

UNFAIR TRADE—DUMPING AND SUBSIDIZING INQUIRIES AND REVIEWS

INTRODUCTION

The *Special Import Measures Act (SIMA)* is the principal legislation in Canada to protect domestic producers from injury due to unfair import competition.¹ *SIMA* implements Canada's rights and obligations regarding unfair trade remedies under the *Agreement Establishing the World Trade Organization*.

Under *SIMA*, Canadian producers can obtain relief from unfair competition from goods exported to Canada at prices that are lower than in the home market or lower than the cost of production (dumping), or from imported goods that have benefited from certain types of financial support provided by foreign governments (subsidizing).

The Canada Border Services Agency (CBSA) has the responsibility to determine whether goods are dumped or subsidized. The Canadian International Trade Tribunal (the Tribunal) has the responsibility to determine whether imports of the dumped or subsidized goods have caused or are threatening to cause injury to Canadian producers of similar goods. If the Tribunal determines that there is injury or threat of injury, the CBSA will impose anti-dumping or countervailing duties on the imported goods to give Canadian producers the opportunity to compete on a fair basis.²

KEY CONCEPTS

Under *SIMA*, “injury” is defined as material injury to the domestic industry. *SIMA* does not define “material injury”. The Tribunal looks at the facts of each case to determine if the extent of harm to the domestic industry amounts to material injury.

The *Regulations* require the Tribunal to consider certain factors when it determines whether imports of the dumped and subsidized goods have caused injury.

The Tribunal must evaluate whether there were significant increases in the volume of imports of the dumped or subsidized goods. It must also assess whether the prices of dumped or subsidized goods significantly undercut, depressed or suppressed the prices of like goods. As well, the Tribunal must assess the impact of the dumped or subsidized goods on the health of the domestic industry in terms of performance indicators such as output, sales, market share, profits, productivity, capacity utilization, inventories, cash flow, growth and the ability to raise capital.

If the Tribunal determines that there is no injury, it goes on to consider whether there is a threat of injury. Under *SIMA*, the circumstances in which the dumping or subsidizing will cause injury must be clearly foreseen and imminent. The *Regulations* require the Tribunal to look at several factors in determining whether there is a threat of injury. These factors include the capacity of foreign producers to manufacture the dumped or subsidized goods and the imposition of anti-dumping or countervailing measures on the same or similar products by other countries.

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1. When interpreting and applying the law in this area, the *Special Import Measures Regulations* (the *Regulations*), the *Canadian International Trade Tribunal Act* (the *CITT Act*), the *Canadian International Trade Tribunal Regulations* and the *Canadian International Trade Tribunal Rules* should also be consulted.
 2. *SIMA* also gives the CBSA the authority to impose duties if the Tribunal determines that imports of the dumped or subsidized goods have caused retardation to the establishment of a domestic industry. However, the Tribunal has never made such a ruling.

SIMA requires that the Tribunal determine that a “causal relationship” exists between the dumping or subsidizing and the injury or threat of injury. This means that the Tribunal must conclude that the dumping and subsidizing caused the injury or threat of injury to the domestic industry.

SIMA also requires the Tribunal to examine other factors that might play a role in causing the injury or threat of injury experienced by the domestic industry. The purpose of this examination is to ensure that any injury or threat of injury caused by such factors is not attributed to the effects of the dumped and subsidized goods.

INQUIRY PROCESS

A dumping or subsidizing case takes approximately seven months to complete and is conducted in parallel by the CBSA and the Tribunal. From the Tribunal’s perspective, a dumping and subsidizing case involves a preliminary injury inquiry and an injury inquiry.

Preliminary Injury Inquiry

A case begins when one or more Canadian producers or an association of producers submit a complaint to the CBSA because they believe that imports of dumped or subsidized goods are harming their businesses. If the CBSA is satisfied that the complaint is properly documented, it begins an investigation to determine if the goods have been dumped or subsidized.

