International Trade Centre

Business and the multilateral trading system

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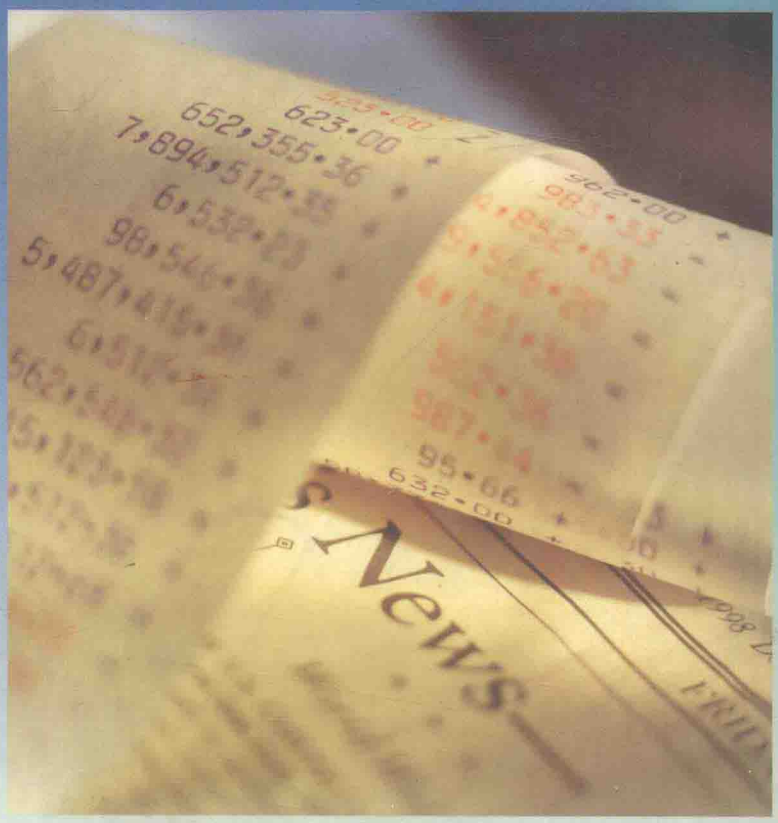
Business Guide to Trade Remedies in Canada

Anti-dumping, countervailing and safeguards legislation, practices and procedures



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INTERNATIONAL TRADE CENTRE UNCTAD/WTO
Business Guide to Trade Remedies in Canada: Anti-dumping, countervailing and safeguards legislation, practices and procedures
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Guide to trade remedy procedures (anti-dumping, countervailing and safeguard) aimed at exporters from developing countries and transition economies, with particular reference to trade remedy legislation and practices of Canada – examines origins of trade remedies and their administration in the country under review; considers role of institutions responsible for trade remedy administration, and the WTO rules governing trade remedies (WTO Agreements on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, WTO Agreement on Subsidies and Countervailing Measures, and WTO Agreement on Safeguards); presents general concepts of anti-dumping, countervailing and safeguard procedures in the Canadian law; reviews the role of the Canadian International Trade Tibunal (CITT) in considering safeguard measures; includes listing of Canadian anti-dumping and countervailing duty investigations with selected abbreviated examples, and bibliographical references.

Subject descriptors: **Canada, Import Regulations, Anti-dumping, Anti-Dumping Agreement, Agreement on Safeguards, Agreement on Subsidies and Countervailing Measures.**

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Foreword

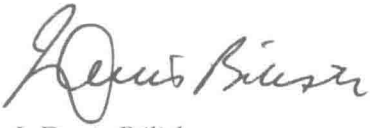
Under the WTO Agreements, Members have the right to apply trade remedies in the form of anti-dumping, countervailing or safeguard measures subject to specific rules. The importance of these rules was highlighted at the WTO Ministerial Conference in Doha, where Members agreed to 'negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures...' (paragraph 28 of the Ministerial Declaration).

