Resources
The Newsletter of the Canadian Institute of Resources Law

No. 19 Published Quarterly Summer 1987

Trading Canada's Natural Resources: Two Perspectives

Introduction: Third Banff Conference on Natural Resources Law

The Third Banff Conference on Natural Resources Law was convened by the Institute May 6 to 9 at the Banff Centre. Focusing on the theme "Trading Canada's Natural Resources", the conference drew approximately 100 participants from Canada, the United States, Norway, Australia, and New Zealand.

The past five years have seen foreign trade issues move to command a dominating place on the Canadian public agenda. Despite efforts both bilaterally and multilaterally to move towards a more liberalized legal framework for international trade, the record of state conduct in recent years provides fewer reasons for optimism. Multilaterally, a dangerous trade war between the United States and the European Economic Community over agricultural subsidies has already engulfed Canada as a bystander. Bilaterally, Canadian lumber producers have begun to suffer from a new wave of United States protectionism. As protectionism in the natural resources sector grows, Canada, as a major exporter of natural resources, has much at stake.

The Banff Conference provided a forum for addressing in detail the special problems of concern to Canada's resource export sector. The program included sessions on: U.S. resources protectionism, multilateral trade initiatives, exporters' remedies, sales contracts for natural resources, countertrade, environment and trade, Canadian and U.S. natural gas deregulation, water export, animal rights and fur markets, and bilateral trade liberalization.

The Institute gratefully acknowledges the support provided to the Conference by the federal Department of Justice, Alberta Economic Development and Trade, and the Social Sciences and Humanities Research Council.

This issue of *Resources* contains excerpts from two of the papers presented at the Conference. The complete papers will appear in a book of Conference essays to be published by Carswell Legal Publications later this year.

Free Trade and the Environmental Implications of Resource Exports

by David Poch

In 1987, the threat of countervailing trade tariffs being imposed against Canada in the resource export market is undeniable. As we have witnessed in the softwood lumber and forest products industries, the level of government royalties, direct and indirct subsidies, and preferential tax treatment for the export sector are all under international scrutiny, whether Canadians like it or not. That scrutiny may be the most pressing reason for increased regulatory recognition of the environmental costs associated with our export industries.

Those U.S. commercial interests that compete in sectors where Canada's environmental protection efforts lag behind are likely to cry foul, just as Canadians will when American environmental regulation is relatively weaker. So long as the public in one country insists upon protections for the environment, subsidies in a competitor nation in the form of regulatory blindness to externalized environmental costs will eventually be "on the negotiating table".

Some have argued that any success in the current free trade initiative will lead to a lowest common denominator situation - each government relaxing its own environmental protection rules to maintain the competitiveness of its export industry. While that is within the bounds of possibility, a dismantling of the tariff structure will necessarily require either uniformity of regulations (which is most unlikely, given concerns about sovereignty) or, more likely, a mechanism to challenge subsidies in the competing nation. Lax environmental standards would, in the latter case, be subject to attack as subsidies.

Thus, even in the free trade scenario, we will continue to see two routes available to an exporter or competitor facing discrimination due to softer regulation abroad. The industry can either pressure its own government to lower domestic standards or it can challenge the other nation's lax standards. Public pressure to uphold environmental protection standards will favour the latter.

The possibility of harnessing the competitive energy of U.S. industry in an effort to foster higher environmental protection standards in Canada has not escaped the interest of Canadian environmentalists, who may be willing to live with the epithet 'strange bedfellows' if the cause is just. That willingness is largely due to the inability of tort law to provide a more direct remedy and the unavailability of domestic statute law to curb environmental abuse (especially if the problem has international aspects).

