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International Trade & Investment Practice

Canadian Anti-Dumping and Countervailing Duty Measures

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TABLE OF ABBREVIATIONS

CBSA	Canada Border Services Agency	NV	Normal Value
DSP	Domestic Selling Price	PDD/S	Preliminary Determination of Dumping/ Subsidization
EP	Export Price	PDI	Preliminary Determination of Injury
FDD/S	Final Determination of Dumping/Subsidization	RFI	Request for Information
GST	Goods and Services Tax	SIMA	Special Import Measures Act
MD	Margin of Dumping	SIMR	Special Import Measures Regulations
MS	Margin of Subsidy		

Preface

Goods imported into Canada are generally only subject to assessment of ordinary customs duty and goods and services tax (GST) or harmonized sales tax. However, during the course of any year, certain imported goods face the additional assessment of anti-dumping and/or countervailing duties because they have been found to have caused injury or retardation to a Canadian domestic industry or because they threaten to cause injury by virtue of being dumped or subsidized.

Two Canadian government bodies, the Canada Border Services Agency (CBSA) and the Canadian International Trade Tribunal (CITT), administer the *Special Import Measures Act* (SIMA) and the *Special Import Measures Regulations* (SIMR), Canada's laws that deal with anti-dumping and countervailing duties. The SIMA and the SIMR contain 98 sections and 58 regulations, respectively, of complex legal rules. This book is designed to provide a brief but thorough outline of the principal elements of Canada's anti-dumping and anti-subsidy legislation, including amendments to the SIMA and the SIMR that came into force in April 2018. However, any person involved in proceedings under the SIMA should seek the guidance of an experienced, Canadian trade lawyer as to the application of the law.

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Investigation of Dumping or Subsidization–The Procedure

Given coverage of the subject by news media and political statements intended to placate constituents, much of the general public believes that dumping or subsidizing of imported goods is an evil practice. However, nothing is farther from the truth. To the extent that dumping and subsidization are not causing or threatening injury, or causing retardation, to a domestic industry in Canada, they may be practised deliberately and with impunity.

In order for proceedings to be initiated under the SIMA, two principal elements must be present:

1. dumping or subsidization; and
2. injury or retardation to a domestic industry of like goods.

Dumping or subsidization that does not cause injury or retardation is of no consequence. Injury or retardation not attributable to dumping or subsidization cannot be relieved by SIMA duties.

The proceedings and responsibility for determinations of dumping/subsidization on one hand, and injury or retardation on the other, are split in that the CBSA has responsibility for determinations of dumping/subsidization and the CITT has exclusive jurisdiction to determine whether or not dumping/subsidization is a cause, or threatens to be a cause, of injury or is a cause of retardation.

The procedures used for investigating dumping or subsidization are very similar although the subject matter is quite different. As well, in the case of subsidization there exists an additional party to the proceedings, the foreign government which has allegedly subsidized the goods. The differences will be dealt with in detail in the following sections covering whether or not dumping and subsidization exist.

For ease of reference, the Appendix sets out principal timeframes under SIMA.

Initiation of Investigation

An investigation is initiated by the President of the CBSA:

1. on his own initiative, or
2. on the basis of a written complaint.

It is far more common that an investigation is initiated based on a complaint. Where the President initiates an investigation on his own initiative, it may be based on evidence which he has gathered or on the advice of the CITT where, during an inquiry into whether dumping or subsidization of goods has caused or threatened to cause injury, or has caused retardation, the CITT forms the opinion that there is evidence that goods, the uses and other characteristics of which closely resemble those of the goods under investigation, are being dumped or subsidized, and the evidence discloses a reasonable indication that the dumping or subsidizing has caused injury or retardation, or threatens to cause injury to a domestic industry.

Complaint: Standing

An investigation will not be initiated based on a complaint unless:

1. it is supported by domestic producers whose production represents more than 50 percent of the total production of like goods by those domestic producers who express either support for, or opposition to, the complaint, and
2. the production of the domestic producers who support the complaint represents at least 25 percent of the total production of like goods by the domestic industry.

Where a domestic producer is an importer, or is related to an exporter or importer, of allegedly dumped or subsidized goods, that domestic producer may be excluded from being considered one of the domestic producers and, therefore, part of the domestic industry.

The President must determine, within 21 days after receipt of a complaint, whether it is properly documented or not properly documented. In the latter case, the President will seek additional information from the complainant(s) to correct the lack of proper documentation.

Objects of Investigation: Sales

The objects of the investigation are sales of goods for export to Canada where such sales are found to be dumped and/or subsidized. Where the dumping and/or subsidization are then found to have been a cause of injury or retardation, or to have threatened to be a cause of injury, they will become subject to an anti-dumping and/or countervailing duty order. Sale includes leasing and renting, an agreement to sell, lease or rent and an irrevocable tender. Therefore, it is not necessary for a sale to have been completed, or an importation to have been made, in order to trigger an anti-dumping investigation. The period of investigation chosen by the President is generally the same as the period during which the domestic industry claims to have suffered injury or retardation.

Notices

If the President causes an investigation to be initiated, he will notify the Secretary of the CITT, the exporters, the importers, the government of the country of export, relevant trade unions, and the complainant(s), and will arrange for the notice of initiation of the investigation to be published in the Canada Gazette, the official publication of the Canadian government.

Where the President decides not to initiate an investigation, the President, on the date of notice of that intention, or the complainant, within 30 days after the date of the notice, may refer to the CITT the issue of whether or not the evidence, contained in the complaint, disclosed a reasonable indication that the dumping or subsidizing has caused injury or retardation or is threatening to cause injury. Where the matter is not referred to the CITT or the CITT concurs with the decision of the President, the investigation will be terminated based on one of the following:

1. there is insufficient evidence of dumping;
2. the margin of dumping (MD) or the actual or potential volume of dumped goods is negligible; or
3. the evidence does not disclose a reasonable indication that the dumping is causing injury or retardation, or threatens to cause injury.

CITT Preliminary Injury Inquiry

Upon receipt of notice of initiation of an investigation, the CITT initiates a preliminary inquiry into whether the evidence discloses a reasonable indication that the dumping or subsidization of the goods has caused injury or retardation, or threatens to cause injury. Parties to the proceeding are permitted to make representations in writing. Exceptionally, the CITT may conduct an oral hearing. In either case, the inquiry is limited to the question of whether or not the complaint contains sufficient evidence, on a reasonable indication basis, of injurious dumping or subsidization. The CITT makes a preliminary determination of injury (PDI) within 60 days of the commencement of its inquiry. Where it finds that there is no reasonable indication of injury, the President of the CBSA will terminate the investigation. Where it finds that there is a reasonable indication, the CITT may instruct the CBSA to collect data and make calculations for what it considers separate classes of like goods.

Parties to the proceeding are permitted to make representations in writing.

Since June, 2017, trade remedy investigations will also be terminated in respect of an individual participating exporter if that exporter is found to have an "insignificant" (de minimis) margin of dumping or amount of subsidy, which is defined as less than 2% and 1% of the export price, respectively.

CBSA Dumping/Subsidization Investigative Procedure

The parallel investigation into dumping or subsidization practices conducted by the CBSA proceeds from the date of initiation of the investigation and results in:

1. termination where the CITT has made a preliminary determination of no injury;
2. termination of the investigation by virtue of a preliminary determination of no or negligible dumping/subsidization; or
3. a decision of dumping/subsidization

within 90 days of initiation of the investigation or within up to 135 days where an extension of the proceedings is taken by the President.

At the time notice of the investigation is given, the President will send detailed requests for information (RFI) to manufacturers, exporters (if different from manufacturers), and importers of the subject goods.

In the case of subsidization investigations, an RFI will also be sent to the foreign government(s).

Manufacturers' RFI

The Manufacturers' RFI is designed to establish the normal value (NV) of the subject goods. RFI questions therefore relate to:

1. domestic sales and conditions of sale;
2. costs of production;
3. selling, general and administrative expenses; and
4. transportation and other handling costs.

