

**STANDING COMMITTEE ON HEALTH  
HOUSE OF COMMONS  
OTTAWA, CANADA**

**RE: PLAIN PACKAGING OF TOBACCO PRODUCTS  
SUBMISSION OF R. J. REYNOLDS TOBACCO COMPANY**

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R. J. Reynolds Tobacco International, Inc.  
Winston-Salem, North Carolina 27102

Paul R. Bourassa  
Senior International Counsel

May 4, 1994

VIA DHL

Ms. Carmen DePape  
Clerk  
Standing Committee on Health  
House of Commons  
Ottawa, Ontario  
K1A 6A6  
CANADA

Dear Ms. DePape:

I am pleased to enclose the submission of R. J. Reynolds Tobacco Company ("RJRTC") to the Standing Committee on Health in relation to the plain packaging of tobacco products.

RJRTC's submission consists of a position letter addressed to the Committee by Mr. Wayne W. Juchatz, Senior Vice President, General Counsel and Secretary of RJRTC and of an opinion addressed jointly to RJRTC and Philip Morris International Inc. by former United States Trade Representative Carla A. Hills, now a partner in the Washington, D.C. law firm of Mudge Rose Guthrie Alexander & Ferdon.

As prior commitments prevent Ambassador Hills from appearing before the Committee, RJRTC has asked former Deputy United States Trade Representative Julius L. Katz, Mudge Rose partner N. David Palmetter and Richard Dearden, partner in the Ottawa office of the Gowling, Strathy & Henderson law firm to present its submission to the Committee and answer any questions the Members may have in relation to RJRTC's trademark and investment concerns.

I have attached the Curriculum Vitae of Ambassador Hills, Ambassador Katz, Mr. Palmetter and Mr. Dearden.

Carmen DePape  
May 4, 1994  
Page Two

Ambassador Hills was the United States Trade Representative from 1989-93. In that capacity, Ambassador Hills negotiated the North American Free Trade Agreement, a multitude of trade agreements; market-opening agreements; investment treaties as well as intellectual property protection agreements with a host of countries. Prior to becoming President Bush's chief trade advisor and negotiator, she founded successful law firms in Los Angeles and Washington, D.C., and served as Secretary of Housing and Urban Development (1975-77), and Assistant Attorney General (Civil Division, 1974). She serves on the boards of several multinational corporations.

Ambassador Katz is President of Hills & Company, International Consultants. He served as the senior Deputy United States Trade Representative from 1989-93, where he was the chief negotiator of the North American Free Trade Agreement, led the negotiations for the United States - U.S.S.R. Trade Agreement, and oversaw the Uruguay Round of multilateral trade negotiations. Prior to joining USTR, Ambassador Katz worked in the private sector in international trade facilitation. He was Chairman and Chief Executive Officer of the futures brokerage activities of Donaldson, Lufkin and Jenrette (1980-85). Ambassador Katz served 30 years in the Department of State, holding senior positions in economic and business-related posts, including Assistant Secretary of State for Economic and Business Affairs (1976-79).

Mr. Palmeto is a well known expert in the field of international trade law. He has represented various manufacturers that export to the United States, including Canadian enterprises, in a multitude of antidumping, countervailing duty, tariff and customs matters. He has authored a number of essays, articles and book reviews on international trade. He presently co-authors the CCH publication NAFTA WATCH with Richard Dearden.

Mr. Dearden is also a well known expert in international trade law. He has been appointed to Canada's roster of panellists used to resolve trade disputes between Canada and the United States pursuant to the Canada - U.S. Free Trade Agreement and has represented a number of clients in trade related matters. He is a frequent speaker and a prolific writer in the area of international trade law.

I trust this is satisfactory and remain available should further information be needed.

Yours truly,



Paul R. Bourassa





May 3, 1994

WAYNE W. JUCHATZ  
Senior Vice President  
General Counsel and Secretary

Winston-Salem, N.C. 27102  
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The Standing Committee on Health  
House of Commons  
Ottawa, Ontario K1A6A6  
Canada

Re: Plain Packaging of Tobacco Products

Dear Sirs:

We thank you for giving us the opportunity to submit a brief to your Committee and to have our representatives present our position to you.

R. J. Reynolds Tobacco Company ("Reynolds") is a wholly owned subsidiary of RJR Nabisco, Inc., a publicly owned food and tobacco multinational with operations in over 160 markets. Reynolds' interest in appearing before your Committee is based on the potential loss of its trademark rights.

Reynolds wholly owns RJR-Macdonald, Inc. ("Macdonald"), a Canadian manufacturer of tobacco products. Macdonald has manufactured and sold tobacco products in Canada for over 100 years. It owns the well-known trademarks EXPORT "A" and MACDONALD. Reynolds itself owns the world famous trademarks CAMEL, WINSTON, VANTAGE and MORE which are used on tobacco products that are either imported into Canada by Macdonald or manufactured under license by the latter for distribution and sale in Canada.

These trademarks and the goodwill attached to them have been developed over many years of effort and investment. Their purpose is to distinguish the products they represent from those of competitors. Removal of trademarks from packages would destroy the value of those trademarks and severely impair consumers' ability to distinguish one product from another. Plain packages will unavoidably be easier to counterfeit and to smuggle.

Trademarks are the most valuable assets of Reynolds and Macdonald. In its 1993 Annual Report, RJR Nabisco, Inc. valued its trademarks as an asset worth more than \$8 billion. The EXPORT "A" trademark alone exceeds \$100 million in value. The plain packaging of tobacco products would constitute an unprecedented and unparalleled attack on Reynolds' investments in Macdonald, and on Reynolds' own trademarks in Canada. No other country in the world has adopted such measures.

As demonstrated in the attached opinion of former U.S. Trade Representative Carla A. Hills, plain packaging legislation would violate three international agreements to which Canada is a party and would give rise to a claim under the provisions of the NAFTA for hundreds of millions of dollars in compensation.

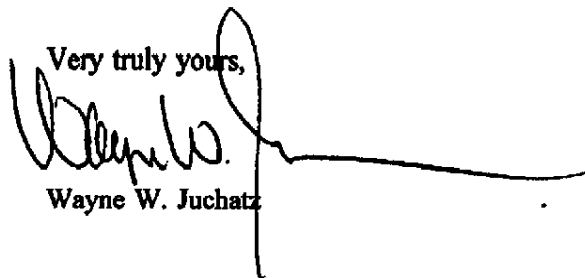
We understand that Health Department officials have admitted to your Committee that they do not have any evidence that plain packaging would reduce the consumption of cigarettes. We understand that the Health Department has not even studied the effect of Phase I health warnings and it has already announced the coming into force of Phase II health warnings in September 1994. Those warnings will become the most prominent in the world. Macdonald and other Canadian manufacturers have already spent millions of dollars to comply with Phase I and Phase II requirements.

In short:

1. plain packaging legislation would violate Canada's obligations under NAFTA, GATT and the Paris Convention; and
2. plain packaging legislation would be an unlawful expropriation of trademarks and investments for which proper and full compensation, in the hundreds of millions of dollars, would have to be paid.

Based on the attached opinion from Ambassador Hills, Reynolds will take all required legal action to prevent the infringement of its trademark rights and the unlawful expropriation of its investments in Canada. The shareholders of RJR Nabisco, Inc. would demand no less.

Very truly yours,



Wayne W. Juchatz

WWJ:jt

Attachment





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May 3, 1994

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Philip Morris International Inc.  
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Re: Legal Opinion With Regard to Plain Packaging of  
Tobacco Products Requirement Under International  
Agreements

Dear Sirs:

You have asked us to provide a legal opinion analyzing the consistency of the plain packaging requirement for cigarettes being considered by the Standing Committee on Health of the House of Commons of the Canadian Parliament with relevant international intellectual property agreements.

It is our opinion that a plain packaging proposal<sup>1</sup> would infringe the trademark rights of foreign investors who own or control the trademarks on cigarettes sold in Canada, in violation of the Government of Canada's obligations under:

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<sup>1</sup> For purposes of this opinion, we assume that a plain packaging proposal would severely restrict the use of trademarks and trade dress in Canada.

- 1) the Paris Convention for the Protection of Industrial Property;
- 2) the North American Free Trade Agreement ("NAFTA"); and
- 3) the Uruguay Round Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods ("TRIPS") contained in the recently signed Final Act embodying the results of the Uruguay Round Multilateral Trade Negotiations.

