

CHANGES TO CANADA'S ANTI-DUMPING AND COUNTERVAILING DUTY LAWS FOR THE NEW MILLENNIUM

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The Special Import Measures Act (or SIMA) is the cornerstone of Canada's Anti-dumping and countervailing duty system. The Canadian International Trade Tribunal Act is also an important component of this system.

On April 15, 2000, an Act to Amend the Special Import Measures Act and the Canadian International Trade Tribunal Act and related amendments to the Special Import Measures Regulations and the Canadian International Trade Tribunal Rules, entered into force.

This package of amendments, which implements recommendations contained in the December 1996 Parliamentary Report on the Special Import Measures Act, introduced significant changes to the SIMA system that are aimed at improving the efficiency, transparency and fairness of Canadian anti-dumping and countervailing duty proceedings. This paper explains and assesses these changes.

La loi sur les mesures spéciales d'importation (LMSI) est la pierre angulaire du régime canadien en matière d'imposition de droits antidumping et de droits compensateurs. La Loi sur le Tribunal canadien du commerce extérieur est aussi une composante importante de ce régime.

Le 15 avril 2000, la Loi modifiant, la Loi sur les mesures spéciales d'importation et la Loi sur le Tribunal canadien du commerce extérieur, ainsi que les modifications connexes au Règlement sur les mesures spéciales d'importation et aux Règles du Tribunal canadien du commerce extérieur, sont entrées en vigueur.

Ces modifications, qui mettent en application les recommandations contenues dans le rapport parlementaire de 1996 au sujet de la Loi sur les mesures spéciales d'importation, apportent des changements significatifs au régime de la LMSI. Ces modifications visent à améliorer l'efficacité, la transparence et l'équité des procédures canadiennes en matière d'imposition de droits antidumping et de droits compensateurs. Ce texte explique et évalue ces changements.

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I. Introduction

Important changes to Canada's trade remedy laws entered into force on April 15, 2000.¹ These changes, which are embodied in *An Act to Amend the Special Import Measures Act and the Canadian International Trade Tribunal Act* (the "new Act") and related regulatory amendments, represent a significant stage in the evolution of the law.

This article assesses how these changes affect Canada's anti-dumping and countervailing duty regime. In this regard, it provides commentary on both the technical aspects of the changes and their practical implications for private sector stakeholders and counsel initiating and defending against antidumping and countervailing duty actions.

II. The Lead-Up to Bill C-35

The Government of Canada periodically reviews legislation to ensure its continued relevance and effectiveness. Prior to 1996, the *Special Import Measures Act* (SIMA),² Canada's principal anti-dumping and countervailing duty legislation had not been comprehensively reviewed since first entering into force in 1984. Since then, there had been significant changes to Canada's international trade environment.³ Moreover, by 1996, Canadian industry, the Trade Bar and government officials had acquired more than a decade of experience in the operation of the legislation. As such, there were compelling reasons to review the SIMA system to determine whether it remained relevant

¹ See Department of Finance Canada News Release 2000-027, 7 April 2000.

² R.S. 1985, c. S-15, as amended by R.S., 1985, c.23 (1st. Supp.); R.S., 1985, c.1 (2nd Supp.); R.S., 1985, c. 47 (4th Supp.); S.C. 1988, c.65; S.C. 1990, c.8; S.C. 1993, c.44; S.C. 1994 c. 13, 47; S.C. 1997, c.14; and S.C. 1999, c.12.

³ Among the developments that contributed to the re-shaping of Canada's international trade environment were bilateral, regional and multilateral trade initiatives such as the *Canada-United States Free Trade Agreement* (FTA), the *North American Free Trade Agreement* (NAFTA) and the *Marrakesh Agreement Establishing the World Trade Organization* (WTO Agreement).

and effective, and continued to strike an appropriate balance among the many competing stakeholder interests.⁴

In May 1996, the Honourable Paul Martin, Minister of Finance, asked the House Standing Committees on Finance and on Foreign Affairs and International Trade to jointly review the SIMA with a view to advising the Government as to whether any changes should be made to the law.⁵ The task of conducting the review was in turn assigned to the Sub-Committee on SIMA Review (struck by the Standing Committee on Finance for this purpose) and the Sub-Committee on Trade Disputes (of the Standing Committee on Foreign Affairs and International Trade).

The Sub-Committees' report, which was issued in December 1996, concluded that SIMA was generally operating well and remained relevant to the needs of Canadian business. That being said, the Sub-Committees did recommend certain changes to the law aimed at improving systemic efficiency, transparency, procedural fairness and responsiveness to the needs of all segments of the Canadian economy. In this regard, the Sub-Committees made sixteen major recommendations covering various aspects of the SIMA system. These recommendations flowed from the Sub-Committees' assessment of oral testimony, written submissions and other information presented during the course of the Sub-Committees' proceedings by various stakeholders⁶ and the government agencies responsible for administering the Act.

The Government's response to the report, which was tabled in the House of Commons in April 1997, was overwhelmingly favourable to the Sub-Committees' recommendations⁷ and officials were directed to draft the necessary implementing legislation.⁸

⁴ Indeed, in the 1992 *Report of the Auditor General of Canada to the House of Commons*, the Auditor General highlighted the need for a formal evaluation of the SIMA in order to determine:

"...if the balance of rights and obligations established in 1984 continues to be appropriate in the present trade environment".

⁵ See Department of Finance Canada News Release 96-037, 17 May 1996.

⁶ The Sub-Committees conducted nine hearings, heard testimony from 32 individuals or groups and received written briefs from an additional 8 individuals or groups.

