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International Trade & Investment–China Focus

2009 Year-In-Review: Antidumping and Subsidy Actions Affecting Chinese Products

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OVERVIEW

In 2009, the People's Republic of China (PRC) continued to be a focus of Canadian manufacturers who complain that Chinese exporters are selling "dumped" or "subsidized" goods into Canada, thereby causing "material injury" to Canada's domestic industries. This article discusses a number of the actions involving Chinese exports which were initiated or concluded in Canada over the course of the year.

Chinese exporters may want to remain mindful of the duties that have been imposed on certain exports from the PRC because these additional duties can significantly add to the costs of doing business in Canada. Moreover, Chinese exporters should be conscious of the possibility that they, too, may find themselves subject to such investigations in the future. In order to avoid the imposition of additional duties, exporters should first take care to ensure that they do not dump products into Canada and, second, in the event that an investigation is initiated, consideration should be given to full participation in the process.

ALUMINUM EXTRUSIONS

The Canada Border Services Agency (CBSA) initiated its dumping and subsidy investigation on August 18, 2008 and the investigation was finally concluded in 2009. In its final determination, the CBSA determined that the estimated overall weighted average margin of dumping was 72.6%. The CBSA made its determination based on section 20 of the *Special Import Measures Act* (SIMA). The margin of dumping assigned to non-co-operative exporters was 101% of the export price. Moreover, the CBSA found that subject goods benefited from subsidies which were found to be on average equal to 47% of the export price of the goods. On March 17, 2009, the Canadian International Trade Tribunal (CITT) concluded that these dumped and subsidized goods caused material injury to the domestic industry. Accordingly, antidumping and countervailing duties were imposed although the CITT did grant a number of the 119 product exclusion requests made.

Subsection 45(1) of the SIMA provides that the CITT shall, on its own initiative or on the request of an interested person, initiate a public interest inquiry if it is of the opinion that there are reasonable grounds to consider that the imposition of antidumping and countervailing duties, or the imposition of such duties in the full amount, would not or might not be in the public interest. The CITT received such requests for a public interest inquiry; however, the CITT ultimately found that there were no reasonable grounds to consider that the imposition of antidumping and countervailing duties would not or might not be in the public interest. Accordingly, in a decision released on June 30, 2009, the CITT decided not to initiate a public interest inquiry into the matter.

Subsection 76.01(1) of the SIMA provides that the CITT may conduct an interim review of a finding or order and that such an interim review may concern the whole finding or order, or any aspect of it. The onus is on the requester to establish that an interim review is warranted. The CITT received a request as early as June 9, 2009 for an interim review of the CITT's finding issued just a few months earlier. The requester sought to have excluded from the scope of the finding certain extruded aluminum shapes used solely as components in the requester's proprietary lines of shower enclosures. In an order issued on July 24, 2009, the CITT decided not to conduct an interim review of its findings.

WATERPROOF (RUBBER) FOOTWEAR

The CBSA initiated an investigation into the alleged dumping of waterproof (rubber) footwear from the PRC (and Vietnam) on February 27, 2009. In its final determination, the CBSA determined that the estimated overall weighted average margin of dumping was 36.6%. In this case, the "normal value" (one of the components of the margin of dumping) could not be based on the domestic selling prices of like goods in the PRC pursuant to section 15 of the SIMA, because all exporters sampled are export-oriented firms which do not sell the goods in their domestic market. Instead, the CBSA calculated a "constructed normal value" pursuant

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to section 19(b) of the SIMA on the basis of the aggregate of the cost of production of the goods, a reasonable amount for administrative, selling and other costs, and a reasonable amount for profits. The margin of dumping assigned to goods shipped by exporters who were sampled but who failed to co-operate was 43.8% of the export price. Those exporters who were not sampled were assigned a margin of dumping of 11.8% of the export price.

On October 13, 2009, the CITT issued its finding that the subject waterproof footwear had not caused, nor threatened to cause, material injury to the Canadian industry. As a result, the provisional duties assessed by the CBSA ceased to apply and no further duties would be collected in future. Central to the "no injury" finding was the CITT's view that despite an increase in imports of the subject goods from 2007 to 2008, the domestic industry was able to increase its production, sales and market share despite the removal, in 2007, of antidumping duties on a large portion of the subject goods. With respect to its "no future injury" finding, the CITT's view was that the co-existence of complementary imported and domestically produced waterproof footwear offerings largely responds to different market needs, which is consonant with retailers' desire to offer a wide range of products and price points to their customers and therefore the evidence did not support an imminent future threat of injury.