It is also our opinion that, under NAFTA, any such plain packaging requirement would constitute an expropriation of the investments of U.S. manufacturers of tobacco products and their subsidiaries in Canada, requiring substantial compensation, which you have told us would be in excess of hundreds of millions of dollars.

#### I. STATEMENT OF FACTS

The proposal currently before the Standing Committee on Health requiring plain packaging of cigarettes does not provide any information on the specific type of plain packaging requirements that would be imposed.

All cigarettes sold in Canada are branded with distinctive trademarks and trade dress, and a major portion of those brands are protected by trademarks owned or controlled by foreign investors. As is the case with most consumer product manufacturers, manufacturers of tobacco products have spent large amounts of money and time in developing and achieving market share in Canada with its product trademark and trade dress, which are major company assets.

A plain packaging requirement that interferes with the use of the trademark or trade dress of cigarette packaging, which includes distinctive lettering, design or coloring, would cause consumer confusion and significant commercial damage. Such plain packaging requirement would significantly encumber the use of a company trademark or trade dress and would substantially diminish the worth of these highly valuable company assets, thereby resulting in tremendous losses.

## **II. THE PLAIN PACKAGING REQUIREMENT WOULD VIOLATE TRADEMARK RIGHTS UNDER INTERNATIONAL AGREEMENTS**

Protection of foreign manufacturers and trademark owners engaging in business in Canada is provided under three agreements: the Paris Convention for the Protection of Industrial Property (most recently revised at Stockholm in 1967), the NAFTA, and the recently signed Uruguay Round TRIPS Agreement. Canada is a signatory to all three agreements. Together, they provide fundamental rights with respect to the registration, use and enforcement of trademarks.

### **A. Paris Convention For the Protection of Industrial Property**

#### **1. Scope of Protection**

Canada is a member of the union of countries formed under the Paris Convention for the Protection of Industrial Property. As a result of its membership in the Paris Union, Canada has assumed

certain specific legal obligations to protect industrial property.<sup>2</sup> The Convention states, *inter alia*, that the "protection of industrial property has as its object . . . trademarks . . . ."<sup>3</sup> The authoritative Guide to the Application of the Paris Convention For the Protection of Industrial Property (hereinafter WIPO Guide), published by the World Intellectual Property Organization ("WIPO"), which administers the Paris Convention,<sup>4</sup> defines a trademark as "a sign serving to distinguish the goods of one enterprise from those of other enterprises."<sup>5</sup>

The proprietor of a trademark generally has the exclusive right to use the trademark<sup>6</sup> and may request a member country:

to refuse or to cancel the registration, and  
to prohibit the use, of a trademark which  
constitutes a reproduction, an imitation, or a

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<sup>2</sup> Paris Convention for the Protection of Industrial Property, Article 1(1).

<sup>3</sup> Id. at Article 1(2). The Canadian Trade-Marks Act provides that: "trade-mark means (a) a mark that is used by a person for the purpose of distinguishing or so as to distinguish wares . . . manufactured [or] sold . . . by him from those manufactured [or] sold . . . by others, (b) a certification mark, (c) a distinguishing guise, or (d) a proposed trade-mark. "Distinguishing guise" means (a) a shaping of wares or their containers, or (b) a mode, a wrapping or packaging wares the appearance of which is used by a person for the purpose of distinguishing or so as to distinguish wares . . . manufactured [or] sold . . . by him from those manufactured [or] sold . . . by others." Canadian Trade-Marks Act Annotated at 2-2, 2-4 (1991).

<sup>4</sup> Technically, the Guide was published by the WIPO's predecessor organization, the United International Bureau for the Protection of Intellectual Property (BIRPI).

<sup>5</sup> G.H.C. Bodenhausen, Guide to the Application of the Paris Convention For the Protection of Industrial Property, 22 (BIRPI 1968).

<sup>6</sup> Id.

translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods."<sup>7</sup>

The WIPO Guide notes that confusion can be created by the use of identical or similar trademarks or form of packaging.<sup>8</sup>

In addition, Article 6quinquies(A) provides that, once registered, a trademark must be protected, subject to the limited reservations set forth in Article 6quinquies(B). These reservations, indicated in a limited enumeration, provide grounds for refusal or invalidation.<sup>9</sup> A member country may invalidate trademark registration only if:

- 1) the mark infringes rights already acquired in the country in which protection is claimed (a similar trademark is already protected in Canada);<sup>10</sup>
- 2) the mark is devoid of any distinctive character<sup>11</sup>, merely descriptive or a generic name; or
- 3) the mark is contrary to morality or public order.<sup>12</sup>

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<sup>7</sup> Paris Convention, Article 6bis(1) (emphasis added).

<sup>8</sup> WIPO Guide at 145.

<sup>9</sup> Id. at 111.

<sup>10</sup> Id. at 115.

<sup>11</sup> The WIPO Guide notes that a mark may be devoid of any distinctive character when it is too simple (a single star, crown or letter) or too complicated (giving the impression of being an adornment or decoration of the goods concerned, or of being merely a slogan consisting of recommendations to buy or use such goods). Id.

<sup>12</sup> A mark contrary to morality would, for example, be a mark containing an obscene picture. Examples of marks contrary to public order could be a mark containing a religious symbol, or a

If the exceptions do not apply, a trademark "may be neither denied registration nor invalidated."<sup>13</sup> Signatories may not apply other grounds for refusal or invalidation of the registration of trademarks.<sup>14</sup>

The "repression of unfair competition" is a separate obligation under the Paris Convention and is an important element in the protection of industrial property.<sup>15</sup> In fact, one of the justifications for requiring the protection of marks is that the use of a confusingly similar mark will, in most cases, amount to an act of unfair competition and be considered prejudicial to the interests of those who will be misled.<sup>16</sup> Article 10bis(1) requires the countries of the Union to assure nationals of other member countries effective protection against unfair competition and prohibits "all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor."<sup>17</sup> The WIPO Guide states that "in many cases, infringement of industrial property

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mark containing an emblem of a forbidden political party. *Id.* at 116.

<sup>13</sup> Paris Convention, Article 6quinquies(B) (emphasis added).

<sup>14</sup> The trademarks must be "covered" by this Article in order to be protected. "Covered" trademarks are those trademarks which are duly registered in the country of origin and which, with regard to the signs of which they are composed, must be accepted for filing and protected, subject to the provisions in Article 6quinquies. WIPO Guide at 114.

<sup>15</sup> *Id.* at 23; Paris Convention, Article 1(1).

<sup>16</sup> WIPO Guide at 90-91.

<sup>17</sup> Paris Convention, Article 10bis(3)(1).

rights, such as the right to a trademark or a trade name, . . . will at the same time be an act of unfair competition."<sup>18</sup> Also, as noted above, any act which creates confusion with the goods of a competitor may constitute unfair competition.

Finally, Article 7 prohibits the nature of the goods to which a trademark is to be applied from being an obstacle to the registration of the mark.<sup>19</sup> The interpretive history<sup>20</sup> of the provision strongly suggests that most countries, including Canada, recognize their obligations under Article 7, not only to register all marks regardless of the nature of the product, but also to refrain from "suppressing or limiting" the exclusive right of the trademark owner to use a mark as long as the sale of the product is legal. Under Canadian law, use of a mark in commerce is required for both registration and renewal of a trademark, and non-use is a grounds for cancellation.

It should be added that, as a general principle of customary international law, countries can temporarily set aside their treaty obligations if necessary to deal with an unexpected emergency. A fundamental change of circumstances which was not foreseen by the parties when they signed a treaty can justify the temporary

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<sup>18</sup> Id.

<sup>19</sup> Id. at Article 7. Note that NAFTA Article 1708(5) contains parallel language ("the nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to the registration of the trademark").

