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EXECUTIVE SUMMARY

1. This study identifies and assesses differences between Canadian and U.S. antidumping (AD) laws and practice including revisions to reflect the World Trade Organization Antidumping Agreement (WTO ADA). This executive summary and the broad conclusions summarized in Chapter IV will be useful to those who are interested in how antidumping laws work but who may not have the time nor the inclination to delve into detailed analysis of antidumping laws in the remaining chapters.

2. The analysis reflects my experience as a policy advisor, administrator, investigator, negotiator and practitioner as well as discussions with colleagues and practitioners in Canada and the USA.[1] A range of issues were discussed with administering authorities, including members of the Canadian International Trade Tribunal (Tribunal) and Commissioners of the United States International Trade Commission (Commission). Submissions were received from and/or discussions held with the Canadian Steel Producers Association (CSPA), Canadian auto parts manufacturers, representatives of other industries in Canada and the USA (including the U.S. steel industry), and the Canadian Importers' Association.[2] Parts of the text were reviewed in draft by experienced officials and practitioners in Canada and the USA. Their advice and comments have been very helpful and have been incorporated wherever possible. However, any errors that remain are my own.

3. Canadian and U.S. antidumping systems differ in legislative provisions, administrative procedures and practice. Both systems are costly to access and are burdensome for respondents. Manufacturers in both Canada and the USA argue that their own AD system is not as effective as it should be. In their view, other countries discipline injurious dumping more effectively than their own authorities do. Clearly no exporter enjoys the irritation, cost and administrative burdens of being named in an antidumping action. What they consider to be fair play when protecting their own market becomes evil and harassing when they become the target of another's action. However, this study concludes both systems are effective in achieving their basic purpose, which is to eliminate the injurious impact of dumping.[3]

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1 This study expands on and updates an earlier draft prepared in conjunction with Riyaz Dattu, Partner, McCarthy Tetrault. Because the study has undergone such extensive revisions, particularly with respect to WTO ADA implementation, responsibility for the analysis and conclusions is mine.

2 While much AD activity between Canada and the USA in the 1990s has involved North American steel producers, this is not a study about dumping in that sector. However, CSPA concerns have been analyzed and reviewed in the context of Commerce AD investigations on *steel rails* and Revenue Canada's and Commerce's investigations of *flat-rolled steel products* and Binational Panel reviews of those decisions.

3 Defined in its simplest terms, dumping results from a firm selling a product in an export market at prices lower than in its domestic market. Over time, this definition has been extended to include exports at prices that do not reflect fully absorbed cost of production plus an amount for profit generally earned on home market sales.

4. Conventional wisdom in Canada suggests that U.S. AD laws and practice are far more effective than Canada's. This study examines in the broad elements of each system. It does not and cannot examine each minute and discrete procedure followed by administering authorities. While these procedures have been considered in reaching conclusions, time and space does not permit them to be examined in greater detail. There are simply too many permutations and combinations to be considered, particularly in the context of constructed value analysis.

5. The study concludes that each country has some elements of AD administrative practice that are more restrictive than the other's, the WTO ADA has reduced differences. These differences are most important in the area of ongoing enforcement. The U.S. enforcement system creates uncertainty and imposes heavy compliance burdens. The Canadian enforcement system is not ineffective; it is, however, less burdensome and more predictable.

6. Antidumping laws will tend to have a greater impact on Canada than on the USA even if the laws and regulations are identical and all investigators and decision makers equally enlightened. This is a fact of economic life based on the reality of differences in size of markets. Industry in Canada is probably more vulnerable to dumping related injury than their counterparts in the USA because of Canada's smaller domestic market. At the same time, because Canadian manufacturers in most industries tend to be more export dependent than their U.S. counterparts they will be impacted more seriously by the uncertainties created by antidumping investigations of their export activities and by the imposition of antidumping duties.

7. Implementation of the WTO ADA eliminated some differences and encouraged harmonization of regulation and practice.[4] U.S. and Canadian requirements to initiate an investigation are now more parallel. Nuisance cases should be precluded by improved positive methods for determining support for a complaint (standing). Further improvements include:

- new provisions have been introduced in both Canada and the USA to treat non-recurring or start-up costs in a fairer and more reasonable manner, but much remains to be done in this area.

- WTO provisions to reduce the risk of dumping being found through improper use of averaging have been implemented. Arbitrary or fixed amounts for profit may no longer be used in constructed cost calculations.

- the USA has introduced a sunset clause to review outstanding injury findings. Canada introduced a similar provision in 1984.

