A Guide to the Canadian Anti-Dumping System

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May 2004
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Anti-Dumping Investigation Process Chart
A Guide to the Canadian Anti-dumping System

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I. INTRODUCTION

Anti-dumping proceedings are by their very nature complex and costly, and often parties find themselves having to seek the help of lawyers, trade consultants, economists and accountants in order to participate in any meaningful way. Anti-dumping proceedings are powerful remedies for Canadian producers seeking protection against unfairly low-priced imports. These proceedings also involve others in the supply chain, such as importers, exporters and retailers. This guide sets out the steps and concepts involved in a typical anti-dumping proceeding in order to demystify what can be a confusing process.

Before getting to the nuts and bolts of an antidumping proceeding, the first question that must be asked and answered is: what is dumping? Simply put, dumping is the export of a good at a price below the price at which it is sold in the home market, or below its cost of production. The difference between the home market price, or the cost of production, and the export price, is known as the margin of dumping. The Special Imports Measures Act (“SIMA”) establishes the legislative framework for anti-dumping proceedings in Canada. It enables Canadian producers to commence anti-dumping proceedings to combat such import competition when the dumping has caused material injury or retardation, or is threatening to cause material injury, to production in Canada of like goods. In the eyes of the harmed Canadian producers, such imports are deemed to be traded “unfairly”.

In accordance with Canada’s international obligations, SIMA permits Canada to impose an anti-dumping duty to offset the margin of dumping or eliminate the injury or retardation where it is shown that the importation of a dumped good has caused material injury or retardation, or is threatening to cause material injury, to a Canadian industry producing like goods. This guide provides a two-part overview of the Canadian anti-dumping system. The first part outlines the institutional context and process of an anti-dumping proceeding (a chart for which appears as an Appendix). The second part describes the main legal concepts applied by the investigating authorities during such a proceeding.

1 This guide is current to May 1, 2004 and has been prepared with the assistance of Dave McKechnie, Student-At-Law, McMillan Binch LLP.

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3 R.S.C. 1985, c. S-15, as amended. It should be noted that SIMA also provides the legislative framework for countervailing duty proceedings (respecting subsidies). Safeguard proceedings (respecting serious injury caused by fairly traded imports) are governed by the Canadian International Trade Tribunal Act, R.S.C. 1985 c. 47 as amended. A discussion of these two trade remedies is beyond the scope of this guide.

4 Canadian consumers of such imports often do not share this view.
1. **History and International Context of Canada’s Anti-dumping System**

Canada has been a pioneer in the trade remedies frontier, having enacted the world’s first anti-dumping law. In 1913, the United States followed suit and passed an act modeled on the Canadian law. Today, anti-dumping proceedings are world-wide with the principal users being producers in Canada, the United States, the EC, Australia and, more recently, Japan and Mexico.

From 1904 to 1968, dumping in Canada was regulated mainly under the Customs Tariff. The most notable feature of the original scheme was the absence of an injury test. Dumping duties were imposed if the domestic producer could establish that the dumped goods were of a “class or kind made in Canada”.

On January 1, 1969, the *Anti-dumping Act* came into force with a view to having Canada’s anti-dumping system conform with Article VI of the 1947 GATT and the provisions of the first Anti-dumping Code (the “1967 Code”) negotiated during the Kennedy Round of multilateral trade negotiations held from 1964 to 1967. Article VI of the 1947 GATT was and remains the core international rule on dumping and permits GATT Contracting Parties to use anti-dumping duties to offset the margin of dumping of dumped goods, provided it can be shown that such dumping is causing or threatens to cause material injury or is causing material retardation to competing domestic industries. The 1967 Code set forth a series of procedural and substantive rules for national anti-dumping laws, and included the requirement of an injury test.

On December 1, 1984, SIMA repealed the *Anti-dumping Act* with a view to having Canada’s laws conform with the revised Anti-dumping Code (the “1979 Code”) agreed to during the Tokyo Round of multilateral trade negotiations held from 1973 to 1979. The 1979 Code superseded the 1967 Code and set out more detailed rules about what constituted dumping and injury and established further constraints to discipline the manner in which national governments determined and enforced anti-dumping duties.

Significant amendments to SIMA were made effective as of January 1, 1989 to implement bi-national panel review of anti-dumping proceedings pursuant to Canada’s obligations under

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5 See *An Act to Amend the Customs Tariff*, 1897, S.C. 1904, c. 11, s. 19. This is a dubious distinction to some commentators, given the so-called “policy hesitations” and economic arguments against anti-dumping laws that are often bandied about. It is beyond the scope of this guide to discuss whether Canada’s anti-dumping law system in fact operates to protect against “unfair” trade. Those who would like an introduction to this subject should read Chapter 10 of Jackson J. H., *The World Trading System* (Cambridge: The MIT Press, 1989) entitled “Unfair Trade and the Rules on Dumping”.


8 For the general principles applicable during this period, see section 6 of the Customs Tariff, R.S.C. 1952, c. 20 and the regulations made thereunder.

Chapter 19 of the Canada-U.S. Free Trade Agreement (the “FTA”). Further amendments to SIMA were made to extend the system of bi-national panel review to Mexico, pursuant to Canada’s obligations under Chapter 19 of the North American Free Trade Agreement (the “NAFTA”).

In 1995, further changes to SIMA and the Regulations were made with a view to ensuring that Canada’s anti-dumping system conformed with the new Anti-dumping Code (the “1994 Code”) and related ministerial decisions and declarations\(^\text{10}\) agreed to by Canada during the Uruguay Round of multilateral trade negotiations held from 1986-1994. The 1994 Code superseded the 1979 Code. SIMA has recently been amended\(^\text{11}\) as a result of the accession of the People’s Republic of China to the World Trade Organization (“WTO”).

It is important to understand the international context within which Canada’s domestic laws on anti-dumping have developed, because the Supreme Court of Canada has held that (a) the provisions of the GATT may be used to interpret Canadian trade legislation in circumstances where this legislation is unclear and (b) at the very outset of an injury inquiry, it is reasonable to make reference to a provision of the GATT which underlies a provision of Canadian trade legislation to determine if there is any ambiguity, even latent, in the Canadian legislation.\(^\text{12}\)

In light of the foregoing, at present, lawyers advising clients in anti-dumping proceedings must be mindful of Canada’s international obligations under Article VI of the 1947 GATT, the 1994 Code, the related ministerial decisions and declaration under the WTO Agreement, and the NAFTA. These international obligations inform the current provisions in SIMA and the Regulations governing Canada’s anti-dumping system and may be used to interpret these provisions in the circumstances noted above.

There have been significant changes recently to how Canada’s anti-dumping regime operates, both structurally and procedurally. Structurally, there is a whole new administrative agency that handles anti-dumping complaints, as the responsibility has been shifted from the Canada Customs and Revenue Agency (CCRA) to the Canada Border Services Agency (CBSA), which was created on December 12, 2003. As a result of this shift, the President of the CBSA (the “President”),\(^\text{13}\) rather than the Deputy Minister of the CCRA investigates and has carriage of anti-dumping complaints.

Procedurally, the recent passage of Bill C-50 gives Canadian producers continued remedies to use against the dumping of goods from China. The remedies were obtained in the negotiations between WTO members and China that led to China’s accession to the WTO. The most

\(^{10}\) The Decision on Anti-Circumvention, the Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the GATT 1994, and the Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the GATT 1994, in The Results of the Uruguay Round of Multilateral Trade Negotiations - The Legal Texts, published by the GATT Secretariat in June 1994 at 453 (“The Legal Texts”)

\(^{11}\) Pursuant to sections 16 of Bill C-50, S.C. 2002, c. 19 (“Bill C-50”)


\(^{13}\) Consequential amendments to SIMA have not yet been made as of this writing, but it will be the President of the CBSA who will have responsibility under SIMA for anti-dumping complaints and investigations.
important aspect of Bill C-50 for the anti-dumping context is that it allows the President to use a
different methodology in computing home market price where the President believes that the
prices are being substantially influenced or determined by the Chinese government. While these
provisions existed previously for countries where there is a suspicion of governmental control
over home-markets, the negotiated agreement provides that WTO countries, including Canada,
can use this surrogated methodology for 15 years, even though China’s economy is in a period of
transition and such control may no longer exist in the near future.

II. INSTITUTIONAL CONTEXT AND PROCESS

An anti-dumping proceeding involves two main stages: first, the receipt of a complaint, the
initiation of an investigation and the determination of dumping by the President of the CBSA;
and second, the conduct of a preliminary injury investigation and the potential finding of
material injury or retardation by the Canadian International Trade Tribunal (the “Tribunal”). It is
only after dumping and material injury or retardation resulting from the dumping have been
established that anti-dumping duties may be levied definitively.