<sup>20</sup> Actes de Lisbonne at 694-704, 761-763 (1958); see generally, Stephen P. Ladas, Patent Trademarks, and Related Rights Vol. II at 1247-1249 (1975).

suspension of a specific provision of a treaty.<sup>21</sup> During the suspension, the larger legal relations between the parties established by the treaty will not be affected, and the parties will refrain from acts that would tend to obstruct the full resumption of the operation of the treaty after the emergency passes.<sup>22</sup>

## 2. Violation of Obligations

The plain packaging requirement for cigarettes would violate Canada's obligations to protect trademarks and trade dress, pursuant to Articles 1, 6*bis*, 6*quinquies*(A), 7 and 10*bis* of the Paris Convention. The proposal undermines the value of the mark protected by Articles 1(2), 6*bis*, 6*quinquies*(A) and fails the "likelihood of confusion" test by requiring packaging that makes the products nearly indistinguishable in the marketplace. Similarly, requiring virtually identical marks for different brands of cigarettes is an infringement of trademark and trade dress rights and would itself constitute a form of unfair competition in violation of Article 1, paragraph 2 and Article 10*bis*. In addition, the plain packaging proposal undermines Canada's obligation under Article 10*bis* to prevent confusion and unfair

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<sup>21</sup> Vienna Convention on the Law of Treaties, Article 62(3); see also Article 44. (The Vienna Convention formalizes the well-established customary principles of international treaty law, and Canada is a signatory. Even though the United States is not a signatory of the Convention, it scrupulously adheres to its precepts).

<sup>22</sup> Id. at Article 72.



competition because in eliminating distinctive marks, it makes both inevitable.

The plain packaging proposal cannot be justified under the limited exceptions set forth in 6quinquies(B). The plain packaging proposal would not fall within any of the three enumerated exceptions because the trademarks at issue do not "invalidate other trademarks", are not "devoid of any distinctive character," and are not "contrary to morality or public order."

The plain packaging proposal also would violate Article 7 of the Paris Convention because it would effectively prohibit use of cigarette trademarks in commerce. If the non-use results in the cancellation of existing marks or an inability to register new marks, it would constitute a breach of Canada's obligations under Article 7.

Finally, the plain packaging proposal cannot be justified under the general principle under customary international law allowing for temporary measures in unexpected emergency situations. Nothing in the proposal suggests that it would be a temporary measure. If anything, the clear implication is that the ban on the use of the trademark would be permanent. Therefore, the "fundamental change of circumstances" escape clause under international law would not permit Canada to deprive trademark owners of their substantive rights under the Paris Convention and could lead to an abrogation of Canada's obligations under the Agreement.

## **B. North American Free Trade Agreement**

### **1. Scope of Protection**

Canada also has ratified the North American Free Trade Agreement and has agreed to provide adequate and effective protection for the trademarks of U.S. corporations pursuant to Chapter 17,<sup>23</sup> which requires adherence to the Paris Convention. Indeed, NAFTA contains far more specific definitions and requirements than the Convention itself.

NAFTA Article 1708 defines a trademark as consisting of any sign or any combination of signs, capable of distinguishing the goods of one person from those of another, including personal names, designs, letters, numerals, colors, figurative elements, or the shape of goods or of their packaging.<sup>24</sup> To ensure adequate and effective protection, each NAFTA Party is required to provide a registration system<sup>25</sup> and specify what conditions may be placed on registration.<sup>26</sup> In addition, a Party may not register trademarks that misrepresent geographic origin, that generally designate goods to which the trademark applies, or that consist of immoral, deceptive or scandalous matter.<sup>27</sup>

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<sup>23</sup> NAFTA Article 1701.

<sup>24</sup> Id. at Article 1708.

<sup>25</sup> Id. at 1708(4).

<sup>26</sup> Id. at Article 1708(3). A Party must require the use of a trademark to maintain a registration. Id. at Article 1708(8)-1708(9).

<sup>27</sup> Id. at Articles 1708(13); 1708(14).

NAFTA sets forth the rights of trademark owners after registration. Specifically, paragraph 2 of Article 1708 requires NAFTA Parties to provide registered trademark owners with the right to prevent other persons from using identical or similar marks for identical or similar goods, where such use would result in a likelihood of confusion.<sup>28</sup> In addition to providing protection against infringement by private parties, NAFTA places limits on the extent to which a signatory government may provide exceptions that encumber trademark rights. Paragraph 5 of Article 1708 provides that a Party may not make "the nature of the good" an obstacle to registration. Article 1708(10) further provides that "a Party may not encumber the use of a trademark in commerce by special requirements such as a use that reduces a trademark's function as an indication of source."<sup>29</sup>

It is important to note that in terms of providing for general exceptions from NAFTA obligations for reasons such as health and safety, as set out in NAFTA Article 2101(1),<sup>30</sup> Chapter 17

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<sup>28</sup> Id. at Article 1708(7). These rights must extend for at least ten years and must be indefinitely renewable if the terms for renewal are met for not less than ten years.

<sup>29</sup> Id. at Article 1708(10) (emphasis added).

<sup>30</sup> For the purposes of:

- (a) Part Two (Trade in Goods), except to the extent that a provision of that Part applies to services or investment, and
- (b) Part Three (Technical Barriers to Trade), except to the extent that a provision of that Part applies to services,

(Intellectual Property) was specifically excluded. Therefore, there are no general or specific exceptions that would permit a NAFTA Party to avoid its obligation to provide trademark protection under Article 1708.

Violations of NAFTA may be raised on a government-to-government basis or by private parties through Canada's domestic legal system. Chapter 20 sets forth NAFTA's general dispute settlement provisions, based on GATT dispute settlement procedures, which include consultations and panel review.<sup>31</sup> NAFTA also provides remedies to private parties under domestic law, including the right to seek injunctive relief and damages through civil court proceedings or arbitration.<sup>32</sup>

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GATT Article XX and its interpretative notes, or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made part of this Agreement. The Parties understand that the measures referred to in GATT Article XX(b) include environmental measures necessary to protect human, animal or plant life or health, and that GATT Article XX(g) applies to measures relating to the conservation of living and non-living exhaustible natural resources. *Id.* at Article 2101 (General Exceptions).

<sup>31</sup> Under NAFTA, the Free Trade Commission oversees implementation of the Agreement and dispute settlement. The Free Trade Commission ("FTC") was established pursuant to NAFTA Article 2001. The standard dispute settlement process, under the NAFTA, entails consultations between the disputing parties, a meeting with the Free Trade Commission if the consultations fail, and as a last resort, the convening of an arbitration panel.

As a general matter, disputes regarding any matter arising under both NAFTA and GATT or any agreement negotiated thereunder, may be settled in either forum at the discretion of the complaining Party. *See* NAFTA Article 2005.

<sup>32</sup> *Id.* at Articles 1714, 2022.

## 2. Violation of Obligations

The plain packaging proposal would, if adopted, violate Canada's obligations under NAFTA Article 1701, as well as paragraphs 2 and 10 of Article 1708. The proposal would seriously diminish the integrity of the trademark and substantially degrade the value of the distinctive packaging, or trade dress, in which the companies have invested heavily over the years. Therefore, the proposal would deny adequate and effective protection to basic trademark intellectual property rights in violation of NAFTA Article 1701.

In mandating plain packaging, Canada would create "confusion as to the source of the products," in violation of paragraph 2 of Article 1708. It also would violate paragraph 10 of Article 1708 by encumbering the use of the trademark by reducing the function of the trademark as an indication of source. These violations are made more egregious by the fact that the elimination of brand distinctiveness is not an unintended consequence, but rather a deliberate objective of the proposal.

### C. Uruguay Round Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods

#### 1. Scope of Protection

The TRIPS Agreement, included in the provisions of the recently signed Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations, contains a broad definition of trademark rights. Specifically:

any sign, or combination of signs, capable of distinguishing the goods or services of one

undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs are eligible for registration as trademarks.<sup>33</sup>

Once registered pursuant to paragraph (1) of Article 16, the owner of a trademark has the right to prevent others from using identical or similar marks for goods that are identical or similar, where such use would result in a likelihood of confusion.<sup>34</sup> Initial trademark registration, and each renewal of registration, is for a term of no less than seven years and is renewable indefinitely.<sup>35</sup> Pursuant to Article 20, the use of a trademark in the course of trade may not be unjustifiably encumbered by special requirements, such as use in a manner detrimental to its capability to distinguish the goods of one undertaking from those of other undertakings.<sup>36</sup> This Article parallels NAFTA Article 1708, paragraph 10. Finally, the TRIPS Agreement requires a Party to adhere to the standards set forth in the Paris Convention.<sup>37</sup>

TRIPS provides for the enforcement of intellectual property rights at the domestic and international level. Members are required to ensure that civil judicial procedures concerning the enforcement of any intellectual property rights covered by the

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<sup>33</sup> TRIPS Article 15 (Protectable Subject Matter).

<sup>34</sup> Id. at Article 16 (1) (Rights Conferred).

<sup>35</sup> Id. at Article 18 (Term of Protection).

<sup>36</sup> Id. at Article 20.

<sup>37</sup> Id. at Article 2(1).