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[4] See David Palmeter. *Operation of the U.S. Trade Laws on the Post-Uruguay Round Era*, Report presented to the UNCTAD (December 1995) 2. In United States Implementation of the Uruguay Round Antidumping Code Journal of World Trade, Vol. 29, No. 3 (June 1995): 39. Mr. Palmeter notes that the WTO ADA - "... required relatively few changes in the lengthy and detailed Antidumping Law of the United States. *Some of these changes, however, are important and, for the most part are trade liberalizing*". (emphasis added)

- the duration of uncertainties in the U.S. enforcement system have been reduced but enforcement remains an important problem and a very significant difference between Canada and U.S. administrative practice.

8. As noted above, the most important differences between Canada and the USA are enforcement and cost of compliance. Revenue Canada generally establishes prospective normal values that is undumped export price levels which eliminate the need to pay antidumping duties.[5] These normal values which are updated regularly, apply to future importations. This prospective system effectively eliminates both dumping and injury caused by dumping. Importers know their liability for duty and their costs before importing the subject product.

9. Under the U.S. Customs service retrospective methodology, a deposit is collected in the amount of estimated antidumping duties. All importations are reviewed periodically (usually annually) by the Department of Commerce (Commerce) and additional duties may be collected or deposits refunded. In addition to the uncertainty which may last two years or more, Commerce administrative reviews must address and assess liability for each importation. The process is much more onerous than Revenue Canada's which may involve only a recent 60 day period in order to establish new normal values. Further, Commerce applies different rules in reviews than in the original investigation; rules which are more likely to establish dumping. However, the U.S. administrative review is now subject to shorter time limits as a result of implication of the WTO ADA.

10. The U.S. system permits exporters to reduce home market prices in order to eliminate dumping. This can result in the refund of antidumping deposits (after the administrative review) even if the exporter has not raised its prices to the USA.[6] This may be a practical option for some producers/exporters whose sales to the USA are much greater than in their domestic market. In these cases, it may be appropriate to forego higher pricing at home to maintain access to the larger USA market. In such situations, dumping may be eliminated but there will be no relief from injurious import competition. However, this may not be possible in some situations (e.g., many constructed cost investigations), and even where it is possible, it may not be a feasible nor an attractive option.

11. Although the Revenue Canada enforcement system is different from that of Commerce, it cannot be said it is less effective in achieving the Government of Canada's (and the WTO ADA's) objective - removing the injurious effects of dumping.

12. Antidumping regimes, if they are based on the relevant WTO rules, are designed to eliminate injury to local producers demonstrably caused by dumping.[7] Both Canada and the USA may in some situations impose antidumping duties that exceed the amount actually required to eliminate injury due to dumping. In these cases, additional duty may be seen as windfall or excess protection. Too little consideration is given to this situation and the implications for users of the dumped product.

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[5] In complex investigations, Revenue Canada may impose a duty based on a percentage of export price.

[6] See "Canada steel firms to get millions" *Globe and Mail*, March 29, 1996.

[7] Antidumping duties are not a cure-all. They are not meant to address injury not attributable to dumping.

13. Both Canadian and U.S. antidumping systems are complex - and their complexity is increasing even after implementing the WTO ADA. To an important degree, this is due to the proliferation of trans-national corporations whose cost-allocation methods and transfer pricing practices require special investigatory and cost attribution methodologies.[8] Complexity may be the price for fairness. Sophisticated record keeping can help to isolate evidence necessary to secure favourable adjustments or to address "shotgun" allegations and evidence of injury.

14. Antidumping laws allow for disciplining practices of foreign competitors such as injurious price matching, freight absorption or freight equalization which are not actionable under domestic competition or anti-trust laws. Nor do antidumping laws make allowance for selling at prices above variable cost but below fully absorbed costs.[9] Canadian exporters have asked why antidumping and not competition laws should regulate discriminatory pricing in a Free Trade Area. Analysis of this proposal goes beyond the scope of this study. However, several prominent Canadian competition practitioners have written thoughtfully on the subject and rejected the option.[10]

15. The essential purpose of AD laws is to discipline the injurious effects of dumped imports.[11] It is not surprising that exporters consider that any antidumping investigation targeted against them constitutes harassment and a blatant protectionist attack designed to reduce their exports. Canadian exporters and exporters in third countries who have been exposed to the U.S. AD system agree that the investigation, verification and enforcement in the USA is quite rigorous. Nor do third country exporters consider their exposure to Revenue Canada investigators a pleasurable experience. However, the enforcement system in the USA generates considerable uncertainty, and may discourage or frustrate continuing trade, including undumped trade.[12]

16. In particular cases, investigating authorities may act or appear to act with excessive zeal. Excessive zeal is difficult to identify or to measure; much of this evidence was anecdotal or based on subjective perceptions. (Targets of AD actions never view them as benign. AD systems are not viewed as good or better - all are bad and some are worse.) The proper test is whether Revenue Canada's[13] practice would preclude treatment of foreign selling or costing practices the same way

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8 Canada recognized this was an emerging problem when the Antidumping Act was introduced in 1968.