If the manufacturer is also the exporter, the RFI will inquire into the terms and conditions of the sales for export to Canada, to assist in the establishment of the export price (EP), including:

1. the selling price;
2. export charges assumed either by the manufacturer/exporter or the importer;
3. whether there are any compensatory arrangements between the parties;
4. whether the exporter and importer are related; and
5. whether there are any financial or other special arrangements between the exporter and the importer.

Finally, if subsidization is alleged, the RFI will cover the alleged subsidies and their per unit benefit/value. The RFI provided to the manufacturers and exporters is expanded to include questions concerning financial contributions which may have conferred a benefit to persons engaged in production, manufacture, growth, processing, purchase, distribution, transportation, sale, export or import of goods, all of which may be considered countervailable.

Importers' RFI

This is intended to establish and/or substantiate the export price and deals with:

1. the terms and conditions of purchase;
2. export charges assumed by the exporter or importer;
3. any special arrangements between the exporter and importer;
4. any special contractual relations between the parties; and
5. any relationship between the exporter and the importer.

Where the exporter and importer are related, additional information is sought related to:

1. the terms and conditions of resale in Canada of the goods, whether resold in the condition in which they are at the time of importation or after assembly, packaging or further processing;
2. selling and administrative costs incurred in Canada by the importer;
3. profit earned by the importer on resale of the subject goods; and
4. special arrangements between the importer and its Canadian customers.

...examining conditions of resale in Canada is to ascertain whether or not the export price is reliable...

The purpose of examining conditions of resale in Canada is to ascertain whether or not the export price is reliable notwithstanding the relationship between the exporter and importer. Where the importer resells at prices that do not fully recover all of its costs and expenses, the export price will be determined based on a formula rather than the actual price.

Resale pricing is also examined in cases where there is no exporter's sale price or no price at which the importer has agreed to purchase (e.g. consignment).

Timetable of Investigation

The respondents to RFIs are generally given 37 to 40 days to complete and file them with the CBSA in both confidential and non-confidential formats, and in both hard copy and electronically. Following a review of the responses, the CBSA may send respondents a supplementary RFI, to obtain more information or clarification of certain responses.

If the RFIs are properly and completely answered, officials of the CBSA may travel to the country of export (at the CBSA's expense) and visit with the respondent(s) for the purpose of verifying the accuracy of the data which has been submitted. The officials will inspect books and records used to source information and data furnished in the RFI responses. They may ask additional questions during the course of the verification. Verification may take anywhere from three to 10 business days. The respondents should have Canadian legal counsel present when CBSA officials are conducting the verification.

In the case of subsidization investigations, CBSA officials may visit with government officials from the exporting country to complete their understanding of the government's response to the RFI and to ask additional questions.

In addition, the importer's response to the RFI may be verified on site by CBSA officials.

Once the verifications are completed, the CBSA officials prepare a report and recommendations to their management respecting the establishment of NVs, EPs, and the presence or absence of dumping or subsidization.

The investigation process is organized in a fashion which allows the President to make a preliminary determination of dumping/subsidization (PDD/S) (or of no dumping/subsidization) within 90 days following initiation of the investigation. Where the investigation is complex or for any other good reason the CBSA officials are unable to complete their investigation within 90 days, the President may extend the time within which the PDD/S is made up to a total of 135 days following initiation of the investigation.

...the CBSA officials prepare a report and recommendation to their management respecting the establishment of normal values, export prices, and the presence or absence of dumping or subsidization.

Before the PDD/S is issued, an opportunity may be provided to a party or its counsel for the furnishing of additional material and/or making of an oral presentation, either generally, at the request of a party or its counsel or specifically following receipt of a supplementary request for information from the CBSA.

The investigation conducted by the CBSA is burdensome. However, exporters and importers are urged to cooperate with CBSA officials in an effort to obtain the very best results possible. Failure to provide sufficient information may result in determination of NVs, EPs and MDs or an amount of subsidy and margin of subsidy (MS), by methods which are arbitrary and punitive in nature, leading to unfavourable results.

Counsel to the foreign manufacturer/exporter or importer can play a significant advisory role during the investigation and may assist the exporter/importer in developing and employing strategies which result in the most favourable outcome possible. Advice provided by attorneys is subject to solicitor-client privilege in Canada, and, therefore, need not be disclosed to CBSA officials in the course of the investigation.

Designation of Information by Exporter/Importer Regarding Confidentiality

Information included in the responses to the RFIs may be designated as confidential. In such case, it is necessary that the respondent provide a non-confidential, redacted version of the response to the RFI which can be made available for public distribution. In addition, the respondent must provide a statement explaining why the information which has been redacted is confidential.

The SIMA has elaborate rules designed to permit selective public disclosure. Every party to the proceedings has a right, on request, to examine and be provided with copies of documentary information unless it has been designated as confidential.

Treatment of Information Designated as Confidential

The President of the CBSA must determine whether or not information is confidential in cases where a confidential designation has been made. Where the President agrees that the information is confidential, he must also be satisfied with the non-confidential summary. Where the respondent fails to correct defaults in the non-confidential summary or to withdraw his/her claim of confidentiality, the information provided will not be taken into account by the President in making his determinations unless he obtains it elsewhere.

Where the investigation has not been terminated, a preliminary determination must be 90 (or exceptionally within 135) days of initiations of the investigation.

If the President determines that the information claimed as confidential is not, the respondent must either permit the information to be made public or the information will be disregarded.

Confidential information may not be disclosed to any other person in any manner that is calculated or likely to make it available for use by a business competitor or rival. Confidential information, however, may be disclosed by the President to counsel for other parties to the proceedings where they have filed appearances and undertakings of non-disclosure. Furthermore, counsel for other parties to the proceedings are permitted to comment upon responses to the RFIs, in an effort to direct the CBSA officials in their investigation. Counsel for party respondents may, in turn, reply to such comments.

Preliminary Determination of Dumping/Subsidization

Where the investigation has not been terminated, a PDD/S must be made within 90 (or, exceptionally within 135) days of initiation of the investigation. Where the President concludes there is dumping/subsidization, he will estimate the MD and/or MS, as the case may be, and specify the goods to which the determination applies and the names of the importers.

Alternatively, the President will terminate the investigation where there is insufficient evidence of dumping or subsidization or the MD or MS or actual or potential volume of dumped/subsidized goods is negligible.

Proceedings between the Preliminary and Final Determinations of Dumping/Subsidization

CBSA officials will pursue their investigation by soliciting and/or receiving additional information, refining their calculations and considering factual and legal arguments. They may, in certain circumstances, accept responses to RFIs from respondents which were not able, or simply failed, to respond in a timely manner for purposes of the PDD/S. In such cases, there may also be a new verification or an additional verification, as the case may be.

Undertakings

The President may accept an undertaking by exporters to raise prices where he forms the opinion that the undertaking will eliminate either the MD or MS, as the case may be, or injury. An accepted undertaking generally suspends the proceedings, but the party making the undertaking may elect to have proceedings continue. The undertaking must be given in writing by an exporter or exporters who account for all, or substantially all, of the investigated exports to Canada (essentially in excess of 85 percent), and must be made subsequent to the PDD/S. Finally, the undertaking must be practicable to administer. In the case of subsidization, the undertaking may also be made by the foreign government in relation to limitation or elimination of the subsidy on goods exported to Canada.

Where the undertaking does not eliminate the MD/MS, but rather merely eliminates injury, officials of the CBSA negotiate with counsel for each of the foreign exporters, and in the case of subsidization with the foreign government, and the Canadian domestic industry as to what will be sufficient to eliminate injury. Direct discussions between parties do not take place as these would be considered anti-competitive.

Rather, the CBSA officials mediate and then the President accepts the undertaking he believes is at an appropriate level to eliminate the injury. He may not accept an undertaking which raises prices in sales to Canada by more than the MD or MS.

Undertakings remain in effect for five years from the time they are accepted and may be renewed for a further period of not more than five years.

Undertakings remain in effect for five years from the time they are accepted and may be renewed for a further period of not more than five years. In addition, violations are reviewed and may result in the termination of undertakings. Exporters and importers may be requested to provide certain information relating to domestic and export sales to Canada while an undertaking is in effect. This information can result in periodic adjustments of undertaking price levels and the inclusion of new exporters, where applicable.

