are established for USTR determinations regarding the fairness of foreign trade practices.
- An explicit time limit is established for taking retaliatory action once a final determination has been made.

- The USTR is required to report on foreign trade practices which impose the most significant limitation on U.S. exports (priority practices) and to estimate the amount by which U.S. exports to each foreign country identified would have increased without these practices. The USTR must also identify those countries with the most restrictive trade practices (priority countries). After the report is submitted to Congress, the USTR is required to initiate section 301 investigations into all priority practices in priority countries. (This provision has been referred to as "Super 301".)
- The USTR is required to identify and report on countries that deny fair and equitable market access for intellectual property rights. (See later discussion of intellectual property rights.)

3. Implications

The U.S. perception is that while the American market remains relatively open to imports, other countries routinely limit access to their own markets. Recently, the U.S. has made increased use of section 301 of the Trade Act of 1974 as leverage to force other countries to provide reciprocal access to their markets. In 1980 President Carter determined that Canadian legislation denying the tax deductibility of advertising expenses incurred by Canadian companies on U.S. border broadcasting stations (Bill C-58) was unreasonable and imposed a burden on U.S. commerce. In 1985 the U.S. took retaliatory action by enacting mirror legislation aimed at Canada.

The changes made to section 301 by the Omnibus Trade and Competitiveness Act are designed to bolster this section further as a tool for opening foreign markets to U.S. goods. This has been done by giving more authority to the USTR, making retaliatory actions by the USTR mandatory for certain types of unfair trade practices (subject to presidential discretion) broadening the definition of other unfair trade practices, imposing a stricter timetable for USTR determinations and retaliatory actions and requiring the USTR to identify and initiate

investigations where countries are guilty of systematic trade restrictions in their home market (Super 301). These changes are likely to lead to an increase in the number of cases initiated under section 301.(2)

A number of U.S. trading partners are concerned with the provision referred to as "Super 301". In April 1989 the USTR released the "1989 National Trade Estimate Report on Foreign Trade Barriers," which identified the most significant foreign trade barriers. The omnibus Act requires the USTR to submit a list of "trade liberalization priorities" within 30 days of submitting the first report and to initiate investigations into all priority practices in priority countries within 21 days of its filing. In May 1989, Japan, Brazil and India were named for investigation under this section.

Section 301 does not require the USTR to take action where the formal dispute settlement mechanism of the GATT or other trade agreement has issued a ruling that the rights of the U.S. are not being denied or violated or when the foreign country is taking satisfactory remedial action. Further, under section 302 of the Trade Act of 1974 the USTR is required to request consultation with a foreign country involving a section 301 dispute and if this should fail, to request dispute settlement procedures under the relevant agreement. In the U.S.-Canada context, initiation of a section 301 case implies automatic invocation of the dispute settlement procedures of either the Canada-U.S. Free Trade Agreement or the GATT.

C. Anti-Dumping Laws (Section 731 of the Tariff Act of 1930 as Amended)

1. Previous Legislation

As amended, section 731 of the Tariff Act of 1930 provides for the imposition of an anti-dumping duty on imported foreign merchandise if two conditions are met. First, the Department of Commerce (DOC) must

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(2) A document prepared for the U.S. Trade Relations Division of External Affairs and dated 5 May 1988 supports the view that the Omnibus Trade and Competitiveness Act is likely to lead to more section 301 cases.

determine that the imported foreign merchandise "is being, or is likely to be, sold in the United States at less than its fair value." The three methods for determining fair value are, in order of preference, home market sales, third-country sales, or constructed value (i.e. based on input costs).

Second, the International Trade Commission (ITC) must determine that "an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise." (Material injury is defined as "harm which is not inconsequential, immaterial or unimportant.") Final determinations in anti-dumping cases are subject to review by the Court of International Trade and on appeal to the U.S. Court of Appeals for the Federal Circuit.