⁷ The Government did not however support the Sub-Committees' recommendation that public interest decisions of the Canadian International Trade Tribunal (CITT) be subject to judicial review in the Federal Court of Canada, noting that such decisions were not in the nature of final orders but, rather, were merely advisory opinions to the Minister of Finance.

In accordance with the Sub-Committees' recommendation, the Government also considered whether there was a need to allow for the temporary exemption of goods from anti-dumping and countervailing duty orders under conditions of domestic short supply. It concluded that a short supply mechanism was not needed given existing statutory authorities, including duty remission authority under section 115 of the *Customs Tariff*, and the general reference authority under section 18 of the *Canadian International Trade Tribunal Act*, (CITT Act), recourse to which could be had in cases of contested short supply. The need for a short supply mechanism was also reduced by certain changes introduced by Bill C-35 itself. These included (i) earlier resolution of framework issues, (e.g., determination

III. Bill C-35

Bill C-35, which was tabled in the House of Commons on March 19, 1998,⁹ was passed by both the House and Senate and received Royal Assent on March 25, 1999. As already noted, the new Act entered into force on April 15, 2000. The changes introduced by the Act and related regulations and rules range from "housekeeping" amendments, (i.e., changes aimed at clarifying existing provisions and correcting technical errors), to substantive and procedural amendments to the SIMA framework. The principal changes in this latter category affect: (i) preliminary determinations of injury; (ii) interim and expiry reviews of injury findings; (iii) public interest proceedings; (iv) submissions in respect of undertakings; (v) access to confidential information; and (vi) the cumulation of the injurious effects of dumped or subsidized imports. The following offers a closer look at how the new Act affects these aspects of the SIMA process:

A) Preliminary Determinations

In order to impose antidumping/countervailing duties, government authorities must, under applicable international trade rules, determine that imports are being dumped and/or subsidized and that such imports are causing or are threatening to cause material injury to the domestic industry that produces like goods.¹⁰ As such, there are three distinct determinations that must be made by the investigating authorities: (i) the dumping/subsidization of goods; (ii) injury or threat thereof to the domestic industry; and (iii) a causal link between the two. Each of these elements must be established in both a preliminary and final determination.

Neither the *WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (Anti-Dumping Agreement) nor the *Agreement on Subsidies and Countervailing Measures* (Subsidies Agreement) explicitly requires the institutional bifurcation of dumping/subsidy and injury/causality determinations. However, bifurcation on the basis of institutional specialization, is arguably more conducive to an "objective" examination as explicitly required under Articles 3.1 and 15.1 of the Anti-Dumping Agreement and Subsidies Agreement respectively.

of subject goods), through the CITT's involvement at the preliminary determination stage of the investigative process; (ii) an improved public interest mechanism, (including prescribed factors relating to the impact of SIMA duties on downstream industries that use the subject goods as inputs); and (iii) explicit authority for interim reviews limited to a discrete aspect of an order, (e.g., whether a particular good should be excluded from the scope of an order/finding).

⁸ See Department of Finance Canada News Release 97-034, 18 April 1997.

⁹ See Department of Finance Canada News Release 98-032, 19 March 1998.

¹⁰ World Trade Organization (WTO) *Agreement on Interpretation of Article VI of the General Agreement on Tariffs and Trade 1994* (Anti-Dumping Agreement) and WTO *Agreement on Subsidies and Countervailing Measures* (Subsidies Agreement).

Both Canada and the United States have opted for bifurcated systems. Before the new Act, the Commissioner of the Canada Customs and Revenue Agency (Commissioner) was responsible for initiating the investigation, the preliminary determination of dumping/subsidizing and injury/causation, as well as the final determination of dumping/subsidizing.¹¹ The Canadian International Trade Tribunal (CITT) was responsible for the final determination of injury and causation. Under the U.S. system, the point of bifurcation occurs immediately after the Department of Commerce (DOC) decision to initiate an investigation, with the DOC being responsible for the preliminary determination of dumping/subsidizing and the International Trade Commission (ITC) being responsible for the preliminary determination of injury and causation.

The preliminary determination establishes the basis for either the application of provisional duties pending completion of the investigation¹² or for the early termination of unfounded investigations.¹³ While the new Act retains the Canada Customs and Revenue Agency (CCRA) as the single gatekeeper to the SIMA, (i.e., the single-point for the filing and assessment of complaints), it reallocates statutory responsibilities for the preliminary determination between the CITT and the Commissioner, with the CITT assuming responsibility for the preliminary determination of injury, and the Commissioner retaining responsibility for the preliminary determination of dumping/subsidizing. Accordingly, once the Commissioner decides to initiate an investigation under section 31 of the SIMA, he/she will transfer the complaint and any other information upon which the decision to initiate was based, to the CITT. New rules on the transfer of information between the CCRA and the CITT form part of the new *Canadian International Trade Tribunal Rules* (Tribunal Rules). The new Act did not affect the final determination phase of SIMA investigations.

Concerns have been expressed that such a reallocation of responsibilities will further complicate the system and entail additional costs for complainants who would be compelled to file separate submissions to the CCRA and the CITT and engage legal counsel earlier in the process. However, such concerns are mitigated by the fact that the CITT is generally not expected to issue detailed

¹¹ By virtue of Bill C-43 [the *Canada Customs and Revenue Agency Act*], which entered into force on 1 November 1999, the Department of National Revenue became the Canada Customs and Revenue Agency and the Deputy Minister of National Revenue became the Commissioner of Customs and Revenue (Commissioner).