At the same time, the Tribunal initiates a preliminary injury inquiry by issuing a notice of commencement of inquiry, which is published in Part I of the *Canada Gazette*.

The purpose of a preliminary injury inquiry is to assess whether the evidence discloses a “reasonable indication” that the presumed dumping or subsidizing of the goods has caused or is threatening to cause injury to the domestic industry. The Tribunal may also form a preliminary opinion on various aspects of the case, such as who are the domestic producers and whether there is more than one class (category) of goods.

Generally, the Tribunal does not send questionnaires or hold hearings to gather information during a preliminary injury inquiry. Instead, the Tribunal relies on the information that it receives from the CBSA, which includes the complaint from one or more producers and the other information that the CBSA used to initiate its investigation, and on submissions that domestic producers and opposing parties, such as foreign producers or importers, make to the Tribunal.

Under *SIMA*, the Tribunal must complete a preliminary injury inquiry within 60 days.

If the Tribunal concludes that there is no “reasonable indication” of injury or threat of injury, the CBSA terminates its dumping or subsidizing investigation and the case is over.

If the Tribunal concludes that there is a “reasonable indication” of injury or threat of injury, the CBSA continues its dumping or subsidizing investigation. The CBSA has 30 days to complete its work following the Tribunal’s preliminary injury determination. (In exceptional circumstances, *SIMA* allows the CBSA to take an additional 45 days to carry out its dumping or subsidizing investigation.)

If the CBSA determines that the goods have not been dumped or subsidized, that the volume of dumped or subsidized goods is “negligible” (small) or that the margin of dumping or amount of subsidy is

“insignificant” (small), it terminates its investigation. Otherwise, the CBSA makes a preliminary determination of dumping or subsidizing and estimates the margin of dumping or the amount of subsidy. The CBSA begins to collect provisional anti-dumping or countervailing duties on imports of the dumped or subsidized goods, and the Tribunal continues with its injury inquiry.

Injury Inquiry

The Tribunal initiates an injury inquiry by issuing a notice of commencement of inquiry, which is published in Part I of the *Canada Gazette*.

An injury inquiry has two broad phases: an investigative phase, which involves collecting information, and an adjudicative phase, which involves testing the information that has been collected.

Investigative Phase

The Tribunal sends questionnaires to Canadian producers, as well as to importers and foreign producers, to collect information that is relevant to the inquiry, including three full years of data on domestic and foreign production levels, the volume and value of imports, domestic sales and exports, and the financial results of Canadian producers. The Tribunal also sends questionnaires to purchasers to ask them to compare the imported goods with similar Canadian goods in terms of price, quality, methods of distribution, etc.

The information obtained through the questionnaires is presented in a comprehensive report called a “pre-hearing staff report” that becomes part of the case record. Parties can use this report to support their points of view about the impact of dumping and subsidizing on the domestic industry.

The Tribunal and its staff may also visit Canadian producers to understand better the manufacturing process for the goods.

Adjudicative Phase

Parties have an opportunity to make written submissions and reply submissions to the Tribunal to support their points of view. Further, parties may request the Tribunal to direct other parties to provide additional information, and the Tribunal itself may request additional information from parties.

Importers or exporters may request the Tribunal to exclude certain products from its final decision, which means that, if the Tribunal grants their request, no anti-dumping or countervailing duties will be imposed on these products. Domestic producers have an opportunity to argue why such exclusions should not be granted. The Tribunal only grants exclusions when it is persuaded that such exclusions will not cause injury to the domestic industry.

The Tribunal generally holds a hearing as part of an injury inquiry. The hearing is an important opportunity to test the views of opposing parties. At the hearing, Canadian producers call witnesses to support their argument that the dumping or subsidizing has caused or is threatening to cause them injury. Importers or exporters, and sometimes users, may call their own witnesses to challenge the Canadian producers’ case. After cross-examination, each side has an opportunity to respond to the other’s case and to summarize its own.

