

DOMESTIC TRADE REMEDIES

Anti-dumping, Countervail and Safeguards

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AGENDA

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A. NATURE OF ANTI-DUMPING AND COUNTERVAIL INVESTIGATIONS

Introduction

- To give effect to Canada's international trade obligations and benefits under the following two World Trade Organization ("WTO") Agreements:
 - 1) the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*; and
 - 2) the *Agreement on Subsidies and Countervailing Measures* (1994).
- The *Special Import Measures Act* ("SIMA") and its Regulations are designed to protect Canadian producers from injury caused, or threatened to be caused, by unfairly traded exports to Canada of dumped and subsidized goods.
- Anti-dumping duties and countervailing duties are intended to offset the margins of dumping and amounts of subsidies.

A. NATURE OF ANTI-DUMPING AND COUNTERVAIL INVESTIGATIONS

General

1. Canada Border Services Agency ("CBSA") initiates the investigations upon receipt of a Properly Documented Complaint (PDC).
2. CBSA conducts the dumping and subsidies investigations (preliminary and final inquiries).
3. Canadian International Trade Tribunal ("CITT") conducts the injury investigations (preliminary and final inquiries).
4. If there are affirmative preliminary determinations by CBSA and CITT, then provisional anti-dumping and countervailing duties can be imposed.

A. NATURE OF ANTI-DUMPING AND COUNTERVAIL INVESTIGATIONS

General (*cont'*)

5. If there is a negative final determination in either the dumping or subsidies or injury investigations, or any of the investigations are terminated, or provisional duties are reduced in the final determination, then provisional duties reversed thereby will be refunded.
6. If there are affirmative final determinations, then the duties generally run for an initial period of up to 5 years, subject to periodic reviews (depending on CBSA's capacity and importer/exporter co-operation) and an expiry review before the end of the 5-year term to consider whether duties should be renewed for another 5 years.
7. Retroactive duties up to 90 days prior to the CBSA preliminary determination may be imposed in exceptional circumstances to punish those seeking to circumvent pending duties by making massive imports before the CBSA preliminary determination.

A. NATURE OF ANTI-DUMPING AND COUNTERVAIL INVESTIGATIONS

Key Concepts and Definitions

1. Subject Goods;
2. Like Goods; and
3. Domestic Industry.

S. 2(1) of SIMA.

A. NATURE OF ANTI-DUMPING AND COUNTERVAIL INVESTIGATIONS

Who has standing to initiate the complaint?

The 50% / 25% Test.

Those domestic producers who comprise a major proportion of the total domestic production of the products, specifically supported by domestic producers whose production represents:

1. more than 50% of the total production of like goods by those domestic producers who express either support or opposition for the complaint; and
2. 25% or more of the total production of like goods by the domestic industry.

S. 31(2) of SIMA.

B. DUMPING

What is Dumping?

1. Sales of products to Canada at “Export Prices” below the “Normal Value”.
2. Normal value is generally determined in reference to the sale price in the exporter’s domestic market, or total cost of goods, plus a reasonable mark-up for profits.
3. Special rule for “non-market economy”:
 - Use “surrogate Normal Values” from a third country market economy. Generally more likely to lead to a finding of dumping or higher dumping margins.

S. 15 and 20 of SIMA.

B. DUMPING

Non-Market Economies

- Goods exported from a country where:
 - 1) the foreign government has a monopoly or substantial monopoly of its export trade; and
 - 2) the government determines domestic sales prices and the prices are not substantially the same as they would be if they were determined in a competitive market.
- In respect of goods exported from a “prescribed country”, only the second criterion is applicable and necessary.
 - China is currently the only prescribed country, effective until December 11, 2016, as part of China’s WTO accession terms.

B. DUMPING

Non-Market Economies (*cont'*)

- A June 2004 CBSA Policy assumes that all foreign countries are market economies, unless proven otherwise. The onus is on the Complainant (domestic industry) to prove otherwise (that the particular industrial sector operates in a non-market economy). Presumption that China is a market economy.¹
- The provisions of S. 20 of the SIMA are applied on a case-by-case sectoral basis (June 2004 CBSA Policy).

S. 20(1)(a) and (b) of SIMA and S. 17.1 of SIMA Regulations.

¹ On November 19, 2004, CBSA terminated anti-dumping and countervailing duties investigations into imports of barbecues from China when it found “insignificant” levels of dumping and subsidies (Statement of Reasons released on December 3, 2004). For this purpose, the CBSA determined that the Chinese barbecue manufacturers operate in a market economy.

B. DUMPING

Insignificant Threshold

1. A dumping margin that is less than two per cent of the export price of the goods is “insignificant”.
2. Dumping investigation is terminated against an exporter or a country’s producers where the dumping margin is insignificant.

S. 2(1), 35 and 41(1) of SIMA.

C. SUBSIDIES

What are “Actionable Subsidies”?