2. Significant Changes in the Omnibus Trade and Competitiveness Act

- A U.S. industry may petition the USTR to request a foreign country that is a member of GATT to undertake anti-dumping proceedings against third countries which are injuring U.S. producers by dumping goods in the foreign country's market.
- In cases where it is necessary to arrive at a constructed value (i.e., neither home market sales nor third country sales form an adequate basis for comparison) and transactions are between related parties, input costs may be determined by an administering authority. This is to adjust for input costs represented as being lower than the actual cost of production, thus providing an artificially low value to compare with the U.S. selling price.
- Anti-dumping and countervailing duty cases may be brought against components imported into the U.S. for assembly where the final product incorporating these components is already the subject of an anti-dumping or countervailing duty order. Anti-dumping and countervailing duty cases may also be brought against merchandise sent to third countries for final assembly or alterations. This section is intended to prevent circumvention of anti-dumping or countervailing duty orders by using U.S. or third country assembly facilities which add only a minimum of value.

- In determining whether imported goods are causing material injury to U.S. producers, previous legislation required the ITC to cumulate the volume and price effects of imports of competitive goods from two or more countries. The Omnibus Trade and Competitiveness Act goes further by permitting the cumulative assessment of price and trade effects across statutes. The new law allows the ITC to cumulate the material injury effects calculated under an anti-dumping investigation involving one country's goods with that calculated in a separate countervailing investigation associated with competing goods from another country. The effect of this provision is mitigated to some degree by an amendment which permits the ITC, to ignore imports which are negligible or are the product of a country which is a party to a free trade agreement with the U.S. which came into effect before 1 January 1987. (Thus, Israel would be granted an exemption under this provision but Canada would not be.)
- Collection of information on imports of merchandise of the same kind as that subject to an antidumping investigation may be expedited where it is suspected that there is a history of dumping this kind of good in the U.S. or where the importer knew that the goods were being dumped (subtitled "Critical Circumstances").
- Merchandise imported by departments of the U.S. government (except the Department of Defense) may be subject to anti-dumping (or countervailing) duties.
- A U.S. domestic producer is permitted to petition the administering authority to monitor imports of a downstream product containing components that are subject to anti-dumping (or countervailing) duties.
- The anti-circumvention provisions of the Act stipulate that an anti-dumping or countervailing duty action also applies to merchandise of the same kind which has undergone minor alterations and to similar merchandise developed after an investigation has been initiated.

3. Implications(3)

According to the Department of External Affairs:

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(3) Canada, External Affairs, U.S. Trade Legislation Proposals - 100th Congress, 5 May 1988.

- Canadian assembly operations might be subject to U.S. anti-dumping actions against other countries under the anti-circumvention provisions;
- the cross-statute cumulation provision will facilitate determinations of injury;
- the monitoring of downstream products will probably lead to more anti-dumping (and countervailing duty) cases;
- the provision for information on critical circumstances could reduce U.S. imports if monitoring goes into effect prior to a preliminary determination.

Altogether, the provisions of the Omnibus Trade and Competitiveness Act broaden the scope of U.S. anti-dumping laws. The changes are likely to lead to the initiation of more anti-dumping cases and increase the likelihood of injury determinations in these cases. Under the Canada-U.S. FTA, bilateral dumping disputes may be taken to a binational panel which will decide whether a final determination by an investigating authority was in accordance with the anti-dumping law of the importing country. Decisions by the binational panel are not subject to judicial review. (These are subject to the FTA's extraordinary challenge procedure in specific circumstances.)

D. Countervailing Duty Law (Sections 303 and 701 of the Tariff Act of 1930 as Amended)

1. Previous Legislation

Sections 303 and 701 of the Tariff Act of 1930 provide for the imposition of duties on goods imported into the U.S. which benefit from a foreign government subsidy on their manufacture, production or exportation. Countervailing duties are intended to neutralize the advantage foreign exporters receive from these government subsidies. Goods exported from countries that are signatories to the Tokyo Round Agreement Relating to Subsidies and Countervailing Measures (the Subsidies Code) are entitled under section 701 of the Tariff Act to an injury test prior to the imposition of countervailing duties. Goods shipped from non-signatory countries

are subject to section 303 of the Tariff Act and generally are not afforded the benefit of an injury test (except for cases involving duty-free imports from countries that are signatories to the original GATT but not to the Subsidies Code.)