WOOD SLATS

The CITT had made its material injury finding concerning imported wood slats from the PRC (as well as from Mexico) on June 18, 2004. An expiry review of the finding was initiated by the CITT on November 7, 2008 and was concluded on July 15, 2009. On March 6, 2009, the CBSA determined that expiry of duties would likely result in the continuation or resumption of dumping of the subject goods by exporters from the PRC. Following a public hearing by the CITT to consider the issue of whether the resumption of dumping would likely result in injury or retardation to the Canadian industry, the CITT decided to renew the finding for an additional period of five years. The CITT was influenced, in part, by the current economic conditions where producers in the subject countries have increasing overcapacity to use and a greater incentive to sell.

LAMINATE FLOORING

The CITT had made its material injury finding concerning imported laminate flooring from the PRC (as well as from France) on June 16, 2005. As part of the enforcement of the finding, in 2009 the CBSA concluded a re-investigation of normal values, and the CITT issued a notice of expiry seeking submissions on whether an expiry review of the finding was warranted. On August 11, 2009, the CITT issued Notice of Expiry No. LE-2009-001 respecting its finding on *Laminate Flooring*. The CITT received no submissions in support of an expiry review and a continuation of the finding. As a result, since the Canadian industry expressed no interest in having the finding continue, the CITT declined to initiate an expiry review, with the result that the original finding will expire on June 15, 2010.

FASTENERS

The CITT had made its material injury finding concerning imported fasteners from the PRC (as well as from Chinese Taipei) on January 7, 2005. As part of its enforcement of the finding, the CBSA initiated a re-investigation of normal values on September 15, 2008 that was concluded on February 23, 2009. As a result of representations from the parties about significant changes affecting the industry, the CBSA embarked on a new re-investigation on September 24, 2009 that is scheduled to be completed on March 24, 2010.

Meanwhile, an expiry review of the finding was initiated by the CITT on April 22, 2009 and is still ongoing. As a result of the commencement of the expiry review, the President of the CBSA initiated an investigation on April 23, 2009, to determine whether the expiry of the finding is likely to result in the continuation or resumption of dumping and/or subsidizing of the goods. The CBSA's investigation was concluded on August 20, 2009. The President of the CBSA determined that the expiry of the findings is likely to result in the continuation or resumption of dumping of the goods from the PRC and Chinese Taipei, and the subsidizing of such product from the PRC.

The CITT held a public hearing in Ottawa commencing on November 16, 2009 and had set aside time for oral testimony and argument by parties who filed requests for product exclusion. The CITT's decision in the expiry review is scheduled to be issued on January 6, 2010.

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OIL COUNTRY TUBULAR GOODS

The CBSA initiated an investigation into the dumping and subsidizing of oil country tubular goods on August 24, 2009. At the time of writing, the CITT had issued a positive preliminary determination of injury on October 23, 2009, and the CBSA issued its preliminary determination of dumping and subsidizing on November 23, 2009. A detailed statement of reasons had not yet been published by the CBSA as of the date of writing.

In its preliminary determination, the CBSA issued estimated margins of dumping and amounts of subsidy for 11 exporters. The estimated margins of dumping ranged from 33.94% to 110.69%. The estimated margin of dumping assessed on "all other" exporters is 167%. With respect to the subsidy investigation, the estimated amounts of subsidy ranged from 0.050% to 2.47%. The estimated amount of subsidy assessed on "all other" exporters is 15%. As a result, an exporter who was not assigned specific normal values has been assigned a total provisional duty rate of 182%.

MATTRESS INNERSPRING UNITS

The CBSA initiated an investigation into the dumping of mattress innerspring units on April 27, 2009. At the time of writing, the CITT had issued a positive preliminary determination of injury on June 26, 2009 and the CBSA issued its preliminary and final determinations of dumping on July 27 and October 26, 2009 respectively. In addition, the CITT issued a positive material injury finding on November 23, 2009. At the date of writing, a detailed statement of reasons had not yet been published by the CITT.

In its final determination of dumping, the CBSA found that Chinese exporters were dumping the goods with an estimated overall weighted average margin of dumping of 57%. The margin of dumping assessed against non-co-operative exporters was 147.4%.

COPPER PIPE FITTINGS

The CITT had made its original material injury finding on February 19, 2007. On November 12, 2009, the CBSA initiated a re-investigation of the normal values and export prices of certain copper pipe fittings originating in or exported from the PRC (as well as from Korea and the USA). The CBSA is not initiating a re-investigation of the amount of subsidy respecting certain copper pipe fittings from the PRC at present. It is anticipated that the re-investigation will be concluded on or before April 1, 2010.

WATERPROOF (PLASTIC) FOOTWEAR AND BOTTOMS

Antidumping duties on waterproof (plastic) footwear and bottoms from the PRC were the subject of the CITT's initial injury finding on December 8, 2000. The original finding was renewed on December 7, 2005 for another five-year term. On October 21, 2009, the CBSA initiated a "re-investigation" of the normal values and export prices of the subject goods. The re-investigation is scheduled to be completed on February 23, 2010 following the opportunity for interested parties to file submissions and reply submissions.