South of the border, U.S. environmentalists have already begun to consider the use of American environmental laws to force environmental assessment and mitigation measures upon U.S. importers of Canadian exports. Accordingly, whenever producers in the importing nation face tougher competition, a likely scenario is, under freer trade, the ratcheting up of environmental standards applicable to competitive export industries to the highest common denominator, or, in the tariff-controlled trade scenario, the induction of higher standards in the exporting nation. Recognition by Canadian export regulators of this possibility would be beneficial, because a failure to incorporate adequate standards in a timely fashion may result in costly tariff blockades of our exports or the forced imposition of such compensating taxation measures as we have seen in the softwood lumber industry.

If Canadian regulators do respond in a timely fashion to the threat of trade loss by incorporating environmental impact assessment and regulation in their processes, we will be the better for it. To ignore the environmental impacts of resource exports is tantamount to exporting the environment itself. And while preservation of the environment may not be a value shared by all, most everyone will agree that it is shortsighted to give away something for nothing. When we give away our environmental quality we often sacrifice valued resources, including our clean water, forest productivity, tourist attractions, and health.

If a million dollars of profit from the export of coal-fired electricity is obtained at a cost of two million dollars in lost timber harvest due to the associated acid rain, are we really ahead? How foolish we will seem to our children if we degrade our natural environment without even charging our export customers for the loss.

At the very least, Canadian resource export regulators should be satisfied that we are accounting for these environmental costs in the price we charge. If the price simply represents the expense actually incurred to avoid environmental disruption, then price is the only regulatory issue. If the price compensates for unavoidable disruption, the added difficulty of compensating the proper party arises, a significant problem of fairness if the negative impacts affect several generations of Canadians.

The thorniness of this compensation distribution problem, coupled with the generally accepted proposition that the costs of clean-up after the fact (if possible at all) usually exceed the costs of preventive action, leads to the conclusion that regulators should favour prevention strategies. Certainly there are non-economic impacts, such as endangerment of species, which are non-compensable, and as long as damage is non-compensable, only a preventive strategy can provide some fairness.

David Poch is Counsel for Energy Probe in Toronto.

Agriculture and the Multilateral Trade Negotiations: An Overview

by J.C. Gilson

In September, 1986, in Punta del Este, Uruguay, the Ministers of the GATT Contracting Parties adopted a Declaration launching the eighth round of the GATT multilateral trade negotiations. The Uruguay Round was publicized as the most complex and ambitious program of negotiations ever undertaken by the GATT, and was initiated with the high hope that order and discipline could be restored in the international trade system within four years from the date of the launch of the trade negotiations. The time frame presents a formidable challenge to the GATT negotiators given the magnitude and complexity of the issues to be tackled. The biggest challenge of all will be associated with the agricultural trade negotiations.

The current agricultural trade issues may be classified into two major categories: import barriers to agricultural trade, and agricultural export- trade distortions. Import barriers to trade are designed generally to protect a domestic farm industry from foreign competition. The import barriers include a wide variety of measures: licensing, quotas, tariffs, health standards, variable import levies, voluntary restraint agreements, countervailing duties and a range of other import contingency devices. Agricultural export-trade distortions have resulted from a number of measures, generally described as export-enhancement incentive programs. These include: export restitutions and subsidies, commodity export bonuses, favorable trade credit arrangements, subsidized trade credit, barter trade, long-term bilateral trade agreements, subsidized shipping arrangements, sales for local (non-convertible) currencies and some food-aid programs.

There are few of these import barriers and export-trade distortions which are not now in use, or which have not been employed during recent years. Few nations can plead innocence with respect to the use of trade-distorting policies of one type or another. Both the import barriers to trade and the export trade distorting measures are deeply rooted in the domestic farm policies of the countries involved. It is obvious, then, why negotiations with respect to non-tariff barriers to agricultural trade are so complex and so difficult to conclude.

The most visible example of these trade-distorting policies is the European Community, with its almost impregnable variable import levy system and its massive expenditures on export subsidies. The former serves to protect the EEC Common Agricultural Policy from foreign

competition, and the latter are designed to export the Community's huge agricultural surpluses abroad.

