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## TARIFFS AND TRADE

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Committee on Subsidies and  
Countervailing Measures

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### US INITIATION STANDARDS: COUNTERVAILING DUTY INVESTIGATIONS

#### Communication from Canada

The Government of Canada expressed concern with regard to US initiation standards in countervailing duty investigations in the April 1990 meeting of the Committee on Subsidies and Countervailing Measures. Since that time, a GATT panel examining the United States Imposition of Anti-Dumping Duties on Imports of Seamless Steel Hollow Products from Sweden has concluded that the US authorities had initiated an investigation without taking steps which could reasonably be considered to be sufficient to ensure that the initiation of this investigation was in accordance with US obligations. As well a recent decision by the US Court of International Trade faulted the US Government for investigating a complaint against Venezuelan rod imports. The court held that the US petitioner lacked standing to bring the case because its petition was not filed "on behalf of" the industry in question. A further area of concern with regard to the US initiation standards is in the examination of "sufficient evidence" before an investigation is initiated. We thus draw to your attention the Government of Canada's concerns in this area and note such practices may affect the exports of all Committee members.

The US authorities have, on three recent occasions, initiated countervailing duty investigations even though petitions alleging subsidization appeared not to contain "sufficient evidence" to warrant further investigation. Specifically, no prima facie evidence was submitted to support claims that the subject Canadian exporters benefited from the alleged subsidies, that the US industry was materially injured and that there was a causal link between the subsidized imports and the alleged injury. As a result of the initiation of these investigations, Canadian exporters were forced to undertake costly legal defences. The initiation of these investigations also causes uncertainty as to the future availability of the product under investigation, potentially reducing sales and encouraging other US industries to file unsubstantiated petitions leading to further harassment of Canadian exports to the US.

Canadian authorities are concerned that low standards of initiation, as employed by the United States, may not be consistent with the Agreement on Interpretation and Application of Article VI, XVI and XXIII of the

General Agreement on Tariffs and Trade. Specifically, Article 2:1 of the Subsidies Code states that a request for initiation of a CVD investigation:

"shall include sufficient evidence of the existence of (a) a subsidy, and if possible its amount, (b) injury within the meaning of Article VI of the General Agreement as interpreted by this Agreement and (c) a causal link between the subsidized imports and the alleged injury" (emphasis added).<sup>1</sup>

The key phrase in interpreting this Article would appear to be the term "sufficient evidence". A common definition of the term evidence is "something that furnishes proof", while sufficient is defined as "enough to meet the needs of a situation or proposed end".<sup>2</sup> Thus, "sufficient evidence" should be interpreted to mean enough proof to meet the situation or proposed end. In determining the proposed end for which the evidence is required, it is important to recall the general principles or intent of the Code. The preamble to the Code notes that "Ministers ... agreed that the Multilateral Trade Negotiations should, inter alia, reduce or eliminate the trade restricting or distorting effects of non-tariff measures and bring such measures under more effective international discipline".<sup>3</sup> Further, the preamble states "Desiring to ensure ... that countervailing measures do not unjustifiably impede international trade".<sup>4</sup>

In the view of the Canadian authorities the intent of the Code and of Article 2:1 is to seek balance between two objectives, to reduce the trade distorting or harassment effects of the application of countervailing duty laws while maintaining a government's right to protect its producers from injurious subsidized imports. "Sufficient evidence" should thus be interpreted to mean **enough proof of the existence of subsidization and injury to prevent the unjustified harassment of exports through initiation of unwarranted countervailing duty investigations.** At the very least, "sufficient evidence" must be interpreted as more than trivial evidence that the industry in question has received a subsidy and that, prima facie, the subsidized imports are causing material injury. A lower threshold of evidence opens the application of countervailing duty laws to abuse. Petitioners could request investigations purely on speculative grounds to cause uncertainty in the market and increase the costs of exporting.

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<sup>1</sup> Agreement on Interpretation and Application of Article VI, XVI and XXIII of the General Agreement on Tariffs and Trade (relating to subsidies and countervailing measures), done 12 April 1979, (hereafter GATT Subsidies Code).

<sup>2</sup> See for example Webster's Ninth New Collegiate Dictionary, Merriam-Webster, 1986 p.430 and p.1179.

<sup>3</sup> See supra note 1.

<sup>4</sup> See supra note 1.

The Canadian authorities contend that the US authorities are not requiring "sufficient evidence" when initiating countervailing duty investigation. The US authorities have initiated three investigations of Canadian exports (plastic tubing corrugators<sup>1</sup>, extended wheel based limousines<sup>2</sup> and thermostatically controlled appliance plugs and internal probe thermostats<sup>3</sup>) even though the petitions in question contained no evidence

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<sup>1</sup>On 7 November 1989, Cullom Machine Tool and Die Inc. of Cleveland, Tennessee filed a countervailing duty petition alleging injury as a result of subsidized Canadian imports. On 7 November the International Trade Commission (ITC) initiated an investigation with regard to injury (54 Fed. Reg. 47583). On 22 November 1989 the Canadian Government passed a diplomatic note to the US authorities arguing that the petition should be rejected on grounds that it did not contain "sufficient evidence" as required by Article 2:1 of the Code. On 27 November the Department of Commerce (DOC) initiated an investigation (54 Fed. Reg. 50263). On 19 December the ITC determined that there was no reasonable indication that the industry in the US was materially injured, or threatened with material injury by reason of imports that are being subsidized (55 Fed. Reg. 372). The investigation was thus terminated.