9 Peter Clark in a Presentation to Canadian Importers' Association, Toronto, April 12, 1994.

10 See for example, C.J. Michael Flavell, Q.C., and Christopher Kent, *Should Domestic Antidumping Law be Replaced with Competition Law?*, Competition Law; Vol. 13, p. 28, and C.J. Michael Flavell, Q.C., *Competition Law; The "Solution" for Trade Policy "Problems"? Not!*, presented to the C.D. Howe Institute (unpublished).

11 The purpose is not to eliminate dumping without regard to injury.

12 One U.S. practitioner, who normally but not exclusively represents petitioners, commented that the U.S. justification of its system of retroactive revision of duties is that the USA wishes to provide an opportunity for exporters to eliminate dumping margins. I have also heard these arguments from U.S. negotiators but cannot link them to a particular document.

13 Revenue Canada, Antidumping and Countervailing Duties Division, referred to here after as Revenue Canada.

Commerce would.[14] On balance, there is little difference between Canadian and U.S. practice in the initial investigation.[15] Amendments to implement the WTO ADA brought Canadian and U.S. practice closer together.

17. Failure to cooperate fully with either Canadian or American antidumping investigators will result in the use of arbitrary methods which often result in effective exclusion of the uncooperative exporters from the market. The burden of compliance in both systems makes complete co-operation very costly. Experience suggests that access to both systems is now beyond the means of small- and medium-sized business. The costs of participation exceed potential benefits and the prospects for no injury findings are limited. Thus complexity and cost may discourage compliance and may persuade foreign suppliers to abandon markets.[16]

18. Once dumping has been determined, an inquiry is undertaken to determine whether or not the dumping has caused or threatened material injury to production in the importing country. Independent agencies are responsible for injury investigations/inquiries. The Canadian International Trade Tribunal (Tribunal) and the United States International Trade Commission (Commission) are responsible for these deliberations. The Commission process is more investigatory than the Tribunal's which is much more like a trial, where parties have an opportunity to test each other's evidence.[17] Both procedures are burdensome and risk becoming even more onerous and costly.[18] Neither the Commission nor the Tribunal is reluctant to reach affirmative injury findings.

19. Statistically both systems appear to be relatively equivalent in providing protection from dumped and injurious imports. For example, the margins of dumping found by Revenue Canada and Commerce in the 1992/93 flat-rolled steel cases were roughly comparable; indeed, margins found for third countries by Revenue Canada were often higher. There were two no-injury findings for Canada in the U.S. cases and two for the U.S. in the Canadian cases.[19]

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[14] Certain practices in recent Canadian and U.S. decisions were reviewed with Revenue Canada and former U.S. Department of Commerce experts. Commerce and Revenue Canada reached the same or similar conclusions in similar circumstances.

[15] Other than statutory minima in the USA, which have now been eliminated by implementation of the 1994 AD Agreement and certain cost averaging methodology by Commerce which might be beneficial in some circumstances and not in others.

[16] See David Palmeter, *"The Antidumping Law: A Legal and Administrative Non-Tariff Barrier"* in *Down in the Dumps*, edited by Richard Boltuck and Robert E. Litan (the Brookings Institution, Washington, D.C., 1995): 80. For a very detailed analysis of the problems encountered in an investigation, see the report of the Binational Panel in *New Steel Rail, Excluding Light Rail, from Canada*, (USA-89-1904-08, August 30, 1990).

[17] Tribunal procedures do not, however, permit discovery. However, it is debatable whether the additional time and cost would produce better results.

[18] The WTO ADA, in attempting to safeguard against abuse, has become much more detailed. In part, this has been done to encourage uniformity and greater transparency. Greater transparency of procedures has not necessarily reduced the burden and cost of compliance. Hopefully, it will improve the prospects for successful defence.

