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Doing Business in Canada

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PART I Government, Legal System, and Business Environment

CHAPTER 6 Import-Export

Part B: SPECIAL IMPORT MEASURES

1-6 Doing Business in Canada § 6.10

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§ 6.10 Antidumping Duties.

[1] The Complaint.

The first stage in an anti-dumping investigation is the filing of a complaint with CBSA. ¹ Complaints should be submitted to the Trade Programs Directorate (Anti-Dumping and Countervailing Duty Program) on the basis of a questionnaire that is available from CBSA. ² The complaint must address the questions of dumping and the resultant material injury or retardation caused to Canadian producers of "like goods." The complaint must be supported by domestic producers whose production represents more than fifty per cent of the total production of like goods by those domestic producers who express either support for or opposition to the complaint. Also, the production of the domestic producers who support the complaint must represent twenty-five per cent or more of the total production of like goods by the domestic industry. ³ The President must decide within twenty-one days after receipt

whether a complaint is "properly documented". The phrase "properly documented" is described in s. 2(1) of SIMA as follows:

(a) The complainant must

(i) allege that the goods have been or are being dumped or subsidized, specify the goods and allege that the dumping or subsidizing has caused injury or retardation or is threatening to cause injury,

(ii) state in reasonable detail the facts on which the allegations referred to in subparagraph (i) are based, and

(iii) make other representations that the complainant deems relevant to the complaint.

(b) The complainant must also provide

(i) information that is available to the complainant to prove the facts referred to in sub-paragraph (a) (ii),

(ii) prescribed information, and

(iii) other information that the President may reasonably require.

If the President is of the view that the complaint is not properly documented, the President must advise the complainant within twenty-one days after receiving the complaint that additional information is required to document the complaint properly. ⁴

CBSA has been restrictive in its interpretation of what constitutes a properly documented complaint and many cases never reach the stage of a formal investigation.

[2] The Investigation.

After notice has been given that the complaint is properly documented, the President must decide within thirty days whether to initiate an investigation. An investigation will be initiated if the President is of the opinion that there is evidence that the goods are being dumped and that there is a reasonable indication the dumping has caused material injury or retardation or is threatening to cause injury to the Canadian producers of similar goods.⁵

If the President is of the opinion that no investigation is warranted, he or she is obliged to send written notice to the complainant and the government of the country of export indicating the reasons for this decision.⁶ If the President decides not to initiate an investigation only because there is a lack of evidence of material injury or retardation, either the complainant or the Commissioner may refer the question of whether the evidence discloses a reasonable indication of material injury or retardation to the CITT.⁷ The President must investigate if the CITT advises that the evidence discloses a reasonable indication of material injury or retardation.⁸ The CITT must provide its opinion within thirty days of the date of referral.⁹

Once an investigation has been initiated, notice must be given to the importers and exporters of the goods, the government of the country of export, the complainant and other interested parties. In addition, notice of the investigation must be published in the Canada Gazette.¹⁰

An investigation is undertaken to determine whether dumping is taking place or has taken place, the degree and margin of dumping, and the volume of the dumped goods. To obtain this information CBSA will send an exporter's questionnaire to all known exporters of "like goods" to Canada. Responses are requested to questions on domestic prices, export prices to Canada, volumes of domestic and export sales, subsidies, discounts, rebates, freight terms, cost of production, differences between the domestic and Canadian goods and selling and administrative expenses and profits.

Questionnaires are also sent to all known Canadian importers of like goods. Questions are asked on import volumes, pricing, sourcing, grades, models, selling expenses, freight terms and the relationship of the importer to the exporter. These questionnaires are particularly important in investigations in which the importer and the exporter are related since special rules will apply to the determination of export price. After verification by CBSA authorities, the responses of the importers will be correlated with those of the exporters. These responses will serve as the basis

for determining normal values, export prices and margins of dumping.

The President or the CITT may terminate a dumping case at the investigation stage. These alternatives are considered below.

[a] Termination by the President. Any time prior to the issuance of a preliminary determination, the President must terminate the investigation if satisfied that:

- (1) there is insufficient evidence of dumping;
- (2) the margin of dumping is insignificant; or
- (3) the volume of dumped goods is negligible.¹¹

The president must also terminate the investigation if the CITT has come to the conclusion that the evidence does not disclose a reasonable indication of material injury or retardation. .