Countervailing duty cases can be initiated either by the International Trade Administration (ITA) of the Department of Commerce (DOC) or as a result of a petition filed simultaneously with the International Trade Commission (ITC) and the DOC by an interested party. The DOC has 20 days from the date of filing to decide whether the petition is legally sufficient to initiate an investigation. The ITC has 45 days from the date of filing to make a preliminary determination whether the domestic industry is materially injured or threatened with material injury. (Material injury is defined as "harm which is not inconsequential, immaterial or unimportant.") The DOC is required to deliver its preliminary determination as to whether there is a "reasonable basis to believe or suspect that a subsidy is being provided" within 85 days of the filing of the petition or of the date of self-initiation. This time period may be shortened or extended under certain circumstances. After an affirmative preliminary decision by the DOC, cash, bond or security equivalent to the calculated amount of the subsidy must be posted. The DOC's final determination is due 75 days after its preliminary decision (except in certain circumstances). If the DOC's final determination is negative, the investigation is terminated but if affirmative, the ITC must deliver its final determination regarding material injury within 120 days of the DOC preliminary decision or within 45 days of the DOC's final determination, whichever is longer. Final determinations are subject to review, first by the Court of International Trade and then by the U.S. Court of Appeals for the Federal Circuit.

2. Significant Changes in the Omnibus Trade and Competitiveness Act

- U.S. trade law discriminates between subsidies which are generally available and thus not countervailable and those which are provided to a "specific enterprise or industry, or group of enterprises or industries" and therefore are subject to countervail. The omnibus Act codifies

recent DOC decisions regarding the interpretation of this so-called "specificity test" such as that reached in the countervail case against Canadian softwood lumber in 1986. Under this interpretation, nominal general availability of a subsidy program under the law, regulation or program is not sufficient basis to disqualify a subsidy from countervail action. If the subsidy is found, in practice, to be used by a specific enterprise or industry or group of enterprises or industries it may be subject to a countervail action.

- The new law requires that subsidies found to be provided to producers of agricultural products be deemed to be passed through to the production of the processed product.

- In assessing whether imports are causing material injury, the ITC is permitted to cumulate injury suffered from imports subject to an anti-dumping investigation with injury found under a countervailing duty investigation. (See earlier discussion of cross-statute cumulation under the anti-dumping section.)

- The legislation permits gathering of information regarding imports subject to an investigation on an expedited basis prior to a preliminary determination of subsidy if there is a reasonable basis to suspect that the subsidy is inconsistent with the GATT (subtitled "Critical Circumstances").

- Merchandise imported by departments of the U.S. government (except the Department of Defense) is subject to countervailing (or anti-dumping) duties.

- A U.S. domestic producer is permitted to petition the administering authority to monitor imports of a downstream product that contains components which are subject to countervailing (or anti-dumping) duties.

- Merchandise which is slightly altered or which is similar to countervailed merchandise but developed later is subject to countervailing duties. (See earlier discussion of dumping in cases of minor alterations and later developed merchandise.)

- The subsidies received by international consortia from more than one government must be cumulated to determine the appropriate countervailing duty.

3. Implications

- Codification of the recent U.S. interpretation of the specificity test could encourage the filing of more countervail petitions increasing the number of affirmative determinations involving Canadian goods.
- According to External Affairs, the provision for calculation of subsidies on certain processed agricultural products "could result in the application of countervailing duties to processed products in excess of the benefits, if any, actually passed through from the unprocessed products."(4)
- Cross-statute cumulation of injury will make it easier for U.S. industries to meet the ITC material injury test in countervail actions.
- The provision respecting "critical circumstances" could have a negative impact on U.S. imports if this process is initiated prior to preliminary determinations.(5)
- The provisions respecting downstream monitoring and affecting merchandise which has been altered slightly increase the scope for countervailing duty investigations potentially affecting a greater number of imported articles.

