

# **PUBLIC INTEREST ELEMENTS IN CANADIAN TRADE LAW**

## **Recent Developments**

**LAWRENCE L. HERMAN ©**

Cassels Brock & Blackwell LLP

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### Introduction:

Canada has a special feature in its trade law designed to take into account the public interest in cases where anti-dumping or countervailing duties are applied on imports. This provision allows the Canadian International Trade Tribunal<sup>1</sup>, in appropriate cases, to recommend that the government of the day reduce or eliminate such duties. The idea is to keep the price of imports down and to minimize the cost of anti-dumping duties that would ultimately be borne by the Canadian public in terms of higher prices.

The Tribunal regularly turned down requests for these kinds of public interest investigations since this feature was first introduced in Canadian law 1984. It has been noted in a previous commentary that one of the reasons this procedure has had infrequent success is because of the narrow interpretation of these provisions by the Tribunal<sup>2</sup>.

However, in some recent decisions the Tribunal appears to have taken a more liberal approach to public interest issues and has accepted public advocacy and consumer concerns, recommending that the federal government reduce anti-dumping duties to less

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<sup>1</sup> A quasi-judicial agency created under the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4<sup>th</sup> supp.), to determine if dumping or subsidization, as the case may be, has caused or threatens to cause material injury to the production in Canada of like goods.

<sup>2</sup> J.-M. Leclerc, "Reforming anti-Dumping Law: Balancing the Interests of Consumers and Domestic Industries", (1999) 44 McGill L.J. 111.

than the full amount<sup>3</sup>. These cases appear to have expanded the public interest concept and clarified the way the it will be handled by the Tribunal in the future. Of significance are three main factors emerging from the cases: price and/or price competition; availability of supply; and public health.

#### Public Interest Factors in Trade Cases:

Public interest hearings are held under Section 45 of Canada's *Special Import Measures Act* ("SIMA")<sup>4</sup>. That section provides that the Canadian International Trade Tribunal can hold an inquiry into the public interest after it issues a positive injury finding in anti-dumping or countervailing duty cases<sup>5</sup>.

Such an investigation is always *post hoc*. It is held only after anti-dumping or countervailing duties ("SIMA duties") are applied. The point of the subsequent section 45 inquiry is to determine whether there are public interest considerations that, as a matter of policy, warrant a reduction or elimination of those duties.

The provisions are a special feature of Canadian trade law. They are not specifically required under either the WTO Anti-Dumping Agreement<sup>6</sup> or the Agreement on Subsidies and Countervailing Measures<sup>7</sup>. In this regard, the Canadian system appears

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<sup>3</sup> Applying the so-called "lesser duty" concept as a way of directly compensating the public for any increased costs resulting from the application of full anti-dumping duties.

<sup>4</sup> R.S.C. 1985, c. S-15, as amended, most recently by S.C. 1999, c. 12 (Bill C-35).

<sup>5</sup> Injury determinations are made under section 42 of SIMA, which requires the Tribunal to hold an inquiry forthwith after the Canada Customs and Review Agency issues a preliminary determination of dumping or subsidizing. Such an inquiry is to determine if the dumping or subsidization, "has caused injury or retardation or is threatening to cause injury".

<sup>6</sup> Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Results of the Uruguay Round of Multilateral Trade Negotiations, WTO 1994, p. 169.

<sup>7</sup> Agreement on Subsidies and Countervailing Measures, *ibid.*, p. 264, referred to as the "SCM Agreement".

somewhat exceptional among the western industrialized countries. Neither the U.S. nor the European Union, for example, has such a feature<sup>8</sup>.

There is an argument that the underlying spirit in the WTO Agreements not only allows such a process in domestic laws and procedures but actually requires it. For example, Article 6.2 of the Anti-Dumping Agreement provides that throughout an anti-dumping investigation, “all interested parties” shall have a full opportunity for the defence of their interests and, to this end, domestic authorities are required to allow parties to meet and for rebuttal arguments to be presented. The definition of “interested parties” normally means the exporters, importers and domestic producers, but the Agreement allows member States to add to the list<sup>9</sup>.

Article 6.12 is the most important Uruguay Round innovation in this regard. It says that, “authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality”<sup>10</sup>.

While technically this provision relates to the investigation and injury determination phase only – as opposed to duty reduction following a finding – it indicates an awareness

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<sup>8</sup> The European Union has an element of public interest in the various stages of its anti-dumping and countervailing duty system in its “Community interest” clause. However, this is much less explicit, has no special hearing provision and is subject to broad discretion on the part of the Commission. There are no such provisions under U.S. trade remedy legislation in Title VII of the *Tariff Act of 1930*, 19 U.S.C. §§1671-1677. See: P. Moen, Public Interest Issues in International and Domestic Anti-dumping Law, Geneva, 1998.

<sup>9</sup> Article 6.11.

<sup>10</sup> Article 12.10 of the SCM Agreement contains identical language.

of the public interest factor by the Uruguay Round negotiators and a need for these kinds of concerns to be taken into account fully in the trade remedy process<sup>11</sup>.

Finally, both the Anti-Dumping Agreement and the SCM Agreement provide that the application of duties is to be “permissive” and that the final duty can be less than the dumping margin or amount of subsidy “if such lesser duty would be adequate to remove the injury to the domestic industry”<sup>12</sup>. In some respects, it is this “lesser duty” obligation that is at the heart of the public interest provisions in Canadian trade law<sup>13</sup>.

While accepting that the WTO Agreements do not specifically mandate public interest proceedings of the kind Canada has provided for, these GATT and WTO Agreement provisions have also been recognized by the Canadian International Trade Tribunal as providing a “useful backdrop” against which to consider the balancing of the various interests affected by the imposition anti-dumping and countervailing duties<sup>14</sup>.

#### Changes under Bill C-35:

Recently amended by Bill-C-35 in 1999<sup>15</sup>, section 45 of SIMA provides that, if the Tribunal makes a positive injury finding in respect of dumped or subsidized imports,

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<sup>11</sup> See Moen, *op. cit.*, at pp. 37-38.

