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Options for an Importer/Exporter/Foreign Producer to Restrict the Product Scope in an Antidumping Case

By Cyndee Todgham Cherniak on August 25th, 2015

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In modern antidumping cases, the complainants (with the help of the Canada Border Services Agency in Canada) draft broad product descriptions for the subject goods to be covered should an injury finding result in 5 years of antidumping duties. The broad product descriptions cover goods that the domestic industry actually manufactures and goods that the domestic industry wishes it could manufacture along with a buffer zone to prevent circumvention.

Once an antidumping investigation has been initiated, the Canadian International Trade Tribunal ("Tribunal") cannot modify the product description. This does not mean that there are no mechanisms to reduce the scope of the product description. On the contrary, there are three mechanisms in Canadian injury proceedings to reduce the scope of an overly broad product description:

1) An importer/exporter/foreign producer may, in the preliminary injury inquiry, ask the Tribunal (a) to divide the product scope into different classes of goods and (b) to make a no injury finding with respect to some of the goods (or all of the goods);

e.g., in the *Grain Corn* case, there is no injury with respect to processed grain corn because there is no domestic processed grain corn industry in Canada

2) An importer/exporter/foreign producer may, in the injury inquiry, ask the Tribunal (a) to divide the product scope into different classes of goods and (b) to make a no injury finding with respect to some of the goods (or all of the goods);

e.g., in the *Fasteners* case, while there is injury with respect to carbon steel screws, there is no injury and no threat of injury with respect to stainless steel and carbon steel nuts and bolts.

3) An importer/exporter/foreign producer may, in the injury inquiry, ask the Tribunal to grant product exclusions should the Tribunal make an injury or threat of injury finding;

e.g., in the Fasteners case, while there is injury with respect to carbon steel screws, carbon steel screws of certain lengths and diameters should be excluded because the domestic industry does not manufacture in these sizes. Also, certain carbon steel screws should be excluded because the domestic industry does not manufacture these types of screws and, therefore

will not suffer injury should the exclusion be granted.

Options 1 and 2 require the importer/exporter/foreign producer to get involved in the case very early in the process. The preliminary injury inquiry proceeding takes place over 60 days. Usually, the importers/exporters/foreign producers must present a compelling classes of goods argument on or about **Day 28** after the initiation. Importers/exporters/foreign producers MUST file a notice of participation by the stated deadline (**usually within 2 weeks of initiation**) in order to receive the documents on the record (including the confidential Complaint and CBSA memos). It is critical to engage counsel as quickly as possible because submissions on classes of goods must contain a significant degree of detail and supporting evidence.

Option 3 requires importers/exporters/foreign producers to understand the Canadian market and what the domestic industry does produce and does not produce, can produce and cannot produce. Product exclusion requests are filed in the injury inquiry. The Tribunal sets the date sometime near **Day 57** after the preliminary determination of dumping. The importers/exporters/foreign producers file a product exclusion request in proper form and the domestic industry is granted an opportunity to respond. The importers/exporters/foreign producers are granted an opportunity to respond to the domestic producer(s) reply(ies). In recent cases, the tribunal has granted parties an opportunity to provide *viva voce* evidence at the hearing concerning product exclusions. As a result, the effort required to request a successful product exclusion has increased (and the associated costs if counsel are asked to assist).

The Tribunal has granted seasonal product exclusions allowing SIMA-free imports during periods of time during the year (see *Garlic* and *Certain Whole Potatoes*). The Tribunal has granted product exclusions for certain sizes (see *Certain Fasteners*). The Tribunal has granted product exclusions for certain types and categories of goods. The Tribunal has granted product exclusions for premium priced items and certain patented items. There have been requests for country exclusions and producer exclusions that generally have not been accepted.

What is important to understand that there are these three mechanisms to maintain a portion of one's market share even if an antidumping order is ultimately rendered by the Tribunal. The key to success is getting involved very early in the process and developing the case for the narrowing of the product scope. Documentation is critical because the Tribunal needs to understand that granting of the request will not result in injury to the domestic industry. Rarely will a short letter containing a brief request suffice.

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