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Auditor General of Canada

to the House of Commons

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Chapter 3

Special Import Measures Act: Protecting Against Dumped or Subsidized Imports

Office of the Auditor General of Canada

The December 2002 Report of the Auditor General of Canada comprises 11 chapters, Matters of Special Importance—2002, a Foreword, Main Points, and Appendices. The main table of contents is found at the end of this publication.

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Chapter

3

Special Import Measures Act: Protecting Against Dumped or Subsidized Imports

The audit work reported in this chapter was conducted in accordance with the legislative mandate, policies, and practices of the Office of the Auditor General of Canada. These policies and practices embrace the standards recommended by the Canadian Institute of Chartered Accountants.

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Special Import Measures Act: Protecting Against Dumped or Subsidized Imports

Main Points

3.1 In 1996 two parliamentary subcommittees conducted a significant review of the *Special Import Measures Act* (SIMA) and issued 16 recommendations to make it more efficient and responsive to Canada's economic needs. Our audit found that the government accepted all the recommendations except for part of two, and changes were made to the applicable legislation and regulations effective 15 April 2000.

3.2 We found that the Canada Customs and Revenue Agency (CCRA) and the Canadian International Trade Tribunal (CITT) have put in place the support and management processes needed to implement most of the recommendations. However, more work is needed to fully implement three key recommendations and address significant concerns in the following areas:

- access to confidential information,
- splitting responsibilities between the CCRA and the CITT, and
- access to the complaints process for small and medium-sized Canadian producers.

3.3 Issues related to granting counsel access to confidential information about the users' business was the greatest concern. Users, such as complainants, are generally satisfied that confidential information provided to domestic counsel will remain protected. However, they are greatly concerned about giving the confidential information to foreign counsel and expert witnesses. Furthermore, they are not convinced that the penalties in place for breach of confidentiality could be enforced. Participants in the SIMA process need to be assured of confidentiality in order for the system to have integrity. We also noted inconsistent requirements for access to confidential information by the Agency and the Tribunal. The CCRA is being challenged in the courts on its interpretation of who is entitled to have access to confidential information in particular circumstances.

3.4 In recent years there has been an increasingly heavy financial, time, and information burden associated with participating in the SIMA process. As a result, the process has become more difficult for users and the barriers to access may now be greater than they were before. Innovative ways need to be found to reduce these barriers wherever possible.

3.5 The subcommittees recommended that the CCRA take concrete measures to ensure fair and equal access to the SIMA process for small and medium-sized Canadian producers. The Agency produced a plan in response to the recommendation, but implementation has stalled since 1998.

Background and other observations

3.6 The SIMA provides a trade remedy system that protects Canadian producers from injury caused by dumped or subsidized goods imported into Canada. Trade remedy actions have had a relatively minor impact on the Canadian economy; by value, they affect about 1 percent of goods imported into Canada. In industries where they do apply, however, they have a substantial impact on Canadian producers and industries that use the imported goods. These include the steel and farming sectors, where dumped and subsidized goods have been found to cause serious financial difficulties. In one case, Canadian producers saw their gross margin of a specific steel product decline from 23 percent to 7 percent in six months. Their net income before taxes dropped $92 million, from $61 million to a loss of $31 million.

3.7 In 1996, the SIMA was reviewed by two House of Commons subcommittees: the Subcommittee on the Review of the *Special Import Measures Act* of the Standing Committee on Finance, and the Subcommittee on Trade Disputes of the Standing Committee on Foreign Affairs and International Trade. After many hearings, the subcommittees concluded that the SIMA was working well overall, and that it continued to be relevant to the competitive needs of the Canadian business community. At the same time, the subcommittees made 16 recommendations intended to make the Act more efficient and responsive to Canada's economic needs. Changes resulting from these recommendations have direct implications for SIMA stakeholders and users, including complainants, importers, exporters, trade experts, lawyers, and trade associations.

3.8 The subcommittees recommended that some administrative responsibilities be split between the CCRA and the CITT. We found that CCRA officers need additional training and guidance to meet their new responsibilities and that the Agency and the Tribunal need to work together to resolve inefficiencies that still exist.

The Agency and the Tribunal have responded. The Canada Customs and Revenue Agency and the Canadian International Trade Tribunal have generally agreed with our recommendations. Their responses, including the action that they are taking or intend to take to address the recommendations, are set out in the chapter. Action includes updating the guidelines on protection of confidential information, exploring options to provide more assistance to small and medium-sized Canadian producers, and consulting with each other to reduce administrative inefficiencies.

Introduction

3.9 Canada is a trading nation. In 2001 Canadians imported $343 billion worth of goods. Exports were worth $402 billion, or almost 37 percent of our country's gross domestic product. Usually trade benefits Canadians, but sometimes foreign exporters to Canada use trading practices that injure Canadian producers. To seek relief, the producers can turn to the *Special Import Measures Act* (SIMA), one of Canada's main trade remedy laws.

3.10 The Canadian trade remedy system, like that in other countries, is based on rules set down in the original text of the 1947 General Agreement on Tariffs and Trade (GATT). The rules have been refined extensively over the years through successive multilateral negotiations—most recently the Uruguay Round negotiations, which concluded with the 1994 World Trade Organization (WTO) agreements. For trade remedies there are three main agreements: the Anti-Dumping Agreement, the Agreement on Subsidies and Countervailing Measures, and the Agreement on Safeguards. These provide the basis for domestic trade legislation, and the international legal framework that defines how member countries determine whether injurious dumping or subsidizing exists, and what they can do about it.

3.11 Dumping is the sale abroad of goods at prices lower than their normal value—usually the selling price of the goods, or comparable goods, in the exporter's country. Subsidizing is the provision of financial assistance by a government to an exporter based within that government's jurisdiction. This subsidization lowers the selling price of goods abroad.

3.12 When a Canadian producer or industry making the same or similar goods can show that it has been injured by dumped or subsidized imported goods, the SIMA allows the government to impose duties on the goods imported into Canada. Forms of injury include reduced prices in the Canadian marketplace, lost sales or market share, decreased profits, or a drop in employment levels for the Canadian industry. Canada can offset the dumping of imported goods by applying anti-dumping duties on those goods when they are imported into Canada; it can offset the subsidizing of imported goods by applying countervailing duties.

3.13 Anti-dumping and countervailing duties are exceptions to liberalized trade. They are applied in specific situations on the basis of the findings of a detailed investigation. They give the affected domestic industry some protection from imports dumped in Canada or subsidized by a foreign government. At the same time they lead to higher prices for the imported goods, and the greater expense affects users of those goods, both consumers and downstream industries. The SIMA is designed to provide a balance between two differing interests: Canadian producers or industries that need protection from injurious dumped or subsidized imports, and Canadian businesses that need access to imports.