<sup>2</sup>On 24 July 1989 Southhampton Coach Works of Farmingdale New York filed a petition on behalf of the extended wheel base limousine industry alleging that US producers of limousines were being materially injured by the importation of subsidized Canadian limousines. On 24 July the International Trade Commission initiated an investigation of injury (54 Fed. Reg. 31897). On 9 August the Canadian authorities presented a diplomatic note to the US authorities arguing that a countervailing duty investigation should not be initiated on the grounds that the petition failed to provide evidence to support allegations that extended wheelbase limousines from Canada were subsidized, nor did it attempt to link subsidy and injury as required by Article 2:1 of the GATT Subsidies Code. On 15 August the DOC initiated countervailing duty investigations (54 Fed. Reg. 34805). On 25 October the DOC preliminarily determined that "no benefits which constitute subsidies within the meaning of countervailing duty law are being provided to manufacturers, producers, or exporters in Canada of limousines" (54 Fed. Reg. 43444). On 19 March 1990, the DOC confirmed its preliminary determination with regard to countervailing duties (55 Fed. Reg. 11035). The countervailing duty investigation was thus terminated.

<sup>3</sup>On 18 April 1988 Triplex Inter Control Ltd. of St. Albans, Vermont filed a countervailing duty petition alleging that US producers of thermostatically controlled appliance plugs and internal probe thermostats were being materially injured by subsidized imports from Canada, Malaysia and Taiwan. On 18 April the International Trade Commission initiated an investigation of injury (53 Fed. Reg. 14801). On 11 May the Department of Commerce (DOC) initiated a countervailing duty investigation (53 Fed. Reg. 16747). On 22 July the DOC preliminarily determined that the Canadian producer in question had not received countervailable benefits (53 Fed. Reg. 27738). On 13 December the DOC issued a final negative countervailing duty determination (53 Fed. Reg. 50057). The countervailing duty case was thus terminated.

that the industries have received subsidies or were eligible to receive subsidies. In all three cases, the petitions for the imposition of countervailing duties merely contained generalized descriptions of programmes that had been found countervailable in other investigations and that "may be available to the Canadian industry". The petitioners did not attempt to provide evidence that the producer in question received subsidies or was eligible to receive subsidies nor did the petitioners attempt to estimate the amount of subsidy received by the Canadian industry.

For example, in the case of plastic tubing corrugators the petition alleged that the Canadian respondent may have received a countervailable subsidy under the Regional Development Incentive Programme and/or the Industrial Regional Development Programme. While the petitioner correctly stated that these programmes had been found countervailable in past investigations, no evidence was presented that would indicate that the Canadian company had received a subsidy. With regard to eligibility for funding the petitioner stated that "the Canadian producer is located in an economically depressed region and thus eligible for benefits under this programme". No evidence was provided to substantiate this claim. In truth, as the US authorities were informed prior to initiation, the respondent was located in the Toronto region which is not considered an economically depressed region.

Similarly, in the case of thermostatically controlled appliance plugs and internal probe thermostats the petition for countervailing duties provided no evidence to support allegations that Canadian appliance plugs and thermostats were being subsidized. The petition briefly described two programmes, the Programme for Export Market Development (PEMD) and the Regional Development Incentives Programme (RDIP) and suggested that Canadian production and export of the product in question "would be eligible" for assistance under PEMD and that "funds may have been distributed" under RDIP, after noting that the programme was discontinued in 1985. As in the case of plastic tubing corrugators, the firm was not located in a region that is considered to be economically depressed and was thus not eligible for funding under RDIP. With regard to PEMD, the petition did not substantiate the allegation nor provide any further evidence that a subsidy may have been received.

The Canadian authorities are also concerned that the US authorities do not examine whether the petitions contain "sufficient evidence" of material injury and a causal link between subsidy and injury. In the three cases cited above, the US authorities initiated investigations without requiring that petitioners demonstrate that there is "sufficient evidence" of injury or "sufficient evidence" of a causal link between the alleged subsidy and the injury.

For example, in the case of plastic tubing corrugators statements contained in the petition pertaining to import volume, import penetration and underselling were either unsupported or based upon mischaracterization of import statistics and other data. Further, the petitioner's claim of

injury rested on two statements that were highly speculative. First, the petitioner claimed that the market should have grown tenfold because demand for corrugated plastic tubing allegedly increased tenfold between 1982 and 1988. There was no basis cited for these estimates. Moreover, there was no logical relationship between increases in demand for pipe in 1982-1986 and demand for plastic tubing corrugators in 1986 through 1988. Second, the petitioner claimed that the US industry had suffered from substantial decreases in domestic production, employment and sales. Elsewhere, however, the petitioner asserted that he represented total US domestic production and that his production, sales and employment had not declined, but remained constant. Despite the apparent lack of evidence of material injury an investigation was initiated by the US authorities.

It is the view of the Canadian authorities that the US authorities may not be properly applying the requirements of Article 2:1. The initiation of countervailing duty investigations on the grounds of unsubstantiated allegations combined with the ITC practice of automatically initiating injury investigations the day the petition is received, results in initiation of virtually all countervailing duty investigations that are formally requested. This appears to be in contradiction to Article 2:1 of the Code which requires the presentation of "sufficient evidence" of subsidy to avoid harassment through the misuse of CVD laws.