Under the FTA, disputes involving Canada-U.S. countervailing duty cases may be referred to a binational panel for a ruling on whether a final determination was in accordance with the countervailing duty law of the importing country. Decisions by the binational panel are not subject to judicial review (but are subject to the FTAs extraordinary challenge procedure in specific circumstances.)

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(4) Ibid., External Affairs.

(5) Ibid.

E. Import Relief Law (Section 201 of the Trade Act of 1974)

1. Previous Legislation

In contrast to anti-dumping and countervailing duty laws, which are aimed at "unfair" foreign competition, the import relief laws (also known as the escape clause) are concerned with providing domestic industries and workers with temporary relief from "fairly" traded but injurious import competition. An investigation may be undertaken by the International Trade Commission (ITC) upon petition by interested parties or on its own initiative "to determine whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article." A substantial cause is defined as a "cause which is important and not less than any other cause." In making its determination of serious injury the ITC is directed by the statute to "take into account all economic factors which it considers relevant" including: idling of productive facilities in the industry; profit levels of firms; and unemployment or underemployment in the industry. With respect to threat of serious injury, the ITC was required to take into account: a decline in sales; a growing inventory; or a downward trend in production, profits, wages or employment in the domestic industry concerned. (The test of "serious" injury in the escape clause is more difficult for a complainant to meet than the "material" injury test in anti-dumping and countervailing duty law.)

An affirmative injury determination by the ITC must include the amount of duty increase or other import restriction necessary to prevent or remedy the injury or it must contain a recommendation for the provision of adjustment assistance. If recommended by the ITC, the President is required to provide import relief unless he determines that it is not in the national interest. The President may also direct that speedy consideration be given to petitions by the industry for adjustment assistance.

2. Significant Changes in the Omnibus Trade and Competitiveness Act

- If the ITC makes an affirmative determination regarding injury from imports, the President is required to "take all appropriate and feasible action" to facilitate a "positive adjustment" to import competition. "Positive adjustment" means that: a) the industry can compete successfully with imports after import relief has been terminated or the industry has transferred resources to other productive pursuits; b) workers have experienced an orderly transition to productive pursuits. Industries petitioning for import relief are encouraged (but not required) to submit a plan to facilitate positive adjustment to import competition.

- Under previous law the ITC was required to submit its determination of injury at the time it made its recommendation for relief (i.e. within six months of the filing of the petition). The new law requires the ITC to make a finding of injury within 120 days of the filing.

- The period for which import relief can be provided is extended from five to eight years.

- Emergency relief is available within 28 days of the filing of a petition for industries which produce perishable agricultural products.

- Provisional relief may be provided 127 days after a petition is filed if in "critical circumstances" (situations where delay in providing relief would accentuate the injury to the domestic industry).

- The criteria used by the ITC in determining "serious injury" or "threat of serious injury" are expanded. The ITC is required under the Act to consider only the domestic industry (i.e. excluding foreign operations) when determining serious injury. Previously, the ITC was permitted, but not required, to include only domestic operations. With respect to establishing the "threat of serious injury" the ITC must now consider, in addition to existing criteria: a decline in market share; the ability of firms in the domestic market to generate modernization or research and development funds; and the diversion to the U.S. of goods as a result of third country trade barriers.

- After an affirmative injury determination by the ITC, the President is required to take all feasible action which "will facilitate the efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs."
- In taking action under section 201, the President's discretion is broadened to include auctioned quotas, international negotiations to address the underlying cause of the increase in imports, proposals to Congress for adjustment assistance or any other action which the President considers appropriate.
- The President is required to undertake negotiations (in the GATT or bilaterally with any country which has a free trade agreement with the U.S.) to obtain consent for the imposition by the U.S. of a uniform import fee to finance trade adjustment assistance to U.S. industries.