¹² Articles 5.7 and 11.7 of the WTO Anti-Dumping Agreement and Subsidies Agreement, respectively, require that evidence of dumping/subsidizing and injury are to be considered simultaneously on a date not later than the earliest date on which provisional duties are applied.

¹³ In this regard, the preliminary determinations of dumping/subsidization and injury/causation serve as the second "screen" used to identify investigations that do not have merit. The first screen is established by the strict initiation requirements that are applied by the Commissioner in accordance with Articles 5 and 11 of the Anti-Dumping Agreement and Subsidies Agreement, respectively.

questionnaires or hold oral hearings as part of the preliminary inquiry¹⁴ given, *inter alia*, the relatively short (60-day) time frame for a preliminary determination of injury, and the "reasonable indication" standard upon which such determinations will continue to be based.¹⁵

There are advantages to this reallocation of responsibility. First, by allowing the CCRA and the CITT to focus on their respective areas of expertise from the outset, it should be possible to achieve certain efficiencies in the investigative process as a whole.¹⁶ For instance, the earlier resolution of basic framework issues, (e.g., the domestic industry, like goods, classes of like goods, etc.), should result in more focussed hearings in the typically more cost-intensive final determination phase of the process. Second, the direct involvement of the CITT, a quasi-judicial body,¹⁷ in the front-end of the investigative process should further enhance the perceived transparency and fairness in preliminary determinations of injury¹⁸ as well as facilitate the earlier termination of cases for want of sufficient evidence of injury. Finally, the CITT will, by

¹⁴ This was noted in an October 19, 1998 letter from the Chairman of the CITT to the Department of Finance Canada. Any claims of entitlement to an oral hearing are addressed by new subsection 34(2) of the SIMA, which explicitly provides that a preliminary inquiry need not include an oral hearing. Moreover, new Rule 52.2 of the *Canadian International Trade Tribunal Rules* (Tribunal Rules), as amended by *Rules Amending the Canadian International Trade Tribunal Rules*, SOR/2000-139, which governs the procedure for preliminary injury determinations, contemplates the filing of written submissions by interested parties without referring to the scheduling of a hearing. Contrast this with Rule 54 in respect of final injury determinations, which explicitly refers to "the place and time fixed for the commencement of a hearing in the inquiry".

¹⁵ As such, the complaint and other information provided by the Commissioner are expected to be the primary evidence in CITT preliminary injury inquiries. Some minor modifications will likely be required to the complaint questionnaire, e.g., to adequately address framework issues such as the definition of "like goods" and "domestic industry". In addition to the complaint and other information provided by the Commissioner, the CITT will also consider submissions made by other interested parties, reply submissions by domestic producers, and any relevant publicly available information.

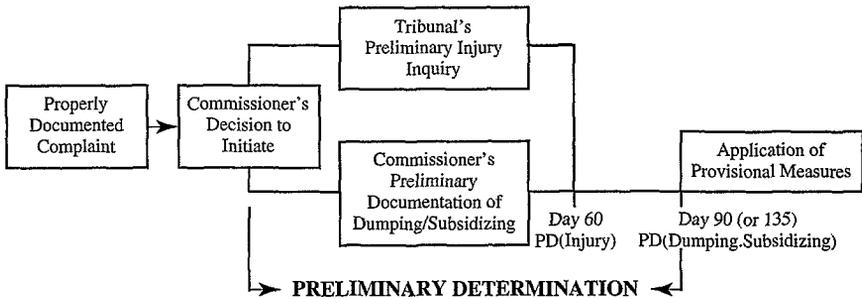
¹⁶ In recognition of the CITT's expertise in injury determinations, the SIMA, prior to its amendment by the new Act, included various provisions that allowed the Commissioner and other interested parties to seek the "advice" of the CITT on the issue of injury during the pre-initiation and preliminary phases of an antidumping/countervailing duty investigation. However, paragraph 37(b) of the Act limited the CITT to a consideration of the information that was before the Commissioner in rendering its advice on the injury issue. The reallocation of responsibilities for preliminary determinations under the new Act allowed for the repeal of the advice provisions under paragraphs 34(1)(b) and 35(2)(b) of the SIMA. However, a decision by the Commissioner not to initiate an investigation for want of a reasonable indication of injury can still be referred to the CITT for advice under subsection 33(2) of the SIMA, which was not repealed by the Bill. Where the CITT advises that the evidence discloses a reasonable indication of injury, retardation or threat of injury, the Commissioner would have to initiate an investigation.

¹⁷ As an independent quasi-judicial body, the CITT adheres to principles of natural justice and procedural fairness.

¹⁸ For example, it is expected that the CITT will circulate written submissions received from interested parties and afford the complainant a reasonable opportunity to respond.

virtue of its earlier involvement, be able to identify more precisely areas in which it will need to seek information from the parties in the event a preliminary determination is made and the investigation proceeds to the final determination phase. [Refer to Figure 1].

Figure 1: The Preliminary Determination



B) *Interim and Expiry Reviews of Injury Findings*

Anti-dumping and countervailing duties are not intended to remain in place forever. Pursuant to Articles 11.1 and 21.1 of the Anti-Dumping Agreement and Subsidies Agreement respectively, such duties are to remain in force only for as long as, and to the extent, necessary to counteract injurious dumping or subsidization.

