New COVID law allows delays in trade remedy proceedings, risks WTO violations

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On July 27, Canada's Bill C-20, *An Act respecting further COVID-19 measures*, became law. Buried in Bill C-20, beneath changes to Canada's emergency fiscal measures, is the power to extend (even retroactively) the timelines for anti-dumping and countervailing duty proceedings in Canada, including the timelines for final determinations in dumping or subsidy investigations. This has the potential to delay and frustrate existing and new proceedings, causing uncertainty for importers, foreign producers and domestic Canadian industries. It also has the potential to violate Canada's WTO obligations.

C-20 in a nutshell

C-20 allows federal ministers, boards and tribunals to extend or suspend specified legislative time limits for up to six additional months, with the possibility for extensions or suspensions to apply retroactively to March 13, 2020 (even for expired limitation periods). However, no extension can have the effect of allowing a time limit to extend beyond December 31, 2020.

Impact on procedures under the *Special Import Measures Act*

The *Special Import Measures Act* is one of the laws subject to extended timelines. C-20 allows the government, via ministerial order, to suspend or extend certain legislated timelines for both the Canada Border Services Agency and Canadian International Trade Tribunal. The specific timelines that may be subject to extensions or suspensions include:

- Final Determinations (CBSA)
- Scope Rulings (CBSA)
- Determinations by designated officers (CBSA)
- Re-determinations by a designated officer or the President (CBSA)
- Ruling on appeals (CBSA and CITT)
- Ruling on reference questions (CITT)
- Injury inquiries (CITT)

- Expiry reviews (CITT)

All of the subject timelines are those that apply to the CBSA and/or CITT itself. They do not affect the deadlines that industry participants have to meet, for example the deadlines to complete written submissions or questionnaires. However, the CBSA and/or CITT would presumably have discretion to adjust timelines for participants to reflect any extension or suspension made in a proceeding.

CBSA struggling to process cases

Since March, we have witnessed an increasing backlog of anti-dumping and countervailing duty case and procedural delays at the CBSA, both in conducting current investigations – some of which have been significantly delayed – and in initiating new ones. We therefore expect the authority under C-20 to be used quickly to extend deadlines in a number of cases. This may achieve compliance with SIMA-mandated timelines. However, the potential for extensions and thus further delays – to both existing and new proceedings – will create additional uncertainty, and likely additional costs, for participants. As well, there may be consequential delays to related proceedings such as normal value reviews, the timing of which is subject to CBSA discretion.

Extensions could violate Canada's WTO obligations

The existing timelines contained in the SIMA reflect Canada's WTO obligations under the *Anti-Dumping Agreement* (ADA) and the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement).The exercise of ministerial discretion to extend those timelines therefore risks violating Canada's WTO obligations and exposing it to a challenge from other WTO Members.

A particular concern is provisional duties, which are levied between preliminary and final determinations of dumping and/or subsidization. Provisional duties are often prohibitively high because the current CBSA practice is not to use exporter data for preliminary determinations. Instead, the CBSA practice is to "estimate" normal values and export prices using information largely provided by domestic trade remedy complainants before concluding the final determination stage of an investigation. Consequently, the extended imposition of provisional duties poses important commercial risks for foreign exporters and importers into Canada because it is likely to shut subject goods out of the Canadian market for significant periods.

Both the ADA and the SCM Agreement specify four-month limits on the imposition of provisional duties. Under the SCM Agreement that limit is unqualified. Under the ADA it may be extended to six or nine months, but only if exporters agree or in circumstances that do not apply under Canadian law.

In a SIMA investigation, the duration of provisional duties is linked to the timing of final determinations of dumping and/or subsidization and of injury. These final determinations are required within 90 days and 120 days, respectively, from the date of the preliminary determinations. Therefore, an extension of the timeline for final determinations beyond four months may result in Canada imposing provisional duties in violation of its WTO obligations.

Conclusion

By their nature, anti-dumping and countervailing duty proceedings create commercial uncertainty and disruption. The timeline extensions enabled by Bill C-20 have the potential to compound these consequences and to contravene Canada's WTO obligations in the process. Importers and exporters of goods subject to SIMA proceedings and exporters' home governments should pay close attention to any ministerial orders extending SIMA timelines.

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