1. The President’s Determinations

A. THE PROPERLY DOCUMENTED COMPLAINT

An anti-dumping proceeding is usually commenced by a domestic complainant filing a properly
documented complaint under section 31 of SIMA with the President. As defined in section 2(1)
of SIMA, a properly documented complaint means that:

(a) the complaint alleges that the goods have been or are being dumped, specifies the
goods, alleges that the dumping has caused injury or retardation or is threatening
to cause injury, states in reasonable detail the facts on which the allegations are
based, and makes such other representations as the complainant deems relevant to
the complaint; and

(b) the complainant provides such information as is available to the complainant to
prove the facts referred to in the complaint, such information as is prescribed by
the SIMA Regulations, and such other information as the President may
reasonably require.

Section 37 of the SIMA Regulations prescribe the following information for a properly
documented complaint:

(a) the volume and value of the complainant’s domestic production of like goods;

(b) a list of all producers of like goods in Canada, and of the associations of such
producers in Canada, of whom the complainant knows;

14 A proceeding may also be commenced on the President’s initiative or as directed by the Tribunal.
15 SOR/84-927, as amended (“SIMA Regulations”)
(c) such details as are reasonably available to the complainant regarding the estimated volume and value of the production of like goods by the producers referred to above in paragraph (b);

(d) the name of each foreign producer or exporter of the allegedly dumped goods of whom the complainant knows;

(e) the name of each importer in Canada of the allegedly dumped goods of whom the complainant knows;

(f) such details as are reasonably available to the complainant regarding the evolution of the volume of imports of the allegedly dumped goods; and

(g) such details as are reasonably available to the complainant regarding the effect of imports of the allegedly dumped goods on the price of like goods in Canada.  

The President has 21 days after filing within which to review the complaint to determine if it is properly documented. If the complaint is not properly documented, the complainant will be notified and given an opportunity to provide additional information.

B. INITIATION AND TERMINATION OF THE INVESTIGATION

Once the complaint is properly documented, the President has 30 days within which to decide whether or not to initiate an investigation. The President must initiate an investigation into the dumping of any goods if the President is of the opinion that there is (a) evidence that the goods have been dumped, and (b) evidence that discloses a reasonable indication that the dumping has caused injury or retardation or is threatening to cause injury.

No investigation may be initiated as a result of a complaint unless the complaint is supported by domestic producers whose production represents more than 50 per cent of the total production of like goods by those domestic producers who express either support for or opposition to the complaint and, the production of the domestic producers who support the complaint represents 25 per cent or more of the total production of like goods by the domestic industry. “Domestic industry” is defined as meaning the domestic producers as a whole of the like goods except that, where a domestic producer is related to an exporter or importer of allegedly dumped goods, or

16 See also Article 5.2 of the 1994 Code in The Legal Texts, supra n. 10 at 176.
17 Section 32(1) of SIMA.
18 Section 32(1) (b) of SIMA.
19 Section 31(1) of SIMA.
20 Ibid.
21 Section 31(2) of SIMA. See also Article 5.4 of the 1994 Code in The Legal Texts, supra n. 10 at 177.
22 The test for whether or not a producer is related to an exporter or importer is set out in section 2(1.2) of SIMA.
is an importer of such goods, “domestic industry” may be interpreted as meaning the rest of those domestic producers.23

The period of 30 days referred to in section 31(1) of SIMA may be extended to 45 days where, before the expiration of the 30-day period, the President gives notice to the complainant and to the government of the country of export that 30 days is insufficient to determine whether the conditions for initiating an investigation have been met.24

If the President decides not to initiate an investigation, section 33(1) of SIMA requires the President to give notice and reasons to the complainant and to the government of the country of export.

If the only reason the President decides not to commence an investigation is because the complaint does not, in the opinion of the President, disclose a reasonable indication that the dumping has caused injury or retardation or is threatening to cause injury, the President, or the complainant, may refer the matter to the Tribunal.25 If the Tribunal advises the President that there is sufficient evidence of injury or retardation, then the President must continue the investigation.26 If the Tribunal advises that there is insufficient evidence of injury or retardation, then the President must terminate the investigation.27

Pursuant to section 35(1) of SIMA, at any time before making the preliminary determination, the President must terminate the investigation where the President is satisfied that:

- there is insufficient evidence of dumping to justify proceeding with the investigation;
- the margin of dumping of the goods is insignificant; or
- the actual or potential volume of dumped goods is negligible.

SIMA contains the following definitions for “insignificant” and “negligible”:

- “insignificant” means a margin of dumping that is less than 2 per cent of the export price of the goods; and
- “negligible” means, less than 3 per cent of the total volume of goods that are released into Canada from all countries and that are of the same description as the dumped goods. However, the definition goes on to provide that where the total volume of dumped goods of three or more countries (each of whose exports of

23 Section 31(3) of SIMA.
24 Section 31(6) of SIMA.
25 Section 33(2) of SIMA.
26 Section 34(2) of SIMA.
27 Section 36 of SIMA.
dumped goods into Canada is less than 3 per cent of the total volume of goods referred to above) is more than 7 per cent of the total volume of such goods, the volume of dumped goods of any of those countries is not negligible.28

Where the President does initiate an investigation, notice of the investigation is given to the complainant, the exporters, importers and governments of the country of export.29 The President must also provide the Tribunal with the information and material with respect to the matter.30 Notice is also published in the Canada Gazette.31

The Tribunal must render its advice on the question within 30 days of such a request without holding any hearings thereon and solely on the basis of the evidence in the possession of the President, namely the information in the complaint, though the President also may gather information from other government agencies, such as Statistics Canada.32

C. PRELIMINARY DETERMINATION

After the 60th day and on or before the 90th day following the initiation of an investigation, the President shall make a preliminary determination of dumping after estimating and specifying, in relation to each exporter of goods in respect of which the investigation is made, as follows:

- estimating the margin of dumping of the goods to which the preliminary determination applies, using the information available to the President at the time the estimate is made;
- specifying the goods to which the preliminary determination applies; and
- specifying the name of the person the President believes, on the information available at the time, is the importer in Canada of the goods.33

The President may extend the 90-day period to 135 days where warranted by the complexity or novelty of the proceedings, the variety of goods or number of persons involved, and/or the difficulty of obtaining satisfactory evidence.34

After making a preliminary determination, the President must give notice to the complainant, the exporters and importers, the government of the country of export and any other prescribed

28 Section 2(1) of SIMA. See, Article 5.8 of the 1994 Code, The Legal Texts, supra n. 10 at 177.
29 Note that Article 5.5 of the 1994 Code, The Legal Texts, supra n. 10 at 177 requires the investigating authority to notify the government of the country of export before proceeding to initiate an investigation. This timing requirement is not expressly set out in section 34(1)(a) of SIMA.
30 Section 34(1)(b) of SIMA.
31 Section 34(1)(a) of SIMA. See also Article 12.1 of the 1994 Code, The Legal Texts, supra n. 10 at 188.
32 Section 37 of SIMA.
33 Section 38(1) of SIMA.
34 Section 39(1) of SIMA.
person. The President must also file the written notice with the reasons for determination, and any other information relating to the determination as may be required by the rules of the Tribunal.\(^{35}\)

During the period between the notice of initiating the investigation and the issuance of the preliminary determination, the President makes inquiries and investigations to estimate the margin of dumping on imports. At the outset of the investigation, the President sends a questionnaire to each exporter who is known to have exported the goods under investigation to Canada during the period of investigation selected by the President.\(^{36}\) Each importer who has been identified also receives a questionnaire soliciting information concerning all imports of the goods in question during the period of investigation. These questionnaires are usually quite detailed and require a significant effort and commitment of time on the part of the exporter or importer to complete. While a foreign exporter is not obliged to comply with the President’s requests for information, failure to co-operate will allow the President to calculate a margin of dumping based on the best information available,\(^{37}\) which usually results in the application of a rate of anti-dumping duties that is significantly higher than the rate that would apply if the exporter had co-operated.

Officers of the CBSA may visit the offices of exporters and importers to verify information provided in questionnaire responses.\(^{38}\)

The focus of the President’s investigation is on the normal values and export prices of the goods in question as defined under SIMA and the SIMA Regulations. The purpose of establishing the normal value is to determine at what price the goods are normally sold in like quantity and under normal commercial circumstances to customers in the country of export. This normal value is then compared with the export price, being the price at which the goods are sold to Canadian importers. If the normal value exceeds the export price, then dumping exists. The concepts of “normal value”, “export price” and “margin of dumping” are discussed further in part III of this guide.


\(^{36}\) In accordance with Canada’s obligation under Article 6.1 of the 1994 Code (The Legal Texts, supra n. 10 at 178), exporters or foreign producers receiving questionnaires should be given at least 30 days for reply and due consideration should be given to any request for an extension of the 30-day period. While extensions are difficult to obtain (given the tight statutory time frame within which the President must operate), upon cause shown and where practicable, they may be granted.

\(^{37}\) See Article 6.8 and Annex II of the 1994 Code in The Legal Texts, supra n. 10 at 180 and 195, respectively.