[3] Preliminary Determination.

Assuming the investigation proceeds, the President is required to make a preliminary determination within ninety days of the initiation of the investigation,¹² or in complex cases, within 135 days.¹³ The preliminary determination must specify the goods or description of goods to which the determination applies, the estimated margin of dumping in respect of each exporter and the identity of the importer.¹⁴ When a preliminary determination has been made, the President is required to provide notice to persons and countries affected by the determination and to publish the notice in the Canada Gazette.¹⁵ In addition, the President must file a notice of the determination with the Secretary of the CITT, provide the CITT with the reasons for his or her determination and provide copies of the documents required under CITT rules.¹⁶

Once a preliminary determination has been made, any goods described in the preliminary determination subsequently imported into Canada are subject to the imposition of provisional duties payable by the importer.¹⁷ These provisional duties are to be in an amount not greater than the estimated margin of dumping.¹⁸ In lieu of payment at the time of importation, the importer may post security to guarantee payment of the provisional duties.¹⁹

If the CITT eventually decides that the dumping has not caused material injury or retardation, the amount of final duties paid will be returned to the importer.²⁰ However, if the President issues a final determination of dumping and if the CITT determines that the dumping has caused material injury or retardation, the amount of provisional duties must be determined by CBSA not later than six months after the CITT finding.²¹

[4] The Final Determination.

Once a preliminary determination is issued and subject to the acceptance of undertakings, the President must continue the investigation for the purpose of establishing more precisely the margins of dumping. If the President is satisfied after further investigation that the margin of dumping and the actual or potential volume is not negligible, he or she must issue a final determination.²² SIMA requires this determination to be made within ninety days after the preliminary determination.²³

Notice of the final determination must be provided to the persons and countries affected by the determination, published in the Canada Gazette and filed with the Secretary of the CITT (along with the reasons for the determination and the supporting documentation).²⁴ In particular, the margins of dumping and volumes, by exporter, are supplied to the CITT and will be relied upon during its inquiry.

[5] Determination of Dumping.

As described above, CBSA investigates whether dumping is occurring. In general terms, dumping takes place when prices in the home market ("the normal value") are greater than prices of comparable goods sold for export to Canada (the "export price"), taking into consideration differences in terms and conditions of sale. Dumping can also occur when the export price to Canada is less than the cost of production of the goods, as established under SIMA. The difference between the home market price or the cost of production and the export price makes up the "margin of dumping." The amount of anti-dumping duties to be levied in a given case will be equal to the margin of dumping, subject to any undertaking or a decision by the Minister of Finance to reduce the amount of anti-dumping duties subsequent to a public interest inquiry.²⁵ Liability for dumping duties will not arise unless the CITT confirms that the dumping has caused material injury or

retardation or is threatening to cause material injury to the Canadian production of like goods.

[a] Normal Value. The primary basis for establishing the normal value of goods sold to an importer in Canada is by reference to the exporter's selling prices of "like goods" in the country of export. These "like goods" are goods sold to unassociated purchasers who are located at the same trade level as the importer, who purchase the same quantities, in the ordinary course of trade, within the same time period and from the place of direct shipment to Canada.²⁶ "Associated" is defined to include persons not dealing with each other at arm's length act or persons related to one another by blood, marriage, adoption or corporate directorships or control.²⁷

Normal value will be evaluated during a sixty-day period and is valid as a basis for comparison to the export price for sales to importers during a period of twelve months following the last day of the sixty-day period. However, when the nature of the trade in the goods so requires, or when the goods are sold for future delivery, normal value may be based on a longer period of time or on a period of time that precedes delivery rather than sale, if the President believes this time period is appropriate.²⁸

The preponderant selling price used to be the basis for appraising the value of like goods. However, the WTO Implementation Act amended SIMA so that the preponderant selling price is no longer considered. Instead, the President uses the weighted average selling price or the "representative" price at which like goods were sold during the period of investigation.²⁹