<sup>12</sup> Anti-Dumping Agreement, Article 9.1; SCM Agreement, Article 19.2.

<sup>13</sup> See Moen, *supra*, for a history of and rationale for the development of the current WTO Agreement provisions and the previous GATT and 1979 Code provisions regarding the “lesser duty” concept and the notion of the public interest, *op. cit.*, pp. 28-49.

<sup>14</sup> *Refined Sugar, Refined from Sugar Cane or Sugar Beets, in Granulated, Liquid and Powdered Form*, Tribunal’s Consideration of the Public Interest Question, 4 April 1996, PB-95-002, p. 3.

<sup>15</sup> *An Act to Amend the Special Import Measures Act and the Canadian International Trade Tribunal Act*, passed by the House of Commons on 7 December 1998, 46-47 Eliz. II, 1997-98, S.C. 1999, c. 12, *supra*.

“. . . the Tribunal shall, on its own initiative, or on the request of an interested person . . . initiate a public interest inquiry if the Tribunal is of the opinion that there are reasonable grounds to consider that the imposition of an anti-dumping or countervailing duty . . . would not or might not be in the public interest.” (emphasis added)

Section 45 has been part of Canadian law since SIMA was first enacted in 1984<sup>16</sup>. The original wording was left unchanged until 1999. The previous version was skeletal and left out a good deal of the process involved in convening a public interest hearing. It simply read, in part, that if the Tribunal “is of the opinion”, after a finding, that anti-dumping or countervailing duties,

“would not or might not be in the public interest, the Tribunal shall, forthwith after making the order of finding,

(a) report to the Minister of Finance that it is of that opinion and provide him with a statement of the facts and reasons that caused it to be of that opinion.”

These changes were made following a Parliamentary review of Canada’s trade remedy legislation in 1996-1997. The changes are not of a major substantive nature but do add some important procedural points that were missing from the 1984 version of section 45. The changes make public interest hearings somewhat easier to initiate.

As noted, old section 45 merely provided that the Tribunal could initiate an inquiry where it was “of the opinion” that SIMA duties would not or might not be in the public interest. Although in practice, the Tribunal asked for the views of interest groups as to whether

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<sup>16</sup> R.S.C. 1985, c. S-15, originally passed as S.C. 1984, c. 25. The pre-Bill C-35 provisions on public interest were enacted in SIMA as a result of the 1982 Parliamentary report known as the Mackasey Report, which recommended that Canada’s trade remedy legislation contain some provisions to allow such representations: Report on the *Special Import Measures Act* by the Sub-Committee on Finance, Trade and Economic Affairs, June 1982, p. 27.

such an investigation should be started, there was no statutory right granted to parties to file these requests. Bill C-35 added the words, “on the request of an interested person”. While the decision whether to launch such an investigation remains discretionary on the Tribunal’s part, the addition of the reference to the filing of requests by interested persons codifies pre-existing practice and recognizes the public dimension of the trade remedy process.

In addition, the new version of section 45 states that the Tribunal may initiate a public interest inquiry if there are “reasonable grounds” for doing so. The old version did not contain this reference. While practically speaking, no such hearing could be convened in the absence of this kind of reasonable justification, this addition of the requirement for “reasonable grounds” usefully clarifies the CITT’s public interest jurisdiction.

One of the important other changes in new section 45 is the specific reference to factors, including “prescribed factors”, that the Tribunal “shall take into account” in deciding whether to launch a public interest investigation and in determining whether circumstances warrant a recommendation for duty relief. Subsection (3) provides:

“In a public interest inquiry, the Tribunal shall take into account any factors, including prescribed factors, that it considers relevant.”

A list of such public interest factors has now been prescribed under section 40.1 of the *Special Import Measures Regulations*<sup>17</sup>. The list is not exhaustive. It enumerates non-exclusive factors such as: the availability and supply of the goods to which anti-dumping or countervailing duties have been applied; the effects of such duties on competition in the Canadian market; the impact of these duties on users of the products as inputs for

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<sup>17</sup> SOR/2000-138, P.C. 2000-517, 6 April 2000.

further manufacturing. As well, there is a catch-all, allowing the Tribunal to consider “any other factors that are relevant in the circumstances”<sup>18</sup>.

#### The Views Expressed in the Parliamentary Review Process:

Bill C-35 resulted from a Parliamentary review of Canada’s anti-dumping and countervailing legislation by Joint Sub-Committees of the House of Commons<sup>19</sup>. The Joint Sub-Committees paid particular attention to these public interest provisions in the legislation and number of witnesses stressed their importance as a matter of transparency and confidence-building. In its final report, these provisions merited special coverage:

“... the Sub-Committees are persuaded that public interest plays an essential role in Canadian trade remedy legislation and that the law needs to be clarified for it to work properly. Therefore, the Sub-Committees recommend that a non-exclusive list of factors be included in section 45 of SIMA that would guide the CITT respecting whether and how to conduct a public interest inquiry.”<sup>20</sup>

The report also went on to note that,

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<sup>18</sup> In a commentary on the 1996 Parliamentary Joint Sub-Committee Report that predates the actual legislative and regulatory changes reviewed in this article, the author questions whether the promulgation of a list of public interest factors will add anything to the public interest process: Leclerc, *op cit.*, p. 131.

<sup>19</sup> In May, 1996, the Minister of Finance had asked the House of Commons Standing Committees on Finance and on Foreign Affairs and International Trade to review SIMA and to advise the government on what changes, if any, should be made to the law. The result was the creation of two sub-committees of each Committee, which held hearings jointly: Report on SIMA, House of Commons, Issue No. 2, Minutes of Proceedings and Evidence of the Sub-Committee on Trade Disputes, 9 December 1996.

<sup>20</sup> *Ibid.*, p. 35.

“Public interest is a term that should receive as clear an operational definition as do the terms dumping or subsidy, which are defined in law, or the term injury, which is largely defined in regulations . . .”<sup>21</sup>

However, the Sub-Committees stopped short of actually recommending new wording. The best they could do was to call for a clear “operational” definition of the term.