Where an undertaking is terminated, proceedings continue as if the PDD or PDS, as the case may be, had been made (not suspended) and proceedings continue to final determination of dumping (FDD) or final determination of subsidization (FDS) and the final determination of injury (FDI).

Final Determination of Dumping/Subsidization

Within 90 days of the PDD/S, the President must make a FDD or FDS. MDs and/or MSs are refined and the President must conclude that the actual or potential volume of dumped or subsidized goods is not negligible. The President specifies the goods to which the determination applies and the MD/MS of such goods.

Where the actual or potential volume of dumped or subsidized goods is negligible, the investigation is terminated.

The FDD/S is final and conclusive and is subject only to being judicially reviewed and set aside or referred back to the President of the CBSA for further consideration by the Federal Court of Canada, or in the case of NAFTA Parties, optionally to a NAFTA panel struck under the NAFTA. The FDD/S can only be set aside where it can be demonstrated that the President of the CBSA exceeded his jurisdiction, erred in law, violated a principle of natural justice, or made erroneous findings of fact. However, except where the President exceeded his jurisdiction, the Federal Court and NAFTA Panels tend to show deference to decisions of the President of the CBSA and rarely overturn them. In cases of jurisdictional error, courts will look more closely at the decision-making process employed by the President of the CBSA.

Imposition of Provisional Duty

Where a PDD or PDS has been made, the importer into Canada of goods must pay provisional anti- dumping or countervailing duty or post security in an amount not greater than the estimated MD/MS on imports made commencing on the date of the PDD/S. Such duties continue to be payable until either:

1. the President causes the investigation be terminated by virtue of the FDD/S; or
2. because the CITT makes a finding of no injury or retardation.

Where the investigation is terminated, duties are refunded to the importer. Where the investigation has not been terminated and the CITT finds injury, duties are provisionally retained by the President. They may be subject to full or partial refund following a further reinvestigation and refinement of the MD or MS in an investigation commenced by the CBSA after the CITT makes the FDI.

Retroactive Imposition of Anti-Dumping or Countervailing Duty

Where the CITT finds injury and concludes there was massive importation, the President must levy anti- dumping or countervailing duties on goods imported during the 90 days preceding the PDD/S. A massive importation is one which is extraordinary in volume as such or as part of a series of importations which

in the aggregate are massive. The duties are applied retroactively where the importer was, or should have been, aware that the (massive) dumping/subsidization was or would have been injurious and where it is considered necessary to prevent recurrence of the injury.

While invoked on rare occasions, the ability to retroactively impose anti-dumping and/or countervailing duties tends to ensure that importers do not purchase extraordinary volumes for importation during the 90 days prior to the date of the PDD/S to evade application of anti-dumping or countervailing duty.

Determining Whether Dumping Exists: Normal Value and Export Price

In order to determine whether or not dumping exists, it is necessary to determine the NV and the EP of the goods which are exported to Canada. Goods are considered dumped when their NV is greater than their EP, and the difference between the two is the MD.

For example, if the NV equals 100 and the EP equals 90, there is dumping and the MD is 10. The MD expressed as a percentage of NV is 10 percent, and expressed as a percentage of EP is 11.1 percent.

Determination of NV

The NV of exported goods is determined based on one of the following:

1. the domestic selling price (DSP) of like goods;
2. the selling price of like goods to importers in third countries;
3. the cost of the exported goods plus a mark-up; or
4. a ministerial specification.

Application of the DSP method must first be attempted. Where it cannot be applied, the second or third method is applied at the option of the President. In virtually every case where the DSP method cannot be used, the President chooses method (iii). The fourth method is applied when none of the first three can be applied.

Each exporter which cooperates with the CBSA and provides a complete and verifiable response to the RFI will be assigned its own NVs. Therefore, different exporters may be assigned different NVs.

Section 20: Export Monopoly and Domestic Prices

The normal value of goods imported from a non-prescribed country will be determined pursuant to section 20 of the SIMA where in the opinion of the President:

1. the government of that country has a monopoly or substantial monopoly of its export trade, and
2. domestic prices are substantially determined by the government of that country, and there is sufficient reason to believe that those prices are not substantially the same as they would be if they were determined in a competitive market.

For prescribed countries, only criteria (ii) is applied. These provisions are applied on an industry basis, that is collectively in respect of producers and exporters of the goods under investigation in the prescribed or non-prescribed countries.

Where goods are shipped directly to Canada from a prescribed country (at the time of writing, only the People's Republic of China is a prescribed country), and where, in the opinion of the President, domestic prices are substantially determined by the government of the prescribed country and there is sufficient reason to believe that they

are not substantially the same as they would be if they were determined in a competitive market, NV is determined based on domestic selling prices in another country designated by the President. Alternatively, the President may designate the use of the aggregate of the cost of production and a mark-up in respect of the goods sold by producers in another country. In no case can pricing by, or costs of, a producer in Canada be used. As a further alternative, where sufficient information has not been furnished or is not available to determine NVs as above, the President may use pricing from another country to Canada to establish the NV.

...at the time of writing, only the People's Republic of China is a prescribed country...

In the case of the People's Republic of China, Canada administers the domestic price provision of the SIMA in a manner which assumes that the Chinese industry accused of shipping dumped or subsidized goods does not have its prices substantially determined by the government of the People's Republic of China. That is, there is a presumption that the industry does not have its prices substantially determined by the government unless there is clear evidence to the contrary.

Positive evidence must be provided by the Canadian industry in the complaint, or must generally be known to officials of the CBSA, in order for an investigation of the export monopoly status of the industry in question to be undertaken. Failing same, the anti-dumping investigation, and particularly the establishment of NVs, in respect of exports from the People's Republic of China are conducted and established on the same basis as any other country industries of which are considered to be free-market in nature.

Particular Market Situation

The SIMA amendments, introduced in April, 2018, permit the CBSA to apply alternative methodologies when determining NV in a anti-dumping investigation where price distortions caused by a "particular market situation" skew the comparability of domestic sales to sales to Canada. These alternative methodologies (employ surrogate data) to calculate NV in cases where a "particular market situation" exists.

In September 2019, amendments to SIMR took effect that provide additional parameters relating to the adjustment of exporter's NVs, accounting for the exporter's input costs (e.g. electricity, water, raw materials), when the CBSA finds a "particular market situation".

If a particular market situation exists in respect of an input, the cost of that input in the exporting country will be considered the first of the following amounts that reasonably reflects the cost of the input:

a. the price of the same or substantially the same inputs that are produced in the country of export and sold to the exporter or to other producers in the country of export;

b. the price of the same or substantially the same inputs that are produced in the country of export and sold form the country of export to a third country;

c. the price of the same or substantially the same inputs determined on the basis of the published prices of those inputs in the country of export;

d. the price of the same or substantially the same inputs that are produced in a third country and sold to the exporter or to other producers in the country of export, adjusted to reflect the differences relating to price comparability between the third country and the country of export; or

e. the price of the same or substantially the same inputs determined on the basis of the published price outside the country of export, adjusted to reflect the differences relating to price comparability with the country of export.

Previously Canada did not have a legislative basis to account for distortions in a market economy that would render normal value calculation methodologies unreliable. These changes will involve greater scrutiny of exporter data, particularly that of exporters with a dominant market position or state owned enterprises with significant involvement by government, in the determination of their normal values.

Related-Company Input Dumping

The September 2019 amendments to the SIMR also include new provisions that target "input dumping" between related parties. Related-party input anti-dumping rules are distinct from "particular market situation" rules. When inputs are acquired from an "associated" company (whether the association is by virtue of common ownership or because the companies are not dealing at arm's length), and the inputs represent a "significant factor" in the production of the goods, the cost of the input in the country of export is considered to be the greater of the following amounts:

a. the price paid in respect of that input by the exporter or producer to the associated person;

b. the cost incurred by the associated person in the production of that input, including the administrative, selling and all other costs with respect to that input; and

c. the price in the country of export of the same or substantially the same inputs, if sufficient information is available to enable the price to be determined on the basis of

    i. the selling prices of those inputs in the country of export, in the same or substantially the same quantities, between parties who are not associated persons, or

    ii. the published prices of those inputs in the county of export.