3.14 From the perspective of the Canadian economy as a whole, trade remedy actions have had a relatively minor impact; by value, they affect about 1 percent of goods imported into Canada. In industries where they apply, however, they have a substantial impact. Examples are the steel and farming sectors, where dumped and subsidized goods have been found to have caused serious financial difficulties. Exhibit 3.1 provides examples of the negative effects on Canadian producers of the dumping of certain imported goods. The Appendix lists the SIMA findings and orders in force as of 31 March 2002.

3.15 The *Special Import Measures Act* was passed in 1984 to consolidate and modernize Canada's trade remedy laws. It replaced the *Anti-dumping Act* and certain provisions in the Customs Tariff concerning countervail. Substantial

Exhibit 3.1 Examples of the negative effects on Canadian producers of the dumping of certain imported goods

Sector	Effects of dumping*
Certain products in the medical sector	The Canadian producer suffered a decline in domestic sales of over $2 million in nine months. The gross margin of one of these products fell by more than 50 percent over two years, resulting in financial losses.
Certain products in the steel sector	For one of the steel products, domestic producers suffered a cumulative decline of over 16 percent in net sales revenue over two years, mainly due to reduced sales volume and significantly lower average selling prices of this product. This reduction contributed to a loss in operating income of over $44 million. For another steel product, the producers' gross margin declined from 23 percent to 7 percent in six months. Their net income before taxes dropped $92 million from $61 million to a loss of $31 million.
Certain products in the retail sector	The Canadian market grew but the share of domestic market by Canadian producers was declining. Gross margins of the Canadian producer for refrigerators declined by 33 percent and 25 percent in two successive years. Similar weak market and financial performance also occurred for dishwashers and dryers.
Certain products in the farming sector	The financial performance of the domestic garlic growers collapsed. In 1998, the garlic growers (small and medium-sized producers) were profitable with gross farm returns of about $170,000. In 1999, the domestic growers lost $348,000. In 2000, their loss increased to over $1 million. Approximately 70 percent of garlic farming in Canada was steadily increasing from 300 acres to almost 900 acres between 1997 and 1999. However, it dropped by about one third in 2000.

* Effects reported in the Statement of Reasons for the SIMA findings

Source: Canadian International Trade Tribunal

changes were made to the Act in 1994 to implement Canada's international obligations resulting from the Uruguay Round negotiations. Further changes were made in 1999 in response to a 1996 parliamentary review.

The SIMA process

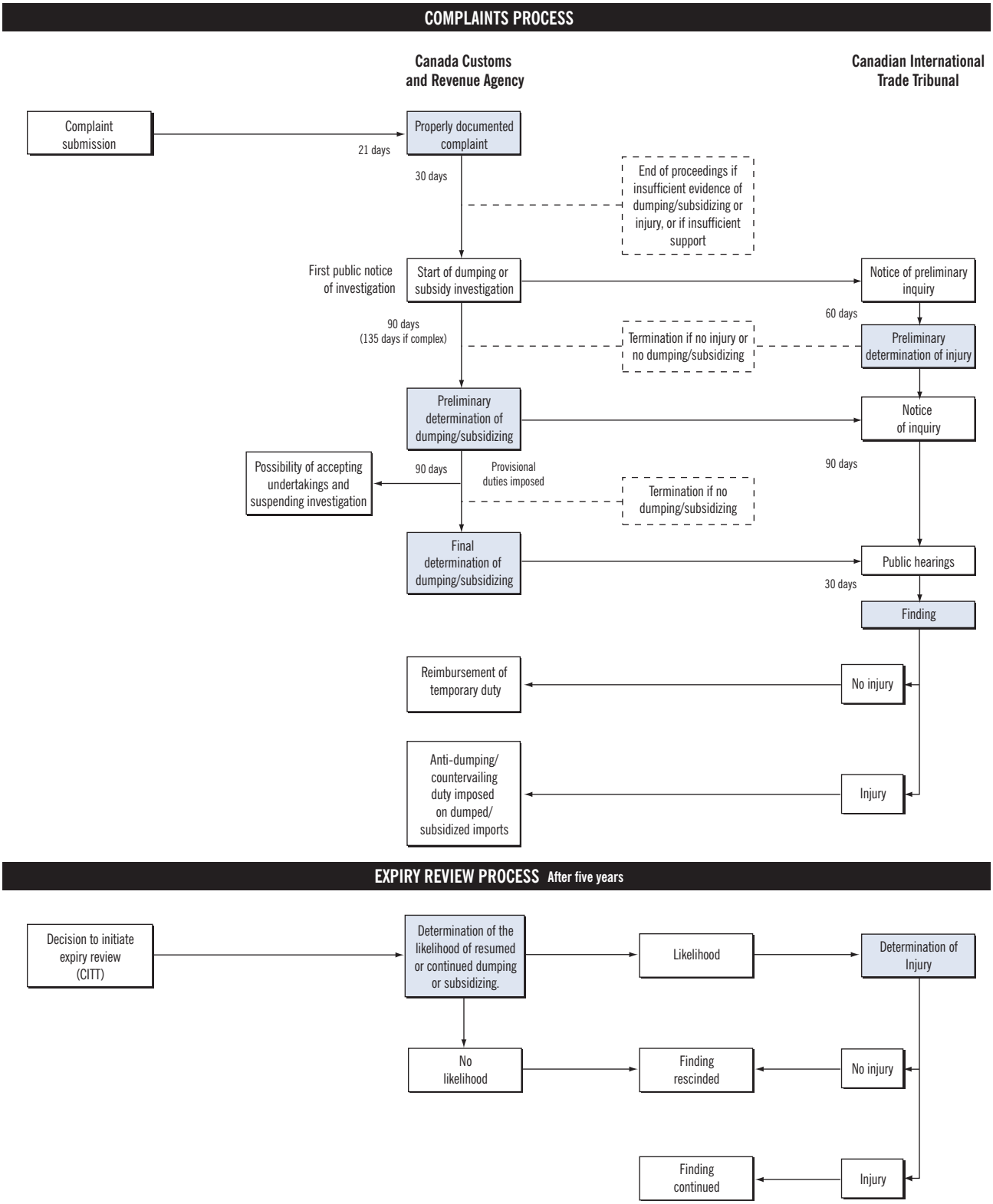
3.16 Three government organizations are involved in administering the SIMA. The Department of Finance is responsible for policy and legislative aspects. The Canada Customs and Revenue Agency (CCRA) is responsible for initiating investigations, determining whether dumping or subsidizing has occurred, and collecting anti-dumping or countervailing duties. The Canadian International Trade Tribunal (CITT), an independent quasi-judicial body, is responsible for determining whether Canadian producers have been or are threatened to be injured as a result of dumping or subsidizing.