In its response to the Joint Sub-Committees’ recommendations, the Federal Government said that a list of non-exhaustive factors to guide the Tribunal in its assessment of the public interest was a good idea<sup>22</sup>. As a result, Bill C-35 included the provision allowing for such factors to be prescribed by Order in Council. No actual definition of the term “public interest” was included. The reference to a set of non-exhaustive factors was seen to meet the need for an “operational definition” referred to in the Joint Sub-Committees’ report.

#### Procedural and Timing Issues:

Notwithstanding the sharpening of section 45, the provisions are procedurally awkward. Only after anti-dumping duties are ordered following an injury inquiry under section 42 of SIMA are interested parties and stakeholders allowed to make the case for a public interest investigation. Requests are to be made within 45 days of an injury finding<sup>23</sup>. Responses to such requests are allowed, with the Tribunal making its decision on whether

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<sup>21</sup> *Ibid.* See also: Leclerc, *op cit.*, pp. 130-133, for a review of the deliberations and recommendations of the Joint Parliamentary Sub-Committee in its 1996 report.

<sup>22</sup> Government Response to the Report on the Special Import Measures Act, etc., Department of Finance, Canada, 19 April 1997.

<sup>23</sup> Public Interest Inquiry Guidelines, p. 1.

to convene an investigation within a targeted 76 days after the finding<sup>24</sup>. The process and timing for such requests are set out in the CITT's Guideline for Public Interest Inquires, 15 April 2000<sup>25</sup>.

The actual public interest hearing, however, is not convened for approximately 60 days following the decision to hold an investigation. After the hearing is complete, the Tribunal's recommendation to the Minister is not issued for a further 40 days<sup>26</sup>. The result is that approximately 180 days elapses after a material injury finding and the application of permanent anti-dumping duties before any public interest recommendations are made.

However, the period during which goods are affected by anti-dumping duties is actually much longer than this 180-day period. Under section 38 of SIMA, provisional duties are put into effect much earlier, once the Canada Customs and Revenue Agency makes its preliminary determination of dumping or of subsidizing and an estimate of dumping margins. Under the Canadian system, the preliminary determination of dumping or subsidization is normally made within 90 days after the initiation of an investigation by the Agency<sup>27</sup>.

Once provisional anti-dumping duties are imposed, a further 120 days elapses before the completion of the Tribunal's section 42 injury inquiry<sup>28</sup>. Anti-dumping duties apply during this entire period, from the time of the preliminary determination through to the

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<sup>24</sup> *Ibid.*, p. 2.

<sup>25</sup> The Guidelines and all other CITT-related reports and documents referred to in this article are found at the CITT's web-site, [www.citt.gc.ca](http://www.citt.gc.ca).

<sup>26</sup> *Ibid.*, p. 4.

<sup>27</sup> SIMA, section 38(1). In complex cases, the time for the preliminary determination can be extended to 135 days following the initiation of the investigation.

<sup>28</sup> SIMA, section 43(1).

completion of the Tribunal's section 42 inquiry. If the Tribunal makes a non-injury finding, duties are terminated and all duties collected are refunded. If the Tribunal makes a positive injury finding, the duties become permanent and last for five-years<sup>29</sup>.

In other words, SIMA duties, even if of a provisional kind, are in effect for 120 days before final duties are ordered by the Tribunal. Adding the time for the holding of a public interest hearing and the issuance of the Tribunal's recommendation, the result is a minimum period of 300 days -- approximately 9 months -- will have elapsed during which SIMA duties, in one form or another, are in effect and before any recommendation as to the public interest is made.

#### Retroactivity of Duty Relief:

There is nothing in SIMA or the *Special Import Measures Regulations* to provide for lesser or reduced anti-dumping duties to pre-date to the time when the Tribunal's recommendations are acted on by the Federal Government. Until recently, the policy position of the Department of Finance seemed to militate against any such retroactivity. This approach seemed to mean that, even if the Tribunal eventually recommended reduced duties, such reduction, through the necessary remission order<sup>30</sup>, would be *prospective* only. Anti-dumping duties in effect during this entire period would not be touched.

It should be noted that if the Tribunal accepts that the public interest demands that SIMA duties not be applied in full or in part it cannot actually order their reduction or elimination. It can only make a recommendation to the Minister of Finance specifying the

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<sup>29</sup> SIMA, section 76(7).

<sup>30</sup> Lesser or reduced duties are applied, as in the case of reduction of regular duties in other circumstances, by way of remission orders made under section 115 of the *Customs Tariff*, S.C. 1997, c. 36.

level of duty reduction or the price levels needed to eliminate injury to the Canadian producers. The final decision on the matter, however, rests solely with the Minister. There is nothing in the legislation that requires the Minister to act in any given way on a recommendation or in any specified time period<sup>31</sup>.

The issue of retroactivity came up in an important public interest decision of the Tribunal in *Prepared Baby Food*<sup>32</sup>, reviewed in more detail below. The Tribunal said it did not have jurisdiction to recommend retroactive relief<sup>33</sup>. It left this to the Minister. The eventual decision by the Minister to reduce duties was not applied retroactively<sup>34</sup>. The subsequent *Contrast Media* case<sup>35</sup>, however, also reviewed below, indicates a change in governmental policy in this respect.

#### “Exceptional” Remedy:

The public interest provisions take a back-seat to anti-dumping and countervailing duty relief. The prime focus in SIMA is on trade remedies and the application of duties to counteract the effects of dumping and subsidization. The Tribunal has oft repeated that

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<sup>31</sup> SIMA section 45(4) provides that, if the Tribunal is of the opinion that imposition of SIMA duties is not in the public interest, it shall “without delay” report to the Minister of Finance and provide the Minister with a statement of the facts and the reasons that caused it to be of that opinion. There is nothing in the legislation prescribing any kind of follow-up action by the Minister or any time-frame within which a decision must be taken.

<sup>32</sup> *Report to the Minister of Finance, Public Interest Investigation into Certain Prepared Baby Food*, PB-98-001, Statement of Reasons, 30 November 1998.