\(^{38}\) See Article 6.7 and Annex I of the 1994 Code in The Legal Texts, supra n. 10 at 180 and 194, respectively.
Provisional anti-dumping duties, based on the estimated margin of dumping, are imposed on goods that are the subject of a preliminary determination.  

D. **FINAL DETERMINATION**

The President continues the investigation and issues a final determination of dumping within 90 days after the date of the preliminary determination.

The final determination is based on additional information obtained from exporters and importers after the date of the preliminary determination. This information is usually more detailed and accurate than the data the President had at the time of issuing the preliminary determination. By the time of the final determination, the President has had an opportunity to consider and receive submissions from interested parties on the appropriateness of the methodologies employed by the President to calculate normal values and export prices. These submissions usually follow disclosure meetings held by Agency officers and trade counsel acting for the exporters and importers. Further, verification visits to exporters and importers by Agency officers will usually give the President a better picture of the goods in question thereby leading to a refinement of the margins of dumping.

E. **UNDERTAKINGS**

SIMA contains expanded provisions for the acceptance and enforcement of undertakings that revise the price of an export or halt the export altogether. An undertaking offers an alternative means of resolving an anti-dumping dispute, without the need for participation in a lengthy and costly investigation by the President and inquiry by the Tribunal.

During the course of an investigation into the dumping of goods, the President may accept an undertaking from the exporter if the President considers that the undertaking will eliminate the margin of dumping or prevent injury to, or retardation of, Canadian industry. The acceptance of an undertaking by the President and its observance by the exporter suspends the investigation into dumping and the collection of duties.

Under the old SIMA, few undertakings were ever offered by exporters, let alone accepted. In part, this was due to the fact that an undertaking could only be accepted prior to the preliminary determination of dumping. The obvious impediment was that an exporter was not predisposed to give an undertaking until it knew whether, and to what extent, dumping had been found. It was only after the preliminary determination that the exporter could make an informed decision as to

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39 Section 8(1) of SIMA. See also Article 7 of the 1994 Code in The Legal Texts, supra n. 10 at 182.
40 Section 41(1) of SIMA.
41 See Canada’s obligation to make such disclosure in Article 6.9 of the 1994 Code, The Legal Texts, supra n. 10 at 180.
42 Section 49(1) of SIMA. See also Article 8.1 of the 1994 Code in The Legal Texts, supra n. 10 at 183.
43 Section 50 of SIMA.
44 Section 49(2) of SIMA used to provide that “the President shall not accept an undertaking with respect to dumped...goods...where he has made a preliminary determination of dumping”.

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whether or not to give an undertaking and, by that stage, it was too late. For several years, commentators and trade counsel had complained that it would be better if SIMA permitted the acceptance of an undertaking for a period of time after the issuance of the preliminary determination. After all, the restriction in old section 49(2) of SIMA had no basis in the 1979 Code.

Article 8.2 of the 1994 Code provides that “price undertakings shall not be sought or accepted from exporters unless the authorities of the importing Member have made a preliminary affirmative determination of dumping and injury caused by such dumping”. To make SIMA consistent with Canada’s international obligations, section 49(2)(b) of SIMA prohibits the President from accepting an undertaking unless a preliminary determination has been made. Furthermore, the President now has authority to accept an undertaking for any period up to 60 days after the issue of the preliminary determination.45

Another significant amendment to the SIMA provisions on undertakings was that the exporter submitting an undertaking can request that the President complete his or her investigation into dumping and that the Tribunal complete its inquiry into material injury or retardation. If the subsequent determination or finding exonerates the exporter, the undertaking lapses.46 Such a request must accompany the undertaking offer made by the exporter and cannot be made after the undertaking has been accepted by the President.47

While the prospects of an exporter seriously considering an undertaking in a particular anti-dumping case increased after these amendments, the giving and acceptance of undertakings are subject to several restrictive conditions, including:

- that the undertaking cannot increase the price of goods imported into Canada by more than the estimated margin of dumping; and
- that, in the opinion of the President, the undertaking would not be practicable to administer.48

Furthermore, in order for the President to accept an undertaking, the exporter or exporters giving it must account for all, or substantially all, of the exports to Canada.49 Revenue Canada had interpreted this requirement to mean that exporters offering undertakings must account for at least 85 per cent of the volume of dumped imports to Canada.50 As a consequence of this high threshold, an undertaking might be impossible in an industry with numerous exporters.

45 Section 49(4) of SIMA and section 57 of the Regulations.
46 Sections 49(3) and 52(1.2) of SIMA. See also Article 8.4 of the Code in The Legal Texts, supra n. 10 at 183.
47 Section 49(3)(a) of SIMA.
48 Section 49(2) of SIMA. See also Article 8.3 of the 1994 Code in The Legal Texts, supra n. 10 at 183.
49 See the definition of “undertaking” in section 2(1) of SIMA.
50 See Revenue Canada’s SIMA Handbook, September 1994, which superseded Revenue Canada’s Assessment Manual. This interpretation was first set out in the Manual at Vol. III-Special Import Measures Act, Part II, Chapter 3, Section B, Page 2, Paragraph 2. The CBSA has undertaken to substantially revise the SIMA Handbook, but as of this writing the
The President is obliged to terminate an undertaking within 30 days of its acceptance upon the request of the complainant or any importer or exporter in the investigation.51 As well, the President may terminate an undertaking if a violation occurs, or if new circumstances arise that adversely affect the efficacy of the undertaking.52 Whereas acceptance of an undertaking suspends the investigation, the termination of an undertaking causes the investigation to be resumed.53

Generally speaking, an undertaking must be reviewed by the President before the expiration of 5 years from the date on which it has been accepted and before the expiration of each subsequent period (not to exceed more than 5 years), if any, for which it is reviewed.54 An undertaking that is not reviewed within the prescribed time period expires at the end of the period.55 Expiration of the undertaking terminates all proceedings, unless the Tribunal has made an order or finding that the dumping of goods has caused injury or retardation or is threatening to cause injury.56

The form of undertaking contains standard terms which oblige the exporter to provide the President with such information as the President requests from time to time to demonstrate adherence to the undertaking and to permit verification of the information provided. Furthermore, the undertaking contains a term whereby the exporter agrees that it may be amended at any time, where necessary, to reflect changes in market conditions.57

2. The Tribunal’s Findings, Further Determinations by the President and Related Appeals

   A. COMMENCEMENT OF TRIBUNAL’S INQUIRY

The initiation of an investigation commences the Tribunal’s preliminary inquiry into the question of injury.58 For this purpose, the Tribunal will issue a Notice of Inquiry, which is sent to all persons who may have an interest in the matter. All notices and findings of the Tribunal are also published in the Canada Gazette. The Notice of Inquiry sets out, among other things, the

51 Section 51(1) of SIMA.
52 Section 52(1) of SIMA. See also Article 8.6 of the 1994 Code in The Legal Texts, supra n. 10 at 184.
53 Section 52(1)(f) of SIMA. It should be noted that, under the new SIMA, the President is no longer obliged to make an immediate preliminary determination of dumping following termination of the undertaking (cf. old section 52(1)(e) of SIMA).
54 Section 53(1) of SIMA.
55 Section 53(2) of SIMA.
56 Section 53(3) of SIMA.
57 Section 54 of SIMA. See, Article 8.6 of the 1994 Code in the Legal Texts, supra n. 10 at 184.
58 Section 42(1) of SIMA.
procedure for filing submissions, the treatment of confidential information, and the time and place of the public hearing.\textsuperscript{59}

\textbf{B. Purpose of Inquiry}

The main purpose of the inquiry conducted by the Tribunal is to determine whether the dumping found by the President has caused material injury or retardation or is threatening to cause material injury to the production in Canada of like goods.\textsuperscript{60}

\textbf{C. Timing and Process of Inquiry}

The Tribunal must complete its preliminary inquiry within 60 days of the initiation of the investigation by the President. Thus, the President’s investigation leading to the preliminary determination of dumping proceeds in parallel with the Tribunal’s inquiry.

The Tribunal sends questionnaires to producers, importers, exporters and other persons who possess information relevant to the inquiry. Any person who proposes to appear at the hearing must file with the Tribunal a Notice of Appearance on or before the date specified in the Notice of Inquiry published in the Canada Gazette (usually within one month of the commencement of the inquiry).\textsuperscript{61} Preliminary briefs are often filed by the parties. Based on the information obtained in its questionnaires, the staff of the Tribunal prepare a pre-hearing report.