[19] The Canadian carbon steel plate inquiry was actually two investigations; one for heat-treated plate and one for not heat-treated. These were joined into a single investigation

20. Readers should not rely too heavily on statistics of frequency of injury findings or the magnitude of antidumping margins to draw definitive conclusions about similarities or differences in the systems. Statistical analysis may mask important qualitative differences[20] in circumstances and indeed the real impact of decisions by investigatory or administering authorities. The qualitative aspects of this analysis are more important than any statistical "ready reckoning". However, the information required to do a complete qualitative analysis is not available, nor within the scope of this study.

21. One cannot simply assess impact by the frequency of affirmative injury findings and the magnitude of dumping margins found in each country. The frequency of affirmative injury determinations does not in itself necessarily tell us how effective a system is. A high percentage of affirmative injury findings may reflect proper screening of complaints prior to initiation as well as the ability of experienced counsel to avoid starting fights that are unlikely to be won. It may also be a function of smaller markets being more vulnerable to dumping than a larger one. It is important to compare the individual aspects of the two AD systems, including legislation, procedures, practice and cost of compliance and effect.

22. Each individual factor in the antidumping investigation and injury inquiry must be given appropriate weight as the importance of a particular factor will vary from one investigation to another. Although exporters might be able to make valid and objective comparisons based on their experience as respondents under both systems for the same product at the same point in time, those companies, with very few exceptions, are not likely to be located in either the USA or Canada.

23. Revenue Canada's investigators tend to have greater industry-specific knowledge than their U.S. counterparts. This in-depth experience in specific industrial product sectors enables them to seek and obtain, effectively verify, and analyze the information they require.[21] The Inspector General of the U.S. Commerce Department auditing the flat-rolled steel investigations concluded that lack of

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before the Tribunal inquiry was initiated.

[20] The product and country coverage may be different, as may be the timing and the strength of local producers.

[21] It would appear that Revenue Canada has made much progress since 1980. Stelco, Dofasco and Algoma, in commenting on Proposals on Import Policy, expressed concerns about staffing at Revenue Canada. They noted:

> "In determining and analysing what are frequently very complex, but very important, data and information, the Department is almost totally dependent upon the responses which it obtains from questions posed to the foreign exporters, who clearly have a self-serving interest in the result. It is virtually impossible, under present procedures, for the Departmental officers to have sufficient knowledge or understanding to be able to assess the quality or the good faith of the foreign exporters supplying the information. They are like the prize fighter entering the ring with one arm tied behind his back."

(Joint Submission of the Algoma Steel Corporation, Limited, Dofasco Inc, Stelco Inc. to the House of Commons Sub-Committee on Import Policy, March 30, 1981, 14.)

experience and industry knowledge among Commerce antidumping investigators leaves much to be desired in their performance.[22]

24. Antidumping legislation is administered and enforced differently in Canada and in the USA. Both systems are complex, and both are administratively and financially burdensome. Although Commerce's approach to the determination of dumping margins is more transparent than Revenue Canada's, this greater transparency does not necessarily translate into greater fairness,[23] at least in the earlier stages of investigation. AD investigations in the USA generally involve a higher cost of compliance than those in Canada. To some extent, this is a function of the greater volume of trade covered by an investigation of dumping into the larger U.S. market. The antidumping system administered and adjudicated by Revenue Canada and the CITT is as effective as the Commerce/USITC AD regime.

25. The study concludes with respect to some of the important elements of AD policy that:

- Revenue Canada has in the past been more thorough and proactive than Commerce about determining industry support for a complaint than Commerce. Differences in practice have been narrowed by implementation of the WTO ADA on Antidumping.

- After initiation, during the investigation phase, Commerce requirements on respondents can be more burdensome than Revenue Canada's.[24] This is often due, at least in part, to a higher volume of exports to the USA that require more documentation and more voluminous responses. However, because the WTO ADA provides detailed instructions about how to calculate dumping, it should not be surprising that Revenue Canada and Commerce require and seek similar information. Revenue Canada may require information at a different point in time than Commerce in its requirements but this appears to be due in large part to differences in statutory timelines. Both administrations treat deficiencies in replies quite harshly. Commerce procedures require notification of deficiencies to respondents so they may remedy them. Revenue Canada tends to "estimate" at the Preliminary Determination and correct deficiencies before the Final

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22 U.S. Department of Commerce, Office of the Inspector General (OIG) on *Operations of the Import Administration*, Report No. TTD-5541-4-0001 (December 1993). A Canadian exporter commented that this relative inefficiency and lack of expertise can make investigations and verifications more burdensome and compliance more difficult.