Agreement are available to the rights holders.<sup>38</sup> TRIPS Article 64 provides that the procedures set forth in the Understanding on Rules Governing the Settlement of Disputes, administered by the Dispute Settlement Body ("DSB"), are available for government-to-government dispute resolution, which may include conciliation, arbitration, and review by a panel.<sup>39</sup> If the panel concludes that the offending Party's measure is inconsistent with an agreement, compensation or suspension of tariff concessions may be authorized if the Party does not follow the panel's recommendations.<sup>40</sup>

The TRIPS Agreement contains two reservations that limit the protection given to trademark holders. First, Article 17 (Exceptions) allows the Signatories "to provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of

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<sup>38</sup> TRIPS Articles 41, 42.

<sup>39</sup> Note: disputes which do not allege specific violations of the TRIPS Agreement (Sub-paragraphs XXIII:1(b) and XXIII:1(c) of the GATT 1994) will not be permitted to participate in the dispute settlement procedure for a period of five years from the entry into force of the Agreement establishing the World Trade Organization (to be established as the successor entity to the GATT upon implementation). During this time period, the TRIPS Council will examine the scope and modalities for Article XX:III:1(b) and Article XX:III:1(c) type complaints made pursuant to this Agreement, and submit its recommendations to the Ministerial Conference for approval. See TRIPS Article 64.

<sup>40</sup> The level of the suspension of concessions authorized by the DSB will be equivalent to the level of the nullification or impairment. If the Member concerned objects to the level of suspension proposed or claims that certain principles or procedures have not been met, the matter will be referred to arbitration. See TRIPS Understanding on Rules and Procedures Governing the Settlement of Disputes, para. 22.6. The parties must accept the arbitrator's decision as final and shall not seek a second arbitration. Panel Report at para. 22.7.

the legitimate interests of the owner of the trademark and of third parties."<sup>41</sup> Second, according to Article 8 (Principles), "Members may, in formulating or amending their national laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement."<sup>42</sup>

We note that GATT Article XX(b) (General Exceptions) contains a similar exemption allowing a Contracting Party to adopt or enforce measures necessary to protect human, animal or plant life or health as long as the measure is necessary and does not constitute a disguised restriction on trade.<sup>43</sup> GATT Article XX(b) is intended to allow Contracting Parties to impose trade-restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals only to the extent that such inconsistencies are unavoidable.<sup>44</sup> As Canada pointed out in recent GATT dispute settlement proceedings,<sup>45</sup> the proponent of the public

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<sup>41</sup> Id. at Article 17 (Exceptions) (emphasis added).

<sup>42</sup> Id. at Article 8 (Principles) (emphasis added).

<sup>43</sup> GATT Article XX(b); Panel Report, United States - Restrictions on Imports of Tuna, Int'l. Legal Materials, Vol. XXX, No. 6, 1598 at para. 5.27 (1991) (hereinafter Panel Report).

<sup>44</sup> Id. citing Panel Report on "Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes", adopted 7 November 1990, BISD 37S/200, 222-223, paras. 73-74.

<sup>45</sup> Id. at para. 4.9. (The United States had not demonstrated to the Panel - as required of the Party invoking an Article XX exception - that it had exhausted all options reasonably



health exception has the burden of proving the imposed measure is "necessary." The burden of proof also would rest on the proponent trying to establish that the trademark violations are unavoidable. To meet the burden of proof, the Government would have to demonstrate that alternatives do not exist which could achieve the Government's objective without violating valuable trademark rights.

## 2. Violation of Obligations

Canada has recently signed the Uruguay Round Agreement. Although it is not yet in force, as a signatory, Canada has agreed to bring itself into compliance with the TRIPS Agreement upon implementation.

The plain packaging requirement violates TRIPS Articles 16 and 20. Plain packaging for all cigarettes would result in exactly the type of confusion proscribed by paragraph (1) of Article 16 of the Agreement, since the appearance of the products would be substantially similar regardless of the manufacturer. Plain packaging also would be a special requirement which would unjustifiably encumber the use of a trademark in violation of Article 20 in absence of evidence that such measure was justified.

The public health exceptions set forth in TRIPS Article 8<sup>46</sup> would not apply in this case since, regardless of the public health or other public interest motivations behind the legislation, it would be inconsistent with the TRIPS Agreement itself. GATT

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available to it to pursue its dolphin protection objectives through measures consistent with the GATT).

<sup>46</sup> TRIPS Article 8(1); GATT Article XX(b).

Article XX(b) also would not apply in this case and would not relieve Canada of its obligations under the Agreement since, according to the record of the proceedings, the Canadian Health Department has conceded that there is no reliable evidence that plain packaging would reduce the sale of cigarettes. Therefore, the Government, by its own admission, cannot satisfy the burden of proof necessary to invoke the GATT Article XX(b) exception.

**III. THE PLAIN PACKAGING REQUIREMENT WOULD CONSTITUTE AN  
EXPROPRIATION OF THE EXISTING INVESTMENT OF U.S. MANUFACTURERS  
OF TOBACCO PRODUCTS IN CANADA UNDER NAFTA ARTICLE 1101(10)**

Imposition of the plain packaging requirement would give foreign investors the right to invoke Canada's obligations under Chapter 11 of NAFTA pertaining to investment.<sup>47</sup> Specifically, the requirement would amount to an expropriation of a lawfully registered trademark in violation of Article 1110(1), giving rise to massive compensation claims.<sup>48</sup>

**A. Scope of Protection**

The investment provisions contained in Chapter 11 of NAFTA protect the investments of investors of Parties to NAFTA through provision of non-discriminatory treatment (Articles 1102 and 1103); freedom from performance requirements (Article 1106); free transfer of investment-related funds (Article 1109); and the requirement

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<sup>47</sup> NAFTA Article 1101.

<sup>48</sup> Id. at Article 1110.

that expropriation must be carried out in conformity with standards set out under international law (Article 1110(1)).<sup>49</sup>

NAFTA Article 1110(1), Paragraph 1 provides that:

No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation") except:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with due process of law and Article 1105(c); and
- (d) on payment of compensation in accordance with paragraphs 2 through 6.<sup>50</sup>

Paragraph 1 of Article 1105 provides that investments must be treated "in accordance with international law, including fair and equitable treatment and full protection and security."<sup>51</sup> Paragraphs 2 through 6 of Article 1110 provide that compensation must be equivalent to the fair market value of the expropriated investment as of the date of the expropriation; paid without delay; and be fully realizable.<sup>52</sup>

Article 1139 subparagraph (g) of Chapter 11 defines the term investment as including "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of

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<sup>49</sup> Id. at Articles 1102, 1103, 1106, 1110(1).

<sup>50</sup> Id. at Article 1110(1).

<sup>51</sup> Id. at Article 1105(1).

<sup>52</sup> Id. at Article 1110(2)-(6).

economic benefit or other business purposes . . . ."<sup>53</sup> Thus, as intangible property, trademarks clearly are within the scope of what is considered an "investment" for the purposes of Chapter 11. Article 1139 also defines an investor as "a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment."<sup>54</sup> To qualify for Chapter 11's protections, an investor of a Party must own or control directly or indirectly the investment as defined under Article 1139(a) through (h).

It is important to note that paragraph 7 of Article 1110 provides that its requirements do not apply to the issuance of compulsory licenses, or to the revocation, limitation or creation of intellectual property rights, as long as such actions are consistent with the requirements of Chapter 17 pertaining to intellectual property.<sup>55</sup> As discussed above, the plain packaging requirement would be inconsistent with the provisions of Chapter 17, in particular Article 1708(10) (which prohibits the imposition of special requirements that encumber trademark use), and therefore would not be exempt from Article 1110.

#### **B. Requirement of Compensation**

The plain packaging requirement significantly encumbers the right to use a particular word in a trademark or a logo (a logo may include design and color), and as such, trademark rights, as

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<sup>53</sup> Id. at Article 1139(g).

<sup>54</sup> Id. at Article 1139.

<sup>55</sup> Id. at Article 1110(7).

defined in Chapter 17, are being expropriated. As investors of a NAFTA Party, those U.S. enterprises who own trademarks or have investments in companies that own trademarks have the right to invoke the protection against unlawful expropriation of their investment under Article 1110(1). To be lawful, the expropriation must meet the criteria described above. If these criteria are not met, the expropriation itself would be subject to challenge under the government-to-government dispute settlement procedures under NAFTA Chapter 20 and by private parties.<sup>56</sup> Even if the expropriation is lawful, it would be at great cost to the Canadian Government as the compensation claims of affected foreign trademark holders would be staggering, amounting to hundreds of millions of dollars. It is also important to note that regardless of the outcome of the interpretation of public purpose, the violations under Chapter 17 would remain since the exemption under Chapter 11 would not apply.