\textbf{D. Treatment of Confidential Information}

The Tribunal divides all material received or generated in response to its questionnaires into confidential and non-confidential books. A copy of the non-confidential material is made available to each party who files a Notice of Appearance. Counsel who wish access to confidential information provided to the Tribunal must file a Declaration and Undertaking to maintain the confidentiality of such material. Only counsel who have filed such an undertaking are provided with copies of the confidential material.\textsuperscript{62}

\textsuperscript{59} Section 54 of the Canadian International Trade Tribunal Rules, SOR/91-499, as amended (the “Tribunal Rules”)
\textsuperscript{60} Ibid.
\textsuperscript{61} Rule 10(1) of the CITT Rules.
\textsuperscript{62} The rules on the filing, submission, disclosure to counsel, service and communication of confidential information at the Tribunal’s inquiry are set out in rules 14-17 of the Tribunal Rules. With respect to the rules governing the treatment and disclosure of confidential information by the President, see sections 82-88 of SIMA. Where a person providing information wishes some or all of the information to be kept confidential, the person shall submit, at the time the information is provided, a statement designating as confidential the information that it wishes to be kept confidential, together with an explanation of why it designated that information as confidential. As well, it is necessary to provide (a) a non-confidential edited version or non-confidential summary of the information designated as confidential in sufficient detail to convey a reasonable understanding of the substance of the information or (b) a statement that such a non-confidential edited version or non-confidential summary cannot be made or that such a non-confidential edited version or non-confidential summary would disclose facts that the person has a proper reason for wishing to keep confidential: see section 85(1)(b) of SIMA. See also Articles 6.1.2 and 6.5.1 of the 1994 Code in The Legal Texts, supra n. 10 at 178-179.
E. **FILING OF CASES BY PARTIES**

A complainant usually has one week from receiving the Tribunal’s books and pre-hearing staff report to file its case, including written statements of evidence of witnesses to be called. Parties adverse in interest to the complainant are then provided with the complainant’s material and have one week to file their cases which, in turn, are made available to the complainant.

F. **THE HEARING**

The informal but adversarial hearing typically takes place at the Tribunal’s offices in Ottawa. Usually, the presentation of the case is divided into public and in-camera sessions. The Tribunal may summon before it any person and require that person to give evidence on oath or affirmation and to produce documents.63 The complainant presents its case first and then the respondents have an opportunity to cross-examine the complainant’s witnesses. Each side then has an opportunity to respond to the other’s case and summarize its own. Upon completion of the hearing, the Tribunal’s staff prepares post-hearing notes which comment on the evidence elicited during the course of the hearing.

G. **THE FINDING AND STATEMENT OF REASONS**

As noted, the Tribunal must issue its finding within 120 days from the date of the preliminary determination. The Tribunal has another 15 days to issue a statement of reasons supporting its decision. The finding and the statement of reasons are sent to all interested parties and the finding is also published in the Canada Gazette.64

If the Tribunal finds no injury or retardation, the proceedings are terminated and all duties collected from the date of the preliminary determination are refunded with interest at the prescribed rate.65

If the Tribunal finds only future injury, goods imported during the 120-day period between the preliminary determination and the Tribunal’s decision will not be assessed for any dumping duty and the provisional duties collected in connection therewith will be refunded together with interest at the prescribed rate.66

If the Tribunal finds past, present and future material injury or past or present retardation, the process enters a further phase of investigation by the President.67

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63 Rule 20(1) of the Tribunal Rules.
64 Section 43 of SIMA.
65 Sections 47 and 8(2) of SIMA.
66 Section 8(2)(a)(iii) of SIMA.
67 See sections II.2.J-L of this guide, infra.
H. PUBLIC INTEREST INQUIRIES

SIMA also provides that the Tribunal has a public interest advisory function. Where the Tribunal is of the opinion that the imposition, in whole or in part, of anti-dumping duties would not or might not be in the public interest, the Tribunal is obliged to report this opinion to the Minister of Finance and cause a copy of its report to be published in the Canada Gazette. Where any person makes a request to the Tribunal for an opportunity to make representations on the report, the Tribunal is obliged to afford such person an opportunity to make representations orally, in writing, or both, as the Tribunal directs. If the Minister of Finance accepts the opinion of the Tribunal, he or she may recommend remission of all or part of the duties. Under SIMA, the Tribunal itself has no power to remit such duties.

I. IMPORTER RULINGS

The Tribunal has authority to rule on the question as to which of two or more persons is, in reality, the importer in Canada of the subject goods. Pursuant to section 89(1) of SIMA, the President may and, at the request of any person interested in the importation of the goods the President shall, request that the Tribunal rule on this question.

J. DETERMINATION BY DESIGNATED OFFICER

Section 55 of SIMA requires the President to cause a designated officer to determine, not later than 6 months after the date of the Tribunal’s order or finding, liability for anti-dumping duties in respect of any goods imported into Canada during the provisional period -- i.e., between the preliminary determination and the Tribunal’s finding. The officer must determine whether the goods are in fact goods of the same description as those subject to the order or finding, and the normal value and export price of the goods.

The determination mandated by this section “finalizes” the provisional duty on goods imported during the provisional period and is only applicable where the Tribunal has made a finding of past injury or a finding of injury due to the massive importation of dumped goods. Where the Tribunal has made an order or finding of no injury, or future injury only, no determination is required under section 55.

K. DETERMINATIONS, RE-DETERMINATIONS AND RELATED APPEALS

Sections 56 to 62 of SIMA concern the assessment of duty on dumped goods subsequent to a Tribunal finding of material injury and the disposition of related appeals. These provisions set out a hierarchy of determinations, re-determination and related appeals.

A determination made under section 56(1) of SIMA is final and conclusive, subject to an appeal being submitted by a person entitled to do so under section 56(1.01). Under this section, the

68 Section 45(1) of SIMA.
69 Section 45(6) of SIMA. See also Article 6.12 of the 1994 Code in The Legal Texts, supra n. 10 at 181.
70 Section 90 of SIMA.
importer of goods may, within 90 days after the making of the determination, make a written request in the prescribed form and manner accompanied by the prescribed information to a designated officer for re-determination, if the importer has paid all duties owing on the goods. Where such a determination is made in respect of goods of a NAFTA country, the government of that NAFTA country or, if they are of that NAFTA country, the producer, manufacturer or exporter of goods, may make a request for a re-determination, whether or not the importer has paid all duties owing on the goods.

A determination or re-determination by a designated officer may be re-determined by the President.\textsuperscript{71} In turn, an appeal of the President’s decision can be made to the Tribunal\textsuperscript{72} and thereafter an appeal lies to the Federal Court on questions of law.\textsuperscript{73}

L. \textbf{EXPEDITED REVIEWS BY PRESIDENT}

Section 13.2 of SIMA\textsuperscript{74} provides for expedited reviews by the President of normal values and export prices for goods under investigation. The exporter requesting such a review must establish that it has not previously been investigated and that it is not associated with any exporter or producer who has been previously investigated.

M. \textbf{EXPIRY OF TRIBUNAL FINDING}

An order or finding of the Tribunal is valid for 5 years unless it has been reviewed or rescinded earlier or extended or amended by the Tribunal.\textsuperscript{75} The Tribunal will issue a Notice of Expiry for its finding no later than 10 months prior to the date of expiry.\textsuperscript{76}

N. \textbf{EXPIRY REVIEW OF TRIBUNAL FINDING}

The Notice of Expiry will request interested parties to make submissions as to why a review should be held or why the findings should simply be allowed to lapse. The Tribunal may review its orders or findings on the question of injury on its own initiative, at the request of the President or any other interested person or foreign government.\textsuperscript{77}

The review involves the same kind of injury criteria covered in the original inquiry and examines whether market circumstances have changed.

\textsuperscript{71} Section 58(2) of SIMA.
\textsuperscript{72} Section 61 of SIMA.
\textsuperscript{73} Section 62 of SIMA.
\textsuperscript{74} See also Article 9.5 of the 1994 Code in The Legal Texts, supra n. 10 at 186.
\textsuperscript{75} Section 76.03(1) of SIMA. See also Article 11.3 of the 1994 Code in The Legal Texts, supra n. 10 at 188.
\textsuperscript{76} Section 76.03(2) of SIMA.
\textsuperscript{77} Section 76.03(3) of SIMA. See also Article 11 of the 1994 Code in The Legal Texts, supra n. 10 at 188.
Upon completion of a review, the Tribunal must issue a decision with reasons. Anti-dumping duties are no longer levied on imports if the finding is rescinded. The Tribunal also has the discretion to amend the original finding to exclude a product, producer or country from it.

3. Review by the Federal Court of Appeal and Bi-national Panels of Final Determinations of Dumping and Injury Findings

Section 18.1(4) of the Federal Courts Act provides for review of a final determination of dumping or a finding of injury if the President, or the Tribunal, as the case may be:

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
(e) acted, or failed to act, by reason of fraud or perjured evidence; or
(f) acted in any other way that was contrary to law.

