THE ANTIDUMPING LAW OF CANADA

According to the Global Antidumping Database, Canadian producers filed 37 antidumping petitions between 1997 and 2004; 80 percent of these cases resulted in the imposition of antidumping duties. As illustrated in Figure 1, excluding the year 2000 Canadian producers filed an average of four petitions per year between 1997 and 2004; antidumping activity in Canada peaked in 2000 when producers filed eight cases.

Figure 1

Legal Procedures

The Special Import Measures Act (SIMA) protects Canadian industries from injury caused by the dumping and subsidizing of imported goods. Canada's antidumping regime includes a two-track antidumping determination system. The Canada Border Services Agency (CBSA) and Canadian International Trade Tribunal (Tribunal) are jointly responsible for administering SIMA and have separate, complementary duties in the antidumping investigation.

A Canadian producer or association of producers may file a written complaint with the CBSA charging that imports from a particular country have been dumped, or sold at a below normal value, and these imports are causing or threatening to cause material injury.1 Within 30 days of receiving the written complaint, the CBSA must determine whether there are (1) sufficient grounds to initiate a dumping investigation and (2) sufficient support by the Canadian industry for the investigation.2 In rare circumstances,

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1 The producer must produce goods that are identical or similar to the competing imported products.
2 Producers supporting the complaint must represent at least 25 percent of total Canadian production and 50 percent of the production of the producers that support and oppose the petition.
the government may self-initiate an investigation if there is a reasonable indication that dumping has caused or is threatening to cause injury.

If the CBSA determines that an investigation should be initiated, the CBSA is charged with investigating whether imported products have been dumped on the Canadian market and the Tribunal is charged with determining whether the dumped imports have caused or threatened to cause material injury to the domestic industry. Although the two inquiries are conducted separately, both are carried out during the same time period. The entire investigation process takes approximately seven months.

Following the initiation of the investigation, the CBSA sends a copy of the complaint to the Tribunal so that it can begin its injury inquiry. The Tribunal has 60 days to collect data and make a preliminary injury decision, while CBSA has 90 days (135 days in complex cases) to collect information from all parties involved and make a preliminary dumping decision. In order for an investigation to continue, both the Tribunal and CBSA must make affirmative preliminary determinations of injury and dumping, respectively. If either the Tribunal or CBSA makes a negative preliminary determination, the investigation is terminated.

**Calculation of the Dumping Margin**

Following its preliminary dumping determination, the CBSA has an additional 90 days to make its final dumping determination. The CBSA makes its dumping determination based in part on information contained in questionnaires that are sent to both exporters and importers of the product in question.

The CBSA calculates the dumping margin as the difference between normal value and the export price of the good. The Commission determines the normal value using one of several possible methods. Whenever possible, the normal value is calculated using the sales price in the exporting country’s domestic market. This sales price is adjusted to account for differences in terms of sales and taxation, as well as other factors. Note that all sales made below unit cost are defined to be outside of the normal course of trade and, thus, excluded from this calculation of normal value.⁴

If there is an insufficient quantity of sales made in the exporting country’s domestic market, the CBSA may calculate the normal value using an alternative method. For example, the CBSA may use the use the prices of sales from the exporting country to a selected third country. Alternatively, the CBSA may calculate a constructed normal value using the exporting country’s cost of production plus amounts for selling, general, and administrative costs and profits. For non-market economy countries, the CBSA determines the normal value using either the sales price or constructed value in a selected market economy country.

If the CBSA determines that sufficient information is not available to enable the calculation of normal value, the normal value may be determined using any information

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⁴ The unit cost is defined as production costs plus selling, general and administrative costs.
available, including information submitted in the petition or submitted by other interested parties.

An investigation is terminated if the CBSA finds that the dumping margin is insignificant, or less than two percent. The CBSA normally calculates a separate antidumping margin for each supplier. If the number of suppliers, products or transactions is too large, the CBSA may select a sample for the investigation. The CBSA calculates the dumping margin for those firms not included in the examination using a weighted average margin of dumping established for those suppliers selected in the sample.

**Material Injury Determination**

The Tribunal typically makes its preliminary determination using information from the CBSA and written submissions by the parties involved. The Tribunal may also request additional clarification from the parties involved during the preliminary investigation phase. Following the CBSA's preliminary dumping determination, the Tribunal has an additional 120 days to make its final injury determination. The Tribunal must hold public hearings within 90 days; at these public hearings, interested parties, including Canadian producers, importers, and foreign exporters, are allowed to present their arguments and question witnesses. The Tribunal must make a final injury determination within 30 days of the public hearings.