In addition, the prices of like goods investigated by the Directorate are subject to numerous adjustments in reaching the "normal values", as described in detail in Part I of the *Special Import Measures Regulations*.³⁰ Thus, prices are adjusted for quantitative differences between sales on the Home Market and sales for export to Canada.³¹ Qualitative differences will also lead to adjustments if the goods sold to the importer in Canada and the like goods differ "in their quality, structure, design or material, in their warranty against defect or guarantee of performance, in the time permitted from their date of order to the date of their scheduled shipment, or in their conditions of sale ... and that difference would be reflected in a difference between the price of the like goods and the price at which goods that are identical in all respects, including conditions of sale, to the goods sold to the importer in Canada would be sold in the country of export."³² Additional adjustments made in

the course of calculating normal values include adjustments for discounts,³³ delivery costs,³⁴ differences in the levels of trade,³⁵ taxes and duties³⁶ as well as production costs.³⁷

[b] Like Goods. The identification of "like goods" is crucial for purposes of appraising normal value. Goods will be considered "like goods" if they are identical in all respects or are goods the uses and other characteristics of which closely resemble each other.³⁸

The identification of "like goods" was elaborated upon in the Bi-national Panel decision of *Beer Originating from the United States for Use or Consumption in British Columbia*.³⁹ There, Heileman Brewing Company, Inc. contested the government's determination of the meaning of "identical" under the like goods definition. This decision marked the first in which the Panel considered the terms "identical products in all respects". The Panel concluded that non-physical characteristics such as trademarks, physical characteristics such as labeling and alcohol content, and market segments were to be considered in like goods determinations. As reiterated by the CITT, the consideration of the issue of like goods will take in a number of factors "including the physical characteristics, the method of manufacture, the market characteristics and whether the goods fulfil the same customer needs."⁴⁰

[c] Restrictions on the use of Domestic Selling Prices. There are several restrictions on the use of domestic selling prices as the basis for establishing normal value. These include the requirement that the exporter must sell like goods to more than one unassociated purchaser in the country of export and in sufficient quantities.⁴¹ "Cost" is defined as: "...the cost of production of the goods and the administrative, selling and all other costs with respect to the goods."⁴² The President no longer has the discretion, as was available in the past, to ignore sales of goods at prices that might not provide for the recovery within a "reasonable period of time" of the cost of production of the goods, plus an amount for administrative and selling costs, as well as profits.

As well, the definition of "cost" no longer requires the exporter to earn a profit on home market sales. Further, the Commissioner cannot disregard intermittent home market sales at prices below cost if the average selling price exceeds the average cost of the goods.⁴³ When analysing below cost sales, a minimum of six months must be reviewed in place of the more discretionary "reasonable period of time" that

had previously been referred to in SIMA.

If the period of investigation includes a start-up phase, the cost of production of the goods and the administrative, selling and all other costs of the goods for that start-up period must be determined in a prescribed manner.⁴⁴

[d] Adjustments to Normal Value.

In most investigations, it is virtually impossible to locate sales in the domestic market that satisfy all of the conditions of SIMA. Accordingly, CBSA may analyze alternative home market sales, which are then adjusted to determine normal value.

⁴⁵ Adjustments are to be made in the prescribed manner to reflect differences in the terms and conditions of sale and in taxation, and to reflect other differences relating to price comparability between the goods sold to the importer and the like goods sold by the exporter in its domestic market.

Adjustments to normal value will be important to exporters and importers as most adjustments tend to reduce the normal value of the goods, possibly to the point of eliminating any margin of dumping. Deductions from normal value may be possible for the following reasons:

[i] Quantitative Adjustments. If the quantity of like goods sold to the Canadian importer is different from the quantity of like goods sold in the country of export, normal value is to be established by reference to those domestic sales that most closely approximate the quantity sold to the importer.⁴⁶ Adjustments are allowed to take into consideration volume discounts generally granted by the exporter on sales of like goods.⁴⁷ When these discounts cannot be ascertained, price adjustments may be made to reflect differences in costs that are incurred by the exporter.⁴⁸

[ii] Adjustments for Qualitative Differences. When the goods sold to the importer and the goods sold in the domestic market differ in their quality, structure, design or material, adjustments may be made to domestic selling prices in order to establish normal value.⁴⁹ For example, if the goods sold in the domestic market are produced with a more expensive material than the goods sold to Canada, the exporter's selling prices in its domestic market can be reduced to reflect the lesser material costs of the goods exported to Canada.

Similar adjustments may be made to take into account differences in warranties,

shipment terms and differences in the conditions of sale.⁵⁰ These differences must be established to CBSA's satisfaction before it will allow the adjustments.