Under the SIMA, anti-dumping and countervailing duties remain in place for as long as the CITT order/finding,¹⁹ justifying the imposition of such duties remains in place.²⁰ These orders/findings are subject to review by the CITT, either on its own initiative or pursuant to a request made by the Commissioner, any other person, or any government. The CITT conducts two types of reviews. Interim reviews, (also referred to as “mid-term” or “change in circumstances” reviews), can occur at any time over the life of an order/finding while expiry reviews, (also referred to as “sunset” reviews), occur upon a request filed in response to a notice of expiry.²¹

The CITT may only initiate a review if satisfied that a review is “warranted”. However, notwithstanding the obvious importance of the review provisions in

¹⁹ In this context, a “finding” is a finding made under subsection 43(1) of the SIMA in respect of an inquiry under subsection 42(1) of the Act, which provided the original basis for the application of anti-dumping or countervailing duties. An “order” is an order referred to in new subsection 76.03(12) of the Act extending a finding for a further five-year period.

²⁰ Although the injury finding determines the duration of the duties, the duties themselves are subject to periodic administrative review by the Commissioner. Such reviews could result in an increase, decrease or elimination of the duties. However, even if the Commissioner determines that the applicable duties are zero, legally the duties remain in place until the underlying injury order/finding either expires or is rescinded.

²¹ Injury findings and orders automatically expire after five years unless continued as a result of an expiry review.

the Act, (as reflected in their usage²²), prior to the new Act, neither the SIMA, the *Canadian International Trade Tribunal Act* (CITT Act), nor the regulations or rules²³ made pursuant thereto offered any guidance as to the grounds for the initiation of interim and expiry reviews.

Specific changes introduced as part of this legislation package improve and clarify the expiry review process under Canadian law. The Tribunal Rules²⁴ have been amended to provide explicit guidance on factors to be considered in deciding whether or not to initiate an interim or expiry review.²⁵ Again, the new Act preserves the single gatekeeper approach, with the CITT having sole

²² Canada's leading experience in the conduct of expiry reviews, which pre-dates the WTO Anti-Dumping and Subsidy Agreements, is reflected in the following table:

SIMA Expiry Reviews 1989 to 18 January 1999
Summary of Outcomes

A.	<u>Review Inquiries:</u>		
	Number of	Continued	Rescinded
	Reviews		
	49	27	22
B.	<u>Reviews by Action (country)*</u>		
	Number of	Continued	Rescinded
	Actions		
	176	68	108

* A CITT expiry review inquiry may cover actions against more than one country.

[Source: Mr. Peter Welsh, Research Director, CITT].

²³ Sub-rule 70(1)(c) of the previous *Tribunal Rules* required that a request for review include "The grounds on which the person believes initiation of the review is warranted and a statement of the facts on which the grounds are based". However, the rules did not offer any illustrative guidance as to the nature of the grounds that could support the initiation of a review.

²⁴ The Tribunal Rules are made pursuant to the enabling authority in paragraph 39(1)(d) of the CITT Act.

²⁵ New Rule 72 of the Tribunal Rules, as amended by SOR/2000-139, provides that, in order to decide whether an interim review is warranted, the CITT may request the parties to provide information concerning: (a) whether changed circumstances or new facts have arisen since the making of the order or finding; (b) facts that were not put in evidence in the original proceedings and were not discoverable by the exercise of reasonable diligence; and (c) any other matter that is relevant to the review.

New Rule 73.2 of the Tribunal Rules, as amended by SOR/2000-139, provides that, for the purpose of deciding whether an expiry review is warranted, the CITT may request the parties to provide information that addresses: (a) the likelihood of a continuation or resumption of dumping or subsidization of the goods; (b) the likely volume and price ranges of dumped or subsidized imports if dumping or subsidization were to continue or resume; (c) the domestic industry's recent performance, including trends in production, sales, market share and profits; (d) the likelihood of injury to the domestic industry if the order or finding were allowed to expire, having regard to the anticipated effects of a continuation or resumption of dumped or subsidized imports on the industry's future performance; (e) any other developments affecting, or likely to affect, the performance of the domestic industry; (f) changes in circumstances, domestically or internationally, including changes in the supply or demand for the goods and changes in trends in, and sources of, imports into Canada; and (g) any other matter that is relevant to the review.

responsibility for determining whether or not an interim or expiry review is “warranted”, as required by new subsections 76.01(3) and 76.03(4) of SIMA.

Many of the requests for review received by the CITT deal with a discrete aspect of an order/finding, (e.g., requests for a product or country exclusion). However, there was no explicit authority in the previous SIMA allowing the CITT to limit the scope of an interim review to a specific aspect of an order/finding. Therefore, in order to exclude goods, the CITT felt compelled to review the entire order/finding and decide whether or not to continue it with or without amendment. New paragraph 76.01(1)(b) provides such authority and obviates the need for the CITT to re-open the entire order/finding in such cases. Pursuant to new subsection 76.01(7), an interim review determination in respect of a discrete aspect of an order/finding runs only for the balance of time remaining in respect of the order/finding that was the subject of the interim review.

Under new section 76.03 of the SIMA, responsibility for expiry reviews are reallocated on the same basis as preliminary determinations in order to take advantage of the expertise of the CCRA and the CITT on dumping/subsidizing and injury issues, respectively. In this regard, the Commissioner assumes responsibility for the determination of whether expiration of the order/finding is likely to result in the continuation or resumption of dumping or subsidizing while the CITT retains responsibility for the likelihood of injury or retardation element of expiry reviews.²⁶

Because only the CITT can rescind, continue or amend a CITT order/finding, the Commissioner’s expiry review determination in respect of the likelihood of a continuation or resumption of dumping or subsidizing has no independent effect.²⁷ Accordingly, the Commissioner’s determination is transmitted to the CITT,²⁸ which then makes an order under new subsection 76.03(12) of the SIMA either rescinding or continuing (with or without amendment) its previous anti-dumping/countervailing duty order/finding.²⁹ [Refer to figure 2].