From 1995 to 2000, records maintained by the WTO Secretariat indicate that approximately 1,500 anti-dumping investigations were initiated worldwide. For almost three-quarters of these cases, exporters in developing and transition countries were the main targets. According to experience gathered under ITC's World Tr@de Net programme, businesses in developing countries and transition economies engaged in producing and exporting 'sensitive' products consider anti-dumping investigations, or the threat thereof, as a significant market access barrier to a number of major markets.

Parties involved in anti-dumping and other trade remedy proceedings, namely exporters, importers and domestic producers of the product in question, often know very little about the procedures themselves and what they entail. They are unaware of the basic substantive rules of the relevant WTO Agreements and/or implementing national legislation, and hence have very limited knowledge of their rights and are thus ill-equipped to defend their business interests. There has been a growing demand for a publication explaining to business people the essential laws applicable and practices followed in such proceedings.

It is in response to this demand that ITC has published this series of Business Guides to Trade Remedies. The three publications of this series concern the relevant trade remedy rules and practices of the European Community, the United States of America and Canada, which are the biggest traditional users of trade remedy measures. However, over the last few years, an increasing number of developing countries and transition economies have begun to implement trade remedy actions at an accelerated pace.

This guide focuses on Canada, which is an important market for many developing countries and transition economies and a frequent user of trade remedy measures. The main objective of this guide is to highlight those aspects of the law and practice of Canada and the appropriate provisions of the relevant WTO Agreements, which may be of practical interest to business managers, exporters and importers in developing countries and transition economies. This guide is not for specialists; special emphasis is therefore given to practical definitions, problems and recommendations.



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Note

Unless otherwise specified, all references to dollars ($) are to Canadian dollars, and all references to tons are to metric tons. The term 'billion' denotes 1 thousand million.

The following abbreviations have been used.

CCRA	Canada Customs and Revenue Agency
CITT	Canadian International Trade Tribunal
CUSFTA	Canada-United States Free Trade Agreement
DSU	Dispute settlement understanding
EP	Export price
EU	European Union
FD	Final determination of dumping or subsidization
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GSA	General selling and administrative expenses
ITO	International Trade Organization
MFN	Most favoured nation
MTN	Multilateral trade negotiations
NAFTA	North American Free Trade Agreement
NGO	Non-governmental organization
NTB	Non-tariff barriers
NV	Normal value
PAP	Profitability analysis period
PD	Preliminary determination of dumping or subsidization
POI	Period of investigation
SCM	Subsidies and Countervailing Measures
SIMA	Special Import Measures Act
SOR	Statement of reasons
The Code	The Anti-Dumping Code
WTO	World Trade Organization

Executive summary

This guide was written for exporters to Canada. It sets out what is important to know to do business and successfully navigate Canadian trade policy and law. For exporters identified in a Canadian dumping, subsidy or safeguard investigation, this guide provides the information needed to understand and optimally participate in these processes. Specifically, the who, what, where, when and why that exporters need to know in order to make their case, be heard and effectively position themselves. Knowledge is power and what is presented here is information needed to effectively manage the trade dispute process with Canada.

Beyond the law and the administrative processes, the sectors particularly sensitive to Canadians which represent the bulk of the trade actions are examined. In a broad sense, the principal sectors where exporters will encounter challenges are steel, textiles, apparel, footwear and agriculture. To be clear, there are major opportunities in the Canadian market for imports, but there may also be significant obstacles.

Canada is a major trading country with 43% of gross domestic product and one in every three jobs accounted for by international trade. The Canadian economy has experienced significant growth in the past decade and international trade has played a major role in that expansion. On average, Canada does $2.2 billion worth of trade daily. In 1999, exports of goods and services increased by 11.3% to reach $410 billion and imports to Canada increased by 7.4% to reach $384.6 billion. The United States is by far Canada's dominant trading partner, representing 85% of Canada's merchandise exports and provided three-quarters of its imports in 1999. The Canadian market is expected to continue to grow throughout 2001 and provide exporters with new opportunities to participate in the economy.