The hearing typically takes place at the same time as the CBSA issues its final determination of dumping or subsidizing. Pursuant to *SIMA*, no later than 90 days after issuing a preliminary determination, the CBSA must issue a final determination that provides a more accurate assessment of the extent of dumping or subsidizing.³ The length of the hearing depends on the complexity of the case and the number of parties involved. A hearing typically lasts 3 to 5 days.

The Tribunal must issue its finding no later than 120 days after the date of the CBSA's preliminary determination of dumping or subsidizing. The finding is published in Part I of the *Canada Gazette*. The Tribunal has another 15 days to issue a statement of reasons explaining its finding.

If the Tribunal finds no injury, the case is over and any provisional anti-dumping or countervailing duties collected by the CBSA are refunded. If the Tribunal finds injury, the CBSA begins to collect duties based on its final determination of dumping or subsidizing. If the Tribunal finds a threat of injury, the CBSA refunds the provisional duties and begins to collect final duties.

PUBLIC INTEREST INQUIRY

The Tribunal may carry out an inquiry to determine whether the imposition, in whole or in part, of the anti-dumping or countervailing duties might not be in the public interest. The Tribunal may decide to conduct a public interest inquiry on its own initiative or at the request of an interested person. A request must be made within 45 days of the Tribunal's finding of injury. The Tribunal will only initiate a public interest inquiry if it is of the opinion that there are reasonable grounds to act on the request. (Refer to the *Guideline on Public Interest Inquiries* found on this Web site.)

The Tribunal starts the process by issuing a notice of commencement of inquiry, which is published in Part I of the *Canada Gazette*. There are no legislative time limitations for this type of inquiry, and the Tribunal establishes timelines on a case-by-case basis.

As part of a public interest inquiry, the Tribunal may send questionnaires or requests for information to Canadian producers, importers, foreign producers and purchasers. It may prepare reports or papers using the information that it collects. The Tribunal normally holds a hearing to obtain the testimony of parties that either support or oppose the reduction or elimination of duties.

If the Tribunal concludes that it is in the public interest to reduce or eliminate anti-dumping or countervailing duties, it issues a report to the Minister of Finance. The report contains specific recommendations, with supporting reasons for (1) a level of reduction of the anti-dumping or countervailing duties or (2) prices for the imports in question that are adequate to eliminate the injury or threat of injury to the domestic industry. It is the Minister of Finance who decides whether the duties should be reduced or eliminated.

REVIEW PROCESS

An injury finding ordinarily lapses at the end of five years, unless the Tribunal conducts a review and decides to continue it for another five years. The purpose of an expiry review is to determine whether anti-dumping or countervailing duties are still necessary to protect Canadian producers. Expiry reviews are not automatic, and the first step is for the Tribunal to determine if such a review is warranted.

3. The CBSA continues to collect anti-dumping or countervailing duties based on its estimate of the margin of dumping or amount of subsidy until the Tribunal makes its final decision.

Notice of Expiry

No later than 10 months before the date on which the finding is scheduled to expire, the Tribunal issues a notice of expiry, which is published in Part I of the *Canada Gazette*. In the notice, interested parties are asked to make submissions, giving reasons why a review should be held or why the finding should be allowed to expire. No later than 50 days after issuing the notice of expiry, the Tribunal decides whether to initiate an expiry review.

The Tribunal must be persuaded that an expiry review is warranted on the basis of the evidence relating to factors such as the likely volumes and prices of goods if dumping or subsidizing were allowed to resume and the resulting impact on domestic producers.

If the Tribunal decides not to initiate an expiry review, the finding will expire as scheduled on its five-year anniversary date. The Tribunal issues a statement of reasons explaining its decision.

If the Tribunal decides to initiate an expiry review, it issues a notice of commencement of expiry review, which it publishes in Part I of the *Canada Gazette*.

Expiry Review

The responsibility for conducting an expiry review is shared between the Tribunal and the CBSA. An expiry review is a two-stage process that extends over a period of 250 days, with the CBSA having 120 days to conduct its part and the Tribunal having 130 days to conduct its part.