<sup>33</sup> Statement of Reasons, p. 42.

<sup>34</sup> The Remission Order made by the Federal Government under the *Customs Tariff*, *supra*, set out a confidential methodology for determining the Canadian re-sale price, as part of the lesser duty system recommended by the Tribunal. The actual Remission Order has not been made public, however. The issue of methodology is discussed in more detail below.

<sup>35</sup> *Report to the Minister of Finance, Public Interest Investigation into Certain Iodinated Contrast Media*, PB-2000-001, Statement of Reasons, 29 August 2000.

the public interest feature, “is to be applied on an exceptional basis, as for instance when relief provided producers causes substantial and possible unnecessary burden to users (downstream producers) and consumers of the product”<sup>36</sup>. A recommendation to the Minister of Finance to reduce SIMA duties will only be made “where the facts demonstrate a sufficiently compelling public interest rationale for doing so”<sup>37</sup>.

### The Concept of the “Public Interest”:

The absence of definition of “public interest” in SIMA was noted in one of the first public interest cases in *Grain Corn* in 1987, where the Tribunal observed,

“The term ‘public interest’ itself provides little guidance to the Tribunal, nor does Canadian jurisprudence offer a definition that is applicable in the context of SIMA, that is to say, within an international trading environment. Review of the case law in the United States and the European Economic Community (EEC) was similarly of little assistance in providing any precise and operational meaning to this term.”<sup>38</sup>

The point was repeated recently in *Prepared Baby Foods*, the Tribunal observing that the absence of a legislative definition meant that interpretation of the term perforce was left to the Tribunal<sup>39</sup>. But the Tribunal shied away from attempting a definition and instead

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<sup>36</sup> *Grain Corn*, Canadian Import Tribunal, Report on the Public Interest, October 1987, p. 2 (emphasis added). See also *Refined Sugar*, PB-95-002, Statement of Reasons, p. 4; *Prepared Baby Food*, PB-98-001, Statement of Reasons, pp. 8-9.

<sup>37</sup> *Prepared Bay Food*, *supra*, p. 9.

<sup>38</sup> *Grain Corn*, Report on the Public Interest, *supra*, p. 2. Several years later, in *Refined Sugar*, PB-95-002, the Tribunal referred to the “dearth of helpful Canadian jurisprudence on the meaning of the words ‘public interest’, but noted that the meaning of the words should be determined by “reference to the context and the objects and purposes” of SIMA: *supra*, p. 3.

<sup>39</sup> PB-98-001, Statement of Reasons, p. 7.

articulated an amalgam of factors that, taken together, comprised its view of the public interest concept:

“In the Tribunal’s view, a public interest investigation conducted pursuant to SIMA permits a wide variety of factors to be taken into account in considering the appropriate level of duties. The Tribunal finds support for this broader, more encompassing approach in a recent decision of the Federal Court of Canada, in which the Court stated,

“A review of the jurisprudence concerning ‘public interest’ reveals that it is a broad, somewhat undefined and flexible concept, which nevertheless includes considerations beyond the interests of the parties to a dispute.”<sup>40</sup>

Following the direction in *Prepared Baby Foods*, the subsequent *Contrast Media* decision found the public interest component, as it were, to be defined by the consumer nature of the product and by the fact that the product at issue related, directly or indirectly, to the public health of Canadians<sup>41</sup>. What could carry more of a public interest dimension than infant formula and x-ray imaging fluids needed for diagnostic procedures at hospitals?

In each case, the Tribunal considered a range of factors bearing on public health and welfare that it assessed as paramount. In *Contrast Media*, the factors included: price effects of anti-dumping duties on imaging product, availability of choice to radiologists, issues of supply to hospitals, competition factors related to the fact that there was a single Canadian producer, availability of alternate sources of supply. All of these, of course, are

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<sup>40</sup> *Prepared Baby Food*, PB-98-001, p. 10, *supra*, citing the Federal Court of Canada judgment in *Wang Canada Limited v. Minister of Public Works, et al.*, Court File N. T-944-98, 28 September 1998 at p. 12. See also: *Iodinated Contrast Media*, PB-2000-01, *supra*, p. 5.

<sup>41</sup> PB-2000-001, *supra*.

not necessarily confined to the X-ray imaging sector and could be examined horizontally, irrespective of product or product grouping. The driving consideration was that the product was essential to radiographic imaging and, like *Prepared Baby Foods*, was a case where price and availability would have a direct impact on the health and well-being of Canadians. Together, these various considerations together comprised the “public interest”.

Both of these cases predate the application of the recent SIMA amendments and the listing of prescribed factors in section 40.1(1) of the amended *Special Import Measures Regulations*, effective 15 April 2000, referred to earlier<sup>42</sup>. However, even with the listing of public interest factors in the amended *Regulations*, such as availability of supply, effect on price and competition and the like, the central term “public interest” remains undefined. At the end of the day, it is an amalgam of considerations that are subject to the views of each particular panel.

#### Initiation of a Public Interest Investigation:

Section 40.1(1) of the *Regulations* codifies the practice of the Tribunal regarding the contents of the post-inquiry request for a party to demonstrate that there are matters of public interest that warrant an investigation<sup>43</sup>. The Tribunal has repeatedly turned down requests by applicants for a section 45 proceeding where the material discloses commercial concerns but no real matters of broader public interest.

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<sup>42</sup> Under the transitional provisions in Bill C-35, if a properly-documented complaint of dumping or of subsidizing had been received by the Canada Customs and Review Agency before April 15, 2000, all proceedings are to be conducted under the former legislation: section 63, S.C. 1999, ch. 12.

<sup>43</sup> The contents of requests are set out in Appendix 1 of the Tribunal’s Guideline for Public Interest Inquiries, 15 April 2000, *supra*.