A 1997 examination by the Canadian International Trade Tribunal (CITT) of domestic and international use of anti-dumping and countervailing measures between 1988 and 1995 included estimates of Canadian imports and Canadian domestic shipments affected by these measures. At the end of 1995 there were 41 injury findings in place in Canada, covering a total of 97 actions and affecting imports from 33 countries. At that time, the value of imports affected by anti-dumping and countervailing measures was estimated to be $1 billion, two-and-a-half times as much as in 1990. Nevertheless, they accounted for only 0.51% of total Canadian imports, which was down from 0.54% in 1994. The value of Canadian domestic shipments affected by trade remedy actions was estimated at $4.3 billion in 1995 and accounted for 2.1% of total domestic shipments.

The CITT examination also noted a shift in the product coverage of the trade remedy actions. In the period 1992–1995 textiles, primary metals and other manufacturing accounted for 72% of affected imports whereas in the period 1988–1992, 70% of the actions were against imports of primary metals, machinery, electrical and agricultural goods. Changes were also noted in the countries affected by the actions. In the period 1992–1995, actions against imports from the United States and Pacific Rim countries increased, while those against the European Union and Japan declined.

While the numbers have not been updated recently, the earlier work highlights the fact that anti-dumping and countervailing measures have actually adversely affected only a very small percentage of Canadian imports and domestic shipments. Since the number of investigations launched between 1995 and 2000 has declined from the two previous five-year periods, it seems reasonable to conclude that trade remedy actions in the latest period have been no more onerous than in the previous periods. However, the mere threat of trade remedy actions can have a more profound negative impact on trade than the number of actual investigations indicates.

Of the 21 new cases launched by the Canada Customs and Revenue Agency (CCRA) between 1 March 1996 and 12 May 2000, 8 cases were related to steel products imported from many countries mainly in Eastern Europe, the European Union and the Pacific Rim. These cases affected imports from 26 different countries, many of which were either transition or developing country economies. None of the new steel actions covered goods imported from the United States. Six other cases were against American goods and included baby food, insulation board, concrete panels, electric refrigerators and bingo paper. Other products subject to new actions included refill paper, spiral books, garlic, filter-tipped cigarette tubes, iodinated radiographic (x-ray) contrast media and waterproof footwear.

It is clear that steel and steel products continue to be an area of high sensitivity in the Canadian market. This situation is unlikely to change in the foreseeable future. As far as remaining products are concerned, it is not possible to isolate any product areas that are especially sensitive to imports. Investigations have ranged from tractors and file folders to apples, gypsum board and pasta. The most that can be said is that Canadian anti-dumping and countervailing actions cover a very wide spectrum of goods and exporters should examine the market carefully before attempting to sell dumped or subsidized goods to Canada.

Canadian industry, even those in relatively small sectors, is familiar with Canada's trade remedy laws and does not hesitate to use them. Exporters shipping product into Canada that is dumped or subsidized run a risk of being caught up in these investigations especially because, in a relatively small economy, only a limited number of firms compete in any given sector and imports take on a high profile.

Import sensitivity in the Canadian market in areas such as textile, clothing, steel and footwear has been high for a number of years and these continue to be areas of concern. Canada is a party to the WTO Agreement on Textiles and Clothing and imports are generally controlled by that mechanism. Agricultural products, especially dairy and poultry, are another sector where the normal trade rules do not apply and exporters should be aware of marketing constraints before shipping these products to Canada. In this connection, it is worth noting that Canada has not taken any safeguard actions since the WTO was created in 1995.

The guide is focused on the Canadian trade remedy system. It examines what exporters might expect when identified in a Canadian trade dispute and factors to consider when entering the market for the first time. The guide is in five chapters: (1) The world trading environment and the WTO trade remedy system, (2) The Canadian trade remedy system, (3) CCRA questionnaires and the calculation of margins of dumping and subsidies, (4) The Canadian International Trade Tribunal: the injury decision-making process, and (5) The Canadian safeguards process. In each section there is information about specific Canadian trade actions, detailed process information, key points for exporters to consider and a focus on maximizing opportunities for exporters identified in Canadian trade investigations.