23 Revenue Canada is transparent in its dealings with respondents, particularly from the preliminary determination onwards. The Department provides a full disclosure of their methodology and calculations. While access to confidential information is envisaged in SIMA, Revenue Canada does not normally provide a petitioner's counsel access to the confidential submissions of respondents.

24 The questionnaire in the first Revenue Canada investigation under the revised (1995) Special Import Measures Act (SIMA) have been more burdensome than most earlier requests for information. This is because the revised SIMA requires more detail in order to assess profitability of home market sales and certain review periods have been extended.

Determination. Once again, this is due to statutory time limits. Computerization has made it easier for investigators to demand and receive ever more detailed information, increasing administrative costs and burdens of compliance.

- While Revenue Canada appears to be more rigorous in its preliminary assessment of antidumping petitions than does Commerce, the U.S. preliminary injury determination by the USITC eliminates more complaints at the preliminary stage[25] than the restricted and less transparent preliminary injury review undertaken by the CITT.[26] Draft complaints are thoroughly reviewed by Commerce and, like in Canada, most frivolous and/or unfounded petitions do not survive.[27]

- When Commerce and USITC activities are considered together, the impact of the pre-initiation/preliminary injury phases in both countries are roughly equivalent.[28] Revenue Canada's requirements are not designed to frustrate complainants. WTO ADA requirements that a properly documented complaint contain a reasonable indication of dumping, material injury (or threat thereof) to domestic production, and a causal link between the alleged dumping and the claimed injury are respected. There is no graveyard at Revenue Canada littered with the corpses of sound complaints unreasonably rejected. Should Revenue Canada decline to initiate based on inadequate of evidence of injury, the petitioner may seek a review by the Tribunal on the issue of injury. The Tribunal seldom reverses the decision of the Deputy Minister, Revenue Canada to initiate or not to initiate an investigation.

- The process for determining dumping and verifying respondents' submissions in both countries is very complex. The normal information requirements of respondents for initial investigations by Revenue Canada are essentially as burdensome as U.S. requirements, relative to the volume of trade involved.

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[25] David Palmeter. Report to UNCTAD, 1-2, where he notes that 2 of 12 investigations in the first 11 months of 1995 were terminated by the Commission. In *Polyvinyl Alcohol from China, Japan, Korea and Taiwan*, 731-TA-726-729 (Preliminary), USITC Pub. 2883 (April 133), he states this decision with respect to Korea was directly attributable to changes in U.S. law required by the WTO ADA.

[26] Revenue Canada is responsible for pre-initiation screening. Neither Revenue Canada nor Commerce seeks information from potential respondents prior to initiation. Revenue Canada may, however, take account of unsolicited submissions from potential respondents; Commerce may not, with the exception of submissions related to standing, go beyond the four corners of the complaint. The Tribunal must base its preliminary injury assessment on the information before Revenue Canada.

[27] United States General Accounting Office (GAO), Report to Congressional Requesters, *International Trade: Comparison of U.S. and Foreign Antidumping Practices*, GAO/NSIAD-91-59, (November, 1990), 19.

[28] Some cases that are initiated, eventually fail because, after thorough analysis, there is (a) no dumping; (b) no injury; or (c) no causal link between (a) and (b). Historically, about 30 per cent of cases fail at the final injury determination in both jurisdictions.

- Revenue Canada and Commerce employ similar methodology for identifying and calculating dumping. Certain practices in each system may be considered to be more restrictive than those of the other[29] on a general basis or in the context of a particular investigation. On balance, there is little difference in the levels of underselling (dumping) found in both countries.[30]

- Commerce grants petitioners' counsel access to the confidential submissions of respondents under an administrative protective order. SIMA contemplates similar access but as a matter of administrative practice, Revenue Canada does not automatically grant such access.[31]

- Access to confidential information permits U.S. counsel for petitioners to better monitor Commerce's activities. Petitioners' counsel input often leads to demands for additional information by Commerce and increases the cost of participation and compliance for both respondents and petitioners.[32] However, discussions

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[29] In the USA, pre-WTO legislated minimum profit and GSA expenses were examples. In Canada, treatment of certain expenses, including cash discounts and deferred discounts and rebates, was and continues to be less generous than Commerce practice.

[30] While this is a generalization, and the validity to the generalization may be affected by timing and circumstances, to do more than generalize would require more time and information than is available.