Domestic Selling Price of Like Goods

The NV is established by looking at the closest comparable domestic sales.

The NV is:

1. the price of goods like those exported (like goods);
2. when sold to purchasers with whom the exporter is not associated;
3. who are at or substantially at the same trade level of the importer;
4. in the same or substantially the same quantities as the sale of the goods to the importer;
5. in the ordinary course of trade for home consumption under competitive conditions;
6. during prescribed 60-day periods;
7. at the place from which the goods were shipped directly to Canada.

The NV, thus established, is then adjusted to take into account specified differences relating to price comparability between domestic and exported goods. These adjustments are set out in the SIMR and deal with differences in:

1. qualities/characteristics between the goods sold to the importer in Canada and the like goods;
2. discounts (i.e. rebates, deferred discounts or discounts for cash) generally granted in relation to the sale of like goods in the country of export;
3. volumes sold to selected customers in the country of export as compared with the importer in Canada;
4. trade level as between that of selected customers in the exporting country and that of the importer in Canada;
5. taxes and duties charged in respect of sales in the exporting country which are not charged in relation to sales to the importer in Canada; and
6. delivery costs.

The NV is determined on an ex- factory basis.

The Price of Like Goods

Like goods are goods which are identical in all respects to the exported goods or, in the absence of any goods which are identical, goods the uses and other characteristics of which closely resemble those of the exported goods.

The price of like goods used to determine NV is either the preponderant DSP or, failing same, a weighted average of DSPs.

Domestic sales selected for establishment of the DSP are those made by the exporter, in the exporting country, to persons with whom it is not associated. Associated persons include both individuals and corporations and refer to those who are related to each other or who are not dealing at arm's length with each other.

Sales to purchasers who purchase in comparable volumes to those purchased by the importer and who are at the same trade level as the importer are to be selected. Where none or an insufficient number are found, sales to domestic customers in the exporting country at a subsequent trade level will be used. In this case, the DSP will be adjusted to reflect the additional costs incurred in the exporting country in selling to such customers. The selected domestic sales are those made within a 60-day period of the date of sale of goods to the importer so as to permit a reasonable comparison between export and domestic sales.

Other Vendors' Sales

Where there are insufficient numbers of domestic sales by the exporter meeting the requirements, the NV will be established based on domestic sales by one or more other vendors in the country of export the sales of which meet the requirements. In such cases, appropriate adjustments are also made.

Selling Price to Purchasers in Third Countries

Under this methodology, the NV is the price of like goods sold by the exporter to unrelated importers in any country other than Canada during the required period. The selling price would be adjusted to reflect differences in terms and conditions of sale, taxation and other differences relating to price comparability between goods sold to the importer in Canada and the like goods sold to the importers in other countries. However, the CBSA avoids the use of this provision because, as a matter of policy, it takes the position that companies dumping or receiving subsidies in respect of exports to Canada are likely also to be dumping or receiving subsidies in respect of exports to other countries.

Cost-Plus Mark-up

Where NV cannot be determined using the DSP approach because there were not sufficient sales of like goods that satisfied the terms and conditions required to do so, the President will apply the cost-plus mark-up method.

Under this approach, the NV is equal to the aggregate of:

1. the cost of production of the exported goods;
2. an amount for administrative, selling and other costs; and
3. an amount for profit.

The cost of production includes all costs attributable to the production of the goods, including costs of design or engineering. Such costs are considered to be fully absorbed.

An amount for administrative, selling and all other costs includes warranty, design and engineering not included in the costs of production, which are directly attributable to production and sale of the goods

Finally, an amount for profit is based on a sequential application of regulations under the SIMR. In order, they are:

1. the weighted average profit made on sufficient domestic sales by the exporter of goods like those sold to the importer in Canada;
2. the weighted average profit made on sufficient domestic sales, by the exporter, of goods that are of the same category as the goods sold to the importer in Canada;
3. the weighted average profit made on sufficient sales by producers in the exporting country, other than the exporter, of goods like those sold to the importer in Canada;
4. the weighted average profit made on sufficient sales by producers in the exporting country, other than the exporter, of goods that are of the same general category as the goods sold to the importer in Canada; and
5. the weighted average profit made by the exporter on sufficient sales of a group or range of goods that is the next largest to that of the same general category as the goods sold to the importer in Canada.

NV by Ministerial Specification

Where the President forms the opinion that sufficient information has not been furnished or is not available to determine NV pursuant to any other method, the NV is established arbitrarily based on a ministerial specification. The same approach is taken in the case of goods exported from countries where there exists an export monopoly.

Export Price

The EP is equal to:

1. the lesser of the exporter's sale price for the goods; and
2. the price at which the importer has purchased or agreed to purchase the goods.

Deductions from the EP are:

1. the costs, charges and expenses incurred in preparing the goods for shipment to Canada that are additional to those generally incurred on sales of like goods for domestic consumption;
2. any federal or provincial duty or tax imposed on the goods which is paid by the exporter; and
3. all other costs, charges and expenses resulting from the shipment of the goods from the place of direct shipment to Canada.

The EP, like the NV, is determined on an ex factory basis.

Alternative Methods of Establishing EP

Under certain circumstances, the EP may be established based on a resale price method or by ministerial specification.

Resale Price Method of Determining EP

Where there is no EP (e.g. consignment sale) or where the President is of the opinion that the EP is unreliable, then the EP will be established based on the price at which goods are resold in Canada by the importer in the condition in which they are imported less costs incurred on or after the importation of the goods, an amount for profit reflecting the profit that would be made in the sale of goods by the importer in the ordinary course of trade, and all costs from the point of direct shipment to Canada.

An EP may be considered unreliable because the sale of the goods for export is between associated persons or for reason of a compensatory arrangement made between the manufacturer, producer, vendor, exporter, importer in Canada, and any other person which impacts the price of the goods, the sale of the goods or the net return to the exporter, vendor, manufacturer or producer of the goods.

The amount of profit is that earned by unrelated vendors in Canada at the same trade level as the importer. It is generally calculated based on a profit survey which includes importers, as well as Canadian manufacturers and other distributors.

Credit Sales to Importers in Canada

Where the sale to the importer is made on credit terms other than cash discounts, the value of the terms is added to the EP.

Special Arrangements

Where the manufacturer, producer, vendor or exporter undertakes, directly or indirectly, to indemnify, pay on behalf of, or reimburse the importer or purchaser in Canada of the goods for any part of the anti-dumping duty that may be levied on the goods, the EP is reduced by that amount. In effect, this creates an additional and equal liability for payment of the duty on the importer.

Similarly, where any benefit is provided by the exporter, directly or indirectly, to persons who purchased the goods in Canada on resale from the importer or any person on any subsequent resale, that benefit is deducted from the EP.

EP Established by Ministerial Specification

Where the President of the CBSA forms the opinion that sufficient information has not been furnished, or is not available, to enable him to determine the EP by one of the other methods, the EP is established arbitrarily by ministerial specification.

Currency Conversion

The NV is always expressed in the currency of the exporting country. In order to compare the NV to the EP, where the latter is based on another currency (e.g. Canadian dollars), the NV will be converted to Canadian dollars at the exchange rate prevailing on the date of sale or, failing information concerning same, on the date of shipment to Canada. Likewise, if the selling price to Canada is in a currency other than the Canadian dollar, a similar currency conversion is made.

Countervailing Duty/Subsidies

What is a Subsidy?

A subsidy may be actionable when there is a financial contribution by a country other than Canada that confers a benefit to persons engaged in production, manufacture, growth, processing, purchase, distribution, transportation, sale, export or import of goods provided that benefit is specific to a business, industry or region, but does not include any duty or internal tax imposed by that country. **Subsidized goods** are goods that benefit from a subsidy. Goods that benefit from subsidies may be subject to countervailing duties depending on the type of subsidy and the amount of subsidy.

Certain subsidies are non-actionable subsidies, in which case they may not be subject to countervailing duties. Other subsidies are prohibited subsidies, which are deemed to be specific and which may be subject to countervailing duties. These are also called countervailable subsidies.

Where a subsidy on subsidized goods is a prohibited subsidy, countervailing duty equal to the amount of the subsidy is applied to the imported goods but only to the extent of the portion of the subsidy that is an export subsidy.