As directed by SIMA, Tribunal authorities must consider significant increases in dumped imports as well as evidence of price undercutting and price depression as factors indicating injury during both the preliminary and final investigations. Other important factors that the Tribunal examines include the impact of dumped imports on output, sales, market share, profits, capacity utilization, inventories and employment. In making a finding, the Tribunal cannot attribute injury caused by other factors to the dumped or subsidized imports. The Tribunal is required to terminate the investigation if the volume of dumped imports is found to be negligible.

SIMA includes provisions that allow the Tribunal to define the domestic industry on a regional basis. It also includes provisions to allow the Tribunal to cumulatively assess the impact of imports from multiple countries under investigation if market conditions warrant such treatment.

**Imposition of Duties**

Following affirmative preliminary decisions by the Tribunal and CBSA, the government imposes provisional duties on imports of dumped goods in an amount equal to the difference between the preliminary normal value determination and the export price. Alternatively, the provisional duty may be assessed as a flat percentage of the export price.
The government may also negotiate a price undertaking following affirmative preliminary determinations. An undertaking is an agreement with the exporters or foreign governments under investigation to change their pricing practices to eliminate the harm to Canadian industry. Although these agreements result in a suspension of the CBSA and Tribunal's investigations, antidumping duties may later be imposed if the parties in question are found to have violated the undertaking agreement.

A final affirmative decision by both the Tribunal and CBSA leads to the imposition of antidumping duties on the targeted imports, while a negative decision by either agency results in the reimbursement of the provisional duties. Canada typically imposes a final dumping duty equal to the final dumping margin determination by the CBSA. However, the Tribunal may initiate a public interest inquiry at the request of an interested party or on its own initiative if it suspects that the dumping duties will harm the public interest. This inquiry can take up to 90 days and result in a reduction of the dumping duties.

**Reviews**

The CBSA typically conducts "re-investigations" every year to update normal values and export prices, and to establish dumping margins for new exporters or products. The Tribunal may also review its findings because of a change in circumstances, such as a change in normal price, either on its own initiative or at the request of the Deputy Minister, interested parties or any other person or government. In addition, the Minister of Finance may ask the Tribunal to review a finding in light of a recommendation or ruling of the WTO dispute settlement body.

Dumping duties are typically removed after a sunset period of five years unless the Tribunal makes the decision following an expiry review that injury due to dumped imports will persist if the duties are removed. The Tribunal must notify all interested parties eight months prior to the date that the expiry review must be initiated. In the notice, interested parties are asked to make submissions explaining why the expiry review needs to be held or why the dumping duties should simply be allowed to expire. The Tribunal only initiates a review if it determines that it is warranted.

The expiry review is similar to the original injury inquiry described above. The Tribunal issues a notice, obtains information through questionnaires, calls for submissions and schedules a public hearing. Time limits are also similar to those in the original injury inquiry. Upon completing the review, the Tribunal issues its finding. If the finding is rescinded, antidumping are no longer collected on imports. The Tribunal may also continue a finding or amend it to exclude a product, country or specific exporter. If a review results in a decision to continue an injury finding, antidumping duties may be collected for an additional five years, or until the order is reviewed and rescinded.

**Compliance with the WTO Antidumping Agreement**

On March 17, 2006, the United States requested consultations with Canada concerning the imposition of provisional antidumping and countervailing duties on unprocessed grain
corn from the United States in December 2005. In the same notice, the United States also requested consultations with Canada regarding certain provisions of Canada’s Special Import Measures Act.

The United States asserted that the provisional duties were inconsistent with Canada’s obligations under provisions of the GATT 1994, the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Duties (SCM) because:

- the Statement of Reasons published by the Tribunal on November 30, 2005 in support of its preliminary determination of injury did not address or refer to mandatory factors in injury analyses such as the volume of imports, the price of imports, and the impact of imports on the domestic industry;
- the Tribunal specifically decided not to analyze the evidence before it with respect to causation, including evidence with respect to the causal link between imports and injury, and with respect to injury caused by factors other than imports;
- the Tribunal based its preliminary finding of injury solely on a supposed correlation between past injury to the Canadian domestic industry and an alleged decline in the U.S. domestic price of unprocessed grain corn rather than on the mandatory injury factors identified in the provisions of the Antidumping Agreement and SCM Agreement;
- the evidence supporting the alleged decline in U.S. domestic price of unprocessed grain corn used by the Tribunal was a projection of future grain corn prices, and therefore could not have been correlated with past injury to the domestic industry as the Tribunal found even if such correlation were relevant to an injury determination; and
- due to reasons listed above, the Tribunal failed to base its preliminary injury finding on "positive evidence" and an "objective examination" of that evidence.

The United States never requested that a dispute panel be formed in this case. The Tribunal made a final negative finding of injury on April 18, 2006, thus the preliminary dumping duties imposed on U.S. grain corn were refunded.