The FTA introduced judicial review of final anti-dumping duty determinations with bi-national panel review and the NAFTA has carried forward this process for the settlement of anti-dumping disputes. The NAFTA, like the FTA, also permits the review of a bi-national panel decision by way of an extraordinary challenge committee if the following conditions are met:

- a member of the panel has been guilty of gross misconduct, bias, or a serious conflict of interest, or has otherwise materially violated the rules of conduct; or
- the panel has seriously departed from a fundamental rule of procedure; or
- the panel has manifestly exceeded its powers, authority or jurisdiction such as failing to apply the appropriate standard of review; and

78 Section 76.03(7) of SIMA.
79 Section 76.03(8) of SIMA.
81 See also Article 13 of the 1994 Code in The Legal Texts, supra n. 10 at 190.
82 Article 1904(2) of NAFTA.
any of the actions set out above has materially affected the panel’s decision and threatens the integrity of the bi-national panel review process.83

Canada’s obligations on dispute settlement respecting goods of a NAFTA country are set out in Part I.1 of SIMA (sections 77.01-77.038). Bi-national panel review is available in respect of any “definitive decision” as defined in section 77.01(1) of SIMA, which includes a final determination of dumping by the President and an injury finding by the Tribunal.

4. Consultation and Dispute Settlement at the WTO

Article 17 of the 1994 Code provides that disputes related to the application thereof shall be dealt with in accordance with the Dispute Settlement Understanding of the WTO Agreement.84 If the Member who has requested consultations (the “complaining party”) considers that they have failed to achieve a mutually agreed solution and if final action has been taken by the administrative authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, the complaining party may refer the matter to the Dispute Settlement Board. At the request of the complaining party, the Dispute Settlement Board will establish a panel to examine and rule on the matter. The standard of review to be applied by the panel in such a review is set out in Article 17.6 of the Code.85

Section 76.1 of SIMA provides a means for the Canadian government to implement the ruling from such a review. Specifically, this section enables the Minister of Finance to request that the President or the Tribunal review a prior decision, order or finding that has been subject to the ruling of a panel established by the Dispute Settlement Board.

III. MAIN LEGAL CONCEPTS APPLIED BY INVESTIGATING AUTHORITIES DURING ANTI-DUMPING PROCEEDINGS

1. Calculation of Normal Values, Export Prices and Margins of Dumping

Under section 2(1) of SIMA, the “margin of dumping” (on which the calculation of anti-dumping duties is based) is defined as “the amount by which the normal value of the goods exceeds the export price of the goods”.

A. Normal Value

In simple terms, normal value is the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. Section 2(1) of SIMA defines “normal value” to mean normal value determined in accordance with sections 15 to 23 and 29 and 30 of SIMA. As well, sections 3 to 19 of the SIMA Regulations govern the calculation of normal value, in particular, taking into account differences between the goods the exporter sells in its domestic market and those exported to Canada.

83 Article 1904(13) of NAFTA.
84 See The Legal Texts, supra n. 10 at 192-193.
85 See also the Decision on Review of Article 17.6 of the 1994 Code in The Legal Texts, supra n. 10 at 453.
(i) **Home Market Method**

The basic rule of calculating normal value is the so-called home market method, as set out in section 15 of SIMA. Under section 15, the normal value is the price of like goods when they are sold by the exporter:

- to purchasers with whom the exporter is not associated at the time of sale and who are at the same, or substantially the same, trade level as the importer;
- in the same, or substantially the same, quantities as the sale of goods to the importer;
- in the ordinary course of trade for use in the country of export under competitive conditions;
- during a 60-day time period selected by the President; and
- at the place from which the goods were shipped directly to Canada,

all adjusted in the prescribed manner to reflect the differences in terms and conditions of sale, in taxation and other differences relating to price comparability between the goods sold to the importer and the like goods sold by the exporter.

Underlying the calculation of normal value is the concept of “like goods” which is defined in section 2(1) of SIMA as meaning, in relation to any other goods,

(a) goods that are identical in all respects to the other goods, or

(b) in the absence of any goods described in paragraph (a), goods the uses and other characteristics of which closely resemble those of the other goods.  

Section 16 sets out the following additional rules to be applied in determining normal value in accordance with the basic rule in section 15:

- Section 16(1)(a) of SIMA provides that, if there was not the number of sales of like goods made by the exporter at the place of direct shipment to Canada as required by section 15(e) of SIMA, sales at the nearest place to the place of direct shipment can be used;

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Section 16(1)(b) of SIMA provides that if there was not the number of sales of like goods made to arm’s length purchasers who are at the same or substantially the same trade level as the importer as required by section 15(a) of SIMA, arm’s length sales at the nearest and subsequent trade level to the importer can be used. Furthermore, section 9 of the SIMA Regulations allows deductions equal to the amount of the costs, charges or expenses incurred by the exporter in selling to a purchaser at the subsequent level of trade. Such deductions are allowed because these costs represent sales activities that would not be performed by the exporter in selling to the same trade level as that of the importer in the exporter’s domestic market;

Section 16(1)(c) of SIMA provides that sales of like goods for use in the country of export by other vendors can be used to determine the normal value of the goods sold to the importer in Canada if sales are made primarily or solely for export, or to non-arm’s length purchasers;

Section 16(1)(d) of SIMA provides that the sales of like goods shall be the largest quantity sold by the exporter for such use if the quantities of the goods sold by the importer are larger than any quantity sold by the exporter for use in the country of export; and

Section 16(1)(e) of SIMA provides that the sales of like goods shall be the smallest quantity sold by the exporter for such use if the quantities of the goods sold to the importer are smaller than any of the quantities sold by the exporter for use in the country of export.

Sections 3 and 4 of the SIMA Regulations set out the quantitative adjustments made to the price of the like goods.

Section 5 of the SIMA Regulations allows for adjustments to be made to the price of the like goods by taking into account the differences in the goods sold to the importer and the like goods that arise as a result of:

- quality, structure, design or material;
- warranties against defect or guarantee of performance;
- time permitted for delivery; or
- other conditions of sale that would cause a difference in price.

These adjustments can result in deductions or additions to the price of the like goods equal to the estimated differences.
Section 6 of the SIMA Regulations provides for further adjustments to be made to the price of the like goods to take into account any rebate, deferred discount or discount for cash that is generally granted in relation to the sale of the like goods.

Sections 7 and 8 of the SIMA Regulations provide for adjustments to the price of the like goods by deducting delivery costs where the price of the like goods include such costs.

Section 10 of the SIMA Regulation provides for a deduction from the price of like goods the amount of any taxes or duties that are included in the price of the like goods but that are not included in the price of the goods sold to the importer in Canada.

Pursuant to section 16(2)(a) of SIMA, in determining the normal value of any goods under section 15, there shall not be taken into account any sale of like goods for use in the country of export by a vendor to a purchaser if the vendor did not, at the same or substantially the same time, sell like goods in the ordinary course of trade to other persons in the country of export at the same trade level as, and not associated with, the purchaser.

Furthermore, section 16(2)(b) of SIMA provides that, in determining the normal value of any goods under section 15, there shall not be taken into account any sale of like goods by the exporter within a period, determined by the President, of not less than 6 months, where

(i) the sale is made at a price that is less than the cost of the goods;

(ii) either

(A) the sale is of a volume that, or is one of a number of sales referred to in subparagraph (i) the total volume of which, is not less than 20 per cent of the total volume of like goods sold during that period, or

(B) the average selling price of like goods sold by the exporter during that period is less than the average cost of those like goods; and

(iii) the sale is made at a price per unit that is not greater than the average cost of all like goods sold during that period.87

In addition, section 16(3) of SIMA defines “cost”, for the purpose of section 16(2)(b) of SIMA, as meaning, in relation to goods, the cost of production of the goods and the administrative, selling and all other costs with respect to the goods”. Section 16 sets out criteria for determining “sales at a loss” consistent with Canada’s obligations under Article 2 of the 1994 Code.

Section 17 of SIMA allows the selection of domestic prices to be based on weighted averages or a representative price. Section 17 provides that, in determining the normal value of any goods under section 15, the price of like goods when sold by the exporter to purchasers is, in most cases, at the option of the President, either:

87 See also footnotes 4 and 5 of Article 2.2.1 of the 1994 Code in The Legal Texts, supra n. 10 at 169.
(a) the weighted average of the prices at which like goods were sold by the exporter to purchasers during that period; or

(b) the prices at which like goods were sold by the exporter in any sale during that period where, in the opinion of the President, the price is representative of the prices at which like goods were sold during that period.

Previously, section 17 of SIMA permitted the price of like goods to be determined by a weighted average price approach only when there was no preponderance of sales at a single price.

SIMA also provides that where, in calculating the normal value of any goods, the investigation period includes a start-up period of production, the cost of production of the goods and the administrative, selling and all other costs with respect to the goods for that start-up period of production shall be determined in the prescribed manner. This permits a more accurate picture of the costs of production of the exporter.

Where the normal value cannot be determined in accordance with sections 15 and 16 of SIMA, normal value will be determined, at the option of the President, either on the basis of sales to a third country (pursuant to section 19(a) of SIMA) or on a constructed-cost or cost-plus basis (pursuant to section 19(b) of SIMA).

(ii) Third Country Method

By this rarely used method, normal value is calculated on the basis of the price of like goods when sold by the exporter to importers in a country other than Canada, that fairly reflects the market value of the goods at the time of the sale of the goods to the importer in Canada, adjusted to reflect the differences in terms and conditions of sale, in taxation and other differences relating to price comparability.

