Government of Canada
Rebuttal Comments

Anti-Dumping Proceedings:
Treatment of Section 201 and Countervailing Duties
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Introduction

The Government of Canada takes this opportunity to respond to comments filed with the Department of Commerce, further to its notice of September 9, 2003 with respect to the appropriateness of deducting duties applied under Section 201 of the Trade Act of 1974 as well as countervailing duties under the Tariff Act of 1930 from the export price and constructed export price in the calculation of dumping margins pursuant to the Tariff Act of 1930.

Background

Section 772(c)(2)(A) of the Tariff Act of 1930 provides that the price used to establish export price and constructed export price shall be reduced by the amount, if any, included in that price, attributable to any additional costs, charges, or expenses, and United States import duties, incidental to bringing the goods from their original place of shipment to the place of delivery in the United States. Section 772(d) provides for certain additional expense deductions in establishing constructed export price.

As the Department of Commerce has consistently recognized, U.S. law does not permit treating countervailing or safeguard duties, which are not "United States import duties", as a cost in calculating the export price and constructed export price in anti-dumping investigations or administrative reviews. This is confirmed by, *inter alia*, the Congress's express rejection, during the legislative process leading to passage of the Uruguay Round Agreements Act, of proposals to treat trade remedy duties as a cost, the introduction of a similar proposal in Congress earlier this year, and the Commerce Department's instant request for comments.

Canadian Position

The Department of Commerce has traditionally held the view that the deduction of trade remedy duties from the export price and constructed export price in anti-dumping investigations and administrative reviews would defeat the purpose of the trade remedy measure in the first place, i.e. to bring an unfairly traded price up to a fairly traded price. The calculation of a fairly traded price in the context of anti-dumping duty orders would be skewed if countervailing and safeguard duties were deducted from the export price.

Such a practice would require exporters to price their goods at levels above the fair price in order to overcome the effect of the other duties and demonstrate that they were in fact trading fairly. In the U.S. retrospective system, where final anti-dumping duty liability is normally determined in annual administrative reviews of the anti-dumping order, it is extremely difficult for an exporter or importer to ensure that it is pricing its goods above the fair price, because the fair price is only established following the administrative review, up to three years or more following the date of shipment. Treating trade remedy duties as a cost would exacerbate that difficulty, since the amount of such duties would not be known. As well, an administrative review of the anti-dumping order could only be finalized following the completion of the administrative review of the countervailing duty order on the identical goods for the same period. This requirement would severely limit the ability of the Department of Commerce to conduct administrative reviews on a timely basis.

Treating countervailing and safeguard duties as a cost, particularly in the context of the retrospective application of U.S. anti-dumping duties, would be a retrograde step in the evolution of U.S. trade remedy law. Such a practice would only increase the uncertainty facing exporters and importers, and undermine the remedial purpose of the antidumping law.

Canadian Practice

Almost half of the formal comments submitted to the Department mentioned Canadian practice. Canada Customs and Revenue Agency (CCRA) officials are unable to recall any case in which countervailing and safeguard duties were deducted from the export price and constructed export price in the calculation of dumping margins pursuant to an anti-dumping investigation. Section 25 of Canada's Special Import Measures Act does require, in those circumstances where the export price must be constructed because there is an affiliation between the exporter and importer of the goods, the deduction of both anti-dumping and countervailing duties from the price used to establish export price. However, under Canada's prospective system of anti-dumping enforcement, exporters/importers are given the opportunity to avoid deductions of such duties from the export price. As such, these duties will not be deducted if the export price is equal to or greater than the normal value of the goods, as established by the CCRA following investigation or review, without making the deduction for such duties. Therefore, if an exporter/importer sells the goods in Canada at a price level high enough to eliminate any dumping, which of course is the purpose of the imposition of anti-dumping duty measures, there is no deduction for either anti-dumping or countervailing duties.

In this regard, the contrast between the Canadian and U.S. systems, if the U.S. system were amended to permit deduction of other trade remedy duties from the export price in anti-dumping proceedings, is particularly evident. On the one hand, while the Canadian system provides for, and in fact encourages, the pricing of goods at fairly traded levels, the U.S. system would, if such a change were made, make it more difficult to price goods at such levels.