COMMENTS

The foregoing indicates that in 2009, the PRC has continued to be a focus of Canadian manufacturers who complain that Chinese exporters are selling "dumped" or "subsidized" goods into Canada, thereby causing "material injury" to Canada's domestic industries.
In fact, 2009 has been a very active year for trade remedy investigations generally. This may suggest that Canadian manufacturers are becoming more accustomed to the antidumping and subsidy complaint/investigation process and will in future increasingly treat the filing of such complaints as another arrow in their quiver of options to deal with import competition.

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New Twist on Law of Dumping of Goods from State-Influenced Economies

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Producers and importers of Chinese and Vietnamese goods, and their competitors, take note: the analysis of whether the goods are being dumped in Canada may take on a whole new complexion following the decision of the Federal Court of Appeal in *Tianjin Pipe (Group) Corporation v. TenarisAlgomaTubes Inc.*

International and domestic law prohibits injury caused by the "dumping" of goods, which occurs when imported goods are sold at less than "normal" value. Under Canada's *Special Import Measures Act* (SIMA), the Canada Border Services Agency (CBSA) usually determines normal value by assessing the fair costs of production of the actual goods in question, with reference to other producers in the same country.

However, section 20 of the SIMA provides that where goods are imported directly from a prescribed country (currently only China and Vietnam), if in the CBSA's opinion the price of the goods is "substantially determined" by the government of that country, then normal value is determined by reference to goods produced in *another* country, other than Canada.

The significance of this section is apparent. Under the default regime, normal value may be quite low if the goods are produced in a country where macroeconomic conditions have a significant downward effect on the costs of production, such as inexpensive labour and limited government regulation. Under the alternative analysis prescribed by section 20 of the SIMA, the normal value of the goods may not reflect those macroeconomic conditions. Thus, Chinese and Vietnamese goods stand to lose significant price advantages if the CBSA is of the opinion that the price of the goods is "substantially determined" by the government.

The question in the *Tianjin Pipe* case was whether the CBSA had erred in its opinion that the price of certain carbon or alloy steel oil and gas well casing had been "substantially determined" by the Chinese government. The CBSA concluded that the cumulative effect of the Chinese government's administrative, regulatory, and tax measures had a considerable impact on the Chinese steel industry through means other than competitive market forces. First, the CBSA found that the government exerted significant control of the sector through state ownership, including control of buyers, suppliers, and other industry participants. Second, the CBSA found that the government exerted significant control through the China Iron and Steel Association. The CBSA found that the association was a government body because its functions replaced a government ministry, the Communist Party Secretary was a member of its top management, and its stated purpose included strengthening the government's control and administration of the sector. Last, the CBSA found that the Chinese government exerted significant control of the sector through the China National Iron and Steel Industry Development Policy. The CBSA found that the policy was more than a mere guideline, as the administration and enforcement of the policy included penalties for its violation and a long list of parties who would be held accountable for such violations.

Before the Federal Court of Appeal, the producer, supported by the Chinese government as intervener, argued that the phrase "substantially determined" could only apply if the Chinese government had *directly* caused the price of goods to be set at a certain level, below the cost of production. The court dismissed this argument, holding that the phrase "substantially determined" captures the various ways in which governments could exert a determinative influence on pricing, *directly or indirectly*. The court also noted that by granting the CBSA the power to decide in its "opinion" whether prices have been substantially determined, Parliament gave the CBSA discretion which ought to be given considerable deference by the court. As such, the court dismissed the challenge to the CBSA's determination.

This case may have significant ramifications for allegations of dumping of Chinese and Vietnamese goods in Canada. The court has affirmed the CBSA's authority to take a broad view of whether the government of China or Vietnam (or any other country that is prescribed in future) has substantially determined the domestic price of goods. In coming to that opinion, the CBSA is empowered to look behind what foreign governments say about their domestic policies, and to consider a broad range of evidence concerning measures that directly or indirectly affect the price of the subject goods. If the CBSA applies this analytical framework more frequently to the swelling imports of Chinese and Vietnamese goods, determinations of dumping of such goods may become more common in Canada.

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World Trade Organization: 2009 China Decisions Break Important Ground

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In 2009, two World Trade Organization (WTO) Panels issued decisions in cases to which China was a party. Both cases were initiated by the U.S. in April 2007. The first relates to Chinese measures relating to the protection and enforcement of copyrights in China, which the U.S. alleged violate intellectual property rights under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The second involves measures relating to the importation and distribution of films, Audiovisual Home Entertainment products (AVHE products), sound recordings and publications. The U.S. alleged that these measures violated Chinese commitments under the General Agreement on Tariffs and Trade (GATT), the General Agreement on Tariffs in Services (GATS), and China's Accession Protocol. This article provides a brief overview of both cases.