(iii) Constructed-Cost or Cost-Plus Method

More commonly, the President adopts the constructed-cost or cost-plus method as set out in section 19(b) of SIMA, which requires that the normal value of the goods be determined as the aggregate of:

(i) the cost of production of the goods;

(ii) a reasonable amount for administrative, selling and all other costs; and

(iii) a reasonable amount for profits.

Sections 11, 12 and 13 of the SIMA Regulations define the terms “cost of production”, “a reasonable amount for profits” and “a reasonable amount for administrative, selling and all other

88 See section 23.1 of SIMA.

89 The term “start-up period of production” is defined in section 2 of the SIMA Regulations.
It is worth highlighting that these sections emphasize that these amounts must be “reasonable”, in accordance with Canada’s obligations under Article 2.2.2 of the 1994 Code.90

(iv) State Trading Countries

SIMA also makes provision for an alternative method for determining normal values in countries where the government of that country has a monopoly or a substantial monopoly of its export trade and domestic prices are substantially determined by the government of that country -- so-called state trading countries.91

Generally speaking, the methods for determining normal values in state trading countries are as follows:

• the price of like goods sold by producers in a third country chosen by the President for consumption in that country;92

• the aggregate of the cost of production of like goods sold for consumption in the chosen country plus a reasonable amount for administrative, selling and all other costs and a reasonable amount for profits;93 and

• where sufficient information has not been furnished or is not available to enable a normal value to be determined by either the above-noted methods, the normal value is the importer’s resale price in Canada adjusted by deducting certain costs, charges and expenses incurred by the importer in shipping the goods to Canada as well as the importer’s profits on the resale.94

(v) Ministerial Specifications

Where normal values cannot be determined for an exporter because sufficient information has not been furnished or is not available, normal values can be determined by means of a ministerial specification under section 29 of SIMA. This section applies to both normal values and export prices and empowers the Minister to specify such values or prices on the basis of the best information that is available.95

90 See The Legal Texts, supra n. 10 at 170.

91 See section 20 of SIMA and sections 14, 15 and 16 of the Regulations. Note that because of the negotiated agreement mentioned above with respect to China’s accession to the WTO, and the enactment by Bill C-50, China will be included as a prescribed country under this section.

92 Section 20(c)(i) of SIMA.

93 Section 20(c)(ii) of SIMA.

94 Section 20(d) of SIMA.

95 See also Article 6.8 and Annex II of the 1994 Code in The Legal Texts, supra n. 10 at 180 and 195, respectively.
B. EXPORT PRICE

Simply put, export price is defined as the lesser of the exporter’s sale price and the importer’s purchase price, in both cases after taking into account deductions to enable a proper comparison of price at an ex factory level.

(i) Basic Rule

The basic rule for calculating export price is set out in section 24 of SIMA, which provides that the export price of goods sold to an importer in Canada (notwithstanding any invoice or affidavit to the contrary) is an amount equal to the lesser of:

(a) the exporter’s sale price for the goods, adjusted by deducting the following amounts:

(i) the costs, charges and expenses incurred in preparing the goods for shipment to Canada;

(ii) any duty or tax imposed on the goods pursuant to a law of Canada or a province, to the extent the duty or tax is paid by or on behalf of the exporter; and

(iii) all other costs, charges and expenses resulting from the exportation of the goods from their place of direct shipment; and

(b) the price at which the importer has purchased or agreed to purchase the goods, adjusted by making the deductions referred to in subparagraphs (a)(i) to (iii).

(ii) Special Rules

Section 25 of SIMA contains special rules to determine export price when the primary method under section 24 cannot be used. Such circumstances include:

(a) where there is no exporter’s sale price or no price at which the importer in Canada has purchased or agreed to purchase the goods; or

(b) the President is of the opinion that the export price, as determined under section 24, is unreliable:

(i) by reason that the sale of the goods for export to Canada was a sale between associated persons; or

(ii) by reason of a compensatory arrangement made between any two or more of the following: namely, the manufacturer, producer, vendor, exporter, importer in Canada, subsequent purchaser and any other person that directly or indirectly affects or relates to:

(A) the price of goods;
(B) the sale of goods;

(C) the net return to the manufacturer, producer, vendor or exporter of the goods; or

the net cost to the importer of the goods.\textsuperscript{96}

In these circumstances, pursuant to section 25 of SIMA, export price is established by taking the first arm’s length sale in Canada by the importer and subtracting all costs, charges, and expenses incurred between the exporter and the first arm’s length sale by the importer and an amount for profit by the importer on the sale.\textsuperscript{97} Export price adjustments are further governed by sections 20-22 of the SIMA Regulations.

The calculation of export price is also affected by reimbursement of the anti-dumping duty to the importer or purchaser in Canada,\textsuperscript{98} adjustments for sales on credit terms,\textsuperscript{99} and benefits provided by the exporter on resales.\textsuperscript{100}

(iii) Ministerial Specifications

As already noted, where export price cannot be determined for an exporter because sufficient information has not been furnished, or is not available, export price is determined by ministerial specification, pursuant to section 29 of SIMA. In other words, the Minister specifies the export price on the basis of the best information that is available.

C. Margin of Dumping

SIMA contains three methods for computing the margin of dumping, which, as noted above, is defined as the amount by which the normal value of the goods exceeds the export price.

First, section 30.1, allows for the establishment of a margin of dumping during the investigation phase based on the weighted average of the margins of dumping determined in accordance with section 30.2.

Section 30.2, therefore contain the standard calculation method. Section 30.2(1) states that the margin of dumping by an exporter is zero, or the weighted average normal value less the weighted average export price, whichever is greater.\textsuperscript{101}

\textsuperscript{96} See also Article 23 of the 1994 Code in The Legal Texts, supra n. 10 at 170.

\textsuperscript{97} Section 25(c) of SIMA.

\textsuperscript{98} Section 26 of SIMA.

\textsuperscript{99} Section 27 of SIMA.

\textsuperscript{100} Section 28 of SIMA.

\textsuperscript{101} If there is a variation in price under section 30.2(2), the President may determine the margin of dumping to be the weighted average of the margins of dumping in relation to the goods of that exporter that are sold in any individual sales that the President considers relevant if, in the President’s opinion, there are significant variations in the prices of goods of that exporter among purchasers, regions in Canada or time periods.
Finally, section 30.3 provides the President with the authority to base an investigation on a “largest percentage” or “statistically valid” sample where the volume or variety of goods is so high that it is impracticable to determine a margin of dumping in relation to all goods under consideration.\textsuperscript{102}

2. \textbf{Material Injury or Retardation}

As previously noted, pursuant to section 42(1) of SIMA, the Tribunal is obliged to make inquiry in the case of any goods to which the preliminary determination applies as to whether the dumping has caused injury or retardation or is threatening to cause injury. The terms “injury” and “retardation” are defined with the adjective “material” in section 2(1) of SIMA.

A. \textbf{Factors to be Considered}

Pursuant to Article 3.1 of the 1994 Code, the “determination of injury” shall be based on “positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products”.\textsuperscript{103}

For the purposes of determining whether the dumping has caused injury or retardation, the following factors are prescribed under the SIMA Regulations:

\begin{itemize}
  \item [(a)] the volume of the dumped goods and, in particular, whether there has been a significant increase in the volume of imports of the dumped goods, either in absolute terms or relative to the production or consumption of like goods;
  \item [(b)] the effect of the dumped goods on the price of like goods and, in particular, whether the dumped goods have significantly:
    \begin{itemize}
      \item [(i)] undercut the price of like goods,
      \item [(ii)] depressed the price of like goods, or
      \item [(iii)] suppressed the price of like goods by preventing the price increases for those like goods that would otherwise likely have occurred;
    \end{itemize}
  \item [(c)] the resulting impact of the dumped goods on the state of the domestic industry and, in particular, all relevant economic factors and indices that have a bearing on the state of the domestic industry, including:
    \begin{itemize}
      \item [(i)] any actual or potential decline in output, sales, market share, profits, productivity, return on investments or the utilization of industrial capacity, and
    \end{itemize}
\end{itemize}

\textsuperscript{102} See also Article 2.4 of the 1994 Code in The Legal Texts, supra n. 10 at 170.