[iii] Trade Level Allowance. An important adjustment to normal value concerns trade level. SIMA provides that if the exporter does not sell to purchasers in the country of export who are at the same trade level as the importer, normal value may be established by reference to sales to purchasers "who are at the trade level nearest and subsequent to that of the importer."⁵¹ For example, in the home market an exporter often sells only to end-users, while sales to Canada are made to distributors. In this circumstance SIMA establishes normal value by reference to the selling prices to the end-users in the domestic market. That price is then adjusted by deducting the additional costs incurred in selling to purchasers who are at the trade level nearest to that of the importer. These costs must be those that result from activities that would not be performed if the goods were sold to purchasers who are at the same level of trade as the importer.⁵² CBSA has strictly interpreted this provision and has allowed adjustments only for direct selling expenses, but not additional general and administrative expenses. These adjustments have included, for example, account advertising, warehousing, and sales' staff expenses incurred on domestic sales that are at a trade level nearest to that of the importer.⁵³

[iv] Freight Adjustments. Normal value is determined under SIMA based on the exporter's domestic selling prices of like goods at the point of direct shipment to Canada.⁵⁴ If there are no domestic sales from the point of direct shipment to Canada, sales of like goods at the next nearest place may be substituted.⁵⁵ In addition, if domestic sales were made at delivered prices, delivery costs are to be excluded in order to arrive at the normal value.⁵⁶ An example of these adjustments arose in the CCRA's second remand determination, following a NAFTA panel, of the anti-dumping duty order on Iodinated Radiographic Contrast Media. In that case, CCRA made the following statements about adjustments:⁵⁷

Normal value is usually the selling price of like goods that meets the conditions of sections 15 and 16 of SIMA, to unrelated domestic customers who are at the same or approximately the same trade level as the importer in Canada, sold in the same or substantially the same quantities, in the ordinary course of trade for use in the country of export under competitive conditions, during a selected period specified by the CCRA,

from the place of direct shipment from where the goods were shipped to Canada or would normally be shipped to Canada.

The selling prices are adjusted by the Special Import Measures Regulations (SIMR) to reflect the differences in the terms and conditions of sale, in taxation and other differences relating to price comparability between the goods sold to the importer in Canada and the like goods sold by the exporter in its domestic market. The normal value of the like goods is normally determined at the place of direct shipment from where the goods were shipped to both the exporter's domestic customers and to the importers in Canada. In other words, the selling price at the place of direct shipment would normally be the ex-factory or ex-warehouse selling price, in accordance with the provisions of paragraph 15(e) of SIMA.

If there were insufficient domestic sales at the place of direct shipment to Canada, then the selling price at another place from where the exporter has other sales of like goods would be used in determining the normal value of the goods. Therefore, the legislation recognizes that in certain instances the export price may be compared to a normal value determined at a place other than the place of direct shipment of the goods to Canada.

In the case under review ... the exporter in Puerto Rico, had no sales of like goods that met the conditions of sections 15 and 16 of SIMA and, in the absence of sufficient information to use a constructed cost plus approach under paragraph 19(b) of SIMA, the normal value of the goods was determined pursuant to section 29 of SIMA. Notwithstanding the fact that the normal value of the goods was determined under section 29 of SIMA, the CCRA strived to follow, as closely as possible, the provisions governing the determination of normal value as contained in sections 15 through 19 of SIMA.

In proceeding under section 29 of SIMA to determine the normal value of the goods, the approach used by the CCRA is similar to the approach provided for in paragraph 16(1)(c) of SIMA, where one or more vendors could be deemed to be the exporter for the purposes of determining the normal value of the goods sold to the importer in Canada. The use of sales by other vendors in determining the normal value of the goods is permitted under paragraph 16(1)(c) of SIMA, where the goods are sold primarily for export or primarily to related parties. However, in the case

under review the conditions as set out in paragraph 16(1)(c) were not met.

While the provisions of paragraph 16(1)(c) of SIMA could not be applied, section 29 of SIMA gives the Minister the authority to specify the method to be used to determine the normal value of the goods. In the case under review, the ministerial specification employed an approach where the normal value would be based on the domestic sales of another vendor or vendors as selected by the CCRA. ... The purpose of the substitution is to determine the normal value of the goods exported to Canada, based on the selling price of like goods that met the terms and conditions of sections 15 and 16 of SIMA, and sold in the country of export in the ordinary course of trade, under competitive conditions by the vendor.⁵⁸

[v] Other Adjustments to Normal Value. Domestic selling prices may be adjusted to take into account rebates, deferred discounts and cash discounts for which Canadian importers would qualify if they purchased in the domestic market.⁵⁹ Other deductions may be made to exclude any taxes or duties that would not be incurred on sales for export to Canada.⁶⁰ This adjustment authorizes deductions for customs drawbacks or exemptions from value-added taxes on export transactions.