Chapter 1, The world trading environment and the WTO trade remedy system, examines globalization and economic integration, and provides a historical perspective on the evolution from GATT to the WTO. This section considers the WTO trade remedy agreements on safeguards, subsidies, and anti-dumping and countervailing measures. It also provides an overview of the anti-dumping and countervailing agreements investigation processes.

Chapter 2, The Canadian trade remedy system, is focused on Canada's anti-dumping and countervailing measures systems. The entire process is documented, from the proper filing of a complaint by a domestic producer through to the issuance of a final determination by CCRA. This section differentiates the dumping and subsidy investigations, outlines the decision-making framework and the time frames associated with this framework, and examines possible solutions such as undertakings.

Chapter 3, CCRA questionnaires and the calculation of margins of dumping and subsidies, provides details concerning the information that must be supplied by exporters to the Canadian authorities and the factors taken into account in making dumping and subsidy calculations, and provides specific illustrations of valuation methodology followed by Canadian officials. The focus is on Canadian Government research processes as well as on exporter information and verification requirements. It provides an understanding of how dumping, subsidy and normal value figures, among others, are calculated, and gives exporters specific guidelines on how to handle requests for information.

Chapter 4, The Canadian International Trade Tribunal: the injury decision-making process, outlines the second half of Canada's bifurcated trade remedy protection system. Anti-dumping and/or countervailing

duty measures may be imposed on imports only when two conditions are met: (1) a positive determination of dumping or subsidization; and (2) demonstrable proof that the dumping or subsidization is injuring the domestic industry. The CITT is responsible for the ruling on injury and the causal link to unfair imports. The paper describes the process, the injury criteria considered and the manner in which CITT members make decisions on injury.

Chapter 5, The Canadian safeguards process, examines temporary emergency measures available to Canadian producers faced with a surge in low-priced imports. Information is provided on Canadian law, procedures and the role of the Canadian International Trade Tribunal in considering safeguard measures.

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CHAPTER 1

The world trading environment and the WTO trade remedy system

Overview

Globalization, trade and economic integration

International trade, services and investment are linked

Globalization of trade in goods and services, finance, production and investment activities is occurring at a rapid pace. Part of this phenomenon is the direct linkage between trade, services and investment for doing business internationally. Trade and investment liberalization efforts are integral components of this process that affect developed countries as well as economies in transition (former State-trading countries) and developing economies. Exporters, especially those in developing countries, need to be aware of changes taking place in world markets and be aware of their rights under the WTO rules-based trading system.

Economic interdependence will continue with globalization

All forecasts suggest that the trend towards greater economic interdependence will continue. Increasing globalization of business operations is anticipated as corporate interrelationships expand, industries continue to develop new international alliances, and intra-industry trade in goods and services is promoted. Linking of production, technology and marketing along value-added lines is sharpening competition both for input and final goods and services throughout the world and between exporters seeking to meet the new trading opportunities created by these developments.

With enhanced globalization, technology and capital are becoming more diffused; service industry and personnel activities are less constrained by national boundaries; and information/communication and computer advances are rapidly disseminated worldwide. Improved modes of transportation continue to reduce distances and border obstacles to the movement of goods and services. Most economic activities now carried out in any one country can be organized and directed from anywhere in the world.

Dynamic economic change may lead to new risks for continued trade liberalization

Dramatic change is also taking place in individual countries. New technologies and new approaches in manufacturing and production mean the decline of some industries and the rise of new ones, changes in employment patterns and skills requirements, and extensive industrial restructuring. Policy initiatives are promoting market forces and efficiency as the way to achieve sustained economic growth. Pressures have been mounting since the December 1999 WTO Ministerial Conference in Seattle to constrain this process and these may pose dangers for exporters and for growth in world trade.

These developments have come together to create a situation in which market access to foreign markets is now viewed by governments and the private sector as covering all the laws, rules and regulations affecting the terms of entry for

foreign goods, services, investments, ideas and business people. The Uruguay Round negotiations and the WTO rules-based system go some distance towards meeting the challenges created by these developments; however, much more needs to be done to promote the continued liberalization of world trade.

