BENCH AND BAR COMMITTEE MINUTES

January 25, 2001

IN ATTENDANCE

CITT	COUNSEL
Pierre Gosselin	Tom Akin
Patricia Close	Ron Cheng
Richard Lafontaine	Riyaz Dattu
Ron Erdmann	Richard Dearden
Michel Granger	Randall Hofley
Gerry Stobo	Greg Tereposky
	Richard Wagner

INTRODUCTORY REMARKS

Pierre Gosselin introduced to the Committee the newest Vice-Chair of the Tribunal, Richard Lafontaine. He informed the Committee that Gerry Stobo (General Counsel to the Tribunal) was leaving for the private sector and expressed his gratitude for Gerry's work with and dedication to the Tribunal.

MINUTES FROM PREVIOUS MEETING

The minutes from the June 1, 2000 meeting were approved.

ANALYSIS OF CHANGES IN MARGINS OF DUMPING

Ron Erdmann presented the findings in the Research staff report *Analysis of Changes in Margins of Dumping*. The report was undertaken by the staff in response to a request by the Committee for an analysis of changes in margins of dumping that occur between the Preliminary Determination of Dumping (PD) and Final Determination of Dumping (FD) made by the Canada Customs and Revenue Agency (CCRA). A copy of the report is available on the Tribunal's website under "Publications".

Mr. Erdmann provided an overview of the analysis and its conclusions. The data source was 220 observations of PD and FD dumping margins between 1985 and 2000. Subsidy margins were not included nor were cases that did not result in Tribunal injury inquires. The report posed three questions:

1. How likely was it that the PD margins changed at the FD?
2. How large were the changes and in which direction did they move?
3. Has there been an increasing or decreasing likelihood of change over time?

In summary, the statistics indicated that the typical dumping investigation results in relatively small changes in margins between the PD and FD. There were no changes in approximately 16 percent of the cases and, where there were changes, in most cases the changes were relatively small. In 69 percent of the cases, the change was less than 5 percentage points and in 29 percent of the cases the change was between 5 and 25 percentage points. The change was greater than 25 percentage points in only 2 percent of the cases. Although there has been a slight decrease in the changes over time, the decrease has not been statistically significant.

Patricia Close queried whether any qualitative analysis had been done as to characteristics that could affect whether or not a change occurred and, if one occurred, its magnitude. For example, was there a particular country or type of case that resulted in greater changes? Did the participation rate by subject exporters affect whether or not a change occurred? Randall Hofley added that where the participation rate was low and CCRA relied on best information available, one would expect that there would not be much of a change in dumping margins between the PD and FD. Ron Erdmann responded that the report focused on statistical analysis, not on qualitative factors.

Ron Cheng noted that the need for the analysis arose from concerns about the timing of the issuance of final determinations in relation to Tribunal hearings in SIMA section 42 injury inquiries. He queried whether any of the counsel at the meeting had encountered difficulties when FDs were issued during the course of rather than prior to the hearing. Gerry Stobo noted that, given the increased complexity of hearings, the Tribunal has scheduled hearings earlier. This enabled more time for the hearing and for the consideration and drafting of the Tribunal's decision. There has not been a lot of discussion by counsel about concerns that arise from the issuance of FDs during the hearing. Riyaz Dattu was of the view that there was a significant shift in dumping margins in approximately one third of the cases. This could pose difficulties for some counsel where the FD is issued during the hearing, particularly if issuance is late in the hearing.

Greg Tereposky identified another issue, unrelated to the magnitude of dumping margins, that could arise from the issuance of the FD during the injury hearing. In some cases, exporters will rely upon verified data from the FD in presenting their defence in an injury hearing (e.g. verified pricing data). If that data is not made available until during the hearing, it makes it difficult to present a full defence. It is particularly problematic where the FD is issued late in the hearing. Patricia Close asked how soon in the SIMA process would counsel know whether they would need to rely on data from the FD. Mr. Tereposky responded that it would depend on the client. In some instances, counsel would know very early in the proceedings (e.g. upon issuance of the PD), in others it would be later (e.g. after verification by CCRA).

OPERATION OF NEW SIMA REGIME

Counsel, the Tribunal and CCRA now have some experience under the new SIMA regime (e.g. the new procedures for preliminary injury determinations, reviews, etc.). Riyaz Dattu noted that CCRA's treatment of confidential information differs depending on the stage of the proceeding.

Gerry Stobo indicated that it would be appropriate to schedule a meeting to discuss the operation of the new procedures shortly after the anniversary of the changes. He suggested that the meeting include officials from CCRA and the Department of Finance. The Tribunal will propose such a meeting at an appropriate time.

ACCESS BY FOREIGN COUNSEL TO THE CONFIDENTIAL RECORD

Tom Akin introduced the issue of access by foreign counsel to the confidential record by noting that the Bar members in the Committee were very concerned about this issue. There was a general view amongst the Bar members that the consultation that occurred prior to the amendment of sub-rule 16(2) of the Tribunal Rules had been insufficient. He emphasized that further consultation on this issue was necessary.