[31] If the respondent fails to provide a detailed non-confidential summary of its submissions, Revenue Canada would likely grant access to the confidential filings. See also Electrohome Ltd. and Deputy M.N.R., 11 CER 31, where Rouleau J. explained:

> "Disclosure of information, which is an essential element of the scheme and purpose of the Act must be balanced against some measure of reassurance to foreign companies that the confidential information with which they entrust our public officials will not be disclosed upon request. Consequently, even if I were persuaded that the word "may" in subs. 84(3) could have two possible interpretations I would be precluded from finding that it was mandatory as such a finding would fail to achieve the manifest purpose of the Act. The court should avoid a construction which would reduce the legislation to futility and should rather accept the construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result. Were I to accept the applicants' argument that once a request is made for confidential information the Deputy Minister no longer has any discretion in the matter, except to set out the terms and conditions under which it was release, I would be rendering the confidentiality provisions of the Act null and void. In effect, there would be little point in a foreign company designating the information provided by it as confidential since the Deputy Minister would have to disclose it upon request in any event."

[32] It is understood that APO access at Commerce was introduced because Congress in 1979 considered that the U.S. dumping authorities (Treasury) favoured respondents and a check on them was necessary. Whether or not it is too late for Commerce to reverse its

with U.S. experts and a review of Federal Register Notices of investigation results, suggest petitioners input may not have a determinative impact on final margins. Petitioners' comments may be adopted in some cases but in others, Commerce also accepts comments by respondents. Should Commerce disagree with the interventions by petitioners, they will reject them.[33] Canadian exporters, even those who have done well in responding to these additional questions, consider the process to be coordinated harassment, which adds to the cost of investigations, and increases the possibility of decisions based on "facts available".

- Counsel to petitioners can and do make representations to Revenue Canada about issues and practices they consider should be addressed during the investigation/verification and how they should be treated.[34] Further, Revenue Canada works closely with petitioners during the complaint assessment phase of the investigation in order to understand the production and costing processes for the subject products of the investigation. They also co-operate with petitioners to develop cost modules in order to assist them in verification. These modules permit easy identification of abberations from the norm and facilitate more effective and intensive verification of specific issues. Petitioners are not directly involved in or present at verification in either country.[35] It is understood that Revenue Canada considers their statutory time limits are too short to consider comments on respondents' filings by petitioners' counsel,

- In Canada, a negative Preliminary Determination (P.D.) of dumping terminates an investigation. In the USA, Commerce may continue their investigation to a Final Determination (F.D.) notwithstanding a negative P.D. However, in Canada, exporter responses are verified before the P.D. is made. Because of tight time limits in SIMA, the Deputy Minister, Revenue Canada need only estimate dumping at the P.D. In the USA, all information submitted which is used in a

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procedures does not mean that Canada should follow.

33 It is interesting that in corrosion-resistant steel, Commerce rejects a number of arguments by petitioners, which were subsequently accepted by the Binational Panel (see USA-93-1904-03, October 31, 1994). For detailed discussion of the use of BIA (facts available) where petitioners' information was accepted, see the report of the Binational Panel in *New Steel Rails* USA-89-1904-08, August 30, 1990).

34 In *beer* (NQ-91-002) even very detailed submissions by the Bureau of Competition Policy in support of U.S. respondents were addressed fully by counsel to the British Columbia brewers. In *polyphase induction motors from Brazil* (CIT-5-88), there were detailed representations made by counsel to petitioners which required a conference of both parties before senior Department officials to resolve the issues.

35 Because of their greater access to confidential information, counsel to petitioners in the USA can "second guess" Commerce but it is not clear how much their comments impact the margins calculated. Respondents too may comment and under Commerce procedures will be aware of petitioners' arguments. Revenue Canada does not automatically advise respondents of petitioners' claims, arguments and allegations.

Final Determination must be verified by Commerce. Verification by Commerce is undertaken after the P.D.

- An individual exporter found not to be dumping, or to be dumping at a *de minimis* level (less than 2 per cent), will be excluded from a Commerce investigation. Canada applies the *de minimis* standard on a country basis. Individual exporters at *de minimis* levels will continue to be included in an investigation as long as the country margin is not insignificant (*de minimis*). This is an important difference between Canadian and U.S. administration.

- The Tribunal's approach to determining injury (which involves a staff economic analysis, pre-hearing submissions, filing of evidence, public hearings and extensive testing of the evidence) is quite different than the investigatory approach undertaken by the USITC.[36] However, the frequency of affirmative injury findings is roughly similar.