The U.S. Food Security Act of 1985 was clearly designed to protect the prices and incomes of American farmers while, at the same time, increasing the use of a variety of agricultural export enhancement programs. Not only has the United States clashed with the European Community with respect to the continued access of U.S. agricultural products to the EEC market, but both have clashed repeatedly in third countries where each has used export subsidies in an attempt to increase its market share.

The EEC and the United States have not, however, been the only offenders with respect to trade distorting policies in agriculture. Both the Community and the United States believe the "Japan problem" will be one of the key issues in the Uruguay Round of trade negotiations:

> [O]pening the Japanese market to imports and redressing Japan's burgeoning trade and current account surpluses are regarded as the *sine qua non* for successful negotiations.[1]

Canada has not been isolated from the current agricultural trade conflicts. Canada has imposed countervailing duties on subsidized exports of beef and pork from the EEC and on corn from the United States. In turn, the United States imposed countervailing duties on Canadian hog exports in 1985. Other exporting nations have expressed criticisms about certain of Canada's domestic agricultural policies, such as its supply-management programs and its grain- transportation subsidy. By far the most serious of the trade-distorting measures for Canada have been the export subsidies, particularly those of the EEC and the United States. Two basic factors make Canada more vulnerable to export trade distorting measures than are most countries:

1. The relatively large proportion of Canada's domestic agricultural production which must be exported. In the case of wheat, almost 80 percent of domestic production is exported abroad, compared with 40 percent for the United States and about 20 percent for the European Community.

2. Canada's fiscal capacity to support subsidies on agricultural exports. This is very small relative to that the United States and the EEC.

The blunt fact is that Canada cannot engage in an agricultural trade policy which involves a battle of national treasuries. This difficulty was well demonstrated in 1986 when Canada made a billion-dollar deficiency payment to grain producers in an attempt to offset some of the effects of the EEC-U.S. grain export subsidy war. This was a huge sum of money given the limited fiscal capacity of the federal government, but it was far from sufficient to offset the full effects of the U.S.-EEC subsidy conflict.

It is obvious that the escalation in agricultural import trade barriers and in export trade distortions can create enormous damage in some sectors of Canada's agricultural industry. Clearly, the remedy for Canada must be found through negotiating a trading framework within which Canadian farmers can compete in accordance with principles and procedures which are fair, predictable and transparent – in other words, a framework which is based on a "rules-oriented" system, and not on financial might. Given the lack of progress on agricultural trade during the Tokyo Round, one could understand a continued skepticism by Canadian farmers as to the efficacy of still another set of negotiators.

It has been suggested that the issues, conflicts and problems which have emerged in the agricultural trading system since 1979 are clear evidence that the GATT is not working. In fact, it has been the lack of collective will to make the GATT work, not the GATT itself, which has been the main cause of its failure. If the existing principles and procedures of the GATT had been followed, much of the current anarchy and chaos in the agricultural trading system would not have occurred. The GATT has its weaknesses and limitations, but the biggest defect has been the persistent conduct of the contracting nations in blatantly violating, or simply brushing aside, the GATT's underlying principles.

J.C. Gilson is a professor in the Department of Agricultural Economics and Farm Management at the University of Manitoba.

1. Hufbauer, G.C. and Schott, J.J., *Trading for Growth: The Next Round of Trade Negotiations*, Washington, D.C., Institute of International Economics, 1985, at 30.

Executive Director

Institute Executive Director Constance Hunt began a one-year sabbatical leave of absence on August 1. While Professor Hunt is away, the Institute's acting Executive Director is Professor Alastair R. Lucas.

Professor Lucas has been a professor at the University of Calgary Faculty of Law since 1976 and the Faculty's Director of Research since 1985. He previously served as the Institute's Executive Director from 1981 to 1983 and was the holder of the University of Calgary Chair of Natural Resources Law from 1979 to 1982. Prior to coming to the University of Calgary, Professor Lucas was a member of the Faculty of Law at the University of British Columbia, a policy advisor to Environment Canada, general counsel to the Canadian Arctic Resources Committee, and a consultant to the Law Reform Commission of Canada.