In *Hot-Rolled Steel Sheet*, the Tribunal observed that “the public interest is broader than private commercial interest” and that,

“those requesting an investigation must demonstrate to the Tribunal that the effects or potential effects that flow from the imposition of the anti-dumping duties extend beyond the narrow commercial interests of parties to an inquiry under section 42 into a broader cross-section of the public.”<sup>44</sup>

This conclusion affirmed the “exceptional nature” of the public interest proceeding, given that the prime purpose of SIMA is to protect Canadian producers from injury brought about by subsidized or dumped imports<sup>45</sup>. Accordingly, “the Tribunal must be satisfied that there exist compelling or special circumstances that necessitate a consideration of the public interest”<sup>46</sup>. Simply pointing to increased prices resulting from duties is not sufficient.

In *Preformed Fibreglass Pipe Insulation* the Tribunal refused to order a full investigation and rejected concerns about increases in price and reduced supply, stating that that “is a natural consequence of the of the anti-dumping regulatory scheme established by Parliament under SIMA”<sup>47</sup>. A similar result obtained more recently in the case of *Refrigerators, Dishwashers and Dryers*<sup>48</sup>. Commercial concerns, however strong, do not,

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<sup>44</sup> *Flat-Hot-Rolled Carbon and Alloy Steel Sheet Products*, PB-99-001, Statement of Reasons, 20 September 1999, p. 5.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Prepared Baby Food*, PB-98-001 *supra*, at pp. 8-9.

<sup>47</sup> *Preformed Fibreglass Insulation*, PB-93-001, Tribunal Consideration of the Public Interest Question, 28 January 1994, p.4.

<sup>48</sup> *Refrigerators, Dishwashers and Dryers*, PB-2000-002, Statement of Reasons, 3 October 2000. See also, *Caps Lids and Jars Suitable for Home Canning, Tribunal’s Consideration of the Public Interest Question*, PB-95-001, 26 February 1996.

in and of themselves, raise the exceptional or compelling circumstances needed to have the Tribunal launch a full-scope investigation under section 45.

The foregoing are instances where the applicants' material failed to disclose a true public interest dimension. There was no convincing evidence to show that the application of anti-dumping duties to the product concerned would prevent of entry into Canada of a sufficient supply of those goods, limit the choice of product for Canadian consumers or reduce competition among producers. What appeared to be lacking was some key element that took the issue outside of the private commercial domain.

Recent history has shown, however, that under the right circumstances the Tribunal will agree to proceed with section 45 investigations. *Prepared Baby Food* and *Contrast Media* are important new cases that illustrate, for example, that where public health and consumer choice of health-related products are involved, there is a better chance of having a public interest investigation launched. Each of these is looked at in greater detail in the sections that follow.

#### Price Issues:

While price and competition factors are closely-related, the impact of SIMA duties on import price and hence on input or consumer cost is often examined separately by the Tribunal. The *Grain Corn* case is an example. While the Tribunal said that the price effect of countervailing duties on imported product was not sufficient, in itself, to support a public interest finding, the price issue was virtually the only factor in that case and was central to the Tribunal eventually recommending duty relief.

The injury finding had led to the imposition of duties equal to \$1.10 per bushel or over \$46.00 per tonne as the margin of subsidization<sup>49</sup>. Agricultural users of grain corn – hog and pork producers in the main, but including poultry and beef producers – argued vigorously for duty relief. So did the industrial users, comprising a large segment of the food processing industry. The grain producers fought to have duties maintained at the full level.

The Tribunal sought to establish a balance between the needs and rights of the Canadian producers for protection, on the one hand, and the needs of the users for cost-effective product and price stability, on the other. After considering voluminous evidence, including detailed studies of the economic impact of the duties, the Tribunal came down in the middle. Instead of duties of \$1.10 per bushel or \$46.00 per tonne, it recommended lesser duties of only \$0.30 per bushel or about \$12.00 per tonne. This level, in the Tribunal's view, would balance the competing interests on the matter of price. Its observations are worth noting, given some unusually forceful lecturing by the Tribunal on the price issue:

“ . . . a countervailing duty above a price premium which the market is prepared to sustain is superfluous as far as enhancing the long-term average price that corn producers can expect to be paid for their product. It does, however, increase uncertainty for both users and corn producers. It raises unwarranted price expectations on the part of corn producers, and unjustified fears on the part of users as to the future price of corn . . .

Both Canadian corn producers and Canadian corn users would benefit by a reduction in the present level of countervailing duty. With such action,

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<sup>49</sup> *Grain Corn, supra*, p. 1.

uncertainty and risk to users would be largely mitigated and would be beneficial to corn producers as well because of the greater ensuing market stability.”<sup>50</sup>

At the end of the day, the Tribunal felt that sufficient protection for the industry could be had with lesser duties in place, articulating a view consistent with the GATT Codes and future WTO Agreements that duties should only be of such magnitude as needed to protect the domestic industry but no higher.

This approach found expression in *Beer from the United States*<sup>51</sup>. There, the Tribunal said that it questioned the need to impose duties on dumped products greater than necessary to remove material injury, noting that unnecessarily high duties would have a deleterious impact on market price, as well as reducing consumer choice unreasonably sheltering the industry from effective competition:

“Unnecessarily high anti-dumping duties shelter the B.C. industry from effective competitors. With the expectation of an increasingly competitive marketplace in British Columbia, as suggested by the Intergovernmental Agreement on Beer Marketing Practices and recent GATT developments, this may not be in the longer term interests of the B.C. beer industry itself<sup>52</sup>.

Interestingly, in that case the Tribunal made no specific recommendation, other than the general one that it would not be in the public interest for the full amount of anti-dumping duties to be applied<sup>53</sup>.

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<sup>50</sup> *Ibid.*, p. 46.

<sup>51</sup> PI-91-001, Opinion, 25 November 1991.

<sup>52</sup> *Ibid.*, p. 4. The *Beer from the United States* case was one of the first cases where the Director of Research in the Competition Bureau made submissions and appeared to argue in favour of maintaining a competitive marketplace. Subsequent experience has borne out the value of such submissions from the Bureau.

<sup>53</sup> *Ibid.* No further action was taken by the Finance Department on this recommendation. See the discussion of the *Beer* case and the price and price-related competition issues in Moen, *supra*, pp. 132-138.