The MS is established on a per-unit basis by distributing the value of the subsidy over subsidized goods based on the application of generally accepted accounting principles.

Any reimbursement of countervailing duty paid directly or indirectly to the importer by the manufacturer, vendor or exporter of subsidized goods or the foreign government is to be added to the amount of subsidy, creating an additional and equal liability for payment of the duty on the importer.

Joint Anti-Dumping and Countervailing Duty Investigations

In cases where the President concludes that subject goods are both dumped and subsidized, anti-dumping duties are only payable on the portion of the MD that is not attributable to the export subsidy. If the MD is entirely attributable to the subsidy, no anti-dumping duty is payable.

The Final Determination of Injury

Where the President of the CBSA makes a PDD or PDS, the final injury inquiry is conducted by the CITT. The CITT conducts hearings in public and in camera (i.e. confidential session) approximately 90 days following the PDD or PDS and makes its FDI within 120 days of the PDD or PDS.

The role of the CITT is to conduct an inquiry to determine whether the dumping or subsidizing of goods:

1. has caused or is likely to cause injury to the domestic industry in Canada of like goods; or
2. would have caused injury or retardation except for the imposition of anti-dumping or countervailing duties.

Key aspects for consideration by the CITT are:

1. What are the like goods?
2. What is the domestic industry?
3. Is there a causal link between dumping or subsidization, as the case may be, and injury or retardation?

The CITT may also be asked to exclude products from the effects of its decision but tends to grant exclusions, which are highly discretionary in nature, on an infrequent basis. Discretion tends to be exercised where the goods are not made in Canada and/or do not compete with Canadian made goods.

To assist in its assembly of pertinent data and other information, the CITT distributes questionnaires to Canadian manufacturers, importers, and foreign producers; in some cases, the CITT issues questionnaires to distributors, retailers or end users of the subject goods. The questionnaire is to be completed and returned within 4 to 6 weeks. The questionnaires elicit both public and confidential data and other information.

Over the course of the 90 days leading to the hearings, the complainant domestic industry files its case and exporters, importers and in some cases end-users file their cases in opposition to the complainant. Interrogatories or requests for additional information are exchanged between parties in order to ensure that, prior to the first day of the hearings, all documentary evidence has been filed. These are likewise both public and confidential.

In some cases, the CITT conducts a pre-hearing conference, prior to the commencement of an inquiry, to consider matters which will assist in the orderly conduct of the hearing. In other cases, parties file motions which may affect proceedings or documentation/information to be filed with the CITT.

The hearing provides the CITT with an opportunity to gather additional information orally and the parties an opportunity to present their cases. This is done principally through direct evidence, cross-examination and argument. Cross-examination proceedings are generally conducted by counsel representing parties. However, members of the CITT themselves are active in asking questions of witnesses. In this connection, the CITT may call witnesses itself.

During the course of the inquiry, the CITT conducts hearings in both public and in camera (confidential) sessions. The latter are attended only by witnesses, legal counsel who have filed appearances and undertakings, CITT members and their staff. These sessions are closed to the public. However, the CITT endeavours to conduct as much of the hearing as possible in public.

The CITT goes to great lengths to ensure that confidential information is maintained as such. Accordingly, it has established procedures whereby confidential documentation may be viewed only by counsel who have filed

undertakings of non-disclosure. Non-confidential versions of documentation designated as confidential, that are redacted of all business proprietary information, must be filed.

The final stage of the hearing consists of closing arguments made by counsel for the complainant, followed by the counsel for the importers and exporters, and finally a rebuttal by the complainant's counsel. The CITT must issue a finding no later than 120 days after the PDD/S was made. Statements of Reasons usually follow within 15 days of the finding.

Injury

Injury means material injury to a domestic industry. Domestic industry means the domestic producers as a whole of the like goods, or those domestic producers whose collective production of the like goods, constitutes a major proportion of the total domestic production of the like goods. In cases where a domestic producer is related to exporters or importers of dumped or subsidized goods, or is an importer of such goods, the producer may be excluded from the collective domestic industry. What constitutes a major proportion varies from case to case. While it must be significant, it does not need to exceed 50 percent.

In some cases, the CITT conducts a pre-hearing conference, prior to the commencement of an inquiry...

Material Injury

Injury, which is described as material injury, is not further defined by the SIMA. A number of considerations are taken into account by the CITT on a case-by-case basis. Typically, the CITT is concerned about:

1. price erosion or suppression;
2. lost sales and market share;
3. reduced production and under-utilization of capacity;
4. reduced employment;
5. reduced investment; and
6. declining gross or net profitability.

Like Goods

The CITT must determine whether or not the dumping or subsidization has caused, threatens to cause, or has been a source of retardation of production, by the domestic industry, of like goods. In determining whether or not goods are like one another, the CITT examines all the characteristics or qualities of the goods and ascertain whether or not they are identical, or failing same, functionally or otherwise similar or substitutable for each other in the marketplace.

Causality

The CITT must find a special connection between the dumping or subsidization and injury. It is not necessary to find that injury is exclusively due to dumping or subsidization, but rather that the latter are a cause of injury.

The SIMR directs that the CITT may consider some or all of the following factors:

1. the volume of dumped or subsidized goods and whether there has been a significant increase in such volume;
2. the effect of the dumped or subsidized goods on the price of like goods and whether the dumped or subsidized goods have significantly undercut the price or depressed the price of like goods, or suppressed the price by preventing it from increasing;
3. the resulting impact of dumped or subsidized goods on the state of the domestic industry, taking into account all relevant economic factors and indices including:
    a. actual or potential decline in output, sales, market share, profits, productivity, return on investments or utilization of industrial capacity;
    b. negative effects on cash flow, inventories, employment, wages, growth or the ability to raise capital;
    c. the magnitude of the MD or MS; and
    d. any other factors relevant in the circumstances.

In looking at the question of causation and threat of injury, the SIMR directs that the following factors be taken into account:

1. whether or not there is a significant rate of increased dumped or subsidized goods;
2. whether there is sufficient freely disposable capacity or an imminent, substantial increase in capacity of the exporters of dumped or subsidized goods;
3. potential for product shifting within production facilities;
4. whether the imported goods are entering the domestic market at prices that are likely to increase demand for further imports;
5. negative effects on existing development and production efforts;
6. magnitude of the MD or MS;
7. evidence of imposition of anti-dumping or countervailing measures by authorities of other countries;
8. in the case of subsidization, the nature of the subsidy in question and the effects it will have on trade in the future; and
9. any other factors that are relevant.

The SIMR also warns against attributing, to the dumping or subsidization, the impact of other factors such as:

1. contraction in demand for the goods or like goods;
2. any change in the pattern of consumption of the goods or like goods;
3. trade-restrictive practices of, and competition between, foreign and domestic producers;

4. developments in technology;
5. export performance and productivity of the domestic industry in respect of like goods; and
6. any other relevant factors.

Effect of CITT FDI and Judicial Review

The final determinations of the CITT is final and conclusive and is subject only to being judicially reviewed and set aside or referred back to the CITT for further consideration by the Federal Court of Canada, or in the case of NAFTA Parties, optionally to a NAFTA panel struck under NAFTA.

Anti-dumping and countervailing duties continue to be payable until and unless the finding of injury is set aside. Such a finding can only be set aside where it can be demonstrated that the CITT exceeded its jurisdiction, erred in law, violated a principle of natural justice, or made erroneous findings of fact. However, except where the Tribunal exceeded its jurisdiction, the Federal Court and NAFTA Panels tend to defer to decisions of the CITT and rarely overturn them on appeal. In cases of jurisdictional error, courts will look more closely at the decision-making by the CITT.

Review by the CITT of its Finding

A CITT finding generally remains in place for a period of five years. The CITT may, in response to a request for interim review, conduct a review of a finding prior to the expiry of five years where circumstances have sufficiently changed. The question of sufficient change in circumstances is examined on a case by case basis. Otherwise, the CITT will give notice of expiry of the finding approximately nine to 10 months prior to the expiry of the CITT finding.