[6] Alternate Methods of Establishing Normal Value.

[a] Constructed Normal Value. If there are no sales of like goods in the domestic market, the Commissioner may, at his or her option, determine normal value either by reference to the exporter's sales of like goods to a third country or by using a constructed value.⁶¹ CBSA has been reluctant to use the first option on the assumption that if an exporter is dumping goods into Canada, sales to a third country will also be at dumped prices. Instead, the preferred approach has been to construct normal value by using a "cost-plus" method.⁶² This method has been slightly modified by the WTO Agreement to include the concept of "reasonableness" in normal value calculations. Under the "cost-plus" method, normal value is the aggregate of:

- (1) the cost of production of the goods;
- (2) a reasonable amount for administrative, selling and all other costs attributable to

the production and sale of the goods; and

(3) a reasonable amount for profits.⁶³

The implementation of the 1994 Anti-dumping Agreement also amended the SIMA Regulations to provide guidance on the calculation of "a reasonable amount for profits" and "a reasonable amount for administrative, selling and all other costs." The amount for profits is to be determined by reference to the weighted average profit made on sales of like goods by the exporter in the country of export. In the absence of sales, the Regulations provide alternate methods of establishing an amount for profits.⁶⁴

Canada's method of calculating an "amount for profit" caused significant debate in the Bi-national Panel's review of CCRA's decision on remand of the final determination of dumping regarding Certain Cold-Rolled Steel Sheet originating from the U.S.⁶⁵ In that case, the U.S. complainants alleged that Canadian officials miscalculated the "amount for profits" when constructing normal value under the "cost-plus" method. Canada responded that since the complainants did not challenge these calculations in the initial Panel proceedings and since the Panel did not remand the profit methods, the principle of "functus officio" (finality of proceedings) applied. The Panel determined that the Canadian officials decision on "amount for profits" was final and could not be revisited, at that stage, to correct possible errors.

A NAFTA panel further reviewed this issue in the Appliances case, noting that the "only possible meaning of 'reasonable amount for profits' for the purpose of the SIMA is the amount derived from the proper application of the statutorily prescribed methodology itself."

[b] Exports from State-Controlled Economies. When goods are shipped to Canada from a state-controlled economy, domestic selling prices are disregarded since they are not considered to reflect market forces. Countries to which this methodology applies are prescribed in the SIM Regulations. At the moment the only prescribed country is the Peoples' Republic of China.⁶⁶ In these circumstances, the Commissioner is authorized to designate a third or "surrogate" country for the purposes of establishing a surrogate normal value for the goods. Normal value will then be established by reference to domestic selling prices by producers in that third country.⁶⁷

Canadian legislation does not require that the designated third country be at a comparable level of economic development as the exporting country. Consequently, the application of the third country approach has resulted in significant margins of dumping in a number of dumping cases involving Eastern European countries and the People's Republic of China and has been an irritant in trade discussions with these countries.

Amendments to SIMA provide, in the context of state-controlled economies, that the CBSA must apply the precise methodology set out in section 20. In applying these provisions, CBSA attempts to gather as much information as possible from the affected respondents in order to form its views of the particular industry under examination. For example, in the case of Xanthates from the People's Republic of China, CCRA noted the following:

...the fact that the Government (of China) is responsible to appoint, remove, reward or punish the factory director, as stated in article 52 and 55 of the State-owned Industrial Enterprises Law of the People's Republic of China, and article 42 of the Regulations for Transformation of Operational Mechanism of State-owned Industrial Enterprises (SOE Regulations), is an indicator of government influence / control on the operations of the SOE's. Furthermore, while the SOE Regulations appear to confer a range of managerial decision powers to SOE's, there remains a wide range of provisions that are indicative of governmental influence. For example, while article 8 of the SOE Regulations states that "Enterprises shall have autonomy in making their own decisions on production and management", it also states that the State enjoys the authority to issue instructive plan, which enterprises shall execute. Finally, some rights afforded to SOE's pursuant to the SOE Regulations are subject to approval by government departments. For example, article 12 of the SOE Regulations states that "Enterprises enjoy the right to import and export" while the same article then specifies that such rights are subject to approval by the GOC and require appropriate qualifications. These are all indicators of potential Government interference in the decisions of SOE's. As such, the pricing decisions of either state-owned xanthates producers or state-owned suppliers of raw materials sold to xanthates producers may not reflect market-based supply and demand consideration.