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<sup>56</sup> Note: A Party's accession and acceptance of the NAFTA constitutes the requisite consent to submit investment disputes to binding arbitration. The arbitration, which will be between a private investor and one of the Parties to the Agreement, can take place in one of three places: the International Center for the Settlement of Investment Disputes ("ICSID") (when both the host country and the investor's home country are signatories to the ICSID convention); the ICSID "Additional Facility" (which can be used when only one Party is a member of ICSID); or an ad hoc arbitration under UNCITRAL Arbitration Rules. Parties must be willing to abide by the arbitration award and, in this regard, must enact any legislation necessary to make the awards enforceable in their national courts.

#### IV. CONCLUSION

As outlined in the preceding sections, the plain packaging requirement would violate the Paris Convention on Industrial Property; Chapter 17 of NAFTA, specifically Article 1701, and paragraphs 2 and 10 of Article 1708; and Articles 16 and 20 of the TRIPS Agreement. These violations would give rise to claims by foreign manufacturers of tobacco products in Canadian courts for injunctive relief and damages and the possibility of government-to-government dispute settlement proceedings. In addition, the proposal would amount to an expropriation of property rights of foreign investors under NAFTA Article 1110(1), requiring the payment of prompt, adequate, and fully realizable compensation.

In evaluating the legality of the proposed plain packaging requirements under international agreements, we are in no way questioning the Canadian Government's authority to prohibit that which can be shown to be harmful to health. However, Canada cannot attempt to discourage the use of such products by undermining the value of a trademark, or encumbering its patent system, or weakening the level of copyright protection. For example, if, in an effort to make soft drinks that contain sugar and caffeine less attractive to children, Canada required the companies to market the product in a plain white can with the brand name written in black in a non-distinctive small type along the bottom of the can, Canada would violate its obligations to protect trademarks and prevent unfair competition under both NAFTA and the Paris Convention.

It is instructive to note that the Canadian plain packaging proposal is not without antecedents. In 1990, the International Trademark Association ("INTA"), a not-for-profit association with a worldwide membership of over 2700, including close to 100 Canadian members, opposed "The Tobacco Control and Health Protection Act," a similar trademark-restrictive proposal, which was pending before the U.S. Congress. The legislation would have, among other things, imposed limits on the use and display of trademarks in cigarette packaging and advertising. Although much less draconian than the Canadian proposal, experts weighed in against the proposal on the grounds that it placed unreasonable restrictions on trademark owners. They argued that these restrictions would interfere with the historic purpose of trademarks -- to permit consumers to distinguish between competing brands:

Regulating a particular product by placing limits on the form or style in which its trademark may be used... sets an unsound legislative precedent. If such restrictions are put into effect for tobacco products, they could easily be extended to any product that Congress seeks to regulate, be it high-sugared, high-cholesterol, alcoholic, or whatever is the product of concern at the moment. Such legislative activity would result in a large number of products that could not be distinguished by their trademarks and to widespread destruction of many trademark identities that consumers rely on to recognize the products of their choice.<sup>57</sup>

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<sup>57</sup> Hearings on the U.S. Tobacco Export and Marketing Practices and the Tobacco Control and Health Protection Act, Before the Subcomm. on Health and the Environment of the Comm. on Energy and Commerce, House of Representatives, 101 Cong., 2d Sess. 828 (1990) (letter from Mr. Garo A. Partoyan, President, U.S. Trademark Association) (currently known as the Int'l. Trademark Association).

In short, INTA opposed the bill as an unjustified restriction on the rights of trademark owners to use and display their logos or symbols. The measure died in committee, and has not been revived. For the same reasons, the current proposal should be rejected.

The enactment of a plain packaging requirement by the Canadian Parliament would be a blatant violation of the Paris Convention, NAFTA, and the GATT/TRIPS Agreement which Canada has agreed to implement. Not only would it infringe the trademark rights of foreign investors protected under international agreements, but it would also amount to an expropriation of property rights requiring the payment of significant amounts in compensation.

MUDGE ROSE GUTHRIE ALEXANDER  
& FERDON

By:

  
Carla A. Hills





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**AMBASSADOR CARLA ANDERSON HILLS**

Ambassador Carla A. Hills is Chairman and Chief Executive Officer of Hills & Company, International Consultants. The firm provides advice to businesses on investment, trade, and risk assessment issues abroad. She is also a Partner in the law firm of Mudge Rose Guthrie Alexander & Ferdon. She served as United States Trade Representative from 1989 to 1993. As a member of President Bush's Cabinet, Ambassador Hills was the President's principal advisor on international trade policy. She was also the nation's chief trade negotiator, representing American interests in multilateral and bilateral trade negotiations throughout the world.

She currently serves as a Member of the Board of Directors for AT&T, American International Group, Chevron, Time Warner, and United Air Lines.

Ambassador Hills was Chairman of the Urban Institute from 1983 through 1988, and was a member of the Executive Committee of the American Agenda, co-chaired by Presidents Ford and Carter. In 1981-1982, she served as Vice-Chairman of President Reagan's Commission on Housing and in 1985-1986 as a member of the President's Commission on Defense Management. Ambassador Hills has been active in the American Bar Association serving, as Chairman of Section of Antitrust Law in 1982-1983, and as Chairman of the Conference of Section Chairman in 1983-1984.

Ambassador Hills served as Secretary of the Department of Housing and Urban Development in the Ford Administration (the third woman to hold a cabinet position). From 1974 to 1975, she was Assistant Attorney General, Civil Division, United States Department of Justice. In 1976, TIME magazine named her as one of ten Women of the Year.

Ambassador Hills co-founded the Los Angeles law firm of Munger Tolles & Hills, where she was a partner from 1962-1974. She was an Adjunct Professor at the University of California at Los Angeles Law School, teaching antitrust law, and co-authored the Antitrust Adviser, which was published in 1971 by McGraw-Hill.

Born in Los Angeles, California, Ambassador Hills received her bachelor's degree from Stanford University, her law degree from Yale University, and has studied at Oxford University.

Ambassador Hills resides in Washington, D.C. with her husband, Roderick M. Hills. They are the parents of four children.

May 5, 1994

# CARLA ANDERSON HILLS

## EDUCATION:

A.B. cum laude, Stanford University, 1955  
Student, St. Hilda's College, Oxford (Eng.) University, 1954  
LL.B., Yale University, 1958

## HONORARY DEGREES:

Pepperdine University, 1975  
Washington University, 1977  
Mills College, 1977  
Lake Forest College, 1978  
Williams College, 1981  
Notre Dame University, 1993

## BAR MEMBERSHIPS:

California, 1959  
U.S. Supreme Court, 1965

## EMPLOYMENT:

1958-61 U.S. Attorney - Civil Division, Los Angeles  
1962-74 Partner - Munger, Tolles, Hills & Rickershauser, Los Angeles  
1972 Adjunct Professor - UCLA School of Law  
1974-75 Assistant Attorney General, Civil Division - Justice Department, Washington, D.C.  
1975-77 Secretary - Department of Housing and Urban Development, Washington, D.C.  
1978-86 Partner - Latham, Watkins & Hills, Washington, D.C.  
1986-88 Partner - Weil, Gotshal & Manges, Washington, D.C.  
1989-93 U.S. Trade Representative - Executive Office of the President, Washington, D.C.  
1993-Pres. Chairman & CEO - Hills & Company, Washington, D.C.  
1994-Pres. Partner - Mudge Rose Guthrie Alexander & Ferdon

## COMMERCIAL DIRECTORSHIPS:

1977-88 American Airlines  
Chevron  
Corning Glass Works  
IBM  
Federal National Mortgage Association  
The Henley Group  
1993-Pres. American International Group  
AT&T  
Bechtel  
Chevron Corporation  
Trust Company of The West  
Time Warner Inc.  
United Airlines