Finally, neither the SIMA, the CITT Act nor the regulations or rules made pursuant thereto offered any guidance as to the criteria to be considered in

²⁶ These determinations are subject to judicial review in Canada’s Federal Court of Appeal under new subsection 96.1(1) of the SIMA.

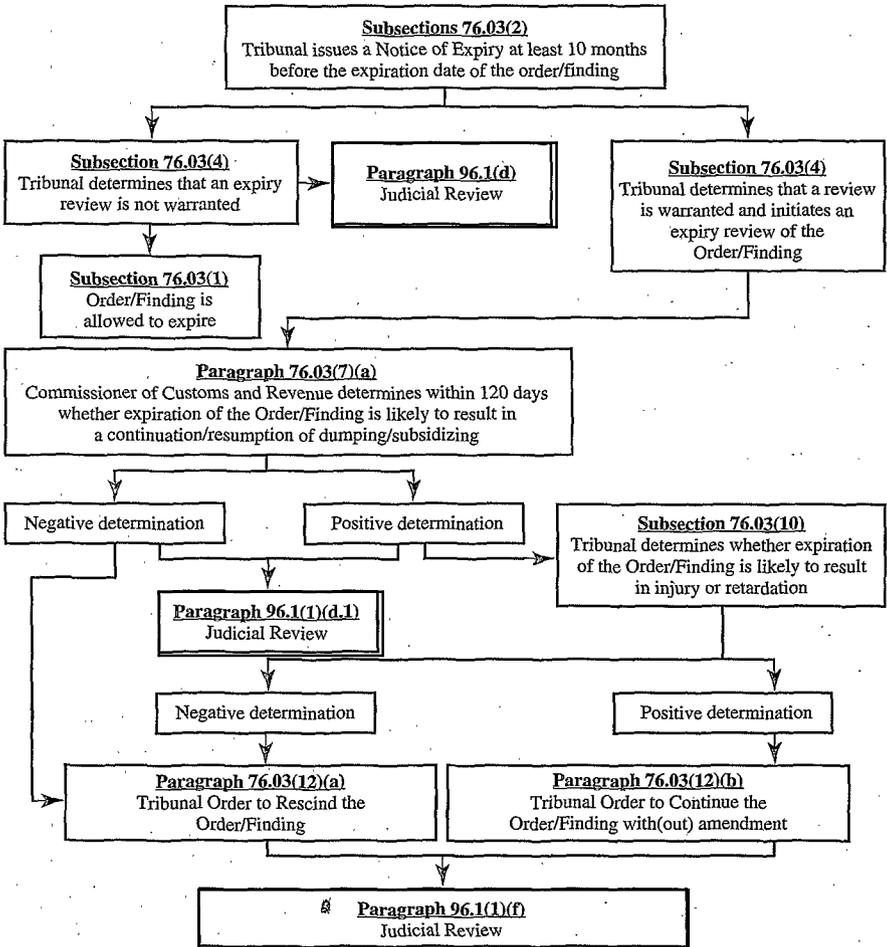
²⁷ Of course, if the Commissioner found that there was no likelihood of a continuation or resumption of dumping or subsidizing, the CITT would be required to make an order terminating the order/finding under review.

²⁸ The Commissioner would provide the CITT with relevant information upon which a determination of a likelihood of continued or resumed dumping or subsidizing was based. This would form part of the CITT’s record.

²⁹ In accordance with Article 1904 and subparagraph (a)(ii) of the definition of “final determination” in Annex 1911 of the *North American Free Trade Agreement* (NAFTA), an order by the CITT under new subsection 76.03(12) continuing an anti-dumping or countervailing duty order or finding with or without amendment, would be subject to NAFTA binational panel review. A decision by the CITT under 76.03(4) not to initiate a review would, of course, also be subject to NAFTA binational panel review pursuant to subparagraph (a)(v) of the definition of “final determination” in Annex 1911 of the NAFTA.

determining whether or not to continue a finding/order on expiry review. In this regard, the *Special Import Measures Regulations* have now been amended to provide explicit guidance on factors to be considered in determining whether or not to continue a finding/order on review.³⁰ These factors are drawn from the reasoning of the CITT and its predecessors in previous review proceedings. Accordingly, they do not introduce major substantive changes to the determination of whether or not to continue an order/finding. They do however significantly improve the transparency and efficiency of review proceedings.

Figure 2: Expiry Reviews



³⁰ New subsection 37.2 (1) of the *Special Import Measures Regulations*, as amended by *Regulations Amending the Special Import Measures Regulations*, SOR/2000-138, sets out a non-exhaustive list of factors that the Commissioner may consider in determining whether there is a likelihood of resumed dumping and/or subsidization while new subsection 37.2 (2) of the regulations provides a non-exhaustive list of factors that the CITT may consider in determining whether there is a likelihood of injury therefrom.

C) *Public Interest Proceedings*

Section 45 of the SIMA contains a “public interest” procedure that allows the CITT to recommend the reduction or elimination of antidumping and/or countervailing duties if such reduction or elimination is considered to be in the public interest. The procedure is conducted in two stages.³¹ First, following an affirmative finding of injury and the imposition of antidumping and/or countervailing duties, interested parties can request the CITT to undertake a public interest investigation. The CITT will solicit submissions from all interested parties and, based on those submissions will determine whether to conduct a further public interest investigation. The CITT’s practice has been to conduct such an investigation only where there are “compelling and special circumstances that necessitate the consideration of the public interest”.³² Second, following an affirmative decision in the first stage, the CITT will conduct a further investigation to determine whether the public interest requires that the duties be maintained, reduced or eliminated. If the CITT determines that the duties should be reduced or eliminated, it will issue a report so advising the Minister of Finance. The Minister of Finance will then determine whether and to what extent to implement the recommendations of the CITT.³³

Parties interested in having duties reduced under this mechanism have requested that a public interest investigation be undertaken in at least fifteen instances.³⁴ Not all of these requests necessitated written reasons from the CITT. In only four instances did the CITT or its predecessor the Canadian Import Tribunal

³¹ See *Guidelines for Public Interest Investigations*, Practice Notice (CITT).