3.17 The Act defines the stages in the SIMA process and the related time limits (Exhibit 3.2). With few exceptions, the process starts when a domestic producer files a complaint with the CCRA. If the Agency determines that the complaint is based on reasonable evidence of injurious dumping or subsidizing and is supported by producers representing at least 25 percent of the total Canadian production of the goods in question, it initiates the investigation. The CCRA and the CITT carry out simultaneous investigations, with the Agency focussing on dumping or subsidizing and the Tribunal focussing on injury. The participants in the process include the original complainant, other producers in the same industry, foreign exporters of the goods in question, foreign governments, and Canadian importers or purchasers of the goods. Most participants are represented by counsel during the investigation.

3.18 If the Agency determines that dumping or subsidizing has occurred and the Tribunal finds that material injury has been caused to the major proportion of total domestic production, or that there is a threat of injury, the Act mandates imposition of anti-dumping or countervailing duties. These are generally equal to the dumping margin (the difference between the price charged to Canadians and the normal value of the goods) or the level of subsidization, and are collected by the Agency when the goods are imported. The Minister of Finance may, on recommendation of the Tribunal, decide not to impose the full duty for public interest reasons. Exporters can eliminate anti-dumping duty liability by charging Canadians a price equal to the normal value; foreign governments can avoid countervailing duties by imposing an offsetting tax or other arrangement to negate the subsidy.

3.19 Anti-dumping and countervailing duty measures normally expire five years after the date of the CITT injury finding. If the Tribunal decides to initiate a review based on the submissions it receives, the Agency and the Tribunal conduct an expiry review to determine whether ending a measure would lead to renewed dumping or subsidization causing material injury to domestic producers. If they find that it would do so, the measure is extended for another five years.

Exhibit 3.2 ***Special Import Measures Act*** **process**



Source: Canada Customs and Revenue Agency and the Canadian International Trade Tribunal

3.20 From 1993 to 2002, the CCRA received 218 inquiries from potential complainants about possible dumping or subsidizing of goods imported into Canada. After reviewing the information provided to it, the Agency concluded that an investigation was warranted in 40 cases. In these cases it found that the dumping margin ranged from 12 percent to 71 percent. Over the same period, the CITT issued 46 findings (some cases involved more than one finding), with the following results:

- 25 findings of injury to the domestic industry, duties were imposed on all subject goods imported after the date of the preliminary determination;
- 6 findings of a threat of injury to the domestic industry, duties were imposed on all subject goods imported after the date of the finding;
- 13 findings of no injury or threat of injury to the domestic industry, or no retardation to the establishment of a domestic industry, no duties were imposed; and
- In 2 cases the inquiries were suspended because the Agency accepted undertakings by exporters to change their pricing practices to eliminate the harm to Canadian industry.

3.21 From 1993 to 2002, the Tribunal conducted 43 expiry reviews. Since the implementation of the legislative amendments to the SIMA, expiry reviews are conducted jointly by the Tribunal and the Agency. The following 51 decisions were reached (some reviews involved more than one decision):

- in 29 decisions, the original finding was continued or continued with amendment; and
- in 22 decisions the original finding was rescinded.

Parliamentary review

3.22 In 1996, the Act was reviewed by two House of Commons subcommittees: the Subcommittee on the Review of *Special Import Measures Act* of the Standing Committee on Finance, and the Subcommittee on Trade Disputes of the Standing Committee on Foreign Affairs and International Trade. The subcommittees held many hearings and issued a detailed report.

3.23 The subcommittees concluded that the Act was working well overall and continued to be relevant to the competitive needs of Canadian business. In addition they concluded that the legislation adequately protected companies injured by dumped or subsidized imports, while taking into account the potential negative effects of anti-dumping and countervailing duties on consumers and downstream industries. At the same time, the subcommittees made 16 recommendations intended to make the Act more efficient and responsive to Canada's economic needs. Changes resulting from these recommendations directly affect SIMA stakeholders and users, including complainants, importers, exporters, trade experts, lawyers, and trade associations.

Focus of the audit

3.24 The audit of the *Special Import Measures Act* is part of a series of audits of the CCRA's customs programs. We examined how the Agency manages the risks for travellers at ports of entry, and we reported the results of the audit in

our 2000 Report, Chapter 5. We also examined how the Agency manages the risks of non-compliance for commercial shipments entering Canada and we reported the results of that audit in our 2001 Report, Chapter 8.

3.25 This audit examined the changes to the SIMA recommended by the two parliamentary subcommittees in 1996. We assessed whether the CCRA and the CITT had put in place the support and management processes required to implement the recommended changes.

3.26 We last audited the administration of the SIMA in 1992. We noted in three subsequent reports that one of the two recommendations made in that audit has not been addressed by the Department of Finance. The recommendation called for measuring the actual extent of the impacts of trade remedies on Canadian consumers or on the Canadian economy as a whole. In light of our follow-up work after the 1992 audit, the overall findings of the major parliamentary review of the SIMA in 1996, and the relative economic significance of trade remedies, we did not examine the full complaints process or individual cases. For further details on our audit, see About the Audit at the end of this chapter.

Observations and Recommendations

Implementing the subcommittees' recommendations

3.27 In their December 1996 report, the parliamentary subcommittees listed 16 recommendations on how to make the SIMA more efficient and responsive to Canada's economic needs. Three of these recommendations did not require any government action.

3.28 The government responded to the subcommittees' recommendations in April 1997. It accepted the recommendations, except for two elements: with respect to the CITT's decision that an anti-dumping or countervailing duty might not be in the public interest, the government did not agree that this should be a formal decision subject to Federal Court review; and it did not implement the recommendation to split the responsibilities for interim reviews. However, it made commitments to implement the rest of the recommendations.

3.29 We found that effective 15 April 2000, the applicable legislation, rules, and regulations—including the SIMA and its regulations, CCRA directives, and the CITT Act and Rules—were changed to address these recommendations.

In most cases, the CCRA and the CITT have modified their management framework as required

3.30 We also examined whether the CCRA and the CITT had modified their management framework as needed for the 13 recommendations requiring action (Exhibit 3.3). We found that the management framework, including guidelines and processes, had been satisfactorily modified as required for 10 of the recommendations. Some of the changes formalized practices already in place or used infrequently.

3.31 We reviewed complaints processed since 15 April 2000, and found that they had been handled in compliance with the modified administrative processes for three recommendations. However, it is too early to determine whether the changes are achieving the results intended by the subcommittees.