3. Implications

- The provisions requiring facilitation of adjustment to imports and encouraging petitioning industries to submit a plan for adjustment to imports are regarded as positive for the trading environment.
- Placing a deadline of 120 days for injury determinations by the ITC, extending the period for import relief from five to eight years, and providing for emergency and provisional relief makes this section more responsive to U.S. industry petitions.
- Expansion of the criteria for determining serious injury or threat of serious injury may increase the likelihood of affirmative determinations by the ITC resulting in the imposition of import restrictions by the President.
- Some Congressmen evidently believe that the requirement that the President take action against imports when this "will provide greater economic and social benefits than costs" will force the President to take action in the majority of cases involving affirmative determinations by the ITC.(6)

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(6) William H. Cooper et al., The Omnibus Trade and Competitiveness Act of 1988 (Public Law 100-418), An Analysis of the Major Trade Provisions, Congressional Research Service, September 1988, p. 10.

- The imposition by the U.S. of an import fee (to finance trade adjustment assistance) would be inconsistent with the FTA and the GATT, according to the Department of External Affairs.(7) Article 403 of the FTA requires the U.S. to phase out existing customs user fees on goods originating in Canada and prohibits the introduction by either country of new fees on the other country's exports. Article VIII of the GATT limits fees to the amount of the cost of the services rendered and prohibits their introduction as indirect protection or as a taxation for fiscal purposes.

The Canada-U.S. FTA restricts bilateral safeguard actions against the other country to once during the transition period (i.e. until the end of 1998) for a particular good and limits the time period for maintenance of an action to three years or less (without the consent of the other country). Safeguard actions undertaken by Canada or the U.S. on a global basis must exclude the goods of the other country unless such imports are "substantial and are contributing importantly to the serious injury or threat thereof." Imports of less than 5-10% or less are not normally to be considered substantial. Global actions may not be undertaken without prior notification and consultation with the other country nor may they reduce the other country's imports below that of a recent trend period. Under the FTA, disputes with respect to actual escape clause actions not resolved by consultations must be referred to binding arbitration by the Canada-United States Trade Commission.

Thus, although the omnibus Act increases the scope for safeguard actions against most U.S. trading partners, the U.S. is bound by the FTA to limit their application to imports from Canada.

F. Intellectual Property Rights (Section 337 of the Trade Act of 1930, Section 301 of the Trade Act of 1974 and title 35 of the United States Code).

1. Previous Legislation

Section 337 prohibited unfair methods of competition and unfair acts in the importation or sale of goods that had the effect or

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(7) Ibid., External Affairs.

tendency to 1) destroy or substantially injure a U.S. industry that was efficiently and economically operated; 2) prevent the establishment of a U.S. industry; 3) restrain or monopolize U.S. trade and commerce. The broad scope of this section encompasses cases such as group boycotts, price fixing, predatory pricing, false labelling, and false advertising. However, the vast majority of section 337 cases have dealt with intellectual property rights infringement. Historically, about three-quarters of all cases have involved patent infringement and about one-fifth involved trademark infringement while a small percentage were accounted for by copyright infringement and non-intellectual property rights violations.

The International Trade Commission (ITC) is responsible for investigating alleged violations upon complaint or on its own initiative. If the ITC determines that a violation does exist, it may issue either an exclusion order or a cease and desist order unless it considers that such an order would not be in the public interest. The time limit for making a determination is one year except for more complicated cases, which must be concluded within 18 months. The President is empowered to disapprove for "policy reasons" the ITC determination within 60 days of receiving notification. Section 337 determinations are subject to appeal in the U.S. Court of Appeals for the Federal Circuit.

2. Significant Changes in the Omnibus Trade and Competitiveness Act

- In intellectual property rights cases the petitioner no longer needs to prove injury.
- In order to qualify for trade law protection as intellectual property, a U.S. industry must have: a) significant investment in plant and equipment; b) significant investment in labour or capital; or c) substantial investment in the exploitation of intellectual property including engineering research and development or licensing.
- The Act removes the requirement in the injury test that the domestic industry be operated "efficiently and economically."

- The ITC is required to make a determination within 90 days of the initiation of the investigation. (Previously there was no deadline.)
- Section 301 of the Trade Act of 1974, as amended, identifies denial of intellectual property rights as an unfair trade practice subject to retaliation. The omnibus Act requires the USTR to identify those "priority" countries that systematically deny protection for U.S. property rights or deny market access to U.S. persons that rely on intellectual property rights protection. The USTR is required to investigate all such practices in "priority" countries and take action.
- The omnibus Act amends the United States Code to clarify that goods covered by a process patent may be excluded from the U.S. market. In cases of non-commercial infringement exclusion may not be granted unless there is no other adequate remedy available.