Competition Issues:

Public interest cases since *Beer from the United States* have included submissions that SIMA duties will limit imports and reduce competition in the domestic marketplace. Such arguments have invoked the policy underpinnings of *Competition Act*<sup>54</sup>. But while the *Competition Act* and SIMA have similar implied objectives to promote and protect fair business practices and to enhance Canadian economic welfare<sup>55</sup>, the two pieces of legislation are often in conflict. SIMA aims at protecting Canadian producers from dumped or subsidized, albeit low-priced, imports. The *Competition Act* aims at ensuring a competitive marketplace where low prices, if sold under competitive conditions, are an advantage.

Resolving this has not been terribly difficult for the Tribunal. It has repeatedly said that, to the extent there is such a conflict, SIMA that must prevail:

“When parties come before the Tribunal seeking protection from imports that are being dumped in Canada or that are being unfairly subsidized, they do so pursuant to SIMA and not the *Competition Act*. It is SIMA that gives the Tribunal its jurisdiction to conduct inquiries with respect to these matters and, to the extent that any inconsistency exists between these two acts, the Tribunal must defer to the provisions of SIMA.”<sup>56</sup>

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<sup>54</sup> R.S.C. 1985, c. C-34.

<sup>55</sup> *Prepared Baby Food*, PB-98-001, *supra*, p. 10.

<sup>56</sup> *Ibid.*, pp. 10-11.

That being said, duties often place limits on competitive pricing. Submissions in favour of public interest investigations typically raise these issues and the Tribunal has looked carefully at market factors in deciding whether to proceed. The state of competition among Canadian producers and the availability of other foreign sources are indeed important factors, notwithstanding the prevailing force of SIMA, and the Tribunal has been faced with these considerations in deciding to proceed.

In *Bicycles from Taiwan and China*<sup>57</sup>, the Tribunal concluded that the Canadian market was and would continue to be very competitive even with duties in place, both from within the industry and from the numerous available offshore sources. Largely because of the absence of any proof of a detrimental effect on competition, it declined to proceed with an investigation.

In *Thermal Insulation (Polyiso) Board*<sup>58</sup>, the Tribunal received arguments that duties would significantly reduce price competition and lead to higher prices to insulation consumers. It concluded, however, that “there will continue to be numerous suppliers of polyiso insulation board from both domestic and US locations even with the anti-dumping duties in place”<sup>59</sup>. Moreover, existing Canadian facilities were operating well below capacity and were in a position to be geared up relatively quickly to higher production levels<sup>60</sup>. As a consequence, the Tribunal declined to proceed further with an investigation.

In *Caps, Lids and Jars*, the Tribunal heard strong representations from the Competition Bureau regarding the consumer impact of reduced competition resulting from anti-

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<sup>57</sup> PB-92-001, Opinion, 27 January 1993.

<sup>58</sup> PB-97-001, Tribunal Report, 13 June 1997.

<sup>59</sup> *Ibid.*, p. 4.

<sup>60</sup> *Ibid.*

dumping duties, which effectively left a single Canadian producer alone in the market. However, the Tribunal rejected the notion that consumer interests and competition policy issues must take precedence over the protection from dumping afforded by SIMA to the domestic producers<sup>61</sup>.

Staying the Course in *Refined Sugar*:

A leading Canadian case on trade law public interest issues in relation to competition policy is *Refined Sugar*<sup>62</sup>. The public interest phase took place following a material injury finding by the Tribunal involving the dumping of refined sugar from the U.S., Germany, the Netherlands and the U.K., together with the subsidization of sugar exports by the European Union. After the finding, seven parties (industrial users and processors of sugar) submitted that there was a public interest question worthy of further investigation. The Tribunal agreed.

Competition policy issues dominated the public interest phase. Detailed studies and projections on all aspects of production capacity, pricing and profitability in the market were tabled in evidence. Almost no aspect of the state of the market was left un-touched. Parties opposed to the duties, including the Competition Bureau, stressed the dangers of shutting out foreign suppliers and leaving few refiners, the dominant being Redpath Industries Ltd., in control of the Canadian market and the dangers this posed to processors and consumers alike<sup>63</sup>. At the end of the day, the Tribunal was not persuaded that anti-dumping duties would not adversely affect market competition, at least to the extent that lesser duties were warranted.

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<sup>61</sup> PB-95-001, 26 February 199, *supra*. This decision is reviewed in some detail in Leclerc, “Reforming anti-Dumping Law”, *supra*, at pp. 133-138.

<sup>62</sup> PB-95-002, *supra*.

<sup>63</sup> *Ibid.*, pp. 5-8.

While accepting that imports from the subject countries had virtually ceased since the finding, the Tribunal found that there remained sufficient alternate import sources and sufficient intra-industry competition to ensure a healthy competitive market. First, it found that even with the full imposition of duties, there was a significant gap in refined sugar prices from the U.S. and the E.U. that would allow these sources to continue to compete in Canada<sup>64</sup>. Secondly, it found that imports from non-subject sources would continue to moderate the efforts of the domestic refiners to increase prices beyond acceptable limits. Finally, it concluded that competition would be assured by the normal play of market realities in a smaller economy such as Canada's. Even though domestic producers' refining margins had increased since the duties as a result of some price increases, these had not been fully passed on to users,

“ . . . due to competition in the industrial user sub-market, the magnitude of margin increases has not been large for industrial users of refined sugar. Although margin increases on sales to re-sellers were larger than on sales to industrial users, competition in the re-seller sub-market has also had a moderating effect on margin increases.”<sup>65</sup>

The Tribunal went on to say that,

“ . . . the domestic refiners and industrial users realize that their relationship is one of implicit partnership. The refiners need the production volume purchased by the industrial users, including the multitude of small- and medium-sized food processors that purchase a significant part of the refiners' output. The industrial users also need the domestic refiners because of assured quality and proximity of

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<sup>64</sup> *Ibid.*, p. 36.