Exhibit 3.3 Assessment of action taken by the CCRA and the CITT to implement recommendations of the 1996 SIMA parliamentary review

Recommendations of the parliamentary subcommittees*	Modifying management framework
The subcommittees recommend:	
1. That the SIMA legislation and process be continued, subject to the modifications addressed in this report.	N/a
2. That Revenue Canada (RC) take concrete measures to ensure fair and equal access to the SIMA process for small and medium-sized Canadian producers.	○
3. That the CITT be given the responsibility for making the preliminary determination of injury.	●
4. That SIMA be amended to provide counsel increased access to confidential information in anti-dumping/countervailing duty investigations conducted by RC.	○
5. That appropriate changes be made to Canadian trade legislation to permit access by experts to confidential information in SIMA proceedings before the CITT.	◉
6. The inclusion in SIMA Regulations of the fact of dumping in third-country markets as evidence of threat of future injury.	◉
7. That Revenue Canada make allowance in regulations to accommodate representations from interested parties when undertakings are being considered.	◉
8. That section 53(2) of SIMA be amended to allow the Deputy Minister of National Revenue to review and terminate undertakings before five years.	◉
9. That SIMA be amended to make cumulation mandatory in the CITT's procedures for determining injury.	●
10. No change from the prospective method of duty assessment.	N/a
11. That the Minister of Finance reform SIMA provisions for the conduct of interim** and expiry reviews in light of the comments made above, and in this context, to bifurcate the administrative responsibilities for the conduct of such reviews.	○
12. That section 76 of SIMA be amended to require the CITT to assess the cumulative injurious effects of dumping/subsidizing in conducting interim and expiry reviews.	●
13. 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.	◉
14. That the CITT's decision, that an anti-dumping or countervailing duty might not be in the public interest, should be a formal decision reviewable by a Federal Court.**The level of any duty reduction should continue as at present in section 45 of SIMA to be a report to the Minister of Finance.	◉
15. That the lesser duty concept as provided in Article 9.1 of the WTO Anti-Dumping Agreement be incorporated into section 45 of SIMA provisions for public interest.	◉
16. That the Minister of Finance consider amending SIMA to allow for the temporary exemption of goods from anti-dumping/countervailing duty orders under conditions of domestic short supply.	Available in the *Customs Tariff*

* The Subcommittee on the Review of the *Special Import Measures Act* of the Standing Committee on Finance, and the Subcommittee on Trade Disputes of the Standing Committee on Foreign Affairs and International Trade.

** This part of the recommendation was not accepted by the government; therefore it is not included in our assessment.

● Satisfactory
◉ Satisfactory (but no applications yet)
○ Not satisfactory
N/a Not applicable

3.32 For seven other recommendations, we could not verify whether complaints had been handled in compliance with the modifications. This was because there have not been any complaints on matters where the recommendations were applicable, since they came into effect.

Further work needed to fully implement three key recommendations

3.33 The remaining three recommendations necessitated more significant changes than the others. For these, we found that the management framework had not been satisfactorily modified and further work is needed. Concerns remain in three main areas and are as follows:

- access to confidential information,
- splitting responsibilities between the CCRA and the CITT, and
- access to the complaints process for small and medium-sized businesses.

Access to confidential information

3.34 The subcommittees recommended that counsel for the participants be granted access to confidential information in investigations conducted by the CCRA (they already had such access for investigations conducted by the CITT). The subcommittees' report presented two principal arguments for greater disclosure. First, it would allow interested parties to make rebuttal submissions to improve the quality and reliability of evidence. Second, it would result in greater procedural fairness, and lead to greater consistency with U.S. policies applied to Canadian producers exporting to the United States.

3.35 Our audit indicated that the CCRA has established guidelines to implement the SIMA changes regarding the disclosure of confidential information. Counsel must sign a disclosure undertaking, and the party being represented by counsel must sign a letter of authorization. Any breach could incur a penalty of up to $1 million.

3.36 In addition to guidelines on how the CCRA discloses confidential information, we also expected to see a system to control access to that information and keep track of submissions and requests for confidential information related to the SIMA process. The CITT has a registry system to handle the flow of documents and record all requests and sign-offs necessary to control access. The Agency does not have a registry system. The Agency's SIMA handbook provides guidance to staff on controlling the release of confidential information. However, files we reviewed showed that this guidance was not followed consistently.

3.37 The subcommittees also recommended that the appropriate changes be made to Canadian trade legislation to permit access by expert witnesses to confidential information in SIMA proceedings before the Tribunal. Expert witnesses are persons with specialized backgrounds—for example, finance, economics, manufacturing, and production—who are accepted as experts by the CITT. The CITT Act and Rules have been amended to respond to this recommendation. However, there have been no requests for such access since the changes came into effect.

The CCRA has denied complainants access to confidential information

3.38 The CCRA uses the *Special Import Measures Act* in its investigations. Since the Act did not clearly define terms such as "party" and "proceeding," the CCRA developed its own guidelines, in consultation with its legal counsel. These guidelines treat a SIMA case as a series of distinct proceedings and define which parties are eligible for access to confidential information in each proceeding (Exhibit 3.4).

Exhibit 3.4 CCRA's definition of "proceeding" and "party"

Proceeding	Eligible party
1. From filing of a written complaint under SIMA to presentation of a properly documented complaint.	• The complainant (the person submitting the written complaint). • Any other domestic producer filing the complaint as joint or co-complainant.
2. From initiation of dumping or subsidy investigation to final determination.	• Any exporter or importer actively participating in the proceeding. • The government of the country of export in a subsidy investigation.
3. Expiry review.	• Any exporter or importer actively participating in the proceeding. • Any Canadian producer of like goods. • The government of the country of export in a subsidy investigation.

Source: Canada Customs and Revenue Agency

3.39 The Canadian International Trade Tribunal Rules on the other hand define "party" generally to include the complainant, domestic producer, exporter, importer, government, association of producers, exporters or importers, or any other person entitled to be heard by the Tribunal.

3.40 On the basis of its interpretation, the Agency has denied the counsel for complainants or domestic producers access to confidential information submitted by importers and exporters in anti-dumping and subsidy investigations. The complainants were concerned that without access, their counsel could not provide relevant evidence to respond to the information provided by exporters and importers.

3.41 Two cases are now before the courts challenging the CCRA's guidelines for access to confidential information by counsel. The cases question whether the Agency's interpretation complies with the intent of the subcommittees' recommendation and the Act. Court hearings have yet to be scheduled.

Users generally satisfied confidential information will be protected but still have concerns

3.42 We interviewed some SIMA process stakeholders or "users"—trade experts, lawyers, and associations—and conducted a telephone survey. Our

survey included the complainant or the representative of the organization named in the complaint, or else the counsel or an association, plus other participants, such as the importers.

3.43 We found that users are generally satisfied that confidential information provided to Canadian counsel by the CCRA and the CITT will remain protected. This is especially important as the information could include the producer's business plans and competitive marketing, pricing, and costing information. The Tribunal and the Agency have guidelines and procedures to protect the information and control its release. There have been no known significant breaches of confidentiality, nor any enforcement actions.