INTELLECTUAL PROPERTY PROTECTIONS REGARDING COPYRIGHT

In the first case, *Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, the U.S. challenged several aspects of China's intellectual property laws. The U.S. led a three-pronged attack, alleging that aspects of Chinese copyright law, customs law and criminal law violate obligations under TRIPS. The impugned copyright measures involve laws that protect rights only in those works that are authorized for publication or distribution by the Chinese government. In some cases, works are subject to a content review prior to authorization, which review is to protect the Chinese public from offensive material. In its January 2009 decision, the Panel found that this part of China's copyright law was inconsistent with certain of China's obligations. Specifically, Article 5(1) of the Berne Convention (1971), which is incorporated by Article 9.1 of TRIPS, requires the provision of rights to authors in countries other than the country of origin, and that these rights should be equal to those in the country of origin (in addition to any rights required elsewhere in the Berne Convention). The Panel held that Chinese copyright law did not protect the rights of foreign copyright holders in this way. Additionally, the Panel found that these measures constitute a violation of Article 41.1 of TRIPS, which requires parties to make enforcement mechanisms available for breaches of intellectual property rights under TRIPS.

The U.S. challenged Chinese customs measures as violating Article 59 of TRIPS, which requires parties to give authorities the power to destroy or dispose of infringing goods. The U.S. challenged measures respecting the auctioning by Chinese authorities of infringing goods seized at the border after the infringing trade-mark is removed from the item. The Panel held that Article 59 is not applicable to those measures related to goods destined for export. However, the Panel held that the Chinese measures were inconsistent with Article 59 insofar as simply removing an infringing trade-mark is not generally sufficient to then lawfully releasing the goods into the stream of commerce.

The U.S. also alleged that Article 61 of TRIPS, which requires parties to provide criminal sanctions for all commercial-scale copyright piracy and willful trade-mark counterfeiting, was breached in that the criminal offences in Chinese law for violations on a commercial scale were insufficient to satisfy China's obligations under TRIPS. The Panel rejected this argument stating that the U.S. had not met its burden on this point. In the course of this decision, the Panel did give guidance on how to determine whether a criminal threshold is appropriate in the circumstances. Thresholds cannot be set so high as to be divorced from commercial reality. Moreover, to determine what constitutes a "commercial scale", one must consider the product being sold and the market it is being sold in. Technological advances and the evolution of marketing practices must also be considered.

RIGHTS REGARDING DISTRIBUTION OF AUDIOVISUAL PRODUCTS

A WTO Panel issued a second decision involving China in August 2009. In the case of *Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, the U.S. alleged that various Chinese restrictions on the importation and distribution of U.S. films, AVHE products, sound recordings and publications violate provisions of the GATT, GATS, and the Accession

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Protocol. The Panel found that China had indeed breached some of its obligations under these provisions. Restrictions on the distribution of publications, AVHE products and music were held to violate Arts. XVI and XVII of GATS, which require treatment no less favourable than that accorded to domestic suppliers, unless otherwise set out in the GATS Schedule. Moreover, restrictions on the distribution of foreign publications were found to violate the national treatment requirements under GATT. Finally, China was found to have breached parts of the Accession Protocol to which it agreed when joining the WTO in its prohibitions on the rights of foreign companies to import films, AVHE products, publications and sound recordings.

The Panel did not accept all of the claims by the U.S. In particular, the U.S. had argued that China violated national (i.e., non-discrimination) treatment obligations under GATT in that only two companies distribute U.S. films in China, whereas domestic films are distributed by numerous companies. The Panel recognized that there was no explicit requirement in Chinese law that foreign filmmakers use only two distribution companies. The Panel suggested that foreign companies could use other existing distributors, or apply to create new ones. The U.S. also argued that this same provision of the GATT was violated by measures which allegedly discriminated against foreign suppliers in relation to the digital distribution of sound recordings, such as distribution over the Internet. The panel held that the U.S. had not shown that the products were "like products". Specifically, the Panel ruled that insufficient evidence had been led to show that music distributed over the Internet was a "like product" to the imported hard copies.

China had argued a defence under Art. XX of the GATT, which allows for measures that would otherwise offend GATT requirements where the measure is necessary for the protection of public morals, among other things. The Panel did not accept this argument, finding that the measures were not "necessary". Interestingly, the Panel refused to rule on whether this defence was available for breaches of the Accession Protocol, or was limited to breaches of GATT. Both China and the U.S. have appealed this decision. The Appellate Panel's report is expected at the end of December 2009.

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