In view of the potential influence the GOC may exert over SOE's, the GOC could, by controlling the state-owned suppliers of raw materials, exert a strong influence on the cost of production of xanthates in China, which in turn could have an effect on the determination of the selling price of the final product, or influence directly the pricing decision of state-owned xanthates manufacturers. Due to the lack of participation by the producers in China, the CCRA could not determine the market share of state-owned xanthates producers in the domestic industry and could not assess if the GOC did in fact interfere with their decisions. The CCRA also could not assess any pricing differences between the raw materials supplied by SOE's and the raw materials supplied by non-SOE's.

If producers in China had provided sufficient information, it would have allowed the CCRA to perform a more accurate appraisal of the extent of these controls. Again, the missing information is considered material in forming an opinion as to whether the GOC substantially determined the domestic prices of xanthates during the POI. As a result, the Commissioner does not have sufficient information on which to form the opinion referred to in section 20(1)(b) of the SIMA. ⁶⁸

Because of this decision CCRA attempted to obtain first level surrogate information from xanthate producers in India or Mexico. However, as no producer in either country provided useful data, CCRA used second level surrogate data as provided by the complainant in its complaint.

[7] Export Price and Ministerial specifications.

[a] General Rule. In order to determine whether dumping has taken place, the "export price" of the goods must also be determined. If the export price is less than the normal value, there will be dumping in the amount of the difference: the margin of dumping. The lower the export price is below the normal value, the larger will be the margin of dumping and, as a consequence, the amount of dumping duties imposed when there has been a CITT material injury finding.

In general, export price is the ex-factory selling price to Canada and is based on the lesser of the exporter's sale price and the importer's purchase price, as adjusted. ⁶⁹

Deductions may be made for the following:

- (1) charges incurred in preparing the goods for shipment to Canada that are additional to the charges generally incurred on sales of like goods in the country of export;
- (2) any Canadian duty or tax paid by the exporter; and
- (3) all other costs resulting from exporting of the goods or arising from the shipment of the goods from the place of direct shipment to Canada.⁷⁰

Determining the export price under SIMA can cause unintentional dumping to occur when the exporter sells to an intermediary trading company, which in turn sells to the Canadian importer. In these circumstances, CBSA considers that the export price should be based on the exporter's selling price to the trading company rather than the importer's purchase price. Any mark-up by the trading company is excluded from the calculation of export price; dumping will occur to the extent that exporter's selling price falls below normal value.

[b] Related Importers and Compensatory Arrangements. Special rules exist to determine the export price when the President believes that the export price, as determined above, is unreliable either because the exporter and importer are "associated" or because a "compensatory arrangement" affects the transaction.⁷¹ Compensatory arrangements include nearly every type of agreement affecting the price, sale, cost or return of the imported goods. These include special finance charges or credit terms available to the Canadian purchaser, subsequent purchaser or any other person, that directly or indirectly affect or relate to the arrangement.⁷²

The purpose of these provisions is to ensure that the export price reflects any decreases in the price paid by subsequent purchasers for services provided by the subsequent purchaser to the manufacturer or exporter, or for similar reasons. SIMA provides that any agreement to reimburse the importer for anti-dumping duties is not a compensatory arrangement, and the export price will be reduced by the amount of the indemnity.⁷³

When the export price is deemed to be "unreliable", the export price is constructed based on the importer's selling prices with deductions for the following:

- (1) costs, including duties, imposed under SIMA or the *Customs Tariff* and taxes;
- (2) an amount for the importer's profit;
- (3) special costs incurred in preparing the goods for shipment to Canada; and
- (4) costs incurred from the exportation of the goods from the place of direct shipment to Canada.⁷⁴