The GATT/WTO – a historical perspective

Following the worldwide depression of the 1930s, characterized by extreme trade protectionism and the upheavals of the Second World War, the 1947 United Nations Havana Conference considered a proposal to create an International Trade Organization (ITO). The aim was to establish a functioning multilateral trading system that would promote trade expansion and an institution with strong decision-making and dispute settlement powers on trade matters. No major trading country ratified the ITO charter and it never came into existence.

Establishment of GATT

Fortunately however, the process of lowering trade barriers among countries was started. At that time, 23 countries adopted a provisional arrangement, the General Agreement on Tariffs and Trade (GATT). GATT was a modest beginning but included (1) an international agreement that sets out the rules for conducting international trade, and (2) an informal structure to administer the agreement. The text of the agreement could be compared to a law, and the structure and dispute settlement process to a combination of parliament and the courts. The term GATT was applied to both the agreement and the structure. A version of GATT exists today as part of WTO.

Basic GATT principles

GATT laid down the very important general principles of non-discrimination, 'national treatment', and progressive trade liberalization. These principles, with certain exceptions, ensured that GATT parties enjoyed equal treatment under 'most-favoured nation' (MFN) terms; that imported products, after payment of any applicable duty, enjoyed equal treatment with domestically produced goods; and that border measures were transparent, price-based (tariffs not quotas), bound against increases and reduced or eliminated over time.

Throughout the post-war period, Canada was a major supporter of the GATT system because it served the objectives of providing a relatively predictable set of international trade rules and procedures that facilitated participation in a global trading system. The GATT was particularly helpful in advancing the interests of small and medium-sized countries, and continues to benefit smaller exporting countries.

Initial GATT trade negotiations

The most visible role of GATT during its first decades was as a forum for periodic 'rounds' of negotiations to lower and remove tariffs and other customs impediments to trade. The first five rounds of negotiations were of relatively short duration and focused on tariff reductions. The sixth, the Kennedy Round (1963–1967), accomplished deeper and wider cuts in industrial tariffs and brought developing-country demands to the fore. It was also noteworthy for shifting the focus away from tariffs to non-tariff barriers (NTBs) when agreement was reached by a limited number of countries on the Anti-Dumping Code.

Non-tariff measures agreements

The Tokyo Round (1973–1979) also cut tariffs substantially and introduced a series of 'codes' or agreements on non-tariff barriers. These were negotiated mainly among industrialized countries and were binding only on those who signed them. They covered subsidies and countervailing duties, customs valuation, government procurement, import licensing procedures and technical barriers to trade.

Launching the Uruguay Round of trade negotiations

The Uruguay Round (1986–1994) was by far the most comprehensive and difficult negotiation ever undertaken in the GATT. It addressed inadequacies in the GATT organization and the difficult issues of agriculture, services and other trade-related issues such as investment and intellectual property. It was an enormously complex agenda that at the time was regarded by many as bold, daring, cutting-edge and stretching the limits of the GATT. Indeed, only after a breakthrough on agricultural issues did a final agreement become possible in December 1993, over seven years after negotiations had been launched in Uruguay.

The Uruguay Round results

In April 1994, the Final Act – incorporating some 40 Uruguay Round agreements and 26,000 pages of individual country schedules of commitments – was signed by representatives of 111 GATT countries. With a few exceptions, it was binding on all parties. Four of these agreements, covering bovine meat, civil aircraft, dairy and government procurement, had no membership obligations.

The Uruguay Round also led to the establishment on 1 January 1995 of the World Trade Organization (WTO) to succeed the GATT. As at 1 January 2002, WTO membership stood at 144 countries and some 30 other countries were negotiating to join. The establishment of the WTO as part of the round was an important step forward since it was the first new international institution created in the post-war years designed to deal with global trade issues.

WTO gives order to international trade and provides a forum to discuss trade problems

The WTO continues and expands the original GATT. It provides two main functions as an institution. First, it contributes to order and predictability by overseeing and managing the application of internationally agreed trading rules and provides various mechanisms for resolving disputes. Second, in keeping with its primary aim of liberalizing world trade, it provides a forum in which countries can discuss trade problems and negotiate the removal of impediments to freer trading arrangements.