As part of the expiry review process, the CBSA and the Tribunal collect information jointly using questionnaires that are sent to Canadian producers, importers and foreign producers. (Refer to the *Guidelines on the Conduct of Expiry Review Investigations under the Special Import Measures Act* found on the CBSA's Web site at <http://cbsa-asfc.gc.ca/sima-lmsi/expiryguide-eng.html> and the *Draft Guideline on Expiry Reviews* found on this Web site.)

First, the CBSA carries out an investigation to determine if the dumping or subsidizing of the goods is likely to continue or resume if the finding expires. During its investigation, the CBSA compiles information from a variety of sources, including replies to portions of the questionnaires, import statistics and submissions from interested persons and governments.

If the CBSA determines that the dumping or subsidizing is not likely to continue or resume, then the Tribunal issues an order rescinding the finding.

If the CBSA finds that dumping or subsidizing of some or all of the goods is likely to continue or resume, then the Tribunal carries out a review to determine whether the continued or resumed dumping or subsidizing is likely to cause injury to the domestic industry.

The Tribunal receives a copy of the information that the CBSA gathered during its investigation. The Tribunal also gathers additional information, including the replies to the questions contained in the Tribunal's part of the shared questionnaires. The information obtained through the questionnaires is presented in a pre-hearing staff report, a comprehensive report that becomes part of the case record. The Tribunal's part of the expiry review provides for submissions and replies of persons and governments having an interest in the expiry review, as well as replies to requests for information, and a hearing. For the

most part, the procedures and time limits for the various steps in the Tribunal's expiry review are similar to those in an inquiry.

SIMA lists factors that the Tribunal may consider when making its determination. First, the Tribunal generally assesses the changes that have taken place in the international and domestic markets over the last five years to understand how resumed dumping or subsidizing would likely affect Canadian producers. As well, the Tribunal looks at what would be the likely volume and prices of the dumped or subsidized goods. It also examines the state of the foreign industry and evaluates its capacity to export the dumped or subsidized goods to Canada. Another factor that the Tribunal considers is whether other countries have imposed anti-dumping or countervailing duties on the same or similar products.

The Tribunal's analysis of the likelihood of injury focuses on what will happen in the near term, generally the next 18 to 24 months.

If the Tribunal determines that the resumed or continued dumping or subsidizing is not likely to cause injury to the domestic industry, it issues an order rescinding the finding.

If the Tribunal determines that the resumed or continued dumping or subsidizing is likely to cause injury to the domestic industry, it issues an order continuing the finding. The Tribunal can choose to narrow the range of goods covered by its order.

In either case, the Tribunal issues a statement of reasons to explain its decision.

Interim Review

The Tribunal may conduct an interim review of a finding or order while it is still in effect. It can do this on its own initiative or at the request of the CBSA, interested parties or any other person or government. The Tribunal must be satisfied that an interim review is warranted before it will act on a request. (Refer to the *Guideline on Interim Reviews* found on this Web site.)

If the Tribunal decides to conduct an interim review, it determines what process is appropriate and issues a notice of commencement of interim review, which it publishes in Part I of the *Canada Gazette*. At the conclusion of the interim review, the Tribunal issues an order rescinding, amending or continuing the finding or order, as well as a statement of reasons explaining the order.

JUDICIAL OR PANEL REVIEW

Any party may request a judicial review by the Federal Court of Appeal of a Tribunal injury finding or order.

In cases involving goods from the United States or Mexico, parties from these countries or Canada may alternatively request a judicial review by a binational panel under the provisions of the *North American Free Trade Agreement*.

DISPUTE RESOLUTION

Governments that are members of the World Trade Organization (WTO) may appeal the Tribunal's decisions in dumping and subsidizing cases to the WTO. Intergovernmental consultations must precede the launching of an appeal to the WTO.

PARALLEL PROCESSES: CBSA INVESTIGATION / TRIBUNAL INQUIRY