**AFFILIATIONS:**

1969-71      Advisory Board - California Council on Criminal Justice  
1970-73      Member - Standing Committee on Discipline, U.S. District Court for Central  
                 California  
1972-74      Member - Administrative Conference of the United States  
1972-74      Board of Councilors, University of Southern California Law Center  
1972-74      Member - Corrections Task Force, Los Angeles County Sub-Regional  
1973          Member - Executive Committee, Law and Free Society, State Bar of California  
1973-78      Member at Large - Executive Committee, Yale Law School  
1974-79      Trustee - Pomona College  
1976-80      Trustee - Norton Simon Museum of Art, Pasadena, California  
1977-79      Member - American Committee on East-West Accord  
1977-79      Trustee - University of Southern California  
1977-79      Member - Sloan Commission on Government and Higher Education  
1977-80      Member - Advisory Committee, Princeton University, Woodrow Wilson School of  
                 Public and International Affairs  
1977-82/93-      Member - Trilateral Commission  
1977-84      Vice Chairman - Advisory Council on Legal Policy, American Enterprise Institute  
1977-89      Member - International Foundation for Cultural Cooperation and Development  
1977-89      Co-chairman - Alliance to Save Energy  
1978          Gordon Grand Fellow - Yale Law School  
1978-80      Member - Federal Accounting Standards Advisory Council  
1978-81      Board of Visitors - Executive Committee, Stanford University Law School  
1978-82      Board of Directors - American Council for Capital Formation  
1978-82      Board of Directors - International Executive Service Corps  
1978-82      Member - Advisory Committee, M.I.T.-Harvard University Joint Center for Urban  
                 Studies  
1978-84      Trustee - Lawyers Committee for Civil Rights Under Law  
1978-80      Trustee - Urban Institute  
1983-89      Chairman - Urban Institute  
1988          Trustee - American Productivity and Quality Center  
                 Member - Committee on Law School, Yale University Council  
                 Fellow - American Bar Foundation  
                 Trustee - University of California  
1985          Trustee - Brookings Institution  
1993-Pres.      Member - Executive Committee, Committee on U.S.-China Relations  
                 Member - American Academy of Diplomacy  
                 Member - Asia Society (Co-chair, South Asia Study Mission 1994)  
                 Member - Competitiveness Policy Council, Trade Policy Subcommittee  
                 Member - Council on Foreign Relations  
                 Member - California Governor's Council of Economic Policy Advisors  
                 Trustee - Gerald R. Ford Foundation  
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                 Trustee - Forum for International Policy  
                 Co-chair - National Policy Forum, Council on Competing in the Global Marketplace  
                 Member - NAFTA and Beyond Commission  
                 Member - Pacific Economic Cooperation Council  
                 Board of Advisors - Thayer Capital Partners  
                 Member - U.S.-China Business Council

**BAR ASSOCIATIONS:**

Los Angeles Women Lawyers Association (President 1964)  
American Bar Association (Chairman of Publications Committee Antitrust  
Section 1972-74; Council 1974, 77-84; Chairman 1982-83)  
Federal Bar Association (President, Los Angeles Chapter 1963)  
Los Angeles County Bar Association (Member, Federal Rules and Practice  
Committee 1963-72; Chairman, Issues and Survey 1963-72; Chairman,  
Subcommittee, Revision Local Rules for Federal Courts 1966-72; Member, Judicial  
Qualifications Committee 1971-72)  
American Bar Institute

**PUBLICATIONS:**

1961 Co-author - Federal Civil Practice  
1971 Co-author, editor - Antitrust Advisor, 1st edition  
1978-88 Contributing editor - Legal Times  
1985 Co-author, editor - Antitrust Advisor, 3rd edition  
1978-88 Member - Editorial Board, National Law Journal

**CLUBS:**

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Yale Club of Washington, D.C.



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Ambassador Katz held the position of Deputy United States Trade Representative from 1989 to 1993. During this period, he was the Chief Negotiator for the United States of the North American Free Trade Agreement (NAFTA). He also had senior management responsibility for bilateral and regional negotiations with Europe and the Western Hemisphere and for the multilateral trade negotiations known as the Uruguay Round.

Ambassador Katz previously worked as a public policy consultant and from 1987 to 1989 was Chairman of the Government Research Corporation in Washington, D.C.

From 1980 to 1985, Ambassador Katz worked in the financial services industry, where he was Chairman of Donaldson, Lufkin & Jenrette Futures, Inc.

Ambassador Katz joined the United States Department of State in 1950 and on his retirement from the Department after 30 years of service, held the position of Assistant Secretary of State for Economic and Business Affairs. While at the Department, Ambassador Katz led numerous U.S. delegations in negotiations on trade, commodity and transport matters.

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## **EXPERIENCE**

**1989-1993 OFFICE OF THE U.S. TRADE REPRESENTATIVE, Washington, D.C.**  
***Deputy U.S. Trade Representative with Rank of Ambassador***

Served as senior deputy to Ambassador Carla A. Hills. Responsible for multilateral trade relations; bilateral and regional trade relations with the Western Hemisphere and Europe; and agricultural trade policy.

- Chief Negotiator for the North American Free Trade Agreement (NAFTA) signed by President Bush on December 17, 1992.
- Led the negotiations for the U.S.-USSR Trade Agreement signed by President Bush on June 1, 1990.
- Provided senior management coordination of Uruguay Round negotiations and negotiated major issues such as agriculture at sub-Ministerial level.
- Chaired the Trade Policy Review Group, a sub-cabinet level interagency committee which coordinates the trade policy of the United States.

**1987-1989 THE GOVERNMENT RESEARCH CORPORATION, Washington, D.C.**  
***Chairman***

Responsible for substantive direction and management of consulting firm which provided clients with analyses of public policy issues and strategic advice on legislative campaigns. Major subjects covered were national elections, economic policy, trade policy, financial services, health care, energy and environmental policy.

- Provided analytical support for private sector coalition lobbying for U.S.-Canada Free Trade Agreement.
- Provided oral and written briefings for clients on public policy issues.

**1985-1987 THE CONSULTANTS INTERNATIONAL GROUP, INC., Washington, D.C.**

***Partner and Vice President***

Provided public policy analysis and advice to domestic and foreign companies in developing investment and trade relationships in financial services, energy, high technology, agribusiness and merchandise trade.

- Prepared study on proposals for deregulation of electricity sector and analyses of proposed import duty surcharges.
- Provided frequent politico-economic risk assessments on countries in Latin America, Africa and the Middle East.

**1980-1985 DONALDSON, LUFKIN & JENRETTE FUTURES, INC., White Plains,**



N.Y.

***Chairman (President and CEO 1981-1982)***

Responsible for management, operations and profitability of futures brokerage company with offices in U.S., Asia, Europe and Latin America.

- Negotiated joint venture agreement with Wardley's Limited for highly profitable futures brokerage company in Hong Kong. Successfully hired company manager and more than ninety percent of account executives and back-office personnel from previous joint venture, also being sought by Merrill Lynch.

1980-1981 **ACLI INTERNATIONAL, INC., White Plains, N.Y.**

***Senior Vice President***

Member of the Board of Directors and Finance Committee with supervisory responsibility for soya and steel trading divisions, commodity futures subsidiary and branch offices in Europe, Asia and Washington, D.C.

- Reorganized credit procedures for futures subsidiary and assumed management responsibility for major litigations involving customer defaults and several commercial arbitrations.

1976-1979 **U.S. DEPARTMENT OF STATE, Washington, D.C.**

***Assistant Secretary of State for Economic and Business Affairs***

Managed the Bureau of Economic and Business Affairs, responsible for formulating foreign economic policy; for negotiating a wide variety of trade, commodity, energy, financial, investment, transportation and telecommunications matters, both multilaterally and bilaterally. Among the specific responsibilities were:

- Negotiated multilateral agreements on coffee and sugar.
- Negotiated a natural gas supply agreement with Mexico.
- Negotiated on civil aviation matters with Japan and various trade issues with Canada.
- Served on numerous delegations to international meetings including the Tokyo Round of multilateral trade negotiations.

1974-1976 **U.S. DEPARTMENT OF STATE, Washington, D.C.**

***Senior Deputy Assistant Secretary of State***

Senior management responsibility for Bureau administration (budget, personnel, etc.). Led U.S. delegations in variety of bilateral and multilateral negotiations on foreign trade, commodity policy, and energy, including negotiations to establish the International Energy Agency.

1968-1974 **U.S. DEPARTMENT OF STATE, Washington, D.C.**

***Deputy Assistant Secretary for International Resources and Food Policy***

Responsible for formulating U.S. international commodity policies. Led U.S. delegations in international commodity conferences on coffee, cocoa, sugar,

grains and energy.

