Now the Past is Unpredictable Too: Importers Face Enhanced Risk of Retroactive Anti-dumping Duties Despite Canada's "Prospective" Trade Remedy System

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Last month, the Canada Border Service Agency (CBSA) issued an updated policy on its administration of anti-dumping normal value reviews, which confirmed what some unfortunate exporters and importers had already discovered after the fact: Canada no longer has a truly prospective trade remedy system.

"Normal values" are the exporters' actual or constructed home-market prices that the CBSA compares to export prices for the Canada-destined goods to determine whether, and to what extent, goods are "dumped".

Under Canadian law – the Special Import Measures Act (SIMA) – the CBSA receives complaints about alleged dumping and conducts an investigation. If the goods are determined to be dumped, the CBSA establishes definitive normal values for goods to be exported to Canada. Those normal values apply prospectively, meaning that an exporter whose goods are subject to an anti-dumping order may price the subject goods to Canadian importers/customers at or above the normal value established by the CBSA, thereby eliminating the Canadian importer's liability for anti-dumping duties at the time of importation of the goods.

Canada's prospective system is intended to offer greater predictability than does a retrospective system like that in the United States, where liability for duties is merely estimated prior to importation and is definitively established only after importation – sometimes a year or more after. In fact, Canada has publicly promoted the benefit of this predictability and the advantages of its prospective system to importers and purchasers, contrasting it with the uncertainty created by other countries' retrospective systems.

In the Canadian system, normal values may be revised periodically because of re-investigations, re-determinations, or administrative appeals under the SIMA, but those revised normal values also apply to imports prospectively from their date of issue. Exporters with normal values have long understood that their Canadian importer customers could face potential retroactive anti-dumping duty assessments only if

exporters did not take reasonable steps to inform the CBSA of changes to their domestic prices, costs, market conditions or terms of sale, thus providing the CBSA with sufficient and timely information to allow it to make an informed decision on whether and when to update definitive normal values.

However, for about the last year, the CBSA's practice has been to insist on notification requirements that are more vague and onerous than those that were reflected in its policy and to impose a new requirement on exporters to make running export price adjustments that are disconnected from the definitive normal values established by the CBSA. As a result, it has been issuing retroactive duty assessments even where exporters have advised the CBSA of cost and/or pricing changes in their domestic markets and have updated their selling prices to Canada to ensure that they were above their (existing) normal values. This means that exporters effectively have to disregard their definitive normal values, attempt to guess at what their normal values may be on an ongoing basis, and have their importers suffer punitive consequences if the CBSA later deems those guesses incorrect.

Like virtually all recent changes to Canadian trade remedy regime, this recent change in practice conforms to the advocacy of steel producers in Canada, advocacy the Government has been unwilling to resist, even where the changes sought may breach Canada's WTO obligations. In this case, the producers' primary concern has been import competition from countries, like Turkey, that have experienced rapid currency devaluations. However, like most of the other recent changes, this one is a blunt instrument that applies to all sectors affected by trade remedies.

The updated policy, **set out in revised CBSA Memorandum D14-1-18**, reflects the CBSA's recent practice but does little to address the vagueness of the obligations it imposes on exporters to Canada. The memorandum cautions that the CBSA may retroactively assess anti-dumping duties for failure to: (i) "promptly notify" changes to domestic prices, costs, market conditions or terms of sale; or (ii) increase export prices in a timely manner where there are increases in domestic prices and/or costs, to ensure that sales to Canada are not only above the normal value but at or above selling prices and full costs and profit of the goods in the exporter's domestic market.

It further warns that where "changes to market conditions caused normal values to become significantly outdated" and "the exporter failed to price up its exports in a timely manner", the CBSA may issue retroactive duty assessments to the exporter's Canadian importers.

These statements leave considerable latitude for capricious and arbitrary enforcement. It is unclear, for example, how significant changes must be to require reporting, when reporting will be considered sufficiently prompt, on what basis normal values will be considered "significantly outdated", or how quickly export prices must be increased for those increases to be "timely". In other words, what is missing from the policy is guidance that would allow exporters and importers to specifically understand and plan for these additional obligations and to comply with them.

Notably, the memorandum does not address situations where normal values become "outdated" because of price and cost declines in the exporter's domestic market. In that case, the exporter has no ability to "price down", *i.e.* below its definitive normal values, because export sales to Canada at prices below normal values will result in anti-

dumping duty liability for the Canadian importer. In other words, the updated policy appears to be strictly a one-way street, one aspect of the policy that raises significant WTO compliance concerns.

Most fundamentally, the CBSA's updated policy removes much of the predictability of a prospective normal value system. Exporters and importers can no longer be confident that prices that they have agreed to, in good faith and with mutually understood commercial risk, that are at or above normal values issued by the CBSA – normal values that the CBSA had previously advised could be relied on until revised – will be sufficient to avoid duty liability when goods are imported into the Canadian market. The updated policy leaves importers exposed to retroactive duty assessments arising from normal value reviews but without the appropriate and fair evidentiary and procedural protections of a true retrospective system.

As with other import duties, importers are liable for payment of duties resulting from retroactive assessments. If they fail to pay, the purchaser of the goods may be required to do so.

For more information on how significant recent changes to Canada's trade remedy regime may affect your business, please contact one of the Partners in our **International Trade and Investment Group.**

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