<sup>65</sup> *Ibid.*

supply. The refiners would not gain if their margins became so high as to cause industrial users to close down their Canadian operations. Industrial users will also not gain if the if the domestic refiners cannot earn reasonable returns on their business.”<sup>66</sup>

The lesson from *Refined Sugar* is that, theoretical studies aside, to the extent there is assured competition within the practical realities of the Canadian market by virtue of other smaller enterprises and sufficient non-subject sources of imports, the case for a detrimental impact on the public interest will not be sustained.

#### New Ground Broken in Consumer and Public Health Issues:

*Prepared Baby Food*<sup>67</sup> was the first public interest decision that concerned a quintessential consumer product and an important, in some cases essential, component of infant health. It was also a large case. Approximately fifty parties, companies and interest groups, made representations for and against the initiation of the investigation. The case also reflected the peculiarities of the small Canadian economy and the immediate impact of SIMA duties in curtailing supplies of imports to a large segment of the consumer market.

Only two companies, Heinz and Gerber, served the entire Canadian market but only Heinz produced baby food in Canada. This magnified the negative effect of the duties, which resulted in Gerber’s exports to Canada being curtailed. Given the obvious public dimension to the application of anti-dumping duties, it was a foregone conclusion that the Tribunal would hold a full investigation. Central to the Tribunal’s analysis was the fact

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<sup>66</sup> *Ibid.*

<sup>67</sup> *Certain Prepared Baby Food, supra*, PB-98-001.

that, as Gerber retreated from the market after the Tribunal's finding, Heinz was left as the sole Canadian producer of baby food<sup>68</sup>.

In its report to the Minister, the Tribunal emphasised the price effect on consumers, particularly the financial burden on low-income families and the effect of the measures on infant health. It concluded that consumer prices would rise significantly if full duties were left in place, even if the full price effect of the duties was somewhat dampened by other factors. Evidence showed that increased prices would impact on infant health and, "if concern over infant health is due to increased prices, then the best solution is to keep prices as low as possible over the long term"<sup>69</sup>.

To do this, reduced duties were the preferred alternative. Elimination of duties entirely could harm Canadian production by allowing dumped goods to return to the market and remove the very protection that SIMA was designed to ensure<sup>70</sup>. With reduced duties, prices would be kept in check and the concerns of low-income families and those regarding the health and welfare of infants would be mitigated<sup>71</sup>. The Tribunal noted,

"Canada is internationally recognized as a highly successful and compassionate country with an enviable standard of living. At the same time, Canada's child poverty rate ranks among the highest of industrialized countries. Not only is the magnitude of the poverty troubling, but the adverse effects caused by poor or insufficient nutrition on a child's emotional, physical and social development are also disturbing."<sup>72</sup>

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<sup>68</sup> *Ibid.*, p. 5.

<sup>69</sup> *Ibid.*, p. 32.

<sup>70</sup> *Ibid.*, p. 34.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*, p. 29.

This observation could hardly then be set aside in favour of the corporate interest in securing an element of protection up to the full amount of the duties. The Tribunal therefore recommended a reduction in duties. However, public disclosure of the minimum re-sale price proved to be problematic because of the need to protect confidentiality and to prevent retailers and wholesalers from knowing the prices below which importers could not sell, it was necessary to keep its recommended price confidential<sup>73</sup>.

*Contrast Media* also concerned public health. The goods were not off-the-shelf consumer products like baby foods but essential ingredients used in diagnostic procedures in hospitals as a means of enhancing X-ray images (low-osmolality contrast media or “LOCM”)<sup>74</sup>. The concerns of hospitals and professional associations was focused on the price impact of SIMA duties which, like *Prepared Baby Food*, would leave the domestic market exposed to a single Canadian producer. The impact of increased prices, even for a relatively small volume of product, would have a negative effect on hospital budgets and ultimately on service to patients. Representations in this regard were made by hospital buying groups, medical associations and hospitals and public health advocates. The Competition Bureau supported the concerns from a market competition perspective.

At the end of the day, the Tribunal accepted the argument that full absorption of anti-dumping duties was not in the public interest. It concluded that a 1 percent increase in the price of contrast media would add approximately \$200,000 to annual Canadian medical expenditures and, while not a large amount in and of itself, would lead to a shift away

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<sup>73</sup> *Ibid.*, p. 37. Reduced duties were eventually implemented by a Remission Order passed by Order in Council. That Remission Order establishes reference prices for re-sale in Canada in accordance with the Tribunal’s recommendation. For confidentiality reasons, the Order has not been made public: information from officials in the Department of Finance, Ottawa.

<sup>74</sup> PB-2000-01, pp. 3-4.

from LOCM procedures by hospitals. The Tribunal expressed the public health concern that,

“price increases at a level that would lead to a reduction in the number of procedures or to a shift towards greater use of [high-osmolality contrast media] would reduce the quality of health care for parties and, as a result, would not be in the public interest.”<sup>75</sup>

It concluded that a reduction in choice of media by radiologists resulting from full duties and possible supply reductions to hospitals of some types of contrast media was likewise not in the public interest. As a result, it accepted arguments that duties should be reduced to a level consistent with its assessment of what the public interest could bear<sup>76</sup>.

#### Implementation Issues:

The effect of total elimination of anti-dumping duties as a section 45 remedy is unambiguous: the parties go back to square one and, irrespective of the injury finding by the Tribunal, the exporters can resume exporting into Canada and the prior dumped price. The results of the original dumping complaint and injury finding is vitiated. Such a result, however, violates the very precept of SIMA as expressed in the cases and, for that reason, total elimination has never been recommended by the Tribunal.

Reduction of duties, however, is a different matter. It has been said that lesser duties appears to be a worthwhile concept that will, if nothing else, at least alleviate some of the harm caused to consumers by the imposition of full anti-dumping duties<sup>77</sup>. As a result of

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<sup>75</sup> *Ibid.*, p. 11

<sup>76</sup> *Ibid.*, p. 14.