\textsuperscript{103} The Legal Texts, supra n. 10 at 172.
(ii) any actual or potential negative effects on cash flow, inventories, employment, wages, growth or the ability to raise capital;

(iii) the magnitude of the margin of dumping in respect of the dumped goods; and

(d) any other factors that are relevant in the circumstances\textsuperscript{104}

In the case of future injury (i.e., that the dumping of goods is \textit{threatening} to cause injury), the following factors are prescribed:

(a) whether there has been a significant rate of increase of dumped goods imported into Canada, which rate of increase indicates a likelihood of substantially increased imports into Canada of the dumped goods;

(b) whether there is sufficient freely disposable capacity, or an imminent, substantial increase in the capacity of an exporter, that indicates a likelihood of a substantial increase of dumped goods, taking into account the availability of other export markets to absorb any increase;

(e) the potential for product shifting where production facilities that can be used to produce the goods are currently being used to produce other goods;

(f) whether the goods are entering the domestic market at prices that are likely to have a significant depressing or suppressing effect on the price of like goods and are likely to increase demand for further imports of the goods;

(g) inventories of the goods;

(h) the actual and potential negative effects on existing development and production efforts, including efforts to produce a derivative or more advanced version of like goods;

(i) the magnitude of the margin of dumping in respect of the dumped goods;

(j) evidence of the imposition of anti-dumping measures by a country other than Canada in respect of like goods; and

(k) any other factors that are relevant in the circumstances\textsuperscript{105}

\textsuperscript{104} Section 37.1(1) of the SIMA Regulations. While there is some overlap, this prescription of factors is not intended to replace the factors listed in rule 61 of the Tribunal Rules (respecting information to be provided to the Tribunal by the parties).

\textsuperscript{105} Section 37.1(2) of the SIMA Regulations.
Moreover, section 2(1.5) of SIMA provides that the dumping of goods shall not be found to be threatening to cause injury unless the circumstances in which the dumping of goods would cause injury are clearly foreseen and imminent.\(^{106}\)

**B. CAUSATION**

The term “cause” is not defined in SIMA. However, Article 3.5 of the 1994 Code refers to the issue of causation as follows:

> It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors that may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the pattern of consumption, trade-restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

Article 3(4) of the 1979 Code is similar to Article 3.4 of the 1994 Code. The provision in the 1979 Code was interpreted by the Tribunal in the *Carpets* case as requiring only that the dumping be “a” cause of material injury, as opposed to the “sole” cause or even the “principal” cause.\(^{107}\) On its face, this case suggests that the Tribunal’s causation standard is low and relatively easy for domestic producers to meet. Given the silence of SIMA on the issue of causation and the wording and negotiating history of the 1994 Code, it is certainly open for counsel acting for domestic producers to argue that the Tribunal should take this approach in a particular case.\(^{108}\)

\(^{106}\) See also Article 3.7 of the 1994 Code in *The Legal Texts*, supra n. 10 at 177-174, where it is stated that “A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility”. One situation in which the 1994 Code states that injury would be clearly foreseen and imminent is set out in footnote 10 to Article 3.7, as follows: “… [where] there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices.”

\(^{107}\) *Carpeting from the United States*, inquiry No. NQ-91-006, Statement of Reasons dated May 6, 1992 at 21 and 25. At page 26, the Tribunal concluded by finding that the dumped imports made “a difficult situation worse” and “a bridgeable gap unbridgeable”.

\(^{108}\) This point is made with considerable force by Lawrence L. Herman in his article entitled “Injury Findings by the Canadian Import Tribunal: The Decisive Elements”, (1987) 1 R.I.B.L. 373 at 393-394. Herman points out that the language contained in the 1967 Code provided for a higher test of causation than that contained in the 1979 Code, quoting the following excerpt from the 1967 Code:
On the other hand, the Tribunal’s approach in the *Carpets* case was criticized and remanded by the Panel that reviewed the finding. On review, the Panel stated that the causation standard has two consequences: first, it must be “demonstrated” that the dumping is causing injury; and second, dumping need not be the sole cause of material injury, but it must be segregated from other, non-price factors. Most importantly, the Panel concluded that it must be shown that dumping “in and of itself” was enough to cause material injury. On remand, the Tribunal applied the Panel’s “in and of itself” test.

There is nothing in SIMA preventing the Tribunal from adopting the higher standard for causation articulated by the Panel in the *Carpets* case; but neither is there anything in SIMA requiring it to do so. While the Tribunal is not legally bound to apply the high threshold “sole”, “principal” or “in and of itself” tests, it must be admitted that the Tribunal has rarely applied the low threshold “a” or “one” tests.

In *Stelco Inc. v. Canada (Canadian International Trade Tribunal)*, Stelco brought an application for judicial review, claiming that the Tribunal used the wrong standard of causation by requiring a showing that the dumped goods were the sole cause of injury. The Court found that the there was nothing in the Tribunal’s reasons to support Stelco’s claim that the Tribunal had used the “sole cause” standard. However, the Court did find that if the Tribunal had applied that standard, it “might well constitute grounds for review.” As there was no evidence that the standard had been applied, the Court dismissed Stelco’s application.

Unfortunately, the Tribunal does not always articulate the causation standard it applies in a given case. However, a review of the Tribunal’s decisions where the standard has been articulated suggests that the Tribunal tends to require a relatively proximate causal link between the dumping and the injury. More often than not, the Tribunal’s practice is to require that the dumped imports constitute an “important”, “significant”, “direct” or “clear” cause of the injury to the domestic industry.

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A determination of injury shall be made only when the authorities concerned are satisfied that the dumped imports are demonstrably the principal cause of material injury or threat of material injury to a domestic industry or the principal cause of material retardation of the establishment of such an industry. (emphasis added): Fifteenth Supp., BISD (Geneva, 1968) at 26.

109 *Carpeting from the United States (Injury)*, Secretariat File No. CDA-92-1904-02, Opinion and Order of the Panel, April 7, 1993 at 19.

110 Ibid. at 20.

111 *Carpeting from the United States (Injury)*, Determination on Remand, NQ-91-006 (Remand 2), February 11, 1994 at 4.


113 Ibid. at ¶2.

114 For example: in *Wide Flange Steel Shapes* (1985), 9 C.E.R 175 at 184, the Tribunal determined that the complainant’s injury had been caused in an important degree by the subsidization of the imported goods; in *Polyphase Induction Motors* (1985), 10 C.E.R 69 at 81, the Tribunal found that the most significant factor in causing the complainant’s injury was the dumped imports (using the same language, see *Fabric-Covered, Padded Wooden Clothes Hangars* (1991), 5 T.T.R. 211 at 222); in *Drywall Screws (Taiwan)* (1986), 12 C.E.R. 16 at 24, the Tribunal found that the injury suffered by the complainant was as a direct consequence of the dumped imports; in *Corrosion Resistant Steel Sheet*, Inquiry No. NQ-93-
Consistent with Canada’s international obligations and pursuant to the Regulations, for the purposes of determining whether the dumping of any goods has caused injury or retardation or is threatening to cause injury, the following additional factors are prescribed:

(a) whether a causal relationship exists between the dumping of any goods and injury, retardation or threat of injury, on the basis of:

(i) the volume and prices of imports of like goods that are not dumped;

(ii) the contraction in demand for the goods or like goods;

(iii) changes in patterns of consumption of the goods or like goods;

(iv) trade-restrictive practices of, and competition between, foreign and domestic producers;

(v) developments in technology;

(vi) the export performance and productivity of the domestic industry in respect of like goods;

(vii) any other factors that are relevant in the circumstances; and

(b) whether any factors other than the dumping of the goods has caused injury or retardation or is threatening to cause injury\(^{115}\)

It would appear that neither SIMA nor the SIMA Regulations requires the Tribunal to consistently apply a particular standard of causation.\(^{116}\) While such flexibility may be desirable from the Tribunal’s perspective, it is at least a cause of some uncertainty for counsel attempting to advise a client (whether an exporter, importer or domestic producer) as to how it might proceed and, ultimately, fare at the injury inquiry.

**C. CUMULATION**

Where the dumping of the subject goods involves more than one exporting country, the Tribunal, in its consideration of material injury or retardation, has consistently conducted a single inquiry and analyzed the impact on the domestic industry of the imports from all subject countries, *en masse*, in a cumulative manner, regardless of origin of the dumped goods.\(^{117}\)

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\(^{115}\) Section 37.1(3) of the SIMA Regulations.

\(^{116}\) However, there is authority for the proposition that, notwithstanding the Tribunal’s duty to be flexible, overriding fairness concerns and the rules of natural justice dictate that the Tribunal should not depart from any well established practice without good reason: see *H.T.Y. Ltd. v. Price Commission* [1976] I.C.R. 170 at 185 (C.A.).

\(^{117}\) The Tribunal has stated its strong commitment to the principle of cumulation in several cases: For example:
The rationale for this practice has been stated by the Tribunal as follows:

Even when dumped imports from certain sources are small and cannot be found to have contributed significantly to the plight of the domestic producers when considered separately, it is their cumulative impact combined with all other imports which is to be assessed in considering the question of material injury.\(^\text{118}\)

The principle of cumulation is well known and has been generally applied in the administration of anti-dumping laws by countries who, over the years, have applied the successive GATT anti-dumping codes.\(^\text{119}\) However, its application can be abused and in recognition of the possible unfairness to exporters, Article 3.3 of the 1994 Code\(^\text{120}\) set out rules to discipline the principle’s application. These disciplines were incorporated into Canadian law by way of section 169 of the World Trade Organization Agreement Implementation Act.\(^\text{121}\)

Section 42(3) of SIMA provides that, in conducting its inquiry under section 42(1), the Tribunal shall make an assessment of the cumulative effect of the dumping of goods to which the preliminary determination applies that are imported into Canada from more than one country if:

(a) the margin of dumping in relation to the goods from each of those countries is not insignificant and the volume of the goods from each of those countries is not negligible; and

(b) an assessment of the cumulative effect would be appropriate taking into account the conditions of competition between goods to which the preliminary determination applies that are imported into Canada from any of those countries and

(i) goods to which the preliminary determination applies that are imported into Canada from any other of those countries, or

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118 Cold-Rolled Steel Sheet, Inquiry No. NQ-92-009, Statement of Reasons dated August 13, 1993 at 28.