1950-1968    **U.S. DEPARTMENT OF STATE, Washington, D.C.**

- Various assignments as economic advisor in the Office of Eastern European Affairs including supervision of U.S. aid programs in Yugoslavia and Poland and negotiation of financial and property claims agreements in the USSR, Poland, Czechoslovakia and Romania.
- As Director of the Office of International Trade, led U.S. delegations to meetings at the GATT and participated in the Kennedy Round trade negotiations.

### **EDUCATION**

B.A., International Relations and Economics.

Graduate studies in Economics.

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## CURRICULUM VITAE

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### PRACTICE

Partner, Mudge Rose Guthrie Alexander & Ferdon. Practice concentrated on international trade and economic law. Formerly, trial attorney, U.S. Department of Justice.

### EDUCATION

Doctor of Law (J.D.), The University of Chicago, 1963.  
Bachelor of Arts (A.B.), Syracuse University, 1960.

### BAR ADMISSIONS

New York, 1963.  
United States Supreme Court, 1967.  
District of Columbia, 1969.  
United States Court of International Trade, 1976.  
United States Court of Appeals for the Federal Circuit, 1976.

### PROFESSIONAL MEMBERSHIPS

American Bar Association - Sections on International and Administrative Law  
Americian Society of Comparative Law  
American Society of International Law  
British Institute of International and Comparative Law  
Canadian Council on International Law  
District of Columbia Bar Association - Section on International Law  
Federal Bar Association - Sections on International and Administrative Law  
International Bar Association - Chairman, Trade and Customs Law Subcommittee, Antitrust and Trade Law Committee, 1989-1993  
Washington Foreign Law Society - President, 1992-1993

### LISTINGS

Who's Who in America  
Who's Who in American Law  
Who's Who in Intellectual Property

## REPRESENTATIVE CASES

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China:	Steel Wire Nails Welded Carbon Steel Pipes and Tubes
EEC:	Antifriction Bearings
FRG:	Thin Sheet Glass
Italy:	Spun Acrylic Yarn
Japan:	Nylon Impression Fabric I Sorbates Nylon Impression Fabric II Color Picture Tubes Digital Readout Systems Nylon Impression Fabric III Telephone Systems and Subassemblies Flat Panel Displays
Korea:	Steel Wire Rope I Monosodium Glutamate Saccharin I Saccharin II Steel Wire Rope II Steel Wire Nails I Steel Wire Nails II Stainless Steel Cooking Ware Steel Wire Rope III
Mexico:	Steel Wire Rod
Norway:	Atlantic Salmon

### Countervailing Duty

Korea:	Leather Wearing Apparel Stainless Steel Cooking Ware Steel Wire Nails
Mexico:	Steel Mill Products Small Diameter Pipe and Tube
Norway:	Dairy Products Atlantic Salmon
Sri Lanka:	Textile and Apparel Products

**Section 22 of the Agricultural Adjustment Act**

India:            Sugar  
Norway:          Dairy Products  
UK:              Dairy Products

**Section 201 of the Trade Act of 1974 - "Escape Clause"**

Honey  
Industrial Fasteners  
Knives  
Leather Wearing Apparel  
Nonelectric Cooking Ware  
Specialty Steel  
Stainless Steel Flatware

**Section 301 of the Trade Act of 1974**

Korea:    Steel Wire Rope

**Section 337 of the Tariff Act**

Copper Clad Stainless Steel Cookware  
Luggage Products  
Picture-in-a-Picture Video Products

**Customs Matters**

Country of Origin Determinations  
Marking Requirements

**General Agreement on Tariffs and Trade (GATT)**

Advice to governments and private parties concerning GATT  
dispute settlement proceedings

Advice to governments concerning proceedings before the  
Committee on Antidumping Practices of the GATT

Advice to governments concerning accession to GATT Antidumping  
and Subsidies Codes

**Other Matters**

Antiboycott investigations  
Generalized System of Preferences  
Caribbean Basin Initiative

Advice to foreign governments and exporters concerning  
negotiations and consultations under the President's Steel  
Program

Trademarks

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"Rules of Origin in Customs Unions and Free Trade Areas," in Anderson and Blackhurst (Eds.) REGIONAL INTEGRATION AND THE GLOBAL TRADING SYSTEM, Harvester/Wheatsheaf, London (1993).

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### Articles: Academic and Professional

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"Environment and Trade: Much Ado About Little?" 27 *Journal of World Trade* No. 3, p.55 (1993).

"Antidumping and Hungary: Resolution of the U.S. Legal Standard Awaits Another Day," *International Bar Association, Eastern European Forum Newsletter*, Vol. 3, No. 1, p.19 (Summer 1993).

"Antidumping and Market Oriented Industries in Hungary: A U.S. Attempt to Refine its Standards," *International Bar Association, Eastern European Forum Newsletter*, Vol. 2, No. 2, p. 32 (Winter 1992).

"The U.S. Search for Net ESP: Antidumping Comparisons When Value is Added After Importation and Before Sale," 26 *Journal of World Trade* No. 4, p. 113 (1992).

"The Honda Decision: Rules of Origin Turned Upside Down," 32A *The Free Trade Observer* 513 (June 1992).

"Environment and Trade: Who Will be Heard? What Law is Relevant?," 26 *Journal of World Trade* No.2, p. 5 (1992).

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March 18, 1994

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## **INTERNATIONAL TRADE BIOGRAPHY - RICHARD G. DEARDEN**

Richard G. Dearden is a senior partner in the Ottawa Office of Gowling, Strathy & Henderson, one of Canada's largest law firms. Mr. Dearden specializes in international trade law and is one of the Canadian counsel advising the Government of Mexico (SECOFI) about the *North American Free Trade Agreement* and its implementation by Canada. Mr. Dearden advised the Office of the United States Trade Representative regarding Chapter 19 of the *Canada-U.S. Free Trade Agreement* and Canada's implementation of the *Canada-U.S. Free Trade Agreement*.

Mr. Dearden acts as counsel in antidumping and countervail cases heard before the Canadian International Trade Tribunal and presently Chairs the Chapter 19 Binational Panel reviewing the U.S. Department of Commerce's final determination that Canadian softwood lumber is subsidized.

Mr. Dearden has written extensively on trade matters including co-authoring the *Free Trade Law Reporter*, the *Canadian Trade Law Reporter* and the newsletter the *Free Trade Observer*.

*Rick Dearden is a senior partner in the Ottawa office of Gowling, Strathy & Henderson who limits his practice to international trade law and Charter of Rights litigation. A frequent speaker and prolific writer, he has been involved at the highest levels in both the Canada-U.S. Free Trade Agreement and the North America Free Trade negotiations.*

***International Trade Negotiations:***

Contract with the Government of Mexico to provide international trade law advice during the negotiation of a North America Free Trade Agreement. This contract requires the provision of legal advice regarding all aspects of the NAFTA, including its drafting, negotiation and implementation.

Contract with the Office of the United States Trade Representative with respect to the binational panels created by Chapter 19 of the Canada-U.S. Free Trade Agreement. These panels review final antidumping and countervail determinations rendered in the U.S. and Canada. The "requirements" section of this contract state:

The services needed consist of consultation with and written summaries by one or more Canadian attorneys highly experienced in the substance and procedure of Canadian administrative practice and quasi-judicial and judicial review in Canadian AD/CVD cases. The qualified person(s) would have substantial knowledge and experience concerning Canada's Special Import Measures Act, its Federal Court Act, other Canadian statutes, Canadian common law, and regulations and procedures of Canada AD/CVD decision-making and reviewing authorities. This expertise is unique to a small number of Canadian attorneys specializing in Canadian trade law and litigation.

Contract with the Office of the United States Trade Representative to examine, analyze and prepare memoranda with respect to Canadian compliance with the Canada-U.S. Free Trade Agreement. The "requirements" section of this contract state in part:

Section 101(c) of the *United States-Canada Free Trade Agreement Implementation Act* requires the United States Trade Representative to report to the Congress on major existing Canadian practices (and their legal authority in Canada) that the U.S.T.R. considers will require change in order to conform with Canada's obligations under the *FTA*. This report will be used as a basis for the President's determination of Canadian compliance...

In compiling the section 101(c) report, and in preparing to advise the President... the Office of the USTR must have recourse to a considerable amount of Canadian legal expertise.... As a practical matter, the depth and range of legal expertise required is only available from a large, multi-faceted Canadian law firm...