- The Tribunal's process was consciously constructed, consistent with traditional Canadian policy and direction by the Courts, to ensure that trade-regulating Tribunals would be courts of easy access where small industries or individuals could represent themselves to reduce the cost of compliance. However, when many parties have significant interests at stake and significant monies are involved, much of the pivotal information will be in the confidential record. A self-represented party cannot access the confidential record because they are not represented by independent, specialized counsel. They are at a serious disadvantage without access to the complete record.

- Canada has traditionally focusses more on eliminating injury than the U.S. system, yet like the U.S. system, AD duties that are greater than necessary to eliminate the injurious effects of dumping are often imposed.[37] WTO ADA recognizes more clearly than the previous GATT Codes the interests of consumers and industrial users.[38] This has been reflected in national legislations. It remains to be seen whether, in practice, there will be a real change in practice to take account of these needs. Canada has a seldom used public interest review;[39] the USA does not; however, pressures are building within the USA to

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[36] Both the CITT, through extensive public hearings, and the USITC, by its information requirements and filing procedures, result in heavy costs on participants.

[37] Palmeter, *Report to UNCTAD*.

[38] WTO ADA Article 6.12. SIMA and the CITT Act and rules already envisaged participation by industrial users.

[39] SIMA s. 45 provides for a public interest review. This is done infrequently and in only one case was the duty imposed actually reduced. See CIT Report on Public Interest, *Grain Corn*, (PI-1-87) (October, 1987). The Tribunal's reasoning in *Refined Sugar* (PB-95-002) supporting a decision not to make a recommendation in the public interest suggest that the standards of persuasion are extremely high.

take greater account of the interests of industrial users.[40] Neither the USA nor Canada have a lesser duty rule.[41]

- The retrospective enforcement mechanisms employed by Commerce, i.e., how duties are collected or dumping is eliminated, although favourably modified by the WTO ADA, remain more trade-restrictive than Revenue Canada's prospective approach. Revenue Canada establishes prospective normal values that permit exporters to raise prices to eliminate dumping making payment of antidumping duties unnecessary.

- Under Revenue Canada methodology, importer and industrial users of the dumped product can generally know their costs and liabilities before importation. Under the U.S. retrospective system, the actual liability is not known until the administrative review has been completed which may be two years after importation.

- Revenue Canada does not permit absorption of antidumping duties by related parties, nor their reimbursement in any way. Commerce, however, does not count antidumping duties in its analysis of dumping in related party transactions because the amount of antidumping duty is not knowable at the time of importation. Some users of the U.S. antidumping laws consider this to be a serious weakness in enforcement.

- Canada introduced a sunset review provision in 1984[42] which requires a review or, in the absence of a review, rescission of affirmative injury findings within five years of making them. A review does not mean automatic rescission of a finding. Indeed, some findings remain in place even after two sunset reviews, i.e., they may remain in place for 15 years (or perhaps more) because there is no fixed termination date. Before the WTO ADA, the USA did not have a "sunset" clause. There is now a statutory sunset review provision in 19 U.S.C.A. § 1675(c)1. The USA is taking five years to phase in this new provision. (Canada took the same approach in 1984 when a sunset clause was introduced in SIMA s. 76(5).) It remains to be seen whether the detailed U.S. rules about sunset reviews are a major improvement over U.S. pre-WTO practice.

26. There is abundant anecdotal evidence of heavy compliance burdens and excess zeal by investigators from both countries. Because the U.S. market is much larger, it tends to attract larger volumes of imports. This creates substantially greater workloads for exporters caught up on U.S. investigations. Under the WTO implementing legislation Canada and the USA are moving closer together in their requirements. The USA is adopting some Canadian practices where Canadian practice was more restrictive, for example, the treatment of profits in related party transactions.

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[40] See, for example, General Motors' submissions to the U.S. Administration on WTO Implementation rule-making and the article "Bill Would Allow Commerce To Waive Unfair-Trade Laws", *Journal of Commerce* (December 14, 1995) page 2.

[41] As envisaged in Article 9:1 of the WTO ADA.

[42] SIMA s. 76(5).

Canadian practice with respect to the use of unprofitable sales in calculating normal values will be closer to Commerce practice.

27. It bears repeating that the most significant and important difference between Canadian and U.S. practice is in the enforcement regimes. While the duration of exposure to unliquidated liabilities under the U.S. system has been reduced, it:

- does not decide final liability until well after importation and sale of the goods;
- requires a very onerous and burdensome administrative review on an entry by entry basis;
- these administrative reviews do not apply the more favourable averaging rules envisaged by the WTO ADA.[43] This is a point of contention between Canada and the USA.