³² For example, see *Flat Hot-Rolled Carbon and Alloy Steel Sheet Products*, PB-99-001 (CITT), at 5.

³³ The CITT can only make a recommendation to the Minister of Finance, it is for the Minister to determine whether the duty should actually be reduced or eliminated. A decision by the Minister of Finance to accept recommendations contained in a CITT public interest report can result in an order under section 115 of the *Customs Tariff* to remit anti-dumping/countervailing duties paid or payable under the SIMA. The CITT’s decision regarding whether to make a recommendation to the Minister and the content of that recommendation is not reviewable by a Canadian court. The Government did not support the Sub-Committees’ recommendation that the decision of the CITT that an antidumping or countervailing duty might not be in the public interest should be made subject to review by a Federal Court.

³⁴ *Certain Iodinated Contrast Media* PB-2000-001 (CITT); *Flat Hot-Rolled Carbon and Alloy Steel Sheet Products*, supra note 32; *Prepared Baby Food*, PB-98-001 (CITT); *Polyisocyanurate Thermal Insulation Board*, PB-97-001; *Refined Sugar*, PB-95-002 (CITT); *Caps, Lids and Jars*, PB-95-001 (CITT); *Preformed Fibreglass Pipe Insulation With a Vapour Barrier*, PB-93-001 (CITT); *Bicycles and Frames*, PB-92-001 (CITT); *Carpets*, PB-91-002 (CITT) (Reasons issued as part of CITT Statement of Reasons in NQ-91-006); *Beer*, PI-91-001 (CITT); *Women’s Leather Boots & Shoes*, PB-90-001 (CITT); *Brass Replacement Key Blanks*, PB-89-001 (CITT); *Yellow Onions*, PI-2-87 (CIT); *Grain Corn*, PI-1-87 (CIT); and *Surgical Adhesives, Tapes & Plasters*, CIT-8-85 (CIT). There are other cases where the issue of examining the public interest was raised but the representations of interested parties were found to lack the necessary substance to require that the CITT or its predecessor consider the matter.

recommended that the duties be reduced.³⁵ The Minister of Finance found it necessary to reduce the duties in only two of those three instances.³⁶

Prior to the new Act, there was no legislative or regulatory guidance as to what the "public interest" was to include. Moreover, neither the Anti-Dumping Agreement nor the Subsidies Agreement elaborated upon the concept of public interest.³⁷ The new Act introduces a number of improvements to the public interest mechanism in section 45 of the SIMA.

First the new Act introduces, in subsection 45(1), a "reasonable grounds" threshold for the initiation of public interest inquiries by the CITT, which replaces the CITT's previous "compelling and special circumstances" threshold referred to above. It is, however, unclear as to how this new threshold differs from the one it replaces. On the one hand, having regard to the principal purpose of the SIMA, (i.e., to afford domestic industry a remedy against the injurious effects of dumping and subsidization), anti-dumping and countervailing duties should arguably only be reduced or removed in circumstances that are "compelling and special". Accordingly, it would be "reasonable" to proceed with an investigation only if such circumstances appear to exist. On the other hand, it can be argued that the enactment of threshold language that clearly differs from that established in jurisprudence evinces a clear intention to lower the bar for the initiation of public interest investigations. The CITT will have to address this interpretative issue in the first public interest proceeding it faces now that new Act enters into force.

Second, new subsection 45(3) provides authority to prescribe factors to be considered by the CITT in public interest inquiries. The new regulations³⁸ made pursuant to this authority prescribe the following factors, which will, among other things, lend greater transparency and efficiency to the process:

- (a) whether goods of the same description are readily available from countries or exporters to which the order or finding does not apply;

³⁵ *Grain Corn*, PI-1-87 (CIT); *Certain Iodinated Contrast Media*, PB-2000-001 (CITT); *Prepared Baby Food*, PB-98-001 (CITT); and *Beer*, PI-91-001 (CITT).

³⁶ It was not necessary for the Minister to reduce the duties in *Beer* because the duties were eliminated as a result of an interim review conducted by the CITT (see *Beer*, RR-94-001 (CITT)). As of the date of writing, a decision has not yet been taken by the Minister of Finance in respect of certain Iodinated Contrast Media.

³⁷ While Article 9.1 of the Anti-Dumping Agreement and Article 19.2 of the Subsidies Agreement contemplate that Members may decide to impose less than the full amount of anti-dumping/ countervailing duty in cases where all the requirements for their imposition have been met, neither agreement requires Members to provide a formal process for the consideration of other public interests that might militate against the application of the full amount of anti-dumping/ countervailing duties. While Article 6.12 of the Anti-Dumping Agreement and Article 12.10 of the Subsidies Agreement require investigating authorities to afford industrial users and representative consumer organizations an opportunity to provide information, this requirement is limited to the investigations regarding dumping, injury and causality. The CITT has recognised that it is not required under Canadian law to employ a "lesser duty" approach in considering the public interest under section 45 of the SIMA (*Refined Sugar*, *supra* note 34 at 3).