Professor Lucas was a founding member and first National Chairman of the Environmental Law Section of the Canadian Bar Association, a director of the Canadian Petroleum Law Foundation and the Legal Education Society of Alberta, and a member of the Canadian Environmental Advisory Council. He has published extensively in the field of environmental, energy, and resources law.

Publications

Liability for Drilling- and Production-Source Oil Pollution in the Canadian Offshore, Christian G. Yoder. Working Paper 12. 1986. ISBN 0-919269-20-6. 85 p. $15.00.

A Guide to Appearing Before the Surface Rights Board of Alberta, (Second Edition) by Barry Barton and Barbara Roulston. Working Paper 11. 1986. ISBN 0-919269-19-2. 124 p. $15.00

Crown Timber Rights in Alberta, by N.D. Bankes. Working Paper 10. 1986. ISBN 0-919269-17-6. 128 p. $15.00

A Reference Guide to Mining Legislation in Canada, by Barry Barton, Barbara Roulston, and Nancy Strantz. Working Paper 8. 1985. ISBN 0- 919269-15-X. 120 p. $20.00

The Canadian Regulation of Offshore Installations, by Christian G. Yoder. Working Paper 9. 1985. ISBN 0-919269-18-4. 116 p. $15.00

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Oil and Gas Conservation on Canada Lands, by Owen L. Anderson. Working Paper 7. 1985. ISBN 0-919269-16-8. 122 p. $15.00.

Public Disposition of Natural Resources, Essays from the First Banff Conference on Natural Resources Law, Banff, Alberta, April 12-15, 1983; Nigel Bankes and J. Owen Saunders, eds. ISBN 0-919269-14-1. 366 p. (hardcover) $45.00

Canadian Maritime Law and the Offshore: A Primer, by W. Wylie Spicer. Canadian Continental Shelf Law 3; Working Paper 6. 1984. ISBN 0- 919269-12-5. 65 p. $11.00

Fairness in Environmental and Social Impact Assessment Processes, Proceedings of a Seminar, The Banff Centre, February 1-3, 1983; Evangeline S. Case, Peter Z.R. Finkle and Alastair R. Lucas, eds. Proceedings 2. ISBN 0-919269-08-7. 125 p. $15.00

Canadian Electricity Exports: Legal and Regulatory Issues, by Alastair R. Lucas and J. Owen Saunders. Working Paper 3. 1983. ISBN 0- 919269-09-5. 40 p. $7.50

The International Legal Context of Petroleum Operations in Canadian Arctic Waters, by Ian Townsend Gault. Canadian Continental Shelf Law 2; Working Paper 4. 1983. ISBN 0-919269-10-9. 76 p. $7.00

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Environmental Law in the 1980s: A New Beginning, Proceedings of a Colloquium, The Banff Centre, November 27-29, 1981; Peter Z.R. Finkle and Alastair R. Lucas, eds. Proceedings 1. ISBN 0-919269-05-2. 233 p. $13.50

Environmental Regulation - Its Impact on Major Oil and Gas Projects: Oil Sands and Arctic, by C.D. Hunt and A.R. Lucas. 1980. ISBN 0- 919269-00-1. 168 p. $10.95

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Managing Natural Resources in a Federal State,

Essays from the Second Banff Conference on Natural Resources Law, Banff, Alberta, April 17-20, 1985. Edited by J. Owen Saunders. Published by Carswell Legal Publications, 1986. 372 pages hardcover. $62.50. This book may be ordered from: Carswell Legal Publications, 2330 Midland Avenue, Agincourt, Ontario M1S 1P7 or call toll free 1-800-387-5164. If payment accompanies your order, Carswell will pay for postage and handling.