3. Implications

- A section 337 remedy is among the most expensive for U.S. petitioners to undertake. The removal of the injury test in cases of alleged violation of intellectual property rights under section 337 may reduce the cost increasing the likelihood of petitioners initiating such cases.
- Identification of systematic foreign violation of intellectual property rights and mandatory retaliation against "priority" countries could lead to more actions under section 301.
- The amendments to the process patent statute broadens protection to owners of process patents potentially leading to exclusion from the U.S. of some products from the U.S. which are found to use the same process.

G. National Security Import Restrictions (Section 232 of the Trade Expansion Act of 1962)

1. Previous Legislation

If requested by a U.S. government department or agency, upon application of an interested party, or upon his own motion, the Secretary of Commerce is required to conduct an investigation into the effect of

imports on national security. The Secretary was required to report to the President within one year whether the imports in question threatened national security, and if so, to recommend what action to take. The President could then take whatever action he deemed necessary. There was no time limit imposed for presidential action but after such action the President had 60 days to report on it to Congress.

2. Significant Changes in the Omnibus Trade and Competitiveness Act

- The Secretary of Commerce is now required to complete the investigation of the effects of imports on national security within 270 days (rather than one year) and report to the President.
- The Secretary of Defense must be notified and consulted regarding any investigation.
- If he agrees with an affirmative finding of the Secretary of Commerce, the President is required to decide within 90 days of receiving the finding what action to take; he has 15 more days to implement this. The President is required to report to Congress within 30 days of his decision to act or not to act. (Previously it was 60 days.)
- If the President decides to negotiate voluntary export restraint agreements (VRAs) and these are not concluded within 180 days, or if they are ineffective, the President must take other action or publish his reasons in the Federal Register.

3. Implications

- Although the deadlines for the section 232 procedure have been tightened up, the President maintains the discretion as to whether or not to take action.

H. Telecommunications Trade

1. Previous Legislation

The U.S. is concerned that while access by foreign telecommunications suppliers to the American market has become relatively easy

since U.S. deregulation, it is much more difficult for U.S. suppliers to enter foreign markets. The most notable restrictions on entry, according to the U.S., are in Europe where telecommunications purchasing remains subject to the local procurement policies of the state ministries which control the post, telegraph and telephone. In the past the U.S. has also been critical of the close supplier relationship of Northern Telecom with Bell Canada. Previously section 301 of the Trade Act of 1974 was the only mechanism available to gain access to foreign markets.

2. Significant Changes in the Omnibus Trade and Competitiveness Act (the Telecommunications Trade Act of 1988)

- The USTR is required to investigate and identify priority countries that deny mutually advantageous market opportunities for telecommunications trade. Priority countries will be identified on the basis of the significance of foreign market restrictions facing U.S. firms and the potential size of the foreign market. The USTR will also consider the economic benefits accruing to foreign firms having access to the U.S. market.

- The President is required to undertake negotiations with priority countries for the purpose of reaching a trade agreement which meets the specific and general negotiating objectives established.

- If negotiations prove unsuccessful, the President is authorized to take any of a number of retaliatory actions. These include suspension of any portion of a trade agreement, actions described under section 301, or prohibition of purchases by the U.S. government of foreign telecommunications products.

- The USTR must conduct annual reviews of trade agreements affecting telecommunications to determine whether foreign practices are violating an agreement or are otherwise denying market access to U.S. firms.

3. Implications

- Countries which refuse to provide U.S. telecommunication suppliers with reciprocal access to their markets may have their own firms' access to the U.S. telecommunications market limited.