³⁸ Refer to subsection 40.1(3) of the *Special Import Measures Regulations* as amended by SOR/2000-138.

- (b) whether imposition of an anti-dumping or countervailing duty in the full amount;
 - (i) has eliminated or substantially lessened or is likely to eliminate or substantially lessen competition in the domestic market in respect of goods;
 - (ii) has caused or is likely to cause significant damage to producers in Canada that use the goods as inputs in the production of other goods and in the provision of services;
 - (iii) has significantly impaired or is likely to significantly impair competitiveness by;
 - (A) limiting access to goods that are used as inputs in the production of other goods and in the provision of services, or
 - (B) limiting access to technology, or;
 - (iv) has significantly restricted or is likely to significantly restrict the choice or availability of goods at competitive prices for consumers or has otherwise caused or is otherwise likely to cause them significant harm;
- (c) whether non-imposition of an anti-dumping or countervailing duty or the non-imposition of such a duty in the full amount is likely to cause significant damage to domestic producers of inputs, including primary commodities, used in the domestic manufacture or production of like goods; and
- (d) any other factors that are relevant in the circumstances.

The SIMA public interest mechanism will ensure that, in protecting domestic industry from the injury caused by dumped or subsidized imports, the adverse effects of SIMA duties on consumers and other segments of the economy are duly taken into account.

One means by which this might be accomplished is by the application of a lesser duty, (i.e., a level of anti-dumping or countervailing duty that, while less than the full margin of dumping or amount of subsidy found, is sufficient to eliminate injury to the domestic industry). A lesser duty could be based on a proposed level of duty reduction or a non-injurious price by reference to which a lesser rate of duty could be determined.³⁹ Developing workable lesser duty methodologies will be among the more challenging aspects of the new law from an administrative point of view.

D) *Undertakings*

Anti-dumping and countervailing duty investigations can be “settled” prior to the imposition of final duties through the negotiation of undertakings.⁴⁰ The Commissioner of Customs and Revenue, in deciding whether or not to accept

³⁹ As noted in the Governments response to the Sub-Committees’ report, the lesser duty calculation is not a requirement in section 45 but, rather, an alternative methodology for addressing public interest concerns.

⁴⁰ An “undertaking” is a commitment made by exporters in dumping cases or a foreign government or certain exporters in subsidy cases, to adhere to certain conditions that serve to eliminate the injury caused to the Canadian industry by the dumping or subsidizing of goods. Refer to the definition of “undertaking” in subsection 2(1) of the SIMA.

an undertaking offer from an exporter or foreign government, consulted with the Canadian producers that filed the complaint. New subsection 49(5) of the SIMA introduces greater transparency and fairness by requiring the Commissioner to also consider representations made by other interested persons, (e.g., retail organizations, interest advocacy groups, etc.).⁴¹

Finally, prior to the new Act, where the Commissioner conducted a review of an undertaking and decided that there was no longer any justification for its continuance, the SIMA did not allow for its immediate termination. Rather, it provided that the undertaking would remain in force for the remainder of its five-year term. New subsection 53(2) of the Act corrects this legislative anomaly by providing for immediate termination in such circumstances thereby rendering the undertaking review provisions consistent with other sections of the statute, including subsection 52(1.2), which requires the Commissioner to terminate an undertaking when the conditions upon which it was based no longer exist.

E) Access to Confidential Information

While the CITT regularly affords counsel access to confidential information in SIMA injury inquiries, the policy of the Commissioner has been to provide counsel with access to such information only where the Commissioner is of the opinion that the non-confidential summary is inadequate to provide a reasonable understanding of the substance of the information.⁴² The new Act should bring

⁴¹ By virtue of new section 57.1 of the *Special Import Measures Regulations*, as amended by SOR/2000-138, such representations must be made within 9 days of the date the undertaking is offered. Given this narrow window, it is expected that undertaking offers will be immediately published on the CCRA web-site.

⁴² The Courts have been reluctant to interfere with the Commissioner's exercise of discretion in respect of disclosure. For example, in *Electrohome Limited, Mitsubishi Canada Inc., Hitachi Canada Inc., Matsushita Canada Limited, RCA Inc., and Sanyo Canada Inc. v. The Deputy Minister of National Revenue and Daewoo Electronics Company Ltd. and Goldstar Co. Ltd.*, (31 January 1986), the Federal Court, in dismissing an application for an order to quash the refusal of the Deputy Minister (now referred to as the Commissioner) to disclose certain confidential information to counsel, held that, in conducting an investigation under SIMA, the Deputy Minister is exercising an administrative, and not a quasi-judicial, function. Therefore, while there was a general duty of fairness, (which depended on the administrative process in question), the rules of natural justice, (and, in particular, the *audi alteram* right to disclosure), did not apply. Similarly, in dismissing an application for judicial review of a decision of the Deputy Minister of National Revenue to refuse access to certain confidential information obtained in an investigation of alleged dumping/subsidizing of sugar imports into Canada, the Federal Court, in the subsequent case of *R.W. Patten Distributors Ltd. v. The Deputy Minister For National Revenue, The Canadian Sugar Institute, The British Columbia Sugar Refining Company Limited, Lantic Sugar Limited and Redpath Sugars*, (2 June 1995), held that the disclosure of confidential information was permissive and not mandatory and that the Court would not intervene in an administrative process except where there was a flagrant misapplication of the law or misdirection of the investigation.

the CCRA's treatment of confidential information more in line with the CITT's practice respecting the protected disclosure of confidential information to counsel. New subsection 84(3), provides that the Commissioner "shall" disclose confidential information to counsel, upon written request and payment of the prescribed fee having been made and subject to such conditions as the Commissioner considers reasonable. While subsection 84(3.1), allows the Commissioner to deny disclosure if satisfied that such disclosure might result in material harm to the business or affairs of the person who designated the information confidential, this provision is clearly cast as an exception to the general requirement to disclosure.

