

November 22, 1996

Subject: Procedural Changes in Injury Inquiries under the *Special Import Measures Act*

In the fall of 1994, the Chairman of the Canadian International Trade Tribunal set up a staff committee to conduct a fundamental review of Tribunal procedures in injury inquiries under section 42 of the *Special Import Measures Act* (SIMA). The committee was mandated to examine ways and means of making the injury inquiry process less costly and less cumbersome, while still preserving fairness. In carrying out its mandate, the committee engaged in wide-ranging consultations both inside and outside the Tribunal.

In the spring of 1996, the committee prepared a discussion paper which identified key issues and questions which needed to be addressed. The paper was distributed for comment to The Canadian Bar Association, members of the trade bar, trade and industry associations, the Department of National Revenue, the Department of Finance, the Bureau of Competition Policy and other Tribunal stakeholders. The responses received indicated that, on many key issues, there was no clear consensus. However, the responses, as a whole, provided valuable input to the committee's deliberations.

Following these consultations, in the fall of 1996, the committee prepared a series of recommendations for consideration by the Tribunal. Based on these recommendations, the Tribunal has decided to proceed with a number of changes to existing procedures. The thrust of these changes is to:

- ensure that staff research is as focused and relevant as possible by seeking input from parties and their counsel on the design of the Tribunal's survey questionnaires in advance of their distribution;
- advance the inquiry schedule so that, generally, information is received and distributed earlier, so that issues arising therefrom may be identified and dealt with, to the extent possible, prior to the hearing;
- provide for key evidence, such as that for specific injury allegations, to be submitted at a time and in a form and manner which allow parties subject to the allegations to have a fair and full opportunity to respond prior to the hearing; and
- reduce the incidence of excessively long hearings.

The changes, as a whole, are intended to foster a process whereby parties' positions are more fully documented prior to the hearing and parties are more fully informed of each other's position. To the extent that this can be achieved, scarce and costly hearing time can be used to focus on the key issues in dispute in an efficient and effective manner.

The new schedule that will result from the changes which the Tribunal proposes to implement is attached, together with explanatory comments. Guidelines and practice notices providing specific details on the proposed changes will be issued, as required, in the coming months. Some of the changes may eventually be incorporated into the *Canadian International Trade Tribunal Rules*. A few of the changes, such as pre-preliminary determination consultations, have already been implemented by the Tribunal in recent cases. Pending the issuance of formal guidelines and practice notices, wherever possible in current and upcoming cases, the Tribunal will proceed with implementing the revised schedule and new procedures in consultation with parties.

As all stakeholders know, the statutory time frames, within which SIMA injury inquiries must be conducted, are extremely tight. This creates an imperative for all scheduled events to occur on time. In the past few years, there has been an increasing tendency for parties to miss deadlines. Accordingly, in the future, the Tribunal will be adopting a more rigorous approach vis-à-vis missed deadlines, under which any late filings by parties will not be received unless leave is granted by the Tribunal. Moreover, to ensure adherence to the inquiry schedule, the Tribunal will hold a teleconference with parties prior to the due date for the return of completed questionnaires and before the filing of submissions.

The SIMA procedures review has not resulted in any specific recommendations regarding the use of electronic information and communication in injury inquiries. However, the Tribunal is considering initiatives in this area which, it believes, hold considerable promise for streamlining and reducing the overall costs of the process. These initiatives will be introduced on a gradual basis, as and when they are ready, in consultation with stakeholders.

Finally, although the focus of the SIMA procedures review committee was on injury inquiries under section 42, a number of its recommendations are equally applicable to reviews of existing findings under section 76. Those recommendations will be implemented, with appropriate modifications, in reviews.

Any questions or comments relating to this matter should be addressed to Mr. Selik Shainfarber at (613) 993-7197 or the undersigned at (613) 993-3595.

Yours sincerely,

Michel P. Granger
Secretary

Encl.

REVISED INQUIRY SCHEDULE

TIME	EVENT	COMMENTS
Pre-PD	1. Preparatory Work	<p>Prior to the PD (e.g., 4 - 6 weeks) CITT staff will (on a contingent basis, subject to an eventual PD):</p> <ul style="list-style-type: none"> • identify and confer, as necessary, with interested persons (industry, importers, exporters, purchasers, associations, etc.) and their counsel on the content of the questionnaire and any other matters which might affect the research program such as product breakdowns, the identification of “bellweather” products for pricing and the presentation of financial statements; and • provide interested persons and counsel with an indication of the possible inquiry schedule, including deadlines for questionnaires and notices of appearance; <p>The above procedures have already been implemented in a number of recent cases. Measures have been and will be implemented to ensure that the pre-PD process is fair and transparent.</p>
Day 0	2. Receipt of PD	
Day 1	3. Notice of Inquiry, Inquiry Schedule and Questionnaires Out.	<p>With the benefit of pre-PD research, questionnaires will be issued with the Notice on or about PD day. In the past, there was usually a delay of several days before questionnaires were issued.</p>
Day 14	4. Appearances In	<p>In the past, notices of appearance were returned at the same time as questionnaires. Under the revised schedule, appearances will be due a week prior to the questionnaires so as to allow for earlier identification of parties and their counsel and for their participation in the teleconference described under Event 5 below.</p>
Day 17	5. Teleconference	<p>This event has been introduced into the inquiry schedule to monitor Tribunal filing deadlines and to ensure compliance by parties. Under the procedure, one or more of the Tribunal Panel members assigned to a case will convene counsel for parties via teleconference to determine whether any problems exist in meeting set deadlines and to ensure that</p>