3.44 However, users are greatly concerned about giving foreign counsel access to confidential information, an issue the subcommittees did not examine. Two thirds of the complainants surveyed were not convinced that confidential information provided to foreign counsel would remain protected. To date, only the Tribunal has received such requests. It has developed guidelines for access to confidential information by domestic counsel. It has imposed additional conditions when granting access to foreign counsel on a case-by-case basis. In two cases the foreign counsel had to be under the control and direction of a domestic counsel. Domestic counsel agreed to be responsible for the way foreign counsel used and treated the confidential information. In the other case, the Tribunal imposed restrictions on the offices and locations where the foreign counsel could see the confidential information.

3.45 Counsel for participants in the SIMA process have discussed their concern about access by foreign counsel at the CITT/Canadian Bar Association Bench and Bar Committee. They were concerned that non-resident counsel would be beyond the jurisdictional reach of the Tribunal and Canadian law. The CITT asked for written submissions about the issue at the January 2001 meeting but had not received any at the time of our audit. The minutes of the last meeting in October 2001 indicated that this remained a serious concern for the Bar. The Tribunal acknowledged the concerns that had been expressed but indicated that, for the time being, it remained satisfied that the rules were adequate to protect confidential information. We noted that the CITT had not consulted other user groups, such as complainants or importers, on this issue.

3.46 A further concern was access to confidential information by expert witnesses at Tribunal hearings. Over half of the complainants surveyed were concerned about giving expert witnesses access to confidential information because these persons are not necessarily affiliated with a professional body capable of holding them accountable for maintaining the confidentiality of the information.

3.47 Despite the fact that there are penalties for breach of confidentiality by counsel, users and complainants we interviewed and surveyed consistently expressed doubt that the penalties could be enforced because it would be difficult to prove a case. While penalties for breach of confidentiality also

apply to foreign counsel, users are not convinced that they are enforceable outside Canada. Users said that participants in the SIMA process must be assured of confidentiality in order for the system to have integrity.

3.48 Users voiced similar concerns about the access to and control of confidential information in expiry reviews. In our telephone survey, complainants involved in expiry reviews expressed doubt that confidential information provided to foreign counsel and expert witnesses would remain protected. We noted in one review that the CCRA refused the counsel for an importer access to confidential information, because, according to the CCRA guidelines, the importer was not considered a party to the CCRA proceedings. However, the importer was a party under the CITT Rules, and the Tribunal gave the counsel for the importer access to the information during the injury portion of the proceedings.

3.49 We also heard concerns from users about confusion caused by differing CCRA and CITT requirements. Each organization required counsel to sign separate disclosure undertakings to ensure protection of confidential information (Exhibit 3.5). Sometimes the same information had to be filed with each organization. The Agency charges for copying information as required by the Special Import Measures Regulations; the Tribunal does not because it is not required by the CITT legislation. While the CCRA and the CITT both administer the SIMA, the Tribunal also operates under the CITT Act. This can result in requirements that confuse users and cause inefficiencies. Since the CCRA and the CITT are dealing with the same clients, they should continue to look for ways to reduce confusion and inefficiencies. In some cases, this may involve asking the Department of Finance to propose changes to the legislation.

Exhibit 3.5 CCRA and CITT requirements for disclosure of confidential information

Canada Customs and Revenue Agency	Canadian International Trade Tribunal
• Counsel must sign Disclosure Undertaking. • The party being represented by counsel must sign Letter of Authorization. • Counsel must represent a party to the proceeding.	• Counsel must sign Notice of Representation and Declaration and Undertaking. • Counsel must represent a party that has filed a Notice of Participation.

Source: Canada Customs and Revenue Agency and the Canadian International Trade Tribunal

3.50 **Recommendation.** The Canada Customs and Revenue Agency should put in place a registry system to control the flow of confidential information.

Agency's response. The Canada Customs and Revenue Agency agrees with the recommendation and will continue to control the flow of confidential information to ensure that there is no loss in the confidence and integrity of the handling of confidential information related to the *Special Import*

Measures Act (SIMA) process. In this regard, the Agency has a system to control access to confidential information, keep track of submissions and requests for confidential information, handle the flow of documents, and record sign-offs necessary to control access to confidential information. The Agency is currently implementing a registry system to centralize control of the flow of confidential information.

3.51 **Recommendation.** To the extent possible given their different legislative authorities, the Canada Customs and Revenue Agency and the Canadian International Trade Tribunal should develop consistent requirements for access to and protection of confidential information.

Agency's response. The Canada Customs and Revenue Agency agrees with the recommendation. The Agency recognizes that the CCRA and CITT both administer the SIMA and deal with the same clients. The Agency acknowledges the importance of minimizing confusion and inefficiencies regarding access to and protection of confidential information. The Agency will examine the administrative and procedural issues raised in the report and will develop, in consultation with the CITT and to the extent possible given the different legislative authorities, consistent requirements for access to and protection of confidential information.

Tribunal's response. As the report notes, the Tribunal is governed by a different statutory framework than the CCRA. The Tribunal is a quasi-judicial organization that has many responsibilities beyond SIMA inquiries. It is and must be seen to be independent, impartial, and at arm's length from the government and from CCRA. The CITT has developed a comprehensive and rigorous set of procedures to ensure the protection of confidential information, while preserving the rights of parties to defend their interests. These procedures have been tested and work well.

3.52 **Recommendation.** The Canadian International Trade Tribunal should, in consultation with the users of the SIMA, update its guidelines on the protection of confidential information to include specific procedures to deal with the disclosure of such information to foreign counsel and expert witnesses.

Tribunal's response. As noted in the report, the Tribunal has specific procedures for the treatment and protection of confidential information that apply across its various statutory mandates, including procedures for the tightly circumscribed disclosure to experts and non-resident counsel in specific cases. The Tribunal notes that, in addition to SIMA inquiries, these procedures need to cover safeguard inquiries, investigations into procurement complaints, economic, trade and tariff inquiries, and appeals of customs decisions by CCRA.

The Tribunal is currently reviewing its published guidelines on the treatment of confidential information to ensure that they fully reflects all of its current rules and procedures. The Tribunal agrees that in finalizing its revised guidelines it should take into account the views of the parties who appear

before it in its full range of proceedings. The Tribunal will continue to balance the interests and protect the rights of all parties according to the law and the principles of natural justice.

Splitting responsibilities between the CCRA and the CITT

3.53 **Transfer of responsibilities from the CCRA to the CITT on preliminary determination of injury.** The parliamentary subcommittees recommended that the CITT be responsible for making the preliminary determination of injury. This had been the responsibility of the CCRA, although it could refer the matter to the CITT. Since 15 April 2000, the responsibility for making the preliminary determination has been split: the Agency is responsible for making the preliminary determination of dumping and subsidizing; the Tribunal is responsible for making the preliminary determination of injury.