119 See Polyphase Induction Motors, supra n. 117 at 13.

120 See The Legal Texts, supra n. 10 at 172.

121 S.C. 1994, c. 47.
As noted above, the terms “insignificant” and “negligible” are defined in section 2(1) of SIMA.

D. “MAJOR PROPORTION” OF CANADIAN PRODUCTION

SIMA only requires the Tribunal to conduct an inquiry into whether dumping has caused material injury or retardation in respect of producers of like goods whose collective production constitutes a “major proportion” of the total domestic production of like goods. If a domestic producer is “related” to an exporter or importer of the dumped goods, it may be excluded from the definition of domestic industry. The Federal Court of Appeal has held that the words “major proportion” mean only “a significant” proportion and “not the more precise mathematical sense of more than one half”.

E. REGIONAL MARKETS

In special cases, SIMA permits the Tribunal to consider the domestic industry based on regional markets. The test, which had developed with Tribunal practice pursuant to old section 42(3)(a) of SIMA and in accordance with Canada’s obligations under the Article 4(1) of the 1979 Code, is set out in section 2(1.1) of SIMA as follows:

In exceptional circumstances, the territory of Canada may, for the production of any goods, be divided into two or more regional markets and the domestic producers of like goods in any of those markets may be considered to be a separate domestic industry where:

(a) the producers in the market sell all or almost all of their production of like goods in the market; and

(b) the demand in the market is not to any substantial degree supplied by producers of like goods located elsewhere in Canada.

Furthermore, section 42(5) of SIMA provides that the Tribunal shall not find that dumping of goods has caused injury or retardation or is threatening to cause injury in a regional market situation unless:

122 Infra at 6.
123 It is submitted that this is the effect of reading together section 42(1) of SIMA and the definitions of “injury”, “retardation” and “domestic industry” in section 2(1).
124 The test for whether or not a producer is related to an exporter or importer is set out in section 2(1.2) of SIMA.
126 For a discussion of the Tribunal’s practice in this regard, see Beer for Use or Consumption in British Columbia, Review No. RR-94-001, Statement of Reasons, December 2, 1994, commencing at 11.
(a) there is a concentration of those goods into the regional market; and

(b) the dumping of those goods has caused injury or retardation or is threatening to cause injury to the producers of all or almost all of the production of like goods in the regional market.127

F. Exclusions

It is well established that the Tribunal has discretion to grant exclusions from its injury finding (e.g., on a product, producer or country basis).128 However, such exclusions will only be granted in exceptional circumstances.129

A request for a product exclusion may be granted if the evidence before the Tribunal indicates that the particular product in question is not made in Canada and has no substitutes that are made in Canada. Often, domestic producers will file written consents to requests for such exclusions.130

Producer and country exclusions also appear to be possible in exceptional cases (such as where the producer or country requesting the exclusion has an insignificant margin of dumping and the volume of imports from that producer or country is negligible). However, as a matter of Tribunal practice, the granting of such exclusions is rare.131

G. Retroactive Duties

Pursuant to sections 5 and 42(1)(b) of SIMA,132 the Tribunal may, in certain circumstances, order that anti-dumping duties be applied retroactively during the 90-day period prior to the preliminary determination.133 To apply duties retroactively, the Tribunal must be satisfied that:

127 On the definitions of domestic industry and regional markets, see also Article 4 of the 1994 Code in The Legal Texts, supra n. 10 at 174-175.

128 See, for example, Hetex Garn A.G. v. The Anti-dumping Tribunal, [1978] 2 F.C. 507 (C.A.) and Sacilor Aciéries v. The Anti-dumping Tribunal (1985), 9 C.E.R. 210 (C.A.). The statutory basis for granting an exclusion is found in section 43(1) of SIMA, which provides that the Tribunal “shall declare to what goods, including, where applicable, from what supplier and from what country of export, the order or finding applies.”

129 Corrosion-Resistant Steel Sheet, supra n. 114 at 39.

130 Ibid. at 39-40. The Tribunal’s consideration of a request for a product exclusion is often made difficult by the domestic producer’s claim that they have made in the recent past and intend to make again in the near future the particular product for which an exclusion is being requested.

131 See, for example: Gypsum Board from the USA, Inquiry No. NQ-92-004, Statement of Reasons dated February 4, 1993 at 18; Steel Welded Pipe from Taiwan, Inquiry No. NQ-91-001, Statement of Reasons dated September 20, 1991 at 10; and Steel Plate, Inquiry No. ADT-18-82, Statement of Reasons dated April 8, 1983 at 16-17.

132 See also Articles 9.3.1 and 10.6 of the 1994 Code in The Legal Texts, supra n. 10 at 185 and 187, respectively.

133 In Photo Albums with Self-adhesive Leaves, (1991) 5 T.T.R. 183 at 206, the Tribunal held that the “massive importation” requirement in section 42(1)(b) of SIMA had been met and applied retroactive duties, commenting as follows:

The majority of the Tribunal is of the view that this provision of SIMA contemplates circumstances where there is a likelihood of a recurrence of material injury. What SIMA intends to deter is not only the importation of
there has occurred a considerable importation of like goods that were dumped, which dumping has caused injury or would have caused injury but for the application of anti-dumping measures; or

the importer of the goods was, or should have been aware, that the exporter was practising dumping and that the dumping would cause injury; and

injury has been caused by reason of the fact that the dumped goods constitute a massive importation134 into Canada and it appears necessary to the Tribunal that duty be assessed on the imported goods in order to prevent the recurrence of that injury.135

H. DIRECTED INVESTIGATION

Section 46 of SIMA gives the Tribunal the power to advise the President to make an investigation where the Tribunal is of the opinion that:

(a) there is evidence that goods, the uses and other characteristics of which closely resemble the uses and other characteristics of the goods to which the preliminary determination applies, have been or are being dumped; and

(b) the evidence discloses a reasonable indication that the dumping has caused injury or retardation or is threatening to cause injury.

This discretion has been exercised by the Tribunal where source shifting by importers has circumvented the protection against unfairly traded imports that SIMA is intended to provide the domestic industry.136

dumped goods from subject countries, but also, the switching en masse of those importations to other dumped sources. By the imposition of retroactive anti-dumping duties on importers, this provision of SIMA imposes a penalty to discourage the importers from switching sources to defeat the purpose of SIMA.

134 Section 42(1)(b)(ii)(B) of SIMA goes on to include the situation where the dumped goods “form part of a series of importations into Canada, which importations in the aggregate are massive and have occurred within a relatively short period of time”.

135 Section 5 of SIMA.

136 See, for example, Drywall Screws from Taiwan (1986) 12 C.E.R. 16 and Drywall Screws from Korea (1987) 13 C.E.R. 305.
IV. CONCLUSION

1. A Complex System and Future

Anti-dumping proceedings are complex and costly. In addition to retaining legal counsel, parties often retain outside trade consultants, economists and accountants. As well, a significant amount of time is usually required of senior officers and employees of the parties in order to instruct counsel, complete the lengthy questionnaires, and attend at verification meetings and the hearing.

While there has been well-reasoned criticism of Canada’s anti-dumping laws and the policies underlying anti-dumping law in general, there is no indication that this area of law will be abolished in the near future. Canada was unsuccessful in negotiating an abandonment of the application of anti-dumping laws under the NAFTA, which provides that each party is permitted to continue to apply its anti-dumping laws to imports of the other parties to the NAFTA. Anti-dumping proceedings arise also at the WTO, and remain a significant part of international trade law.
APPENDIX

ANTI-DUMPING INVESTIGATION PROCESS CHART

Canada Border Services Agency (CBSA)

Property documented complaint received by President

30 Days

Start of dumping investigation

90 Days

Preliminary decision of dumping
(Temporary duty imposed on imports)

90 Days

Final decision of dumping

Anti-dumping duty imposed on dumped imports

Reimbursement of temporary duty
Termination of proceedings

Canadian International Trade Tribunal (CITT)

End of proceedings if insufficient evidence of dumping or injury, or if insufficient support from Canadian Producers

Start of injury inquiry

60 Days

Preliminary decision of injury

Injury inquiry continues

90 Days

Public hearings

Final injury decision

Issuance of Reasons

Judicial/panel review

Injury

No Injury

Termination if no dumping

Possibility of accepting undertakings and suspending investigation

30 Days

15 Days

Termination if no dumping or no injury

30 Days