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Day 21	6. Questionnaires In.	counsel understand the consequences which can ensue if deadlines are missed (i.e., documents would be returned unless leave for late filing is granted by the Tribunal).
	- Specific Account Allegations	This advances the return of appearances and questionnaires by approximately one week compared to the old schedule. However, as a result of pre-PD consultations, parties will know what the information requirements and timeframes will be and, accordingly, they may begin to organize their data and information in advance of official receipt of the questionnaire. In the past, the producer's questionnaire asked the complainant to provide specific examples of injury at the customer account level. There was no requirement for supporting evidence to be filed at this stage. In the past, the supporting evidence for these allegations, together with additional allegations and evidence (which, in many cases, exceeded the numbers of allegations initially filed), were generally filed later at the submissions stage.
	- Disclosure	Under the proposed procedures, complainants will be required to file all of their injury allegations and supporting evidence with their questionnaire responses. Late filings will not be allowed unless leave is obtained from the Tribunal. The Tribunal will require that details regarding these allegations be disclosed to relevant parties on a selective "need to know" basis and will be issuing guidelines in this regard in the near future. The foregoing changes are intended to put a sharper focus on primary allegations and to allow issues to be joined earlier as well as fairly and more effectively.
	- Financial Information	As part of its review of procedures, the Tribunal has examined the way in which it gathers financial information from parties. One of the options considered was to require independent audits of "like goods" financial statements. Consultations with stakeholders indicated little support for such a measure and the Tribunal has decided not to pursue

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		<p>this option.</p> <p>Instead, the Tribunal will be clarifying questionnaires to ensure that the basis for all allocations made is fully explained and the like goods financial statement can be readily reconciled with total company financial statements. This change is intended to reduce the time currently spent, both prior and during the hearing, on questions related to understanding the derivation and basis for the financial statements reported in Tribunal questionnaires by producers.</p> <p>In the past, the Tribunal routinely collected financial information from producers down to the net income before taxes (NIBT) line. In its review of procedures, the Tribunal raised the question as to whether, in some cases, it might be appropriate to stop at gross margin or some other line above NIBT. Stakeholders generally felt that this should be decided on a case-by-case basis. The Tribunal agrees. This will be one of the items discussed in the pre-PD consultations.</p>
	- Economic Information	<p>The Tribunal consulted stakeholders on the use of economic models and the role of economic analysis. There was limited support for the specific use of the COMPAS model. However, there was more general support for the use of economic models in some cases. Accordingly, the Tribunal has decided that the use of economic models should be decided on a case-by-case basis. In the meantime, the Tribunal will continue to collect relevant economic data through its questionnaires for presentation in the Market Characteristics section of the Staff Report.</p>
Day 50	7. Distribution of Staff Report and Tribunal Exhibits	<p>The Tribunal considers it vital for parties to receive relevant information as early as is possible and practicable in the process. In its review of SIMA procedures, the Tribunal considered the option of distributing completed questionnaires early i.e., on or about Day 28, followed by the regular distribution of documents about two weeks later. This early, double distribution was tried in recent cases and presented the Tribunal with a number of major administrative problems. Moreover, consultation with stakeholders</p>

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		revealed that a majority favoured a single distribution.
		In the circumstances, the Tribunal has decided to continue with a single distribution. However, the distribution under the revised schedule will be effected sooner than the former schedule. In the past, the Staff Report was typically distributed around Day 65. The new procedure brings this event forward by two full weeks.
Day 55	8. Teleconference	One or more Panel members will teleconference with counsel for all parties to discuss filing deadlines for upcoming events, including submissions and interrogatories, and the consequences for failing to meet deadlines. See Event 5 above.
Day 60	9. Domestic Producers' Submission In	In the past, there were no rules or guidelines governing the form and content of parties' submissions. However, typically, complainants used their submissions to introduce the bulk of their injury allegations, with supporting evidence in the form of extensive witness statements and other related documentation. As noted under Event 6 above, under the new procedure, injury allegations and supporting evidence will be filed together with the returned questionnaires. The submissions which are filed on Day 60 should therefore be focused primarily on presenting the complainant's case in the form of views and analysis of the evidence. In doing so, the submissions should address, among other things, the various injury factors set out in the CITT Rules as well as the issue of causality. In due course, the Tribunal will be issuing guidelines in this area.
Days 60 - 70	10. Interrogatories Replies Re: Domestic Producers	In the past the schedule did not specifically acknowledge interrogatories (i.e., questions seeking clarification or elaboration of submitted material as well as requests for additional material) as an "event" and hence did not provide a time period for the exchange of questions and answers between parties. Yet, interrogatories are, and always have been, a common occurrence in SIMA injury inquiries. In the absence of a set time period for the exchange of questions and answers, the Tribunal has found that