3.54 The change was intended to let each organization concentrate on its area of expertise, reduce institutional duplication, provide a more streamlined and efficient system, promote greater transparency and procedural fairness, and cause unwarranted complaints to be settled or dropped earlier in the process.

3.55 The split in responsibilities has achieved some positive results. The process is perceived as being more transparent because parties can make submissions on injury earlier in the process. In addition, better use is made of the expertise of the CCRA and the CITT. Since 15 April 2000, however, no cases have been dropped at the preliminary determination stage.

3.56 **Transfer of responsibilities from the CITT to the CCRA in expiry reviews.** The subcommittees recommended splitting the administrative responsibilities for the conduct of expiry reviews: the CCRA would determine the likelihood of resumed or continued dumping or subsidizing on the expiry of a finding; the CITT would determine the likelihood of injury. Before the change, the Tribunal had conducted both parts of an expiry review. The intent of the change was to provide the same division of responsibilities as in the original determinations of dumping or subsidization and injury: the CCRA would focus on dumping and subsidizing for all cases, and the CITT would focus on injury.

3.57 **Changes in responsibilities have increased workloads.** The Agency now needs to generate more data and prepare a more formal administrative record for the Tribunal's use in making a preliminary determination of injury. The Agency's new responsibilities for expiry reviews have also increased its workload. The Agency sought and received new funding of $292,000 annually to cover additional costs. However, there was no transfer of staff from the CITT to the CCRA or change in funding for the Tribunal as a result of the transfer of responsibilities to the Agency. The Tribunal told us that it experienced essentially no reduction in its level of effort for many expiry reviews and that it had to assume the new responsibilities related to preliminary determination of injury without the allocation of new resources.

CCRA officers need additional training and guidance

3.58 To meet its new responsibilities for expiry reviews, the CCRA needed some additional expertise as well as guidance and training for its staff. Expiry reviews focus on determining the likelihood of resumed or continued dumping or subsidizing. This involves forecasting, which goes beyond determining whether dumping or subsidizing has already taken place. We expected the CCRA to identify the additional expertise and related training and guidance needed to conduct expiry reviews.

3.59 The Agency believes that its staff already have the necessary expertise to conduct expiry reviews, including the economics expertise to deal with the forecasting issues. Therefore, it assigned expiry reviews to staff based on availability or experience on other complaints casework. We are not convinced that staff had the needed economics expertise and we noted that the Agency has recently hired some economists for the Anti-dumping and Countervailing Directorate.

3.60 We found that limited training has been provided to date for staff assigned to expiry reviews. Staff did much of their learning in the process of conducting the expiry reviews. The only formal training provided was two one-day seminars, one prior to the conduct of the first expiry review, and the other after the first two expiry reviews were completed. Recently an overview of the expiry review was included in the orientation course for new staff. We also noted that there is little guidance on expiry review procedures in the SIMA handbook.

The CCRA is in the initial phase of examining expiry review procedures

3.61 After completing the first two expiry reviews, the Agency revised some of its expiry review guidelines in July 2001. However, the Directorate decided that another procedural review was necessary to modify policy, procedures, work instruments, and expiry review case management. Staff identified 24 issues that needed to be addressed. The aim of this review was to improve the efficiency and effectiveness of the processes while respecting principles of natural justice, procedural fairness, legal obligations, and client service objectives.

3.62 The Directorate Management Committee approved the proposal for this review in early May 2002. It was in its first stage at the time of our audit. This will be followed by consultations with the CITT and the public. The review was expected to lead to further revisions of the CCRA guidelines on conducting expiry review investigations, a comprehensive revision of the SIMA handbook on expiry review procedures, and training for staff and management in the new procedures. However, there is no timetable for each stage or for completion of the entire review. Furthermore, we are concerned that the review does not place more emphasis on staff training for expiry reviews.

3.63 We also noted that the Anti-Dumping and Countervailing Directorate itself is facing other pressures. In particular, it experienced a high staff

turnover since April 2000: 18 departures and 30 new hires, resulting in a net increase of 12 to bring the total staff to 105. Most of the staffing was done in 2002 in anticipation of the retirement of senior staff over the next five years. We also noted that among the new hires, almost all commerce officers were at an entry level while those who were departing were at more senior levels. We are concerned that this could lead to a knowledge gap within the Directorate, a small unit within the Agency that requires specific expertise and knowledge. The Directorate's need to build up its capacity to carry out its responsibilities is increasingly urgent.

Complaints and expiry reviews are becoming more expensive and time-consuming

3.64 We surveyed a variety of users including Canadian producers who file complaints and importers that respond to those complaints. About 70 percent of complainants we surveyed felt that the process was too costly for them. They reported that the cost for external counsel for each participant could range from $100,000 to $500,000 for parties to participate in the entire SIMA process. In one case the cost exceeded $1 million for the complainant and in another case it exceeded $1 million for the importer. The cost for external counsel for each participant could range from $50,000 to $100,000 for an expiry review. These costs have caused hardship, particularly for small and medium-sized Canadian producers. However, much of the cost is due to the nature and complexity of the process and the need to comply with international agreements.

3.65 Part of the increasing costs is likely due to the split of responsibilities. Now that the CITT is responsible for the preliminary determination of injury, user costs may rise if counsel's advice is needed earlier in the SIMA process. The expiry review process has become more expensive and time-consuming. In the past, when the CITT had full responsibility for expiry reviews, briefs and arguments on dumping and injury were presented concurrently. Now they are presented separately, which raises user costs. On the other hand, costs may be lower than before in cases where the CCRA finds no likelihood of dumping or subsidizing. In those cases, the CITT would cease its review for the likelihood of injury. Since April 2000, two cases were dropped after the CCRA had completed its investigations.

3.66 While the splitting of responsibilities has increased costs, users told us that the potential benefit of the changes is not yet apparent. We noted that the Agency and the Tribunal have made some efforts to work together. When part of the expiry review responsibilities were first transferred from the CITT to the CCRA, sessions were held to develop a joint questionnaire and working tools. In our view, more needs to be done to ensure that the expiry review process is as efficient and effective as possible so that Parliament's intentions in splitting the process are achieved. It would be beneficial for the CCRA and the CITT to conduct a review that would highlight the difficulties and inefficiencies in the expiry review process. The review could also point out the need for possible policy changes that would have to be addressed by the Department of Finance.

3.67 **Recommendation.** The Canada Customs and Revenue Agency should do the following:

- provide additional training and guidance to support the conduct of expiry reviews,
- develop an action plan with timelines for its review of the expiry review process, and
- identify any remaining administrative difficulties or inefficiencies in the expiry review process and work with the Canadian International Trade Tribunal to resolve them.