I. Agriculture

1. Previous Legislation

Although the U.S. has made the elimination of subsidies in agricultural trade a priority of the Uruguay Round of the GATT, nevertheless, it maintains a number of agricultural subsidies to American exporters of farm products. The major assistance programs include:

1. Export Enhancement Program (EEP) - Under this program (U.S.) $1.5 billion worth of surplus agricultural commodities was available to exporters to help recapture lost U.S. market share.
2. Targeted Export Assistance Program (TEA) - (U.S.) $110 million worth of redeemable commodity certificates was made available to producer groups that were adversely affected by unfair foreign competition.
3. Dairy Export Incentive Program (DEIP) - Cash or in-kind subsidies are provided to U.S. exporters to offset foreign competition.
4. Export credit programs provide loans and loan guarantees to help finance export sales.
5. Funds are provided by the Department of Agriculture to assist 67 commodity organizations in export market development.

2. Significant Changes in the Omnibus Trade and Competitiveness Act

- If GATT negotiations do not bring significant progress toward reducing agricultural subsidies, the President is required to implement in 1990 a new federal price-support loan for wheat, feedgrains and soybeans.
- The Export Enhancement Program (EEP) is extended for two years (through 1990) and provided with an additional $1 billion worth of surplus commodities for a total of $2.5 billion in assistance.

- Assistance under the Targeted Export Assistance Program (TEA) is increased from $110 million to $215 million. Funds may be used to pay the expenses incurred after 1 January 1986 in defending U.S. producers or processors of agricultural commodities against foreign countervailing duty suits (i.e. the legal fees incurred by the Corn Growers Association in the countervailing duty suit brought by Canada).
- Other export incentive programs are maintained.
- The President is required to encourage countries receiving U.S. food aid assistance to give preference to U.S. food and food products.
- The effective date for a marketing order may be advanced when the Secretary of Agriculture determines that imported commodities are not meeting quality standards.
- The Secretary of Agriculture must conduct a study of the Canadian Wheat Board's import licensing program, submit the results to the USTR and with the USTR consult with Congressional committees on the progress in negotiations with Canada on the elimination of the Board's import licensing program.

3. Implications

The Department of External Affairs noted the following concerns with the provisions affecting agricultural trade:(8)

- The Export Enhancement Program depresses world agricultural prices.
- The provision encouraging countries receiving U.S. food aid assistance to favour U.S. suppliers could adversely affect other countries' food exports.
- The provision respecting the advancement of marketing orders could make the application of quality standards more burdensome to imports.

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(8) Ibid., External Affairs.

J. Foreign Direct Investment

1. Significant Changes in the Omnibus Trade and Competitiveness Act of 1988 (Defense Production Act of 1950)

The omnibus Act provides the President with new authority to prohibit any acquisition, merger, or takeover of a U.S. firm by a foreign person or enterprise if the President determines that the foreign investment would threaten to impair national security. In his determination the President must consider the following requirements of national security:

1. domestic production needed for projected national defence requirements,

2. the capability and capacity of domestic industries to meet national defence requirements, including the availability of human resources, products, technology, materials and other supplies and services, and

3. the control of domestic industries and commercial activities by foreign citizens as it affects the capability and capacity of the U.S. to meet the requirements of national security.

2. Implications

The omnibus Act provides the President with broad discretionary power to disallow foreign direct investment in the U.S. The extent and manner in which this power is used depends on the President's interpretation of "national security".

Under the Canada-U.S. FTA each country must provide national treatment to the investors of the other country in the establishment, acquisition, conduct and operation and sale of business enterprises located in its territory. While Article 1607 of the FTA stipulates that the national treatment requirement does not apply to a non-conforming provision of existing legislation, the dispute settlement procedures of Chapter 18 of the FTA are available in the event that future U.S. national security measures adversely affect Canadian direct investment in the U.S.

OTHER TRADE PROVISIONS

A. Steel Imports

In determining import quantities under the voluntary restraint arrangements (VRAs) reached with steel exporting countries, steel products manufactured in non-arrangement countries from steel originally made in an arrangement country will be considered as a product of the arrangement country. (This provision is not expected to apply to Canada under the FTA.)

B. Foreign Shipping Practices

The Federal Maritime Authority is empowered to investigate and take action against foreign carriers when it or its government's practices adversely affect the operations of U.S. carriers and when the U.S. does not use such practices against foreign carriers.