If no one requests that the finding be extended for a further period or the CITT is not convinced that a review should be initiated, the finding will be allowed to lapse and will be cancelled by the CITT. Otherwise, a review will be initiated. The President of the CBSA will conduct an investigation into the propensity, on the part of the exporters in question, to continue and/or resume dumping and/or receive a countervailable subsidy if the finding is cancelled. If a finding of a propensity to dump and/or to receive a countervailable subsidy is made by the President of the CBSA, the CITT will continue with the review and will examine the question as to whether such likely dumping or subsidization will continue to be a cause of injury or retardation.

A Finding in the Case of NAFTA Origin Goods

In the event an inquiry covers goods originating in the United States of America or Mexico, the CITT must make a separate finding in respect of such goods. This does not mean that the CITT will necessarily separately weigh the impact in Canada of U.S. or Mexican goods. In most cases, the CITT will cumulate the effects of the dumping or subsidization subject thereafter to requests for product exclusions.

As noted above, the FDI, or the FDD or FDS, are subject to review under the terms of the NAFTA by a NAFTA panel.

Disposition of Reviews

Where the Federal Court of Appeal or NAFTA panel determines that the FDD/S or FDI has been made in error, in general the matter will be sent back to the decision-maker for reconsideration.

...the anti-dumping or countervailing duties would not, or might not, be in the public interest, it will report this to the Minister of Finance and provide a statement of facts and reasons for its conclusion.

Public Interest

Persons whose interests may be adversely affected by a finding of injury by the CITT may ask the CITT to conduct a public interest inquiry in cases where the CITT has made an affirmative finding of injury. These persons would be concerned about the application of anti-dumping or countervailing duties and/or an increase in the cost of acquiring the subject goods.

Certain persons have been designated as being entitled to request relief. These are:

1. persons engaged in the production, purchase, sale, export or import of foreign or Canadian produced goods that are like or of the same description as the goods which are the subject of the inquiry;
2. a person who is required or authorized by any federal or provincial legislation to make representations to the CITT on the matter;
3. a user of goods that are of the same description as the goods which are the subject of the inquiry; or
4. any association whose purpose is to advocate the interests of consumers in Canada.

The request should address the following:

1. the availability of goods of the same description from other countries or exporters to which the finding does not apply;
2. the effect that the imposition of anti-dumping or countervailing duty has had or will have on competition in the Canadian market;
3. the effect that the imposition of the duty has had or is likely to have on producers in Canada that use the goods as inputs in the production of other goods and in the provision of services;
4. the effect that anti-dumping or countervailing duties have had or will have on competition by limiting access to goods that are used as inputs in the production of other goods and in provision of services, or by limiting access to technology;
5. the effect of anti-dumping duties on the choice or availability of goods at competitive prices for consumers and the effect of the anti-dumping or countervailing duties on domestic producers of inputs used in the production of like goods.

Role of the CITT

The CITT does not view its responsibility as balancing the interests of competing industries. The CITT will not determine whether the public interest will be better served by protecting the producers of the subject goods or their users who may also be producers.

Rather, the CITT determines whether the full level of anti-dumping or countervailing duty is necessary for the protection of the Canadian producers of the subject goods. If not, it will recommend a reduction.

CITT Report

Where the CITT is of the opinion that imposition of all or part of the anti-dumping or countervailing duties would not, or might not, be in the public interest, it will report this to the Minister of Finance and provide a statement of facts and reasons for its conclusion. The Governor in Council, essentially the Cabinet of the party in power, may then, in its sole discretion, grant the appropriate relief.

Application of Anti-Dumping or Countervailing Duties

After the CITT has made its finding, the matter reverts to the CBSA for enforcement purposes.

Where there is no past or threat of injury or retardation, proceedings are terminated and all provisional duties are refunded to the importer.

Where there is a threat of injury finding or of retardation, provisional duties said will be refunded to the importer. However, imports after the date of the CITT's finding are subject to assessment of anti-dumping or countervailing duties to the extent of the MD or MS.

Finally, where there is an injury finding, the CITT will not investigate whether or not there is also a threat of injury or retardation. In such case, anti-dumping and countervailing duties will be payable on goods imported from the date of the PDD or PDS forward.

Goods imported during the provisional period (date of PDD/S to date of CITT finding) are subject to anti-dumping or countervailing duties in an amount no greater than the MD/MS that was determined for purposes of the PDD or PDS.

In cases where an undertaking accepted by the President has been violated, and in cases of massive importation, anti-dumping or countervailing duties may be assessed retroactively.

In the event that the Governor in Council determines that a lesser amount than the full amount of the MD or MS should be the basis for determining applicability of anti-dumping or countervailing duties, this will be taken into account in the calculations.

Scope Proceedings

The April 26, 2018 amendments to the SIMA and SIMR introduced a new CBSA enforcement process known as scope proceedings. Scope proceedings are formal processes whereby an interested person (such as domestic producers, importers, exporters, or consumers) can obtain a ruling from the CBSA on whether a particular product falls within the scope of the description of subject goods in a SIMA finding, order or undertaking. This includes questions relating to the determination of origin of goods. Scope proceedings may also be self-initiated by the CBSA.

After the CBSA receives a scope ruling request, it has has 30 days (or 45 days, if extended) to review the application and determine whether a scope proceeding should be initiated. If the ruling application is rejected, the CBSA will notify the applicant and provide the reasons for its decision. Reasons that a scope ruling application could be rejected are prescribed in the SIMR, for example if the goods have not been produced on the date of the application, if the basis for the ruling request is already the subject of another proceeding before the CBSA, the CITT, an appellate court or a NAFTA panel, or if the CBSA determines that the application is frivolous, vexatious or made in bad faith.

The CBSA then has 120 days (or 210 days, if extended), to review the application, consider the merits, and either terminate the scope proceeding or issue a binding scope ruling. It will provide notice to the applicant, if any, the government of the country of export, the exporter, the importer and the domestic producers that a scope proceeding has been initiated. Interested parties have a right to participate in the scope proceeding by submitting evidence and arguments to the President.

A scope ruling may be appealed to the CITT by any interested person. A notice of appeal must be filed in writing with the CBSA and the CITT within 90 days of the date the scope ruling was made. An appeal decision made by the CITT is subject to judicial review by the FCA.

Anti-Circumvention Investigation

The April 26, 2018 amendments to the SIMA and SIMR also introduced a new type of proceeding to allow the CBSA to investigate allegations of circumvention of SIMA duties. The CBSA may expand or modify a finding to address the circumvention activity, which may include behavior such as trans-shipping goods through a third country, modifying country of origin marking, making minor alterations to bring goods outside the scope of a finding, or assembling parts in a third country without adding significant value. More specifically, circumvention is defined as occurring when all of the following elements are present:

- a change in the pattern of trade has occurred after a dumping or subsidy investigation was initiated;
- a prescribed activity is occurring and imports of the goods to which that prescribed activity applies are undermining the remedial effects of an order or finding of the Canadian International Trade Tribunal (CITT); and
- the principal cause of the change in trade pattern is the imposition of anti-dumping or countervailing duties.

The CBSA can initiate an anti-circumvention investigation on the President's initiative or after receiving a complaint from a member of the public. The CBSA will notify the importer, the exporter, the government of the exporting country, the domestic producers and the complainant, if any, of the initiation of the investigation, a termination, an extension, the publication of the statement of essential facts, and the final decision.

The process generally takes about 225 days from the time the CBSA receives a complaint until the CBSA makes a decision regarding circumvention. When a complaint is received, the CBSA has 45 days to determine if an anti-circumvention investigation should be initiated. After initiation, the CBSA will issue a statement of essential facts, on which interested parties may provide comments. The CBSA has 180 days after the date of initiation (or 240 days if the investigation is extended) to conduct its investigation and either terminate the investigation or make a decision. The factors that the CBSA will consider in making a circumvention finding are prescribed in the SIMR.

If the CBSA finds circumvention, it must file its decision with the CITT, which shall, without delay, make an order amending the order or finding that is the subject of the President's decision in the manner described in the decision, including any terms and conditions that are set out in the decision.