Agency's response. The Canada Customs and Revenue Agency agrees with the recommendation and acknowledges the importance and priority of training its staff. In this regard, the Agency will continue to provide training to all staff directly and indirectly involved with expiry reviews. In addition, the Agency will develop and enhance its training programs, training instruments and administrative policies to supplement existing training plans in order to ensure that all staff receive sufficient training for the conduct of expiry reviews.

An action plan with timelines for the review of the expiry review process will be developed by the end of December 2002.

The Agency will continue to review and identify any remaining administrative difficulties or inefficiencies in the expiry review process. The Agency is currently in the process of reviewing its expiry review procedures and will subsequently consult with the CITT and the public. The Agency will work with the CITT to resolve, to the extent possible, any administrative difficulties and inefficiencies resulting from differing or inconsistent organizational requirements.

3.68 **Recommendation.** The Canadian International Trade Tribunal should review the expiry review process to identify administrative difficulties or inefficiencies and work with the Agency to resolve them.

Tribunal's response. The introduction of the bifurcated expiry review process has caused some administrative difficulties. However, because there have been relatively few expiry review cases that have been fully conducted under the new regime since April 2000, it may be premature to draw conclusions.

The Tribunal is currently reviewing its expiry review procedures in light of the experience to date in order to identify both difficulties and potential solutions. In areas where the separate process of the Tribunal and the CCRA interact with one another, Tribunal staff will work with CCRA staff to find ways to reduce the difficulties, while respecting the independence and impartiality of the Tribunal.

Access for small and medium-sized businesses

Small and medium-sized Canadian producers face several barriers

3.69 The subcommittees recommended that the CCRA take concrete measures to ensure fair and equal access to the SIMA process for small and medium-sized Canadian producers. Although no formal definition of "fair

and equal access" exists, the Agency has generally taken it to mean a situation in which no industry sector or size of business has an advantage over another in gaining access to the SIMA process.

3.70 The CCRA consulted stakeholders to discuss the SIMA process after the subcommittees prepared their report. However, it did not use the findings of the consultations to systematically identify the access barriers faced by small and medium-sized producers, their relative importance, and ways of overcoming them. Nevertheless, the consultations, as well as the Agency's contact with producers in the course of administering the Act, have given the CCRA a sound appreciation of the barriers. They include the following:

- the costs of complying with SIMA requirements, including a significant paper burden;
- the complexity, formality, and duration of the process;
- lack of knowledge and expertise among producers about SIMA and relevant procedures; and
- the need to work together with other small producers, or through producer associations.

3.71 CCRA officials recognize that all producers encounter barriers in the SIMA process. Some are inevitable, given Canada's obligations to its trading partners and the need to ensure that the decisions will meet the tests established by WTO and NAFTA trade dispute panels, and by the Federal Court. Officials also recognize that the barriers, particularly the costs involved, are more formidable for smaller producers than for big producers.

3.72 The barriers identified by the CCRA both formally and informally correspond closely with those identified by stakeholders we consulted during the audit. These stakeholders were mostly associations representing small and medium-sized producers.

The CCRA plans and initiatives for small and medium-sized producers have stalled

3.73 Following the subcommittees' report and the government's April 1997 response, the CCRA moved quickly to develop a coherent approach to the unique problems faced by small and medium-sized producers. Between April 1997 and February 1998, it gave 20 SIMA presentations to government organizations dealing with small businesses, established a Web page to provide ready access to SIMA-related materials, and revised its procedures with the intention of providing at least two weeks of direct assistance to any small or medium-sized producer preparing a complaint. However, we noted that the CCRA's Anti-dumping and Countervailing Directorate Web pages can be difficult for a first time user to find.

3.74 The CCRA reviewed the practices of some of Canada's trading partners concerning small and medium-sized companies. The World Trade Organization Anti-Dumping Agreement recognizes the difficulties faced by small companies, and directs the authorities of member countries to provide them with practicable assistance. The CCRA also found that other countries have mechanisms to support and assist business, particularly small and medium-sized producers.

3.75 On the basis of these reviews and the actions already under way, in February 1998 the Agency produced a plan to further respond to the recommendation by taking the concrete steps urged by the subcommittees. The plan called for the following three groups of activities:

- promoting and raising the visibility of the SIMA program in general by assigning clear responsibility for information dissemination and developing an organized communications strategy;
- a pilot project to test revised procedures by assisting certain small and medium-sized producers that want to file a complaint, and getting feedback from them on the service received and their level of satisfaction with it; and
- proposing a process to analyze and assess other steps that might be taken to improve accessibility, including possible legislative, policy, and administrative changes.

3.76 The plan was approved and action began on its implementation. However, an October 1998 memorandum to all staff noted that the project had been put on hold because of budgetary constraints. The memorandum also indicated that access for small and medium-sized producers remained a priority. It urged staff to continue making efforts and seeking innovative ways of improving SIMA accessibility, including providing assistance when requested.

3.77 Since 1999 the Agency has undertaken further planning and action on improving access within the context of its Continuous Process Improvement initiative. The aim of the initiative was to improve client service and use the Agency's resources efficiently. In recent years the focus has been on improving SIMA administrative practices in general, instead of outreach activities specifically designed to improve access for small and medium-sized Canadian producers.

3.78 At the time of this audit, the amount of direct assistance provided by the Agency to small and medium-sized producers varied according to the requests made, resource availability, and staff workload at any given time.

3.79 Further, the CCRA does not have an operational definition of small and medium-sized Canadian producers for SIMA purposes. Without this definition, the Agency has not been able to target its activities to a specific group of producers; nor has it had a basis for measuring its performance by reference to such a group of producers. In our view, this has made it difficult for the Agency to design and target concrete measures to respond to the subcommittees' recommendation, and to assess how well it has ensured fair and equal access.

3.80 To act on Parliament's intent of ensuring fair and equal access to the complaints process for small and medium-sized Canadian producers, more focussed efforts are required. In our view, little progress can be achieved without systemic support to reduce costs. Further, the CCRA needs indicators to periodically assess its performance in implementing the subcommittees' recommendation that concrete measures be taken to ensure fair and equal access to the SIMA process for small and medium-sized Canadian producers.

3.81 **Recommendation.** The Canada Customs and Revenue Agency should do the following:

- move quickly to develop and implement measures to provide more support and assistance to small and medium-sized Canadian producers, and
- develop and use indicators to periodically assess its performance in implementing the subcommittees' recommendation that concrete measures be taken to ensure fair and equal access to the SIMA process for small and medium-sized Canadian producers.

Agency's response. The Canada Customs and Revenue Agency agrees with the recommendation. The Agency recognizes the difficulties faced by small companies and the importance of providing them with practicable assistance. In this regard, the Agency has taken steps to improve SIMA administrative practices, to provide direct assistance, and to improve accessibility of the SIMA process to small and medium-sized Canadian producers. The Agency will explore options to develop and implement measures to provide more support and assistance to small and medium-sized Canadian producers.