1. A subsidy is a financial contribution by a foreign government that confers a benefit to a foreign producer or exporter.
2. A subsidy is actionable if it is specific to a particular industry or enterprise or a limited number of enterprises (not generally available) or a prohibited subsidy.
3. An actionable subsidy is not “insignificant”.
4. An insignificant subsidy is less than one per cent of the export price of the goods.

S. 2(1), (1.4), (1.6) and 2(7.1) to (7.4) of SIMA.

D. INJURY

Material Injury and the Causal Link

1. “Injury” means material injury to the domestic industry.
2. Both causation and materiality have to be proven by the domestic industry to the satisfaction of CITT.
3. CITT will consider “serious” or “substantial” declines in financial performance, “material”.
4. Dumping/subsidies and non-dumping/non-subsidies injury “factors” prescribed by S. 37.1 of SIMA Regulations and governed by Rule 61 of CITT Rules.

D. INJURY

Material Injury and the Causal Link (cont')

5. In *Machine Tufted Carpeting from the United States*, Inquiry No. NQ-91-006, Statement of Reasons dated May 6, 1992 at pages 21 and 25, CITT required that the dumping be a cause of the material injury, as opposed to the sole cause or even the "principal" or "major" cause. "This conclusion does not deny the fact that dumping is one of several factors interacting in this case to injure the domestic industry."

S. 2(1) and 42 of SIMA.

E. PUBLIC INTEREST REVIEWS

Mitigation or Elimination of Duties where an Overriding Public Interest

- After final determinations affirming dumping and/or subsidies causing material injury to the domestic industry, CITT can recommend to the Minister of Finance a reduction or elimination of the full amount of duties levied if it is of the opinion that it “would not or might not be in the public interest”.
- The Minister of Finance, in consultation with Cabinet, can follow the recommendations in whole or in part, or reject the recommendations entirely.

S. 45 of SIMA.

F. SAFEGUARDS

There are two kinds of safeguard investigations:

1. Global; and
2. Only against exporters/producers from the People's Republic of China (as part of China's terms of accession to the WTO in 2001).
 - No unfairly traded imported goods by way of injurious dumping or subsidies required.
 - Sufficient increase in imports to cause injury to the domestic industry (a "safety valve").

F. SAFEGUARDS

Global Safeguards

Initiating the Case

1. Governor in Council (Cabinet) can refer the matter to CITT for consideration; or
2. The domestic industry can initiate with a Complaint.

F.SAFEGUARDS

Global Safeguards

1. Cabinet Referral

- Cabinet may refer to CITT for inquiry whether increased quantities of imported goods are a principal cause of serious injury or threat thereof to domestic producers of like or directly competitive goods.

F. SAFEGUARDS

Global Safeguards

2. Domestic Industry Complaint

- The Complaint alleges that goods are being imported in such increased quantities and under such conditions as to be a principal cause or threat to cause serious injury to domestic producers of like or directly competitive goods.

S. 20, 23, 26 and 27 of the *Canadian International Trade Tribunal Act* ("CITT Act").

F. SAFEGUARDS

Global and Chinese Safeguards

“Like or Directly Competitive Goods”

1. Identical goods to the imported goods that are the subject of the Complaint; or
2. Goods the uses and other characteristics of which closely resemble those goods that are the subject of a complaint.

S. 3 of CITT Regulations.

F. SAFEGUARDS

Global Safeguards

Factors to be taken into account by CITT

1. The actual volume of the goods imported into Canada.
2. The effect of the imported goods on prices.
3. The general impact of imported goods on the domestic industry, taking into account relevant economic factors.

S. 27 of CITT Act and S. 5 of CITT Regulations.

F. SAFEGUARDS

Global and Chinese Safeguards

Remedies in a Safeguards Case

There are generally three types of measures considered to remedy any injury found in a global or China safeguard inquiry:²

- 1) tariff duties or surtaxes, irrespective of import volumes;
- 2) tariff-rate quotas (TRQs), which impose different tariff duty rates below and above certain import volume thresholds (with the duty rate increased above the quota threshold); or
- 3) quotas, which establish an upper limit on the absolute volume of imports that can enter the market within a given period of time.

² Paragraph 224 of the *Report on the Global Safeguard Inquiry into the Importation of Bicycles and Finished Painted Bicycle Frames into Canada*, GS-2004-01 and GS-2004-02 (September 2005). Paragraph 143 of *Market Disruption Inquiry Into Barbecues Originating in the People's Republic of China*, China Safeguard Inquiry No. CS-2005-0001 (October 2005).

F. SAFEGUARDS

Global Safeguards

Recent Case

Inquiry into the Importation of Bicycles and Finished Painted Bicycle Frames - CITT Final Report and Recommendations Released in September 2005.

- The CITT Report recommends decreasing annual rates of safeguard duties of 30% in the first year, 25% in the second year, and 20% in the third year, for the three successive years of their imposition on certain kinds of imported bicycles. The Cabinet has not made a decision whether to implement the recommendations, and there is no indication when it might do so.
- The CITT Report and recommendations to Cabinet are not binding on the Canadian government. There does not appear to be any statutory requirement that the government take any decision within any specified time period. Is there a common law duty for the Cabinet to act or take a decision (including to not implement any safeguard remedies) within a reasonable time period?