Anti-circumvention decisions by the President are subject to judicial review by the FCA. An exporter may also request an exemption from the extension of duties under the anti-circumvention finding. In order to qualify for an exemption, the exporter must establish that it is not associated with any exporter who was given notice of the circumvention investigation, and that it has not been given notice of the initiation of that investigation or requested to provide information during the course of that investigation.

Re-Determinations

After an importer has self-assessed, or has received an assessment, and has paid anti-dumping/countervailing duties, SIMA provides for a multi-stage review process involving re-determinations by a CBSA Designated Officer or the President of the CBSA as the case may be. Re-determinations may be initiated by the importer, a Designated Officer, or the President, depending on the circumstances. For NAFTA originating goods, others may request a re-determination, including the producer or exporter of the goods, provided they are of the NAFTA country.

Re-determinations are the only mechanism under the SIMA that allows an importer to challenge an assessment of anti-dumping/countervailing duties. These same processes also allow the CBSA or the President to retroactively reassess anti-dumping duties on past importations.

In a re-determination, a Designated Officer or the President, as the case may be, has the authority to address the following matters:

a. the normal value;
b. the export price;
c. the amount of subsidy or export subsidy; or
d. whether the goods are of the same description as those description as those described in the order or finding of the Tribunal or in the order of the Governor in Council.

From the perspective of an importer seeking to challenge an initial assessment of anti-dumping duties, the first level of redress is a request for a Designated Officer re-determination. An importer can challenge a Designated Officer re-determination at the second level by requesting a further re-determination by the President. The third level involves an appeal to the CITT, and from there to the Federal Court of Appeal, and from there, with leave, to the Supreme Court of Canada.

Each of the multi-level re-determination processes is subject to a number of strict procedural requirements. To request a re-determination, an importer of non-NAFTA goods must file a request within 90 days of the date of the last assessment and first pay any anti-dumping duties owing within the 90-day deadline. If either of these criteria are not satisfied, the CBSA will reject the request. Designated Officers and the President are also subject to restrictions. A Designated Officer or the President cannot re-determine an importation more than two years back from the date of the initial assessment unless it falls within one of the enumerated exceptions in the SIMA.

Re-determinations are normally decided on a transaction-by-transaction basis. In the case of an importer filing multiple re-determination requests, the CBSA allows the importer to file a blanket request that consolidates the requests into a single proceeding. Blanket requests reduce the paper burden and ensure that all the transactions covered by the request are decided at the same time and by the same CBSA officers delegated to make the re-determinations.

The CBSA may use the results of a Re-Investigation or a Normal Value Review to make a re-determination or further re-determination.

Post-Importation Reviews – Re-Investigations and Normal Value Reviews

Re-investigations and Normal Value Reviews enforce the prospective normal value regime employed by Canada and administered by the CBSA.

The CBSA applies prospective normal values and an “all others rate” to determine the anti-dumping duty liability on importations of goods subject to an anti-dumping order. At the conclusion of an anti-dumping investigation, the CBSA issues prospective normal values to exporters who provided verifiable and complete responses in investigation. The CBSA applies a fixed percentage rate to impose anti-dumping duties on exporters who did not participate or otherwise cooperate in the investigation.

Prospective normal values are calculated based on the sales and cost data filed by the exporter in the anti-dumping investigation. In a Re-investigation or Normal Value Review, the CBSA updates these prospective normal values to ensure that they reflect any changes in domestic selling prices, production costs or exchange rates that have occurred since the last time the CBSA issued prospective normal values. A Re-investigation is country-wide and any exporter can participate, even an exporter found to be uncooperative by the CBSA in a prior proceeding. A Normal Value Review only involves a single exporter. Both proceedings apply to export prices as well as to normal values.

Re-investigations and Normal Value Reviews are consequential proceedings because they directly affect anti-dumping duty liability. For example, if an exporter with prospective normal values fails to cooperate in a Re-investigation or

Normal Value Review, the CBSA will cancel the exporter's normal values and instead apply the "all others rate", which usually results in prohibitively high anti-dumping duty assessments. At the conclusion of a Re-Investigation or Normal Value Review, the CBSA can also issue retroactive reassessments of anti-dumping duties by way of a re-determination.

The CBSA may retroactively re-assess anti-dumping duties at the conclusion of a Re-investigation or Normal Value Review. The CBSA may retroactively reassess anti-dumping duties if it determines that an exporter with prospective normal values failed to promptly notify the CBSA in writing of changes to domestic prices, costs, marketing conditions or terms of sale associated with the goods covered by a prospective normal value. The CBSA may also retroactively reassess anti-dumping duties if it determines that an exporter failed to increase its prices to Canada to account for any increases in the sales and cost data used to calculate prospective normal values. While these are two of the most common scenarios, the CBSA has stated that it may retroactively reassess duties based on any grounds it deems relevant.

The decision to initiate a Re-investigation or Normal Value Review is at the discretion of the CBSA. The CBSA takes the following factors into account when determining whether to initiate a Re-investigation or Normal Value Review:

a. the volume of imports of the subject goods and fluctuations in import volume;
b. the elapsed time since values were last issued; the nature of the subject goods;
c. the presence of new models or products imported;
d. the presence of new exporters of the subject goods;
e. changes in the selling prices in the exporter's home market;
f. changes in the selling prices in the exporter's third country export markets;
g. changes in the exporter's costs;
h. fluctuations in the currency exchange rate;
i. changes in the nature or amount of subsidies;
j. changes in the channels of distribution for the goods sold to Canada;
k. changes in any other manner in which the goods were sold to Canada;
l. in need to review the export prices, such as where exports are associated with the importers;
m. the number of requests for re-determination;
n. the timing of the next potential expiry review;
o. resources available; and
p. any other relevant consideration.

In terms of whether to initiate a Normal Value Review or a Re-Investigation, the CBSA has identified the following factors as supporting a Normal Value Review:

- a significant volume of the imports of subject goods are from a particular exporter or a limited number of exporters;
- where there are new models, they are limited to a particular exporter or limited number of exporters;
- where there are a limited number of new exporters in the market who have requested to be part of the next re-investigation
- where there are factors impacting export prices, they are limited to a particular exporter or a limited number of exporters;

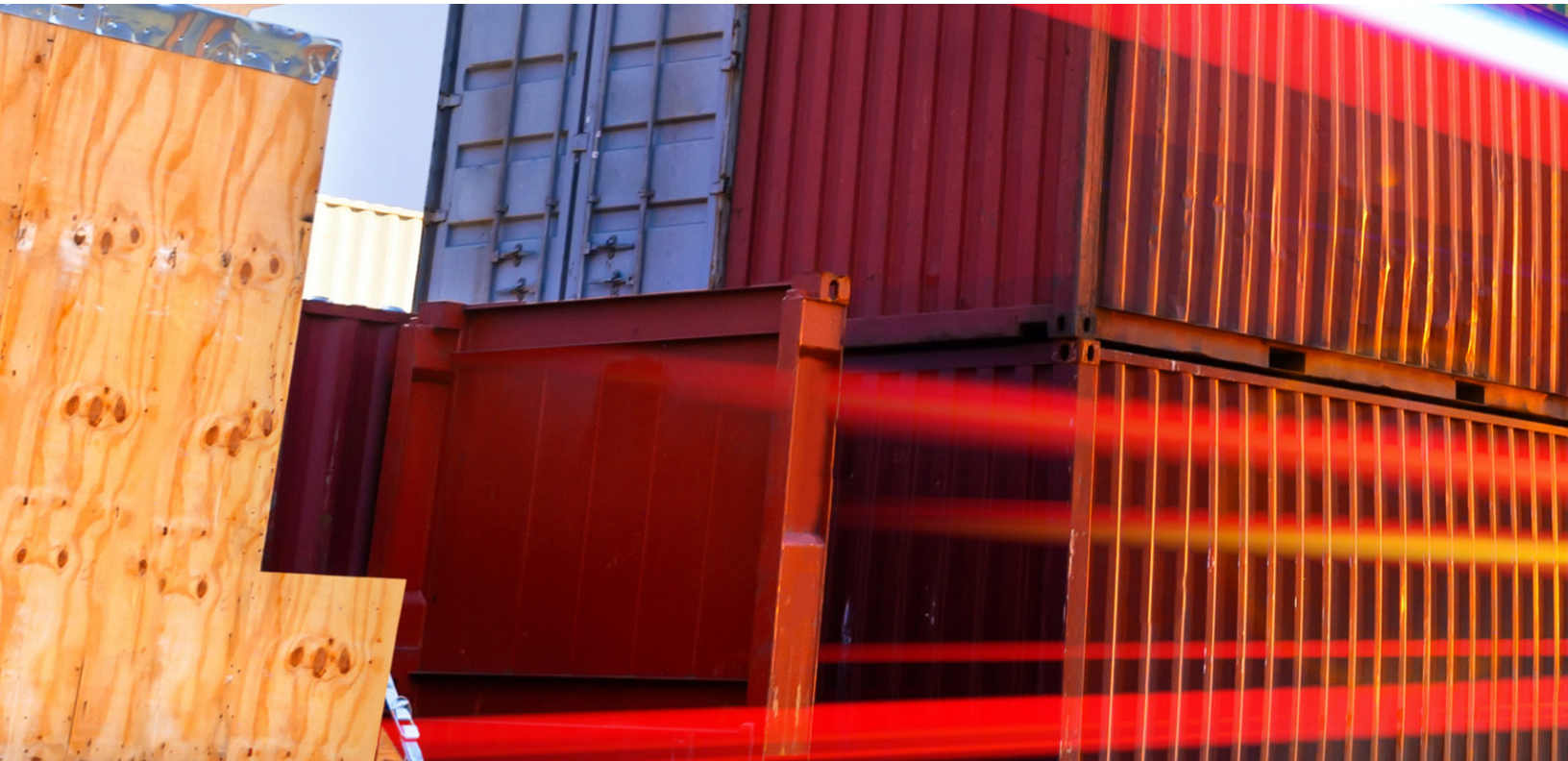
- where representations are made in respect of a particular exporter or the issue raised impacts a limited number of exporters; and
- where a request for a re-determination has been filed by an importer, which includes a request that normal values be issued for its exporter.