The Canada Customs and Revenue Agency agrees with the recommendation. The Agency recognizes the importance of the generation and use of meaningful performance measures. The Agency will explore opportunities and prepare an action plan to develop and use indicators to periodically assess its performance in implementing the subcommittees' recommendation that concrete measures be taken to ensure fair and equal access to the SIMA process for small and medium-sized Canadian producers.

Conclusion

3.82 The government has implemented most of the recommendations of the parliamentary subcommittees on the SIMA. The applicable legislation and regulations were changed, and the CCRA and the CITT have modified their management framework. Our audit highlighted some areas where improvements are needed to fully implement the recommendations. These include issues related to granting counsel access to confidential information, splitting responsibilities between the CCRA and the CITT, and working to ease access to the SIMA process for small and medium-sized producers. More work is needed in these areas if the Agency and the Tribunal are to achieve the results Parliament expected.

3.83 Recent years have seen an increasingly heavy financial, time, and information burden associated with participating in the SIMA process. As a result, it has become more difficult to reduce the inevitable barriers to accessing the complaints process. The CCRA and the CITT face the challenge of continuing to improve their management framework and administrative process. In this audit, we have identified opportunities for improving and streamlining CCRA and CITT administrative processes. In our view, the Agency and the Tribunal must find innovative ways to lessen the procedural burden in order to help ensure that the SIMA is an efficient and cost-effective trade remedy system.

About the Audit

Objectives

The objectives of our audit were the following:

- to assess whether the Canadian Customs and Revenue Agency and the Canadian International Trade Tribunal had put in place the support and management processes required to implement the changes to the *Special Import Measures Act* recommended by parliamentary subcommittees in 1996, and
- to identify opportunities for improving the application of the modified management framework.

Scope and approach

After our 1992 SIMA audit, two parliamentary subcommittees conducted a significant review of the Act in 1996. Their report contained 16 recommendations, 13 of which required legislative and administrative changes. This audit focussed on whether the CCRA and the CITT have put in place the support and management processes to implement those changes, as required.

Our examination included a review of relevant legislation, regulations, processes, guidelines, and files of selected complaints. The aim was to ensure that the management framework had been modified and applied appropriately. We carried out our work at the CCRA's headquarters and at the CITT in Ottawa.

During our examination we studied documents and interviewed CCRA and CITT managers and staff, as well as selected stakeholders or users of the SIMA process, including complainants, importers, trade experts, lawyers, and associations. We also conducted a telephone survey of 29 users, including small, medium-sized and large companies to learn how they perceived the way in which the complaints and expiry review processes were administered. In addition, our survey covered some people who had made inquiries with the CCRA and had asked for assistance in the documentation of a complaint. We requested their views on access to the complaints process.

Criteria

The criteria for our audit were drawn from the recommendations of the 1996 SIMA parliamentary review, and from the relevant regulations and guidelines. We expected to see the following:

- the legislation, rules, and regulations had been changed to address the recommendations of the parliamentary subcommittees;
- the CCRA and the CITT had modified the management framework as required to reflect the changes recommended by the parliamentary subcommittees; and
- the CCRA had taken concrete steps to ensure fair and equal access to the complaints process for small and medium-sized Canadian producers.

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Appendix The SIMA findings and orders in force as of 31 March 2002

Date of decision	Product	Country	Date of original decision*
11 April 1997	Polyiso insulation board	United States	
21 April 1997	Machine tufted carpeting	United States	21 April 1992
27 June 1997	Concrete panels	United States	
20 October 1997	Certain waterproof rubber footwear	China	25 May 1979
27 October 1997	Certain hot-rolled carbon steel plate	Mexico, China, South Africa, and Russian Federation	
28 November 1997	Fresh iceberg (head) lettuce	United States	30 November 1992
10 December 1997	Bicycles and frames	Chinese Taipei and China	11 December 1992
29 April 1998	Certain prepared baby foods	United States	
4 September 1998	Certain stainless steel round bar	Germany, France, India, Italy, Japan, Spain, Sweden, Chinese Taipei, and United Kingdom	
18 November 1998	Preformed fiberglass pipe insulation	United States	19 November 1993
17 May 1999	Certain hot-rolled carbon steel plate and high-strength low-alloy plate	Italy, Korea, Spain, and Ukraine	17 May 1994
18 June 1999	Certain stainless steel round bar	Korea	
22 June 1999	12-gauge shotshells	Czech Republic and Republic of Hungary	22 June 1994
2 July 1999	Certain flat hot-rolled carbon and alloy steel sheet products	France, Romania, Russian Federation, and Slovak Republic	
19 July 1999	Black granite memorials and black granite slabs	India	20 July 1994
28 July 1999	Certain corrosion-resistant steel sheet products	Brazil, Germany, Japan, Korea, and United States	29 July 1994
27 August 1999	Certain cold-rolled steel sheet products	Belgium, Russian Federation, Slovak Republic, and Turkey	
12 January 2000	Certain concrete reinforcing bar	Cuba, Korea, and Turkey	
20 March 2000	Subsidized canned ham	Denmark and Netherlands	7 August 1984
1 May 2000	Iodinated contrast media	United States (including the Commonwealth of Puerto Rico)	
1 May 2000	Women's boots	China	3 May 1990
5 June 2000	Carbon steel welded pipe	Korea	28 June 1983
27 June 2000	Certain carbon steel plate	Brazil, Finland, India, Indonesia, Thailand, and Ukraine	
1 August 2000	Certain refrigerators, dishwashers, and dryers	United States	
13 September 2000	Whole potatoes	United States	4 June 1984
27 October 2000	Certain stainless steel round bar	Brazil and India	
3 November 2000	Refined sugar	United States, Denmark, Germany, Netherlands, United Kingdom, and European Union	6 November 1995
8 December 2000	Waterproof footwear and bottoms	China	
2 May 2001	Garlic, fresh or frozen	China and Vietnam	
1 June 2001	Certain concrete reinforcing bar	Indonesia, Japan, Latvia, Republic of Moldova, Poland, Chinese Taipei, and Ukraine	
24 July 2001	Certain carbon steel welded pipe	Argentina, India, Romania, Chinese Taipei, Thailand, and Brazil	26 July 1991
17 August 2001	Certain flat hot-rolled steel sheet and strip	Brazil, Bulgaria, China, Chinese Taipei, India, Macedonia, South Africa, Ukraine, and Yugoslavia	
27 December 2001	Leather footwear with metal toe caps	China	
20 March 2002	Fresh garlic	China	21 March 1997

*The Canadian International Trade Tribunal found injurious dumping has continued since this date (see paragraph 3.19 for an explanation of expiry reviews)

Source: Canadian International Trade Tribunal, *Annual Report,* 2002