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November 22, 2004

Mr. James Jochum
Assistant Secretary for Import Administration
International Trade Administration
US Department of Commerce
Washington, DC 20230

Dear Mr. Jochum,

Docket No 040722214-4214-01
Certification of Factual Information to Import Administration
During Antidumping and Countervailing Duty Proceedings

Please find appended the comments of the Government of Canada in the above-indicated rulemaking.

Yours sincerely,

Susan Harper
Minister-Counsellor
(Economic & Trade Policy)

COMMENTS BY THE GOVERNMENT OF CANADA TO THE INTERNATIONAL TRADE ADMINISTRATION U.S. DEPARTMENT OF COMMENTS

CERTIFICATION OF FACTUAL INFORMATION TO IMPORT ADMINISTRATION DURING ANTIDUMPING AND COUNTERVAILING DUTY PROCEEDINGS

U.S. FEDERAL REGISTER 69FR56738 SEPTEMBER 22, 2004

Submitted by:
The Canadian Embassy
November 22, 2004

It is Canada's view that there is no justification or necessity for the proposed changes in the Department's certification requirements in antidumping and countervailing duty proceedings, as set in Section 351.303 (g) of the regulations. The Department has not provided a rationale for the proposed changes in either its notice of September 22, 2004 or its previous notice of inquiry on the issue as published in the Federal Register on January 26, 2004. In this context, Canadian authorities are not aware of any evidence that there has been, or continues to be an incidence of fraudulent or misleading information flowing from the current certification procedures.

Further, and more importantly, the Department's current certification requirements and verification procedures are sufficient to allay any concerns that the Department may have regarding the veracity of information it receives during the course of anti-dumping and countervailing duty investigations. Aside from the professional obligations of U.S. legal counsel, whose certifications, in Canada's experience, accompany a large portion of filings with the Department, verification provides the Department with ample opportunity to ensure that the information provided to it is both accurate and complete. Such procedures also allow the Department to impose a penalty, in the form of adverse inference in the use of facts available, in response to behavior which may be improper. This remedy, which can result in serious consequences for respondents in investigations, should be sufficient protection for the Department to ensure that the information on which it is proceeding is reliable. Further, Canada does not understand the advantage of listing participants in the preparation of the factual submission process. It adds a further burden to a process which is already taxing without appearing to add anything of substance to the certification process.

Canada also notes that the Department's discomfort with the accuracy of information it may receive during the course of investigations appears to pertain primarily to the information that may be provided by respondents. While Canada disagrees with the need for additional certification procedures and requirements, it would expect that any new standard applicable to respondents would be made to weigh equally on petitioners.

With respect to the proposed regulation itself, Canada has several questions and observations. The proposed regulation is unclear as to whether it applies equally to certifications by both companies and governments. As the Department is aware, government officials often provide certifications regarding submissions in countervailing duty investigations. Canadian authorities would appreciate clarification on this point. Given that a government may be presumed to provide accurate information, it would appear unnecessary to request further assurance or detail beyond the current certification.

Similarly, it is not clear as to whether it is proposed that detailed certifications by both company representatives and legal counsel, covering the same personnel, would be required in all cases. As the Department is aware, in many cases, counsel will file certifications to accompany questionnaire responses prepared with counsel advice and assistance but produced substantively by company or government officials. In such cases, would legal counsel be required to not only certify but also to list the company or government officials that participated in the preparation of the response? On this point, the proposed certification process would require that the identity of those persons having a "significant responsibility" for the preparation of part or all of the submission be specifically identified. Is it expected that company/government and counsel certification list the same people?

Company certifications raise another problem. They assume that there is a strict supervisory hierarchy in the organization providing the factual submission. Often, however, in companies or governments, there is no clearly discernable "supervisory" relationship involved in the preparation of submissions. Rather, factual input is coordinated and assembled from a large variety of sources. In such circumstances, it is difficult to see how any person can provide a certification with regard to "supervision" of others significantly involved in the preparation of a submission.

More generally, the terms used in the certifications are vague enough to subject people to an uncertain standard. It would be difficult to determine, with any precision, a "reasonable" basis on which an "informed judgment" regarding the accuracy or completeness of information can be made. There is no indication regarding the manner in which the Department intends to interpret this particular provision. It is Canada's view, therefore, that the proposed certification process would be quite onerous in those countervailing duty investigations that involve, for example, multiple levels of government and many responding departments and agencies.

The issue of the possible imposition of criminal sanctions is troublesome. Given the other sanctions, both in terms of the investigations itself and the code of professional conduct governing legal counsel, Canada has serious doubts whether any legitimate purpose could be served by recourse to such a mechanism. Further, Canada has concerns about the effect that the prospect of such sanctions could have on parties to provide information, the accuracy of which cannot be absolutely certified. For example, parties may have doubts about providing costing information from sub-contractors because they would not be entirely sure that it was accurate. Such circumstances could easily result in important information, which would be subject to verification in any event, not being submitted. This in turn could result in investigations that could be flawed in important, if not crucial, areas.

Finally, Canada notes that the Canadian Border Services Agency (CBSA) also has a certification requirement with respect to the completeness or accuracy of the information that is provided to it during the course of anti-dumping or countervailing duty investigations. However, it is not only less onerous than the proposed U.S. certification procedure, it is also less onerous than the current U.S. process. For example, CBSA does not require certification from legal counsel who may have assisted parties in the submission of information. In its view, there is no guarantee that counsel, no matter how diligent, can ever be absolutely certain of the veracity of information for which counsel does not have the ultimate responsibility. Further, there is no provision for civil or criminal sanctions if CBSA determines that information that is being certified is inaccurate, misleading or fraudulent. CBSA practice has been to simply reject such information; the use of facts available is the only sanction applied. CBSA does not see any need to change its current certification requirements.