Canadian legal counsel will be requested to examine analyze and prepare memoranda with respect to the question of whether current major Canadian governmental practices comply with the provisions of the *FTA*. Counsel will be expected to include in its examination major current and draft or proposed local, provincial, and federal laws, regulations, procedures, practices, and policies that may materially affect compliance with Canada's obligations under the *FTA* at the date of its entry into force...

Contract with Ontario's Ministry of Industry, Trade and Technology (September, 1988) regarding GATT panel reports dealing with existing GATT arrangements affecting trade in services. The "requirements" section of this contract state in part:

In order to assess the possible impact of including services in the GATT, it is necessary to evaluate how disputes over services industries and issues have been dealt with under existing GATT arrangements.... This research project would be conducted in two stages. First, a review of GATT Panel reports and dispute settlement would be conducted in order to determine whether and to what extent any are applicable to services industries and services issues. Second, once identified, any applicable disputes would be analyzed...

### ***Legal Opinions:***

Legal opinions regarding the General Agreement On Tariffs And Trade and the GATT Codes as they affect trade in goods and services; the North American Free Trade Agreement; the Canada-U.S. Free Trade Agreement; customs matters (valuation, classification, seizures); antidumping and countervail actions; safeguard petitions; export and import controls. These opinions require knowledge of international agreements such as the GATT, the North American Free Trade Agreement and the Canada-U.S. Free Trade Agreement as well as legislation such as the Special Import Measures Act, the Customs Act, the Customs Tariff, the Export and Import Permits Act and Regulations issued pursuant to these statutes.

### ***Counsel:***

Counsel in trade cases held before the Canadian International Trade Tribunal, the Federal Court of Canada and binational panels established under the Canada-U.S. FTA. These cases involve antidumping actions, countervail actions, customs tariff classification appeals, customs valuation appeals, customs seizures, and export and import controls.

### ***Panellist:***

Chair of the Chapter 19 Canada-U.S. FTA panel reviewing U.S. countervailing duties imposed upon Canadian exports of softwood lumber (U.S.A.-92-1904-01).

### ***Appointments:***

Canada-U.S. Free Trade Commission - Panellist - binational dispute resolution mechanism established pursuant to Chapter 18 of the Canada-U.S. Free Trade Agreement.

International Bar Association - Vice Chairman - Trade and Customs Law Subcommittee.

### ***Awards:***

Georgetown University Leadership Seminar Certificate of Merit (School of Foreign Service).

### ***Associations:***

- The Advocates Society
- International Bar Association - Anti-Trust and Trade Law Committee
- American Bar Association - Section of International Law and Practice
- Canadian Bar Association
- The Canadian Council on International Law.



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**Richard G. Dearden**

*Books, Papers & Lectures*

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**CCH CANADIAN LIMITED**

*Canadian Trade Law Reporter* (Richard G. Dearden & Kate Murray)

*Free Trade Law Reporter* (Richard G. Dearden & David Palmetter)

"The Free Trade Observer" (a monthly newsletter updating the *Free Trade Law Reporter*)

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*Living With Free Trade* (Editors: Richard G. Dearden, Michael M. Hart, Debra P. Steger - 1990)

*The Canada-U.S. Free Trade Agreement - Commentary and Related Documents* (J.D. Richard & Richard G. Dearden)

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**INTERNATIONAL BAR ASSOCIATION**

**SECTION ON BUSINESS LAW - ANTITRUST AND TRADE LAW COMMITTEE**

Co-Editor - Antitrust and Trade Law Committee Newsletter (1987-1991)

"U.S. Exporter's Guide to Trade Remedy Actions in Canada" and "The Canada-U.S. Free Trade Agreement" (Atlanta, Georgia - 1988)

Canada's Conversion of the Customs Tariff to Conform to the International Convention on the Harmonized Commodity Description and Coding System" (London, England - 1987)

"Recent Developments in Canadian Trade Law" (Singapore - 1985)

**WASHINGTON FOREIGN LAW SOCIETY**

"A Mexico-U.S. Free Trade Agreement: The View from Canada" (Washington - 1990)

**GENERACION EMPRESARIAL MEXICANA**

"Canada, U.S.A. and Mexico - An Invitation to Prosperity" - North American Forum (Simi Valley, California - 1992)

***AMERICAN BAR ASSOCIATION***

Antidumping Procedures in Canada, The European Communities and Mexico (Washington - September, 1991)

"The Jurisprudence of the U.S.-Canada Free Trade Agreement - Where We Stand Today" (Washington - 1991)

***THE FOOD AND DRUG LAW INSTITUTE***

"The Canada-U.S. Free Trade Agreement" (Washington - 1990)

***TAX EXECUTIVES INSTITUTE, INC.***

"The Canada-U.S. Free Trade Agreement" (Annual Canadian Conference - Ottawa - 1988)

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The Charter of Rights and Revenue Canada" (Toronto Chapter - 1984)

***CANADIAN CHAMBER OF COMMERCE***

International Affairs Committee - "Dispute Resolution Mechanisms Under the Canada - U.S. Free Trade Agreement" (Ottawa - 1989)

***CANADIAN COUNCIL ON INTERNATIONAL LAW***

"Resolving Disputes in Canada - United States Trade Relations; The Canadian System" (Ottawa - October, 1987)

***THE CENTRE FOR TRADE POLICY AND LAW  
(UNIVERSITY OF OTTAWA/CARLETON UNIVERSITY)***

"International Trade and Sustainable Development" (Planning Committee - 1992)

"Trade Policy in the 1990's" (Planning Committee - 1991)

"Due Process and Transparency in Trade: International Rules and Domestic Procedures" (Planning Committee - 1990)

**"Living With Free Trade - Canada, the Free Trade Agreement and the GATT" (Planning Committee - 1989)**

**Canada-U.S. Free Trade Agreement; Analysis of the Text - "Antidumping and Countervailing Duty Provisions - Judicial Review by Binational Panels" (Planning Committee - 1988)**

**"Conference on Canada and International Trade: Law, Business and Policy" (planning Committee - 1985)**

***THE INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO***

**"The Canada-U.S. Free Trade Agreement" (Toronto - 1988)**

***CANADIAN PAPER BOX MANUFACTURERS ASSOCIATION***

**"How will the Elimination of Customs Duties and the Creation of Dispute Resolution Mechanisms Affect Canada's Independence?" (Toronto - 1988)**

***KITCHENER-WATERLOO ESTATE PLANNING COUNCIL***

**"Canada-U.S. Free Trade Agreement" (1987)**

***CANADIAN INSTITUTE OF CHARTERED ACCOUNTANTS  
COMMODITY TAX SYMPOSIUM***

**"The Dispute Settlement Mechanisms Under Chapters 18 and 19 of the Canada-U.S. Free Trade Agreement" (Ottawa - 1990)**

**"The *Special Import Measures Act*" (Montreal - 1986)**

**"Construction Contracts - Tax and Duty Clauses" (Ottawa - 1985)**

**"The Access to Information Act - Requests for Information from Revenue Canada - customs and Excise" (Toronto - 1983)**

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**"Judicial Review of Decisions of the Tariff Board and the Anti-dumping Tribunal" (Mont St. Marie - 1981)**

**CANADIAN INSTITUTE OF CHARTERED ACCOUNTANTS  
CUSTOMS COURSE**

"Non Tariff Barriers" and "The Canada-U.S. Free Trade Agreement" (Toronto - 1987 & 1988)

**CANADIAN INSTITUTE OF CHARTERED ACCOUNTANTS  
COMMODITY TAX COURSE**

"Value For Duty - The Transaction Value System" (Toronto - 1986)

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**CANADIAN TAX FOUNDATION**

Federal Sales Tax Conference - "Part IV of the Draft Amendments to the *Excise Tax Act* - Licences and Authorizations; Joint and Several Liability; Diversions" (1982)

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"Taxpayers Rights Under the New Constitution" (1985)

**THE RAWSON ACADEMY OF AQUATIC SCIENCE**

"Water and the Free Trade Agreement" (Toronto - 1988)

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*Importweek* - "The Protection of Personal Information - Part IV of the Canadian *Human Rights Act*" (1983)

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"Customs Valuation of Computer Software" (1985)

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"The Defence Counsel's Perspective" - lecture to Special Investigations Unit - Excise  
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OPERATION TRADE WINS SYMPOSIUM***

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"The Canadian International Trade Tribunal - The Path it is Charting" (Toronto - 1989)