C. International Air Transportation

The time limit is shortened for the Secretary of Transportation to review complaints and to take action when foreign governments discriminate against U.S. carriers.

D. Buy America

The President must identify countries whose procurement policies discriminate against U.S. firms and if consultations fail to resolve the issue, to ban U.S. government purchases from firms located in offending countries.

E. Tariff and Customs Procedures

The omnibus Act raises the duty on a number of goods. External Affairs identified two items of interest, grapefruit juice and

certain plywood and veneer panels, which should be subject to GATT negotiation and compensation.(9)

F. Primary Dealers

Foreign security dealers are prohibited from primary dealing in U.S. government securities if their own country denies U.S. firms opportunities dealing in government securities similar to those it accords its domestic firms. Countries, which as of 1 January 1987 either had a free trade agreement with the U.S., or were negotiating a bilateral trade agreement with the U.S., are excepted from this section. (This effectively excepts Canada from these provisions.)

G. Trade Adjustment Assistance

The Trade Adjustment Assistance (TAA) set of programs, in existence since 1962 to provide help to workers and firms harmed by import competition, are expanded by the omnibus Act. The Act extends the TAA program from 30 September 1991 to 30 September 1993 and broadens the program to include firms or workers supplying essential goods or services to other firms directly hurt by imports. The Act contains provisions authorizing: supplementary payments to workers forced by imports to take lower paying jobs; retraining for workers; and the establishment of a trust fund to finance the TAA. Funds for the trust fund are to come from an import fee to be negotiated with U.S. trading partners. (See earlier discussion of Import Relief Law.)

H. Exchange Rates

The omnibus Act requires the President to negotiate multilaterally on coordination of macroeconomic policies, and on exchange rates and current account balances. The Secretary of the Treasury must consult bilaterally with countries that manipulate their exchange rates relative to the dollar and have large global current account surpluses and significant bilateral trade surpluses with the U.S.

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(9) Ibid., External Affairs.

CONCLUSION

Under the FTA, Canada and the U.S. maintained their respective trade laws and Canada did not gain an exemption from the changes to U.S. law in the omnibus Act, therefore, the legislation applies to Canada. While the Act is not aimed primarily at this country, the fact that Canada is the second largest source of U.S. imports means that Canadian exports are liable to be affected. However, sections of the FTA, such as those respecting safeguard actions, restrict the application to Canada of certain provisions of U.S. trade law and in these and other types of trade actions it can be argued that an improved mechanism for settling trade disputes is provided.

With respect to anti-dumping and countervailing duty law, Canada and the U.S. are attempting to reach agreement on a substitute system of rules which should reduce the number of disputes in this area. In the meantime, the FTA provides a dispute settlement mechanism to handle these cases, although there is disagreement on its effectiveness since the binational panels are restricted to using the law of the importing country. Nevertheless, some trade lawyers have claimed that the FTA's countervailing and anti-dumping dispute settlement mechanism is clearly superior to the route through the U.S. courts, because the former is likely to: be faster than U.S. judicial review; be cheaper, since the government may represent an exporter before a panel; provide more predictable decisions (five binational panel members vs. one judge); encourage a more complete airing of the issue; and increase the perception of more equitable application of the legislation.

For other types of trade disputes, the procedures outlined in Chapter 18 of the FTA constitute a new mechanism for settling bilateral trade-related disputes. Trade lawyers note that the FTA's procedures represent an improvement over those of the GATT because of the provision for binding dispute settlement in some cases, stricter time limits for dispute resolution and less susceptibility to delays through the use of political influence because the FTA offers a formal, legal process.

It might be argued that absent the omnibus Act, the gains from free trade would be greater, since there would be less potential for U.S. harassment of Canadian exports. However, without the FTA Canadian exports would still be subject to harassment from U.S. trade law but exporters would lack the benefit of the FTA's safeguard restrictions and dispute settlement provisions. Thus, while the omnibus trade legislation might modify the gains from free trade, it can be argued that certain provisions of the FTA ameliorate the legislation's costs.

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