Alternatively, the CBSA has identified the following factors supportive of a Re-investigation:

- there are many exporters who have exported subject goods to Canada since the conclusion of the last proceeding;
- where there is a new model exported by multiple exporters;
- where there are multiple new exporters in the market who have request to be part of the next re-investigation;
- where factors impacting export prices are not limited to a particular exporter or a limited number of exports;
- where the issues raised in representations impact multiple exporters;
- where information from a variety of industry participants will likely be sought
- where there are a large number of requests for re-determinations and/or updated values in respect of multiple exporters; and
- there is an expiry review potentially upcoming.

The CBSA is not bound by any prior proceedings when determining how to update prospective normal values and export prices in a Re-investigation or Normal Value Review. As a result, the CBSA may change normal value and export price methodologies based on the particular facts and circumstances of the Re-investigation or Normal Value Review.

Complainants, importers, exporters and other interested persons may write to the CBSA to request a Re-Investigation or Normal Value Review. The CBSA considers these representations when deciding whether to initiate a Re-investigation or Normal Value Review. The CBSA also publishes these representations on its website.



Liability for Anti-Dumping and Countervailing Duties

The general rule is that the importer in Canada of dumped or subsidized goods is solely liable for applicable duty. The importer is defined by SIMA as being the person who "is in reality the importer of the goods". There are no legislative criteria which establish characteristics of an importer.

The President may, on his own initiative, and must when requested to do so, ask the CITT for a ruling as to which of two or more persons is the importer of goods imported into Canada.

The CITT's ruling as to the true importer is not subject to appeal but is subject to judicial review by the Federal Court of Appeal or a NAFTA panel, as the case may be, or by the CITT itself.

Conclusion

The SIMA is a formidable weapon in the hands of complaining Canadian industries. It can be unleashed quickly and without prior notice. Where foreign exporters and manufacturers and their Canadian importers are not prepared to respond quickly, they may suffer arbitrary and punitive decisions which can have the effect of destroying existing levels of market penetration and future opportunities. It is therefore incumbent on those facing anti-dumping or countervailing duty investigations to retain expert legal counsel, cooperate fully with the CBSA and the CITT and marshall resources, both administratively and financially, to fight back.

Appendix

Event	SIMA
1. Initiation of Investigation	Forthwith on President's initiative or where he receives complaint, within 30 days after date on which the President notifies complainant that the complaint is properly documented
2. Preliminary Determination of Injury	Upon initiation of investigation, an inquiry is commenced culminating in a preliminary determination of injury within 60 days of the date of initiation
3. Preliminary of Determination of Dumping/ Subsidization	Made either within 90 days or, in exceptional cases, within 135 days of the date of initiation of the investigation, and causing the injury inquiry to continue
4. Possibility of Accepting Undertakings and Suspending Investigation	Following preliminary determination of dumping or subsidization
5. Final Determination of Dumping/Subsidization	Within 90 days of the preliminary determination of dumping
6. Final Determination of Injury	Public hearings to commence within approximately 90 days of the preliminary determination of dumping/subsidization; the final injury determination to be made within 120 days of the preliminary dumping/ subsidization
7. Public Interest Inquiry	Upon request and where conditions are satisfied, following a CITT affirmative finding of injury
8. Determination of Normal Value, Export Price and Amount of Subsidy for Enforcement Purposes	Within six months after the date of the CITT's finding
9. Scope Ruling	At any time after a finding, upon request by any interested person; within 150 days of receipt of the complaint (255 if extended)
10. Anti-Circumvention Finding	At any time after a finding, upon complaint by any interested person or initiation by CBSA; Within 225 days of receipt of complaint (285 if extended)
11. Appeal by Importer of Margin of Dumping or Amount of Subsidy and/or whether or not goods are within the scope of the CITT finding	Within 90 days of import entry
12. Further reviews of margin of dumping or amount of subsidy, or scope issue	Within 90 days of first decision when initiated by importer or within two years when initiated by CBSA; thereafter, within 90 days to the CITT, then 90 days to the Federal Court of Appeal or NAFTA panel; and finally, with leave, within 60 days to the Supreme Court of Canada

Typical Canadian Anti-Dumping Process

Day	CBSA	CITT
0	Notice of Initiation of Investigation	Notice of Commencement of Preliminary Injury Inquiry
10-14	Notification of CBSA of Intention to Participate	Notices of Participation, Representation, Declarations a and Undertakings
15	Statement of Reasons on Initiation of Investigation	Distribution of CBSA Documents
21	Importer Responses to CBSA RFIs	-
30	-	Submissions by Parties opposed to Complaint
37	Exporter Responses to CBSA RFIs	-
40	-	Replies from Complainants
41-59	Supplemental RFIs and Responses	-
60	-	Preliminary Injury Determination
75-80	-	Reasons for Preliminary Injury Determination[1]
90	Preliminary Determination of Dumping/Subsidization	Notice Of Commencement of Final Injury Inquiry; Issuance of CITT Questionnaires
95-120	On-site Verification of Exporters,	-
105	Importers, Governments (Subsidy Only)	Notices of Participation, Representation, Declarations, Undertakings
110	-	Replies to CITT Questionnaires
135	Closing of record date	-

140	-	Distribution of CITT Exhibits and Investigation Report
142-145	Case Arguments – All Parties	-
146-148	-	Filing of RFIs from Parties; Requests for Product exclusions; Cases of Parties Supporting Injury Finding
152	Replies to Case Arguments	Objections to RFIs
155-157	-	CITT decisions on RFIs
160-163	-	Responses to Requests for Product Exclusions; Cases of Parties Opposing Injury Inquiry; Replies to RFIs
165-166	-	Replies to Responses for Requests to Product Exclusions; Reply Submissions of Parties Supporting Injury Finding
180	Final Determination of Dumping/ Subsidization	-
180-190	-	Public Hearing
195	Statement of Reasons for Final Determination of Dumping/ Subsidization	-
210	-	Issuance of Injury Finding
225	-	Reasons for Injury Finding
230-290	Section 55 Review of Provisional Duties and Refunds of Provisional Duties	-

[1]May be extended by 45 days to day 135 at discretion of CBSA. This will re-set the CITT schedule by the same 45 day extension.

Canadian Anti-Dumping and Countervailing Duty Measures, July 2018

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