F. SAFEGUARDS

Chinese Safeguards

Part of China's Accession to WTO in 2001 (do not apply to Hong Kong and Taiwan)³

Either of the following two types of cases can give rise to safeguard remedies against imported goods originating in China:

- 1) increased quantities causing or threatening to cause **market disruption** to domestic producers; or
- 2) any action that causes or threatens to cause a **significant diversion of trade** into the domestic market in Canada.

S. 30.2, 30.21, 30.22 and 30.23 of CITT Act.

³ Like with Global Safeguards, Chinese Safeguards may be initiated by 1. Cabinet referral; or 2. Complaint by the domestic industry.

F. SAFEGUARDS

Chinese Safeguards

Key Definitions

- “**Market disruption**” means a rapid increase in the importation of goods ... in absolute terms or relative to the production of those goods by a domestic industry, so as to be a **significant cause** of material injury, or threat of material injury, to the domestic industry.
- “**Significant cause**” need only be an important cause, and does not have to be as important as, or more important than, any other cause of the material injury or threat.

F. SAFEGUARDS

Chinese Safeguards

Key Definitions (cont'd)

- “Action” means any action, provisional or otherwise, taken
 - 1) by the Chinese government to prevent or remedy a market disruption in a WTO Member other than Canada, or
 - 2) by a WTO Member other than Canada to withdraw WTO concessions (benefits) or otherwise limit imports to prevent or remedy market disruption in that Member caused or threatened by the importation of goods originating in China.

S. 30.2 of CITT Act.

F. SAFEGUARDS

Chinese Safeguards

Factors to be Taken into Account in a Market Disruption Case

1. The actual volume of the goods originating in the People's Republic of China that are imported into Canada;
2. The effect of the imported goods on prices of like or directly competitive goods in Canada; and
3. The impact of the imported goods on domestic producers of like or directly competitive goods in Canada.

S. 30.21(1)(a) and 30.22(6) of CITT Act
and S. 5.1 of CITT Regulations.

F. SAFEGUARDS

Chinese Safeguards

Recent Market Disruption Case

Market Disruption Inquiry into Barbecues Originating in the People's Republic of China, Safeguard Inquiry No. CS-2005-001 - CITT Final Report and Recommendations released in October 2005⁴

- Rapid increase of imports of barbecues from China are an important cause of “market disruption” and material injury to domestic manufacturers of barbecues.
- Recommends to Cabinet imposing a 3-year 15% safeguard duty. Cabinet has not made any decision to date.

⁴ Various parties opposed to the imposition of any safeguard duties have filed Applications to the Federal Court of Appeal for judicial review of the CITT's Report and recommendations.

F. SAFEGUARDS

Chinese Safeguards

Factors to be Taken into Account in a Trade Diversion Case

1. The actual or imminent increase in market share of goods originating in the People's Republic of China in Canada;
2. The nature and extent of the action;
3. The actual or imminent increase in the importation of goods originating in the People's Republic of China that is due to the action;
4. The conditions of supply and demand in the domestic market for the like or directly competitive goods; and
5. The volume of the goods originating in the People's Republic of China that are imported into Canada and into any WTO Member taking an action.

S. 30.21(1)(b) and 30.23(6) of CITT Act
and S. 5.2 of CITT Regulations.

SAFEGUARDS

Chinese Safeguards

Expiry

- These transitional measures cease to have effect on December 11, 2013.

S. 30.26 of CITT Act

G. APPEALS

Other Challenges to Potential Duties

- After final determinations affirming dumping and/or subsidies causing material injury to the domestic industry, the foreign exporters and producers could challenge CBSA and/or CITT final determinations before a NAFTA review panel or on a judicial review application to the Federal Court of Appeal. If still not satisfied with the outcome on review, they can appeal further to a NAFTA Extraordinary Challenge Committee or the Supreme Court of Canada.
- If the domestic industry is unsatisfied with the results (i.e., negative finding of material injury or of causal linkage to the dumping/subsidies, resulting in no duties, or termination of the dumping and/or subsidies investigations against certain countries, or insufficient level of duties), the domestic industry has similar avenues of appeal open to it.

G. APPEALS

Other Challenges to Potential Duties *(cont')*

- CBSA and CITT decisions may also be subject to challenge through the WTO Dispute Settlement Understanding process (for decisions taken that are inconsistent with Canada's international trade and treaty obligations).

H. SUMMARY

Options for Redress of Injury Caused by Imports

- Domestic industry can assert its rights under trade law to protect itself against injurious imports.
- Embedded statutory rights protecting the domestic industry against unfairly traded dumped and subsidized imports causing material injury, subject to a reduction or elimination of duties where in the “public interest”.
- Where no unfairly traded dumped or subsidized imports, domestic industry could resort to safeguards case if increased imports causing injury.
- Safeguards implementation recommended by CITT is subject to political oversight by, and discretion of, Cabinet.