The purpose of these special rules is to prevent the possibility of "secondary dumping" by requiring a related importer to sell at a price level in Canada at which it recovers all costs, a reasonable amount for profits and dumping duties. No deduction for dumping duties may be made from the importer's resale price if the constructed export price, without making the deduction, is equal to or greater than the normal value.⁷⁵ The SIM Regulations state that the deduction of an "amount for profit" has to be based on the amount of profit that would be made in the ordinary course of trade on the sale of the goods.⁷⁶

[c] Ministerial Specifications. If, in the opinion of the President, sufficient information has not been furnished or is not available to determine normal value or export price, the Minister has the discretion to specify the determination. Further, if goods are to be shipped to Canada on consignment and there is no Canadian purchaser of the goods, the normal value and export price are to be determined as the Minister specifies.⁷⁷ In practice, ministerial specifications are punitive and can effectively exclude the exporter from the Canadian market.

[8] Margin of Dumping.

Once normal value and export price have been calculated, they will be compared to determine if there is dumping. The "margin of dumping" for any goods is the difference between the normal value of the goods and the export price of the goods.⁷⁸ Normal values and export prices are calculated by CBSA on an individual transaction basis. Therefore, an investigation covering a wide variety of goods exported into Canada over an extended period will require multiple calculations.

For the purposes of the preliminary determination and final determination CBSA must calculate weighted average margins of dumping.⁷⁹ At any time before making a preliminary determination, the investigation may be terminated if the President is

satisfied that the margin of dumping of goods from the country in question is "insignificant".⁸⁰ An "insignificant" margin of dumping is defined as less than two percent of the export price of the goods.⁸¹

FOOTNOTES:

↗Footnote 1. SIMA, s. 31(1).

↗Footnote 2. See the guidelines for preparing a complaint available at <http://www.cbsa-asfc.gc.ca/sima-lmsi/complaint-plainte-eng.html>, accessed September 1, 2009.

↗Footnote 3. SIMA, s. 51(2).

↗Footnote 4. *Id.*, s. 32(1)(b).

↗Footnote 5. *Id.*, s. 31(1).

↗Footnote 6. *Id.*, s. 33(1).

↗Footnote 7. *Id.*, s. 33(2).

↗Footnote 8. *Id.*, s. 31(8).

↗Footnote 9. *Id.*, s. 37.

↗Footnote 10. *Id.*, s. 34.

↗Footnote 11. *Id.*, s. 35(1)(a).

↗Footnote 12. *Id.*, s. 38(1).

↗Footnote 13. *Id.*, s. 39(1).

↗Footnote 14. *Id.*, s. 38(1).

↗Footnote 15. *Id.*, s. 38(3)(a).

↗Footnote 16. *Id.*, s. 38(3)(b).

Footnote 17. *Id.*, s. 8(1), "Where the President considers that the imposition of provisional duty is necessary to prevent injury, retardation or threat of injury..."

Footnote 18. *Id.*, s. 8(1)(c).

Footnote 19. *Id.*, s. 8(1)(d).

Footnote 20. *Id.*, s. 8(2).

Footnote 21. *Id.*, s. 55(1).

Footnote 22. *Id.*, s. 41(1)(a).

Footnote 23. *Id.*, s. 41(1)

Footnote 24. *Id.*, ss. 41(3)(b) and 3(b).

Footnote 25. *Id.*, s 49 and 45.

Footnote 26. *Id.*, s. 15.

Footnote 27. *Id.*, s. 2(2) and (3).

Footnote 28. *Id.*, s. 15(d).

Footnote 29. *Id.*, s. 17(a) and (b).

Footnote 30. SOR/84-927 (the "SIM Regulations"), available at <http://lois.justice.gc.ca/en/S-15/SOR-84-927/index.html>.

Footnote 31. SIM Regulations, at s. 3-4.

Footnote 32. *Id.*, s. 5.

Footnote 33. *Id.*, s. 6.

Footnote 34. *Id.*, s. 7-8.

Footnote 35. *Id.*, s. 9.

↗Footnote 36. *Id.*, 10.

↗Footnote 37. *Id.*, ss. 11-13.1.

↗Footnote 38. SIMA, s. 2(1).

↗Footnote 39. CDA-91-1904-01 (August 6, 1992), available at collection.nlc-bnc.ca/100/202/301/fta-ch19/cdn-e/ca91010e.pdf.

