

FEDERAL GOVERNMENT LAUNCHES CONSULTATIONS ON REMEDIES AGAINST LOW-PRICED IMPORTS

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Introduction

Until September 26th, Canadian manufacturers have a rare opportunity to provide input on changes to Canada's trade laws that could have a significant impact on their businesses. The Government of Canada has invited Canadians to provide their views on two pieces of legislation that are fundamental to Canada's trade remedies system: The *Special Import Measures Act* (SIMA) and the *Canadian International Trade Tribunal Act* (CITT Act). These Acts regulate anti-dumping, subsidies and safeguards investigations, and set out rules under which Canada may impose duties on imported goods.

Canada has requested stakeholder input under five headings: (1) participation of unionized workers in trade remedy proceedings; (2) investigations into circumvention of duties; (3) massive importations; (4) expiry reviews; and (5) improving access for SMEs to Canada's trade remedy system. We take a closer look at each of these areas and discuss how changes to the law might affect Canadian producers.

1. Participation of Unionized Workers

The first proposal concerns the participation of unionized workers in trade remedy proceedings. While unions were given full participatory rights in 2017, they remain unable to file trade remedy complaints under *SIMA* or the *CITT* Act. In addition, under the current law, assessment of injury to domestic producers, a prerequisite for the imposition of duties, does not consider effects on workers. Canada is seeking views on whether to give unions the explicit right to file trade remedy complaints and whether to expand the factors it considers in determining injury to include the effect of imports on workers.

As a significant portion of Canada's workforce continues to be unionized, these proposals, if adopted, would have broad implications for trade remedies law in Canada. Unions bring to the table a specific set of interests, and their formal inclusion in the trade remedies process would facilitate bringing those interests into view. Similarly, expanding the notion of injury to include effects on workers is another avenue through which Canadian trade law would acknowledge workers' concerns. It would also add to the arguments producers would have in favour of the imposition of trade remedies.

2. Investigations Into Circumvention of Duties

Canada is also considering changes to anti-circumvention investigations. These investigations involve determining whether a foreign producer has altered its trade and business practices to avoid anti-dumping or countervailing duties. Circumvention can occur, for example, when a foreign producer ships parts to a third country for assembly in order to avoid duties. Under current law, an anti-circumvention investigation must begin with a formal complaint, placing the burden on the complainant to substantiate the allegations with evidence.

While circumvention can pose a serious problem for domestic producers, in practice, anti-circumvention investigations are almost never launched. This is because the process for doing so is opaque and uncharted. To remedy this situation, the government is seeking views on clarifying the applicable standard for initiating them.

As circumvention allows foreign producers to effectively side-step duties imposed on them under Canadian law, the relief that trade remedies offers can be undermined if this practice is permitted to occur or it is simply too burdensome to enforce. A more transparent and clarified process for launching these investigations will bring greater certainty, reducing the risks associated with commencing them, and raising the prospect that they will actually be used. As a result, the proposed changes could add an effective tool to domestic producers' arsenals for challenging circumvention.

3. Massive Importations

The third area in which Canada is considering changes is massive importations. Massive importations refers to the practice of increasing imports just before provisional measures (typically duties) are implemented. This occurs because foreign producers seek to import as much as possible just prior to the date the duties are set to apply. In other words, they are yet another means by which foreign producers avoid Canadian trade remedies.

To counteract massive importations, the CITT can apply duties retroactively on goods imported in the period before the application of provisional measures. Unsurprisingly, data on the quantity of imports during this period is crucial. In practice, however, the CITT does not systematically collect this data. To rectify this, Canada is considering requiring the CITT to collect information on imports beginning 90 days before the initiation of an investigation.

Moreover, under *SIMA*, the CITT is only to apply retroactive duties when necessary to prevent the recurrence of injury. Canada is considering whether to introduce a more flexible standard under which retroactive duties are only applied where massive importations are likely to seriously undermine the remedial effect of the duties.

A third issue related to massive importations under consideration is the notification that the CBSA gives to

foreign governments before launching a subsidy investigation. Because of the procedural timetable of the CBSA, foreign governments are typically given a 30-day window between the date of notification and the initiation of an investigation. In practice, this has given foreign producers the opportunity to export large quantities of goods prior to the imposition of duties covering the period of investigation. The government is seeking views on whether to shorten this window of opportunity to 20 days in the case of subsidy investigations and 7 days in the case of anti-dumping investigations.

Massive importations, whose objective is to escape duly imposed trade remedies, have the potential to distort the Canadian market to the detriment of Canadian producers. Retroactive duties, which fight against this, are therefore an important feature of an effective trade remedy regime. Mandated data collection would likely facilitate transparent decision-making on this issue. Similarly, a more flexible standard could lower barriers to obtaining a finding of massive importation, with knock-on benefits to Canadian producers. Reducing the notification period to 20 days is also a step in the right direction, as it shortens the window within which an influx of imports could occur.

4. Expiry Reviews

The next area covered by the consultations is expiry reviews. Anti-dumping and countervailing duty orders are valid for 5 years, after which they either expire or are extended. The practice of the CITT has been to invite comments from interested parties leading up to the end of the 5-year period and, based on those comments, decide whether an expiry review is warranted. In other words, the ball is in domestic producers' court if they wish to prevent the expiry of a trade remedy order. In place of this process, Canada is considering requiring the CITT to initiate expiry reviews *automatically*. The proposal would also allow the CITT to terminate the expiry review if it is apparent that there is no support from the domestic industry.

For domestic producers as well as the CITT, automatic expiry reviews would streamline the process that occurs towards the end of the 5-year term of a trade remedy order. Moreover, these changes would benefit domestic producers by eliminating another formal impediment to the imposition of duties beyond the 5-year mark.

5. Improving Access for SMEs to Canada's Trade Remedy System

The last area in which Canada is considering changes is with respect to small and medium-sized enterprises (SMEs). International trade law recognizes that SMEs (defined in Canada as producers with fewer than 500 employees) may find it difficult supply the information requested by investigating authorities in trade remedies proceedings. In 2003, the CBSA created a "virtual unit" to assist SMEs in gathering information and filing complaints. However, the unit's role has been relatively limited. For example, it does not assist SMEs throughout the investigation or review process, but only does so prior to the filing of a complaint.

To better address the difficulties faced by SMEs when navigating Canada's trade remedy system, Canada is considering creating a dedicated independent trade remedy counseling unit to provide free assistance to companies negatively affected by imports or trade remedy duties. The service would aid companies in preparing complaints and other applications, requests and representations. Canada is seeking views on the kinds of services, information and resources producers would find helpful, and whether those services should be provided to domestic as well as foreign producers, and to SMEs only or to all companies.

The proposed changes with respect to SMEs present perhaps some of the biggest opportunities for Canadian producers. Given the complexity of the trade remedies system, many SMEs continue to have difficulty navigating it, despite the potential benefits that trade remedies may bring. Depending on the kind and quality of services it provides, an independent counseling unit could significantly improve outcomes for SMEs by improving access and making the process comprehensible and more predictable.

Conclusion

The ongoing consultation process for *SIMA* and *CITT* Act amendments is a relatively rare opportunity for Canadian producers to express their views on a number of key aspects of Canada's trade remedy system. The proposed changes offer expanded access to the trade remedies process, additional technical support, particularly for SMEs, and improved effectiveness of trade remedies themselves. Each of these aspects can have a significant impact on Canadian producers. Indeed, to the extent this stakeholder engagement gives producers the chance to influence the tailoring of Canadian trade remedies legislation, it is a process in which all producers should consider taking part.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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