28. Revenue Canada operates a prospective enforcement system which usually permits exporters to adjust prices to eliminate dumping so that payment of antidumping duties is not necessary. Exporters selling at normal value are not avoiding payment of antidumping duties; they have raised their prices to eliminate dumping. Periodic reviews focus on a relatively brief, recent period to establish normal values. A somewhat longer investigation period (6 months to a year) period will be used to determine profitability. Retroactive application of antidumping duties in Canada is rare and would normally result from misrepresentation or the exporter's failure to report an important change in circumstances.

29. There are sound policy reasons why Canada as a large, but sparsely populated, trade-dependent country should avoid excessively burdensome requirements and harassment in its administrative practice and procedures. The Government of Canada must encourage and promote the competitiveness of all Canadian firms at home and in export markets. Security of access to export markets and diversification of exports are very important to Canada. Many Canadian manufacturers and exporters are more dependent on imported components and materials than their U.S. competitors.[44] Canadian producers will be less competitive both at home and in export markets if their foreign competitors can purchase parts, intermediate products and materials at lower prices.[45]

30. Protection is a privilege, not a right. Protection[46] transfers revenue from or imposes costs on the general resources of the country to provide benefits to a specific industry or industries. The purpose of antidumping laws is to offset the injurious impact of unfairly traded imports. However, once

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43 Palmeter. Report presented to UNCTAD, 10.

44 Foreign producers establishing a world scale North American production facility may find that a large portion of production of a Canadian plant, often up to 85%, may be exported. A similar sized plant in the USA may export 10-15% or less of its production.

45 Canada's decision to reduce tariffs on auto parts to make Canada a more attractive host to foreign investment are an excellent example of the pragmatism which must be exercised by Canadian policymakers.

46 It may also be argued that antidumping, to the extent that it eliminates the injurious impact of an unfair trade practice, is not protection.

prices are raised to the point where the injury specifically caused by dumping is eliminated, the collection of antidumping duties above that level constitutes an additional and unnecessary tariff/tax on Canadian users (i.e., protection).[47] Such protective/tax burdens, which are superfluous to achieving the object and purpose of the SIMA, must be considered carefully.

31. Because the USA has a much larger economy and domestic market than Canada, the impact of U.S. antidumping actions against Canada will generally be more serious for Canadian exporters than Canadian actions will be for U.S. firms. Because of Canada's much greater relative export dependence, an antidumping investigation would have a greater impact on a Canadian exporter than a U.S. exporter even if Canada and the USA had identical AD laws, regulations and practices. This is a fact of economic life.

32. If Canada is to negotiate more favourable antidumping rules either bilaterally or multilaterally, it must be recognized that many Canadian practices are quite similar to those we are trying to modify. Very significant modifications will be required to create a system that will not burden Canadian exporters disproportionately because of the smaller size of the Canadian market and its relatively greater export dependency. The parties must, of course, address these systems as they now are and not as they were before the of the WTO ADA was concluded.

33. The concerns of those whose exports have been caught up in antidumping investigations must not be trivialized or dismissed. These concerns are real. However, Canadian manufacturers too need protection from dumped and injurious imports. Indeed, because the Canadian market is small, Canadian industries may be more vulnerable to dumping than their U.S. counterparts. A balance must be sought.

34. Those who have been targets of U.S. actions but not of Canadian AD investigations may disagree with parts this analysis and conclusions. Clearly, there have been examples where U.S. "unfair" trade actions go beyond what is needed to do the job and have damaged or eliminated Canadian industry (e.g., *limousines* (USITC Publication 2220, 1989), which was a CVD action where a small Canadian producer was seriously, indeed, mortally harmed notwithstanding the absence of subsidies). The Commerce investigations of *new steel rails* (USITC Publication 2135, 1988) and *OCTG* (USITC Publication 1865, 1986) have had very negative impacts on Algoma and Sysco. However, the failed Canadian action against *cars produced by Hyundai* (CIT-13-87) did not enhance the Korean producer's position in the Canadian market and indeed, was probably a significant factor in its decline. While Canadian decisions have stood up well to Binational Panel reviews, certain aspects of decisions by both the CITT and Revenue Canada have been remanded. Based on the examination of many investigations and extensive personal experience, it is my view that Canadian legislation fulfils its basic purpose as well as does that of the USA. However, the U.S. system of enforcement is more burdensome than Canada's.

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[47] It may be possible to eliminate injury by imposing less than the full amount of the duty (the lesser duty rule).