Greg Tereposky summarized his concerns and concerns voiced by some of the Bar members. The principal concern was the inability of the Tribunal to prevent from disclosure confidential information within the personal knowledge of non-residents. This will have a chilling effect on the willingness of domestic and foreign participants in Tribunal proceedings to provide sensitive confidential information (e.g. strategic planning documents).

Another concern is the apparent absence of legal jurisdiction for the Tribunal to allow access to foreign counsel. Section 45 of the CITT Act authorizes the Tribunal to disclose confidential information only with the consent of the party providing the information or subject to such conditions reasonably necessary to prevent unauthorized disclosure. Since a non-resident will be beyond the jurisdictional reach of the Tribunal and Canadian law, it is not possible for the Tribunal to comply with the "reasonableness" requirement in section 45. Bar members questioned the ability of the Tribunal to distinguish between counsel from different countries when administering sub-rule 16(2). The most-favoured-nation (MFN) obligation in the WTO *General Agreement on Trade in Services* will prevent the Tribunal from discriminating between counsel from different WTO member countries as Canada has not taken a reservation to the MFN obligation with respect to the relevant services. Finally, Mr. Tereposky noted that, on policy grounds, the Governments of Canada and the United States have refused to provide sensitive confidential information in certain WTO proceedings on the ground that such information could not be protected by WTO procedures in part due to lack of enforceability of sanctions (e.g. *Canada – Measures Affecting the Export of Civilian Aircraft* and *United States – Definitive Safeguard Measures on Imports of Wheat Gluten From the European Communities*).

Richard Wagner added that his concerns went beyond legal issues because difficult policy and possibly political issues would be created. For example, if the Tribunal were to treat counsel from different countries differently or if the Tribunal had to provide for special treatment in the case of certain types of confidential information. Any discrimination, whether based on origin of counsel or other factors, would have to be justified.

Pierre Gosselin noted that sub-rule 16(2) will make the Tribunal's proceedings more efficient because it will enable participating parties to present their cases more effectively and give them more confidence in the system. This is clearly in the interest of the Tribunal and all those appearing before it. He expressed concern that it would be difficult for the Tribunal to make an informed judgment in a proceeding if non-resident parties were not able to respond effectively. He noted that protective measures were available such as requiring Canadian counsel to act as an intermediary between the foreign counsel and the Tribunal and for that Canadian counsel to sign a non-disclosure undertaking that covered disclosure by the foreign counsel. Gerry Stobo added that, to his knowledge, this was the practice in other jurisdictions such as the United States. Pierre Gosselin queried whether sub-rule 16(2) would truly reduce the level of confidence in Tribunal proceedings.

Randall Hofley was of the view that the wider the access to confidential information, the more difficult it would be to protect it and the less confidence there would be in the system. He noted that Canada is one of the smaller markets in the world economy and that confidential information pertinent to a Tribunal proceeding could have implications for larger markets (e.g. the United States). This increases the importance of limiting access to confidential information in Canadian antidumping and countervailing proceedings.

Richard Dearden queried what "mischief" sub-rule 16(2) was aimed at. In his view, there was no mischief to be addressed. Gerry Stobo responded that there had been requests for access by foreign counsel in the past. He also noted that some Canadian counsel had been granted access to confidential information in antidumping and countervailing proceedings in the United States. These factors combined with changes to the SIMA penalty provisions and a degree of comfort that satisfactory assurances could be provided regarding non-disclosure underpinned sub-rule 16(2).

Although the Tribunal has addressed the issue in sub-rule 16(2) and in subsequent practice applying that sub-rule, Gerry Stobo indicated that the Tribunal would like to hear the detailed views of the Bar members on the issue in writing.

PRESENTATION OF THE ELECTRONIC CASE BOOK INITIATIVE

Michel Granger provided a detailed presentation on the Tribunal's electronic case book initiative. Started in 1998, after the consideration of various products the Tribunal is now in the second pilot project stage of the initiative using Filemaker Pro – Toolkit. The objective of the initiative is to use information technology to help with the management of Tribunal cases and

proceedings by: (a) building the administrative record; (b) communicating electronically; and (c) automating the hearing room process.

The Tribunal has considered various products since 1998 and as part of its testing process has identified the functions and requirements that will be demanded from the chosen information technology product. In March 2000, RDIMS software was identified as a possible solution and the Tribunal's first pilot project used that product. A closed case—the *Rebar* inquiry—was used to test the software. Many requisite functions were successfully tested. However, while it was a good product, certain functions were determined not to be sufficient to meet the specific needs of the Tribunal's staff. In September 2000, a new product was identified, Filemaker Pro – Toolkit. It is being used in a second pilot in a live case, *Grain Corn*. The product is being used in parallel with the Tribunal's normal procedures.

Upon the selection and implementation of a product, it is envisaged that it will initially be used by the staff and members of the Tribunal. The ultimate objective is to have all participants in Tribunal proceedings using the system. It is expected that it will greatly improve the efficiency and conduct of proceedings.

The Tribunal will update the Committee on developments in the electronic casebook initiative. At the moment, the pilot project looks promising.

CLOSE OF MEETING

There being no other business, the meeting was adjourned.