Some trade policy experts argue that the organization's highly complex structures of councils which include all members and numerous subsidiary bodies are cumbersome, inefficient and require further renovation. The problem could grow worse as the WTO expands beyond the present membership, three-quarters of which are developing countries. At the same time, NGOs are concerned that the WTO represents a closed culture dominated by the commercial interests of the largest and most powerful industrial countries.

The evolution of the WTO trade remedy system

Building on the GATT provisions

Trade remedy provisions part of original GATT

Trade remedy provisions have been an integral part of the GATT since 1947. As noted above, the early GATT was mainly concerned with reducing and removing tariffs and dealing with customs border issues. Very little attention was given to the trade remedy provisions that are found in GATT Article VI covering anti-dumping and countervailing duties, Article XVI on subsidy practices and Article XIX dealing with emergency safeguard measures.

When the GATT was first negotiated, the trade remedy provisions were regarded as essential to the trade liberalization effort. Some countries needed to satisfy their domestic industries that governments would be able to protect them if imports caused injury. Little has changed in this regard in the past 50 years. Firms still seek this kind of assurance against injurious imports caused by foreign government subsidies, dumping or rapid changes in market conditions.

Complainants often comment that individual firms cannot and should not be expected to compete with the financial resources of governments. Nor should they have to compete against private sector firms determined to eliminate competition or who sell products in foreign markets for prices below that which they sell for at home. In the same vein, it is argued that where market conditions change quickly, firms should be afforded some breathing space to adjust to these new circumstances. The validity of these claims is recognized by the WTO through the provisions of the Anti-Dumping Agreement, the Subsidies and Countervailing Measures Agreement (SCM Agreement) and the Safeguards Agreement.

Anti-Dumping Code was first GATT Non-tariff Agreement

In the latter part of the 1960s dumping became a real concern for the international community. As a result, certain GATT members decided to initiate discussions during the Kennedy Round to establish rules governing the application of anti-dumping duties.

These negotiations resulted in the Anti-Dumping Code (the Code), which was agreed to by a limited number of countries, and provided common rules and procedures to be followed by them in anti-dumping cases. In many respects, the Code became a model for subsequent negotiation of other non-tariff agreements in the Tokyo Round.

First Countervailing Agreement negotiated in Tokyo Round

The Code, however, dealt only with one part of Article VI. The countervailing duties portion of the Article and subsidy practices under Article XVI did not become a focus of attention until the Tokyo Round negotiations. Bringing greater discipline to the use of countervailing measures and subsidy practices became a central objective for the trade remedy negotiations. The negotiations, which were very difficult because of the interface involved between government practices and programmes, eventually led to the Subsidies and Countervailing Measures Agreement.

The Agreement was relatively comprehensive in spelling out the rules and procedures to be followed in countervailing duties investigations and generally followed the procedures set out in the Anti-Dumping Code. However, it fell considerably short and did not come to grips with issues relating to subsidy practices, particularly their definitions and what subsidy practices should or should not be permissible in international trade. This Agreement was also limited in membership.

ADA and SCMA renegotiated and Safeguards Agreement negotiated in Uruguay Round

In the Uruguay Round, the Anti-Dumping and SCM Agreements were renegotiated and a new agreement on Article XIX safeguard measures was adopted. These agreements are now commonly known as the three pillars of the World Trade Organization's trade remedy system.

What are trade remedies?

Trade remedies are duties or other measures imposed to counteract injury from imports

Trade remedies are the rules, other than tariffs, under which countries can apply measures or duties that affect the price or volume of goods they import. Trade remedy actions by governments are important because they are basically inconsistent with the primary trade liberalization objective of the WTO, can directly influence business decisions affecting goods in international trade and can have an immediate and commanding impact on business and government decisions relating to the sale of goods in the marketplace.

Anti-dumping, countervailing and safeguard measures are approved trade remedies

Dumping is the export sale of a product by a private party at a price lower than the price at which the same good is sold at a profit in the exporter's domestic market. Subsidization usually means that government funding (e.g. loans at preferential rates, grants or tax incentives) has contributed, in one way or