Prior to the new Act's entry into force, an expert could obtain access to confidential information as counsel⁴³ for a party to SIMA-related proceedings before the CITT but then, as counsel, was generally precluded at common law from appearing as an expert witness in the same proceeding. The amendment introduced to subsection 45(3) of the CITT Act addresses this issue by explicitly allowing for the disclosure of confidential information to such persons in their capacity as expert witnesses.⁴⁴ In this regard such a person would, *inter alia*:

- i) have to be qualified as an expert in respect of the matter(s) at issue;
- ii) have to be acting under the control/direction of counsel for a party to the proceedings;
- iii) have to accept any conditions imposed by the CITT as reasonably necessary or desirable to prevent unauthorized disclosure; and
- iv) be subject to new firewalls that expressly limit the use of the confidential information, notwithstanding any other Act or law, to those proceedings.

Among the persons whom the CITT can recognise as experts under new subsection 45(5) of the CITT Act are specified employees of the Competition Bureau. While counsel for the Commissioner of the Competition Bureau can and has intervened in SIMA-related proceedings before the CITT by virtue of the Commissioner's mandate under section 125 of the *Competition Act*, allowing Bureau officers to participate as expert witnesses should allow for more effective interventions in respect of competition issues.

In order to discourage the misuse of confidential information, the new Act introduces significant new penalties. Under new subsections 96.4(1) and (2) of the SIMA and 45(6) and (7) of the CITT Act, any person who misuses

⁴³ The term "counsel" is not restricted to members of the legal profession and is defined in subsection 84(4) of SIMA and subsection 45(4) of the CITT Act to include, in relation to any party to proceedings under either Act, "any person, other than a director, servant or employee of the party, who acts in proceedings on behalf of the party".

⁴⁴ This is consistent with the U.S. approach where the *Rules of Practice and Procedure of the United States International Trade Commission* allow access to business confidential information, under administrative protective order, to: an attorney, excepting in-house counsel; an in-house attorney not involved in competitive decision-making for an interested party; a consultant/expert who regularly appears before the Commission and is not involved in any competitive decision-making for an interested party; and a representative of an interested party, not represented by counsel, and not involved in any competitive decision-making of an interested party.

confidential information or contravenes a condition of disclosure is guilty of a hybrid offence punishable on summary conviction by a fine of up to \$100,000 or on indictment by a fine of up to \$1 million. In addition, under new subsection 45(9) of the CITT Act, counsel or an expert who misuses confidential information can be barred from further appearances before the CITT.

Finally, in an effort to balance the interests of all parties, the Tribunal Rules, *inter alia*, provide a mechanism for parties to challenge requests for disclosure of all/part of the confidential record, and for the possibility of obtaining authorization to file single copy exhibits of confidential information.

Consistent with the spirit and intent of Article 6 of the Anti-Dumping Agreement and Article 12 of the Subsidies Agreement, these changes will allow all interested parties to better defend their respective interests in anti-dumping/ countervailing duty investigations while, at the same time, ensuring effective protection of confidential information.

F) *Cumulation*

The new Act requires the CITT to cumulate the injurious effects of dumping and subsidizing of imports from more than one country in injury inquiries and expiry reviews under the SIMA. This is in recognition of the fact that dumping/ subsidizing, whether from one or multiple sources, has a single price effect in the domestic market which, in most cases, cannot be disentangled. The ability to cumulate is, however, subject to certain pre-conditions under SIMA,⁴⁵ as required by the WTO Anti-Dumping and Subsidies Agreements.⁴⁶

G) *Other Issues*

In addition to the foregoing, the *Special Import Measures Regulations* have been amended to explicitly recognize the existence of dumping in third country markets, (i.e., the imposition of anti-dumping or countervailing measures by competent authorities of a third country) as positive evidence of threat of injury.⁴⁷ This is consistent with the reasoning of the CITT in previous threat of injury cases.

In amending its Rules, the CITT also introduced changes that go beyond the recommendations of the Sub-Committees. For example, amendments to the Rules contemplate electronic filing and service of documents and electronic hearings that, presumably, could occur via the internet. The rules also formalize the "interrogatory" process that has developed in SIMA proceedings. A number

⁴⁵ Refer to subsection 42(3) of the SIMA.

⁴⁶ Refer to Article 3.3 of the Anti-Dumping Agreement and Article 15.3 of the Subsidies Agreement.

⁴⁷ Refer to new paragraph 37.1(2)(g.2) of the *Special Import Measures Regulations* as amended by SOR/2000-138.

of technical changes have also been introduced to promote a more efficient inquiry process, while ensuring the fairness of those proceedings.

IV. Conclusion

The changes introduced to Canadian anti-dumping and countervailing duty law by this new legislation represent the culmination of a comprehensive Parliamentary review process in which all stakeholders were afforded an opportunity to present views.

As with any new legislation, issues will inevitably emerge in the early stages of the operation of the new SIMA framework. For example, while both the CCRA and CITT have been working diligently and co-operatively to adapt their internal administrative procedures to reflect their new and shared investigative responsibilities under the new Act, certain unforeseen co-ordination issues could emerge.

On balance, however, these changes represent a significant improvement to the SIMA regime, which should ensure the continued relevance and effectiveness of Canada's trade remedies system in the years to come.