<sup>77</sup> Leclerc, op cit., p. 132.

consumer concerns, the two recent cases of *Prepared Baby Food* and *Contrast Media* each resulted in Tribunal recommendations that duties be reduced. The notion is deceptive, however. Lesser duties, while simple in theory, in reality are complex and technically difficult to implement, these complexities being inherent in the anti-dumping system.

Anti-dumping duties are applied where the net export price for the goods sold to the Canadian importer is less than net ex-factory selling price (“normal value”) in the exporter’s home market. The duties are applied to the extent of this margin<sup>78</sup>. The margin is determined by the Canada Customs and Revenue Agency in its investigation and at the time of the preliminary determination, anti-dumping duties are applied to all further imports of subject goods<sup>79</sup>. Where the export price of the goods is increased to the level of normal value, however, the margin of dumping is eliminated and no anti-dumping duties are payable.

The concept of lesser duties means that such anti-dumping duties are not to be charged in the full amount but that only a portion or percentage of such duties are payable by an importer. However, merely reducing duties by a given percentage may lower the penalty payable by an importer but provides no protection from continued dumping for the Canadian producer and does nothing to ensure that the re-sale price of the goods is increased in the marketplace.

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<sup>78</sup> SIMA section 3.

<sup>79</sup> SIMA Handbook (November, 1998), Part 4.7.1 to Part 4.7.8 and Part 5.14 and SIMA Self-Assessment Guide, found on the CCRA web-site at [www.ccr-a-adrc.gc.ca](http://www.ccr-a-adrc.gc.ca). Note that provisional SIMA duties and the concept of an advance over the export price is based on past importations of dumped product as found during the period of investigation (“POI”). The POI pre-dates the preliminary determination. The advance over the export price, however, is applied to entries of goods after the preliminary determination and during the provisional period, until a re-determination can examine the actual values of goods entering Canada during this provisional period. In such re-determination, anti-dumping duties are applied to the actual difference between export price and normal values. Any excess of duties collected under the advance are refunded.

Some system is required, therefore, to ensure that the ultimate price of the goods sold in the Canadian market increases by a given amount so that some degree of protection is accorded the Canadian industry, even if less than the full margin of dumping. In other words, even if full duties are not payable, a methodology must be developed to set the permitted difference between the export price and the normal value. The other challenge is to put into place a system that the Canada Customs and Revenue Agency can enforce and at the same time one that will provide penalties when the required target prices are not met<sup>80</sup>.

In a useful summary of the considerations involved, the Tribunal Staff reviewed some of these options in a report prepared for the Tribunal in *Contrast Media*<sup>81</sup>. It listed factors related to enforceability and efficiency, together with a need to ensure a direct link with market conditions and flexibility. Among the possible options were: an advance over the export price; the fixing of domestic selling prices; the fixing of the exporter's price; a percentage reduction in the normal value<sup>82</sup>. The objective in all of these options was to devise a scheme for reduced duties that was effective and administratively workable.

In *Prepared Baby Foods*, the Tribunal recommended a reduction of duties based on a minimum Canadian re-sale price for the imported goods which, in turn, would be based on an increase in the net export price to Canada. If the Canadian resale price fell below the revised export price, duties would be payable to make up the difference. The Tribunal felt that such a system would be relatively simply to administer and would not place additional burdens on the exporter<sup>83</sup>.

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<sup>80</sup> *Prepared Baby Food*, p. 35.

<sup>81</sup> *Contrast Media*, PB-2000-01, Staff Discussion Paper, 11 July 2000 (Tribunal Exhibits, vol. 1, p. 279).

<sup>82</sup> *Ibid.*, pp. 284-289.

<sup>83</sup> *Ibid.*, p. 36. This minimum domestic resale price would be indexed on an annual basis using the food component of the CPI: *ibid.*, p. 41.

In a variation of this approach in the *Contrast Media* case, the Tribunal recommended a complex formula whereby normal values (that is, the cost of production plus profit where the goods were made) of the exported goods would be increased by approximately 12 percent. This upwardly-revised normal value, in turn, would require that the net export price to Canada and the net Canadian re-sale price after importation would have to be increased correspondingly<sup>84</sup>. The Tribunal concluded that this would provide the Canadian producer with price protection but not so high as to impact unduly on hospital diagnostic procedures<sup>85</sup>.

#### Delays in Implementation:

Together with these complexities, the length of time between the commencement of an investigation and actual relief can be rather long. In *Prepared Baby Food*, the implementing measure was not promulgated for 18 months following the Tribunal's lesser duty recommendation<sup>86</sup>. In *Contrast Media*, the lesser duty measure was not issued for approximately 8 months following the Tribunal's recommendations<sup>87</sup>. It is not the purpose of this article to discuss the detailed methodology set out in that Order. The key point is its complexity in achieving a reduction of anti-dumping duties. The details took the Finance Department several months to work out.

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<sup>84</sup> PB-2000-001, *supra*, p. 20.

<sup>85</sup> *Ibid.*, p. 19.

<sup>86</sup> As noted, *supra*, the Remissions Order in this case was not made public because of the confidential reference price in that Order. Information on this matter was obtained from officials in the Canadian Department of Finance by the author.

<sup>87</sup> *Iodinated Contrast Media Anti-Dumping Duty Remission Order*, P.C. 2001-799 (SOR/2001-161), 2 May 2001.

Conclusions:

Canada's public interest feature in its trade law regime, in some respects, is unique. While the mechanism was not frequently used in the first number of years after its introduction in 1984, recent developments indicate that it may have more frequent application. The key seems to be a demonstration that direct consumer and public health concerns are impacted by full ant-dumping duties.

Even where the Canadian International Trade Tribunal has been prepared to accept the need to protect these public interests from the effect of full anti-dumping duties, implementation of lesser duties is conceptually complex. The recent example in *Contrast Media* bears this out. On the other hand, *Contrast Media* also illustrates that a lesser duty regime, based on target prices for the sale of the subject good in Canada, can be a workable solution that balances the interests of the Canadian producers in attaining some degree of protection from dumping and the interests of consumers in ensuring the continuation of lower prices and a broader range of choice than would otherwise be the case.

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