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Day 70	11. Importers'/ Exporters' Submissions and Witness Statements	<p>this has often occurred in a disorderly manner and, on occasion, has even extended well into the hearing.</p> <p>For questions which arise from submissions, the Tribunal has decided that there should be specified timeframes for this process, as indicated. It is apparent that for the exchanges to be completed within the 10 day interval provided, parties will have to act in a reasonable, co-operative and efficient manner.</p> <p>For questions that can be identified prior to parties seeing each others' submissions (i.e. questions which are not submission dependent), the Tribunal will expect such questions to be presented and the responses to be provided at the earliest possible time (i.e. well before the Day 60 - 70 time period). This matter will be discussed by the Tribunal with parties at the teleconference on Day 17 (Event 5).</p> <p>If necessary, the Tribunal will be prepared to hear and rule on any disputes arising between the parties in connection with these exchanges as promptly as possible, including through the use of teleconferencing. Some exchanges between parties may produce information which, in whole or in part, is not necessary for the record. The Tribunal will be monitoring these exchanges and, as may be necessary, conferring with parties, to ensure that the record does not become unnecessarily cluttered with extraneous information.</p> <p>As with the complainant's submission, guidelines will be issued on the form and content of importers'/ exporters' submissions. See Event 9 above.</p>

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Days 70-80	12. Interrogatories/ Replies re: Importers/ Exporters	As with the interrogatories on the complainant's submissions, an equivalent time period will be provided for the exchange of questions and answers regarding importers'/exporters' submissions. See Event 10 above.
Day 80	13. Domestic Producers' Reply Submission (If Necessary)	There is no provision for this reply procedure in the former schedule. This new procedure should allow the principal issues in dispute to be more closely joined, prior to the hearing.
Days 83-86	14. Pre-hearing Conference (optional)	In the consultations on the SIMA Procedures Review, stakeholders generally agreed that pre-hearing conferences could be an effective forum to resolve disputes and procedural issues, prior to the hearing, provided that firm and clear rulings were delivered by the Tribunal. The Tribunal agrees and will continue to use this procedure, as required, to settle issues in advance of the hearing. To reduce costs and facilitate the convening of parties, electronic teleconferencing will be used, whenever possible.
Day 90	15. Hearings	<p>In their replies to the Tribunal's Discussion Paper, most stakeholders pointed to inefficient cross-examination as a principal factor in prolonging hearings. Some attributed this to lack of pre-hearing disclosure and others to insufficiently rigorous control of proceedings by Panels.</p> <p>As far as lack of pre-hearing disclosure is concerned, most of the new procedures outlined above are intended to foster a process whereby parties' positions are fully documented prior to the hearing and parties are fully informed of each others' positions. In this way, scarce and costly hearing time can be used to focus on the key issues in dispute in a more efficient effective and fair way.</p> <p>In controlling hearings, panels will, among other things, set reasonable time allocations for cross-examination by individual counsel, based on discussions with counsel as to their anticipated time requirements. In the past, these allocations were</p>

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		sometimes viewed as rough estimates. In the future, these allocations will be seen as firm targets. Once set, they will be vigorously and fairly applied by Panels, both to counsel conducting their cross-examination and to witnesses subjected to cross-examination.
Day 105	16. Latest End of Hearing	In the past, some hearings on large and complex cases have gone on for more than two weeks. The Tribunal considers such lengthy hearings unnecessary, regardless of the nature of the case, and inappropriate, given its statutory obligation to render a decision by Day 120 and to provide reasons (in both official languages) by Day 135. Accordingly, in the future, the Tribunal will not schedule hearings to extend, in any case, beyond 10 sitting days or Day 105, whichever is shorter.
Day 120	17. Finding	
Day 135	18. Reasons	

SIMA Injury Inquiry Timeline

<u>Proposed Time</u>	<u>Event</u>	<u>Current Time</u>
Pre-PD (4 - 6 weeks)	Preparatory Research	Limited (1 - 2 weeks)
Day 0	Receipt of PD	Day 0
Day 1	Notice/Questionnaires/Schedule Out	Day 5 - 7
Day 14	Appearances/Undertakings In	Days 35 - 40
Day 17	Teleconference	NA
Day 21	Questionnaires In	Days 35 - 40
Day 50	Distribution of Staff Report and Exhibits	Days 65 - 70
Day 55	Teleconference	NA
Day 60	Complainant's Submission In	Days 72 - 77
Days 60 - 70	Interrogatories /Replies re: Complainant	NA
Day 70	Importers'/Exporters' Submissions In	Days 79 - 84
Days 70 - 80	Interrogatories/Replies re:Importers	NA
Day 80	Complainant's Reply Submission	NA
Day 83 - 86	Pre-hearing Conference (optional)	Varies
Day 90	Hearing	Day 90
Day 105	Latest End of Hearing	NA
Day 120	Finding	120
Day 135	Reasons	135