↗Footnote 40. Asea Brown Boveri Inc. v. CCRA, available at www.citt.gc.ca/appeals/decision/ap2c004_e.asp; see also Re Carbon Steel Pipe Nipples, available at www.citt-tcce.gc.ca/dumping/inquirie/findings/nq2c004_e.asp#P9_653.

↗Footnote 41. SIMA, s. 16.

↗Footnote 42. *Id.*, s. 16(3).

↗Footnote 43. *Id.*, s. 16(2)(b).

↗Footnote 44. *Id.*, s. 23.1; see SIM Regulations, s. 13.1.

↗Footnote 45. SIM Regulations, s. 16.

↗Footnote 46. SIMA, s. 16(1)(d) and (e).

↗Footnote 47. SIM Regulations, s. 3.

↗Footnote 48. SIM Regulations, s. 4.

↗Footnote 49. *Id.*, s. 5.

↗Footnote 50. *Id.*

↗Footnote 51. SIMA, s. 16(1)(b).

↗Footnote 52. SIM Regulations, s. 9.

Footnote 53. See Statement of Reasons, "Concerning the making of a final determination of dumping with respect to Certain Top-Mount Electric Refrigerators, Electric Household Dishwashers, and Gas or Electric Laundry Dryers..." June 30, 2000, File No. 4246-106 Case No. AD/1235, available at <http://cbsa-asfc.gc.ca/sima-lmsi/i-e/ad1235/ad1235f-eng.html>, accessed August 9, 2008. A NAFTA Panel reviewed the case, see file No. CDA-USA-2000-1904-03; their decision is available at collection.nlc-bnc.ca/100/201/301/nafta_chapter19/cda-e/ca2000030e.pdf.

Footnote 54. SIMA, s. 15(e).

Footnote 55. *Id.*, s. 16(1)(a).

Footnote 56. SIM Regulations, s. 7.

Footnote 57. The review took place prior to the shift of authority from CCRA to CBSA. Accordingly all of the text references are to CCRA.

Footnote 58. July 10, 2003. The decision is available from CBSA at <http://cbsa-asfc.gc.ca/sima-lmsi/i-e/ad1234/ad1234f-eng.html>, accessed September 15, 2008.

Footnote 59. SIM Regulations, s. 6. The Beer Panel decision illustrates an adjustment to normal value to reflect discounts granted to U.S. wholesalers but not to Canadian importers: CDA-91-1904-01 (August 6, 1992), available at collection.nlc-bnc.ca/100/202/301/fta-ch19/cdn-e/ca91010e.pdf.

Footnote 60. SIM Regulations, s. 10.

Footnote 61. SIMA, s. 19.

Footnote 62. *Id.*

Footnote 63. SIMA, s. 19(b).

Footnote 64. SIM Regulations, s. 11(b). Section 13 also provides guidelines for interpreting 11(b).

Footnote 65. CDA-93-1904-08 (January 31, 1995), available at collection.nlc-bnc.ca/100/202/301/fta-ch19/cdn-e/ca93080e.pdf.

↗Footnote 66. SIM Regulations, s. 17.1

↗Footnote 67. SIMA, s. 20.

↗Footnote 68. The final determination of the CBSA, dated February 2, 2003, is available at <http://cbsa-asfc.gc.ca/sima-lmsi/i-e/ad1282/ad1282f-eng.html>, accessed September 1, 2009; the final injury enquiry of the CITT, dated March 4, 2003 may be found at http://www.citt-tcce.gc.ca/dumping/inquirie/findings/nq2c003_e.asp, accessed September 1, 2009.

↗Footnote 69. SIMA, s. 24.

↗Footnote 70. *Id.*

↗Footnote 71. *Id.*, s. 25(1)(b).

↗Footnote 72. *Id.*, s. 26.

↗Footnote 73. *Id.*, s. 25(2).

↗Footnote 74. *Id.*, s. 25(1)(c).

↗Footnote 75. *Id.*, s. 25(2).

↗Footnote 76. SIM Regulations, s. 20.

↗Footnote 77. SIMA, s. 29.

↗Footnote 78. *Id.*, s. 2(1), subject to ss. 30.1, 30.2 and 30.3.

↗Footnote 79. *Id.*, s. 30.1.

↗Footnote 80. *Id.*, s. 35(1)(a)(ii).

↗Footnote 81. *Id.*, s. 2(1).